

University of Tennessee College of Law

Legal Scholarship Repository: A Service of the Joel A. Katz Law Library

Tennessee Law in the News

Faculty Scholarship

2024

Book Review: Jane Henderson, The Constitution of the Russian Federation: a contextual analysis (Hart Publishing, 2d ed. 2022)

Robert C. Blitt

Follow this and additional works at: https://ir.law.utk.edu/in_the_news



Part of the [International Law Commons](#)

Book Review

JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION:
A CONTEXTUAL ANALYSIS* (Hart Publishing, 2d ed. 2022)[†]

*Reviewed by Robert C. Blitt**

The second edition of Jane Henderson’s analysis of Russia’s Constitution remains a praiseworthy introductory guide for comparative scholars, students, legal practitioners, and general readers curious about the country’s idiosyncratic and ongoing constitutional journey.¹ This revised edition incorporates substantial changes brought about in 2020 by the largest set of amendments to modify Russia’s Constitution since its ratification in 1993.² But in a potentially surprising decision, Henderson opted to decline the editors’ offer to delay publication to account for Russia’s February 2022 invasion of Ukraine.³ In Henderson’s assessment, more value would come from having the book published sooner, so readers could appreciate what has influenced Russia’s Constitution and recognize “the reality for Russian citizens of recent changes in legislation which severely restricted their right to protest.”⁴

Undoubtedly, the assault on Ukraine exposes the relevance of the 2020 amendments. But more fundamentally, considering the Kremlin’s ability to disrupt the international order without any viable domestic opposition, these collective changes raise profound questions concerning the very function of Russia’s Constitution. And while Henderson’s painstakingly measured effort to unpack the Constitution through the lens of Russia’s own unique legal tradition still points to the same ineluctable conclusion, it comes with one vexing caveat: Gleaning this inclusion requires a reader able to track and collate the many overly impassive findings that obscure—lurking just out of sight—the all-encompassing assault on the Constitution being waged

[†] <https://doi.org/10.1093/ajcl/avae020>

* Toms Foundation Distinguished Professor of Law, University of Tennessee College of Law, Knoxville, Tenn., USA.

1. JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION: A CONTEXTUAL ANALYSIS* (2d ed. 2022).

2. *What Changes Will Be in the Constitution of the Russian Federation?*, FED. ASSEMBLY OF THE RUSSIAN FED’N (Mar. 20, 2020), <http://duma.gov.ru/en/news/48039>.

3. HENDERSON, *supra* note 1, at vii.

4. *Id.*

by President Vladimir Putin and his apparatchiks. Ultimately, if any shortcoming emerges from Henderson's praiseworthy contribution, it lies in the tendency to downplay the erosion of constitutionalism in Russia, not only in the "liberal" sense, but as measured against the bedrock principle upon which constitutionalism rests, namely the imposition of effective limits on rule.

Before elaborating this proposition, a brief description of Henderson's book is merited. This new edition retains the straightforward layout of the previous volume. The book's initial chapters afford readers a comprehensive—though still accessible and succinct—summary of Russia's turbulent and dynamic history from the period before the Russian Empire and through the tumult of the USSR's disintegration. According to Henderson, this contextual foundation is critical for avoiding a simplistic view and instead rendering "a more nuanced consideration" of unique approaches to legal reform—including Imperial, Slavophile, and Soviet for example—that continue to inform contemporary constitutionalism in Russia.

The remaining chapters focus on major constitutional headings—President, Legislature, Government, Judiciary, and Rights—and each provides lucid analysis discussing key provisions and topics. Across these chapters, the author deftly harnesses constitutional history, for example, tracing the origins of President Putin's centralization project not only to Russia's Tsarist tendency, but also to the more contemporary effort to claw back power devolved or promised to Russia's various federal subjects beginning after ratification of the 1993 Constitution.⁵ Notably, unlike other scholars who minimized the significance of the 2020 constitutional amendments,⁶ Henderson correctly recognizes that these "major" constitutional changes reflect a "breathtaking" scale of reform likely to deepen the continued centralization of power in Russia.⁷

