



## **The Impact of the 2020 Constitutional Changes on Authoritarian Constitutionalism in Russia: Judicial Pragmatism Between the Russian Constitutional Court (RCC) and the State**

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### **Abstract**

In 2003, the Russian government abruptly arrested Mikhail Khodorkovsky, then CEO of Yukos, the largest private oil company in Russia at the time. Yukos was sold for parts through court-mandated auctions and eventually acquired by state oil company Rosneft. The Yukos Affair transformed Russia's oil industry, energy sector, and state relationship with private enterprises. In response, Yukos shareholders appealed the injustice to international courts and have fought to enforce a USD 50 billion compensation ruling for nearly two decades. This article follows the timeline of the Yukos trials, assessing Russia's aggressive resistance to the Yukos compensation ruling and focusing on the 2020 Russian constitutional amendments that legalized selective compliance of international rulings. The analysis concludes that the constitutional changes represent a critical juncture moment for the Russian Constitutional Court (RCC) that transforms its relationship with the executive branch, offsetting the RCC's balancing act of judicial pragmatism with the state by formally erasing the separation of powers between the executive and the judiciary. This article examines possible motivations for this change, which include the Yukos trials.

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## **Introduction**

In 2003, Yukos, the largest private oil company in Russia at the time, was in the middle of merger talks with ChevronTexaco and ExxonMobil - an unprecedented deal which would have created the largest oil company in the world. Later that year, Yukos' CEO Mikhail Khodorkovsky was arrested on charges of tax fraud. Yukos was sold for parts through court-mandated auctions and eventually acquired by state oil company Rosneft. The Yukos Affair transformed Russia's oil industry, energy sector, and state relationship with private enterprises.

Since Yukos was auctioned off at staggeringly low prices without due process, Yukos shareholders suffered a tremendous loss of capital and appealed the injustice to the international courts. For nearly two decades, the shareholders and the Russian government have continued to overturn and reinstate the compensation ruling of a USD 50 billion payout. The Yukos trials have been processed in the European Court of Human Rights (ECtHR), the Permanent Court of Arbitration (PCA), Hague District Court, and Hague Court of Appeal. As of September 2021, the trials continue in the Supreme Court of the Netherlands.

New developments in response to the Yukos trials, such as the 2020 Russian constitutional amendments that legalized selective compliance of international rulings, reflect Russia's aggressive resistance to the Yukos compensation ruling. These developments threaten the constitutional rights and freedoms of Russian citizens and private enterprises.

The focus of this paper is as follows: what are the implications of the recent constitutional changes on authoritarian constitutionalism in Russia, specifically judicial pragmatism between the Russian Constitutional Court (RCC) and the state?

This article concludes that the constitutional changes represent a critical juncture moment for the RCC that transforms its relationship with the presidency. The RCC's balancing act of judicial pragmatism with the state has been offset by formally erasing the separation of powers between the executive and the judiciary. This article examines possible motivations for this change, among which are the Yukos trials.

### *1990s: Hopeful Beginnings*

Immediately after the fall of Communism, judicial scholars were hopeful for the modernization of the Constitution of the Russian Federation and federal legislature (Mishina 2020, 63). Their goal was radical legislative transformation. The initial judicial reforms of the 1990s exceeded expectations, including political competition, free speech, freedom of the press, democratic elections, and other democratic institutions previously nonexistent during the Soviet Union (Partlett and Krasnov 2019, 644-67). The Constitutional Court of the Russian Federation was established in accordance with European standards and was the first judicial agency in Russian history with the power to legally evaluate the actions of actors in the highest levels of government, which includes the actions of the President. The Law on the Constitutional Court espoused judicial immunity, irremovability, and impartiality to establish judicial autonomy (Mishina 2020, 71). In 1991, the Law of the Russian Federation on Mass Media declared freedom of the press and the removal of Soviet norms of censorship and ideological restrictions on independent journalism (2020, 71). The 1996 Russian Criminal Code emphasized protection of the individual and outlined

its core principles of legality, equality of individuals before the law, and criminal liability based only on guilt, justice, and humanism (Articles 3-8 of the 1996 Criminal Code of the Russian Federation [RF]).

