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Russian Symphonia vs. Rule of Law?

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Russian *Symphonia* vs. Rule of Law?

Mikhail Antonov*

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INTRODUCTION

In secular societies, the principle of rule of law implies that churches and other social institutions may not assert themselves as above the law or replace the official law¹ with their moral or canon rules. Abiding by this principle is a problem not only for the Russian Orthodox Church (ROC or the Church), but also for many other religious denominations that historically have carried considerable sway over social and political life in their countries by way of their “moral entrepreneurship”² and that are now reluctant to cede that influence. Surely, different denominations tackle the principle of rule of law in different ways, and the extent of their resistance and collaboration with this principle varies broadly – from theocratic regimes with high levels of resistance to the official

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1. Distinguished from canon law, customary law, soft law, and other varieties of “living law” would be embraced by a broad understanding of law as a form of normative or social ordering. See, e.g., Mikhail Antonov, *In the Quest of Global Legal Pluralism, in POSITIVITÄT, NORMATIVITÄT UND INSTITUTIONALITÄT DES RECHTS* 15–30 (Aulis Aarnio et al. eds., 2013).

2. This kind of moral authority analyzed by Professor Stoeckl means that the Church takes part in constructing cognitive frames of Russian society in order to guide public perceptions of appropriateness, sometimes contrary to the letter of law. Kristina Stoeckl, *The Russian Orthodox Church as Moral Norm Entrepreneur*, 44 RELIGION, STATE & SOC'Y 132 (2016).

law to liberal regimes in which churches tend to collaborate rather than resist. Not surprisingly, each case often corresponds with the legal culture and history within each respective country.

This is the case in Russia, where the principle of rule of law and the provision regarding the separation of church and state in the 1993 Constitution are placed into a larger intellectual framework in which the Church has reinforced the legitimacy of the State and its legal prescriptions. Certain developments in post-Soviet Russia suggest that the Church's ambitions go far beyond the status quo that existed before the 1917 Revolution. The restoration of the Patriarchate in 1918, along with important privileges that the ROC snatched from the weak Russian State in the early 1990s, stir the Church's ambitions toward more aspirational goals. These ambitions are informed by narratives glorifying traditions of cooperation of church and state in Russian medieval history and the ideology that underpinned this cooperation. In turn, this ideology goes back to Byzantine social philosophies where church-state cooperation was described in terms of *Symphonia*.

Theoretically, almost no type of church-state relations, beyond radical atheistic and theocratic regimes, a priori violate the rule of law. In this sense, French *laïcité*, American *wall of separation*, as well as cooperationist models are generally compatible with the rule of law. However, church-state cooperation in contemporary Russia often provokes concerns and criticism as being incompatible with the principles of rule of law and of secularity which are enshrined in Articles 1 and 14 of the Russian Constitution.³ While the model of church-state relations in the Russian Constitution is literally separationist (it has both *free exercise* and *establishment clauses*), constitutional practices, ordinary laws, and administrative practices are grounded on an absolutely different logic of favoring the ROC and disfavoring *non-traditional religious denominations*.⁴ The present Article will outline the legal, ideological, and ethical background of this contradiction, focusing on the prevailing

3. KONSTITUTSIIA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] (Russ.) The official English version is available at Russia's Supreme Court website, <http://www.supcourt.ru/en/documents/constitution/>, with amendments through July 21, 2014. Unless indicated otherwise, references to "Article" or "Chapter" in this Article shall mean articles and chapters of the Russian Constitution.

4. See generally Mikhail Antonov & Ekaterina Samokhina, *The Realist and Rhetorical Dimensions of the Protection of Religious Feelings in Russia*, 40 REV. CENT. & E. EUR. L. 229 (2015).

ideological pattern of church-state cooperation described with reference to the Byzantine concept of *Symphonia*.

As will be shown below, this concept is still utilized by the ROC to embrace an ideal model of church-state relations that largely differs from the original Byzantine version and from its conceptualizations in medieval Russia. Is this model in its Russian version—in the manner reflected in the ROC's main policy documents—compatible with the principle of rule of law (*Rechtsstaat*)⁵ enshrined in Article 1 of the Russian Constitution? This problem will be analyzed by examining the example of the Church's attitude toward human rights and, more specifically, how the Church manipulates religious teaching on human dignity to reinterpret the liberal conception of human rights enshrined in the Russian Constitution. My working hypothesis is that the Church's attitude is intertwined with the ROC's larger strategy to assume the lead in ideological spheres; this strategy itself problematizes the principle of secularity and separation of state and church. So far, the State has not actively resisted this strategy of the Church, putatively seeing the Church only as an efficient tool for fostering the government's legitimacy and without considering the Church as a serious competitor in political and ideological matters.⁶

The Church's attitude toward the separation principle is ambiguous. On the one hand, the ROC endorses it to protect its own competences and interests from the State's interferences, appealing to human rights and the separation principle when the State's intrusions are perceived as exorbitant. On the other hand, the Church claims that state and church shall be one, like body and soul (the body language that underpins the concept of *Symphonia*), so that the Church may, in the legal field, prioritize religious morals over legal norms and principles and define limits for the interpretation and application of human rights. This normative conflict becomes clear when the Church imposes its moral conception of human dignity on the liberal reading of human

5. The Russian term *pravovoe gosudarstvo* utilized in the Constitution is the literal translation of *Rechtsstaat*, but in legal scholarship this Russian term covers both *Rechtsstaat* and *rule of law*.

6. Such an attitude seems to reflect the real political situation in which the ROC has little chance to really assert its will and to impose it on the State. Nonetheless, this does not impede aspirational thinkers from creating ambitious, albeit unrealistic schemes of restoration of *Symphonia*. These schemes are enshrined in a number of normative documents of the Church and are repeatedly utilized by its top hierarchs, which confirms their symbolic power and ideological attractivity.

rights.⁷ In another dimension, this conflict means that the ROC thereby challenges not only the principle of secularity, but also calls into question the principle of rule of law.

One may be surprised: Why discuss this latter principle in Russia—a country that is heavily criticized for the lack of the rule of law in many spheres? The present Article does not intend to analyze whether this criticism is justified or not. Regardless, the rule of law is often not black and white, so that one might miss the point of arguing that some countries have this principle incorporated into their law and politics and some have not. For so-called transitory countries (on the way from socialist popular democracies toward western liberal democracies), this principle can be seen rather as a polychromic continuum—Russia, Poland, Hungary, and other post-socialist countries have established the rule of law *de jure* as a constitutional principle, but *de facto* have yet to succeed in fully implementing it.⁸

This Article does not have the ambition to evaluate Russia's success or failure in moving along this transformational path. My use of the term "rule of law" here means only that *de jure*, Russia has the rule of law in a sense as the rule of written laws or rule by law, which means that secular laws govern every other social norm, including religious ones.⁹ This is confirmed by the above-mentioned constitutional provisions and by the fact that state law evidently prevails over other normative orders of "living law" in Russia. *De facto*, although Russia does not soar in rule-of-law rankings, at least, it is not the last country on the list, which suggests that there is at least "some" rule of law in Russia.

Part I addresses the long-term strategy of the Church to cooperate with the State so that this latter protects the Church, while the Church legitimizes the State's policies insofar as these fit the Church's objectives.

This strategy could efficiently work in Imperial Russia where the Orthodoxy was an official religion and, since the eighteenth

7. See generally KRISTINA STOECKL, *THE RUSSIAN ORTHODOX CHURCH AND HUMAN RIGHTS* (2014).

8. Among others, the conception of the rule of law as a continuum, not a black and white dichotomy, is developed by Professor Gowder. See PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016).

