

# Farewell to the European Constitutional Tradition:

## The 2020 Russian Constitutional Amendments

*Johannes Socher\**

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\* The author is a postdoctoral research fellow at the Free University of Berlin.

## Abstract

This article critically analyses the 2020 Russian Constitutional Amendments. It argues that, although many amendments have to be considered mainly symbolic, they constitute the most fundamental changes of Russia's Constitution in its 26-year history. Moreover, all amendments taken together, in combination with the drafting process and entering into force, arguably undermine the democratic legitimacy of the Russian Constitution to such a degree that they can be interpreted as a farewell to the European constitutional tradition.

## I. Introduction

On 15.1.2020, Russian President *Vladimir Putin* proposed several amendments to the Russian Constitution during his annual address to the Federal Assembly.<sup>1</sup> Shortly afterwards, *Dmitri Medvedev* announced his resignation from the post of prime minister, linking his departure to the proposed changes.<sup>2</sup> In turn, *Putin* nominated *Mikhail Mishustin*, previously the Director of the Russian Federal Tax Service, as *Medvedev's* successor, who was swiftly confirmed by the State Duma and appointed new Prime Minister of Russia. Only three months later, the adopted constitutional amendments were planned to enter into force upon the approval in an "all-Russian vote" originally scheduled for 22.4.2020 – *Lenin's* 150<sup>th</sup> birthday – which had then however to be postponed due the spread of the coronavirus.<sup>3</sup> On 1.7.2020, with Russia's coronavirus cases passing 650,000 and following an elaborate spectacle of public affirmation,<sup>4</sup> the Russian elec-

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<sup>1</sup> Presidential Address to the Federal Assembly, 15.1.2020, <<http://en.kremlin.ru>>. See Putin Calls For Constitutional Changes, More Social Spending in Annual Address, Radio Free Europe/Radio Liberty, 15.1.2020.

<sup>2</sup> See *A. Higgins*, Russian Premier Abruptly Quits Amid Swirl of Speculation on Putin, New York Times, 15.1.2020.

<sup>3</sup> See *A. Higgins*, Citing Virus, Putin Suspends Vote on Keeping Him in Power, New York Times, 25.3.2020. By the end of May 2020, Russia's official number of coronavirus cases surged towards 400,000, with a puzzling low mortality rate of only 13 deaths per million, see *I. Nechepurenko*, A Coronavirus Mystery Explained: Moscow Has 1,700 Extra Deaths, New York Times, 11.5.2020.

<sup>4</sup> See *A. Higgins*, The Theatrical Method in Putin's Vote Madness, New York Times, 1.7.2020.

torate eventually confirmed the amendments, resulting in the Russian Constitution's most fundamental changes in its 26-year history.<sup>5</sup>

Although the exact timing caught many commentators by surprise, rumours about upcoming plans to amend the Russian Constitution existed at least since *Putin's* second re-election as president in March 2018. In retrospect, an opinion article published a few months after *Putin's* inauguration by *Valery Zorkin*, Chairman of the Russian Constitutional Court and frequent commentator to legal policy issues, can be regarded as a first sign that "something" was in the making.<sup>6</sup> "Of course, our constitution has shortcomings", *Zorkin* wrote, in particular

"the lack of an adequate balance in the system of checks and balances; bias in favour of the executive branch of the government; [and] the lack of clarity in the distribution of powers between the presidents and the government".

In his article, *Zorkin* furthermore argued for the significance of *sobornost*, a concept coined by nineteenth century Russian Slavophiles stressing the need for co-operation between people at the expense of (Western) individualism:

"We need a legal theory that synthesizes, within the framework of law, the ideas of individual freedom and social solidarity. Such an approach to legal thinking is most relevant to the mentality of the Russian people, their legal and moral consciousness",

*Zorkin* maintained.<sup>7</sup>

This article critically analyses the 2020 Russian Constitutional Amendments, both regarding to its drafting process and entering into force (Chapter II) as well as with regard to the mainly symbolic (Chapter III) and more substantial (Chapter IV) contents of the adopted changes. Although both aspects were instantly discussed in the academic blogosphere,<sup>8</sup> they have so

<sup>5</sup> Конституция Российской Федерации [Constitution of the Russian Federation], Rossiiskaya Gazeta, 25.12.1993. All quotations in this article from the Russian Constitution in force prior to the 2020 amendments follow the English translation on the Russian Constitutional Court's website: <<http://www.ksrf.ru>>.

<sup>6</sup> V. D. *Zorkin*, Буква и дух Конституции [The Letter and the Spirit of the Constitution], Rossiiskaya Gazeta, 9.10.2018. See M. *Eckel*, Russia's Top Judge Spurs New Talk of Changing Constitution, RadioFreeEurope/RadioLiberty, 16.10.2018.

<sup>7</sup> V. D. *Zorkin* (note 6).

<sup>8</sup> See e.g. T. *Morshchakova*, Отменить несменяемость судей ничего не стоит [Abolishing the Irremovability of Judges Costs Nothing], Advokatskaya ulitsa, 16.1.2020; G. *Bogush*, Конституцию менять незачем — приоритет международного права в РФ де-факто уже отменен [There is No Need to Change the Constitution – The Priority of International Law in the Russian Federation has De Facto Already Been Cancelled], The Insider, 17.1.2020; Y. *Ioffe*, The Amendments to the Russian Constitution: Putin's Attempt to Reinforce Russia's

far not been the subject of an in-depth-analysis in an international academic journal.<sup>9</sup>

## II. Drafting Process and Entering into Force

Evidently to avoid the elaborate and burdensome procedure foreseen for amendments to the Russian Constitution's Chapters 1, 2 and 9 in Article 135 of the Russian Constitution (RC),<sup>10</sup> all changes in the 2020 amendments regard Chapters 3 to 8 only. Broadly speaking, these sections regulate the organisation of the Russian state, i.e. its federal structure (Chapter 3), president (Chapter 4), parliament (Chapter 5), government (Chapter 6), judiciary (Chapter 7), and local self-government (Chapter 8). The procedure for amendments to these sections is laid down in Articles 136 and 108(2) RC, a provision almost identical to Article V of the United States Constitution and as such relatively difficult and complex. As a consequence, constitutional amendments were for a long time considered politically unfeasible, and it was only in 2008 when changes to the Russian Constitution were adopted for the first time.<sup>11</sup>

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Isolationist Views on International Law?, EJIL Talk!, 29.1.2020; A. *Cherviatsova*, Imitating Democracy: Putin's Constitutional Initiatives, *Verfassungsblog*, 12.3.2020.

<sup>9</sup> But see International Commission of Jurists, ICJ Briefing Paper on Certain Amendments to the Constitution of the Russian Federation, 26.3.2020, <<https://www.icj.org>>. For a first critical analysis by a group of Russian constitutional lawyers see I. *Aleastrova*/M. *Krasnov*/O. *Kryazhko*/E. *Lukeyanova*/E. *Mishina*/T. *Morshchakova*/T. *Sokolov*, Деконструкция Конституции. Что нужно и что не нужно менять в российском Основном Законе [Deconstruction of the Constitution: What is Necessary and What Doesn't Need to Change in the Russian Basic Law], 2020.

<sup>10</sup> Article 135 RC states: "(1) The provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation may not be revised by the Federal Assembly. (2) If a proposal on revising the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation is supported by three fifths of the total number of members of the Council of Federation and deputies of the State Duma, then in accordance with federal constitutional law, a Constitutional Assembly shall be convened. (3) The Constitutional Assembly shall either confirm the invariability of the Constitution of the Russian Federation or draft a new Constitution of the Russian Federation, which shall be adopted by the Constitutional Assembly by two thirds of the total number of its members or shall be referred to a referendum. In the event that a referendum is held, the Constitution of the Russian Federation shall be considered to have been adopted if over one half of voters who participated in the vote voted in favour of it and provided that over half of the electorate participated in the referendum". See B. *Wieser*, Art. 135, in: B. *Wieser* (ed.), *Handbuch der russischen Verfassung*, 2014.

<sup>11</sup> In total, the Russian Constitution had so far been amended four times: Federal Constitutional Law Amending the Russian Constitution No. 6-FKZ, Об изменении срока полномочий Президента Российской Федерации и Государственной Думы [On Changing the Terms of Office of the New President of the Russian Federation and the State Duma],

## 1. Approval by Parliament and Legislative Authorities of Federal Subjects

Amendments to Chapters 3 to 8 of the Russian Constitution need the approval of at least two-thirds of the deputies of the State Duma (the parliament's lower house) and at least three-quarters of all members of the Federation Council (the parliament's upper house). Subsequently, the agreed draft law has to be approved also by the regional legislative authorities in at least two-thirds of Russia's 85 constituent entities. Following the signing by the Russian president, the law enters into force on the day of its publication.<sup>12</sup>

### a) First Reading in State Duma and Consideration of Proposals by "Working Group"

On 20.1.2020, *Putin* submitted a draft law "On Improving the Regulation of Certain Issues of Public Authority Organisation" to the State Duma, in line with the president's right of initiative to propose constitutional amendments pursuant to Article 134 RC.<sup>13</sup> On 23<sup>rd</sup> January, following a preliminary assessment by the Committee on State Building and Legisla-

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30.12.2008, Собрание законодательства Российской Федерации [Collected Legislation of the Russian Federation] (SZRF) 2009, 1, 1; Federal Constitutional Law Amending the Russian Constitution No. 7-FKZ, О контрольных полномочиях Государственной Думы в отношении Правительства Российской Федерации [On the Powers of Control of the State Duma in Relation to the Government of the Russian Federation], 30.12.2008, SZRF 2009, 1, 2; Federal Constitutional Law Amending the Russian Constitution No. 2-FKZ, О Верховном Суде Российской Федерации и прокуратуре Российской Федерации [On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation], 5.2.2014, SZRF 2014, 6, 548; Federal Constitutional Law Amending the Russian Constitution No. 11-FKZ, О Совете Федерации Федерального Собрания Российской Федерации [On the Federation Council of the Federal Assembly of the Russian Federation], 21.7.2014, SZRF 2014, 30, 4202. See *R. Grote*, The Russian Federation: Introductory Note, in: *R. Wolfrum/E. de Wet* (eds.), *Constitutions of the Countries of the World*, Vol. XV, 2014, Supp. 2014-6, 4.

<sup>12</sup> Article 136 and Article 108(2) RC. The details of the procedure are set out in Federal Law No. 33-FZ, О порядке принятия и вступления в силу поправок к Конституции Российской Федерации [On the Procedure for the Adoption and Entry into Force of Amendments to the Constitution of the Russian Federation], 4.3.1998, SZRF 1998, 10, 1146. See *B. Wieser*, Art. 136, in: *B. Wieser* (note 10), MN 2 et seq.

