

# What Changes for the Constitutional Court with the New Russian Constitution?

*Ivan S. Grigoriev* | ORCID: 0000-0002-0058-8583

Associate professor, Department of Political Science and International Relations and Centre for Comparative Governance Studies, HSE University, St. Petersburg, Russia  
*igrigoriev@hse.ru*

## Abstract

Of the 206 amendments introduced to the Russian constitution and adopted on July 1, 2020, 24 deal directly with the Constitutional Court, its organization, functioning, and the role it plays in the political system. Compared to many other, these are also rather precise and detailed, ranging from the number of judges on the bench, their nomination and dismissal, to the Court's inner procedures, new locus standi limitations, and the primacy of the Constitution over Russia's international obligations. Most changes only reproduce amendments brought to the secondary legislation over the last twenty years, and are therefore meant to preserve the status quo rather than change anything significantly. At the same time, a number of amendments aim at politicizing and instrumentalizing the Court for the president's benefit, marking a significant departure from the previous institutional development.

## Keywords

Russian Constitutional Court – constitutional amendments – authoritarian institutions

The July 2020 constitutional amendments mark the crowning achievement in Vladimir Putin's two-decade long institutional effort to rearrange Russia's political system to his convenience. This process was far from linear and saw some back-and-forth movement over the stretch of time—as in first abolishing in 2004, and then reinstating in 2012 the direct gubernatorial elections; or first significantly reducing the number of officially registered political parties

over the 2000s and then pumping it back up in the 2010s. However, starting roughly with the second Putin administration,<sup>1</sup> all of these significant institutional changes seem to fall into place and increasingly reveal as their main and only motivation the yearning to consolidate and extend Putin's personal power.<sup>2</sup> This yearning culminates in the Tereshkova amendment which would "zeroize" the term count for all acting and retired presidents thus allowing Putin to run for president for two more terms, possibly extending his rule till 2036, when he turns 84.<sup>3</sup>

The 2020 amendments thus bring a logical constitutional closure to the process of constructing a personalistic electoral autocracy in Russia—a type of political regime "that permits certain institutions normally associated with democracy, such as elections and political parties, to exist, while remaining authoritarian in the basic patterns of power distribution and reproduction."<sup>4</sup> The amendments simultaneously serve as the pinnacle of this process, previously executed through legislative changes, and complete the process by filling the gaps that the government, unwilling to meddle in constitutional matters, used to leave out.

Whereas the general personalistic and authoritarian trend had already become self-evident even before this open secret was blurted out in the Tereshkova amendment, it remains unclear what effect Russia's authoritarian turn has had on the quasi-democratic institutions that it wrapped around, absorbed, and accommodated over the years. Has the process of retaining and altering these institutions led to their overall enfeeblement and depletion? Or have these institutions in fact remained strong and efficient?

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1 Several authors contend that building autocracy was not an end in itself at least for the first Putin administration, and that the authoritarian turn was in fact provoked by a number of contingencies the government faced in the early 2000s, see Henry E. Hale. "The Origins of United Russia and the Putin Presidency: The Role of Contingency in Party-System Development." *Demokratizatsiya* 12, no. 2 (2004): 169–94; Grigorii V. Golosov, "The Regional Roots of Electoral Authoritarianism in Russia." *Europe-Asia Studies* 63, no. 4 (May 2011): 623–39. <https://doi.org/10.1080/09668136.2011.566427>; Ivan S. Grigoriev, and Anna A. Dekalchuk. "Collective Learning and Regime Dynamics under Uncertainty: Labor Reform and the Way to Autocracy in Russia." *Democratization* 24, no. 3 (April 16, 2017): 481–97. <https://doi.org/10.1080/13510347.2016.1223629>.

2 Fabien Burkhardt, "Institutionalizing Personalism: The Russian Presidency after Constitutional Changes." *Russian politics* 6, no. 1 (2021).

3 The amendment is named after its author, Valentina Tereshkova, the first woman-cosmonaut and veteran of Soviet and Russian parliamentary politics.

4 Grigorii V. Golosov, "Authoritarian Party Systems: Patterns of Emergence, Sustainability and Survival." *Comparative Sociology* 12, no. 5 (2013): 618.

Theoretically, this question pertains to the broad discussion regarding the purpose, fate and validity of institutions under autocracy.<sup>5</sup> In this article I approach the subject by focusing on a particular set of institutions regulating constitutional review and the functioning of the Russian Constitutional Court (RCC)—a body that has been reformed several times over the past twenty years, and that nevertheless drew significant attention in 2020. Of the 206 amendments introduced and adopted on July 1, 2020, 24 deal with the organization, functioning, and the role of the Court in the political system. Compared to many other vague amendments, these are precise and detailed, ranging from the number of judges on the bench, their nomination and dismissal, to the Court's inner procedures, locus standi limitations, and the primacy of the Constitution over Russia's international obligations.

In what follows, I trace the RCC-related constitutional amendments to their antecedents in the RCC reforms conducted in 2001–2018. My goal is to establish their source and motivation: Are they brought about by the Court, to resolve some of the problems it faces? If so, is it possible to trace these solutions through earlier reforms, and by doing so to establish which problems they are supposed to solve? Or are they brought about by the government and effectively imposed upon the Court? Finally, are these reforms motivated by pursuit of power, or solutions to policy-oriented problems arising in the field of constitutional justice?

I show that between the late 2000s–early 2010s the process of reforming the RCC aimed at solving policy-oriented problems of constitutional justice, with just certain elements of politically induced status quo preservation. But by the late 2010s the logic of power preservation and of instrumentalizing the Court for that purpose starts to dominate the agenda, possibly at a cost to the Court's normal operation. On a more conceptual note, my article contributes to our understanding of institutional dynamics under authoritarianism by illustrating the path-dependent, gradual transition from keeping institutions intact while mitigating their potential to challenge the ruler (or be used for that purpose by the opposition), and ultimately, to their full-scale instrumentalization in order to preserve power.

