What's in a Word: "sovereignty" in the Constitutional Court of the Russian Federation

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Introduction

The word "sovereignty" (суверенитет) played a crucial role in Russian political discourse during the second term of Vladimir Putin as the second President of Russia. The word formed part of a pair: "sovereign democracy" (суверенная демократия), extracted by Vitaliy Tretyakov (2005) and Vladislav Surkov (2006), the ideologist of the regime, from Putin's first six annual addresses to parliament to 2005. The discourse was encapsulated in the collection of articles, including Putin's addresses and articles by Medvedev and others, published later in 2006 (Garadja, 2006). I explore these issues in my book on Russia (Bowring, 2013 b).

This article explores the role played by "sovereignty in the legal discourse of the Chairman of the Constitutional Court of the Russian Federation, Valeriy Zorkin. Mr Zorkin, born in 1943, has been a judge of the Court since its establishment in 1991. He served as Chairman from 1991 to 1993, when the Court was suspended after it declared unconstitutional Boris Yeltsin's storming of the Supreme Soviet in the White House and, tearing up of the Constitution. He resumed his role as a judge of the Court in 1994, and in 2003 he was again elected Chairman, a post he still holds.

International law and the Russian Constitutional Court

Russia has a 'monist' approach to international law, which means that treaties ratified by Russia become an integral part of Russian law without the need for further legislation. Article 15(4) of the 1993 Constitution provides that treaties take priority over domestic law. Russia became a member of the Council of Europe in 1996, and on ratification in 1998, the European Convention on Human Rights became an integral part of Russian law (Bowring, 2013a).

On 10 October 2003 the Supreme Court of the Russian Federation adopted an authoritative Resolution 'On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation,' (Supreme Court 2003). The judges of the Constitutional court participated in the drafting of this Resolution, as did Anatoliy Kovler, until recently the Russian judge on the European Court of Human Rights. Furthermore, ten years later, on 27 June 2013, the

Supreme Court adopted a further Resolution 'On application of the ECHR by the courts of general jurisdiction.' (Supreme Court 2013).

These resolutions are binding on all the lower courts, and firmly entrench the Convention and its jurisprudence in Russian law. The Constitutional Court regularly refers to both in its judgments.

Mr Zorkin and sovereignty

Valeriy Zorkin was an early participant in debates about "sovereignty". Indeed, he can be said to be one of the progenitors of the phrase "sovereign democracy". On 17 November 2006 he participated and led in a discussion on "The sovereign state in conditions of globalisation: democracy and national identity", together with leading intellectual and scholarly figures – and Vladislav Surkov. This discussion is published in Surkov's 2008 collection *Teksty 1997-2007*. (Surkov 2008)

This round table discussion followed publication on 22 August 2004 of Zorkin's article "Apology for the Westphalian system" in *Rossiyskaya Gazeta*. (Zorkin 2004). Zorkin declared at the discussion's conclusion that "From this point of view Russian democracy - is sovereign, and the sovereignty of the Russian state - is democratic… Precisely for this reason in the globalising world the defence of the interests of the state demands the uniting and not the breaking up of sovereignties."

An adverse ruling at Strasbourg

Matters came to a head for Zorkin some years later, in the context of a ruling of the Strasbourg Court.

On 7 October 2010 the Chamber of the ECtHR gave judgment in the case of *Konstantin Markin v Russia*, a controversial case concerning violations of Article 14 (discrimination) with Article 8 (respect for family and private life), denying a serving male officer leave to look after his children which would have been available to a female officer.[1] The Chamber strongly criticised the ruling of 15 January 2009 of the Constitutional Court of the Russian Federation (CCRF).

