ARTICLES

ON THE RULE OF LAW IN THE CONTEXT OF RUSSIAN FOREIGN POLICY

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The article is an attempt to analyze the Russian school of law features and history of development over the last century, characterized by the priority of the positivist theory of law over the natural law approach. In particular, the author examines the differences in interpretation of such concepts as 'rule of law,' 'rule by law' and 'Law-Bound State' by Russian and foreign lawyers and concludes that these concepts are mixed and misunderstood. Based on the differences of interpretation, the author concludes that there is a significant difference in mentality not only between Russian and foreign lawyers, but also between lawyers in Russia: law enforcers on the one hand and human rights activists, advocates and some independent scientists on the other and, consequently, there are specific criteria for the specialist selection in competent state bodies.

As an example of the differences of interpretation, the author analyzes in detail the decision of the Russian Federation Constitutional Court of March 19, 2014, on the constitutionality of the Treaty between the Russian Federation and the Republic of Crimea on the admission of the Republic of Crimea into the Russian Federation and the establishment of new subjects within the latter.

Keywords: rule of law; positive law theory; legalism; civilization of law; independence of judges; legislative process; fair elections; Venice Commission Report; Kosovo ruling; Russia's foreign policy; Russian-Ukrainian relationships; Crimea; international recognition; sanctions.

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1. Law and Its Rule as an Apple of Discord

In his comments on Ukraine-related statements by Russia's President Vladimir Putin, US President Barak Obama said: 'I know President Putin seems to have a different set of lawyers, maybe a different set of interpretations.'[1] In fact, Obama was quite circumspect. German Chancellor Angela Merkel was blunt. Addressing the *Bundestag*, she said: 'During the Ukrainian crisis, Russia followed the law of the jungle dating back to 19th and 20th centuries.'[2] What does it all mean – enemy intrigue, attacks by geopolitical competitors seeking global domination? Still, even though it had been complicated before, the cooperation development logic did not involve such breakdowns. Is it truly about law? Let us try and sort it out.

1.1. On Different Interpretations

1.1.1. Law

Indeed, Russian lawyers understand law differently from their European and US colleagues. Asked what law is, most of them (individuals with degrees in law) would promptly and confidently reply that law is the totality of rules of conduct that are authorized by the state and that, if breached or not complied with, entail legal liability. Few, however, would clarify that there is a gamut of requirements as to the substance and form of such rules, the way they are formulated, applied and, most importantly, the way they operate.

This is due to the fact that, from the last decades of the 19th century until the 1920s, Russia busily developed a positive law theory in its legal, sociological, and psychological versions. Ye.V. Vaskovsky, M.N. Ghernet, D.D. Grimm, D.A. Dril, A.A. Zhizhilenko, M.N. Kapustin, M.M. Kovalevsky, N.M. Korkunov, S.A. Muromtsev, N.A. Neklyudov, N.I. Palienko, S.V. Poznyshev, P.A. Sorokin, I.Ya. Foinitsky, and G.F. Shershenevich make up but a partial list of Russian scholars that made discernible contributions. At the time, those were new ideas rooted in Western Europe, whereas positive law was a global trend.

More than a century and a half later, the worldwide views of the state and the law had heavily shifted to favor the natural law approach which, in addition to law established by the state, postulates the existence of 'natural law' of greater force compared to positive law; it comprises the notions of fairness and common good,

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[1] Обама прокомментировал высказывания Путина по Украине [*Obama prokommentiroval vyskazyvaniya Putina po Ukraine* [Obama Commented Putin on Ukraine]], *RIA Novosti* (Mar. 4, 2014) <http://ria.ru/world/20140304/998156375.html> (accessed May 15, 2015).

[2] Меркель: Россия действует на Украине «по закону джунглей» [*Merkel: Rossiya deistvuet na Ukraine 'po zakonu dzhunglei'* [Merkel: Russia Acts in Ukraine by 'The Law of the Jungle']], *Vedomosti* (Mar. 13, 2014), <http://www.vedomosti.ru/politics/news/23913481/merkel-rossiya-dejstvuet-na-ukraine-po-zakonu-dzhunglej> (accessed May 15, 2015).

as well as social institutions that protect free exchanges and help curb aggressive violence. On the contrary, Russia has seen a conservation of positive law views. The reason was that the authoritarian Soviet regime benefited from the positive law approach, and Soviet scholars rejected inimical 'bourgeois' studies and kept researching positive law postulates.[3] As a result, the sole scholarly substance of the law has been reduced to studies of legislation, while jurisprudence has been supplanted with legalism.

Modern-day Russia inherited from the USSR century-old positive law trends as the dominant line of scholarship. Even though this line has been prevalent, it is, fortunately, not the only one out there. The fact is that true Russian academia features a great deal of what is modern and interesting. That includes, for instance, the libertarian law concept of jurisprudence by Academician Nersesyants, the legal regulation theory by Academician Tikhomirov, and the institutional theory of law by Professor Chetvernin. Thanks to these theories, law can be examined not only as official texts, but also as actually applicable rules, a phenomenon of social life and a framework of social communications.[4] However, overall, mass-produced Russian research and academies that train specialists for the judiciary and law enforcement do not deal in such complex categories. They do not consider law as a complex sociopolitical science featuring a huge number of delicate internal relationships and interdependences inseparable from one another.

Contradicting itself, mass-produced Russian jurisprudence proclaims life to be the material source of law, yet views formal sources as the sole true authority. To date, it takes pleasure in citing Nikolay Korkunov, a brilliant Russian law philosopher in the second half of the 19th century, who claimed that 'law cannot serve as a yardstick for assessing interests in the light of good and evil. It merely establishes certain rights and obligations of parties in a relationship.'[5] This differs from the English who have long refrained from using the word 'law' in its pure form. Their legal discourse refers to 'law and morality.'

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[3] *Зорькин В.Д.* Позитивистская теория права в России [Zorkin V.D. *Positivistskaya teoriya prava v Rossii* [Valery D. Zorkin, Positive Law Theory in Russia]] (Moscow University Press 1978).

[4] *Нерсесянц В.С.* Философия права: либертарно-юридическая концепция // Вопросы философии. 2002. № 3 [Nersesyants V.S. *Filosofiya prava: libertarno-yuridicheskaya kontseptsiya // Voprosy filosofii*. 2002. No. 3 [Vladik S. Nersesyants, *Jurisprudence: Libertarian Law Concept*, 2002(3) Problems of Philosophy]]; *Тихомиров Ю.А.* Правовое регулирование: теория и практика [Tikhomirov Yu.A. *Pravovoe regulirovanie: teoriya i praktika* [Yury A. Tikhomirov, Legal Regulation: Theory and Practice]] (Formula prava 2010); *Четвернин В.А.* Лекции по теории права и государства [Chetvernin V.A. *Lektsii po teorii prava i gosudarstva* [Vladimir A. Chetvernin, *Lectures on the Theory of Law and State*]] (2013), <http://www.teoria-prava-ru.1gb.ru/> (accessed May 15, 2015); *Четвернин В.А.* Лекции по теории права и государства [Chetvernin V.A. *Lektsii po teorii prava i gosudarstva* [Vladimir A. Chetvernin, *Lectures on the Theory of Law and State*]] (2009), <http://audio-booki.ru/tiching/15351-vladimir-chetvernin-lekcii-po-teorii-prava-i-gosudarstva-audiokniga.html> (accessed May 15, 2015).

[5] *Коркунов Н.М.* Сборник статей (1877–97) [Korkunov N.M. *Sbornik statei (1877–1897)* [Nikolay M. Korkunov, Collected Articles (1877–97)]] 59 (N.K. Martynov 1898).

1.1.2. Rule of Law

Russia's 1998 accession to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, in one fell swoop, added a vast number of new notions to the official legal lexicon. Those formerly unknown concepts included, for instance, a party injured by a violation of rights and freedoms, free and fair elections, priority of values, and numerous others. Law practitioners (including professors of various legal subjects) faced an uphill task merely to learn all the new terminology, not to mention fully internalizing its substance by coming to grips with the whole load of knowledge, ideas, hypotheses, and proofs that had taken scholars from various countries a long time to develop so that a common acceptable intercontinental legal regime could be established. In addition, just as the process of implementing European law got under way, Russia conducted a large-scale legal reform. The scope of new substantive and procedural rules was so huge that lawyers were too busy to delve into lofty meanings and attain the sophistication of European scholars.

