

# **ICJ Briefing Paper on Certain Amendments to the Constitution of the Russian Federation**

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### I. INTRODUCTION

On 15 January 2020, the President of the Russian Federation, Vladimir Putin, addressed the Parliament (Federal Assembly of the Russian Federation), proposing a wide range of amendments to the Constitution. On the same day, the President signed a decree "On the working group to prepare proposals on amendments to the Constitution of the Russian Federation"<sup>1</sup> and approved the composition of its members.<sup>2</sup>

On 20 January 2020, President Putin submitted the Draft Law on "an amendment"<sup>3</sup> to the Constitution No. 885214-7 "On improving the regulation of separate issues of organization of the public authority" to the State Duma of the Russian Federation.<sup>4</sup> which passed its first reading in the State Duma on 23 January 2020.<sup>5</sup> On 2 March 2020, President Putin proposed amendments to the Draft Law suggesting additional changes to the Constitution.<sup>6</sup> The Draft Law was adopted at the second and third readings on 10 and 11 March 2020 respectively, incorporating the new proposed changes.<sup>7</sup> The Council of Federation of the Russian Federation (the Upper Chamber of the Parliament) approved the Draft Law on 11 March.<sup>8</sup> On 12 and 13 March, the Draft Law was approved by the legislative councils of all the subjects of the Russian Federation.<sup>9</sup> On 14 March, the Draft Law was signed into law by the President of the Russian Federation and a request was sent to the Constitutional Court to check that it corresponded Chapters 1, 2 and 9 of the Constitution.<sup>10</sup> On 16 March, the Constitutional Court issued an Opinion on the request of the President, finding that all the amendments were in conformity with Chapters 1, 2 and 9 of the Constitution.<sup>11</sup>

While there are a number of the proposed amendments that give cause for concern, the ICJ, in this brief analysis, does not address each of the 46 paragraphs proposed for amendment by the Draft Law. Rather, it considers certain amendments to Articles 79, 83, 102, 125 that are likely to have a particularly negative impact on the ability of the justice system of the Russian Federation to comply with Russia's international legal obligations to protect human rights, and makes recommendations for these amendments to be reconsidered. These include obligations that arise under the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and other international human rights law treaties to which the Russian Federation is a party.

The proposed amendments which this paper analyses include:

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<sup>1</sup> *Presidential address to the Federal Assembly*, President of the Russian Federation, 15 January 2020. <http://kremlin.ru/events/president/news/62582> (Accessed 11 March 2020).

<sup>2</sup> *The working group to prepare proposals on amendments to the Constitution of the Russian Federation is organized*, President of the Russian Federation, 15 January 2020. <http://kremlin.ru/events/president/news/62589> (Accessed 11 March 2020).

<sup>3</sup> The law uses "an amendment" in singular to refer to several dozens unrelated changes to the Constitution.

<sup>4</sup> Draft Law No. 885214-7 "On improving the regulation of separate issues of organization and functioning of the public authority" (the Draft Law), State Duma of the Russian Federation. <https://sozd.duma.gov.ru/bill/885214-7> (Accessed 11 March 2020).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Vyacheslav Volodin told about the presidential amendments to the Constitution*, State Duma of the Russian Federation, 2 March 2020. <http://duma.gov.ru/news/47919/> (Accessed 19 March 2020).

<sup>7</sup> The Draft Law, *Op.cit.*

<sup>8</sup> *The Council of Federation approved the law of the Russian Federation on amendments to the Constitution of the Russian Federation*, Council of Federation of the Russian Federation, 11 March 2020. <http://council.gov.ru/events/news/114701/> (Accessed 11 March 2020).

<sup>9</sup> The Resolution of the Council of Federation of the Russian Federation, On Establishing the Results of Consideration by the State Legislative (Representative) Bodies of the Subjects of the Russian Federation of the Law of the Russian Federation on an Amendment to the Constitution of the Russian Federation " On improving the regulation of separate issues of organization and functioning of the public authority", 14March 2020, No. 98-SF.

<sup>10</sup> *President sends a request to the Constitutional Court*, President of the Russian Federation, 14 March 2020, <http://kremlin.ru/events/president/news/62989> (Accessed 14 March 2020).

<sup>11</sup> *The Constitutional Court of the Russian Federation issued an Opinion on the request of the President of the Russian Federation*, Constitutional Court of the Russian Federation, 16 March 2020. <http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3529> (Accessed 18 March 2020).