<sup>13</sup> Draft Federal Constitutional Law Amending the Russian Constitution No. 885214-7, О совершенствовании регулирования отдельных вопросов организации публичной власти [On Improving the Regulation of Certain Issues of Public Authority Organisation], 20.1.2020, <<https://sozd.duma.gov.ru>>.

tion, the Russian parliament's lower house unanimously adopted the draft law in the first reading.<sup>14</sup>

In the following weeks, proposals on changes to the draft law were considered by a "working group" set up by the Russian president,<sup>15</sup> who had stated in that context that the group's task "requires the highest legal and judicial skills".<sup>16</sup> However, only a fraction of the working group's members turned out to have a legal background, while the broad majority consisted of an illustrious group of Kremlin-loyal figures from arts, music, drama, literature, and sports.<sup>17</sup> *Andrei Klishbas*, one of the co-chairs of the working group, had previously argued for the suppression of "fake news and foreign agents media" and had attempted to introduce a Russian "sovereign internet", and *Taliya Khabariyava*, another co-chair, had made calls in the past for a broad discussion about "genetically inherent" values of Russian society to be implemented as national ideology in the Russian Constitution.<sup>18</sup>

In total, the working group received some 900 proposals for constitutional amendments.<sup>19</sup> Following the consideration of these proposals within the working group and several meetings with the Russian president,<sup>20</sup> an updated draft law was prepared by 5.3.2020.<sup>21</sup>

<sup>14</sup> See Государственная Дума приняла в первом чтении предложенные Президентом изменения в Конституцию [State Duma Adopted the Amendments Proposed to the Constitution by the President in the First Reading], State Duma, 23.1.2020, <<http://duma.gov.ru>>.

<sup>15</sup> Presidential Decree, О рабочей группе по подготовке предложений о внесении поправок в Конституцию Российской Федерации [About the Working Group on the Preparation of Proposals on Amendments to the Constitution of the Russian Federation], 15.1.2020, <<http://kremlin.ru>>.

<sup>16</sup> Meeting with Members of the Working Group on Drafting Proposals for Amendments to the Constitution, 16.1.2020, <<http://en.kremlin.ru>>.

<sup>17</sup> Members included the nationalist writer *Zakhar Prilepin*, the former pole vaulter *Yelena Isinbayeva*, actors *Alexander Kalyagin* and *Vladimir Mashkov*, classical pianist *Denis Matsuev*, former cosmonaut *Valentina Tereshkova*, and the directors of the State Hermitage Museum and the State Tretyakov Gallery. See *I. Arkhipov*, Putin's Constitution Dream Team Has Those Who Never Read It, Bloomberg, 13.2.2020.

<sup>18</sup> See *A. Starchenko*, History as a Battleground: What's Next in Russia's Constitutional Reform?, New Eastern Europe, February 2020. Although not among the new constitutional amendments, a controversial new federal law amending the Russian Information Act was adopted in November 2019.

<sup>19</sup> See *M. Eckel*, God, Gays, and "Victorious Power": Other Proposed Amendments to Russia's Constitution, RadioFreeEurope/RadioLiberty, 6.2.2020.

<sup>20</sup> Transcripts of these meetings were published on the Kremlin's website. For English excerpts of these transcripts see <<http://en.kremlin.ru/events/president/news/62592>>; <<http://en.kremlin.ru/events/president/news/62776>>; <<http://en.kremlin.ru/events/president/transcripts/62862>>.

<sup>21</sup> Draft Federal Constitutional Law Amending the Russian Constitution No. 885214-7, О совершенствовании регулирования отдельных вопросов организации и функционирования

## b) Second and Third Reading and Approval in State Duma

On 10.3.2020, the updated draft law was reviewed by the State Duma in the second reading.<sup>22</sup> Apart from a surprising proposal to lift the restrictions on the number of presidential terms or, alternatively, to “reset to zero” the number of terms an incumbent or former president has already held (on this delicate proposal see IV. 1. b) below), it was also proposed to hold snap elections – an idea immediately rejected by the Russian president in a rare appearance in front of the State Duma.<sup>23</sup>

On 11<sup>th</sup> March, the final version of the draft law was approved by the Russian parliament’s lower house in the third reading, with 383 deputies voting for the amendments, none against, and 43 abstaining.<sup>24</sup>

## c) Approval by Federation Council and Legislative Authorities of Federal Subjects

The draft law was then forwarded to the Federation Council, which in turn swiftly approved the amendments, easily surpassing the necessary three-quarters majority (160 senators voted for and 1 against, 3 abstained),<sup>25</sup> and by 13.3.2020, i.e. within record speed of only two days, all regional legislative authorities of the 85 constituent entities of the Russian Federation had followed with their approval.<sup>26</sup> The following day, Russian President *Putin* signed the Law on Improving the Regulation of Certain Aspects of

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публичной власти [On Improving the Regulation of Certain Issues of the Organisation and Functioning of Public Authority], 5.3.2020, <<https://sozd.duma.gov.ru>>.

<sup>22</sup> See В Государственной Думе прошло рассмотрение поправок в Конституцию РФ во втором чтении [State Duma Passed the Amendments to the Constitution of the Russian Federation in the Second Reading], State Duma, 10.3.2020, <<http://duma.gov.ru>>.

<sup>23</sup> Speech at State Duma Plenary Session, 10.3.2020, <<http://en.kremlin.ru>>.

<sup>24</sup> Draft Federal Constitutional Law Amending the Russian Constitution Approved by the State Duma, О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти [On Improving the Regulation of Certain Issues of the Organisation and Functioning of Public Authority], 11.3.2020, <<https://sozd.duma.gov.ru>>. See Изменения в Конституцию РФ приняты в третьем чтении [Amendments to the Constitution of the Russian Federation Adopted in Third Reading], 11.3.2020, <<http://duma.gov.ru>>.

<sup>25</sup> Federation Council Resolution No. 75-SF, 11.3.2020, <<http://council.gov.ru>>. See Совфед одобрил закон об изменениях в Конституции России [Federation Council Approved Law on Amendments to the Russian Constitution], TASS, 11.3.2020.

<sup>26</sup> See the list attached to Federation Council Resolution No. 98-SF, 14.3.2020, <<http://council.gov.ru>>.

the Organisation and Functioning of Public Authority (the Amendments Law).<sup>27</sup>

## 2. Entering into Force in “Special Manner”

As has been noted at the outset of the previous section, federal constitutional laws amending the Russian Constitution generally come into force following their signing by the Russian president on the day of their publication.<sup>28</sup> (Although the Law on the Procedure of Amendments to the Russian Constitution allows for the setting of a different *date* of entry into force by the amendment law itself, alternative *methods* for entry into force are not mentioned in that law.<sup>29</sup>) The Amendments Law deviates from that rule by being structured in a way that only its Article 3 enters into force on the day of its publication, while the rest of the law – with Article 1 containing the actual constitutional amendments – enters into force in a way the law itself calls “a special manner”, a complex three-stage mechanism that seems to have been invented especially for that occasion:

In a first stage, the Russian Constitutional Court, upon the request by the Russian president, shall determine the constitutionality of the amendments listed in Article 1 of the Amendments Law as well of the procedure for its entry into force;<sup>30</sup> second, in case the Constitutional Court confirms the constitutionality, Article 2 enters into force which provides that an “all-Russian vote” on the amendments shall be held, again on the initiative of the Russian president, in accordance with the requirements set out in that article;<sup>31</sup> third, only if more than half of the voters in the “all-Russian vote” agree with the constitutional amendments, then Article 1 containing the actual amendments shall enter into force.<sup>32</sup>

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<sup>27</sup> Federal Constitutional Law Amending the Russian Constitution No. 1-FKZ, О совершенствовании регулирования отдельных вопросов организации публичной власти [On Improving the Regulation of Certain Issues of Public Authority Organisation], 14.3.2020, SZRF 2020, 11, 1416.

<sup>28</sup> See note 12.

<sup>29</sup> Federal Law No. 33-FZ (note 12), Article 13.

<sup>30</sup> Federal Constitutional Law Amending the Russian Constitution No. 1-FKZ 2020 (note 27), Article 3(2).

<sup>31</sup> Federal Constitutional Law Amending the Russian Constitution No. 1-FKZ 2020 (note 27), Article 3(3).

<sup>32</sup> Federal Constitutional Law Amending the Russian Constitution No. 1-FKZ 2020 (note 27), Article 3(4) and (5).

### a) Approval by Russian Constitutional Court

In line with this three-stage mechanism, following the signing of the Amendments Law by *Putin* on Saturday, 14.3.2020, the Russian Constitutional Court deliberated over the weekend and issued its decision on Monday, finding both the special mechanism for entry into force and the proposed constitutional amendments themselves in conformity with the Russian Constitution.<sup>33</sup>

In the meantime, public protest against the planned amendments began to gather momentum. On the same weekend, more than four hundred scholars, journalists, and legal experts had signed and published an open letter on the website of the independent radio station Echo of Moscow, warning of a “constitutional crisis and a pseudo-legal, unconstitutional coup”.<sup>34</sup> Already earlier, several opposition groups had filed requests with Moscow city authorities to hold mass rallies against the planned amendments, but from 10.3.2020 all public protests were banned in the city to prevent the spread of the coronavirus.<sup>35</sup>

### b) “All-Russian Vote”

Already in his January address to the Federal Assembly, *Putin* had noted that a referendum was not legally required for implementing the proposed changes, but argued that a “vote of Russian citizens on the entire package of the proposed amendments” was necessary for reasons of legitimacy. “The final decision must be made only on the basis of [the all-Russian vote’s] results”, *Putin* stated, adding that

“[t]he opinion of people, our citizens as the bearers of sovereignty and the main source of power must be decisive. In the final analysis everything is decided by the people, both today and in the future. [...] We will be able to build a strong, prosperous and modern Russia only on the basis of unconditional respect for the opinions of the people.”<sup>36</sup>

<sup>33</sup> Russian Constitutional Court Decision No. 1-3, 16.3.2020, SZRF 2020, 12, 1855.

<sup>34</sup> Не допустить конституционный кризис и антиконституционный переворот. Обращение учёных, писателей и журналистов к гражданам России [Prevent a Constitutional Crisis and an Unconstitutional Coup. Appeal of Scholars, Writers and Journalists to Russian Citizens], Echo of Moscow, 15.3.2020 <<https://echo.msk.ru>>. See Russian Scholars, Legal Experts Sign Up Against “Constitutional Coup”, RadioFreeEurope/RadioLiberty, 16.3.2020.

<sup>35</sup> See Russia’s Federation Council Approves Bill Allowing Putin to Run For a New Term, RadioFreeEurope/RadioLiberty, 11.3.2020.

