

Russian Constitutional Court and the execution 'à la carte' of ECtHR judgments

Pietro Pastorino *

1. Introduction

By judgment of 19 April 2016 the Russian Constitutional Court ruled out that it could fully execute the judgment of the European Court of Human Rights (ECtHR) in the *Anchugov and Gladkov v Russia*¹ case, in which the ECtHR held that the Russian Federation had violated Article 3 of Protocol I to the European Convention of Human Rights (ECHR) because prisoners in Russia were denied the right to vote.²

The Russian Constitutional Court's judgment follows its earlier decision in which – in general terms and not linked to any specific case³ – it had raised the possibility of not executing at all or only partially executing specific ECtHR judgments concerning Russia should they be

* Professor of International Law, University of Siena and Luiss Guido Carli (Rome).

¹ *Anchugov and Gladkov v Russia* App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013).

² See Judgment no 12-P/2016 'in the case concerning the resolution of the question of possibility to execute the Judgment of the European Court of Human Rights of 4 July 2013 in the case of Anchugov and Gladkov v Russia in accordance with the Constitution of the Russian Federation in respect to the request of the Ministry of Justice of the Russian Federation'. Unofficial English translation available at <www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf>.

³ The legal ground for the two judgments is the law amending the powers of the Russian Constitutional Court that entered into force on 14 December 2015. For a comment see N Chaeva, 'The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in Anchugov and Gladkov', EJIL: Talk! (26 April 2016) and, in more detail, Interim Opinion no 832/2015 of 15 March 2016, delivered by the European Commission for Democracy through Law (Venice Commission), 'On the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation' paras 28-34, available at <www.venice.coe.int>.

held to be contrary to the Russian Constitution.⁴ In that earlier decision the Russian Constitutional Court clarified the procedure that would now trigger a review of the constitutionality of an ECHR provision or the execution of an ECtHR judgment: the first situation, deriving from an application filed by a domestic court, involves the constitutionality of a national law where the ECtHR has held it to be contrary to the ECHR; the second situation arises when there is a doubt as to constitutionality with specific reference to the execution of an ECtHR judgment in the internal legal system. In this second situation, the application to the Russian Constitutional Court can be filed by the President or a member of the Russian government, as occurred in the case under discussion here since the application was filed by the Ministry of Justice of the Russian Federation.

The April 2016 judgment poses a series of important legal questions ranging from the obligation of the Contracting Parties to the ECHR to abide by judgments of the Strasbourg Court to the more general issue of observance of the fundamental provisions of the ECHR and the relationship between the domestic legal orders of the Contracting Parties and the ECHR. Regarding this latter aspect, a key topical issue is Contracting Parties' invoking of constitutional limits when it comes to their obligations to observe the ECHR.

2. *The judgment of the ECtHR in the Anchugov and Gladkov case*

The judgment of the Russian Constitutional Court originates from the Russian Federation's obligation to execute – pursuant to Article 46 of the ECHR – the ECtHR judgment in the *Anchugov and Gladkov* case in that country's own domestic legal system.

⁴ Judgment no 21-P/2015 of 14 July 2015. It would appear that the judgment has been published only in Russian. For a comment see M Smimova, 'Russian Constitutional Court Affirms Russian Constitution's Supremacy over ECtHR Decisions' *EJIL: Talk!* (15 July 2015); M Aksenova, 'Anchugov and Gladkov is not Enforceable: the Russian Constitutional Court Opines in its First ECtHR Implementation Case' *Opinio Juris* (25 April 2016).



In the aforementioned decision the ECtHR held that Russia had violated the right to free elections.⁵ On the basis of Article 32 of the Russian Constitution,⁶ referred to in various Russian federal laws,⁷ the applicants were in fact deprived of this right in relation to numerous parliamentary and presidential elections between 2000 and 2008 following their sentencing to a term of imprisonment for having committed serious crimes in Russia.