Inspired by the Constitution of the Fifth Republic in France, the 1993 Constitution of the RF also established a semi-presidential system (Mishina 2020, 72). The fundamental principles of the 1993 Constitution of the RF explicitly recognized the exercise of “[state power in the RF] on the basis of separation of legislative, executive and judicial branches,” (Article 10 of 1993 Constitution of the RF) and the independence of these three branches. Articles 118-123 went on to establish the immunity, irremovability, and inviolability of judges (Articles 118-123 of 1993 Constitution of the RF). This was a remarkable achievement, especially since judicial independence was nonexistent under Soviet rule, as the courts operated as an arm of the repressive government apparatus (Mishina 2020, 75). The Constitution also established a judicial system composed of the RCC, the Supreme Court, federal courts of general jurisdictions, courts of arbitration, and justice-of-the-peace courts (Article 118 of 1993 Constitution of the RF).

Further, the 1996 Criminal Code decriminalized many anti-Soviet crimes including “anti-Soviet agitation, propaganda, sodomy, vagrancy, illegal currency transactions, [and] speculation” (Mishina 2020, 73). The Criminal Code also placed crimes against a person in superior priority to crimes against the state, thus privileging humanization and democratization.

### **Authoritarian Constitutionalism**

In the past, studies of authoritarian constitutionalism focused on countries such as Singapore (Tushnet 2015, 391-462), Turkey (Isiksel 2013, 702-26), South Africa (Davis 2019, 57-75), Myanmar (Crouch 2020, 487-515), and non-Russian Former Soviet Republics (Newton 2019, 209-39). There was little scholarship on authoritarian constitutionalism in Russia because, as Maria Popova (2017) argued, Russia did not adhere to Tushnet’s definition where “the autocrat sets the substantive law, often in negotiation with his governing coalition” (65). Alexei Trochev and Peter Solomon (2018) counter that Tushnet’s definition of authoritarian constitutionalism is so “demanding” (212) that most authoritarian states would not fit the bill. Trochev and Solomon (2018) argue that there is a balancing act of authoritarian constitutionalism in Russia. This paper builds on their balancing act argument by analyzing the recent 2020 constitutional changes to demonstrate how the balancing act has been disrupted.

### **Authoritarian Constitutionalism in Russia: A Balancing Act**

Despite the achievements of the 1990s judicial reforms, the Russian judiciary was still open to manipulation and political pressure. This has led to a trend of authoritarian constitutionalism, especially between the RCC and the executive branch. During their respective terms between 2001-2016, President Putin and President Medvedev amended the 1994 Federal Constitutional Law on the Constitutional Court of the Russian Federation a collective total of 15 times, making key changes to RCC regulations including salary changes, relocations, and age limits to test the loyalty and compliance of the RCC (Trochev and Solomon 2018, 204-5).

Trochev and Solomon have previously written about how the RCC's defence of Russian sovereignty against international judicial bodies is one of the RCC's adjustments to Vladimir Putin's increasingly authoritarian regime (Trochev and Solomon 2018). They argue that the RCC engages in a balancing act between two governance regimes – the constitutional regime and the regime of political expediency, resulting in what they categorize as the Russian version of authoritarian constitutionalism. Popova (2017) disagrees, arguing that while Singapore has authoritarian constitutionalism, Russia does not, since the political regime only selectively adheres to constitutionalism. Among many examples, she cites the Yukos Affair and Khodorkovsky's arbitrary arrest as evidence of the Kremlin's disregard for constitutionalism and political use of the law (2017, 67). Her article predicted the Kremlin's preference for "greater politicization of the judiciary" (2017, 74). This article builds upon her prediction by demonstrating how the political regime has erased the remaining independence of the judiciary and departed further from authoritarian constitutionalism.

