Securing justice:
The disciplinary system for judges in the Russian Federation

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Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

UN Basic Principles on the Independence of the Judiciary

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with the established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and of the legislature in impeachment or similar proceedings.

Abbreviation:

QCJ – Qualification Collegium of Judges
HQCJ – High Qualification Collegium of Judges
SRF – Subject of the Russian Federation
SC RF – Supreme Court of the Russian Federation
HAC RF – High Arbitration Court of the Russian Federation
CC RF – Constitutional Court of the Russian Federation
DJP – Disciplinary Judicial Presence

I. INTRODUCTION

The International Commission of Jurists' Mission to Russia

This report follows from a mission of the International Commission of Jurists (ICJ) in April 2012 to the Russian Federation. The mission included Azhar Cachalia, Judge of the Supreme Court of Appeals of South Africa and Commissioner of the ICJ; Alejandro Salinas, lawyer from Chile and a member of the CIJL Advisory Committee; Róisín Pillay, Director of the ICJ Europe Programme, and Temur Shakirov, Legal Adviser at the ICJ Europe Programme. The mission was organised in co-operation with one of the ICJ's affiliate organisations in Russia, the Independent Council for Legal Expertise.

The mission spent one week in Moscow. It held meetings with the President of the Supreme Court; with judges of the High Arbitration Court, including members of the Disciplinary Judicial Presence and the Judicial Commission on Ethics of the Judicial Council; with the Judicial Department under the Supreme Court; with members of the Civil Society Development and Human Rights Council under the President of the Russian Federation and its Head, Adviser to the Russian Federation President; with a number of former judges who had been dismissed or resigned; with academic experts on matters of judicial discipline and the judicial system; and with lawyers and human rights NGOs. The ICJ wishes to thank all those with whom it met. It greatly appreciates the time and courtesy afforded to the mission by the Russian judicial authorities, including at the highest level, and the openness of the judicial community to discussion and exchange of experiences in regard to judicial disciplinary standards and procedures. The ICJ also wishes to record its particular thanks to those former judges who met with the mission and provided information on their own often very difficult experiences of the judicial disciplinary system and the termination of their office as a judge.

The mission addressed the disciplinary sanctions and process applicable to judges in the Russian Federation, in the context of an ongoing process of judicial reform in Russia. It followed an ICJ mission to the Russian Federation in 2010, which undertook a more general assessment of the judiciary and judicial reform and led to a report, *The State of the Judiciary in Russia*. [1] The report found that there were deep-seated deficiencies in respect of judicial independence, which required comprehensive reform, including of the appointment and disciplinary procedures, and of the administration of the courts. In light of these conclusions, the 2012 mission sought to address in more detail one of the key issues identified in the report, the judicial disciplinary system.

[1] Available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf.

Focus of the Mission

The mission's focus on the judicial disciplinary system recognizes its importance for securing judicial integrity and an effective and independent judiciary in any State. The disciplinary system, in any country, is a delicate and potentially hazardous tool, but a necessary one. It may be a double-edged sword, which must be used only as a last resort when other means to ensure the proper administration of justice have proved ineffective. There are indeed occasions when the disciplinary process can and must be invoked, when a judge must be disciplined and even dismissed to protect the integrity of the judiciary. But, in the Russian Federation as in many other states, the judicial disciplinary system can also, intentionally or unintentionally, work for interests other than those of upholding public accountability, judicial integrity and the Rule of Law. If the disciplinary system allows for abuse, such as the arbitrary dismissal of judges, then the security of tenure of all judges is threatened. In such circumstances, other legal safeguards, that ensure the appointment of the best candidates as judges, and provide them with life tenure, may be undermined by the unjustified application of disciplinary sanctions.

In a system that protects judicial independence and security of tenure, judges who follow the law and their personal convictions can be confident that they have no need to fear disciplinary action. Judges must not work in conditions where they are anxious about their dismissal, worried they may offend a superior by making an independent but unwelcome, unexpected or controversial ruling in a case. In particular, judges must not fear dismissal if they fail to follow "instructions" from more senior judges. Indeed, senior judges should not proffer instructions that are not related to matters of judicial administration, but rather go to the core of the judicial decision-making function. A system of judicial discipline that is reliable, predictable, fair and protected from abuse and arbitrariness is essential if judges are to develop and maintain their independence. By ensuring security of tenure, a disciplinary system that is free from abuse creates conditions in which judges can work with professionalism and personal independence.

The mission also recognized that dismissals of judges cannot be considered in isolation from the wider issues affecting the Russian judiciary. Resolving the problems in the disciplinary system will not alone create a strong and independent judiciary in the Russian Federation, but it is a necessary element of reform. It is the disciplinary system that provides – or at least should provide – protection against the unjustified removal of judges and the security of judicial tenure that is enshrined in Russian law. The system must ensure in practice that disciplinary sanctions are applied according to clear standards and through a fair process, and that the removal of a judge is a rare exception, that applies only where all other options have failed. Due process and effective safeguards in the disciplinary system, as well as limitations on the application of disciplinary sanctions are crucial in ensuring that the security of tenure of judges is guaranteed.

Context: The Russian Judiciary

The Russian judicial system is highly sophisticated and well-organized, drawing on a long legal tradition. One of its most conspicuous features is that judges are relatively well protected in many ways. They enjoy (qualified) immunity from administrative or criminal liability, as well as extensive social benefits during their judicial career and beyond. It is important to note that the special role of judges is enshrined in law. However, protection against some forms of intrusion into the judicial role, though established by law, often is illusory in practice.

The reasons for this complex situation are partly historical and cultural. The legacy of the Soviet system, under which judges had no more institutional or personal independence from the executive than a police officer or a clerk, remains powerful. In conversations with judges and former judges, apart from those at the highest levels of the judicial hierarchy, the notion of the judiciary as a strong, independent, check on executive power is strikingly absent. The mindset of judges themselves, both collectively and individually, is perhaps the most deep-rooted obstacle to an effective and independent judiciary. Judges seem to lack a sense of autonomy and authority, or indeed their right to such authority; instead they often appear to operate in a state of constant anxiety about the whims of their more senior colleagues, by whom they are easily intimidated. One former judge told the ICJ mission that: "[j]udges don't decide independently. We are not talking about oppression - they are just begging for instructions. They are just used to working like that."

It would be misleading, however, to reduce the problem to the attitudes and mindset of individual judges. The reasons for the lack of judicial independence are often systemic. Among the most intractable systemic problems, discussed for many years among the expert community, is the disproportionate power, both formal and informal, of Court Presidents. Court Presidents expect to, and do, exercise significant power over judges in their courts and beyond, and in some cases, that power is abused. The powers of Court Presidents extend throughout the judicial system, and affect and shape the disciplinary process, the appointments process, the allocation of cases, and the salaries and benefits of judges. The system is established in such a way that it is open to abuse by or through Court Presidents to impose control on members of their Court for illegitimate reasons. Some mechanisms which seem reasonable in principle, have had remarkably negative side effects in practice. For example, the power of Court Presidents to assign cases has been abused on occasion to create a situation where a judge is overburdened with cases and, therefore, may be subject to disciplinary proceedings for delay.

There are also inescapable issues of the quality of the judiciary and the ability of the profession to attract the highest quality candidates. Its failure to do so in all cases may have consequences for the application of disciplinary sanctions more frequently than should be necessary. During its mission, the ICJ was told by several lawyers and other experts that the quality of the Russian judiciary was sometimes inferior to the quality of lawyers and that there were difficulties in recruiting judges for some posts. Judicial office, they pointed out, was not seen as the pinnacle of a lawyer's career ladder, as it is in many countries, or as an aspiration for the brightest and most ambitious law graduates. The reasons for this are complex and partly cultural and historical, but can to some extent be addressed through rigorous judicial reform.

This is the context in which the system of judicial discipline is applied in the Russian Federation. Many, if not all, judicial systems struggle to reach the ideal of a truly independent judiciary, seeking to trap this phantom in the prosaic realities of procedures and administrative structures. The solutions are rarely perfect, and are often pragmatic, but what makes them work in the real world is the animating spirit of the judiciary of that country, that enables judges to act with real independence.

The ICJ is aware of the diversity of the problems of the judiciary in the Russian Federation and the varying situation in different regions. The judiciary in Kaliningrad is not facing the same issues as judges in Chechnya or Lipetsk. The differences preclude drawing certain conclusions of generalized nature when speaking about "problems in Russia", yet there is a common paradigm which brings a certain logic to the operation of the system, revealing systemic problems characteristic of the judiciary as a whole.

