Is there a Basis for Russian Non-Compliance with International Court Rulings? Theoretical Sources and Modern Practice

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Abstract

Recently much has been devoted to the question of the Russian Federation recognising decisions made in international courts. This issue came to a head in relation to the Russian Federation's wish not to comply with the Ruling of the European Court of Human Rights of 31 July 2014 in the case 'OAO Neftyanaya Companiya Yukos vs. Russia' (Application No. 14902/04). The matter of the Russian Federation's inability to comply with the European Court of Human Rights' ruling became subject to consideration by the Constitutional Court of the Russian Federation. (The Court was petitioned by the Justice Ministry of the Russian Federation, which argued that compliance with the European Court of Human Rights ruling was impossible in the Russian Federation as the ruling was based on an interpretation of provisions in the Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols (hereafter, 'Convention') that was at variance with the Constitution of the Russian Federation in its basic, fundamental provisions).

Keywords: Court, constitutional order, human rights, authorities, legislation, constitution

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Introduction

The most vital principle of constitutional order in the Russian Federation is the sovereignty of the Russian Federation. Sovereignty presupposes that decisions of international bodies be assessed from the position of whether they exceed international obligations accepted by the Russian Federation upon its accession to international agreements. The Russian Federation's recognition of the European Court of Human Rights' jurisdiction that resulted from its accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms presupposes that it accepts the implementation of the European Court of Human Rights' decisions only within the scope that the Convention defines as part of its jurisdiction. This involves, in principle, the review of cases, related to violations of the Convention as well as the scope of governance of the European Court of Human Rights. In a sense, the Constitutional Court's subjection would contradict a whole range of basic, fundamental principles enshrined in the Constitution of the Russian Federation.

Of course, Section 3, Article 46 of the Constitution of the Russian Federation guarantees the right of any party to appeal to international bodies entrusted with the protection of human rights and freedoms if all existing means of protection in the local legal system have been exhausted, and in concordance with international agreements signed by the Russian Federation. This right presumes that the state in question may accept the international obligation to recognize the jurisdiction of international courts and, at once, agree with the possibility of deliberating cases beyond the limits of the national court system.

However, international court jurisdiction has a subsidiary character and does not *ipso facto* cover the national legal system. It is, rather, realized through decisions taken by national state agencies. By such means, national state agencies are also entrusted with testing the legality of international court decisions.

Meanwhile, according to Article 46 of the Convention and Article 1 of the Federal Law of 30 March 1998, 54-FZ 'On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols', the legal positions of the European Court, which are final rulings, are obligatory for the governing state when taken with respect to the Russian Federation. The imperative of the European Court's rulings has been accepted by higher courts of the Russian Federation several times. The Constitutional Court of the Russian Federation ruling of 14 July 2015 (21-P) settled on the obligation of executing final rulings of the European Court in cases related to Russia. This included payment of necessary, commiserate, just compensation (section 2.1). The Constitutional Court's ruling noted that such a judgement by the European Court is, in effect, a part of the Russian legal system (section 2.2) and that the Constitution of the Russian Federation and the Convention 'are based on one and the same basic values for the protection of human and civil rights' (section 4). The Constitutional Court of the Russian Federation reaffirmed its previous finding that 'The Russian Federation may join intergovernmental associations and convey some of its authority in accordance with international agreements if this does not lead to limitations of human and civil rights and freedoms and does not contradict the constitutional order of the Russian Federation'. It also reaffirmed that Russian participation in international organizations and acceptance of the obligation to abide by resulting legal outcomes does not nullify the primacy of the Constitution of the Russian Federation for the Russian legal system. Thus rulings of the European Court of Human Rights 'are a realization within the confines of this system only under the condition that they abide by the superior legal authority, namely the Constitution of the Russian Federation'. Furthermore, the Constitutional Court of the Russian Federation stipulated that 'Russia may in exceptional cases decline to enforce its obligations when such action is the only possible means of avoiding a violation of the Constitution of the Russian Federation' (section 2.2). This stipulation does not especially refer to the international agreement itself, but to 'an obligation set by a governing international agency that results from the standard interpretation of a rule in the course of its consideration of an individual case' (section 3). The Russian Federation's Constitutional Court in the ruling of 19 April 2016 (12-P) reconfirmed its previous finding on the supremacy of the Constitution of the Russian Federation making use of the right of exemption from the European Court of Human Rights (section 4.4).

The demand to respect and protect human rights which has been developed over several different international acts, including the body of the United Nations and the 1948 Universal Declaration of Human Rights, by virtue of its universality and general applicability, is addressed not only to states but also to international associations they might form. It also applies to those vested with individual state powers, including, obviously, the European Court of Human Rights itself. In order to accept the imperatives and norms developed by the European Court of Human Rights in its rulings and contacts with individual states, it is imperative that these legal norms and the procedures for adopting them correspond to requirements that have been accepted and adjudicated *in toto* by the international community of states as received norms from which it is unacceptable to deviate in practice.

