

Draft No 993553-6, Federal Law "On amending certain legislative acts of the Russian Federation in regard to ensuring the right of a lawyer to collect data necessary for providing qualified legal aid".

COMMENTS BY THE INTERNATIONAL COMMISSION OF JURISTS

April 2016

INTRODUCTION

In this submission, the International Commission of Jurists (ICJ) provides comments on the Draft Federal Law "On amending certain legislative acts of the Russian Federation concerning ensuring the right of a lawyer to collect data necessary for providing qualified legal assistance" No 993553-6 (Draft Law). The comments are provided in light of international law and standards on the role of lawyers and are informed by the ICJ report "Towards a Stronger Legal Profession in Russia" published in December 2015.¹ The comments touch upon a limited number of issues and do not provide a comprehensive analysis of the Draft Law, therefore, the absence of comments on any part of the text of the Draft Law does not suggest endorsement of that text.

This document addresses the following issues: a "lawyers' query", a new legal tool which intends to empower defence lawyers to make requests for data and information; admission of evidence gathered by lawyers to be included in the case-file; the lawyers' certificate which grants access to state buildings and the related issue of obstruction of lawyers' access to their clients; ethical standards of lawyers and the problem of "pocket lawyers" in the Russian Federation.

THE LAWYER'S QUERY

The Draft Law introduces the concept of the lawyer's query, an official request on issues of competence of specified bodies and organizations about documents, necessary for providing qualified legal assistance.² Such queries may be addressed to state bodies, municipal bodies, public associations and other organizations.³ In their turn, the latter are obliged to provide a response in written form within 30 days,⁴ unless the collection and provision of the information requested requires more time, in which case it can be prolonged for a further 30 days.⁵ The Draft Law does not specify the procedure for prolongation of the initial 30 day period.

¹ International Commission of Jurists, 'Towards a Stronger Legal Profession in the Russian Federation', report following a mission to the Russian Federation in May 2015, at URL: <http://www.icj.org/russian-federation-the-legal-profession-requires-reform-to-become-stronger/>.

² Draft No 993553-6, Federal Law "On amending certain legislative acts of the Russian Federation in regard to ensuring the right of a lawyer to collect data necessary for providing qualified legal aid", Article 2.2.

³ Draft No 993553-6, *ibid*, Article 2.2.

⁴ Draft No 993553-6, *ibid*, Article 2.2.

⁵ Draft No 993553-6, *ibid*, Article 2.2.

The format of such a query is to be determined "by the federal body of justice in coordination with the State bodies concerned".⁶ The Draft Law specifies in which cases state bodies may refuse to provide information, including when they do not have the information requested, when the query is in an improper format, or when access to the information requested is limited by law or constitutes a State secret.⁷ The Draft Law introduces a "legal responsibility" for "unlawful refusal" to provide information or failure to adhere to the deadline for the reply to the query.⁸

Under existing legislation in Russia, lawyers have the right⁹ to collect information that is necessary for legal representation, including to request documents from various bodies and institutions; to question, subject to their consent, individuals who may have information related to the case in the context of which legal representation is provided; and to collect and present exhibits and documents.¹⁰

In practice, lawyers may encounter refusals to reply to their requests for information, which is partly attributed to the absence of an obligation to address such queries.¹¹ The ICJ has noted that ignoring lawyers' requests for information while investigators' requests are treated as compulsory leads in reality to an inequality of arms between lawyers and the investigation and means that the right to request information enshrined in the law, and the corresponding right to disclosure of information as an aspect of fair trial, loses much of its practical meaning.¹²

Under international standards, States must provide conditions in which lawyers can discharge their professional duties and functions. The UN Basic Principles on the Role of Lawyers enshrine States' obligation "to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time".¹³ The UN Special Rapporteur on the independence of judges and lawyers in this regard stated that: "Preconditions for lawyers to adequately provide legal counseling include their unhindered access to any relevant information and the confidentiality of their relationship with their clients".¹⁴ The European Court of Human Rights has held that, in order to comply with the right to a fair trial, "... counsel has to be able to secure without restriction the fundamental aspects of that person's defence", including collection of evidence favourable to the accused and preparation for questioning.¹⁵

The Draft Law addresses the problem of the status of lawyers' queries by making compliance with them mandatory and introducing legal responsibility for failing to comply with the obligation to reply to such queries. The ICJ considers, however, that the time limit of 30 days may fall short of providing access to information "at

⁶ Draft No 993553-6, *ibid*, Article 2.3.

⁷ Draft No 993553-6, *ibid*, Article 2.4.

⁸ Draft No 993553-6, *ibid*, Article 2.5.

⁹ Federal Law No. 63-FZ of 31 May 2002 (as amended on 2 July 2013) "On lawyers' activities and advokatura in the Russian Federation", Article 6 (3).

