

CURRENT DEVELOPMENTS

INTERNATIONAL LAW AND THE 2020 AMENDMENTS TO THE RUSSIAN CONSTITUTION

By Lauri Mälksoo*

ABSTRACT

This Current Development Essay discusses the international legal implications of constitutional amendments adopted in the Russian Federation by an “all-Russian vote,” a quasi-referendum from June 25 to July 1, 2020. The most important of these amendments gives the Russian Constitution priority over decisions made by international courts and treaty bodies. The amendments also address Russia’s state succession to the Soviet Union. Another provision protects Russia’s territorial integrity. The Essay discusses the background to these amendments, their content, and their significance for international law.

I. INTRODUCTION

On July 1, 2020, an “all-Russian vote” (*общероссийское голосование*) was held in the Russian Federation on constitutional amendments that President Vladimir Putin had initiated in his speech to the Federal Assembly in January of the same year. The government reported that turnout was 67.97 percent, and that 77.92 percent voted for the amendments, while 21.27 percent were against. The vote was initially planned for April 2020 but was postponed due to the COVID-19 pandemic. Thus, the Russian Constitution, initially adopted by referendum in late 1993—a generation ago immediately following the breakup of the Soviet Union—has now been modified by the addition of new significant substantive provisions, several of which are relevant to international legal issues.

The international media has highlighted the amendment authorizing President Putin to stay in power for two more presidential terms (Article 81, paragraph 3.1). Formally, this proposal was made at a late stage in the drafting process by Valentina Tereshkova, member of the State Duma and the first woman to have flown in space. In Russia, by contrast, the government promoted amendments with references to patriotism, as well as new constitutional norms that arguably strengthen social protection—that pensions will be indexed every year (Article 75, paragraph 6), that the minimum wage would reflect the cost of living in the

* Professor of International Law at the University of Tartu (Estonia). Research for this Essay was supported by grant PRG969 of the Estonian Research Council. The author would like to thank Dr. Gleb Bogush (Moscow) for useful comments on an earlier draft of this Essay.

Russian Federation (Article 75, paragraph 5), and so on.¹ The amended Constitution also contains a promise of “respect for the working man” (Article 75.1) and the assurance that children will be the highest priority of state policies (Article 67.1, paragraph 4).

The “all-Russian vote” can at best be characterized as quasi-referendum; the authorities did not even pretend to meet the threshold foreseen for referendums under the Russian law.² As the hurdles for amending Chapters I and II of the Constitution—The Fundamentals of the Constitutional System; and Rights and Freedoms of Man and Citizen—are very difficult, the parliamentary working group on constitutional amendments proposed no modifications to these two key chapters. Instead, the amendments were inserted in Chapters III through VIII of the Constitution. In addition, certain amendments have preamble-like qualities. For example, Article 67.1, paragraph 2 declares solemnly that “the Russian Federation, united by a thousand-year history, preserving the memory of ancestors who have passed on to us ideals and a belief in God and also continuity in the development of the Russian state, recognizes historically formed state unity.”

This patchwork approach raises questions about how seriously the holistic and aesthetic aspects of the Constitution are taken in Russia.³ However, the somewhat haphazard placement and tone of the revisions do not mean that the amendments do not affect the fundamentals of Russia’s constitutional system or the civil rights it protects. These issues offer much food for thought for comparative constitutional lawyers and political scientists.

This Current Development Essay highlights the noteworthy implications of the 2020 constitutional amendments for international law. Understanding these implications is especially important in light of Russia’s status as a permanent member of the UN Security Council and as a country that has historically had adversarial relations with the United States. The Essay also furthers the goal of comparative international law, increasing global awareness of international legal issues in countries which may be harder to access for linguistic and other reasons.⁴

With the help of Russian academic literature and relevant periodicals, this Essay explores the context and history of Russia’s constitutional amendments that are relevant for international law, asking what was at stake and why Russia arrived at these amendments. The Essay demonstrates that President Putin and the other drafters of the constitutional amendments have tried to address challenges that Russia inherited from history, especially the legacy and fate of the Russian Empire.

The Essay’s principal claim is that whereas the Russian Constitution of 1993 highlighted—in contrast to the Soviet Constitution of 1977—human rights and pursuit of democracy, the constitutional amendments of 2020 are intended to strengthen Russia’s territorial integrity, state continuity (and succession) with the Soviet Union, and reshape the Constitution’s relationship to the country’s international legal obligations.

¹ In polls, norms concerning social protection, quality of medical insurance, etc. received the highest approval. See Ksenia Vorontsova, *VTSIOM: 61% rossiian sobiraiutsia podderzhat' popravki k Konstitutsii* (VTSIOM: 61% of Russians Intend to Support Amendments to the Constitution), ROSSIYSKAYA GAZETA (May 30, 2020), at <https://rg.ru/2020/05/30/vciom-61-rossiian-sobiraiutsia-podderzhat-popravki-k-konstitucii.html>.

² See further on the political-legal techniques of the “all-Russian vote,” Johannes Socher, *Farewell to the European Constitutional Tradition: The 2020 Russian Constitutional Amendments*, 80 ZAÖRV 2020 1, 11 et seq.

³ On the Constitution of 1993 and the Russian constitutional culture, see JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION. A CONTEXTUAL ANALYSIS* (2011).

⁴ See Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AJIL 467 (2015).

The remainder of this Essay proceeds as follows: Part II examines the new norm on the defense of territorial integrity and its historical justification. Part III discusses the norms relating to state succession and continuity vis-à-vis the USSR. Part IV explores the reference to the revised Constitution as ranking higher in the Russian legal order than treaty obligations as interpreted by competent international bodies. The analysis in each of these Parts is organized around quotes of the key language of each amendment. Part V concludes.

II. LESSONS OF HISTORY: DEFENDING RUSSIA'S TERRITORIAL INTEGRITY

Russia has had a turbulent imperial history that also significantly affected its borders. The territory of the Russian Empire (until 1917) included today's Finland, Estonia, Latvia, and Lithuania as well as key parts of Poland, while the territory of the Soviet Union (until 1991) included today's independent republics of Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. The three Baltic states maintain that they were illegally occupied and annexed by the Soviet Union from 1940 to 1991.⁵ The 1990s saw one further serious attempt at secession concerning a component part of the Russian Federation itself—Chechnya—and a “parade of sovereignties” in Tatarstan, Bashkortostan, and elsewhere.⁶ Russia also continues to have territorial disputes with at least one neighbor—Japan, which has not recognized the annexation of its Northern Territories (the Kurile Islands) at the end of World War II.

