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RUSSIA'S 2020 CONSTITUTIONAL AMENDMENTS: A COMPARATIVE ANALYSIS

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Abstract
This article will place the 2020 amendments to the Russian Constitution in comparative perspective. Although these amendments were officially justified as strengthening the Russian state in order to tackle emerging new problems, they constitutionalise already-existing legislative trends from the last twenty years. They therefore do little to overcome existing problems of Russian state building. What was the reform process about then? It was intended to project the image of reform by involving the people in a staged process of constitutional change while further entrenching the power of the current political elite. The constitutional reforms therefore demonstrate the symbolic role that constitutional law can play in seeking to ensure the survival of mature or later-stage forms of authoritarian populism. This kind of 'theatrical constitution-making' is a broader reminder of how the expressive aspects of constitutional change can be (ab)used by established authoritarian regimes.

KEYWORDS: Russia, Constitution, Amendments 2020, Populism

In January 2020, President Vladimir Putin unexpectedly announced major changes to the Russian Constitution. Seven months later, after a week of voting, Russia formally made the most significant changes to its constitution since its adoption in 1993.[1] These amendments do not formally alter Russia's fundamental—and still not realised—constitutional commitments to democracy, separation of powers, and individual rights found in Chapters 1 and 2 of the Russian Constitution.[2] They do, however, further centralise the organisation of public power in Chapters 3–8 of the Russian Constitution. In addition, they further isolate Russia from international law and, therefore, its obligations under the European Convention on Human Rights. They therefore represent

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[1] A Osborn and V Soldatkin, 'Russians Grant Putin Right to Extend his Rule until 2036 in Landslide Vote' (*Reuters*, 1 July 2020), https://www.reuters.com/article/us-russia-putin-vote/russians-grant-putin-right-to-extend-his-rule-until-2036-in-landslide-vote-idUSKBN24254A.

[2] See, for example, Chapters 1 and 2, Russian Constitution. Amended text available (in Russian) at http://kremlin.ru/acts/constitution. There is currently no English-language translation of the amended Constitution. The pre-amendment text that includes the text of Chapters 1 and 2 can be found at: Constitute, 'Russian Federation 1993 (rev 2014)', https://www.constituteproject.org/constitution/Russia_2014?lang=en. See also W Partlett and M Krasnov, 'Russia's Non-Transformative Constitutional Founding' (2019) 15(4) *European Constitutional Law Review* 644.

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the most significant changes to the text of the Russian Constitution since the foundation of Russia's post-Soviet constitutional order in 1993.

The 2020 constitutional reform came at a time of growing concern about the ability of the Russian state to respond to key challenges. In particular, there had been recurring complaints—even voiced at the highest level of Russian government—about state corruption and ineffectiveness that hinder Russian economic and political development.[3] This weakness of the Russian state—and particularly its regional governments—has been laid bare in the dysfunctional response of the Russian state to the coronavirus pandemic (particularly in the Russian regions).[4] This situation has triggered a leading scholar to recently describe Putin as a 'weak strongman'.[5]

High-level officials described the 2020 constitutional reform as responding to these problems. President Vladimir Putin initially described the major constitutional overhaul as improving the quality of 'state governance' to better address the 'economic, social, and technological challenges' facing contemporary Russia.[6] Taliya Khabrieva, the head of the Working Group that helped to draft the amendments, stated that the changes would 'democratise' the constitutional system and make it more stable.[7] Sixth months later, during the final vote on the amendments, President Putin reiterated that the changes will 'strengthen our nationhood and create conditions for the progressive development of our country for decades to come'.[8]

The amendments, however, do not seek to reform Russia's constitutional system. On the contrary, they constitutionalise existing legislative trends toward centralised and isolationist governance.[9] This centralising approach has historically tended to weaken state capacity by undermining institutional effectiveness. For instance, one chronic accountability problem stemming from centralisation is that public officials are more likely to strive to please their superiors than respond to their constituents.[10]

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[3] L Alexandrovna, 'Ministers, Governors to be Fined for Failing to Implement Presidential Decrees' (*TASS*, 1 February 2014), https://tass.com/opinions/763168 (discussing how Putin and other federal leaders have repeatedly complained about the failure to implement his decrees).

[4] J Yaffa, 'How the Coronavirus Revealed the Hollowness of Putin's Vertical of Power' (*The New Yorker*, 26 May 2020), https://www.newyorker.com/news/dispatch/how-the-coronavirus-revealed-the-hollowness-of-putins-vertical-of-power.

[5] T Frye, *Weak Strongman: The Limits of Power in Putin's Russia* (Princeton University Press, 2021).

[6] Russian President Vladimir Putin, Speech to the Federal Assembly (15 January 2020), http://en.kremlin.ru/events/president/news/62582.

[7] Interview with Taliya Khabrieva (in Russian) (*Rossisskaya Gazeta* (Russian Newspaper), 30 January 2020), https://rg.ru/2020/01/30/taliia-habrieva-popravki-v-konstituciiu-ukrepiat-stabilnost-vlasti.html.

[8] M Rodionov, 'Constitutional Changes Are the "Right Thing" for Russia: Putin' (*Reuters*, 6 July 2020), https://www.reuters.com/article/us-russia-putin-constitution/constitutional-changes-are-the-right-thing-for-russia-putin-idUSKBN2460OD.

[9] B Noble and N Petrov, 'From Constitution to Law: Implementing the 2020 Russian Constitutional Changes' (2021) 6(1) *Russian Politics* 130.

[10] N Petrov, M Lipman, and H E Hale, 'Three Dilemmas of Hybrid Regime Governance: Russia from Putin to Putin' (2014) 30 *Post-Soviet Affairs* 1, pp 21–22.

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In recent years, this has meant that central policy makers in Moscow (who hold the official power) frequently lack the information to make effective policy, turning decision making into a 'guessing game'.[11] This has significantly undermined the effectiveness of the Russian state.

The reform therefore poses a puzzle: Why go to such lengths to make few functional changes? The answer requires understanding the overall context of the reforms. The constitutional changes are an attempt to ensure the survival of Russia's current system of 'authoritarian populism'.[12] Describing the current Russian leadership as populist might seem surprising. The current Putin administration frequently states that it stands for stability against the upheaval of major political revolutions.[13] But populist rhetoric and mechanisms play a key role in the legitimacy of the regime.[14] The stability of the regime is heavily grounded on the trust relationship between President Putin and 'the people'.[15] In a country where partisan political competition is often derided as damaging, the claims by Putin to represent the whole people are the central plank of its political legitimacy.[16]

This populist connection between Putin and the people is not a project of political change; instead it is a status quo project focused on maintaining elite stability. This form of status quo, authoritarian populism is not just a Russian phenomenon. In Europe, Belarus and Hungary are two prominent examples where existing leaders (and their elites) use populist mechanisms to maintain power.[17] Outside of Europe, Venezuela and Bolivia are other examples.[18] In these countries—as in Russia—change-based populist movements have ultimately transformed into authoritarian forms of status quo, populist governance.

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[11] Ibid.

[12] C Mudde and C R Kaltwasser, 'Populism' in Michael Freeden and Marc Stears (eds), *The Oxford Handbook on Political Ideologies* (Oxford University Press, 2013) 493, pp 495–98.

[13] B Taylor, 'Putin's Stability Becomes Russia's Stagnation' (*Oxford University Blog*, 13 August 2018), https://blog.oup.com/2018/08/putins-stability-russias-stagnation (describing how Putin repeatedly stresses stability as a key feature of his governance style).

[14] R Brubaker, 'Why Populism?' (2017) 46 *Theory and Society* 357 (describing how populists rely on rhetoric that they are the true representatives of the people against a corrupt elite).

[15] G Yudin, 'Governing Through Polls: Politics of Representation and Presidential Support in Putin's Russia' (2020) 27 *Javnost – The Public: Journal of the European Institute for Communication and Culture* 2 (arguing that polls showing the personal support for Vladimir Putin are critical to regime legitimacy); T Frye, S Gehlbachb, K L Marquardt, and O J Reuterd, 'Is Putin's Popularity Real?' (2017) 33 *Post-Soviet Affairs* 1 (arguing that Putin's personal approval ratings are a critical 'source of legitimacy' for the President and his regime).

[16] V Surkov, 'Putin's Long State (*Dolgoe Gosudarstvo Putina*)', available (in Russian) at https://www.ng.ru/ideas/2019-02-11/5_7503_surkov.html (describing democratic pluralism as an illusion and arguing that a better and more 'honest' approach is a close connection between the leader and the people).

[17] S Rogers, 'Hungarian Authoritarian Populism: A Neo-Gramscian Perspective' (2020) 36 *East European Politics* 107; A Ivanou, 'Authoritarian Populism in Rural Belarus: Distinction, Commonalities, and Projected Finale'(2019) 46 *Journal of Peasant Studies* 586.

[18] S Levitsky and J Loxton, 'Populism and Competitive Authoritarianism in the Andes' (2013) 20 *Democratization* 107.

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The Russian amendment process shows the role that large-scale constitutional reform can play in *maintaining* this kind of status quo, authoritarian populism. In this scenario, constitutional change does not make important functional changes to the operation of power. It therefore does not fit the usual definition of 'abusive' constitution-making.[19] Instead, constitutional reform becomes a method for achieving two goals. First, it creates the image of change and, through its reliance on popular referendums, a newly invigorated relationship between the people and its leader. It therefore is an important tool for regimes that 'struggle … to deliver services to its public', but are 'effective in using (often monopolising) media resources to get its message' to a domestic audience.[20] Second, and relatedly, it is therefore simultaneously a method for maintaining the current political status quo.

This use of constitutional law is fundamentally different from other populist projects in Europe. In Hungary, constitutional change was used to fundamentally change the system of governance and centralise power in the interests of Viktor Orbán and his Fidesz party. By contrast, in Russia, the 2020 constitutional reform was used to create the appearance or image of change while instead actually securing the position of the current political elite. This suggests a neglected way in which constitutional reform can be used (or abused) in mature or more established projects of authoritarian populism. This kind of 'theatrical' constitution-making therefore must be understood as a way of securing 'new' forms of authoritarianism such as authoritarian populism.[21] It is not necessarily new, however. In socialist regimes, theatrical constitution-making has (and continues to be used) as a way of mobilising the population and ensuring ongoing support.[22] It is therefore a broader reminder of how constitutional change does not just have functional goals but also expressive ones.[23]

To make this argument, this article will be divided into seven parts. Part I will set the stage by describing the relationship between populism and constitutional law. Part II will explain Russia's transformation into an authoritarian populist regime. Parts III–VI will describe how the 2020 amendments constitutionalise existing legislative trends, thereby seeking to renew flagging support for the regime by framing a corrupt external elite for the Russian government to struggle against. Part III will describe how the constitutional amendments constitutionalise existing trends toward anti-pluralist institutionalism and centralism. Part IV explains how the amendments entrench recent legislative trends toward protectionism from international elites. Part V will describe how the amendments draw on antagonistic re-politicisation by

[19] D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189 (describing how leaders can use constitutional change to fundamentally change political functioning and entrench power).

