Appointing the judges: Procedures for Selection of Judges in the Russian Federation

ICJ Mission Report 2014

International Commission of Jurists

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I. INTRODUCTION

ICJ Mission to the Russian Federation 2014

In May 2014, the International Commission of Jurists (ICJ) carried out its fourth mission to address aspects of the judicial system in the Russian Federation. This ICJ mission examined laws and practices concerning the selection, appointment and promotion of judges. During the mission, the ICJ held two round table seminars with experts on the organization of the judiciary. The seminars were held in cooperation with two Russian NGOs: the Institute of Law and Public Policy and the Independent Council for Legal Expertise. The ICJ also held bilateral meetings with national experts to discuss the law and practice of judicial selection, appointments and promotions, and proposals for judicial reform.

The mission team included Justice Azhar Cachalia, Judge of the South African Court of Appeal and Chair of the ICJ Executive Committee, Judge Jolien Schukking, Judge of the Administrative High Court for Trade and Industry, Vidar Stromme, Chair of the ICJ-Norway, Róisín Pillay, Director of the ICJ Europe Programme, Temur Shakirov, Legal Adviser of the ICJ Europe Programme and Mari Gjefsen, member of the ICJ-Norway. The mission benefited from the advice of Justice Tamara Morshakova, ICJ Commissioner and former justice of the Constitutional Court of the Russian Federation. The mission was also advised by Irina Kuznetsova, who prepared a background research paper for the mission. The ICJ expresses its gratitude to all those who assisted the mission and contributed to its successful implementation.

The mission followed three previous ICJ missions to Moscow on questions of the organization and functioning of the judiciary, in 2010, 2012 and 2013. During its first visit the ICJ assessed the general situation within the judiciary in Russia, the challenges it faced and the progress made through recent reforms. The ICJ issued a report, *the State of the Judiciary in Russia,* following that mission.[1] It concluded that there were deep-seated deficiencies in respect of judicial independence in the Russian Federation, which required comprehensive reform, including of the appointment and disciplinary procedures, and of the administration of the courts.

In light of these findings, the 2012 and 2013 missions scrutinized the judicial disciplinary system, and addressed the procedures and grounds for disciplinary action against judges, including dismissals of judges. The report of the 2012 mission, *Securing Justice: the disciplinary system for judges in the Russian Federation* analyzed legal and practical aspects of disciplinary action, and how they affect the operation of the judiciary, including its independence.[2] In concluded among other things that:

> *"The deficiencies of the judicial disciplinary system in the Russian Federation reflect wider problems within the Russian judiciary, as it continues to struggle with long-standing institutional and cultural legacies that are difficult to reconcile with a strong, independent judiciary. The current legal*

[1] *The State of the Judiciary in Russia,* Report of the ICJ Research Mission on Judicial Reform to the Russian Federation, 2010, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf.

[2] *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, 2012, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf.

> *and administrative framework for the judiciary in the Russian Federation is unable to protect judges from undue influence and does not effectively uphold judicial independence. Problems persist in many aspects of the functioning of the judiciary, including selection, appointment procedure, promotion, and security of tenure and disciplining of judges. Although outside pressure on the judiciary can often be visible and traceable, it is the internal mechanisms which are most effective in stripping judges of protection. In particular, the disciplinary system can and does operate to undermine judicial independence."*[3]

Continuing its programme of work, the ICJ mission of 2014 examined issues of the selection, terms of tenure, including the appointment and promotion of judges, considering the institutional, procedural and practical aspects of judicial appointments and promotions. The 2014 mission coincided with a major constitutional change, the merger of two highest judicial instances: the Supreme Court and the High Arbitration Court of the Russian Federation, and a process of re-appointment of judges to the new Supreme Court. The ICJ mission was therefore also able to address this process, which was highly relevant to the mission's more general concern with judicial appointments.

The significance of the judicial appointment process

An independent judiciary is essential to the maintenance of the rule of law and the proper administration of justice.[4] An appropriate selection and appointment process is part and parcel[5] of and is a condition *sine qua non* for guaranteeing the independence of the judiciary.[6] In order to safeguard the independence of both the judiciary as an institution and the individual judges of which it is constituted, judicial bodies that are charged with the appointment, management and disciplining of judges must themselves be independent in composition and granted all necessary powers. An essential condition of an independent and impartial judiciary is also respect for the principle of separation of powers, meaning that the executive, legislative and judicial branches are administered distinctly and are independent from each other.[7]

To achieve the objective of an independent judiciary, the legal, institutional and procedural framework of judicial appointments have to be designed in such a way as to guarantee the selection of highly qualified and personally reliable judges and to define settings in which judges can work witout being unduly

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3 *The State of the Judiciary in Russia,* Report of the ICJ Mission 2010, *op. cit.*, p. 44.

4 International Commission of Jurists, Declaration of Delhi, 10 January 1959.

5 UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

6 Inter-American Commission for Human Rights, Guarantees for the independence of the justice operators, OEA/Ser.L/V/II. Doc. 44, 5 December 2013, p. 25.

7 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 18 ("It is the principle of the separation of powers, together with the rule of law, that opens the way to an administration of justice that provides guarantees of independence, impartiality and transparency".); Report of the Special Rapporteurs on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/add.1 (1997), para. 71 (noting that "the separation of powers and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively"); Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1995/39 (1995), para. 55; Judgment of 31 January 2001, Inter-American Court of Human Rights, Constitutional Court Case *(Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru),* para. 73.

subjected to external influence.[8] The reason for this is that the judiciary's ability to remain independent as a separate autonomous state power and judges' ability to make independent decisions that uphold the rule of law and protect human rights, depend to a large extent on who qualifies and, not less importantly, on who fails to qualify as a judge.

Judges may hold significant powers over individuals, but they cannot fulfill their role as guardians of the rights and freedoms of people unless they are independent.[9] If certain critical parameters in the process of selection are not respected, "it would be possible to design a regimen that allows a high level of discretional consideration in the selection of the judicial career officials, by virtue of which the people chosen would not necessarily be the most fit".[10]

Judges are the face of the justice system. Not only do they deliver justice, but they are also responsible for its appearance in the public perception. They are therefore responsible for demonstrating how justice is administered. A failure in selecting jurists who are highly qualified to serve as judges will lead to the loss of trust in the judiciary; conversely, an appropriate selection procedure which ensures that the most qualified candidates are selected, results in increase of trust of the society in the judiciary and the system of administration of justice.

The judicial appointments system is the system of selecting those who are placed to carry out one of the most important social roles—to deliver justice in the society. There is thus a fundamental societal interest that only those who meet the highest standards of competence and integrity are accorded the powers of a judge; that judges are appointed who will make decisions that are impartial, fair, and are dictated by law and conscience. The question of selecting those who are given judicial powers is not merely a technical one, but a problem of fundamental imporance for ensuring the quality and the independence of the justice system, upholding the rule of law, protecting human rights, and ensuring effective access to justice. The availability and operation of a disciplinary system may serve in part to repair any failures arising from the process of judicial selection, but on certain occasions and in certain contexts the disciplinary process may itself serve to impede judicial independence.[11]

An independent judiciary is an inherent part of the obligation of the State to guarantee the right to a fair trial by an independent and impartial tribunal established by law, under article 6 of the European Convention on Human Rights (ECHR) and article 14 of the International Covenant on Civil and Political Rights (ICCPR), and is necessary for the effective protection of other rights guaranteed under these and other international human rights treaties to which the Russian Federation is a party.

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8 *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission 2012, *op. cit.*
The Venice Commission, *Report on the Independence of the Judicial System,* part I: Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), CDL–AD(2010)004, 16 March 2010, para. 8.

9 *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, *op. cit.*
Venice Commission, *Report on the Independence of the Judicial System,* part I: Independence of Judges, *op. cit.*, para. 6.

10 IACtHR, Case of Reverón *Trujillo v. Venezuela,* Judgment of June 30, 2009, (Preliminary Objection, Merits, Reparations, and Costs), para. 74.

11 *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, *op. cit.*

International standards on the independence of the judiciary establish principles designed to ensure that the selection criteria, and appointments and promotions procedures, support a strong and independent judiciary. The UN Basic Principles on the Independence of the Judiciary; the Recommendations of the Committee of Ministers of the Council of Europe; the European Charter on the Statute for Judges and explanatory Memorandum; and Opinion No. 1 of the Consultative Council of European Judges (CCJE) on Standards Concerning the Independence of the Judiciary and Irremovability of Judges,[12] each require that the authorities responsible for appointments and promotions should be independent of the executive, that selection criteria should be designed to identify the most highly qualified candidates, and that appointment criteria and procedures should be fair, non-discriminatory and transparent. These principles, described at greater length in the opening sections of each chapter of this report are the main criteria against which the ICJ has assessed the law and practice of the Russian Federation on the appointment and promotion of judges.

The structure of the judiciary in the Russian Federation

The Russian Federation has a two-tier system of courts—federal courts and the courts of the ubjects of the Russian Federation.[13]

Federal courts include: the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, the Supreme Courts of the Subjects of the Russian Federation and other courts of a similar level as specified by law, and various arbitration courts.[14]

The courts of the subjects of the Russian Federation include: Constitutional Courts of the Subjects of the Russian Federation and justices of the peace.

There are courts of two jurisdictions under the law: the courts of general jurisdiction and constitutional courts:

- Courts of general jurisdiction consider economic, criminal, administrative and other types of cases falling under their jurisdiction. The Supreme Court is the highest instance of the courts of general jurisdiction. Arbitration and military courts fall under the jurisdiction of the Supreme Court. Justices of the Peace decisions fall under the jurisdiction of the relevant courts of general jurisdiction. With the exception of Justices of the Peace, all the courts of general jurisdiction in the Russian Federation belong to the federal level.
- Constitutional courts consider compliance of federal laws as well as laws of the Subjects of the Russian Federation with the Constitution of the Russian Federation and with the regional Constitutions and Charters. Constitutional courts of the Subjects of the Russian Federation are not subordinate to the Constitutional Court of the Russian Federation.

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12 For a comprehensive list of international and regional standards see *ICJ Practitioners' Guide No. 1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,* http://www.icj.org/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/.

13 The Russian Federation consists of its subjects which, according to the Constitution, can be republics, krays, oblasts (regions), cities of federal significance, autonomous oblasts, autonomous okrugs (circuits).

14 Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in Russia", *op. cit.*, Article 4.

The current structure is the result of the recent constitutional reform of the judicial system, which has led to the merger of two of the three highest courts of the Russian Federation—the Supreme Court and the High Arbitration Court. There are currently two main higher courts—the Supreme Court of the Russian Federation and the Constitutional Court of the Russian Federation. The Supreme Court is the highest court of general jurisdiction, while the Constitutional Court considers a small amount of cases, which raise questions of compliance with the Constitution.

Decisions of selection, appointment, promotion and discipline of judges as well as other questions of the operation of the judiciary are within the competence of the so-called *"bodies of the judicial community"*. These bodies, according to the law, comprise: [15]

- All-Russian Congress of Judges, the highest body of the judicial community, which is empowered to take decisions on all issues related to functioning of the judiciary in Russia, including approval of the Code of Ethics;
- Conference of Judges of the Subjects of the Russian Federation, a meeting organized at least once every two years deciding all the issues related to the operation of the judicial community in the Subjects of the Russian Federation;
- Council of Judges of the Russian Federation, an elected body in charge *inter alia* of appointing candidates to certain judicial bodies;
- Council of Judges of the Subjects of the Russian Federation, an elected body which inter alia appoints judges to disciplinary bodies;
- General Meetings of Judges of Courts, a body which *inter alia* elects delegates among judges;
- High Qualification Collegium of Judges of the Russian Federation;
- Qualification Collegia of Judges of the Subjects of the Russian Federation;
- High Examination Commission on the qualification examination for the judicial position;
- Examination Commissions of the Subjects of the Russian Federation on the qualification examination for the judicial position.[16]

Historical background: the development of Russian law on selection, appointment and promotion of judges

The Russian judiciary can be said to be amenable to undue pressures that compromise its independence and suffers from long-standing institutional weaknesses.[17] In the Soviet era "the Party leadership of the courts, selection and appointment of judges by *raykoms* [district party departments] and *obkoms* [regional party departments], the Central Committee of the Communist Party of the Soviet Union did not allow them to administer justice in the true sense."[18] The reforms undertaken after the collapse of the Soviet system

[15] *Ibid.,* Article 3.1.

[16] For more information see: *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, *op. cit.*

[17] Former President of the Russain Federation Dmitry Medvedev, Go Russia! http://eng.kremlin.ru/news/298, September 10, 2009.

[18] S. A. Pashin, *The Establishment of Justice* [Становление правосудия], Moscow 2011, p. 53.

did not lead to significant reform.[19] The fall of the USSR left the judiciary in Russia in a situation where deep reforms were needed to attain the new constitutional principle of the separation of powers. The government's Judicial Reform Conception, the policy document approved by the Parliament in 1992, which set out the government's plan for judicial reform, focused on improving the guarantees of independence of judges, their accountability to the law alone and securing their irremovability.[20] The elements of the Judicial Reform Conception, as well as other provisions concerning the status of judges, were enshrined in the Law "On Status of Judges in the Russian Federation" adopted on 26 June 1992 ("Status of Judges Act").[21] Under that law, initial selection of judicial candidates was assigned to Qualification Collegia of Judges entirely elected by the bodies of the judicial community from among their representatives.[22]

The Law "On Status of Judges", as adopted in 1992, took steps to strengthen the role and independence of judges. The Law established life tenure of judges (a provision unknown in Russia before).[23] Among other things, the law enshrined, for the first time, the guarantees of irremovability of judges,[24] a possibility of suspending the powers of judges,[25] as well as the grounds for judicial resignation.[26]

Amendments to the Status of Judges Act of 15 December 2001 established the framework for subsequent development of the status of judges, including their selection procedure.[27] Some of the amendments to the Status of Judges Act can be seen as retrogressive, as they reinforced significantly the "judicial vertical"[28] (i.e. hierarchical control within the system) and, consequently, introduced further restrictions on the independence of judges.[29] On the one hand, those amendments introduced—legitimately—more stringent requirements for candidates for judicial office. On the other hand, they made judges even more dependent on presidents of their respective courts, while making court presidents more dependent on the highest judicial officials.[30]

The amendments further established a new procedure for selection of judicial candidates that remains in place today. One of the 2001 legislative innovations was specific regulation on appointment of court presidents and deputy presidents and termination of their powers, as well as prescription of the scope of their administrative functions.

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19 S. A. Pashin, *The Establishment of Justice, op. cit.*

20 *Conception of the Judicial Reform in Russia.* Russian Supreme Soviet Publishing House.—Moscow, 1992.

21 Bulletin of the Congress of People's Deputies and the Supreme Court of Russia, 1992, issue 30, p. 1792.

22 O. A. Schwarz, *Legal status of judges* // http://www.indem.ru/Proj/SudRef/prav/PraStaSu.htm.

23 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 11.

24 *Ibid.,* Article 12.

25 *Ibid.,* Article 13 para. 1.

26 *Ibid.,* Article 15 para. 1, Article 14 para. 1.

27 Federal Law No. 169–FZ of 15 December 2001 "On introducing amendments and supplements to the Law of the Russian Federation "On the Status of Judges in the Russian Federation".

28 *The State of the Judiciary in Russia,* Report of the ICJ Mission, *op. cit.*, p. 7.

29 M. A. Krasnov, *Russian Femida with her eyes open,* M. A. Krasnov, E. A. Mishina; T. G. Morshchakova (edited by)—Moscow, Liberal Mission Foundation, 2007—84.

30 *Ibid*.

Problems identified in the current system

The ICJ's 2010 mission report considering various aspects of the operation of the judiciary, concluded that the "selection and appointment system lacks transparency, strict criteria and rules for selection and accountability, which inevitably leads to arbitrariness and abuses."[31] The weaknesses of the selection and appointment system were further underscored in the ICJ report of 2012, which examined disciplinary proceedings against judges and highlighted an unusually high level of dismissals: 50–60 cases each year, while in some other countries there are few dismissals of judges over decades.[32] Although many of these dismissals may be unjustified and may arise from abuse of the disciplinary system, the ICJ's report on the disciplinary system also found that the high number of judges dismissed also pointed to a serious problem in the quality of the judges selected, in its turn suggesting problems in the system of selection and appointment of judges.[33] The ICJ therefore considers a detailed examination of the selection procedures that determine who becomes a judge in Russia, to be an essential task.

The ICJ notes that the selection system for judges in the Russian Federation is very complex. And it would be misleading to suggest that to become a judge in Russian Federation is a simple undertaking. But a system that makes it difficult for prospective judges to secure a position in the judiciary does not necessarily guarantee transparency, fairness and predictability. In a 2014 report to the UN Human Rights Council, the UN Special Rapporteur on Independence of Judges and Lawyers expressed concern at the selection process of judges in Russia. In particular she concluded that "[. . .] the examination process can be, and often is, manipulated by the president of the court where the vacancy is located. There is also a real risk that newly appointed judges may feel indebted towards the president of their court."

Indeed, the system of selection is anything but predictable and transparent. Throughout the process of selection, not only procedures and institutions, but also individual decisions, such as those of court presidents, play a crucial role. These powers are officially enshrined in law, but most worrying are the influences, including by court presidents, that are not reflected in law at all, or run contrary to the law. The most worrying reports of such informal influences which the mission heard, date back to appointments in the 1990s, but such influence appears to continue despite reported improvements in practice in recent years.

A serious systemic shortcoming is unchecked discretionary powers exercised at key stages throughout the selection procedure. The law and regulations describe in great detail the selection bodies and procedures, but there is an apparent lack of procedural strictness and institutional strength of the authorities involved in the selection process, which means that wide discretion can become a more important factor than formal procedures.

This report does not aim to assess comprehensively the full range of existing challenges in respect of the judicial selection, appointment and promotion

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31 The State of the Judiciary in Russia, Report of the ICJ Mission, *op. cit.*, p. 13

32 *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, *op. cit.*, p. 8.

33 *Ibid*.

procedures. The report, however provides a description of the applicable legislative framework, and highlights and assesses what the ICJ considers to be the most serious problems arising in law and practice. The ICJ also provides a number of practical recommendations which it considers important to redress the main deficiencies in the appointment and promotions systems with a view to making the judiciary a more effective institution for the fair administration of justice in the Russian Federation.

The report

The report is divided into four analytical chapters, followed by a chapter containing conclusions and recommendations. Chapter II considers the structure of the authorities in charge of judicial appointments and the judicial career. It looks into legislation on the composition, procedures, selection, as well as the position of the authorities involved in the process, and how they interact. The independence of each of these authorities, and the points where their composition or affiliations may affect independence of the appointments procedure contrary to international standards, is considered. Some practical problems of the composition of the authorities and their functioning are also examined.

Chapter III discusses the process of selection and appointment of judges, from the application to pass an exam to the final approval of the appointment by the President, in light of international standards. In particular, attention is paid to some of the extra-procedural influences within the judiciary and the key role of court presidents in such improper influences, as well as to the significant role of the advisory commission to the President of the Russian Federation on judicial appointments.

Chapter IV assesses the promotion of judges and their evaluation. While the same authorities are involved in the promotion of judges, as are responsible some specificities in this process are considered.

Chapter V of the report describes the reform of the Supreme Court and the establishment of the new highest judicial authority. The chapter describes the legal framework in respect of the authorities charged with selection of the judges of the new Supreme Court, criteria for selection and other aspects of the process.

The report finally sets out conclusions and recommendations for the reform of the laws, institutions, and procedures of selection, appointment and promotion of judges.

II. INSTITUTIONS AND STRUCTURES GOVERNING JUDICIAL APPOINTMENTS AND THE JUDICIAL CAREER

Introduction

This chapter describes the institutional framework for the selection, appointment and promotion of judges. It assesses the extent to which the composition, functions and powers of these institutions serve to guarantee their independence and ensures a sufficient degree of expertise and high standards in the qualification, appointment, and promotion of judges. It further assesses the compliance of these institutions with international standards on the independence of the judiciary.