Referring to principles laid down in its own case law the ECtHR stated in general that 'there is no question that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction' and that the ECHR system bans 'automatic disenfranchisement based purely on what might offend public opinion'. The Court clarified that the measure of disenfranchisement must also be applied in conformity with the principle of proportionality and hence the lawfulness of the measure must be based on a finding of 'discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned'.⁸

Acknowledging that Contracting Parties enjoy a certain margin of appreciation as regards limiting the right to vote of prisoners, the ECtHR considered 'a blanket restriction' on all convicted prisoners as contrary to the ECHR where disenfranchisement is applied automatically to all prisoners 'irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances'.⁹ However, the Court affords some leeway to national legal systems or judicial practice that limit the cases in which individuals are deprived of the right to vote, when disenfranchisement is applied only in respect of certain serious offences 'against the State or the judicial system' or for

⁵ Art 3 of Protocol I to the ECHR: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

⁶ According to para 3 of art 32 citizens kept in places of deprivation of liberty under a court sentence are deprived of the right to elect and be elected.

⁷ For the list of federal laws that incorporated the constitutional rule in question, see judgment no 12-P/2016 (n 1) para 1.

⁸ *Anchugov and Gladkov* (n 1) para 97.

⁹ *ibid* para 99, in which the Court expressly referred to what was stated in its judgment *Hirst v the United Kingdom (No 2)*, App no 74025/01 (ECtHR, 6 October 2005) para 82.



offences punishable by a term of imprisonment of three years or more.¹⁰ In that case the Court is also mindful of the fact that under the same national law it is possible for a convicted person who has been permanently deprived of the right to vote to recover that right on condition that a certain length of time has elapsed since the conviction and the individual concerned has exhibited, amongst other conditions, ‘a consistent and genuine display of good conduct’.¹¹ Considering that national legislation of this type would be compatible with the ECHR, the Court appreciates above all any effort made by the legislator to adjust the application of the measure of disenfranchisement to the particular circumstances of each case ‘taking into account such factors as the gravity of the offence committed and the conduct of the offender’.¹²

It should be noted that the ECtHR considers that the margin of appreciation enjoyed by a State covers disenfranchisement – subject of course to the limits set out in the Court’s case law – not only where that measure stems in concrete from a court decision but also where it comes about in another way,¹³ for example, based on a decision adopted by administrative authorities under national legal provisions. From this standpoint the Court demonstrates both deep knowledge of national laws concerning restrictions on the right to vote of prisoners and a certain willingness and flexibility in broadening the margin of appreciation afforded to Contracting Parties under the ECHR.

With specific regard to its judgment in the *Anchugov and Gladkov* case, it should be noted that the ECtHR likened the law in Russia to that in the United Kingdom and considered among others¹⁴ by it in the *Hirst* case. According to the Court the applicants ‘were stripped of their right to vote by virtue of Article 32(3) of the Russian Constitution which applied to all persons convicted and serving a custodial sentence, irrespective of the length of their sentence and irrespective of the nature

¹⁰ *Scoppola v Italy* (No. 3) App no 126/05 (ECtHR, 22 May 2012) para 106.

¹¹ *ibid* para 109.

¹² *ibid* para 106. The passages of the judgment adopted in the *Scoppola* case are summarily referred to in *Anchugov and Gladkov* (n 1) para 100.

¹³ See the judgment in the *Scoppola* case (n 10) para 104.

¹⁴ For further references regarding ECtHR case law concerning the United Kingdom and other countries, see P Pustorino, ‘Detainee’s Right to Vote between CJEU and ECtHR Case Law’ SIDIBlog (6 November 2015) <www.sidiblog.org/2015/11/06/detainees-right-to-vote-between-cjeu-and-ecthr-case-law>.



or gravity of their offence and their individual circumstances'.¹⁵ With special reference to the scope of the legislative provisions and the proportionality of the national measures adopted, the Court rejected the Russian government's arguments as to the limited application in practice of disenfranchisement since that was not sufficiently proved during the proceedings. In this respect the Russian government had claimed, firstly, that disenfranchisement affected solely prisoners convicted of serious offences and, secondly, that the domestic courts took into consideration all relevant circumstances, including the nature and degree of public dangerousness of the criminal offence and the defendant's personality.¹⁶ On the contrary, according to the ECtHR disenfranchisement in Russia 'concerns a wide range of offenders and sentences, from two months (which is the minimum period of imprisonment following conviction in Russia) to life and from relatively minor offences to offences of the utmost seriousness'.¹⁷