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5 See Thomas Pepinsky, "The Institutional Turn in Comparative Authoritarianism." *British Journal of Political Science* 44, no. 3 (2014): 631–53.

## 1 Original Constitutional Setting (1993) and Early Reforms of the RCC (2001–2008)

The pace of RCC reform was rather uneven over the last three decades. The Court was created in 1991 and heard its first cases in early 1992. It was then shut down in October 1993 after the confrontation between the president and the parliament where it sided against the president. Following the adoption of a new constitution in December 1993 the Court underwent a profound reform, so when it reopened in 1995 it basically was a new body institutionally, with significant changes introduced to all major aspects of its functioning.<sup>6</sup>

The fundamentals of the Court's functioning, as well as its place in the broader political system, were laid down directly in the Constitution. It is important to review these major starting points as a backdrop for 2020 constitutional amendments. The discussion identifies elements covered in the Constitution, elements that are omitted, and those regulated by the so called "Federal Constitutional Law." The latter is an act of secondary legislation detailing and supplementing constitutional provisions and adopted with additional procedural safeguards that make it harder to amend.

Under the 1993 Constitution, the Court retained its function of protecting the constitution. It is in the presence of the judges of the Constitutional court (along with the members of the upper and lower chambers of the parliament) that the President takes "the oath of loyalty to the people" (Article 82). Similarly, joint sessions of parliament were only called to hear the president (along with foreign leaders) or the Constitutional Court address them (Article 100). Both of these provisions underscore the symbolic importance of the Court in the political system.

Second, the constitution defined the Court's functions as establishing constitutionality of legislation and interpreting constitution (with locus standi limited by Articles 125.2 and 125.5, respectively), judicial review of legal norms applied in concrete cases (Article 125.4), resolving disputes on jurisdiction and competences between public bodies (Article 125.3). Aside from the two unused auxiliary functions of providing its opinion on legality of the impeachment proceedings (Article 93), or the ill-defined power to initiate legislation "in its sphere of competence" (Article 104), the Court's mission was rather clearly

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6 Trochev provides a detailed explanation of how the RCC functioned in 1992–1993, as well as what was reformed in 1994. The changes would be so profound, and so many, that Trochev treats these two periods as two separate courts. Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (Cambridge University Press, 2008): 61–85.

limited to posterior constitutional review, with different locus standi provisions specified for the abstract and concrete procedures.

Third, the constitution also specified the composition of the Court: both the number of judges, set at nineteen (Article 125.1), and the procedure whereby the president nominates and the Federation Council (the upper house of the parliament consisting of representatives of the regions) approves new justices should a vacancy arise on the bench (Articles 83, 102 and 128).

In addition to these Constitutional fundamentals, the actual specifics of the Court's organization and functioning were defined in the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation' (the RCC Act).<sup>7</sup> As opposed to regular federal laws, adopted and amended with parliamentary majorities, it takes a *constitutional* majority (two thirds and three fourths of the total number of the Duma and the Federation Council members, respectively) to amend a constitutional law. Constitutional amendments (except for chapters 1, 2, and 9) also require this more complicated procedure, with an additional requirement of the amendment's subsequent approval by two thirds of the regional legislatures. The provisions of federal constitutional laws are therefore almost as hard to modify as the constitution itself when it comes to legislative majorities.

The effects of these requirements are immediately visible in the chronological pattern of amending the RCC Act. After its adoption in 1994, there was not a single amendment throughout the Yeltsin years, with the 2001 amending legislation (*1-FKZ*) barely reaching the constitutional majority threshold of 300 votes in favor. However, as of 2001 when Vladimir Putin managed to put together a stronger and more coherent pro-presidential majority in the parliament, it was amended sixteen times—on average, almost on a yearly basis. As Figure 1 attests, the general dynamics of adopting federal constitutional laws mirrors that: with only 11 adopted in 1994–2000, there were more than 130 in 2001–2019, with still a few in the pipeline in 2020 following the constitutional reform.

The first series of amendments (passed between 2001 and 2007, see Table 1) addressed questions of the justices' retirement ages and tenures, but also of noncompliance with the court rulings—the two problems that were most pressing at the time.<sup>8</sup> The problem of judicial tenure arose because of the

7 Curiously, although article 118 was specific about “establishing the organization of the judicial authority” (including matters of constitutional justice) with constitutional laws only, according to article 125.4 the matters of organizing concrete judicial review would be dealt with regular federal laws—probably, an error which was finally rectified in 2020.

8 Trochev writes, “judicial recruitment, the implementation of the RCC decisions, and financial independence of the Court stirred the most controversy” around the 1994 draft of RCC