The most difficult term for Russians to perceive has been '*verkhovenstvo prava*.' They have tried to translate it verbatim and ended up with '*verkhovenstvo zakona*,' *i.e.* rule of the law. In fact, with a subpar translation, the English 'rule of law' denoting this '*verkhovenstvo prava*' would produce identical Russian phrases both as '*verkhovenstvo prava*' and '*verkhovenstvo zakona*.' However, in English, rather than the form and text of a regulatory legal act of Parliament, 'law' means a legal writ with a higher meaning, which fails to fully match the Russian word '*zakon*' from a formal point of view. In fact, 'law' does not authentically translate as '*pravo*,' the way it is understood in Russia, and should not be translated as '*pravo*.' '*Pravo*' means 'right.'

As a result, the English 'rule of law' and its Russian translation denote radically different philosophical concepts, because the rule of law, in addition to strict compliance with the statutes, effectiveness, and hierarchy of regulatory acts, mostly means rule of the meanings, whereas, in Russia, it is interpreted as the rule of the letter of the law. The Venice Commission's *Report on the Rule of Law* pays a lot of attention to the difference between such notions as 'rule of law' and 'rule by law.' 'Over time, – it says, – the essence of the rule of law in some countries was distorted so as to be equivalent to "rule by law," or "rule by the law," or even "law by rules." *These interpretations permitted authoritarian actions by governments* and do not reflect the meaning of the rule of law today'[6] (emphasis added).

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[6] *See Report on the Rule of Law*, Venice Comm'n, 86th Sess., ¶ 15, Study No. 512/2009 (CDL-AD(2011)003rev) (2011), available at <http://www.venice.coe.int/webforms/documents/CDL-AD(2011)003rev-e.aspx> (accessed May 15, 2015); Serhiy Holovaty, 1–3 The Rule of Law LXIV, 1747 (Phoenix Publishing House 2006).

1.1.3. Law-Bound State

The Russian interpretation of the rule of law principle[7] has been further compounded by the term 'law-bound state' that is enshrined in the Russian Constitution and comprises the continental alternative to the Anglo-Saxon 'rule of law.'[8] However, after twenty years, Russia 'has yet to develop the kind of unity that would suggest that the Russian legal science has a generally accepted doctrine of a law-bound state.'[9]

It has not, and could not have, developed because all Russian textbook definitions, according to which the state is a form of organization of society, have grown obsolete. These are wrong with regard to any modern state, and twice as wrong if used to characterize a law-bound state. Commonly used definitions such as 'the state is the society's political organization that extends its authority across the country's entire territory and its population, has a special apparatus of government for such purposes, issues generally binding fiats, and enjoys sovereignty' could not, likewise, be viewed as suitable explanations for the nature of a law-bound state. A law-bound state cannot be defined in itself; it must be defined through the prism of its dealings with the civil society without which it cannot exist. By the same token, the civil society cannot fully develop unless the state is bound by law.[10]

That means that some interpretations have grown obsolete, others have not yet evolved, and still other interpretations are yet to be agreed. Meanwhile, these are not mere definitions; they make for a completely different political and legal model of interactions between the state and the society, which underlies the legal consciousness and legal conduct. Apparently, Russia lives in a different legal dimension compared to most modern states. In a single phrase, a fine constitutional

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[7] Russian authors unwillingly follow English-speaking philosophers of law, who largely use the concept of 'state' in terms of international law; as they discuss domestic legal system, they apply the term 'government' normally translated into Russian as '*pravitelstvo*.' The term 'state' is most often used in the American English legalese to mean 'legal status,' then a 'state' as a constituent territory of the USA, and less frequently as '*gosudarstvo*' in the Russian sense of this word. This gives rise to misunderstandings due to translations that distort the difference between the doctrine of Russian law-bound state in the RF Constitution and Kant's German *Rechtsstaat* in the German Constitution, on the one hand, and the Anglo-American doctrine of the rule of law, on the other hand.

[8] The concepts of *Rechtsstaat* (*law-bound state*) and *rule of law* differ on two counts: 1) the Anglo-American tradition does not believe that law could be reduced to a logical system controlled by the constitutional court only; 2) it does not believe that the citizen is vested with his or her rights by the state.

[9] *Зорькин В.Д.* Конституционное развитие России [Zorkin V.D. *Konstitutsionnoe razvitie Rossii* [Valery D. Zorkin, Russia's Constitutional Development]] 52–53 (Norma 2011).

[10] *See further Баренбойм П.Д.* Концепция Зорькина – Танчева о соотношении современных доктрин верховенства права и правового государства // Законодательство и экономика. 2011. № 10 [Barenboim P.D. *Kontseptsiya Zor'kina – Tancheva o sootnoshenii sovremennykh doktrin verkhovenstva prava i pravovogo gosudarstva // Zakonodatel'stvo i ekonomika*. 2011. No. 10 [Pyotr D. Barenboim, *Zorkin – Tanchev Concept of Relationship between the Modern Doctrines of Rule of Law and Law-Bound State*, 2011(10) Legislation and Economy]], available at <http://philosophicalclub.ru/content/docs/vt/voprosy_teorii.pdf> (accessed May 15, 2015).

lawyer and the forty-fourth US President, Barak Hussein Obama has managed to express the crux of a problem that one day breached the limits of a purely scholarly discussion and, in a prevailing specific situation, brought about a head-on conflict. While speaking about the same things, we have been assigning completely different meanings to what we say and, therefore, we have failed to understand each other.

1.2. On Different Lawyers

In Russia, lawyers likewise differ from their foreign counterparts. Of course, this does not apply to all of them. This nation counts numerous highly professional independent experts in the field of law. However, they are usually barred from decision-making within the government and the powers that be, because, over 20 years, the state has selected the sort of legal doers it found convenient for itself. The rest, one way or another, were gradually removed beyond the bounds of the state's legal activities. As a result, two legal communities have evolved; they speak completely different languages and use different legal constructs. One community comprises officials 'in the field of law,' judges, parliament members, election commissioners, and law enforcement officers. The other community is made up of lawyers, human rights activists, and some of the independent scholars.

At an international symposium 'Doctrines of Law-Bound State and Rule of Law in the Modern World' hosted by the Russian Constitutional Court in October 2013, American Bar Association President James Silkenat described four universally applicable requirements for a functioning system that could implement the rule-of-law principle. These include the following:

1) the government apparatus, its officers, and officials submit to law;

2) statutes are clear and definitive, officially published, meet the requirements of stability and fairness, and are made with intent to secure and protect fundamental rights, including protection of the individual and property;

3) the process of statute passage, execution, and enforcement is open, fair, and reasonable;

4) justice is administered by competent, highly moral and independent assessors or neutral parties that are available within the state in sufficient numbers, adequately resourced, and reflective of the makeup of the society they serve.[11]

To Mr. Silkenat, such principles appear simple and easy to grasp. However, he would find it hard to recognize that most Russian government lawyers need further explanation.

For instance, judges have to be taught that, if prosecution evidence is found inadequate or unconfirmed in the course of judicial investigation or if the defense

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[11] *See Крохмалюк А.* Верховенство права *vs.* верховенство закона? // Новая адвокатская газета. 2013. № 21 [Krokhmalyuk A. *Verkhovenstvo prava vs. verkhovenstvo zakona?* // *Novaya advokatskaya gazeta*. 2013. No. 21 [Alexander Krokhmalyuk, *Rule of Law vs. Rule by Law*, 2013(21) New Lawyers Gazette]], available at <http://www.advgazeta.ru/arch/158/1188> (accessed May 15, 2015).

produces evidence that puts the defendant's guilt into doubt and is never refuted, the judges are required to follow the constitutional principle whereby the defendant has the benefit of irremediable doubt (Art. 49(3)).

Russian judges need further explanations that they cannot but adduce exculpatory evidence refuting the prosecution's position to the case file, cannot but carry out procedures they are obliged to perform in the course of a judicial investigation for establishing the truth. A Russian judge knows that any acquittal verdict he or she issues will be repeatedly questioned, examined, and appealed. Therefore, judges manipulate procedural rules and the bounds of judicial discretion to issue judgments that are safest for them. To make sure this does not happen, the Russian judge, at the very least, needs further guaranties that any judgment he or she issues on the basis of law will pose no danger to his or her status. On the contrary, the judge should be confident that he or she would be held responsible for an unjust ruling knowingly issued, and that such knowledge will be a matter of fair public proof.

