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## Ex oriente lex ...

Rozpad Związku Sowieckiego stanowił, jak wiadomo, największą katastrofę geopolityczną XX wieku. Pomocna dłoń zielonych ludzików (*вежливые люди*) wyciągnięta w 2008 r. w stronę Gruzji, a od 2014 r. Ukrainy nie spotkała się ze zrozumieniem. Sankcje międzynarodowe, w tym pozwanie Ojczyzny Wielkiego Lenina w kilku sprawach przed sądami międzynarodowymi, skłoniły władze rosyjskie do korekt w polityce i prawie państwa, które nie bez powodu dostrzega narastające zagrożenie ze strony prawa międzynarodowego.

O ile początkowo, w roku 2015, przeciwdziałanie znalazło wyraz w znowelizowanej wersji ustawy o Federalnym Sądzie Konstytucyjnym, o tyle w roku 2020 zakres ochrony Federacji Rosyjskiej rozszerzono i podniesiono do rangi norm konstytucyjnych, zarówno w odniesieniu do wiążących Rosję decyzji instytucji międzynarodowych, jak i wyroków sądów międzynarodowych.

W istocie rzeczy nie chodzi jednak o ochronę kompetencji państwa i swobodę ich wykonywania, lecz o dopuszczenie możliwości naruszania niewygodnych dla państwa, lecz wiążących je norm prawa międzynarodowego. Zauważmy, że o ile dochodzi czasami do niewykonania przez państwa takich decyzji lub wyroków, o tyle nie jest to regułą i nie zasługuje na naśladownictwo.

Dzieje się tak zazwyczaj z powołaniem na znane wytrychy pojęciowe, takie jak suwerenność, interwencja w sprawy wewnętrzne, demokracja suwerenna, przekroczenie przez struktury międzynarodowe granic powierzonych im kompetencji (*ultra vires*) lub naruszenie tożsamości konstytucyjnej, czyli niezgodność z narodową konstytucją traktowaną jako prawo najwyższe (najwyższe wobec kogo/czego?).

*Światło ze Wschodu* czerpie zatem nową energię nie tylko z gazu i ropy naftowej, lecz również z zasobów duchowych, w tym zaszczepiania niebanalnej myśli prawniczej. W tym kontekście frapujące zdaje się zjawisko dobrosąsiedzkiej osmozy między Rosją a jej niektórymi sąsiadami. Zwłaszcza jeśli, za pośrednictwem spolegliwego sądu konstytucyjnego, dochodzi do frontalnego ataku rządu na traktatowe podstawy kompetencji Unii Europejskiej.

A więc nie tylko *lux*, lecz również *lex ex oriente*!

Czy na ten zarazek istnieje jakieś skuteczne antidotum?

## I

### Konstytucja Federacji Rosyjskiej (1993) po zmianach z 2020 r.

[https://poland.mid.ru/web/polska\\_pl/konstytucja-federacji-rosyjskiej](https://poland.mid.ru/web/polska_pl/konstytucja-federacji-rosyjskiej)

#### WYBRANE FRAGMENTY

##### Artykuł 1

1. Federacja Rosyjska – Rosja jest demokratycznym federalnym państwem prawa o republikańskiej formie rządów.

##### Artykuł 2

Człowiek, jego prawa i wolności są wartością najwyższą. Uznawanie, przestrzeganie i ochrona praw i wolności człowieka i obywatela jest powinnością państwa.

##### Artykuł 3

1. Podmiotem suwerenności i jedynym źródłem władzy w Federacji Rosyjskiej jest jej wielonarodowy lud.

#### Artykuł 4

1. Suwerenność Federacji Rosyjskiej rozciąga się na całe jej terytorium.
2. Konstytucja Federacji Rosyjskiej i ustawy federalne mają zwierzchnią moc prawną [*верховенство, supremacy*] na całym terytorium Federacji Rosyjskiej.
3. Federacja Rosyjska zapewnia integralność i nienaruszalność swojego terytorium.

#### Artykuł 15

1. Konstytucja Federacji Rosyjskiej ma najwyższą moc prawną [*высшую юридическую силу, supreme juridical force*], jest stosowana bezpośrednio i obowiązuje na całym terytorium Federacji Rosyjskiej. Ustawy i inne akty prawne wydawane w Federacji Rosyjskiej nie mogą być sprzeczne z Konstytucją Federacji Rosyjskiej.

4. Ogólnie uznane zasady i normy prawa międzynarodowego oraz umowy międzynarodowe zawarte przez Federację Rosyjską stanowią część składową jej systemu prawnego. Jeżeli zawarta przez Federację Rosyjską umowa międzynarodowa stanowi inaczej niż przewiduje ustawa, stosuje się postanowienia umowy międzynarodowej.