9. Discretionary disrespect of law and its misuses in "high-profile cases" is another conceptual aspect that goes beyond the scope of this Article. See, e.g., Kathryn Hendley, *Assessing the Rule of Law in Russia*, in *DEVELOPMENTS IN RUSSIAN POLITICS* 9, 108–18 (Richard Sakwa et al. eds., 2019).

century, the emperor was also the head of the Church. When the Church attempted to regain its power in post-Soviet Russia, it followed this pre-revolutionary pattern of church-state cooperation. But, as Part II argues, this strategy was no longer compatible with the principles enshrined in the 1993 Constitution.

The Church had to tackle this discrepancy and, as a result, the Church's Social Concept appeared in 2000. Part III examines the attempted combination of theological and constitutional principles in that document. The conception of *Symphonia* proposed by the Concept did not fit either the Russian Constitution or the Orthodox teaching on church-state cooperation.

Despite this principal incompatibility, the conception of *Symphonia* became widely applied not only by the Church's hierarchs but also by Russian political leaders. In fact, *Symphonia* as interpreted in the Social Concept turned into one of ideological tools of the Russian State. This transformation is briefly studied in Part IV, where the 2020 constitutional amendments are cited as one of the typical patterns of this cooperation.

This tandem work of the State and the Church was not cloudless – gradually certain tensions became perceptible. At some points the Church, inspired by too-ambitious interpretations of *Symphonia*, tried to impose onto the State solutions which were overtly incompatible with the constitutional law. These tensions are examined in Part V.

It turns out that on such sensitive issues as that of human rights, the State is not ready to fully replace its legal rules by the Church's religious ethics, although interpretation of these rules rarely goes in line with conservative doctrines of the Church. This situation is summed up in the Conclusion.

I. THE CHURCH'S ASPIRATIONS TO WORK IN TANDEM WITH THE STATE

According to the Preamble of the 1997 Russian Law *On Freedom of Conscience and Religious Associations*, Russian Orthodoxy holds a "special role in the history of Russia and in the establishment and development of Russia's spirituality and culture."¹⁰ Along with this

10. Federal'nyĭ Zakon RF o Svobode Sovesti i o Religioznykh Ob'edineniiakh [Federal Law of the Russian Federation on Freedom of Conscience and Religious Associations] SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII, [SZ RF] [Russian Federation

symbolic recognition, the Church received a number of material privileges, from duty-free tobacco imports to the return of properties nationalized by the Bolsheviks. In return, the ROC works to maintain the legitimacy of state power and, for this purpose, appropriates that power to define the ultimate goals of social development in Russia. This *de facto* situation resulted from the ideological vacuum of the early 1990s and the general weakness of the State at that time. This situation enabled the Church's aspirations. Under Putin's rule, the Russian State actively started to reestablish its symbolic power and to demonstrate its own ideological ambition. This immediately prompted the ROC to craft several documents in which it attempted to restate its ideological authority, relying on centuries-old Russian and Orthodox tradition.

Illustratively, in recent years the Church has supported the State not only by legitimizing its power inside Russia, but also by endorsing controversial Russian campaigns abroad, like the Syrian war or the conflict with Ukraine.¹¹ The ROC was also able to creep into decision-making processes at different levels of political power and to make its voice be heard with respect to some principal legal matters, including anti-gay and domestic violence legislation.¹² The 2020 constitutional amendments,¹³ in which the Church successfully lobbied for the heterosexual marriage clause,¹⁴ the state-forming people clause,¹⁵ and the mentions of traditional values and God in the Constitution, can be considered as one of its

Collection of Legislation] 1997, No. 125. The official Russian version is available at <http://pravo.gov.ru/proxy/ips/?docbody=&end=102049359>.

11. See, e.g., Dmitry Adamsky, *The Role of the Russian Orthodox Church in Moscow's Syrian Campaign*, PONARS EURASIA (Feb. 10, 2020), <https://www.ponarseurasia.org/memo/role-russian-orthodox-church-moscows-syrian-campaign>; Mikhail Suslov, *The Russian Orthodox Church and the Crisis in Ukraine*, in CHURCHES IN THE UKRAINIAN CRISIS 133–62 (Andrii Krawchuk & Thomas Bremer eds., 2016).

12. See, e.g., Jamie Manson, *The Orthodox Church's Role in Russia's Anti-Gay Laws*, NAT'L CATH. REP. (Aug. 14, 2013), <https://www.ncronline.org/blogs/grace-margins/orthodox-church-s-role-russia-s-anti-gay-laws>; *Russian Orthodox Leader Rails Against 'Foreign' Domestic Violence Law*, MOSCOW TIMES (Jan. 7, 2020), <https://www.themoscowtimes.com/2020/01/07/russian-orthodox-leader-rails-against-foreign-domestic-violence-law-a68829>.

13. Federal'nyĭ Zakon RF o Popravke k Konstitutīi Rossiĭskoi Federatsīi [Federal Law of the Russian Federation on Amendment of the Constitution of the Russian Federation] SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOI FEDERATSII, [SZ RF] [Russian Federation Collection of Legislation] 2020, No. 1. The official Russian version is available at <http://publication.pravo.gov.ru/Document/View/0001202003140001>.

14. KONSTITUTSIIA ROSSIĬSKOI FEDERATSII [KONST. RF] [CONSTITUTION] (Russ.) art. 72, para. 1, pt. zh.-1 (adopted 2020).

15. *Id.* art. 68, para. 1.

latest significant ideological victories.¹⁶ However, apart from bargaining for ad hoc privileges, there was no realistic long-term strategy in the ROC's relations with the Russian State—the Church's ideological and other ambitions had aspirational character informed by rather old conceptual schemes with little to do with actual Russian constitutional law. It comes therefore as no wonder that the Church sometimes was unsuccessful in its attempts to impose a number of legislative restrictions, such as the ban on abortion.¹⁷

The *Bases of the Social Concept of the Russian Orthodox Church* (the *Social Concept*), adopted at the Sacred Bishops' Council of the ROC on August 14, 2000,¹⁸ was the first consistent attempt to outline a strategy of the Church in its interaction with the State. This strategy exposed the medieval conception of *Symphonia*, which hardly fits the Russian Constitution. The *Social Concept's* authors utilized *Symphonia* to outline the ROC's ideal pattern in terms of the relationship between “body” (state) and “soul” (church): “[I]t is in their linkage and harmony that the well-being of a state lies.”¹⁹

References to the past usually reinforce modern-day ideological messages (not infrequently without accounting for differences between past and present situations) by comparing them with seemingly persuasive examples that stir national pride and the ideology of the greatness of state power (*velikoderzhavnost'*, in Russian conservative parlance). From this standpoint, it is not surprising that the Church decided to justify its cooperation with the State and the equal status within this cooperation by allusions

16. Kristina Stoeckl justly opined that “[t]he Church officials were, in short, successful in having their priorities reflected in the Russian constitution of 2020.” Kristina Stoeckl, *The End of Post-Soviet Religion: Russian Orthodoxy as a National Church*, PUB. ORTHODOXY (July 20, 2020), <https://publicorthodoxy.org/2020/07/20/the-end-of-post-soviet-religion/>.

17. All that the ROC could gain in its long and still ongoing struggle against abortions in Russia was a declaratory agreement on cooperation with the R.F. Ministry of Public Health regarding healthcare. Article 9 of this agreement (signed on June 18, 2015) describes how the Ministry and the Church will coordinate their efforts in matters pertaining to pregnancy and childbirth. RUSSIAN ORTHODOX CHURCH, SOGLASHENIE O SOTRUDNICHESTVE MEZH DU MINISTERSTVOM ZDRAVOOKHRANENIIA ROSSIĬSKOI FEDERATSII I RUSSKOĬ PRAVOSLAVNOĬ TĖRKOV'IDU (2015), <http://www.patriarchia.ru/db/text/4124569.html>. This declaratory document is characteristic for the general framework of *Symphonia* between the Church and the state authorities. *Id.*

18. RUSSIAN ORTHODOX CHURCH, THE BASIS OF THE SOCIAL CONCEPT (2000), <http://orthodoxrights.org/documents/the-basis-of-the-social-concept> [hereinafter SOCIAL CONCEPT].