Mr. Silkenat would deem impossible a situation where the court chairperson requires each judge to provide daily reports on pending cases, particularly on those 'involving government authorities and officials as litigants.' A US lawyer will find it incomprehensible to see a judge that declines such requirement being stripped of his or her status. In his or her worst nightmare, a US lawyer would never dream that the chair would say, before a court of law, that a judge cannot be independent because he is part and parcel of the judiciary.[12]

In Russia, such situations are routine; they establish preconditions that rule out the application of virtually all requirements referenced by Mr. Silkenat. For instance, during election campaigns, electoral commissions deny complaints of electoral law violations and suggest that the complainants refer to courts of law. Meanwhile, such courts either refuse to accept evidence and order forensic reviews or issue judgments having no basis whatsoever, contrary to fairness and common sense, using nothing but judicial discretion. Thereafter, electoral commissions claim that the courts have not found any violations and go on to approve the outcome of unfair and unjust elections.

As a result, given the inherently flawed selection system, the competence of representative authorities is ratcheted down. In its turn, the Parliament so elected manipulates procedural rules in the context of law-making. Three readings of a law could be held in a day without circulating the bill to parties that enjoy legislative initiative, which is a mandatory requirement, while amendments are voted on without discussion, using tables preapproved by the relevant committee for the purpose of 'rejection' or 'passage.' In some cases, the effective date of a law is established ahead of

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[12] *See Гордиенко И.* «Я федеральный судья, а не продавщица» // Новая газета. 2008. № 95 [Gordienko I. *'Ya federal'nyi sud'ya, a ne prodavshchitsa'* // *Novaya gazeta*. 2008. No. 95 [Irina Gordienko, *'I Am a Federal Judge, Not a Shop Assistant,'* 2008(95) New Gazette]], available at <http://www.novayagazeta.ru/politics/37492.html> (accessed May 15, 2015).

the earliest possible timeline, so as to coincide with a special calendar date, if required to achieve a certain political objective.[13] Given such procedure, it is impossible to ensure that regulatory acts are clear, definitive, stable, and fair, which is a *sine qua non* for implementing the rule-of-law principle. Therefore, naturally, the least-used rule in Russia's Constitution is the prohibition on passage of laws that abrogate or prejudice the rights and freedoms of the human being and citizen (Art. 55(2)).

But not all Russian courts and judges are like that, are they? Evgeny Semenyako, President of Russia's Federal Chamber of Lawyers, claims: 'Whereas, in Europe, the agencies, standards, and principles of the European Union stand above each country's authorities, the last bulwark defending the Constitution in Russia is its Constitutional Court.'[14] Indeed, special requirements are mandated by law for would-be judges of the Constitutional Court. As opposed to any other judge, whose eligibility requirements only include Russian citizenship, a degree in law, and a certain length of service in the legal profession, to be appointed a judge of the Constitutional Court, the citizen must have an unimpeachable reputation and a recognized high qualification in the field of law. Constitutional Court judge, Professor Nikolay Bondar is confident that the Constitutional Court is a co-author of the Russian doctrine as regards the rule of law. He believes it is Constitutional Court judgments that underpin the doctrine's understanding and assure the proper balance of power, freedom, and property. For a number of years, Constitutional Court Chairman Valery Zorkin sat on the European (Venice) Commission for Democracy through Law and only left it because, at the Commission meetings, he 'had to, ever more often, make statements on the substance of legal rules that eventually end up reviewed by the Court, and such statements are prohibited by law.'[15] Could it be that at least this Russian court does not follow the common template? To answer this question, it suffices to analyze Constitutional Court actions in a situation that prompted such a drastic response on the international community's part, namely the Russia-Ukraine relationship that nearly reached its breaking point after Russia annexed the Republic of Crimea and the city of Sevastopol.

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[13] For instance, Federal Law No. 65-FZ (it introduces special liability for organization of public events) was approved by the State Duma without public discussion in two months; the Duma adopted it in its third reading on the eve of a scheduled protest rally, holding a nighttime session that had no precedent in the chamber's history. The Federation Council approved the Law the very next day, a feat that is, yet again, perfectly impossible in procedural terms. However, that was not enough. The Law came into effect in a completely unique manner, on the day of its publication, rather than in ten days thereafter as contemplated by the Federal Law No. 5-FZ of June 14, 1994, 'On the Procedure of Publication and Effectiveness of Federal Constitutional Laws, Federal Laws, and Acts of Federal Assembly Chambers.'

[14] *See* Krokhmalyuk, *supra* n. 11.

[15] *See* Валерий Зорькин воспользовался конституционным правом [*Valery Zorkin vospol'zovalsya konstitutsionnym pravom* [*Valery Zorkin Used a Constitutional Right*]], *Kommersant.ru* (May 24, 2013), <http://www.kommersant.ru/doc/2195731> (accessed May 15, 2015).

2. Rule of Law and Crimea

In analyzing the Crimean situation of 2014, I have to make a caveat: I can hardly be accused of Crimea phobia. I dearly love Crimea. For the past twenty years, I have lectured on the status of territories gravitating to Russia, including the Republic of Crimea. Throughout the years, as the leader of a team of scholarly experts on these territories, I kept writing and telling people that Crimea required greater flexibility on the part of Ukrainian authorities and greater persistence on the part of Russian politicians. I sent papers to the Presidential Staff but never received a reply.

In fact, I am not alone. Even in 1992, Russia's Supreme Soviet deemed it 'necessary to settle the Crimean issue by way of interstate negotiations between Russia and Ukraine with Crimea's participation.'[16] In the context of a Crimea-wide referendum held on June 25, 1995, the State Duma suggested that 'the Russian Federation Government take the necessary steps to re-energize the process of negotiations with Ukraine.'[17]

This is why I was very upset by the way Crimea was incorporated into Russia in 2014. Why now? In fact, it was not the first time that Crimea held a referendum. Why did they keep silent for 22 years and then annex it in 23 days?[18] Why only Crimea? Indeed, as early as September 2006, a similar referendum was held in the Pridnestrovian Moldavian Republic, with 97.1% voters choosing to join Russia.[19] The Crimean annexation has endangered the entire set of European policies adopted after the 1945 Yalta Conference, created a dangerous precedent of a self-proclaimed state, already applied in Eastern Ukraine, and badly hurt the Russian economy.

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[16] *See* Постановление Верховного Совета Российской Федерации от 21 мая 1992 г. № 2809-I «О правовой оценке решений высших органов государственной власти РСФСР по изменению статуса Крыма, принятых в 1954 году» [*Postanovlenie Verkhovnogo Soveta Rossiiskoi Federatsii ot 21 maya 1992 g. No. 2809-I 'O pravovoi otsenke reshenii vyshchikh organov gosudarstvennoi vlasti RSFSR po izmeneniyu statusa Kryma, prinyatykh v 1954 godu'* [Resolution of the Russian Federation Supreme Soviet No. 2809-I of May 21, 1992, 'On Legal Assessment of the 1954 Decisions by Supreme Government Authorities of the RSFSR to Change Crimea Status']], available at <http://sevkrimrus.narod.ru/ZAKON/o1954.htm> (accessed May 15, 2015).

[17] *See* Постановление Государственной Думы Федерального Собрания Российской Федерации от 17 мая 1995 г. № 771-I ГД в связи с обращением Верховного Совета Крыма [*Postanovlenie Gosudarstvennoi Dumy Federal'nogo Sobraniya Rossiiskoi Federatsii ot 17 maya 1995 g. No. 771-I GD v svyazi s obrashcheniem Verkhovnogo Soveta Kryma* [Resolution of the State Duma of the Federal Assembly of the Russian Federation No. 771-I GD of May 17, 1995, as Regards a Petition by the Republic of Crime]], available at <http://sevkrimrus.narod.ru/ZAKON/1995ref.htm> (accessed May 15, 2015).

[18] A mere 23 days elapsed between the day when the ARC government offices were first occupied and the day the ARC was reconstituted as a member territory of the Russian Federation; by that time, only six days elapsed since the start of popular vote in Crimea.

[19] *See* Приднестровье попросилось в состав России [*Pridnestrovie poprosilos' v sostav Rossii* [*Transnistria Asks to Be a Part of Russia*]], *Lenta.ru* (Mar. 18, 2014), <http://lenta.ru/news/2014/03/18/transnistria> (accessed May 15, 2015).