#### Artykuł 79

Federacja Rosyjska może uczestniczyć w organizacjach międzypaństwowych i przekazywać im część swoich kompetencji zgodnie z umowami międzynarodowymi, jeżeli nie pociąga to za sobą ograniczenia praw i wolności człowieka i obywatela, i nie jest sprzeczne z podstawami ustroju konstytucyjnego Federacji Rosyjskiej. Decyzje organów międzynarodowych przyjęte na podstawie umów międzynarodowych, których stroną jest Federacja Rosyjska, o treści sprzecznej z Konstytucją Federacji Rosyjskiej, nie są w Federacji Rosyjskiej wykonywane.

#### Artykuł 79<sup>1</sup>

Federacja Rosyjska podejmuje działania na rzecz utrzymania i wzmocnienia międzynarodowego pokoju i bezpieczeństwa, zapewnienia pokojowego współistnienia państw i narodów, a także dla zapobiegania ingerencji w wewnętrzne sprawy państwa

#### Artykuł 83

##### 1. Prezydent Federacji Rosyjskiej:

f) przedstawia Radzie Federacji kandydatów na stanowiska Przewodniczącego Sądu Konstytucyjnego Federacji Rosyjskiej, Zastępcy Przewodniczącego Sądu Konstytucyjnego Federacji Rosyjskiej i sędziów Sądu Konstytucyjnego Federacji Rosyjskiej, Przewodniczącego Sądu Najwyższego Federacji Rosyjskiej, Zastępców Przewodniczącego Sądu Najwyższego Federacji Rosyjskiej i sędziów Sądu Najwyższego Federacji Rosyjskiej; mianuje prezesów, wiceprezesów i sędziów innych sądów federalnych;

f<sup>1</sup>) powołuje po konsultacjach z Radą Federacji i odwołuje Prokuratora Generalnego Federacji Rosyjskiej, zastępców Prokuratora Generalnego Federacji Rosyjskiej, prokuratorów podmiotów Federacji Rosyjskiej, prokuratorów wojskowych i prokuratorów innych wyspecjalizowanych prokuratur, równych rangą prokuratorom podmiotów Federacji Rosyjskiej; powołuje i odwołuje innych prokuratorów, jeżeli taki tryb mianowania i zwalniania przewiduje ustawa federalna;

f<sup>3</sup>) przedkłada Radzie Federacji wniosek o ustaniu, ze względu na przepisy konstytucyjnej ustawy federalnej, pełnienia obowiązków przez przewodniczącego Sądu Konstytucyjnego Federacji Rosyjskiej, zastępcy przewodniczącego Sądu Konstytucyjnego Federacji Rosyjskiej i sędziów Sądu Konstytucyjnego Federacji Rosyjskiej, prezesa Sądu Najwyższego Federacji Rosyjskiej, zastępców Prezesa Sądu Najwyższego Federacji Rosyjskiej i sędziów Sądu Najwyższego Federacji Rosyjskiej, przewodniczących, zastępców przewodniczących i sędziów sądów kasacyjnych i apelacyjnych, w przypadku popełnienia przez nich czynu godzącego w cześć i godność sędziego, a także w innych przypadkach, przewidzianych w konstytucyjnej ustawie federalnej, wskazujących na niemożność pełnienia obowiązków przez sędziego;

## Artykuł 125

1. Sąd Konstytucyjny Federacji Rosyjskiej jest najwyższym w Federacji Rosyjskiej sądownym organem kontroli konstytucyjnej, wykonującym władzę sądowniczą w drodze postępowania konstytucyjnego dla ochrony podstaw porządku konstytucyjnego, podstawowych praw i wolności człowieka i obywatela, zapewnienia zwierzchności i bezpośredniego działania Konstytucji Federacji Rosyjskiej na całym terytorium Federacji Rosyjskiej. Sąd Konstytucyjny Federacji Rosyjskiej składa się z 11 sędziów, w tym z Prezesa Sądu Konstytucyjnego Federacji Rosyjskiej i jego zastępcy.

2. Sąd Konstytucyjny Federacji Rosyjskiej, na wniosek Prezydenta Federacji Rosyjskiej, Rady Federacji, Dumy Państwowej, jednej piątej senatorów Federacji Rosyjskiej lub deputowanych do Dumy Państwowej, Rządu Federacji Rosyjskiej, Sądu Najwyższego Federacji Rosyjskiej oraz organów władzy ustawodawczej i wykonawczej podmiotów Federacji Rosyjskiej, rozstrzyga sprawy zgodności z Konstytucją Federacji Rosyjskiej: (...)

d) umów międzynarodowych Federacji Rosyjskiej przed ich wejściem w życie.

5. Sąd Konstytucyjny Federacji Rosyjskiej na podstawie wniosków Prezydenta Federacji Rosyjskiej, Rady Federacji, Dumy Państwowej, Rządu Federacji Rosyjskiej i organów władzy ustawodawczej podmiotów Federacji Rosyjskiej dokonuje wykładni Konstytucji Federacji Rosyjskiej.