<sup>36</sup> Presidential Address to the Federal Assembly (note 1).

However, a first representative survey by the independent Levada Center conducted between 20.-26.2.2020 showed that around two-thirds of the surveyed had no clear opinion on the essence of the proposed amendments, with roughly the same percentage of people stating that they either had never read the Russian Constitution (41 %) or that they have read it, but do not remember anything (29 %).<sup>37</sup> Moreover, in a second representative survey conducted between 19.-25.3.2020 by the same organisation, more than one-fourth of the surveyed stated that they will definitely or most likely not take part in the upcoming vote, naming as the most common reason for their intention not to participate that “it makes no sense, it’s useless, everything has already been decided”.<sup>38</sup> (Although support rates for the amendments dropped during the coronavirus pandemic to a narrow lead of only 6 % in March 2020, they increased again by the end of April 2020.<sup>39</sup> In the end, at least according to official results of the “all-Russian vote”, an overwhelming 78.56 % of the electorate supported the amendments, on a 67.88 % turnout.<sup>40</sup>)

The requirements for the procedure and conducting of the “all-Russian vote” were laid out in Article 2 of the Amendments Law. They are problematic (to say the least) for a number of reasons. First, the rules set out in the Amendments Law differed significantly from those provided in the Federal Constitutional Law on Referendum, adopted in 2004 to concretise the rules on referendums mentioned in Article 3 RC.<sup>41</sup> Article 1 of the Law on Referendum provides that popular votes may be held under that law on “questions of state importance”,<sup>42</sup> among which are, according to its Article 6(4), “issues related to the jurisdiction of the Russian Federation” – i.e.: also

<sup>37</sup> Levada Center, Конституция и всенародное голосование, [Constitution and Nationwide Vote], 28.2.2020, <<https://www.levada.ru>>.

<sup>38</sup> Levada Center, Общероссийское голосование по поправкам в Конституцию [All-Russian Vote on the Amendment to the Constitution], 27.3.2020, <<https://www.levada.ru>>.

<sup>39</sup> Levada Center, Общероссийское голосование по поправкам в Конституцию [All-Russian Vote on the Amendment to the Constitution], 6.5.2020, <<https://www.levada.ru>>.

<sup>40</sup> See Central Election Commission of the Russian Federation, Общероссийское голосование по вопросу одобрения изменений в Конституцию Российской Федерации [All-Russian Vote on Approval of Amendments to the Constitution of the Russian Federation], 3.7.2020, <<http://www.vybory.izbirkom.ru>>. For a discussion of allegations of fraud based on statistical evidence see Data Scientist Claims “Staggering” Fraud at Russia’s Constitution Vote, *Moscow Times*, 3.7.2020.

<sup>41</sup> Russian Federal Constitutional Law No. 5-FKZ, О референдуме Российской Федерации [On the Referendum of the Russian Federation], 28.6.2004, SZRF 2004, 27, 2710. On the complex and cumbersome procedure of this law see *B. Breig*, Sachunmittelbare Demokratie in Russland, in: P. Neumann (ed.), Sachunmittelbare Demokratie im interdisziplinären und internationalen Kontext 2010/2011, 2012, 255, 269 et seq.

<sup>42</sup> On the meaning and possible origins of this term see *B. Breig* (note 41), 270.

the adoption and amending of the constitution.<sup>43</sup> The establishment of different rules for the procedure and conducting of the “all-Russian vote” therefore appears as an intentional bypassing of existing rules on referendums.

Second, the procedure for the “all-Russian vote” set out in Article 2 of the Amendments Law does not provide for, and in some cases even contradicts, certain electoral standards.<sup>44</sup> For example, the general phrasing of the question put to the vote (“Do you agree with the amendments to the Constitution of the Russian Federation?”)<sup>45</sup> does not respect the principle of unity of content, i.e. the requirement that the voter must not be called to accept or refuse as a whole provisions without an intrinsic link.<sup>46</sup> Another example is the lack of a provision regarding international observation.<sup>47</sup>

### III. Mainly Symbolic Amendments

#### 1. Social Guarantees

When the Russian president had first proposed to amend the Russian Constitution in his address to the Federal Assembly, the inclusion of social guarantees was a central argument for why changes were necessary. For his current presidential term, *Putin* has put the reduction of poverty on the top of his policy agenda. Shortly before his re-election as president in March 2018, he had called for a drastic reduction in poverty by 2024,<sup>48</sup> a goal which to many observers seemed unrealistic.<sup>49</sup> Currently, the official poverty line is set at 11,185 roubles per month (at the time of writing approximately 128 euros or 150 US dollars), and according to Rosstat, the Russian Federal State Statistics Service, the percentage of people with an income be-

<sup>43</sup> Russian Federal Constitutional Law No. 5-FKZ (note 41), Articles 1 and 6(4); Article 71(a) RC.

<sup>44</sup> See generally Venice Commission Study No. 371/2006, Code of Good Practice on Referendums, 25.10.2018, CDL-AD(2007)008 rev-cor.

<sup>45</sup> Presidential Decree No. 188, О назначении общероссийского голосования по вопросу одобрения изменений в Конституцию Российской Федерации [On Setting a Date for an All-Russian Vote on Amendments to the Constitution of the Russian Federation], 17.3.2020, SZRF 2020, 12, 1743, Article 2.

<sup>46</sup> See Venice Commission (note 44), III. 2.

<sup>47</sup> Venice Commission (note 44), II. 3.2.

<sup>48</sup> Presidential Address to the Federal Assembly, 1.3.2018, <<http://en.kremlin.ru>>.

<sup>49</sup> See *B. Aris*, Can Russia Halve Its Poverty Level?, *Moscow Times*, 14.5.2019. On poverty in Russia generally see *N. E. Tikhonova/S. V. Mareeva*, Poverty in Contemporary Russian Society: Formation of a New Periphery, *Russian Politics* 1 (2016), 159.

low the subsistence minimum was 13.5 % in the first half of 2019.<sup>50</sup> (The subjective poverty line is much higher: more than two thirds of the respondents to a representative survey conducted by the Levada Center estimated their income below the required minimum subsistence level.<sup>51</sup>) Among pensioners, the risk of poverty is particularly high: in 2018, the pension level amounted to only 30.8 % of the pre-retirement income, i.e. almost 10 % below the International Labour Organization's minimum standard of 40 %.<sup>52</sup>

Amended Article 75 RC now guarantees a subsistence minimum also on a constitutional level as well as a pension system for Russian citizens "on the basis of universality, justice and solidarity". Arguably, the significance of this amendment is limited to a symbolic value since the provision is evidently not formulated as a fundamental right for which individuals can seek protection in courts, and its inclusion in Chapter 3 – which otherwise regulates monetary policy, the central bank and the Russian tax system – rather than in Chapter 2 among other fundamental rights seems not intended to change the law as it stood already prior to the amendments.<sup>53</sup> To the contrary: against the backdrop of the controversial pension reform of 2018 which sparked nationwide protests and shrank *Putin's* popularity, the amendment appears more like an attempt to appease the public at no additional cost for the Russian government.<sup>54</sup>

<sup>50</sup> See the figures reprinted in Russian Analytical Digest No. 249, 20.3.2020, 6 (Figure 1).

<sup>51</sup> Levada Center, Оценка необходимого прожиточного минимума среди россиян [Estimation of the Necessary Living Wage Among Russians], 20.9.2019, <<https://www.levada.ru>>.

<sup>52</sup> See *M. Brand*, Fighting Poverty in Russia, Russian Analytical Digest No. 249, 20.3.2020, 2, 4.

<sup>53</sup> In this vein already *C. von Gall*, Herrschaft über die Verfassung? Die Vorschläge Präsident Putins zur russischen Verfassungsreform, Verfassungsblog, 21.1.2020. In 2005, the Russian Constitutional Court affirmed that the human dignity guaranteed in Article 21 RC can in principle be violated in case the state fails to satisfy basic existential needs of pensioners. However, also other state benefits such as the use of public transport have to be considered, the court ruled, and therefore did not find a violation of the constitution in the case at hand, Russian Constitutional Court Order No. 17-O, 15.2.2005, Rossiiskaya Gazeta, 20.4.2005. Already earlier, a possible right to minimum assistance was discussed in front of the ECtHR, see *Larioshina v Russia*, judgement, 23.4.2002, Application No. 56869/00. On the issue generally see *I. Leijten*, The Right to Minimum Subsistence and Property Protection under the ECHR: Never the Twain Shall Meet?, European Journal of Social Security 21 (2019), 307.

<sup>54</sup> The key feature of the reform is a gradual raise of the retirement age for women from 55 to 60 and for men from 60 to 65. See *M. Eckel*, Putin vs. Pensions: Will His Reelection Finally Free Him to Tackle Looming Crisis?, RadioFreeEurope/RadioLiberty, 16.5.2018; Putin Signs Unpopular Bill Raising Retirement Ages by Five Years, RadioFreeEurope/RadioLiberty, 3.10.2018.

## 2. Enforcement of Decisions by International Bodies

Another major justification for amending the Russian Constitution was the strengthening of Russia's sovereignty. In his address to the Federal Assembly, *Putin* stated that "Russia can be and can remain Russia only as a sovereign state. Our nation's sovereignty must be unconditional". Therefore,

"requirements of international law and treaties as well as decisions of international bodies can be valid on the Russian territory only to the point that they do not restrict the rights and freedoms of our peoples and citizens and do not contradict our Constitution".<sup>55</sup>

Consequently, a sentence has now been added to Article 79 RC, stating that decisions by international bodies adopted on the interpretation of provisions of international treaties to which the Russian Federation is a party shall not be enforced in Russia if they are contrary to the constitution.<sup>56</sup>

Again, this amendment has to be considered largely symbolic since this was already the legal situation prior to the constitutional changes: in 2015, the Russian Constitutional Court had concluded that if a judgement of the European Court of Human Rights (ECtHR) is in contradiction with the Russian Constitution, then Russia has the right not to implement measures foreseen in the judgement if this constitutes the only possible means to avoid violating the constitution.<sup>57</sup> Subsequently, the Russian parliament made respective amendments to the Law on the Russian Constitutional Court, thereby turning the judgement into positive law.<sup>58</sup>

Since this readjustment towards the European human rights protection system by the Russian government in 2015, the relationship between the Russian Constitutional Court and the ECtHR has further worsened.<sup>59</sup> Less

<sup>55</sup> Presidential Address to the Federal Assembly (note 1).

<sup>56</sup> On this amendment see in particular also the analyses by *G. Bogush* (note 8) and the International Commission of Jurists (note 9), Section II.