This report makes recommendations for the reform of laws and procedures on judicial discipline in the Russian Federation to strengthen the safeguards they provide for judges against the abuse of this system. The ICJ is conscious that such a reform is not in itself sufficient; that a deeper and more universal culture of respect for the judiciary and its independence, as well as a sense of autonomy and empowerment within the judiciary itself, is also necessary to prevent abuses of the judicial disciplinary process. Most importantly, conditions must exist to ensure that judges do not feel they need to act like 'heroes', but instead can focus on meeting conditions prescribed by law that are respected and guaranteed by the system. This can help judges to assume their roles as defenders and interpreters of law.

Judicial Independence and the Disciplinary System in the Russian Federation

The mission heard recognition from judges as well as experts in the disciplinary system that the number of dismissals of judges in the Russian Federation each year is unusually large by comparison with other States. On average, some 40 to 50 judges are dismissed each year following disciplinary proceedings.[2] This is partly accounted for by the size of the country and the large number of judges in the Russian Federation (approximately 30,000), but even when this is taken into account, the numbers remain surprisingly high. Many European States, for example, will typically dismiss no judges at all in any given year and often go for decades without removing a member of the judiciary. The number of dismissals of judges in the Russian Federation must be regarded as significant in a country where a strong culture of judicial independence is yet to be developed, where judges are perceived as weak and subject to executive influence, and where there are regular allegations of judicial corruption, including "contracted" cases where a particular outcome is agreed or imposed on the judge.[3] Even if all of the judges who have been dismissed in recent years were indeed rightly dismissed, this would point to a serious problem in the quality of the judiciary, and would suggest that the system of selection and appointment of judges is deeply flawed and requires urgent reform.

The impact of disciplinary action goes far beyond the 40 or 50 judges dismissed each year. There are also cases of warnings, the only other available disciplinary sanction, and anecdotal evidence gathered during the mission suggests that there are frequent instances of judges who are pressured to or choose to resign under the threat of disciplinary proceedings. Indeed, the mission met with several such judges.

Perhaps most significantly, the example of those who have been subject to disciplinary proceedings and dismissal serves to "encourage the others" to conform to the practices and expectations of the judicial establishment, for example to follow the line expected by a court president or the local authorities. Such pressure is not conducive to the development of an independent judiciary with judges who, acting freely within legal boundaries, consistently deliver fair trials. A real threat of dismissal, without clear grounds and a reliable process for establishing the facts, can serve to discourage the independent and effective discharge of the judicial function. In this way, the disciplinary process sends signals to which the entire judiciary is carefully attuned, shaping the degree of security of tenure which judges enjoy, as well as the boundaries of acceptable judicial conduct, the attitudes of judges and the values they defend in their everyday service. Since judges in the Russian Federation enjoy life tenure by law, the disciplinary process has become the main means by which their security of tenure, and their freedom to act with independence during their tenure, can be effectively undermined. Where it is abused, the disciplinary system weakens the capacity of the judiciary to

[2] See statistics: http://www.msamoylov.ru/?p=3780.
[3] ICJ Report: The State of the Judiciary in Russia, 2010, http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf.

deliver justice through the legal system. Where it is used to impose disciplinary sanctions on judges who have clearly acted contrary to judicial ethics, by contrast, this can instil confidence in the judicial system, not only amongst judges themselves but also amongst the wider public.

The threat of arbitrary dismissal may also work in conjunction with other aspects of the judicial culture, to distort the justice system and prevent it from operating fairly. For example, one senior official told the mission that judges' training and the legal tradition in which they operate have led them to believe that if they hand out a lenient sentence, they will be punished, as they will be suspected of corruption. So the fear of disciplinary action reinforces the judicial practice of harsh sentencing, for reasons unrelated to the crime committed. This of course is a matter of more than just culture and tradition: it concerns practices imposed by the judicial hierarchy. One former judge told the mission that he had been dismissed for a high rate of acquittals, which had amounted to five or six per 300 cases. This rate, the mission was told, was not tolerated by the system, which expected an acquittal rate close to zero per judge per year, the usual rate for judges in that particular court.

The ICJ mission met with many former judges who had either been dismissed, or had felt themselves compelled to resign, following the initiation or threat of disciplinary proceedings. The circumstances of their cases, and the reasons for dismissal, varied significantly (The judges the mission interviewed had served in a range of courts in several regions of the Russian Federation, though predominantly in Moscow or in the Western or Southern parts of the country). The ICJ also heard accounts of other dismissals, from the legal representatives of dismissed judges or from academic researchers. It should be noted however that the accounts heard by the ICJ do not provide a comprehensive picture of the practical application of disciplinary sanctions against judges throughout the entirety of the Russian Federation.

The mission also met with a number of experts including academicians and lawyers who have studied the disciplinary system in detail or who have worked as judges or members of disciplinary bodies. On the basis of these discussions, as well as the research carried out by a number of experts with whom the ICJ met, and those cases which were reported to the ICJ directly, some general conclusions can be drawn:

- Most cases of dismissals of judges are not 'political', in the sense of a centralized and deliberate attack on judges that take a particular policy position. There are no signs that the disciplinary system is overtly and systematically used by the government to cleanse the judiciary of a particular category of judges. However, clear signals are sent by dismissals of certain judges which are received by the rest of the judiciary, engendering a "chilling effect" among many of them.

- Reliable information points to the persistence of conditions allowing for abuse of the disciplinary process to serve the interests of court presidents or the local legal or law enforcement establishment. It cannot be said that such corruption of the system is endemic, or occurs consistently across all regions of the Russian Federation, but it does appear that the problem is more significant than a few isolated cases, and that the system at least enables such abuses to take place.

- Disciplinary sanctions are not applied consistently across the Russian Federation, leaving room for arbitrary and abusive application by regional authorities or Court Presidents. The vagueness of the judicial ethics code, its arbitrary interpretation and application as well as the malleability of the disciplinary process and the

absence of even legally prescribed due process safeguards in the procedure, facilitates this conduct.

- Many judges feel constant pressure to conform to expectations inconsistent with the independent exercise of the judicial function, and are acutely and constantly aware that if they do not do so, they will face dismissal.

Judicial reform[4]

There is an ongoing process of judicial reform in the Russian Federation, which has already made significant progress. Important reforms have already been put in place, including the abolition of the three-year probationary period for new judges and the introduction of random allocation of cases in some courts. Within the disciplinary system, the establishment of the Disciplinary Judicial Presence as a federal judicial appeal body has been significant and now looks likely to be followed by the creation of similar bodies at the regional level.

During the mission, the ICJ was told of further reforms that are underway, including a group established by the (former) President of the Russian Federation to consider reforms to legislation relating to disciplinary responsibility. These amendments include a revision of the Code of Ethics and a proposed law to establish new judicial disciplinary tribunals at the regional level to take on the current functions of Qualification Collegia in relation to judicial discipline. Shortly after the mission, the ICJ obtained a proposed draft of the new Code of Ethics to be adopted at the forthcoming Congress of Judges of December 2012.[5]

[4] For more information on the reform see ICJ Report: The State of the Judiciary in Russia, 2010.
[5] The 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 those falling under the competencies 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 (Law on the Bodies of the Judicial Community, art. 6).

Structure of this report

This report analyzes the law and practice, and sets out conclusions and recommendations, on the Disciplinary Structures and Bodies (Chapter II); the Grounds for Disciplinary Responsibility (Chapter III) and the Disciplinary Process (Chapter IV).

Each chapter begins with a brief analysis of international standards relating to the subject considered. This includes both the universal and regional standards applicable to the operation of the judiciary and, in particular, the disciplinary procedure. Though these standards are broadly worded and provide much leeway to national systems in how disciplinary mechanisms should be structured and operate, they provide authoritative and widely accepted principles by which the judicial disciplinary procedure should be informed and analysed.

Throughout this report, we cite examples of good practice from other countries that help to shed light on the practice in the Russian Federation or provide inspiration for reform. The good practices found in one country are often not easily transferable in whole to another legal and political system where a distinct legal culture applies, but can nevertheless inform and enrich national reforms in that system. The comparative examples cited are merely illustrative and are drawn from a number of countries where the ICJ has conducted research – including Belgium, France, and the Netherlands.

The report makes a series of recommendations for specific and practical measures designed to advance the process of reform of the judicial disciplinary system in the Russian Federation. It does so by drawing on international standards, comparative experiences, the discussions held in Moscow and an analysis of Russian law. The mission was impressed by the real commitment to achieving a fair and independent judiciary, the acknowledgement of current problems and the openness to reform expressed at the highest levels of the Russian judiciary, as well as of the judicial administration. It is hoped that this report will inform and help to inspire future reforms.