19. *Id.* § III.4. Below, paragraphs (para.) will refer to the *Social Concept's* sections or, if specially mentioned, to sections of the *Basic Teaching on Dignity*.

to centuries-old patterns stemming from the “glorious past” of Russia and of Byzantium (portrayed as the spiritual predecessor of Orthodox Russia, the “second Rome”). This conceptual reference is quite ambiguous and theoretically risks creating conflicts between the ROC and the Russian State. The apparent problem is that within the framework of “symphonic” cooperation, the Church uses its power to influence the State’s legislative and judicial decisions, which is unacceptable in a rule-of-law state.²⁰

The kind of *Symphonia* formulated in the *Social Concept* suggests that the Church appropriates its power to define what the social, spiritual, and other goals of the society shall be, and leaves to the State only to decide how to reach these goals, implicitly preserving a kind of “veto power.” The Church shall retain the right to evaluate state policies and norms,²¹ and given that “God’s commandment to fulfil the task of salvation in any situation and under any circumstances is above this loyalty,” the Church may “refuse to obey the State.”²² Body politics in the *Social Concept*, analogies with consubstantiality, and other mystical allegories did not contribute to a sensible delineation of mutual requirements and competences of the Russian State and the Church. Their relations gradually turned into an implicit *de facto* alliance, with no clear rules of the game either for the Church or the State. The difficulty with playing *Symphonia* between the Russian State and the ROC is that the Church’s claims do not fit with either the real political situation or current Russian law. Informed by the Slavophile ideology,²³ neither party pays enough attention to the differences between the legal frameworks of Byzantium and medieval Russia, and current Russian constitutional law.

One oft-cited example from early Russian history can illustrate this symphonic approach. When Prince Vladimir the Great in AD

20. In Russia, churches are not legally precluded from lobbying for political decisions, so the ROC’s insistence on making its voice heard does not contradict as such the rule of law principle. Also, in liberal democracies, religious beliefs of policymakers can play a significant role. However, the expressions utilized by the authors of the *Social Concept* and their tonality demonstrate that the Church’s ambitions go far beyond a simple participation in public deliberations. As will be shown below, the ROC claims, along with the power to give binding advice to state authorities, a kind of veto right for state policies and judicial and legislative decisions.

21. SOCIAL CONCEPT, *supra* note 18, § III.4.

22. *Id.* § III.5 (emphasis omitted).

23. Mikhail Suslov, *Genealogiia monarkhicheskoi idei v postsovetskikh politicheskikh diskursakh Russkoi pravoslavnoi tserkvi*, 3 GOSUDARSTVO, RELIGIJA, TSERKOV’ V ROSSII I ZA RUBEZHOM 75–116 (2014).

996 decided, shortly after the Baptism of 988, to abolish capital punishment, clerics persuaded the Prince that he had been divinely appointed to reward the just and to punish the wrongdoers.²⁴ Ceding to this persuasion, Vladimir mandated,

Whoever violates these rules, which we have established in accordance with the canons of the Church Fathers and according to the regulations of the first emperors, whoever shall violate these rules, whether my children, my great-grandchildren, or a lieutenant in some town, or an overseer, or judge, and they offend a church court, or someone else, then may they be cursed in this age and in the next by the seven ecumenical councils of the holy Fathers.²⁵

This way, the Prince linked his political authority and binding force of his enactments with the rules of the Church.

When the *Social Concept* mentions that medieval Russian church-state relations were the best example of *Symphonia*,²⁶ its authors apparently have in mind something similar to such a veto power. From the *Social Concept's* perspective, the ideal framework of church-state relations is when the Church does not meddle in the routine work of the state machine but from time to time interferes to correct grave errors that are potentially dangerous for the entire society.

Albeit historically placed under the tutelage of the State during the Synodal period (1721–1917), the Church formally enjoyed the symbolic power to define religious dogma and to influence state policies and rules related, even indirectly, to dogma. The Church justified its power by the fact that the emperor was at the same time the supreme legal authority and the head of the Church after 1721: solely to him belonged both the privilege to issue legal norms (acting as the emperor) and to legitimize them (acting as the head of the Church). This system distorted the pattern of *Symphonia* as two authorities coincided in one person. In 1918, the Patriarchate was restored, and in the late 1980s the ROC returned to

24. Ferdinand M. Feldbrugge, *Wergeld, Bloodwite, and the Emergence of Criminal Law, in VON KONTINUITÄTEN UND BRÜCHEN: OSTRECHT IM WANDEL DER ZEITEN* 3, 3 (Herbert Küpper ed. 2011).

25. THE LAWS OF RUS': TENTH TO FIFTEENTH CENTURIES 44 (Daniel H. Kaiser ed. and trans., 1992) (alterations omitted).

26. SOCIAL CONCEPT, *supra* note 18, § III.4 ("Unlike Byzantine basileuses, Russian tsars had a different legacy. For this and other historical reasons, relationship between the church and the state authorities was more harmonious in Russian antiquity.") (emphasis omitted).

the pre-Petrine²⁷ conceptualization of church-state relations, representing this return as fidelity to the centuries-old tradition of the Orthodox *Symphonia*.

Apparently, this basic presupposition has not changed over the years; in its “conservative crusade”²⁸ the ROC still relies on a symphonic “concordat” with the State, considering *Symphonia* as binding both on the State and the Church—as this dogma stems from national tradition and spirituality. As the religious power to formulate and to interpret this dogma belongs to the Church, the Church turns out to be the only agency with the final say about the validity of relevant legal enactments and whether they conform with religious ethics or not. It is this theocratic supposition that is implied in the *Teaching’s* statement about the supremacy of “the divine truth, the eternal moral law given by the Lord . . . no matter whether the will of particular people or people’s communities agree with it or not.”²⁹ Surely, states might ignore such ecclesiastic judgments, and this happens very often in secular societies. The Russian specificity is that the State made itself more vulnerable by basing (in part) its legitimacy on national religious tradition and therefore making its legitimacy dependent on continuing to play the *Symphonia* with the Church.

II. THE POWER OF TRADITION AGAINST CONSTITUTIONAL VALUES?

One imminent danger against which the ROC’s hierarchs constantly plead is the liberal ideology of human rights that is allegedly based on individualism and therefore is irreconcilable with Russian national identity. This “liberal individualism” in the 1993 Constitution is completely ignored by the *Social Concept*. Moreover, this policy document does not even mention the Constitution. The ROC makes it explicit that it “cannot favour a world order that puts in the centre of everything the human

27. Predating Peter the Great, tsar of Russia from 1682 to his death in 1725.

28. Kristina Stoeckl, *The Russian Orthodox Church’s Conservative Crusade*, 116 CURRENT HIST. 271 (2017).

29. RUSSIAN ORTHODOX CHURCH, THE RUSSIAN ORTHODOX CHURCH’S BASIC TEACHING ON HUMAN DIGNITY, FREEDOM AND RIGHTS §III.2 (2008), <https://mospat.ru/en/documents/dignity-freedom-rights> [hereinafter TEACHING]. While this Article was being written, the Church removed the official English translation from its website for unknown reasons. The English text is also available at <http://orthodoxrights.org/documents/russian-church-freedom-and-rights>.

personality darkened by sin"³⁰ and stirs nationalist sentiments to counter liberal individualism all over the world.³¹

