

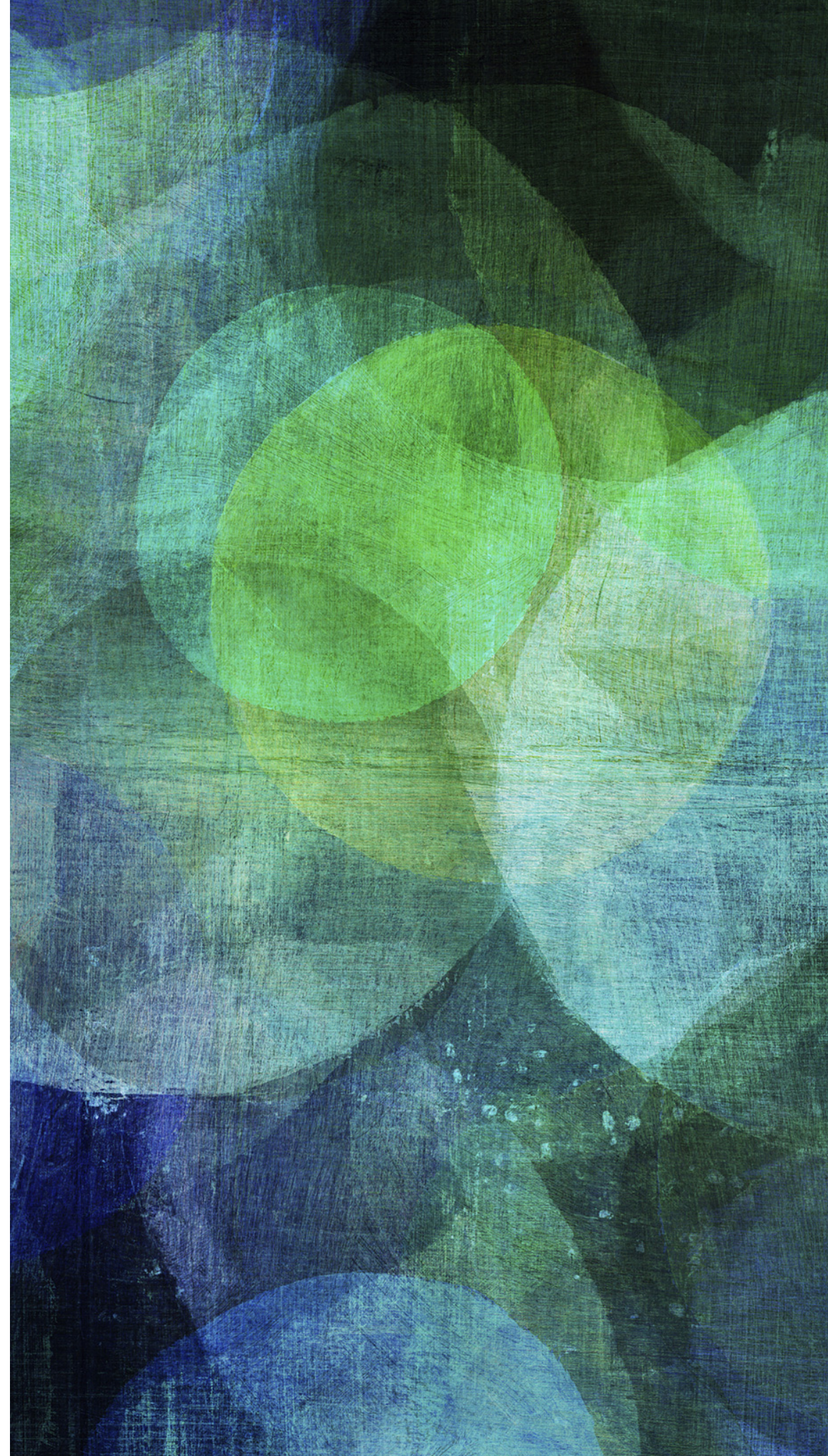
ACCESS TO REMEDIES POST ANCHUGOV AND GLADKOV

... .

A Comparative Perspective

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WHAT HAS CHANGED?