¹⁰ Criminal Procedure Code of the Russian Federation, Articles 86(3) and 53(2).

¹¹ ICJ Report, 'Towards a Stronger Legal Profession in the Russian Federation', *op. cit.*, page 46.

¹² *Ibid*, page 46.

¹³ UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990), Principle 21.

¹⁴ Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc A/64/181 (2009), para. 103.

¹⁵ *Dayanan v. Turkey* (2009) ECHR 2278, para. 32.

the earliest appropriate time” as provided for in Principles 21 of the UN Basic Principles on the Independence of the Judiciary.

The ICJ recommends that:

- 1. The Draft Law is amended to read “as soon as possible but no later than thirty days”. The procedure for prolongation of the thirty day period should be prescribed in precise terms to ensure proportionality and access to information within a time commensurate with the right to a fair trial.**
- 2. The form for lawyers’ queries is developed in consultation with the Federal Chamber of Lawyers and not only with the Ministry of Justice and other State bodies.**
- 3. Reconsideration should be given to the grounds for refusals of lawyers’ queries, such as a lack of information and improper format of the query, as they vest those bodies and organizations who are obliged to provide information with a broad discretion when refusing to provide a response. Lack of the necessary information may be considered a response rather than a refusal to provide one. Refusal to provide a response due to the improper form of the query risks being used as an excuse to delay or refuse to provide any information. The ICJ recommends that these grounds be amended to ensure that they do not impede compliance with lawyers’ queries.**

ADMISSION OF EVIDENCE GATHERED BY LAWYERS

While a requirement to answer a lawyer’s query may strengthen lawyers’ capacity to collect evidence in favour of their clients, it should be noted that this does not guarantee that evidence collected will be included in the case-file to be sent to the court.

Evidence obtained by lawyers in Russia is not included in the case-file without the authorization of the investigator or a judge. In the Russian Federation, the list of evidence to be assessed by pre-trial investigation authorities, the prosecutor and the judge does not include evidence adduced by the defence.¹⁶ As inclusion of evidence of lawyers is not mandatory, attempts to include it in the case file may turn out be very problematic.¹⁷ As stated in the ICJ report: “The inability of lawyers to include materials in the case-file is one of the most serious problems which undermines equality of arms between the prosecution and the defence during the investigation. Bearing in mind the reliance of judges on the case-file they receive from the investigator, the equality of arms principle may be already nullified before the case reaches the court”.¹⁸

Under international law, an essential element of the right to a fair trial, as protected in international human rights law, including under Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, is the guarantee of equality of arms between the parties to the case, which requires that the same procedural rights

¹⁶ Criminal Procedure Code of the Russian Federation, Article 87.

¹⁷ ICJ Report, ‘Towards a Stronger Legal Profession in the Russian Federation’, op. cit., page 47.

¹⁸ Ibid, page 47.

are to be provided to all the parties.¹⁹ This, inter alia, means that “each side be given the opportunity to contest all the arguments and evidence adduced by the other party”.²⁰

As a general principle, all the parties to the process must have “a reasonable opportunity to present his [or her] case—including evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.²¹ The European Court of Human Rights, in *Mirilashvili v Russia*, held: “...whatever the system of criminal investigation, if the accused chooses an active defence, he should be entitled to seek and produce evidence “under the same conditions” as the prosecution”.²²

The ICJ recommends that:

- 4. To ensure equality of arms at all the stages of proceedings, and to provide a genuine opportunity to operate on an equal basis with the investigation and prosecution, defence lawyers should be able to include in the case file the results of their queries and any other materials they consider appropriate without the need for authorization of the investigative or prosecutorial authorities. It should be entirely up to the defence lawyers – both in law and in practice – to decide what evidence is included in the case file to support their case, in order to allow them to have equal opportunities vis-à-vis the investigation and prosecution.**

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LAWYERS’ CERTIFICATE AS A DOCUMENT AUTHORIZING ACCESS

According to the Draft Law, lawyers’ certificates, their professional identifications, allow them to have “an unhindered access... to the courts, bodies of prosecution in connection with their professional activity”.²³ This legal initiative is welcome. Alongside this provision, the opportunity should be taken to address other shortcomings with access of lawyers to places of detention.

Under the current criminal procedural legislation of the Russian Federation, once the lawyer is admitted as defence counsel²⁴ in the criminal proceedings, (s)he may have meetings with the suspect or defendant²⁵ and these meetings may not be arbitrarily restricted in duration or in number.²⁶ According to law, only two documents must be provided by a lawyer to be admitted to visit a client in detention: a lawyer’s certificate and a warrant.²⁷ The law forbids demands for any

¹⁹ Human Rights Committee, ‘General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial’, UN Doc CCPR/C/GC/32 (2007), para. 13.