As regards the further objection of the Russian government hinging on the fact that in the Russian legal system the preclusion of the right to vote of prisoners is based on constitutional provisions and not 'ordinary' legal instruments, the ECtHR easily dismissed it by reiterating that domestic law, including that of constitutional rank, does not exempt Contracting Parties from respecting the rights and freedoms of everyone within the jurisdiction of the States, pursuant to Article 1 of the ECHR and in line with the general principle set forth in Article 27 of the 1969 Vienna Convention on the Law of Treaties.¹⁸

Finally, acknowledging the likely difficulty for the Russian government to execute the ECtHR judgement and avoid further judgments against it, the Court asserted that the question of the right to vote of prisoners in the Russian legal system can be addressed adopting 'various approaches' and in particular 'through some form of political process or

¹⁵ *Anchugov and Gladkov* (n 1) para 101.

¹⁶ The Russian government's position regarding the limited and 'reasoned' application by the courts of the measure of deprivation of liberty and hence disenfranchisement was referred to and accepted by the Russian Constitutional Court on the base of 'statistical data' and 'official statistics': see judgment no 12-P/2016 (n 2) para 5.3.

¹⁷ *Anchugov and Gladkov* (n 1) para 105.

¹⁸ *ibid* para 108.

by interpreting the Russian Constitution by the competent authorities',¹⁹ therefore alluding to an amendment of the Constitution or, alternatively, an interpretation of the relevant constitutional provisions in harmony with the ECHR and ECtHR case law in such a way as to coordinate their effects and avoid any conflict between them.

3. *The judgment of the Russian Constitutional Court of 19 April 2016 on the execution of the ECtHR's decision in the Anchugov and Gladkov case: the Supremacy of the Russian Constitution*

Turning now to analysing the general arguments set out in the judgment of the Russian Constitutional Court,²⁰ it should be noted that the decision in question can be construed as part of a tendency to essentially apply ECtHR judgments *à la carte*, choosing to execute solely the portions thereof considered to be compatible with the Constitution and discarding the rest.

In brief, the Russian Constitutional Court expressly held that it could not execute the ECtHR's judgment in the *Anchugov and Gladkov* case as regards its measures of a general character contemplating a change in the national law on deprivation of the right to vote for all convicted persons serving a sentence in places of deprivation of liberty under a court decision. The Court ruled out also execution of the ECtHR's measures of an individual character in favour of the two applicants because they had been sentenced to long terms and for the commission of particularly grave crimes.²¹

By contrast, the Russian Constitutional Court held that it would be compatible with the Constitution to execute the portion of the ECtHR's judgment concerning the conformity of Russia's legislation and judicial practice with the measures of a general character consisting of taking into account, in the matter of the deprivation of the right to vote, elements of justice, proportionality and differentiation in the application of the disenfranchisement measure. More specifically, according to the

¹⁹ *ibid* para 111.

²⁰ The Russian Constitutional Court's more specific arguments are analysed in the following sections of this work.

²¹ See points 1 and 3 of the operative part of the judgment no 12-P/2016 (n 2).



Russian Constitutional Court, the execution of that portion of the judgment would ensure a reduction of cases entailing a sentence imposing a deprivation of liberty and consequently a deprivation of electoral rights.²²

In reality, even conformity with this last portion of the ECtHR judgment is more apparent than real. In fact, the Russian Constitutional Court did not consider that Russia, as a Contracting Party to the ECHR, is obliged to execute at least this 'residual' part of the judgment and hence reduce the number of cases of *deprivation of the electoral rights* for individuals sentenced to imprisonment. Rather, the Constitutional Court limited itself to asserting that it would favour legislation and judicial practice that reduce the application of the measure of *deprivation of liberty*, which if imposed would continue to be flanked by the automatic suspension of voting rights.

In any case, the legal basis for this 'selection' consists of the fact that while the Russian Constitutional Court pointed out that the ECHR 'is an integral part' of the Russian legal system, that the relationship between the two systems must be based on 'a dialogue' and that the Constitution is 'a non-contradictory legal system',²³ it went on to assert that the effectiveness of the ECHR 'depends on the respect of the European Court of Human Rights for national identity'²⁴ and to stress, as specifically regards the execution of ECtHR's judgments, 'the priority of the Constitution of the Russian Federation for Russia's legal system' and its 'supremacy and supreme legal force'.²⁵

It is worth highlighting that according to the Russian Constitutional Court the supremacy of the Russian Constitution over the ECHR and hence the ability not to execute judgments of the ECtHR is perfectly in line with the principle of subsidiarity governing relations between the domestic legal systems of the Contracting Parties and the ECHR.²⁶

Based on the above premise the Russian Constitutional Court ruled out that the prohibition contained in Article 32(3) of the Russian Constitution can be subject to exceptions or restrictive interpretations that

²² See *ibid*, point 2 of the operative part of the judgment.