International Standards

International law safeguards designed to ensure judicial independence in the course of administration of justice encompass guarantees related to the selection, appointment and promotion of judges.

The European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR article 6, has specified a number of factors to take into account when assessing the independence of the judiciary. It has held that "... [i]n determining whether a body can be considered to be "independent'—notably of the executive and of the parties to the case—the Court has had regard to the *manner of appointment of its members* and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."[34]

The UN Human Rights Committee, in explaining the scope of the obligation to ensure a fair trial under article 14 of the ICCPR, has emphasized that the requirement of independence of the judiciary inherent in the right to a fair trial refers not only to actual freedom from political interference but also to "the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions".[35]

In accordance with international standards, judicial bodies in charge of selection and appointment of judges should be independent of the executive and legislative powers. The European Charter on the Statute for Judges envisages an authority "independent of the executive and legislative powers" for every decision "affecting the selection, recruitment, appointment, career progress or termination of office of a judge".[36] The UN Special Rapporteur on the independence of judges and lawyers has indicated that there should be an independent authority in charge of the selection of judges.[37]

The Council of Europe's European Commission for Democracy through Law (Venice Commission), of which the Russian Federation is a Member State, and which is charged with providing legal advice to its Member States, has stressed

[34] See ECtHR, *Campbell and Fell v. The United Kingdom,* (Application No. 7819/77; 7878/77), Judgement, 28 June 1984, para. 78.

[35] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 19.

[36] European Charter on the Statute for Judges, DAJ/DOC (98) 23, Principle 1.3.

[37] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 27.

the importance of establishing "a politically neutral High Council of Justice or an equivalent body into their legal systems—sometimes as an integral part of [a State's] Constitution—as an effective instrument to serve as a watchdog of basic democratic principles. These include the autonomy and independence of the judiciary, the role of the judiciary in the safeguarding of fundamental freedoms and rights, and the maintaining of a continuous debate on the role of the judiciary within a democratic system. Its autonomy and independence should be material and real as a concrete affirmation and manifestation of the separation of powers of the State."[38]

A significant proportion of the membership of such a body should be judges who are chosen by their peers. For example, the Council of Europe Committee of Ministers Recommendation (2010)12 says that "at least half" of the members should be judges.[39] The same prescription is contained in the European Charter on the Statute for Judges.[40]

The Committee of Ministers of the Council of Europe, in its Recommendation (2010)12 has stressed that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers. [...] However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.[41]

The rationale behind these requirements for a membership that is predominantly judicial, as noted by the Special Rapporteur on the independence of judges and lawyers, is that "if the body is composed primarily of political representatives there is always a risk that these 'independent bodies' might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly".[42] Similarly, the Explanatory Memorandum to the European Charter on the Statute for Judges states that in order to avoid the "risk of party-political bias," the judges who are "members of the independent body should be elected by their peers, on the grounds that the requisite independence of this body precludes the election or appointment of its members by a political authority belonging to the executive or the legislature."[43]

The Venice Commission, in its Judicial Appointments Opinion concluded that an "appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy"[44] and that "[s]uch a Council

38 Venice Commission, Opinion on Recent Amendments to the Law on Major Constitutional provisions of the Republic of Albania, CDL-INF(1998)009, para. 5.

39 See Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, CoM Recommendation (2010)12, para. 27.

40 See also: European Charter on the Statute for Judges, Principle 1.3 ("at least one half of those who sit are judges elected by their peers").

41 CoM Recommendation (2010)12, *op. cit.*, paras.46 and 47.

42 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

43 Explanatory Memorandum to the European Charter on the Statute for Judges, Principle 1.3.

44 Judicial Appointment, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007), para. 48.

should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them."[45]

A number of human rights bodies have raised concern about the inappropriate involvement of the executive or the legislature in the appointment of judges. The Human Rights Committee and others have recommended the establishment of an independent body to safeguard appointment, promotion and regulation of the judiciary. In the case of Tajikistan, for example, the Human Rights Committee raised the "apparent lack of independence of the judiciary, as reflected in the process of appointment and dismissal of judges, as well as their economic status." It recommended the establishment of "an independent body charged with the responsibility of appointing, promoting and disciplining judges at all levels"[46]

Authorities charged with selection, appointment and promotion of judges in the Russian Federation

In the Russian Federation, the procedures concerning judicial appointments and the judicial career are complex. These procedures are described in Chapter III. The authorities and officials which play a role in the procedures of selection and appointment, at different stages in the process, are:

- Qualification Collegia of Judges (of the Subjects of the Russian Federation);
- Examination Commissions;
- Qualification Collegium of Judges of the Russian Federation;
- [Presidential] Commission for preliminary examination of candidates for judicial positions of federal courts;
- President of the Russian Federation.

Each of these authorities, in the course of the appointment process, described in Chapter III, disqualifies a significant number of candidates.[47] However, once the Presidential Commission has selected the final list of candidates, the President of the Russian Federation in practice, almost invariably appoints those candidates, acting as the final instance in the appointment process.

Qualification Collegia of Judges

Functions

Qualification Collegia of Judges are "bodies of the judicial community" under Russian law.[48] They have a number of functions,[49] including an important role in

[45] *Ibid.*, para. 49.

[46] Concluding Observations of the Human Rights Committee on Tajikistan, UN Doc. CCPR/CO/84/TJK, para. 17; See also Concluding Observations of the Human Rights Committee on Honduras, UN Doc. CCPR/C/HND/CO/1, para. 16.

[47] E.g. E. I. Chugunova, Problem of Formation of Judicial Manpower in Modern Russia.

[48] "Bodies of the judicial community" are a complex of judicial bodies established by the law that operate on the basis of federal constitutional and federal laws "to express the interests of judges as members of the judiciary" and to undertake the internal governance of the judiciary. These bodies are: All-Russian Congress of Judges; conferences of judges of the Subjects of Russia; Council of Judges of Russia; councils of judges of the Subjects of Russia; general meetings of judges of courts; High Qualification Collegium of Judges of Russia; qualification collegia of judges of the Subjects of Russia; High Examination Commission responsible for judicial qualifying examination. Federal Law No. 30–FZ of 14 March 2002 (as amended on 12 March 2014) "On bodies of the judicial community in Russia", Article 3, paras. 1 and 2. For more information see: *Securing justice: The disciplinary system for judges in Russia.* Report of an ICJ mission, *op. cit.*, p. 14.

[49] See Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in Russia," Article 4 for further information about functions of the bodies of the judicial community.

the appointment of judges.[50] The Qualification Collegia of Judges (QCJs) are the first in the chain of authorities responsible for selection of candidates.[51] Among other functions,[52] they consider applications for judicial positions and, having regard to the qualifying exam results, recommend or reject such candidates for the position.[53]

QCJs also consider proposals of the court presidents of the relevant court[54] to approve the appointment of judges as members of their respective Presidiums and submit their opinion[55] on such appointments to the Plenary of the Supreme Court of the Russian Federation. QCJs further decide on proposals by the Presidents of the relevant Courts[56] to approve the appointment of Presidents of Civil and Criminal Chambers and other Chambers and submit their opinions for approval by the President of the Supreme Court of Russia.[57]

QCJs place media announcements about judicial vacancies,[58] thus initiating the process of selection of a judicial candidate. They do an initial verification of the authenticity of biographical and other information submitted, and they may seek and obtain any other information from other State institutions and agencies to decide on whether to recommend a candidate for appointment.[59]

Composition

Each QCJ is composed of thirteen judges of local and regional courts, seven "representatives of the public" and one representative of the President of the Russian Federation (citizens who are public officials in Russia).[60] QCJ members are elected for a term of four years.[61] Judges-members of QCJs are elected by a secret ballot at a Conference of Judges,[62] and between conferences by the Council of Judges.[63]

Representatives of the public are appointed by the regional legislatures based on regional law.[64] While the federal law does not define the notion the "rep-

50 See Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in Russia," Article 4.3.

51 They select judges of the Supreme Court of the Republics, kray and regional courts and courts of cities with federal subject status, court of autonomous region and courts of autonomous areas, commercial courts of the Subjects of Russia, justices of the peace, judges of district courts (including district court presidents and deputy presidents), as well as, where the laws of the Subjects of the Russian Federation provide so—judges of the constitutional (charter) courts of the Subjects of Russia. See Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in the Russian Federation", Article 19 para. 1.

52 Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in the Russian Federation", Article 19.

53 *Ibid.,* Article 19 para. 2 (1).

54 Supreme Courts of Republics, kray and regional courts, courts of cities with federal subject status, court of autonomous region and courts of autonomous areas.

55 Federal Law No. 30–FZ of 14 March 2002 "On the bodies of the judicial community in the Russian Federation", Article 19 para. 2 (1/1).

56 Supreme Courts of Republics, kray and regional courts, courts of cities with federal subject status, court of autonomous region and courts of autonomous districts.

57 Federal Law No. 30–FZ of 14 March 2002 "On the bodies of the judicial community in the Russian Federation", Article 19 para. 2 (1.2).

58 *Ibid.,* Article 19 para. 2 (3); Article 19 para. 2 (4); Article 17 para. 2(3).

59 *Ibid.,* 19 para. 2 (1); 19 para. 2 (4).

60 *Ibid.,* Article 11 para. 1.

61 *Ibid.,* Article 13 para. 1.

62 *Ibid.,* Article 11 para. 6.

63 *Ibid.,* Article 11 para. 6.

64 *Ibid.,* Article 11 para. 6.

resentative of the public", regional legislation typically construes it extremely broadly, including deputies of legislative bodies of the regions, representatives of the executive and municipalities.[65] In most regions the main bodies that can recommend candidates are "public associations" and "labour collectives." However, in no region is there legislation which specifies any criteria for such associations or collectives.[66] An analysis of practices of 58 regions of Russia demonstrated that most of "the representatives of the public" are legal scholars including university professors (37.6%), commercial structures (34.4%), pensioners including former judges or prosecutors (13.7%), state officials (4%), labour unions (2.4%) and NGOs (1.6%).[67]

All further steps following nomination—from consideration of candidates to their appointment—are performed by members of the legislature, members of the judicial community or the senior regional officials.[68] The mission was told that regional legislation, which should regulate this area, often does not exist. Indeed, the procedure for appointing the "representatives of the public" suffers from vagueness or absence of universal legislation, while practice fails to protect against manipulation or appointment of candidates desired by the judicial community or public authorities.[69]

Under the law, QCJs are not accountable to their electing bodies for any decisions made.[70] The law requires, in broad terms, that when carrying out their responsibilities as members of QCJs and in their external relationships, representatives of the public or representatives of the President of the Russian Federation should avoid any conduct which could detract from the authority of the judiciary or raise doubts as to their objectiveness, fairness or impartiality.[71]

The powers of QCJ members who are representatives of the public may be prematurely terminated by a decision of the regional legislature,[72] for commission of a dishonourable act or in cases of systematic failure to discharge their responsibilities.[73] The powers of the representative of the President of the Russian Federation on the QCJ may be terminated only by the President.[74] The law does not specify the grounds for termination of the representative of the President. The decision on premature termination of the powers of a judge-member of the QCJ is made by the Congress of Judges and, in the period between Congresses of Judges, by the relevant Council of Judges.[75] The powers of a judge-member of the QCJ may also be prematurely terminated on their initiative, or in the case of disciplinary misconduct, or due to their absence at sessions of the QCJs for a period of four consecutive months without a valid reason.[76]

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65 Moscow Helsinki Group Report *The Role of the Public in Increasing the Independence and Effectiveness of Justice in Russia,* pp. 19–20.

66 *Ibid.,* p. 20.

67 *Ibid.,* p. 29.

68 *Ibid.,* p. 42.

69 *Ibid.,* pp. 26, 42.

70 Federal Law "On the bodies of the judicial community in the Russian Federation", *op. cit.*, Article 5 para. 2.

71 *Ibid.,* Article 11 para. 8.

72 *Ibid*.

73 *Ibid*.

74 *Ibid*.

75 *Ibid.,* Article 11 para. 7.

76 *Ibid*.

The mission heard criticism as to the selection of "representatives of the public" to serve on QCJs. According to the law, representatives of the public must be Russian citizens who have reached the age of 35, have higher education, have not committed "dishonourable acts",[77] do not hold any public positions and are not heads of organizations or other agencies, lawyers or notaries.[78]

An expert researcher on this topic reported to the mission that the public is sometimes represented by people who do not have appropriate expertise. It was said that the minimum requirements for membership and, especially, the practice in such appointments, do not ensure that members of the QCJs, including members of the public, are those best equipped to carry out this important social and public function independently and to resist the pressures of the judicial hierarchy.

Undue influence and lack of transparency

Transparency in public administration generally, and in the administration of justice in particular, is a fundamental rule of law principle. The public must be able to know both the content of decisions and actions and the manner in which they are carried out, as, in a democratic society, these are purportedly carried out in the public's name and interest. The principle is reflected in a recommendation by the Council of Europe's the Committee of Ministers, which states that "[c]ouncils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions."[79]

The composition of QCJs ensures a majority of judicial members, in accordance with international standards on judicial independence. Russian legislation includes some additional guarantees of independence of QCJs. These include stipulations that Presidents and deputy presidents of courts must not be members of QCJs; [80] that members of the QCJ cannot be elected as chair or deputy chair for more than two consecutive terms; [81] and that a QCJ can operate only if it is composed of at least two-thirds of its members.[82]

Despite these legal guarantees and the broad powers they exercise over judges under law, QCJs may be subjected and susceptible to pressures and informal influences from the judicial hierarchy. In particular, it was reported to the ICJ mission that QCJs are dependent on court presidents and exposed to pressures from them.[83] Court Presidents play a significant role in the composition of QCJs.

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77 The law does not define the term "dishonourable act." Furthermore, there is a lack of clarity regarding the procedures to be followed when making a finding of such act, or the applicable criteria. For instance, it is not clear whether such act should be committed as a part of professional activity or private life; or whether any statute of limitations applies.

78 Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in Russia", Article 11 para. 8.

79 Recommendation CM/Rec(2010)12 of the Committee of Ministers , *op. cit.*, para. 28.

80 Federal Law "On the bodies of the judicial community in the Russian Federation", *op. cit.*, Article 11, para. 7.

81 *Ibid*.

82 See the Regulation on Qualification Collegia of Judges, Article 2 para. 1. Note that, to date, no amendments have been introduced into the above Regulation in view of the abolishment of the High Arbitration Court of Russia. For this reason, the Regulation still mentions the President of the High Arbitration Court of Russia. The necessary amendments are likely to be introduced shortly. For this reason, this Report does not analyze any procedures involving the President of the High Arbitration Court.

83 See the Moscow Helsinki Group Report *The Role of the Public in Increasing the Independence and Effectiveness of Justice in Russia,* p. 15.

They also carry out a number of informal functions to determine the list of representatives of the public to be appointed to the QCJ. For instance, Presidents of Regional Courts approve the list of representatives of the public.[84] The ICJ has received reports of members of QCJs voting for candidates who had been pre-approved outside of the QCJ; it is not however in a position to confirm these reports.

Representatives of the public may also receive bonuses from court presidents, providing a further channel of influence.[85] It was reported to the mission that in practice, representatives of the public on QCJs often do not make independent decisions, and sometimes have little influence on the decision-making process even if they do act independently.

As regards the judge-members of QCJs, it should be noted that the internal justice system administration operates under a rigid and strict hierarchy.[86] There may be pressure for these judges to vote as expected by their superiors, court presidents, on whom they are dependent. In general, it was said that court presidents may have, informally, a decisive role in QCJ decision-making and that once a candidate has been approved by a court president, the matter is effectively decided.[87] In response to criticism of such practices, an independent expert and former judge with whom the mission met, asked about the decisive influence of court presidents on selection of judges: "but who would one entrust these functions if not court presidents, the people who have to have long-term vision for their courts?" The question, which seems to reflect a general way of thinking in Russian judicial culture, underscores the difficulty of ensuring independence in the decision-making in the judicial selection process of QCJs.

The concerns reported to the mission regarding the powers of court presidents over QCJs suggest that, despite guarantees in national law, these bodies may in practice fail to comply with international standards on the independence of the institutions with responsibility for the selection, appointment, and promotion of judges.

Representatives of the public and the representative of the President of Russia were introduced on QCJs in 2002[88] as an attempt to overcome judicial "corporatism"[89] in the appointment process[90] and, as has been suggested by one expert, to make judges accountable not only to their peers, but also to the public

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84 See *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, 2012, *op. cit.*, pp. 19–20

85 *Ibid.* p. 19.

86 "The practice of the president directing instructions as to the expected outcome of cases is said to be routine. However, as was stressed often, there is no need to give instructions in every case, as judges are aware of the expectations. If the expectations are not met, a decision may be revoked and a judge may face disciplinary measures due to a poor record, pushing justice to the sidelines". (*The State of the Judiciary in Russia,* ICJ Mission Report, 2010, p. 27).

87 Also see: *How to ensure independence of judges in Russia,* Institute for the Rule of Law, http://www.enforce.spb.ru/images/analit_zapiski/pm_1207_judge_independence_web.pdf, p. 11.

88 Pursuant to the 2002 amendments to the Federal Law "On the bodies of the judicial community in the Russian Federation".

89 In its Decision No. 412-O of 5 May 2003, the Constitutional Court clarified that representatives of the public were made members of the QCJ to guarantee the independence of the latter, as such representatives are not vested with any State authority and do not function as representatives of State agencies, including legislative bodies. Furthermore, the Court noted that the lack of explicit reference to members of the legislative bodies of the Subjects of Russia should not mean that one person may hold such positions at the same time (Decisions Nos. 411–O and 412–O of 5 May 2003).

90 O.A. Schwarz, Legal status of judges // http://www.indem.ru/Proj/SudRef/prav/PraStaSu.htm.

in general.[91] However, changing the composition of the QCJs has so far failed to increase their accountability to the public,[92] not least due to the procedure of selection and appointment of the members of the public to the QCJs.

The Moscow Helsinki Group report also criticizes lack of transparency in the QCJ process and notes that it has become common for Presidents of the QCJ or regional legislative bodies to require that members not disclose the agenda of the QCJ meetings or its decisions.[93] For instance, candidates for membership of QCJs in the Rostov Region are required to sign a written undertaking to comply with the provisions of Article 11 para. 8 of the Federal Law "On bodies of the judicial community", referring to the obligation of non-disclosure.[94] One reported mechanism deployed is the sanctioning of QCJs for "improper conduct" where they disclose information. The introduction of representatives of the public in QCJs has failed to increase their openness.[95]

Representatives of the Russian President participate in the QCJs, which necessarily heightens the real and perceived influence of the executive on the selection process. In 2014, the UN Special Rapporteur on the Independence of Judges and Lawyers underscored the inherent impropriety of such involvement: "[t]he Special Rapporteur considers that any representation from the executive, and to the extent possible the legislative, should be avoided. An appointment body that is independent of both the executive and legislative branches of Government is essential in order to counter politicization in the appointment of judges and minimize the likelihood of judges having improper allegiance to interests other than those of fair and impartial justice."[96]

The High Qualification Collegium of Judges of the Russian Federation

Functions

The High Qualification Collegium of Judges (HQCJ), a "body of the judicial community" under national law, is the main authority responsible for selection of candidates for the highest and certain intermediate levels[97] of the judicial system.[98] In particular,[99] it considers applications for the office of the President of the Supreme Court[100] and submits its opinion on these applications to the President of the Russian Federation.[101] It also considers applications for various

91 O. A. Schwarz, Legal status of judges // http://www.indem.ru/Proj/SudRef/prav/PraStaSu.htm.

92 See the Moscow Helsinki Group Report *The Role of the Public in Increasing the Independence and Effectiveness of Justice in Russia,* p. 40.

93 See *Ibid.*, p. 41.

94 See *Ibid.*

95 See *Ibid.*, p. 6.

96 Report of the Special Rapporteur on Independence of Judges and laweyrs, Mission to the Russian Federation, 30 April 2014, A/HRC/26/32/Add.1, para. 18.