5<sup>1</sup>) Sąd Konstytucyjny Federacji Rosyjskiej:

b) w trybie, określonym przez konstytucyjną ustawę federalną, rozstrzyga kwestię możliwości wykonania decyzji organów międzypaństwowych, przyjętych na podstawie postanowień umów międzynarodowych, których stroną jest Federacja Rosyjska, o treści sprzecznej z Konstytucją Federacji Rosyjskiej, jak również możliwości wykonania decyzji zagranicznego lub międzynarodowego (międzypaństwowego) sądu, zagranicznego lub międzynarodowego sądu rozjemczego (arbitrażowego), nakładającej obowiązki na Federację Rosyjską, jeżeli decyzja jest sprzeczna z podstawami publicznego porządku prawnego Federacji Rosyjskiej;

6. Akty normatywne lub ich poszczególne przepisy, uznane za sprzeczne z Konstytucją, tracą moc prawną; niezgodne z Konstytucją Federacji Rosyjskiej umowy międzynarodowe Federacji Rosyjskiej nie wchodzi w życie i nie są stosowane. Akty normatywne lub ich poszczególne przepisy uznane za sprzeczne z Konstytucją zgodnie z interpretacją Sądu Konstytucyjnego Federacji Rosyjskiej nie mogą być wykonane w innej interpretacji.

## II

L. Mälksoo, **International Law and the 2020 Amendments to the Russian Constitution**, American Journal of International Law 2021, Vol. 115/1, pp. 78-93  
(fragmenty)

### IV. THE SPECIFIED HIERARCHY BETWEEN THE RUSSIAN CONSTITUTION AND THE COUNTRY'S TREATY OBLIGATIONS

Probably the most important of the 2020 amendments to the Russian Constitution from the viewpoint of international law is the new Article 79, which stipulates:

The Russian Federation in conformity with relevant treaties may participate in international associations and delegate to them part of its powers, if this does not limit the rights and freedoms of the individual and the citizen or contradict the fundamentals of the constitutional system of the Russian Federation. Decisions of interstate bodies, adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner contrary to the Constitution of the Russian Federation, shall not be subject to enforcement in the Russian Federation.

This new norm constitutes a significant specification of the Constitution of 1993, which stipulates in Article 15, paragraph 4:

The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied.

The 2020 amendment makes a clear distinction between the Constitution itself and other domestic laws of Russia. In cases of conflict between different norms, international treaties continue to rank higher than Russian laws below the Constitution, but the Constitution itself is recognized as ranking higher than norms stipulated in international treaties as interpreted by “interstate bodies.”

The development enshrined in Article 79 is not entirely new. The Russian Constitutional Court and the Russian State Duma established essentially the same principle already in 2015. At the time, a group of deputies of the State Duma asked the Constitutional Court in the framework of abstract norm control whether certain legal norms specifying the role of the judgments of the European Court of Human Rights (ECtHR) in the Russian legal order were compatible with the Constitution. The Constitutional Court found that if interpretations of the European Convention on Human Rights (ECHR) would lead to a direct collision with the Constitution, such a judgment could not be enforced in Russia.<sup>31</sup> In December 2015, the State Duma and the Federation Council adopted legislation specifying such a procedure of establishing incompatibility with the Constitution at the Constitutional Court.<sup>32</sup>

<sup>31</sup> Judgment of 14 July 2015, No 21-П/2015 (Const. Ct. Russ. Fed.) (Russ.), available at <http://doc.ksrf.ru/decision/KSRFDecision201896.pdf>.

<sup>32</sup> Federal Constitutional Law on the Introduction of Amendments to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation,” entered into force Dec. 14, 2015, N 7-ФК3.

The constitutional amendment of 2020 also expands the scope of the Constitutional Court’s position because it will be the modified Constitution that operates as the yardstick for measuring the compatibility of judgments of the ECtHR. For example, new Article 72 ж.1 specifies that marriage is an institution between a man and a woman—which is relevant because the ECtHR has repeatedly found Russia to have violated LGBTQ rights. A same-sex marriage/partnership case against Russia is currently pending before the ECtHR. The Russian message is that if the ECtHR recognizes that states are obligated to recognize same-sex marriage, Russia will not accept this development. This further underscores the importance of Article 79.

Moreover, an additional new article that further deepens the direction taken by Article 79 is **Article 125, paragraph 5.1 6** which specifies the competences of the Constitutional Court. According to this article, the Constitutional Court will decide on the implementation of decisions of interstate treaty organs that may contradict with the Russian Constitution but in addition also “on the possibility of implementing decisions of a foreign or international (interstate) court, foreign or international arbitration court, putting obligations on the Russian Federation, in case such a decision contradicts with the foundations of public legal order of the Russian Federation.” Here a *further possibility is opened* not to implement a decision or judgment based on international legal obligation as the contradiction no longer has to be with the Constitution but, more broadly, with the “foundations of public legal order.”

