

**Judgment of the Constitutional Court of the Russian Federation
no 12-P/2016: Refusal to execute judgments of ECHR
or the search for compromise between Russian and international law?**

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1. *Introduction*

On April 19, 2016 the Constitutional Court of the Russian Federation (hereinafter, the Constitutional Court) issued decision 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 (hereinafter, the ECtHR) of 4 July 4 2013 in the case *Anchugov and Gladkov v Russia* in accordance with the Constitution of the Russian Federation in respect of the request of the Ministry of Justice of the Russian Federation’.¹ In the latter case, the ECtHR came to the conclusion that the provision in Article 32 (part 3) of the Russian Constitution, automatically and indiscriminately banning convicted Russian prisoners from exercising voting rights was disproportionate and thus in violation of Article 3 of Protocol no 1 (right to free elections) of the European Convention on Human Rights (ECHR).²

The adoption of this decision has raised considerable interest, both in the Russian Federation and abroad, because for the first time in its modern history, the Constitutional Court held a hearing on the question of whether a particular decision of the ECtHR should be implemented in accordance with the Russian Constitution. The very possibility of

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¹ Judgment no 21-P/2016, unofficial English translation available at <www.ksrf.ru/en/Decision/Judgments/Pages/2016.aspx>.

² *Anchugov and Gladkov v Russia* App nos 11157/04 and 15162/05 (ECtHR, 4 July 2013).



such a question arising has led to much debate. Thus, immediately following the announcement of the decision of the Constitutional Court, a variety of interpretations have been proposed. Some authors have seen the refusal by the Constitutional Court to implement the ECtHR decision in the case of *Anchugov and Gladkov v Russia* as an openly political move, which disregarded the binding essence of the European Court's judgments.³ Other – more moderate authors – saw in the decision of the Russian Constitutional Court not only negative aspects (including the refusal to comply with the judgment of the ECtHR), but also positive ones (in the search for a dialogue between the Constitutional Court and ECtHR), thereby separating the decision into widely differing parts. The well-known Internet service 'Fontanka.ru', for example, commenting on the first part of this decision, suggested that it demonstrated a harsh rhetoric towards the Strasbourg Court, with an undeniable refusal to execute the judgment in the case of *Anchugov and Gladkov v Russia*. It suggested meanwhile that the second part was aimed at finding a compromise with the ECtHR. It is interesting that it called the first part 'a demonstrative flogging', and the second 'an apology'.⁴

It should be noted that the decisions of the Constitutional Court are often extremely rich in reasoning and argumentation, which might tempt readers to draw conclusions solely on the basis of the reasoning for the decision (the operative part), rather than considering each sentence in detail. The operative part of the judgment under consideration includes three main conclusions, which, at first glance, may seem radical. They are worth outlining in full:

'1. To recognize execution of the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v Russia* ... – with regard to the measures of general character, contemplating the insertion of amendments to Russia's legislation (and thereby alteration of the judicial practice based on it), which would allow to restrict in electoral rights not all convicted persons serving a sentence in places of deprivation of liberty under a court sentence, – *as impossi-*

³ See N Chaeva, 'The Russian Constitutional Court and its Actual Control over the ECtHR Judgement in *Anchugov and Gladkov*' *EJIL:Talk!* (26 April 2016) available at <www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement-in-anchugov-and-gladkov/>.

⁴ See 'The Constitutional Court left a loophole for Strasbourg' available at <www.fontanka.ru/2016/04/19/182/>.



ble, so far as the prescription of Article 32 (Section 3) of the Constitution of the Russian Federation, having supremacy and supreme legal force in Russia's legal system, with all certainty means an imperative ban, according to which all convicted persons serving sentence in places of deprivation of liberty defined by the criminal law have no electoral rights with no exceptions.

2. To recognize execution of the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v Russia* ... – with regard to measures of general character, ensuring justice, proportionality and differentiation of application of the restriction of electoral rights, – *possible and realizable* in Russia's legislation and judicial practice, so far as in accordance with Article 32 (Section 3) of the Constitution of the Russian Federation and the provisions of the Criminal Code of the Russian Federation concretizing it, as a general rule, the penalty in the form of deprivation of liberty and thereby deprivation of electoral rights of convicted persons having committed crimes of small gravity for the first time is excluded, and for crimes of medium gravity and grave crimes deprivation of liberty as a stricter kind of penalty from the number of envisaged by the Particular Part of this Code for the commission of a respective crime, is prescribed under a court sentence and, consequently, entails disenfranchisement only in the event if less strict kind of penalty cannot ensure achievement of goals of the penalty. At the same time, guided by the Constitution of the Russian Federation, including its Article 32 (Section 3), and legal positions of the Constitutional Court of the Russian Federation expressed in the present Judgment, the federal legislator is competent, consistently realizing the principle of humanism in criminal law, to optimize the system of criminal penalties, including by means of transfer of individual regimes of serving deprivation of liberty to alternative kinds of penalties, although connected with forced restriction of liberty of convicted persons, but not entailing the restriction of their electoral rights.