The legal significance of the word "sovereignty" in Russia was further emphasised on 29 October 2010 when Mr Zorkin published a long article in the *Rossiyskaya Gazeta* entitled "The limit of compromise", expressing defiance of the European Court of Human Rights. (Zorkin 2010)

Zorkin argued (I have highlighted the repetitive use of the word "sovereignty"):

> "The principles of state **sovereignty** and the supremacy of the Constitution in the legal system of Russia lie at the foundation of its constitutional system. The Convention as an international treaty of Russia is a component part of its legal system, but it is not higher than the Constitution…. Each decision of the European Court is not only a legal but a political act. When such as decision is taken in the interests of the protection of the rights and freedoms of the citizen and the development of our country, Russia will always precisely obey it. But when it or another decision of the Strasbourg court is doubtful from the point of view of the goal of the European Convention on Human Rights and moreover in a direct fashion concerns national **sovereignty**, and fundamental constitutional principles, Russia has the right to work out a defence mechanism against such decisions. Precisely through the prism of the Constitution the problem of the relationship between orders of the CC and the ECtHR must also be worked out… Like any other European state, Russia must fight as much for the preservation of its **sovereignty,** as for the careful relationship with the European Convention, and defence of its **sovereignty** against inadequate, doubtful decisions."

On 18 November 2010, the Strasbourg Court communicated to Russia the *United Opposition* case,[2] in which complaints were made about the 2003 elections. Judge Zorkin complained that the Court's decision was 'connected with political reasons' and said: 'Not all decisions of the ECtHR are obligatory for execution, in particular, those concerning **sovereignty**' [emphasis added].

Conflict at the St Petersburg Forum

This was followed by heated exchanges with Jean-Paul Costa, the ECtHR's then President and others at the Thirteenth International Constitutional Justice Forum in St Petersburg in November 2010.[3] At this Forum Zorkin declared that Russia could even leave the ECHR because of the threat posed to its **sovereignty**.[4]

Mr Zorkin sought juridical support from the judgment of the German Constitutional Court in its 2004 *Görgülü* judgment,[5] which, at the time was a cause of concern to the then president of the ECtHR, Lucius Wildhaber, who interpreted the decision as denying binding force to ECtHR judgments and setting a bad example with counterproductive effects in other countries.[6] Gertrude Lübbe-Wolff (2006), on the contrary, sought to show that:

> As the Constitutional Court puts it, the Basic Law – the German Constitution - has not taken the greatest possible steps in opening itself to international-law connections. The greatest possible step would have been to endow international agreements and other international law with the status of constitutional law – or an even higher status - and thereby to reduce to a minimum or even exclude the possibility of conflict between national and international law. This step has not been taken in Germany - neither generally nor with respect to the Convention in particular. The Convention has

> only been given the status of a normal federal statute. Accordingly, there is the possibility of conflict between the Convention and higher-ranking domestic law, and the Constitutional Court has made it clear that in the event of such a conflict, it is the Constitution – not the conflicting international agreement – which German Courts would have to apply.
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> The *Görgülü* decision dwells on the issue of conflict at some length and insists on the national sovereignty which the German state has reserved by not submitting to international law unconditionally. On an atmospherical level, this has probably contributed to the impression that the Constitutional Court is questioning the authority of the Convention or even seeking conflict with the ECtHR. Sticking to the hard legal doctrines set out in the decision, however, you will find that there is little to worry about. By stressing the obligation of all German Courts, including the CCt, to interpret not only ordinary law, but also constitutional law in accordance with the Convention as read by the ECtHR, and by stating that in a case of failure by a court of ordinary jurisdiction to take due account of a decision of the ECtHR, the party concerned may take this to the Constitutional Court as a violation of the relevant constitutional right, the decision even enhances and strengthens the role of the Convention in German Law.

This was also the position taken by the German judge at Strasbourg, Angelika Nussberger, in her response to Mr Zorkin at the St Petersburg Forum in November 2010.[7] Zorkin said that he took the idea that the CC could block decisions of the ECtHR from the German legal system. However, Angelika Nussberger, who was elected as the Strasbourg judge from Germany on 1 January 2011, answered that "Germany not only recognises the obligatoriness of decisions of the ECtHR, but also executes them, regardless of whether they cause dissatisfaction in German society."

Polemicising with Zorkin, she recalled Article 27 of the Vienna Convention, according to which a state cannot not execute international treaties, by referring to internal legislation. Zorkin reacted toughly. He said that in distinction from Germany, "we proceed from the fact that a decision of the ECtHR can be executed only within limits. We gave the authority to incorporate the jurisdiction of the European Court. But if Russia wants to, it can denounce this treaty." He emphasised "The Committee of Ministers cannot demand of Russia the execution of a decision of the ECtHR, if it contradicts the decision of the Constitutional Court, which serves the normative base in order to defend rights and freedoms. This proceeds directly from the Constitution."