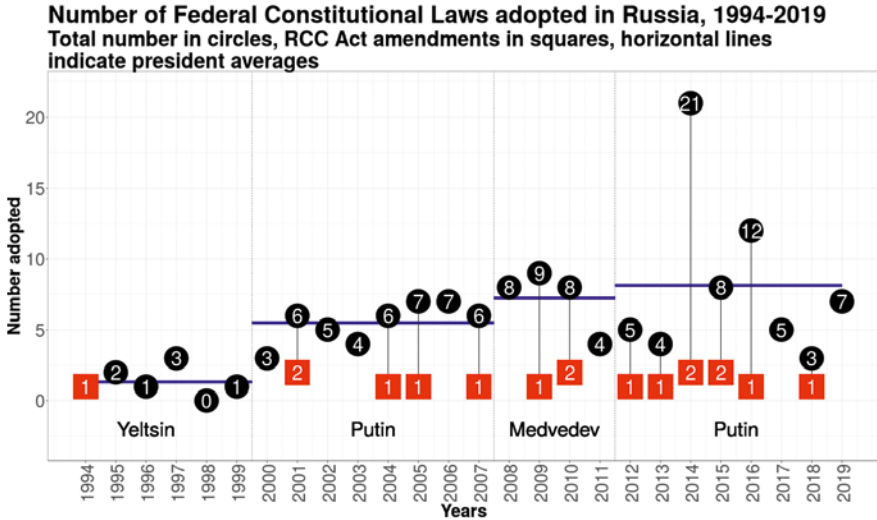


FIGURE 1 Number of federal constitutional laws adopted in Russia, 1994–2019

conflicting norms regarding judicial terms between the 1994 RCC Act (a single non-renewable twelve-year term with retirement at 70) and the 1991 version (no term limits at all and retirement at 65), that remained applicable to justices appointed in 1991. After a series of seemingly incoherent reforms (as in first lifting, and then reinstating the mandatory retirement age of 70—in a single year) the problem with the tenure was finally resolved in 2005. Now all justices are nominated for life, with retirement at 70.<sup>9</sup>

The problem of noncompliance remained on the agenda despite reforms. The first period of reforming the Court closed in 2007 with the decision to relocate the Court to St. Petersburg.<sup>10</sup> One typical feature of this first set of amendments of the RCC Act is that it solved only the most pressing problems and left the more technical details of the Court functioning untouched, generally preserving the regulation provided by the original 1994 RCC Act.

Act (Trochev, *Judging Russia*: 80), and remained on the agenda in the early 2000s when it was first amended.

9 Trochev provides a compelling explanation of this “zigzagging behaviour,” Trochev, *Judging Russia*: 85–87.

10 Alexei Grigoriev, “Law Clerks as an Instrument of Court–government Accommodation under Autocracy: The Case of the Russian Constitutional Court,” *Post-Soviet Affairs* 34, no. 1 (January 2, 2018): 17–34. <https://doi.org/10.1080/1060586X.2018.1408927>.

TABLE 1 Reforms of the Russian Constitutional Court, 2001–2007

Year	Amending legislation	Substance of changes
February 8, 2001	1-FKZ	Increased tenure from 12 to 15 years, mandatory retirement age increased (70) for all judges nominated after 1994.
December 15, 2001	4-FKZ	<ol style="list-style-type: none"> <li>1 Returned the mandatory retirement age of 70 years for all judges, as of January 1 2005.</li> <li>2 Relaxed provisions protecting justices from arrest, search, etc. without RCC sanction.</li> <li>3 RCC can advise cancellation or revision of norms, mandating that relevant bodies consider changes, and establish a concrete timeline for the government and the president to introduce recommended changes.</li> <li>4 Regional authorities (governors and legislatures) that fail to comply with the Court rulings, can be dismissed or disbanded by the president.</li> </ol>
June 7, 2004	3-FKZ	Lists costs to be reimbursed if the petitioner wins the case (the contested norm is found unconstitutional).
April 5, 2005	2-FKZ	Lifts the 15 years duration and defines retirement age of 70 for all judges regardless of appointment date.
February 5, 2007	2-FKZ	Relocates the Court to St. Petersburg (as of 2008).

## 2 Reforms prior to Constitutional Amendments (2009–2018)

After the Court relocated in 2008 the focus of reforms changed. Much of the reform conducted in 2009–2018 concerned optimizing the internal organization and procedures of the Court, as well as its place in the broader political system. At the same time, institutional evolution preserved the political status quo—maintaining stable composition, and most importantly keeping the Court chairman Valeriy Zorkin in place.

### 2.1 *Controlling the Court and Preserving the Status Quo*

This process starts in 2009 when the procedures for appointing the chairperson and her deputies, changed from direct secret-ballot elections by the justices to presidential appointment with approval of the Federation Council. The chairperson and deputies' tenures increased from three to six years. By 2010 the presidential administration realized that they forgot to fix the established dismissal procedure, allowing justices to impeach the chairperson or her deputies, and made amends. New regulations mandated that justices could only initiate impeachment proceedings (following the same procedure) by suggesting that the president and Federation Council remove the chairperson or a deputy.<sup>11</sup>

These two reforms reoriented the chairperson's loyalty away from the fellow justices and towards the president. To consolidate that effect and escape (or at least postpone) the trouble and uncertainty of having to look for a new chairperson in the future, in 2010 the retirement age was waived for the chairperson: as long as the justice chaired the Court, she would not retire. This reform effectively extended Valeriy Zorkin's tenure indefinitely, after his seventieth birthday. He remained the Court chairman through two nominations in 2012 and January 2018. Importantly, now that Zorkin is in his seventies, he depends on the President for renomination to the bench and reappointment as Chairman.

Besides the general trend towards a higher stability of judicial personnel in Russia (evident in not changing the chairman of the Supreme Court), this insistence on retaining Zorkin as the RCC chairman reflects the vision of the Court's inner workings as highly volatile and dependent on the chairperson's capacity to handle other judges and micro-manage judicial deliberations on each important case. Presumably, by the mid-2000s a fragile balance was reached in the context of the relatively independent institution: the justices accommodated the president's (increasingly, constitutionally controversial) reforms and did not contest the general political trend towards authoritarianism.<sup>12</sup> Yet, it took a number of additional reforms beyond extending leadership stability to preserve this balance.

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11 Similarly, almost as an afterthought, in 2014 a minor modification to chairperson/deputy nomination scheme was introduced which allowed the chairperson and the deputies retain their positions if the president and Federation Council fail to nominate a substitution at the end of their terms.