As these chapters unfold, the astute reader would be forgiven for sensing the emergence of an unspoken pattern laying bare the country's relentless march towards the concentration of unchecked power in a presidential authority beholden to no one. Sensitized to this pattern, the text arguably provides an autopsy for Russia's atrophied constitutionalism and the steady descent to authoritarianism under the banner of "autocratic legalism"⁸ or *diktatura zakona*⁹ (dictatorship

5. In 1990, President Boris Yeltsin encouraged Russia's federal subjects to "take as much autonomy as you can swallow." *Id.* at 77. Since that heady period, however, the federal government—with the judiciary's assistance—has consolidated its monopoly over sovereignty. *Id.* at 108. See also Mikhail Antonov, *Theoretical Issues of Sovereignty in Russia and Russian Law*, 37 REV. CENT. & E. EUR. L. 95 (2012) (tracing the Constitutional Court's support for concentrating sovereignty at the federal level).

6. Paul Kalinichenko & Dimitry Vladimirovich Kalinichenko, *Amendments to the 1993 Constitution of the Russian Federation Concerning International Law*, 60 I.L.M. 341 (2021).

7. HENDERSON, *supra* note 1, at viii.

8. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

9. The term denotes prioritization of public order and the state's interests, in contrast to a rule-of-law-based approach favoring protection of individual rights and freedoms. HENDERSON, *supra* note 1, at 241.

of law). Indeed, while Henderson deploys this latter term she does so only sparingly, despite acknowledging that it is a term preferred by President Putin himself.¹⁰

This tendency to avoid more directly addressing the overarching constitutional consequences flowing from the steep uptick in autocratic conduct in Russia over the past two decades is repeated across Henderson's text. And as a pattern, it signals the book's single greatest weakness. To be clear, it isn't that Henderson denies this grim conclusion. Rather, it is that the overall impact of her analysis is softened by disproportionate unpacking of dense constitutional minutia, unwarranted optimism, and excessively clinical conclusions that obscure the gravity of the situation.

A few examples of these tendencies are helpful to illustrate the pattern. Consider Henderson's seven-page treatment of the legislature's myriad oversight powers, which ends with her characterization of legislative oversight as merely "weak."¹¹ Lost in this lengthy assessment, however, is a damning takeaway—provided only in Henderson's paraphrasing of another scholar—that "the oversight methods have been subverted, so that they act more to legitimise governmental activities that question them."¹²

Undeniably, this subversion is platformed on the dearth of meaningful political opposition in Russia. But Henderson's brief treatment of political parties (just three pages) is bookended by two disconcertingly anodyne statements: a "multi-party system remains an ongoing issue in Russia"¹³ and "[a]ny bill directly initiated by the President stands a very high chance of adoption."¹⁴ Supplementing this assessment, Henderson bemoans the "common perception that the current Duma is a 'rubber stamp' . . . enacting executive policy," and calls for "a more nuanced perception."¹⁵ This reckless framing buries the central factor that undermines legislative oversight in Russia: the Kremlin's erasure of "non-systemic"¹⁶ political opposition through the poisoning, double poisoning, imprisonment, and killing of individuals such as Alexi Navalny, Vladimir Kara-Murza, Ilya Yashin, and Boris Nemtsov, as well as the habitual registration denials and disqualifications of political opposition organizations including Navalny's Russia of the Future party (and its prior iterations, denied registration nine times!).¹⁷

On the issue of human rights, the author too often paints an optimistic, even naïve, portrait where reality demands otherwise. For

10. *Id.*

11. *Id.* at 144.

12. *Id.* at 141.

13. *Id.* at 126.

14. *Id.* at 129.

15. *Id.* at 128.

16. Andrew E. Kramer, *In Shadow of Navalny Case, What's Left of the Russian Opposition?*, N.Y. TIMES (June 10, 2021), www.nytimes.com/2021/06/10/world/europe/putin-navalny-russian-opposition-crackdown.html.

