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COMMISSION
OF JURISTS

THE STATE OF THE JUDICIARY IN RUSSIA

**REPORT OF THE ICJ RESEARCH MISSION ON JUDICIAL REFORM TO
THE RUSSIAN FEDERATION
on 20-24 June 2010**

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The International Commission of Jurists

The International Commission of Jurists (ICJ) is a non-governmental organisation dedicated to international law and rule of law principles that advance human rights. The ICJ provides legal expertise at both international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level. It was founded in Berlin in 1952 and is composed of sixty jurists (senior judges, attorneys and academics) coming from all regions of the world and different legal traditions with the aim to reflect the geographical diversity of the world and its many legal systems. The ICJ Secretariat, based in Geneva, works closely with the Commissioners as well as with the ICJ sections and affiliated organisations throughout the world to achieve the goals of the organisation. It enjoys consultative status in the United Nations Economic and Social Council (ECOSOC), UNESCO, the Council of Europe and African Union. The ICJ maintains cooperative relations with various bodies of the Organisation of American States.

Research Mission

The ICJ undertook a five-day research mission to Moscow from 20 to 24 June 2010 to analyse judicial reform in the Russian Federation (RF) and to assess the progress made so far and the problems that remain. The purpose of the mission was to gather information and views on the current state of the Russian judiciary, in particular as regards its independence, in law and in practice, from the executive and other powerful interests. The ICJ was particularly interested to hear the opinions and views of the Russian stakeholders who work on the issue and possess first-hand knowledge of the situation. The mission met with a range of actors in order to hear different perspectives and have as full and objective picture as possible. In particular the mission met with senior representatives of the Ministry of Justice of the RF, Constitutional Court, the Civil Society Institutions and Human Rights Council under the President of RF, representatives of the Parliament, Moscow Bar, sitting judges, former judges, lawyers, academic experts and various NGOs involved in the judicial reform process. It is important to note that, with some exceptions, the mission only had the opportunity to meet with stakeholders from Moscow. Though the experts enquired about the issues relevant for the judiciary in Russia in general, this could not but affect the impression the mission had as well as the findings reflected in the report.

The mission was conducted by high-level experts Ketil Lund, a former Supreme Court judge of Norway; Vojin Dimitrijevic, member of the European Commission of Democracy through Law (the Venice Commission), Professor of Law at the University of Belgrade and former member of the United Nations Human Rights Committee; and Róisín Pillay, Senior Legal Adviser of the ICJ Secretariat in Geneva.

The Report

This report aims to reflect and analyse the information and opinions gathered at various meetings with officials and the expert community during the trip to Moscow. The report was not drafted with an ambition to encompass all aspects of the legal framework governing the judiciary in Russia, or to describe comprehensively the practical problems faced by judges, across a vast and varied country. For instance, the North Caucasus, where the general problems are exacerbated and other problems such as lack of security persist, was not a subject of the discussions and is not covered in

the report. However the ICJ has previously considered some of those problems in its various submissions to UN bodies.¹ This report aims to shed light on certain aspects of judicial independence and to suggest solutions to address some of these long-standing issues.

The report starts with an introduction into the issues of judicial independence in Russia (section I) and provides a brief overview of the court system in the RF and legal framework governing relevant aspects of the justice system (section II). It then examines the structural issues which limit judicial independence and effectiveness (section III) and goes on to consider the practical matters that affect the independence of the judiciary (section IV). Conclusions and recommendations are set out in the final part of the report (section V).

¹ See: *Human Rights Committee International Commission of Jurists submission to the review of the 6th Periodic Report of the Russian Federation*, http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22867; *United Nations Human Rights Council 4th Session of the Working Group on Universal Periodic Review, 2-13 February 2009 ICJ Submission to the Universal Periodic Review of the Russian Federation*, http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22869; *Russian Federation: ICJ Calls for Thorough, Independent Investigation into Killing of Judge*, http://icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23182.
ICJ: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, http://icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22936.

I. INTRODUCTION

Judicial Independence and the Rule of Law

The judiciary is one of three basic and equal pillars in the modern democratic state. Judges are charged with the ultimate decision over the freedoms, rights, duties and property of citizens and non-citizens.² Judicial independence is a fundamental aspect of the rule of law, and a necessary safeguard for those who seek and expect justice as well as the protection of their human rights.³ International standards, which form the benchmark for the ICJ's work on judicial independence in Russia as elsewhere, provide that the Government and other institutions of the State respect and observe the independence of the judiciary, which must be enshrined in the Constitution or law.⁴ To establish whether a body can be considered independent "regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence".⁵ Judicial independence also means total impartiality.⁶ Judges must not only be free from any inappropriate connection, bias or influence in practice, they must also appear to a reasonable observer to be free from it. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary.⁷

The Legacy of the Past and Judicial Reform

In the mission's discussions on the need for judicial reform, the *tradition* and the *past* were often mentioned as the core of the problem and the Russian experts in many instances referred to the legacy of the Soviet Union where the judiciary formed part of the law enforcement system to enforce the policy of the state. Traditions of the Soviet system have undoubtedly had significant influence on Russia's judiciary throughout its post-Soviet history. Despite the independent status of the judiciary under the new Constitution, its old internal culture and *modus operandi* continue to hamper the establishment of an independent judicial branch with strong *de facto* status and powers. Although there have been advances in reforming the judicial system, in particular in the early 1990s, and improvements to the salaries and material conditions of judges, there have also been counter-reforms that have had a negative effect, and it is far from clear that the executive and legislative branches have wholeheartedly or consistently pursued the goal of an independent judiciary. Lack of political will or

² 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.

³ Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges (*Adopted by the Committee of Ministers on 13 October 1994 at the 516th meeting of the Ministers' Deputies*), principles 11 and 10.

⁴ Basic Principles on the Independence of the Judiciary, art. 1.

⁵ European Court of Human Rights, *Langborger v. Sweden*, Application no. 11179/84, 22 June 1989, para 32.

⁶ 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, para. 12.

⁷ *Ibid.*

consensus is clearly a significant factor in the slow and uneven progress of judicial reform. The issue however has recently been pronounced as a priority by the Russian President Dmitry Medvedev who has said that citizens “*need to be protected primarily from the sort of corruption that breeds tyranny, lack of freedom and injustice*” and that Russian society has “*to rid [themselves] of the contempt for law and justice, which [...] has lamentably become a tradition in this country*”.⁸ This recognition at the highest level of the Russian government of the importance of a strong and independent judiciary, and of the need for judicial reform in Russia, is extremely welcome, and it is to be hoped that it will form the basis for real and lasting progress on judicial reform in the coming months and years.

Judicial Independence in Russia Today

*Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restriction, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*⁹

Lack of independence of judges and the interconnected problem of lack of confidence of the public in the judiciary were pointed out as the main problems in the Russian judicial system. While understandings of the depth or scope of the problem may differ, the mission heard strikingly consistent views from a range of experts, observers and participants in the judicial system and institutions of government indicating that the judiciary was not in practice independent, or is at least not perceived to be so. Lack of judicial independence, despite the Constitution’s recognition of the judiciary as a “self-dependent” branch of state power, seems to be Russia’s “Punchinello’s secret”.

Sometimes the dependent position of the judiciary was presented in very stark terms: one expert warned that proposals for reform could not be made “on the assumption that the judicial branch exists” – when in practice judges in Russia were more akin to high officials. Indeed, the mission heard that senior judicial figures openly assert that “claims of the judiciary being independent from the political branch are invalid as the judicial branch is a part of the political power which is exercised in interests of the public”.¹⁰ This is not a unique opinion. In modern Russia, as in Soviet times, judges are often not seen as arbiters, but rather as defenders of the interests of the state. Many judges do not see themselves as independent or expect to be so. In the same vein, the *Law on Security* of 5 March 1992 specifies that “the security system is formed of the bodies of legislative, executive and judicial powers”. Though this can partially be explained by the proximity of the time of its enactment to the Soviet era, it in general reflects a prevailing official attitude towards the judiciary, which is yet to be altered. The problems of the Russian judiciary therefore have deep roots in the legal and political culture of the Russian state bureaucracy and society. Such

⁸ President of Russia Dmitry Medvedev, Go Russia! <<http://eng.kremlin.ru/news/298>>, September 10, 2009.

⁹ Draft Universal Declaration on the Independence of Justice, (“Singhvi Declaration”), para. 2.

¹⁰ An interviewed high level expert citing an official at a meeting with the mission.

problems are not easy to address, or even to locate with any precision. The mission repeatedly heard of “powerful forces” preventing any deep reforms to make the judiciary truly independent, although the precise identity of these forces was never specified.

The poor state of judicial independence is clearly facilitated by a legislative and administrative framework that fails to protect judges from undue influence by state or private interests. The selection and appointment procedures are not transparent and are not free from abuse. Tenure of judges is often not secured and judges can be dismissed for improper reasons. Court presidents enjoy overly broad powers including a decisive role in promotion of judges, disciplinary proceedings and material benefits. Sometimes material benefits are used to try to achieve the loyalty of certain judges or courts in general and justices of the peace seem to be particularly vulnerable in this regard. Allocation of cases by court presidents is highly problematic, as cases are often assigned to certain judges to achieve a needed result or reassigned when judges do not agree to rule in a way required from a judge. The system pressures judges to show loyalty to state bodies or certain officials and to take into account political considerations. This includes pressure from the prosecution, which can lead to disciplinary proceedings against judges. With a strong prosecution, the criminal process has retained its accusatory nature and equality of arms is not always guaranteed in practice.

Threats to judicial independence are reported to be particularly acute in cases where powerful political or economic actors have an interest in an outcome of a case, but pressure on judges permeates the judicial system as a whole. Such pressures can – although they by no means always do - affect a court’s ability to deliver justice in a wide range of cases. The way the judiciary operates puts pressure on judges through a complex system which is not always apparent or visible. The problem is not one of external pressure only, but to a great extent has to do with internal mechanisms and bureaucracy. These internal mechanisms have become more significant as a result of the government’s drive to strengthen the powers of the executive, known in Russia as “strengthening the vertical of power”. Methods of inappropriate influence on judges are multifarious and range from manipulation of promotions or benefits to applying direct pressure on a judge regarding a concrete case and the chilling effect on judges of dismissing colleagues perceived to be too independent or outspoken.