97 Other than judges of the Supreme Courts of Republics, kray and regional courts, courts of cities with federal subject status, court of autonomous region or courts of autonomous areas.

98 It selects judges of the Supreme Court of Russia, commercial area courts and commercial courts of appeal, Intellectual Property Court and military courts.

99 Federal Law No. 30–FZ of 14 March 2002 "On the bodies of the judicial community in the Russian Federation", Article 17 para. 2.

100 The recent judicial reform resulted in an abolishment of the position of the President of the High Commercial Court.

101 Federal Law "On the bodies of the judicial community in the Russian Federation", *op. cit.*, Article 17 para. 2 (1).

other judicial offices.[102] The HQCJ submits its opinion on these applications to the President of the Supreme Court.[103]

The HQCJ also considers the proposals of the Supreme Court President regarding nomination of the Supreme Court judges to be appointed members of the Supreme Court's Presidium by the President of the Russian Federation, and submits its opinion to the Supreme Court President.[104]

Given these responsibilities, the HQCJ must be considered as one of the most critical institutions in the judicial appointment process. If it were to conduct itself forcefully and with independence, it could play a leading role in safeguarding judicial independence. Its function in advising on the composition of the Supreme Court and appointment of its President confers considerable responsibilities on this body. The mission was informed, however, that the HQCJ shares many of the same flaws as regional QCJs and lacks independence in decision-making and general functioning.

Composition

The HQCJ is composed of 29 members[105] elected by a secret ballot for a period of four years[106] at a Congress of Judges.[107] The HQCJ is composed of 18 judges of various courts,[108] 10 representatives of the public[109] (appointed by the

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102 The office of the First Deputy President of the Supreme Court; Presidents of the Judicial Chambers of the Supreme Court; President and Deputy President of the Chamber of Appeals of the Supreme Court; judges of the Supreme Court; Presidents and Deputy Presidents of other federal courts (other than district courts); judges of commercial area courts and commercial courts of appeal; Intellectual Property Court; and military courts.

103 Federal Law "On the bodies of the judicial community in the Russian Federation", *op. cit.*, Article 17 para. 2(2).

104 *Ibid.,* Article 17 para. 2 (2.1).

105 *Ibid.,* Article 11 para. 2.

106 *Ibid.,* Article 13 para. 1.

107 *Ibid.,* Article 11 para. 3.

108 As of 20 October 2014, these members were:President of the HQCJ—Mr N. V. Timoshin (judge, President of the Panel, member of the Supreme Court's Presidium); Deputy President of the HQCJ—Mr S.I. Klyukin (President of the Volgo-Vyatskiy Area Federal Commercial Court); Mr A. A. Sboyev (President of the 3rd Circuit Military Court); Mr V. V. Batsiyev (President of the High Commercial Court's Panel); Mr V. A. Belov (President of the Krasnodarskiy Kray Commercial Court); Mr O. A. Derbilov (Deputy President of the Leningradskiy Circuit Military Court); Mr V. I. Zheltyannikov (President of the 13th Commercial Court of Appeal); Ms S. V. Izotova (President of the Commercial Court for S.-Petersburg and the Leningradskiy Region); Mr A. A. Kaygorodov (President of the Tomsk Regional Court); Ms T. E. Korchashkina (judge of the Supreme Court of Russia); Ms V. V. Kudryashova (Deputy President of the S.-Petersburg City Court); Ms L. R. Litventseva (President of the 8th Commercial Court of Appeal); Ms N. P. Lysyakova (President of the Ulyanovsk Regional Court); Ms A. A. Makovskaya (judge of the High Commercial Court of Russia); Mr A. V. Orlov (President of the Federal Commercial Court for the Far Eastern Area); Mr V. A. Osin (Deputy President of the Moscow Circuit Military Court); Mr V. M. Suvorov (President of the Kemerovo Region Commercial Court); Mr A. D. Chernov (President of the Krasnodarskiy Kray Court).

109 As of 20 October 2014 these were: Ms N. A. Sheveleva (S.-Petersburg State University, Faculty of Law, Dean, Head of the Public and Administrative Law Department); Mr I. A. Tarkhanov (Kazan State University, Faculty of Law, Dean); Mr A. N. Tarbagayev (Sibirskiy Federal University, Institute of Law, Head of the Criminal Law Department); Mr B. V. Rossinskiy (Russian Academy of Law under the Ministry of Justice of Russia, Vice-President for Academic Affairs, Head of the Administrative Law Department); Mr S. V. Nikitin (Russian Academy of Justice, Vice-President for Academic and Educational Affairs); Mr V. V. Yeremyan (Peoples' Friendship University of Russia, Faculty of Law, Professor at the Constitutional and Municipal Law Department); Mr I. G. Dudko (Ogarev Mordovia State University, Head of the Public and Administrative Law Department); Mr Zh. A. Dzhakupov (All-Russian NGO "Association of Lawyers of Russia", Board President); Mr I. Ya. Kazachenko (Ural State Academy of Law, Head of the Criminal Law Department); Mr V. A. Musin (S.-Petersburg State University, Faculty of Law, Head of the Civil Procedure Department).

upper chamber of the Parliament) and one representative of the President[110] of Russia.[111] Judges-members of the HQCJ are elected by a majority of the Congress delegates, provided that votes have been cast by more than one half of the Congress delegates from the respective courts.[112] Judge-members of the HQCJ are elected by the Council of Judges between the sessions of the Congress.[113] The President and Deputy Presidents of the Supreme Court are not eligible for election to the HQCJ.[114] The HQCJ is not accountable to its electing bodies for any decisions made.[115]

The powers of a representative of the public may be prematurely terminated by the upper chamber of the Parliament, while those of the representative of the President of Russia may be prematurely terminated by the President alone.[116] The powers of judges-members of the QCJs may be terminated by the decision of the Conference of Judges or (in-between Conferences) by the respective Council of Judges.[117]

The HQCJ can carry out its functions only if it is constituted of at least two-thirds of its members provided by law regardless of the representation balance.[118] The Chair and deputy chair of the HQCJ are elected by a majority of votes[119]and may serve no more than two consecutive terms.[120] Notably, at least over the last decade, the HQCJ has been headed by Supreme Court judges.[121]

Examination Commissions

Functions

Two types of examination commissions (ECs) on qualification exams for judicial office (examination commissions of the Subjects of the Russian Federatio at regional level, and the High Examination Commission at federal level)[122] act to test a candidate's knowledge, experience and skills necessary for a judicial position.[123] Examination commissions were created by legislative amendments

110 Mr A. Yu. Fedorov (Head of the Civil Service and Human Resources Directorate under the President of the Russian Federation).

111 Federal Law "On the bodies of the judicial community in the Russian Federation", *op. cit.*, Article 11 para. 2.

112 *Ibid.,* Article 11 para. 3.

113 *Ibid.,* Article 10 para. 1 (3).

114 *Ibid.,* Article 11 para. 7.

115 *Ibid.,* Article 8 para. 2.

116 *Ibid.,* Article 11 para. 8.

117 *Ibid.,* Article 11 para. 7.

118 See Regulation on Qualification Collegia of Judges, adopted by the High Qualification Collegia of Judges of the Russian Federation on 22 March 2007, Article 2 para. 1.

119 *Ibid.,* Article 10 para. 5.

120 Federal Law "On the bodies of the judicial community in the Russian Federation", *op. cit.*, Article 11 para. 7.

121 In 1993-2000, Mr Zherebtsov (President of the Ulyanovsk Regional Court) acted as the first chair of the HQCJ, http://www.uloblsud.ru/index.php?option=com_content&task=view&id=907&Itemid=82;
In 2000–2012, the HQCJ was headed by Mr Kuznetsov (judge, President of the Supreme Court's Panel, member of the Supreme Court's Presidium); http://pravo.ru/news/view/81016/; since 2012, the HQCJ has been headed by Mr Timoshin elected at VIII All-Russian Congress of Judges. http://pravo.ru/news/view/81016/.

122 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 5 para. 4.

123 *Ibid.,* Article 5 para. 2(2.1).

of 2002[124] as a response to the problem of inadequate selection procedures for judges.[125] In 2011, following amendments to the law, they became independent bodies of the judicial community.[126] As this report was being drafted, legislative amendments, which would make ECs bodies that operate under the authority of relevant courts, were submitted to the Parliament by the Supreme Court.[127]

Composition

ECs are composed of judges of various courts,[128] professors of law, researchers holding a degree in law, as well as representatives of All-Russian public associations of lawyers.[129] Professors, researchers and representatives of NGOs receive remuneration for their work on the ECs.[130] Secretaries of the Commission are officers of the Judicial Department under the Supreme Court of Russia, or officers of a body that forms part of its system but do not vote.[131]

Members are elected by Regional Congresses of Judges in accordance with the procedure established by the Congresses of Judges on the basis of their Rules of Procedure. Congresses of Judges further determine the number of their members, having regard to the necessary rates of representation of judges from the respective courts,[132] as well as other categories of commission members.[133] Judges-members are elected upon the proposal of Presidents of Courts.[134] Other members are elected upon the proposal of court presidents[135] from among the candidates proposed to them by higher education institutions, research organizations and All-Russian public associations of lawyers.[136] Presidents of the respective courts[137] must propose at least two candidates

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124 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*

125 See among others: Vyacheslav Lebedev, President of the Supreme Court of the Russian Federation, *The examination before the profession,* http://www.rg.ru/2009/09/30/lebedev.html [rus].

126 Federal Law No. 388–FZ of 03 December 2011 "On Amendments to Certain Legislative Acts of the Russian Federation in connection with the improvement of the operation of the Examination Commissions for qualifying examination for the position of a judge"

127 Draft law No. 314591–6, http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/24F05A30AB337FE-143257BA60043BF47/$FILE/314591-6.PDF?OpenElement.

128 Judges of courts of general jurisdiction and judges of commercial courts; moreover, their respective representation in the relevant examination commission should be equal and they should make up at least 3/4 of all members of the examination commission.

129 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 11.1 para. 1.

130 *Ibid.*

131 *Ibid.,* Article 11.1 para. 13.

132 Supreme Court of Republic, kray or regional court, court of the city with federal subject status, court of autonomous region or autonomous area, as well as commercial court of the Subject of the Russian Federation and district courts.

133 Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in Russia", Article 11.1 para. 6.

134 Supreme Court of Republic, kray or regional court, court of the city with federal subject status, court of the autonomous region or autonomous area, as well as commercial court of the Subject of the Russian Federation (Federal Law "On bodies of the judicial community in the Russian Federation", *op. cit.*, Article 11.1 para. 9(1)).

135 Supreme Court of Republic, kray or regional court, court of the city with federal subject status, court of the autonomous region or autonomous area, as well as commercial court of the Subject of Russia.

136 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 11.1 para. 9(2).

137 Supreme Court of Republic, kray or regional court, court of the city with federal subject status, court of the autonomous region or autonomous area, as well as commercial court of the Subject of Russia.

for each position open at the EC.[138] The procedure for proposing candidates to the EC is governed by the Rules of the Conference of Judges of the Subject of Russia.[139] The role of Court Presidents in forming the composition of ECs is thus rather significant.

The powers of judge-members[140] and other members[141] of the EC can be terminated prematurely. The decision on the premature termination of powers of members of the commissions is made by Congress of Judges and, in the period between Congresses of Judges, by the relevant Council of Judges. Where the powers of a member of the commission have been terminated prematurely, they should be replaced by another member elected by the relevant Council of Judges up to the expiry of the powers of the EC. Chairs and deputy chairs are elected by the ECs from among their members.[142]

The creation of the ECs in 2002 was said to be a step forward and to have improved the qualification procedure for judges which had previously suffered from lack of quality and uniformity of the standards applied. The examination procedure is considered in detail in Chapter III. However, it should be noted here that the mission also heard that the creation of ECs had not brought the desired effect and that many of the previous flaws remained in place, including poor quality of assessment and a lack of insulation against external influence.

The mission heard that the work of the ECs is not transparent and, as with the QCJs, court presidents have significant powers in shaping the composition of ECs. Indeed, as was described above, they nominate judges, academic lawyers, researches and representatives of the All-Russian public associations of lawyers to be elected to the ECs.[143] Court presidents were said to sometimes use their powers to form ECs according to their needs rather than based on clearly established criteria, which exclude personal preferences.

High Examination Commission on Qualifying Exams for a Judicial Office

The High Examination Commission on Qualifying Exams for a Judicial Office ("HEC") is composed of 21 members[144] elected by the All-Russian Conference of Judges by a secret ballot[145] for a period of four years.[146]

The HEC is composed of 16 judges representing various courts, four professors of law and researchers and one representative of All-Russian public associa-

138 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 11.1 para. 10.

139 *Ibid.*

140 On their own initiative or in case of disciplinary misconduct, or due to their absence at sessions of the commission for a period of four consecutive months without a valid reason (Federal Law No. 30–FZ of 14 March 2002 "On bodies of the judicial community in Russia", Article 11.1 para. 12).

141 On their own initiative or in case of criminal of administrative misconduct as determined by the final decision of the competent authority, or due to their absence at sessions of the commission for a period of four consecutive months without a valid reason (Federal Law No. 30-FZ of 14 March 2002 "On bodies of the judicial community in Russia", Article 11.1 para. 12).

142 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 11.1 para. 13.

143 *Ibid.,* Article 11.1 paras. 8 and 9.

144 *Ibid.,* Article 11.1 para. 5.

145 *Ibid.,* Article 11.1 para. 8.

146 *Ibid.,* Article 13 para. 1.

tions of lawyers.[147] Judge-members of the HEC are elected at separate meetings of delegates from various courts[148] upon the proposal of the Supreme Court President.[149] Other members are elected upon the proposal of the Supreme Court President from among candidates proposed to him or her by higher education institutions, research organizations and All-Russian public associations of lawyers.[150] The Supreme Court President must propose at least two candidates for each position open at the HEC.[151] The procedure for proposing candidates to the HEC is governed by the Rules of the All-Russian Conference of Judges.[152] These Rules establish the procedure for electing members to the HEC by the Council of Judges of the Russian Federation between meetings the All-Russian Congress of Judges, as well as for electing new members to replace those members who leave the HEC between the sessions of the Congress of Judges.[153]

Commission under the President of the Russian Federation for preliminary consideration of judicial candidates for federal courts

Function

The Commission under the President of Russia for preliminary consideration of candidates for federal courts ("the Presidential Commission") is an advisory body constituted under the President of the Russian Federation.[154] The Commission was established in 1994 and is not a body of the judicial community according to the law, despite its decisive powers in shaping the composition of the judiciary.

The Presidential Commission helps the President to select, evaluate and appoint federal judges.[155] Its principal objectives are: a) with regard to the position of the authorized representatives[156] of the President of Russia in federal

147 *Ibid.,* Article 11.1 para. 5.

148 Courts of general jurisdiction and commercial courts.

149 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 11.1 para. 8 (1).

150 *Ibid.,* Article 11.1 para. 8(2). Due to the abolishment of the High Commercial Court, reference to its President has been removed from Article 11.1 para. 8 of the above law. For this reason, delegates from judges of both courts of general jurisdiction and commercial courts shall be selected upon the proposal of the Supreme Court President.

151 *Ibid.,* Article 11.1 para. 10.

152 *Ibid.,* Article 11.1 para. 11.

153 Council of Judge's Presidium's Decision No. 289 of 1 February 2012 "On Rules for proposal and election of candidates to the High Examination Commission on Qualifying Exam for a Judicial Office", Article 2. Please note that, as of the date hereof, no amendments have been introduced into the above Regulation in view of the abolishment of the High Commercial Court. For this reason, the Rules still mention the High Commercial Court President. The necessary amendments are likely to be introduced shortly. For this reason, this Report does not analyze procedures involving the High Commercial Court President.

154 See Decree No. 1185 of the President of Russia of 4 October 2001 "On the Commission under the President of Russia for preliminary consideration of candidates for federal courts", para. 1.

155 Direction No. 400–rp of the President of Russia of 25 July 1994 "On approving the Regulation on the Commission of the Council for Personnel Policy under the President of Russia for preliminary consideration of candidates for federal courts." The Direction was revoked upon the adoption of Decree No. 1185 of the President of Russia of 4 October 2001 "On the Commission under the President of Russia for preliminary consideration of candidates for federal courts."

156 Authorized representative is a federal public officer belonging to the President's Administration, appointed and dismissed by the President of Russia upon the proposal of the Head of the President's Administration for the period identified by the President but not exceeding the President's term of office. The authorized representative is subordinate immediately to the President of Russia and accountable to him. See Decree No. 849 of the President of Russia 13 May 2000 "On authorized representative of the President of Russia in a federal area."

areas[157] elaborating recommendations to propose judicial candidates for federal courts, including for the offices of their presidents and deputy presidents; b) drafting proposals to improve laws and regulations pertaining to the procedure for selection of judicial candidates for federal courts and the procedure for conferring powers on federal judges; c) drafting proposals aimed at improving uniform public policy for selection of judicial candidates for federal courts.[158]

Composition

Members of the Commission are selected by the President.[159] Concerns have been raised as to the composition of the Commission, which consists largely of representatives of law-enforcement authorities and security agencies.[160] Currently, it consists of eight executive or law enforcement representatives, five members of the judiciary, two representatives of the Parliament and five representatives of other agencies.[161] This composition means that judges are in reality selected for appointment by the executive, including law enforcement representatives. Certain governmental authorities which may on occasion be parties in criminal, administrative and civil cases may effectively choose judges to their liking.[162]

Independence

The Presidential Commission, unlike the other bodies described above, is an organ of the Executive. Its operation and functions are not prescribed by any of the laws which regulate the operation of the judiciary. Due to lack of transparency, it is unknown what, if any, criteria it uses to evaluate and select the candidates.

Some experts with whom the mission met considered that the work of the Presidential Commission was part of the legitimate discretion of the President of the Russian Federation to appoint judges. This was the position adopted by the Constitutional Court of the Russian Federation, in a 2011 judgment.[163] However, many experts expressed concern to the mission as to the selection of judges by a non-judicial body.[164] This concern is also reflective of international standards stipulating that, while it may be appropriate for the executive to act formally as a final appointing authority, such an appointment should generally follow without alteration the advice of an independent body. The Venice Commission said in particular: "[a]s long as the President is bound by a proposal made by an independent judicial council, the appointment by the President does not appear to be problematic."[165]

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157 A federal public officer belonging to the President's Administration. See Decree No. 849 of the President of Russia 13 May 2000 "On authorized representative of the President of Russia in the federal area" for more details about the authorized representatives of the President of Russia in federal areas."

158 Decree No. 1185 of the President of Russia of 4 October 2001 "On the Commission under the President of Russia for preliminary consideration of candidates for federal courts", para. 3.

159 Order "On the Commission for preliminary consideration of candidates for judicial positions of federal courts", *op. cit.*, para. 7.

160 The Commission for preliminary consideration of candidates for judicial positions of federal courts, http://state.kremlin.ru/commission/2/staff.

161 *Ibid.*

162 Institute for the Rule of Law, *How to ensure independence of judges in Russia,* http://www.enforce.spb.ru/images/analit_zapiski/pm_1207_judge_independence_web.pdf, p. 16.

163 Decision of the Constitutional Court of the Russian Federation No. 190–O–O of 27 January 2011, Decision of the Constitutional Court of the Russian Federation No. 1805–O–O of 21 December 2011.

164 E.g. Institute for the Rule of Law, *How to ensure independence of judges in Russia, op. cit.*, p. 16.

165 Judicial Appointment, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16–17 March 2007), para. 14.

As noted above, the Committee of Ministers of the Council of Europe has indicated that "[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers."[166] Neither of these basic requirements are satisfied by the Commission.[167] The same Council of Europe standards do acknowledge that the Head of State, government or legislature may, in some systems, make decisions concerning the appointment or career of judges. However, in such circumstances "an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice" (emphasis added). In the case of the Russian system, however, the ICJ notes that the Presidential Commission excludes 10 or 20 per cent of candidates[168] or according to some estimates experts the number is even higher. The Commission, consisting of members of the executive and law enforcement agencies, therefore effectively determines the composition of the judiciary, which is contrary to the international standards on the independence of the judiciary.

