

Russian Federation: Draft Law Amending the Law on the Status of Judges

Comment by the International Commission of Jurists

Geneva

10 May 2013

I. Introduction

The International Commission of Jurists (ICJ)¹ welcomes this opportunity to comment on the *Draft Law amending Articles 12¹, 14 and 15 of the Law of the Russian Federation "On the Status of Judges in the Russian Federation"*. The ICJ considers this amending law, which introduces reforms to the judicial disciplinary system, to be an important one, since it addresses issues essential to the integrity and independence of the judiciary in the Russian Federation. A fair disciplinary system, with adequate safeguards against arbitrary disciplinary sanctions, is essential to upholding judicial independence, as well as in ensuring accountability for wrongdoing by judges. In 2012, the ICJ published a report, *Securing justice: the disciplinary system for judges in the Russian Federation*,² which analysed the problems in the judicial disciplinary system of the Russian Federation. The report found that arbitrary and inconsistent application of disciplinary sanctions undermines judicial independence and the integrity of the judiciary and thereby weakens the capacity of the judiciary to protect the rule of law. The report made detailed recommendations for reform of the structures of disciplinary bodies, procedures of the disciplinary system, the grounds for disciplinary action and the range of penalties for disciplinary misconduct.

The Draft Law includes a number of positive amendments. Nevertheless, the ICJ regrets that this opportunity has not been taken to introduce more comprehensive reforming legislation, which would address the institutional, substantive and procedural weaknesses in the system that allow for abuse and facilitate arbitrariness and inconsistency in the application of disciplinary sanctions. In this paper, the ICJ submits proposals for amendments to several articles of the Draft Law. More detailed recommendations on reform of the judicial disciplinary system can be found in the ICJ's report.³

¹ Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

² ICJ, *Securing justice: the disciplinary system for judges in the Russian Federation*, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf>

³ *Ibid.*

The draft law follows a Constitutional Court decision of 20 July 2011, which raised several points of principle, including the elements of a disciplinary offence, the need to define the grounds for disciplinary misconduct, the dismissal of a judge for judicial mistake, and the range of sanctions available for judicial misconduct. The ICJ recalls in this connection that both the Constitutional Court and the Supreme Court of the Russian Federation have, in recent years, issued a number of decisions in regard to the disciplinary procedure for judges, which point to existing flaws in the law and procedure. These decisions form an important basis for legislative improvements. The ICJ submits that full account should also be taken of international standards and the jurisprudence of international tribunals and bodies, addressing the question of judicial disciplinary procedures and other questions of the independence of the judiciary. Such bodies include the European Court of Human Rights, an authoritative source given that the Russian Federation is a party to the European Convention on Human Rights.

II. Statute of Limitations

The ICJ warmly welcomes the introduction of a limitation period of two years for disciplinary action against judges. Amended Article 12¹(4) of the law stipulates that disciplinary action may be taken no more than two years from the time of the misconduct complained of or six months from the moment when the misconduct first became known, provided that such knowledge is attained within two years of the act of misconduct itself. This corrects a problematic anomaly in Russian law, whereby disciplinary misconduct by judges is among the only categories of offences (in addition to crimes against peace and the security of humanity),⁴ which are not subject to any limitation period. In its report, the ICJ noted that the lack of a limitation period was one of the principal factors that facilitated abuse of the disciplinary system. The introduction of a limitation period in the Draft Law provides for an important safeguard against such abuse.

III. Definition of disciplinary misconduct and grounds for disciplinary action

Amended article 12¹(1) of the Draft Law provides a definition of disciplinary misconduct. . It refers to “[...] a culpable act (omission) in the course of official duties as well as outside of official duties incompatible with the present law and (or) provisions of the Code of Judicial Ethics adopted by the All-Russia Congress of Judges, which has led to derogation of the authority of the judiciary and caused damage to the reputation of the judge [...]”. This definition is vague, and it fails to provide the prescription function which allows a judge or other person to identify the precise conduct that would fall within its ambit. The draft law does not introduce any concrete types of misconduct, but only provides for a general indication of disciplinary misconduct.

It is a general principle of both criminal and administrative law that prescriptions of conduct must be clearly – not vaguely- defined in law. Failure to provide an adequate definition in this respect falls afoul of the principle of legality.