12 Trochev and Solomon refer to the Court's 'pragmatic approach', see Alexei Trochev, and Peter H. Solomon, "Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State," *Communist and Post-Communist Studies*, August 24, 2018. <https://doi.org/10.1016/j.postcomstud.2018.06.002>.



First, as part of the Court's 2010 comprehensive reform its two chambers collapsed into one.<sup>13</sup> Previously, the Court heard most cases in two separate nine- and ten-member compositions—a feature introduced in the 1994 RCC Act. The provision allowed the Court to process more cases at a time. By the late 2000s it was clear that the two-chamber structure mitigated the chairman's capacity to monitor and sanction the behavior of the other justices as he could only preside over one chamber at a time.<sup>14</sup> The reform also removed the possibility of the two chambers taking inconsistent decisions.<sup>15</sup>

Second, even with the chairman's better grasp over the Court, and his enhanced informal influence over other justices, it was possible that this very containment would result in the justices' discontent spilling over. This occurred when Justices Yaroslavtsev and Kononov, who in 2009 openly criticized both the government for its authoritarian turn and the prevalence of *siloviki* in decision-making, and the Court for its inaction, were informally disciplined by the Court. In 2010, Justice Kononov was forced to resign. Following these events, the November 2010 reform extended formal grounds for the Court to launch dismissal proceedings against one of its own: including "committing an action discrediting them as a judge," "keeping up with activities incompatible with the judicial office," and "abstaining from participating in the Court hearings or voting for more than two times in a row."

Abolishing the chambers also had two additional downsides. First, the Court would technically only be able to process half as many cases. To deal with the potential backlog, a novel procedure was introduced to allow the Court to pass decisions without hearing the parties present arguments.<sup>16</sup> It took a while to

13 As all justices interviewed by the author in 2012 attest, unlike some other changes, this reform was not initiated by the Court, but rather imposed unexpectedly by the president.

14 Notice that as of June 2009 instead of one judge-secretary of the Court and one deputy chairperson whose task it was to preside over one of the two chambers (along with the chairperson presiding over the other one), the Court started appointing two coequal deputies, without specifying which should be presiding over the second chamber.

15 One of the justices interviewed by the author in 2012 articulates this as a practical problem caused when judges specializing in legal theory of the case did not sit in the chamber assigned the case: "Sometimes there would be a situation when, discussing a particular case, you would want to ask a justice from a different chamber about it—who is a strong specialist in the issues involved: you would want to consult him and to know his opinion."

16 Introducing the written procedure was a response to a number of issues, and in particular, the regular courts' noncompliance with the RCC decisions adopted in a peculiar genre of 'Inadmissibility decision with positive contents,' see Ivan S. Grigoriev, "Why Dismiss a Good Case? Origins of the 'Positive Inadmissibility' Practice and Its Rationale in the Russian Constitutional Court." *Russian Politics* 5, no. 4 (2020): 375–400. <https://doi.org/10.30965/24518921-00504001>.

adjust the written procedure, greasing its gears<sup>17</sup> and making sure that the rest of the political and judicial system accept the novelty, but over time it became the Court's preferred mode of adjudication.<sup>18</sup>

Second, with all 19 justices now participating in deliberations, the process of coming to an agreement slowed—both because the Court needed to accommodate more positions in its decision, but also, as one of the judges interviewed by the author in 2012 stated, “it would take a lot of time to just go around the table and let everyone express their opinion,” even where the opinions did not differ.

Recall however that the number of justices is one of the few things determined directly by the Constitution, and apparently amending the Constitution just to reduce the number of members of the Court was not viable. The regime adopted a subtler approach, reforming the provisions of the RCC Act regulating judicial quorum and renomination. In June 2014, with the passage of the federal constitutional law 9-FKZ, the Court was allowed to operate with two-thirds of its membership nominated.<sup>19</sup> Retiring justices were allowed to leave the bench before the president nominated a replacement.

At the same time, according to the 2014 amendments the Court needed to maintain a 13-member court, so the thirteenth justice facing retirement would remain on the bench until the president seated a replacement. Immediately, the clock was set ticking on the moment the temporary solution would no longer work, and a permanent one would be needed. In the context of the sitting court, the provision meant the Court would have only thirteen members in just five years: Justices Seleznirov, Kleandrov, and Zhilin would go in 2015–2016, and then three more justices: Danilov, Boytsov, and Bondar' would retire in a quick succession in August–November 2020.<sup>20</sup> At that point, the RCC Act would have

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17 One prominent example of future “greasing” is the 2014 reform that allowed the Court to decide whether the parties' insistence on *not* going into written procedure (an option they got according to the 2010 reform) is warranted, and to decline. This decision was motivated by the fact that there were “lots of motions by the parties to not go into written procedure” (Author interview, Justice, 2012).

18 For instance, in 2019 (that is, before the COVID pandemic) 29 of our 41 Judgments were adopted without oral hearings using the written procedure.

19 The timing is explained by the fact the first justice to retire after the 2010 reform, Gennadiy Seleznirov, faced retirement in June 2015, so question of renomination was not pressing until that point.

20 This process accelerated unexpectedly when Justice Khokhriakova passed away in 2019. Just six months before her death, in a striking attempt to arrest the natural process of justices retiring and stepping down, the authorities renominated Khokhriakova as deputy chairman well ahead of schedule, effective as of January 11, 2019 (her seventieth birthday when she would otherwise have to retire). To be able to do that, the RCC Act was amended

to be amended again, allowing the Court to function below the two-thirds threshold. Or the president would have to start renominating justices again, and then nominate six justices quickly—but this change could undermine the informal practices used to manage the court.<sup>21</sup> Or, finally, Justice Bondar' (and possibly Justices Mavrin and Rudkin, both due to retire in 2021) would have to stay put—which might be seen an act of selfless solidarity with the recent unpopular reform to raise retirement age, which the RCC found entirely constitutional in its April 2019 decision. The 2020 constitutional reform provided a permanent solution to this conundrum.