[20] E Schatz, 'When Capital Cities Move: The Political Geography of Nation and State Building' (University of Notre Dame, Helen Kellogg Institute for International Studies, February 2003) Working Paper No 303, p 9.

[21] I Krastev, 'Paradoxes of the New Authoritarianism' (2011) 22 *Journal of Democracy* 5 (discussing the mechanisms and resilience of 'new authoritarianism').

[22] S Lomb, *Stalin's Constitution Soviet Participatory Politics and the Discussion of the 1936 Draft Constitution* (Routledge, 2018).

[23] T Ruskola, 'Legal Orientalism' (2002) 101 *Michigan Law Review* 179, pp 203–20.

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extending socio-economic rights. Part VI will then conclude by examining constitutional process, detailing how the all-Russian plebiscite sought to involve Russians in a 'theatrical' process of change. Part VII will conclude.

I. POPULISM AND CONSTITUTIONAL LAW

There is growing agreement amongst political scientists that 'populism' shares significant rhetorical similarities.[24] In this 'thin' definition, populists attack existing institutions and the current elite (or party system) for being corrupt or undemocratic.[25] Avoiding commitments to left-wing or right-wing political projects, they argue instead that centralised—and frequently charismatic—leadership (often without clear fixed ideological commitments) is the best way to advance the interests of a 'pure' people against a 'corrupt' elite.[26] Political scientists have described a common set of populist rhetorical devices tied to populism.[27] Each has key important implications for constitutional development.

The first—and arguably most important—constitutional consequence of populist governance is *anti-pluralist institutionalism*.[28] Muller reminds us that populists are not against institutions *per se*; on the contrary, they must govern through institutions. But populists—because they claim to personally represent the whole people—use constitutional reform to dismantle institutions that check their power.[29] Thus, populists amend or replace constitutions to remove 'institutions, especially political parties, media, and the courts' that represent the interests of a corrupt elite.[30] In their place, the populist leader creates a centralised institutional arrangement that will ensure that the leader can advance the agenda of the 'pure' people. In constitution-making, this tends to lead to highly centralised and personalised constitutional design that concentrates significant power in one institution or individual (such as the president or prime minister). In European authoritarian populism, this anti-pluralism has led, for instance, to constitutional change that weakens the independence of courts

[24] Brubaker, note 14 above; D Landau, 'Personalism and the Trajectories of Populist Constitutions' (2020) 16 *Annual Review of Law and Social Science* 13.1 (arguing how scholars have generally converged on a 'thin' definition that describes a number of populism's unifying characteristics); C Bickerton and C Accetti, *Technopopulism: The New Logic of Democratic Politics* (Oxford University Press, 2020) (describing how populism often rejects ideology altogether as leaders seek to represent the whole people).

[25] D Landau, 'Populist Constitutions' (2018) 85 *University of Chicago Law Review* 521.

[26] Ibid, pp 360–61. See also J Mansbridge and S Macedo, 'Populism and Democratic Theory' (2019) 15 *Annual Review of Law and Social Science* 59, pp 59–77. C Mudde, 'The Populist Zeitgeist' (2004) 39(4) *Government and Opposition* 542, p 543 (describing populism as the struggle between the 'pure people' and the 'corrupt elite').

[27] Brubaker, note 14 above.

[28] Ibid, pp 365–66.

[29] Jan-Werner Mueller, 'Populism and Constitutionalism' in C R Kaltwasser, P Taggart, P O Espejo and P Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford University Press, 2017), pp 597–98.

[30] Brubaker, note 14 above, p 365.

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(particularly constitutional courts) by expanding the number of judges and stacking them with loyal supporters.[31]

The second element is *protectionism* and involves rhetoric about the importance of protecting 'the pure people' from threats from 'above, from below, and, today especially, from the outside'.[32] In constitution-making, this often leads to the introduction of constitutional mechanisms or language that will 'protect' the people from a corrupt elite. In authoritarian populism in Europe, this has recently included constitutional provisions seeking to formally protect constitutional identity from alteration by liberal international or supranational institutions.[33] For instance, the Seventh Amendment to the Hungarian Constitution inserted language that would seek to protect Hungary's constitution from international law that undermined 'Hungary's inalienable right of disposition relating to its territorial integrity, population, political system and form of governance'.[34]

The third component of populist governance is *majoritarianism*.[35] This concept suggests that the interests of the majority should be prioritised over those of minorities (who are sometimes associated with a nefarious elite). Populism therefore seeks to restore the majority—often rhetorically associated with the 'pure people'—to its rightful place. This has significant implications for the constitution-making process. In particular, it tends to prioritise the use of direct, plebiscitary mechanisms over existing institutions or rule-based approaches in constitutional change.[36] In European authoritarian populism, Belarusian President Alexandr Lukashenko's frequent use of constitutional referendums to consolidate power is a good example of this populist majoritarianism.[37]

The final element at the centre of populism is *antagonistic re-politicisation*.[38] This concept argues that the state must reassert control over aspects of life that have been depoliticised and have fallen under the control of a corrupt elite. In constitution-making, this can include the inclusion of provisions that 're-politicise' parts of everyday life that were previously depoliticised. In European authoritarian populism, this has included the antagonistic re-politicisation of history, marriage, family, and

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[31] K Scheppelle, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545 (discussing how leaders in both Hungary and Poland consolidated centralised power in party by eliminating independent courts through a process of stacking courts with loyal judges).

[32] Brubaker, note 14 above, p 366.

[33] F Fabbrini and A Sajo, 'The Dangers of Constitutional Identity' (2019) 25 *European Law Journal* 457.

[34] N Chronowski, M Varju, P Bárd, and G Sulyok, 'Hungary: Constitutional (R)evolution or Regression?' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press, 2019).

[35] Brubaker, note 14 above, p 365.

[36] W Partlett, 'The Dangers of Popular Constitution-Making' (2012) 38 *Brooklyn Journal of International Law* 193 (relying on a particular conception of constituent power).

[37] L March, 'Populism in the Former Soviet States' in C R Kaltwasser, P Taggart, P O Espejo, and P Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford University Press, 2017), pp 222–24 (describing President Lukashenko as the most consistent populist in the former Soviet republics).

[38] Brubaker, note 14 above, pp 364–65.

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education.[39] For instance, the text of the 2011 Hungarian Constitution re-politicises marriage by describing it as 'the union of a man and woman' and links this with the 'protection of the family'.[40]

Some of these constitutional approaches—particularly those associated with authoritarian populism—exist in clear tension with the principles of constitutionalism such as the separation of powers. For instance, anti-pluralist institutionalism clearly undermines the importance of political pluralism as well as checks and balances in the separation of powers.[41] Furthermore, majoritarian constitution-making can undermine an inclusive and deliberative form of constitution-making by making the process overly majoritarian.[42] Finally, protectionist rhetoric can undermine the protection of individual rights. Not all parts of the populist constitutional project, however, are incompatible with constitutionalism. For instance, the re-politicisation of socio-economic rights need not undermine the key principles of constitutionalism. The next section will consider how Russia's recent amendments help us understand more about the relationship between populism and constitutional law over time.

II. RUSSIAN AUTHORITARIAN POPULISM

Russia is rarely included in general studies of European populism and constitutional law.[43] This is understandable. Russia is currently an established form of authoritarianism in which the leadership protects an elite that has been in power for decades. But Russia holds important lessons for understanding the relationship between populism and constitutional law over time.

A. Russia's Populist Roots

Modern Russia was founded almost thirty years ago on the populism of President Boris Yeltsin.[44] Luke March describes President Boris Yeltsin as a 'mobilisational president' who sought to forge new 'popular identities separate from the

[39] See, for example, Hungarian Constitution, Preamble and Article L (describing the importance of Hungary's 'historical constitution' grounded in Christianity as well as that marriage is the 'union of man and a woman'). In Poland, the government has signed a law making it a crime to suggest that Poland was complicit in any war crimes. U Belavusau and A Wójcik, 'Polish Memory Law: When History Becomes a Source of Mistrust' (*New Eastern Europe,* 19 February 2018), https://neweasterneurope.eu/2018/02/19/polish-memory-law-history-becomes-source-mistrust.

[40] Article L, Hungarian Constitution 2011.

[41] N W Barber, *Principles of Constitutionalism* (Oxford University Press, 2018).

[42] W Partlett and Z Nwokora, 'The Foundations of Democratic Dualism: Why Constitutional Politics and Ordinary Politics Are Different' (2019) *26 Constellations: An International Journal of Critical and Democratic Theory* 177.

[43] N Robinson and S Milne, 'Populism and Political Development in Hybrid Regimes: Russia and the Development of Official Populism' (2017) 38(4) *International Political Science Review* 412.

[44] L Aron, 'Yeltsin Russia's Rogue Populist' (*Washington Post*, 3 June 1990), https://www.washingtonpost.com/archive/opinions/1990/06/03/yeltsin-russias-rogue-populist/043c753b-5b20-40b0-9838-3d8881218228.

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Communist Party … [that prioritised] democracy, sovereignty, and independence' as well as relied on anti-elitism that 'focus[ed] on the corruption of the communist bureaucracy'.[45] In adopting populist techniques, Yeltsin's Russia was therefore one of a handful of countries in the former Soviet Union that exhibited populist governance—Belarus's Aleksandr Lukashenko is another example.

As President of the Russian Republic of the Soviet Union in 1991 and 1992, Yeltsin relied on anti-pluralist institutionalism and majoritarianism to dismantle the institutions of the Soviet system—most notably the Communist Party of the Soviet Union—and establish a new constitutional system in a newly independent Russia.[46] After being elected President in 1991, Yeltsin declared himself and his relationship with the Russian people to be at the centre of a new Russia, declaring that his leadership would put the 'interests of the people' above those of a corrupt Communist elite.[47] After the collapse of the Soviet Union, Yeltsin used majoritarianism in his struggle for power with the elected, Soviet-era Russian legislature (Supreme Soviet). Perhaps the best example was his victory in a referendum that included the question 'Do you trust Boris Yeltsin, the President of Russia?'[48] Yeltsin used a 53% vote of popular support in his personal leadership to justify the unilateral establishment of a new post-Soviet constitutional system without the institutions of the Soviet state.