In this regard, I would like to cite the opinion of Ksenia Sobchak, a well-known Russian journalist holding International Relations degrees from the St. Petersburg State University and Moscow's MGIMO:

> The truth is that Russia's Ukraine foreign policy has failed with a deafening thud, and political looting was employed in lieu of diplomatic solutions. One could even forget 'morality' for, in the politics of any state, it always takes a back seat to measured calculation. However, the economic consequences that all of us are going to experience in the coming years will be keenly felt by each and every Russian national. As a result, it turns out that our state has committed an unprecedented political act, condemned by the international community, yet derived no benefit and, instead, harmed its economy. Crimea WAS supposed to become a part of Russia . . . However, that historical wrong should have been righted through years of negotiations with Ukraine, cultivation of relationships, diplomatic bargaining, rather than by stealing a candlestick from the neighbor's blazing house, even though you may have given that candlestick away while blind drunk.[20]

The rapid procedure of the Crimean annexation and the strident propaganda that accompanied it have stupefied the Russian scholarly community. However, having taken one's breath and looked at the developments with clear eyes, one could conclude that all these events perfectly fit the context of Russia's general legal paradigm. It is Crimea's annexation by Russia that offers a classical example of how the rule-of-law principle is breached by interpreting meanings and manipulating procedures.

A key role in this story was played by Russia's Constitutional Court. In performing one of its core actions contemplated by law in the context of incorporating a portion of a foreign state into Russia, *i.e.* in reviewing an international treaty, yet to become effective, for compliance with the Constitution, it breached its own procedures at least eight times and resorted to interpretation of statutory rules.

Now, what happened exactly? We need to revisit the *chronicle of events* to understand.

According to newswires,[21] on the night of *February 26* and early morning of *February 27, 2014*, a group of unknown persons seized the building that housed the Supreme Soviet and the Council of Ministers of the Autonomous Republic of Crimea [hereinafter ARC]. Russian flags were hoisted on top of the buildings. On February 27,

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[20] *See* Собчак К. Открытое письмо Никите Михалкову [Sobchak K. *Otkrytoe pis'mo Nikite Mikhalkovu* [Ksenia Sobchak, *Open Letter to Nikita Mikhalkov*]], *Snob* (Sep. 1, 2014), <http://www.snob.ru/profile/24691/blog/80450> (accessed May 15, 2015).

[21] События дня, 27 февраля 2014 года [*Sobytiya dnya, 27 fevralya 2014 goda* [*Events of the Day, February 27, 2014*]], Interfax (Feb. 27, 2014), <http://www.interfax.ru/history/27/02/2014/> (accessed May 15, 2015).

the land connection between Crimea and mainland Ukraine was blocked. On the same day, the ARC Supreme Soviet announced a referendum as regards Crimea's autonomous status and an expansion of its powers. The vote was scheduled for *May 25, 2014*. At that time, the question put up for referendum contained no provisions that violated Ukraine's territorial integrity. The referendum sought to 'improve the ARC's status and make sure that the autonomy rights are guaranteed notwithstanding any changes in Ukraine's central authorities or its Constitution.'

On March 1, Russian President Vladimir Putin asked the Federation Council to grant him the right to use a limited military contingent outside the Russian Federation and received a blank check to move the military into the Ukrainian territory for the purpose of 'normalizing the sociopolitical situation in that country.' On the same day, the Crimean referendum was moved forward to *March 30, 2014*.

On March 4, President Putin stated that Russia was not considering Crimea's incorporation into Russia. 'It is only citizens themselves, – he said, – under conditions suitable for the free manifestation of their will, who may and should determine their future.'

On March 6, ARC and Sevastopol City authorities announced an amendment to the language of the referendum question and that the voting day had been rescheduled to *March 16*. The referendum was held as scheduled. According to official data, 96.77% of those taking part in the referendum voted in favor of Crimea's reunification with Russia.

On March 17, based on the referendum results, the ARC Supreme Soviet declared Crimea to be an independent sovereign state, the Republic of Crimea, with the city of Sevastopol enjoying a special status.

On March 17, President Putin signed a decree recognizing the Republic of Crimea as a sovereign and independent state. At the same time, the Republic of Crimea asked Russia to incorporate it into the Russian Federation as a new member territory of the Russian Federation having the status of a republic. The Crimean Parliament quickly drafted an international treaty on joining the Russian Federation.

On March 18, Putin initiated the procedure of incorporating Crimea into Russia. He notified the Government and the Parliament chambers of the proposals made by the Crimean State Council and Sevastopol's Legislative Assembly as regards their admission into the Russian Federation and the establishment of new member territories. Next, he approved and signed an interstate Treaty admitting Crimea and Sevastopol as parts of Russia, whereby new member territories, *i.e.* the Republic of Crimea and the Federal City of Sevastopol were established within the Russian Federation. On the same day, Putin asked Russia's Constitutional Court to examine the Treaty so signed for compliance with the Constitution. The request was accepted for review forthwith, without any public hearings.

On the morning of March 19, the Constitutional Court ruled the Crimea accession Treaty compliant with the Russian Constitution.

On March 19, President Putin sent the Treaty along with relevant bills to the State Duma for ratification.[22]

On March 20, the State Duma ratified the Treaty.

On March 21, the Federation Council ratified the Treaty. Putin signed the laws on Crimea's and Sevastopol's accession to Russia. The Treaty came into effect.

On March 21, the Crimean Federal District was established within Russia, and the Russian Federation President's envoy to Crimea was appointed.

At first glance, in terms of the Federal Constitutional Law 'On the Procedure of Admission to the Russian Federation and Establishment of a New Member Territory of the Russian Federation' [hereinafter Admission Law], the procedure has been complied with. Indeed, a foreign state may be admitted as a new member territory of Russia by their mutual agreement pursuant to an international treaty. Following the referendum, the Republic of Crimea declared itself to be such a state. Russia recognized that state. An international treaty was entered into. The Constitutional Court reviewed it for compliance with the Constitution. The Parliament ratified that treaty while simultaneously adopting a relevant law and automatically adding the names of the new member territories to the Constitution. Apparently, there are no problems. At the end of the day, the President might well have thought it unnecessary to hold any further consultations with the Parliament or the Government on the Crimean accession. Likewise, he may have asked the Parliament to convene on an emergency footing. The Parliament itself may have been so profoundly convinced that the question was properly put to it that it never discussed anything (as evidenced by the tally of the Treaty ratification votes). Such things do happen, occasionally.

However, the review of the Treaty between the Russian Federation and the Republic of Crimea on Admittance of the Republic of Crimea into the Russian Federation and on the Establishment of New Member Territories as Part of the Russian Federation, as carried out by the Constitutional Court, does raise certain

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[22] Законопроект № 475944-6 «О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов – Республики Крым и города федерального значения Севастополя» [*Zakonoproekt No. 475944-6 'O prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov – Respubliki Krym i goroda federal'nogo znacheniya Sevastopolya'* [Draft Federal Constitutional Law No. 475944-6 'On Admission of the Republic of Crimea into the Russian Federation and Establishment of New Member Territories in the Russian Federation – the Republic of Crimea and the City with Federal Status Sevastopol']] (2014), <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=475944-6&02> (accessed May 15, 2015); Законопроект № 475948-6 «О ратификации Договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов» [*Zakonoproekt No. 475948-6 'O ratifikatsii Dogovora mezhdu Rossiiskoi Federatsiei i Respublikoi Krym o prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov'* [Draft Federal Constitutional Law No. 475948-6 'On Ratification of the Treaty between the Russian Federation and the Republic of Crimea to Admit the Republic of Crimea into the Russian Federation and Establish New Member Territories of the Russian Federation']] (2014), <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=475948-6&02> (accessed May 15, 2015).

questions. In fact, it is the central legally significant action of the entire procedure. Under Art. 91(2) of the Admission Law, 'an international treaty shall not come into effect or apply, *i.e.* it cannot be ratified or approved and cannot otherwise become effective for the Russian Federation if the Constitutional Court finds it non-compliant with the Constitution.'

Truly, Russia's Constitutional Court found itself in a tricky situation. It only had one night to issue its ruling. It faced a stark choice of staying within the bounds of law or going with the flow. That is why the Constitutional Court Ruling issued thereby on the night of March 18, 2014, merits special attention in and of itself.

Violation one: inadmissible request. There is a lot of doubt as to whether the Constitutional Court properly admitted the request for the Treaty's review and whether the case could be examined at all. Article 36 of the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation' [hereinafter Constitutional Court Law] contemplates a sole basis for trying a case, *i.e.* 'an uncertainty found as to whether an international treaty yet to come into effect is compliant with the Russian Federation's Constitution.' Article 89, titled just this way, *Request Admissibility*, only calls for a potential review of an international treaty if such document is subject to ratification (para. 1) and '*the applicant believes that the same may not be put into effect or applied* in the Russian Federation for reason of its non-compliance with the Russian Federation Constitution' (emphasis added) (para. 2). However, no uncertainty in the Treaty had been identified. The President, who lodged the request with the Constitutional Court, did not believe the Treaty to be unconstitutional. Therefore, the request itself was inadmissible and the Constitutional Court could not have admitted it for consideration.