A. “Action Directed at Alienating Parts of Territory as Well as Calls to Such Actions Not Permitted”

The newly inserted Article 67, paragraph 2.1 of the Russian Constitution asserts that the Russian Federation ensures the defense of its sovereignty and territorial integrity:⁷ “Action . . . directed at alienating parts of state territory as well as calls to such action will not be permitted.” The provision contains exceptions for delimitation, demarcation, and re-demarcation of state territory, which will continue to be permitted. On July 22, 2020, the Russian State Duma adopted a new bill according to which activities violating the territorial integrity of the Russian Federation will be persecuted and punished as extremism.⁸ Apparently, this norm is intended to target in particular citizens who, consistent with the predominant opinion in the international community, have questioned the legality of Russia's annexation of Crimea in March 2014.⁹ Moreover, on November 18, 2020, further legislation was adopted

⁵ For detailed evidence from international and constitutional practice of Estonia, Latvia and Lithuania, see, e.g., INETA ZIEMELE, *STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA: PAST, PRESENT AND FUTURE AS DEFINED BY INTERNATIONAL LAW* (2005); LAURI MÄLKSOO, *ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES IN THE USSR* (2003).

⁶ See, e.g., Jeff Kahn, *The Parade of Sovereignties: Establishing the Vocabulary of the New Russian Federalism*, 16 *POST-SOVIET AFFAIRS* 58 (2000).

⁷ Here and in the following, reference to the amended constitutional articles is taken from the *Novyi tekst Konstitutsii s popravkami 2020 (New Text of the Constitution with the Amendments of 2020)*, STATE DUMA NEWS (July 3, 2020), at <http://duma.gov.ru/news/48953>.

⁸ *Chem v Rossii groziat prizvyvy k otchuzhdeniu territorii (What Threatens in Russia in the Case of Calls to Secession of Territory)*, STATE DUMA NEWS (Aug. 10, 2020), at <http://duma.gov.ru/news/49299>.

⁹ See GA Res. 68/262, *Territorial Integrity of Ukraine* (Mar. 27, 2014).

establishing criminal and administrative responsibility for the alienation of territory or calls to undertake it.¹⁰

In an interview given to Russian state television in June 2020, President Putin, himself a lawyer by education, highlighted the importance of the constitutional amendment concerning territorial integrity.¹¹ He contrasted the current approach with Bolshevik leader Vladimir Lenin's support, in and after 1917, for the right of peoples to self-determination, including secession. Putin pointed out that Lenin's approach stood in contrast to Joseph Stalin's approach, in that Stalin was willing to concede to non-Russian peoples of the Soviet Union only national autonomy, but no right to separation. In the interview, Putin further criticized the fact that the right of the Soviet republics to secede from the Soviet Union was recognized in the 1922 Treaty on the Formation of the Soviet Union and reiterated in the Soviet Constitutions in 1924, 1936, and 1977.¹²

According to President Putin, this constituted a "slow-impact mine" from the perspective of the territorial integrity of the historical Russian Empire.¹³ Putin further criticized the fact that the Treaty on the Formation of the Soviet Union and the subsequent Soviet Constitutions did not specify any procedure for secession. As a result, according to Putin, some Soviet republics did not leave in 1991 with "what they came with," but took along with them historical Russian lands as well.¹⁴

Nothing in the Constitution of 1993 could be understood as permitting or tolerating secession from the Russian Federation, especially based on the right of peoples to self-determination. All states assume their right to territorial integrity and virtually no national constitution explicitly permits secession. In this sense, the new Russian constitutional amendment of Article 67, paragraph 2.1 appears almost superfluous. Apparently, the amendment expresses many Russians' grievances due to the disintegration of the Soviet Union in 1991. Today's message appears to be that even if secessions were accepted previously, they will not be in the future. No constitutional self-affirmation can change the fact, however, that new claims to nationhood within existing state borders is a historical process that cannot be exclusively controlled by constitutional prohibitions.

More worrisome is President Putin's suggestion that unnamed former Soviet republics left the USSR with historical Russian lands. This presidential remark may help psychologically to explain Russia's annexation of Ukraine's Crimea in 2014 and its military intervention in Ukraine's Donbass region—although officially Moscow claims that the standoff in Donbass is only between Ukraine and its separatists. While now it is enshrined in the Constitution that Russia will not cede (further) territory to other countries, it remains open how revisionist Moscow will be concerning territories that it earlier, in and after 1991, recognized as belonging to other former Soviet republics. One worrisome aspect of

¹⁰ *Priniaty zakony ob otvetstvennosti za otchuzhdenie territorii (Laws Adopted on Responsibility for Alienating Territory)*, STATE DUMA NEWS (Nov. 18, 2020), at <http://duma.gov.ru/news/50048>.

¹¹ Artem Girsh, *Putin rasskazal o "mine zamedlennogo deistviia" v Konstitutsii SSSR (Putin Told About the "Slow-Impact Mine" in the Constitution of the USSR)*, VEDOMOSTI (July 5, 2020), at <https://www.vedomosti.ru/politics/news/2020/07/05/833979-putin-rasskazal-o-konstitutsii>.

¹² However, scholars have rightly observed that in practice, this right remained only on paper. See PETR P. KREMNEV, *RASPAD SSSR: MEZH DUNARODNO-PRAVOVYE PROBLEMY (DISINTEGRATION OF THE USSR: INTERNATIONAL LEGAL PROBLEMS)* 43 (2005).

¹³ See Girsh, *supra* note 11.

¹⁴ *Id.*

Russia's annexation of Crimea and covert intervention in Donbass is that in 2003 Russia and Ukraine concluded and later ratified a border treaty in which Russia had recognized those territories as Ukrainian.¹⁵ This demonstrates that when circumstances change, Moscow is willing to unilaterally revise its earlier attitude and ignore its international legal obligations. For another neighboring country, Japan, the constitutional amendment on territorial integrity sends a clear message that further negotiations concerning the Kurile Islands will be futile and any substantive concessions would be impossible from Russia's constitutional perspective.

From the historical viewpoint, Russia has now evolved from a strong rhetorical supporter of the right of peoples to self-determination during most of the Soviet period to a skeptic of that right, at least if used against Russia's own territorial integrity. This change corresponds to more recent moods in Russian scholarship as well. For example, Tatiana Matveeva has criticized "separatism working under the banner of the right of peoples to self-determination."¹⁶ The annexation of Crimea is in contradiction with the proclaimed defense of territorial integrity only when one thinks of Crimea as genuinely foreign (Ukrainian) territory. But apparently Moscow did not, given its claim that some countries had left it "not with what they came with."

B. Ethnic Russians as "State-Forming People in a Multinational Union of Peoples with Equal Rights"

Further reflecting President Putin's claim that the constitutional amendments were intended to fix the "slow-impact mine" of the right of secession that Lenin and the Bolsheviks had sown, additional constitutional amendments deal with languages, ethnicity, and identity. Article 68, paragraph 1 affirms that the Russian language is the official language in the whole territory of the country, as a language of the "state-forming people" (in Russian: *государствообразующий народ*) in a "multinational union of peoples with equal rights." Article 68 appears to include a certain contradiction, as inevitably the question arises whether peoples (ethnic groups) can really be equal if one of them is at the same time "state-forming" and also insists that its language be used by others in the state. However, the fear behind this norm is apparent: that Russian as a unifying language might be pushed aside in places like the North Caucasus, which in turn might lead to future calls for secession, as the Russian state in its different incarnations has already experienced in two waves during the twentieth century (in 1917–1918 and in 1991). For the sake of balance, Article 68 of the Constitution now also foresees in paragraphs 2 and 3 that the constituent republics of the Russian Federation may introduce their own official languages besides Russian and that the state guarantees to all its peoples the right to the preservation of their native language.