²⁰ Ibid.

²¹ *Dudko v. Australia*, Human Rights Committee Communication No. 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (2007), para. 7.4, *Dombo Beheer B.V. v. The Netherlands* (1993) ECHR 49, para. 33.

²² *Mirilashvili v. Russia* (2008) ECHR 1669, para. 225.

²³ Draft No 993553-6, op. cit., Article 2.5.

²⁴ Defence counsel is someone who protects the rights and interests of suspects or defendants and gives them legal advice during criminal proceedings in accordance with the procedure established by the Criminal Procedural Code. See Criminal Procedural Code of Russia of 18 December 2001, issue 174-FZ (as amended on 22 October 2014), Article 49(1).

²⁵ Criminal Procedural Code of the Russian Federation of 18 December 2001, issue 174-FZ (as amended on 22 October 2014), Article 53(1).

²⁶ Federal Law of 15 July 1995 No. 103-FZ (as amended on 28 June 2014) “On detention on remand of individuals suspected of or charged with criminal offences”, Article 18; Criminal Procedural Code of the Russian Federation, Article 47(4.9).

²⁷ See Criminal Procedural Code of the Russian Federation, Article 49(4).

further documents from lawyers as a condition of a visit.²⁸ The Constitutional Court has clarified that the lawyer's right to meet with clients may not depend on the discretion of an official or a body in charge of the criminal investigation.²⁹

These clear provisions prescribed in the law, however, are not strictly followed in practice. According to the ICJ report: "The law enforcement bodies, which have full control over the person in detention, deny access to lawyers if documents, which are not required by law, are not presented".³⁰ The report concluded that: "lawyers are regularly prevented from meeting with their clients upon presentation of only the two documents: the certificate and the warrant. As a rule, a permit issued by an investigator or a judge is also required."³¹ This practice occurs regularly, not only in isolated instances, and the decision of the Constitutional Court is not applied in practice to ensure effective access.

Under international law, the accused must be granted prompt access to a lawyer and has the right to communicate with a lawyer at all stages of proceedings.³² Such access may serve *inter alia* as a preventive measure against ill-treatment, coerced self-incriminations and confessions or other violations of the rights of the suspect.³³ Moreover, the European Court of Human Rights has held that "a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial".³⁴ Therefore, not only do practices of impeding access of lawyers to clients run contrary to international law and standards, but they also lead to violations of human rights, which may not necessarily be remedied at future stages in the proceedings.³⁵

The Draft Law presents an opportunity to address the widespread problem of obstruction of access of lawyers to their clients. The ICJ therefore recommends that:

- 5. The Draft Law should extend the right of unhindered access of lawyers with a lawyer's identification to places of detention. Furthermore, Draft Law should consider introducing legal responsibility for undue prevention of access or obstruction of lawyers' access to places of detention of their clients, analogous to the responsibility for an "illegal refusal to provide information" provided by the Draft Law.**

ETHICAL STANDARDS AND POCKET LAWYERS

²⁸ Federal Law "On detention on remand of individuals suspected of or charged with criminal offences", op. cit., Article 18.

²⁹ Decision of the Constitutional Court of Russia No. 14-P of 25 October 2001 "In the case concerning compatibility of articles 47 and 51 of the Criminal Procedural Code of the RSFSR and article 16, para. 2 (15) of the Federal Law 'On detention on remand of individuals suspected of or charged with criminal offences' to the Constitution of Russia in view of the complaints lodged by Mr A. P. Golomidov, V. G. Kislitsyn and I. V. Moskvichev".

³⁰ ICJ Report, 'Towards a Stronger Legal Profession in the Russian Federation', op. cit., page 44.

³¹ Ibid.

³² General Comment 32, op. cit., para. 34; UN Basic Principles on the Role of Lawyers, op. cit., Principle 1.

³³ Human Rights Committee, 'General Comment No 20 (Article 7)', 30 September 1992, para. 11; *Salduz v. Turkey* (2008) ECHR 1542, para. 54.

³⁴ *Al-Moayad v. Germany* (2007) 44 EHRR (Admissibility), para. 101.

³⁵ *Salduz v. Turkey*, op. cit., para. 62.

A significant part of the Draft Law is dedicated to questions of professional ethics of lawyers and standards of qualified legal assistance as well as certain aspects of the disciplinary practice.