Some leading juridical representatives of Russia, especially President of the Constitutional Court Valery Zorkin, saw the country’s sovereignty as under threat and began to criticize what they saw as **judicial activism on the part of the ECtHR.**

Judge Zorkin and the Constitutional Court claimed that the interpretation that a blanket ban on prisoners’ voting rights violated the European Convention **was a result of an “evolutive interpretation” and judicial activism by the ECtHR and is not required by the text of the Convention itself.**

The Commission also observed that the extent to which Article 79 of the Russian Constitution will have adverse effects on Russian international obligations under the European Convention depends on its concrete implementation. With implicit reference to the Yukos case, the Venice Commission also noted “with great concern” that the Constitutional Court “ha[d] reached the conclusion that a judgment concerning exclusively the question of payment of sums of money as just satisfaction was non executable.”<sup>45</sup>

<sup>45</sup> European Commission for Democracy Through Law (Venice Commission), Russian Federation, Opinion on the Draft Amendments to the Constitution (as Signed by the President of the Russian Federation on 14 March 2020) Related to the Execution by the Russian Federation of Decisions by the European Court of Human Rights, Opinion No. 981/2020, paras. 55, 62 (June 18, 2020), para. 59.

The Russian government was not disturbed by the Venice Commission’s criticism. Just as Stalin once famously asked about the pope: “How many divisions does he have?,” the Venice Commission does not have any “divisions” either.

With its practice since 2015 and the constitutional amendments of 2020, Russia stepped back toward the earlier Soviet interpretation propagated by Andrey Vyshinski, suggesting that Soviet law took priority over treaty obligations.

### III

European Commission for Democracy Through Law (Venice Commission).

**Opinion on the Draft Amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) Related to the Execution in the Russian Federation of Decisions by the European Court of Human Rights** (Opinion No. 981/2020 - CDL-AD(2020)009)

Adopted on 18 June 2020

(fragmenty)

36. Fourth, the Constitutional Court assessed Article 1 of the Law on amendment to the Constitution which provides an addition to **Article 79** of the Constitution with the provision that “the decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in an interpretation which contradicts the Constitution of the Russian Federation, shall not be executed in the Russian Federation”.

The Constitutional Court underlined the connection of this amendment with the proposed amendment to **Article 125** of the Constitution, according to which the Constitutional Court shall rule on the possibility of executing decisions of interstate bodies taken on the basis of the provisions of the Russian Federation's international treaties in an interpretation that is contrary to the Russian Federation Constitution, and also on the possibility of executing decisions of an international/interstate court or a foreign or international court of arbitration/mediation placing the Russian Federation under obligations, where such a decision is contrary to the tenets of public order in the Russian Federation.

The Constitutional Court found that “these provisions, as follows directly from their wording, do not prescribe a repudiation by the Russian Federation of compliance with the international treaties themselves and of the honouring of its international obligations and, accordingly, are not contrary to Article 15 (paragraph 4) of the Russian Federation Constitution. The given mechanism is not intended to establish a repudiation of execution of international treaties and the decisions of interstate court bodies based thereon but rather to devise a constitutionally acceptable means of executing such decisions by the Russian Federation while steadfastly safeguarding the supreme legal authority of the Russian Federation Constitution within the Russian legal system, a component part of which is constituted by the unilateral and multilateral international treaties of Russia, including those providing for the corresponding powers of interstate courts.”

40. In the exchanges which the rapporteurs of the Venice Commission had with the Russian authorities and representatives of the academic community in Moscow, the authorities disputed that the amendments express the rejection by the Russian Federation of its international obligations; they underlined that the proposed draft amendments do not relate to Chapter 1 (Fundamentals of the constitutional system), Chapter 2 (Rights and Freedoms of Man and Citizen) and Chapter 9 (Constitutional amendments and Review of the Constitution) of the Constitution and that the Russian Federation has adopted a position of principle: it will fulfil all its international commitments.

In this regard, they also stressed that Article 15 (4) of the Constitution according to which principles and norms of international law as well as international agreements are an integral part of the Russian Federation legal system, remains unchanged. The amendments will not affect Article 15; they will not prejudice the possible ratification of new international treaties and will not restrict the right of citizens of the Russian Federation to apply to international bodies.

It was nonetheless stressed in this context that pursuant to current Article 79 of the Constitution, the commitments which follow the ratification by the Russian Federation of international treaties may not “limit the rights and freedoms of the individual and the citizen or contradict the fundamentals of the constitutional system of the Russian Federation”.

41. It was stated that legal certainty is the driving force behind these amendments: by entrusting the Russian Constitutional Court with the power to “resolve matters concerning the possibility of enforcing decisions of interstate bodies [...], where construed in a manner contrary to the Constitution of the Russian Federation”, the proponents of the constitutional amendment are seeking to put an end to the current state of affairs, that is, to a fluid situation whereby the enforcement of decisions of international organizations to which Russia participates (such as the judgments of the ECtHR) often poses allegedly “serious” problems. On the contrary, under the proposed provision, all interested parties will know once and for all, in time and for all purposes whether such decision will be enforced in Russia and in what terms.