## 2.2 *Solving the RCC's Problems*

Within the same time frame several reforms aimed at solving some of the Court's own problems.<sup>22</sup> Most importantly, these were the problems of excessive workload as the number of cases on the docket rose dramatically in the mid-2000s,<sup>23</sup> and noncompliance with the Court rulings, which diminished the Court's authority.

The struggle against noncompliance took different directions depending on its source. One, and technically the easiest to cope with, is the government and the parliament, which can be considered as one consolidated law-making body, failing to amend legislation deemed unconstitutional. In 2013 a reform was passed to extend the government's timeframe to submit amended legislation from three to six months, eliminating non-compliance due to time lags. But generally, the real solution lay with the Court maintaining a good relationship with the government, and, as a nuclear option, raising instances of the outrageous issues of noncompliance during the Justices' annual December reunions with the president. Compliance statistics collected by the Court after 2013, reflect its happiness with the parliament's discipline and responsiveness.<sup>24</sup>

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yet again in June 2018 (with the retirement age for the RCC deputy chairman set at 76), thus giving Khokhriakova an extended term on the bench and as deputy.

21 An interviewee who worked at the RCC in the early 2010s conjectured that having the four new justices nominated by President Medvedev in 2008–2010 was problematic for chairman Zorkin since he could not build a personal rapport with them so quickly (Author interview, Retired RCC Law Clerk, 2020). The balance in steering the bench would be more problematic if six justices arrived simultaneously.

22 Of course, new problems arose as the president solved problems of his own—such as the reduction in the number of justices on the bench following the abolition of chambers, described above.

23 See Grigoriev, "Law Clerks as an Instrument of Court-government Accommodation under Autocracy:" 27.

24 Solomon and Trochev sum up the compliance statistics nicely, noting that "the record of the compliance with RCC decisions improved somewhat under consolidated

General courts constitute another source of non-compliance. For much of the previous period, the RCC sought to deal with this problem informally, through its relationship with the Supreme Court, and by repeating incessantly that all of its rulings (judgments and inadmissibility decisions) are mandatory. The problem, however, was aggravated by two issues: First, regular courts considered positions formulated as inadmissibility decisions advisory.<sup>25</sup> Second, the courts also tended to overlook judgments where the RCC did not strike out the contested norm as unconstitutional, but rather found it constitutional with reservations, or only “in the constitutional meaning revealed by the Court.” In both instances the regular courts would reject citizens’ requests to override or correct their earlier rulings following the decision by the RCC. This practice effectively resulted in the regular courts not implementing RCC’s decisions.

In the 2010 reform, the twofold response to that problem made sure the RCC only adopted decisions on merits with judgments, and stopped (improperly) using its inadmissibility decisions; and unambiguously stated that the RCC could instruct a specific lower court to review its earlier ruling where a norm found unconstitutional by the RCC was applied. The expectation was that it would then be hard for the regular court to ignore such an unequivocal order.<sup>26</sup> Following the Court’s expanding practice of not disqualifying contested norms, but rather “revealing their constitutional meaning,” the 2016 reform obliged the regular courts to only enforce legal norms in their true “constitutional meaning” established by the Court.<sup>27</sup>

Finally, one last source of noncompliance is the international courts and tribunals—most importantly the European Court of Human Rights (ECtHR), but also potentially the Court of the Eurasian Economic Union, established in 2015. The subject of the constitutional courts’ relationship with international tribunals is not always read that way, but from the RCC’s perspective, it effectively *is* an instance of noncompliance when an international court gives a

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authoritarianism [i.e., in the 2010s]—a consequence of intensified cooperation of the Court with the Parliament and the Cabinet,” see Solomon and Trochev, “Authoritarian constitutionalism in Putin’s Russia”, 211.

25 This sophisticated issue is analyzed in great detail in Grigoriev, “Why Dismiss a Good Case?”

26 The goal was achieved through amendments to article 75 of the RCC Act, listing all possible elements of a court ruling, to include an optional element: “an instruction [to the lower court] to review the petitioner’s case if as its final decision the RCC adopts a judgment.”

27 One RCC employee in the 2010s argued that ensuring that RCC judgements are binding source of law also required amending the codes of procedure which the regular courts follow—something the RCC unsuccessfully lobbied for throughout 2010s (Author interview, Retired RCC Law Clerk, 2020).

TABLE 2 Reforms of the Russian Constitutional Court, 2009–2018

Year	Amending legislation	Substance of the changes	Purpose and effect
June 2, 2009	2-FKZ	<p>1 Elimination of a deputy chairperson and a judge-secretary of the Court, in favor of two deputies.</p> <p>2 The President and Federation Council appoint the chairperson and two deputies from among the justices for renewable six-year terms. Justices retain their right to impeach the chairperson or her deputies using old process.</p>	<p>Control over RCC leadership</p> <p>Control over RCC leadership</p>
December 28, 2010	8-FKZ	Added the mention of the chairman of newly established investigative committee into Article 77 listing all parties that have to be notified of the judgments and conclusions.	Technical
December 28, 2010	7-FKZ	<p>1 Eliminate the two-chamber structure.</p> <p>2 Introduce written procedure to adopt judgments.</p> <p>3 Eliminate age limit for the chairperson.</p> <p>4 Limit the justices' power to impeach the chairperson or deputy.</p> <p>5 Extend involvement of the Federation Council in impeaching individual justices.</p> <p>6 Clarify the locus standi provisions for natural persons and courts.</p> <p>7 Clarify scope of RCC decisions applicability by regular courts.</p>	<p>Control over justices</p> <p>Workload and compliance</p> <p>Control over RCC leadership</p> <p>Control over RCC leadership</p> <p>Control over justices</p> <p>Workload and compliance</p> <p>Compliance</p>
December 25, 2012	5-FKZ	Reform of judicial wages (mostly covering the regular courts), replacing 'salary of the judge' with 'monthly monetary remuneration' and 'quarterly monetary remuneration'.	Technical