17. *Russian Supreme Court Liquidates "Russia of the Future"—The Party that Kept Navalny from Registering His Political Party Back in 2019*, MEDUZA (Sept. 21, 2020), <https://meduza.io/en/news/2020/09/21/russian-supreme-court-liquidates-russia-of-the-future-the-party-that-kept-navalny-from-registering-his-political-party-back-in-2019>.

example, Henderson observes that abusive enforcement of the 2002 Law on Extremist Activity, used to shutter non-violent NGOs and religious organizations, merely occurs with “unfortunate regularity.”¹⁸ Here, the author notes the 2017 judicial ban against the Jehovah Witnesses as an extremist group, references the group’s continued persecution by the state, but then concludes with a curious punt: “Why they have been particularly targeted is unclear.”¹⁹ The simple answer is that the group—because of its Western origin, spurning of expressions of nationalist fervor, and active proselytism—represents the antithesis of the Kremlin’s nationalist cocktail of state power and devotion to Russian orthodoxy.²⁰ This type of hedging effectively blunts Putin’s campaign to snuff out perceived regime opponents, including by discarding constitutionally protected rights like freedom of association and freedom of religion or belief.²¹

Rather than directly confronting this grim rights landscape, Henderson opts to re-endorse her argument from the previous edition that the development and enforcement of human rights still augurs promise due to Russia’s membership in the Council of Europe (CoE).²² Setting aside Henderson’s decision to forgo comment on Russia’s suspension and subsequent dismissal from the Council of Europe²³—events which followed on the heels of the invasion—ample evidence existed prior to these watershed events to suggest a less sanguine analysis was merited. Already in 2015, Russia’s Constitutional Court gained authority to declare the “non-possibility” of enforcing judgments of the European Court of Human Rights (ECtHR).²⁴ With ratification of the 2020 amendments, the Kremlin hardcoded this newly minted authority into the constitutional text, further facilitating the rejection of international decisions under the decidedly less onerous standard of conflict with Russia’s public order.²⁵

Finally, Henderson scaffolds her unjustified optimism concerning human rights by drawing a curious equivalence between civil rights and social rights: “On one hand, many important rights exist and are effectively enforced. On the other hand, rights protection can be absolutely contingent on whether the ruling regime feels a political

18. HENDERSON, *supra* note 1, at 217. Henderson’s brief treatment of the extremism law cites the SOVA Center for Information and Analysis. Attesting to the judiciary’s complicity in eradicating human rights in Russia, a Moscow court shuttered the SOVA Center in April 2023. *Moscow Court Orders Closure of Sova Analytical Center*, MOSCOW TIMES (Apr. 27, 2023), www.themoscowtimes.com/2023/04/27/moscow-court-orders-closure-of-sova-analytical-center-a80969.

19. HENDERSON, *supra* note 1, at 217.

20. See Emily B. Baran, *Contested Victims: Jehovah’s Witnesses and the Russian Orthodox Church, 1990–2004*, 35 RELIGION STATE & SOC’Y 261 (2007).

21. For other examples, see HENDERSON, *supra* note 1, at 216, 218, 220.

22. *Id.* at 229–30.

23. Comm. of Ministers, *Resolution CM/Res(2022)2 on the Cessation of the Membership of the Russian Federation to the Council of Europe* (Mar. 16, 2022), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51.

24. HENDERSON, *supra* note 1, at 186.

25. *Id.* at 237–38.

threat.”²⁶ From this assessment, Henderson concludes, the Kremlin’s “transactional approach to rights, reminiscent of Soviet dependent rights . . . may change” when future generations reassert their preference to “embrace international standards.”²⁷ It is difficult to reconcile this pollyannaish faith with the current constitutional landscape, colored as it is by a crackdown on civil rights, amendments that entrench a muscular view of sovereignty, and a war that has triggered a rapid and massive outflow of Russia’s youth fleeing a state²⁸ increasingly at odds not only with its own constitutional first principles but also the first principles of international law.