42. The authorities reiterated several arguments raised at the time of the introduction of the legislative amendments in 2015. Putting emphasis on national sovereignty, they stressed that in several other countries, notably in Germany and in Italy, there exists constitutional case-law to the extent that the primacy of the constitution over international treaties may lead to the non-execution of international judgments.

43. They argued that the ECtHR has interpreted the ECHR beyond its originally intended meaning to an extent that exceeds the original consent of States. They referred to the case of *Anchugov and Gladkov v. Russia*<sup>15</sup> to illustrate this point. They argued that at the time of Russia’s ratification of the ECHR, Article 32 of the Constitution already contained the contested ban on prisoners’ right to vote and that no question was raised about the possible incompatibility of this provision with the ECHR. Hence, the incompatibility was the result of the Strasbourg Court’s interpretation of the ECHR’s provision to which the Russian Federation did not consent at the time of its accession to the Convention. “European Values” should be redefined from the beginning, with the participation on equal grounds of Russia. Until such an agreement is reached, Russia reserves its right to openly contest decisions (including Court judgments) that are rendered unilaterally.

<sup>15</sup> *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, Judgment 4 July 2013.

44. The Commission’s interlocutors (authorities and representatives of the scientific community) also underlined that the right of the ECtHR to interpret the ECHR is not contested per se. What is questioned is the ECtHR’s method of interpretation of the ECHR and the way it uses the “European consensus” concept. They argue that there are more and more voices contesting the ECtHR’s extensive use of powers deriving from Article 32 of the Convention<sup>16</sup>.

<sup>16</sup> Article 32 ECHR: “1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47. 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”

#### IV. Analysis of the proposed draft amendments

47. Current Article 79 of the Constitution provides that:

“[t]he Russian Federation in conformity with the relevant treaties may participate in international associations and delegate to them part of their powers, if it does not limit the rights and freedoms of the individual and the citizen or contradict the fundamentals of the constitutional system of the Russian Federation” (see Chapter one and two of the Constitution with Articles 16, 64 and 135 paragraph 1).

The proposed draft amendment to Article 79 of the Constitution adds that:

“Decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner contrary to the Constitution of the Russian Federation, shall not be subject to enforcement in the Russian Federation”.

Directly correlated to this amendment, the proposed draft amendment to **Article 125 § 5 b)** provides that the Constitutional Court of the Russian Federation

“shall, in accordance with the procedure stipulated by the federal constitutional law, resolve matters concerning the possibility of enforcing decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation, where construed in a manner contrary to the Constitution of the Russian Federation.”

48. At the outset, the Commission notes that the proposed additions to Articles 79 and 125 § 5b) refer to “decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation” (emphasis added), whereas the 2015 amendments to the Federal Law on the Constitutional Court refer to decisions of “*interstate human rights protection institutions.*” (emphasis added). Indeed, draft

Article 125 § 5 b) contains a further clause, empowering the Constitutional Court to resolve matters “concerning the possibility of enforcing a decision of a foreign or an international (interstate) court, foreign or international arbitration tribunal or authority, which imposes on the Russian Federation obligations, if this decision is contrary to the fundamentals of the public legal order of the Russian Federation.” The Venice Commission will not comment further on this matter, as the request for this opinion relates to the context of execution of judgments of the European Court of Human Rights only.

49. Furthermore, the Commission observes that the sentence added to Article 79 forbids the execution of decisions which are “contrary to the Constitution”. This formula is broader than that of current Article 79 (“limit[ing] the rights and freedoms of the individual and the citizen or contradict[ing] the fundamentals of the constitutional system of the Russian Federation”). The addition will therefore increase the possibility for the Constitutional Court to declare decisions of interstate bodies non executable, beyond human rights and basic principles of the Constitution.

50. The Venice Commission has already had the occasion to stress<sup>19</sup> that the domestic solutions in respect of the relation between the international and the domestic legal order are very diverse, and that there is a wide variety of choices as to the status of the ECHR in domestic law in relation to constitutional provisions. The choice of the relation between the national and the international systems is a sovereign one for each State to make. Similarly, the model of the division of power between the branches of the state (government, legislature and judiciary) is a matter for constitutional law (except where the state has undertaken specific international law obligations affecting this division, e.g. a duty to provide for judicial review in certain situations). Whatever model is chosen, however, the State is bound by international law under Article 26 of the Vienna Convention on the Law on Treaties (“Pacta sunt servanda”), which stipulates that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 of the Vienna Convention (“Internal law and observance of treaties”) further stipulates that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...”. No legal argument at national law, including constitutional law, can justify an act or omission which turns out to be in breach of obligations stemming from international treaties which it has chosen to ratify. The execution of international obligations stemming from a treaty in force for a certain State is incumbent upon the State as a whole, i.e. all State bodies, including the Constitutional Court.

<sup>19</sup> CDL-AD(2016)016, §§ 81 ff. and 111.