The Draft Law prescribes the requirement for lawyers "to constantly improve [their] knowledge and increase [their] professional level"³⁶ and introduces mandatory standards for qualified legal assistance.³⁷ It gives the authority to the Federal Council of Lawyers to approve a universal methodology of professional education for lawyers,³⁸ and to approve recommendations on disciplinary practice.³⁹ The Draft Law further provides for a new body, the Commission of the Federal Chamber of Lawyers on Ethics and Standards, which will comprise nine lawyers and six representatives of State bodies including the Ministry of Justice and the Parliament.⁴⁰ The Commission, among other things, will develop standards of legal aid and other standards for legal representation,⁴¹ provide binding interpretations of the application of the Code of Professional Ethics,⁴² systematize disciplinary practice and provide recommendations in this regard.⁴³

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A more active role of the Federal Chamber of Lawyers in enforcing ethical standards is timely and is welcomed by the ICJ. The problem of corruption of lawyers, in particular lawyers appointed to provide State-funded legal aid to defendants in criminal cases, is widely recognized as one of the greatest challenges facing the legal profession in the Russian Federation.⁴⁴ The term "pocket lawyers" is often used to refer to lawyers who serve the interests of the prosecution or other powerful actors rather than those of their clients. Among other practices, such lawyers may collaborate with the investigating authorities and encourage their clients to confess, fail to attend the investigative activities, or can merely sign the papers given by the investigators without ever meeting their clients.⁴⁵ Often, "pocket lawyers" are those appointed to provide State funded defence, referred to in the Russian Federation as "appointed lawyers".⁴⁶ The ICJ report has noted a certain level of tolerance towards the problem of pocket lawyers in Russia,⁴⁷ concluding that: "The widely acknowledged existence of this large group of lawyers who regularly fail to act in accordance with the principles of the profession cannot be considered as to any degree acceptable or tolerable".⁴⁸

The Basic Principles on the Role of Lawyers emphasize that, due to the importance of the duties they perform, it is indispensable that lawyers avoid impairment of their independence and "maintain the honour and dignity of their profession as essential agents of justice".⁴⁹ Lawyers must be able to act freely, diligently and fearlessly in accordance with the wishes of their clients, being

³⁶ Draft No 993553-6, op. cit., Article 2.3.

³⁷ Draft No 993553-6, op. cit., Article 2.12.

³⁸ Draft No 993553-6, op. cit., Article 2.13. a.

³⁹ Draft No 993553-6, op. cit., Article 2.13.6.

⁴⁰ Draft No 993553-6, op. cit., Article 2.14.

⁴¹ Draft No 993553-6, op. cit., Article 2.14.4.1.

⁴² Draft No 993553-6, op. cit., Article 2.14.4.2.

⁴³ Draft No 993553-6, op. cit., Article 2.14.4.3.

⁴⁴ ICJ Report, 'Towards a Stronger Legal Profession in the Russian Federation', op. cit., page 38.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid, page 40.

⁴⁸ Ibid, page 67.

⁴⁹ Basic Principles on the Role of Lawyers, op. cit., Principle 12.

guided by the established rules, standards and ethics of the profession.⁵⁰ The Basic Principles provide that “lawyers shall always loyally respect the interests of their clients”.⁵¹ They further specify that this duty and any other obligation towards the client should be carried out to the best of lawyers’ ability, diligently and at while all times remaining independent.⁵² In this regard the Code of Ethics is an important tool against those lawyers who either fail to carry out their obligations in remedying violations of their clients’ rights, or are complicit in those violations.

It is an important function of the lawyers’ association “[t]o maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession”.⁵³ A strong and properly enforced code of ethics is an essential tool in prescribing the conduct of lawyers in accordance with international standards, ensuring high professional standards and protecting the standing of the profession in society.⁵⁴

The ICJ recommends that:

- 6. The Draft Law should not only require that the legal assistance provided by lawyers should be qualified, but also that it is of utmost importance that legal assistance is provided by independent lawyers who act in the interests of their clients. A failure to meet the standard of independence should necessarily lead to a disciplinary action against the lawyer concerned and the Bar Associations play a crucial role in taking the lead in combating the corrupt practices among their members.**

- 7. Acts of corruption, including those of so-called “pocket lawyers”, should be seen as an egregious form of violation of the Code of Ethics and therefore disciplinary action should be initiated and disciplinary sanctions should be applied consistently and rigorously where lawyers fail to act in an independent manner or against the interests of their clients. Furthermore, procedures that are conducive to the existence of “pocket lawyers”, including the appointment of state defence lawyers by investigators, and investigators calculating the honorarium for defence lawyers work, should be reviewed.**

⁵⁰ Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), which formed the basis for the UN Basic Principles on the Independence of the Judiciary, para. 83.

⁵¹ Basic Principles on the Role of Lawyers, op. cit., Principle 15.

⁵² Ibid, Principle 14.

⁵³ Singhvi Declaration, op. cit., para. 99(b).

⁵⁴ Eastern partnership project report, Enhancing Judicial Reform in the Eastern Partnership Countries, working group “Professional Judicial Systems”, Directorate General of Human Rights and Rule of Law, p. 68, Strasbourg, May 2012.