3. To recognize execution of the Judgment of the European Court of Human Rights of 4 July 2013 in the case of *Anchugov and Gladkov v Russia* ..., – with regard to measures of individual character, which are stipulated by the effective legislation of the Russian Federation, – with respect to citizens S.B. Anchugov and V.M. Gladkov *as impossible*, since these citizens were sentenced to deprivation of liberty for long terms for the commission of particularly grave crimes, and therefore could not count, even according to criteria elaborated by the European Court of Human Rights, on access to electoral rights.⁵

⁵ Judgment no 12-P/2016 (n 1) 38-40.

2. *Decisions of the Russian Constitutional Court and international law*

We believe that the aforementioned decision of the Constitutional Court cannot be interpreted in the sense of a failure to comply with international commitments or to enter into a confrontation with the ECtHR. There is no such desire in any of the decisions of the Constitutional Court. On the contrary, the Constitutional Court often emphasized the special importance of international law in the Russian Federation, since in accordance with Article 15 (part 4) of the Russian Constitution, the universally-recognized norms of international law and international treaties and agreements of the Russian Federation are a component part of its legal system. If an international treaty or agreement of the Russian Federation sets rules other than those envisaged by Russian law, the rules of the international agreement shall take precedence. In the context of this constitutional provision, the Constitutional Court has even ordered the application of non-ratified international treaties, in other words treaties which ‘de jure’ do not have legal force in the Russian Federation. A good example of this is the act of the Constitutional Court of the Russian Federation of 19 November 19 2009 no 1344-O-R, which considered the compatibility of the death penalty in Russia in the presence of a signed, but not ratified Protocol no 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In this decision, the Constitutional Court expressed the conclusion that ‘the fact that Protocol no 6 is still not ratified in the context of the existing legal reality does not preclude recognition of its essential element of the legal regulation of the right to life. In accordance with Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969, the State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed. Thus, the sentence of death should neither be assigned nor enforced’ (para 4.3).

In the more recent judgment of 14 July 2015 no 21-P/2015 ‘on the case concerning the review of constitutionality of the provisions of Article 1 of the Federal Law “On Ratification of the Convention for the



Protection of Human Rights and Fundamental Freedoms and Protocols thereto”, which followed a request by a group deputies in the State Duma, the Constitutional Court pointed out, that ‘while required to comply with an international treaty that has entered into force, namely the Convention for the Protection of Human Rights and Fundamental Freedoms, the Russian Federation, is nonetheless obliged to consider, within its legal system, the rule of the Constitution, which forces it in the event of any conflicts in this area – notwithstanding the fact that the Russian Constitution and the Convention on the Protection of Human Rights and Fundamental Freedoms are based on the same basic values, rights and freedoms of man and citizen – to give preference to the Russian Constitution requirements and thus do not follow literally the European Courts of Human Rights’ judgments in the event that its implementation is contrary to constitutional values’ (para 4).

It should be noted that in this judgment the Constitutional Court does not mean to say that Russia may avoid compliance with its international obligations, but rather that priority should be given to the national Constitution, not to override the Convention itself (which is in organic connection with the constitutional regulations), but rather its interpretation by the ECtHR and only then in the case that it directly contradicts with the provisions of the Constitution.

This interpretation may be different and variable from case to case and is, therefore, controversial. It is no coincidence that A. Nussberger – a judge of the ECtHR, speaking about the possibility of re-evaluation of human rights on the basis of the practice of the Strasbourg Court, compares such rights with a navigation system, which, of course, needs to be updated from time-to-time.⁶ Not everyone agrees with such an approach to human rights. For example, E. Taribo believes that human rights can only be regarded as a navigator when they lead to the intended address and purpose: that is to say, to fully understand the scope of the right to personal integrity, to a fair trial, to respect for family life, etc. A navigator cannot radically change the content of basic legal concepts and institutions, which is why such a comparison is controversial.⁷

⁶ See A Nussberger ‘Human Rights as a Navigation System?’ (2015) no 4(107) *Comparative Constitutional Review* 32-40 (in Russian, with English abstract available at <[www.ilpp.ru/netcat_files/userfiles/SKO_Archiv/SKO4\(107\)2015_ENG.pdf](http://www.ilpp.ru/netcat_files/userfiles/SKO_Archiv/SKO4(107)2015_ENG.pdf)>).

⁷ E Taribo, ‘The Interpretation of Human Rights in the Social Context’ (2015) no 3 *Platon* 32-36 (in Russian).

Naturally, such a comparison draws fear that such a navigation system may pave the way through the sovereignty of a particular State (through decisions that are contrary to the State's Constitution), in this case the Russian Federation.⁸ Accordingly, the logic of decision no 21-P/2015 does not focus on the execution of the judgments of the ECtHR, but on the protection of the Constitution. However, in the operative part of the above mentioned judgment the Constitutional Court outlined the importance for Russia of the Convention, which is part of the Russian legal system, as well as the decisions of the ECtHR adopted on the basis of the Convention, pointing out that the issue of conflict between them with the Constitution (if occurs) will be resolved by the Constitutional Court.