Two forces were said by Russian experts to prevail inside the judiciary: fear and arbitrariness. However exaggerated this opinion might have seemed to the mission, it is shared to a greater or lesser extent by most of the independent experts, lawyers, NGOs and former insiders – dismissed judges – with whom the mission met. In this context, public confidence in the judicial system is said to be very low. It seems to be a universal truth among Russian experts that no justice can be found in the justice system, with a salient pessimistic mood about the prospects of any serious reforms among many of those who shared their views with the mission.

II. BRIEF OVERVIEW OF THE RUSSIAN JUSTICE SYSTEM

Federal and Regional Structure

The Court System in Russia has two levels – federal courts and regional courts – courts of the subjects of the RF (SRF).

Federal courts are: a) Constitutional Court; b) first and second instance courts in the SRFs, military and specialised courts; RF High Arbitration Court, federal arbitration courts of cassation, arbitration appeal courts, RFS arbitration courts; c) Disciplinary Judicial Presence.

Courts of the subjects of the RF are: a) Constitutional (charter) courts of the SRF; b) justices of the peace.

Court Jurisdictions

Under the Federal Constitutional Law of the RF, *On the Court System of the Russian Federation*, the court system comprises all of the courts, including federal courts and the courts of the regions in Russia (SRFs).¹¹ The court system is divided into:

- *Courts of general jurisdiction*, which consider criminal, administrative, civil and other types of cases falling under their jurisdiction. The Supreme Court is the highest instance of the courts of general jurisdiction. Military courts form a separate branch subordinate to the Supreme Court. Justices of the Peace (JP) fall under the jurisdiction of the courts of general jurisdiction. With the exception of JPs, all the courts of general jurisdiction in the RF belong to the federal level.
- *Constitutional courts* consider compliance of the laws of the RF with the Constitution of the RF and compliance of the laws of the SRFs with their Constitutions (Charters). Constitutional courts of the SRFs are not subordinate to the Constitutional Court of the RF.
- *Arbitration Courts* consider disputes in the economic sphere. The Supreme Arbitration Court is the highest instance in the arbitration courts hierarchy.

Administration of the Courts: Judicial Bodies

Judicial Department under the Supreme Court of the RF

The Judicial Department under the Supreme Court of the RF is a federal administrative state body in charge of human resources, financial, logistical and other issues of the courts of general jurisdiction including the JPs.¹² It carries out activities such as examining the work of the operation of courts and making recommendations on its improvement, submitting recommendations on creation or abolishment of

¹¹ The Russian Federation consists of its subjects which, according to the Constitution, can be republics, krais, oblasts (regions), cities of federal significance, autonomous oblasts, autonomous okrugs (circuits).

¹² RF Law *On Judicial Department under the Supreme Court of the Russian Federation*, 8 January 1998 N 7-FZ, art. 1; RF Law *On the Bodies of Judicial Community in the Russian Federation*, 14 March 2002 N 30-FZ, arts. 27, 28.

courts to the Supreme Court, determining the need of courts in cadres, organising the work on selection of candidates for the vacancies of judges, organising and ensuring the work of examination commissions in charge of qualification exams.¹³ The Director General of the Department is appointed by the President of the Supreme Court with the consent of the Council of Judges and Director General's Deputies are appointed by the President of the Supreme Court upon nomination of Director General of the Judicial Department. The Department has a Collegium (The Judicial Department Collegium) consisting of the Director, his/her deputies and other staff members of the Department. The Collegium can issue orders and instructions. The Department has branches (units) in the SRFs.

Bodies of the Judicial Community

Under the law *On the Bodies of the Judicial Community* the Judicial Community comprises the judges of federal courts of all kinds and levels and judges of the courts of the SRF forming the judiciary of the RF.¹⁴ The bodies of the judicial community are:

- *All-Russia Congress of Judges* is the highest body of the judicial community. It can take decisions on all issues related to operation of judicial community (with exception of qualification collegiums), can adopt the code of judicial ethics and acts regulating activities of the judicial community. It takes place every four years and includes representatives of all the courts;
- *Conference of judges of the subjects of the Russian Federation* is a representative body for the SRF. It is summoned at least once in two years and can take decisions with regard to the operation of the judiciary in the SRFs;
- *Council of Judges of the Russian Federation* is formed by the All-Russia Congress of Judges from both federal judges and the judges of SRF. The working body of the Council of Judges is its Presidium, which is summoned at least four times a year. Among its other functions, the Council agrees on appointment and dismissal of the Director General of the Judicial Department and elects judges for the High Qualification Collegium of Judges in place of those who were dismissed during its sessions;¹⁵
- *Council of Judges of the subjects of the RF* is elected by the Conferences of judges from judges of the courts of different levels including JP and military courts. It elects judges for qualification collegiums of a relevant SRF in place of those who were dismissed between the sessions of the Conferences.
- *General meetings of judges of courts*;
- *High Qualification Collegium of the RF* consists of 29 members of the Collegium including judges of different levels, ten members of the public who are appointed by the Federation Council of the Federal Assembly of the RF¹⁶ and one representative of the President of the RF appointed by the President. Members are elected by a secret ballot at a Congress by delegates of relevant

¹³ For a comprehensive list please see RF Law *On Judicial Department under the Supreme Court of the Russian Federation*, art. 6 and chapter III.

¹⁴ RF Law *On the Bodies of the Judicial Community in the Russian Federation*, art. 1.

¹⁵ *Ibid*, art. 9.

¹⁶ Federal Assembly of the Russian Federation is the official name of the Russian parliament. *Federation Council of the Federal Assembly* is the upper chamber of the parliament, while *the State Duma* is its lower chamber.

courts at separate meetings of delegates.¹⁷ Those members that retired between the meetings of the Congress are appointed by Council of Judges.¹⁸

- *Qualification Collegiums of judges of the subjects of the Russian Federation* are formed of judges of the courts of the SRF of different levels, representatives of the public and a representative of the President of the RF. Judges-members are elected by a secret ballot at a Conference of Judges. Elections between the conferences are carried out by the Qualification Collegium of the judges of the SRF. Representatives of the public are appointed by the legislatures of the SRF and the representative of the President is appointed by the President of the RF. A member of a Qualification Collegium can be dismissed, among other reasons, for disciplinary misconduct. The decision on dismissal of the judges-members is taken by the Conference of Judges and in the periods between conferences by the relevant Council of Judges.¹⁹

¹⁷ RF Law *On the Bodies of the Judicial Community in the Russian Federation*, art. 11(3).

¹⁸ *Ibid*, art. 11(3).

¹⁹ *Ibid*, art. 11(7).

III. THE JUDICIARY: STRUCTURAL AND PROCEDURAL ISSUES

Selection and Appointment

*The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification.*²⁰

*[C]lear, and transparent procedures [should] be applied in judicial appointments and assignments, in order to [...] safeguard the independence and impartiality of the judiciary.*²¹

In any legal system, fair appointment procedures that guard against improper influence are of the utmost importance for guaranteeing the independence of the judiciary.²² The authority deciding on the selection and career of judges is to be independent of the government and administration as well as of the legislature. However, where provisions and traditions allow judges to be appointed by the government, guarantees should exist ensuring that the appointment procedures are transparent and independent in practice and that the decisions are not influenced by any reasons other than those related to objective criteria.²³ The right to fair trial can be violated when the manner of appointment of those presiding over trials, together with lack of guarantees against outside pressures, demonstrate lack of independence of the bodies.²⁴

In Russia, selection of candidates to hold judicial positions begins with an examination carried out by examination commissions under respective qualification collegiums of judges, which approve their personal composition.²⁵ Under the regulations adopted in 2002, Qualification Commissions can be composed of the most experienced judges and can include legal scholars and teachers of legal subjects,²⁶ as opposed to the regulations of 1999,²⁷ under which “Examination Commissions were created out of most experienced judges, *law enforcement agencies* employees and units (departments) of the Justice Departments under the Supreme Court of the RF, legal scholars and other high qualification specialists in law”. Exclusion of the law enforcement agencies was a positive step, as the participation of law enforcement agencies in the selection of judges constituted a clear interference in the operation of

²⁰ Universal Charter of the Judge, approved by the International Association of Judges in Taipei (Taiwan) on 17 November 1999, art 9.

²¹ Concluding Observations of the Human Rights Committee on Azerbaijan, UN document, CCPR/CO/73/AZE, para. 14.

²² 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.

²³ Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, principle I(2)(b).

²⁴ European Court of Human Rights, *Lauko v. Slovakia*, application no. 4/1998/907/1119, 2 September 1998, paras. 63,64.

²⁵ RF Law *On the Status of Judges in the Russian Federation*, of 26 June 1992, N 3132-I, art. 5(4).

²⁶ Regulations on Examination Commissions on Qualification Exams for a Position of Judge adopted by the High Qualification Commission on 15 May 2002, art. 2.1.