This populist strategy ultimately pushed Yeltsin to violently dissolve key institutions of the old Soviet state including the legislature (Supreme Soviet) as well as new ones like the Constitutional Court. He then proceeded to push through Russia's current constitutional order in a referendum in December 1993.[49] As will be described in more detail, this 1993 Constitution reflects its populist genesis. Most notably, it demonstrates anti-pluralist institutionalism by centralising significant formal power in the hands of the Russian president and increasing the number of the new constitutional court judges to allow Yeltsin to control its decisions.[50] Finally, the process of constitution-making was highly majoritarian, ignoring pre-existing institutions and grounding the 1993 Constitution on the will of the people in a 12 December 1993 referendum.[51] Notably, however, the 1993 Constitution did not reflect all the problematic elements of populist constitution-making. In addition, the text of the Constitution was non-protectionist, opening Russia significantly

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[45] March, note 37 above, p 222.

[46] Ibid.

[47] D Remnick, 'Yeltsin Sworn in as Russian President' (*Washington Post*, 11 July 1991), https://www.washingtonpost.com/archive/politics/1991/07/11/yeltsin-sworn-in-as-russian-president/533c96df-a858-44a7-8827-eab25130a551.

[48] M C Walker, *The Strategic Use of Referendums: Power, Legitimacy, and Democracy* (Palgrave MacMillan, 2003), pp 83–85.

[49] Partlett and Krasnov, note 2 above, pp 644–67.

[50] W Partlett, 'Crown-Presidentialism' (2022) *International Journal of Constitutional Law* (forthcoming).

[51] Partlett and Krasnov, note 2 above.

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to the international law system and declaring individual rights to be its 'supreme goal'.

B. Russian Authoritarian Populism

Since the early 2000s, Yeltsin's hand-picked successor—Vladimir Putin—has largely defended the status quo elite of the 1990s (including key members of the Yeltsin family) as well as a new, post-2000 status quo elite personally loyal to him. Russia is therefore no longer a revolutionary populist regime. But Putin's team has continued to draw on populist rhetoric and mechanisms to remain in power (rather than following a traditional right-wing or left-wing political programme).[52] The continued deployment of this populist strategy reflects widespread distrust (both at the elite and popular level) for partisan political competition or ideological projects. In its place is personalised leadership that represents the whole people and solves their problems.[53]

When this populist rhetoric is used to insulate an existing elite from political competition or criticism it becomes 'authoritarian populism'.[54] These leaders argue that centralised governance allows them to continue to best solve the problems of the people.[55] Furthermore, as these leaders continue to claim to represent the 'pure' people against 'corrupt' elite, they must now focus rhetorical attacks away from the existing elite. To do this, authoritarian populist leaders often focus on elites outside the country (and their supposed allies within the country). Finally, because the central plank of political legitimacy is the connection between the leader and the people, this populist rhetorical strategy allows for significant ideological flexibility. In fact, one leading Russian commentator has stated that 'ideas hardly matter' in Russia.[56] This

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[52] T Burrett, 'Charting Putin's Shifting Populism in the Russian Media from 2000 to 2020' (2020) 8 *Politics & Governance* 193, p 196.

[53] C Bickerton and C Accetti, *Technopopulism: The New Logic of Democratic Politics* (Oxford University Press, 2020) (describing how populism rejects partisan democratic dialogue and instead sees the leader as representing the whole people and solving their problems); S Hanson, 'Instrumental Democracy: The End of Ideology and the Decline of Russian Political Parties' in V L Hesli and W M Reisinger (eds), *The 1999–2000 Elections in Russia: Their Impact and Legacy* (Cambridge University Press, 2011), pp 163–85. See also M Maruelle, 'Putin's Regime and the Ideological Market: A Difficult Balancing Game' (Carnegie Institution White Paper, 16 March 2017), https://carnegieendowment.org/2017/03/16/putin-s-regime-and-ideological-market-difficult-balancing-game-pub-68250.

[54] C Mudde and C R Kaltwasser, 'Populism' in M Freeden and M Stears (eds), *The Oxford Handbook of Political Ideologies* (Oxford University Press, 2013), pp 495–98 (describing authoritarian populism as a distinct type of populism linked to right wing movements); B Bugaric, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism' (2019) 17 *International Journal of Constitutional Law* 592; B Bugaric, 'The Two Faces of Populism: Between Authoritarian and Democratic Populism' (2019) 20 *German Law Journal* 390.

[55] Bickerton and Accetti, note 53 above.

[56] D Trenin, 'Russia Redefines Itself and Its Relations with the West' (*Carnegie Endowment*, 1 March 2007), https://carnegieendowment.org/2007/03/01/russia-redefines-itself-and-its-relations-with-west/3lz.

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post-ideological position gives the leader significant flexibility in claiming to represent the whole people. For instance, the Kremlin has recently turned away from the aggressive nationalist messaging that accompanied its annexation of Crimea by returning some prominent liberals to powerful positions.[57] The amendments themselves also reflect this flexibility, constitutionalising both a right-wing position on marriage while taking a left-wing position on socio-economic guarantees.

But this form of populist legitimation has vulnerabilities. In particular, its ongoing commitment to the centralisation of power (so that the leader can personally solve the people's problems) can undermine state effectiveness by weakening institutions and bottom-up political accountability. Moreover, it is open to bottom-up, populist criticism that the current leadership *itself* represents a corrupt elite who believe in nothing other than their own personal enrichment. This kind of 'populist reordering' is currently an increasingly effective opposition strategy by grassroots opposition movements in Russia and Belarus.[58] The two leading examples of this are the opposition movements led by Alexei Navalny in Russia and Svetlana Tikhanovskaya in Belarus.[59]

Until 2020, Russian authoritarian populism under Vladimir Putin was secured through legislation and presidential decree. This legal change centralised power and sought to protect a more nationalistic conception of Russian identity. Two leading law professors at the Higher School of Economics described these legal changes as a form of 'creeping anti-constitutionalism' that have further undermined the fundamental guarantees in the foundational chapters of the Constitution.[60]

We can trace these trends in at least four different areas. First, Putin's presidential administration has intensified anti-pluralist institutionalism. In the early 2000s, it moved aggressively to centralise power in the federal government in Moscow.[61] To do this, the administration has introduced a number of legal changes that extended the power of the presidential administration over regional leadership, including a series of changes allowing the president to control the selection of regional governors.[62]

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[57] M Laruelle, 'Putin's Regime and the Ideological Market: A Difficult Balancing Game' (Carnegie Task Force White Paper, 16 March 2017), https://carnegieendowment.org/2017/03/16/putin-s-regime-and-ideological-market-difficult-balancing-game-pub-68250.

[58] J Lassila, 'Aleksei Naval'nyi and Populist Re-ordering of Putin's Stability' (2016) 68(1) *Europe-Asia Studies* 118.

[59] Ibid.

[60] 'Two Higher School of Economics Professors Explain How the Russian Constitution Keeps Democratisation Hopes Alive' (*Meduza*, 6 December 2018), https://meduza.io/en/feature/2018/12/06/two-higher-school-of-economics-professors-explain-how-the-russian-constitution-keeps-democratisation-hopes-alive. Based on an interview that can be found here: https://novayagazeta.ru/articles/2018/12/05/78819-dni-konstitutsii.

[61] E Ferris, 'There's More to Russia Than Putin' (*Foreign Policy*, 6 August 2019), https://foreignpolicy.com/2019/08/06/theres-more-to-russia-than-putin.

[62] W Partlett, 'Putin's Artful Jurisprudence' (*The National Interest*, 2 January 2013), https://nationalinterest.org/article/putins-artful-jurisprudence-7882?nopaging=1 (explaining how Putin has used legal changes to weaken two key parts of the elite: regional leaders and wealthy oligarchs).

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Second, the presidential administration has relied heavily on 'protectionist' rhetoric against external elites (and their internal agents). Thus, the Putin administration has introduced laws that 'protect' government service from dual citizens or those with connections outside of the country and which seek allow certain groups to be labelled foreign agents or extremists. Third, again relying on a corrupt external elite, the presidential administration has relied on antagonistic re-politicisation to regulate history and education. This includes, for instance, laws criminalising the falsification of history.[63] Fourth, the Putin regime has continued to rely on a direct relationship between President Putin and the people as a critical aspect of its governance style.[64] An excellent example is President Putin's annual call-in show called 'Direct Line' in which President Putin takes calls from Russians and personally solves their problems.[65] In this system, polls showing the personal popularity of President Putin are a critical form of legitimacy for the current regime.[66]

The following parts of this article will describe how the 2020 amendments have constitutionalised these trends. This analysis will show that what was once a creeping or subterranean method of undermining the constitutional commitments in Chapters 1 and 2 of the then Russian Constitution has now been constitutionalised. These changes therefore do not make any fundamental changes to Russian governance; instead, they simply transfer these legislative trends to the constitutional level. Placing these norms in the constitution, however, allows the current leadership to frame a new set of enemies (a corrupt elite) and create the image of reform in order renew popular support. This use of constitutional reform therefore demonstrates the theatrical uses of large-scale constitutional reform in ensuring the survival of mature or later-stage forms of authoritarian populism.

III. ANTI-PLURALIST INSTITUTIONALISM

Written constitutions are traditionally drafted in order to disperse or divide institutional power in a way that seeks to avoid the concentration of power in the hands of one individual or group. This constitutional pluralism is critical to ensuring political competition, the rule of law, and the democratic accountability of public officials. This part will describe how the 2020 constitutional amendments

[63] 'Putin Criminalizes Rehabilitation of Nazism' (*Russian Legal Information Agency*, 5 May 2014), http://www.rapsinews.com/legislation/20140505/271257417.html.

[64] A Pertsev and M Solopov, 'What Putin Reads' (*Meduza*, 17 July 2020), https://meduza.io/en/feature/2020/07/17/what-putin-reads (describing how the Kremlin invests heavily in polling to understand and shape popular opinion).

[65] S Wengle and C Evans, 'Symbolic State-Building in Contemporary Russia' (2018) 34(6) *Post-Soviet Affairs* 384, p 388.

[66] Yudin, note 15 above (arguing that polls showing the personal support for Vladimir Putin are critical to regime legitimacy); Frye, Gehlbachb, Marquardt and Reuterd, note 15 above (arguing that Putin's personal approval ratings are a critical 'source of legitimacy for the President and his regime); see also Surkov, note 16 above (describing Putinism as grounded on the trust relationship between the president and the people).

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constitutionalise legislative developments that further centralise power in one institution and one individual (the current President, Vladimir Putin).