For the purposes of this investigation, judicial pragmatism refers to practical judicial decision making in recognition of limitations to legal formalism. Judicial pragmatism allows judges the freedom to "follow the law to the letter or openly disregard it, depending on the context" (Hendley 2017, 4), allowing them to cater to political realities while pursuing judicial activism on lower risk cases. In this sense, judicial pragmatism is "activist" (Posner 1995, 4) in that it is "a rejection of the idea that law is something grounded in permanent principles and realized in logical manipulation of those principles, and a determination to use law as an instrument for social ends" (405). Judicial pragmatism by the RCC includes "adaption to institutional changes" (Trochev and Solomon 2018, 204), "adaption to personnel changes" (206), and "tolerating disobedience with judgments" (211) as well as adaption to the Kremlin's needs and expanding judicial activism on non-politically sensitive cases.

Trochev and Solomon (2018) demonstrate that one of the key ways the RCC has carefully maneuvered the tensions in the duality between constitutionalism and political expediency is by presenting itself as an effective defence against ECtHR international encroachment upon Russian national sovereignty. They illustrate how the RCC's defence of selective compliance is necessary to adjust to new political realities and preserve (some) autonomy for RCC judges to continue other important work in expanding domestic judicial activism (Trochev and Solomon 2018). Similarly, Khalikova (2020) has highlighted how the RCC has balanced restricted judiciary freedom on politically sensitive issues, on the one hand, with the greater freedom to adjudicate social rights issues on the other. The duality is maintained so long as the regime of political expediency maintains the exercise of unrestrained power that can "bypass constitutional restraints and prevail over constitutional values" (Trochev and Solomon 2018, 202) and the constitutional regime maintains the "operation of formal constitutional rules and rules of European human rights law, which both constrain and guide Russia's leaders in ruling their country" (202).

Richard Sakwa (2020) has also argued that the Russian government benefits from a "dual state model" where the "administrative regime" (45) gains legitimacy and authority from the constitutional regime principles, and yet can continue to subvert constitutional principles. Published in early 2020, Sakwa's book agrees with Trochev and Solomon's argument that the administrative regime is "balanced by the constitutional state" (47). This article assesses whether the recent constitutional changes that function as domestic defences of national sovereignty against international courts have now subverted the duality of the two governance regimes by firmly subjugating the RCC and other branches of power directly under presidential control, erasing their

constraint on Russian government leadership. The former balancing act between the administrative and constitutional regime has now been undone.

### **Current Literature**

This article contributes to the scant literature surrounding authoritarian constitutionalism in Russia and literature on the Yukos trials as publications catch up to the recent constitutional changes, new Yukos trials, and their implications for the future. Before the 2014 PCA's compensation ruling, scholars studied how the Yukos Affair was politically motivated and not simply an issue of fraud and tax evasion or property redistribution as Russian authorities claim (Gustafson 2012). In recent years, researchers have examined the Yukos trials and their impact on Russia's relationship with the ECtHR and the Council of Europe (Aksenova and Marchuk 2018). There is a general consensus that the Yukos trials were the most significant factor, *inter alia*, that affected the 2015 RCC defence mechanism to check ECtHR's jurisdiction (Kornya 2017) and subsequently the role of the 2020 constitutional amendments on the trials (Krimmer 2020, 86-94).

Scholars have also focussed on how the landmark Judgment 21-P/2015 and the rapid Russian constitutional changes in 2020 signify a disengagement with international courts and superiority of national sovereignty over international law (Kalinichenko and Kochenov 2021, 341-46). Others have also categorized the 2015 Russian defence mechanism as among the slew of other similar cases in Germany, Italy, UK, and others in the broader recent global trend of backlash against international courts (Voeten 2020, 407-22).