⁴ Criminal Code Article 78.5

This principle has been reaffirmed in a wide range of contexts, by international and national courts, including directly in relation to judicial conduct. The Consultative Council of European Judges (CCJE), in its Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, and in particular on ethics, incompatible behaviour and impartiality,⁵ stresses the importance of definition in national law of the precise reasons for disciplinary action, taking note of the great generality with which these are usually stated.⁶ The advisory body for the Council of Europe, the European Commission for Democracy through Law (Venice Commission), has similarly explained that: "[...] Precision and foreseeability of the grounds for disciplinary liability is desirable for legal certainty and particularly to safeguard the independence of the judges; therefore an effort should be made to avoid vague grounds or broad definitions".⁷ The Venice Commission found to be particularly problematic general definitions such as "the commitments of actions that dishonour a judicial office or may cause doubts in his/her impartiality, objectivity and independence, integrity, incorruptibility of the judiciary" and "violation of moral and ethical principles of human conduct". Such grounds for disciplinary liability were "too broadly conceived", requiring a more precise regulation to guarantee judicial independence.⁸ On this point, the European Court of Human Rights has stressed: "[i]t follows that a description of an offence in a statute, based on a list of specific behaviours but aimed at general and innumerate application, does not provide a guarantee for addressing properly the matter of the foreseeability of the law".⁹

In its 2012 report, the ICJ concluded that the unclear grounds for dismissal of judges in the Code of Ethics and the Law on the Status of Judge, as well as the inconsistent interpretation and application of these rules, facilitated abuse of the system and the arbitrary sanctioning of judges. The report recommended that judges and judicial bodies must be able to rely on and must be made aware of, clear legal standards on judicial ethics and the precise type and forms of conduct that could trigger disciplinary action. Although it will not be possible to specify exhaustively every particular act that may lead to disciplinary action, at a minimum, clear and predictable grounds for disciplinary action must be established in legislation and applied in practice.

In a judgment of 2011, the Constitutional Court of the Russian Federation found that the law on judicial disciplinary proceedings must include elements that are "precise, exclude arbitrary disciplining of judges and do not violate the principles of self-dependence and independence of courts, irremovability and security of tenure of a judge"¹⁰ The ICJ, in its report, recognised that judges and the judiciary as a whole often suffer from the absence of clarity as to what constitutes disciplinary misconduct and that this uncertainty may lead to arbitrary application of penalties and lack of

⁵ Opinion No 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19 November 2002.

⁶ *Ibid*, para. 65.

⁷ The Venice Commission, Joint Opinion on the Law Amending Certain Legislative Acts of Ukraine in Regulation of the Prevention of Abuse of the Right to Appeal, 15-16 October 2010, [http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD\(2010\)029-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2010)029-e), para 45.

⁸ *Ibid*.

⁹ ECtHR, *Volkov v Ukraine*, Application no. 21722/11, Judgment of 9 January 2013, para. 178.

¹⁰ Constitutional Court decision of 28 February 2008 N 3-II, para. 3.

security of tenure. In this environment, legislative mention of concrete acts of punishable behaviour would have the potential to enhance consistency and predictability in the judicial disciplinary system, and thus support judges' security of tenure.

In a judgment of 2008, the Constitutional Court stated in particular that: "... corporate acts of the judicial community which are the [...] codes, formulating the rules of behaviour of judges [e.g. the Code of Ethics], cannot proceed from broad interpretation of the elements of the disciplinary misconduct as they are defined by the Federal Law on the Status of Judges. Accordingly, non compliance with the mentioned corporate norms cannot by themselves serve as grounds for premature termination of the powers of a judge unless he committed other actions which the law considers as incompatible by their nature with the high title of the judge".¹¹ Disciplinary action under the Draft Law continues to be based on the Code of Ethics, despite the Constitutional Court's denunciation. The language of the proposed definition does not reflect this decision, as it refers to an act or omission which violates the law "and (or) the provisions of the Code of Judicial Ethics [...]". On the other hand, according to the Consultative Council of European Judges it is "incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions".¹² According to the standards of the CCJE, while ethical rules are relevant,¹³ the essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in the position of the person who has allegedly misconducted him or herself.¹⁴

The ICJ recommends that the definition of disciplinary misconduct be revised in accordance with the decisions of the Constitutional Court and blanket reference to violation of the Code of Ethics as a ground for dismissal should be excluded. Grounds for dismissal should be defined precisely in law, so that a reasonable judge, guided by publically known principles of judicial conduct and ethics, will act in such a manner as not to incur responsibility for a disciplinary infraction. In particular, the ICJ considers that the law should be amended to include a non-exhaustive list of conduct that incurs disciplinary responsibility. These could include, for example, failure to act impartially, undue consultations with governmental officials, bias, use of information from undisclosed sources, influence over another judge, interference with the decision of another judge, disclosure of confidential information, improper attitude towards parties in a judicial process, or undue use of a judicial position to gain benefits or avoid duty or responsibility. Furthermore, along the lines of the Constitutional Court decisions,¹⁵ the ICJ recommends that there be specific provision in the law stipulating that having a decision overturned by a higher instance court is not in itself a valid ground for disciplinary action.