- Amendments concerning the role of international law and of decisions of international courts or other mechanisms (Article 125 of the Constitution)
- Appointment of judges (Article 83 of the Constitution)
- Procedures of appointment and removal for judges (Articles 83, 102 and 128 of the Constitution)

The regular procedure for amending the Russian Constitution<sup>12</sup> is modified for the purposes of the amendments proposed by the Draft Law. Under the modified procedures,<sup>13</sup> the President forwards the Draft Amendments to the Constitutional Court requesting a check on compliance with the provisions of Chapters 1, 2 and 9 of the Constitution.<sup>14</sup> If the Court confirms that the amendments are in line with Chapters 1, 2 and 9, an "All-Russian popular vote"<sup>15</sup> is held on the Draft Amendments.<sup>16</sup> If approved by the popular vote, the amendments enter into force upon publication of the results of the vote.<sup>17</sup>

## II. THE ROLE OF INTERNATIONAL LAW IN THE RUSSIAN LEGAL SYSTEM

According to Article 15(4) of the Constitution, which would not be amended under the proposals, "[u]niversally recognized principles and norms of international law as well as international treaties of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, the rules of the international treaty shall be applied." Article 16 of the Constitution provides that none of the provisions of the Constitution can contradict Chapter 1, the Fundamentals of the Constitutional Order, where the role of international law is enshrined (Chapter I, Article 15).

Article 79 of the Constitution presently provides that "[t]he Russian Federation may participate in interstate associations and transfer to them part of its powers according to international treaties and agreements, if this does not involve the limitation of the rights and freedoms of man and citizen and does not contradict the principles of the constitutional system of the Russian Federation." Furthermore, According to Article 17(1) in Chapter II, "[i]n the Russian Federation, rights and freedoms of person and citizen are recognised and guaranteed according to the universally recognized principles and norms of international law and according to the present Constitution". This Article, similarly to Article 15 may not be changed other than by way of adoption of a new constitution.<sup>18</sup> Paragraph 12 of Article 1 the

<sup>12</sup> Under Article 134 of the Constitution, the President of the Russian Federation is among the authorities which are competent to put forward proposals on amendments to and revision of the provisions of the Russian Constitution. The Constitution prohibits revision of Chapter 1 (The Basis of the Constitutional System), Chapter 2 (Human and Civil Rights and Freedoms), and Chapter 9 (Constitutional Amendments and Reconsideration of the Constitution). If both Chambers of the Parliament vote in favour of amendments to provisions of these Chapters by a qualified majority (three fifth) a Constitutional Assembly is summoned (Article 135(2)). Where proposals are made to amend other provisions of the Constitution, an ordinary procedure set by the Constitution in Chapter 9 and Federal Law On the order of adoption and entry into force of amendments to the Constitution of the Russian Federation, is used. (Articles 134-137) According to the procedure prescribed by this law, after approval by the State Duma (Lower Chamber of the Parliament) by at least two thirds and the Council of Federation (Upper Chamber of the Parliament) by at least three quarters<sup>12</sup> of the constitutional amendments must be approved by at least two-thirds of legislative bodies of the 85 Russian regions - Subjects of the Russian Federation. If approved by at least two thirds of the Subjects of the Russian Federation, the law on amendments is sent to the President of the Russian Federation for signature and official publication. Once officially published, the amendments enter into force. Amendments enter into force after approval by the Subjects of the Russian Federation (Article 136 of the Constitution) and are subject to signing and official publication (Federal Law On the order of adoption and entry into force of amendments to the Constitution of the Russian Federation, Article 12).

<sup>13</sup> Draft Law, *Op.cit.*, Article 3(1).

<sup>14</sup> *Ibid.*, Article 3(2).

<sup>15</sup> The Federal Constitutional Law on Referendum of the Russian Federation of 28 June 2004 N 5-FKZ prescribes a specific procure and guarantees applicable for "a referendum". Yet, this vote is not said to be a referendum but a popular all-Russian vote for which the legal framework does not exist. It is therefore unclear what procedures and guarantees, including those which ensure transparency of the vote, can be applied.

<sup>16</sup> Draft Law, *Op.cit.*, Article 3(3).

<sup>17</sup> *Ibid.*, Article 3(4).