3. *Some 'dogmatic' arguments*

Judgment no 12-P/2016 proves that the Constitutional Court is not seeking to abuse this right, and is aimed at constructively overcoming these controversies. This solution was initially saturated with the spirit of dialogue and compromise (which excludes both a humble submission to any decisions of the ECtHR and a denial of them), while it does not contain any harsh words against the Strasbourg Court. Of course, part of the decision is devoted to the justification (a key word) of the reasons that Russia cannot execute the decision of the ECtHR, which directly conflicts with a crucial rule of the Constitution (the first conclusion of the operative part of the judgment).

Nevertheless, any other result could simply not be, because: a) the ECtHR decision directly conflicts with Article 32 of the Constitution; b) the Constitution by virtue of its provisions has priority, including over conflicting treaties, that cannot be ratified by Russia nor enter into force insofar as they clash with the Constitution; c) at the signing of the Convention on the Protection of Human Rights and Fundamental Freedoms, the Russian side proceeded on the basis that the provisions of the

⁸ This *idée fixe* is not only Russian. See for example S Kern 'European Court Undermining British Sovereignty' available at <www.gatestoneinstitute.org/4134/echr-uk>; 'European Court of Human Rights "risk to UK sovereignty"' available at <www.bbc.com/news/uk-politics-25535327>.



treaty are fully consistent with the provisions of the Constitution, and the Council of Europe did not express any concerns about the presence of any such contradictions; d) the Constitution has been adopted via referendum by all of the citizens of the Russian Federation; e) Article 32 is in Chapter II of the Constitution, which cannot be changed in any way, as the rules of this chapter may only be changed through the adoption of a new Constitution.

Accordingly, if the Constitutional Court chose to oppose the ECtHR, demonstrating disregard for its decisions (an assumption that in general is absurd, since 1/3 of the judgments of the Constitutional Court contain references to the practice of the ECtHR, which is also used by the Constitutional Court to support its conclusions in each case) it could only refer to the accompanying ‘dogmatic’ arguments. Moreover, the Constitutional Court has already referred to the case of *Anchugov and Gladkov v Russia* in its judgment no 21-P/2015 as an example of ‘the most obvious discrepancy with the provisions of the Constitution of the Russian Federation’ (para 4). However, although such a ‘dogmatic’ argument of the impossibility to execute ECtHR judgments is used in the judgment of the Constitutional Court, it is not the main one. In the decision under review here, the main arguments are in fact ‘actual’. Unlike the dogmatic approach, they do not come from the fact that a decision cannot be enforced, because it contradicts with the constitutional regulation, having a special status in the system of Russian law, *but from the fact that the ECtHR does not quite correctly understand the situation in Russia in general.*

3.1. *The ‘British’ and ‘Italian’ approaches*

Para 3 of the judgment no 21-P/2016 is extremely important for the understanding of the spirit and idea at the core of the reasoning of the Constitutional Court. It begins with a description of two cases previously heard by the ECtHR, embodying the two opposite approaches to resolving the issue of the limitation of voting rights of prisoners. The first case, *Hirst v United Kingdom*,⁹ contains a discretionary approach, which provides for the automatic deprivation of electoral rights for all prisoners, without any differentiation in the application of this restriction.

⁹ *Hirst v the United Kingdom (No 2)*, App no 74025/01 (ECtHR, 6 October 2005).



Let's call this the 'British' approach. The Constitutional Court draws attention to the fact that it is this approach that the ECtHR plainly 'rejected'. At the same time there is a second approach, an approach that can be called 'Italian', because its score was given by the ECtHR in the case *Scoppola v Italy*.¹⁰ In contrast to the 'British' approach, the latter is differentiated and individualized. The 'Italian' approach is endorsed by the ECtHR.

It is obvious that the analysis of these approaches by the Constitutional Court at the beginning of the mentioned case is not accidental. The rest of the judgment, in essence, seeks to justify the fact that the Russian approach to this issue is consistent with the 'Italian' one, and that the ECtHR merely did not understand this during the proceeding of the case *Anchugov and Gladkov v Russia*. It is here that it becomes clear that the real addressee of the text of the decision is not the Ministry of Justice of the Russian Federation, who initiated the trial in the Constitutional Court, nor the citizens Anchugov and Gladkov, but the European Court itself directly. Only after this introduction, which sets the tone for the judgment, does the Constitutional Court discuss the ban in part 3 of Article 32 of the Constitution. Interestingly, the Constitutional Court in its decision refers to the history of the restrictions on voting rights of prisoners in Russian constitutional law, as well as the solution of this issue in the development of the 1993 Constitution, in particular, its Article 32. It is believed that the Constitutional Court has indulged in such a digression into the history with a view to demonstrating that legally (at the level of legal regulation) issues of differentiation and individualization in determining the relevant constitutional restrictions have always been taken into account by the Russian legislator. The Constitutional Court drew the attention of the ECtHR to the fact that the issues which, according to the Strasbourg Court, are ignored in Russia, in fact have been accounted for *the past 100 years!* In order to verify this thesis the texts to which the Constitutional Court refers must be fully analyzed.