This vision suggests that religion must prioritize collective interest over individual choice. Given that the liberal interpretation of the rule of law puts human value, as it is and irrespective of how it is evaluated in terms of religious morals, at the foundation of democratic legal order, religious criticism of liberal individualism may sound like a challenge to the rule of law. Nonetheless, the *Social Concept* implicitly disavows the right of each individual to make his or her own ethical choice and develop his or her personality without comparison to "correct" religious ethics. One contemporary Russian researcher noticed that "the ROC has never lived in a pluralistic society and such a situation is contrary to the Church's historical, spiritual and cultural experience. This experience cannot consider pluralism as normative, as positive, as a good dimension of human life."³²

Today, the degree of the conservative *Symphonia* is so intense that it is not clear who plays the "first fiddle" in the exceptionalist narrative that now prevails in Russia: the Church or the State.³³ The former inspired the illiberal narrative in the early 1990s. It is around the agenda of desecularization defended by the ROC that sundry conservative forces closed their ranks, while the first Russian President, Boris Yeltsin, formally paid lip service to the agenda of westernization and liberalization, shying from the Church's identitarian agenda.³⁴ Consequential development of this agenda involved the denial of human rights as an independent imperative that binds religious morals. To restrict the human rights granted by

30. SOCIAL CONCEPT, *supra* note 18, § XVI.4.

31. It is symptomatic that the amendment to the R.F. Constitution about Russians as the state-forming people came from within ROC circles, from the Orthodox archpriest Dmitry Smirnov who is the head of the Patriarchal Commission for Family, Defense of Motherhood and Childhood. See *RPT predlagaet otrazit' v Konstitutsii osobuiu rol' russkogo naroda*, INTERFAX, (Feb. 9, 2020) <http://www.interfax-religion.ru/?act=news&div=74235>. However, this proclivity to nationalism is not inherent in Russian Orthodox political philosophy. See generally Anastasia Mitrofanova, *L'Église orthodoxe russe: nationalisme ou universalité?*, 3 HERODOTE 97 (2017) (Fr.).

32. ALEKSEI SITNIKOV, PRAVOSLAVIE, INSTITUTY VLASTI I GRAZHDANSKOGO OBSHCHESTVA 166 (2012).

33. See Fedor Stanzhevskiy & Dmitry Goncharko, *Pluralism and Conflict: The Debate About "Russian Values" and Politics of Identity*, 13 J. NATIONALISM, MEMORY & LANGUAGE POL. 251 (2019).

34. Sergei Korolev, *Sekuliarizatsiia i desekuliarizatsiia v kontekste kontseptsii psevdomorfnogo razvitiia Rossii*, 1 FILOSOFSKAIA MYSL' 1-54 (2015).

the Constitution through application of religious morals is already happening in Russian courts, which prefer to discard posited constitutional freedoms for the sake of “traditional values.”

These traditional values work in Russian political discourse as a means to counteract Western liberal ideology. The role of the ROC in formulating and implementing traditional values can be seen differently. It does not appear as if the Church continued to follow the centuries-old pattern of submitting to be the State’s instrument—the ROC clearly pursues a more active and independent strategy in promoting its identitarian ideology through the Russian State.³⁵ The Russian State’s traditional-values ideology was evidently informed by the religious conceptions advocated by the ROC—in this aspect, the State and the Church are likely to adhere to the pattern of *Symphonia* as coordination of their mutual efforts to preserve the national identity of Russians is allegedly based on Orthodoxy.³⁶

In 2000, the future Patriarch Kirill (then Metropolitan of Smolensk and Kaliningrad) set out this identitarian ideology of traditional values in the following manner:

If currently liberal thought is used as a basis for the country’s public and social development model, then, in full compliance with the liberal principle of checks and balances, it must be countered with a policy of introducing a system of values that are traditional for Russia into the upbringing of youth, education, and interpersonal relationship formation. Thus, the issue of shaping legislation, education, culture, social relations, and public morals is, in fact, a matter of preservation of our national civilization in the coming century. It is a matter of finding our place in the global community of nations and of survival as an Orthodox nation.³⁷

Later, in 2006, he saw the central idea of his conception of traditional values in “according human rights with traditional

35. See Kristina Stoeckl, *Постсекулярные конфликты и глобальная борьба за традиционные ценности*, 4 GOSUDARSTVO, RELIGIJA, TSEKOV’ V ROSSII I ZA RUBEZHOM 223–41 (2016).

36. “Within the framework of the narrative of Russia as ‘the guardian of traditional values,’ the interests of the Kremlin and the ROC are complementary and their efforts parallel.” ALICJA CURANOVIĆ, *THE GUARDIANS OF TRADITIONAL VALUES: RUSSIA AND THE RUSSIAN ORTHODOX CHURCH IN THE QUEST FOR STATUS* 22 (2015).

37. Metropolitan Kirill of Smolensk and Kaliningrad, *Norma very kak norma zhizni*, NEZAVISIMAJA GAZETA (Feb. 16, 2000) (author’s translation), https://www.ng.ru/ideas/2000-02-16/8_norma.html.

morality.”³⁸ Such references to religious morals in the matter of human rights provide a practicable (for the illiberal Russian government) defense of exceptionalism against universal human rights standards, as “according rights with morality” inevitably implies restricting these rights in a conservative sense.

Assuming that Russian people have their own religious morals separate from the morals forecasted in other Orthodox peoples, let alone the morals of people of the decayed West, there is no good reason to subordinate State policies to universal human rights standards informed by “alien” morals.³⁹ This is another convenient ideological argument persistently used by Russian political leaders.⁴⁰ This is also the position of the Church implicitly exposed in another policy document: the *Basic Teaching of the Russian Orthodox Church on Dignity, Freedom and Human Rights* (the *Teaching*), adopted on June 22, 2008.⁴¹

In various matters—education, marriage, and other social fields—the ROC does not shy away from imposing on the State its views informed by religious morals. The ROC’s strategy for fighting abortion, same-sex marriage, and other practices seems to rely on the same theoretical background that prioritizes the Church’s opinion, including the power of ethical judgment about admissibility of human rights.⁴² At first sight, this approach follows the original meanings of *Symphonia*, providing the Church with symbolic ideological power. The problem is not that this power of judgment belongs to the Church, but the legal consequences, which are anticipated in the *Social Concept* and the *Teaching*. In case of a negative judgment, the relevant constitutional provision ceases to

38. Metropolitan Kirill of Smolensk and Kaliningrad, Chairman, Dep’t for External Church Rels. of the Moscow Patriarchate, Presentation at the ‘Evolution of Moral Values and Human Rights in Multicultural Society’ Conference: The Experience of Viewing the Problems of Human Rights and their Moral Foundations in European Religious Communities (Oct. 30, 2006).

39. For a description of the growing nationalist moods in the ROC and their intellectual origins, see Zoe Knox, *Russian Orthodoxy, Russian Nationalism and Patriarch Aleksii II*, 4 NATIONALITIES PAPERS 533 (2005), and Daniela Kalkandjieva, *Orthodoxy and Nationalism in Russian Orthodoxy*, 3-4 ST. VLADIMIR’S THEOLOGICAL Q. 281 (2013).

40. See ANASTASIA LIKHACHEVA, IGOR MAKAROV, PAVEL ANDREEV, ALEXANDER GABUEV & EKATERINA MAKAROVA, NATIONAL IDENTITY AND THE FUTURE OF RUSSIA: VALADAI DISCUSSION CLUB REPORT (2014), http://vid-1.rian.ru/ig/valdai/Identity_eng.pdf.