C. Peaceful Coexistence and Non-intervention

Another constitutional amendment indicates Russia's support of foundational international law principles of state sovereignty and territorial integrity. New Article 79.1 stipulates:

¹⁵ See Russian President Press Release, *Dogovor mezhdru Rossiiskoi Federatsiei i Ukrainoi o rossiisko-ukrainskoi gosudarstvennoi graniitse* (Jan. 28, 2003), at <http://kremlin.ru/supplement/1653>.

¹⁶ Tatiana D. Matveeva, *Printsip territorialnoi tselostnosti v mezhdunarodno-pravovom instrumentarii mirnogo razreshenia territorialnykh sporov (The Principle of Territorial Integrity in the Context of Territorial Dispute Resolution)*, 1 *MOSCOW J. INT'L L.* 6, 13 (2018).

“The Russian Federation undertakes measures for the support and strengthening of international peace and security, for ensuring the peaceful coexistence of states and peoples, for non-permissiveness of intervention in the internal affairs of the state.”

“Peaceful coexistence” was a popular slogan in Soviet international law doctrine from the Nikita Khrushchev era onward, popularized in particular by the international lawyer Grigory Tunkin.¹⁷ It also implies that different forms of government should be allowed to coexist peacefully and that, consequently, for example, pro-democratic interventions should not be tolerated. On the rhetorical level, both the Soviet and the Russian governments have consistently supported the non-intervention principle, recently also together with China.¹⁸ Within Russia, this principle also represents a language critical of the West, especially toward the United States, which has been historically perceived as using concepts such as democracy and human rights in order to intervene ideologically in Russia’s (and, earlier, Soviet) affairs. Of course, Russia’s European neighbors often have their own critical perspectives on how big a supporter post-Soviet Moscow is of the non-intervention principle in international law. Beside Russian military intervention against Georgia in 2008 and Ukraine in 2014, hybrid forms of intervention with lower intensity have arguably been used elsewhere, e.g., against Estonia in 2007.¹⁹

III. THE DUAL REFERENCE TO STATE SUCCESSION AND CONTINUITY WITH RESPECT TO THE USSR

Another noteworthy constitutional amendment from the viewpoint of international law is Article 67.1, paragraph 1 according to which “the Russian Federation is the state successor of the USSR on its territory and also state successor (continuator) (in Russian: *правопреемник* (*правопродолжатель*)) of the USSR in terms of membership in international organizations and their organs, membership in international treaties, and also when foreseen with international treaties with respect to actions and obligations of the USSR beyond Russian borders.”

What is puzzling about this amendment is the confusing use of the concepts of state succession (*правопреемство*) and continuity (*правопродолжательство*; in the literature also *континуитет*) essentially as synonyms. Their difference in international legal doctrine is well established,²⁰ and also well known and discussed in Russian international legal scholarship.²¹ In international law doctrine, the two concepts are not meant as synonyms but, rather, in some ways, even as opposites. In the case of state succession, the previous state disappears and there is an inheritance of certain rights and duties by another state that replaces

¹⁷ See GRIGORY I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 21 (William E. Butler trans., 1974).

¹⁸ See recently, e.g., Russ. Fed. Min. For. Aff. Press Release, *The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law* 4 (June 25, 2016), at https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698.

¹⁹ See, e.g., Ivo Juurvee & Mariita Mattiisen, *The Bronze Soldier Crisis of 2007. Revisiting an Early Case of Hybrid Conflict*, INT’L CENTRE DEFENSE & SECURITY (ICDS) (Aug. 2020), available at https://icds.ee/wp-content/uploads/2020/08/ICDS_Report_The_Bronze_Soldier_Crises_of_2007_Juurvee_Mattiisen_August_2020.pdf.

²⁰ See, e.g., JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 667 (2d ed. 2007). The classic study is KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* (1954).

²¹ See STANISLAV V. CHERNICHENKO, *TEORIA MEZHDUNARODNOGO PRAVA* (THEORY OF INTERNATIONAL LAW), VOL. II, at 58–87 (1999); VLADISLAV L. TOLSTYKH, *KURS MEZHDUNARODNOGO PRAVA* (COURSE IN INTERNATIONAL LAW) 267 (2019); *MEZHDUNARODNOE PRAVO* (INTERNATIONAL LAW) 91 (Valery I. Kuznetsov & Bakhtiyar R. Tuzmukhamedov eds., 2d ed. 2007).

the former in legal relationships. However, in the case of state continuity, the previous subject continues to exist, notwithstanding turbulence such as revolution, temporary occupation, or loss of territory. One problem with continuity and succession, of course, is that the international legal and constitutional identities of countries may differ considerably. For example, today's Federal Republic of Germany is identical with Nazi Germany as a subject of international law, but in constitutional terms it is rather a negation of the latter. The French call their current republic the Fifth Republic, although as a subject of international law it is the same state as, for example, Napoleonic France.

Stanislav Chernichenko, one of the leading international law academics in post-Soviet Russia, has criticized the simultaneous use in Russia of both concepts—state continuity and state succession—to characterize the international legal status of the post-1991 Russian Federation.²² In his view, what the Russian Federation has claimed in state practice is state continuity with the USSR and therefore the simultaneous use of the concept of state succession is misleading. However, Petr Kremnev, another international law scholar from Moscow, has referred to the concept of state succession in characterizing the Russian Federation's post-1991 status.²³ In state practice too both concepts have been used, although at least the Russian Ministry of Foreign Affairs, one of the carriers of international legal knowledge in Russia, seems to have preferred the concept of state continuity with the USSR.

The constitutional amendment of 2020, which mentions both theoretical concepts in parallel, may appear as a blow for legal purists. It will be another reason for future academic writers on state continuity and succession to lament that, in state practice, the distinction between the two concepts is unclear. Apparently it is a pragmatic decision and essentially suggests that the Russian Federation intends to use both concepts interchangeably and strategically, depending on the context. If it suits, Russia will appear as a continuation of the Soviet Union; if it will be detrimental to Russia's interests, Moscow will claim to be state successor and will argue for the discontinuity of certain Soviet obligations or responsibilities. Whether such a Janus-faced double role in terms of state identity is acceptable under contemporary customary international law remains doubtful.