166 CoM Recommendation (2010)12, *op. cit.*; European Charter on a Statute for Judges, *op. cit.*, para. 3.1 and 1.3.

167 K. Titayev, I. Grigoriev, *Extra Jus: The Secret of the Judicial Chair,* http://www.enforce.spb.ru/publikatsii-sotrudnikov/mi-v-smi/5696-k-titaev-i-grigorev-extra-jus-tajna-sudejskogo-kresla.

168 *Ibid*.

III. SELECTION AND APPOINTMENT OF JUDGES

Introduction

This chapter examines the process of selection for judicial positions in the Russian Federation and the criteria the criteria which candidates for such positions must satisfy. The following stages are described: announcement of the vacancy by a court president, qualification criteria, examination procedure, further recommendation by the QCJ. The final stage, the Presidential Commission is then considered. It is this Commission that makes the final selection of the candidate for a judicial position, which may be finally approved by the President.

International standards

As described above, the UN Basic Principles on the Independence of the Judiciary (the UN Basic Principles) require that "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives" and that promotions "should be based on objective factors, in particular ability, integrity and experience".[169] A range of sources of international standards make clear that the selection of judges should be based on objective and transparent criteria[170] and that such criteria should be focused on legal training, experience, and integrity.[171] The Venice Commission in this regard has affirmed the principle that: "all decisions concerning appointment and the professional career of judge should be based on merit, applying objective criteria within the framework of the law".[172] In the selection of judges, there must be no discrimination on any ground. A requirement that a candidate be a national of the country concerned is not considered discriminatory.[173]

The UN Human Rights Committee, in its General Comment on article 14 of the ICCPR, which concerns the right to a fair trial, has explained that the provision establishes the obligation on States to "take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the

169 UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principles 10 & 13; see also Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), paras. 10 and 14.

170 CoM Recommendation (2010)12, *op. cit.*, para. 44; UN Basic Principles on the Independence of the Judiciary (hereafter "UN Basic Principles on the Independence of the Judiciary"), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Principle 10; the ACHPR Principles and Guidelines, Section A, Principle 4 (i); European Charter on the Statute for Judges, Principle 2.1. See also Concluding Observations of the Human Rights Committee on Bolivia, UN Doc. CCPR/C/79/add.74, para. 34; Concluding Observations of the Human Rights Committee on Lebanon, UN Doc. CCPR/C/79/Add.78, para. 15; Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

171 UN Basic Principles on the Independence of the Judiciary, Principle 10; ACHPR Principles and Guidelines, Section A, Principles (4) (i)–(k); CoM Recommendation (2010) 12, *op. cit.*, paras. 44–45.

172 Venice Commission, Report on the Independence of the Judicial System, part I: Independence of Judges, CDL–AD(2010)004, 16 March 2010, para. 27.

173 UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 10; CoM Recommendation (2010)12,para. 45; ACHPR Principles and Guidelines, Section A, Principle 4 (j); Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWASIA Council in 2001, OP 13 (hereafter "Beijing Statement of Principles").

judiciary and disciplinary sanctions taken against them."[174] Thus the principle of judicial independence under the ICCPR extends to all aspects of the management of the careers of judges.

Requirements to be met by a candidate for a judicial position

The Constitution outlines general requirements which candidates for federal judicial positions must satisfy.[175] A candidate must:

(1) be a Russian citizen;

(2) have reached the age of 25;[176]

(3) have a degree in law; and[177]

(4) have at least five years professional legal experience.[178]

The following attributes will preclude a candidate from becoming a judge: a) criminal record, including where criminal proceedings were terminated on rehabilitative grounds;[179] b) foreign citizenship or residence permit or any other document certifying the right of the Russian national to reside, on a permanent basis, in a foreign State;[180] c) a medical condition obstructing the exercise of judicial functions.[181] In order to make sure that the judicial candidate does not suffer from any such medical condition,[182] a preliminary medical examination is carried out.[183]

Furthermore, a person is not eligible to be a judge if he or she is: a) declared legally incapable by the court;[184] b) suspected of or charged with a criminal offence;[185] c) a close relative or relative-in-law (spouse, parent, child, sibling, grandparent, grandchild, or spouse's parent, child or sibling) of the same court's President or Deputy President;[186] or d) registered with a drug abuse or neuropsychiatry clinic as a patient receiving treatment for drug, solvent or

174 General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), para. 19.

175 The Constitution of the Russian Federation, Article 119.

176 Judge of the Constitutional Court must be a citizen who has reached the age of 40 and has at least 15 years of professional legal experience; judge of the Supreme Court of Russia—who has reached the age of 35 and has at least 10 years of professional legal experience; judge of the Supreme Court of the Republic, kray or regional court, court of the city with federal subject status, court of autonomous region or court of autonomous area, circuit (fleet) military court, commercial area court, commercial court of appeal, specialized commercial court—who has reached the age of 30 and has at least 7 years of professional legal experience; judge of the commercial court of the Subject of Russia, constitutional (charter) court of the Subject of Russia, district court, garrison military court, as well as justice of the peace—who has reached the age of 25 years and has at least 5 years professional legal experience. See Federal Law "On the Status of Judges in the Russian Federation", Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of Russia", *op. cit.*, Article 4 para. 2.

177 The HQCJ has explained that a bachelor's degree is not sufficient for a judicial appointment, "licentiate" being the necessary degree. See: Commentary by the High Qualification Collegium of Judges of 18 March 2004 // Bulletin of the High Commercial Court of Russia. 2004. Issue 6.

178 The Constitution of the Russian Federation, Article 119.

179 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 4 para. 1 (2).

180 *Ibid.,* Article 4 para. 1 (3).

181 *Ibid.,* Article 4 para. 1 (6).

182 The list of diseases impeding a judicial appointment as approved by Decision No. 78 of the Council of Judges of the Russian Federation on 26 December 2002 consists of 32 diseases.

183 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 4 para. 1.

184 *Ibid.,* Article 4 para. 1 (4).

185 *Ibid.,* Article 4 para. 4.

186 *Ibid.,* Article 5 para. 8.

alcohol abuse, chronic and continuous mental disorder.[187] Psychodiagnostic examination to check use of drugs, solvent or alcohol abuse or chronic and continuous mental disorder is mandatory.[188] QCJs sometimes assess these tests to decide whether to recommend a candidate for the judicial office.[189]

Application for the examination

Any citizen who meets the above requirements[190] may take a judicial qualifying examination by lodging the relevant application with the competent examination commission.[191] In addition to the application, the following documents must be submitted:

a) candidate's ID as a Russian national;

b) completed questionnaire with biographical details of the candidate;

c) certificate of higher legal education;

d) candidate's employment record;

e) medical certificate that the candidate does not suffer from a medical condition preventing his or her appointment as a judge.[192]

The Examination Commission (EC) may not deny access to the qualifying examination to a candidate who has submitted all the documents listed above.[193] Judges[194] and Russian citizens who are not judges but have a PhD in law or LLD and hold a title of honour "dignified lawyer of Russia" are exempted from the qualifying exam.[195] The EC checks that the documents and information submitted by the candidate satisfy the requirements proscribed by law.

The ICJ heard of frequent instances in which a submitted degree certificate was hard to verify or aroused suspicion as to its validity. Experts referred to the general problem of corruption, including in educational institutions, and lack of control over standards in the numerous law faculties which have emerged in the last 20 years. Mistrust in medical institutions, which issue certification of medical condition, was also mentioned as a problem.[196] The President of the EC under the HQCJ has noted that "in practice, most issues arise in relation to the documents certifying higher legal education, professional legal experience and the lack of health conditions that would impede a judicial appointment."[197]

In these ways, the generally widespread problem of low-level corruption in the Russian Federation, and the consequent mistrust of institutions, may im-

187 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.,* Article 4 para. 1 (5).

188 See Decree No. 147 of the Judicial Department under the Supreme Court "On facilitating experimental use of psychodiagnostic methods when examining the personality of judicial candidates."

189 Case of A. A. Krylov, Decision of the HQCJ of 14 December 2011.

190 See Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 4 for more details concerning judicial candidate requirements.

191 *Ibid.,* Article 5 para. 3.

192 *Ibid.,* Article 5 para. 3.

193 *Ibid.,* Article 5 para. 3.

194 Except for judges who retired more than 3 years ago. Such judges must take another exam. See Regulation on Qualification Collegia of Judges, Article 21 para. 8.

195 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 4 para. 5.

196 V. V. Yershov, The then Chair of the ECJ, *Examination Commissions: high potential and serious challenges,* http://www.vkks.ru/publication/184/.

197 *Ibid*.

pede reliance on solid and verified information in the appointments process.[198] It appears that this lack of trust in the validity of documents to some extent results from another deformation of the procedure—a high level of reliance on informal checks of candidates (see further below). It may be the case that the demand for informal checks is created by the lack of trust in the initial check of documents, which in its turn makes the procedure even less transparent.

Examination

Upon their arrival at the examination, judicial candidates must present their ID to the Secretary of the EC. Then they should pick one of the examination cards, sheets of paper with examination questions printed on them, presented in random order. Candidates must prepare their answer in the same room during the time afforded to them by the EC.[199] The content of examination cards and written test depends on the kind and level of the judicial office candidates are seeking.[200] Examination cards for candidates for the courts of the Subjects of the Russian Federation (region) include questions related to the laws of the relevant region.[201]

The law specifies that the examination must consist of three theoretical questions in different fields of law, two cases to resolve and an assignment to draft a procedural document for a mock case.[202] This structure was said to be a recent improvement in response to the criticisms that the previous examination tasks failed to ascertain the necessary level of knowledge of the candidates. However, the mission was told on several occasions that the system has not significantly improved since this new structure was introduced. The ICJ heard that there is no universal standard applied in the examination and depending on the region, questions may vary from very basic to very difficult ones.

Candidates are given at least two hours to prepare their answers to the examination questions and draft the procedural documents.[203] They may use compilations of laws and reference materials during the examination.[204] Russian experts, including those with whom the mission met in Moscow, have asserted that the time allocated for the examination has been criticized by Russian experts is insufficient.[205] In the absence of a well-developed system of evaluation, it is difficult to fully determine whether the time is sufficient.

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198 In the 2013 Transparency International's Corruption Index, Russia was listed as 127 out of 175 countries: http://files.transparency.org/content/download/700/3007/file/2013_CPIBrochure_EN.pdf.

199 Regulation on examination commissions on qualifying examination for a judicial office, *op. cit.*, para. 4.3.

200 *Ibid.,* para. 3.1. At the time of publication of this report, no amendments have been introduced into the above Regulation in view of the abolishment of the High Arbitration Court of Russia. For this reason, the Regulation still mentions the President of the High Artibtration Court of Russia. The necessary amendments are likely to be introduced shortly. For this reason, this Report does not analyze procedures involving the President of the High Arbitration Court.

201 *Ibid*.

202 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 26.3 para. 3.

203 Regulation on examination commissions on qualifying examination for the judicial office, *op. cit.*, para. 4.4.

204 *Ibid*.

205 L. N. Rakitina, *Qualification examination for the position of a judge: issues related to ways of its improvement,* 2009.

The EC has discretion to ask additional questions of the candidate on the specialized judges' training programme.[206] The examination card number, questions and tasks it contains are recorded in the minutes of the EC meeting to be signed by its President and Secretary.[207] Once the candidate has answered all of the questions, these papers are attached to the minutes of the EC meeting to be stored in the archives of the EC for at least four years.[208]

Experts told the mission that the examination resembles exams that were at one in place for high schools, but have since been discarded. In this connection, comparison was unfavourably made to the newly introduced system of the Unified State Examination for high schools, which has a well-developed grading system, protection against leaks and universal approach to evaluation.[209]

Experts also told the mission that there was a problem of lack a unified, well-developed and well-thought through approach to testing knowledge of candidates.[210] One expert reassured the mission that if some of the best judges and lawyers in the Russian Federation were to take an examination in their region they would be sure to fail, as the questions are very difficult to answer. While a sophisticated examination is necessary, this may merely be the result of the lack of "infrastructure" for preparation for the examination and lack of predictability of as to the nature and content of the examination so as to allow for effective preparation.

The question remains whether there is a sufficiently sophisticated and complex examination, and whether it allows not only for legal knowledge to be tested, but also tests other relevant competencies, such as analytical skills. At the same time, there must exist sufficient materials and a unified approach to preparation and evaluation. For example, candidates often have difficulties drafting procedural documents.[211]

Lack of preparatory "infrastructure", including regularly updated certified comprehensive materials, text books and guides, needed for preparation for exams, in practice leads to inability of candidates to prepare in an effective way. While the particular assessment may vary depending on the region and a concrete EC, what is obvious is that the evaluation of candidates currently suffers from lack of unified standards, uneven evaluation and susceptibility to abuse. The two main concerns in this regard are an absence of a detailed system of preparation and training of candidates and the lack of a system of adequate or objective assessment of individual candidates. These systemic gaps allow for manipulation of the procedure, bias and personal preferences in evaluation and examination. It means that the examination often depends on the individual understanding of EC members, rather than on a fair and objective system in place, universally applied for all candidates. Justice Lebedev, President of the Supreme Court, has noted, outside of his judicial capacity, the

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206 Regulation on examination commissions on qualifying examination for a judicial office, *op. cit.*, para. 4.5.

207 *Ibid.,* para. 4.3.

208 See Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 26.3 para. 3.

209 Unified State Examination Website, http://ege.edu.ru/.

210 V. V. Ershov, *Examination Commissions: big potential and serious problems,* http://www.vkks.ru/publication/184/.

211 L. N. Rakitina, *Qualifying examination for a judicial office: the ways to improve it,* Russian Justice, 2009. Issue 8. pp. 57–59.

following problems in this regard: "[. . .] lack of proper legal regulation of their [ECs'] activities, a common standard of knowledge assessment of applicants for the position of judge, methods of organizing qualification examination, [and] Examination Commissions' disunity [. . .]".[212]

Bearing in mind the problems of the examination, some experts have recommended introducing a single examination once a year for candidates across Russia. This would require a unified approach to the examination and protection against leaks.[213] Whatever solution is adopted, there is a clear need for improvements to remedy the examination system's flaws and abuses.

Evaluation of examination papers

The EC makes a decision on the grade of a candidate without the presence of the candidate or any third party, by an open ballot and by simple majority.[214] The commission decides whether the candidate has passed the qualifying examination for a judicial office of the relevant kind and level or not.[215] The grades are awarded for oral answers and written tasks and may range from "excellent", "good" to "satisfactory" and "unsatisfactory".[216] The grades are similar to grades awarded to all students in their graduate or postgraduate studies.

The grades are awarded for each answer to the examination questions. Grades are recorded in the minutes of the EC to which the written tasks completed by the candidate are attached.[217] The examination results are announced on the date of the examination.[218] The EC issues a certificate indicating the qualifying results with grades. The qualifying results are valid for three years.[219]

There is a lack of precisely defined and sufficiently elaborated criteria for qualification as well as lack of a general understanding "the qualification parameters" for candidates.[220] The lack of established unified criteria when assessing the responses of judicial candidate is a problem recognized at the highest judicial level.[221] According to an expert, the Commission members inevitably estimate the examination results on the basis of their inner conviction. Given that the grading is awarded collectively,[222] the risks of the relevant decisions being unjustified is reduced. Nevertheless, the risk of arbitrarily applied criteria and/

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212 Vyacheslav Lebedev, President of the Supreme Court of the Russian Federation, *The examination before the profession,* http://www.rg.ru/2009/09/30/lebedev.html [rus].

213 "The Judge" Journal, *Modernization of the work of Examination Commissions,* http://zhurnalsudya.ru/archive/2011/3/?article=70&print=Y.

214 Regulation on examination commissions on qualifying examination for a judicial office, *op. cit.*, para. 4.6.

215 *Ibid.,* para. 4.8.

216 *Ibid.,* para. 4.6.

217 *Ibid.,* para. 4.7.

218 *Ibid*.

219 See Federal Law "On bodies of the judicial community in Russia", *op. cit.*, Article 26.3 para. 4.

220 E. V. Burdina, *Examination Commissions as Bodies of Judicial Community: the problems of orgnaiation and operation,* Eurasian Law Journal, № 11 (42) 2011, http://www.eurasialaw.ru/index.php?option=com_jcontentplus&view=article&id=2844:2012-03-15-04-04-20&catid=156:2010-08-18-06-47-30&Itemid=196.

221 Vyacheslav Lebedev, President of the Supreme Court of the Russian Federation, *The examination before the profession, op. cit.*

222 In accordance with the Regulation on Examination Commission of Judges decisions on the grades are taken by Examination Commissions in the absence of the applicant and other persons by an open vote by a simple majority (para. 4.6.). Based on the results of the examination, a decision is made on succeding or failure in the qualification examination for the position of a judge (para. 4.8.).

or manipulation during the examination is a significant concern.[223] Collective decision making does not seem to reduce such manipulation.

The Head of the HQCJ Professor V. V. Ershov identified, some 10 years ago, certain of the main problems of the qualification process, such as gaps in assessment of the analytical capacities of a candidate.[224] He found that this leads to the situation where "... in most cases responses to legal questions in law because of the gaps in it do not exist at all. What follows from this is that candidates cannot demonstrate knowledge of what is absent in law."[225]

The ICJ considers that lack of a well-developed universally applied system of comprehensive evaluation and guidance to the EC members across the country is one of the reasons for this regrettable situation. The ICJ notes the creation of a website of the HQCJ where approximate questions are posted as a positive step. Yet, it does not remedy the problems mentioned above.

Where a candidate is denied access to the qualifying examination, the relevant decision must be reasoned in writing.[226] Judicial candidates may appeal against the decision made by the EC.[227] In so far as the decisions of the ECs pertain to the assessment of the candidate's knowledge, they are only subject to appeal on the ground of procedural violations committed when making such decisions or in view of non-compliance with other qualifying examination requirements.[228] Most appeals considered in the course of the ICJ's research were lodged against refusals to grant access to the examination on formal grounds. Furthermore, a judicial candidate may appeal against the EC's decision denying him or her access to the qualifying examination, as well as against action or inaction by the EC as a result of which the candidate was denied access to the examination.[229] The EC's decisions are subject to appeal to the Supreme Court of Republics, kray or regional courts, courts of cities with status of federal Subject, court of autonomous region or courts of autonomous areas.[230] The HEC decisions are subject to appeal to the Supreme Court of Russia.[231] The law restricts the scope of such appeals to procedural grounds or other violations of requirements for organization of the examination.[232]

The certificate of a successful candidate may be used to apply for a judicial position once there is a vacancy in a court. The procedure which follows the examination is described in the following section.

Proceedings before Qualification Collegia of Judges following the exam

The president of a court with a vacancy for a judge notifies the relevant QCJ of the vacancy.[233] Within 10 days from the notification, the QCJ places an an-

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223 *The State of the Judiciary in Russia,* Report of the ICJ Mission, 2010, *op. cit.*, p. 13.

224 V. V. Ershov, *Examination Commissions: big potential and serious problems, op. cit.*

225 *Ibid*.

226 Federal Law "On the Bodies of the Judicial Community in the Russian Federtaion", *op. cit.*, Article 26.3 para. 8.

227 The appeal is made to a court within 10 days from the date on which they received the certificate on qualifying examination results.

228 Federal Law "On the Bodies of the Judicial Community in the Russian Federtaion", *op. cit.*, Article 26.4 para. 2.

229 *Ibid.,* Article 26.4 para. 3.

230 *Ibid.,* Article 26.4 para. 1.

231 *Ibid*.

232 *Ibid.,* Article 26.4 para. 2.

233 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 5.2.

nouncement of the vacancy in local media or the official gazette.[234] Information about judicial competition is published on the website of the HQCJ[235] or a QCJ of the Subjects of Russia[236] and sometimes on the websites of courts.[237] The judicial vacancy announcement refers to the place for submitting applications and documents by candidates, as well as the deadline for such a submission.[238] A similar procedure takes place for higher courts.[239] With a growing use of the Internet by the judiciary (each court in the Russian Federation has its own website), the dissemination of information about judicial positions has grown significantly.