- Previously, Russia was under an obligation to implement all judgments of the ECtHR to which it was a party (Article 46 of the Convention)
- After the 2015 Federal Law, the Russian Constitutional Court has the power to declare the ECtHR judgments impossible to implement if they contradict the Constitution. This power was firstly used in *Anchugov and Gladkov*
- Hence, even though some remedies might be awarded by the ECtHR, appellants can still be denied access to them

“

A devastating blow for people in Russia who turn to the European Court because they cannot find justice in the Russian courts

*-Hugh Williamson,
Human Rights Watch*

“

An affront to the human rights and
the rule of law

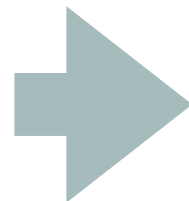
-Amnesty International

RUSSIA-ECtHR COOPERATION: TIMELINE

1998

RATIFICATION

- Direct effect (Art 15 of the Constitution)
- Supremacy (?)
- ECtHR rulings should be implemented (Art 46 of the Convention)



2015

RCC PROPOSAL



2015

FEDERAL LAW

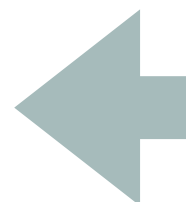
- Russia does not have to implement ECtHR rulings when they contradict the Constitution



ANCHUGOV AND GLADKOV

- Incompatibility of the ECtHR ruling requiring to remove ban on prisoner voting with Constitutional ban

2016



YUKOS

- Incompatibility of the Yukos award with Constitutional obligation to pay taxes

2017

ANCHUGOV AND GLADKOV

- Appellants: the prohibition on prisoner voting is contrary to the Convention
- The ECtHR finds in their favour, citing *Hirst (no. 2)* and *Scoppola (no. 3)* - a blanket ban on prisoner voting is
- Problem: the ban on prisoner voting is constitutional
 - Article 23(3): “*deprived of the right to elect and be elected shall be citizens recognized by court as legally unfit, as well as citizens kept in places of confinement by a court sentence*”
- Hence, RCC found that ECtHR judgment was impossible to implement, citing the 2015 Federal Law (blatant incompatibility with the Constitution)

IS THE CASE 'POLITICAL'?

- Long-run political factors: appeal to identity
 - Importance of the Constitution
 - Constitutional moment (via referendum)
 - Written Constitution
 - Internal structure and procedures
 - Clash of values
 - *Markin* as an example
 - Role of ECtHR
 - “Living instrument” interpretation

IS THE CASE 'POLITICAL'?

- Short-run factors:
 - *Markin* case (2011): the 'mental turning point', the first time the ECtHR has overruled an RCC ruling
 - *Yukos* case (originally 2014): was overruled like *Anchugov v Gladkov* (under the 2015 law) in January 2017
 - *Anchugov v Gladkov* itself

CONSTITUTIONAL BRAKES: UK

- *Pinnock* (Lord Neuberger): “[ECtHR decisions] whose effect is not inconsistent with some **fundamental substantive or procedural aspect of our law**, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle”
- *Chester*: “[i]t would have then to involve some **truly fundamental** principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.”
- Key difference: not all constitutional principles are equally valuable

CONSTITUTIONAL BRAKES: GERMANY

- *Görgülü:*
 - “German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government”
 - “[i]f the Convention law of the European Convention on Human Rights, and with it the federal legislature on the basis of Article 59.2 of the Basic Law, has provided that the legal decisions are directly applicable, then they have this effect below the level of constitutional law”
- Key difference: based on already existing hierarchy of laws & human rights

- Russian constitutional brake is distinct from similar practices in the United Kingdom and Germany:
 - It is based on a written source (unlike in the UK)
 - Legal principles are considered regardless of their substantive value (unlike in the UK, and partly Germany)
 - It redefines the existing hierarchy of legal sources instead of affirming it (unlike in Germany)
 - It is based on state authority rather than human rights considerations (unlike in Germany)

ANOTHER WAY?

- Mistake
 - Not applicable, since the wording of the Constitution is clear enough
- Interpretation methods
 - The Constitution and the ECtHR ruling are directly incompatible
- Remedy
 - An equivalent of a declaration of incompatibility under the HRA
- Declaratory judgment

CONCLUSION

- The RCC's activity is not a legitimate constitutional brake if we rely on UK and German experience
- Alternative methods of resolving the crisis in question do not fully work in the circumstances
- Hence, the current scenario shows a defect in the implementation of the Convention by signatory states: it should be resolved on an international plane

ANY QUESTIONS?

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