

**Draft Resolution of the Plenum of the Supreme Court of the Russian Federation "On judicial practice of application of legislation regulating the issue of disciplinary responsibility of judges" of 2016.**

**COMMENTS BY THE INTERNATIONAL COMMISSION OF JURISTS**

**April 2016**

**INTRODUCTION**

In this paper, the International Commission of Jurists (ICJ) provides comments on the Draft Resolution of the Plenum of the Supreme Court of the Russian Federation "On judicial practice of application of legislation regulating the issue of disciplinary responsibility of judges" (Draft Resolution). The new Resolution will replace the existing one of 31 May 2007 N27 "On the practice of consideration by courts of cases on challenging the decisions of Qualification Collegia of Judges on disciplining judges of general jurisdiction". The new Resolution will be adopted pursuant to the amendments to the Law on the Status of Judges of 26 June 1992 No 3132-I in July 2013.

These comments draw on the ICJ's report and recommendations "Securing justice: the disciplinary system for judges in the Russian Federation" published in 2012 following a mission to the Russian Federation.<sup>1</sup> The report made a series of recommendations for specific and practical measures designed to advance the process of reform of the judicial disciplinary system in the Russian Federation. Among other things the report concluded that "comprehensive reforms of the [disciplinary] system [were] needed to establish a judiciary that is an effective guardian of the Rule of Law, complies with international standards on the judicial independence, and is a reliable guarantor of the right to a fair hearing".<sup>2</sup>

The ICJ's recommendations in its 2012 report on the disciplinary system for judges are based on international law and principles on the independence of the judiciary and international human rights law. This paper focuses on a number of issues in the disciplinary system that the ICJ considers to be of particular importance in this regard. The ICJ considers that the Draft Resolution should, in particular:

- *Clarify further the definition of disciplinary misconduct;*
- *Prohibit disciplinary action for judicial decisions of judges; and*
- *Clarify further the very exceptional nature dismissals of judges.*

**THE DEFINITION OF DISCIPLINARY MISCONDUCT**

The Draft Resolution defines publishable disciplinary misconduct as a violation of the requirements under the Law of the Russian Federation of 26 June 1992 No 3132-I, Article 3, and the Code of Judicial Ethics, adopted by the All-Russian

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<sup>1</sup> International Commission of Jurists, 'Securing justice: The disciplinary system for judges in the Russian Federation', Report of an ICJ mission, December 2012, <http://icj.wpengin.netdna-cdn.com/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf>.

<sup>2</sup> Ibid, page 44.

Congress of Judges of 19 December 2012 “as a result of a culpable act (or omission) of a judge when carrying out their professional responsibilities or in extra-professional activities, which lead to a derogation of the authority of the judiciary and harm the reputation of a judge...”.

Under the UN Basic Principles on the Independence of the Judiciary, all disciplinary, suspension or removal proceedings of judges should “be determined in accordance with established standards of judicial conduct”.<sup>3</sup> The Universal Charter of the Judge provides that “disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure”.<sup>4</sup> It may be necessary to ensure a certain degree of flexibility for lawyers to allow the courts “to develop the law in the light of their assessment of what measures are necessary in the interests of justice”.<sup>5</sup> However, it would run counter the independence of a judge if almost any misbehaviour by a judge occurring at any time during his or her career could be interpreted, if desired by a disciplinary body, as a sufficient factual basis for a disciplinary charge of “breach of oath” and lead to his or her removal from office.<sup>6</sup>

The ICJ considers that the definition of disciplinary misconduct under the Draft Resolution, though in line with the Law on the Status of Judges, is too broad to ensure judicial independence in accordance with international standards. This broad definition may allow for an unforeseeable interpretation of the boundaries of ethical behaviour, which may lead to arbitrary application of disciplinary proceedings. Furthermore, it may not be sufficiently clear to allow a judge to alter his or her behaviour in such a way as to respect the ethical boundaries expected from a judge.