A citizen of the Russian Federation who has passed the qualifying examination may lodge a request with the competent QCJ to recommend him or her for the judicial vacancy. In addition to the application, the candidate must submit documents to prove that he or she meets the relevant judicial requirements. These documents include:

1) the candidate's ID;
2) a completed questionnaire with biographical details of the candidate;[240]
3) document certifying a degree in law;
4) documents certifying the candidate's employment record;
5) documents certifying heath conditions;
6) qualifying examination results by non-judges and by judges retired for more than three years;
7) record of service covering last five years of employment (service);[241]
8) information about income, belongings and liabilities of the candidate, his/her spouse and minor children.[242]

Court presidents play a significant role at this stage, both in relation to candidates for a first judicial appointment and candidates with a previous judicial career. A candidate who is a judge submits information about his or her most recent judicial appointment, as well as a record of service for the last five years, signed by the court president, indicating the amount of cases examined by the

234 Regulation on qualification collegia of judges, *op. cit.*, Article 21 para. 2.

235 Official Webste: http://www.vkks.ru/category/2/.

236 E.g. Official Website of the QCJs of Tver: http://tve.vkks.ru/publication/18755/.

237 E.g. Official Website of the Saratov Arbitration Court: http://saratov.arbitr.ru/about/kadr/vakans.

238 Regulation on qualification collegia of judges, Article 21 para. 3.

239 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 5 para. 2; Regulation on qualification collegia of judges, Article 21 para. 1.

240 The following example is symptomatic in this respect: the QCJ quashed its own decision on the basis of new developments, as the candidate had concealed from the QCJ that he had been subjected to disciplinary responsibility during his service at the prosecutor's office, while his close relatives—mother and sister—had been subjected to criminal responsibility. The candidate had failed to indicate the above information in the questionnaire in response to the relevant questions (Resolution of the Supreme Court No. 23–G11–7 of 25 January 2012).

241 One example may be cited in this context to demonstrate the impact a record of service may have on the QCJ decision to recommend the candidate. The QCJ refused to recommend a candidate in view of his record of service issued by the prosecutor (last place of employment being prosecutor's office) that used the following language: *"[the candidate] has lost his interest in prosecution service"* and *"expressed discontent with the workload of the prosecutor's office."* (Decision of the HQCJ of 13 December 2011.)

242 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 5 para. 6.

judge, the quality of decisions made and, where the decisions were quashed or amended, or cases were examined in breach of the procedural time-limits—indicating the reasons for violations of the procedural time-limits or reasons why they were quashed or amended.[243] It is unclear what criteria court presidents use to evaluate the "quality of the decisions" of their colleagues. When such a candidate is recommended for a judicial office, the opinion shall explain why any such failings should not be interpreted as demonstrating low qualifications of the candidate and do not impede his or her judicial appointment.[244]

The QCJ must check the authenticity of the documents submitted by the candidate. Where necessary, it must ask the competent authorities to verify such documents and entrust the relevant verification to the president of the relevant or higher court, and, in case of candidates for courts of general jurisdiction, to the Judicial Department under the Supreme Court or its bodies, which should not however prevent the QCJ from conducting an additional verification.[245] During or after the examinations, requests for verification of documents are sent to law enforcement agencies. At this stage, various factors may play a role. It is highly significant, however, that the criteria which are used to assess candidates are not prescribed by law, nor are they publically accessible. Nonetheless, the results they produce are used for recommendation or non-recommendation of appointment of a candidate.

Under the Law on the Status of Judges, judicial candidates should be evaluated on the basis of the amount of their experience working as a judge or in law-enforcement agencies, their holding State or other official awards or title of honour "dignified lawyer of Russia", a postgraduate degree in law and, in case of candidates who are sitting judges, the quality and speediness of their adjudication. Furthermore, it is to be considered whether candidates have qualifications fitting the specialization of the court they apply for.[246] All the above criteria are taken into account by the QCJ when making its decision.[247]

Having considered applications by all judicial candidates, verified the authenticity of the documents and information submitted by them and having regard to the results of the qualifying examination and assessment of other information about candidates, the QCJ, in a meeting attended by more than one half of its members,[248] considers recommending one or more candidates for the judicial office, giving reasons for its decision in its opinion.[249] A decision is valid if it has received more than a half of the votes of the QCJ members taking part.[250] The ICJ was made aware of at least one case where the decision not to recommend a judge was challenged before the Supreme Court.[251]

Given that the Law on the status of judges provides for very broad criteria

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243 Regulation on qualification collegia of judges, *op. cit.*, Article 21 para. 11.

244 *Ibid*.

245 *Ibid.,* Article 22 para. 12.

246 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*,Article 5 para. 8.

247 *Ibid*.

248 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 23 para. 1.

249 Regulation on qualification collegia of judges, *op. cit.*, Article 22 para. 7.

250 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 23 para. 1.

251 Decision of the Supreme Court No. 93–G08–4 of 21 May 2008.

for selection of judicial candidates and does not specify the conditions under which competition is to take place, the decision-making procedure of the QCJ enables it to deny recommendation for appointment in circumstances where the candidate meets the requirements of the above law.[252]

The absence of strict selection criteria consistently applied in practice may lead to arbitrariness in judicial appointments. Such arbitrariness may arise from impropriety in the decision making process, or from the inherent incertitudes arising from a nebulous procedure. One expert indicated to the mission that information about any candidate may be interpreted as compromising, if members of the QCJ are predisposed to see it as such. For instance, when refusing to issue one judge with a recommendation for appointment, the QCJ had regard to the fact that the judge's spouse's sister had been subjected to administrative liability.[253] Furthermore, there were situations in practice where similar information about a candidate could be either disregarded by the QCJ or play a decisive role in case of judges who "didn't suit the system of justice." For instance, in one case, information about a judge's ex-husband was not taken into account when she was originally appointed for the term of three years,[254] but was later considered when the judge applied for a second term of office.[255] In a recently reported case, a judge with 20 years of judicial experience was not appointed for a judicial position and the Supreme Court judge who presided in the appeal hearing admitted that some of the factors which were not even mentioned in the decision not to appoint, such as his son

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252 In one case, the candidate was denied recommendation for the office of court president despite his previous judicial experience for more than 23 years, 1st qualification class, 2nd degree medal "For Service to the Russian System of Justice", title of honour "Dignified lawyer or Russia" and a positive record of service. Satisfying the judicial requirements established by Article 4 of the Status of Judges Act does not bind the QCJ to recommend such a candidate for the judicial vacancy at the given court, as it makes its choice out of candidates who meet the above requirements on a competitive basis. When making its decision, the QCJ had regard to the disciplinary record of the candidate, the lack of sufficient experience related to court management, as well as 2 years' break in his judicial service. The QCJ of the Subject of the Russian Federation concluded that the above candidate could not be recommended for the office of court president on the basis of a collective assessment given by its members to the information concerning the candidate's professional and personal qualities in their entirety (Decision of the HQCJ of 14 February 2013);
In another case, the HQCJ denied a recommendation for the office of a military court president. It had regard to the candidate's judicial experience of more than 22 years, his professional qualifications, work experience, judicial performance, organizational skills, professional and moral qualities, but also to the fact that he had no title of honour such as "Dignified lawyer of Russia" and no post-graduate degree in law. Under Article 5 of the Status of Judges Act, QCJ shall select candidates for judicial vacancy out of candidates who meet the relevant statutory requirements; at the same time, satisfying the judicial requirements established by Article 4 of the above Act does not bind the QCJ to recommend such candidate for the judicial vacancy. The HQCJ voted for refusing to issue the candidate with recommendation for the office of military court president as he was not supported the necessary number of the HQCJ members (Decision of the Supreme Court of the Russian Federation No. APL13–535 of 3 December 2013);
In a third case, the HQCJ did not recommend the judicial candidate as, out of 28 members who took part in its meeting, less than one half voted for him. The Supreme Court of the Russian Federation held that the HQCJ opinion appealed against had been made in accordance with the procedure established by law. The HQCJ had the right to make its decision, as its meeting was attended by more than one half of its members (28 out of 29). Less than 15 members of the HQCJ who attended the meeting voted for recommending the candidate for the judicial office. In the opinion of the Supreme Court, the court of first instance was right to indicate that satisfying the judicial requirements established by Article 4 of the Status of Judges Act did not bind the QCJ to recommend such candidate for the judicial vacancy at the given court (Decision of the Supreme Court No. APL 12–557 of 9 October 2012).

253 Supreme Court's Decision No. 73–APG12-2 of 11 July 2012.

254 Prior to 17 July 2009, the first appointment of for judicial was doen for a 3 year period following a life term in case of reappointment.

255 HQCJ decision of 27 September 2011.

being a lawyer, his administrative offence and even his age, may have served as "latent factors".[256]

Other cases illustrate improper influences by court presidents. For instance, in one case, the court president had disagreed with the QCJ's recommendation of a candidate in question which led to the same QCJ quashing its own decision and not recommending the candidate.[257] The Supreme Court later decided against the appointment of the candidate.[258]

Experts with whom the mission met criticized the fact that candidates with lower grades in the examination would nevertheless be recommended for a judicial position if they have particular kinds of work experience. It was reported that, if a candidate had some experience in law enforcement bodies, the chances of his or her appointment increased significantly. This confirms the reported problem of use of non-official criteria in appointments.

Pursuant to the Federal Law *"On introducing amendments to some laws of Russia in view of the Amendment to the Constitution "On Supreme Court and Prokuratura",* the refusal of the QCJ of the Subject of Russia to issue a recommendation to appoint a judge is only subject to appeal to the relevant higher courts.[259] This follows amendments to the law of 2002, prior to which there could be an appeal to the HQCJ as well as to the courts.[260] Refusals to recommend for appointment are only subject to appeal for procedural violations.[261]

In practice, QCJs reportedly often fail to explain why they have declined to issue a recommendation for appointment. A review of appeals against QCJ opinions refusing to recommend appointments has shown that most opinions of QCJs lack adequate or appropriate reasoning. Out of 47 opinions reviewed, eight failed to give any specific reason for refusal to issue a recommendation, while the reasons given in seven other opinions were contrary to the factual circumstances of the case; three opinions were made in breach of the procedure.[262]

A recent report of the HQCJ states three main problems with decisions of QCJs: "lack or absence of motivation of decisions, mismatch of the findings and facts of the case, violation of the procedure of consideration".[263] It is reported that, often, a decision is attributed only to the voting results, without any explana-

256 Pravo.Ru, "He has probably felt that he has run down and resigned", http://pravo.ru/court_report/view/106405/.

257 HQCJ decision of 14 December 2011.

258 Decision of the Supreme Court of the Russian Federation of 7 April 2010 No. 1–G10–1.

259 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 26 para. 3.

260 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 26 para. 1; Decision of the Constitutional Court of the Russian Federation No. 1418–O–O of 3 November 2009 "On refusal to accept the complaint by the HQCJ of the Russian Federation about a violation of constitutional rights and freedoms by Article 7 para. 5 of the Federal Law "On introducing amendments to some laws of the Russian Federation in view of the Federal Law "On counteracting corruption" and Article 17 para. 2 (10.1) and Article 26 para. 1 of the Federal Law "On the Bodies of the Judicial Community in the Russian Federation".

261 Federal Law, "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 26 para. 6.

262 Entry "On the examination by the HQCJ of appeals against the decisions of the QCJ of the Subjects of Russia" // Bulletin of the High Qualification Collegium of Judges, 2013, issue 2. Consultant Plus legal reference system.

263 *Ibid*.

tion of the substantive reasons. The mission was informed that the grounds for a refusal to recommend a candidate for a judicial position may be formulated approximately as follows: "[t]he decision is taken by the majority of the votes". This is contrary to the Regulations which specify that "[t]he decision of the Qualification Collegia of Judges about a refusal to recommend must be motivated".[264] It was said that such minimal reasoning excludes the possibility to effectively challenge the decision[265] and on appeal the decision is often found valid because "the majority of the members voted against nomination". Clearly, the formulation that the decision is taken because the majority voted in a particular way fails to meet the requirement of a reasoned refusal for nomination and effectively prevents an appeal for those who would seek to challenge the decision.

The percentage of successful appeals against the QCJ decisions regarding the recommendation of a judicial candidate is low.[266] From 2009 to 2012, the HQCJ received 98 appeals against the decisions of the QCJs, 47 of them concerning refusals to recommend judicial candidates.[267] In 2012, the courts examined appeals against 28 decisions and 17 opinions issued by the QCJs, upholding 22 decisions and 10 opinions, modifying one decision and quashing five decisions and seven opinions. The Supreme Court examined six appeals against the HQCJ decisions and opinions. It upheld four opinions and one decision; only one decision was quashed.

Court presidents' role

If they agree with the recommendation of the candidates, court presidents refer the recommendation to the Presidential Commission. If they do not agree, court presidents may object to the recommendation and send back the decision to recommend a judge to the QCJ, providing written reasons for their disagreement.[268] The case is then heard by the QCJ a second time and in order to override the "veto" of the court president, a qualified majority of two thirds of the QCJ members must vote in favour of the candidate.[269] This may serve as an insurmountable barrier for a candidate who has not been "preapproved" by a court president, yet was considered by the QCJ as qualified.

The 2010 ICJ report on the State of the Judiciary in Russia found that: "[a]lthough qualification collegiums have rather broad powers they are nevertheless dependent and are influenced by court presidents."[270] The same problem was brought to the attention of the ICJ mission of 2012, which concluded: "[t]he powers of Court Presidents extend throughout the judicial system, and

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264 Regulation on Qualification Collegia of Judges, *op. cit.*, Article 22 para. 7.

265 One example of successful appeals against the QCJ decisions is as follows. The HQCJ held that refusal to recommend a judicial candidate was unreasoned, as the QCJ opinion did not refer to any circumstances impeding a judicial appointment of the candidate. Furthermore, the applicant complained that the QCJ had no regard to his judicial workload and failed to summarize the merits of the complaints lodged against the judge in its opinion (only 4 out of 12 complaints being deemed well-founded), thus preventing the judge from challenging the relevant submissions or making his submissions on the merits of the complaints (Decision of the HQCJ of 14 December 2011).

266 Overview of the work for 2012, An analysis of practice, http://vkks.ru/publication/11039.

267 "On the examination by the HQCJ of appeals against the decisions of the QCJ of the Subjects of Russia", Bulletin of the High Qualification Collegium of Judges, 2013, issue 2.

268 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 5 para. 9.

269 *Ibid.,* Article 5 para. 9.

270 *The State of the Judiciary in Russia,* ICJ Mission Report, 2010, *op. cit.*, p. 13.

affect and shape the disciplinary process, the appointments process, the allocation of cases, and the salaries and benefits of judges."[271] This improper influence was said to threaten the independence of QCJs.[272] The 2014 mission also heard similarly serious concerns regarding the improper influence of court presidents, which was said typically to be the decisive factor in nominating candidates for judicial positions.

The official powers of Court Presidents in the appointments process and in the court system are generally significant and go beyond powers ordinary accorded to "first among equals". The Law of 15 December 2001 *"On introducing amendments to the Status of Judges Act"* vested court presidents with extensive powers. In addition to their functions as judges of the respective court and certain procedural powers, they also discharge a number of administrative functions.[273] Under the law, court presidents play an important role in selection of judicial candidates. Apart from informing the competent QCJ about a judicial vacancy,[274] giving a consent to a recommendation of a QCJ and submitting a proposal to appoint the individual recommended by the QCJ as a judge in accordance with the established procedure,[275] a court president may disagree with the QCJ recommendation and return the decision to the same QCJ for review indicating his or her objections.[276] Where two-thirds of the members of the QCJ uphold their initial decision during the review, the court president is required to lodge a proposal to appoint the candidate in question as a judge within 10 days from the receipt of the above decision.[277] The "veto power" of the court president was introduced as early as 1992, in the original version of the Status of Judges Act, and has remained unaffected to date.[278]

Given that QCJs ordinarily have close links with the judicial hierarchy, they are often apt to accept the court president's objections.[279] In addition, the court president issues a record of service in respect of judicial candidates.[280] This reference given to judges by court presidents[281] may play a decisive role in the appointment process.[282] The importance of such references in securing a judicial appointment tends to make a judge in some respects dependent, from the very outset, on the court president who has supported his or her appointment.

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271 Securing Justice, ICJ Mission Report 2012, *op. cit.*, p. 7.

272 *Ibid.,* p. 21.

273 Federal Law "On the Status of Judges in the Russian Federation," *op. cit.*, Article 6.2 para. 1.

274 *Ibid.,* Article 5 para. 2.

275 *Ibid.,* Article 5 para. 9.

276 *Ibid*.

277 *Ibid*.

278 *Ibid.,* Article 5 para. 7.

279 M. A. Krasnov, *Russian Femida with her eyes open,* in M. A. Krasnov, E. A. Mishina; T. G. Morshchakova (edited by), Moscow, Liberal Mission Foundation, 2007—86.

280 Regulation on Qualification Collegia of Judges, *op. cit.*, Article 16 paras. 10, 11.

281 Website of the QCJs of Vladimir Region, http://vla.vkks.ru/publication/4144/.

282 The information letter of the Vladimir Regional QCJ addressed to the Presidents of the region's district courts is symptomatic in this respect as it establishes certain requirements toward records of service to be issued by Court Presidents in respect of judicial candidates. In addition to certain professional information about judicial candidates and their qualifications and information about individual moral and ethico-psychological features of candidates, the letter states that the record of service shall conclude whether the candidate deserves holding a judicial office in view of his or her personal qualities.

Furthermore, the mission was told that it is problematic that court presidents have the right to attend the meetings of the QCJ and express their position on matters under consideration that fall within their competence, before the QCJ starts its deliberation.[283] Presidents of the QCJ are required to inform court presidents and councils of judges in advance about issues to be examined at the QCJ meetings.[284] Presidents and deputy presidents of courts, heads of the Judicial Department under the Supreme Court and its bodies, presidents and deputy presidents of councils of judges, other qualification collegia of judges or their representatives may express their position on issues under discussion that fall within their competence before the QCJ starts deliberation.[285] However, only members of the QCJ may be present when discussing the issue under examination and during voting.[286]

This right to attend the meeting in practice usually amounts to regular participation by court presidents in the meetings where recommendations for judicial positions are decided. Sometimes, a written recommendation may even be provided for a candidate by the court president.[287] In any case, it is usually known that there is a candidate that a court president has endorsed.[288] The ICJ heard of examples of applications to the HQCJ by members of the QCJ complaining that "the court president interfered with the work of the collegium and treated the collegium, its president and members without respect by undermining its meeting where the collegium rejected the court president's complaint and refused to follow his directions."[289] In one case, a court president adopted a substantially new approach to staffing the court he headed, contrary to a number of statutory provisions. According to the HQCJ decision in the case, the staff selection scheme developed by this president amounted to a violation of the principle of selection of judicial candidates on the basis of competition. Moreover, the HQCJ found that the court president violated the rule of secrecy of the deliberation by putting pressure on members of the QCJ.[290]

Bearing in mind the problems of undue influence of court presidents, their participation in QCJ meetings is problematic. Such participation may result in influences on the basis of personal preferences or agreements, and may undermine the individual independence of judges. Court presidents were sometimes said to act as "employers hiring an employee" and relationships of personal favours and dependence emerge from the very beginning of the selection process.[291]

Despite this well known problem, the Supreme Court has held that court presidents' participation in these meetings ensures transparency of the work of the QCJs: "the principle of open work of qualification collegia of judges [...] requires, in particular, that presidents of the respective courts should be given the right to take part in the meetings of collegia and express their position on

283 Regulation on Qualification Collegia of Judges, *op. cit.*, Article 16 para. 9.

284 *Ibid.,* Article 16 para. 1.

285 *Ibid.,* Article 16 para. 9.

286 *Ibid.,* Article 18 para. 1.

