

## ZOOM IN

### *The question:*

#### **The Russian Constitutional Court's ruling on *Anchugov and Gladkov* and the complex relationship of domestic courts with the European Court of Human Rights**

*Introduced by Serena Forlati\**

The Russian Constitutional Court's judgment no 12-P/2016 of 19 April 2016,<sup>1</sup> declining to ensure the execution of the general measures required by ECtHR's judgment in *Anchugov and Gladkov v Russia* on the issue of prisoners' voting rights, comes at a time where 'backlashes' against international courts and tribunals<sup>2</sup> are not infrequent, the latest example being the steps taken by Burundi and South Africa to denounce the ICC Statute.<sup>3</sup> Serious, systemic criticism has also been raised specifically towards human rights courts and their role: Venezuela's denunciation of the American Convention on Human Rights was justified

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<sup>1</sup> Unofficial English translation available at <[http://www.ksrf.ru/en/Decision/Judgments/Documents/2016\\_April\\_19\\_12-P.pdf](http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf)>.

<sup>2</sup> Cf D Caron, E Shirlow, 'Dissecting Backlashes: The Unarticulated Causes of Backlash and its Unintended Consequences', electronic copy available at <<http://ssrn.com/abstract=2834000>>, suggesting that backlash 'manifests as "intense", "sustained" and "aggressive" calls for the abandonment of a system or for the adoption of a radically alternative structure'. Cf. also K Alter, JT Gathii, LR Helfer, 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 Eur J Intl L 293-328.

<sup>3</sup> See 'Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir' (21 October 2016) available at <[www.justice.gov.za/m\\_statements/2016/20161021-ICC.html](http://www.justice.gov.za/m_statements/2016/20161021-ICC.html)>; 'President of the Assembly regrets withdrawal of any State Party from the Rome Statute and reaffirms the Court's fight against impunity' ICC Press Release no ICC-CPI-20161021-PR1248 (22 October 2015).

with reference to the Inter-American Court's attempt to substitute itself in the place of national governments.<sup>4</sup> While no contracting State has so far withdrawn from the ECHR, the Convention system is under pressure because of similarly negative reactions to the ECtHR's case law.<sup>5</sup>

Judgment no 12-P/2016 does not take this kind of radically negative stance; it rather recalls the Russian Constitutional Court's 'multiannual experience of a constructive cooperation and mutually respectful dialogue with the European Court of Human Rights'<sup>6</sup> before upholding the argument whereby constitutional provisions enjoy supreme status in the domestic legal order and, hence, prevail over the obligation to execute the ECtHR's judgments. The Russian Constitutional Court thus follows the line of other constitutional courts in Europe as regards the relationship between international judgments and the national legal order – notably, of the Italian Constitutional Court in its well-known judgment no 238/2014 on jurisdictional immunities of the State.<sup>7</sup>

On the one hand, the actual impact of Article 32 of the Russian Constitution on prisoners' voting rights is arguably more nuanced than it would appear at first sight and mostly targets authors of serious crimes: specifically as regards Messrs Anchugov and Gladkov, the ECtHR actually did acknowledge that this was the case, considering that its own pronouncement would be an adequate form of satisfaction.<sup>8</sup> In this respect the Russian Constitutional Court raises an argument touching upon the ECtHR's interpretation of domestic law rather than of the European Convention as such; this is an area where the ECtHR usually defers to domestic courts, and has at times actually accepted the need to reconsider its own case law on the basis of input by national jurisdictions. *Horn-*

<sup>4</sup> Declaration made by the President of Venezuela, Maduro, on 9 September 2013, as reported in 'Venezuela abandona el sistema de derechos humanos interamericano' *El Pais Internacional* (10 September 2013) available at <<http://internacional.elpais.com>>.

<sup>5</sup> Cf. Lord Hoffmann, 'Foreword', in Michael Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (Policy Exchange 2011) 7, arguing that the ECtHR seeks to 'micromanage the legal systems of the member states of the Council of Europe (or at any rate those which pay attention to its decisions)'.