<sup>18</sup> Constitution of the Russian Federation, adopted at referendum from 12 December 1993, Articles 64 and 135 (1).

proposed Draft Law No. 885214-7 would add to Article 79 of the Constitution that “[...] Decisions of intergovernmental bodies, adopted based on the provisions of international treaties of the Russian Federation in their interpretation which contradicts the Constitution of the Russian Federation, are not executed in the Russian Federation”.

Article 125(6) of the Constitution in its pertinent part provides “that.....; international treaties and agreements not corresponding to the Constitution of the Russian Federation shall not be liable for enforcement and application”. The Constitutional Court has interpreted this provision in conjunction with Article 125.2(g) as applying only to treaties that have not yet entered into force in respect of the Russian Federation.<sup>19</sup>

Draft law No. 885214-7 in its paragraph 40 (g) proposes to extend the powers of the Constitutional Court of the Russian Federation under Article 125 of the Constitution, allowing the Court to decide “on the possibility of execution of decisions of the interstate bodies adopted on the basis of provisions of international treaties of the Russian Federation in their interpretation, which is contrary to the Constitution of the Russian Federation”.

Under general principles of international law and in particular according to the Vienna Convention on the Law of Treaties to which the Russian Federation is a party,<sup>20</sup> “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>21</sup> According to the article 27 of the Convention “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.....”<sup>22</sup> Thus, the current text of Articles 15 and 17 of the Constitution of the Russian Federation is in line with the Vienna Convention.

The obligation of execution of international treaties is a well-established principle enshrined, in particular, in the Vienna Convention.<sup>23</sup> As is reflected in Article 15 (4) of the Constitution, national law cannot be a justification for not implementing an international treaty.<sup>24</sup> A termination of a treaty or a withdrawal must be done in line with the provisions of the treaty or at the consent of the parties to the treaty.<sup>25</sup> Besides, any termination or suspension of the operation of treaties, should be done in accordance with international law, in particular, the Vienna Convention.<sup>26</sup>

The proposed amendments would risk undermining compliance with the Vienna Convention and a core precept of international law: that domestic law will not override international legal obligations. They would consequently risk non-compliance with particular treaties, including human rights treaties, to which the Russian Federation is a party. They may particularly impact on the ability to seek redress for alleged human rights violations before the European Court of Human Rights (ECtHR), the UN Human Rights Committee and other international human rights bodies. Under the ECHR, the Russian Federation, as a State Party to the European Convention, “undertakes to abide by the final judgment of the Court in any case to which they are parties.”<sup>27</sup> The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and its Protocols and in the case of a dispute about the jurisdiction of the Court, it is the Court which decides.<sup>28</sup> Thus

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<sup>19</sup> Resolution of the Constitutional Court of the Russian Federation No. 7-P of July 9, 2012 On the matter of verification of the constitutionality of the international treaty of the Russian Federation that has not entered into force - the Protocol on the Accession of the Russian Federation to the Marrakesh Agreement on the Establishment of the World Trade Organization St. Petersburg, para. 2.3. <http://doc.ksrf.ru/decision/KSRFDecision104097.pdf>.

<sup>20</sup> Ratified on 29 April 1986, entered into force on 27 January 1980.

<sup>21</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, Treaty Series vol. 1155, at 331 (Vienna Convention), Article 26.

<sup>22</sup> The only exception to this norm is where there is a conflict between a treaty and peremptory norm of international law (*jus cogens*) as provided by Article 53 of the Convention.

<sup>23</sup> Vienna Convention on the Law of Treaties, *Op.cit.*, Article 26.

<sup>24</sup> *Ibid.*, Article 27.

<sup>25</sup> *Ibid.*, Article 54.

<sup>26</sup> *Ibid.*, Part V.

<sup>27</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (ECHR), Article 46(1), Binding force and execution of judgements.

<sup>28</sup> *Ibid.*, Article 32(2), Jurisdiction of the Court.

the Russian Federation, like other 47<sup>29</sup> States Parties to the ECHR, has recognised the competence of the Court to interpret the ECHR, decide on individual cases, and render judgments which State parties are bound to execute.

States have similar obligations under the UN human rights treaties, including those which establish Treaty Bodies. The UN Human Rights Committee stressed in its General Comment 33:

“The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

...