The reason for this conflict is clear. A lot of time elapsed between the adoption of the Constitutional Court Law (1994) and Admission Law (2001), the result being that the members of Parliament simply forgot to bring one in line with the other. The Constitutional Court itself, being fully entitled to initiate legislation on 'issues within its own remit,' also 'missed' this conflict between the two constitutional laws. However, the procedure had to be complied with. Consequently, the Court had to wiggle out of the situation right there, in its own ruling.[23] Almost two pages of its text (para. 1)

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[23] Постановление КС РФ от 19 марта 2014 г. № 6-П «По делу о проверке конституционности не вступившего в силу международного договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов» // Собрание законодательства Российской Федерации. 2014. № 13. Ст. 1527 [*Postanovlenie KS RF ot 19 marta 2014 g. No. 6-P 'Po delu o proverke konstitutsionnosti ne vstupivshego v silu mezhdunarodnogo dogovora mezhdu Rossiiskoi Federatsiei i Respublikoi Krym o prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov' // Sobranie zakonodatel'stva Rossiiskoi Federatsii. 2014. No. 13. St. 1527* [Ruling of the Constitutional Court of the Russian Federation No. 6-P of March 19, 2014, 'On the Case of Constitutionality Review of an As-Yet Ineffective International Treaty between the Russian Federation and the Republic of Crimea to Admit the Republic of Crimea into the Russian Federation and Establish New Member Territories of the Russian Federation,' 2014(13) Collection of Russian Federation Legislation, item 1527]].

serve to justify why the Court eventually opted to breach the law and review the case. The Court honestly admitted that the request never referred to the Treaty being unconstitutional; that, contrary to the procedure, a disputing party was missing in assessing the Treaty, and that the Court failed to find 'full procedural identity' between this situation and other instances of elective constitutional supervision. Finally, the Court concluded that the Treaty's review constituted a mere 'integral part of the legal substance of a government authority's decision' and, therefore, the Court's duty. That means, if we cannot do it but we want it real bad, then, yes, we can.

Violation two: non-compliance with the mandatory review procedure. In reviewing the Treaty, the Constitutional Court failed to comply with Arts. 41 and 49 of the Constitutional Court Law. The Court should be given its due, for in its ruling it honestly admitted that the mandatory procedure of case review, as contemplated by law, was breached in reviewing the Treaty. It stated that it was 'obliged to consider the case on merits without resorting, in this instance, *given this case's specifics*, to procedures involving a prior examination of such request by a Constitutional Court judge or hearings of the case' (emphasis added). Now, while a case may be reviewed, in principle, without hearings (Art. 47.1), the Constitutional Court Law proscribes such option unless the matter has been subjected to a prior scrutiny. However, as mentioned, the Court was only given a single night to issue its ruling. There was no time for prior scrutiny or appointing a *rapporteur* judge. Still, given lack of time, the Court might well have relied on Art. 42(2) of the Constitutional Court Law to request relevant authorities and officials to suspend the effectiveness of the Russian Federation's international treaty so challenged until the case review was completed. It could have used it but it did not. Why bother? All the same, everything has been predetermined 'given this case's specifics.'

Violations three, four, and five concern the binding limits for the Treaty's review. The Constitutional Court Law (Arts. 86 and 90) lays down binding limits for reviewing an international treaty of the Russian Federation that is yet to come into effect, for its compliance with the Constitution. The Law says that the Court is obliged to review any such treaty: 1) as to the substance of its rules; 2) as to its form; 3) as to the procedure of its signing, execution, adoption, publication, or enactment. In addition, the Law requires the Constitutional Court to issue its ruling on the case while 'assessing both the literal meaning of the act so reviewed and the meaning ascribed thereto by the official or other interpretation or the prevailing case law, and also minding its place in the system of legal acts' (Art. 74(2)).

Following an analysis of the Court's Ruling of March 19, 2014, in terms of these mandatory requirements, a confident conclusion may be made that the Court removed itself from reviewing the Treaty on quite a number of mandatory parameters.

The Constitutional Court removed itself from assessing the Treaty to see if the substance of its rules complies with the fundamentals of Russia's constitutional system. The Treaty's text says that the Russian Federation enters therein

> in keeping with generally recognized principles and rules of international law, while being mindful of the close interconnection of other fundamental principles of international law, as laid down, in particular, in the United Nations' Charter and the Helsinki Final Act of the Conference on Security and Cooperation in Europe, the principle of respect for and compliance with human rights and freedoms . . .[24]

Was the Court obliged to see if the above provision was true? Most definitely so, but it did not.

Meanwhile, it is the 1975 Helsinki Final Act of the CSCE, underpinning the entire European security system and cited in the Treaty, that clearly requires its signatory states (including Russia as the USSR successor) to respect and not undermine in any way each others' territorial integrity and border inviolability. The 1995 Memorandum on Maintaining Peace and Stability within the CIS states that Commonwealth member countries undertake to provide no support to separatist movements or separatist regimes, if any, within each others' territories; establish no political, economic, or other relations therewith; prevent any use of CIS member states' territories and communications by such regimes and movements; and provide no economic, financial, military or other assistance to them. 'Nothing . . . shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples,' – the 1970 General Assembly Declaration on Principles of International Law explains the principles of territorial integrity and self-determination of peoples as set forth in the UN Charter. In fact, these are the very documents that should have provided the context for a substantive review of the Treaty, for these constitute Russia's effective obligations under international law.

Ultimately, as it waived a substantive analysis of the Treaty's contents, the Court also failed to examine it for compliance with Arts. 15(2) and (4) of the Constitution. The article states that '[g]enerally recognized principles and rules of international law and international treaties of the Russian Federation are an integral part of its legal system.' The Constitutional Court itself repeatedly reaffirmed it in its rulings:

> In keeping with the principles of a law-bound state as laid down by the Russian Federation Constitution, government authorities, in their activities, are bound by both domestic and international law. In keeping with Article 15(4) of the Russian Federation Constitution, generally recognized principles

[24] *See* Российская газета. 2014. № 6334 [*Rossiiskaya gazeta.* 2014. No. 6334 [2014(6334) Russian Gazette]], available at <http://www.rg.ru/2014/03/18/krim-site-dok.html> (accessed May 15, 2015).

> and rules of international law, as well as international treaties, are an integral part of its legal system and must be observed in good faith.[25]

As follows thence, in case an international treaty yet to come into effect conflicts with other international obligations assumed by Russia, which predate it and have not been denounced by its review date, that such treaty must be reviewed for compliance with such obligations. Moreover, the Constitutional Court could not ignore the unavoidable consequences of the Treaty's ratification, *i.e.* the adoption of Russian domestic laws that would be quite consistent with the Treaty so 'reviewed' yet would result in an antagonistic conflict with other treaties.

However, as it would turn out, this does not apply to the Crimea situation. In its ruling, the Court honestly admits:

> Since, pursuant to Article 3(3) of the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation,' the Constitutional Court