Nevertheless, if one thing is clear about this new norm on state succession/continuity, it is contemporary Russia's constitutional commitment to the legacy of the Soviet Union. Before the referendum, President Putin made a last appeal to voters in front of a gigantic newly erected World War II memorial in Rzhev, a Russian town where heavy battles were fought against Nazi German forces in 1942–1943. The Soviet victory in World War II has become the central foundation of state identity in today's Russia—even though people in other former Soviet republics, including Ukraine, also significantly contributed to this victory.

A. Context for the Amendment: The Dissenting View of Judge Aranovsky

Why, in 2020, was there a need for a new constitutional norm on Russia's international legal identity? In 1993, it was not deemed necessary to address this question on the constitutional level. One possible reason is that voices have emerged among Russian legal and intellectual elites—voices that question the wisdom of emphasizing Russia's continuity with (or in

²² CHERNICHENKO, *supra*, note 21, at 84–87.

²³ See KREMNEV, *supra*, note 12, at 241–42.

some aspects even succession to) the Soviet Union. For example, the renowned historian Andrey Zubov has portrayed the Communist period in Russia's history as tragic, unfortunate, and even illegal from Russia's domestic perspective.²⁴

Perhaps most relevantly in our context, in a judgment of the Russian Constitutional Court of December 10, 2019, Judge Konstantin Aranovsky added a separate opinion in which he challenged the idea that Russia is "state successor" of the USSR in the context of responsibility for Soviet violations of constitutional rights.²⁵ The concrete issue was the right of individuals who were children of the victims of Soviet political repressions to return to Moscow, where their deceased parents previously had apartments and from where their parents had been sent to internal exile elsewhere in the Soviet Union. The Russian legislation foresaw the possibility for children to return to the initial place of living of the parents who had been politically repressed at the cost of the local municipality, but, in the opinion of the plaintiffs, restricted this right unconstitutionally and allowed for municipal loopholes in the implementation. While agreeing with the Court's judgment on the merits, which was supportive of the plaintiffs' claim, Judge Aranovsky pointed out that the Russian government should not take upon itself all of the guilt for Soviet crimes, since they were perpetrated by a different regime and some of the acts were, in his words, "terrorist."²⁶

Aranovsky's dissenting viewpoint seems to concern the crux of this constitutional amendment: the point was to assert the legal nexus with the USSR beyond any doubt. Inasmuch as significant parts of the Russian population cherish the Soviet legacy, one goal of the amendment is to assure them that the view identifying oneself with perceived positive aspects of the USSR will not be snatched from them, whatever "dissidents" like Aranovsky and Zubov might claim. Thus, the puzzling norm addressing Russia's international legal status (state succession/continuity) has possibly more of an intended domestic rather than international audience—which is normal and legitimate with constitutions.

Overall, the impression is that contemporary Russia wants, even on the constitutional level, to take from Soviet history the heroic aspects representing strength and glory, but at the same time is not willing to accept the negative aspects of Soviet state identity and history, especially the responsibility for Soviet crimes during the Stalinist period. On its face, of course, Article 67.1, paragraph 1 does not refer to any state succession in the context of responsibility for Soviet crimes or wrongdoings.

B. Defense of the "Historical Truth"

The amended Article 67.1, paragraph 3 of the Constitution declares that the Russian Federation "honors the memory of the defenders of the Fatherland and ensures defense of

²⁴ ISTORIYA ROSSII. XX VEK. 1894–1939 (HISTORY OF RUSSIA. THE 20TH CENTURY. 1894–1939) 544 (Andrey Zubov ed., 2009); ISTORIYA ROSSII. XX VEK. 1939–2007 (HISTORY OF RUSSIA. THE 20TH CENTURY. 1939–2007) 15 (Andrey Zubov ed., 2009).

²⁵ *Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti polozhenii stat'i 13 zakona "O reabilitatsii zbertv politicheskikh repressii," punktov 3 i 5 stat'i 7, punkta 1 chasti 1 i chasti 2 stat'i 8 Zakona goroda Moskvyy "Ob obespechenii prava zhibitelei goroda Moskvyy na zhiblye pomeshtchenia" v svyazi s zhalobami grazhdan A.L.Meissner, E.S. Mikhailovoi i E.B. Shashevoi* (Dec. 10, 2019), available at <http://doc.ksrf.ru/decision/KSRFDecision442846.pdf>. See also Aleksandr Chernykh & Natalia Glukhova, *Sudia KS otidelil RF ot SSSR (Judge of the CC Separated the Russian Federation from the USSR)*, KOMMERSANT (Feb. 17, 2020), at <https://www.kommersant.ru/doc/4258690>.

²⁶ See *Postanovlenie*, Opinion of Judge Aranovsky, *supra* note 25, at 30.

the historical truth. Diminishing the significance of the heroism of the people in defense of the Fatherland will not be permitted.” Considering, for example, how much intellectual energy President Putin has recently spent on justifying the secret protocols of the Molotov-Ribbentrop Pact of 23 August 1939²⁷ or that Russia and Ukraine have disagreed on whether the Holodomor of 1932–1933, the famine in Soviet Ukraine that killed millions of Ukrainians, specifically targeted Ukrainians with genocidal intent, the battle over history in the public discourse among Russia and other Central and East European governments is likely to continue. For example, the Russian government vehemently rejects the idea that the Molotov-Ribbentrop Pact played a key role in starting World War II, or that the Soviet invasion of Poland on September 17, 1939 was legally and morally comparable to the Nazi attack against Poland on September 1, 1939. Highlighting the significance of historical events such as the Molotov-Ribbentrop Pact might well “diminish the heroism of the defenders of the Fatherland” and might even, in Russia, entail criminal consequences for anyone rash enough to say so. However, it also means that the “historical truth” that is defended in the Russian constitutional amendment acquires a quite contested context and meaning. For example, on March 31, 2020, an amendment was introduced to the Russian Criminal Code in response to the removal of the statue of the Soviet World War II Marshal Ivan Konev in Prague.²⁸ Article 243.4 makes it a punishable offense to damage war graves, monuments, memorial plaques, or obelisks that are dedicated to Russia’s military glory or the defense of Russia’s fatherland and its interests—notably, whether such places are located within or outside of the Russian Federation.²⁹

IV. THE SPECIFIED HIERARCHY BETWEEN THE RUSSIAN CONSTITUTION AND THE COUNTRY’S TREATY OBLIGATIONS

Probably the most important of the 2020 amendments to the Russian Constitution from the viewpoint of international law is the new Article 79, which stipulates:

The Russian Federation in conformity with relevant treaties may participate in international associations and delegate to them part of its powers, if this does not limit the rights and freedoms of the individual and the citizen or contradict the fundamentals of the constitutional system of the Russian Federation. Decisions of interstate bodies, adopted on the basis of provisions of international treaties of the Russian Federation, where

²⁷ Vladimir Putin, *The Real Lessons of the 75th Anniversary of World War II*, NAT’L INTEREST (June 18, 2020), at <https://nationalinterest.org/feature/vladimir-putin-real-lessons-75th-anniversary-world-war-ii-162982>. See also Russian President Press Release, Vladimir Putin, President Russian Federation, Speech at the CIS Informal Summit (Dec. 20, 2019), at <http://en.kremlin.ru/events/president/news/62376>.