<sup>57</sup> Russian Constitutional Court Decision No. 21-P, 14.7.2015, SZRF 2015, 30, 4658. See *L. Mälksoo*, Russia's Constitutional Court Defies the European Court of Human Rights: Constitutional Court of the Russian Federation Judgement of 14 July 2015, N 21-II/2015, *Eu Const. L. Rev.* 12 (2016), 377.

<sup>58</sup> Federal Constitutional Law No. 1-FKZ, О Конституционном Суде Российской Федерации [On the Constitutional Court of the Russian Federation], 21.7.1994, SZRF 1994, 13, 1447, amended by Federal Constitutional Law No. 7-FKZ, 14.12.2015, SZRF 2015, 51, 7229.

<sup>59</sup> See *M. Aksenova/I. Marchuk*, Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights, *I.CON* 16 (2018), 1322.

than a year after the Law on the Russian Constitutional Court had been amended, the Constitutional Court made use of the new provision for the first time and ruled that it was impossible to enforce the ECtHR's *Anchugov and Gladkov* judgement in Russia.<sup>60</sup> In a second instance in 2017, the court overturned a demand by the ECtHR for Russia to pay 1.9 billion euros to shareholders of the former Yukos Oil Company, again based on the argument that Russia has the right not to implement measures ordered by the ECtHR to avoid violating its constitution.<sup>61</sup>

In response, the Council of Europe's Commissioner for Human Rights condemned Russia's refusal to abide by the ECtHR's ruling, stating that its non-compliance "bears far-reaching consequences for human rights protection in Russia and elsewhere in Europe".<sup>62</sup> Already earlier, the Venice Commission had concluded that possible declarations of unenforceability of judgements by the ECtHR based on the amended Law of the Russian Constitutional Court violate the European Convention on Human Rights and are at variance with the Vienna Convention on the Law of Treaties.<sup>63</sup> Shortly prior to its confirmation in the "all-Russian vote", the commission confirmed this assessment and considered that the amendment to Article 79 RC should be removed.<sup>64</sup>

<sup>60</sup> Russian Constitutional Court Decision No. 12-P, 19.4.2016, SZRF 2016, 17, 2480; ECtHR, *Anchugov and Gladkov v. Russia*, 4.7.2013, Application Nos. 1157/04 and 15162/05. On the subsequent developments see *G. Bogush*, Case Closed, But What About the Execution of the Judgement? The Closure of *Anchugov and Gladkov v. Russia*, EJIL Talk!, 30.10.2019.

<sup>61</sup> Russian Constitutional Court Decision No. 1-P, 19.1.2017, SZRF 2017, 5, 866; ECtHR, *AO Neftyanaya Kompaniya Yukos v. Russia*, 31.7.2014, Application No. 14902/04. See *M. Timofeev*, Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgement, *Verfassungsblog*, 26.1.2017.

<sup>62</sup> Statement by the Commissioner for Human Rights, Commissioner Concerned About Non-Implementation of a Judgement of the European Court of Human Rights, 20.1.2017, <<https://www.coe.int>>.

<sup>63</sup> Venice Commission Opinion No. 832/2015, Interim Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of the Russian Federation, 15.3.2016, CDL-AD(2016)005, paras. 99-100.

<sup>64</sup> Venice Commission Opinion No. 981/2020, Opinion on the Draft Amendments to the Constitution (as Signed by the President of the Russian Federation on 14.3.2020) Related to the Execution in the Russian Federation of Decisions by the European Court of Human Rights, 18.6.2020, CDL-AD(2020)009, para. 68. Initially, the opinion was planned to be considered on the 20.-21.3.2020 plenary session, but eventually had to be postponed to the June 2020 session due to the spread of the coronavirus. See 122<sup>nd</sup> Plenary Session of the Venice Commission of the Council of Europe – Opinions Adopted by Written Procedure, 20.-21.3.2020, <<https://www.venice.coe.int>>.

### 3. Amendments with Ideological Elements

“No ideology shall be proclaimed as State ideology or as obligatory”, the Russian Constitution explicitly states in its Article 13(2). What counts as ideology, however, is of course a matter of debate.<sup>65</sup> Amendments to the Russian Constitution that proclaim a “Western democratic” or “liberal” state would in any case run counter to that prohibition,<sup>66</sup> as would probably changes that explicitly stress national-religious and greater Russian sentiments or any other codification of a greater Russian civilisation.<sup>67</sup> Nevertheless, a whole series of amendments has at least ideological elements, and most of them are in any case problematic also for other reasons.

#### a) Prohibition to Surrender any Part of Russian Territory

Supplemented Article 67(2)<sup>1</sup> RC postulates that actions “aimed at alienating part of the territory of the Russian Federation as well as calls for such actions, are not allowed”. According to *Pavel Krashenninikov*, the third of the co-chairs of the “working group”, relevant amendments in the Russian Criminal Code and the Code of Administrative Offences will complement the new provision.<sup>68</sup> Evidently, the provision is intended to suppress domestic calls for “returning” Crimea to Ukraine following its illegal annexation by Russia in 2014.<sup>69</sup> But it possibly also has implications for other un-

<sup>65</sup> For views in that context by Russian constitutional lawyers see *V. Yakunin*, Государственная идеология и национальная идея. Конституционно-ценностный подход [State Ideology and National Idea. Constitutional-Value Approach], *Gosudarstvo i Pravo* 2005, No. 5, 5; *N. S. Kunichkina*, Идеологическое многообразие и запрет на государственную (обязательную) идеологию в нормах Конституции Российской Федерации [Ideological Diversity and the Ban on State (Obligatory) Ideology in the Norms of the Constitution of the Russian Federation], *Konstitutsionnoe i munitsipal'noe pravo* 2008, No. 14, 8; *A. M. Tsaliev*, О государственной идеологии в контексте статьи 13 Конституции Российской Федерации [On State Ideology in the Context of Article 13 of the Constitution of the Russian Federation], *Leningradskii yuridicheskii zhurnal* 2018, No. 4, 82.

<sup>66</sup> See *B. Wieser*, Art. 13, in: *B. Wieser* (note 10), MN 7.

<sup>67</sup> For that reason, in 2011 a group of scholars from the Department of Public Policy of Moscow State University proposed a model for an entirely new constitution which was explicitly oriented anti-Western and full of ideological references to a greater Russian civilization: *S. S. Sulakshin*, Научный макет новой Конституции России [Scientific Model of a New Russian Constitution], 2011. See *O. Luchterhandt*, Einleitung, in: *B. Wieser* (note 10), MN 46.

<sup>68</sup> See Запрет на отчуждение территорий РФ отразят в Уголовном кодексе и КоАП [Ban on the Alienation of Territories of the Russian Federation will be Reflected in the Criminal Code and the Code of Administrative Offences], *Regnum News Agency*, 25.2.2020.

<sup>69</sup> The illegality of Russia’s annexation of Crimea is widely assumed in (Western) international law scholarship, while leading Russian academics follow the official view of Russia that

resolved disputes like that over the Kuril Islands which Russia considers an integral part of its territory as a result of World War II while Japan regards the islands to be illegally occupied by Russia.<sup>70</sup> Moreover, as the transcript of the working group's second meeting with the Russian president shows, the amendment was also proposed to prevent more exotic calls aimed at alienating part of Russian territory like a possible cession of Kaliningrad Oblast to Germany or Lithuania.<sup>71</sup>

## b) Russia as “Legal Continuator” of the Soviet Union

A further change in Article 67 RC regards the question of the legal effects of the transition of the Soviet Union to the Russian Federation. Supplemented Article 67(1)<sup>1</sup> RC reads:

“The Russian Federation is the legal continuator of the USSR in its territory as well as the legal continuator (*pravoprodolzhatelem*) of the Soviet Union in relation to membership in international organisations, their bodies, participation in international treaties, as well as in relation to obligations and assets of the Soviet Socialist Republics of the USSR stipulated by international treaties outside the territory of the Russian Federation.”

On 17.2.2020, in a separate opinion, judge of the Russian Constitutional Court *Konstantin Aranovsky* had rejected that the Russian Federation has

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the incorporation of the peninsula into the Russian Federation was a lawful expression of the population of Crimea's right to self-determination. See only the contributions in this journal on the matter, e.g. *V. Bilková*, The Use of Force by the Russian Federation in Crimea, *HJIL* 75 (2015), 27, with *A. Kapustin*, Crimea's Self-Determination in the Light of Contemporary International Law, *HJIL* 75 (2015), 101. For the Russian government's view see Legal Arguments for Russia's Position on Crimea and Ukraine, 27.10.2014, available at: <<http://russianunesco.ru/eng/article/1637>>. On the comparative aspect of this divide see *A. Roberts*, Crimea and the South China Sea: Connections and Disconnects among Chinese, Russian, and Western International Lawyers, in: *A. Roberts/P. B. Stephan/P.-H. Verdier* (eds.), *Comparative International Law*, 2018, 111, 116 et seq.

<sup>70</sup> For an overview over this dispute and the different legal positions see *Y. Zinberg*, Kuril Islands, in: *R. Wolfrum* (ed.), *MPEPIL*, last updated: May 2011.

<sup>71</sup> See Встреча с рабочей группой по подготовке предложений о внесении поправок в Конституцию [Meeting With the Working Group on Drafting Proposals for Amendments to the Constitution], 13.2.2020, <<http://kremlin.ru>>. Both possibilities were discussed in Russian media following the annexation of Crimea. See *G. Tétrault-Farber*, If Russia Gets Crimea, Should Germany Get Kaliningrad?, *Moscow Times*, 21.3.2014; *A. Taranova*, С лёгкой претензией на Калининград [With a Slight Claim to Kaliningrad], *Novaya Gazeta*, 26.9.2014.

maintained state continuity with the Soviet Union.<sup>72</sup> The Russian government, in turn, rejected the judge's view and dismissed his comments as personal opinion.<sup>73</sup> *Aranovsky's* separate opinion could have been the starting point for a domestic debate on a long-disputed question. In Russian legal doctrine, scholars generally follow the official view of the Russian government according to which the transition from the Soviet Union to the Russian Federation can neither be interpreted as a series of secessions (making Russia legally identical with the former Union, while the remaining fourteen Soviet republics would have to be considered successor states of the Soviet Union) nor as a dismemberment (resulting in the complete disappearance of the Soviet Union as a subject of international law and making all former fifteen Soviet republics successor states). Instead, the Russian government took a position somewhere in between, describing the Russian Federation as the "continuator state" (*gosudarstvo prodolzhatel'*) of the Soviet Union which at the same time is not identical to the Soviet Union.<sup>74</sup>

Against this background, supplemented Article 67(1)<sup>1</sup> RC – which originates in a proposal by the "working group" made only nine days after *Aranovsky's* separate opinion –<sup>75</sup> appears as an attempt to put an end to a debate before it could gather more momentum.<sup>76</sup>

### c) Protection of "Historical Truth"

Supplemented Article 67<sup>1</sup> RC furthermore provides in a third paragraph that Russia "honours the memory of the defenders of the Fatherland", ensures the "protection of historical truth", and prohibits "belittling the peo-

<sup>72</sup> Russian Constitutional Court Decision No. 39-P, 10.12.2019, 29 et seq. (Separate Opinion *Aranovsky*). See *E. Razumnyi*, Russia Should Drop "Terrorist" Soviet Legacy, Constitutional Court Judge Says, *Moscow Times*, 17.2.2020.