A. Constitutional Centralism

A key principle underpinning democratic constitutionalism is the separation of powers.[67] Separation of powers theory argues that constitutions should disperse power between the institutions of the state in order to ensure that checks and balances are placed on the concentration of formal power.[68] This dispersion of power has a critical state-building purpose: it helps to build institutional independence and specialisation which foster a more effective state.[69] It also seeks to protect the rule of law, the democratic accountability of public officials, and the liberty of the individual.[70]

Some constitutions create separate institutions but do so without checks and balances.[71] This centralisation of power is underpinned by an anti-pluralist belief (common to populist regimes) that centralised power is a more effective form of state-building. A clear example of this design is 'crown-presidentialism'.[72] This design concentrates power by assigning the president two different roles. First, the president has nearly unlimited management authority to dominate the executive branch ministers (including the prime minister) and the bureaucracy; this is frequently referred to as the presidential 'vertical of power'. But, in addition to this ultimate decider role, the president can also assume a crown-like, guardian role to transcend the system of power and control the legislative and judicial branches of power as arbiter and coordinator of state unity.

The Russian Constitution

Russia's 1993 Constitution adopted this crown-presidential design. Chapter 1 of the Russian Constitution declares that state power is 'divided' into executive, legislative, and judicial branches of power and that they are 'independent'.[73] But Chapters 4–6 of the Russian Constitution—which detail the actual relationships between institutions—make it clear that the president dominates all three branches of power.[74] This formal centralisation reflected Yeltsin's populist desire to centralise power in the office of the president in order to avoid parliamentary checks on power and advance the

[67] Barber, note 41 above.

[68] M JC Vile, *Constitutionalism and the Separation of Powers*, 2nd ed (Liberty Fund, 1998), https://oll.libertyfund.org/titles/vile-constitutionalism-and-the-separation-of-powers.

[69] Barber, note 41 above.

[70] Vile, note 68 above, pp 1–3; Barber, note 42 above.

[71] W Partlett, 'Separation of Powers Without Checks and Balances' in W Simons and T Borisova (eds), *The Legal Dimension in Cold War Interactions: Some Notes From the Field* (Brill, 2012).

[72] Partlett, note 50 above.

[73] Article 10, Russian Constitution.

[74] Partlett, note 50 above.

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interests of the people. The 1993 Constitution, however, did create an asymmetrical system of federalism in which the subnational regions had independent power. Although the formal structure was ambiguous, this placed some checks on centralised power during the 1990s. In particular, the regional governors checked the power of the president to exercise power regionally by using their offices to sign bilateral treaties with the centre.

This design has seen no constitutional amendment since 1993. Yet, since 2000, the Putin administration has introduced a series of laws and presidential decrees that centralised power over regional and local government.[75] A notable change has been the relationship between regional governors and the president. In the 1990s, regional governors emerged as a critical check on the power of President Boris Yeltsin. Upon coming to power, President Putin sought to eliminate this check on presidential power. Putin's first move was a presidential decree creating seven regional divisions and appointing presidential representatives to each.[76] In September 2004, the Putin administration pushed through a law which gave the president the power to appoint regional governors. This law was later upheld by the Russian Constitutional Court. Other legislative changes in 2004 also gave the president increased powers over the legislative branch of government in the regions.[77] Although this broad presidential appointment power was later taken away in 2012, it was replaced with a 'presidential filter' for the president to propose candidates and a 'municipal filter' that made it difficult if not impossible for independent candidates to register and run for election. These reforms were explicitly justified as creating a vertical of power.

Another notable legislative change has been legislation that increases central control over local government. Initially, in the 1993 Constitution, local government was not considered to be state power, providing it a formal level of insulation from centralised control. But legislative changes have undermined this insulation. To take just one example, Article 34(4) of the Federal Law on the Organisation of Local Self-government gives the organs of central power the right to be involved in the formation of the organs of local self-government as well as the appointment and dismissal of officials of the local government.[78] This power has allowed significant central interference in the activities of local government. The Constitutional Court has generally upheld this creeping centralisation of power through law, arguing that local self-governance does 'not exclude their constructive co-operation with organs of state [centralised] power for an effective fulfilment of general tasks, linked

[75] E V Gritsenko, 'Federalism and Local Self-Government in the Light of the Russian Constitutional Reform of 2020' in Aziz Ismatov, Kaoru Obata, and Herbert Küpper (eds), *Dynamics of Contemporary Constitutionalism in Eurasia: Local Legacies and Global Trends* (forthcoming 2021).

[76] M Hyde, 'Putin's Federal Reforms and Their Implications for Presidential Power in Russia' (2001) 53(5) *Europe-Asia Studies* 719.

[77] M Krasnov, 'The Legislative Powers of the Russian President: A Necessity or Servility?' (2011) 83 (4) *Comparative Constitutional Review* 1, p 9 (in Russian).

[78] Federal Law No 131-FZ of 6 October 2003 'On the General Principles of the Organisation of Local Self-Government in the Russian Federation'.

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immediately with questions of local importance'.[79] One scholar wrote in 2018 that for ten years, local government has become 'less competent, with less financial and administrative autonomy, fewer resources for self-organisation, and more reliance on vertical state power'.[80]

Another component of this centralisation strategy was the concentration of financial power in Moscow.[81] This has allowed the central government to control a number of areas that were constitutionally assigned to regional or local government. A good example of this was the May Decrees of 2012. These presidential decrees were issued after Vladimir Putin successfully returned to the presidency in 2012. They set ambitious targets for a number of areas that were not formally under the control of the central government, including stating that 'life expectancy would increase from age 70 in 2012 to age 74 by 2018; the cost of housing a square meter would decrease by 20 per cent; 25 million high-productivity jobs would be created by 2020, more than doubling the estimated number in 2012'.[82] These decrees therefore signalled the federal government's desire to enter policy areas normally thought to be reserved to Russia's regions.

A final aspect of this centralisation strategy took place within the central government itself. In particular, the presidential administration under Vladimir Putin has sought to centralise power over the executive branch ministers and bureaucracy. Fabian Burkhardt describes how the presidential administration used a number of different legal tools to exert more effective control over Russia's increasingly large, executive branch bureaucracy. This included not just presidential decrees but also presidential 'assignments'.[83] This section will describe how the 2020 amendments to the Russian Constitution have entrenched these centralising trends by further concentrating power in the hands of the Russian president.

The amendments

Early reporting from the amendment process led to speculation that the amendments would reverse this process of centralisation by placing more checks on the exercise of presidential power as a form of political insurance for Putin when he became ex-president.[84] President Putin himself seemed to support this approach in his speech

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[79] Decision of the Constitutional Court No 33-P of 18 July 2018.

[80] R V Babun, 'Local Self-Government in Russia. A New Stage of Municipal Development' (2018) 60(8–9) *Problems of Economic Transition* 624.

[81] I Busygina, M Filippov, and E Taukebaeva, 'To Decentralize or to Continue on the Centralization Track: The Cases of Authoritarian Regimes in Russia and Kazakhstan' (2018) 9 *Journal of Eurasian Studies* 61, p 62.

[82] W E Pomeranz and K Smith, 'Commentary: Putin's Domestic Strategy: Counting the Trees, Missing the Forest' (*Reuters*, 31 May 2016), https://www.reuters.com/article/us-russia-putin-domestic-commentary-idUSKCN0YM08V.

[83] F Burkhardt, 'Institutionalizing Authoritarian Presidencies: Polymorphous Power and Russia's Presidential Administration' (2021) 73(3) *Europe-Asia Studies* 472.

[84] I Krastev, 'Putin's New Orchestra' (*NY Times*, 27 January 2020), https://www.nytimes.com/2020/01/27/opinion/putin-government-change.html (arguing that '[b]y constraining the powers of the

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to the Federal Assembly, stating that the constitutional amendments would bring about 'a greater balance between the branches of power'.[85] The actual changes, however, do not balance Russia's constitutional system by placing any checks on presidential power. Instead, they constitutionalise the further centralisation of power in the office of the president that has taken place over the last two decades. They do this at the expense of regional and local government as well as an independent bureaucracy.

Some of the amendments appear to weaken the president's management powers over the executive branch government by determining the makeup of the government. For instance, an amendment now *requires* the president to appoint certain deputy ministers that have been appointed by the prime minister and confirmed by the lower house of the legislature (Duma).[86] But a closer analysis shows that the president actually has more management power. The president retains the unilateral authority to remove any of these ministers (including the prime minister). Furthermore, the amendments exempt from this process of required appointment the most important executive branch ministers such as the ministers of justice, foreign affairs, defence, internal affairs, and emergency situations. These ministers are now to be appointed by the president after 'consultation' with the upper house of the Russian legislature (which is already controlled by the president).[87] In addition, other textual changes have further increased presidential management powers over the executive branch. These include statements emphasising the president's control over the executive branch government, most notably stating the 'personal responsibility' of the prime minister to the president and the president's general authority 'to exercise general power over the government'.[88] These constitutional powers therefore constitutionalise growing formal presidential domination over the executive branch government and the bureaucracy.

Second, the president's increasing powers over the other branches of power have been constitutionalised. The general description of the presidency has been altered, adding an additional mediator role in supporting 'civil peace and harmony in the country'.[89] Moreover, the president now has the authority to *remove* judges from office (including constitutional court judges) by introducing a proposal to the upper house.[90] The president also has enhanced power to appoint regional prosecutors.[91] This provides even more formal power over regional law enforcement and

(F'note continued)
president, empowering Parliament, and making himself the ultimate power center beyond the Kremlin, Vladimir Putin would create institutional competition that is not now present').

[85] Putin speech to the Federal Assembly, note 6 above.

[86] Article 112.3, Russian Constitution (amended version).

[87] Article 83(d^1), Russian Constitution (amended version).

[88] Articles 113, 83(b), Russian Constitution (amended version) (respectively).

[89] Article 80.2, Russian Constitution (amended version).

[90] Article 83(e^3), Russian Constitution (amended version).

[91] Article 83(e^1), Russian Constitution (amended version).

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responds to Putin's concern that the current system of appointing local prosecutors (with the agreement of local authorities) leads to 'informal, obligations towards local authorities and ultimately to the risk of losing objectivity and impartiality'.[92]

In addition, the president has new constitutionally entrenched appointment power over critical oversight institutions such as the Audit Chamber.[93] Finally, the president has increased constitutional power over the legislature. This includes more power to dissolve the lower house of Parliament (Duma) as well as the authority to appoint thirty members of the upper house of Parliament (Federation Council) of which seven can be lifetime appointments.[94] In addition, in the event that the legislature overrides the veto of the president (unlikely given presidential control over the upper house of the legislature), the amendments provide the president with the authority to ask the Constitutional Court to review this law for constitutionality.[95] Given the increasing authority of the president over the Constitutional Court, this power will operate as a kind of 'super-veto'.