41. TEACHING, *supra* note 29.

42. Alexander Agadjanian, *Liberal Individual and Christian Culture: Russian Orthodox Teaching on Human Rights in Social Theory Perspective*, 38 RELIGION, STATE & SOC’Y 97 (2010).

be binding, so that believers have the right to disobey.⁴³ The language of the *Teaching* allows for the conclusion that this religious right (and obligation at the same time) is not subject to constraints of constitutional and international law – this right is constructed as a religious duty and empowers believers to consider legal norms as having no binding force if those laws contravene religious ethics.⁴⁴

III. THE CHURCH AIMED AT BROADENING THE LIMITS OF ITS AUTHORITY?

In accordance with the *Social Concept*, the ROC accepts the general principle of separation of state and church: they shall be distinguished by their competences, and cooperation must be

43. In 2000, the ROC openly authorized civil disobedience to state laws.

If the Church and her holy authorities find it impossible to obey state laws and orders, after a due consideration of the problem, they may take the following action: enter into direct dialogue with authority on the problem, call upon the people to use the democratic mechanisms to change the legislation or review the authority's decision, apply to international bodies and the world public opinion and appeal to her faithful for peaceful civil disobedience.

SOCIAL CONCEPT, *supra* note 18, § III.5. The 2008 *Teaching* also allows it, but in more careful words:

Without seeking a revolutionary reconstruction of the world and acknowledging the rights of other social groups to participate in social transformations on the basis of their own worldview, the Orthodox Christians reserve the right to participate in building public life in a way that does not contradict their faith and moral principles.

TEACHING, *supra* note 29, § V.4. One recent example of this disobedience was the incitement on the part of various ROC hierarchs to ignore COVID-related restrictions. See Mikhail Antonov, *Russian Orthodox Symphonia in the Time of Coronavirus*, INT'L CTR. FOR L. & RELIGION STUD. (July 24, 2020), <https://talkabout.iclrs.org/2020/07/24/russian-orthodox-symphonia-in-the-time-of-coronavirus/>.

44. "While recognizing the value of freedom of choice, the Church affirms that this freedom will inevitably disappear if the choice is made in favor of evil." TEACHING, *supra* note 29, § II.2. "The exercise of human rights should not be used to justify any encroachment on religious holy symbols things, cultural values and the identity of a nation." *Id.* § III.5. It has often been suggested that the ROC has always been subservient to the State and supportive of its autocracy and stays so. *Contra* VLADIMIR VALDENBERG, DREVNERUSSKIE UCHENIIA O PREDELAKH TSARSKOI VLASTI (1916) (persuasively refuting the thesis about the Church's submissiveness). Whatever the Church's teaching on civil disobedience might be, there are no compelling reasons to consider this "caesaropapism" as an immutable feature of Russian Orthodoxy. It was not without good grounds that one of the first commentators of the *Social Doctrine* found in paragraph III.5 a new approach to the doctrine of disobedience: "[T]his point of doctrine seems to be an important step to overcome an archaic Byzantine symphony of Church and state, by transferring to a more modern model of Church-state relations, founded on a contractual basis." Benjamin Novik, *Analysis of "The Fundamentals of Social Conception of the Russian Orthodox Church,"* 22 OCCASIONAL PAPERS ON RELIGION E. EUR., no. 5, 2002, at 8.

based on mutual support and mutual responsibility without one side's intruding into the exclusive domain of the other."⁴⁵ Nonetheless, the way Chapter III of the *Social Concept* describes the domains of the Church's competence implicitly broadcasts broader theocratic ambitions. By compiling a short list of exclusive state competences⁴⁶ and outlining a longer list of joint competences of state and church,⁴⁷ the *Social Concept* endows the Church with a broad domain of implied competences that has so far been unknown in the history of Byzantium or Russia.

The *Social Concept* also provides a closed short list of state prerogatives where the Church is precluded from intervening: resistance to sin by force, use of temporal authoritative powers and assumption of governmental functions which presuppose coercion.⁴⁸ Another version of this list a few paragraphs below also includes political struggle, civil war, and intelligence.⁴⁹ This list is much shorter compared with the exclusive prerogatives of state powers in Byzantium where the Church was not allowed to intrude.⁵⁰ This division of powers between the Church and the State is reminiscent of medieval Catholic conceptions such as the two swords doctrine. What is more important, there were no such *closed* lists in Byzantine law. It implicitly belonged to the emperor to determine the limits of possible intervention from the Church into "human affairs." Also, the emperor could at any time lengthen this list at his discretion or prohibit any interference of the Church in any matters.

A broader, more open list of the Church's fields of cooperation with the State is provided elsewhere in the *Social Concept*, which embraces various spheres from social programs, national healthcare, culture, family, and education to international law, national legislation, crime control, and public morality⁵¹: all of these spheres in Byzantium were explicitly reserved for the state. It suffices to take a look at the contents of the *Social Concept* to see the scope of the ROC's ambitions that by far exceed what the Byzantine

45. SOCIAL CONCEPT, *supra* note 18, § III.4.

46. *Id.* § III.3.

47. *Id.* § III.8.

48. *Id.* § III.3.

49. *Id.* § III.8.

50. Deno J. Geanakoplos, *Church and State in the Byzantine Empire: A Reconsideration of the Problem of Caesaropapism*, 34 CHURCH HISTORY 381, 388-92 (1965).

51. SOCIAL CONCEPT, *supra* note 18, § III.8.

or medieval Russian Church could claim based on the theory of *Symphonia*. The *Social Concept* approvingly cites the 1917-18 Declaration of the ROC Local Council, which mandated that

decrees and statutes issued the Orthodox Church for herself in the order established by herself, as well as deeds of the church government and court shall be recognized by the State as legally valid and important unless they violate state laws . . . State laws concerning the Orthodox Church shall be issued only with the consent of the church authorities.⁵²

However, it remains unclear whether the ROC claims in modern day that its decrees and statutes shall also become sources of Russian law. It is hardly conceivable in the foreseeable future that religious doctrines would obtain the force of law, like the decisions of ecumenical councils that were accepted as law in the Byzantine Empire pursuant to Novel 131 of Justinian, or that the Russian State would require the Church's approval for some of its laws. Not only does the technical question of "sources of law" impede the implementation of *Symphonia* in Russian law, but so does the fundamental legal principle of rule of law.⁵³ It might be that the ROC implies here not the power to regulate social life (to issue legal rules binding on every member of society) but rather the power to define (to provide interpretations to legal rules and thereby to control application of the law in matters that are relevant to the Church). Regardless, this kind of *Symphonia* implicates that the ROC believes that its dogma prevails over the law.⁵⁴

IV. RUSSIAN LAW AND IDEOLOGICAL RAPPROCHEMENT OF THE CHURCH AND THE STATE

Until recently, this combination of the ideological authority of the Church and the political power of the State might have seemed a reasonable balance. Establishment of state or official ideology is prohibited by Article 13 of the Russian Constitution, but Russia badly needed an ideology in the early 2000s when Putin proclaimed

52. *Id.* § III.4.

53. *See supra* Part II.

54. In some situations, secular law can cede to religious ideology to protect the right of believers (e.g., conscientious objectors); in such situations, religious denominations can be said to have success in prioritizing their dogmas over general legal provisions. It is a matter of degree to decide whether the continued triumph of a religious denomination over official law constitutes a threat to the rule of law or not.

his program of rebuilding Russia as a great power, with allusions to the “great national past.”⁵⁵ Almost immediately, already in 2000, the ROC’s *Social Concept* outlined ideological preferences and rhetoric for political authorities for years to come.