Elsewhere, Henderson’s overly clinical or muted conclusions similarly undercut a more direct confronting of Russia’s constitutional decay. For example, while correctly recognizing the attenuation of constitutional checks and balances, Henderson concludes that judicial independence merely “remains an issue” while courts endure as “important in Russian civil life, not least in the defense of human rights.”²⁹ More accurately, longstanding evidence confirms that the judiciary operates as an unflinching ally in Putin’s campaign to silence NGOs, political opposition, media outlets, and predictability now, all anti-war sentiment. Russian courts have readily endorsed new laws championing the absurd notion that schoolteachers and food bloggers threaten Russia’s national security through the spread of “knowingly false information,” and that any access to fact-based information risks “mass public disorder.”³⁰

Even without accounting for the predictable judicial crackdown on dissent following the invasion, Henderson’s mild-mannered assessment falls flat. Already a decade ago, a UN Special Rapporteur warned that government efforts to control the judicial system undermined its independence and impartiality.³¹ Confirmation for this problem exists at the pinnacle of Russia’s judicial system³² and is only exacerbated by the 2020 amendments.³³

26. *Id.* at 238. Part of this assessment is premised on Henderson’s exceedingly generous reading of the Procuracy’s role defending social rights, which itself relies on but overstates William E. Pomeranz’s findings. See William E. Pomeranz, *Russia’s Resilient Legal Powerhouse: The Procuracy Enters the 21st Century*, 42 KENNAN CABLE (June 2019), www.wilsoncenter.org/sites/default/files/media/documents/publication/ki_190617_cable_42_v1.pdf.

27. HENDERSON, *supra* note 1, at 239.

28. Within a month of the invasion, media outlets reported up to 200,000 Russians fleeing. *Meet the Russians Who Are Fleeing—Not the War, But Their Own Government*, NAT’L PUB. RADIO (Mar. 25, 2022), www.npr.org/sections/pictureshow/2022/03/25/1087865980/meet-the-russians-who-are-fleeing-not-the-war-but-their-own-government.

29. HENDERSON, *supra* note 1, at 204.

30. Robert C. Blitt, *Justifying Aggression: Russia’s 2020 Constitutional Amendments and the Invasion of Ukraine*, 57 VAND. J. TRANSNAT’L L. 1, 16 (2024).

31. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mission to the Russian Federation*, ¶¶ 15–16, UN Doc. A/HRC/26/32/Add.1 (Apr. 30, 2014).

32. Lauri Mälksoo has concluded that the Constitutional Court “artificially constructed” the conflict between international law and the Russian constitution “to justify the government’s preferred outcome.” Lauri Mälksoo, *Current Developments: International Law and the 2020 Amendments to the Russian Constitution*, 115 AM. J. INT’L L. 78, 93 (2021).

33. The President can seek dismissal of any sitting judge for tarnishing honor and dignity. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 83(f)(3) (Russ.).

On balance, Henderson's meticulous analysis provides a useful accounting of Russia's constitution. Her zeal for objectivity rooted in the country's long and turbulent history, however, is too often preoccupied with assessing constitutional bark and downplaying the systemic attack on Russia's constitutional tree. Beneath the surface of every chapter is the never confronted reality that individual constitutional provisions have been manipulated to obliterate resistance to President Putin's "dictatorship of law." Overseen by the judiciary, this project has sought to inhibit all manifestations of regime opposition, attenuate basic constitutional checks and balances, bless the steady erasure of constitutional rights, including rudimentary equality and nondiscrimination safeguards for vulnerable minority groups like Russia's LGBTQ community, and discard basic rules of the international legal order. From this perspective, declining to consider the Constitution's role as an engine for validating war represents another missed opportunity to expose more unambiguously what Russia's Constitution has become today: A Kremlin-managed text to facilitate rule over a nation of 150 million people systematically stripped of their rights internally and rendered anathema internationally. Although Henderson could not say this in 2022, today this constitutional order also holds the strikingly unenviable distinction of being one of the few overseen by an indicted war criminal. Regardless of whether Putin retains power, Henderson's next edition will surely require substantial reworking to account for the deeper implications of the 2020 amendments and the war, and for a country whose populace has become acutely disconnected from constitutional basics like limits on power, to say nothing of "liberal" norms like government accountability and human rights.