<sup>73</sup> See В Кремле будут исходить из того, что Россия является правопреемницей СССР [Kremlin will Assume that Russia is Successor of the USSR], *Interfax*, 17.2.2020.

<sup>74</sup> See e.g. *I. Lukashuk*, Rußland als Rechtsnachfolger in völkerrechtliche Verträge der UdSSR, *Osteuroparecht* 39 (1993), 235, 239 et seq.; *B. G. Boyarshinov*, Международные договоры в правовой системе Российской Федерации [International Treaties and the Legal System of the Russian Federation], *Zakonodatel'stvo* 1997, No. 4, 59. The formulation is not a technical term but was invented by the Russian government at the time. For a discussion of this claim see *A. Nußberger*, Russia, in: *R. Wolfrum* (ed.), *MPEPIL*, last updated: October 2009, MN 105 et seq. (generally concurring).

<sup>75</sup> See Встреча с рабочей группой по подготовке предложений о внесении поправок в Конституцию [Meeting with Members of the Working Group on Drafting Proposals for Amendments to the Constitution], 26.2.2020, <<http://kremlin.ru>>.

<sup>76</sup> But see Россия сама является жертвой Советского Союза [Russia Itself Is a Victim of the Soviet Union], *Kommersant*, 17.2.2020.

ple's heroic protection of the Motherland". The amendment was proposed in the context of the preparations for the upcoming celebrations of the 75<sup>th</sup> anniversary of the Soviet Union's victory in World War II.<sup>77</sup> Already in his address to the Federal Assembly in January, *Putin* had stated:

"For Russia, May 9 is the greatest and [a] sacred holiday. We are proud of the generation of victors and honour their feat, and our memory is not only a tribute to our heroic past, but it also serves our future, inspires us and strengthens our unity. It is our duty to defend the truth about the [v]ictory; otherwise what shall we say to our children if a lie, like a disease, spreads all over the world? We must set facts against outrageous lies and attempts to distort history."<sup>78</sup>

With the spread of "outrages lies and attempts to distort history", the Russian president is referring to the "memory wars" that are increasingly fought between Russia and other states in connection with anniversaries of historical events, most recently the 80<sup>th</sup> anniversary of the signing of the *Molotov-Ribbentrop* Pact in August 2019 and the 75<sup>th</sup> anniversaries of the liberation of the Auschwitz concentration camp in January and the victory over Nazi Germany in World War II in May 2020, respectively.<sup>79</sup> In recent years, Russia has established a whole set of official alternative narratives concerning its Soviet past, often fundamentally deviating from well-established "Western" interpretations.<sup>80</sup> To doubt these official Russian interpretations is not only disfavoured, but increasingly criminalised. Most notoriously, an amendment to the Russian Criminal Code from 2014 now prohibits the public "dissemination of knowingly false information about the activities of the Union of Soviet Socialist Republics (USSR) during World War II".<sup>81</sup>

Against this background, the constitutional amendment to protect a particular (and often *very* controversial) official reading of historical events

<sup>77</sup> The celebrations had to be postponed due to the spread of the coronavirus, but were eventually held amid the ongoing pandemic on 24.6.2020, only days ahead of the "all-Russian vote", see Russia Stages Massive "Victory Day" Parade Amid Pandemic, RadioFreeEurope/RadioLiberty, 24.6.2020.

<sup>78</sup> Presidential Address to the Federal Assembly (note 1).

<sup>79</sup> See e.g. *M. Eckel*, "Memory Wars": Polish, Russian Fight Over World II Shifts to Auschwitz, RadioFreeEurope/RadioLiberty, 20.1.2020.

<sup>80</sup> For the most recent example see *V. Putin*, The Real Lessons of the 75<sup>th</sup> Anniversary of World War II, The National Interest, 18.6.2020.

<sup>81</sup> Russian Criminal Code, Russian Federal Law No. 63-FZ, 13.6.1996, SZRF 1996, 25, 2954, Article 354(3), supplemented by Russian Federal Law No. 128-FZ, 5.5.2014, SZRF 2014, 19, 2333. See *G. Bogush/I. Nuzov*, Russia's Supreme Court Rewrites History of the Second World War, EJIL Talk!, 28.10.2016.

seems only the next logical step in a broader trend of politicised memory legislation in Russia.<sup>82</sup>

#### d) Russians as a “State-Forming People”

Whereas Article 68(1) RC previously simply established the Russian language as “the State language on the entire territory of the Russian Federation”,<sup>83</sup> the amended paragraph now additionally speaks of Russian as the language “of a state-forming people (*gosudarstvo-obrazuyushchego naroda*) that is part of a multinational union of equal peoples of the Russian Federation”, thereby seemingly stipulating that ethnic Russians are first among equals in relation to the more than 190 other ethnic groups living in the Russian Federation.

The term “multinational union of equal peoples” appears to be a variant of “the multinational people of the Russian Federation” mentioned in the preamble of the Russian Constitution, but also in Article 3(1) RC, of which the latter defines it as the state’s “bearer of sovereignty and the sole source of power”. In the past, Russian scholars were careful to avoid defining the “multinational people” – a Soviet remnant –<sup>84</sup> in terms of ethnicity and nationality. *Suren Avakyan* for example, one of the most influential constitutional lawyers in Russia and also a member of the “working group”, defines the term in his reference work on Russian constitutional law as “all citizens [emphasis in the original] of the Russian Federation regardless of age and nationality”.<sup>85</sup> By linking the Russian language to one particular “state-forming people”, this careful differentiation – “people” on the one hand, ethnicity and nationality on the other hand – has arguably been conflated. Which is surprising, considering that it can be used as an argument that there is more than one bearer of the right to self-determination on the territory of the Russian Federation, to the effect that the populations of Chech-

<sup>82</sup> See *N. Kopolov*, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, 2017.

<sup>83</sup> On the meaning of Russian as the “state language” see *M. Geistlinger*, Art. 68, in: *B. Wieser* (note 10), MN 8 et seq.

<sup>84</sup> See Article 70 of the so-called *Brezhnev* Constitution of 1977 which spoke of the Soviet Union as an “integral, federal, multinational state” that embodies “the state unity of the Soviet people”, Конституция (Основной Закон) Союза Советских Социалистических Республик [Constitution (Fundamental Law) of the Union of Soviet Socialist Republics], 7.10.1977, *Vedomosti Verkhovnogo Soveta SSSR*, 1977, 41, 616.

<sup>85</sup> *S. Avakyan*, Конституционное право России [Constitutional Law of Russia], Vol. 1, 5<sup>th</sup> ed. 2014, 97.

nya, Tatarstan or Crimea could potentially claim a right of secession under international law.<sup>86</sup>

### e) Reference to “Faith in God”

According to Article 14 RC, the Russian Federation is a secular state in which “[n]o religion may be established as a State or a compulsory religion”. Moreover, unlike many other but in line with most post-Communist constitutions,<sup>87</sup> prior to the amendments not even a general reference to god in the preamble was included. Therefore, the reference to a “faith in god” in supplemented Article 67<sup>1</sup>(2) RC has to be considered a significant, even if only symbolic change.

The worrisome aspect of this amendment is therefore not the reference to god as such but that it originates in a proposal by *Patriarch Kirill*, the head of the Russian-Orthodox Church, made on the occasion of the 11<sup>th</sup> anniversary of his enthronement on 1.2.2020.<sup>88</sup> Ever since the adoption of the Law on Religion in 1997,<sup>89</sup> Orthodox Christianity has regained a privileged role in Russia,<sup>90</sup> and *Kirill* has collaborated closely with the Russian government in the past in all spheres of public life, including legal matters. For example,

<sup>86</sup> It is even more surprising considering the fact that this – by the Russian legislator certainly unintended – interpretation of the plural form of “people” has been discussed (and rejected) by Russian constitutional lawyers in the context of Article 5(3) RC enshrining the “self-determination of peoples in the Russian Federation”. *Avakyan* for example insists in his textbook that there is only one bearer of the right to self-determination in the Russian Federation, and that is “the multinational people of the Russian Federation” mentioned in the preamble, basing his argument on the preposition “in the Russian Federation” in Article 5 RC instead of “of the Russian Federation” in the preamble, *S. Avakyan* (note 85), 98. Evidently, even this explanation is not possible any longer in the context of amended Article 68(1) RC which explicitly speaks of “peoples of the Russian Federation”. On the right to self-determination in the Russian Constitution see *J. Socher*, *Russia and the Right to Self-Determination in the Post-Soviet Space*, forthcoming.

<sup>87</sup> See *W. Voermans/M. Stremmer/P. Cliteur*, *Constitutional Preambles: A Comparative Analysis*, 2017, Chapter 3.4.3 (footnote 26).

<sup>88</sup> See Патриарх Кирилл предложил упомянуть Бога в Конституции [Patriarch Kirill Proposed Mentioning God in Constitution], *Kommersant*, 1.2.2020.

<sup>89</sup> Russian Federal Law No. 125-FZ, О свободе совести и о религиозных объединениях [On Freedom of Conscience and Religious Associations], 26.9.1997, SZRF 1997, 39, 4465. See e.g. *W. Daniel/C. Marsh*, *Russia’s 1997 Law on Freedom of Conscience in Context and Retrospect*, *Journal of Church & State* 49 (2007), 5.