In terms of this new *Symphonia*, the Russian State concedes ideological leadership to the ROC and implicitly accepts the secondary ideological role of “protector of the true belief,” a title ascribed to the Russian State since the late Middle Ages. This *Symphonia* implicitly requires the State to submit itself to the ideological authority of the Church in its capacity of “soul” (the guiding force of *politeia*, according to the Sixth Novel of Justinian).⁵⁶ As far as both the ROC and the Russian State follow similar conservative agendas of “traditional values,” there should be no important contradictions between them. In 2000, the Church found itself in a position to create a mutually beneficial relationship: the Church gets to assert its symbolic authority over the State and its law while at the same time demanding non-interference of the State into religious issues, and the State gets to profit from the Church’s ideological authority to reinforce state legitimacy, so that both are able to fight their common “liberal enemies.”

The 2020 constitutional amendments⁵⁷ have apparently been aimed at affirming this *Symphonia*. For example, the reference to “the belief in God as this belief was transferred to us from our ancestors” as the guarantee of Russia’s state integrity in Article 67.1 implicitly means that the “vertical of power” (the top-down command structure established by Vladimir Putin during his

55. Already in his inaugural speech on May 7, 2000, Putin asserted, “There is no doubt that we can draw strength from our past . . . [and will] feel pride in these pages that we are writing in the history of our great nation.” Vladimir Putin, President of Russia, Inaugural Address (May 7, 2004), <http://en.kremlin.ru/events/president/transcripts/48210>.

56. THE CIVIL LAW: INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN & THE OPINIONS OF PAULUS (S.P. Scott trans., 1932), https://droitromain.univ-grenoble-alpes.fr/Anglica/N6_Scott.htm.

57. Federal’nyi Zakon RF o Popravke k Konstitutsii Rossiiskoi Federatsii [Federal Law of the Russian Federation on Amendment of the Constitution of the Russian Federation] SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII, [SZ RF] [Russian Federation Collection of Legislation] 2020, No. 1. The official Russian version is available at http://publication.pravo.gov.ru/Document/View/0001202003140001_.

presidency)⁵⁸ in Russia is legitimized by the Orthodoxy.⁵⁹ Along with mentioning God (as proposed by Patriarch Kirill),⁶⁰ the 2020 amendments introduced into the Constitution a number of other conservative ideas that reflect dogma: historical roots of religious beliefs, heterosexual family, traditional values, etc.⁶¹ The practicality of these amendments is clear—they help to keep political authorities and courts immune to the ubiquitous reproaches of sham constitutionalism, meaning to act contrary to the letter and spirit of the Constitution.⁶² At the same time, these amendments indirectly reaffirm the ideological authority of the Church that managed to insert its doctrinal provisions into the Constitution.

As shown above, the ROC profited from the ideological vacuum and weakness of the Russian State in the early 1990s, having acquired a good deal of political influence. But short-term political expediency was and remains questionable in terms of the rule of law. The dilemma for the ROC was that by accepting secular human rights and liberal principles, the Church would risk losing its ideological power or, at least, would not increase it. On the other side, by rejecting these values, the Church would risk entering a conflict with the State which is formally bound by human rights⁶³—the Russian Constitution considers them as fundamentals of its constitutional order.⁶⁴ *De facto*, the State has the prerogative to put constitutional principles aside when pursuing its geopolitical and other objectives. But it is hardly believable that the State is prepared to tolerate the Church's claims to the same sovereign

58. See ANDREW MONAGHAN, CHATHAM HOUSE, *THE RUSSIAN VERTIKAL: THE TANDEM, POWER AND THE ELECTIONS* (2011).

59. Mikhail Antonov, *God and "the Belief of Ancestors" in the Russian Constitution*, INT'L CTR. FOR L. & RELIGION STUD. (Oct. 31, 2020), <https://talkabout.iclrs.org/2020/10/31/god-and-the-belief-of-ancestors-in-the-russian-constitution/>.

60. Elizaveta Koroleva, *Popravki v Konstitutsiiu: tserkov' prosit ne zabyt' o boge*, GAZETA.RU (Feb. 1, 2020), <https://www.gazeta.ru/social/2020/02/01/12939446.shtml?updated>.

61. KONSTITUTSIIA ROSSIĀSKOĪ FEDERATSII [KONST. RF] [CONSTITUTION] arts. 67, 68, 72 (Russ.).

62. See generally Andrey Medushevskiy, *Russian Constitutional Development: Formal and Informal Practices*, 6 BRICS L.J. 100 (2019).

63. KONSTITUTSIIA ROSSIĀSKOĪ FEDERATSII [KONST. RF] [CONSTITUTION] art. 17 (Russ.).

64. *Id.* ch. 2.

power to exclude itself from constitutional order.⁶⁵ After all, it is not out of the question that post-Putin Russia might reaffirm its fidelity to the letter and spirit of the 1993 Constitution and its liberal interpretation.

Putting this situation in Schmittean terms, if the Church acts as a direct enemy of human rights (in their liberal meaning enshrined in the Constitution), it formally can become the enemy of the State. This does not mean that the Church will become the State's enemy in reality for the foreseeable future. In many situations the Russian State does not really care about the Constitution,⁶⁶ so the State can side with the Church on human rights despite the Constitution. Nonetheless, by rejecting human rights the Church would formally challenge the political order established by the State in the Constitution—the power which belongs only to the sovereign (including the power to act beyond the law and to introduce exceptions from the law). From this perspective, the ROC can fall into what Professor Stoeckl calls the “disestablishment model,”⁶⁷ in which the Church would act like an antagonist of the State, engaged in moral or cultural opposition to it. The tension between the Church and the State would not concern human rights as such—for the ROC, attacking human rights would also imply challenging the State's sovereign powers and its symbolic authority.

To avoid this dangerous conundrum, the ROC attempted to “appropriate” human rights—in the sense of interpreting them in the way they are subordinated to religious morals. This attempt was reflected, among other sources, in the *Teaching*, which opens with the statement that “human rights protection is often used

65. The interpretation of *Symphonia* as empowering the Church to control the sovereign powers of the State can be found in the conception of Archbishop Serafim Sobolev (1881–1950). His book *Russian Ideology* (1939) presupposed a kind of checks and balances mechanism between church and state authorities, picturing the Church and the State as co-protectors of the national sovereignty of Russia. In the recent years, this conception has grown in popularity among contemporary ROC's thinkers and conservative ideologists. E.g., Tatiana L. Migunova & Luybava R. Romanovskaia, *Simfonia vlastei kak printsip vzaimootnoshenii mezhdu cherkov'iu i gosudarstvom*, 3 VESTNIK NIZHEGORODSKOGO UNIVERSITETA: GOSUDARSTVO I PRAVO 147 (2013); Hieromonk Gennadius, *Tserkovno-politicheskie vzgliady sviatitelia Serafima (Soboleva)*, 1 VESTNIK ISTORICHESKOGO OBSHCHESTVA SANKT-PETERBURGSKOI DUKHOVNOI AKADEMII 29 (2018). In 2016, Archbishop Serafim was canonized by the ROC.

66. E.g., William E. Pomeranz, *Russia's Broken Constitution*, WILSON CTR. (June 26, 2020), <https://www.wilsoncenter.org/blog-post/russias-broken-constitution>.

67. Kristina Stoeckl, *Three Models of Church-State Relations in Contemporary Russia*, 3 GOSUDARSTVO, RELIGIIA, TSERKOV' V ROSSII I ZA RUBEZHOM 195–223 (2018).

as a plea to realize ideas which in essence radically disagree with Christian teaching.”⁶⁸ It therefore belongs to the Church to delimit the extent to which human rights are coextensive with “faith and moral principles”⁶⁹ and, implicitly, condemn – or, at least, bring into question – all other human rights. Symbolically, the *Teaching* does not mention the Russian Constitution and the ROC’s acceptance of its provisions. Instead, the Church relies on the concept of human dignity, trying to align human rights with religious morals *sub specie aeternitatis* or, in terms of legal philosophy, relying on a kind of suprastatutory natural (divine) law.