One must accept that this theoretical speculation was not prompted by the financial difficulties that had arisen for the Russian Federation. Russian legal scholars would argue that pre-Revolutionary jurisprudence might serve to inform the present case. Of course, pre-Revolutionary jurists themselves hailed from different philosophical and legal conceptions. One, therefore, may resort to one conception that helps to settle one aspect of the

issue, or perhaps even settle the issue as a whole. Furthermore, one must consider that the theoretical development and foundation behind the thought of pre-Revolutionary legal scholars seems to be a great deal more substantial than many modern attempts to establish defensible scholarly work.

Materials and Methods

The problem of in coercion in law concerned many pre-Revolutionary scholars, legal minds and philosophers, though special attention should be given to the work of Gavril Felixovich Shershenevich (1863-1912).

In order to assess the approach of one or another author to the understanding of 'coercion', one must assess that author's conception of the state and law in general; that is, one should adopt a more complex analysis and move from general categories to the specific.

Thus the problem of the association between state, law and society has, in an objective sense, a multivalent character. '...The body of the state is not invented but trickles down from the conditions in which a given society is placed. G. F. Shershenevich comes to the conclusion that, historically, the state preceded the law. For there is no law outside the state, and the effect of the norms of law are restricted by the limits of state power. Therefore, the law is a manifestation of the life of the state and it can only be understood against the background of an understanding of the state. Moreover, he proposed that truth is inscribed in the law, in the dogma of law. Because the law is a product of the state it requires an organizing force, and only the state has that force. This apparently rather typical statist approach to law should be examined more carefully.

Thus it is essential to note that G. F. Shershenevich's understanding of the state has a significant speculative weight: 'the name 'state' signifies a union of people settled into well-known borders and subject to a single power'. '... It is the obligation of each citizen to think of what, in his opinion, the best form is for the state to take, what laws are necessary and how the state should govern to the common good.

G.F. Shershenevich developed a theory of the basic signs of a coherent state. The first sign is the ability to impose will (to subordinate others' wills to one's own, to compel oneself to conform one's will to that of the powerful, to insert one's will as an essential motivation that determines the behaviour of another). The second sign is the collection of persons which form the population of a state or people. The third sign is the territory (that is, the space over which state power is extended).

At the same time, like a true civil jurist, G. F. Shershenevich proposed that 'the state not only acts as a social organization which stands above citizens and exerts power over them but also as subject to laws and obligations, equal to all citizens, addressing them as one equal to another'. However, the relations that make up the state are always public and the state can never be a private legal entity. Furthermore, to the extent that the state is a source of law, it cannot be subject to legal sanction. His clarification does not conform to the modern theoretical conception of the legal subjugation of such an institution as the state, though it follows perfectly from his initial positions. Indeed, one cannot relate seriously to the idea that one 'carves out for oneself' particular norms that in turn have been established for themselves.

State power, according to G. F. Shershenevich, is a higher authority, one of the many aspects of social authority. In his opinion *vlast'* (power, authority) is the central element of the state to the extent that 'only state power can turn a mass of people into a state' (all other forms of power which act within the same territory have a derivative character). He related the most important signs of state power with its independence, absoluteness, supremacy, unity and indivisibility. Under the sense of the independence of state power, G. F. Shershenevich understood it to be a self-reliant entity with respect to other states. To wit, if an authority is independent with respect to that which is outside it, it is supreme within (if there is another authority within the state that does not cede to the

force of the state, and also seeks after superiority, then the state is under revolutionary conditions). Shershenevich arrives at the conclusion that state power is superior and thus is 'unlimited'. Unlimited refers to the ability to act from the position of the state upon the will of those subject to it (so far as this is physically possible). Unity refers to the sign that state power is the supreme power and that is is one. This leads to the next sign, indivisibility.

To effect state power, G.F. Shershenevich isolates the following functions: 1) imposition of the norms of law, 2) execution of acts of government within the boundaries of these norms, 3) protection of the norms of law from their violation. In analysing these functions, he arrives at the conclusion that they conform to the three branches of state authority (*vlast'*): legislative, executive and judicial.

Shershenevich accorded a principal role to government's administrative authority, calling it state power's source. The state mechanism becomes perfected in the course of its activity, which leads to an 'increase in the number of secondary agencies and wheels and cogs'. All the strength of the state 'mechanism coalesces in the hands of the agencies of state power'. Thus 'the more perfected the mechanism, the easier it is for one to control an enormous state'.