²³ *ibid* para 4.1

²⁴ *ibid* para 1.2.

²⁵ The Russian Constitutional Court's reasoning had already been set out in the same terms in its earlier 2015 judgment cited above (n 4).

²⁶ Judgment no 12-P/2016 (n 2) para 4.4.

reduce the scope of the provision. The prohibition is to be considered as an ‘imperative ban’ ‘with no exceptions’²⁷ and hence there can be no room for compromise as regards granting voting rights to prisoners. So arguing, the Russian Constitutional Court implicitly rejected one of the ECtHR’s solutions to the conflict between the ECHR and the Russian legal system, that is, to interpret domestic law in conformity with the ECHR and ECtHR case law. No presumption of conformity between the Russian Constitution and the ECHR is by contrast permissible, at least in the present case, for the Russian Constitutional Court.

4. *Examination and critique of the Russian Constitutional Court’s specific arguments*

Although the Russian Constitutional Court is of the view that its decision in the present case is not a cause for great concern since the right to object to a specific ECtHR judgment must be considered ‘as an exceptional case’,²⁸ in reality its reasoning seeks to dispute the very heart of the ECtHR’s power to interpret in a binding way – on the basis of rules of interpretation by now widely used in its own case law – the provisions of the ECHR and hence jeopardise the Russian Federation’s very participation in the ECHR system.

It would seem that the Russian Constitutional Court has two main goals. The first one is to dispute recourse to the method of evolutive interpretation of the ECHR with reference in the present case to Article 3 of the Protocol no 1 to the Convention.

In that regard, the Russian Constitutional Court’s arguments are rather complex. In its view the problem of the conflict between constitutional rules and the ECHR must be tackled and resolved ‘in the context of the circumstances and conditions in which Russia has signed and ratified it’.²⁹ Among those ‘original’ conditions is respect for the fundamental principles of the Constitution, which as mentioned before entails the supremacy of the Constitution in the Russian legal system.³⁰ For

²⁷ *ibid* para 4.1.

²⁸ *ibid* para 4.4.

²⁹ *ibid* para 4.2.

³⁰ *ibid*.

that reason it is the Court's view that ratification of the ECHR by Russia was (and still is) conditional on ruling out that at the time there was a conflict between Article 32 of the Constitution and Article 3 of Protocol no 1 to the Convention. The Court added that its interpretation is confirmed by the absence of any objections from the Council of Europe at the time of Russian ratification about the existence of conflict between the Russian Constitution and the ECHR. Consequently, the ECtHR's subsequent interpretation attributed Article 3 of Protocol no 1 a different and evolutive meaning that altered its original meaning and to which Russia 'gave no consent'.³¹

From this point of view the Russian Constitutional Court exhibited an approach different from that adopted by the Italian Constitutional Court in its well-known judgment no 238 of 22 October 2014 regarding the constitutional limits to the application in the Italian legal system of the international customary law on the immunity of foreign States from civil jurisdiction in circumstances where the defendant State is accused of grave violations of human rights.³² In that instance, through expressing itself to be 'concerned' by the content of the customary rule as reconstructed by the International Court of Justice in the *Jurisdictional Immunities of the State* case³³ and highlighting how that content had evolved over the course of time, the Italian Constitutional Court did not dispute the power of the ICJ to assess the existence of the said customary rule at international level and apply it to the dispute submitted for adjudication (*Germany v Italy*).³⁴

In short, the Russian Constitutional Court's aim would seem to contest if not actually eliminate the possibility for the ECtHR to rely on the method of evolutive interpretation, thus favouring static interpretation not open to variation to keep abreast of continuous and formidable legislative and social changes in Europe and in the international communi-

³¹ *ibid.*

³² It should be noted that in its previous judgment of 2015, it was that same Russian Constitutional Court which referred to the case law of other countries including Italy, Germany and the United Kingdom (on this point see also n 41).