Finally, the amendments constitutionalise the increased power of the president over regional and local government. Initially, they expand federal dominance in a number of areas, including education, culture, and health.[96] Further, the amendments now include local government in an overall system of 'public power (*publichnaya vlast*)'. This change provides additional legal basis for centralised control of local government. The president is now charged with guaranteeing the harmonised functioning of all 'organs in the uniform system of public power', thus creating a constitutional basis for federal interference into the organisation and exercise not only of the regional power but also local self-government.[97] Finally, a new provision no longer allows local government to '*establish*' local taxes and levies but only to '*introduce*' them, signifying further fiscal centralisation.[98]

In sum, these changes constitutionalise the subordination of both legislative and judicial power as well as regional and local government to the president's top-down vertical of power. By further empowering the office of the President, Russian governance is likely to even more closely resemble the excessive centralisation of power found in 'big men' presidential rule in Africa and 'hyper-presidentialism' in Latin America, Eastern Europe, and Asia.[99] This vast concentration of power in

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[92] Putin speech to the Federal Assembly, note 6 above.

[93] Article 83, Russian Constitution (amended version).

[94] Article 95(2), Russian Constitution (amended version).

[95] Article 107.3, Russian Constitution (amended version).

[96] See, for example, Article 71(g), (m), (t) Russian Constitution (amended version)

[97] Article 80(2) Russian Constitution (amended version)

[98] Article 132(1) Constitution RF (amended version)

[99] O Van Cranenburgh, 'Big Men Rule: Presidential Power, Regime Type, and Democracy in 30 African Countries' (2008) 15 *Democratization* 952; S Rose-Ackerman, D A Desierto, and N Volosin, 'Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and Philippines' (2011) 29 *Berkeley Journal of International Law* 246.

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the president in turn is likely to continue to weaken key institutions that deliver important aspects of state power.

B. *Constitutional Personalism*

Constitutions do not just disperse power between institutions to create strong and stable governmental institutions; they also often seek to limit the amount of time that one individual can serve in powerful institutions. This practice is intended to avoid the over-personalisation of power and to ensure institutional effectiveness. The dangers of personalism are particularly problematic in constitutional systems with elected presidents. As a result, presidential constitutions frequently include term limits to ensure political pluralism and the rotation of power.[100]

Comparative experience from presidential systems in Latin America, Asia, and Africa, however, demonstrates the tendency of populist regimes to keep leaders in power for long periods of time. In Latin America, the practice of staying in power is so common it has been given a particular name: '*continuismo*'.[101] Several strategies for prolonging personal rule are available. The first—called the avoidance strategy—keeps presidential term limits in place but finds a way for the existing president to remain in power. A common method is for the president to step down but remain as *de facto* leader while occupying another important constitutional position. This approach was recently taken in Kazakhstan, where President Nursultan Nazarbaev stepped down from the presidency but remained *de facto* head of the country as chairman of the Security Council.[102] Another avoidance strategy is to start a new countdown for presidential terms.[103] A second group of strategies is to formally extend or remove term limits.[104] This can involve specific textual changes to the part of the constitution including term limits (e.g., removing any mention of presidential term limits). This is what happened in China in 2018, when Xi Jinping pushed through a constitutional amendment abolishing presidential term limits in the Chinese Constitution.[105] It also could include

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[100] G Maltz, 'The Case for Presidential Term Limits' (2007) 18 *Journal of Democracy* 128 (2007).

[101] A Baturo, 'Continuismo in Comparison: Avoidance, Extension, and Removal of Presidential Term Limits in The Politics of Presidential Term Limits' in R Elgie and A Baturo (eds), *The Politics of Presidential Term Limits* (Oxford University Press 2019).

[102] W Partlett, 'Constitutional Design and Post-Soviet Presidential Succession: The Kazakh Model?' (*International Journal of Constitutional Law Blog*, 1 May 2019), http://www.iconnectblog.com/2019/05/constitutional-design-and-post-soviet-presidential-succession-the-kazakh-model. This is also the approach taken by President Vladimir Putin in 2008 when he remained de facto head of the country despite stepping down from the president.

[103] A number of different mechanisms are possible. See, for example, D Tull and C Simons, 'The Institutionalisation of Power Revisited: Presidential Term Limits Revisited' (2017) 52 *Africa Spectrum* 79 (discussing the use of court decisions in Senegal (2012) and Burundi (2015) to restart the clock on presidential term limits).

[104] Baturo, note 101 above, pp 83–84.

[105] C Buckley and A Wu, 'Ending Term Limits for China's Xi Is a Big Deal. Here's Why' (*NY Times*, 10 March 2018), https://www.nytimes.com/2018/03/10/world/asia/china-xi-jinping-term-limit-explainer.html.

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fundamentally transforming the constitution into a parliamentary system that does not have any term limits on the political leader (normally, the prime minister).[106]

The Russian Constitution

The 1993 Russian Constitution guarantees a 'republican' form of government and states that one individual cannot hold the office of president for more than 'two terms in a row'.[107] But personalism has always been an important part of Russian governance. After establishing a system of centralised presidential rule, President Boris Yeltsin frequently sought to rule by decree when he could not get the support of the legislature. Since 2000, personalist rule has further intensified under President Vladimir Putin. Perhaps the clearest example is the decision by Vladimir Putin to step down from the presidency and become prime minister for four years in 2008 and then return to the presidency in 2012. This decision has meant that Vladimir Putin has been Russian president for sixteen of the last twenty years. As stated above, his personal popularity has been a critical source of legitimacy for the regime for many years.

The amendments

Russia's amendments continue this personalist trend (at least in the short term). The amendments do not accomplish this by removing the term limit provision. Instead, the amendments make the general term limit more stringent, stating that 'one individual cannot hold the office of the president for more than two terms'.[108] This removes the word 'in a row (*podriad*)' and therefore forbids an individual from serving two terms, stepping down, and then later returning to the presidency (as Vladimir Putin did). A last-minute and hastily drafted amendment, however, resets the number of terms to zero for any current or former Russian president.[109] The purpose of this so-called 'zeroing provision' is clear: to allow the current president—Vladimir Putin—the possibility of holding the office of president for two additional six-year terms in addition to the four terms as president he has already served.

This amendment is a clear reflection of personalism in the constitutional text. In fact, given that Putin is currently in his fourth term as president, it allows him the possibility of holding the office of the president for six total terms, four of which are consecutive terms. From a comparative point of view, the Russian zeroing provision rejects another key avoidance technique in which an individual steps down from the presidency but remains *de facto* leader. Instead, the zeroing amendment places Russia far closer to

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[106] Reforming Centralism and Supervision in Armenia and Ukraine, in The Annual Review of Constitution-Building Processes 2015 (International Institute for Democracy and Electoral Assistance 2016).

[107] Article 81, Russian Constitution (current version). Available at (in Russian): http://kremlin.ru/acts/constitution.

[108] Article 81(3), Russian Constitution (amended version).

[109] Article 81(3^1), Russian Constitution (amended version).

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the highly personalised constitutional systems that exist in Africa where presidents have simply exempted themselves from term limits and stayed in power.

Although this approach might minimise political instability in the short term, this constitutionalisation of personalised power has dangerous long-term effects. In fact, personalism's reliance on 'manual control' undermines the independence and effectiveness of public institutions.[110] A key reason is that the institutions at the centre of effective state operation atrophy if all power is formally concentrated in the hands of one individual.[111] These reforms therefore signal the continuance of older personalised forms of government found in both the Tsarist and Soviet periods.

IV. PROTECTIONISM: CONSTITUTIONAL IDENTITY

In the immediate post-Cold War period, many saw democratic constitutions as mechanisms for protecting minority rights and integrating with post-Cold War supranational institutions and international law. Constitutions were viewed as part of a new world order in which 'state values' were being replaced by 'human values'.[112] Consequently, many new constitutions opened the domestic system to international human rights norms which would protect the individual from the actions of majorities.

In recent years, however, authoritarian populist leaders (particularly in Europe) have sought to use constitutions to 'protect' a conservative identity grounded in a particular version of history. This rhetoric frequently seeks to safeguard the people from minority rights and the international institutions underpinning them. In Europe, a key target of this protectionist language has been the European Union and the European Court of Human Rights. For instance, in Hungary, a 2018 constitutional amendment ultimately stated that it is the 'fundamental obligation' of the state to protect Hungarian self-identity rooted in its 'historical constitution'.[113] Underlying this historical constitution was traditional values tied to a conservative agenda, including defining marriage as 'the union of a man and a woman established by voluntary decision'.[114] This historical constitution has also been used by Hungary to resist European Union directives, including the resettlement of refugees.[115]

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[110] B Geddes, J Wright, and E Frantz, *How Dictatorships Work: Power, Personalization, and Collapse* (Cambridge University Press, 2018) (arguing that personalised dictatorships are less stable); E Frantz, *Authoritarianism: What Everyone Needs to Know* (Oxford University Press, 2018).

[111] Geddes, Wright, and Frantz, note 110 above (arguing that personalised dictatorships are less stable); Frantz, note 110 above.

[112] L Henkin, 'Human Rights and State Sovereignty' (1996) 25 *Georgia Journal of International & Comparative Law* 31.

[113] Seventh Amendment of the Basic Law of Hungary (2018), https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf.

[114] Article L, Hungarian Constitution.

[115] G Halmai, 'The Making of 'Illiberal Constitutionalism' with or without a New Constitution: The Case of Hungary and Poland' in D Landau and H Lerner (eds), *Comparative Constitution Making* (Edward Elgar Publishing, 2019), p 310.

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Similar trends can be found in Russia, where laws have increasingly been used to protect a particular version of Russian identity. For instance, for more than twenty years, a law has been in force describing the way in which Russia would support its 'compatriots' abroad.[116] Furthermore, federal law has introduced a number of requirements about the patriotic education of children.[117] The most notorious—what some have called 'gay propaganda laws'—are laws at both regional and federal governments that seek to 'protect' children from information that defends homosexuality or other 'non-traditional' forms of interaction. For instance, on 29 June 2013, the Code of Administrative Offences of the Russian Federation was amended, introducing in Article 6.21 administrative liability for the 'promotion of non-traditional sexual relations among minors'.[118] These laws were upheld by the Russian Constitutional Court but were later declared in violation of the European Convention by the European Court of Human Rights.[119] Further, particularly since the annexation of Crimea, legislation has sought to advance conservative narratives about Russian history.[120] Finally, and perhaps the clearest form of protection, legislation has given the Russian Constitutional Court the power to nullify decisions by international courts that conflict with the Russian Constitution. The 2020 constitutional amendments to the Russian constitution constitutionalise these sub-constitutional forms of protectionism.

The Russian Constitution

The foundational chapters of the Russian Constitution were originally adopted to break free from protectionism (associated with the Soviet past). Key foundational provisions therefore proclaim the 'universally recognised principles and norms of international law and binding international treaties' above legislation.[121] Chapter 2 of the Russian Constitution includes a long list of 'inalienable' individual rights that are to be guaranteed 'according to the universally recognised principles and norms of international law and according to the present constitution'.[122] These rights include the right to equality, life, dignity, liberty, personal privacy, and

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[116] Federal Law 'About Government Policy of the Russian Federation in Relationship to Compatriots Abroad' (Федеральный закон от 24.05.1999 N 99-ФЗ (ред. от 23.07.2013) 'О государственной политике Российской Федерации в отношении соотечественников за рубежом')

[117] Federal Law 'About Basic Guarantees of the Rights of Children in the Russian Federation' (17.12.2009).