²⁷ Introduced by the Decree of the Director General of the Judicial Department and the President of the High Qualification Collegium of Judges of 31 May 1999.

the judiciary, contrary to international standards and the principle of separation of powers.²⁸

The mission learned that the examination process lacks clear unified standards; questions, for instance, depend solely on the examination commissions, which draft their own exams in each of the regions themselves. Furthermore, there is no unified standard for evaluation, which can lead to arbitrariness and manipulations at examinations. Indeed, lack of regulation and clear procedures and standards poses risks for abuse, as has been noted by the Venice Commission.²⁹

Once a vacancy for a judicial position is opened, the president of a court informs the relevant Qualification Collegium about it within ten days.³⁰ The Qualification Collegium is to make a public call for the position in the media. Normally judicial vacancies are posted on the web. A person who has successfully passed exams and meets other requirements under the law submits documents to the respective Qualification Collegium to recommend the candidate to occupy the vacant position. Following consideration of the package of documents, the Collegium recommends the person or several persons for the office or declines such recommendations. A positive decision is sent to the court president who can either agree and approve or disagree with the decision, in which case the president can return the decision with reasons for the negative decision. This disagreement of the court president may be overcome by two thirds of the votes of the Collegium members, upon which the court president must approve a candidate for the further appointment procedure.³¹

The “veto powers” of court presidents introduced by the law of 15 December 2001 demonstrate the presidents’ general broad competencies even with regard to the Qualification Collegium, which unlike the court presidents thoroughly considers a candidate, assesses exams and makes an informed decision. Under the same law, the RF President’s refusal to appoint a judge became final, without the possibility of review or the need to provide reasons, unlike the previous procedure under the old law which made it possible for the Collegium to examine the RF President’s reasons for declining a candidate and to submit the application for the President’s approval again. It is apparent that the final and unchallengeable nature of Presidential refusals of appointment has weakened the selection procedure. Furthermore, no clear standards exist for selection of judges, especially with regard to the procedure at the presidential administration’s office in charge of approving candidates. For instance, the absence of time limits on the appointments of judges has in the past sometimes resulted in consideration of candidates over the span of several years, delays which reportedly in some cases were not due to negligence, but to a deliberate postponing of approval when there were no grounds for non-appointment. It was reliably reported that apart from the package of documents, more than a dozen authorisations must in fact be collected, including those of the prosecutor’s office, police, intelligence

²⁸ Council of Europe, Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges: “The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules”.

²⁹ Report on the Independence of the Judicial System, Part I: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

³⁰ The Law of RF *On the Status of Judges in the Russian Federation*, art. 5(2).

³¹ *Ibid*, art. 5.

services and other law enforcement bodies, through an unofficial approval process before a judge is appointed, and that poor relationships with the prosecution can easily prevent a candidate from becoming a judge. Information from these sources can, reportedly, form the main basis for the decision on appointment. It was mentioned that due to the above reasons, posting announcements on the web about vacancies does not play any role in adding competitiveness to the process of selection of judges.

In general, the internal selection and appointment system lacks transparency, strict criteria and rules for selection and accountability, which inevitably leads to arbitrariness and abuses. In this respect, it is noted by the mission that a significant percentage of recommended judges do not get approved by the Presidential administration. As the Venice Commission has noted: “What matters most is the extent to which the head of state is free in deciding on the appointment. It should be ensured that the main role in the process is given to an independent body – the judicial council”. It added, however, that “As 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.”³² This is not the case in Russia, where the President’s office is not bound by the recommendation of the Qualification Commission and can overturn the recommendation without any reasons given and without a possibility for appeal. In fact, the mission heard that the procedure operates in such a way that would not allow someone regarded unfavourably by law enforcement authorities or other powerful executive interests, to join the judiciary. It is hardly possible to become a judge if presidents of the highest courts have a negative attitude towards a person, whereas good relationships and connections can facilitate the process. This process clearly runs contrary to UN Basic Principles on the Independence of the Judiciary, guaranteeing that “any method of judicial selection shall safeguard against judicial appointments for improper motives”.³³

It was reported that the Qualification Collegia, which mostly consist of professional judges and some laypeople, are not in fact the decision makers and have no real influence in the decision making process. This situation is not limited to isolated instances or a certain region. The mission received credible information that the collegiums often vote on candidates for judicial positions in accordance with the preapproved lists drafted by someone outside the collegiums. Although qualification collegiums have rather broad powers they are nevertheless dependent and are influenced by court presidents. The powers of the collegia include consideration of applications to hold judicial office and recommending the candidate for the office, appointment of examination commissions, attestation of judges and decisions on qualification classes of judges, dismissal of judges, recommendations on awarding judges, etc.³⁴ As collegiums are heavily influenced by court presidents, in practice, it is court presidents who often have such powerful tools at their disposal. For example, the mission heard of a conflict between a Court President and the Chair of a Qualification Collegium who tried to prevent the unfair dismissal of judges, which allegedly resulted in dismissal of the Qualification Collegium Chair both as a judge and as the Chair of the Collegium. It was pointed out that while the selection and

³² Judicial Appointment, Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), para. 14.

³³ Basic Principles on the Independence of the Judiciary, Principle 10.

³⁴ RF Law *On the Bodies of the Judicial Community in the Russian Federation*, chapter II.

appointment procedures are rather complex and have several stages, including approval on the highest level by the President of the RF, the dismissal procedure, which is often a mere formality, is very simple and no high-level compulsory revision or approval is necessary.

The mission was told that, presently, former lawyers are generally not appointed as judges. It was also suggested that there is now some reluctance to appoint former prosecutors, although there is no official prohibition on such appointments. The Soviet and post Soviet practice of appointing prosecutors as judges has changed or at least is no longer so dominant. Judges are mostly drawn from judges' offices: in many cases they are former researchers and court clerks. At the same time, some said that while lawyers are not appointed as judges, former police officers or prosecutors do get appointed, which raises further concerns over the selection process. It is worth noting that the *Law on the Status of Judges* in its article 3(4) provides that retired judges who have served for up to 20 years cannot work as prosecutors, investigators or lawyers. However no such restriction exists on judicial appointments. The Universal Charter of the Judge in this regard states: "The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification."³⁵

Promotion of judges

*Promotion 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.*³⁶

Many of those with whom the mission met emphasised that the judicial promotion procedure is neither transparent nor predictable. Legislation or rules do not specifically regulate judicial promotions meaning that the general law regarding appointments is applied in cases of promotion. Apart from meeting formal requirements set out in the *Law on the Status of Judges*, to achieve promotion a judge needs the support of a court president as well as local authorities. In order to become a court president a judge needs, in practice, to seek the support of the court president of the higher court.

The mission was consistently told that loyalty of a judge and "political sensitivity" are the most important factors for determining promotion, while independent and principled judges often have much lesser chances to be promoted or appointed as a court president. The mission also heard that candidates are sometimes "invited" for a meeting with officials in charge of selection of judges, where it is subtly explained to them to be mindful of the state's position and interests.

The key recommendations of the Council of Europe Committee of Ministers indicate that "all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency." In addition, "where

³⁵ Universal Charter of the Judge, Art. 9.

³⁶ Draft Universal Declaration on the Independence of Justice, ("Singhvi Declaration"), art. 14.

the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should 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 the objective criteria mentioned above”.³⁷ Contrary to these recommendations, telephone justice, however outdated the term seems, reportedly persists (see below section *Undue influence on judges*) and, although it is nowadays often relatively subtle, judges sometimes receive actual phone calls during which, for example, a court president will be reminded of a coming reappointment.

Security of Tenure

*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.*³⁸

The independence of judges cannot be safeguarded without guaranteeing the tenure in office of judges. According to international standards, judges should either be appointed for life,³⁹ to a reasonable age of retirement, or to a fixed period long enough not to endanger the judge’s independence.⁴⁰ In any case, “Judges [...] shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists”.⁴¹ Appointed judges should not be permanently removed from office without valid reasons until mandatory retirement. Removal may be only for “reasons of incapacity or behaviour that renders them unfit to discharge their duties”⁴² reasons, which should be defined in precise terms by the law.⁴³ Security of tenure should be guaranteed⁴⁴ and promotion should be based on objective factors in particular ability, integrity and experience.⁴⁵ The authorities in charge of appointment and promotion should give effect to objective criteria, to ensure that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”.⁴⁶

Under the law *On the Status of Judges*,⁴⁷ federal judges in the RF are appointed for life.⁴⁸ Justices of the Peace, however, are appointed for a period of five years.⁴⁹ Until

³⁷ Council of Europe, Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, Principle I(2)(b).

³⁸ UN Basic Principles on the Independence of the Judiciary, Principle 12.

³⁹ Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence, adopted on 19 June 1998, Guideline II.1.

⁴⁰ Universal Charter of the Judge, approved by the delegates attending the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on November 17, 1999, art. 8.

⁴¹ UN Basic Principles on the Independence of the Judiciary, Principle 12; Council of Europe, Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, Principle I.3.

⁴² UN Basic Principles on the Independence of the Judiciary, Principle 18.

⁴³ Council of Europe, Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, Principle VI(2).

⁴⁴ UN Basic Principles on the Independence of the Judiciary, Principle 12.

⁴⁵ *Ibid*, Principle 13.

⁴⁶ Council of Europe, Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, Principle I(2)(c).

⁴⁷ RF Law *On the Status of Judges in the Russian Federation*, art. 11.

⁴⁸ Federal judges in Russia are appointed for life, while justices of the peace are appointed for the

recently, all the federal judges appointed for the first time had to go through a “probation period” of three years following a permanent appointment.⁵⁰ The three-year probation period for judges reportedly often served as a “filter” for selecting judges and excluding judges due to lack of professional competency, but also sometimes for political or personal reasons. Under a new law of 17 June 2009, the three-year probation period was abolished, after the mechanism was criticized by President Medvedev at the VII All-Russian Congress of Judges in 2008.⁵¹ Abolishing a three-year probation period for federal judges did not, however, lead to altering the law under which Justices of the Peace are appointed for a period not exceeding five years after which they are subject to reappointment.⁵² This means that the same problems remain in place for Justices of the Peace, judges who are widely considered as at the start of their judicial career and thus meriting a thorough screening process. The decision to abolish the probation period for federal judges was considered by many legal professionals and academics in Russia to be an important step in remedying one aspect of the insecurity of tenure, which negatively influenced the judiciary and provided an effective screening process against “disloyal” judges without providing any reasons or mechanisms for appeal against such decisions. The mission heard directly from former judges who had lost their positions through such a process.