¹¹ *Ibid*, para 3.3.

¹² Opinion No 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19, para. 60.

¹³ *Ibid*, para. 61.

¹⁴ *Ibid*, para. 63.

¹⁵ E.g. The Constitutional Court decision of 20 July 2011 N 19-II, the Constitutional Court decision of 28 February 2008 N 3-II.

IV. Penalties for disciplinary misconduct

An additional penalty, a reprimand, is introduced by amended article 12¹(1) of the Draft Law. Under the current law, a warning and a dismissal are the only available sanctions for disciplinary misconduct by judges.

This amendment is welcome in that it adds one more sanction that can be applied short of dismissal. However, this modification is not sufficient to introduce real proportionality into the system. In its report, the ICJ recommended that the range of sanctions for disciplinary misconduct be developed so that disciplinary sanctions correspond appropriately to the particular act of misconduct. Sanctions should include those aimed at improving the performance of judges, enhancing the integrity of the judiciary and bringing judicial conduct into line with the rules of judicial ethics. The variety of sanctions should be sufficient to minimise the use of dismissals. Such sanctions may include additional training, short-term suspension, change of rank or transfer to a lower court or to a different court of the same level.

International and European standards on the independence of the judiciary affirm the need for proportionality in penalties for disciplinary misconduct of judges.¹⁶ A particular expression of this principle is the universal standard contained in the UN Basic Principles on the Independence of the Judiciary, namely that judges should be suspended or dismissed only for the most serious misconduct, amounting to incapacity or behaviour that renders them unfit to discharge their duties.¹⁷

The European Court of Human Rights has addressed this issue in its judgment in *Volkov v Ukraine*,¹⁸ in which it found that the dismissal of a judge did not meet Convention standards of foreseeability and proportionality.¹⁹ This determination was in part because "domestic law did not set out an appropriate scale of sanctions for disciplinary offences and did not develop rules ensuring their application in accordance with the principle of proportionality [...] only three sanctions for disciplinary wrongdoing existed: reprimand, downgrading of qualification class and dismissal. These three types of sanction left little room for disciplining a judge on a proportionate basis. Thus, the authorities were given limited opportunities to balance the competing public and individual interests in the light of each individual case."

The ICJ therefore recommends that consideration be given to amending the draft law to add further additional penalties for disciplinary misconduct, which could include, for example, suspension, demotion to a lower rank, transfer or a requirement to undergo additional training. The primary purpose of the sanctions imposed should be enhancement of the integrity, independence, impartiality and professional aptitudes of judges.

¹⁶ Council of Europe Committee of Ministers recommendation No.R (2010)12 on judges, art.69; European Charter on the Statute for Judges Article 5.1

¹⁷ UN Basic Principles on the Independence of the Judiciary, principle 18

¹⁸ *op cit*

¹⁹ Under Article 8 ECHR, the right to respect for private life.

V. Dismissal of a judge as an exceptional measure

Under amended article 12¹(2) of the Draft Law, it would be specified for the first time in Russian law that the dismissal of a judge should be an exceptional measure. This amendment is welcome, and in accordance with international standards, which specify that judges should be dismissed only for the most serious misconduct. It reflects the standard contained in the UN Basic Principles on the Independence of the Judiciary, which stipulate that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.²⁰

This statement of principle, while a positive development, is only a first step in ensuring that the sanction of dismissal is applied appropriately and proportionately. To achieve this, the whole system needs to be attuned to ensure that a dismissal will only be a measure of last resort, applied in cases of the most serious misconduct, where other measures have failed or are inadequate to uphold the integrity of the judiciary. This is only possible if and when the status of a judge is reconsidered and security of judicial tenure becomes a reality including through a minimal number of dismissal of judges. **The ICJ remains concerned that the Russian judicial disciplinary system does not include sufficient safeguards to protect against the disproportionate or arbitrary application of the sanction of dismissal. It considers that reliable compliance with this principle requires the availability of a range of other, less severe, disciplinary penalties, as well as further safeguards to ensure the independence of disciplinary bodies and fair procedures in disciplinary proceedings.**

²⁰ UN Basic Principles on the Independence of the Judiciary, principle 18