[118] See *Case of Bayev and Others v. Russia* (Applications nos. 67667/09, 44092/12, and 56717/12) [2017] ECHR (describing these laws).

[119] S Chan, 'Russia's 'Gay Propaganda' Laws Are Illegal, European Court Rules' (*NY Times*, 20 June 2017), https://www.nytimes.com/2017/06/20/world/europe/russia-gay-propaganda.html.

[120] G Bogush and I Nuzov, 'Russia's Supreme Court Rewrites History of the Second World War' (*EJIL Talk Blog*, 28 October 2016), https://www.ejiltalk.org/russias-supreme-court-rewrites-history-of-the-second-world-war.

[121] Article 15, Russian Constitution.

[122] Article 17, Russian Constitution.

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inviolability of the home that closely approximate international human rights norms.[123]

The amendments

The recent amendments, however, constitutionalise Russia's recent legislative trend toward protectionism. These new constitutional norms are incongruously inserted into Chapter 3 of the Russian Constitution, which details Russia's 'federal structure'. Many of these norms now contradict or stand in tension with the foundational norms in Chapters 1 and 2.

A. Expressions of Russian National and Constitutional Identity

The amendments first entrench constitutional protectionism by inserting text supporting an exclusionary, nationalist form of Russian identity. This draws on growing rhetoric about Russia's unique civilisational identity grounded in history.[124] To do this, these provisions link Russian identity more tightly with its imperial past, explicitly declaring Russia to be the successor state to the Soviet Union, protector of historical truth about the defenders of the Fatherland, and responsible for ensuring patriotism in children's education.[125] Other provisions emphasise the importance of Russia's Orthodox religious identity, a belief in God, and defining marriage as a union between a man and a woman.[126] Finally, additional provisions declare Russians to be the 'state-forming' people and emphasise the need for Russia to provide support to its 'compatriots' overseas in the protection of Russian cultural legacy.[127]

The precise functional effect of these particular textual amendments is likely to be minimal as these norms already exist in ordinary law. But these changes are expressive statements meant to renew popular majoritarian support for a civilisational form of Russian identity that stands in contrast with the West. These new constitutional norms also provide the Constitutional Court with a stronger textual basis for its failure to aggressively protect individual rights contained in Chapter 2 of the Constitution. In theory, this effect, however, should be limited because these norms and values have *not* been inserted into the foundational chapters or preamble of the Russian Constitution (as in the Hungarian example). As stated above, these statements of Russian national identity have been placed in Chapter 3, which details Russia's 'Federal Structure'. But given the Court's recent jurisprudence—for

[123] Articles 19–25, Russian Constitution.

[124] This use of the constitution in Russian exceptionalism has echoes of American exceptionalism where the Constitution emerges as a symbol of sovereign power that resists international influence. See, for example, S Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism' (2008) 107 *Michigan Law Review* 391.

[125] Article 67[1], Russian Constitution (amended version).

[126] Ibid.

[127] Articles 68–69, Russian Constitution (amended version).

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instance the case mentioned above upholding the laws 'protecting' children against gay propaganda—it is likely that these norms will lend further support to the Constitutional Court's turn toward a conservative form of constitutional identity.

B. Russian Constitutional Identity and International Decisions

The amendments also constitutionalise pre-existing legislative provisions allowing the constitution to become a shield against the international legal system. The amendments constitutionalise the power of the Constitutional Court to render particular 'decisions' of international bodies which contradict the Russian Constitution 'impossible to implement'.[128] This power has existed since 2015 when an amendment to the law on the Constitutional Court of Russia on 14 December 2015 gave the Constitutional Court the power to declare 'impossible to implement' judgements of a human rights body on the ground that its interpretation of the international treaty provisions at the basis of the judgement is inconsistent with the Constitution of the Russian Federation. This came on the heels of a July 2015 decision in which the Constitutional Court suggested that such a legislative change should be made. The Court reasoned that that the European Convention should only be enforced in Russia if it did not conflict with the Russian Constitution. In addition, the Court argued that this position was in line with the standpoint of other European states objecting to activism of the European Court of Human Rights, and therefore should be perceived as 'a contribution to building-up well-balanced ECtHR case law'.[129]

The effect of this formal amendment is clear. In fact, this power has already been selectively used by the Russian Constitutional Court in politically salient cases. Although this power has so far only been used to nullify the decisions of the European Court of Human Rights, it also is possible that it will be used in the future to render impossible to implement decisions of other international tribunals. Perhaps the most likely upcoming example is a $50 billion judgment against Russia issued by the Permanent Court of Arbitration in the Hague.[130] Moreover, the inclusion of this mechanism has important symbolic meaning as it elevates this protective mechanism to the constitutional level.[131] These changes were frequently justified as protecting the Russian people and Russian sovereignty against the interference of an international elite that seeks to undermine Russia's national interests.

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[128] Article 79, Russian Constitution (amended version).

[129] Decision of the Russian Constitutional Court, 14 July 2015. Available in English at http://www.ksrf.ru/en/Decision/Judgments/Documents/resume%202015%2021-%D0%9F.pdf.

[130] Y Khalikova, 'Russia's Cat and Mouse Game with International Court' (*Riddle*, 28 March 2020), https://www.ridl.io/en/russia-s-cat-and-mouse-game-with-international-courts.

[131] W Partlett and T Khramova, 'Interpretation and the Impossibility of Implementation in Russian Prisoner Voting' (*International Association of Constitutional Law*, 18 August 2016), https://blog-iacl-aidc.org/2016-posts/2016/8/18/analysis-interpretation-and-the-impossibility-of-implementation-in-russian-prisoner-voting.

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C. *Eligibility Requirements for Public Office*

Finally, the amendments constitutionalise eligibility requirements for service in public office that already exist in federal law. A 2006 federal law bans individuals with foreign citizenship or residency from running for public office.[132] The new constitutional provisions constitutionalise and, in some cases, expand it. First, a new constitutional provision states that heads of public organs (include judges) cannot have foreign citizenship, foreign residency, or hold any money in foreign bank accounts.[133] Second, the federal government can ban foreign citizens or residents from serving in regional or municipal governments.[134] Third, the constitutional eligibility requirement is increased for the president. To be eligible for president, the constitution bans anyone who has *ever* held foreign citizenship or foreign residency.[135]

With the exception of the provision on eligibility for the presidency, these provisions on their own are not problematic. Democratic constitutions contain provisions limiting access to public office for those with foreign citizenship; these are in place to ensure sovereignty and national security. But these eligibility requirements themselves must be proportional to these goals. For instance, the Australian Constitution bans individuals who have dual citizenship from serving in Parliament.[136] But this ban on foreign citizenship has been interpreted by the Australian High Court to allow individuals the possibility of serving in Parliament if they have taken 'reasonable steps' to renounce their foreign citizenship.[137]

President Putin justified these norms in this language, describing the importance of 'obligatory requirements' for those who hold 'positions of critical significance for national security and sovereignty'.[138] The provisions, however, are not textually committed to proportional implementation or to allow the renunciation of foreign connections. The Constitutional Court has already upheld language in federal legislation banning foreign citizens or residents from running for public office as not infringing the constitutional right to be elected.[139] It therefore seems unlikely that the Court will require the possibility of renunciation.

More problematically, the new constitutional eligibility requirements for the Russian president do not allow for a proportional implementation. Most notably, they exclude from the office of the president any person who has *ever* held foreign residency or

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[132] The constitutional provision draws from the wording of the Law on Basic Guarantees of Electoral Rights and the Law on the Election of the Russian President which forbids an individual from running for office who holds foreign citizenship or residency.

[133] Article 78.5, Russian Constitution (amended version) (leaders of the federal bureaucracy); Article 119, Russian Constitution (amended version) (judges).

[134] Article 71(t), Russian Constitution (amended version).

[135] Article 81.2, Russian Constitution (amended version).

[136] Section 44, Australian Constitution.

[137] *Re Canavan* [2017] HCA 45.

[138] Putin speech to the Federal Assembly, note 6 above.

[139] Decision (Opredelenie) of the Russian Constitutional Court, 4 December 2007, http://doc.ksrf.ru/decision/KSRFDecision16866.pdf.

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citizenship. They therefore do not allow any possibility of renunciation. This is clearly overly inclusive and targeted at excluding Russian citizens with experience living overseas. This form of exclusion is another reflection of constitutional protectionism, which views association with the outside world as suspicious or problematic.

V. ANTAGONISTIC RE-POLITISATION: ECONOMIC RIGHTS AND POLITICISING HISTORY

A traditional goal of written constitutions was to carve out a space for autonomous activity for civil society.[140] Populists often criticise this approach, arguing that constitutions should be tools for re-politicising aspects of life that have been depoliticised. On the left, this use of constitutions challenges *laissez faire* principles underlying some versions of constitutionalism by 're-politicising' parts of everyday economic life—such as work or healthcare—that were previously left to market regulation.[141] It therefore views constitutions as documents that should place positive obligations on the state to act in certain ways to overcome social challenges.[142] In Latin America, the Colombian Constitutional Court has enforced the 'vital minimum' doctrine in which it has held that the state should spend money ensuring that all citizens receive at least a minimal level of food, clothing, and housing.[143]

Authoritarian populism (often drawing on right-wing ideology) has capitalised on the shift of the centre-left to *laissez-faire*, market-based policies by re-politicising key economic and social questions.[144] For instance, leaders in Poland and Hungary have moved to raise minimum wages and provide benefits to families to improve the demographic situation and battle child poverty.[145] This use of re-politicisation has been coupled with protectionist rhetoric aimed at international institutions that seek to advance 'anti-family' minority rights claims. Finally, authoritarian populists have also re-politicised patriotic conceptions of history in order to appeal to particular groups. This has led to the spread of 'memory laws' in many forms of European authoritarian populism.

Russia has followed this trend. Perhaps the best example is a high-profile law that seeks to protect history from falsification.[146] In May 2015, President Putin signed a

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[140] Barber, note 41 above.

[141] Landau, note 25 above, p 524.

[142] See H Arendt, *On Revolution* (Penguin Books, 1963) (the social question).

[143] D Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 189, p 208.

[144] S Berman and M Snegovaya, 'Populism and the Decline of Social Democracy' (2019) 30(3) *Journal of Democracy* 5, pp 13–14.