The reform, while welcome, only addressed one problem among a number of difficulties that have led to the arbitrary or unfair removal or disciplining of judges. Indeterminate and vague grounds for disciplinary responsibility, which can be interpreted as broadly as is necessary in a certain situation, are used to put pressure on judges or to dismiss them. In particular the requirement to avoid “anything which can undermine the authority of the judiciary” is often used as a basis on which to dismiss a judge.⁵³ Thus on the one hand a judge has life tenure and on the other hand there is a requirement that judges do not “undermine the authority of the judiciary” which hangs above every judge as a kind of “Sword of Damocles”. Indeed, these grounds are reportedly most often used in disciplinary proceedings against judges, creating a

period not exceeding 5 years. Judges of the Supreme Court and High Arbitration Court are appointed by the Federation Council of the Federation Assembly (Upper Chamber of Parliament) upon recommendation of the President of the Russian Federation taking into account the opinion of the Presidents of the Supreme Court and High Arbitration Court.

Judges of federal arbitration courts are appointed by the President of the Russian Federation upon recommendation of the President of the High Arbitration Court. Judges of other federal courts of general jurisdiction and arbitration courts are appointed by the President of the Russian Federation upon nomination of the Presidents of Supreme and High Arbitration courts respectively. Judges of military courts are appointed by the President of the Russian Federation upon recommendation of the President of the Supreme Court in case of a positive conclusion of the High Qualification Collegium of Judges of the Russian Federation.

⁴⁸ The Federation Council of the Federation Assembly appoints presidents of the Supreme Court and the High Arbitration Court and their deputies. Presidents and their deputies of other courts are appointed by the President of the Russian Federation.

⁴⁹ Attempts of regional authorities for instance Tatarstan and Bashkortastan to limit life tenure failed and the federal authorities managed to preserve it.

⁵⁰ RF Law *On Introducing Amendments to articles 6 and 11 of the Law of the Russian Federation On Status of Judges” and articles 17 and 19 of The Federal Law On the Bodies of the Judicial Community* in the Russian Federation, of 17 July 2009, N 157-FZ.

⁵¹ Speech of President Medvedev at the VII All-Russian Congress of Judges, http://www.ssrf.ru/ss_detale.php?id=795.

⁵² The RF Law *On Justices of the Peace* of 17 December 1998 N 188-FZ, art. 7(1).

⁵³ The RF Law *On the Status of Judges in the Russian Federation*, art. 3(2).

chilling effect for their peers in both independent and impartial decision-making and attempts to resist improper interference with their work.

The mission met with a number of former judges, dismissed for reasons which appeared to be illegitimate, and which followed inadequate processes. For example, the mission met with Judge Olga Kudeshkina, who was dismissed on the basis that critical statements she made concerning the pressure to which she had been subjected with regard to a case she was considering “...undermined public confidence that the judiciary in Russia are independent and impartial; consequently, many citizens were led to believe, erroneously, that all judges in this country are unprincipled, biased and venal, that in exercising their functions they only pursue their own mercenary ends or other selfish goals and interests”. Judge Kudeshkina appealed this decision to the ECtHR, which decided in her favour. However, she was not reinstated as a judge. This decision was appealed to the Supreme Court, which agreed that she should not be reinstated. The refusal of the Supreme Court to reinstall Judge Kudeshkina following the decision of the European Court is discouraging and raises serious concerns regarding implementation of the European Court decisions. It undermines confidence of the judges in their ability to effectively administer or even seek justice and defend themselves in cases of improper interference with their work.⁵⁴ The mission heard of other instances of the use of the provision on undermining the authority of the judiciary when judges tried to speak out about real problems of the judiciary, even in measured terms. As the European Court held in the Kudeshkina case, although “it [is] incumbent on public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question”⁵⁵ even critical statements concerning the state of judicial independence, presented with “a certain degree of exaggeration and generalisation” but with some factual grounds, are “not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance”.⁵⁶ In any event, judges can be subject to suspension or removal for reasons of incapacity or behaviour that renders them unfit to discharge their duties⁵⁷ and whenever disciplinary procedures against a judge are initiated they should be conducted fairly in a manner that would guarantee a judge’s right to a fair hearing⁵⁸ with a possibility of review in cases of disciplinary suspension or removal proceedings.⁵⁹

Even when judges are protected by law, pressures within the system, including from court presidents, sometimes undermine the legal guarantees. For instance, it was reported that in one regional court, retired judges are invited to hold a judicial office on a contractual basis, finding themselves in a position where they need to be more

⁵⁴ It should be noted that judge’s tenure is not directly protected as a right under the ECHR. This makes it difficult to address the problems of the security of tenure through the European Court. In *Kudeshkina* case the Strasbourg court considered the complaint admissible due to the violation of Kudeshkina’s rights under ECHR art. 10.

⁵⁵ European Court of Human Rights, *Wille v. Liechtenstein* [GC], no. 28396/95, § 41, ECHR 1999-VII, 28 October 1999, para. 64.

⁵⁶ European Court of Human Rights, *Kudeshkina v. Russia*, Application no. 29492/05, 26 February 2009, para. 95.

⁵⁷ UN Basic Principles on the Independence of the Judiciary, Principle 18.

⁵⁸ *Ibid*, Principle 17.

⁵⁹ *Ibid*, Principle 20.

sensitive to the instructions or orders of court presidents in order to secure their jobs and benefits. Such judges typically show the highest level of loyalty.

Under international standards, it is well accepted that provisional judges do not enjoy sufficient security of tenure to ensure independence. For example, the Inter-American Commission considers that the provisional character of judges “implies that their actions are subject to conditions, and that they cannot feel legally protected from undue inference or pressure from other parts of judiciary or from external sources”.⁶⁰ In Russia, such practice is often a means to circumvent barriers to executive influence. The mission was told of one instance in which 13 judges were not assigned to a court when courts were restructured even though they had already received life tenure. They were all invited for a conversation where it was proposed that they resign to become honorary judges. Those who refused to resign “voluntarily” were dismissed after audits were initiated against them. “Voluntary” resignation was said to be applied in other instances as well.

In general, security of tenure is among the most serious problems of the judiciary in Russia. The judiciary’s weak position in this regard even at the highest levels is exemplified by the fact that the retirement age for constitutional court judges was changed five times within several years. At the end of September 2010, President Medvedev introduced a draft law which among other amendments introduces further changes to the retirement age, this time completely lifting it for the Constitutional Court President.⁶¹ Constant changes to legislation without any apparent reason creates unpredictability of laws, weakens the judiciary, undermines its authority and creates an atmosphere of uncertainty. Moreover, the latest change, which places the Constitutional Court President in a significantly different position to other judges of the Court, creates room for further manipulation and is contrary to the principle of an equal status of all judges.

Particular concerns were raised with regard to the independence of Justices of Peace who are believed to be more dependent on the local authorities than federal judges and thus more vulnerable to external pressure. Justices of the Peace are elected or appointed in accordance with the laws of the SRF⁶² and in general are the weakest link in the system lacking guarantees federal judges enjoy, while considering a majority of the cases in total.

⁶⁰ Report on the Situation of Human Rights in Venezuela, OAS document OEA/Ser.L/V/ii.118 doc.4 rev.2.29 December 2003, para. 159.

⁶¹ Federal Draft Law of 27 September 2010, № 431379-5 *On introducing amendments to the Federal Constitutional Court “On the Constitutional Court of the Russian Federation”*.

⁶² RF Law *On Justices of the Peace in the Russian Federation*, art. 1(1).

Disciplinary Proceedings

*The administration of the judiciary and disciplinary action towards judges must be organised in such a way, that it does not compromise the judges' genuine independence, and that attention is only paid to considerations both objective and relevant.*⁶³

*States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention...*⁶⁴

Grounds and procedure for disciplinary action

Disciplinary measures can be taken in case of violation of the RF Law *On the Status of Judges* or the *Code of Judicial Ethics*. Under the Constitutional Court decision of 28 February 2008, to trigger disciplinary measures, such 'infraction must be incompatible with the honour and dignity of judges'. In cases of dismissal of judges, the court president submits the case on a judge to a particular Qualification Collegium. Penalties for misconduct can include a warning or an early dismissal of the judge. If a judge does not commit another act of disciplinary misconduct during the period of one year after a disciplinary penalty, the punishment is annulled.⁶⁵

Disciplinary proceedings can be initiated by court presidents, giving rise to concerns regarding impartiality of courts presidents and objectivity of the information collected, especially because the disciplinary bodies tend to follow the court presidents' advice. Disciplinary proceedings may also be initiated by a body of the judicial community⁶⁶ by filing an application on dismissal of a judge, after which the Qualification Collegium, consisting of two-thirds membership of professional judges and one-third other persons, including lay members and representatives of the RF President, can carry out an additional review of the submissions.⁶⁷ Complaints and applications can also be submitted by judges, public bodies and officials as well as citizens, in which case either the Collegium verifies the information or forwards it to the president of the respective court.⁶⁸

The member of the Qualification Collegium who has been assigned organisation of the review of the complaint may involve judges and court management, courts' staff,

⁶³ The Universal Charter of the Judge, art. 11.

⁶⁴ Council of Europe, Recommendation no. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges, Principle VI (3).

⁶⁵ RF Law *On the Status of Judges in the Russian Federation*, art. 12.1.

⁶⁶ All the bodies of the judicial community and their competences are listed in the *Federal Law on the Bodies of Judicial Community in the Russian Federation*.

⁶⁷ RF Law *On the Bodies of the Judicial Community in the Russian Federation*, art. 22(1).