At the Forum Judge Kovler said: "The European Court does not understand the beating of people by the police, even not taking into account their rights."[8] He continued: "…the problem of human rights in Russia is the source of various speculations." He also expressed

his concern that the acceptance of human rights is sometimes affirmed by reference to the definitions of the cultural particularities of various countries.

The leading legal commentator Anna Pushkarskaya commented (Pushkarskaya 2010):

> "Yesterday at the XIII International Forum on Constitutional Justice in St Petersburg, Zorkin and Costa spoke on the absence of a mechanism for regulating legal conflicts occurring in the case of contradictory decisions by the ECtHR and CC in one and the same case. Kovler spoke on the "eternal Russian argument on which comes first – the state or human rights."

Kovler was, she said, was arguing with the ideas of Nikita Mikhalkov in his "Manifesto for enlightened conservatism".

The official government newspaper *Rossisskaya Gazeta* commented:

> "The decisions of the Strasbourg court are not obligatory for execution… as a result of the first day of the XIII Forum, they perfectly well understand in Strasbourg that Russian absolutely may not carry out the decisions of the Strasbourg Court." [9]

On 22 November 2010 Anna Pushkarskaya commented further (Pushkarskaya 2010a) that "Valerii Zorkin is ready for defence of national legal **sovereignty**"

> "The XIII Forum finished on Saturday with a public warning by Valerii Zorkin: "Russia, if it wishes, can leave the jurisdiction of the ECtHR". At the same time he noted the adoption of a "mechanism for protection of national **sovereignty**", permitting the Russian authorities not to execute a decision of the ECtHR which differs from the position of the CC. In the opinion of experts, this tough approach, adopted on the eve of the taking of decisions in Strasbourg of decisions on the complaints of YUKOS and others, is directly connected "with the internal and external politics of the Constitutional Court.""

Mr Zorkin returned to the fray on 11 December 2010, at a meeting at former President Medvedev's residence with Constitutional Court judges. He referred to the St Petersburg discussions the previous month. The President replied: "As it seems to me, we all the same never transferred such a part of our **sovereignty**, the **sovereignty** of Russia, as would permit any international court or foreign court to take a decision, changing our national legislation."[10] And on 13 December 2010, he insisted that he would not allow Strasbourg to change Russian legislation.[11]

Fall-out from the *Republican Party* case

On 12 April 2011 Mr Zorkin and his fellow-thinkers were further outraged by the Strasbourg Court's judgment in *Republican Party v Russia*, holding that dissolution of the party in 2007 violated its rights under Article 11, and on 16 May 2011 he continued his challenge, at a conference dedicated to the anniversary of the Nuremberg trials. Mr Zorkin presented a paper

entitled "Legal results of the Nuremburg trials and their contemporary significance" and once more spoke out against the "liberal-globalist" principle of "the priority of international law over national law", which he defined as "the attempt at senseless extension" of the unprecedented situation of the Nuremburg trials in relation to "private and dubious international collisions." At the same conference the Minister of Justice, Aleksandr Konovalov, delivered a paper "Legal traditions in the contemporary global world", giving some "nuances" to Zorkin's presentation. In his view, the general tendency of public law was "an inadequate legal reaction to new threats – from terrorism to illegal migration, which leads to an absence of balance between the rule of law and police and administrative aspects of expediency." [12]

In May 2011, at a conference on the anniversary of the Nuremburg trials, Sergey Mironov, the Speaker of the Federation Council, the Minister of Justice Aleksandr Konovalov, and Judge Zorkin returned to the fray. Anna Pushkarskaya reported (Pushkarskaya 2011) that all three unanimously condemned "the contemporary practice of strengthening the role of international justice." They all attacked the Strasbourg Court in particular.

Zorkin is not the only senior Russian judge to have expounded on the nature of sovereignty. On 17 July 2012 the commentator and political scientist Nikolai Zlobin published an article entitled "Anton Ivanov as the last stronghold of Russian sovereignty". (Zlobin 2012) Anton Ivanov (born 1965), a fellow student of Dmitry Medevedev's at the Law Department of Leningrad State University, was the Chairman of Russia's Supreme Commercial Court, until its merger in 2014 with the Supreme Court.[13] Zlobin started by commenting on the recent *Berezovsky v Abramovich* case at the London Commercial Court. He and colleagues were impressed by the general atmosphere of objectivity and supremacy of law; for him, that is what is now needed in Russia. But this is not the case in the view of the Russian judges. Ivanov and other senior judges propose "defending sovereignty" from the London and other foreign courts.