The character of the views of the Committee is further determined by the obligation of States parties to act in good faith, both in their participation in the procedures under the Optional Protocol and in relation to the Covenant itself. A duty to cooperate with the Committee arises from an application of the principle of good faith to the observance of all treaty obligations. ...

[...] In any case, States parties must use whatever means lie within their power in order to give effect to the views issued by the Committee”.<sup>30</sup>

The ICJ cannot but fully agree with the position of the Supreme Court of the Russian Federation where it said as follows:

“From the provisions of international treaties (the Convention and the Optional Protocol), the Constitution of the Russian Federation, the legal position of the Constitutional Court of the Russian Federation and the explanations of the Plenum of the Supreme Court of the Russian Federation, it follows that the opinion of the Committee on the Elimination of Discrimination against Women, adopted following a written communication from a citizen of the Russian Federation, recommendations for the Russian Federation on the elimination of violations of the Convention on the Elimination of All Forms of Discrimination against Women, are mandatory for the execution by the Russian Federation and may be a new circumstance in relation to paragraph 4 of Part 4 of Article 392 of the RF Code of Civil Procedure for the revision of a court decision, which has entered into force, in order to respect the rights and lawful interests of citizens, according to which the Committee has issued its Views.”<sup>31</sup>

It is essential to stress that international bodies, when issuing decisions in individual cases, do so only in order to protect individuals where those individuals were allegedly not able to enjoy protection of their rights at the national level where these rights are protected under a treaty. This reflects the principle of the subsidiarity by which the primary responsibility for compliance with international human rights obligations lies with the national authorities, with international courts or mechanisms performing a supervisory function.<sup>32</sup>

Where there is a conflict between a treaty and the national legal framework, priority is given to the respective international instrument as interpreted by the body whose competence is recognised by the State party.

The proposed amendments to the Constitution regarding the status of decisions of international courts and tribunals are of particular concern in light of other proposed amendments in the same Law, which have the potential to be applied in a way contrary to

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<sup>29</sup> *Chart of signatures and ratifications of Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe. [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=cT1l6cWU](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=cT1l6cWU) (Accessed 19 March 2020).

<sup>30</sup> Human Rights Committee, General Comment no 33, CCPR/C/GC/33, 25 June 2009, paras. 13, 15 and 20.

<sup>31</sup> Decision of the Judicial Collegium on Civil Affairs of the Supreme Court of the Russian Federation No. 46-KG17-24 of July 24, 2017.

<sup>32</sup> See, e.g. Council of Europe, Report of the Steering Commission on Human Rights, the longer term future of the system of the European Convention on Human Rights, 11 December 2015, para.17.

international human rights law, including rights to the equal protection of private and family life, and the rights of the child. These include reference to the “parental” obligation of the State in regard to children left without care,<sup>33</sup> marriage being a union of man and woman,<sup>34</sup> respect for workers and the balance of rights and obligations of a citizen.<sup>35</sup>

It is a general rule of treaty interpretation, reflected in article 31 of the Vienna Convention on the Law of Treaties, that treaties should be interpreted in line with their object and purpose. This necessarily entails a dynamic process in certain cases. Accordingly the European Court of Human Rights, like other judicial bodies construing international or Constitutional rights provisions, has emphasized the importance of treating the European Convention as “a living instrument which [...] must be interpreted in the light of present-day conditions”.<sup>36</sup> The ECtHR has said that it “cannot but be influenced by the developments and commonly accepted standards [...] of the member States of the Council of Europe”.<sup>37</sup> The Court furthermore stressed that “[t]he Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions”.<sup>38</sup>

Some of the proposed changes, including those mentioned above, may undermine the ability of individuals under the jurisdiction of the Russian Federation to have their rights protected, in particular if national State authorities fail to apply in good faith or construe treaty obligations in a manner contrary to international jurisprudence. Courts such as the European Court, and other supervisory mechanisms, such as the UN Human Rights Committee are the authoritative interpreters of the international human rights treaties, and without them the treaties themselves are rendered ineffective.