II. DISCIPLINARY STRUCTURES AND BODIES

International Standards

According to international standards, judicial administration and disciplinary action should be carried out by independent bodies that include substantial judicial representation.[6] Proceedings for judicial removal or discipline should be held before a Court or a Board predominantly composed of members of the judiciary and, when the power to remove or discipline is vested in the Legislature, it should be done upon a recommendation of such a Court or Board.[7]

It is widely accepted in both European and universal standards on judicial independence, that disciplinary, suspension or removal proceedings decisions should be subject to an independent review.[8] The Council of Europe Committee of Ministers has affirmed that where judges fail to execute their duties "in an efficient and proper manner" disciplinary proceedings may follow, but has stipulated that such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision and sanction, which must also be proportionate to the misfeasance.[9] The Consultative Council of European Judges has stressed the particular importance in the disciplinary process of "procedures, guaranteeing full rights of defence."[10]

According to the European Charter on the Status of Judges, sanctions against judges may be applied when the dereliction by a judge of one of his or her duties is a) expressly defined by the statue; b) the sanction is applied upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority consisting at least as to one half of elected judges; c) through procedures involving the full hearing of the parties; d) in which the judge proceeded against is entitled to representation.[11]

The Council of Europe's Venice Commission on Democracy though Law, in its Report on Judicial Appointments, states that "[a]n appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and autonomy. Such a Council should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them. A substantial element or a majority of the members of the judicial council should be elected by the judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications". [12]

The Consultative Council of European Judges (CCJE) of the Council of Europe has stated that "disciplinary procedures in first instance, when not addressed within the jurisdiction of a disciplinary court, should preferably be dealt with by a disciplinary commission composed of a substantial representation of judges elected by their peers, different from the members of the Council for the Judiciary, with provision of an appeal before a

[6] The Universal Charter of the Judge, art. 11, second indent.
[7] The Draft Universal Declaration on the Independence of Justice (or Singhvi Declaration), Art. 26(b).
[8] The UN Basic Principles on the Independence of the Judiciary, Principle 20.
[9] Council of Europe Committee of Ministers Recommendation No R (2010) 12 to Member States on judges: independence, efficiency and responsibilities, art. 69.
[10] 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, Strasbourg, 23 November 2001, para. 60(b).
[11] European Charter on the Status of Judges, para.5.1.
[12] CDL-AD(2007)028, paras. 48-50.

superior court".[13] The CCJE has also stressed "that the body responsible for appointing such a tribunal [i.e. the independent authority that decides on disciplinary proceedings] can and should be the independent body (with substantial judicial representation chosen democratically by other judges) which […] should generally be responsible for appointing judges. That in no way excludes the inclusion in the membership of a disciplinary tribunal of persons other than judges (thus averting the risk of corporatism), always provided that such other persons are not members of the legislature, government or administration." [14] The CCJE has stated that decisions relating to an appointment and career of a judge should be based on "objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria".[15]

The Judiciary of the Russian Federation[16]

There are approximately 30,000 judges in the Russian Federation in total, including magistrates.[17] The Court System in the Russian Federation has two levels – federal courts and regional courts (courts of the Subjects of the Russian Federation (SRF)). Federal courts are: a) the Constitutional Court; b) first and second instance courts in the SRFs, military and specialised courts; the High Arbitration Court, federal arbitration courts of cassation, arbitration appeal courts, SRF arbitration courts; c) the Disciplinary Judicial Presence. Regional Courts (Courts of the SRF) are: a) regional Constitutional (charter) courts; b) justices of the peace. Apart from local Constitutional Courts and justices of the peace, therefore, all judges are considered federal judges.

Under the Federal Constitutional Law, *On the Court System of the Russian Federation,* 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 belong to the federal level.

- *Constitutional courts* consider compliance of the laws of the Russian Federation with the Constitution of the Russian Federation and compliance of the laws of the regions (SRFs) with their Constitutions (Charters). Regional constitutional courts are not subordinate to the Constitutional Court of the Russian Federation.

[13] Opinion No 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, Strasbourg, 23 November 2007, para. 64.
[14] Opinion No 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19 November 2002, para. 71.
[15] 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, Strasbourg, 23 November 2001, para. 37.
[16] For more general information about the judiciary in the Russian Federation see: The State of the Judiciary in Russia, ICJ Mission Report, 2010.
[17] In 2009 there were 23297 federal judges of general jurisdiction, 7440 justices of the peace, 3673 judge of arbitration courts; Website of the High Qualification Collegium of the Russian Federation: http://www.vkks.ru/ss_detale.php?id=9706&columnValue=3&CATEGORY_2=%CE%E1%E7%EE%F0%20%F0%E5%E7%F3%EB%FC%F2%E0%F2%EE%E2%20%E4%E5%FF%F2%E5%EB%FC%ED%EE%F1%F2%E8&f=/index.php.

- *Arbitration Courts* consider disputes in the economic sphere. The Supreme Arbitration Court is the highest instance in the arbitration courts hierarchy, thus forming a separate jurisdiction not falling under the competence of the Supreme Court.

Internal Governance of the Judiciary

The internal governance of the Russian judiciary is the responsibility of several "bodies of the judicial community" established under the Law on the Bodies of the Judicial Community (BJC) of 14 March 2002.[18] It defines the "Judicial Community" as the judges[19] of all types and levels of federal and regional courts.[20] One of the main tasks of the bodies of the judicial community is "protection of rights and lawful interests of judges".[21] The bodies of the judicial community are:[22]

- All-Russian Congress of Judges, the highest body of the judicial community[23]
- Conference of Judges of the Subjects of the Russian Federation, a meeting organised at least once every two years deciding all the issues related to the operation of the judicial community in the Subjects of the Russian Federation;[24]
- Council of Judges of the Russian Federation, an elected body in charge *inter alia* of appointing candidates to certain judicial bodies;[25]
- Council of Judges of the Subjects of the Russian Federation, an elected body which *inter alia* appoints judges to disciplinary bodies;[26]
- General Meetings of Judges of Courts, a body which *inter alia* elects delegates among judges;[27]
- High Qualification Collegium of Judges of the Russian Federation;[28]
- Qualification Collegia of Judges of the Subjects of the Russian Federation.[29]

In addition to these bodies, the Judicial Department under the Supreme Court of the

[18] Law on the Bodies of the Judicial Community of 14 March 2002, N 30-FZ.
[19] Including retired judges (Law on the Bodies of the Judicial Community art. 2(2)).
[20] *The Law on the Bodies of the Judicial Community in the Russian Federation*, art. 1.
[21] *Ibid*, art. art. 4(2).
[22] *Ibid*, art. 3(2).
[23] See footnote 6 above.
[24] It 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 SRF (with exception of those falling under the competencies of qualification collegiums) (Law on BJC art. 7).
[25] 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 (Law on BJC art. 10.1).
[26] 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 Conference (Law on BJC, art. 10.4).
[27] Each court summons general meetings of judges at least once a year (Law on BJC, art. 12).
[28] 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 RF 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 courts at separate meetings of delegates (Law on BJC art. 11(2, 3)). Those members that retired between the meetings of the Congress are appointed by Council of Judges.
[29] 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 pubic 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 (Law on BJC art. 11(4-8)).

Russian Federation is responsible for the administration of courts of general jurisdiction throughout the Russian Federation. The Director General of the Judicial Department is appointed by the Council of Judges of the Russian Federation.[30] The role of the Judicial Department is to provide financial and technical support to judicial bodies, including judicial disciplinary bodies.

Disciplinary proceedings against judges are heard in specialized bodies. At first instance, disciplinary proceedings are heard by the Qualification Collegia of Judges (QCJ). Since 2010, a new appeal body, the Disciplinary Judicial Presence, has heard appeals related to dismissals of judges from the decisions of QCJ at both levels.[31] The decisions on the other disciplinary sanction – the warning – is appealed to the courts of general jurisdiction.[32]

[30] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 10(1)(2).
[31] Federal Constitutional Law on the Disciplinary Judicial Presence, art. 6; The Law on the Bodies of the Judicial Community in the Russian Federation, art. 26(5).
[32] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 26(1).