<sup>6</sup> Para 4.4.

<sup>7</sup> See on this judgment the comments published in (2014) QIL-Questions of Intl L.

<sup>8</sup> *Anchugov and Gladkov v Russia* App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013), operative part.



*castle*<sup>9</sup> and the ECtHR Grand Chamber's 'response' in *Al-Khawaja and Tahiri v the United Kingdom*<sup>10</sup> are probably the best-known example in this regard, but there are others<sup>11</sup> and similar instances are currently at the ECtHR's attention. The Italian Constitutional Court, when discussing the effect of *Varvara v Italy*<sup>12</sup> on confiscations in the context of criminal proceedings which eventually become time-barred, maintained that the obligation of domestic courts to implement ECtHR judgments only applies to 'well-settled case law'. At the same time it stressed that 'under Italian law a judgment finding that an offence is time-barred is not logically or legally incompatible with a full finding of responsibility'.<sup>13</sup> Whether the ECtHR can be convinced by this kind of reading will be seen when the Grand Chamber issues its long-awaited judgment in *G.I.E.M. and Others v Italy*<sup>14</sup>. Generally speaking, however, an approach whereby the ECtHR takes the position of domestic courts into account in such a context seems to be in keeping with the principle of subsidiarity.

Other aspects of judgment no 12-P/2016 are more problematic in this respect; notably, the Russian Constitutional Court refers to an absence of a 'well established' interpretation of Article 3, Protocol no 1. However, differently from its Italian counterpart, it does so in order to challenge the evolutive interpretation of such provision; the finding may touch not only upon the actual outcome of the interpretation of the Convention adopted by the ECtHR but also upon evolutive interpreta-

<sup>9</sup> [2009] UKSC 14, 9 December 2009, per Lord Phillips.

<sup>10</sup> *Al-Khawaja and Tahiri v the United Kingdom* App nos 26766/05 and 22228/06 (ECtHR, 15 December 2011) and the concurring opinion of Judge Bratza.

<sup>11</sup> *Boyd, Hastie and Spear Saunby and others v the Army Prosecuting Authority and The Royal Air Force Prosecuting Authority and The Treasury Solicitor*, [2002] UKHL 31, where the House of Lords refused to follow the ECtHR's ruling in *Morris v. United Kingdom* App no 68416/01 (ECtHR, 26 February 2002). The ECtHR later reversed its position in *Cooper v the United Kingdom* App no 48843/99 (ECtHR, 16 December 2003).

<sup>12</sup> *Varvara v Italy* App no 17475 (ECtHR, 29 October 2013).

<sup>13</sup> Judgment no 49/2015, unofficial English translation available at <[www.corte costituzionale.it/documenti/download/doc/recent\\_judgments/S49\\_2015\\_en.pdf](http://www.corte costituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf)>.

<sup>14</sup> *G.I.E.M. and Others v Italy* Cases nos 1828/06, 34163/07 and 19029/11, Grand Chamber hearing of 2 September 2015. In some instances the criticism of national courts also concerns the way in which the respondent Government argues a case: see for instance, on *Contrada (No. 3) v Italy* App no 66655/13 (ECtHR, 15 April 2015) and the ECtHR's finding that the criminalization of aiding and abetting mafia-like associations in Italy is 'judge-made law', the reaction of the Italian Court of Cassation, judgment no 34147/2015, paras 8 ff.

tion as a method of interpretation capable of binding all Contracting States. This kind of criticism draws the attention to the thin line between judicial dialogue, ‘systemic’ difficulty and backlash, which is at the heart of the complex relationship between domestic courts and the ECtHR – or, for that matter, other international courts.

QIL asked Pietro Pustorino and Ivan Kleimenov, two scholars with different legal backgrounds but sharing the same sensibility for the above mentioned issues, to consider those and other legal questions raised by judgement no 12-P/2016 of the Russian Constitutional Court. While their readings of the judgment diverge in many respects, they both contribute to shed light on the implications of this controversial case.