TABLE 2 Reforms of the Russian Constitutional Court (*cont.*)

Year	Amending legislation	Substance of the changes	Purpose and effect
April 5, 2013	1-FKZ	Extend the timeframe (from 3 to 6 months) for the Cabinet to introduce amended legislation in response to RCC ruling.	Compliance
June 4, 2014	9-FKZ	<p>1 Allow the Court to function with just two-thirds of its membership (13 out of 19 justices).</p> <p>2 Allow the Court to work with the quorum of only two thirds of its acting members present.</p> <p>3 Granting the Court powers to check constitutionality of a question put up for referendum.</p> <p>4 Allow the chairperson and deputies hold seats after their terms run out as long as these vacancies are not filled.</p> <p>5 Reduce the number of copies of documents submitted with the petition from 30 (or three for natural persons) to one.</p> <p>6 One-year limit to petition to the RCC after a regular court application of an unconstitutional norm.</p> <p>7 Simplification of time frame for the Court's internal processing of the petitions.</p> <p>8 Broaden the written procedure (article 47.1) and giving the Court more discretion in deciding whether it is applicable or whether oral hearings are necessary.</p> <p>9 Allow the Court to review applicability of decisions by international bodies and tribunals about violations of human rights to check that they do not diverge from the RCC's understanding of constitutional rights and constitution.</p>	<p>Expediting the workload</p> <p>Reducing the number of justices</p> <p>Using the Court as political instrument?</p> <p>Technical</p> <p>Technical</p> <p>Workload reduction</p> <p>Technical</p> <p>Expediting the workload</p> <p>Compliance and using the Court as political instrument</p>

TABLE 2 Reforms of the Russian Constitutional Court (*cont.*)

Year	Amending legislation	Substance of the changes	Purpose and effect
August 6, 2014	5-FKZ	Removed mentions of the Supreme Commercial Court (reformed and effectively disbanded in 2014) from the RCC Act.	Technical
June 8, 2015	5-FKZ	Allowed to submit petitions online, to communicate with the petitioner online, to announce hearings online, and even to stream them online.	Technical
December 14, 2015	7-FKZ	<p>1 Allowed the Ministry of Justice to bring cases asking the RCC whether it should comply with decisions by international tribunals taken against Russia, if they diverge from the Constitution the way RCC interprets it. (A whole chapter 13.1 was introduced describing the procedure for such proceedings.)</p> <p>2 Allowed the president and the government to also ask the RCC for interpretations of the Constitution to eliminate uncertainty which arises because of contradictory understanding of the constitution by international courts and tribunals.</p>	Using the Court as political instrument
December 28, 2016	11-FKZ	Made sure regular courts only applying norms covered by the RCC case-law in their meaning established by the RCC in its interpretation.	Compliance
July 29, 2018	1-FKZ	Raised the age of the deputy chairperson to 76 years old.	Keeping existent cadre on the bench

Russian case a different reading from the one provided by the RCC, causing a Russian lower court to review its earlier ruling according to the international court's decision.<sup>28</sup> This process could generate a decision contrary to the decision made by the RCC, as was the case when the ECtHR decided in favor of Konstantin Markin despite an earlier RCC ruling against him.<sup>29</sup>

A series of reforms conducted in 2014–2015 aimed at establishing the RCC's primacy in settling this kind of collisions. The Court acquired competence to review applicability of decisions by international tribunals to check that they do not diverge from the RCC's understanding of constitutional rights and constitution. The Ministry of Justice was charged with consulting the RCC on whether it has to comply with an international tribunal's decision.

Finally, apart from dealing with issues of non-compliance, the Court also faced a challenge of an overwhelming number of petitions it started receiving by the late 2000s. In response, it sought to streamline its internal procedures while at the same time narrowing the locus standi provisions to reduce frivolous petitioning. In particular, as of 2010 the RCC Act distinguishes more clearly between two separate routes for concrete cases to appear on the Court's docket, only the lower court judges now allowed to ask about constitutionality of a norm "subject to application in a concrete case," and the citizens only allowed to bring petitions after they have received a lower court's ruling applying the contested norm in their case. Furthermore, as of 2014, citizens would only have one year to bring a petition to the RCC following a regular court decision—a measure which should have reduced the number of petitions coming from the regular citizens.<sup>30</sup>

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28 Decisions by international courts such as the ECtHR are considered "a newly discovered circumstance" in the Russian codes of procedure, and therefore provide grounds to reopen cases that review earlier court decisions.

29 Markin, an army officer who was refused a paternity leave following divorce with his wife, won a case against Russia in the ECtHR in 2010 already after the RCC decided against Markin in 2009, finding the discrimination against male servicemen was justified by matters of national defense and therefore constitutional. See William E. Pomeranz, "Uneasy Partners: Russia and the European Court of Human Rights." *Human Rights Brief* 19 (2011–2012): 17–21.

30 This one-year application period also works as a neat way to make citizens choose between "going to St. Petersburg" (where the RCC sits) or "going to Strasbourg" for an international judgement.