**The ICJ recommends that:**

- 1. The Resolution should further clarify the notion of “disciplinary misconduct”. In particular, it should clarify the scope of the “derogation of the authority of the judiciary” and the “harm to the reputation of a judge” in order for judges to understand the permissible limitations of their behaviour.**
- 2. “Derogation of the authority of the judiciary” and the “harm to the reputation of a judge” should be defined to include actions of judges which point to a lack of independence including through improper interference in judicial decision-making. Such actions should include any attempt to exert influence on a judge from outside or from within the judiciary. Improper influence from inside the judiciary should include attempts by judges and Presidents of courts to influence their colleagues, including those subordinate to them, either directly or indirectly.**

**PROHIBITION OF DISCIPLINARY RESPONSIBILITY FOR JUDICIAL DECISIONS**

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<sup>3</sup> 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 (1985), and endorsed by General Assembly resolution 40/32 (1985) and 450/146 (1985), Principle 19.

<sup>4</sup> The Universal Charter of the Judge, approved by the International Association of Judges (17 November 1999), Article 11, third indent.

<sup>5</sup> *Goodwin v the United Kingdom* (1996) ECHR 16, para. 33.

<sup>6</sup> *Volkov v Ukraine*, ECtHR Application No. 21722/11, judgment of 9 January 2013, para. 185.

Paragraph 3 of the Draft Resolution, following the language of Article 16.2 of the Law on the Status of Judges states that “a judge may not be subjected to any liability for an opinion expressed during the administration of justice or a court decision, except when the judge has been convicted of criminal abuse of power. The Resolution further rules out the possibility of disciplining a judge for “a judicial mistake which resulted from a wrong evaluation of evidence on a case or a wrong application of the norms of the material or procedural law”.<sup>7</sup>

The ICJ Report of 2012 noted that “under the general principle of not undermining the authority of the judiciary or the status of judges, judges were being disciplined simply for having had their decisions revoked in higher courts”.<sup>8</sup> The Report mentions that “judges are often disciplined because they have not imposed pre-trial detention in a ‘sufficient’ number of cases”.<sup>9</sup> In such cases, “bringing the judiciary into disrepute” may be interpreted to apply where the judge does not impose pre-trial detention in a relatedly high percentage of cases.<sup>10</sup>

Recommendations of the Committee of Ministers of the Council of Europe on judges provide that: “The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence”.<sup>11</sup> They further say that “[j]udges should not be personally accountable where their decision is overruled or modified on appeal”.<sup>12</sup> In this regard, the UN Special Rapporteur on the independence of judges and lawyers stated that: “...judges must not be removed from office because of errors in judicial decisions or because their decision has been overturned on appeal or review by a higher judicial body”.<sup>13</sup> The UN Human Rights Committee expressed concerns about judges’ “...lack of security of tenure (appointments of only four years), combined with the possibility, provided by law, of taking disciplinary measures against judges because of errors in judicial decisions”.<sup>14</sup> The Human Rights Committee has also stressed that “taking disciplinary measures against judges because of ‘incompetent rulings’, exposes them to broad political pressure and endangers their independence and impartiality”.<sup>15</sup>

The ICJ therefore welcomes the desire of the Supreme Court to address the problem of judicial decisions as grounds for disciplinary measures against judges, which appears to be a significant problem in the Russian Federation’s judicial disciplinary system.

### **The ICJ recommends that:**

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<sup>7</sup> Draft Resolution of the Plenum of the Supreme Court of the Russian Federation “On judicial practice of application of legislation regulating the issue of disciplinary responsibility of judges”, para. 2.

<sup>8</sup> Securing justice, op. cit., page 27.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), para. 68.

<sup>12</sup> Ibid, para. 70.

<sup>13</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/11/41 (2009), para. 58.

<sup>14</sup> Concluding Observations of the Human Rights Committee, Viet Nam, UN Doc CCPR/CO/75/VNM (2002), para. 10.

<sup>15</sup> Concluding Observations of the Human Rights Committee, Uzbekistan, UN Doc CCPR/CO/71/UZB (2001), para. 14.