Thus, the Constitution of the Russian Soviet Federative Socialist Republic adopted by the Fifth All-Russian Congress of Soviets on 10 July 1918, as set out in Article 65 states, 'The right to elect or to be elected is denied to persons if they belong to one of the following cate-

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



gories: a) persons who employ hired labour for profit; b) persons living on unearned income, such as interest on capital, profits from enterprises, receipts from property, etc .; c) private traders, trade and commercial intermediaries; d) monks and spiritual ministers of churches and religious cults; d) employees and agents of the former police, the special corps of gendarmes and security departments, as well as members of the reigning house in Russia; e) persons duly recognized as mentally ill or insane, as well as persons who are under guardianship; g) *persons convicted of selfish and defamatory crimes for a period established by law or a court sentence.*'

These provisions were later reproduced in Article 69 of the Constitution of 11 May 1925. It seems that in the above formulation, the question of the limitation of voting rights has been fully defined: here, on the one hand, the purpose of the restriction is obvious – to prevent the formation of government and the penetration into it of 'undesirable' elements and, in relation to prisoners – persons capable of criminalizing the government (this, by the way, is referred to by the Constitutional Court in the mentioned judgment as the root cause of the limitation of voting rights).¹¹ On the other hand, this restriction is the most differentiated: voting rights are lost by persons, convicted of specific types of crimes and for a certain period, while if the time limit is set by a court sentence it is even more individualized. Moreover, there are two approaches simultaneously implemented on the limitation of voting rights, which are endorsed by the ECtHR – that this limitation might be legitimate and not disproportionate.

The Constitution of the Russian Soviet Federative Socialist Republic of 21 January 1937, in Article 139 set a limitation of voting rights (passive and active) only for those suffering from insanity and persons specifically sentenced by the court to a deprivation of their electoral rights. Accordingly, here, this restriction was associated with a particular criminal case and its particular circumstances.

In the original version of the Constitution of the Russian Soviet Federative Socialist Republic of 1978 in general there were no re-

¹¹ The Constitutional Court stated in para 2 of the judgment no 12-P/2016 (n 1) that some restrictions 'may also be dictated by the need to ensure forming legitimate bodies of people's representation, maintenance of public legal order and *minimization of the risks of criminalization of electoral relations.*'



strictions on voting rights of prisoners. It seems that this was due to the so-called period of 'stagnation', when in the country there weren't any landmark political events and elections were just a formal event with a known result. It was only by the Law of the Russian Soviet Federative Socialist Republic of 27 October 1989 'On amendments and additions to the Constitution (Fundamental Law) of the Russian Soviet Federative Socialist Republic' that the provisions of the Constitution concerning the right to vote were supplemented by the following rule: 'The participation of elections are restricted for the mentally ill, who are recognized by the court as incapable persons, who are detained by a decision of a court, an order by a prosecutor or a decision by the court to impose compulsory treatment'. These changes in 1989, were not successful, as they provided an excessively wide range of the respective limits, and in 1991 they were restricted as follows: 'The participation in elections is restricted for the mentally ill, who are recognized by the court as incapable, and persons serving a sentence in prison ordered by the court'.

Under these constitutional provisions, the limitations of voting rights of convicted persons have never been made automatic by the Russian legislator, as in the 'British' approach. In this regard, a reference to this constitutional regulation in the judgment of Constitutional Court seems justified and fair.

The drafting history of the 1993 Constitution, in particular its Article 32, reveals a rather curious situation. The 1993 Constitution was adopted in a spirit of liberalism and does not involve any direct deprivation of the rights and freedoms of man and citizen. The *only* (!) exception is the limitation of voting rights. The reason why the drafters of the Constitution incorporated this restriction in the text is not quite clear.

The Constitutional Council, which developed the text of the Constitution (from 29 April to 10 November 1993), took as its basis two projects. The first – submitted by the President of the Russian Federation – namely Article 42, which stated that persons found incompetent by a court, as well as those held in places of restriction of liberty by the sentence of the court cannot vote or be elected citizens. The second one – prepared by the Constitutional Commission of the Congress of People's deputies of the Russian Federation – namely Article 29 stipulated that those found incompetent by a court, as well as citizens kept in places of restriction of liberty pursuant to an enforceable court judgment cannot vote or be elected citizens.



In discussing the relevant draft provisions a variety of views on the limitations of the rights of convicts were considered. The preparatory works show that individual panelists' general belief was that individuals who are in prison should not be deprived of their rights.¹² Others highlighted that the Constitution's formulation, affecting only the voting rights of actual prisoners, should be seen as a guarantee against any 'broad interpretation' of such restrictions on other categories of convicts and prisoners, for which there might not be any sentence.¹³ On another occasion, it was suggested that a person serving a sentence in detention, without access to information, will receive specially distorted information and will probably be subject to manipulation. Accordingly, such persons must not be granted the opportunity to participate in the elections, to avoid a distorted result.¹⁴

Thus, from these arguments, it would seem that the drafters of the Constitution included this provision by inertia, because of its presence in previous constitutions, rather than with the aim of avoiding the criminalization of the government. However, the issues of differentiation and individualization of restrictions on voting rights were not ignored in the drafting process: they were resolved by replacing the term 'restriction (limitation) of liberty' by the term 'deprivation of liberty'. As the preparatory works show, the former expression has a much broader scope than the second, which includes only those kinds of punishment as imprisonment for a fixed term and life imprisonment.¹⁵