Qualification Collegia of Judges

Function

Qualification Collegia of Judges (QCJs) are the primary disciplinary tribunals for judges in the Russian Federation. Amongst other functions,[33] they apply disciplinary sanctions (налагают дисциплинарные взыскания) against judges and verify information published in the mass media, alleging conduct by judges that is contrary to the Code of Judicial Ethics, and which undermines the authority of the judiciary.[34] QCJs apply disciplinary sanctions to judges of courts within their jurisdiction (including presidents and deputy presidents of district courts) for acts of disciplinary misconduct (за совершение ими дисциплинарного поступка).[35] A QCJ is entitled to reconsider an earlier decision based on newly discovered circumstances.[36]

Composition

QCJs are made up of judges of federal and regional courts, representatives of the public and representatives of the President of the Russian Federation.[37] Their members are elected for a period of two years[38] (for a maximum of two terms[39]) and carry out their functions in an independent capacity.[40] Each QCJ is composed of 13 judges, 7 representatives of the public, and one representative of the President of the Russian Federation.[41] Judges-members of the QCJs at regional level are elected by a secret ballot at a Conference of Judges,[42] and between conferences by the Council of Judges.[43] Representatives of the public in these QCJ are appointed by the regional legislatures based on regional laws.[44] A QCJ can carry out its functions if it is composed of no less than two thirds of its members provided by law regardless of the representation balance.[45] Chairs and deputy chairs of the QCJ are elected by a majority of votes.[46]

Presidents of Courts and their deputies cannot be members of QCJs.[47] A judge cannot be elected as a member of the Council of Judges and a member of a QCJ of the same level and cannot be a member of QCJs of different levels.[48] The powers of a judge-member of a QCJ can be terminated prematurely on their own initiative or in the case of disciplinary misconduct, or due to their absence at sessions of the QCJs for a period of four consecutive months without a valid reason.[49] The decision on the premature termination of the powers of members of the QCJs is made by the Congress of Judges and, in the period between Congresses of Judges, by the relevant Council of Judges.[50]

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[33] *Ibid*, art. 19 (Powers of the Qualification Collegia of Judges of the SRF).
[34] *Ibid*, art. 19(2)(1.3).
[35] *Ibid*, art. 19(2)(8).
[36] The Law on the Status of Judges in the Russian Federation, art. 12.1(1); The Law on the Bodies of the Judicial Community in the Russian Federation, art. 20(1).
[37] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 11(1).
[38] *Ibid*, art. 13 (1).
[39] *Ibid*, art. 11(7).
[40] Regulations on the Operation of the Qualification Collegium of Judges, art. 13.3.
[41] See The Law on the Bodies of the Judicial Community in the Russian Federation, art. 11(4).
[42] *Ibid*, art. 11(6).
[43] *Ibid*.
[44] *Ibid*.
[45] Regulations on the Operation of the Qualification Collegium of Judges, art. 2.1.
[46] *Ibid*, art. 10.
[47] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 11(7).
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.

Under the law, members of the public in QCJs must be Russian citizens who have reached the age of 35, have higher education, have not committed dishonourable acts, do not hold state or municipal positions[51], and are not heads of organisations or other agencies, lawyers or notaries).[52] Representatives of the President of the Russian Federation in QCJs must be Russian citizens having higher education, who have not committed dishonourable acts.[53] The powers of a representative of the public can be prematurely terminated where he or she has committed a dishonourable act or in cases of systematic failure to discharge the responsibilities of a member of a QCJ.[54] The powers of the representative of the President of the Russian Federation can be terminated only by the President.[55] The law stipulates that representatives of the public or the President of the Russian Federation on a QCJ should, when carrying out their responsibilities as members of QCJs and in their external relationships, avoid any conduct which could detract from the authority of the judiciary or raise doubts as to their objectiveness, fairness and impartiality.[56]

The High Qualification Collegium of Judges

The High Qualification Collegium of Judges (HQCJ) of the Russian Federation is composed of 29 members[57] elected in accordance with the Law on the Bodies of the Judicial Community,[58] for a period of four years,[59] by a secret ballot at a Congress[60] of Judges.[61] The HQCJ is composed of 18 judges of various courts, 10 representatives of the public (appointed by the upper chamber of the Parliament) and one representative of the RF President.[62] Judges-members of the HQCJ are elected by the Council of Judges of the Russian Federation between the sessions of the Congresses.[63] Presidents of Supreme and High Arbitration Courts and their deputies cannot be elected as members of the HQCJ.[64]

The functions of the HQCJ include conducting checks of information published in the mass media about conduct of judges which is not in line with the requirements of the code of judicial ethics, and which undermines the authority of the judiciary, if the judge was recommended for the office by this Collegium.[65] The HQCJ has power to suspend, resume, and terminate the powers of, and to suspend, resume or, terminate the retirement of, the members of the HQCJ, Presidents of QCJs and their deputies.[66] It applies disciplinary sanctions against the Presidents of federal courts (except for district courts), as well as judges of the Supreme Court of the Russian Federation, the High Arbitration Court of the Russian Federation, federal arbitration courts of counties (округов), arbitration appeal courts and military courts, members of the HQCJ, and Chairpersons and deputy Chairpersons of Councils of Judges and QCJs, in cases of

[51] In RF Constitutional Court decisions of 5 November 2003 N 411-O and 412-O the Constitutional Court explained that not mentioning specifically deputies of legislative bodies of the RF Subjects does not authorise a combination of these two positions.
[52] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 11(8).
[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*, art. 11(2).
[58] *Ibid*.
[59] *Ibid*, art. 13 (1).
[60] For more on Congress of Judges see: The Law on the Bodies of the Judicial Community in the Russian Federation, art. 6.
[61] *Ibid*, art. 11(3).
[62] *Ibid*, art. 11(2).
[63] *Ibid*, arts. 10(1)(3) and 11(3).
[64] *Ibid*, art. 11(7).
[65] *Ibid*, art. 17(2)(2.2).
[66] *Ibid*, art. 17(4).

disciplinary misconduct.[67] It approves rules of procedure of QCJs,[68] considers complaints against the decisions of the QCJ of the SRF[69], and examines and generalises the practice of QCJs.[70] QCJs' rules of procedure are adopted by the HQCJ.[71]

Issues in the composition of Qualification Collegia of Judges

The mission was told that, while members of the public are appointed to QCJs by regional Dumas as required by law, the federal law leaves it to the regional authorities to establish the means and procedures of nomination and appointment in their respective regions.[72] Research published in 2011 by the Moscow Helsinki Group in a report entitled *the Role of the Public in Increasing the Independence and Effectiveness of Justice in the Russian Federation* examined 74 regional laws governing such appointments and found that they generally provide for nominations to be made by a range of civil society organisations, such as labour organizations, NGOs and religious organizations, as well as by deputies, governors, or others with public positions. In practice, it was found that the largest proportion of appointees are lawyers or others with a legal background, such as legal academics, followed by representatives of 'labour collectives', and then by retired police officers, judges and prosecutors. It found that only one percent of appointees fall outside of these groups.[73] In practice, the procedure for appointment was said seldom to lead to effective public scrutiny and the quality of the representatives of the public was deemed to be problematic.

Others with whom the mission met, who had been members of QCJs or researched their operation in practice, confirmed that members of the public appointed to QCJs were most often academic lawyers, lawyers or retired judges.

The Moscow Helsinki Group report argued that the current appointees do not represent the wider society, only corporate and professional interests, and that the independence of QCJs and the disciplinary process in general is undermined by the lack of a real role for the general public. The above report proposes a strict, new definition as to who is a member of the public – which already exists in the regulations of the Federation Council in regard to appointees to the HQCJ. It further proposes amending the eligibility requirements for members of the public, further detailing of the procedure of procedure of the QCJs, and adoption of a model/framework law which would contain uniform requirements for the regional laws regulating the election of the members of the public to QCJs.[74]

There are serious concerns as to the power of the judicial establishment, in particular the unofficial role of Court Presidents, to determine the composition of QCJs. Several experts told the mission that, in practice, Court Presidents play a decisive role in the composition of the QCJs. One expert analysed the situation as follows: "One part of the membership of Qualification Collegia are judges of general courts dependent on Court Presidents; the other part is made up of members of the public, from a list approved by regional Court Presidents. So, all of the members can be influenced by Court Presidents." He further suggested that although according to the law, members of the public are volunteers, in

[67] *Ibid*, art. 17(8).
[68] *Ibid*, art. 17(9).
[69] *Ibid*, art. 17(10.1).
[70] *Ibid*, art. 17(11).
[71] *Ibid*, art. 14(3).
[72] *Ibid*, art. 11(6).
[73] Moscow Helsinki Group: The Role of the Representatives of the Public in Increasing Independence and Effectiveness of Justice in the Russian Federation, Executive Editor Nina Takankina 2011, http://www.mhg.ru/files/011/KKC.pdf.
[74] *Ibid*, pages 46-48.

practice they may receive bonuses from court presidents, providing a further channel of influence; however it should be noted that the ICJ does not have other evidence for these allegations.