The central contribution of this article is that it examines the current state of authoritarian constitutionalism in Russia in the context of the Yukos trials, which accelerated a series of constitutional changes as a form of domestic defence of national sovereignty. The research methodology of this investigation mainly involves scrutiny of legal documents (case judgments, statutes, constitutional amendments), news articles, and relevant literature (scholarship on the Yukos trials, constitutional changes in Russia, authoritarian constitutionalism, and backlash politics). Research for this article included relevant RCC judgments, federal laws, and the case files of the Yukos trials from the ECtHR, PCA, Hague District Court, Hague Court of Appeal, and the Supreme Court of the Netherlands. The legal documents were presented in English, Russian, or French and were accessible online.

### **The Yukos Trials: The Elephant in the Room**

#### *Timeline of the Yukos trials*

After the collapse of the Soviet Union in 1991, the Russian government underwent a process of rapid privatization. Part of this process involved the government selling valuable state-owned companies at low prices to private owners in loans-for-shares auctions (Sim 2008, 6). Mikhail Khodorkovsky, the then owner of Menatep bank, acquired Yukos between 1995 and 1996. In order to foster economic growth in poorer regions, the Russian government issued a low-tax-region program in the 1990s, allowing local authorities to either partially or fully exempt their corporations from corporate-profit tax. Yukos then relocated its trading companies to these internal offshore tax havens, selling oil to its own trading companies at low prices and then reselling the oil abroad at market prices, all while profiting from the low tax rates on the sales. During the Yukos trials, the Russian Federation asserted that Yukos "increased step by step from sham shell to sham

shell, generating artificially inflated profits through non-arm's length transactions" (*Yukos Universal Limited (Isle of Man) v. The Russian Federation* 2014). The Russian Federation accused Yukos of "fraudulently evad[ing] billions of dollars of Russian corporate profit tax from 1999 to 2004 [by] abusing the [low-tax-region] program" (*Yukos Universal Limited (Isle of Man)* 2014 at 109). While profiting from tax optimization methods, Yukos became one of the largest oil companies in the world by 2002 (Krimmer 2020, 87). By 2003, Khodorkovsky had become popularly known as the richest man in Russia and entered merger talks with Sibneft, ExxonMobil and ChevronTexaco. In October 2003, Khodorkovsky was arrested on charges of forgery, fraud, and tax evasion. On December 19, 2004, Yukos' major production company 'Yuganskneftegaz' was acquired by a shell company Baikalfinansgroup. Four days later, Baikalfinansgroup sold those shares to state-owned oil company Rosneft (Chernykh 2011, 1240).

So far, two international courts have released rulings on the trials between Yukos shareholders and the Russian government. On July 18, 2014, the PCA ruled that Russia must pay USD 50 billion in damages to the Yukos shareholders in full by January 14, 2015 or interest would begin to accrue (*Yukos Universal Limited (Isle of Man)* 2014). Two weeks later, the ECtHR issued a just satisfaction judgment of EUR 1.9 billion to be paid by Russia (*OAO Neftyanaya Kompaniya Yukos v Russia* 2014).

Subsequently, at the State Duma's (lower house of Parliament) request, the RCC began to revisit and review the constitutionality of the federal laws pertaining to Russian compliance with the European Convention of Human Rights. On July 15, 2015, the RCC issued their Judgment No. 21-P/2015 that ranked ECtHR authority (and therefore international law) subsidiary to RCC jurisdiction, thus making selective compliance of international rulings legal (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 iulia 2015). Referring to the *Anchugov and Gladkov v. Russia* case from July 14, 2013, the RCC judgment argued that implementation of the ECtHR's judgment would violate the Constitution of the RF. To substantiate their defence, the RCC also cited similar case law by the German Constitutional Court, Italian Constitutional Court, Austrian Constitutional Court, and the UK Supreme Court. On December 14, 2015, President Putin signed a federal law empowering the RCC to evaluate international court decisions and their compliance with the RF Constitution to verify their enforceability (Federal'nyi zakon 2015).