²⁸ See *V GD prokomentirovali snos pamiatnika marshalu Konevu v Prage (In the State Duma the Removal of the Monument to Marshal Konev in Prague Was Commented Upon)*, STATE DUMA NEWS (Apr. 10, 2020), at <http://duma.gov.ru/news/48262> (referring to the views of Leonid Slutsky, the chairman of the Committee on Foreign Affairs in the State Duma).

²⁹ See *Prinyat zakon Prezidenta RF ob ugovnoyi otvetstvennosti za povrezhdenie voinskiikh zakhoronenii (Law of the President of the RF Was Adopted on Responsibility of Damaging Military Graves)*, STATE DUMA NEWS (Mar. 31, 2020), at <http://duma.gov.ru/news/48192>. See also Ugolovnyi kodeks Rossiiskoi Federatsii (Criminal Code of the Russian Federation), available at http://www.consultant.ru/document/cons_doc_LAW_10699/ce7af482a33b637b65c85f433ea3f82d916cb418.

construed in a manner contrary to the Constitution of the Russian Federation, shall not be subject to enforcement in the Russian Federation.

This new norm constitutes a significant specification of the Constitution of 1993, which stipulates in Article 15, paragraph 4:

The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied.

The 2020 amendment makes a clear distinction between the Constitution itself and other domestic laws of Russia. In cases of conflict between different norms, international treaties continue to rank higher than Russian laws below the Constitution, but the Constitution itself is recognized as ranking higher than norms stipulated in international treaties as interpreted by “interstate bodies.”

The development enshrined in Article 79 is not entirely new. The Russian Constitutional Court and the Russian State Duma established essentially the same principle already in 2015.³⁰ At the time, a group of deputies of the State Duma asked the Constitutional Court in the framework of abstract norm control whether certain legal norms specifying the role of the judgments of the European Court of Human Rights (ECtHR) in the Russian legal order were compatible with the Constitution. The Constitutional Court found that if interpretations of the European Convention on Human Rights (ECHR) would lead to a direct collision with the Constitution, such a judgment could not be enforced in Russia.³¹ In December 2015, the State Duma and the Federation Council adopted legislation specifying such a procedure of establishing incompatibility with the Constitution at the Constitutional Court.³²

Nevertheless, raising a legal idea to the constitutional level—and even advertising it as one of the *raison d’êtres* of the constitutional amendments—further strengthens the principle and enables bolder use of it in international relations. The constitutional amendment of 2020 also expands the scope of the Constitutional Court’s position because it will be the *modified* Constitution that operates as the yardstick for measuring the compatibility of judgments of the ECtHR. For example, new Article 72 ж.1 specifies that marriage is an institution between a man and a woman—which is relevant because the ECtHR has repeatedly found Russia to have violated LGBTQ rights.³³ A same-sex marriage/partnership case against Russia is currently pending before the ECtHR.³⁴ The Russian message is that if the ECtHR

³⁰ See Socher, *supra* note 2, at 13.

³¹ Judgment of 14 July 2015, No 21-II/2015 (Const. Ct. Russ. Fed.) (Russ.), available at <http://doc.ksrf.ru/decision/KSRFDecision201896.pdf>.

³² Federal Constitutional Law on the Introduction of Amendments to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation,” entered into force Dec. 14, 2015, N 7-ФКЗ.

³³ See Dmitri Bartenev, *LGBT Rights in Russia and European Human Rights Standards*, in *RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT* 326–51 (Lauri Mälksoo & Wolfgang Benedek eds., 2017).

³⁴ Fedotova and Shipitko v. Russia, App. Nos. 40792/10, 30538/14, 43439/14 (communicated May 2, 2016), at <http://hudoc.echr.coe.int/eng?i=001-163362>.

recognizes that states are obligated to recognize same-sex marriage, Russia will not accept this development. This further underscores the importance of Article 79.

Moreover, an additional new article that further deepens the direction taken by Article 79 is Article 125, paragraph 5.1 6 which specifies the competences of the Constitutional Court. According to this article, the Constitutional Court will decide on the implementation of decisions of interstate treaty organs that may contradict with the Russian Constitution but in addition also “on the possibility of implementing decisions of a foreign or international (interstate) court, foreign or international arbitration court, putting obligations on the Russian Federation, in case such a decision contradicts with the foundations of public legal order of the Russian Federation.” Here a further possibility is opened not to implement a decision or judgment based on international legal obligation as the contradiction no longer has to be with the Constitution but, more broadly, with the “foundations of public legal order.”

A. *The Road to Article 79*

Behind these changes stands a decade-long conflict between the Russian government—most visibly, the Russian Constitutional Court—and the ECtHR, whose judgment in *Markin v. Russia* came to a different conclusion from the earlier Constitutional Court decision in the same case.³⁵ Prior to this ruling, a profound disagreement had been developing between Russian legal-political elites and the ECtHR on how to approach human rights in specific national contexts and, ultimately, which judicial body had the last word. Some leading juridical representatives of Russia, especially President of the Constitutional Court Valery Zorkin, saw the country’s sovereignty as under threat and began to criticize what they saw as judicial activism on the part of the ECtHR.

As previously mentioned, the backlash came in 2015 when the Constitutional Court decided that it had the authority to determine that ECtHR judgments were non-enforceable in Russia if they are incompatible with the Russian Constitution.³⁶ In 2016, the Constitutional Court first applied the new principle in *Anchugov and Gladkov v. Russia*, ruling against implementation of an ECtHR judgment on prisoners’ voting rights on the ground that it would violate Article 32, paragraph 3 of the Constitution, which prescribes that citizens kept in places of confinement under a court sentence are deprived of the right to elect and be elected.³⁷ This provision was not seen as an obstacle when Russia joined the Council of Europe in 1996 and ratified the ECHR in 1998. Perhaps for this reason, Judge Zorkin and the Constitutional Court claimed that the interpretation that a blanket ban on prisoners’ voting rights violated the European Convention was a result of an “evolutive interpretation” and judicial activism by the ECtHR and is not required by the text of the Convention itself.

In many countries, it is not unusual for the constitution to stand higher in the legal hierarchy than international treaties and international court judgments. For example, it is well

³⁵ Case of Konstantin Markin v. Russia, App. No. 30078/06, Judgment (Eur. Ct. Hum. Rts. Oct. 7, 2010); Grand Chamber Judgment (Mar. 22, 2012).

³⁶ July 14, 2015 Judgment, *supra* note 31.