### 3 What Changes with the Constitutional Amendments?

Most reforming observed in 2009–2018 aimed either at making the Court *harmless* to the president—a goal achieved through keeping chairman Valerii Zorkin in place, controlling him through presidential renominations, and giving him a better vantage point to control the other justices; or at making it more *efficient*—mostly, by improving and streamlining compliance by other bodies and sorting out the issues related to excessive workload (but also gradually reducing the number of justices to make the Court more workable following abolishment of the chambers in 2010). Allowing the Court to review decisions of international courts (such as the ECtHR) which start to increasingly irritate the government in the 2010s, could be seen as trying to make the Court *useful*, but in fact the main and prior interest in resolving the collision with the ECtHR (and, potentially, the Court of the Eurasian Union) also comes from the RCC itself and ultimately has more to do with noncompliance.<sup>31</sup> The only reform unambiguously indicating the government's wish to instrumentalize the Court is extending its competences to also include the power to review constitutionality of questions proposed for referendum in 2014—a power that could be used against the opposition if it tried to engage the people and politicize (or even subvert) certain governmental policies by putting them up for a referendum (as could be the case, for instance, with the unpopular pension reform in 2018). The opportunity to use this power has not yet arisen.

As Table 3 shows, a notable proportion of the constitutional amendments enacted in 2020 actually covers the subjects already regulated by the secondary legislation (as reformed in 2009–2018), its provisions often simply transposed into the Constitution: the nomination and dismissal procedures, as well as requirements to prospective justices; the Court's general functional (such as its role in confirming or rejecting decisions by the international tribunals); some procedural aspects and locus standi requirements. Even decreasing the number of justices from 19 to 11, dramatic as it may seem, only consolidates the trend towards a more compact court already observable at least since 2014.

31 See Valerii Zorkin's op-ed in *Rossiyskaya Gazeta* (October 29, 2010) devoted specifically to making a point that “when a ruling by the ECtHR is doubtful from the perspective of the very substance of the European Convention on the Human Rights itself and, especially, when it directly touches upon the national sovereignty and the basic constitutional principles, Russia should have the right to work out a mechanism of defense against such rulings [by the ECtHR]. It is in the light of the Constitution that the issue of relationship between the judgments of the RCC and the ECtHR should be resolved.” The 2014–2015 reforms effectively created such a “mechanism of defense” resolving the potential collision between the RCC and the ECtHR, and giving the RCC the upper hand.

TABLE 3 Constitutional amendments related to the Constitutional Court

Article amended	What changes and how it relates to the RCC	When was the amendment introduced	Is it already the case?
Art. 67 <sup>1</sup>	Russia is proclaimed the legal successor to the USSR. (Note that in February 2020, one month before this amendment is introduced, Justice Aranovskii published his concurring opinion to Judgment 39-P/2019 where he questions Russia's legal continuity with the USSR. The constitutional drafters seem to have responded to this questioning.)	Introduced in February–March	No
Art. 79, Art. 125.5 <sup>1</sup> (b)	Russia should not take international obligations that result in violation of human rights or contradict its constitutional fundamentals. On president's request, the RCC checks constitutionality and applicability of decisions by international bodies and tribunals. Decisions by international bodies should not be enforced if in its decision an international body interprets Russia's international obligations in a manner which contradicts the Constitution.	Introduced in January (in a slightly softer formulation)	Already in secondary legislation
Art. 83, Art. 102(zh), Art. 128.1	President puts forward for approval by the Federation Council the candidacies of RCC chairman and deputy chairman.	Introduced in January	Already in secondary legislation
Art. 83(e <sup>3</sup> ), Art. 102(l), Art. 128.1	President proposes, and the Federation Council dismisses RCC chairman, deputy chairman, and the regular justices—among other things, “if they discredit themselves as judges.”	Introduced in January	Dismissing the chairman and deputy already in secondary legislation. Dismissing individual justices—new

TABLE 3 Constitutional amendments related to the Constitutional Court (*cont.*)

Article amended	What changes and how it relates to the RCC	When was the amendment introduced	Is it already the case?
Art. 93, Art. 125.7	Impeachment procedure against president also applicable to strip retired presidents of their immunity (including the RCC having to submit its Conclusion to confirm legality of such motion).	Introduced in February–March	New
Art. 100	The two houses of parliament only hold joint sessions to hear the president. (Previously the RCC could also address both houses, which only happened once in March 1993.)	Introduced in February–March	New, but follows the existent practice
Art. 107, Art. 125.5 <sup>1</sup> (a)	If the Duma and Federation Council override the presidential veto over a bill, the president can ask the RCC to inspect its constitutionality first, and does not have to sign if RCC finds the bill unconstitutional.	Introduced in January	New
Art. 108, Art. 125.5 <sup>1</sup> (a)	The president can ask the RCC to inspect a draft federal constitutional law before signing it and after the parliament adopts it; does not have to sign if RCC finds the draft unconstitutional.	Introduced in January	New
Art. 118, Art. 128.3	The judiciary consists of RCC, Supreme Court, general federal courts, commercial courts, and justices of peace of the regions. (The implication is that the regional charter courts should not exist—the reading that the RCC gives this clause, and also something chairman Zorkin promoted for a long time now.)	Introduced in February–March	New
Art. 119	List of requirements for all judges, including RCC justices—age, education, work experience, residence in Russia and Russian citizenship only, not having assets or connections abroad.	Introduced in January, except for the part on foreign bank accounts	Already in secondary legislation

TABLE 3 Constitutional amendments related to the Constitutional Court (*cont.*)