In the post-Soviet period, relations between the ROC and the Russian State have been mutually profitable. As in previous centuries, the Church has supported the legitimacy of the State and assumed privileges and protection from it. In pre-1917 Russia, this *Symphonia* of the Church and the State was one of the cornerstones of the law, as reflected in the famous motto “Orthodoxy, Autocracy, Nationality.” Legality and legitimacy of the church-state tandem in Imperial Russia reinforced each other. There were no concerns about the Church’s conformity with prerevolutionary Russian law, albeit the Russian version of caesaropapism⁷⁰ was harshly criticized by intellectuals from other perspectives.

In 1917, the Church was separated from the Russian State and was banned from all fields of social and political life. The 1993 Russian Constitution confirmed that the supreme values of the Russian State and society were not derived from the Holy Scriptures or from religious dogma and, according to the literal meaning of the Constitution, they were not subject to any control or approval of the Church, which is separate from the State.⁷¹ As part of those supreme values, human rights were proclaimed to lie at the foundation of Russian legal order.⁷² With this, the ROC’s claims to have a say in political matters and to define the extent of the admissibility of human rights are formally incompatible with

68. TEACHING, *supra* note 29, Introduction.

69. *Id.* § V.4.

70. Employing this term only to refer to the factual order of the relations between the State, the Church, and the Emperor in Byzantium, I follow the established historiographical tradition, 4 ARNOLD TOYNBEE, A STUDY OF HISTORY 320–408, 592–623 (1954), without approving it or rejecting other, dissenting theories.

71. KONSTITUTSIJA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 14 (Russ.).

72. *Id.* art. 18.

constitutional law. The ROC's claim to act "symphonically" with the State concerning the binding force of human rights inevitably enters into conflict with what the rule of law in a democratic state shall be. (Formally, Russia is both a rule-of-law (*Rechtsstaat*) and a democratic state, according to its Constitution).⁷³ Also, the legitimacy that the State draws from its symphonic tandem with the Church appears questionable, to say the least, from the perspective of legality.

Conceptualization of this new state of affairs requires from the ROC a good deal of creativity, as in its intellectual tradition the Church does not have conceptions that are suited to this constitutional framework—both in Byzantium and in pre-1917 Russia, the alliance of church and state was approved by state law. Priority of the Constitution and federal laws over all other social norms in Russian society translates to, among other things, the secular principle according to which citizens are bound by the legal norms and principles created by the State, irrespective of their conformity with the Holy Scriptures, religion, or ethical doctrines.⁷⁴ Within this constitutional context, the Church may not make any judgments on the validity of constitutional and statutory law, human rights inclusive,⁷⁵ and the State does not need religious justification for imposing these norms and principles upon citizens, or for being bound by human rights in its activities.⁷⁶ Along with the separation principle, influencing lawmaking and law-application through imposing religious ideologies plainly contradicts Article 14, which bans obligatory ideologies.⁷⁷

However, multiple observers argue that these formal requirements from the 1993 Constitution are not fully implemented in reality.⁷⁸ These statements seem to be confirmed by the top

73. *Id.* art. 1, para. 1; *id.* art. 4, para. 2.

74. *Id.* art. 4, para 2.

75. *Id.* art. 15.

76. *Id.* art. 18.

77. *Id.* art. 14.

78. E.g., Marina Shishova, *Spiritual and Political Dimensions in the Conception of the Russian Orthodox Church Concerning Dignity, Freedom and Human Rights*, in ORTHODOX CHRISTIANITY AND HUMAN RIGHTS 351–64 (Evert Van der Zweerde & Alfons Brüning eds., 2012); John Anderson, *Religion, State and 'Sovereign Democracy' in Putin's Russia*, 2 J. RELIGIOUS & POL. PRAC. 249–66 (2016); Alexander Agadjanian, *Tradition, Morality and Community: Elaborating Orthodox Identity in Putin's Russia*, 45 RELIGION, STATE & SOC'Y 39–60 (2017).

hierarchs of the Church.⁷⁹ Not infrequently, the Church incites political leaders and legal actors to disrespect the rule of law.⁸⁰ As has been demonstrated above, the Church criticizes human rights or, at least, prefers to interpret them far from the original meaning of the Constitution, which was drafted according to the patterns of “liberal individualism” and without the Church’s participation.⁸¹ This strategy of the ROC does not remain without effect in lawmaking and in law-application. The ideas voiced in the *Social Doctrine*, the *Teaching*, and other policy documents of the ROC are regularly repeated by politicians, judges of higher courts, and other legal actors—not only in their publications or public speeches, but also in their decisions.⁸²

V. THE RULE OF LAW AND RELIGIOUS ETHICS

There are many gateways through which the Church can influence the interpretation of legal rules and principles. Human dignity is one of these ways. As could be expected, the definition and interpretation of dignity falls into the sphere of the Church’s ideological competences as far as “human dignity” is presumed to reflect God’s image in man.⁸³

From the very beginning, the *Teaching* makes clear that “[t]he human rights theory is based on human dignity as its fundamental notion. This is the reason why the need arises to set forth the Church’s view of human dignity.”⁸⁴ Dignity is derived from the fact that man is created according to the image of God,⁸⁵ and is

79. PATRIARCH KIRILL, SVOBODA I OTVETSTVENNOST’: V POISKAKH GARMONII. PRAVA CHELOVEKA I DOSTOINSTVO LICHNOSTI (2016).

80. Sergei Firsov, *Tserkov’ i gosudarstvo pri Sviatishem Patriarkhe Kirille (Gundiaeve): osnovnye tendentsii razvitiia*, 3 VESTNIK RUSSKOI KHRISTIANSKOI GUMANITARNOI AKADEMII 351-60 (2013).

81. E.g., Mikhail Antonov, *The Russian Constitutional Court as a Mediating Link Between Russian and European Law?*, in EUROPEAN YEARBOOK ON HUMAN RIGHTS 547-66 (Philip Czech et al. eds., 2019).

82. See, e.g., John Anderson, *Putin and the Russian Orthodox Church: Asymmetric Symphonia?*, 61 J. INT’L AFFS. 185 (2007).

83. Although the Western concept of human dignity stems from Christian anthropology and is largely informed by it, secular definitions are also possible. Among others, such is the Kantian conception of dignity which prohibits each and every instrumentalization of human beings and requires treating everybody as a subject and nobody as an object. However, this prohibition is too general and, in practice, quite often is enriched by the “positive content” which originates from religious intellectual traditions.

84. TEACHING, *supra* note 29, § I.1.

85. *Id.* § I.2.

described as God's gift to human beings. The preliminary conclusion from this argument is that human beings are responsible for the direction and way of their lives⁸⁶—this moral responsibility lies in the foundation of law.⁸⁷

Dignity is defined by the Church as a moral category *par excellence*. This implies the supremacy of religious ethics over other normative social orders, including legal order: “in the cases where the human law completely rejects the absolute divine norm, replacing it by an opposite one, it ceases to be law and becomes lawlessness, in whatever legal garments it may dress itself.”⁸⁸ At the same time, ethical obligations shall precede any rights human beings may enjoy in social life. It follows that human rights are valid insofar as they are compatible with human dignity and their binding force is dependent on their congruity with religious ethics: “According to the Orthodox tradition, a human being preserves his God-given dignity and grows in it only if he lives in accordance with moral norms because these norms express the primordial and therefore authentic human nature not darkened by sin.”⁸⁹

This conclusion allows one to argue that “human rights cannot be superior to the values of the spiritual world” and therefore can be restricted to fit religious morals.⁹⁰ The *Teaching* provides a list of restrictions on the use of concrete human rights freedoms.⁹¹ The conclusion of Section III of the *Teaching* is telling:

To make it possible the implementation of human rights should not come into conflict with God-established moral norms and traditional morality based on them. One's human rights cannot be set against the values and interests of one's homeland, community and family. The exercise of human rights should not be used to justify any encroachment on religious holy symbols things, cultural values and the identity of a nation.⁹²

One cannot help but notice that the development of case law of the Russian Constitutional Court until the 2020 constitutional amendments confirms, in various formulations, these principles:

86. *See id.*

87. *See* SOCIAL CONCEPT, *supra* note 18, § IV.2.