³⁷ See Judgment of Apr. 19, 2016, No. 12-II/2016 (Const. Ct. Russ. Fed.) (Russ.), available at http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf; see also Case of Anchugov and Gladkov v. Russia, App. Nos. 11157/04, 15162/05, Judgment (Eur. Ct. Hum. Rts. July 7, 2013); A.Kh.Abashidze, M.V. Ilyashevich & A.M.Solntsev, *Anchugov & Gladkov v. Russia*, 111 AJIL 461 (2017).

known that this is the accepted constitutional doctrine in the United States.³⁸ There are also important examples of the highest courts in West European countries challenging interpretations of international courts.³⁹ At the same time, Article 46, paragraph 1 of the ECHR stipulates that the parties undertake to abide by the final judgment of the Court in any case to which they are parties, which can be understood as an obligation to accept the Court's judgments, notwithstanding criticisms based on judicial activism and evolutionary interpretation. This gives a specific context to the new Russian constitutional doctrine.

An additional problem with the specified Russian constitutional norm hierarchy is that it can be—and in my view already has been—misused. In *Anchugov and Gladkov*, the contradiction with the Russian Constitution was indeed quite literal (even though it could still have been overcome by interpretation). But in another prominent ECtHR case, *Yukos v. Russia*, involving almost two billion euros awarded as compensation, the conflict appeared rather artificially constructed by the Constitutional Court.⁴⁰ In *Yukos*, the Russian Constitution served more like a pretext to justify the government's preferred outcome, namely, not to satisfy the arbitral award and thus also recognize the legitimacy of the Yukos shareholders' claims. Perhaps the ECtHR got the relationship between law and politics, at least in Russia, wrong when it assumed in *Yukos* that it was a "usual" case in which the Convention had to be applied. The Constitutional Court's *Yukos* judgment has also been criticized by leading Russian international lawyers, especially in its discussion of how international treaty interpretations by international courts or bodies may violate *jus cogens*.⁴¹

B. Criticism of the Venice Commission

The Vienna Convention on the Law of Treaties stipulates that a party may not invoke the provisions of its internal law as justification for its failure to observe a treaty (Article 27), unless there was a manifest violation of provisions of internal law regarding competence to conclude treaties and concerning a rule of its internal law of fundamental importance (Article 46). In this spirit, the European Commission for Democracy Through Law (Venice Commission), an advisory body of the Council of Europe, on June 18, 2020 adopted an opinion focusing on this Russian constitutional amendment. The Venice Commission emphasized that member states of the Council of Europe are under a treaty obligation (Article 46 of the European Convention) to abide by the judgments of the ECtHR.⁴² The Commission

³⁸ See *Medellin v. Texas*, 552 U.S. 491 (2008). See generally CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2d ed. 2015).

³⁹ BVerfG, Judgment of the Second Senate of 05 May 2020 – 2 BvR 859/15 (Ger.), at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html; Judgment No. 238 (It. Const. Ct. 2014) (It.), available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf.

⁴⁰ See Case of OAO Neftyanaya Kompaniya Yukos v. Russia, App. No. 14902/04, Judgment (Just Satisfaction) (Eur. Ct. Hum. Rts. July 31, 2014). Judgment of Jan. 19, 2017 (Const. Ct. Russ. Fed.) (Russ.), available at <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf>.

⁴¹ Stanislav V. Chernichenko, *Evropeiskii Sud po pravam cheloveka: problema neispolnimosti postanovlenii (The European Court of Human Rights: The Problem of Unenforceable Judgments)*, 3 MOSCOW J. INT'L L. 7 (2018).

⁴² European Commission for Democracy Through Law (Venice Commission), Russian Federation, Opinion on the Draft Amendments to the Constitution (as Signed by the President of the Russian Federation on 14 March 2020) Related to the Execution by the Russian Federation of Decisions by the European Court of Human Rights, Opinion No. 981/2020, paras. 55, 62 (June 18, 2020), at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)009-e).

concluded that the Constitutional Court's power to declare a judgment definitively non-executable contradicts Russia's obligations under the Convention, and that "the Commission is alarmed by the constitutional entrenchment of such a power."⁴³

The Commission also observed that the extent to which Article 79 of the Russian Constitution will have adverse effects on Russian international obligations under the European Convention depends on its concrete implementation.⁴⁴ With implicit reference to the *Yukos* case, the Venice Commission also noted "with great concern" that the Constitutional Court "ha[d] reached the conclusion that a judgment concerning exclusively the question of payment of sums of money as just satisfaction was non-executable."⁴⁵

The Russian government was not disturbed by the Venice Commission's criticism. Just as Stalin once famously asked about the pope: "How many divisions does he have?," the Venice Commission does not have any "divisions" either. Much will depend on how other member states react to Russia's new constitutional approach. If they tacitly accept the amendment and its further interpretations by the Constitutional Court, Russia will have succeeded in effectively establishing a constitutional veto power over certain judgments of the ECtHR. However, it could also trigger a consensus among the Council of Europe that Russia cannot continue as a member of the regional organization with such a "pick and choose" enforcement policy.

It also remains to be seen how "contagious" the Russian approach will be in the Council of Europe. It may be tempting for some other member states to follow Russia's lead and not accept some of the hardest judgments of the ECtHR if they are seen to contradict the state's constitutional identity. It is usually assumed that human rights treaty obligations are not based on reciprocity, but we will soon see in the context of the world's most far-reaching regional human rights system whether this will always be the case. If such a scenario materializes, it may signify a decline of the ECtHR and its authority.

Russia's constitutional amendment undoubtedly also exerts pressure on the ECtHR because, whether they are willing to concede it or not, the judges of the ECtHR may need to consult the Russian Constitution and its prevailing interpretations before making further far-reaching judgments against the country. It will also create gloomy prospects for the successful resolution of high-profile cases in the ECtHR, for example, the recent filing by the Netherlands of an interstate complaint against Russia, over the downing of flight MH17 in Eastern Ukraine in 2014⁴⁶ and also the pending *Ukraine v. Russia* cases at the Court.

During the months preceding the "all-Russian vote," the idea that the government would take back its sovereignty from international institutions was enthusiastically advertised by proponents.⁴⁷ In the view of political scientist Dmitry Abzalov, the significance of the

⁴³ *Id.*, para. 64.

⁴⁴ *Id.*, para. 59.

⁴⁵ *Id.*

⁴⁶ *Rossia otvergaet obvinenia Niderlandov v prichastnosti k krusheniu reisa MN17 (Russia Rejects Accusations by The Netherlands Regarding Participation in the Downing of Flight MN17)*, KOMMERSANT (July 10, 2020), at <https://www.kommersant.ru/doc/4414853>.