287 The Institute for the Rule of Law, *How to Ensure Independence of Judges in Russia,* July 2012, p. 11.

288 *Ibid*.

289 Decision of the HQCJ of the Russian Federation of 28.06.2012 "On establishment of the Commission in order to verify the information contained in the claims of the members of the Tula regional QCJ and Tula Regional Court judges against the chairperson of the Tula regional court."

290 *Ibid*.

291 M. A. Krasnov, *Russian Femida with her eyes open,* in M. A. Krasnov, E. A. Mishina; T. G. Morshchakova (edited by)—Moscow, Liberal Mission Foundation, 2007—131.

issues under discussion that fall within their competence. Consequently, the right of court presidents to take part in the meeting of the qualification commission ... is justified, in the first place, by the need to deal with public objectives related to the activities of the court taken as a whole."[292]

Codifying the powers conferred on court presidents and their deputies in the 2001 legislation[293] was supposed to restrain abuse of their administrative power. However, the extensive list of powers and vague construction, such as "[court presidents] shall also exercise other functions to organize the operation of the court", may be seen as legal authorization of their action ultra vires.[294]

It was strongly recommended by many of those with whom the mission met that there be a separation of functions between QCJs and court presidents, so as to insulate QCJs against any extra-procedural influences in the selection process, and that court presidents should be prevented from taking part in QCJ meetings.

A review of the QCJ's decisions of 2012 demonstrated that 15 decisions to recommend judicial candidates were returned to QCJs for review by the presidents of the relevant courts. Following a review, the QCJS upheld their initial decision only in 5 cases.[295] In 2011, 18 such decisions were returned to the QCJS for review by the presidents of the respective Court: in 17 cases, in relation to the courts of general jurisdiction, in one case—in relation to the commercial court. Following a review, the QCJs upheld its initial recommendations in six instances.[296] As demonstrated by individual cases, if the QCJ still recommends a candidate for a position, it does not mean that the court president will agree.[297] Nonetheless, cases where court president's disagreement was overpassed point to certain independence of those ICJs.

Referral to the Commission under the President of the Russian Federation for preliminary consideration of judicial candidates for federal courts

Once a candidate has been recommended by the QCJ for a judicial position in a federal court, this recommendation is referred by the relevant court president to the Commission under the President of the Russian Federation for preliminary consideration of candidates for federal courts (the Presidential Commission).[298] The Commission is not bound by the recommendations issued by the QCJ. The President must appoint judges of federal courts within two months[299] from the receipt of the necessary materials.[300]

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292 Decision of the Supreme Court of the Russian Federation of 20 September 2013 in case No. AKPI13-910.

293 Federal Law N 169-FZ of 15 December 2001 "On Amendments and Additions to the Law of the Russian Federation" On the Status of Judges in the Russian Federation.

294 O. A. Schwarz, *Legal status of judges,* http://www.indem.ru/Proj/SudRef/prav/PraStaSu.htm.

295 Overview of the work for 2012, An analysis of practice, http://vkks.ru/publication/11039/.

296 Overview of the work for 2011, An analysis of practice, http://vkks.ru/publication/11038/.

297 The above power was exercised, for instance, in the case of Ms Kirichenko who was refused a recommendation for the judicial office. The applicant appealed against the refusal to the HQCJ. The appeal was granted, her application and file were remitted for a fresh examination to the QCJ. As a result, Ms Kirichenko received a recommendation for the Commercial Court of the Altai Republic. The President of the above Court disagreed with the above decision and returned it for review to the same collegium. The latter granted the proposal of the Court President, quashed its previous decision and refused to issue Ms Kirichenko a recommendation.

298 Federal Law"On the Status of Judges in the Russian Federation, *op. cit.*, Article 5 para. 9.

299 Order "On the Commission for preliminary consideration of candidates for judicial positions of federal courts", *op. cit.*, para. 5.1.

300 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 6 para. 5.

The Presidential Commission considers newly recommended candidates at its monthly meetings. Proposals to appoint candidates as federal judges, including court presidents or deputy presidents, must be submitted to the President of the Russian Federation within one month from the relevant meeting of the Commission.[301] When examining the documents submitted with the nomination, the Commission may obtain the necessary materials on request from federal authorities, public authorities of the Subjects of the Russian Federation, as well as from organizations and public officials, including from authorized Plenipotentiaries of the President of the Russian Federation in federal districts of Russia (not to be confused with Subjects of the Russian Federation).[302] For this reason, the Commission may increase the time it needs to examine the documents, but not by more than one month, where it has not yet received the necessary materials requested from the authorities.[303] Each candidate is "screened" by the relevant authorities, including the Ministry of Interior and the Federal Security Service.[304] The ICJ was told that the main burden of ascertaining whether the given candidate satisfies the judicial requirements rests with the staff of the Commission.[305] This makes the work of the Commission particularly intensive, as it has to deal with more than 100 applications during one meeting that lasts between one and two days. The ICJ heard of significant delays in consideration of recommendations for judicial office.

The meeting of the Commission is conducted by the Chair, who is elected at each meeting upon the proposal of the Secretary of the Commission by a majority of the Commission members who attend the meeting.[306] As a rule, the Commission holds its meetings on a monthly basis.[307] One half of the Commission members constitute a quorum of a meeting.[308]

The Commission adopts its decisions by a simple majority of members present at the meeting. The Commission delivers its decisions in the form of minutes and opinions on each issue on the agenda, to be signed by the Chair and Secretary of the Commission. The Commission members may state their dissenting opinion in writing to be entered into the minutes and attached to the opinion.[309] However, according to an expert the ICJ interviewed "the Commission's opinions are often not written or reasoned documents; its refusals are not subject to appeal, as this is considered to be a preliminary stage of the President's judicial appointment function."

The work of the Commission is not transparent. It is unclear whether there are any objective criteria for the evaluation of candidates by the Commission and, if

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301 Order "On the Commission for preliminary consideration of candidates for judicial positions of federal courts", *op. cit.*, para. 5.2.

302 *Ibid.,* para. 5.

303 *Ibid.,* para. 5.1.

304 Judicial Candidates are checked by the police and the Federal Security Service, Interview of Justice Valentin Kuznetsov, Justice of the Supreme Court, Former Chair of the High Qualification Collegium of Judges, http://www.supcourt.ru/print_page.php?id=749; Grigory Yermoshin, *Status of Judges in Russia: Regulatory Issues,* Consultant Plus Legal Reference System, 2012.

305 See also: Grigory Yermoshin, *Status of Judges in Russia: Regulatory Issues*, *op. cit.*

306 Order "On the Commission for preliminary consideration of candidates for judicial positions of federal courts", *op. cit.*, para. 8.

307 *Ibid*.

308 *Ibid.,* para. 9.

309 *Ibid.,* para. 11.

so, what they are.[310] Only the total number of applications for courts of general jurisdiction and commercial courts examined per month is disclosed, indicating that joint decisions were made upon the examination of all materials. In effect, it is the Presidential Commission that decides on the nomination as the President usually follows the recommendation. According to a reliable source, most likely, the President does not reject the decisions made by the Commission; the President never considers the candidates rejected by the Commission; thus, the presidential power to appoint judges only applies to those candidates who have not been rejected by the Commission. It is reported that the Commission is likely to inform the President about applications rejected by it, but the President does not review its decisions. Thus, the actual nomination of candidates for judicial position is carried out through a non-transparent procedure, without any publicly known or clear selection criteria by a body whose composition does not satisfy international standards for independence of the judiciary (see chapter II above). In addition, there is no procedure to challenge the decision of the Commission before the courts or indeed through any other procedure.

Several unsuccessful attempts have been made to challenge the constitutionality of a decision of the President rejecting a judicial candidate. The Constitutional Court of the Russian Federation has held, however, that the discretionary power of the President to appoint judges is based directly on the Constitution of the Russian Federation and is not incompatible with individual constitutional rights in so far as the President may refuse to appoint an individual as judge without giving any reasons.[311]

The Presidential Commission also has a key role in the appointment of Court Presidents.[312] It considers appointments by the President of Russia of Court Presidents and Deputy Court Presidents of federal courts, for a period of six years.[313] In practice, it takes the authorities an average of nine months (in some cases—more than two years) to appoint federal judges after the relevant proposal has been made by the Supreme Court President.[314]

Professional background of judicial appointees

Responses to a survey of judges show that approximately one-third (33.3%) of sitting judges have worked as a part of court staff, while the second most frequent experience is work in a prosecutor's office (22.1%).[315] As to preferential

310 Report of the Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, Following his visit to the Russian Federation from 3 to 12 April 2013, para. 53.

311 Decision of the Constitutional Court of the Russian Federation No. 190–O–O of 27 January 2011, Decision of the Constitutional Court of the Russian Federation No. 1805–O–O of 21 December 2011.

312 An individual may be appointed President (Deputy President) of the same court several times, but not more than for two consecutive terms (Federal Law "On the Status of Judges in the Russian Federation", Article 6.1 para. 14). The rule does not apply to the President and Deputy Presidents of the Constitutional Court, as well as President of the Supreme Court who may be appointed for several terms: President and Deputy Presidents of the Constitutional Court may be appointed for a new term at the end of their term of office (Federal Constitutional Law No. 1–FKZ of 21 July 1994 (as amended on 5 April 2013) "On the Constitutional Court of the Russian Federation", Article 23). An individual may be appointed President of the Supreme Court several times (Federal Constitutional Law No. 1–FKZ of 7 February 2011 (as amended on 1 December 2012) "On Courts of General Jurisdiction in the Russian Federation", Article 21 para. 2).

313 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 6.1 paras. 6–8.

314 Address of the Council of Judges of the Russian Federation to President Vladimir Putin "On tenure of judges of federal courts of general jurisdiction and commercial courts", of 30 November 2006.

315 See V. V. Volkov, A. V. Dmitriyeva, M. L. Pozdnyakov, K. D. Titayev, *Russian judges as a professional group: Social research,* edited by V. Volkova.—SPb.: Institute for the Rule of Law under the European University in Saint Petersburg, 2012, p. 15.

attitudes, most respondents (79.4%) believe that the most appropriate work experience for a judge is as a part of court staff, while second best was considered to be work in a prosecutor's office (appreciated by 53.2%). Working as a lawyer is believed to be far less relevant, as it was only mentioned by 17.5% of respondents. The least popular work experience in terms of judicial profession is working in the Ministry of the Interior bodies (2%).[316]

Hence, the existing structure of preferences gives better chances of joining the judiciary to the court staff, their bureaucratic experience being appreciated the most. As follows from an interview with a former court president: "50 percent of court's work is not administration of justice by judges, but work of court clerks, assistant judges and court's registry."[317] This may be a natural outcome in the absence of a well-functioning system of education and preparation for judicial office. However, this points to a problem, which requires attention and reform. Of concern is the possible application of different standards to certain categories of legal professional, which is not prescribed by law. It may also in practice lead to arbitrary disqualification of more qualified and more suitable professionals based on their experience as lawyers.

The Special Rapporteur on the Independence of Judges and Lawyers noted in her report following her visit to the Russian Federation that she had "heard claims that, as a result of the current selection and appointment procedures, lawyers interested in entering the judicial profession suffer *de facto* discrimination and rarely succeed."[318]

Furthermore, it was pointed out to the ICJ that additional documents may be demanded to confirm that the candidate's spouse or close relatives are not lawyers. A reliable source has reported that it is not only lawyers who are denied access to the judicial profession; even someone whose relative is a lawyer may not become a judge. It was reported to the mission that, where an individual applies for a judicial office, even for the High Commercial Court, his or her spouse has to quit their job as a lawyer, by contrast, where a relative of the candidate is an investigator, this does not prevent his or her appointment as a judge.

316 *Ibid.,* p. 19.

317 *Ibid.,* p. 20.

318 Report of the Special Rapporteur on Independence of Judges and lawyers, Mission to the Russian Federation, 30 April 2014, A/HRC/26/32/Add.1, para. 20.

IV. PROMOTION OF JUDGES

Introduction

The mission addressed two main systems of judicial promotion—promotion through the system of "qualification classes", grades denoting level of seniority which apply to all judges in the Russian Federation; and progression up the judicial hierarchy by moving to a higher court.

International Standards

In accordance with international standards, any assessment of a judge should be based on "objective criteria" that are "published by the competent judicial authority" and judges should be able to express their views and to challenge assessments before an independent authority or a court.[319] Decisions on the promotion of judges should be based on the same kind of independent and objective criteria that regulate selection, namely "ability, integrity and experience."[320] The fundamental standard governing promotion is best expressed in the Singhvi Declaration, which states: "[p]romotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive".[321]

The UN Human Rights Committee has noted that if promotion decisions depend on the discretion of administrative authorities, it may "expose judges to political pressure and jeopardize their independence and impartiality."[322] Although the head of the court "may legitimately have supervisory powers to control judges on administrative matters," a judge must be "independent vis-à-vis his judicial colleagues" in the decision-making process.[323] As CoM Recommendation (2010)12 makes clear, "[h]ierarchical judicial organization should not undermine individual independence."[324]

The European Charter on the Statute for Judges stipulates a system of promotion "based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned."[325] In this regard, the Human Rights Committee has emphasized that the exercise of power by the Ministry of Justice over judicial matters, including its powers of inspection of the courts, constitutes interference by the executive and a threat to the independence of the judiciary.[326]

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319 CoM Recommendation (2010)12, *op. cit.*, para. 58.

320 UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principle 13 ("Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."); ACHPR Principles and Guidelines, Section A, Principle 4(0) ("Promotion of officials shall be based on objective factors, in particular ability, integrity and experience."); CoM Recommendation (2010)12, para. 44 ("Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity".).

321 Singhvi Declaration, *op. cit.*, para. 14.

322 Concluding Observations of the Human Rights Committee on Azerbaijan, UN Doc. CCPR/CO/73/AZE, para. 14.

323 IBA Minimum Standards of Judicial Independence, adopted in 1982 by the International Bar Association, paras. 32 & 46.

324 CoM Recommendation (2010)12, *op. cit.*, para. 22.

325 European Charter on the Statute for Judges, *op. cit.*, Principle 4.1.

326 Concluding Observations of the Human Rights Committee on Romania, UN Doc. CCPR/C/79/Add.111, para. 10.

International standards are clear that assignment and transfer decisions should be the responsibility of judicial authorities and not members of the political branches of government. This is to ensure that jurisdictional decisions are not made, nor seen to be made, based on improper motive, including by political authorities that may be a party to or otherwise have a vested interest in the outcome of a case. It is also to safeguard against assignment and transfer being used as an effective sanction against a judge. Thus, the International Bar Association's Minimum Standards of Judicial Independence provides: "The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld."[327] The Singhvi Declaration provides that the assignment of a judge to a post "shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist."[328] The Singhvi Declaration further states that "judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge."[329] Likewise, the European Charter on the Statute for Judges recommends that the decision to assign a judge to a tribunal be taken by an "independent authority" or "on its proposal, or its recommendation or with its agreement or following its opinion."[330]

Procedure of Judicial Qualifying Evaluation

Regular qualifying evaluations of judges form the basis for designation of the "qualifying classes",[331] which are awarded based on the level of the court, work experience and other grounds provided by law.[332] The law specifies that classes do not affect the equality of status of judges in regard to other judges.[333]

QCJs carry out a qualifying evaluation of the work of judges.[334] Regulations specify who should recommend a qualifying evaluation of judges, but as a rule court presidents recommend judges for qualifying evaluation.[335] Certain documentation must be attached to the proposal: a) information indicating personal details and professional activities of the judge; and, in respect of newly appointed judges, indicating that the judge has completed professional retraining or has been exempted from such retraining in accordance with the procedure established by law; b) record of service giving an assessment of the professional activities, professional and "moral qualities of the judge"; c) information indicating the number of judicial cases examined by the judge since the last evaluation or since his or her recent appointment; d) information indicating the number of judicial cases examined in breach of the procedural time-limits, the number of judicial decisions that were subsequently quashed or amended,

327 IBA Minimum Standards of Judicial Independence, *op. cit.*, Standard A.12.

328 Singhvi Declaration, *op. cit.*, para. 13.

329 *Ibid.,* para. 15.

330 European Charter on the Statute for Judges, *op. cit.*, Principle 3.1.

331 Judicial qualification class is awarded taking into account the position, length of service as a judge, professional training. Judicial class is not an honorary or special rank.

332 Federal Law No. 3132–1 of 26 June 1992 "On the Status of Judges in the Russian Federation", Article 2 para. 2.

333 *Ibid.,* Article 2 para. 2.

334 Regulation on qualification collegia of judges, *op. cit.*, Article 25.

335 *Ibid.,* Article 25(2–4).

giving reasons for such violations of procedural time-limits or reasons why the judicial decisions were quashed or amended.[336]

Qualifying evaluation of judges is carried out by the competent QCJ.[337] For instance, the HQCJ carries out qualifying evaluation of the Supreme Court judges, presidents and deputy presidents of federal courts (other than the Supreme Court and district courts), as well as judges of commercial area courts and commercial courts of appeal, intellectual property court and military courts; [338] and it is the body that is empowered by law to award to judges the first and the highest qualifying classes.[339] QCJs carry out qualifying evaluation of all other judges, including justices of the peace, presidents and deputy presidents of district courts, and award qualification classes to them (other than the first and the highest classes).[340]

The relevant QCJ adopts its decisions on awarding qualification classes to judges following the same procedure as when recommending a candidate for judicial office.[341] As a result of the qualifying evaluation, the QCJ decides whether to award the new qualification class to the judge.[342] When leaving the judge's qualification class unaffected (except where the judge's qualification class cannot be higher given the position he or she holds), another qualifying evaluation of the judge must be carried out upon the proposal of the court president between one and three years later.[343] Within this period, the basis on which a determination is made as when the new evaluation will be conducted is unknown, and the discretion as to when to hold the evaluation within this two year period may represent an impediment to fair and consistent awards of qualification class.

As with appointments, court presidents have significant influence on the process of promotion of judges. In order to gain promotion, endorsement is sought with the court president having jurisdiction. The ICJ agrees with the experts who observed that the state of the judiciary depends on who moves up the career ladder to form "the establishment" of the judiciary. The mission was told that with other things being equal those who have a record of adopting an independent and principled approach to their work were not those who would be seen as deserving further promotion. In the absence of a well-developed system consistently applied, personal preferences play a significant role. A key role here is attributed to court presidents.

The QCJ meeting may be attended by the court president who has proposed the candidate or his or her representative and, at the discretion of the QCJ, and "other persons".[344] As established in case-law, court presidents may challenge a QCJ's decision to award a qualification class to a judge on the basis of certain procedural violations. These include where there had been an alleged violation of the court president's right to be informed about matters to be discussed at

336 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 20.2 para. 11.

337 *Ibid.,* Article 20.2 para. 9.

338 Federal Law "On the Bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 17 para. 2 (5).

339 *Ibid.,* Article 17 para. 2 (7).

340 *Ibid*. Article 19 para. 2 (6).

341 See Section II Subsection 3 Item "B" above for more details.

342 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 20.2 para. 13.

343 *Ibid.,* Article 20.2 para. 14.