[145] A Toplišek, 'The Political Economy of Populist Rule in Post-Crisis Europe: Hungary and Poland' (2020) 25 *New Political Economy* 388, pp 395–96 (describing how in Hungary and Poland a number of policies have been put in place seeking to raise the minimum wage and provide tax credits and benefits for working families).

[146] A Weiss-Wendt, *Putin's Russia and the Falsification of History: Reasserting Control over the Past* (Bloomsbury, 2020).

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law 'On the insertion of changes in particular legal acts of the Russian Federation'. It criminalises the expression of certain opinions about the Soviet past. Article 1 threatens heavy fines or a three-year prison term for the 'public distribution of lies about the activities of the Soviet Union in World War II, if the offender is aware of the false character of these statements'.[147] These 'lies' include arguments suggesting Soviet complicity in the invasion of Poland for signing the Molotov-Ribbentrop Accords.[148]

The Russian Constitution

The Russian Constitution already contains commitments to socio-economic rights protection, stating that Russia is a 'social state' and that the 'labour and health of people shall be protected' including 'a guaranteed minimum wage' as well as 'state pensions'.[149] It also guarantees that 'state support shall be given to the family, maternity, paternity and childhood'.[150] The Russian Constitutional Court has enforced some of these economic rights, invalidating provisions in federal laws that deny particular citizens their entitlements to state monetary support.[151] Underlying this is a Russian-language literature of 'constitutional economics (*konstitutsionnaya ekonomika*)' which sees constitutions regulating economic life.[152]

The amendments

The amendments provide additional constitutional guarantees of socio-economic rights for Russian citizens. For instance, one new amendment guarantees that the minimum wage 'should not be less than the cost of living of the able-bodied population as a whole in the Russian Federation'.[153] Another provides that 'compulsory social insurance, targeted social support of citizens and indexation of social benefits and other social benefits are guaranteed according to federal law'.[154] Another related amendment states that pensions are to be indexed 'at least once a year in the manner prescribed by federal law'.[155] The new amendments also re-politicise history and

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147 The text of the law is available at http://kremlin.ru/acts/20912.

148 M Edele, 'Fighting Russia's History Wars: Vladimir Putin and the Codification of World War II' (Fall/Winter 2017) 29(2) *History & Memory* 90.

149 Article 7, Russian Constitution.

150 Article 7, Russian Constitution.

151 See, for example, Decision of the Russian Constitutional Court from 5 December 2017 (striking down a provision in federal law denying an insurance pension to an individual on the basis that the recipient was attending university in a foreign country).

152 P Barenboim and N Merkulova, '25th Anniversary of Constitutional Economics: The Russian Model and Legal Reform in Russia' in F Neate and H Nielsen (eds), *The World Rule of Law Movement and Russian Legal Reform* (Yustitsinform, 2007), p 172.

153 Article 75(5), Russian Constitution (amended version).

154 Article 75(7), Russian Constitution (amended version).

155 Article 75(6), Russian Constitution (amended version).

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education, tasking the Russian state with protecting 'historical truth'[156] and ensuring that patriotic education is guaranteed to children.[157]

The functional impact of these provisions is likely to be negligible. Some have criticised the language in these provisions for being too general and therefore incapable of any serious implementation.[158] Further, the amendments' more general emphasis on collective concepts such as historical truth are unlikely to make significant changes to existing laws that limit discussion of Russian history. Instead, they will allow the central government to continue its 'conservative' agenda, for instance through the exercise of control over the development of school curricula.

Another practical barrier undermines the realisation of these constitutionally guaranteed socio-economic guarantees. The central government 'implements' these socio-economic rights by issuing orders to regional governments to enforce them.[159] These socio-economic responsibilities require significant resources, however, and the central government has failed to provide the regional governments the necessary resources to fulfil them. This problem of unfunded mandates is widespread.[160] A well-known example occurred after Vladimir Putin's return to the presidency in 2012. Upon assuming office, Putin signed an ambitious set of presidential decrees seeking to achieve some of the socio-economic goals.[161] These decrees were left to the regions to implement but were not adequately funded by the centre; this has led to serious problems of non-compliance due to a lack of funding.[162]

The Russian Constitutional Court has sought to remedy some of the problems associated with impoverished regional governments unable or unwilling to honour their commitments.[163] Most recently, on 14 January 2020, the Russian Constitutional Court reached an important decision in a housing subsidy case.[164]

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[156] Article 67^1(3), Russian Constitution (amended version).

[157] Article 67^1(4), Russian Constitution (amended version).

[158] A Soboleva, 'Indexing words. Why the 'Social' Amendments to the Constitution Are Not Only Meaningless, But Also Harmful' (*The Insider*, 28 March 2020), https://theins.ru/politika/208840 (in Russian).

[159] G Di Bella, O Dynnikova, and F Grigoli, 'Fiscal Federalism and Regional Performance in Russia' (2018) 4 *Russian Journal of Economics* 108, p 114. In 2016, regional spending represented 95 percent of general government expenditure for housing and utilities, 80 percent for education and cultural activities, and around 85 percent for health including spending by territorial extra-budgetary medical funds.

[160] World Bank, 'Russian Federation: Reducing Poverty through Growth and Social Policy Reform' (Poverty Reduction and Economic Management Unit, Europe and Central Asia Region, World Bank, 2005) Report No 28923-RU, p 114.

[161] Pomeranz and Smith, note 82 above.

[162] Burkhardt, note 83 above; Pomeranz and Smith, note 83 above (describing how the regions lack the funding and resources to implement presidential decrees).

[163] See, for example, The Decision of the Russian Constitutional Court, 10 December 2019 (finding that rehabilitated victims of political repressions as well as any children born in the Gulag system or in exile have the right to receive housing in the cities where their families lived at the time of the repression), available at: https://rg.ru/2019/12/19/ks-dok.html.

[164] Decision of the Russian Constitutional Court, 14 January 2020, http://doc.ksrf.ru/decision/KSRFDecision448507.pdf.

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This case involved a woman—Marina Alisova—who worked in a rural hospital and received a state subsidy for the construction of a house under federal legislation. After this money was stolen by Ms Alisova's builder, the region then pursued the full amount of the subsidy against Ms Alisova. The Russian Constitutional Court —relying on the fact that Russia is a social state (Article 6) as well as the individual right to housing (Article 40)—held that the regional authorities cannot recover money when the recipient is not at fault.

The Russian Constitutional Court, however, can only do this on a small scale. The Court does not have the resources to solve the broader problem of 'unfunded mandates' in the area of socio-economic rights. Until the federal government in Moscow adequately distributes funds to regional governments to implement these socio-economic guarantees, they will remain largely empty constitutional promises. If they remain this way, the expanded socio-economic guarantees are more of a symbol meant to generate popularity than a real attempt to transform Russian life.

VI. MAJORITARIANISM: POPULAR CONSTITUTION-MAKING

Democratic constitutions are grounded on the will of the people.[165] This principle of popular sovereignty is seen as critical to ensuring the democratic nature of constitutionalism. A populist interpretation of this principle of popular sovereignty—one that I have previously called 'popular constitution-making'—holds that a majority of the people should be able to make important legal changes outside of existing institutional, legal, and constitutional constraints.[166] Underlying this interpretation of popular sovereignty is often an anti-pluralist and majoritarian set of ideas which argues that leaders should be able to circumvent existing institutions and place their preferred constitutional drafts directly to the people.

Comparative experience shows that this approach can often develop into authoritarian governance. As populist leaders insulate themselves from political criticism and competition, they must develop sophisticated strategies for 'manufacturing' the continued support of popular majorities.[167] One strategy involves the clever manipulation of the rules or timing of popular votes.[168] Another example is combining technical but important structural amendments that centralise power or limit checking institutions with more popular constitutional guarantees. This forces voters

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[165] V Hart, 'Democratic Constitution-Making' (Special Report, United States Institute of Peace, 1 July 2003).

[166] W Partlett, 'The Dangers of Popular Constitution-Making' (2012) 38 *Brooklyn Journal of International Law* 193; See generally, E J Sieyes, *What Is the Third Estate?* (S E Finer (ed), M Blondel (trans), Pall Mall Press, 1963), pp 121–22 (describing the 'constituent power (pouvoir constituent)' of the people to break with the pre-existing order to build a new one).

[167] Partlett and Nwokora, note 42 above (explaining how best to structure constitutional politics to ensure that the people are able to genuinely speak).

[168] W Partlett, 'Expanding Revision Clauses in Democratic Constitutions' in G Negretto (ed), *Constitution-Making in Democratic Orders* (in press, forthcoming 2020) (discussing how rules in revision clauses can help to guard against abusive constitutional change).

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to accept the bad amendments to get the ones that they want. Furthermore, popular votes are frequently timed to coincide with symbolic holidays that are likely to further encourage majority support for particular changes. Finally, specialised votes or referendum are often backed by 'administrative resources' such as a powerful state-led media campaigns or ballot stuffing or fraud. This manufacturing of public opinion undermines institutional effectiveness by allowing charismatic leaders to continue to circumvent institutions by placing their policies or constitutional changes to a popular vote.[169] This process can allow populist leaders to dictate the terms of the discussion and avoid discussion through institutional interaction.[170]

The Russian Constitution

The Russian Constitution contains a set of provisions ensuring popular sovereignty. Chapter 1 states that the Russian people are the sole bearers of sovereignty.[171] Chapter 9 of the Constitution seeks to protect this principle by ensuring that the legislative branch cannot amend the 'Fundamentals of the Russian Constitution' in Chapter 1 or 2 of the Constitution. Instead, altering these fundamental principles requires: (1) a 'Constitutional Assembly' to draft a new constitution; and (2) this new constitution to be ratified by two thirds of the Constitutional Assembly or a majority of Russians in a formal referendum. By contrast, amendments to Chapters 3–8 of the Russian Constitution only require ratification by Russia's legislative branch of power (led by the federal assembly).

The amendments

The 2020 amendments did not alter any of the constitutional text in Chapters 1, 2, or 9 of the Constitution. Russia's amendments could therefore have been ratified through Russia's existing legislative institutions. But after these legislative approvals were given, these amendments were still put to a popular vote. This provides the initial evidence that the amendment process was a stage-managed attempt to project the image of majoritarian popular support for a 'reformed' Russian state.

Additional factors lend further support to the theatrical nature of the amendment process. First, there was never any bottom-up pressure from the Russian people for constitutional change. Instead, formal constitutional change was unexpectedly introduced by President Vladimir Putin in his speech to the Federal Assembly on 15 January.[172] Second, there was little public participation in the drafting of the constitutional amendments. Instead, the amendments were tightly controlled by the

[169] See, for example Partlett, note 38 above.

[170] Partlett, note 168 above (discussing how rules in revision clauses can help to guard against abusive constitutional change).

[171] Article 3, Russian Constitution.