## V. Conclusion

62. The Russian Federation has made the political decision to join the Council of Europe and remain a member of the organisation. In ratifying the ECHR and accepting the jurisdiction of the Strasbourg Court, it has committed itself to executing the judgments of the Court. Indeed, there is no choice to execute or not to execute the Strasbourg Court judgment: under Article 46 of the Convention the judgments of the ECtHR are binding. In countries where the constitution has supremacy over the European Convention on Human Rights, there exists a possibility that the Constitutional Court might find a contradiction between the Constitution and the interpretation by the European Court of Human Rights of a given provision of the European Convention on Human Rights. But this finding would not put an end to the question of execution.

63. A dialogue between the European Court of Human Rights and the apex domestic courts is an appropriate forum for finding a solution before the matter becomes one for execution via the Committee of Ministers.

64. The Venice Commission has previously found that the power of the Constitutional Court of the Russian Federation to declare a judgment non executable as such, thus putting an end to the process of execution, contradicts the obligations of the Russian Federation under the European Convention on Human Rights. The Commission is alarmed by the constitutional entrenchment of such a power.

65. In addition, **the Commission is concerned that the proposed amendments enlarge the possibilities for the Russian Constitutional Court to declare that decisions of interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation which collide with the Constitution may not be executed in the Russian Federation.** Indeed, the proposed amendments use the notion “contrary to the Constitution”, which is too broad a formula, broader than that of current Article 79 (“limit[ing] the rights and freedoms of the individual and the citizen or contradict[ing] the fundamentals of the constitutional system of the Russian Federation”).

66. These concerns should be seen against the backdrop of the proposed amendment to Article 83 of the Constitution, empowering the Council of the Federation to dismiss the judges of the Constitutional Court at the request of the President. This makes the Court vulnerable to political pressure.

67. Whether – and to what extent – the proposed amendments will have adverse effects on honouring Russia's commitments under the ECHR depends on the manner in which the amendments will be applied. In that respect, the Commission reiterates that the power of the Constitutional Court to rule on the constitutionality of an ECtHR judgment should not extend to individual measures such as orders to pay just satisfaction.

68. Therefore, and in the light of its previous conclusions,<sup>30</sup> the Venice Commission considers that the proposed addition to Article 79 of the Constitution should be removed, or its wording should be amended to make it similar to the wording of Article 125 § 5 b), which underlines the aim to find a solution to possible contradictions. It also reiterates its previous conclusions as regards the limits to the power of the Constitutional Court to review the constitutionality of measures of execution of judgments of the European Court of Human Rights.

<sup>30</sup> CDL-AD(2016)016, §§ 38-46.

69. Finally, as concerns the compatibility of the proposed draft amendments with Article 15 (4) of the Constitution of the Russian Federation, it is not for the Venice Commission to assess it; it is up to the Constitutional Court, within its legal competences; the latter has actually examined it in its opinion of 20 March 2020, reaching the conclusion that the draft amendments are compatible with Article 15 of the Constitution.

## IV

J. Kahn, **The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg**, *European Journal of International Law* 2019, Vol. 30 no. 3, pp. 933–959  
(fragmenty)

In December 2015, a federal law expanded the RCC's jurisdiction to consider petitions asserting a 'discovered contradiction' between the Russian Constitution and an ECtHR judgment. **Finding such a contradiction, the RCC must – not may – forbid compliance with that judgment.**

**Although the RCC did not articulate a standard for deciding what to do, it decided which institution should have the final word: the RCC itself.**

**Even assuming a constitution's prioritization, how does one know when an international treaty contradicts domestic constitutional law?**

**Unsurprisingly, the RCC agreed with the deputies that it should have the final word.**

The RCC's opinion acknowledges the ECHR as 'an integral part of its legal system', citing Article 15(4) of the Constitution. Citing other constitutional provisions, however, the Court asserts 'the priority of the Constitution' in this relationship.<sup>25</sup> The emphasis is resolutely on the sovereignty of a Russian state that:

**concludes international treaties and participates in inter-state associations, transferring some of its powers to them, which, however, does not mean its renunciation of state sovereignty, belonging to the foundation of the constitutional system and contemplating supremacy, independence and self-sufficiency of the state power, fullness of legislative, executive and judicial powers of the state on its territory and independence in international relations....<sup>26</sup>**

<sup>25</sup> Constitutional Court of the Russian Federation, Judgment no. 21-P/2015, 15 July 2015, para. 2.2. The Court cited Arts 4(1) (on state sovereignty), 15(1) ('supreme juridical force' of the Constitution) and 79: 'The Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation.'

<sup>26</sup> Constitutional Court of the Russian Federation, Judgment no. 21-P/2015, 15 July 2015, para. 2.2

This recitation is a non sequitur since, by ratifying the ECHR, Russia accepted the role of the ECtHR to interpret the convention. Thus, there is no prima facie ‘renunciation of state sovereignty’ in voluntary accession to the convention. Treaty ratification is an exercise of sovereignty.