**The binding nature and effectiveness of decisions in “any case”<sup>39</sup> to which the Russian Federation is a party are put into question by the proposed provisions. It is also unclear how the proposed addition to the existing constitutional texts in connection with the adoption of new editions of Articles 79 and 125 of the Constitution can coexist in the same document as Articles 15 and 17 of the Constitution. The ICJ recommends that in order to best ensure an appropriate guarantee for human rights protection in accordance with international law, the amendments proposed to Articles 79 and 125 should not be approved.**

### III. CERTAIN PROPOSED AMENDMENTS CONCERNING THE JUDICIARY

#### a) Appointment of judges

According to Article 83 of the Constitution, the President of the Russian Federation appoints judges of federal courts and recommends judges for positions of the Supreme and Constitutional Courts. Under the Law of the Russian Federation on the Status of Judges, judges of the Supreme Court are appointed by the Council of the Russian Federation upon the recommendation of the President of the Russian Federation, while other federal court judges are appointed by the President of the Russian Federation upon a recommendation of the President of the Supreme Court.<sup>40</sup>

Article 1(17) of the Draft Law No. 885214-7 would amend the Constitution (Article 83, paragraph «e») by giving the powers to the President of the Russian Federation to “submit to the Council of the Federation candidates for appointment for the position of the President of the Constitutional Court of the Russian Federation, vice-President of the Constitutional Court of the Russian Federation and judges of the Constitutional Court of the Russian Federation, President of the Supreme Court of the Russian Federation, vice-Presidents of the Supreme Court of the Russian Federation and judges of the Supreme Court of the Russian

<sup>33</sup> Draft Law, *Op.cit.*, Article 1, paragraph 2.

<sup>34</sup> *Ibid.*, Article 1, paragraph 5.

<sup>35</sup> *Ibid.*, Article 1, paragraph 9.

<sup>36</sup> *Tyrer v UK*, ECtHR, Application No. 5856/72, Judgement of 25 April 1978, para. 31.

<sup>37</sup> *Ibid.*

<sup>38</sup> *STEC and Others against the United Kingdom*, ECtHR, Applications Nos. 65731/01 and 65900/01, Judgement of 12 April 2006, para. 48.

<sup>39</sup> ECHR, *Op.cit.*, Article 46, Binding force and execution of judgments, “1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”.

<sup>40</sup> Law “On Status of Judges in the Russian Federation” of 26 June 1992, Article 6, paragraphs 1-4.

Federation...". The draft law delegates respective powers to the Council of the Federation to appoint the judges of various courts including Constitutional, Supreme and appeal and cassation courts.<sup>41</sup>

The independence of the judiciary is a universal and core tenet of the rule of law. The UN Basic Principles on the Independence of the Judiciary guarantee that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary".<sup>42</sup> The UN Human Rights Committee, in its General Comment 32, sets out the nature and scope of obligations under article 14 of the International Covenant on Civil and Political Rights (ICCPR), which concerns the right to a fair trial by a competent, independent and impartial court established by law. There the Committee explains that "[t]he requirement of independence refers, in particular, 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, and the actual independence of the judiciary from political interference by the executive branch and legislature.**"<sup>43</sup>

According to international standards on the independence of the judiciary, reflected in a Recommendation of the Committee of Ministers of the Council of Europe, the authority in charge of the selection and career of judges should be independent of the government and administration<sup>44</sup> It should comprise substantial judicial representation chosen democratically by other judges.<sup>45</sup> This is why the European Charter on the Statute for Judges affirms that, "[i]n respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary".<sup>46</sup>

Where judges are formally appointed by the government, there must be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to [...] objective criteria.<sup>47</sup> An appropriate method for guaranteeing judicial independence, according to the Council of Europe's European Commission for Democracy through Law (Venice Commission), is "the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy".<sup>48</sup> Such a body should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them.<sup>49</sup>

Once an independent judicial body has recommended a candidate or candidates, this recommendation should as a rule be followed, though it may be that body will put forth more than one acceptable candidate from which the executive can choose. In particular, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia elaborated: "Where the final appointment of a judge is with the State President, the

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<sup>41</sup> Draft Law, *Op.cit.*, Article 1, paragraph 24, amendments to Article 102 of the Constitution of the Russian Federation.

<sup>42</sup> 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 1.

<sup>43</sup> 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.

<sup>44</sup> Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges.

<sup>45</sup> Consultative Council of European Judges (CCJE), Opinion No. 1 (2001) - On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, para. 45.

<sup>46</sup> European Charter on the statute for judges, DAJ/DOC (98) 23, Council of Europe, Strasbourg, 8-10 July 1998, para. 1.3.