⁶⁸ RF Law *On the Bodies of the Judicial Community in the Russian Federation*, art. 22(2).

judicial department, law enforcement and other state bodies.⁶⁹ The procedures for bringing judges to disciplinary responsibility are:

- with regard to a court president – application of the president of the upper court, with regard to the president deputy – application of the president of the upper court or the court where this judge is employed as a deputy;
- with regard to a justice of the peace – application of the president of the relevant court or the upper court;
- with regard to a president, deputy president, or a judge – application of the relevant body of the judicial community.⁷⁰

Possible grounds for disciplinary responsibility are violations of the provisions of the Law *On the Status of Judges in the Russian Federation* and the provisions of the Code of Judicial Ethics. The judges against whom the proceedings have been initiated must be informed as to the date, time and place of the hearing of the Qualification Collegium within a period sufficient to appear before the hearing. A judge has a right to acquaint himself or herself with the documents, including making copies and presenting objections and comments, filing motions on the inclusion of documents and on participation of other people who possess information about the case. The burden of proof lies with the person who filed the complaint or the complainant's representative acting on the basis of a warrant. The Collegium votes and decides in the absence of the judge whose case is being considered. All doubts regarding the proof of a disciplinary misconduct are to be interpreted in favour of the judge. As a result of the consideration of the case, disciplinary responsibility in the form of early termination of powers (dismissal) or a warning can be applied. A member of the Collegium can attach a dissenting opinion. Decisions of the Qualification Collegiums can be appealed before the High Qualification Collegium of the RF. Decisions of the High Qualification Collegium as well as decisions of Qualification Collegiums of the SRF can be appealed before the Disciplinary Judicial Presence.

The Disciplinary Judicial Presence

On 12 March 2010, a new body was created, the Disciplinary Judicial Presence,⁷¹ a specialised federal court serving as a second instance for decisions of qualification collegiums on disciplinary measures against judges. It consists of six judges (three judges of the Supreme Court and three judges of the High Arbitration Court), who are elected by a secret vote. A judge cannot be elected more than two consecutive times and there must be at least two candidates for each position when electing Disciplinary Presence judges. The Disciplinary Presence is expected to consider approximately 100 cases per year.⁷²

The effectiveness of the new body is yet to be seen. However, experts in Russia are concerned that the law has deficiencies, such as an absence of any independent expert representation, and the requirement to decide cases initiated by the President of the

⁶⁹ Regulation on the order of operation of Qualification Collegiums of Judges, adopted by the High Qualification Collegium of Judges of the Russian Federation of 22 March 2007 based on article 14 of the HF Law *On the Bodies of Judicial community*, art. 27.

⁷⁰ *Ibid.* art. 28.

⁷¹ Federal Constitutional Law *On Disciplinary Judicial Presence*, of 09 November 2009, N4-FKZ.

⁷² Rossiyskaya Gazeta, Disciplinary Judicial Presence will consider approximately 100 cases against judges per year, <http://www.rg.ru/2010/02/10/disciplinarnoe.html>.

Supreme Court, in which case independent decisions cannot always be guaranteed. In addition, the opportunity to appeal against disciplinary measures has been reduced, as the decision of the Presence is final and is not subject to appeal. Previously, decisions by qualification boards could be appealed before the courts of two instances including the Supreme Court. Another deficiency of the law is insufficient detail in the procedure proscribed. Perhaps as a result of scarce information about the procedure, the mission heard contradictory opinions about what the procedure entails. A specific concern expressed by one Russian expert was that though the judges of the Presence have rather high positions, they nevertheless depend on the Chair of the Qualification board and the President of the Moscow City Court, as well as president of the Supreme and High Arbitration Courts. Some experts said that lack of independence nullified any potential positive achievements that creation of such a body could have brought and an independent body is still needed.

Issues of Concern

The mission heard concerns from dismissed judges about the fairness of procedures before qualification collegia in their cases, including disproportionate rejection of motions on behalf of the judge. Allegations that qualification collegia are subject to influence by the executive or by court presidents are worrying in the context of the pattern of apparently highly dubious dismissals of judges in recent years.

Previous laws in fact did not contain provisions regarding either disciplinary or administrative responsibility of judges, apparently because of concerns that such provisions could lead to abuse, and vulnerability of judges. Indeed, since the possibility of disciplinary and administrative responsibility for judges was introduced, judges have become less protected.

The mission heard from a number of experts that disciplinary proceedings and punishments are used selectively against certain judges. As was previously pointed out, Qualification Collegiums seem to be weak and incapable of protecting judges against arbitrary decisions. Their decision-making is heavily influenced by court presidents and the procedure is sometimes a mere formality used to dismiss judges who have displeased their superiors. For instance the hearing on the dismissal of a judge Lukyanovskaya lasted only about 30 minutes and every appeal simply upheld the previous finding. The Kudeshkina case and a few other cases are examples that became known, while there are many others that remain unknown to the broad public, but have an extremely negative chilling effect and lead to “cleansing” the judiciary of the judges who are not loyal enough.

The method of evaluation of the work of judges raises concerns. Judges are said to undergo evaluation based in part on the number of cases overruled by the upper courts. In certain cases, this is specifically used to rid the judiciary of unwanted judges by just quashing several of a judge’s decisions, often on minor grounds. In general, an overruled decision is considered to be a mistake and a judge whose decisions are often overruled is considered unprofessional which increases the likelihood of dismissal. For instance, when a case is decided against a high level official, the risk that this decision will be overturned is higher, which increases the likelihood of dismissing a judge.

Court Presidents: appointment and excessive powers

*The head of the court may exercise supervisory powers over judges only in administrative matters.*⁷³

*In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.*⁷⁴

Many with whom the mission met mentioned excessive powers of the court presidents as a very serious problem.⁷⁵

Former judges emphasised the high degree of reliance of judges on court presidents. One former judge spoke of a web of executive influence on court presidents and qualification collegia, through which “judicial bodies have become vehicles to transcend the will of the executive”. Apart from general administrative functions, court presidents play a decisive role in hiring judges, their promotion and remuneration, bringing judges to disciplinary responsibility and other functions, far beyond the principle of “the first among equals”, the so called *primus inter pares* principle. In the regional courts, court presidents decide whether or not justices of the peace should be reappointed. In order to be promoted or receive additional benefits, a judge must maintain good relationships with court presidents as was mentioned above. In addition, court presidents informally exert influence on judges or try to influence the decision making in certain cases judges are considering. Though court presidents do not have official tools to influence decision making, in practice they very often “consult” other judges on different matters or give direct instructions. Court presidents are key in controlling internal discipline, which often is dictated by the executive of different levels. Such concerns were expressed not only by NGOs, scholars and dismissed judges, but also officials who admit that such powers are not contributing to strengthening the independence of the judiciary, the quality of judges and their impartiality, especially because the presidents are bestowed with such powers by the executive.

Court presidents are appointed by the RF President or upon his nomination (depending on the level of the court) for a once renewable six-year term. The Constitutional Court for many years used to be an exception to this rule, with its president elected by other judges, and was therefore seen by many as the last bastion of judicial self-governance and independence. Ironically, President Medvedev, who

⁷³ Draft Universal Declaration on the Independence of Judges, (“Singhvi Declaration”), para. 36.

⁷⁴ The Bangalore Principles of Judicial Conduct, annexed to ECOSOC resolution 2006/23 of 27 July 2006, principle 1.4.

⁷⁵ Court presidents together with carrying out judicial functions, procedural powers for court presidents organises the operation of courts, establishes internal regulations in courts, assigns duties to the deputy presidents and in a manner prescribed by the federal law among judges, organises work on professional development of judges, carries out general management of the court apparatus, employs and dismisses the employees of the court apparatus and assignees tasks to them, takes decisions on providing benefits to the court apparatus employees or bringing them to disciplinary action, organises work on professional development of the employees of the court apparatus, carries out other functions on organisation of operation of the court (The Law of the Russian Federation of 26 June 1992, N 3132-I On the Status of Judges in the Russian Federation, art. 6.2).

announced strengthening the independence of the judiciary as one of his priorities, initiated changes to the previous order. In 2009, a new system for appointment of the Court president by Federation Council upon the recommendation of the president of the RF was introduced.⁷⁶ Clearly elections of the Constitutional Court President secured greater independence of the Court. However, instead of spreading the practice guaranteeing more self-governance among other courts, the contrary practices were initiated, highlighting a general trend of strengthening control over the judiciary. Experts the mission met with, including officials, lawyers and NGO representatives, were unanimous in their view that election of court presidents should be in the hands of the judiciary. It was also widely considered that such selection could be done through a system of rotations or another system limiting interference of the executive, through a more transparent and fair procedure. It was said that the existing system is flawed and in conflict with democratic principles.

Court presidents also distribute cases among judges, although such a function is not prescribed by law but continues a practice from the Soviet tradition. Not only do court presidents have the ultimate power to distribute cases, but they can also reassign them. Coupled with the other extensive powers of court presidents, this practice creates room for abuses, including the distribution of cases to judges who are more likely to handle a case with a predictable outcome. In commercial courts automatic allocation of cases has been introduced and their effectiveness has yet to be assessed.

A prominent Russian expert on the judiciary said that court presidents have three levers of influence: disciplinary penalties, career and promotion and allocation of benefits, and bonuses. At the same time, judges are virtually defenceless before court presidents, lacking any tools to protect themselves from pressure exerted by them. To the contrary, attempts of judges to act in their own defence can have negative consequences. Judges can be disciplined for critical remarks against court presidents and for acting against instructions they get – for instance refusal to extend detention.

Financial Issues Influencing the Judiciary

*Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.*⁷⁷

Financing the Judiciary

International standards require that sufficient financial resources be provided to the judiciary to ensure independent and effective discharge of its duties.⁷⁸ It is important

⁷⁶ Federal Constitutional Law *On Introducing Amendments to the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”* of 2 June 2009.

⁷⁷ Consultative Council of European Judges (CCJE), Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.