That may be a reason why the Vienna Convention on the Law of Treaties itself (Art. 27) states, in relevant part: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

It is not excluded, however, that an international treaty, which at the moment of accession of the Russian Federation to it both from its literal meaning and the meaning attributed to it in the course of application by an interstate body, authorized to do it by the international treaty itself, was in conformity with the Constitution of the Russian Federation, subsequently by means of interpretation alone (particularly at sufficiently high degree of abstract character of its norms, inherent, in particular, in the Convention for the Protection of Human Rights and Fundamental Freedoms) was rendered concrete in its content in the way that entered into contradiction with the provisions of the Constitution of the Russian Federation...<sup>27</sup>

<sup>27</sup> Constitutional Court of the Russian Federation, Judgment no. 21-P/2015, 15 July 2015, para. 3.

In other words, Russia agreed to be bound by the ECHR as it was understood in 1998 (when it was ratified). The convention conformed with Russian constitutional law at that time. Subsequently, however, the ECtHR’s evolutive interpretations changed the convention’s meaning in ways that Russia could not have accepted – because it was in conflict with its law – at the relevant time of agreement. Did not Russia agree to this interpretive approach?

Article 32 of the ECHR provides that the ECtHR’s jurisdiction ‘shall extend to all matters concerning the interpretation and application of the Convention’. Article 46 provides that the parties ‘undertake to abide by the final judgment of the Court in any case to which they are parties’.

The RCC cited the Vienna Convention on the Law of Treaties (VCLT) to argue that Russia’s acceptance was not unconditional. First, **the RCC implied that the ECtHR has not always (in the words of Article 31) ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’.** If it had done so, presumably, the ECtHR would not have ‘subsequently ... rendered concrete [the ECHR’s] content in the way that entered into contradiction with the provisions of the Constitution of the Russian Federation’.

On 14 December 2015, Federal Constitutional Law no. 7-FKZ on the Constitutional Court of the Russian Federation amended an already much-amended 1994 statute that established the mechanics for the Court’s jurisdiction and authority.

The law authorizes the RCC to hear a new category of civil action. According to Article 3.2, the RCC:

[s]hall upon requests **by federal executive body** competent to operate in the field of protecting Russia’s sovereign interests within the procedure of considering complaints filed against the Russian Federation, which is carried out by the interstate human rights protection institution according to an international covenant to which Russia is a party, **resolve the issue of feasibility [‘разрешает вопрос о возможности’] of the enforcement of the interstate human rights protection institution’s decision.**<sup>58</sup>

<sup>58</sup> See Venice Commission, Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation of 14 December 2015, Doc. CDL-REF(2016)006, 20 January 2016.

The RCC’s translation of ‘разрешает вопрос о возможности’ as ‘resolve the issue of feasibility’ is somewhat misleading. Feasibility in the sense of ease or convenience is not really the question. Clarification is found in the new Article 104.4. Here, the statute provides the only two conclusions that the RCC may reach to resolve such a case: conformity (the Court’s translation of ‘о возможности’) or non-conformity (‘о невозможности’) in whole or part with the Russian Constitution. Taken together, these provisions suggest that ‘feasibility’ might better be understood to mean ‘possibility’ (or ‘impossibility’).

This understanding is supported by the result that the law prescribes should a finding of non-conformity be made. Articles 104.4 and 106 are unequivocal: ‘[A]ny measures (acts) aimed at enforcement of respective interstate institution’s decision shall not be taken (adopted) within the territory of the Russian Federation.’<sup>59</sup>

<sup>59</sup> In Russian, Art. 106 omits the adjectival phrase ‘for the protection of human rights and freedoms’ that appears in the otherwise identical Art. 104.4(2).

The Venice Commission found ‘evident differences’ between the Russian and German approaches. First and foremost, only the Russian approach allowed for a ‘direct review of the constitutionality of an ECtHR-decision and leads to a decision about the feasibility’ of its enforcement in Russia.<sup>74</sup> The German approach focused on individuals claiming a right under the German Basic Law, whereas only the state could petition the RCC regarding a ‘discovered contradiction’ between the ECtHR decision and the Russian Constitution.

The biggest difference, however, was a philosophical one. The Russian approach was binary and absolute; the RCC’s only choice was whether an ECtHR judgment conflicted with the Russian Constitution, and, if it did, the only option was forbidding its enforcement. The Venice Commission concluded that this approach ‘prevents dialogue and does not allow to find solutions in the future’.<sup>75</sup> ‘In contrast’, the German approach ‘is based on the idea of cooperation and harmonization between the two legal regimes’.<sup>76</sup>

<sup>74</sup> Venice Commission, Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, Doc. CDL-AD(2016)016, 10–11 June 2016, para. 135.

<sup>75</sup> Ibid., para. 136.

<sup>76</sup> Ibid., para. 138.