¹² Thus the position of V Nikonov, V Shumeyko, Y Milyukov at the meeting of a group of representatives of producers and entrepreneurs to finalize the draft of the Constitution, held on June 8, 1993. They believed that such deprivation is undemocratic; as inmates the question concerns a very small part of the population, their participation in the elections would not change anything, but would enhance the level of democracy. Moreover, the issue of whether people convicted of minor crimes (such as minor assault or crimes against traffic safety) should be deprived of electoral rights. See Constitutional Council, 'Transcripts. Materials. Documentation' vol 5 (Legal lit 1995) 374-376.

¹³ See eg K Bendukidze – a businessman and later a prominent politician of the revolutions in Georgia and Ukraine, *ibid*.

¹⁴ See eg VS Stolypin, *ibid* 268-271.

¹⁵ Thus, at a meeting of the working committee to finalize the draft of the Constitution, held on June 15, 1993 comments were made that the project proposed in the President's term 'place restrictions on liberty' is not quite correct. A Yakovlev suggested to refer to 'places of limitation and deprivation of liberty', since colony-settlement is a place 'not of deprivation, but limitation of liberty'. Others (A Sobchak) pointed out that

Limitation of liberty is, of course, a broader term that includes such forms of punishment as arrest, forced labour or deprivation of liberty (of the same name form of punishment). The appearance of the term ‘deprivation of liberty’ and not a ‘restriction (limitation) of liberty’ thus substantially minimized the range of Article 32 of the Russian Constitution.

As we can see already in the preparation of the Constitution, the connection of the limitation of voting rights to the presence of a sentence has been clearly defined. Without a sentence, these rights cannot be deprived. Accordingly, such restrictions do not apply to persons detained in detention centres. They are implemented in relation to prisoners sentenced to actual imprisonment. In this regard, the Constitutional Court notes that the ECtHR by hearing the case of *Anchugov and Gladkov v Russia* somewhat became confused with these terms. Thus, in para 5.1 of its decision the Constitutional Court pointed out that in *Anchugov and Gladkov v Russia* the ECtHR, translated the phrase ‘deprivation of liberty (“imprisonment”)’ contained in Article 32 (part 3) of the Constitution, with the term ‘detention’,¹⁶ which is not appropriate. In this connection it is necessary to bear in mind that the notion of ‘deprivation of liberty (or “imprisonment”)’ as a form of punishment under criminal law, within the meaning of Article 32 (part 3) of the Constitution, is not the same in terms of content as the notion of ‘deprivation of liberty by law’ used in para 1 of Article 5 of the Convention. The latter includes any lawful apprehension, taking into custody, remand in custody (detention), one type of which is ‘the lawful detention of a person after conviction by a competent court’, ie a criminal penalty, along with other types of ‘deprivation of liberty by law’. In other words, the Constitutional Court stated that the ECtHR unjustifiably interpreted the limitations contained in Article 32 of the Constitution widely.

a detention center is also not a place of deprivation, but a person may be there for a long time (ibid 464-466). As a result, it was decided to replace the word ‘limitation’ with the word ‘deprivation’. It is indeed curious that these arguments about the nature of colony-settlement received a second life in this decision of the Constitutional Court (para 5.5).

¹⁶ See *Anchugov and Gladkov* (n 2) para 31.



3.2. *'Sufficiently serious' crimes and criminal law-based arguments of the Constitutional Court*

The Constitutional Court points out that the ECtHR in its judgments in the cases *Scoppola v Italy* and *Anchugov and Gladkov v Russia*, solely defines the criteria for 'sufficiently serious' crimes in order to provide a base – which does not violate the requirement of proportionality – to deprive perpetrators of electoral rights by virtue of the direct instructions of the law. These are crimes for which the prescribed penalty is imprisonment for a term of three years or more; moreover, a person, sentenced to imprisonment for a term of five years or more, according to a court decision may be deprived of voting rights for life.¹⁷ The Constitutional Court furthermore clarifies that the Russian legislation fully corresponds to these criteria. Thus, the Constitutional Court referred to Article 15 of the Criminal Code of the Russian Federation (the Criminal Code), laying down the categories of crimes. It should be noted that the 'categories of crimes' is a basic concept in the Russian criminal law, since depending on the category of the crime committed many questions are defined: the form of punishment, the type of the correctional institution, the time-period after which those serving time in prison can apply for parole and so on. Article 15 of the Criminal Code classifies criminal acts, depending on the nature and degree of social danger.¹⁸ Therefore, consistently with the interpretation of 'sufficiently serious' crime provided by the ECtHR, crimes of less gravity under Russian criminal law do not fall into this definition. Furthermore, as the Constitutional Court explained, the sentences in the form of imprisonment imposed for such offences are extremely rare and only follow a comprehensive assessment of the nature of the guilty and the act

¹⁷ Judgment no 12-P/2016 (n 1) para 5.2.