The power of Court Presidents in relation to the composition of QCJs needs to be seen in the light of Court Presidents' powers to use the disciplinary process to dismiss judges, and evidence that some of them abuse these powers (see below Chapters III and IV). The ICJ mission repeatedly heard allegations that Court Presidents had manipulated the disciplinary process in specific cases, as well as more general assessments from experts that this was a widespread, though not universal, problem. Reportedly, this control is needed in order for the Court Presidents to retain power over disciplining or dismissing judges working in a certain court. One expert told the mission "If [as a Court President] you terminate the powers of several judges, you look good. You try to assert your status as court chair." There is no evidence of widespread practice of this kind, but this anecdotal evidence suggests room for such abuse of the current disciplinary system.

The Disciplinary Judicial Presence

A new judicial body, the "Disciplinary Judicial Presence" (DJP) was established in 2010 to hear appeals against the decisions of the HQCJ and QCJs on dismissals of judges.[75] It considers appeals of dismissed judges, as well as applications (обращения) relating to decisions of the HQCJ or a QCJ by the Presidents of the Supreme Court or High Arbitration Court, not to terminate the powers of a judge.[76] Consideration of appeals of decisions to issue warnings (the other disciplinary sanction against a judge) does not fall under its jurisdiction. Within the judicial system, the DJP has the status of a federal court. It is formed of six judges (three judges of the Supreme Court and three judges of the High Arbitration Court).[77] Presidents of these courts, their deputies as well as the judges-members of the HQCJ and the Council of Judges of the Russian Federation cannot be elected as judges of the DJP.[78] The judges are elected by a majority of the Plenums of the respective courts[79] for a period of three years.[80] They can serve up to two consecutive terms only.[81] A member of the DJP cannot be brought to disciplinary responsibility.[82]

When it was created, the DJP was expected to consider approximately 100 cases per year.[83] In 2010, the DJP considered 147 applications[84] and, in 2011, 208 applications.[85] In 2010, approximately one third (34.4%) were reversed and in 2011 the rate of reversals reached 41.7%.[86]

The mission heard differing views as to the value of the introduction of the DJP. It is welcomed by some as having introduced greater consistency into the decisions of QCJs, and providing effective redress to judges who have been unjustly dismissed. The overturning of a significant number of decisions in the first two years of its application provides evidence for this. One judge whose dismissal had been overturned by the DJP

[75] The Constitutional Law on the Disciplinary Judicial Presence, art. 1.
[76] *Ibid*, art. 6(2).
[77] *Ibid*, art. 2.
[78] *Ibid*, art. 3(2).
[79] *Ibid*, art. 4.
[80] *Ibid*, art. 5(2).
[81] *Ibid*, art. 3(3).
[82] *Ibid*, art. 5(4).
[83] Rossiyskaya Gazeta, http://www.rg.ru/2010/02/10/disciplinarnoe.html.
[84] Disciplinary Judicial Presence website, statistics of 2010, http://dsp.sudrf.ru/index.php?id=67&item=303.
[85] Disciplinary Judicial Presence website, statistics of 2011, http://dsp.sudrf.ru/index.php?id=67&item=316.
[86] Disciplinary Judicial Presence website, Judicial statistics, http://dsp.sudrf.ru/index.php?id=67.

saw the balance of membership between the Supreme Court and High Arbitration Court as leading to greater independence and fairness. Many experts welcome the procedure under which a split vote of the DJP is always in favour of the judges whose case is being considered as it guarantees a higher threshold for dismissals of judges.

Others consider that the creation of the DJP has excluded the possibility of appeal to the ordinary courts from the decisions of QCJs. One expert told the mission that the "DJP was set up to take disciplinary matters away from the Supreme Court" and that dismissed judges had thereby lost access to a court of first instance, whilst more power was now concentrated in the Chairs of the Supreme Court and High Arbitration Court, who could appeal decisions not to dismiss, to the DJP. Others pointed out that there were insufficient safeguards to ensure the independence of the judges of the Supreme Court and High Arbitration Court sitting in the DJP from the Presidents of those courts and considered that the absence of any independent expert representation on the DJP also restricted its independence.

It is also significant that the DJP is a judicial body that uses a procedure closer to that of an ordinary court than that applied by QCJs, providing for greater procedural safeguards for parties to the case (see further below chapter IV). The procedure of the DJP is proscribed by the Plenums of the Supreme and High Arbitration Courts.[87]

Comparative experiences

Specialized disciplinary bodies, with roles similar to the QCJ and HQCJ, are in place in many jurisdictions. In France, for example, the High Council of the Judiciary (*Conseil Supérieure de la Magistrature*) acts as the disciplinary authority for judges.[88] It is presided over by the President of the Court of Cassation and comprises five judges, one public prosecutor, one member of the Council of State (*Conseil d'Etat*) and one lawyer, in addition to six qualified, prominent citizens who are not members of any of the branches of government. Of the latter six, two are appointed by the President and two by each of the two Houses of Parliament. In addition, the judge belonging to the section of the High Council with jurisdiction over public prosecutors is also a member of the body. The Minister of Justice is explicitly prohibited from participating.[89]

Detailed rules further govern the composition of the High Council of the Judiciary. The five judges-members must include: one magistrate *hors hiérarchie* (outside the hierarchy) of the Court of Cassation, elected by his peers; one First President of a Court of Appeal, elected by his peers; one President of a *Tribunal de Grande Instance*, elected by the Presidents of those *Tribunals*, the *Tribunals de Première Instance* or the *Tribunal Supérieur d'Appel*; and two other judges, elected by their peers.[90] These latter two judges are elected through a procedure that does not involve any court Presidents; the same *mutatis mutandis* goes for the public prosecutor (hence no involvement of the *procureurs généraux*).[91] The Council of State elects its member sitting on the High Council,[92] and the lawyer is appointed by the President of the national Bar Association, after an *avis conforme* of the general assembly of the Bar.[93] Lastly, the nominations of qualified citizens are subject to approval by the pertinent House's permanent

[87] The Constitutional Law on the Disciplinary Judicial Presence, art. 5(5).
[88] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature,* art. 48 *jo. Constitution,* art. 65.
[89] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature,* art. 48 *jo. Constitution,* art. 64-65.
[90] *Loi Organique No. 94-100 du 5.2.1994 sur le Conseil supérieur de la magistrature*, art. 1.
[91] *Ibid*, art. 3 and 4.
[92] *Ibid,* art. 5.
[93] *Ibid,* art. 5-1.

commission responsible for the organisation of the judiciary, while the President has to consult Parliament with regard to his nominees and he may not make an appointment when the sum of the negative votes in each House's committee represents at least three fifths of the votes cast by the two committees.[94]

In Belgium, in circumstances where allegations are made against a judge that may give rise to a serious sanction, the matter is investigated by the National Disciplinary Council, which issues non-binding advice on the measure to apply.[95] This body is composed of three judges, two public prosecutors and two "members not part of the judiciary". The latter are selected by the Council of the Bar Association and by the boards of universities from a list of lawyers and law professors with at least ten years' experience who must not have incurred a disciplinary sanction themselves. The magistrates, who also need to have at least ten years' experience and must not have incurred a disciplinary sanction themselves, are elected by their peers from a list of candidates.[96]

Hence, in both countries a single body considers matters of judicial discipline, rather than, as is the case in Russia, a multiplicity of bodies whose decisions can be appealed to a higher level.

Conclusions

The role and powers of the QCJs and of the DJP on appeal are highly significant, not only for individual judges, whose careers they can end, but also because, in any system, judiciary disciplinary bodies make decisions of constitutional significance, having profound effects on the independence of the judiciary. It is therefore essential that their composition, formation and functioning are carefully regulated and reviewed through transparent mechanisms to exclude abuse, arbitrariness and corruption, or such perception of them by the professionals or the public. Ultimately, the overriding interest of the disciplinary system must be to ensure that judges are capable of acting with the independence and impartiality that will provide for a fair hearing. In the Russian context, achieving this is particularly difficult, since both judges and non-judges may be susceptible to a degree of informal pressure and undue influence.[97]

The structure and composition of the QCJ and HQCJ, although not *prima facie* in conflict with international standards, is in practice problematic since it gives Court Presidents a high degree of control, which in some instances undermines the independence of the QCJ. Some experts attribute this to inadequate, or insufficiently independent, public participation in QCJs. However, such participation has not so far acted as a reliable safeguard against inappropriate influence of QCJs by the judicial hierarchy. An alternative model is to move towards a more judicial composition and procedure for the consideration of disciplinary matters, along the model of the DJP. Although some questions also remain regarding the independence of the DJP, which applies a judicial model at appeal level, it appears to have been relatively effective in introducing greater fairness and consistency into the disciplinary process, overturning many decisions of QCJs. The DJP may also provide an appropriate model for first-instance decision-making. In this connection, the mission was told that consideration is now being given by the Government to legislative proposals that would replace the functions of QCJs regarding disciplinary matters, with new bodies similar to the DJP at regional level. These proposals have not yet been published, and the ICJ has therefore not been able to

[94] *Loi Organique No. 94-100 du 5.2.1994 sur le Conseil supérieur de la magistrature*, art. 5-2 *jo*. Constituion, arts. 65 and 13.
[95] *Code Judiciaire*, art. 409(1).
[96] *Ibid,* art. 409.
[97] See ICJ Report: The State of the Judiciary in Russia, 2010.

assess them in any detail. However, as the ICJ understands the proposal, the new tribunals would be quasi-judicial bodies applying a judicial procedure.