The ECtHR could give evolutive judgments to the ECHR as a living document, but the RCC warned that it did so at its own risk. **The RCC thus justified its approach as a help, not a hindrance, to the ECtHR:**

[T]he Constitutional Court of the Russian Federation notes that if as an exception it deems it necessary to enjoy the right to objection, it is only in order to make contribution to the crystallization of the developing practice of the European Court of Human Rights in the field of suffrage protection, whose decisions are called upon to reflect the consensus having formed among states parties to the Convention.<sup>104</sup>

<sup>104</sup> Constitutional Court of the Russian Federation, Judgment no. 12-Π/2016, 19 April 2016, at 24, s. 4.4.

## V

### L. Mälksoo, *Russian Approaches to International Law*, Oxford 2015 (fragmenty)

Russian legal scholars strongly emphasize state sovereignty as the foundational principle of international law. At the same time, they often give a specific illiberal meaning to the concept of state sovereignty. There is something nineteenth-century Hegelian about these positions in the sense that they glorify the state as such, an embodiment of the Absolute Idea, often detaching the state from its democratic legitimacy.

For example, Chernichenko has repeatedly argued that the drafters of the Constitution of the Russian Federation of 1993 got it wrong from the viewpoint of legal theory: the people of the Russian Federation cannot logically be the ‘bearer’ (nositel’) of sovereignty; the ‘bearer’ of sovereignty can only be the Russian Federation itself, i.e. the state. In political terms, this interpretation means that Russia’s sovereignty does not, and should not depend on whether the country is a democracy or autocracy.

This view seems to identify the idea of popular sovereignty as a dangerous Western, especially US constitutional idea, and vividly exposes how key theoretical questions in international law are linked with the respective constitutional theory.

In the context of international law, sovereignty means the right of each state to be a full master in its own house. Whether this is still the case in the post-Cold War era has preoccupied leading Russian legal minds. Quite symbolically, the Chairman of the Constitutional Court of the Russian Federation, Valery Zorkin, has entitled his programmatic article on international law ‘An Apology for the Westphalian System’.<sup>132</sup> With this title, the main point is already stated. Zorkin argues that the Westphalian system is currently under attack from two directions: on the one hand, human rights and the right of peoples to self-determination are set against state sovereignty and territorial integrity, and on the other hand, nation states are considered ineffective administrators in conditions of globalization.<sup>133</sup>

<sup>132</sup> V. Zorkin, *Rossia i konstitutsia v XXI veke*, 2nd edn (Moscow: Norma, 2008) 379–87 (originally published in the No 3 May–June issue of *Rossia v global’noi politike* in 2004).

<sup>133</sup> Ibid., 380.

Altogether the Russian statisticians have understood well from which ideological directions the main danger comes. (...) Instead, Chernichenko and his colleagues see well where this all eventually ends up; that the issue is not to somehow include human beings in a legal order dominated by sovereign states but to eventually turn international law into cosmopolitan law where individuals and states change places in the overall hierarchy.

For example, Anne Peters, director of Heidelberg's Max Planck Institute, has written:

The constitutionalist approach offers a new foundation for the view that the ultimate international legal subjects are individuals. Constitutionalism postulates that natural persons are the ultimate unit of legal concern. States are no ends in themselves, but merely instrumental for the rights and needs of individuals.<sup>204</sup>

This is exactly the opposite of what Chernichenko has written and argued for.

<sup>204</sup> A. Peters, 'Are We Moving towards Constitutionalization of the World Community?' in Cassese, *Realizing Utopia*, 118–35 at 129.

## VI

### Pro memoria

Fragment orzeczenia francuskiej Rady Stanu z 21 kwietnia 2021 r.

Conseil d'Etat statuant au contentieux – Nos 393099, 394922, 397844, 397851, 424717, 424718  
French Data Network et autres, décision du 21 avril 2021

8. Wbrew temu, co twierdzi Premier, do sędziego administracyjnego nie należy czuwanie nad przestrzeganiem, przez prawo wtórne Unii Europejskiej lub sam Trybunał Sprawiedliwości, podziału kompetencji między Unią Europejską a państwa członkowskie. Sędzia ten nie może zatem sprawować kontroli zgodności orzeczeń Trybunału Sprawiedliwości z prawem Unii, a w szczególności pozbawiać ich mocy wiążącej, o której mowa jest w art. 91 regulaminu tego Trybunału, z powodu przekroczenia przez Trybunał jego kompetencji ze względu na nadanie zasadzie lub aktowi prawa Unii zakresu stosowania wykraczającego poza traktaty założycielskie.

[« 8. En revanche, et contrairement à ce que soutient le Premier ministre, il n'appartient pas au juge administratif de s'assurer du respect, par le droit dérivé de l'Union européenne ou par la Cour de justice elle-même, de la répartition des compétences entre l'Union européenne et les Etats membres. Il ne saurait ainsi exercer un contrôle sur la conformité au droit de l'Union des décisions de la Cour de justice et, notamment, priver de telles décisions de la force obligatoire dont elles sont revêtues, rappelée par l'article 91 de son règlement de procédure, au motif que celle-ci aurait excédé sa compétence en conférant à un principe ou à un acte du droit de l'Union une portée excédant le champ d'application prévu par les traités ».]