¹⁸ More specifically, there are crimes of lesser gravity (for the commission of which the maximum penalty does not exceed three years deprivation of liberty); crimes of average (medium) gravity (deliberate crimes for the commission of which the maximum punishment does not exceed five years deprivation of liberty and non-deliberate crimes for the commission of which the maximum punishment stipulated by the present Code exceeds three years of the deprivation of freedom); grave crimes (deliberate acts, for the commission of which the maximum penalty does not exceed 10 years deprivation of liberty); and especially grave crimes (intentional acts, for the commission of which a deprivation of liberty for a term exceeding 10 years, or a more severe punishment is set forth).

itself.¹⁹ On this basis the Constitutional Court comes to the conclusion that Russian criminal law almost completely eliminates the possibility of the imprisonment of persons who have committed minor crimes in the absence of aggravating circumstances, and therefore, it does not permit and does not envisage actual restriction of their voting rights. Courts, taking into account the provisions of the Criminal Code, prescribe for the commission of minor crimes, penalties in the form of a real deprivation of liberty (with serving sentence in a colony-settlement or – taking into consideration the circumstances of the commission of a crime and the personality of the guilty person – in a correctional colony) only in cases when they come to the conclusion that the guilty person cannot be rehabilitated without his isolation from society.

The above stated argumentation of the Constitutional Court can be described as being *criminal law-based*, as its conclusions are based on the rules of criminal law. As a matter of fact, the Criminal Code is currently undergoing a reform. Thus amendments thereto are mostly liberal and aimed at reducing the number of persons convicted and sentenced to actual imprisonment (which is criticized by the Russian scientific community). Current legislation includes Chapter 11, ‘Exemption from criminal liability’, the articles of which provide different variations of exemption from criminal responsibility of individuals, in particular for first-time offenders who have committed not only minor, but also medium-gravity crimes.²⁰ Special mention should be made of Article

¹⁹ Thus, according to the first part of art 56 of the Criminal Code, a penalty in the form of a deprivation of liberty may be prescribed by a court to a convicted person having committed a crime of lesser gravity for the first time only in the presence of such aggravating circumstances as are enumerated in art 63 of this Code, with the exception of three kinds of crimes connected with the illegal sale of and psychotropic substances. Moreover, art 60 of the Criminal Code, laying down the general principles of sentencing, stipulates that a more severe punishment from among those provided for a specific crime may be decided only if less strict kinds of punishment will not be able to achieve the purposes of punishment (part one); when prescribing a penalty, the nature and the degree of public danger of the crime and the personality of the guilty are taken into account, including circumstances, extenuating and aggravating, as well as the influence of the prescribed penalty on the correction of the convicted person and on the living conditions of his family (part three).

²⁰ Thus, under art 75 of the Criminal Code, a person who has committed a crime of lesser or medium gravity can be released from criminal liability, if after the perpetration of the offence he has given himself up, assisted in the exposure and investigation of a crime, compensated for the damage inflicted, or in any other way effected restitution for



76(1) of the Criminal Code, which provides for exemption from criminal liability for first-time offences in the sphere of economic activity, which belong to a different category. Accordingly, the question of the appointment of this form of punishment as a real deprivation of liberty is extremely detailed and individualized in the Russian criminal law.

3.3. *Some arguments drawn from statistics*

Besides criminal law arguments, the Constitutional Court uses arguments in reference to court statistics.²¹ Thus, in the period from 2011 to 2015 in the Russian Federation there were between 719,315 (the minimum value inscribed in 2014) and 782,247 (the maximum–2011) persons convicted, of which between 206,254 (the minimum– 2012 year) and 227,050 (the maximum– 2011) were subjected to actual imprisonment. That is, the average total number of prisoners imprisoned is no more than 30% of the total. As for a lesser gravity crimes, the following data is illustrative:

Year	2011	2012	2013	2014	2015
Total number of persons, condemned for small gravity crimes	286448	273436	340709	330898	342267
Of which imprisoned %	8,8	7,8	10,5	11	10,5

Source: www.cdep.ru

In other words, only a small number of people have been sentenced to actual imprisonment for lesser gravity crimes.

the damage caused as a result of the crime, which has ceased to be socially dangerous as a result of active repentance. Art 76 of the Criminal Code provides that a person who has committed a crime of small or medium gravity for the first time may be released from criminal liability if he has reconciled with the victim and restituted any damage inflicted on the victim. Art 76(2) of the Criminal Code states that a person who has committed a crime of lesser or medium gravity may be released by the court from criminal liability with punishment replaced with a court fine if they have provided reparation or they otherwise make amends for the harm caused.

²¹ Judgment no 12-P/2016 (n 1) para 5.3.

That is to say, in sentencing persons for lesser gravity crimes in the form of actual imprisonment the principles of individualization and differentiation are fully taken into account by the courts. Accordingly, the limitation of voting rights of convicted persons, which acts as a consequence of imprisonment, is fully individualized and differentiated because, as pointed out by the Constitutional Court, ‘a sentence of imprisonment shall be appointed according to the specific circumstances of the case, taking into account such factors as the nature and severity of the crime and criminal behaviour (including taking into account the presence or absence of mitigating and aggravating circumstances)’.