<sup>47</sup> Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and the role of judges, principle 1 (c).

<sup>48</sup> The European Commission for Democracy through Law (Venice Commission), Opinion No. 403/2006, 22 June 2007, CDL-AD(2007)028, para. 48.

<sup>49</sup> *Ibid.*, para. 49.



discretion to appoint should be limited to the candidates nominated by the selection body (e.g. Judicial Council, Qualification Commission or Expert Commission; [...]). Refusal to appoint such a candidate may be based on procedural grounds only and must be reasoned. In this case the selection body should re-examine its decision. One option would be to give the selection body the power to overrule a presidential veto by a qualified majority vote. All decisions have to be taken within short time limits as defined by law".<sup>50</sup>

In its report on judicial appointments in the Russian Federation of 2014, the ICJ concluded 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."<sup>51</sup>

The ICJ recommended in regard to the independence of the Russian judicial appointment system that:

"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 [Qualification Commission of Judges].

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"<sup>52</sup>

The procedure whereby the President of the Russian Federation appoints judges of various courts, including court presidents, does not specify that the appointment by the President of the Russian Federation is done in a pro forma manner. There is no indication that in law and in practice this role of the President would be limited to an automatic appointment of judges selected by an independent body of the judiciary itself. The significant role of the President in the selection and appointment of judges in Russia has been already criticized by the UN Human Rights Committee in 2015.<sup>53</sup> The Committee recommended to "reduce the role of the role of the Presidential Commission in the process of the appointment of individuals proposed by independent bodies established to govern appointments".<sup>54</sup> The proposed amendments to the Constitution do not appear to aim to implement this recommendation.

**The ICJ therefore recommends that in the interests of judicial independence, the amendments to Article 83, 102 and 128 of the Constitution are modified to ensure that the participation of the President of the Russian Federation is removed or limited to a nominal or symbolic role, following an actual appointment by the specialised bodies of the judiciary itself.**

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<sup>50</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 23-25 June 2010, para. 23.

<sup>51</sup> *Appointing the judges: Procedures for Selection of Judges in the Russian Federation*, ICJ Mission Report 2014, page 58. <https://www.icj.org/wp-content/uploads/2014/11/RUSSIA-Selecting-the-judges-Publications-Reports-2014-Eng.pdf> (Accessed 11 March 2020).

<sup>52</sup> *Ibid.*, page 60.

<sup>53</sup> Concluding observations on the seventh periodic report of the Russian Federation, UN Doc. CCPR/C/RUS/CO/7 (2015).

<sup>54</sup> *Ibid.*

b) *Removal of judges*

Under Article 18 of the Law on the Constitutional Court of the Russian Federation, the powers of judges of the Constitutional Court may not be revoked without the decision of the Constitutional Court itself, which should initiate such as procedure.<sup>55</sup>

Under existing procedure, "Powers of the President or Deputy Presidents of the Constitutional Court of the Russian Federation may be terminated prematurely by the Council of the Federation on the proposal of the President of the Russian Federation if, **by a decision of the Constitutional Court of the Russian Federation**, it is established that the Chairperson or vice-chairperson of the Constitutional Court of the Russian Federation does not perform official duties or performs them improperly. The decision of the Constitutional Court of the Russian Federation shall be adopted by a majority of at least two-thirds of the number of sitting judges of the Constitutional Court of the Russian Federation by secret ballot [...]"<sup>56</sup>

The amendments introduce changes to the system of termination of office of judges. Article 83 (e) and (e)<sup>3</sup> on the powers of the President of the Russian Federation and paragraphs Article 102 (j) and (l) on the powers of the Council of Federation are proposed for amendment. In particular, Article 102(1) is to be amended to include paragraph "l", adding to the jurisdiction of the Council of Federation "l) termination of the powers of the President of the Constitutional Court, deputy chairperson of the Constitutional Court of the Russian Federation and judges of the Constitutional Court of the Russian Federation, the chairperson of the Supreme Court of the Russian Federation, deputy chairperson of the Supreme Court of the Russian Federation and judges of the Supreme Court of the Russian Federation [...]" upon the proposal of the President of the Russian Federation [...]" and all judges of these as well as appeals and cassation courts.<sup>57</sup>