⁷⁸ Basic Principles on the Independence of the Judiciary, principle 7; European Charter on the Statute for judges para.1.6

that the opinion of the judiciary is taken into account and that funding does not become subject to political manipulation.⁷⁹

For many years the judiciary was underfinanced and working conditions of judges were poor, despite article 124 of the Russian Constitution providing that financing: “shall ensure full and independent administration of justice in accordance with federal law”. For instance, a presidential decree was issued with an order “to provide buildings convenient to administer justice and corresponding to the high level of the judiciary.” In 1998, the Constitutional Court, upon request of the Supreme Court, considered the constitutionality of the budget, having decided that the “full and independent administration of justice in the RF as in a state with the rule of law presupposes financing of expenditures for the judiciary, which would convert all expenses necessary to carry out tasks and functions of justice.” The Court found that item 102(1) contradicted the Constitution saying that by reducing expenses the government of the RF and the Ministry of Finance do not provide full and independent administration of justice, normal function of the judiciary, which lowers the trust of the public, and eventually puts the human right to a fair trial guaranteed by the Constitution under threat.⁸⁰ Still, in 2006 the Council of Judges in its decree of 27 April 2006 noted that only 15-20 per cent of the needed funds were allocated for the construction, reconstruction and renovation of buildings and premises, which had not changed since 2001 when the figure was 15 per cent.

Salaries and Benefits

The gradual and constant increase in salaries of judges was mentioned as one of the successes of the judicial reform in Russia. Significant resources have been invested in the judicial system, not only in salaries, but also in new technology. The Special Rapporteur on the Independence of Judges and Lawyers during his recent visit to Russia noted a ten-fold rise in the salary of judges.⁸¹ It is worth underscoring that the salaries were often increased by the Decree of the President of Russia *On Increase of the Salaries of the Judges of Courts of the Russian Federation and the Prosecutor's Office Employees*,⁸² although the Judicial Department remains the body in charge of financial and logistical (material and technical) as well as “other measures aimed at creation of conditions for full and independent administration of justice”.⁸³ This practice indicates the weakness of the procedures governing salary adjustments, with remuneration for judges apparently in the hands and the will of the executive, who acts as a benefactor.

In fact, the substantial increases in salaries for judges have failed to strengthen independence. To the contrary, the manner in which these increases have been

⁷⁹ Opinion no 2 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the funding and management of courts with reference to the efficiency of the judiciary and to article 6 of the European Convention on Human Rights.

⁸⁰ Decision of 17 July 1998 N23-P On Examination of Constitutionality of article 102 para. 1 of the Federal Law *On Federal Budget for the Year of 1998*.

⁸¹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to the Russian Federation, A/HRC/11/41/Add.2, 23 March 2009, para. 64.

⁸² It is important to note is that the above decrees puts judges and prosecutors in one basket. While it is not necessarily a hint on behalf of the executive, yet it shows the mindset of the drafters.

⁸³ The Law of the Russian Federation *On the Judicial Department under the Supreme Court of the Russian Federation, Art. 1*.

decided and administered may have contributed to the decline of the independence of the judiciary over the course of the last decade. At several meetings, the example was cited of a local authority widely considered to have “bought” the judiciary in its area by providing generous funding. It seems essential that increase of salaries should be transparent, predictable, and consistent across the state, involving the judicial community through prescribed procedures.

The mission heard that even though formally the funding of the courts should come from the federal budget, local authorities provide supplementary funding and benefits, especially housing. In fact, healthcare access, end of year bonuses and other payments can sometimes be larger than annual salaries while court presidents take decisions on the distribution of those benefits among judges. No general rules exist for allocation of various material benefits, including housing, and court presidents enjoy discretion in making such determinations. The Venice Commission has noted in this regard that this can “easily permit abuse and the application of subjective criteria”⁸⁴ and “[e]ven if such benefits are defined by law, there will always be scope for discretion when distributing them. They are therefore a potential threat to judicial independence. While it may be difficult to immediately abolish such non-financial benefits in some countries since they correspond to a perceived need to achieve social justice, the Venice Commission recommends the phasing out of such benefits and replacing them by an adequate level of financial remuneration”.⁸⁵

Justices of the Peace find themselves in an even more vulnerable position. A judge’s “judicial class” and thus his or her salary and status depend on the level of the court and position of the judge, which affects both the status and material benefits. In practice, judges often must avoid any conflicts with the court presidents and show as much loyalty and obedience as possible, if they are not to endanger desired promotion and benefits.

Number of Courts

Insufficient number of courts and their accessibility was another problem raised during the mission. Providing new court buildings and equipment is an expensive goal to achieve, given the size of Russia. Although Justices of the Peace have improved access of the population to the courts, not all courts are easily accessible. The problem is becoming more acute in Russia, as the caseload is growing, now numbering some 8.3 million cases per year.⁸⁶ In May 2001, the *Federal Law on Increasing the number of judges and staff of courts of arbitration in the RF*, and in February 2001 the *Law on the Overall number of Judges of the Peace and number of judicial territorial jurisdictions (number of courts)* were adopted, increasing such jurisdiction from 64 to 84. However, many positions are still vacant partly because lawyers prefer more “profitable” spheres.

Recently, the President of the High Arbitration Court, Anton Ivanov, announced that in 2010 the High Arbitration Court would start a new initiative called Electronic

⁸⁴ European Commission for Democracy through Law, Report On the Independence of the Judicial System Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010) para. 49.

⁸⁵ *Ibid*, para. 50.

⁸⁶ Olga Schwartz, On Organisation of Courts in the Russian Federation, <http://www.indem.ru/Proj/SudRef/prav/SudourRF.htm>.

Justice. From 2010 there will be a possibility of initiating complaints against judges and challenging courts' decision for judicial review. It is planned that this system will then be used for cassation complaints, appeals, and in 2011 for the first instance trials.⁸⁷ The mission notes the law *On Ensuring Access to Information about Operation of Courts in the Russian Federation*, which entered into force on 1 July 2010 as a positive step in this regard. No sanctions, however, are mentioned in the law for lack of its implementation.

Caseload

The caseload of the Russian courts is high, sometimes resulting in slow and lengthy trials or superficial consideration of cases with poor quality of decisions. Judges at times consider up to 10 cases per day and an average number of cases considered by JPs is 114 per month.⁸⁸ This affects the quality of decisions. Instances occur when paragraphs from different decisions are cut and pasted with incorrect names or other details or repetition of the same mistake occur.

Insufficient number of courts and judges, lack of effective pre-trial and alternative mechanisms of conflict resolutions contribute the problem of high caseload. The problem was recently addressed by enacting the *Law on Compensation for Violation of the Right to Trial within a Reasonable Time or the Right to Implement a Judgment within a Reasonable Time in April 2010*. Another recent law addressing the issue is the *Law on Alternative Procedure for Dispute Settlement with Participation of a Mediator* of 27 July 2010. It remains to be seen whether these laws can decrease the caseload, but Russian experts are optimistic about such changes and consider that they may bring positive results.

An interesting initiative aimed at lowering the caseload is simplified procedures for dispute resolution considered by the Arbitration Court. Under the proposals announced by High Arbitration Court President Anton Ivanov, in order to consider insignificant disputes of up to RUB 100 000 (2500 Euros) it will be sufficient for the parties to submit their arguments and counter-arguments in written form. Such a procedure will not only be available for civil cases, but for public cases such as administrative violations and administrative fines.⁸⁹ It is suggested that this system can be applied to 70-80 per cent of cases,⁹⁰ which may contribute to speeding up the process and improve the quality of work of judges with regard to other cases.

⁸⁷ Rossiyskaya Gazeta, "The High Arbitration Court begins an experiment on introduction of e-justice", <http://www.rg.ru/2010/04/22/pravosudie-site-anons.html>.

⁸⁸ Federal Target Programme "Development of the Judiciary in Russia" 2007-2011, adopted by the decree of the Government of Russian Federation of 21 September 2006.

⁸⁹ Rossiyskaya Gazeta, High Arbitration Court to develop simplified forms of dispute resolution, <http://www.rg.ru/2010/04/22/spory-site-anons.html>.

⁹⁰ *Ibid.*

IV. THE JUDICIARY IN PRACTICE: PROBLEMS OF INDEPENDENCE AND EFFECTIVENESS

Undue influence on judges

*There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.*⁹¹

Telephone Justice

The mission heard that “*telephone justice*” has not been relegated to history. Judges were said to be often directly instructed on how to resolve a case. One dismissed judge was genuinely surprised at the mission’s “ignorance” about the *de facto* obligation of judges to receive instructions on certain cases from court presidents. In fact, the mission was told that there has been an increase of telephone justice and a broadening of other means of exerting influence upon judges. 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. For instance, in extremism and terrorism cases, which are quite sensitive,⁹² decisions are in fact determined at the federal level based on which judges get instructed. In such cases, the presumption of innocence is ignored and, for example, judges are instructed not to provide asylum to individuals accused of carrying out “terrorist acts”. In such cases, accused persons may be stripped of their rights and judges are expected to play an important role such as, for instance, condoning torture or ignoring claims of torture.

Another example of strict directives to judges concerns cases involving questions of freedom of expression and freedom of assembly, where judges are not free to issue decisions in favour of activists. This is especially the case with justices of the peace who, unlike federal judges, almost never rule in their favour. According to some JPs in all such cases they are instructed that all the public actions without prior consent of the authorities should be punished.

Procuratura and Law Enforcement

The procuratura is said to be the least reformed institution in Russia, which cannot but influence the judiciary, contrary to the requirement of strict respect of the independence and the impartiality of judges and prohibition of “casting doubts on judicial decisions”.⁹³ The mission was told that generally more weight is given to the prosecution’s opinion than to that of the defence, while judges who are not attentive enough to the demands of the prosecution may face consequences including

⁹¹ UN Basic Principles on Independence of Judiciary, Principle 4.

⁹² International Commission of Jurists submission to the review of the 6th Periodic Report of the Russian Federation by the UN Human Rights Committee, September 2009, <http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22867>.

⁹³ Recommendation No. R (2000) 19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system, Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers’ Deputies, para. 19.

dismissals as allegedly happened in the recent case of Judge Lukyanovskaya.⁹⁴ The mission also heard that judges may face adverse consequences if they grant too many acquittals or refusals to apply pre-trial detention. For example, the mission met with a former judge who was told off the record that his dismissal was partly due to refusal in around five per cent of the cases before him to grant pre-trial detention.

