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Recommendations on the Draft Federal Law introducing certain amendments to the procedure of selection of judges (Draft Law No.314591-6)

Introduction

In this paper, the International Commission of Jurists (ICJ) provides its comments regarding the Draft Federal Law № 314591-6 “On introduction of amendments to the *Law of the Russian Federation on the Status of Judges in the Russian Federation*, the *Federal Law on the bodies of judicial community in the Russian Federation* and the *Civil Procedure Code of the Russian Federation*” (“The Draft Law”). According to the explanatory note to the Draft Law, since “the work of the judge is one of the most complex and important legal professions, characterized by greater responsibility towards the society and citizens” it is necessary “to improve the process of selection of candidates for positions of judges at the stage of qualifying examinations in relevant Examination Commissions [...]”. The explanatory note states that the Draft Law *inter alia* aims to introduce certain changes regarding the academic requirements for judicial appointments, the categories of persons who are obliged to pass the examination in order to be appointed, and procedural changes to ensure uniform practice in evaluation of candidates.¹

The ICJ welcomes the goals of the Draft Law. Indeed, a fair and effective selection process is not a mere legal technicality, but a condition *sine qua non* for guaranteeing judicial independence and protecting human rights.² The judiciary’s ability to remain independent as a separate autonomous state power, and individual 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. The manner in which judges are appointed, promoted and subject to transfer, is an important indicator as to the independence of the judiciary and its capacity to deliver the fair administration of justice.³ Certain critical parameters must be respected in the process of selection, to ensure that the best candidates are chosen for judicial office.⁴

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”.⁵ The UN Human Rights Committee, in its General Comment on article 14 of the ICCPR, which protects 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

¹ Draft Law No 314591-6, Introduced by the Supreme Court of the Russian Federation.

² 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; Findlay v The United Kingdom, ECtHR, Application No. 22107/93, Judgment of 25 February 1997, para. 73.

³ Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014, <http://icj.wengine.netdna-cdn.com/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf>, page 58.

⁴ IACtHR, Case of Reverón Trujillo v. Venezuela, Judgment of June 30, 2009, (Preliminary Objection, Merits, Reparations, and Costs), para. 74.

⁵ 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.

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 judiciary and disciplinary sanctions taken against them".⁶ The Venice Commission in this regard has affirmed the principle that: "all decisions concerning appointment and the professional career of the judge should be based on merit, applying objective criteria within the framework of the law".⁷

The present analysis is informed by the findings of an ICJ report of 2014, *Appointing the judges: Procedures for Selection of Judges in the Russian Federation*. The report found that the systemic problems in the judicial selection in the Russian Federation have had adverse consequences for judicial independence, undermining the judiciary's capacity to administer justice effectively and to uphold the right to a fair hearing. The ICJ report concluded that the judicial examination process in the Russian Federation is weak and affords little protection against the risk of dishonest conduct and manipulation in various forms. This vulnerability to abuse is partly derived from the long-standing practice of administering the examination as a mere formality, and lack of effort to ensure that the selection is always made by means of a transparent process involving evaluation of merits, rather than through unofficial agreements and approvals.⁸

In the Russian Federation, the unusually high rate of judicial dismissals⁹ suggests that the disciplinary system is being relied on too heavily to remedy flaws in the selection process that result in the appointment of a disproportionately high number of candidates who turn out to be unsuitable and so must later be removed through disciplinary procedures. . Relying heavily on disciplinary procedures against sitting judges, while failing to ensure the competency of initial appointments, can only weaken public confidence in the quality of the judiciary overall, and risks eroding judicial security of tenure more generally.

The Draft Law provides an opportunity to address some of the shortcomings of the selection system, provided that it takes account of the systemic defects from which the judicial examination process suffers. However, the ICJ considers that the Draft Law in its current form falls short of addressing the existing problems. Below, the ICJ makes recommendations for additional measures to be included, focusing on a limited number of issues within the scope of the Draft Law. More detailed recommendations on other aspects of judicial appointment are included in the 2014 ICJ report.¹⁰

Examination process

The ICJ report of 2014 identified the weak examination process as a serious problem in judicial appointments.¹¹ In the absence of strong independent

⁶ 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. See also ECtHR, *Campbell and Fell v UK*, App. No.7819/77, 7878/77, Judgment of 28 June 1984, para.78.

⁷ Venice Commission, Report on the Independence of the Judicial System, part I: Independence of Judges, CDL-AD(2010)004, 16 March 2010, para. 27.

⁸ *Appointing the judges: Procedures for Selection of Judges in the Russian Federation* ICJ Mission Report 2014, pages 59.

⁹ *Securing justice: The disciplinary system for judges in the Russian Federation* Report of an ICJ mission, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf>, page 8.

¹⁰ *Appointing the judges: Procedures for Selection of Judges in the Russian Federation* ICJ Mission Report 2014.

¹¹ *Ibid*, pages 59.

oversight or clear operational guidance, examination commissions have no option but to rely on their own understandings of quality of the candidates and of their legal knowledge. These understandings and knowledge may vary from commission to commission. Even certain rudimentary elements necessary for a rigorous and fair examination, such as standardized preparatory materials, well elaborated and sophisticated standardized examination papers, and clear, transparent and uniform evaluation criteria and processes, are currently lacking.¹²

The Draft Law introduces a requirement of approval by the High Examination Commission of "the procedures for (Russian text: порядок проведения) conducting the qualification examination for the position of the judge and the procedures for determining the evaluation of knowledge of a candidate for the position of a judge", to be provided for in the regulations of examination commissions.¹³ It also stipulates that theoretical questions for the written examination cards (Russian text: экзаменационные билеты) are to be drafted by the High Examination Commission, while more practical exercises on judicial practice and on drafting procedural documents, which are based on case studies, will continue to be drafted by relevant examination commissions (subject to approval by the High Qualification Commission).¹⁴

While these amendments aim to address the problem of a weak examination process, they are not sufficient to ensure meaningful improvement of the current system.