4. *A reasonable compromise?*

Noting that in Russian legal realities limitation of voting rights is, in fact, differentiated and individualized, the Constitutional Court at the same time tries to *demonstrate* a willingness to contribute to the complete elimination of any unjustified restriction to persons convicted for crimes of lesser gravity. It is known that a person who has committed these crimes serves his or her sentence in colony-settlements, the regime of which is radically different from the mode of other correctional institutions (colonies of general or strict and special regime, as well as prisons). The Constitutional Court, relying on Article 129 of the Criminal Executive Code of the Russian Federation, which regulates the conditions of those serving imprisonment in colony-settlements, indicates that the inmates of such colonies, who are contained without the use of guards may move freely within the territory of the colony and outside the colony within the municipality in whose territory it is located; they can live with their families on their own or in rented living space in the colony-settlement or outside, but within the boundaries of the municipality in whose territory the colony-settlement is located; they may wear civilian clothes, carry money and valuables, receive parcels, packages and postal packets; they may have unlimited visitation; they shall have the right to work and study by correspondence in educational institutions of higher education and vocational education institutions. These ‘privileges’ are unavailable to prisoners serving sentences in any other correctional facili-

ty.²² The presence of these conditions, according to the Constitutional Court, shows that the ‘semi-freedom’ mode operates in colony-settlements.²³ Accordingly, the special status of these colonies is quite obvious. On the other hand, in these colonies, there are people serving punishments who have committed crimes of negligence (carelessness), first time offenders convicted of a crime of lesser or medium gravity and, furthermore, convicts transferred from general and strict regime colonies on grounds of good/positive behaviour. It is obvious that restrictions on suffrage affecting the latter category of prisoners, as well as persons convicted of a medium gravity crime, meet the criteria developed by the ECtHR, in particular the criterion of proportionality of such restrictions.

As for first-time perpetrators of lesser gravity crimes and crimes of negligence (in Russia the latter are primarily crimes related to violation of traffic rules, which result in grave consequences), for whom a restriction of voting rights would not be proportionate, the Constitutional Court envisages a more detailed individualization and differentiation of the limitation of voting rights in order to reform the current legislation. From this perspective, the Constitutional Court points out that the federal legislator is competent to make amendments to the criminal and criminal-executive legislation, setting forth a separate kind of criminal penalty for this group of individuals, to which the restriction envisaged by Article 32 (Section 3) of the Constitution of the Russian Federation would not apply. The above mentioned idea seems to be quite reasonable and relevant.

The Constitutional Court thus stresses, on one hand that Russia currently adopts the ‘Italian scheme’ of the deprivation of electoral rights of prisoners which is approved by the ECtHR. On the other hand, in a spirit of better understanding, respect and co-operation with the Convention system, it acknowledges that there may be room for further

²² Judgment no 12-P/2016 (n 1) para 5.5.

²³ This idea of ‘semi-freedom’ perfectly illustrates the difference in the practice of checking the presence of convicted persons in prisons, which are a sort of disciplining symbolic act, demonstrating total control over the person convicted. According to the internal regulations of correctional institutions, approved by Order of the Ministry of Justice of 3 November 2005 no 205, line-ups of convicts in prisons are carried out daily in the morning and evening hours, as defined by the daily routine; at the same time the appearance of the person convicted is checked; where necessary, this check may be carried out at any time of the day. In turn, line-ups of inmates living with their families in the colonies-settlements are carried out up to four times per month at the scheduled time for registration.

democratic reforms. In this respect, the Constitutional Court of the Russian Federation ‘passes the ball’ on this part. That is to say, it leaves it to the responsibility of the federal legislator, pointing out that the legislator ‘has the right’ (is entitled to, but not obliged) to make these changes. In other words, the Constitutional Court is saying that it has done everything it could, and now the resolution of this issue is under the competence of the legislator.

However, Judge K Aranovskiy of the Constitutional Court in his dissenting opinion pointed out that granting to prisoners serving their sentence in colony-settlements the right to vote, on one hand, may have a negative impact on equity, as in these colonies are also persons serving sentences that have been convicted of causing death by negligence. On the other hand, the courts, also believing in the injustice of these measures, will make every effort not to assign those serving such sentences in these colonies. It appears that these concerns are unlikely to be justified because what causes in the population a sense of injustice is not attributing voting rights to prisoners but, rather, the lack of the inevitability of the punishment as such, caused by regular amnesties²⁴ and a biased liberalization of criminal law creating privileges for white-collar criminals which leads them to avoid facing criminal responsibility. Thus, pursuant to the All-Russian Public Opinion Research Center, according to citizens of Russia, justice is avoided most by the rich (38%), by officials and deputies, their children and relatives (38%), as well as by the ‘golden youth’ (6%) and businessmen and oligarchs (6%)²⁵.