The RCC has applied the defence mechanism to two ECtHR rulings: *Anchugov and Gladkov v Russia* and the Yukos compensation ruling. On April 19, 2016, the RCC issued Judgment No. 12-P/2016, which reviewed and denied the possibility of implementing the ECtHR's *Anchugov and Gladkov v Russia* ruling (Constitutional Court of the Russian Federation 2016). The following day, on April 20, 2016, the Hague District Court overturned the PCA's USD 50 billion ruling on the grounds that the case was outside of the PCA's jurisdiction (*The Russian Federation v. Veteran Petroleum Limited, Yukos Universal Limited, Hulley Enterprises Limited* 2016). Next, on January 19, 2017, the RCC successfully stopped the implementation of the Yukos compensation ruling, to which RCC Judge Aranovsky and Judge Yaroslavtsev dissented (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 ianvaria 2017).

On February 18, 2020, the Hague Court of Appeal reinstated the compensation ruling (*Veteran Petroleum Limited, Yukos Universal Limited, Hulley Enterprises Limited v. The Russian Federation* 2020). The next month, Putin introduced a slew of constitutional amendments including the precedence of Russian constitutional law over international law, making selective compliance of international rulings constitutional. By June 2020, the Supreme Court of the Netherlands accepted the Russian government's appeal to challenge the Hague Court of Appeal's

ruling. By December 2020, Russia passed a law banning Constitutional Court judges from publishing dissenting opinions (Gustafson 2012, 272-318). At the time of writing, the Supreme Court of the Netherlands' final judgment is still pending. Between January 15, 2015, and January 14, 2021, approximately USD 7 billion of interest has accrued, bringing the total of the awards to USD 57 billion.

### *Significance of the Yukos Trials*

Scholars agree that Khodorkovsky's aggressive economic policies designed to increase foreign investment, increasingly defiant criticism of state policies, funding for opposition parties, pro-American stance along with rumours of political ambition, all contributed to the singling out of his company Yukos (Gustafson 2012, 272-318). Since Yukos was no different from other oil companies in its perfectly legal tax optimization methods, the Yukos Affair made an example of Khodorkovsky and reasserted the primacy of state authority over big business as well as the power of state coercion, especially given his wealth and visibility (Tompson 2005, 159-81). More importantly, Putin's power and legitimacy are directly tied to Russia's economic performance on the global stage, particularly within the energy sector (Sim 2008, 69). After Rosneft acquired Yukos, Russia's economy benefited significantly, which translated into political longevity for Putin.

The Yukos government takeover marked the beginning of a series of selective state acquisitions of private companies across a variety of industries, in a process of creeping nationalization. The OECD Economic Survey of the Russian Federation reported 29 major state acquisitions between 2004-2006 alone (not including state acquisitions of foreign assets) across the banking, electric power, nuclear construction, machine-building, media, aviation, auto, oil and gas, and titanium sectors (OECD 2006, 38). The role of state-owned enterprises (SOEs) in the Russian economy is unusually significant as SOEs dominate the country's top ten firms, especially the banking, energy, and transport sectors (OECD 2014, 28-29). More recently, in 2016, the private oil company Bashneft was sold to state-owned Rosneft without a public tender (US Department of State 2021). With the capital flight from Russia and sharp decline in foreign direct investments, it is expected that exiting private shareholders will continue to sell their assets to state-owned enterprises.

The Yukos compensation ruling is significant to Russian state interests not only because it threatens a USD 57 billion financial cost but because it would alter the business-state institutional relationship (reasserted by the Yukos Affair and solidified by creeping nationalization of key industries) as well as set legal precedence of state responsibility for corrupt asset renationalization.

## **Constitutional Changes: Offsetting the Balancing Act**

### *Judgment 21-P/2015*

After the 2014 PCA compensation ruling, a group of State Duma members requested that the RCC revisit the constitutionality of federal laws regarding Russian compliance with the ECtHR, ostensibly to review a separate ECtHR ruling: *Anchugov and Gladkov v Russia*. On July 4, 2013, the ECtHR had ruled that Russia had violated Article 3 of Protocol No. 1 of the Convention by not allowing convicted prisoners the right to vote in parliamentary elections (*Anchugov and Gladkov v. Russia* 2013). However, this was in direct conflict with Article 32(3) of the Russian Constitution that states prisoners do not have the right to vote or be elected. Russian resistance against the