<sup>90</sup> See *C. Knox*, *The Symphonic Ideal: The Moscow Patriarchate’s Post-Soviet Leadership*, *Europe-Asia Studies* 55 (2003), 575. See also *P. Glanzer/K. Petrenko*, *Religion and Education in Post-Communist Russia: Russia’s Evolving Church-State Relations*, *Journal of Church & State* 49 (2007), 53.

the Patriarch has criticised the human rights understanding of western states as “anthropocentric”, and has challenged a secular approach to human rights and its universality.<sup>91</sup>

#### f) Marriage as “Union of a Man and a Woman”

It is also in that context in which the definition of marriage as a “union of a man and a woman” in supplemented Article 71(g)<sup>1</sup> RC appears in a different light. To be sure, same-sex marriage was not legal under Russian law already prior to the amendments,<sup>92</sup> with the Russian Family Code explicitly describing marriage as a heterosexual partnership between a man and a woman.<sup>93</sup> In recent years however, the lesbian, gay, bisexual, and transgender (LGBT) rights situation in Russia has increasingly deteriorated, also due to interventions by the Russian-Orthodox Church. In 2017 for example, *Patriarch Kirill* maintained that homosexual marriage laws are a threat to “humanity” and compared their adoption to fascist laws in Nazi Germany.<sup>94</sup> Already earlier, the notorious Law to Protect Children from Information that Promotes the Denial of Traditional Family Values was adopted,<sup>95</sup> more commonly known in the anglophone world as the “Gay Propaganda Law” condemned by human rights groups as an “assault on freedom of expression” and a “tool for discrimination”.<sup>96</sup>

<sup>91</sup> See e.g. *L. Mälksoo*, The Human Rights Concept of the Russian Orthodox Church and Its Patriarch Kirill I: A Critical Appraisal, *European Yearbook on Human Rights*, 2013, 403.

<sup>92</sup> See *C. Schmidt*, Art. 38, in: *B. Wieser* (note 10), MN 2.

<sup>93</sup> Federal Law No. 233-FZ, Семейный кодекс Российской Федерации [Family Code of the Russian Federation], 29.12.1995, Article 12(1), SZRF 1996, 1, 16. See also Order of the Russian Government No. 1618-г, Концепция государственной семейной политики в Российской Федерации на период до 2025 года [Concept of State Family Policy in the Russian Federation for the Period until 2025], 29.8.2014, Rossiiskaya Gazeta, 29.8.2014.

<sup>94</sup> See Head of Orthodox Church Compares Homosexual Marriage to Nazism, *Moscow Times*, 29.5.2017.

<sup>95</sup> Federal Law No. 135-FZ, 29.6.2013, SZRF 2013, 14, 1658.

<sup>96</sup> Amnesty International, Russia’s Anti-Gay “Propaganda Law” Assault on Freedom of Expression, 25.1.2013, <<https://www.amnesty.org>>; Human Rights Watch, Russia: Anti-LGBT Law a Tool for Discrimination: An Anniversary Assessment, 29.6.2014, <<https://www.hrw.org>>. See also Venice Commission Opinion No. 707/2012, Opinion on the Issue of the Prohibition of So-called “Propaganda of Homosexuality” in the Light of Recent Legislation in Some Member States of the Council of Europe, 18.6.2013, CDL-AD(2013)022-e.

#### 4. Limiting Political Rights of Individuals Holding Foreign Citizenship

A further largely symbolical change concerns the incorporation into the constitution of a prohibition for an extensive range of public officials to hold foreign citizenship, or a residence permit, or any other document allowing to reside permanently in the territory of another state. For example, amended Article 77(3) RC now has the following new wording:

“The highest official of a constituent entity of the Russian Federation [...] shall be a citizen of the Russian Federation who [...] has resided permanently in the Russian Federation, has no citizenship of a foreign state or a residence permit or any other document confirming the right of permanent residence of a citizen of the Russian Federation in the territory of a foreign state.”

Similar amendments are envisaged with regard to the Russian president, the prime minister and his or her deputies, federal ministers, heads of federal agencies, parliament deputies, and judges as well as prosecutors. Apart from the required duration of permanent residency for the Russian president which was raised from 10 to 25 years – a change possibly aimed at Russia’s main opposition leader *Alexei Navalny* –<sup>97</sup> and the requirement that he or she must never (as opposed to: at the time of candidature) have had foreign citizenship. This was however already the case prior to the adoption of the amendments, even if not prescribed on constitutional level: since 2006, both the Law on Basic Guarantees of Electoral Rights and the Law on the Election of the Russian President include a provision with the exact same wording,<sup>98</sup> which the Russian Constitutional Court confirmed to be in accordance with the constitution and international law due to possible conflicts of interest arising from the special “political-legal relation of citizens” to their states.<sup>99</sup>

<sup>97</sup> See *A. Baunov*, Putin is Planning a Partial Retirement, Carnegie Moscow Center, 17.1.2020, <<https://carnegie.ru>>.

<sup>98</sup> Federal Law No. 67-FZ, Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации [On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation], 12.6.2002, SZRF 2004, 24, 2253, Article 4(3-1) amended by Federal Law No. 128-FZ, 25.7.2006, SZRF 2006, 31, 3427; Federal Law No. 19-FZ, О выборах Президента Российской Федерации [On the Election of the President of the Russian Federation], 10.1.2003, SZRF 2003, 2, 171, Article 3(5-1), amended by Federal Law No. 128-FZ, 25.7.2006, SZRF, 31, 3427.

<sup>99</sup> Russian Constitutional Court Order No. 797-O, 4.12.2007, Rossiiskaya Gazeta, 26.12.2007.

Nevertheless: as has been pointed out for example in the Austro-German Handbook of the Russian Constitution, such a reading is problematic since the restriction is at variance with Article 6(2) RC guaranteeing every Russian citizen all rights and freedoms.<sup>100</sup> Moreover, although similar requirements for heads of state and sometimes also for holders of other public offices exist in other countries, the extensive range of offices encompassed by the Amendments Law arguably amounts to a violation of the human right to political participation.<sup>101</sup> Article 25 of the International Covenant on Civil and Political Rights guarantees every citizen the right and the opportunity to be elected as well as to have access to public service on general terms of equality.<sup>102</sup> As set out in General Comment 25 of the United Nations Human Rights Committee, any restrictions on these rights “must be justifiable on objective and reasonable criteria”, and persons who are otherwise eligible to stand for election “should not be excluded by unreasonable or discriminatory requirements such as [...] residence or descent”.<sup>103</sup> Not every distinction amounts to discrimination, so in principle the restricting amendments could be justified on reasonable and objective grounds, in pursuit of an aim that is legitimate under the Convention. However, as has been rightly observed by *Yulia Ioffe*, it appears doubtful if the Russian president’s invocation of national security and sovereignty as reasons for restricting political rights of individuals holding dual citizenship or residence permit in another state are distinctions that meet these requirements.<sup>104</sup>

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<sup>100</sup> *H.-G. Heinrich/A. Dubowy*, Art. 81, in: B. Wieser (note 10), MN 17.

<sup>101</sup> On political participation as a human right see e.g. *H. Steiner*, Political Participation as a Human Right, Harvard Human Rights Yearbook 1 (1988), 77; *G. H. Fox*, The Right to Political Participation in International Law, Yale J. Int’ L. 17 (1992), 539; *G. H. Fox*, Democracy, Right to, International Protection, in: R. Wolfrum (ed.), MPEPIL, last updated: March 2008.

<sup>102</sup> See e.g. *S. Joseph/M. Castan*, The International Covenant on Civil and Political Rights: Cases, Materials and Commentary, 2013, 727.

<sup>103</sup> UN Human Rights Committee, General Comment No. 25 (57), 27.8.1996, UN Doc. CCPR/C/21/Rev.1/Add.7.

<sup>104</sup> *Y. Ioffe*, The Amendments to the Russian Constitution: Putin’s Attempt to Reinforce Russia’s Isolationist Views on International Law?, EJIL: Talk!, 29.1.2020. For the Russian Constitutional Court’s reasoning with regard to a possible violation of the human right to political participation see Order No. 797-O (note 99), para. 2.1.

## IV. Substantial Amendments

### 1. President

By far the biggest and most controversial substantial changes in the Amendments Law concern with no doubt the office of the Russian president, regulated in Chapter 4 (Articles 80-93) of the Russian Constitution. While a proposal by the nationalist politician *Vladimir Zhirinovskiy* to rename the office to “Supreme Ruler of Russia” was rejected,<sup>105</sup> two provisions (plus the one on personal requirements, see III. 4. above) were in the end amended in that context: the extension of constitutional immunity also to former presidents, and changes with respect to the number of terms.

#### a) Extension of Immunity to Former Presidents

Amended Article 92(1) RC now states that the Russian president “having ceased to exercise his powers [...] shall have immunity”. Previously, only the incumbent president explicitly enjoyed constitutional immunity (Article 91 RC), although immunity for former office holders was already prescribed in a federal law that guaranteed special protection against law enforcement.<sup>106</sup> Moreover, constitutional immunity for former presidents was discussed – and predominantly supported – in Russian scholarship already prior to the amendments.<sup>107</sup> Most prominently, former judge of the Russian Constitutional Court *Boris Ebzeev* argued in favour of such an extensive

<sup>105</sup> *Zhirinovskiy* has on several occasions made that proposal, rejecting the use of the foreign loan word President as being “un-Russian”. According to *Dmitry Peskov*, Putin’s press secretary, the Russian president is agnostic about the proposal. See Песков: Путин “ничего не думает” о переименовании президента в “верховного правителя” [*Peskov*: Putin “Doesn’t Think Anything” About Renaming the President “Supreme Ruler”], TASS, 29.1.2020.

<sup>106</sup> Federal Law No. 12-FZ, О гарантиях Президенту Российской Федерации, прекратившему исполнение своих полномочий, и членам его семьи [On Guarantees to the President of the Russian Federation Who Ceased to Exercise His Powers, And to Members of His Family], 12.2.2001, SZRF 2001, 7, 617. The law was originally adopted to grant former president *Boris Yeltsin* immunity from prosecution after he resigned at the end of 1999 amid allegations of corruption.

<sup>107</sup> See e.g. *P. A. Skoblikov*, Об иммунитете Президента РФ, прекратившего исполнение своих полномочий [On the Immunity of the President of the Russian Federation Who Ceased to Exercise His Powers], *Pravo i Politika* 2000, No. 12, 39; *N. S. Sopol'tseva*, Иммунитет Президента Российской Федерации, прекратившего исполнение своих полномочий [Immunity of the President of the Russian Federation Who Ceased to Exercise His Powers], *Konstitutsionnoe i munitsipal'noe pravo* 2005, No. 5, 22.

reading of Article 91 RC, at least for acts while having hold office.<sup>108</sup> No matter how persuasive this doctrinal view was,<sup>109</sup> with the amendment of Article 92(1) RC it has now evidently been turned into positive law.