³³ *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99.

³⁴ See para 3.1 of the part of the Italian Constitutional Court's judgment no 238/2014, English translation available at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf>.

ty. If one considers that the methods of interpretation that have enabled greater development of the ECHR system are precisely evolutive interpretation and teleological interpretation, it is quite evident that cancellation of evolutive interpretation of the ECHR would have extremely negative consequences.

As for the above mentioned assertion that the conflict between the Russian Constitution and the ECHR should be resolved in light of the conditions in which Russian ratification occurred – conditions that the Russian Constitutional Court claims were not objected to by the Council of Europe – the Court (relying on fanciful reasoning of a type that lawyers are sometimes no strangers to) appears to be stating that the Russian ratification of the ECHR essentially contained an ‘implied reservation’ regarding the interpretation of Article 3 of Protocol no 1 to the ECHR. Ever apart from the fact that international law does not recognise implied reservations, it is worth stressing that any such ‘virtual’ reservation would contradict the express provisions of Article 57 of the ECHR concerning the conditions for formulating reservations and would also clearly be contrary to the object and purpose of the ECHR and hence invalid on the basis of the ECtHR’s own well known case law on the matter.

The Russian Constitutional Court’s second goal would seem to be to dispute *on the merits* the reconstruction provided by the ECtHR in the *Anchugov and Gladkov* case relying on the evolutive interpretation method already criticised by the Constitutional Court. Indeed, the ‘European consensus’ found by the ECtHR as to the unlawfulness of a blanket ban on electoral rights of convicted persons ‘has not yet emerged’ as far as the Russian Constitutional Court is concerned.³⁵

In order to further clarify its position on this point the Russian Constitutional Court stated that its decision to object to the execution of the ECtHR judgment in the *Anchugov and Gladkov* case serves the specific purpose of contributing to the crystallisation of the case law of the ECtHR ‘in the field of suffrage protection, whose decisions are called upon to reflect the consensus having formed among Contracting Parties to the Convention’.³⁶ Therefore, the Russian Constitutional Court (*a*) maintained that no European consensus has ever formed against prisoners automatically losing their right to vote despite the ECtHR’s finding to the contrary

³⁵ Judgment no 12-P/2016 (n 2) para 4.3.

³⁶ *ibid* para 4.4.

and (b) attempted to thwart any future formation thereof by coming out very strongly against it.

Again in this respect the Russian Constitutional Court's approach sharply differs from that of other national supreme courts. For example, in Italy, although in its judgment no 49 of 26 March 2015 the Constitutional Court introduced rather vague and questionable criteria to limit the effects of ECtHR judgments in the Italian legal system,³⁷ it did not dispute the ECtHR's power to interpret the Convention's provisions in an evolutive manner. Indeed, when it came to reviewing the constitutionality of certain provisions of the ECHR and especially their interpretation by the ECtHR, the Italian Constitutional Court sought to strike an appropriate balance with the conflicting constitutional values that the case before it involves.³⁸

In conclusion, it is arguable that the Russian Constitutional Court's judgment appears to openly contradict not only the *individual fundamental provisions* of the ECHR but also the entire *system of protection* put in place by the Convention. It constitutes not just a clear violation of the obligation to execute ECtHR judgments pursuant to Article 46 of the ECHR but also implies casting doubt on the very power of the ECtHR 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols' pursuant to Article 19 of the Convention. From this standpoint it is unquestionable that the Russian Constitutional Court's position on compliance with ECtHR judgments is particularly problematic and in 'open defiance of the binding nature of ECtHR judgements'.³⁹

On a more general level, acceptance of the objections raised by the Russian Constitutional Court would be tantamount to creating a *special*

³⁷ See, in particular, para 7 of the Italian Constitutional Court's judgment no 49/2015, English translation available at <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf>.

³⁸ Likewise, any comparison with the United Kingdom, where as aforesaid there is a similar 'blanket ban' regarding the exercise of voting rights by prisoners, is incorrect because in that legal system there is not a law comparable to that in Russia capable of being used to block the domestic application of *any* provision of the ECHR and *any* judgment of the ECtHR. Finally, for the distinction between the positions of the German Constitutional Court and the Russian Constitutional Court regarding observance of the ECHR in domestic legal systems, see the Interim Opinion of the Venice Commission (n 3) 23-24, paras 88-92.