*Anchugov and Gladkov v Russia* ruling was reinforced by *Hirst v UK* (2005), a similar case concerning prisoner voting rights that also received pushback from domestic courts in the UK against the ECtHR case law. This straightforward conflict between an ECtHR ruling and the RF Constitution was the perfect opportunity to develop the first domestic defence mechanism: RCC issued Judgment No. 21-P/2015, ranking ECtHR rulings subsidiary to RCC jurisdiction, and setting a precedent for future international court rulings (Postanovlenie 2015). Judgment No. 21-P/2015 was further solidified later that year by Putin, who signed a federal law authorizing RCC evaluation of enforceability of international court decisions (Federal Constitutional Law No.7/2015) (Federal'nyĭ zakon 2015). Similar to the UK, Russia took the opportunity of clear-cut, straightforward judicial conflict and applied it to a political agenda of limiting ECtHR jurisprudence. After applying the defence mechanism to the *Anchugov and Gladkov v Russia* ruling in 2016 (Judgment 12-P/2016) (Constitutional Court of the Russian Federation 2016), the RCC unsurprisingly then applied it to the Yukos award in 2017 (Judgment 1-P/2017) (Postanovlenie 2017).

### *Constitutional Amendments 2020*

When the Hague Court of Appeal reinstated the Yukos award in early 2020, Putin fast tracked sweeping changes to the Russian Constitution (Isachenkov 2020). The changes included the expansion of presidential control, which had been in motion prior to the reinstallation of the Yukos award but were accelerated by the Court of Appeal's decision, given the urgency and political sensitivity of national sovereignty against unsavoury international jurisdiction.

Prior to 2020, few amendments have been made to the 1993 Constitution. Aside from minor changes, the most substantial of any amendments made was the extension of the presidential term from four to six years and the State Duma deputy terms from four to five years in 2008, and the expansion of presidential power on the procuracy in 2014 (Teague, 2020, 303).

Of the 2020 constitutional amendments, Articles 79 and 125 are directly relevant to the Yukos trials. Article 79 now stipulates that “decisions of international organizations adopted on the basis of provisions of international treaties of the [RF] which in their interpretation contradict the Constitution shall not be subject to implementation in the [RF] (Article 79 of the Constitution of the RF 2020).” While the previous Russian law and court decisions were addressed to the ECtHR specifically, Article 79 now expands the supremacy of national sovereignty to include any and all international courts and organizations to which Russia is connected. The new wording of Article 79 thus expands to include the Energy Charter Treaty (ECT) (crucial to the Yukos trials that are based on Russia's alleged breach of obligations of the ECT that Russia signed but never ratified) and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which the Yukos shareholders cite in their subsequent attempted enforcement proceedings of the award since Russia signed and ratified the New York Convention in 1960). Clearly, this effort was designed to address future Yukos decisions such as those from the Hague and the simultaneous enforcement proceedings.

An added 5.1(b) to Article 125 formally empowers the RCC to determine the possibility of enforcing international rulings if they “contradict the fundamentals of the public legal order of the [RF].” This constitutionalized the RCC's authority to decide on the enforceability of “decisions of interstate bodies adopted on the basis of provisions of international treaties of the RF [...], a foreign or international (or interstate) court, [or] a foreign or international private arbitration court (arbitration)” (Article 125(5-1.b) of the Constitution of the RF 2020). Specific mention of



interstate, foreign, and international courts, and foreign or international private arbitration courts demonstrates how this addendum was again designed to address any and all future Yukos decisions.

The Amended Article 83(f-3) of the Constitution grants the President power to submit requests to terminate powers of a whole host of judges including the Chairman, Deputy Chairman and judges of the Constitutional Court, the chairman, deputy chairpersons and judges of the Supreme Court, and judges of courts of cassation and appellate courts (Article 83(f-3) of the Constitution of the RF 2020). This termination request can be in case of any “act besmirching the honor and dignity of the judge” (Article 83(f-3) of the Constitution of the RF 2020), giving the president the right to fire judges at will based on ambiguous criteria, revoking the irremovability of judges, and neutralizing the authority of constitutional court judges to constrain state leadership.