## b) Number of Terms

The second amendment regards the number of terms of the Russian presidency. Initially, the president was elected for a term of four years, but in 2008 the election cycle was prolonged to six years for *Putin's* third presidential term following the rotation with former prime minister and meanwhile president *Dmitry Medvedev*.<sup>110</sup> This switching of positions had become necessary because Article 81(3) RC states that “[o]ne and the same person” cannot hold the president’s office “for more than two consecutive terms”.<sup>111</sup>

*Putin's* originally proposed draft law only removed the word “consecutive” in Article 81(3) RC, giving rise to speculations of how he might plan to stay in power after 2024 (when his second cycle of two consecutive terms will end), in particular against the background of the simultaneously proposed elevation of the State Council to a constitutional body (see IV. 2. below). On 10.3.2020 however, in the second reading of the draft law, *Valentina Tereshkova*, deputy of the State Duma and former cosmonaut famous for being the first woman in space, suggested that

“we either lift the restriction on the number of presidential terms or indicate in an article of this law that the incumbent president, just like any other citizen, has the right to run for president after the amended constitution takes effect”.<sup>112</sup>

<sup>108</sup> B. S. Ebzeev, in: V. D. Zorkin (ed.), *Комментарий к Конституции Российской Федерации* [Commentary on the Constitution of the Russian Federation], 3<sup>rd</sup> ed. 2013, 742 et seq.

<sup>109</sup> See B. Wieser, Art. 91, in: B. Wieser (note 10), MN 10, arguing that neither the straightforward wording of Article 91 RC (“The President of the Russian Federation shall have immunity”) nor the purpose of the norm speak in favour of such an interpretation.

<sup>110</sup> Federal Constitutional Law Amending the Russian Constitution No. 6-FKZ (note 11). See M. Mandelbaum, *Die Änderung der russischen Verfassung – harmlose Korrektur oder “verfassungswidriges Verfassungsrecht”?*, JOR 50 (2009), 311.

<sup>111</sup> On the interpretation of this article prior to the amendment see H.-G. Heinrich/A. Dubowy, Art. 81, in: B. Wieser (note 10), MN 19 et seq. See also Russian Constitutional Court Order No. 134-O, 5.11.1998, SZRF 1998, 46, 5701, in which, against the (unlikely) prospect of a third presidential term of *Boris Yeltsin*, the Constitutional Court had (at least implicitly) maintained that three or more terms are in principle possible, but only if they do not occur consecutively.

<sup>112</sup> See Russian Lawmakers OK Constitutional Change That Would Allow Putin to Run in 2024, RadioFreeEurope/RadioLiberty, 10.3.2020.

Following this astonishing suggestion, *Putin* appeared in the State Duma and stated his support for the second alternative of *Tereshkova's* proposal,<sup>113</sup> spiking rumours that it was choreographed.<sup>114</sup> Supplemented Article 81(3)1 RC reads:

“The provision of Article 81(3) of the Constitution of the Russian Federation [...] applies to a person who has held and (or) holds the office of the President of the Russian Federation, without taking into account the number of terms during which he has held and (or) holds that office at the time of the entry into force of the amendments to the Constitution of the Russian Federation, introducing a corresponding restriction, and does not exclude the possibility for him to hold the office of President of the Russian Federation for the periods allowed by that specified provision.”

In its decision of 16.3.2020, the Russian Constitutional Court justified this amendment to “reset to zero” previous presidential terms the following way:

“The decision on the maximum number of terms of office (consecutive terms of office) during which it is possible to occupy the post of head of state with a republican form of government by one person [...] is always, in essence, a matter of striking a balance between different constitutional values. On the one hand, the constitutional characteristic of a democratic state based on the rule of law presupposes, although it does not predetermine, the establishment of rather strict limitations in this respect. On the other hand, the constitutional principle of democracy means that the people can exercise their right to elect in free elections the person whom they consider most worthy of the post of head of state, despite the fact that his determination in the framework of electoral competition always remains with the voter [...]. Against the background of this basic balance, the constitutional legislator may also take into account specific historical factors when making the corresponding decision, including the degree of threat to the state and society, the state of the political and economic system, etc.”<sup>115</sup>

The Russian president, in his just mentioned speech to the State Duma on 10.3.2020, had argued precisely in that vein, stating that more than two presidential terms may be justified for reasons of stability and comparing Russia's current situation – notably *before* the outbreak of the coronavirus

<sup>113</sup> Speech at State Duma Plenary Session (note 23).

<sup>114</sup> See e.g. the remarks by the analyst *Stanislav Belkovsky* in an interview with Radio Svoboda: “They handed her the precise text that should be delivered by a [...] person who is a symbol of our victories in space and the Soviet Union – the state to which Putin would like to return and whose glory he feeds upon.” See *E. Rýkovtseva*, Путин пошёл на пожизненное [Putin Went for Lifelong], Radio Svoboda, 10.3.2020, <<https://www.svoboda.org>>.

<sup>115</sup> Russian Constitutional Court Decision No. 1-3 (note 33), para. 6.2.

pandemic – to that of the United States during the Great Depression and World War II (when *Franklin D. Roosevelt* served as America’s president for four consecutive terms). Moreover, restrictions on the number of terms do not exist in many other states, “including our neighbours”, *Putin* maintained, adding that he was certain that

“the day will come when the supreme, presidential power in Russia will not be so personified [...]. But this is exactly how it was in our previous history, and we must take this into account.”<sup>116</sup>

It is difficult to see how these arguments could be persuasive. First of all, it is simply not correct that many other states, “including [Russia’s] neighbours”, do not have restrictions on the number of presidential terms.<sup>117</sup> In fact, of the twelve states with a presidential system that share a border with Russia, only Azerbaijan, Belarus and China have no limitations at all, and even there they were removed only recently.<sup>118</sup>

Moreover, constitutional provisions allowing for more than one re-election in presidential systems entail “risks for the balance of powers and even for democracy as such”, as the Venice Commission has put it in a recent report.<sup>119</sup> Recapitulating the arguments against limited mandates from an earlier report on democracy, limitation of mandates and incompatibility of political functions, the commission found that they – just like in the Russian Constitutional Court’s decision – usually

“concentrate on the idea that citizens have the right to say who will govern them, and that they are the only ones who have the right to a free and absolute choice of their politicians, and when the people want one person to lead them for a longer period of time, they should be allowed to have that right”.<sup>120</sup>

However, the Venice Commission concluded its initial report, unlimited mandates in countries that have no democratic tradition and that do not

<sup>116</sup> Speech at State Duma Plenary Session (note 23).

<sup>117</sup> See Venice Commission Study No. 646/2011, Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, 31.1.2013, CDL-AD(2012)027rev.

<sup>118</sup> See Venice Commission Study No. 908/2017, Report on Term-Limits, Part I: Presidents, 20.3.2018, CDL-AD(2018)010, 3; China’s Xi Allowed to Remain “President for Life” as Term Limits Removed, BBC News, 11.11.2018. Poland has a limitation through fixed number of possible terms; Estonia, Finland, Georgia, Kazakhstan, Latvia, Lithuania, and Ukraine have a limitation through fixed number of possible consecutive terms (like Russia used to have prior to the amendments); and Kyrgyzstan has even an absolute ban on re-election, see Venice Commission Opinion No. 482/2010, Opinion on the Draft Constitution of the Kyrgyz Republic, 8.6.2010, CDL-AD(2010)015-e.

<sup>119</sup> Venice Commission Study No. 908/2017 (note 118), para. 70.

<sup>120</sup> Venice Commission Study No. 908/2017 (note 118), para. 68.

have a developed civil society “create the danger of having a republican monarch”, in which a “Head of state could introduce a new ‘Caesar’ or a new ‘Bonaparte’, regardless of the model of government”.<sup>121</sup> There is little to add to that finding, other than one is inclined to mention, for the case at hand: or a new “Tsar”.

## 2. State Council

Initially, i.e. prior to *Tereshkova’s* proposal to “reset to zero” *Putin’s* (or, for the record, also *Medvedev’s*) previous presidential terms, the biggest surprise among the proposed amendments was the announcement that the status of the State Council was planned to be changed from a consultative to a constitutional body, revitalising speculations that *Putin* might plan to continue to chair it after his fourth term as president will have ended in 2024. Something similar had occurred in Kazakhstan in 2018, where long-term president *Nursultan Nazarbaev* stepped down only to become chairman for life of the Kazakh Security Council after a corresponding law had been adopted that upgraded it from an advisory to a constitutional body.<sup>122</sup> Ever since, policy analysts discussed the prospect of a possible “Kazakh retirement” for *Putin*.<sup>123</sup>

Interestingly, the creation of the State Council was among the first modifications of the presidential administration initiated by *Putin* after he had first took office in 2000, although until now it functioned only as an advisory body.<sup>124</sup> The State Council is chaired by the Russian president and is otherwise composed of “members”, which since 2012 are the chairmen of the Federation Council and the State Duma, respectively, the envoys of the Russian president in the federal districts,<sup>125</sup> the heads of the highest executive bodies of state power of Russia’s 85 constituent entities, and the leaders

<sup>121</sup> Venice Commission Study No. 646/2011 (note 117), paras. 66–67.

<sup>122</sup> See *Kazakh Leader to Become Life-Long Security Council Chairman*, RadioFree Europe/RadioLiberty, 31.5.2018.

<sup>123</sup> See e.g. *A. Baunov*, *Putin Wants a Kazakh Retirement*, Carnegie Moscow Center, 22.3.2019, <<https://carnegie.ru>>.

<sup>124</sup> Presidential Decree No. 1602, *О Государственном совете Российской Федерации* [On the State Council of the Russian Federation], 1.9.2000, SZRF 2000, 36, 3633. See *V. Luchin/I. Danilov*, *Государственный Совет Российской Федерации: проблемы становления* [The State Council of the Russian Federation: Problems of Formation], *Pravo i Politika* 2001, No. 4, 19.

<sup>125</sup> Envoys (officially called “Plenipotentiary Representatives of the President of the Russian Federation in a Federal District”) are appointed by the Russian president and represent the president within the federal districts, groupings of federal subjects of the Russian Federation that are not envisaged in the Russian Constitution.

of the different fractions in the State Duma.<sup>126</sup> The State Council has a presidium consisting of the envoys of the federal districts, a secretary, and an advisory commission appointed by the president among the heads of the constituent entities (which are however not members of the State Council). Over the past two decades, the State Council has convened about every three months on issues from all spheres of public policy.<sup>127</sup>

According to amended Article 83(3) RC, the State Council's purpose is to ensure

“the coordinated functioning and interaction of state authorities, determine the main directions of the domestic and foreign policy of the Russian Federation and the priority areas of socio-economic development of the state”.

The details are to be determined by a federal law. Although the future role of the State Council in the broader constitutional architecture therefore remains to be seen, its mere elevation to a constitutional body in Chapter 3 instead of Chapter 1 arguably contradicts Article 11 RC enumerating the bodies that exercise state power: president, parliament, government, and courts.<sup>128</sup> In any case, if *Putin* decides to step down as president in 2024 notwithstanding the possibility to run for another two consecutive terms (see IV. 1. b) above) but continues to chair the State Council after having moved the centre of power to that body by a further constitutional amendment like in Kazakhstan, the system of checks and balances would be arguably so distorted that the democratic legitimacy of the entire constitution would have to be questioned.