³⁹ See Chaeva (n 3).

and more favourable legal regime for the Russian Federation. And as if that were not enough, that regime would not be definitely set in stone but would be constantly developing and open to change depending on subsequent decisions by the Russian Constitutional Court on constitutional provisions other than those considered in the present case. Thus, it is our view that through its judgment the Russian Constitutional Court would in essence appear to be placing the Russian Federation outside the logic of the ECHR system.

5. *The constitutional limits to the application of international law in domestic legal systems: a useful saving clause or a serious threat to the international legal order?*

Recourse by constitutional courts to fundamental provisions of their respective constitutions to limit the application of international law in domestic legal systems by now constitutes one of the most topical and highly debated issues at international level.⁴⁰

This author is of the conviction that resorting to that legal device serves in principle a dual positive function. The first concerns protecting the domestic legal system and ensuring that it holds up well in the face of external rules that could upset its overall balance. The second concerns protecting some supreme values of the international legal order, such as human rights, where they are prejudiced by some court interpretations of a 'conservative' nature and hence not in line with certain developments in international law.⁴¹ In such situations supreme courts are afforded an opportunity to play a subsidiary and more progressive role, acting on an interpretative level to limit the effects of such 'erroneous' interpretations and if necessary going so far as to block the

⁴⁰ On the possible different reasons regarding the application of constitutional limits to the respect of international law rules see A Caligiuri, 'Il punto di vista della giurisprudenza costituzionale russa sui rapporti tra CEDU e ordinamento interno', in (2016) 3 *Diritti umani e Diritto Internazionale* (forthcoming).

⁴¹ On this point see P Pustorino, 'Coordinamento e conflitto fra norme internazionali e regole di organizzazioni internazionali nella giurisprudenza nazionale' in M Vellano (ed), *Il futuro delle organizzazioni internazionali. Prospettive giuridiche* (Editoriale scientifica 2015) 233-235.



domestic application of those rules thereby enhancing the chances for overcoming those interpretations also at international level.

However, the Russian Constitutional Court's judgment adds a new worrying element to the debate about using the Constitution as a brake to complying with international law because what is lacking in the Court's reasoning, unlike in Italian and German constitutional case law before analysed, is any effort to strike a balance between national and international values and principles. Certainly one could consider the Russian Constitutional Court's judgment as an example of an 'abuse' of the resort to constitutional law. Some 'uncharitable' minds could even see the 2016 judgment as 'testing the water' while the Russian Constitutional Court gears up for much more important decisions in relation to landmark judgments of the ECtHR (and other international courts) already adopted against Russia.

The issue however is not that simple to tackle. Can one really suppose that there is a 'right and 'wrong' way to apply the theory of constitutional limits? And who would be the judge in this regard? The truth is that any constitutional judgment depends on the type of constitution considered, the constitutional status afforded to international law or more specifically some international agreements, the effective force and supremacy of the constitution in the domestic legal system, the room for manoeuvre that a constitutional court has to interpret the constitution in a restrictive or expansive manner to take account of international rules, the personal sensibilities of the constitutional judges themselves and their independence from executive power, etc.

If that is so, as we believe it is, then one must ask if and to what extent it is possible to 'internationalise' recourse to such a device, affording it legitimacy but at the same time setting the boundaries within which one can use the 'internal weapon' in question.⁴² The alternative is to keep still faith with the principle set out in the previously mentioned Article 27 of the Vienna Convention on the Law of Treaties and reiterated, as regards international responsibility, in Article 32 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrong-

⁴² In our view it is excessive to maintain, as one prominent scholar does (B Conforti, *Diritto internazionale* (Editoriale Scientifica 2015) 402-403), that conflict with the fundamental rules of a constitution can amount to a veritable circumstance of precluding the wrongful act of the State on an international level.



ful Acts, according to which a State may not rely on the provisions of its internal law as justification for failure to comply with its international obligations. This option is of essence if one considers that a different stance would not only be difficult to apply in practice – since it would be very complicated to set limits on the recourse to constitutional law as a ‘shield’ against the application of international law – but would also entail a risk of significantly weakening the effectiveness of the international legal system and the reciprocal trust among members of the international community regarding observance of international law.