More generally, the pressure from law enforcement interests remains strong and laws have recently been adopted that strengthen the FSB.⁹⁵ A recent decision of the Plenum of the Supreme Court of 29 October 2009 expanded the number of grounds for arrest, including for failing to carry an identity document. The same decision can be used to consider arrest motions *in camera*. The decision of the Plenum of the Supreme Court of 10 February 2009 N1 makes it more difficult to challenge the actions of investigative bodies at the pre-trial stage.

Corruption

Not only are courts subject to political pressure, there are allegations that some judges provide “services” to organizations and individuals, for instance by taking bribes for expedited consideration of cases or for making particular decisions. Sometimes court decisions serve to fix the agreements achieved prior to the trial or as a tool in business competition. One of the recent measures to combat corruption was *RF Law On Introducing Amendments into article 3 of the Law of the Russian Federation On the Status of Judges in the Russian Federation* of 27 September 2009, which bans former judges from representing persons in courts due to possible use of their past connections when representing a client. Judges are said to be often vulnerable before powerful people who try to influence them. It was reported for instance that as judges approach retirement, they are prone to issue fairer decisions, as they are under less pressure as to their independence.

Jury Trials

The jury trial system in Russia, which existed prior to its abolition by the Soviet Union, was reintroduced by a law of 16 July 1993. The last region to introduce jury trials was Chechnya in January 2010. The decision to try a case by jury can be made on a motion of the defendant in certain cases, including murder, kidnapping, rape and other crimes as provided by articles 30 and 31 of the Criminal Procedure Code.⁹⁶

The mission was told that jury trials cannot be as easily influenced as trials administered solely by judges. Jury trials have the highest acquittal rate among all Russian courts – around 20 percent of cases compared to one per cent in regular trials - which partly explains the negative or skeptical attitude of the law enforcement bodies towards this institution. Although attempts are reportedly made to try to

⁹⁴ According to Judge Lukyanovskaya, on 25 November 2008, she quashed a decision of a lower court and released a person held in pre-trial detention. The prosecution arrived in prison and rearrested him without letting him out. In December a check of Lykyanovskaya’s work as judge was carried out. During the check falsification of documents was alleged. Shortly afterwards the Qualification Collegium took a decision to terminate Lukyanovskaya’s powers of judge. The Supreme Court upheld the dismissal. The European Court dismissed the case without mentioning any grounds for it.

⁹⁵ ICJ, E-Bulletin on Counter-terrorism and Human Rights - NO. 45, Russian Federation: President signs into law new legislation on intelligence services, <http://icj.org/getEbulletinsDetails.asp?bulletinID=77>.

⁹⁶ Jury trials are conducted in accordance with a general order taking into account the particularities provided by chapter 42 of the Criminal Procedure Code.

influence the decision of juries, especially in high profile cases, it was suggested that due to much greater control over judges, there is a gradual limitation of the jurisdiction of jury trials. The verdict of the jury is never totally predictable and thus a tendency for limiting the jurisdiction of the jury trials is likely to continue.⁹⁷

The most recent instance of the restriction of jury trials is the law of 2008 limiting jurors' jurisdiction in cases of terrorist acts, hostage taking, creating an illegal armed group, organising mass disorder, treason, espionage, violent seizure of power, armed revolt, and sabotage. At the beginning of 2010 this law was challenged before the Constitutional Court, which confirmed its constitutionality. Still, many lawyers and legal experts view jury trials as one of few tools within the judiciary itself having potential for improving the Russian justice system. Whilst jury trials bring undoubted benefits, in particular in the Russian context and given the low public confidence in the courts, the expanded use of jury trial also raises issues of the adequacy of reasons for decisions which need to be addressed.

Factors influencing the attitudes and mindset of judges

*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*⁹⁸

Criminal procedure in Russia has retained the accusatory character it had during the Soviet period and is still institutionalised. Once a person enters the criminal process as a defendant or accused it is highly unlikely that the accused will not be found guilty of a crime. The percentage of acquittals in Russia is around one per cent, which is the same as for instance in Kazakhstan⁹⁹ and other former USSR countries. In 2009 more than 900 000 people were found guilty and only around 9 000 were acquitted. In practice, judges are not de facto free to acquit with much greater frequency, as acquittals are likely to negatively affect judges.

It appears difficult for judges to apply more liberal laws, even when such an initiative comes from the very top of the political hierarchy.¹⁰⁰ The mission heard on many occasions including from judges themselves that problems of the judiciary are rooted in the attitudes of judges. It was explicitly said by one official during the mission that resistance to democratic changes on behalf of judges is due to the fact that “they do not fit the mentality of judges and law enforcement personnel” as those high level

⁹⁷ In September 2010 it was proposed that jury trials jurisdiction should be limited for cases involving state secrets. Rossiyskaya Gazeta, Secretly to the Whole World: The State Duma Can Limit Participation of Juries in Closed Trials, <http://212.69.111.24/2010/07/06/zasedateli.html>.

⁹⁸ UN Basic Principles on the Independence of the Judiciary, principle 2.

⁹⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, Mission to Kazakhstan, 11 January 2005, E/CN.4/2005/60/Add.2, para. 53.

¹⁰⁰ The law not permitting arrest for crimes related to entrepreneurship, enacted on 7 April 2010, was President Medvedev's personal initiative after the death of Sergei Magnitsky, a lawyer of Investment Fund Hermitage Capital Management. President Medvedev met with the Presidents of the Supreme, Constitutional and High Arbitration Courts and raised concerns about lack of implementation of the law following which the resolution of 10 July 2010 was adopted explaining what crimes related to “entrepreneurship activity” meant.

positions are held by people of the “Soviet school”, for whom it is difficult to recognise the priority of human rights and interests of an individual. Many judges see themselves as agents of the state whose main goal is to protect its interests. This is in line with the Soviet tradition where membership in the Communist Party was a primary criterion for a person to become a judge.

At the same time, it is evident that the existing system of selection and discipline, as well as measures taken against those judges who actively confront certain problems of the judiciary, demonstrates that this attitude of excessive deference is either condoned or fostered deliberately and judges who try to resist may be expelled from the system. An expert the mission met with put it this way: “The Russian judicial system has turned judges into clones. This system defends itself against new persons among themselves”.

Loyalty and political sensitivity were said to often be more important qualities for judges than professionalism and experience. In many cases, judges are stripped of powers simply because they have been criticised by higher-level courts. However, judges need to satisfy their superiors within the judiciary and they need to take into account the possible reaction of authorities when making a decision regarding a certain case. Additionally, there appears to be at least a perception that, in civil disputes between “ordinary” people, judgments tend to be fairer, as judges have no interest in the outcome. However, when one party is an official a decision would usually be in favour of the official. In fact it is not necessary to instruct judges on every single case as there may be a general tacit understanding about how a case should be decided. Judges have an acute sense of the political situation and know what will be proper and safe decision for them to make in a particular case.

Some persons with whom the mission consulted, however, said that being independent or impartial can also be a matter of personal choice for a judge. The mission heard that judges themselves are often unhappy about the situation, and “they did not like their tails being pulled by FSB”. For instance, there are judges who apply European standards and issue decisions based on them even on such sensitive topics as freedom of expression or freedom of assembly, although the extent to which they do so varies among regions. For example the mission heard that courts in one region ruled against officials or executive authorities relatively frequently. On many occasions, especially in uncontroversial cases in areas such as civil or family law, lawyers appear to be satisfied with the way judges conduct proceedings. Some experts spoke highly of judges’ professionalism, and noted that there were judges delivering progressive judgements, on issues such as for example transgender rights.

It seems that changing attitudes of judges and education about the current developments in legal thinking and human rights standards is an area where local NGOs and experts could be much more actively engaged in work with judges and the judiciary. The mission did manage to meet with highly qualified Russian legal experts with impressive expertise in Russian legislation and international standards. Such experts can also contribute to improvement of public understanding of the concerns and interests of the judiciary and the law enforcement agencies and engage with the judiciary on complex human rights legal issues requiring special knowledge and skills.

While no special enquiry was made into the legal education issues in the RF, the mission heard from a number of experts that the system of legal education, particularly as regards human rights, leaves much to be desired and needs be brought into line with requirements in other European countries. For instance, many European law schools have specialised masters' degrees in human rights, which produce a good number of up-to-date publications, books, manuals, text-books on a regular basis. In Russia, by contrast, human rights law is a fairly new addition to the curriculum and requires further development rather rapidly to catch up with many other states of the Council of Europe. There is a need for both advanced human rights education at post-graduate level, and for essential elements of human rights law to permeate the general legal curriculum, including the teaching of both criminal and civil law.

Public trust and civil society

*The development of democracy in European states means that the citizens should receive appropriate information on the organisation of public authorities and the conditions in which the laws are drafted. Furthermore, it is just as important for citizens to know how judicial institutions function.*¹⁰¹

In addition to the parties to any particular dispute, the general public as a whole must have confidence in the judiciary.¹⁰² There is a clear lack of public trust in the fairness and effectiveness of the justice system, as judges are often viewed as servants of the state and defenders of its interests. This condition in part stems from the Soviet legacy of mistrusting the justice system. In addition, the public will often become aware about the operation of the judiciary through high profile or scandalous cases which may shape an exaggeratedly negative image of the judiciary. Such attitude inevitably lowers the demand to use the justice system and results in lack of trust or belief in the possibility of positive reform. In cases involving powerful elements or interests of officials of different levels, there seems to be little public trust at all, which was conveyed by the experts with whom the mission met.