⁴⁷ See, e.g., *Vtoroe chtenie popravok v Konstitutsiu zaplanirovano na 11 fevralia (Second Reading of Amendments to the Constitution is Planned for the 11th of February)*, STATE DUMA NEWS (Jan. 23, 2020), at <http://duma.gov.ru/news/47611> (referring to the statements of State Duma Chairman Viatcheslav Volodin); Anna Poltavtseva, *Politolog: Otmena primata mezhdunarodnogo prava v Konstitutsii snizit vneshnee vozdeistvie na Rossiu (Political Scientist: The Change in the Primacy of International Law in the Constitution Diminishes Foreign Interference in*

constitutional amendments goes beyond not recognizing certain judgments of the ECtHR but might also concern, for example, the award of the Permanent Court of Arbitration (PCA) in the Yukos investor-state arbitration,⁴⁸ international judicial interpretations of the historical origins of World War II,⁴⁹ UN resolutions on Crimea, and so on.⁵⁰ Indeed, the new Article 125, paragraph 5.1 6 recognizes this possibility.

C. Background: Russia's Scholarly Debates About the Interrelationship Between International and Constitutional Law

In order to understand more fully what the new Article 79 in connection with Article 125, paragraph 5.1 6 has achieved, a short excursion in Russian scholarly debates may be helpful. The question of the interrelationship between Russian law and international law has been intensely debated in academic literature over the last decade.⁵¹ In 1993 it seemed that the Russian Constitution had established the ultimate priority of international treaty obligations over Russian domestic law, for the sake of post-Soviet Russia's own development. Initially, Russian academic lawyers writing on these topics hardly considered the possibility of a clash between the Constitution and international treaties.⁵² However, when the ECtHR and Russian interpretations over the meaning of human rights in concrete cases started to clash, expert voices appeared in Russia suggesting that the Constitution itself must enjoy priority over international treaties.⁵³ This position undermining the effect of Article 15,

Russian Affairs), ROSSIYSKAYA GAZETA (June 5, 2020), at <https://rg.ru/2020/06/05/politolog-otmena-primata-mezhdunarodnogo-prava-v-konstitucii-snizit-vneshnee-vozdejstvie-na-rossiiu.html> (interview with political scientist Dmitry Abzalov); Andrei Klishas, *Suverenitet bez ogranichenii: Zashchita gosudarstvennogo suvereniteta v usloviakh globalizatsii: Rossia v mirovom trende (Sovereignty Without Limits: The Protection of State Sovereignty in Conditions of Globalization: Russia in the Global Trend)*, ROSSIYSKAYA GAZETA (June 9, 2020), at <https://rg.ru/2020/06/09/kliskas-suverenitet-samostoiatel'nost-celostnost-rossii-bez-uslovny.html>.

⁴⁸ Yukos Universal Limited (Isle of Man) and the Russian Federation, PCA Case No. AA227, Final Award (July 18, 2014), at <https://pcacases.com/web/sendAttach/420>.

⁴⁹ In the context of the ECtHR, such cases have so far concerned the three Baltic states, not the Russian Federation directly.

⁵⁰ Poltavtseva, *supra* note 47.

⁵¹ See, e.g., SERGEY YU. MAROCHKIN, *THE OPERATION OF INTERNATIONAL LAW IN THE RUSSIAN LEGAL SYSTEM* (2019); S.V. Chernichenko, *Tezis o verkhovenstve mezhdunarodnogo prava i Konstitutsia Rossiiskoi Federatsii (Thesis of the Supremacy of International Law and the Constitution of the Russian Federation)*, 2016 RUSSIAN Y.B. INT'L L. 20 (2017); IMPLEMENTATSIA RESHENII EVROPEISKOGO SUDA PO PRAVAM CHELOVEKA V ROSSIISKOI PRAVOVOI SISTEME: KONTSEPTSII, PRAVOVYE PODKHODY I PRAKTIKA OBESPECHENIA (IMPLEMENTATION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE RUSSIAN LEGAL SYSTEM: CONCEPTS, LEGAL APPROACHES AND PRACTICE) (V.V. Lazarev ed., 2020); M.A. Likhachev, *Konstitutsionnyi Sud Rossii i Evropeiskii Sud po Pravam cheloveka: poisk kompromissa prodolzhaetsia (Russia's Constitutional Court and the ECHR: The Search for Compromise Continues)*, in *MEZHDUNARODNOE I NATSIONALNOE PRAVO: KONFRONTATSIA ILI SIMBIOZ?* (L.A. Lazutin & I.V. Fedorov eds., 2016); V.V. Bogatyrev & R.A. Kalamkarian, *Pravoprimenitelnyi rezhim implementatsii mezhdunarodnogo prava v pravovoi sisteme Rossiiskoi Federatsii (The Legal Enforcement Regime of International Law in the Legal System of the Russian Federation)*, 11 GOSUDARSTVO I PRAVO 79 (2018); BOGDAN L. ZIMNENKO, *MEZHDUNARODNOE PRAVO I PRAVOVAIA SISTEMA ROSSIISKOI FEDERATSII (INTERNATIONAL LAW AND THE LEGAL SYSTEM OF THE RF)* (2010).

⁵² See, e.g., OLEG I. TIUNOV, ANNA A. KASHIRKINA & ANDREI N. MOROZOV, *VYPOLNENIE MEZHDUNARODNYKH DOGOVOROV ROSSIISKOI FEDERATSII (IMPLEMENTATION OF INTERNATIONAL TREATIES IN THE RUSSIAN FEDERATION)* (2012).

⁵³ See, e.g., I.I. Karandashov, *Printsip pacta sunt servanda i chast 4 stati 15 konstitutsii Rossiiskoi Federatsii: predely ikh tolkovania i primeneniya v Rossiiskoi Federatsii (The Pacta Sunt Servanda Principle and Art. 15 para. 4 of the Constitution of the RF: Limits of Interpretation and Application in the RF)*, 2012 RUSS. Y.B. INT'L L. 174 (2013); Pavel A. Laptev, *Konstitutsia i mezhdunarodnye dogovory (The Constitution and International Treaties)*, 2011 RUSS. Y.B. INT'L L. 219 (2012); VIACHESLAV V. GAVRILOV, *PONIATIE I VZAIMODEISTVIE MEZHDUNARODNOI*

paragraph 4 of the Constitution also drew criticism from other Russian international lawyers who challenged the primacy of the Constitution over treaty norms.⁵⁴

Different nations' historical relationship with international law and treaties is not set in stone. With its practice since 2015 and the constitutional amendments of 2020, Russia stepped back toward the earlier Soviet interpretation propagated by Andrey Vyshinski, suggesting that Soviet law took priority over treaty obligations.⁵⁵ As the Venice Commission has suggested, we will have to wait and see how far this new Russian legal hierarchy will be taken in practice. However, the general message and trend is clear: by referring to the Constitution, one can reclaim state sovereignty from the "threat" of certain international legal obligations. Speaker of the State Duma Viatcheslav Volodin has already suggested that as a follow-up to the amendment, Russia should now check whether treaties concluded—especially during the 1990s—are compatible with the (renewed) Constitution.⁵⁶ However, Russia is not entirely an outlier, other major countries, such as the United States and the United Kingdom, have sought to reclaim sovereignty and indicated hostility toward certain international legal obligations, albeit without revising their respective constitutions.