International standards on judicial independence provide that disciplinary action against judges must be carried out in accordance with established standards of judicial conduct<sup>58</sup> by independent bodies that include substantial judicial representation.<sup>59</sup> Judges may be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.<sup>60</sup> Proceedings for dismissal of judges or other disciplinary responsibility should be held before a court or a board exclusively or predominantly composed of members of the judiciary and, when the power to remove or discipline is vested in the legislature, the action should be taken upon a recommendation of such a court or board.<sup>61</sup> Disciplinary, suspension or removal decisions should be subject to an independent review.<sup>62</sup> Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision and sanction, which must also be proportionate to the misfeasance.<sup>63</sup>

In 2015 the Human Rights Committee in its concluding observations recommended that the Russian Federation "[e]nsure that an independent body is responsible for judicial discipline, clarify the grounds for disciplinary action and guarantee due process in judicial disciplinary proceedings and independent judicial review of disciplinary sanctions".<sup>64</sup>

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<sup>55</sup> The Federal Constitutional Law of 21 July 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation", Article 18.

<sup>56</sup> *Ibid.*, Article 23.

<sup>57</sup> Draft Law, *Op.cit.*, Article 1, paragraph 24 (a).

<sup>58</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 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 19.

<sup>59</sup> The Universal Charter of the Judge, adopted by the IAJ Central Council in Taiwan on November 17th, 1999 and updated in Santiago de Chile on November 14th, 2017, Article 7-1.

<sup>60</sup> UN Basic Principles on the Independence of the Judiciary, *Op.cit.*, Principle 18.

<sup>61</sup> Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), Article 26 (b).

<sup>62</sup> UN Basic Principles on the Independence of the Judiciary, *Op.cit.*, Principle 20.

<sup>63</sup> Council of Europe Committee of Ministers Recommendation No. R (2010) 12 to Member States on judges: independence, efficiency and responsibilities, Article 69.

<sup>64</sup> Concluding observations on the seventh periodic report of the Russian Federation, *Op.cit.*

In its 2012 report on the disciplinary system for judges in the Russian Federation, the ICJ concluded that:

"A deeper and broad-based culture of respect for the judiciary and its independence, in all institutions of the State, and within the judiciary itself, needs to be developed in Russia. For this culture to emerge, life tenure must become a reality and the disciplinary system must not operate as the sword of Damocles for judges who act independently, against the wishes of the judicial hierarchy, or other state or non-state interests. This is a prerequisite for true separation of powers and judicial independence."<sup>65</sup>

The proposed amendments would provide for a system which would fail to meet these basic requirements. They introduce a procedure for dismissal of judges without the participation of the judiciary itself. Rather than aiming to improve the current guarantees against arbitrary removal of judges, they appear to introduce a decisive role for the executive and legislature in the exercise of the judicial role.

In particular, under the current legislation, judges of the Constitutional Court cannot be removed without a decision of the Constitutional Court itself.<sup>66</sup> The dismissal of the Supreme Court judges can also take place only through a procedure with the participation of the judiciary itself. In particular, the judges of the Supreme Court and other judges can be dismissed by the decision of Qualification Commission of Judges, which can be appealed to the Supreme Court of the Russian Federation.<sup>67</sup> These guarantees of institutional judicial independence risks being undermined by the increased role of the executive in termination of office of judges, under the proposed amendments. **The ICJ therefore recommends that, in the interests of preserving the security of tenure of judges and the independence of the judiciary as required by international law, the proposed amendments to Articles 83 and 102 of the Constitution, on the termination of office of judges, should be rejected.**

**Bearing in mind the afore-mentioned, the ICJ recommends the reconsideration of the text of the amendments, with a view to dropping them or revising them in a manner that ensures that:**

- **Execution of decisions of international human rights courts and mechanisms is not hindered by the Constitution.**
- **The independence of the judiciary is not eroded and the judiciary enjoys legal and practical guarantees of independence in line with the rule of law.**

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<sup>65</sup> *Securing justice: The disciplinary system for judges in the Russian Federation, Report of an ICJ mission*, page 44. <https://www.icj.org/wp-content/uploads/2012/12/MISSION-RUSSIA-REPORT.pdf> (Accessed 19 March 2020).

<sup>66</sup> Federal Constitutional Law of 21 July 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation, Article 18.

<sup>67</sup> Law of 6 June 1992 No. 3132-1 "On the Status of Judges in the Russian Federation", Article 12.1, Paragraphs 1 and 7.



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