88. *Id.* § IV.3 (emphasis omitted).

89. TEACHING, *supra* note 29, § I (emphasis omitted).

90. *Id.* § III.2.

91. *See id.* § IV.

92. *Id.* § III (emphasis omitted).

human rights shall be protected if they do not encroach national identity, sovereignty, and traditional values.⁹³

Claiming the power to define and delimit human rights according to religious ethics, the Church indirectly challenges the constitutional order of Russia and reveals its political ambitions. Although not clearly articulated until now, these ambitions imply that the ROC reserves for itself the power to “teach” the State and the entire Russian society about the “correct religious ethics” and to obligate the State to “balance” human rights with this ethical doctrine. In terms of the body politics that underpins the *Social Concept*, the Church as “moral entrepreneur” guarantees the inner peace of the social body, while the State is expected to provide its force and coercion to implement this guarantee.

Following these philosophical conclusions, high Orthodox hierarchs often condemn protecting the rights of minorities as apology of all-permissiveness. Thus, in 2017, Patriarch Kirill stressed that “freedom cannot be confused with all-permissiveness and the concept of human rights and freedoms should be complemented with the ideas of moral responsibility.”⁹⁴ From this point of view, putting religious morals below human rights is wrong: “The liberal treatment of human rights and freedoms presupposes the absolutization of the sovereignty of the individual and his rights outside the moral context.”⁹⁵ Here, one can notice how the Church tries to bridge its narrative to the contemporary conservative “political theology” based on the concept of sovereignty.

The problem that the Patriarch failed to mention but seemingly had in mind is that human rights are derived from and intrinsically connected with the “secular liberal understanding” he has decried. To find a way to criticize human rights, he preferred to rely on the

93. See, e.g., *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08 & 14599/09 (Oct. 21, 2010), <http://hudoc.echr.coe.int/eng?i=001-101257> (discussing bans on gay parades in Russia); *Bayev v. Russia*, App. Nos. 67667/09, 44092/12 & 56717/12 (June 20, 2017), <http://hudoc.echr.coe.int/eng?i=001-174422> (discussing lesbian, gay, bisexual, and transgender activists); *Markin v Russia*, 3 Eur. Ct. H.R. 77 (2012) (discussing paying maternity leave to a military man). For the interplay between the protection of human rights and the argument of sovereignty in Russian law, see Mikhail Antonov, *Sovereignty and Russian Resistance to Human Rights*, in *EUROPEAN YEARBOOK ON HUMAN RIGHTS* 529 (Philip Czech et al. eds., 2020).

94. Patriarch Kirill, Patriarch of Moscow and all Russia, Opening Remarks at the Presidium of the Interreligious Council in Russia (Oct. 24, 2017), <https://mospat.ru/en/2017/10/24/news151731/>.

95. *Id.*

concept of dignity. Rejecting “such social sinful things as abortion, homosexuality or euthanasia,” which are pleaded under the banner of human rights, the Patriarch Kirill is confident that “[w]ithout the religious roots the idea of dignity comes to hang in the air. . . . If we tear away the religious foundation, if we tear man away from God, then human dignity loses its justification as well.”⁹⁶ If not directly, in this and in other allocutions the Patriarch and other hierarchs of the Church deny the priority of human rights guaranteed by the constitution, make them dependent on religious ethics, and thereby bring their views and the entire ROC political doctrine into dangerous opposition with the principle of rule of law.

In the post-Soviet era, there have been almost no serious conflicts between the Russian State and the ROC. This is easily explained by the fact that so far both have pursued similar conservative agendas, each taking advantage of its part in the “*Symphonia* of powers.” But the Church’s hierarchs should consider that this symphonic cooperation is not guaranteed going forward. In Putin’s Russia any future movement toward liberalization can appear as an unsustainable pipe dream. But can one contend that there is absolutely no chance that this illiberal agenda will be discontinued in post-Putin Russia in favor of liberal ideology? This ideology has one important advantage—even after the 2020 amendments, it coincides with the letter of the Constitution and thereby has a strong legitimizing effect. The change of ideologies is a normal process in the political development of states, but in contrast, for churches the change of their ideological landmarks is usually a long and difficult mission, if even possible in the first place. After all, one cannot exclude that hostility toward religious, ethical, and other pluralism can eventually prompt the ROC to oppose more actively the principle of rule of law in Russia, if political “winds” sometimes start blowing in a more liberal direction.

CONCLUSION

Dwelling on further developments of church-state relations in Russia, John Burgess admitted “the possibility that Russia could someday restore an Orthodox monarchy and hence a Church-state

96. *Id.*

symphonia.”⁹⁷ But this can happen only if the Russian State becomes weak and falls under the tutelage of the Church, and this latter’s strategy would be to weaken the state. This strategy would be anything but politically safe for the ROC. The ROC is unable, under present circumstances, to impose its will on the autocratic Russian State and is likely to understand that such attempts would be destructive for the Church itself. In its tandem with the Russian State the ROC is still a minor, a weaker partner of the State, dependent on its will. Both historically and presently the Church does not control the State and its law, although sometimes it influences both. Still, the power of ideals is often irrational and can prompt irrational action even if there are no real chances of success. It is especially true in the sphere of religious belief which, in the words of the Gospel, is able to move mountains. Therefore, one needs to take seriously the ambitions of the ROC exposed in the *Social Concept*, the *Teaching*, and its other policy documents.

Challenging the foundations of Russia’s constitutional order through defiance of the liberal conception of the rule of law (the ethical pluralism which entails “all-permissiveness” for minorities) has become a routine topic of the ROC,⁹⁸ despite the fact that realistically the Church has neither reasons nor forces to undermine this order. The Church also prefers to ignore the fact that the Russian Constitution’s literal meaning is incompatible with conservative religious morals. At the same time, it relies on the Constitution and on human rights to vindicate its own interests.

Recent developments due to COVID-19 in Russia have exposed this inconsistency. In the spring of 2020, one could observe how the Church decried the unconstitutionality of certain antivirus restrictions, asserting its constitutional rights against the State. The theocratic formulations of the *Social Concept* prompted sundry clericals, who took the idea of *Symphonia* literally, to challenge state commands and to insist the Patriarchate resist the State’s interferences more actively. With this, the *Symphonia* of church-state relations in Russia in the spring and summer of 2020 seemed to start transforming into cacophony. Disastrous for the Church’s economic interests and political ambitions, this is also a serious challenge for the State, which now must reevaluate its control over

97. JOHN P. BURGESS, *HOLY RUS’: THE REBIRTH OF ORTHODOXY IN THE NEW RUSSIA* 32 (2017).

98. See generally Hanna Staehle, *Seeking New Language: Patriarch Kirill’s Media Strategy*, 46 *RELIGION, STATE & SOC’Y* 384 (2018).

the Church. Such a development is not unfamiliar – Russian history has already seen similar patterns in the seventeenth and eighteenth centuries. Given the ideological ambitions of Russian political leadership, one cannot exclude the possibility or probability that the ROC will eventually become first chair in the caesaropapist orchestra conducted by the Russian State pursuant to the literal meaning of *Symphonia* as it was composed in Byzantine history more than a millennium ago.