The new Article 79 along with Article 125, paragraph 5.1 6 reminds one of the gun in the imagery of Russian playwright Anton Chekhov: if the dramatist has hung a gun on the wall on stage, in the following act it will be fired. We have already seen the constitutional gun being fired in the *Yukos* case and now, with the 2020 constitutional amendment, the gun was moved to an even more prominent place on the juridical stage, probably in preparation for what will happen in the next act(s).

V. CONCLUSION

Writing in 2010, the Russian scholar Boris I. Osminin suggested that if the country discovers incompatibility between the Russian Constitution and an international treaty, it must seek either to amend or terminate the treaty, according to the procedures foreseen in the treaty, or Russia should amend its Constitution.⁵⁷ With the Constitutional Court's practice since 2015 and the constitutional amendments of 2020, the Russian Federation has discovered a third approach—to stay in the European Convention but in certain cases effectively

I NATSIONAL'NYKH PRAVOVYKH SISTEM (THE CONCEPT OF INTERACTION BETWEEN INTERNATIONAL AND NATIONAL LEGAL SYSTEMS) 200 (2d ed. 2019); Bogdan L. Zimnenko, *O meste i znachenii praktiki mezhgosudarstvennykh organov po zashchite prav i svobod cheloveka v pravovoi sisteme Rossiiskoi Federatsii (na primere rassmotrenia sudami Rossiiskoi Federatsii konkretnykh del (The Role and Significance of the Practice of Interstate Organs for the Protection of Human Rights and Freedoms in the Legal System of the Russian Federation (Cases Considered by the Courts of the Russian Federation))*, 3 MOSCOW J. INT'L L. 92 (2017).

⁵⁴ Vitali S. Ivanenko, *Mezhdunarodnye dogovory, Konstitutsia i pravovaia sistema Rossiiskoi Federatsii: evoliutsia sootnosheniia i tendentsii vzaimodeistviia (International Treaties, Constitution and the Legal System of the RF: Evolution of the Coexistence and Tendencies of Mutual Impact)*, 2009 RUSS. Y.B. INT'L L. 9, 25 (2010).

⁵⁵ See, e.g., A.A. Dorskaya, *Mezhdunarodno-pravovye normy v sisteme Rossiiskogo prava: istoriko-pravovoi analiz (International Legal Norms in the Russian Legal System: Historical-Legal Analysis)*, 2011 RUSS. Y.B. INT'L L. 81, 90 (2012).

⁵⁶ Viatcheslav Volodin predlozhit' proanalizirovat' mezhdunarodnye dogovory RF na sootvetstvie verkhovenstvu Konstitutsii (Viatcheslav Volodin Proposed to Analyze International Treaties of Russia with Respect to the Supremacy of the Constitution), STATE DUMA NEWS (July 9, 2020), at <http://duma.gov.ru/news/49037>.

⁵⁷ BORIS I. OSMININ, ZAKLIUCHENIE I IMPLEMENTATSIA MEZHDUNARODNYKH DOGOVOROV I VNTRIGOSUDARSTVENNOE PRAVO (THE CONCLUSION AND IMPLEMENTATION OF INTERNATIONAL TREATIES AND DOMESTIC LAW) 367 (2010).

veto the implementation of ECtHR judgments. A similar constitutional logic can now be used in other contexts as well, for example in investor-state arbitration such as the PCA's *Yukos* arbitration award, which the Russian government has challenged in Dutch courts.⁵⁸ In a sense, the new constitutional approach of Article 79 along with Article 125, paragraph 5.1 6 is honest because Russia has been practicing this since 2015. However, it is not necessarily honest toward other Council of Europe member states or to other relevant treaties such as investment agreements. The Foreign Policy Concept and the National Security Strategy of the Russian Federation have in earlier editions always feted Russia's strong support for international law.⁵⁹ We will soon see whether this self-congratulatory language will be played down now that the primacy of the renewed Russian Constitution has been established.

That Russia would emphasize its territorial integrity constitutionally makes sense from a historical viewpoint, as the country has apparently grown tired of retreating territorially. That the amendment would simultaneously refer to concepts of state succession and continuity vis-à-vis the Soviet Union, can be seen as legal nihilism and carelessness toward the purity of legal concepts, but it is first of all a form of pragmatism.

Taken together, Russia's 2020 constitutional amendments seem like a requiem to an optimistic liberal understanding of the role of international law that prevailed when the Constitution was adopted in 1993. It corresponds with the current zeitgeist among great powers in which national interest trumps international cooperation and demands for state sovereignty over such international legal obligations that have started to appear burdensome. All this makes the basic norms of the Vienna Convention on the Law of Treaties—*pacta sunt servanda* and the rule precluding a state from invoking its internal law as a justification for its failure to perform a treaty—appear weaker in the practice. In this sense, the new Russian approach is also an invitation to reinterpret in practice how the European human rights system and the ECtHR must work.

International lawyers seem sometimes to believe that “progress”⁶⁰ is toward recognizing more international law, including its supremacy. This is why the wording of the Russian Constitution of 1993 was sometimes modestly celebrated in the West as holding the promise of progress via international treaties and law,⁶¹ especially against the backdrop of the history of Soviet constitutionalism. From this perspective, some of the 2020 constitutional amendments appear as a backlash to the international legal order. However, the Russian approach is not unique as far as constitutional supremacy is concerned. In reality, international law can only develop in interaction with national legal orders that in some sense always have the last word, especially those of the major powers. Societies learn through their interactions with international treaties and organizations, and then, upon some internal reflection and even backlashes may hopefully return with new energy to international cooperation.

⁵⁸ See Johannes Fahner, *A New Hope for the Yukos Shareholders – PCA Awards Revived by the Hague Court of Appeal*, EJIL:TALK! (Mar. 4, 2020), at <https://www.ejiltalk.org/a-new-hope-for-the-yukos-shareholders-pca-awards-revived-by-the-hague-court-of-appeal>.

⁵⁹ See Russ. Fed. Min. For. Aff. Press Release, Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on November 30, 2016), paras. 26 et seq., at https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6BZ29/content/id/2542248.

⁶⁰ See Thomas Skouteris, *The Idea of Progress*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW (Anne Orford & Florian Hoffmann eds., 2016).

⁶¹ See, e.g., MANJA HUSSNER, DIE ÜBERNAHME INTERNATIONALEN RECHTS IN DIE RUSSISCHE UND DEUTSCHE RECHTSORDNUNG. EINE VERGLEICHENDE ANALYSE ZUR VÖLKERRECHTSFREUNDLICHKEIT DER VERFASSUNGEN DER RUSSLÄNDISCHEN FÖDERATION UND DER BUNDESREPUBLIK DEUTSCHLAND (2005).