There are risks inherent in establishing a system in which the judiciary has full control of the disciplinary system, without representation from civil society. Nevertheless, in the particular context of the Russian Federation, where the current system (which does include significant representation from civil society) has not been reliable in protecting against abuse, in providing fair procedures (see below Chapter III) or in ensuring consistency, there are advantages in adopting a more judicial procedure, that is subject to the guarantees of due process that would apply in the civil courts. The ICJ therefore supports in principle the creation of new specialized disciplinary bodies on the model of the DJP at regional level, provided that their structure, composition and procedure are subject to sufficient safeguards providing strong guarantees of independence.

III. GROUNDS FOR DISCIPLINARY RESPONSIBILITY

International Standards

The UN Basic Principles on the Independence of the Judiciary stipulate that judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.[98] All disciplinary, suspension or removal proceedings are to be determined in accordance with the established standards of judicial conduct.[99] European standards also affirm that permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law.[100] Disciplinary proceedings, then, "may follow where judges fail to carry out their duties in an efficient and proper manner", giving rise to sanctions that "should be proportionate".[101] Furthermore, "judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures, but offer guidance to judges on how to conduct themselves".[102] These principles "should be laid down in codes of judicial ethics", with judges playing a leading role in their development.[103]

The Universal Charter of the Judge provides that "disciplinary action against a judge can only be taken when provided for by pre-existing law and in compliance with predetermined rules of procedure."[104] The Draft Universal Declaration on the Independence of Justice in this regard states "all disciplinary action shall be based upon established standards of judicial conduct" [105] and that "a judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office".[106]

The European Charter on the Statute for Judges provides that sanction for judicial dereliction "is subject to the principle of proportionality".[107]

The Consultative Council of European Judges (CCJE) in its Opinion No. 3 (2002) on the principles and rules governing judges' professional conduct, and in particular on ethics, incompatible behaviour and impartiality,[108] stresses that it is "incorrect to correlate breaches of proper professional standards with misconduct giving rise potentially to disciplinary sanctions", as professional standards represent best practice.[109] That is not to say the latter may not be of relevance when assessing misconduct.[110] The essence of disciplinary proceedings lies in conduct fundamentally contrary to that to be expected of a professional in the position of the person who has allegedly misconducted him or herself.[111] The Council deems further definition in national law of the precise reasons for disciplinary action "desirable", taking note of the great generality with which these are

[98] UN Basic Principles on the Independence of the Judiciary: Principle 18.
[99] *Ibid*, Principle 19.
[100] Council of Europe Committee of Ministers recommendation No. R(2010)12 on judges, art. 50.
[101] *Ibid*, art. 69.
[102] *Ibid*, art.72.
[103] *Ibid*, art. 73.
[104] The Universal Charter of the Judge , art. 11, third indent.
[105] Draft Universal Declaration on the Independence of Justice, art. 27.
[106] *Ibid*, art. 30.
[107] The European Charter on the Statute for Judges, (art. 5.1).
[108] Opinion No 3 (2002) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, Strasbourg, 19 November 2002.
[109] *Ibid*, para. 60.
[110] *Ibid*, para. 61.
[111] *Ibid*, para. 63.

usually stated.[112] As regards the sanctions to be imposed, the CCJE endorses "the need for each jurisdiction to identify the sanctions permissible under its own disciplinary system, and for such sanctions to be, both in principle and in application, proportionate".[113]

The Law – Grounds for Disciplinary Responsibility

Under Russian law, any judge, except for a judge of the Constitutional Court, can be subject to disciplinary proceedings for conduct in violation of the Law on the Status of Judges and the Code of Ethics. A recommendation or motion of a Court President is the basis for disciplinary action against a judge, as follows:

- With regard to a court President: a proposal (представление) by the President of a higher Court;
- With regard to a Deputy President of a court or a judge: a proposal by the President of a higher instance court, or the President of the Court of the judge (суда, в котором замещает должность данный судья);
- With regard to a justice of the peace: a proposal by the President of a relevant district or an upper court.[114]

In addition, disciplinary action with regard to a Court President, Deputy President, or judge may be initiated on the basis of a recommendation or proposal of a "relevant judicial body".[115]

Disciplinary action may be taken on grounds of violation of the standards established in the Law on the Status of Judges in the Russian Federation ***or*** of the Code of Judicial Ethics.[116] Article 12.1 of the Law on the Status of Judges in the Russian Federation and Article 11 of the Code of Ethics states that disciplinary responsibility *may* [emphasis added] be applied for violation of the standards set out in those instruments, which as some experts suggest, allows for discretion in how and when the standards are applied.

The Law on the Status of Judges provides in article 3 that:

> "1. A judge must strictly observe the Constitution of the Russian Federation and other laws.
> 2. In exercising his or her powers, and also in his or her conduct outside the office, a judge must refrain from anything that would derogate from the authority of the judicial power or the dignity of a judge or cast doubts on his or her objectivity, fairness and impartiality."

Section 12.1 of the law stipulates that:

> "A judge *who has committed a disciplinary offence (a breach of this Law and of the Code of Judicial Ethics* [emphasis added] adopted by the All-Russian Judicial Congress) may, with the exception of the judges of the Constitutional Court of the Russian Federation, receive a disciplinary penalty in the form of:
> – a warning; [or]
> – early termination of judicial office.
> The decision to impose a disciplinary penalty must be taken by the

[112] *Ibid*, para. 65.
[113] *Ibid*, para. 74.
[114] Regulations on the Operation of the Qualification Collegium of Judges, art. 28.1.
[115] *Ibid*.
[116] *Ibid*, art. 28.2.

judicial qualification board that has competence to examine the question of termination of office of a particular judge at the time of that decision".

Article 14 provides that:

"1. Judicial office may be terminated on the following grounds:
...
(7) pursuing activities incompatible with holding judicial office;"

The Code of Ethics of a Judge in the Russian Federation,[117] provides:

Article 3 "A judge in any situation must retain personal dignity, cherish his honour and refrain from anything that could diminish the authority of judicial power, cause damage to the reputation of the judge and put in question his objectiveness and independence when administering justice."

Article 6.1 "... A judge must not make public statements, comment judicial cases, speak to the press regarding cases under examination by a court before a final judicial decision enters into force. A judge must not publicly, outside the professional framework, challenge court judgments that have entered into legal force or professional acts of his or her colleagues."

Article 8.3 "A judge may participate in public life so long as this does not cause damage to the authority of the court and proper discharge by the judge of his or her professional duties."

Comparative experiences

By way of comparison, in France,[118] Belgium[119] and the Netherlands,[120] disciplinary sanctions may only follow from commission or omission of certain acts or conduct, specified in the law. Unlike the disciplinary provisions, which serve as a basis to sanction unwanted conduct, the Codes of Ethics in these jurisdictions[121] serve to support and guide members of the judiciary in their actions, indicating which conduct is desirable in certain situations, as well as clarifying for the public the complex and delicate balance entailed in a magistrate's task.