He proposed that state authority is 'granted by the very conditions of social life'. In his opinion Shershenevich argues that the limits of this authority depend on the extent to which the populace submits to the state (*vlast'*). If it 'allows itself to go too far beyond the limits that can be tolerated by the public's world-view, it must then expect an expression of its subjects' dissatisfaction', and the forms of this dissatisfaction 'may be diverse, from stifled grumbling to armed insurrection'. Law acts as the deterring, uniting element in society.

At the same time, Shershenevich was identifying the preeminent characteristics of a state governed by law (which is to say a state where the principal aim is that law rules over discretion everywhere and over everyone). The basic means of forming such a state are the removal of arbitrary exercise of power on the part of the state, a strict distinction of authority among government agencies and a restriction of the government by the protections of personal law. It is essential that each aspect of state power be expressed through particular acts – legislative ones set in law, executive ones through administrative actions, and judicial ones by means of court judgments. In a state ruled by law, each function must be accorded to a particular party. A legally instituted 'administration' and independent court are the main structures of a legal state.

It is important to note that Shershenevich's theory characteristically rejects the principle of divided government. If such an event would take place, the unity of the state could not be preserved. Thus he wrote: 'The legislative, executive and judicial are not three branches of government but three forms of controlling one, indivisible state power'. He went on to criticise the conclusions of Charles Louis de Montesquieu (1689-1755) regarding the division of powers and noted that Jean-Jacques Rousseau (1712-1778) had already subjected such a theory to severe criticism. 'Three equal powers cannot exist together: the one that is the stronger will be the true power, and the others will submit to it in any case and will cease to be independent powers.

Certainly one could find weaknesses in Shershenevich arguments. At once he presents three branches of government, legislative, executive and judicial, and then proclaims the error of divided government. Yet it would be improper to see an internal contradiction in Shershenevich's concepts where one simply does not exist. In the context of already-existing authorities, it is always possible to search out differing aspects and tendencies in the workings of the state. Likewise, an analysis of a legal entity's authority may also take note of its legal status. This tract does not propose that government activities be administered independently and divided from one another.

In fact, only a state can institute the rules in a society that can be called laws. Therefore, the norms of law are a requirement of the state and so law itself is a mutable substance. 'Law is a product

of state power. Rules come out of it in the form of legislation that serves to justify the usefulness of the state to the citizenry which expects it to be so.' The state institutes law beginning 'with the principle of the common good' (Jeremy Bentham (1748-1832) exerts some influence here in some respect: the principle of 'the greatest happiness of the greatest number of individuals'). Thus Shershenevich determined the basic outlines of the law: 1) law is expressed in the form of rules of behaviour, 2) legal norms have an enforceable character, 3) legal norms are supported by the force of the state (the state protects the norms of law from violations of them (effective rule of law)).

At the basis of law lies fear of the threat of punishment. A particularity of legal norms is that the threat of punishment comes from the state and is carried out by state agencies. Law is a norm (a rule) of behaviour whose adherence is upheld by the threat of suffering on the part of one who is subject to the state. If the requirement to observe norms comes from a higher power, then these norms are called legal.

Furthermore, it is worth noting that Shershenevich held that 'there is no single government (*vlast*') in the world that possesses enough power to force a man to act as it would and not as he would'. The task of government is to assure that the social conditions under which citizens live equip them with choices that conform to lawful behaviour.

Shershenevich's position clearly wields a blow to the possibility of the existence of international law, generally held principles and human rights that could be characterised as 'supra-governmental law'. Indeed, in Shershenevich's position there can be no law which does not come out of the government. In the opposite case, it is not clear how to make possible proper enforcement of legal norms without the real prospect of incurring adverse consequences. Yet it is also necessary to consider the fact that 'international law' does not arise from somewhere. Here one should set in first place the so-called 'law of international treaties'. Accordingly, it is possible for a party to bear responsibility for the violation of rules of behaviour that have been set by international agreements (that is, in the context of treaty obligations). A state in this case merely resembles an entity subject to civil law. In such case conflicts with international agreements (conventions) that have not been signed by the state in question (unratified agreements) are not considered.

Therefore, Shershenevich's conception excludes the formal use of the term 'international law', though it does not go beyond the scope of law in the sense of the practical conditions behind concluding international treaties (agreements). In other words, there is a conflict over terminology that need not interfere with actual situations.