In general, there is a lack of cooperation and sometimes understanding between NGOs and human rights defenders and judges or law enforcement agencies. Having different perspectives on many issues, the mission heard that NGOs are often isolated and experience hostility. Many NGO representatives said that civil society is not sufficiently involved in the process of both the operation of the judiciary and its reform. In this regard, the Human Rights and Civil Society Council under the RF President has been instrumental and proactive in many legislative initiatives, with its critical opinions often considered by the executive. However, there is apparently a lack of procedure for consideration of the opinion of this consultative body both within the presidential administration and the Parliament. In addition, there is clearly a need for involvement of civil society at the regional level, including in respect of the selection, evaluation, and training of judges. In such situations Russian civil society

¹⁰¹ Consultative Council of European Judges, Opinion no 7 (2005) of the Consultative Council of European Judges (CCJE) to attention of the Committee of Ministers on "justice and society", para. 6.

¹⁰² 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, para. 12.

representatives seem to have significant capacity for contribution into the cause of building an independent judiciary in the RF. As noted by the Consultative Council of European Judges, the judiciary can develop with support of social actors “outreach programmes” which would bring students, parents, teachers, community leaders, media and others to the court to learn about the work of the judiciary, which can help shape “a correct perception of judges role in the society” for which appropriate staff and funding should be provided.¹⁰³

One factor that adds to low public trust in the effectiveness of the justice system is poor implementation of judicial decisions. Almost fifty per cent of judgements are either not carried out, or are not carried out within a reasonable time.¹⁰⁴ Corruption (court decisions are not executed unless bailiffs receive an 'honorarium'), low qualification of bailiffs, low salaries of bailiffs, high level of staff turnover, lack of resources and instruments (e.g. databases) hamper the implementation of court decisions. An institutional change that is suggested by experts is a control mechanism over bailiffs afforded to courts, a single centre for the execution of decisions and the creation of a fund to cover execution of decisions. In this regard, the mission took account of the recent laws mentioned above aimed at two main issues: speeding up the court procedure and timely execution of court decisions.¹⁰⁵

By contrast with the national courts, the European Court of Human Rights is seen by Russian lawyers and experts – as well as widely by the general public - as an effective tool in seeking justice. Decisions of the European Court are usually implemented with regard to payment of compensation, although there is a less consistent and sometimes poor record of implementation of general measures. Ratification of Protocol 14 of the European Convention on Human Rights and the decision of the Constitutional Court of 26 February 2010 acknowledging ECtHR decisions as new circumstances, in which case the courts cannot refuse to reconsider a case, were important steps in implementation of the ECHR. The Supreme Court decision in the case of T., of 21 October 2009, held that the Supreme Court could change or annul court decisions when an ECtHR decision allows it to make conclusions about lack of legality, justification or fairness of court decisions. Although there are difficulties with the system of precedent, which is rather new for Russia, precedent can be an effective tool in the Russian legal system and is becoming more influential and known among Russian lawyers and judges.

It was pointed out by experts that judgments of the European Court are not officially translated and no Russian language database or reference books on the European

¹⁰³ Consultative Council of European Judges, Opinion no 7 (2005) of the Consultative Council of European Judges (CCJE) to attention of the Committee of Ministers on “justice and society”, paras. 17, 19, 20, 22.

¹⁰⁴ Federal Target Programme “Development of the Judiciary in Russia” 2007-2011, adopted by the decree of the Government of Russian Federation of 21 September 2006; Heers Mireille et al. *Examination of Problems related to the Execution of Decisions by National Civil Courts against the State and its Entities in the Russian Federation*, European Commission for the Efficiency of Justice, Strasbourg, 2005.

¹⁰⁵ RF Law of 30 April 2010 N 68-FZ *On the compensation for the violation of the right to trial within a reasonable time or the rights to the execution of the act within a reasonable time*; RF Law of 30 April 2010 N 69-FZ *On Amendments to Certain Legislative Acts of the Russian Federation in connection with the adoption of the Federal Law "On the compensation for the violation of the right to trial within a reasonable time or the rights to the execution of the act within a reasonable time"*.

Court case law exist. Judges are mostly not well aware of developments due to lack of available official literature and are not used to applying European case law, partly due to lack of relevant education and sometimes reluctance to apply “foreign” law. However, the mission was told that the situation is improving. The Constitutional Court and the Supreme Court seem to be taking the lead in applying ECHR standards and jurisprudence, regularly referring to ECtHR caselaw in their judgments. This is not generally the case with other Russian courts, although the mission was told that some progressive judges find ECtHR jurisprudence helpful in their work.

V. CONCLUSIONS AND RECOMMENDATIONS

The judiciary in Russia seems to be struggling with its institutional past and long-standing legal culture. Some positive reforms have been instituted, but more far-reaching reforms are needed. Yet there is a near-absence of open public discussion on reforms or a clear plan for carrying reform forward. Such reforms should not only deal with technical aspects of the functioning of the system, but should be aimed at establishing a system of checks and balances through a plan of action. Effective and practical change will not be achieved only through legislative means or by reforming just one institution. The problems relating to judicial independence in Russia are complex, requiring a multi-faceted approach. Raising salaries, providing housing, building new courtrooms, while important, will not in themselves achieve much by way of judicial reform, in the context of the deeper problems in the system. And if not carried out in the context of broader reform, they could even be counterproductive.

There is therefore a need for systematic reforms to be carried out with a coherent policy. The executive must clearly and consistently signal that any attempts to exert improper influence on the judiciary will be confronted, including in serious cases through prosecution in accordance with law.

Judges must be effectively protected against undue and unwarranted influence from all levels of authority – law enforcement bodies, local authorities, federal authorities, business or any other “powerful figures”, be they state representatives or private parties. It is hardly possible to ensure such protection unless the tenure of judges is guaranteed in practice with clear, transparent and fair rules applied in a manner that does not undermine the role of judges in carrying out their professional functions.

Judges must feel secure, and this requires that the disciplinary system becomes transparent and predictable, while the existing fear and loyalty as driving forces for the conduct of judges are substituted by professionalism, actions based on belief in the rule of law, independent thinking, and responsibility. Judges must not accept inappropriate orders on the disposition of cases or make decisions based on fear of punishment, considerations of promotion or benefits. Judges should be immune from any such improper pressure and see themselves not as instruments of executive authority, but as the final opportunity for individuals to find justice and fairness.

There are some reasons for optimism for the future of the judicial system. Some judges have shown courage and determination in insisting on exercising their professional functions independently and speaking out about the problems in the judiciary. The judgement of the European Court of Human Rights in the case of *Kudeshkina v Russia*, finding that the dismissal of Judge Kudeshkina for critical remarks she made regarding judicial independence, violated Article 10 ECHR, is a significant development. Whether the government implements this decision in full, including by reinstating Judge Kudeshkina, will be a significant test of its commitment to judicial independence.

There is a strong civil society and expert legal and academic community leading debate and formulating proposals for judicial reform. The contribution of civil society to the judicial reform debate has been greatly facilitated by the Civil Society Institutions and Human Rights Council under the President of the RF. The unexpected

resignation of the former Chair, Ella Pamfilova, at a crucial moment when civil society proposals on judicial reform are being prepared and presented to government, was highly regrettable. Under Ms Pamfilova's leadership, the Council had become a potent, independent body which initiated a number of important legal initiatives. The recent appointment of Mikhail Fedotov and his announcement that judicial reform will be one of his priorities, gives hope that the new chair will be keen to pursue this issue with equal determination and skill.

On a political level, the statements of President Medvedev regarding judicial reform are highly encouraging. However, whether there exists in Russia sufficient political will and consensus to establish a truly independent judiciary – in particular when so many elements of the executive have an interest in maintaining at least the potential for judicial dependence – remains uncertain.

The strong Presidential statements on judicial reform now need to be followed through with a clear and comprehensive programme, structure and process for legislative reform and for the implementation of such reforms. This process should be led by a specialist, independent and expert judicial reform body. It should allow for the involvement of civil society, as well as foster a wider public debate. The issues it should address include:

- establishment of an independent body responsible for judicial administration, run by organs elected by the judicial community, independent of the executive and legislative branches and free of particular bonds to the Supreme Court; such a body would carry out such functions in the place of the present Judicial Department under the Supreme Court;
- reform of the system of appointment of judges. The qualification collegiums, and the discretionary powers of the President of the RF in appointment matters, should be replaced by an appointment body fully independent of the executive and parliament and with participation of civil society;
- establishment of transparent, clear, predictable procedures and objective criteria for selection and appointment of judges, ensuring that all appointments are merit based. Under such procedures, all judges should be appointed for life or until the age of general retirement; lawyers, whether civil or criminal, must not be excluded from appointments;
- reform of the system of disciplinary action and dismissal. Judges should not be disciplined or dismissed for exercising their freedom of expression, including the freedom to criticize court decisions and court presidents and to inform the public on questions of the exertion of undue influence on judges;
- abolition of the requirement that judges “avoid anything which can undermine the authority of the judiciary” or abstain from activity “incompatible with the honor or dignity of judges.” These vague and overbroad prescriptions constitute far-reaching infringements on judges’ freedom of expression. Judges should not be disciplined or dismissed for insignificant procedural errors or “wrong” decisions on the merits of a case;

- guaranteeing that cases of disciplinary action/dismissal in the qualification collegium and the second instance Disciplinary Judicial Presence are conducted according to fair trial principles. The judge should have the right to appeal the collegium's decision on all grounds. The judge should without restrictions have the right to appeal a Disciplinary Judicial Presence judgment of dismissal to the Supreme Court of the RF;
- reform of the system of appointment for presidents of courts, so that they are selected by judges of the court. The length of tenure should be restricted according to a general rule without possibility of reelection;
- reform of the powers of court presidents, in particular, measures to ensure that determination of all material benefits, housing, any other bonus payments or privileges including the mechanisms for salary increase are not left at the discretion of court presidents but are regulated according to general rules;
- reform of the mechanism of allocation of cases through a system excluding any abuses or influence on the outcome of the case;
- improvement of legal education, including education of judges. Human rights law courses and departments should be introduced in law schools and in general human rights law should permeate legal education as well as other adjoining spheres such as education for police and those working in the penitentiary system; the education system should ensure that new appointees to judicial positions should have extensive knowledge of national and international law, including in particular the European Convention on Human Rights and its implementation in Russian law.