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[25] *See* Постановление КС РФ от 31 июля 1995 г. № 10-П «По делу о проверке конституционности Указа Президента Российской Федерации от 30 ноября 1994 г. № 2137 «О мероприятиях по восстановлению конституционной законности и правопорядка на территории Чеченской Республики», Указа Президента Российской Федерации от 9 декабря 1994 г. № 2166 «О мерах по пресечению деятельности незаконных вооруженных формирований на территории Чеченской Республики и в зоне осетино-ингушского конфликта», Постановления Правительства Российской Федерации от 9 декабря 1994 г. № 1360 «Об обеспечении государственной безопасности и территориальной целостности Российской Федерации, законности, прав и свобод граждан, разоружения незаконных вооруженных формирований на территории Чеченской Республики и прилегающих к ней регионов Северного Кавказа», Указа Президента Российской Федерации от 2 ноября 1993 г. № 1833 «Об Основных положениях военной доктрины Российской Федерации»» // Вестник Конституционного Суда Российской Федерации. 1995. № 5 [*Postanovlenie KS RF ot 31 iyulya 1995 g. No. 10-P 'Po delu o proverke konstitutsionnosti Ukaza Prezidenta Rossiiskoi Federatsii ot 30 noyabrya 1994 g. No. 2137 "O meropriyatiyakh po vosstanovleniyu konstitutsionnoi zakonnosti i pravoporyadka na territorii Chechenskoi Respubliki," Ukaza Prezidenta Rossiiskoi Federatsii ot 9 dekabrya 1994 g. No. 2166 "O merakh po presecheniyu deyatel'nosti nezakonnykh vooruzhennykh formirovanii na territorii Chechenskoi Respubliki i v zone osetino-ingushskogo konflikta," Postanovleniya Pravitel'stva Rossiiskoi Federatsii ot 9 dekabrya 1994 g. No. 1360 "Ob obespechenii gosudarstvennoi bezopasnosti i territorial'noi tselostnosti Rossiiskoi Federatsii, zakonnosti, prav i svobod grazhdan, razoruzheniya nezakonnykh formirovanii na territorii Chechenskoi Respubliki i prilegayushchikh k nei regionov Severnogo Kavkaza," Ukaza Prezidenta Rossiiskoi Federatsii ot 2 noyabrya 1993 g. No. 1833 "Ob Osnovnykh polozheniyakh voennoi doktriny Rossiiskoi Federatsii'" // *Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii*. 1995. No. 5 [Ruling of the Constitutional Court of the Russian Federation No. 10-P of July 31, 1995, 'On the Case of Constitutionality Review of the Russian Federation President's Decree No. 2137 of November 30, 1994, "On Measures to Restore Constitutional Legality, Law, and Order within the Chechen Republic," Russian Federation President's Decree No. 2166 of December 9, 1994, "On Measures to Disrupt Activities of Illegal Armed Units within the Chechen Republic and in the Ossetian-Ingush Conflict Area," Resolution of the Russian Federation Government No. 1360 of December 9, 1994, "On Assuring State Security and Territorial Integrity of the Russian Federation, Legitimacy, and Citizens' Rights and Freedoms, Plus Disarmament of Unlawful Armed Units within the Chechen Republic and Adjacent Regions of North Caucasus," and the Russian Federation President's Decree No. 1833 of November 2, 1993, "On Fundamental Provisions of the Russian Federation's Military Doctrine,'" 1995(5) Bulletin of the Constitutional Court of the Russian Federation]] [hereinafter – Ruling No. 10-P].

of the Russian Federation addresses solely issues of law, it does not assess the political expediency associated with the execution of an international treaty.

That is, while international law constitutes a crucial legal pillar of Russia's constitutional system in some cases, in others it boils down to legal expediency. Thus, the Court relied on a deliberate substitution of notions to elegantly skirt a difficult situation fraught with the evil of the day.

The Constitutional Court removed itself from assessing the Treaty in terms of form. In its Ruling, the Court willfully modified the Treaty review scope to omit 'analysis of the documents referenced in such treaty as its foundation.' Clearly, it was the only way out for the Court in that situation; otherwise, had those documents been examined, the Court could hardly have held the Treaty compliant with the Constitution.

First, the Treaty is based on the Republic of Crimea's declaration of independence, and the core legal position thereof relies on a ruling made by the International Court of Justice in the Kosovo case. The declaration expressly states: '[C]onsidering that, on July 22, 2010, the International Court of Justice, with regard to Kosovo, confirmed that a unilateral declaration of independence by a portion of a state does not violate any rules of international law . . . we resolve. . .'[26] However, such reliance is made completely in bad faith. First, because the International Court of Justice is only competent to provide an advisory opinion on a request received thereby. The verdict issued by the International Court of Justice is in fact titled this way, Advisory Opinion of the International Court of Justice on Kosovo. Even though, nowadays, numerous parties present this document almost as an international authorization to secession, at that time, July 22, 2010, the United Nation's judicial body had no discussion at all as regards the lawfulness or unlawfulness of ethno-political secession or a nation's right to self-determination as a principle. By that point in time, 69 of the 192 UN member nations had recognized Kosovo as an independent state. Meanwhile, the entire UN has not recognized Kosovo's independence yet, because two permanent members of its Security Council (Russia and China) are flatly against this unilateral self-determination by Serbia's breakaway autonomous region. Even Europe lacks consensus on recognizing Serbia's breakaway autonomous region as an independent entity (in fact, 5 EU member countries, namely Spain, Greece, Romania, Cyprus, and Slovakia have not recognized Kosovo).[27] Please note: *it is Russia that flatly rejects* the

[26] Рада Крыма приняла «декларацию о независимости» [*Rada Kryma prinyala 'deklaratsiyu nezavisimosti'* [*The Crimean Rada Adopted the 'Declaration of Independence'*]], *UNIAN* (Mar. 11, 2014), <http://www.unian.net/politics/895069-rada-kryima-prinyala-deklaratsiyu-o-nezavisimosti.html> (accessed May 15, 2015).

[27] On this matter *see Голубок С.А.* О соответствии международному праву односторонней декларации независимости Косово. Консультативное заключение Международного суда ООН от 22 июля 2010 года // Международное правосудие. 2011. № 1 [Golubok S.A. *O sootvetstvii mezhdunarodnomu pravu odnostoronnei deklaratsii nezavisimosti Kosovo. Konsultativnoe zaklyuchenie Mezhdunarodnogo*

Kosovo ruling by the International Court of Justice! However, it is this very ruling that underpins all documents on Crimea's accession to Russia, and the Constitutional Court cannot but be aware of that.

Second, the grounds for entry into the Treaty are constituted by Russia's recognition of the Republic of Crimea as an independent state. On March 17, 2014, the Russian Federation President signed Decree No. 147 'On Recognition of the Republic of Crimea' which says: 'Considering the will expressed by the Crimean peoples at the Crimea-wide referendum held on March 16, 2014, recognize the Republic of Crimea wherein the City of Sevastopol enjoys special status, as a sovereign and independent state.' However, the Crimean people expressed their will on a completely different matter. Two questions were put up for the Crimea-wide referendum: 'Are you in favor of Crimea's reunification with Russia as a member territory of the Russian Federation?' and 'Are you in favor of restoring the effectiveness of the 1992 Constitution of the Republic of Crimea and in favor of Crimea's status as part of Ukraine?' There is no mention of independence. Should the Constitutional Court have reviewed that legal basis or is it, yet again, covered by the definition of legal expediency?

The Constitutional Court removed itself from assessing the Treaty in terms of its execution procedure. The Court only verified the Russian party's authority which was already evident. The Court stated that the Treaty 'has been signed by the Russian Federation President who, under the Russian Federation Constitution and federal laws, is authorized to determine the key areas of the state's domestic and foreign policies.' 'Therefore, the execution of the reviewed Treaty by the Russian Federation President complies with the Russian Federation Constitution.' Nothing else was examined, even though there was clearly a certain scope for such an examination.

On Crimea's part, the Treaty was signed by the Head of the Crimean Government Sergey Aksyonov, the Speaker of the Crimean Parliament Vladimir Konstantinov, and the Head / Mayor of the City of Sevastopol Aleksey Chaly. However, the status of Sevastopol as part of Ukraine presumed no elected mayor at all. The so-called 'popular' mayor, Russian national[28] Aleksey Chaly, had been elected by the residents

suda OON ot 22 iyulya 2010 goda // Mezhdunarodnoe pravosudie. 2011. No. 1 [Sergey A. Golubok, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. Advisory Opinion of the International Court of Justice of July 22, 2010*, 2011(1) International Justice]]; *Маркедонов С.* Косово: декларации или политическая реальность? // Ноев ковчег. 2010. № 9 [Markedonov S. *Kosovo: deklaratsii ili politicheskaya real'nost'? // Noev kovcheg*. 2010. No. 9 [Sergey Markedonov, *Kosovo: Declarations or Political Reality?*, 2010(9) Noah's Ark]], available at <http://noev-kovcheg.ru/mag/2010-09/2195.html> (accessed May 15, 2015).