Several key amendments also significantly expanded the powers of the President to a staggering degree. Amended Article 83(a) grants the President power to “remove the Chairman of the Government of the Russian Federation [aka the Prime Minister] from office” (Article 83(a) of the Constitution of the RF 2020) at his own discretion, without needing confirmation from the State Duma or consultation with the Federal Council. Previously, if the President wished to remove the Chairman (Prime Minister), as a condition, he had to dismiss the entire government as well (Teague 2020, 326).

The European Commission for Democracy through Law (known as the "Venice Commission"), an advisory body for the Council of Europe, has warned that under the new constitutional amendments, “the lack of regulation of the removal process in the Constitution, appears to increase the possibility of influence of the Executive over the Constitutional Court (European Commission for Democracy through Law 2020, 17).” In reference to Trochev and Solomon’s authoritarian constitutionalist balancing act, the constitutional changes have allowed “the regime of political expediency” (2018, 202) to expand its power over “the constitutional regime,” (202) severely offsetting the duality of the two regimes by threatening judicial independence and constitutionalism.

Amended Article 107(3) grants the RCC power to exercise a “preventive constitutional review by request of the president” (Mishina 2020). The President has formally and constitutionally enlisted the RCC to help him block federal laws he dislikes while removing Parliament’s ability to overcome a presidential “super veto” (Teague 2020, 324). Grigoriev has noted that while the amendment appears redundant since the President controls the Duma, it is an effective failsafe in case the opposition should gain a larger representation in parliament (Grigoriev 2021, 47). Previously, the RCC maintained a balancing act by presenting itself as an effective defence against international encroachment as a quid pro quo for judicial autonomy on other issues. Now, the RCC is increasingly being directly employed by the government as an apparatus of power and losing judicial autonomy altogether.

The most notorious of the amendments, Article 81(3-1) limits presidential terms to two per individual but also resets Putin’s clock by nullifying his past presidential terms. This means he could run again for president in 2024 and 2030, potentially extending his term in office until 2036, at which point he will be 84 years old (Grigoriev 2021, 28).

The constitutional amendments in 2020 have firmly subjugated the RCC under government control, dissolving the prior balancing act and duality between the constitutional regime and the

regime of political expediency in Russia. The amendments signal a “re-Sovietization” of the Russian legislature and negates the initial efforts in 1993 to commit to norms of international law, principles of democratization, and constitutional rights and freedoms. The amendments signal a clear disregard of international treaties and laws by subordinating them to the interests of national sovereignty. The President has not only significantly expanded his own powers and influence on all executive branches but has also made it far more difficult to strip him of his immunity once his presidency ends. Amended Article 93 now requires that in order for a President to be “deprived of immunity,” he must be charged with “high treason or of commission of another serious crime” (Article 93(1) of the Constitution of the RF 2020). This decision must be passed by a two-thirds majority in the upper house and at least one third vote of the State Duma (Article 93(2) of the Constitution of the RF 2020). The charge must be confirmed by the Supreme Court as well as concluded by the Constitutional Court. For context, there have been a sum total of three attempts of impeachment (“two in 1993 under the 1978 Constitution of the RSFSR and one in 1999” (Mishina, 2020, 99) and in all attempts they never managed to collect enough votes. With the new amendments, the feat would require such an orchestration of government members upon which the President has direct termination control over, it has been rendered impossible, unless the judges, chairpersons, and deputy chairpersons are willing to “[pay] with their posts” (Mishina 2020, 92).