- 3. The Resolution, in line with well-established international standards in this regard, explicitly mentions that, where a decision of a judge is overturned on appeal, this may not of itself lead to initiation of a disciplinary action against a judge. This should apply in all cases including controversial ones or when a judge makes a series of decisions that are statistically at variance with those of other members of the judiciary. This is derived from the principle that judges must be free to decide cases based on their independent assessment of the facts and the law and that it is the role of the appeal courts, not the disciplinary system, to correct any judicial errors. Furthermore, this principle should consistently and rigorously be applied in practice to ensure that judges do not face disciplinary action in circumstances that undermine the independence and integrity of the judiciary.**

### **EXCEPTIONAL CHARACTER OF DISMISSALS OF JUDGES**

The Draft Resolution states that "premature termination of powers of a judge may be imposed on a judge in exceptional circumstances specified by paragraph 5 of Article 12<sup>1</sup> of the Law of the Russian Federation "On the Status of Judges of the Russian Federation"". <sup>16</sup> The Resolution in this regard echoes the law which has an identical provision.

In practice, the number of dismissals of judges in the Russian Federation is relatively high. Pointing to the weak guarantees of "life tenure" for judges in the Russian Federation, the ICJ report of 2012 concluded that: "the number of dismissals of judges in the Russian Federation each year is unusually large by comparison with other States. On average, some 40 to 50 judges are dismissed each year following disciplinary proceedings."<sup>17</sup> However, the report stressed that: "The impact of disciplinary action goes far beyond the 40 or 50 judges dismissed each year"<sup>18</sup> as "[a] real threat of dismissal, without clear grounds and a reliable process for establishing the facts, can serve to discourage the independent and effective discharge of the judicial function".<sup>19</sup> It therefore concluded that "the disciplinary process has become the main means by which their security of tenure, and their freedom to act with independence during their tenure, can be effectively undermined".<sup>20</sup>

According to international standards, security of tenure and irremovability of judges "are key elements of the independence of judges".<sup>21</sup> The UN Basic

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<sup>16</sup> The definition: "Disciplinary action in the form of early termination of powers of a judge may be imposed on a judge, in exceptional cases, for a substantial guilty, incompatible with the high title of a judge violation of the provisions of the present Law and (or) of the Code of Judicial Ethics, including for the violation of these provisions in the course of the administration of justice, if such violation entailed a distortion of the principles of the judicial process, a gross violation of the rights of the parties to the process, is evidence of the impossibility of continuing the carrying out of the judicial functions and is established by a court decision which entered into force issued by a higher court instance or a court decision, taken at the request of expedited proceedings or on the award of compensation for a breach of the right to trial within a reasonable time".

<sup>17</sup> Securing justice, op. cit., page 8.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Recommendation CM/Rec(2010)12, op. cit., para. 49. See also: Opinion no 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges.

Principles on the Independence of the Judiciary stipulate that “[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists”.<sup>22</sup> According to the Consultative Council of European Judges’ Opinion N 17:

“The principles of security of tenure and of irremovability are well-established key elements of judicial independence and must be respected. Therefore, a permanent appointment should not be terminated simply because of an unfavourable evaluation. It should only be terminated in a case of serious breaches of disciplinary or criminal provisions established by law or where the inevitable conclusion of the evaluation process is that the judge is incapable or unwilling to perform his/her judicial duties to a minimum acceptable standard, objectively judged.”<sup>23</sup>

**The ICJ recommends that:**

- 4. The Resolution stresses the fact that the security of tenure of judges is a prerequisite for the independence of judges, and for their ability to administer justice based on their honest and diligent application of the law. It should underline that an abusive or excessive application of dismissals of judges may in reality nullify the principle of life tenure of judges and undermine their judicial independence. It should stress that dismissals of judges should be a measure of last resort, reserved for the most exceptional cases and that there should be a presumption against dismissals of judges.**

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<sup>22</sup> UN Basic Principles on the Independence of the Judiciary, op. cit., Principle 12.

<sup>23</sup> Consultative Council Of European Judges (CCJE) opinion N° 17 (2014) On the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence, para. 29.