Article amended	What changes and how it relates to the RCC	When was the amendment introduced	Is it already the case?
Art. 125.1	Defines the RCC, reduces the number of its members from 19 to 11, the number of deputies from two to one.	Introduced in January	New, but constitutionalizes the already reduced number of justices
Art. 125.2	The RCC allowed to also inspect for constitutionality the federal constitutional laws. (Omitting it in the 1993 Constitution was probably an error.)	Introduced in February–March	New, but follows the existent practice
Art. 125.4(a)	Following a petition by a citizen, the RCC checks constitutionality of legal norms applied in concrete cases if the citizen has exhausted all other national means of legal defense.	Introduced in February–March	New
Art. 125.4(b)	Upon request from a regular court the RCC gives its preliminary ruling on constitutionality of a norm due to be applied in a concrete case heard by that court.	Introduced in February–March	Already in secondary legislation
Art. 125.5 <sup>1</sup> (v)	On president's request, the RCC checks constitutionality of the regional laws adopted by legislatures, before their publication.	Introduced in January	New
Art. 125.6	Legal norms found unconstitutional shall not be applied. The interpretation given to a legal provision by the RCC is binding. (Notice the phrasing of this clause similar to how the RCC formulates the resolute parts in its judgment where it "reveals the constitutional meaning" of contested norms.)	Introduced in February–March	Already in secondary legislation
Art. 125.8	RCC performs "other activities" set for it by the federal constitutional law.	Introduced in January	Already in secondary legislation

Most of the 2020 constitutional amendments therefore simply reproduce and *constitutionalize* the status quo achieved through reforming the RCC over the previous twenty years.

Of course, in some respects these “status quo” amendments amplify the existent trends: On the one hand, some of the powers the RCC promoted over the last decade now got constitutionalized, such as making sure it is only in the constitutional meaning “revealed” by the RCC that legal norms shall be applied (Article 125.6). Probably, the right to only accept petitions from citizens after they have exhausted all other national means of legal defense (thus reducing the Court’s workload) also falls into this category.<sup>32</sup> On the other hand, giving the president and the Federation Council the power to dismiss individual justices clearly strengthens the presidential control on the bench (previously only secured through the chairperson’s personal loyalty and dependent on her ability to control and manipulate other justices).

At the same time, one very clear novelty we observe in 2020 is giving the Court a lot of new powers that it does not necessarily need itself—powers that politicize the Court and that rather seem to be vested in it by the president with a view of using these new powers in the future either to preserve his power, or even as safeguards against prosecution. Thus, the president gets stronger relative both to the legislature and to the regional authorities since, with the help of the RCC he could now effectively veto legislation adopted on the regional level (Article 125.5<sup>1</sup>(v)) or by a disobedient parliament—that is, of course, if following a request by the president the RCC *will* oblige and find the acts adopted by these bodies in contradiction of the Constitution. Notice that whereas previously according to the constitution it was the parliament that got an upper hand over the president (since it could override the presidential veto with a constitutional majority of its members), now it is the president who overrides even a constitutional majority in the parliament with a little help from the Court.

Similarly, the president will now be able to effectively veto the constitutional laws—something which should not have been possible previously—using the RCC as a proxy. This strengthening of the president may seem inconsequential now that the president controls the Duma. However, that would no longer be the case should the opposition get a stronger representation in the parliament—a development one cannot rule out. In a similar vein, another

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32 In its conclusion on the constitutionality of the amendments, the Court states that the exhaustion requirement will “provide for a more efficient appeal process in a concerted operation of all courts,” implying that it would provide for a more harmonious coexistence with the regular courts and the Supreme Court in particular.

“unnecessary” extension of the RCC’s powers is its role in the newly established procedure of impeaching the retired president (again—apparently, a possibility in the amenders’ opinion), where the Court has to provide its conclusion that in bringing charges against the ex-president the legal procedure has been complied with.

One wonders if, given these additional powers and the president’s dependency on the Court in these matters, it is not to ensure the president’s reliance on the Court that the instruments of direct control over the justices were introduced in the first place. Notice how almost all of these amendments—to strengthen the president in his relationship with the regional authorities and the parliament by using the RCC as an additional safeguard, and to strengthen the presidential control over individual justices (but, importantly, not the one on protecting the retired presidents from prosecution)—were actually already introduced in the presidential draft in January 2020 and therefore constitute the core of Putin’s vision for the new constitutional order.

What changes following the amendments is that the Court becomes a political instrument in the president’s toolkit, the amended constitution containing tools for all possible scenarios, even including one where Vladimir Putin is retired and faces charges as an ex-president (and needs support and protection by the RCC). It is therefore also to a whole variety of scenarios that the RCC should be prepared. And even though the Court was gradually being prepared for that in 2009–2018, becoming more controllable, but also efficient enough to shoulder this burden, the amendments still present a significant deviation from the previous path of only taming the Court, by effectively weaponizing constitutional justice, with the president using the Court both for offense against the parliament and the regional authorities, but also as a defense. Achieving that comes at a cost of making the Court controllable and loyal to the president, which already runs counter to requirements of impartiality. It also puts additional pressure on the Court’s political functions, which in the future may jeopardize its legal authority.

Overall, the development that the RCC has undergone in the last twenty years suggests an interesting implication for our understanding of institutional dynamics under authoritarianism. Most reforms conducted in 2001–2018 stroke a delicate balance between, on the one hand, making the Court more loyal to the president, largely through informal means, and, on the other hand, building up its organizational capacity and making it stronger relative to other bodies. As a result, for most practical purposes the RCC was getting stronger and more efficient. However, when it came to finalizing the authoritarian development and preparing for the bad times (and many amendments seem to anticipate such development) a crucial turn has been made towards

ensuring the Court's loyalty to the president directly and formally while also raising stakes on the Court by channeling the president's new powers through the RCC.

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