### *Dissenting Opinions*

By November 2020, the State Duma passed amendments to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” to prohibit the publication of dissenting opinions of RCC rulings (State Duma Committee on State Building and Legislation 2020). Though RCC rulings are passed by a majority vote, individual judges could previously publish dissenting opinions expressing their disagreement in written form. They carry no legal force and are usually added to the case file and published along with the RCC’s final decision. The law does not ban dissenting opinions outright, but they are no longer publicized and will be accessible only in archives and out of the public eye. This carries severe legal consequences as it undermines the independence of the judiciary and undercuts the principles of open justice and pluralism. Silencing dissenting opinions also means RCC judgments will appear unanimous should the RCC need to refuse future Yukos decisions.

### *Amicus Curiae*

On January 28, 2021, the RCC removed paragraph 34.1 on legal organizations and legal academics and scholars providing opinions on cases from their rules of procedure, thus ending the practice of *amicus curiae* (friends of the court) (ROSBIZNESCONSULTING 2021). While legal scholars and independent experts will no longer be able to present opinions to trials of public interest, the RCC is not rejecting opinions from government agencies. This development stands in stark contrast to the past, when in spite of protest from Putin’s lawyers, RCC judges would request *amicus curiae* submissions on politically sensitive cases from NGOs that the government had attempted to silence politically (Trochev and Solomon 2018, 201). Former Constitutional Court judge Tamara Morshchakova noted how the regulations on *amicus curiae* reflected the readiness of the RCC to take into account views on issues of public importance and recognize citizen participation in state affairs. She noted that the Court is now holding closed sessions and denying trial participants access to relevant evidence and case materials without justification. Access to forensic information is also becoming increasingly restricted (Shturma 2021). The removal of *amicus curiae* only strengthens this process of restricting citizen participation and access to legal proceedings of public

interest. Legal scholars agree that this development is unnecessary, seriously harms the credibility of the RCC, and cements the perception of the RCC as a vehicle of the government (Rights in Russia 2021; Nagornaia 2021).

## **Conclusion**

In conclusion, the constitutional changes have transformed the RCC's relationship with the Russian presidency. Designed to strengthen domestic defences of national sovereignty against international encroachment, the constitutional changes have offset the RCC's balancing act of judicial pragmatism with the state by formally erasing the separation of powers between the executive and the judiciary. Among the possible reasons behind these changes are the Yukos trials. Although Trochev and Solomon convincingly argued that the RCC has thus far maintained authoritarian constitutionalism in Russia by navigating a balancing act and catering to government needs in order to exercise limited judicial autonomy, that balancing act has now been offset by the recent constitutional changes.

The new amendments and constitutional changes have removed the necessary checks and balances which allow for judicial autonomy of the RCC by formally erasing the separation of powers between the executive and the judiciary. In particular, the changes directly countermand the efficacy of the RCC in its balancing act by reducing their efficiency, removing their ability to publish dissent, and empowering the RCC to function as a vehicle of the government. Without an independent judiciary and clear separation of powers between branches of state governance, the balancing act has been nullified. This bodes severe consequences for the rule of law in Russia and threatens the constitutional rights and freedoms of Russian citizens and private enterprises.

The extent to which Russia has successfully dodged the Yukos ruling and neutralized RCC judicial autonomy has severe implications for the effectiveness of human rights advocacy and state accountability in international tribunals. This study on the constitutional changes and eradication of authoritarian constitutionalism in Russia raises further questions on what mechanisms are available for rights advocates to seek justice in the face of this challenge. What does this mean for victims who initiate or have initiated legal proceedings against powerful states in international courts and the subsequent enforcement of politically unsavoury rulings? What can stakeholders of international justice do to adjust to these challenges? The growing leniency from the institutional bodies themselves in reaction to the backlash and tightening of state sovereignty raises further questions on the integrity of international legal institutions and their efficacy in rights protection in the future.

It is also likely that resistance against international judicial mechanisms and the eradication of RCC judicial autonomy are linked to NGO repression in Russia. Further study of the functioning of the RCC in Russia and reactions to the Yukos trials (especially how they will progress beyond the Supreme Court of the Netherlands) could contribute to the dialogue between academics and rights activists on how resistance and backlash affect legal mobilization for rights advocates in civil society and the legitimacy of international human rights systems.

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