### 3. Judiciary

While Western commentators paid relatively little attention to the amendments with regard to the Russian judiciary when they were first announced,<sup>129</sup> they were widely discussed among Russian constitutional law-

<sup>126</sup> See Presidential Decree No. 1153, 10.8.2012, SZRF 2012, 33, 4632.

<sup>127</sup> See Новости Государственного совета [News of the State Council], <<http://kremlin.ru>>.

<sup>128</sup> M. Timofeev/O. Kryazhkova, Personal Instead of Institutional Power, Verfassungsblog, 20.1.2020. Contra A. Dubowy, Russland. Eine superpräsidentielle Republik. Implikationen eines Gesetzesentwurfs zur Verfassungsänderung, Russland-Analysen No. 381, 7.2.2020, 8.

<sup>129</sup> But see C. von Gall (note 53) and later also International Commission of Jurists (note 9), Section III.

yers.<sup>130</sup> Apart from the introduction of a preliminary constitutional review for the Russian Constitutional Court,<sup>131</sup> changes regard in particular the composition of the constitutional court and the independence of the judiciary due to modifications in the appointment and termination process of judges of the highest Russian courts.

### a) Reduction of Number of Constitutional Court Judges

A first change is the reduction of judges at the Russian Constitutional Court from nineteen to eleven in Article 125(1) RC. Whereas the regulations regarding the tenure of constitutional court judges had been modified several times in the past,<sup>132</sup> the number of judges of the court had so far been kept consistent at nineteen since the adoption of the Russian Constitution in 1993. Three seats had however not been filled since 2016 following the termination of authorities of three judges due to the reaching of the 70 years age limit.<sup>133</sup> Since the death of one further judge in July 2019, the composition of the court was further reduced to fifteen. Considering that the court has at the same time received more competences with the introduction of a preliminary constitutional review, the decision to reduce the number of judges appears counter-intuitive at first sight, but can probably be explained with the aim to solve the problem of open vacancies and possibly also to reduce costs.<sup>134</sup>

<sup>130</sup> See in particular the contributions on Advokatskaya ulitsa <<https://advstreet.ru>>, e.g. T. Morshchakova (note 8); S. Pashin, Гонки по вертикали [Vertical Race], Advokatskaya ulitsa, 17.1.2020; K. Koroteev, Судьи клялись подчиняться Конституции, а не звонку из администрации президента [Judges Vowed to Obey the Constitution, Not a Call from the Presidential Administration], Advokatskaya ulitsa, 18.3.2020; A. Dziedzinsky, Если бы поправки действительно хотели обсудить [If One Really Wanted to Discuss the Amendments], Advokatskaya ulitsa, 23.3.2020.

<sup>131</sup> On this amendment in more detail see O. Kryazhkova, Как поправить Конституционный Суд [How To Fix the Constitutional Court], in: I. Aleastrova/M. Krasnov/O. Kryazhkova/E. Lukyanova/E. Mishina/T. Morshchakova/T. Sokolov (note 9), 42.

<sup>132</sup> See C. Schmidt, Art. 125, in: B. Wieser (note 10), MN 3.

<sup>133</sup> See М. Баршевский: количество судей в составе Конституционного суда не является принципиальным [M. Barshchevsky: The Number of Judges in the Constitutional Court is Not Fundamental], TASS, 20.1.2020.

<sup>134</sup> In this vein K. Koroteev (note 130).

## b) Appointment and Dismissal of Judges

Amended Article 83(e) RC now furthermore provides that the Russian president “submits to the Federation Council candidates for appointment” for the president, vice-president, and all other judges of the Russian Constitutional Court as well as the president, vice-president, and all other judges of the Russian Supreme Court. According to supplemented Article 83(e<sup>3</sup>) RC, the same goes for the dismissal of these judges, if they “commit an act defaming honour and dignity” of the judiciary or in any other case enumerated by federal constitutional law indicating the judge’s inability to exercise his powers. For constitutional court judges, Article 18(1) of the Law of the Russian Constitutional Court names the loss of Russian citizenship, repeated non-attendance at court sessions without excuse or criminal convictions as further reasons for termination of office.<sup>135</sup>

Previously, the role of the Russian president in the appointment of the constitutional court and supreme court judges was limited to “present to the Council of Federation candidates for the posts” (Article 83(f) RC), with the parliament’s upper house leaving the task of appointment (Article 102(g) RC). Conversely, the Federation Council also decided over the dismissal of judges, in the case of a constitutional court judge upon a corresponding proposal by the plenum of all judges of the Constitutional Court that had decided that the criteria for termination are met.<sup>136</sup> This latter competence of the Federation Council to dismiss judges was previously only regulated in the Law on the Russian Constitutional Court and is now also explicitly stated in the constitution in amended Article 102 RC, however with the additional provision that the president “submits to the Federation Council the termination” of judges in accordance with federal constitutional law.

What precise role the Russian president now assumes is unclear, but the involvement as such is problematic.<sup>137</sup> For example, the European Charter on the Statute for Judges envisages for the termination of the office of judges the “intervention of an authority independent of the executive and legislative powers”,<sup>138</sup> and with respect to different appointment systems for judges the Venice Commission found that the participation of presidents is

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<sup>135</sup> Federal Constitutional Law No. 1-FKZ (note 58), Article 18(1), last amended by Federal Constitutional Law No. 9-FKZ, 4.6.2014, SZRF 2014, 23, 2922. See C. Schmidt, Art. 125, in: B. Wieser (note 10), MN 5.

<sup>136</sup> Federal Constitutional Law No. 1-FKZ (note 58), Article 18(5).

<sup>137</sup> See International Commission of Jurists (note 9), Section III b), for a more detailed analysis.

<sup>138</sup> Council of Europe, European Charter on the Statute for Judges, 8.-10.7.1998, DAJ/DOC (98) 23, para. 1.3.

only unproblematic as long as he or she is bound by a proposal made by an independent judicial council, so that it would for example not be allowed for the president to appoint a candidate not included on the list submitted by that council.<sup>139</sup>

## V. Conclusions

In a recent article published right before the Russian president's announcement of his amendment plans, *William Partlett* and *Mikhail Krasnov* argued that the presidential centralism of the Russian Constitution has hindered the transformative potential of the other parts of the constitution, and that "[a]ny future turn to transformative constitutionalism in Russia will require weakening the power of the Russian presidency".<sup>140</sup> As this contribution has shown, the exact opposite now happened,<sup>141</sup> giving *Putin* the possibility to stay in power until 2036 which would make him the longest-serving Russian leader since *Peter the Great*, surpassing *Stalin's* reign of 31 years. With this extreme extension of term limits, exacerbated by the added dependency of the judiciary of the highest courts on the president, the amendments may be considered a textbook example of "abusive constitutionalism", i.e. in the words of *David Landau* and *Rosalind Dixon*,

"constitutional processes [that] are used to promote distinctly antidemocratic ends or to advance the cause of would-be autocrats by removing democratic checks and balances on the exercise of political power".<sup>142</sup>

The democratic legitimacy of these changes is further undermined by the amendments process. In its Report on Constitutional Amendment, the Venice Commission held that constitutional amendment procedures should be

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<sup>139</sup> Venice Commission Opinion No. 403/2006, Report on Judicial Appointments, 22.6.2007, CDL-AD(2007)028, para. 14. See also Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 23.-25.6.2010, para. 23: "Where the final appointment of a judge is with the State President, the discretion to appoint should be limited to the candidates nominated by the selection body [...]."

<sup>140</sup> *W. Partlett/M. Krasnov*, Russia's Non-Transformative Constitutional Founding, *Eu Const. L. Rev.* 15 (2019), 644, 644.

<sup>141</sup> For a comparative analysis of the amendments by one of the just mentioned authors see now also *W. Partlett*, Russia's Constitutional Amendments: A Comparative Perspective, University of Melbourne Legal Studies Research Paper No. 887, June 2020.

<sup>142</sup> *D. Landau/R. Dixon*, Constraining Constitutional Changes: Constitution-Making and Breaking, *Wake Forest Law Review* 50 (2015), 859, 859.

drafted “in a clear and simple manner, and applied in an open, transparent and democratic way”.<sup>143</sup> Moreover,

“properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time. In contrast, if the rules and procedures on constitutional change are open to interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself.”<sup>144</sup>

Arguably, all these undermining factors were at work in the amendment process of the 2020 Russian Constitutional Amendments.<sup>145</sup> The mere speed of only two months from the first announcement to propose changes to the constitution (15.1.2020) to the signing of the Amendments Law (14.3.2020) indicates that a proper democratic discourse did not take place. In particular, the setting-up of a “working group” – an institution neither envisaged in the Russian Constitution nor in the Law on the Procedure of Amendments – was clearly intended to create the image that a public discourse would take place, but on closer inspection turned out to be a group of Kremlin-loyal figures that developed no critical views on almost any of the suggested proposals by the Russian president. Even worse: the last-minute proposal by *Valentina Tereshkova* to “reset to zero” *Putin’s* presidential terms – the single most important proposed change to the constitution – arguably made the entire process appear like a farce.

Although the remainder of the drafting process followed the rules on making amendments to Chapters 3 to 8 of the Russian Constitution (three readings and approval in the State Duma; approval by the Federation Council and the legislative authorities of the federal subjects; signing of the law by the president), the two additionally included elements to the amendment process (the coming into force in “a special manner”) arguably further undermined its legitimacy. Notwithstanding that it was evidently intended to have the opposite effect – to add to the legitimacy of the process – but that is precisely the problem: the Constitutional Court waved through the amendments in less than 48 hours, and the planned referendum was renamed an “all-Russian vote” in order to bypass the Russian Law on Refer-

<sup>143</sup> Venice Commission Study No. 469/2008, Report on Constitutional Amendment, 19.1.2010, CDL-AD(2010)001, para. 202.

<sup>144</sup> Venice Commission (note 143), para. 204.

<sup>145</sup> Concurring, with similar arguments, *M. Timofeev/O. Kryazhkova* (note 128).

endum, replaced by rules drawn up and applicable only for that occasion and not meeting international electoral standards.

Lastly, the largely symbolic changes to the Russian Constitution can be interpreted as an attempt to codify a nationalist idea of Russia (ethnic Russians as a “state-forming people”; limitation of political rights to Russian citizens), fuelled by references to traditional values (inclusion of a reference to “faith in god”; marriage as a “union of a man and a woman”) and a glorious Soviet past (the USSR as a “victorious power” of World War II; protection of “historic truths”; Russia as the “continuator state” of the Soviet Union), supported by an insistence on Russia’s “absolute” sovereignty and independence from the West, in particular in human rights issues.