Somewhat more difficult, however, is the situation of so-called 'general principles of human rights'. The problem is not so much that this category is directly linked with theories of natural law in contrast with positivism. It is important to identify the list of these 'natural rights' which are recognized by a particular state. If one were to extrapolate from Shershenevich's theoretical model it is clear that this list is absent. In fact, each state has its own independent, legislatively enforced list of human rights. Amendments that might be made to this list are merely literary attempts to illustrate the significance, from the point of view of the contents, of their inclusion in the list of rights. Certainly, there are cases where, in effect, it is observed that legal powers of different states coincide. This, in itself, is not surprising considering the integrative tendencies in international development. And the number of such coincidences, in the end, must only be increasing. The fact of various states converging will, for obvious reasons, remove or at least reduce, the problem of enforcement. What would be the basis on which a state, firstly, will assume the even voluntary responsibility that does not conflict with its 'intra-governmental' legal system and that, secondly, will allow it to levy sanction against itself? Clearly, such arguments run against Shershenevich's claims. B. A. Kistyakovsky demonstrated that Shershenevich's theories have two overriding characteristics. The first is that the latter applied a purely psychological understanding

to the notion of the necessity of law. This is expressed in the fact that legal norms are manifested by the threat of untoward consequences should they not be followed. The second is the 'utterly, exclusively formal and logical sequence he applied to all of his studies'.

G.F. Shershenevich's central position in his teaching of law is, rather, the following: Law is a norm directed toward the relation between one man and another, the threat of imminent suffering if he violates it, and the government agencies put in place to inflict that suffering. Shershenevich believed that law protects, above all, the inviolability of power.

Furthermore, he was in support of the notion of a 'sense of legality'. This was when a person must follow a law not from the sense of danger at the 'untoward consequences that menace him for his lack of adherence', but by virtue of the fact that the habit of 'following lawful prescriptions' works upon a person to make them adhere and 'demand they not deviate' from a law. He adds that, in his opinion, Russia is 'poor soil' for the development of a sense of legality: Russian citizens do not participate in the work of lawmaking ('he has invested neither his effort nor his blood' into it, and the 'norms that preserve order speak nothing to his heart').

Results and Discussion

Russian Federation is one of the leaders in terms of the overall number of registered applications it has filed against it in the European Court of Human Rights.

In 2014, 8,952 complaints against the Russian Federation were registered in the ECHR and in 2013, the number reached 12,328. The only country that had more applications filed against it than the Russian Federation in 2014 was Ukraine, with a total of 14,198.

In 2015, the ECHR established the presence of violations in 109 complaints regarding Russia.

The most well-known ECHR verdicts in cases against the Russian Federation:

A number of inhabitants of Chechnya managed to bring the Russian Federation to account for the deaths of civilians during counter-terrorist operation. There are in excess of two hundred 'Chechen cases' being dealt with by the ECHR.

Khodorkovsky and the YUKOS case. A court adopted a decision ordering the Russian Federation to pay 1.86 bln euros in compensation to YUKOS company shareholders.

The storming of the centre on Dubrovka and the school in Beslan. In 2012, the ECHR decided that the decision on the storming had been justified, as had been the use of special means and gas. However, it did agree with the plaintiffs that the Russian military and security forces had committed a violation in the planning and execution of the assault and ordered the Russian authorities to pay between 9 thousand and 66 thousand euros to each of the 64 plaintiffs.

On 15 December 2015, amendments to the Federal Law 'On the Constitutional Court of the Russian Federation' were signed. According to the amended law, the Constitutional Court of the Russian Federation now has the power to adopt decisions on the impossibility of enforcing decisions of an inter-state organ for the protection of human rights and liberties (first and foremost the ECHR) should they contradict the Constitution of the Russian Federation.

The Russian Federation has thereby abrogated the unconditional priority of international law over domestic law and has given itself the opportunity to avoid enforcing ECHR decisions.

The amended Constitutional Court Act came into force in December 2015 and grants the Constitutional Court of the Russian Federation with the right to rule that it is impossible to carry out a decision of an international court if the decision contradicts the principle of the prevalence of the norms set under the Constitution of the Russian Federation.

The Russian Constitutional Court's decision has set a precedent in the context of relations between the Russian Federation and the Council of Europe. The Russian Constitutional Court's decision is the

first case when the act of December 2015 was put into practice.

It is certainly that the Russian Constitutional Court's decision is a sign that all rulings passed by international courts with regard to the Russian Federation will be rejected.

Conclusion

The state must develop among the populace a relation toward the law that is like that toward its own munificence, allowing for the compliant fulfillment of the law under the threat of punishment. Furthermore, legality must be formal and not 'for each unto his own' just as, indeed, justice must be.

Considering that the majority of Russian legal scholars have been brought up under Soviet legal practice, they are, for the most part, inclined towards a statist tradition in the execution of the law. It would thus be unfair to expect a fundamentally different approach from the Constitutional Court of the Russian Federation. The principle of state sovereignty cannot, in any full sense of the term, be limited by that which is exterior to the body of the state.

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