The Draft Law should be revised to establish a more comprehensive framework for more effective examinations, although changes in actual practice will of course also be required. In particular, the legislative framework governing the examination procedure should establish a credible process of rigorous and comprehensive testing of the legal knowledge and profession ethics of candidates for judicial office in light of international human rights law and international standards on independence of the judiciary.

Therefore the ICJ recommends that the Draft Law include provisions to develop a comprehensive examination system that ensures a thorough evaluation of candidates for judicial office. In particular, it should make provision for:

- **Comprehensive preparatory materials for judicial examinations, as well as comprehensive examination papers, developed at federal level and universally applied;**
- **Incorporation in the examination of questions on judicial ethics including questions of independence from any influence from the outside or inside of the judicial hierarchy, in light of international human rights law and international standards on the independence of the judiciary;**
- **Universally applied examination policies and rules of behaviour for examiners, including mandatory training for members of examination commissions about examination policies and rules of conduct of examiners;**
- **A system for management of examination data which will be protected against any leakage or improper sharing of examination**

¹² *Ibid.*

¹³ Draft Law No 314591-6, Introduced by the Supreme Court of the Russian Federation, article 2.4.a.

¹⁴ *Ibid.*, article 2.4.b.

information between examinees and examiners or any other person.

Evaluation of examination papers

The lack of established uniform criteria when assessing test results of judicial candidates is a problem that has long been recognized in the Russian Federation including at a high level within the judicial hierarchy.¹⁵ The ICJ in its report noted the need for defined and sufficiently elaborated criteria for qualification as well as shared understanding of “the qualification parameters” for candidates.¹⁶ It noted that since there is no generally applicable system for grading, examiners “inevitably estimate the examination results on the basis of their inner conviction”.¹⁷

The Draft Law appears to be intended to address this problem by adding to the relevant provision of the Law on the Bodies of Judicial Community of the Russian Federation that the “procedure for evaluation of knowledge of candidates for a judicial position is established by the regulations of examination commissions, approved by the High Examination Commission”¹⁸ thereby introducing a check by a centralized body. While this is a positive step, it does not sufficiently ensure a well-developed universally applied system of evaluation of examination papers.

The ICJ recommends that, to effectively address the problem of evaluation, the Draft Law should:

- **Establish a clear framework and process for the High Examination Commission to develop detailed and uniform criteria and guidance for evaluating and grading examination papers;**
- **Establish a system for the High Examination Commission to review and evaluate the application in practice of this system by examination commissions, and to ensure consistency in the application of the criteria and guidance,** for instance, through a formal process of auditing.

Institutional independence

To achieve the objective of an independent judiciary, the institutions responsible for judicial appointments must also be strong and independent. The ICJ previously expressed concern at the lack of independence of examination commissions, noting their lack of “insulation” against external influence.¹⁹ The role of court presidents in shaping the composition of examination commissions raised concern. The ICJ report found that court presidents use their powers to nominate members of examination commissions according to their own preferences, rather than based on clearly established objective criteria that should exclude personal bias.

It is appropriate that court presidents, as senior judicial figures independent of the executive, play a significant role in administration of the judiciary, including in relation to decisions relating to selection, appointment and promotion of judges.

¹⁵ 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>

¹⁶ Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014, , pages 31.

¹⁷ Ibid.

¹⁸ Draft Law No 314591-6, Introduced by the Supreme Court of the Russian Federation, article 2.4.a.

¹⁹ Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014, page 22.

However, it is important in this regard that they do not exceed the role and powers afforded to them within the national legal framework, or exercise those powers in an improper fashion.

The practice of informal endorsement of certain candidates, with those candidates then automatically passing exams and further stages of judicial appointment, needs to be addressed. Such "extra procedural" arrangements and influences may in reality determine the appointments of judges, undermining the integrity of the formal procedures. The ICJ heard that this practice does not exist only in isolated instances.²⁰ Given the recent experience of undue influences over the selection procedure in the Russian context, any undue or otherwise improper informal influence from any person within or outside of the judicial hierarchy over selection and appointment procedures should itself be subject to disciplinary, administrative or criminal sanction as contrary to the judicial code of ethics as well as to obligations of independence under relevant legislation.

The ICJ believes that unless this problem is effectively addressed, including through appropriate legal responsibility, other improvements in the examination process may not have the intended effect.

In this regard, the ICJ recommends that the Draft Law should recognize and respond to the problem of undue informal influence over judicial appointments procedures, by including measures to protect the independence of examination commissions, in particular:

- **Revision of the appointment criteria for members of the examination commissions, to ensure a high level of qualification and independence;**
- **Revision of procedures for appointment of examination commission members to guarantee transparency and fairness;**
- **A system of guidance and training for members of examination commissions about professional ethics, including in regard to their independence and accountability.**

²⁰ Appointing the judges: Procedures for Selection of Judges in the Russian Federation ICJ Mission Report 2014,, pages 37-40.