344 Regulation on qualification collegia of judges, *op. cit.*, Article 25.7.

the QCJ meeting that fall within his or her competence and to express his or her position on them.[345]

The decision made by the QCJ as a result of the qualifying evaluation is subject to appeal to the court or to the HQCJ (in case of the QCJ decisions).[346]

Evaluation and qualification classes

Federal Law No. 269–FZ of 25 December 2012 *On introducing amendments to some laws of Russia in order to improve judicial remuneration scheme in Russia, as well as on revoking some laws (legislative provisions) of Russia* increased the number of qualification classes from six to ten (nine qualification classes plus the highest class)[347] and the size of incremental salary premium based on qualification classes.[348] The maximum size of incremental salary premium is received by holders of the highest qualification class and is equal to 150% above the basic salary; minimum incremental salary premium of 30% above the basic salary is paid to holders of the lowest (9th) qualification class.[349]

Federal Law 269–FZ reduced the number of qualification classes awarded to district court judges and justices of the peace,[350] thus restricting the possibilities of promotion for "lower" officials of the system of justice. Now, professional qualities of a justice of the peace cannot be evaluated higher than the 7th class, while district court judges cannot qualify higher than the 5th class throughout their judicial career.[351] Prior to the enactment of these amendments, district court judges and justices of the peace could be awarded all qualification classes, with the exception of the first and the highest class.[352] With the adoption of the amended law, judges from among these categories would need to get an appointment to a higher court to secure further promotion, which is likely to be practicable only in a very few cases. Where judges move from the higher court to the district court, their qualification class is scaled down in accordance with the conversion table.[353]

One expert told the mission that the changes in law may run contrary to the principle of the uniform status of judges prescribed by Russian law,[354] as higher

345 Decision of the Supreme Court of the Russian Federation No. AKPI13–910 of 20 September 2013.

346 Federal Law "On the bodies of the Judicial Community in the Russian Federation", *op. cit.*, Article 26 para. 1.

347 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 20.2 para. 2.

348 *Ibid.,* Article 19 para. 1.

349 *Ibid*.

350 The Explanatory Note to Draft Federal Law No. 269–FZ of 25 December 2012 does not justify the class restrictions for district court judges and justices of the peace. It rather focuses on changes to the judicial remuneration scheme introduced by the Draft Law and provides the details of monthly remuneration of judges, as well as grounds for paying premium. As regards classes, the Explanatory Note only mentions that *"the number of qualification classes shall be increased from six to ten, including the highest qualification class; 9th qualification class shall entail a salary premium of 30% above the basic salary; highest qualification class—of 150% above the basic salary; furthermore, the procedure to follow when awarding qualification classes is improved."* http://asozd2.duma.gov.ru/main.nsf/(SpravkaNew)?OpenAgent&RN=159916-6&02.

351 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 20.2 para. 3 (3,4).

352 Regulation on qualification collegia of judges, *op. cit.*, Article 25 para. 4.

353 Federal Law No. 269–FZ of 25 December 2012 (as amended on 2 July 2013) "On introducing amendments to certain laws of the Russian Federation in order to improve judicial remuneration scheme in Russia, as well as on revoking certain laws (legislative provisions) of the Russian Federation", Article 9.

354 Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 2 para. 2.

qualification classes are only accessible to judges of the higher courts, discouraging district court judges and justices of the peace from improving their qualifications and stripping them of a possibility of a greater financial remuneration.

Criteria for Judicial Qualifying Evaluation

In Judicial Qualifying Evaluations, QCJs evaluate judges' professional skills and ability to apply them in the administration of justice, judicial efficiency, professional and moral qualities and compliance with the judicial requirements established by the Status of Judges Act and the Code of Judicial Ethics.[355] The general phrasing "evaluation of professional skills and ability to apply them during the administration of justice" may give rise to broad interpretation and discretion when awarding qualification classes to judges.

The system of evaluation may directly impact on the fairness of judicial proceedings across the country. For example, the unusually low level of acquittals in criminal cases of around one per cent is partly attributed by experts and judges themselves to the system of judicial evaluation. The mission's attention was drawn to the problem of evaluation of judges' performance based on the number of a judge's decisions which were reversed by the upper instances. With this system of evaluation in place, a judge may be under pressure to comply with expectations based on the patterns common to the system, rather than acting independently in ways which potentially negatively impact on his or her performance evaluation.[356] This in turn results in serious violations of fair trial guarantees, including the presumption of innocence and failures to secure other rights through judicial proceedings.

The authority to "evaluate professional and moral qualities of the judge and his or her compliance with the requirements of the Code of Judicial Ethics" is also a part of the QCJ discretion. In the absence of clear criteria, universally and consistently applied ensuring a predictable professional growth of a judge, there is a risk of bias and other abuse when assessing a judge's professionalism, resulting in qualified and independent judges being forced out of the ranks of the judiciary.

355 Regulation on qualification collegia of judges, *op. cit.*, Article 25.1 para. 5.

356 See also: *The number of acquittals have risen in Russia,* http://www.rg.ru/2014/08/06/opravdanie.html?fb_action_ids=10204015979667171&fb_action_types=og.recommends, 06.08.2014 [rus].

V. THE NEW SUPREME COURT

Background

The ICJ visit coincided with the institution of a highly significant constitutional reform of the judiciary in Russia, namely the establishment of the new Supreme Court. The reasoning behind this reform was explained in June 2013 by the President of the Russian Federation in his speech at the St. Petersburg International Economic Forum, as necessary "[i]n order to ensure unified approaches to the resolution of disputes with participation of both citizens and organizations, as well as disputes with State bodies and municipal bodies".[357]

The newly created Supreme Court was conceived as a merger between the former Supreme Court and the High Arbitration Court. Previously, under the Constitution, the High Arbitration Court had a separate jurisdiction, as the highest court of appeals in commercial matters. The "merger" was perceived by many lawyers and legal experts as abolition of the High Arbitration Court.[358] A letter addressed to the Russian President by a group of lawyers and law firms expressed doubts as to the propriety of the abolition of the High Arbitration Court.[359] Nevertheless, the law, which amended the Constitution of the Russian Federation and changed the landscape of the judicial system in Russia, was adopted in just four months, and without any amendments to the initial draft having been made over the course of the legislative process.[360]

There has, however, been no automatic merger of the two higher courts with all the judges preserving their positions. Instead, judges of the new Supreme Court were to be selected through a special procedure, resulting in a great number of sitting judges of the two merged courts either being unsuccessful in their bids to be appointed to the new court or, in some instances, refusing to go through the qualification procedure.[361] This process has raised concerns amongst the legal and judicial communities.

The ICJ has serious concerns regarding the appointments process for the new Supreme Court, arising in part from information gathered and views heard during its mission to Moscow. These concerns related to the composition and procedures of the body responsible for appointments to the new court, the procedure for appointment, and the criteria of selection. Any reform of judicial structures or merger of courts should preserve and safeguard, and preferably strengthen, the operation of the principle of the independence of the judiciary as guaranteed under international law and standards. According to the UN Basic Principles "[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives".

It remains unclear why an ad hoc body was established for appointments to the new Supreme Court while a functioning HQCJ existed. The official doc-

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357 Official website of the President of the Russian Federation, The Plenary session of the St. Petersburg Internaitonal Economic Forum, 21 June 2013, http://www.kremlin.ru/news/18383.

358 Sergey Zaikin, *High Arbitration Court: Data Deleted,* Comparative Constitutional Review, No. 3(100) 2014.

359 Address of representatives the legal business regarding the draft law "On the Supreme Court", 14 November 2013, http://www.arbitrations.ru/press-centr/news/obrashchenie-predstaviteley-yuridicheskogo-biznesa-po-zakonoproektu-o-verkhovnom-sude-rf/.

360 Sergey Zaikin, *High Arbitration Court: Data Deleted, op. cit.*.

361 *Judges have resigned collectively,* Pravo.Ru, http://pravo.ru/story/view/89378/, 9 October 2013.

ument of justification for the reform of the Supreme Court took note of the international standards which need to be respected, indicating that "[...] candidates for the positions of the judges of the Supreme Court of the Russian Federation will be selected by a body mainly consisting of judges, which is in line with international requirements regarding the selection of candidates for judicial positions".[362] However, the fact that the selection was not carried out by a regularly constituted body raises concerns. In fact, this official document did not provide any justification for the need to establish a special body, which would duplicate the functions of the HQCJ.

Special qualification collegium of judges

One of the main tasks in the course of the reform was selection of judges of the new judicial authority. Pursuant to the Amendment to the Constitution of the Russian Federation *"On the Supreme Court of the Russian Federation,"*[363] the Special Qualification Collegium of Judges (SQCJ)[364] was established one month after the enactment of the Federal Law No. 16–FZ of 5 February 2014 *"On procedure for selection of candidates to the initial composition of the Supreme Court established under the Amendment to the Constitution 'On the Supreme Court and Prokuratura'"* (in force since 6 February 2014).[365] Its main task was to undertake examination of the candidates to become judges of the new Supreme Court.[366] It was created as an *ad hoc* body only for the duration of the "transition period"[367] (ending 6 August 2014), i.e. the period during which the new Supreme Court was being established.[368] Thus the regular HQCJ was excluded from the selection process. The reasons for this were not specified in law or in any accompanying official documents that were publicly available.

The SQCJ had a composition different from the HQCJ. It was composed of 27 members: one representative of the President of the Russian Federation, one representative of the Civic Chamber of Russia, and one representative of All-Russian public associations of lawyers.[369] The other 24 members were judges elected by the regional Councils of Judges (CJs) from among the mem-

362 Justification of the need to adopt the amendments to the Constitution of the Russian Federation on the Supreme Court of the Russian Federation and the Procuratura of the Russian Federation, annexed to Pr-2355, 7 October 2013.

363 See Federal Law No. 16–FZ of 5 February 2014 "On procedure for selecting candidates to the initial composition of the Supreme Court established under the Amendment to the Constitution "On the Supreme Court of the Russian Federation and Prokuratura of the Russian Federation," Article 1 para. 5.

364 Explanatory Note to the Draft Amendment to the Constitution of the Russian Federation "On the Supreme Court and Prokuratura" made a brief comment on the organization of the SQCJ indicating that candidates for the Supreme Court shall be selected by the body composed, for the most part, of the representatives of the judiciary, in accordance with the international standards of selection of judges. http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/87719AA68713572943257BFD00533AD2/$FILE/352924-6.PDF?OpenElement.

365 The date of entering into effect of Amendment No. 2–FKZ of 5 February 2014 to the Constitution "On the Supreme Court of the Russian Federation and Prokuratura of the Russian Federation". The Amendment was made public on the official legal information web-site http://www.pravo.gov.ru—on 6 February 2014.

366 Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of Russia", *op. cit.*, Article 1 para. 6.

367 See Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of Russia", *op. cit.*," Article 1 para. 6.

368 See Amendment No. 2–FKZ of 5 February 2014 to the Constitution "On the Supreme Court of the Russian Federation and Prokuratura of the Russian Federation", Article 2 para. 2.

369 *Ibid.,*" Article 2 para. 1.

bers of such councils.[370] Each Federal District delegated three representatives.[371] Judges to the SQCJ were elected at the meeting of representatives of the regional CJs. Judges to the SQCJ were elected by the majority of judges attending the meeting of the representatives.[372] Representatives of the President of the Russian Federation and the Civic Chamber of the Russian Federation were appointed by the President and Civic Chamber respectively. Representatives of All-Russian Public Associations of Lawyers were elected by the All-Russian public association of lawyers selected by the upper chamber of the Parliament.[373]

Special Examination Commission

Like the SQCJ, the SEC was established within one month of the enactment of the law[374] to be in operation up to the end of the transition period[375] (6 August 2014). The SEC was composed of 11 members,[376] including: three members of the Commission elected by All-Russia Public Associations of Lawyers;[377] eight judges elected by the CJs from among their members: and one member by each CJs operating in each federal area.[378] Members of the SEC were elected

370 The judge-members elected were: Mr A. B. Bondar—President of the Nizhniy Novgorod Regional Court, Chair of the Special Qualification Collegium; Ms G. A. Agafonova—Deputy President of the Moscow City Court, Deputy Chair of the Special Qualification Collegium; Mr V. V. Gorban—judge of the Krasnodar Kray Court, Secretary of the Special Qualification Collegium; Mr O. D. Vasilyev—Deputy President of the Amur Regional Court; Mr D. I. Voynitskiy—Deputy President of the Kamchatka Kray Court; Ms N. D. Volkova—Deputy President of the Tyumen Regional Court; Mr S. Kh. Dzhioyev—President of the Promyshlenny District Court of Vladikavkaz, North Ossetia-Alania; Ms T. Z. Ibragimova—President of the Leninskiy District Court of Grozny, Chechen Republic; Mr S. P. Kamnev—Deputy President of the Altay Kray Court; Ms N. V. Kozlova—Deputy President of the Chelyabinsk Regional Court; Mr P. I. Kolmogorov—President of the Tomsk District Court, Tomsk Region; Ms I. V. Kotelevskaya—member of the Civic Chamber of Russia; Ms L. F. Mashtachkova—judge of the Astrakhan Regional Court; Ms Yu. V. Meleshkin—President of the Gorodishchenskiy District Court, Volgograd Region; Mr A. V. Milushechkin—President of the Bryansk Garrison Military Court; Ms L. V. Olifer—judge of the Kaliningrad Regional Court; Ms I. N. Petrunina—judge of the Novosibirsk Regional Court; Mr A. L. Poluyan—Deputy President of the Court for the Khanty-Mansi Autonomous Area-Yugra; Ms L. A. Salomatina—judge of the Primorsky Kray Court; Mr V. Yu. Tarasov—President of the Smolninskiy District Court of S.-Petersburg; Mr A. A. Tolmachev—Deputy President of the Commercial Court, the Mariy El Republic; Mr V. N. Tumanov—All-Russian NGO "Association of Lawyers of Russia", member of the Board; Mr A. Yu. Fyodorov—head of the Civil Service and Human Resources Directorate under the President of Russia; Ms N. P. Fedotova—President of the Yaroslavl District Court, Yaroslavl Region; Mr A. K. Khamitsevich—Deputy President of the Supreme Court of the Komi Republic; Mr E. A. Shepelin—Deputy President of the Saratov Regional Court; Ms O. P. Shetogubova—Judge of the Stavropol Kray Court.

371 Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of Russia", *op. cit.*, Article 2 para. 1.

372 *Ibid*. Article 2 para. 5.

373 *Ibid*.

374 *Ibid*.

375 *Ibid.,* Article 1 para. 7.

376 These members were: Mr R. F. Gafarov—Deputy President of the Supreme Court of the Tatarstan Republic; Mr A. N. Kiryushin—Deputy President of the Kemerovo Regional Court; Mr A. V. Krivoshchekov—President of the Yevreyskiy Autonomous Region Commercial Court; Mr Ye. V. Lamonov—Deputy President of the Tambov Regional Court; Ms Ye. V. Milyukhina—Deputy President of the Sverdlovsk Regional Court; Mr V. V. Panteleev—judge of the Arkhangelsk Regional Court; Ms N. A. Privalova—President of the Cherkessk City Court, Karachayevo-Cherkessk Republic; Mr I. V. Redkin—All-Russian NGO "Association of Lawyers of Russia", Board Deputy President; Mr E. N. Renov—NGO "Association of Lawyers of Russia", member of the Presidium; Mr A. I. Trakhov—President of the Supreme Court of the Republic of Adygea; Mr V. F. Yakovlev—All-Russian NGO "Association of Lawyers of Russia", Co-President.

377 Official website: http://www.alrf.ru/.

378 Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of Russia", *op. cit.*, Article 6 para. 1.

by the CJs and All-Russian Public Associations of Lawyers in the same manner as the SQCJ members.[379] A member of the SEC could not be a member of the SQCJ.[380]

The Special Examination Commission (SEC) procedure

The procedure for the qualifying examination for "the initial composition of the Supreme Court" was similar to that of the HEC. Judges, those with a PhD degree in law or LLD and those having the title of an "honoured lawyer of Russia" were exempted from the qualifying exam.[381] Other candidates[382] had to submit the documents required by law to the SEC.[383]

The SEC could carry out the qualifying examination if at least one-half of its members were present.[384] The SEC was to issue a candidate who had passed the examination with a certificate indicating the examination results, grades awarded for each question and the final grade. The examination results are valid for three years, so that a candidate who had passed the examination but was refused a recommendation by the SQCJ, could still apply for the office of a federal judge in the following three years without taking another exam.

The SEC was to deliver its decision in the form of meeting minutes to be signed by its President and Secretary.[385] Where a candidate was not allowed to take an exam, such decision to that effect had to be reasoned and in writing.[386] The SEC decision was subject to appeal to the Supreme Court in view of any violation of the qualifying examination procedure, including violation of the decision-making procedure.[387]

The Special Qualification Collegium of Judges (SQCJ) procedure

Judges and other Russian citizens could submit an application for membership of the new Supreme Court to the SQCJ within 70 days from the entry into of force of the law, indicating the position they were applying for or specifying to which Chamber of the Supreme Court they wished to be appointed.[388] The law specified that, prior to the SQCJ meeting, candidates could take cognizance of any materials pertaining to their profile and submit their objections or comments.[389] Candidates were to be given reasonable notice about the time and place of the SQCJ meeting.[390] Where a candidate failed to appear at the SQCJ meeting without a valid reason, it could consider

379 Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of Russia", *op. cit.*, Article 6 para. 2.

380 *Ibid.,* Article 6 para. 6.

381 *Ibid.,* Article 4 para. 3.

382 See Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 4.

383 The list of documents required for admission to qualifying examination for the initial composition of the Supreme Court of the Russian Federation is identical to the list of documents to be submitted to the EC.

384 See Federal Law "On procedure for selecting candidates to the initial composition of the Supreme Court of the Russian Federation", *op. cit.*, Article 7 para. 6.

385 *Ibid.,* Article 7 para. 11.

386 *Ibid.,* Article 7 para. 13.

387 *Ibid.,* Article 8 para. 2 and 8 para. 3.

388 *Ibid.,* Article 4 para. 4.

389 *Ibid.,* Article 5 para. 3.

390 *Ibid.,* Article 5 para. 4.

the recommendation in his or her absence.[391] Minutes of the SCQJ meeting were to be kept to record all the necessary details about the consideration of each application.[392]

The SQCJ could decide to recommend the candidate for the vacancy or refuse such recommendation, provided that its meeting had been attended by more than one-half of its members, who vote in the absence of the candidate. When recommending candidates for the judicial vacancy at the Supreme Court, the SQCJ was to give preference to candidates under the age of 65 (except for the President and Deputy Presidents of the Supreme Court).[393]

The SQCJ decision was made in writing, and decisions to recommend the candidate for a vacancy were to be submitted to the President of the Russian Federation within 10 days.[394] Where the SQCJ decided to refuse a recommendation, such decision had to be reasoned. The candidate was to be notified within five days of the decision,[395] and the candidate could challenge the decision on grounds of a violation of the procedure established by law or on its merits.[396] An appeal against the SQCJ decision could be lodged with the Supreme Court within ten days of its adoption.[397]

Security of tenure

The primary concern of the experts the ICJ heard regarding this process was that creation of the new Supreme Court through a competitive process involving sitting judges of the two higher courts, and requiring those judges to apply for appointment to the SQCJ, could amount to a violation of the constitutional principle of irremovability of judges, which protects judges' security of tenure.[398] In international standards, this principle is reflected in Principle 12 of the UN Basic Principles on the Independence of the Judiciary, which provides that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists."[399]

Under the Constitution of the Russian Federation, judges are irremovable; their powers cannot be terminated or suspended otherwise than in accordance with the procedure and on grounds established by the federal law.[400] It was pointed out that the abolition of a court could not be a sufficient ground in itself to terminate the powers of a judge.[401] The Status of Judges Act provides that judges of an abolished court must be offered a judicial position in a different court; only where a judge refuses to move to a different court from the abolished court may there be grounds for premature termination of the judicial

391 *Ibid.,* Article 5 para. 5.

392 *Ibid.,* Article 5 para. 7.

393 *Ibid.,* Article 5 para. 8. The Explanatory Note to the above Draft Law does not offer any reasons for the above provision.

394 *Ibid.,* Article 5 para. 12.

395 *Ibid.,* Article 5 para. 14.

396 *Ibid.,* Article 5 para. 1.

397 *Ibid.,* Article 5 para. 3.

398 Comment of the High Arbitration Court No. 352924–6 on the proposed Amendment to the Constitution of the Russian Federation "On Supreme Court of the Russian Federation and Prokuratura of the Russian Federation".

399 UN Basic Principles on the independence of the judiciary, *op. cit.*, principle 12.

400 The Constitution of the Russian Federation, Article 121.

401 Comment of the High Commercial Court No. 352924–6, *op. cit.*

office (Article 14, para. 1(11) and para. 2).[402] Thus, in cases of restructuring, all judges must be transferred without any additional checks, exams, or any other selection to other courts. Concerns were raised that in reality as a result of this reform, judges of two courts of the superior judiciary—Supreme Court and High Arbitration Court—were dismissed, despite the constitutional guarantees of the security of tenure principle.