> Ivanov wants not simply to overrule in Russia their decisions, but even to confiscate the property of companies and persons who run to foreign courts, and to refuse the foreign judges entry to Russia. The judicial claims of foreigners against Russians, accusing them of corruption, Ivanov considers to be an "abuse of law" and he demands that Russian courts be given the possibility of overruling such decisions. And this is in a situation in which foreign investors are not standing in line at the Kremlin, and the flight of capital grows, and Russian entrepreneurs hold all their interests offshore.

> D. Afanasiev of the leading lawyers firm "Yegorov, Puginskiy, Afanasiev and Partners" not long ago asserted that not more than 10% of significant deals are concluded in the Russian jurisdiction, and that businessmen prefer English law as the proper law of the contract. The Chairman of the Duma Committee for Economic Policy Ye. Fyodorov recognises that 95% of the largest Russian firms are to be found in foreign jurisdictions.

Mr Zorkin publishes again

Indeed, on 16 May 2012, Mr Zorkin published again in the *Rossiyskaya Gazeta* – a long (more than 7,000 words) essay entitled "The supremacy of law and the imperative of security" (Zorkin 2012). Mr Zorkin started by presenting his account of the supremacy of law, which was the supremacy of human rights, as set out in Article 2 of the 1993 Constitution of the Russian Federation:

> Article 2
>
> Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State.[14]

However, he was at pains to point out that he meant human rights in the classical liberal sense, that is, starting from the equality of human rights and freedoms, in which it is understood that people are different, and have different hierarchies of values, ideals and preferences. Thus, the rights and freedoms of one person finish where the rights and freedoms of another person begin. Mr Zorkin distinguished this "classical liberalism" from what he describes as "aggressive 'liberalisation'", whose apologists confuse freedom with "everything is permitted". In practice this meant social individualism and state egoism. This led Zorkin to a discussion of multi-culturalism:

> … within the one-sided concept of "liberalisation of democracy there is more and more to be found a priority of the minority over the majority. This tendency is especially apparent in the USA and a number of countries of Western Europe, where for some time now they argue that the protection of minority rights must become the fundamental task of key legal institutions which regulate the life of society. And they say this in such a way that in fact signifies the right of the minority to aggressive propaganda of its values, norms and way of life.

This tendency was exemplified by such human rights organisations as Amnesty International and Freedom House which propagate the assertion that to the extent that the self-expression of the person is one of the highest freedoms, this freedom is acceptable even when it shocks, discredits, and defames other people.

Mr Zorkin also saw dangers in the process of formation of a unified legal space within the Council of Europe, in which the key player is the European Court of Human Rights.

> In their desire to take on themselves the function of "norm control" on the quality of national legislation, they turn, in this way, into a general European legislator.

He further pointed out that if the Strasbourg court is now a legislator, there is no general European system of checks and balances.

This led Mr Zorkin into a discussion – of sovereignty once more.

> I consider very dangerous the assertion, popular nowadays, that the withdrawal from or even rejection of the principle of state **sovereignty** is a movement to the side of disintegration of world society. On the contrary, we must try to prove that it is the only means of guaranteeing security and the protection of human rights in conditions of globalisation, when the national state only is capable of resolving these tasks.

In Mr Zorkin's view, the UN itself exists only thanks to the will of sovereign states which decided to create the UN in the aftermath of WWIY. He insists that the concept of state sovereignty, starting with Westphalia, lies at the foundation of the supremacy of national constitutions in the legal system. This is the only basis for a person-centred system of international law.

According to Mr Zorkin, the most active idea for "wiping out" state sovereignty is developed by lawyers who support a relation between international and national law, a concept which can be called "radical legal monism". They consider that it is essential to create a global legal system in which international law will have absolute priority over national legal norms and over the national legal system as a whole, including the constitution. Mr Zorkin considered this either to be very short-sighted or a provocation.