5. *Some additional issues*

5.1. *Supervision ‘in abstracto’ or ‘in concreto’*

In this decision the Constitutional Court puts a direct question to the ECtHR: whether the restriction of Anchugov and Gladkov’s voting

²⁴ See: Resolution of the State Duma on December 18, 2013 no 3500-6 GD ‘On amnesty in connection with the 20th anniversary of the adoption of the Constitution’ and on April 24, 2015 no 6576-6 GD ‘On amnesty in connection with the 70th anniversary of the Victory in the Great Patriotic war of 1941–1945’.

²⁵ See ‘Inequality before the court and how to fight it?’ available at <<http://wciom.ru/index.php?id=236&uid=115769>>.



rights was disproportionate given the fact that these persons were convicted for especially grave crimes, namely murder, for which they were originally sentenced to death, subsequently commuted to 15 years of imprisonment.²⁶ Nevertheless, the Constitutional Court once again reiterates that ‘proceedings from standards established by the European Court of Human Rights itself, disenfranchisement for serious crimes, that is crimes punishable by three or more years of imprisonment, does not violate the principle of proportionality’.²⁷ Accordingly, it is impossible to talk about the disproportionate restriction of the electoral law in these specific cases, and in this sense the decision *Anchugov and Gladkov v Russia* is essentially an act of abstract normative control (in abstracto) by the ECtHR.²⁸ This is so although the ECtHR pointed out in this judgment that in cases arising from individual petitions, its task is not to review the relevant legislation or an impugned practice in the abstract, rather it must confine itself, as far as possible, without losing sight of the general context, to examining the issues raised by the case before it.²⁹ That is why the Constitutional Court comes to the conclusion about the impossibility of performance of individual measures against these citizens.

5.2. *The individual opinions of the judges of the Constitutional Court*

It should be noted that not all the judges of the Constitutional Court agreed with this decision. Three individual opinions were appended to the decision.³⁰ Since such a number of dissenting opinions is not typical of the Constitutional Court, it appears that the reason for this was the ambiguity of the issue.

²⁶ According to the Criminal Code of the Russian Soviet Federative Socialist Republic in effect prior to the adoption in 1996 of the new Criminal Code of the Russian Federation imprisonment of 15 years is the second most severe punishment after the death penalty.

²⁷ Judgment no 12-P/2016 (n 1) para 6.

²⁸ *ibid.*

²⁹ *Anchugov and Gladkov* (n 2) para 51.

³⁰ Individual opinions are envisaged by art 76 of the Federal Constitutional Law ‘On the Constitutional Court of the Russian Federation’.

So, Judge S Kazantsev in his dissenting opinion, suggested that if the federal legislator would provide some citizens, remanded in prison upon conviction, the right to vote, thereby narrowing the limitation provided for by Part 3 of Article 32 of the Constitution, such legal regulation could not be considered a violation of the Russian Constitution, as the limitation provided in the said article is a maximum, not the minimum acceptable measure of restriction of citizens' electoral rights. In addition, according to Judge Kazantsev, unless the Constitution provides a less complete protection of certain rights than the Convention, preference should be given to the provisions of the Convention, including its interpretation by the ECtHR.

In turn, Judge V Yaroslavtsev believes that the concept of 'citizens contained in detention' is defined by sectoral legislation – criminal and criminal procedure, and therefore does not exclude consideration of the legislator by partial differentiation of restrictions of active voting rights in the framework of development and interpretation of the concepts of 'deprivation of liberty', 'place of detention', 'content' in such places 'by the verdict of the court'.

An interesting dissenting opinion was provided by Judge K Aranovskiy who justifies the inadmissibility of the appeal to the Constitutional Court of the Russian Federation of the Ministry of Justice, stating that no one removes the obligation of the Russian Federation to respectfully study and take into account all that is considered promising and binding of the ECtHR, not only according to the case against Russia, but also to other countries. However, the obligation to respect ECtHR decisions is different from the obligation to execute its prescriptions. And when no clear prescription is given in the judgment (as in the case *Anchugov and Gladkov v Russia*, according to the judge's opinion), there is no obligation of the Russian Federation to execute it.

6. *Conclusions*

As you can see the opinions of judges of the Constitutional Court are diametrically opposed: from a suggestion that the Convention should actually have greater importance than the Constitution, to the doubting of the correctness of the Constitutional Court even having the right to hear this case. The presence of such dissenting opinions once



again underlines the nature of the compromise solution, which does not imply any subordination of the Constitutional Court to the European Court, nor ignore the legal position of the ECtHR, and is aimed at the development of dialogue between the two high courts. Within the framework of this dialogue, each party has the right to express not only its own opinion, but also to express doubts about the validity of the conclusions made by another court, which, however, does not preclude mutual concessions. It would be desirable to react to this decision in the key of such a partnership, not in a spirit of mutual political accusations and claims that a priori are counterproductive for the protection of human rights.³¹

³¹ It is positive that the Venice Commission in its Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court (albeit otherwise fairly critical) noted that it seems clear that the Constitutional Court (in the judgment no 12-P) 'has not spared its efforts to avoid a conflict with Strasbourg, which is to be welcomed' (para 33). See 'Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court adopted by the Venice Commission at its 107th Plenary Session' (Venice, 10-11 June 2016), available at <[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)016-e)>.