Issues Regarding the Grounds for Disciplinary Responsibility

Vagueness of the Grounds

The mission found that the criteria used in the law and the Code of Ethics to qualify an act of a judge as meriting disciplinary action are vague. The unhelpful imprecision of the standards established in the law has been acknowledged by the Russian Supreme Court,

[117] The Code of Ethics of 2 December 2004.
[118] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, art. 43
[119] *Code Judiciaire*, art. 404.
[120] *Wet Rechtspositie Rechterlijke Ambtenaren (Law on the Legal Position of Judicial Officials*), arts. 46c and 46l.
[121] France: 'Compendium of the Judiciary's Ethical Obligations', developed by the High Council of the Judiciary, available at http://www.conseil-superieur-magistrature.fr/recueil-des-obligations-deontologiques-des-magistrats; Belgium: 'Code of Deontology', developed by the High Council of Justice, available at http://www.hrj.be/doc/divers/deontologie.pdf; the Netherlands: see vision on the administration of justice developed by the Council for the Judiciary, available at http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Visie-op-de-rechtspraak/Pages/Kernwaarden-van-de-rechtspraak.aspx and 'Guide for Judges' Conduct', developed by the Dutch Society for the Judiciary, available at http://www.nvvr.org/download/1459-nvvr-rechterscode.pdf.

which found that: "[s]tudy of the judicial practice has shown that in consideration of the appeals against the decisions of the QCJs, courts experience certain problems when differentiating actions of judges falling under the features of disciplinary misconduct from the actions not entailing disciplinary responsibility".[122]

The Constitutional Court has somewhat narrowed the interpretation of the actual grounds for disciplinary action in its decision of 28 February 2008 N 3-П: "… corporate acts of the judicial community which are the [...] codes, formulating the rules of behaviour of judges [e.g. the Code of Ethics], cannot proceed from broad interpretation of the elements of the disciplinary misconduct as they are defined by the Federal Law on the Status of Judges. Accordingly, non compliance with the mentioned corporate norms cannot by itself serve as grounds for premature termination of the powers of a judge unless he committed other actions which the law considers as incompatible by their nature with the high title of the judge".[123]

In this decision the Constitutional Court further stated that, to trigger disciplinary measures, an "infraction must be incompatible with the honour and dignity of judges".[124] The Court also held that the termination of the powers of a judge must be made only on the basis of the principle of proportionality, which must be guaranteed by the independent status of the bodies of judicial community with power to dismiss a judge, and by a fair procedure for consideration of disciplinary cases.[125]

In another decision, the Constitutional Court emphasized that: "By conferring legal public authority on the QCJs, by the exercise of which they are involved in the formation of the judiciary, the federal legislature aimed to ensure constitutional and legal status of judges and fulfilling the tasks of the judiciary. Thus, it is assumed that the QCJs shall take *lawful, reasonable and fair decisions* [emphasis added] that correspond to the public interest of the formation of the judiciary, which meet high professional and moral requirements, and that their unaccountability in relation to the decisions taken, including the conclusion on a recommendation to the judicial office, does not mean that these decisions can be arbitrary".[126]

Senior members of the judiciary concurred with other experts with whom the mission met, in acknowledging the vagueness of the criteria, describing the grounds for judicial discipline as "too abstract" during their meetings with the mission. Such vagueness, together with some institutional and procedural problems, creates room for wrongful and arbitrary interpretation, some advanced in good faith and some in bad faith, as highlighted below.

[122] Supreme Court decision of 31 May 2007, N 27 "On the practice of consideration by courts of cases concerning appeals against the decisions of the QCJs related to bringing judges of the courts of general jurisdiction to the disciplinary responsibility", preamble, para. 4.
[123] The Constitutional Court decision of 28 February 2008 N 3-П
[124] Decision of the Constitutional Court of the Russian Federation of February 28 2008 N 3-P "On the constitutionality of several provisions of Articles 61 and 121 of the Russian Federation Law" On the Status of Judges in the Russian Federation "and Articles 21, 22 and 26 of the Federal Law" On the Bodies of Judicial Society in the Russian Federation "in connection with the complaints of citizens G.N. Belyusova, G.I. Zimin, H.B. Sarkitova, S.V. Semak and A.A. Filatova".
[125] *Ibid.*
[126] Constitutional Court Decision (постановление) of 24 March 2009, N 6-П, "On checking constitutionality of the provisions of item 8 art. 5, item 6 of art. 6 of the Law of the Russian Federation "On the Status of Judges in the Russian Federation" and item 1 art. 23 of the Federal Law "On the Bodies of the Judicial Community in the Russian Federation" in conjunction with a complaint by citizen V. N. Ragozin, para. 4.

Arbitrary Interpretation of the Grounds for Dismissals

According to the Supreme Court study, which was supported by the experts who discussed this issue with the mission, there has been no consistency in application of the disciplinary action against judges. It is common practice that for the same or similar alleged misconduct, some judges are dismissed, others receive a warning, and in other cases no grounds for disciplinary action are found.[127] Thus, there does not seem to be a common understanding or interpretation of the grounds for disciplinary action. Rather, the interpretation and application of these grounds is to a large extent arbitrary. One expert told the mission that grounds for disciplinary action "can be anything from having sent inappropriate SMS messages to having requested discounts in shops." The mission was told that judges are often disciplined because they have not imposed pre-trial detention in a "sufficient" number of cases. Sometimes this is given as the explicit justification for disciplinary action, represented as judicial error, or sometimes it may be expressed as a charge of corruption, as for example in one case where it was alleged that a judge did not impose detention because she knew a relative of the accused.

The mission met with one former judge who had been dismissed for "bringing the judiciary into disrepute" ostensibly because his rate of dismissing requests for pre-trial detention was "unacceptably high" (at 10 percent), that dismissals had been unfounded, that his use of the conciliation procedure was unlawful, that several of his sentencing decisions had been too lenient, and that he had "passed suspended sentences on non-Russian citizens". At one high-level meeting, the mission was told that it was unsatisfactory that under the general principle of not undermining the authority of the judiciary or the status of judges, judges were being disciplined simply for having had their decisions revoked in a higher court.

Arbitrariness in the interpretation and application of disciplinary action is therefore widespread and of great concern. It can partly be explained by the large number of regional jurisdictions within the Russian Federation. Members of the judiciary pointed to this explanation, to the fact that the Law and the Code of Ethics are being interpreted and applied by 80 QCJs across Russia, without a mechanism for ensuring consistency.

One lawyer, who has carried out extensive research into the disciplinary process and has presented his research to members of QCJs, told the mission that many members of the QCJs had a great appetite for guidance and clarification of the standards applicable in cases of disciplinary action. He added that guidelines in themselves are not enough – there also needs to be an enforcement mechanism, by a body that will apply legal process to develop standards and criteria.

Lack of clarity persists in several aspects of disciplinary standards, for example in respect of *mens rea* (requirement of intent by the accused). Whether *mens rea* is a legal requirement for disciplinary responsibility is not clear.[128] Rather, it seems to depend on the understanding and practice of the particular QCJs. Some scholars are engaged in academic discussions on this issue,[129] pointing to the need for the development of a more solid doctrine.

Part of the problem of inconsistency is procedural, as will be discussed in the next chapter. Some experts and judges met by the mission were optimistic that the relatively

[127] Generalisation of the Practice of application by QCJs of legislation on disciplinary responsibility of judges, Romanets Y. V., http://vkks.ru/ss_detale.php?newid=278, para. 6.
[128] But see "Responsibility of the Judge" V.K. Aulov and Yu.N. Tuganov, who are of a different opinion.
[129] As seen in an article of one of few researchers on the topic "Features of Legal Regulations of the Disciplinary Responsibility of Judges of Military Courts", p. 10.

new appeal mechanism of the DJP would prove to be helpful in addressing the problem as mentioned above. But the lack of precision in law and absence of a consistent and coherent practice creates space for divergence and, more significantly, for the arbitrary and abusive application of the standards.

The mission heard that a working group, established on the instructions of the President of the Russian Federation, is currently working on judicial reform and is considering in particular a revision of the Code of Ethics. The ICJ understands that the original intention was to define in the Code of Ethics what precisely constitutes a disciplinary offence. However the mission learned that the intention is now to address this issue in a separate law, though the new draft Code does contain some further elaboration of the ethical standards that apply to the judiciary.[130]

Comparative experiences

The Russian Federation is not alone in defining in very general terms the grounds for which disciplinary action may be used against judges. Some jurisdictions however, have defined explicitly and clearly the acts or omissions that amount to judicial misconduct. For example, in France disciplinary measures may be undertaken following any failure by a magistrate when carrying out the responsibilities of his or her position and the duties of honour, scrupulousness or dignity. The law does, however, explicitly mention that a serious and deliberate violation of a procedural rule that constitutes a guarantee for the parties' rights, found in a definitive judicial decision, constitutes a breach of these duties.[131] Disciplinary proceedings may also be carried out following a national or international conviction of the State for reasons relating to deficiencies in the judicial service.[132]

In the Netherlands, various disciplinary sanctions can be imposed dependant upon the behaviour indicated. Firstly, written warnings may be issued for conduct that is negligent to the honour or tasks associated with the office, or for breaches of specific rules, such as failing to ensure the confidentiality of proceedings in chambers or the prohibition of out-of-court contact with parties.[133] A judge may be dismissed when he or she is deemed to be unsuitable for fulfilling his or her duty. Furthermore, a judge may be dismissed when he or she, through commission or omission, damages the proper course of justice or the trust that has been put in him or her. Dismissal is also possible when a judge has been convicted of a serious offence in a final judgement, or has been declared bankrupt or put under guardianship. Recidivism concerning the breach of specific rules (for which the judge has already received a written warning) also constitutes an optional basis for dismissal.[134]

Abusive application of disciplinary measures

Several of those with whom the mission met pointed to the manipulation of the Code of Ethics and the disciplinary system to apply sanctions where it was obvious that no punishment should be applied. One former judge, who had been dismissed following disciplinary proceedings, told us that her Court President: "would call judges to her office and instruct them on what decisions to take in particular cases. If they disobeyed, there

[130] Rapsi: Rules on responsibility of judges excluded from the draft Code of Judicial Ethics, http://rapsinews.ru/judicial_news/20120518/263199260.html.
[131] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, art. 43
[132] *Ibid,* art. 48-1.
[133] *Wet Rechtspositie Rechterlijke Ambtenaren (Law on the Legal Position of Judicial Officials*), art. 46c(1).
[134] *Ibid,* art. 46(c)(2)-(3), 46l and 46(m)(a)-(b).

were negative consequences." If established, it would be the Court President, not the judge, who should be subject to disciplinary proceedings.