[172] Putin speech to the Federal Assembly, note 6 above; A Troiankovski, 'Putin's Power Shakeup: Here Are Six Takeaways' (*NY Times*, 15 January 2020), https://www.nytimes.com/2020/01/15/world/europe/russia-putin-government.html.

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lower house of the Russian federal legislature (the Duma) in consultation with both the presidential administration and a presidentially appointed 'Working Group'.[173]

Third and most importantly, the theatrical nature of the reform is also demonstrated in the legal technicalities of the vote. Constitutionally, the vote was called an 'all-Russian plebiscite' (*vserossiskoe golosovanie*) and not a 'referendum' (*vsenaradnoe golosovanie*). This was a deliberate decision to avoid the more stringent rules surrounding formal referendums contained in federal law.[174] This law includes strict requirements on campaigning as well as 50% of the overall population to participate for an affirmative answer.[175] The turnout requirement itself is important as it tends to judge general enthusiasm for the reforms as well as the simple mathematic outcome.

The choice to have an 'all-Russian plebiscite' (*vserossiskoe golosovanie*) instead allowed the plebiscite to be a majority vote with no turnout requirement that made no provision for a 'yes' and a 'no' campaign. The procedures for the 'all-Russian plebiscite' were described in Article 2 of the same law that detailed the constitutional amendments. These provisions made it very clear that the process of voting would be governed by rules made by the Central Election Commission (and not under any of the provisions of the federal law on referendums).[176] In fact, with the exception of the law on federal procurement, no other law is mentioned at all. Thus, the precise rules for the vote were to be completely determined by the executive branch.

Fourth, the state spent large resources on achieving a successful outcome. This included significant state spending on billboards and social media videos. To take just one example, the government's yes campaign spent $145 million on prizes for individuals—in one case including a free apartment—who went to the polls and voted.[177] The vote was also timed to coincide with a rescheduled World War II Victory parade.[178] Further, Vladimir Putin addressed the nation twice during the voting. In one of these speeches, he stressed that a yes vote was a 'vote for the country where we want to live, with cutting-edge education and healthcare, a reliable system of social protection and an effective government accountable to the people'.[179] Finally, the campaign strongly focused on the popular parts of the amendments,

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[173] Presidential Order, 'On the Working Group on the Preparation of Proposals for Amendments to the Constitution of the Russian Federation', http://kremlin.ru/events/president/news/62589 (in Russian).

[174] Article 135, Russian Constitution.

[175] Federal Law, 'About Referendums in the Russian Federation', 28 June, 2004, http://www.consultant.ru/document/cons_doc_LAW_48221 (in Russian).

[176] Articles 11–16 of the Law.

[177] 'Moscow to Hand Out $145M in 'Prizes' to Voters for Putin's Constitutional Reforms' (*Moscow Times*, 11 June 2020), https://www.themoscowtimes.com/2020/06/11/moscow-to-hand-out-145m-in-prises-to-voters-for-putins-constitutional-reforms-a70553.

[178] See, for example, 'Russia Bars Campaigns Against Reforms Extending Putin's Rule' (*Moscow Times*, 2 June 2020), https://www.themoscowtimes.com/2020/06/03/russia-bars-campaigns-against-reforms-extending-putins-rule-a70470.

[179] V Putin, Address to the Nation, 30 June 2020, http://en.kremlin.ru/events/president/transcripts/statements/63584.

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including the provisions protecting historical truth about World War II, those raising the minimum wage and indexing pensions, and protecting national sovereignty.[180]

Finally, the vote was repeatedly described by the Putin administration as a demonstration of popular support for the regime. President Putin's formal request to the Russian Constitutional Court to review the amendments argued that the special plebiscite was a reflection of the principle of 'popular sovereignty' in Article 3 of the Russian Constitution.[181] The Russian Constitutional Court accepted this argument, referring more than once to the vote's 'special legal significance' as an important justification for any procedural or substantive inconsistencies between the amendments and the foundational chapters of the constitution.[182]

Moreover, the reaction to the positive results of the vote were later described as a vote of public support for a newly invigorated Russian state. In one of his first public speeches after the yes vote, President Putin addressed his appointed working group.[183] He noted the positive result of the vote and asked them to work hard on implementing the important changes that would stem from these changes. In particular, President Putin stressed the hard work of 'updating the legal base' in line with the amendments. Although in reality the constitutional reforms do not necessitate serious legal change, this rhetoric was an important way to stress that the people had been involved in important reforms to the Russian state.

Russia's 2020 process of constitution-making was therefore an attempt to manufacture popular consent for the regime by involving the populace in the image of creating a new stronger and reformed Russian state. The process reflects the continuing importance of the perception of ongoing popular support for the legitimacy of the Russian state.[184] This strategy is not likely to effectively solve the key long-term and structural drivers of sagging popularity for the Russian state: the weakness of Russian institutions and therefore of the Russian state.

VII. CONCLUSION

Russia's 2020 constitutional reform helps us better understand two things. Within Russia, it shows a continued commitment to the mechanisms of authoritarian populism to legitimise power. The constitutional reforms are therefore not an attempt to change Russian governance. They are instead an attempt to create the image of

[180] A Roth, 'It Looks Like a Gameshow: Russia's Pseudo-vote on Putin's Term Limits' (*The Guardian*, 26 June 2020), https://www.theguardian.com/world/2020/jun/26/it-looks-like-a-game-show-russias-pseudo-vote-on-putins-term-limits.

[181] Request (Zapros) of President Vladimir for the Constitutional Court to Review the Amendments, http://kremlin.ru/events/president/news/62989 (in Russian).

[182] Decision of the Russian Constitutional Court, 16 March 2020, http://doc.ksrf.ru/decision/KSRFDecision459904.pdf (in Russian).

[183] V Putin, Meeting with the Working Group on Drafting Proposals for Amendments to the Constitution, 3 July 2020, http://en.kremlin.ru/events/president/transcripts/statements/63599.

[184] Y Gorokhovskaya, 'Why Putin Needs a Nationwide Vote' (*Institute for Modern Russia*, 16 June 2020), https://imrussia.org/en/analysis/3123-why-putin-needs-a-.

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change while simultaneously cementing the position of the current political elite. In so doing, the amendments further entrench some of the key causes of state dysfunction that have plagued Russian governance since the Soviet period. In particular, they further undermine the transformative constitutional text placed in the 1993 constitution which sought to improve Russian governance through the creation of more effective institutions.[185] For instance, the constitutional entrenchment of a 'law-based state' (*pravovoe gosudarstvo*) was viewed as critical for overcoming Soviet-era legal nihilism as well as local despotism and corruption.[186] Furthermore, the guarantee of the separation of powers (*razdelenie vlastei*) was seen as critical in ensuring the growth of independent, responsive, and efficient institutions.[187] By contradicting these attempts at transformation, these amendments are therefore likely to only further undermine the project of building an effective Russian state.

More broadly, the Russian example helps us understand the (ab)use of large-scale constitutional change in *maintaining* mature forms of authoritarian populism. In this scenario, constitutional reform is not being used to change governance. Instead, constitutional reform is used to create the image of a renewed connection between the regime and the people while also framing the new rhetoric of a leader protecting the pure people from a corrupt elite. This theatrical goal strongly underpinned Russia's 2020 constitutional reform.

This theatrical constitution-making is an important reminder that constitutions are not just functional documents. Constitutions are also expressive documents that transmit important messages to the people. Mary Ann Glendon describes how constitutions 'tell[] stories about the culture that helped to shape it and which it in turn helps to shape'.[188] Teemu Ruskola explains that 'law does not simply mirror 'our' pre-given national identity but enacts that identity'.[189] Furthermore, this kind of stage-managed, theatrical constitution-making is not new. For decades, socialist countries have used constitutional change to mobilise the population in support for the regime.[190] The 1936 Soviet Constitution was adopted after a stage-managed, theatrical process of participatory politics.[191] This process did not 'result in

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[185] This was underpinned by the link between law and state development in the Russian legal tradition.

[186] O Rumiantsev, *Konstitutsiya devianosto tret'ego. Istoriya ivalenie [The Constitution of Ninety Three. A History of Influences*] (Moscow 2013), pp 31–35, 294–97. In the late Soviet period, a number of academics discussed the importance of the law-based state for Russian state building. See, for example, Valery Zorkin, Chicherin (Moscow: Yuridicheskya Literatura [Legal Literature] 1984) (in Russian).

[187] Rumiantsev, note 186 above, pp 31–35, 294–97.

[188] M A Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, 1987), p 8.

[189] T Ruskola, 'Legal Orientalism' (2002) 101 *Michigan Law Review* 179, p 205.

[190] J Hughes, *Stalinism in a Russian Province: A Study of Collectivization and Dekulakization in Siberia* (Macmillan Press in association with the Centre for Russian and East European Studies, University of Birmingham, 1996), p 208.

[191] S Lamb, *Stalin's Constitution: Soviet Participatory Politics and the Discussion of the 1936 Draft Constitution* (Routledge, 2017).

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substantive changes' but was instead a scripted process aimed at mobilisation and therefore 'further strengthen[ing] and stabilis[ing] the Soviet state'.[192] The 1977 Soviet Constitution was adopted after a nearly twenty-year period of popular mobilisation. In the end, the process was not intended to change Soviet governance and the dominance of the Communist Party—in fact, the new constitution 'br[oke] no new ground'.[193] Instead, the process sought to send important messages to the Soviet people about the direction of the Soviet state. It therefore reflected the 'educational' role of constitutional law.[194]

This use of theatrical constitution-making is now re-emerging as a critical tactic for securing power in authoritarian populist regimes.[195] In fact, theatrical constitution-making appears to be a critical component of the discussion of constitutional change by Belarus' embattled president, Aleksandr Lukashenko. This reform process is most likely a theatrical tactic meant to project the image of change while undermining the momentum of the opposition's constitutionalist movement and securing the position of the current political elite.[196] Future work might explore the extent to which this theatrical constitution-making is being used to maintain authoritarianism elsewhere in the world.

[192] Ibid, p 1.

[193] R Sharlet, 'The New Soviet Constitution' (1977) 26(5) *Problems of Communism* 1, p 5.

[194] H J Berman, 'The Educational Role of the Soviet Court' (1972) 21 *International & Comparative Law Quarterly* 81.

[195] I Krastev, 'Paradoxes of the New Authoritarianism' (2011) 22(2) *Journal of Democracy* 5 (discussing the mechanisms and resilience of 'new authoritarianism').

[196] 'Lukashenko: All the Changes Will Start with the Constitution, Not Maidan Riots' (*BelTA News Agency*, 9 July 2020), https://eng.belta.by/president/view/lukashenko-all-the-changes-will-start-with-the-constitution-not-maidan-riots-131627-2020.

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