[28] Мэр Севастополя Чалый – гражданин России, но это не юридическое противоречие [*Mer Sevastopolya Chaly – grazhdanin Rossii, no eto ne yuridicheskoe protivorechie* [*Sevastopol Mayor Chaly is a Russian Citizen, but It Is Not a Legal Contradiction*]], *Sevastopolskie Novosti* (Feb. 25, 2014) <http://sevastopolnews.info/2014/02/lenta/politika/069214828/> (accessed May 15, 2015); Алексей Чалый – мэр Севастополя. Справка [*Aleksei Chaly – mer Sevastopolya. Spravka* [*Sevastopol Mayor Aleksey Chaly. Inquiry*]], *Argumenty i Fakty* (Mar. 19, 2014), <http://www.aif.ru/dontknows/file/1127241> (accessed May 15, 2015).

at a public rally.[29] That is, at the time of his election, the mayor's position had not been contemplated by the Ukrainian Constitution. Even assuming it had been so contemplated, the person in question could in no case have been elected to such an office for reason of his foreign nationality.[30]

At least as many questions arise as regards the procedure of electing Sergey Aksyonov as the Chairman of the Crimean Government. When, on February 27, 2014, the building hosting the Crimean Supreme Soviet was captured by a detachment of unknown armed individuals in battle fatigues, the captors let in a group of deputies, *but not before they confiscated their cell phones*. However, the Ukrainian Constitution (Art. 136) requires a nominee chairman of the Crimean Government to be cleared by the Ukrainian President. According to V.A. Konstantinov, V.F. Yanukovich, whom the parliament members considered the Ukrainian President, phoned him and approved Aksyonov's nomination orally. How did that happen? Over a cell phone that had been confiscated?

As a result, the deputies elected Aksyonov as Prime Minister of the new Government (Resolution No. 1656-6/14). However, no video recording was made of the session and no reporters were allowed in. According to an official statement by the Supreme Soviet's press office, 53 deputies voted in favor of that decision. *ZN.UA* claims that 53 deputies were initially in the room but some of them left the session. Moreover, a scandal broke out as they considered the removal of former Prime Minister A.V. Mogilyov and S.V. Aksyonov's appointment to that position, and a group of deputies refused to vote. Deputy S.V. Kunitsyn notes that, at time of the vote, only 47 persons were in the room whereas a quorum of 51 was required. According to certain deputies, the list of those who ostensibly 'voted' includes not only the names of those who indeed voted but absentee names as well.

A question arises: given that the authority yielded by two of the three signatories was so doubtful, could the Constitutional Court rule the Treaty compliant with the Constitution as far as its signing procedure was concerned? Otherwise, it would turn out that the review of its execution form failed to address issues of law and was instead reduced to checking if the right sort of ink was used to sign the Treaty.

Violation six: in reviewing the Treaty's constitutionality in terms of its effectiveness procedure, the Constitutional Court resorted to interpreting the statutes for the purpose of

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[29] Предприниматель Алексей Чалый назван мэром Севастополя [*Predprinimatel' Aleksei Chaly nazvan merom Sevastopolya* [Businessman Aleksey Chaly Was Declared as the Mayor of Sevastopol]], *RIA Novosti* (Feb. 23, 2014), <http://ria.ru/world/20140223/996553169.html> (accessed May 15, 2015).

[30] Aleksey Mikhailovich Chaly only acted as Sevastopol's governor for two weeks. On April 1, he was appointed to that office by deputies of Sevastopol's Legislative Assembly (formerly City Council) who supported his nomination unanimously. That decision was non-compliant with the Russian law whereby an acting governor is appointed by the President. However, a declaration was made on the same day that the existing executive system in Sevastopol would remain in existence for not more than a month, and that the city's Charter would be adopted by the end of April whereby acting governor appointments would follow the Russian practices.

attaining a predetermined objective. The Treaty (Art. 10) states that it shall 'provisionally apply as of the execution date and shall come into effect as of its ratification date,' whereas the Republic of Crimea stands admitted to the Russian Federation as of the Treaty's execution date (Art. 1(1)). The Court ruled such provisions compliant with the Constitution and attempted to furnish a highly detailed justification for this ruling (para. 3 of the Ruling). Its justification refers, among others, to the Vienna Convention on the Law of Treaties, which permits such possibility,[31] and to its own legal position.[32] Apparently, everything is convincing and proper. However, for some reason, no mention is made of Art. 65(2) of the Russian Constitution which, in this particular case, refers the Court to a special constitutional law it must follow in assessing the Treaty.

Now, that Law prescribes a strict rule applicable to this very kind of international treaty, *i.e.* treaties on admitting a foreign state to Russia as a member territory thereof. The Law (Art. 91(2) of the Constitutional Court Law) states unequivocally: '*[A]n international treaty shall not come into effect or apply, i.e. it cannot be ratified or approved and cannot otherwise become effective for the Russian Federation if the Constitutional Court finds it non-compliant with the Constitution*' (emphasis added). That is, until the Court issues its Ruling, such treaty cannot apply. In fact, the Court understood it only too well. It understood it so well that it did not use its favorite language to the effect that it considers solely the issues of law, which it normally applies in sticky political situations. The Court expressly stated: 'The fact that the Republic of Crimea stands admitted to the Russian Federation as of the Treaty execution date has the nature of a fundamental manifestation of political will.'

Violation seven: the Constitutional Court issued the Ruling contrary to its own legal position. Back in 1995, as it reviewed the constitutionality of Yeltsin's Presidential Decrees on the use of military force in Chechnya, the Constitutional Court stated that national integrity was 'a fundamental pillar of the Russian Federation's constitutional system,' that 'the Russian Federation Constitution does not contemplate a potential unilateral decision on the matter of changing the status of a Russian Federation member territory or its secession from the Russian Federation.'[33] If so, then, based

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[31] 'A treaty . . . is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed' (Vienna Convention on the Law of Treaties, May 23, 1969, Art. 25(1), U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), at <https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01p.pdf> (accessed May 15, 2015), of which the Russian Federation is a party; it is essentially reproduced in Art. 23 of the Federal Law No. 101-FZ July 15, 1995, 'On International Treaties of the Russian Federation'). Such legal construct is also confirmed as admissible by the Russian Federation Constitutional Court in its Ruling No. 8-P March 27, 2012.

[32] The Court refers to its Ruling No. 8-P March 27, 2012, which, in particular, says that provisional application of an international treaty, as a rule, is used by the Russian Federation in its practice of interstate communication if the treaty subject is of particular interest to its parties.

[33] Ruling No. 10-P, *supra* n. 25.

on the principles of good faith and consistency, Russia was also obliged to respect Ukraine's right to territorial integrity.

This legal position has been neither contested by any party nor revised by the Court itself. This means it was binding. Article 6 of the Constitutional Court Law states: 'Decisions of the Russian Federation's Constitutional Court are binding throughout the Russian Federation on all representative, executive, and *judicial bodies* of government, local government bodies, enterprises, institutions, organizations, officials, citizens, and their associations' (emphasis added).

Violation eight: the Sevastopol issue. This might be one of the most important issues: how did the city of Sevastopol come to be part of the Republic of Crimea accession treaty and what were the legal grounds for its accession to Russia?

As we remember, a foreign state could be admitted to Russia as a new member territory. While the ARC featured an adequate number of criteria, as a nation, for the purposes of self-determination, self-declaration, and recognition as an independent nation by a foreign state,[34] the city of Sevastopol most certainly could not do that. The reason is it was neither a part of the Crimean Region when the USSR collapsed nor a part of the ARC at the time of the Crimea-wide referendum.

Decree No. 761/2 issued by the Presidium of the RSFSR Supreme Soviet on October 29, 1948, carved Sevastopol out of the Crimean Region to become a city that was directly administered by the RSFSR government. The Resolution 'On the Transfer of the Crimean Region from the RSFSR to the Ukrainian SSR,' as made by the Presidium of the RSFSR's Supreme Soviet of February 5, 1954, *transferred the Crimean Region rather than the Crimean Peninsula*. By that time, Sevastopol had not been part of the region for six years. Sevastopol was turned over to Ukraine under a bilateral treaty between Ukraine and Russia executed on November 19, 1990, whereby the parties gave up any mutual territorial claims. Subsequently, this principle was consolidated in various treaties and agreements among CIS countries. Sevastopol's special status as part of the ARC was only referenced in the text of the 1992 Constitution of the Republic of Crimea, and the question on reintroducing that Constitution failed to win a majority vote in the Crimea-wide referendum of March 16, 2014.

It means that, as of the Treaty execution date, Sevastopol was not a foreign state and could not be admitted to Russia using the same rules as the Republic of Crimea. With regard to such cases, the Admission Law (Art. 4(2)) prescribes a completely different procedure: 'A portion of a foreign state shall be admitted to the Russian Federation by mutual agreement of the Russian Federation and such foreign state under an international / intergovernmental treaty made by the Russian Federation with such foreign state.'

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[34] Modern international law contemplates a theoretical possibility whereby a new independent state may arise once the self-determination right of a certain people is recognized and its own state is created, provided the international community of nations acknowledges an existential threat to such people should it remain within a state that fails to comply with the principle of equal rights and self-determination of peoples.