The European Charter specifically addresses the removal of judges to another court: "A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof".[403]

Judges of the Supreme Court were not automatically appointed to the new Court, which might have fallen under this exception. Instead, they were required to reapply for a judicial post, a process which raises concerns under a number of international standards on security of judicial tenure. Under the UN Basic Principles and other international standards, irremovability of judges is a key element of their independence and tenure should be guaranteed, at least until a mandatory retirement age.[404]

Independence of the SQCJ

Doubts were expressed to the ICJ mission as to the independence of the bodies charged with formation of the new Supreme Court. Concerns were raised as to the status of those vested with power to make appointments to the highest judicial body, pointing to lack of trust among the legal community of the members of the SQCJ. The mission heard strong support for a system which would have involved automatic re-appointment of the judges of both courts to the new Supreme Court.

There was particular concern that members of the SQCJ included judges of courts lower in the judicial hierarchy than the Supreme Court. Indeed, it is hard to comprehend how it could be appropriate for judges of lower courts to assess the professional qualification or performance of sitting judges of the highest judicial authorities, as happened in this case.

The ICJ understands the scepticism of legal professionals in Russia, who alleged that the SQCJ was not able to carry out the role it was given, and that the SQCJ and the SEC lacked independence. It was alleged that presidential representatives were often the ones who took the leading role in deciding on recommendations. According to one reliable source, in all the Councils of Judges, the representatives of the President pointed to the judges they wanted to see nominated to the New Supreme Court. Such information was not made public though reports appeared in the media.

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402 Comment of the High Commercial Court No. 352924–6, *op. cit.*

403 European Charter on the Statute for Judges, *op. cit.*, 3.4.

404 CoM Recommendation (2010)12, *op. cit.*, para. 26.

Concerns were expressed by several experts that an objective of the SQCJ was to filter judges, among other things, on the basis of their age. The retirement age for judges in the Russian Federation is 70 years.[405] However, the law stipulated that the SQCJ had to "give preference to candidates under the age of 65" (except for the President and Deputy Presidents of the Supreme Court). No explanation was given as to why a deviation from a regular age of election of judges was adopted, including the difference of the age depending on the position. Under international law, a difference in treatment is only acceptable if it is based on reasonable and objective criteria.[406] The Court of Justice of the European Union decided in a case about lowering a regular age of retirement for judges, prosecutors and notaries that Hungary was in violation of its obligation by adopting a national scheme "[...] which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued—Hungary has failed to fulfill its obligations [...]"[407]. The ICJ noted in its earlier report on the Russian judiciary that the age of judges has been an issue in the Russian Federation.[408]

Criteria for selection

Of particular concern in the appointment process was lack of identifiable qualification criteria for appointment to the new Supreme Court. Notably, such criteria were not set in the law, but instead were reportedly developed in the process of selection. However, no list of clear criteria was made public. In practice, the reasons for non-recommendation reportedly included: the family member of judges had worked in certain capacities such as as a lawyer or a judge ("the relatives filter"); the candidates had made "frequent" trips abroad; they did "not correspond to the modern requirements which should be met by judges of the Supreme Court" or they were engaged in "active teaching". In the absence of any written criteria it was almost inevitable that arbitrary decisions were made in regard to judicial appointments.

It was reported to the ICJ that a former judge of the Supreme Court was not appointed because her daughter was a judge, while another judge was not appointed because he had allegedly established a company, although this reason was never mentioned in the hearing on his appointment.[409] The official grounds for his non-nomination were overturned judgments and non-participation in the work of the Presidium, two more qualification criteria which were not prescribed in law or regulations but developed in an ad hoc way by the QCJ "on the run". A case was reported where a former Supreme Court judge tried to appeal against his non-nomination for reasons other than those specified in

405 See Federal Law "On the Status of Judges in the Russian Federation", *op. cit.*, Article 11 para. 1.

406 Communication 172/1984, *S. W. M. Brooks v. the Netherlands,* (Views adopted on 9 April 1987), UN Doc. Supp. 40 (A/42/40) at 139, annex VIII.B, para. 13. See also, among others: Communication No. 182/1984, *Zwaan-de-Vries v. The Netherlands,* (Views adopted on 9 April 1987), UN document Supp. No. 40 (A/42/40) at 160, annex VIII.B; Communication 196/1985, *Ibrahima Gueye and others v. France* (Views adopted on 3 April 1989), UN Doc. CCPR/C/35/d/196/1985; and Communication 516/1992, *Alina Simunek v. The Czech Republic* (Views adopted on 19 July 1995), UN Doc. CCPR/C/54/d/516/1992.

407 Case C-286/12, *Commission v. Hungary,* http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=20661, para. 81.

408 *The State of the Judiciary in Russia,* Reportof the ICJ Mission, 2010, *op. cit.*, p. 18.

409 SCQJ turns down Deputy of the HAC, a constant critic of the reform, 22 May 2014, http://pravo.ru/review/view/105372/.

the decision, but announced his refusal to continue the proceedings during a Court hearing, saying that he had "lost trust in the Court".[410]

It was also reported that the questions which were asked at the interview had not been included in the official minutes, as required by law, while it was possible that answers to those questions constituted substantial grounds that were taken into consideration in the decision on appointment. One of the questions, which according to the media accounts had been put by the SQCJ to a judge, who was a well-known critic of the reform of the higher courts, at her appointment hearing, concerned her attitude to the ongoing reform. The non-appointment of the judge, a Deputy President of the High Administrative Court and the Chair of the Ethics Commission, was reportedly linked to her public position on the reform of the Supreme Court.[411]

In another case, non-appointment of a Supreme Court judge was attributed to "the professional level, organizational skills, work experience, professional and moral qualities" of the candidate. At the appeal hearing a representative of the SQCJ could not clarify the precise nature of these qualities and disclosed that the real reason for her non-appointment was the fact that her daughter was a judge in another court. The SQCJ representative clarified that the judge was not recommended for appointment "so that she would not have to recuse herself" in cases involving her daughter. She stated that the real reason for the decision not to appoint was not mentioned in the minutes as it was not based in law and the rapporteur in the case before the SQCJ "did not consider it necessary" to specify the reason.

The rationale behind the disqualification of candidates based on the "conflict of interests" with family members may have a reasonable justification in attempts to fight against nepotism and other corruption, from which Russia suffers. However, the absence of published, transparent, criteria, consistently applied, led to serious and valid concerns within the judicial community over the fairness of the process and the eventual composition of the new highest judicial authority. It appears that the criteria used to disqualify some candidates were not applied in other cases and it was impossible to know in which case the disqualification criteria would apply.

Other aspects

An unfortunate outcome of the reform was abolition of the Disciplinary Judicial Presence, the main disciplinary body, consisting of judges of each of the higher courts. The nascent institution, established only in 2010, had brought positive change to the disciplinary practice against judges, which suffers from serious imperfections, described in detail in the ICJ's previous report "Securing Justice: the Disciplinary System for Judges in the Russian Federation".[412] It could have further contributed to the strengthening independence of personal and institutional judicial independence. It is now almost inevitable that the achievements of the Disciplinary Judicial Presence will be diminished. With the abolition of this institution which had brought greater fairness to disciplinary

410 Kommersant, I refuse to Work at the Supreme Court of this composition, 26 June 2014, http://www.kommersant.ru/doc/2499779.

411 *SCQJ turns down Deputy of the HAC, a constant critic of the reform, op. cit.*

412 *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, 2012, *op. cit.*

proceedings,[413] it will be highly challenging to find an equally strong solution to the problem of establishing an authority which would be institutionally strong and independent enough to fairly resolve cases of dismissals of judges.

The new unified Supreme Court, despite the concerns over its establishment, is a Court with no history or significant practice. This, for a brief period, creates unique opportunities to establish and develop its reputation and authority. Much depends on how the new Court starts its operation, whether its decisions dispel doubts of the many experts who had concerns about the process of creation of the Court, and whether it contributes to strengthening the independence of the judiciary and improving the position of the judges themselves.[414] It is to be hoped that the Court will seize the opportunity to act meaningfully to strengthen the independence of the judiciary and uphold the Rule of Law and protection of human rights.

413 An equal split of votes was always considered to be in favour of the judge in cases of an appeal against a dismissal or a reinstatement as a judge. See: *Securing justice: The disciplinary system for judges in the Russian Federation,* Report of an ICJ mission, 2012, *op. cit.*, p. 20.

414 Among others see: Letter of the High Arbitration Court of the Russian Federation of 25 October 2013 No. BAC=C01/EGG-2086 "On the draft law of the Russian Federation and on Amendments to the Constitution of the Russian Federation No. 352924–6 'On the Supreme Court of the Russian Federation and the Prosecutor's Office of the Russian Federation'".

VI. CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The manner in which judges are appointed, promoted and subject to transfer, is no doubt a critical feature of the judiciary and an indicator as to its independence and capacity to serve as an effective instrument for the fair administration of justice. There is no single, universally agreed system of organization for the judiciary, including as it relates appointments, transfer or promotions. There are however, basic international standards in this area, which serve as a framework within which any system must operate. More generally, every judicial system, to accord with the rule of law, must maintain the general attributes of independence, integrity and fairness of the system. The system must succeed in ensuring the appointment of judges who can be guardians of human rights and the rule of law and maintain the independence of the courts.

The Russian Federation has a long legal tradition, which has undergone permutation and evolution over centuries. It is marked by a complex and highly distinctive system of judicial administration, which draws on this particular tradition and is shaped by the demands of a large federal state. There is no doubt, however, that the system of selection, appointment and promotion of judges in Russia has for many decades suffered from systemic problems that have adverse consequences for judicial independence and therefore for the capacity of the judiciary to administer justice effectively and to uphold the right to a fair hearing and the right to an effective remedy. Although judicial reforms have improved certain aspects of the operation of the judiciary, they have not effectively and positively transformed the process of selection, appointment and promotion of judges. The weaknesses in the judicial appointments process have contributed to shortcomings in the independence of the Russian judiciary, which the ICJ has highlighted in previous reports. Comprehensive reform of the system judicial appointments and promotions, as well as of other aspects of the judicial system, is therefore essential to establishing a Russian judiciary that is an effective guardian of the rule of law.

A substantial gap persists between law and practice in the selection process, which means that it is often "extra procedural" influences and practices which in reality determine which judges are appointed or promoted. Failure to strictly follow the prescribed procedure typically results in a failure to apply objective and appropriate criteria that genuinely determine appointments and promotions. In some instances such criteria are absent or inappropriate; in other they may be not applied or misapplied. At the same time, those tasked with navigating the complex multistage process of selection and appointment of judges may adopt "shortcuts" which run contrary to law.

In general, a gulf between words and deeds seems to lie at the heart of many of the weaknesses in the judicial appointments and promotions systems. Among the problems that arise, is that those legal reforms that are conceived and adopted are rendered ineffective, as changes in law may not lead to the purported effect or may be futile.

The institutional weakness and lack of independence of the authorities responsible for the selection process is conspicuous. The authorities in charge of initial selection lack independence in practice, even where they are established

as independent in law. Their procedures and overall independence are weakened by undue interferences and extra-procedural influences which are or may be exerted on them. The selection of members of the QCJs, especially those who are from the non-judicial sector, has tended to be especially problematic.

The independence of QCJs, and their autonomy in the appointments process, is compromised in practice by the inappropriate influence, for example, exercised by court presidents, on their decision-making. Court presidents seem to play a key and often decisive role in initial appointments, including through influences which are not prescribed by law. Although court presidents may have a legitimate role in the selection process, their functions and powers should not exceed those prescribed by law and be appropriate, if the integrity of the process is to be preserved.

At the same time, not all of the bodies involved in appointments and promotions are institutionally independent, even in law. In particular, the Presidential Commission, which *de facto* carries out the selection for the President's approval, is not part of the judiciary and its composition fails to meet international standards for the bodies charged with selection of judges. The significant role of the Presidential Commission in judicial appointments diminishes, in practice, the role of the independent bodies established to govern appointments, including the QCJs and the ECs.

The weak and incoherent examination process, which affords little protection against the risk of dishonest conduct, is conducive to manipulation in different forms. The features giving rise to this vulnerability include a general lack of transparency relating to the examination, the long-standing practice of administering the examination as a mere formality, and lack of effort to ensure that the selection is made exclusively by means of a transparent process involving evaluation of merits rather than through unofficial agreements and approvals.

Certain of the rudimentary elements necessary for a rigorous and fair examination, such as preparatory materials, well elaborated and sophisticated examination papers, and clear, transparent evaluation criteria and processes, are clearly lacking. In a country as vast and expansive as the Russian Federation, the absence of an effective control over the examination leads to serious problems. In the absence of such control and clear operational guidance, examination commissions will typically have no option but to rely on their own understandings of quality the candidates and of their legal knowledge.

Beyond appointment, further steps in the judicial career are also affected by lack of fairness and transparency. The evaluation criteria used in promotions of judges—for example, the number of decisions overturned on appeal—may themselves undermine personal independence of judges.

The net result of these weaknesses in the appointments and promotions system is that those candidates most likely to become strong, highly competent and independent judges are likely to be discouraged from even applying for judicial office. When they do apply, they are likely to face significant obstacles to appointment and later, to promotion. The system has produced a judiciary in which the majority of judges appointed are former court employees, many others are former prosecutors, and very few have a background as lawyers. This fosters a conservative corporatism, and leads to appointments of judges reluctant to assert their individual independence in their work. This in turn

impedes the capacity of judges to uphold the rule of law, and in particular to ensure the fair administration of justice.

Recommendations

In light of the above conclusions, the ICJ makes the following recommendaitons:

Legislative safeguards are not in themselves enough to remedy the long-standing problem of illegitimate interferences in the appointment process and decisions made outside of transparent and fair processes based on the prescribed law, rules and criteria. All officials and institutions involved in the process, including examination commissions, qualification collegia and courts presidents have a responsibility to and must ensure that clear procedure is not circumvented in practice in the selection and appointments process.

Practical measures must be taken to eradicate any parallel unofficial arrangement for appointment or promotion, including preliminary agreements with court presidents or any other persons who are involved in the decision-making process. All those involved in the process must take all steps within their powers prescribed by law to ensure that decisions on the selection, appointment and promotion of judges are made in accordance with legitimate and fair criteria and in a transparent and fair manner as prescribed by law.

Independence and role of the institutions of selection, appointment and promotion of judges

The institutions responsible for judicial appointments must be independent of the executive and of any other undue influences from within or outside the judiciary. The executive must be publicly seen to be disengaged from judicial appointments, and it must be seen that, in making such appointments, the President acts on binding recommendations of an independent, professional body, such as the QCJ.

The law must ensure that each of the authorities involved in the selection process is institutionally independent in line with international law and standards on the independence of the judiciary. Even if the President preserves the function of the final approval for nomination of judges, such approval should be automatic, while exceptional instances of non-approval should be sufficiently reasoned to be subject to judicial review.

Law enforcement agents and bodies must play no direct role at any stage of the process of appointments of judges, either ex officio or in any other way, including in the final appointment by the President.

Examination Commissions

A reform of the legislative framework governing the examination procedure is needed to establish a credible process which involves more rigorous and comprehensive testing of the legal knowledge and professional ethics of candidates for judicial office, in light of international standards on the independence of the judiciary.

Clear guidance, policies, materials for examinations as well as regularly updated preparation materials and manuals should be disseminated to all applicants for judicial positions and be made publicly available. Members of the ECs

should be trained about examination policies and rules of behaviour of examiners, which must be universally applied across the Russian Federation.

Detailed criteria for marking examination papers should be put in place to ensure that objective evaluation is not undermined by personal preferences of EC members or other actors.

Coherent and appropriate appointment criteria for members of the ECs should be adopted and implemented to ensure a high level of qualification of members of the ECs.

Qualification Collegia

Qualification Collegia of Judges, as the professional, independent authorities that make recommendations for the appointment of judges, must, in practice as well as in law, play the decisive role in determining which judges are appointed. Their decisions should not be undermined by the wide discretion of the executive at later stages of the appointment process.

If QCJs are to discharge this important role effectively and fairly, and to enjoy the confidence of the public in doing so, then their independence must be protected not only in law, but crucially, also in practice. QCJs must resist inappropriate pressure by court presidents in the appointments process, and assert their independence from these and other outside informal influences in their work.

The criteria for appointment to QCJs, especially of members of the public, should be revised to ensure more effective transparency and diverse public involvement.

QCJs must ensure in practice that their evaluation of every candidate is based on clear and objective criteria and these criteria should be consistently applied throughout the country.

The Presidential Commission

The role of the President—including of advisory bodies to the President—in judicial appointments should be limited, save in exceptional cases, to formal powers of appointment, on the advice of QCJs. Those candidates recommended by QCJs should be appointed in all but exceptional cases; and where they are not, the President should provide reasoned and substantiated written explanation for the non-appointment.

It is not acceptable, and is contrary to international standards on the independence of the judiciary, that the Presidential Commission, a body composed mainly of law enforcement authority representatives, has *de facto* become the appointing authority for judges. The discretion of the Presidential Commission should therefore be significantly narrowed.

Alternatively, the Presidential Commission should be reconstituted as a body under the authority of the judiciary whose composition meets international standards for the appointment of judges.

Whichever model is adopted, the Presidential Commission or whatever body exercises equivalent powers, should meet international standards of transparency. Its rules, procedures and the criteria it applies in recommending candidates, should be clear and publicly available.

Procedure of selection, appointment and promotion of judges

The appointments system needs to encourage and facilitate the appointment and promotion of judges who will be more assertive in protection of their personal independence and the independence of the judiciary as a whole. There is a need to attract and encourage applications from candidates from a wider range of professional legal backgrounds, including lawyers, and to ensure that such candidates are not disadvantaged vis-à-vis colleagues with law enforcement experience.

All of the stages of selection and appointment of judges must be transparent. All of the factors which play a decisive role in appointments, should be clearly reflected in selection criteria established in legislation. Decisions on appointments should not be affected by considerations other than those identified in the law.

Court presidents

Court presidents, as senior judicial figures independent of the executive, play a significant role in administration of the judiciary and their independent authority should be upheld. For this reason, it is important that the role of court presidents in selection, appointment and promotion of judges be limited to the powers afforded to them by law.

While it is legitimate for court presidents to have a role in appointments and promotions under the law, the assumption of an unofficial, extra-legal role in judicial appointments and promotions, which has been well established in practice, must be discontinued. Declaratory legal norms circumscribing the powers of court presidents are insufficient to address this problem, without effective steps by the judiciary itself to eliminate extra-procedural influences.

The system of selection, appointment and promotion must not be conducive to informal influences and pressures which court presidents exert due to their position within the judicial hierarchy.

Any informal influence of Court Presidents in the appointments or promotions processes should itself be subject to disciplinary, administrative or criminal sanctions as appropriate, as contrary to the judicial ethics code, as well as to relevant legislation.

The judicial reform process

The problems which this report identifies should not be considered in isolation. Reforms to the selection, appointment and promotions systems should form part of a wider package of judicial reforms. Previous ICJ report on the judiciary in the Russian Federation have put forward additional recommendations in this regard.

The ICJ stresses that, as noted in previous reports, Russian civil society, including NGOs, legal professional and academic experts, has made a valuable contribution to judicial reform in Russia. The Human Rights Council under the President of the Russian Federation, has played a particularly important role in proposing and developing reforms, which should continue.

The ICJ recommends that, in the continuing development of reforms of the judiciary, and in particular in regard to reforms of the selection, appointment and promotion systems, the government, as well as the governing bodies of the

judiciary should put in place procedures for consultation with civil society organizations and individuals, academic and legal experts and practitioners, as well as with the judiciary on the judicial reforms proposed. It should also involve in the debate relevant international actors, including the UN Special Rapporteur on the Independence of Judges and Lawyers, the Venice Commission for Democracy through Law, and the ICJ.

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