His conclusion was that the most important step in improving the system of international law will be

> to make the formulation of the basic documents of the UN more precise, defining legal boundaries and the relation and hierarchy of basic concepts such as **sovereignty**, non-interference in the internal affairs of sovereign states, territorial integrity, the right of nations to self-determination, the protection of human rights and so on.

This is not so far at all from the Soviet conception of international law.

Markin v Russia in the Grand Chamber

However, before the confrontation between Strasbourg and St Petersburg had the chance to really come to a head, the *Markin* case was referred at Russia's request to the Grand Chamber of the ECtHR, and on 22 March 2012 the Chamber's judgment was upheld, but this time with no overt criticism of the Constitutional Court.[15]

Armed with the Grand Chamber judgment, Mr Markin returned to the Russian courts, and on 30 January 2013 the Leningrad Okrug Military Court applied to the CCRF to decide the issue arising from the fact that in Russian law the judgments of the CCRF and the ECtHR appeared to be of equal status. The CCRF gave judgment on 6 December 2013;[16] Judge Sergei Mavrin, a participant in the debates, was Judge Rapporteur.[17]

My EHRAC colleague Kirill Koroteev commented that this was 'the conflict which never was'. (Koroteev 2014) He observed:

> …there is definitely not a conflict between the Russian Constitutional Court and the ECtHR, there is only a violation of the Convention, as correctly interpreted by the ECtHR. I note that the Russian government at the hearing before the Grand Chamber wholly reasonably did not put forward arguments as to "interference with internal affairs" or "violation of sovereignty": such arguments would have been rejected.

Koroteev highlighted four recent cases in which the Constitutional Court had violated the Convention, and concluded:

> … in view of the unreserved support for the legislative and executive authorities given by the judges in the building of the Senate and the Synod[18] only the ECtHR will exercise judicial control of the constitutionality and compliance with the Convention of Russian laws.

Ekaterina Mishina (Mishina 2013) in turn described the judgment as 'A Rubik's Cube from the CCRF', 'that can be turned any way you like it: You want a green side? You got it. You want a red one? You can have that, too.' After turning the cube, the CCRF had come out on top. She referred to the justices' meeting with President Putin on 12 December 2013[19] in which he said:

> In my opinion, the Russian Constitutional Court chose optimal solutions and very appropriate ones, as I have already said, from a legal point of view. You suggested an appropriate way of implementing decisions of the European Court, which will not lead to distortion of provisions of the Russian Constitution.

Conclusion – an end to the discussion of "sovereignty"?

Like the German Constitutional Court, the CCRF had taken a pragmatic approach. It held that if provisions of Russian law impeached by the ECtHR are found to be consistent with the Constitution, then the issue must be referred to the CCRF, which will determine possible constitutional means of implementation of the judgment of the ECtHR. Outright refusal to obey the judgment of the ECtHR was ruled out. As Mishina added (Mishina 2013):

> Good for you, dear judges. You masterfully avoided an open confrontation with the ECtHR and at the same time made it clear who the boss is and who will decide whether to implement decisions of the European Court of Human Rights on Russian territory.

Mr Zorkin's long articles 'The Civilisation of Law', published on 13 March 2014, and 'Law and Economics', published on 22 May 2014, did not mention either the Markin case or sovereignty. On 23 May 2014, the State Duma passed at second and third reading a law amending the law 'On the Constitutional Court' so as to implement the CCRF's judgment. And Markin got his leave, and was paid compensation.

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[9] http://www.pravo.ru/news/view/42556/
[10] See http://kremlin.ru/news/9792
[11] http://www.chaskor.ru/news/dmitrij_medvedev_ne_pozvolit_strasburgu_menyat_rossijskie_zakony_21514
[12] See http://www.kommersant.ru/doc/1642018
[13] He is now a professor at the Research University – Higher School of Economics
[14] At http://www.constitution.ru/en/10003000-02.htm
[15] *Konstantin Markin v Russia*, n.1.
[16] Published in the *Russian Gazette* on 18 December 2013 at www.rg.ru/2013/12/18/ks-dok.html.
[17] See commentary on the web-site of the Constitutional Court, at www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3137.
[18] The Constitutional Court of the Russian Federation is now housed in the magnificently reconstructed building for the Senate and Synod, the highest judicial instances of the Russian Empire.

[19] http://www.kremlin.ru/transcripts/19832