Here, as in the case of the Treaty's provisional application prior to its ratification, the Constitutional Court should have followed an express constitutional reference: 'Admission to the Russian Federation and creation of a new member territory thereof shall follow a procedure established by a federal constitutional law' (Art. 65(2) of the Constitution). In order to establish the Treaty's compliance with the Constitution, the Court was obliged to examine it for compliance with the Admission Law. However, it did not do that. What if it had? Perhaps history might have taken another turn. When our domestic laws are only violated with regard to ourselves, it is not the end of the world. Ultimately, it is our internal business, but even that is not always true. Human rights issues have long been elevated to the international level. However, in this case, the situation is different, as the violation of our domestic law injured individuals and states outside this country. Moreover, it was the work of one of the highest Russian courts.

3. Civilization Problem?

Nowadays, a lot is said and written to suggest that the root cause of the confrontation between Russia and its former international partners can be traced to a civilization-scale rift affecting the world, as Russia finds itself outside the system of European achievements and values.[35] The historical typology of civilizations clearly offers an attractive theory. It sounds lofty and compelling. The only cause for concern is its simplicity, typical of a blind alley, for this theory can be used to easily justify almost any kind of bizarre behavior, which is something that is not supposed to happen. There is no doubt that civilization models must be studied, since they make for a finer and deeper understanding of the world. However, insurmountable cultural and genetic differences cannot be relied on to explain away any actions and processes. After all, there is no credible evidence that each people's ability to internalize the achievements of human thought and third party experience depends on unique cultural and historical attributes of such people.

The fatalist 'pigeonholing' with reference to civilization models is artificial; it is merely a convenient propaganda ploy to justify a refusal to develop or to cover up true reasons for such refusal. It is no coincidence that the talk of Russia's unique civilization reemerged with a greater force right at the time when its civil society embarked on a natural transition to the European development model, when its citizens came to understand that the state is not a sacred entity conferred from above but merely an apparatus funded by their own taxes and meant to carry out publicly significant functions they themselves define. The point is, as long as the state continues to act as the holder of authority vested with a supreme power, the

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[35] *See, e.g., Хантингтон С.* Столкновение цивилизаций [Huntington S. *Stolknovenie tsivilizatsii* [Samuel Huntington, Clash of Civilizations]] (Yury Novikov & Takhir Velimeev, trans.) (AST 2003).

civil society as the supervisor of and participant in government decision-making will face the desperate resistance of the state. A leading Russian theorist of law, Vladimir Chetvernin asserts:

> Objectively, the Russian ruling groups have no stake in modernizing and establishing an industrial society, particularly private property, because, under such a development scenario, they stand to lose their dominance. Democracy will only have its outward attributes, while the elite would explain tougher controls over the country by the need to protect national values from inimical foreign influences.[36]

That is, the problem is not about any difference among civilizations. As soon as Russia saw a change in the public requirements placed upon the state and the shifting view of the Russian population on the state's nature, purpose, and place in the society, the powers that be identified a tangible threat. Given that such changes were driven by a set of competitive factors (*competition of lifestyles*, *competition of meanings*, *competition of information*, and *globalization*[37]), the state's reasonable protective response was to fight those very factors. The first blows targeted the media, internet, and education in the form of school curricula and textbooks, so as to eliminate competing information and competing meanings. Next, under the guise of a response to international sanctions, they launched a campaign against competing lifestyles by restricting international exchanges, making exit from the country more complicated for individuals, and clearing store shelves of goods that testify to substantial competitive advantages of their producers.

However, there is a bit of a civilization-based problem in here. Just one point though: rather than talking of different types of civilization, we are dealing with the

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[36] *See Четвернин В.А.* Исторический прогресс правовой свободы и цивилизационно-историческая типология [Chetvernin V.A. *Istoricheskii progress pravovoi svobody i tsivilizovanno-istoricheskaya tipologiya* [Vladimir A. Chetvernin, *Historical Progress of Legal Freedom and a Historical Typology of Civilizations*]] (2008), <http://www.teoria-prava.hse.ru/nersesyants-conferece/3/57-chetvernin-abstracts> (accessed May 15, 2015).

[37] *Competition of lifestyles* means more than two decades of openness throughout the nation, whereby the population had a chance to see and compare for itself. *Competition of meanings* means access to alternative literature (fiction and research), rather than to officially recommended books only, whereby the generations growing up in those years have learned to think and analyze. *Competition of information* means an information-based society whereby people are not merely able to avoid constant bombardment by state propaganda, not merely able to have a viewpoint of their own, but can also initiate their own discussion on any issue, for they bypass the system of prior approvals and self-censorship of official media. *Globalization* means a harmonization of certain values based on their competitive advantages, as assessed by the humanity and as translated into interstate standards. Despite significant differences and antagonistic assessments of globalization by Russian researchers, all of them nevertheless are united on one point: the current period represents a global (and not merely Russian) phase of a mammoth transformation affecting diverse aspects of human life – from production processes to management to justice and individual values.

difference between civilization and barbarity for, in the modern world, the watershed between those lies in the peoples' attitude to law. In a situation where the state, to an ever greater extent, finds itself a service provider subject to quality assessment by the public, it is law that turns into a universal value of civilization that all people together seek to preserve and develop. Rather than a mere listing of rules, it is a set of standards based on an international morality of peaceful coexistence,[38] as agreed by various societies and nations. They have elevated such standards to law and equipped them with special procedures, while everyone has undertaken to comply with them under mutual supervision and in interaction with each other.

Ironically, it was Valery Zorkin, Chairman of Russia's Constitutional Court, who expressed this idea most accurately. In his article 'Civilization of Law,' he said:

> And the bulk of humanity agreed as follows: We hold fair elections. We accept the person trusted by the majority as our leader. We restrict such leader within the bounds of law. And we live until the next election. Humanity, wary after two world wars and fearing a prospective third world war, hankers for elementary tranquility and joy of peaceful private life, believing it could achieve stability on the basis of such basic social contract. That is how the civilization of law is ultimately established, on the foundation of huge sacrifices, through bloody trials and horrible errors.[39]

This is true. Russia also attempted to embark on that path. However, almost straight away, two caveats formalized by law arose to prompt an unavoidable sideways swerve: elections fair in name only and the nation's inability to keep its leader within the bounds of law. Therefore, nothing has come of it, because law is a balanced multi-dimensional system. It features no trivial and minor points that could be painlessly ignored or sacrificed without threatening the existence of the system in its entirety.

It only should be added that, in assessing Russia's actions, Mrs. Merkel got her timeline somewhat wrong. A system where governing leaders are not bound by laws they have enacted does not mean 'the law of the jungle dating back to the 19th or 20th century.' A justification for such lack of bounds was given back in the 4th century B.C. in a Chinese book titled *Shang Chün shu* (*The Book of Lord Shang*).[40] Now, Professor Valery

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[38] The English language has no discourse at all based on the word 'law.' They refer to that as 'law and morality.'

[39] *See* Зорькин В.Д. Цивилизация права [Zorkin V.D. *Tsivilizatsiya prava* [Valery D. Zorkin, *Civilization of Law*]], *Rossiiskaya Gazeta* (Mar. 12, 2014), <http://www.rg.ru/2014/03/12/zorkin.html> (accessed May 15, 2015).

[40] *See* История политических и правовых учений: Учебник для вузов [*Istoriya politicheskikh i pravovykh uchenii: Uchebnik dlya vuzov* [History of Political and Legal Doctrines: Textbook for High Schools]] (Vladik S. Nersesyants, ed.) (4th ed., Norma 2004).

Zorkin, Chairman of Russia's Constitutional Court, a specialist in history of political and legal doctrines, knows it all too well, without a shadow of a doubt. 'Should law perish, the world will find itself on the brink of a precipice,' he wrote. Largely thanks to the court he chairs, we are already there, on that brink. Inability to provide an assessment while staying true to the spirit of law and the spirit of civilization founded on that law spells barbarity. Still, barbarity is curable, even though the cure may not be immediate. The curative recipe is quite simple: education and culture.

In analyzing Russia's current foreign policy disagreements with the international community, it seems appropriate to cite an old Buddhist parable whereby residents of a village asked Buddha to disabuse a blind man who never believed in the existence of light. Claiming that no one could give him a single uncontestable proof of its existence, the blind man was so convincing in his reasoning that even those knowing for sure that light exists were swayed by his arguments. Rather than disabusing the blind man, Buddha asked a doctor to cure him. When, in six months, the hitherto blind man gained his vision, Buddha suggested that they argue about light. However, the argument never happened because now they were facing identical realities.

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