The vagueness of the grounds for disciplinary action means that sanctions may be applied for seemingly valid reasons. This vagueness appears to be one of the weakest aspects of Russia's disciplinary system, since it makes it very difficult to prove that a judge's dismissal was an illegitimate or illegal one. The result is that the disciplinary process can be invoked whenever a Court President wants to dismiss a judge for any reason and, as the mission heard from many experts it met with, it is possible to invoke these grounds against any judge. There are many circumstances in which the relationship between a Court President and a judge may break down, and this can often lead to a view that a particular judge 'must' and most likely will be, dismissed.

For example, sanctions may be applied to judges on the grounds that there are unacceptable delays in processing cases. One former judge noted that Court Presidents routinely keep statistics on performance and case processing by individual judges, and that, based on these statistics, a Court President may submit a complaint to a QCJ. This practice occurs despite the fact that there are no clear performance criteria established in relation to the number of cases a judge is expected to deal with in any given period, though the definition of such criteria has been under discussion in the judicial community for some years. In many courts, Court Presidents have the authority to allocate cases and, as such, this creates significant scope for abuse. A Court President may deliberately overload a judge with complex cases in order to induce a poor performance record and initiate disciplinary proceedings. Since a recommendation for disciplinary action is at the discretion of the Court President, and because there are no clear criteria in this regard, the same rate of processing cases might result in disciplinary action against one judge and none against another. The threat of arbitrary disciplinary action on grounds of delay also provides a way for Court Presidents to keep any judge they choose under close control. However, as one expert pointed out, in such cases it is often hard to show that the Court President has acted illegitimately, because there are no clear standards in the law as to when judicial delay becomes misconduct.

Some Court Presidents, the mission was told, have an interest in dismissing a certain number of judges even if they have no personal grudge, since the process of carrying out such dismissals sends a signal to the judicial hierarchy that one is in control and has a desire to cleanse the system of weak or corrupt judges. Jurisprudence of the Supreme and Constitutional Court also shows that, in some cases, judges have been dismissed for merely criticising their Court President[135] or for refusing to prolong the arrest of a detained individual.[136] These cases point to lack of clarity or at least common understanding by the disciplinary bodies as to what acts or decisions of judges may never be subject to disciplinary sanction. This potentially creates uncertainty among judges themselves and may allow for manipulation.

Lack of Limitation Period for Disciplinary Action

Time limitations do not apply in the judicial disciplinary process, as has been confirmed by a Supreme Court judgement.[137] This is an exception in Russian law, which generally applies limitation periods not only to crimes or violations of laws, but also to other disciplinary processes, including those against lawyers, prosecutors, civil servants and

[135] Decision of the Constructional Court of the RF of 28.02.2008 N 3-П.
[136] Decision of the Supreme Court of 3 May 2006, N 5-Г06-44, against judge R., http://law7.ru/base55/part6/d55ru6796.htm.
[137] Supreme Court decision of 8 February 2006, 5-Г05-141: "... with regard to the timing of bringing a judge to disciplinary responsibility provisions of Art. 193 of the Labour Code of the Russian Federation do not apply".

military officers. The only other offences that are not subject to a statute of limitations are crimes against peace and security of humanity.[138] However, the Supreme Court has confirmed that the general statute of limitations in the Labour Code does not apply to disciplinary action against judges. As a matter of principle it is right not to consider judges as mere employees and thus apply the Labour Code to them. In this context, the logic of the Supreme Court can be understood. However, the Court did not use the opportunity to address the legal gap that is often used against judges. The ICJ mission was told of several cases where disciplinary action was initiated for acts that had taken place five years previously, and others regarding action that had taken place over ten and twelve years previously.

The absence of any statute of limitations for disciplinary proceedings against judges means that the risk of disciplinary action is pervasive. Many judges are likely to feel constantly at risk of arbitrary dismissal or discipline because of a minor mistake, even one made fifteen or twenty years prior to the disciplinary action.

Another consequence highlighted to the mission is that, due to lack of a statute of limitations, a judge may potentially be disciplined for an action that is only classified as 'misconduct' long after the event. Thus, judges do not enjoy protection of the well-recognised principle of legality.[139]

In practice, the absence of a time limitation increases the power of Court Presidents over judges, since they will keep information about misconduct or mistakes made by a judge during the course of his or her career and have the power to use that information to recommend their dismissal at any point. Given the vagueness of the grounds on which a judge can be dismissed, and the range of conduct that can be construed as grounds for disciplinary action, this power is considerable and constant. A Court President who receives information about possible misconduct of a judge in 2012 may decide not to recommend a disciplinary process at that point, but instead wait until 2020 (or later) to launch proceedings on the same grounds. Since according to existing practice (see above), judicial misconduct may include anything from causing delays in processing cases to unduly lenient sentencing and serious allegations of drunkenness, corruption or sexual harassment, the power of the Court President to apply disciplinary measures can be held over every judge indefinitely and used as a means to manipulate them.

It is also possible that a newly appointed Court President may review historic records and take a different view to the previous Court President as to what constitutes disciplinary misconduct. He or she may then recommend disciplinary proceedings concerning acts that took place many years previously. The mission was even told of cases where a Court President leaving the court would hand over 'the dossier' on a particular judge to the new Court President.

The lack of a statute of limitations was widely seen by those met by the ICJ mission as a crucial factor in facilitating abuse of the judicial disciplinary system. Concern relating to this issue was also expressed by senior figures in the judiciary.

[138] Criminal Code Article 78. Exemption from criminal liability due to the expiration of the limitation period, para. 5.
[139] Both researchers writing on the topic and the experts the mission met with mention cases where a motion to dismiss a judge was submitted regarding something which had happened 5 years, 11 years and 16 years before.

Comparative experiences

In other jurisdictions, limitation periods do apply to judicial disciplinary action. For example, in Belgium, the authority responsible for discipline must launch proceedings within six months of having been made aware of the facts.[140] French law stipulates that a complainant must file his or her grievances within one year after the final decision in the pertinent case.[141] However, there is no similar stipulation in the case where the Minister of Justice or the President of one of the Courts of Appeal or other *Tribunals Supérieurs d'Appel* seizes the High Council of the Judiciary.

Disciplinary Penalties

There are only two types of disciplinary penalties that can be imposed on a judge in the Russian Federation: a warning and the early termination of a judge's powers (i.e. dismissal).[142] When considering the level of disciplinary penalty to be applied, the Code of Ethics specifies that all circumstances of the misconduct should be taken into account, including the harm caused to the authority of the judiciary and the title of the judge, the personality of the judge and his or her attitude towards the misconduct committed.[143]

Many of those to whom the mission spoke considered the limited range of penalties available to be highly problematic. Dismissal of a judge is considered to be a particularly severe penalty, because it also implies the loss of pensions and other social benefits, such as healthcare, which carry a high monetary value. Several of the dismissed judges with whom the mission met were particularly concerned at the loss of these benefits, and the mission heard of other cases where a judge's decision to resign rather than go through a threatened disciplinary process appears to have been significantly influenced by the desire not to lose such benefits. It was suggested, for example, that there could be an intermediary penalty of termination of powers without being stripped of the status of a judge, which would allow for the retention of the pension and other benefits.

Judicial officials told the mission that the judicial community was divided as regards the need for a wider range of penalties, but that the predominant view was that there should be some additional measures available. There did not appear to be any consensus as to which additional measures should be introduced, however. The mission was told that, although warnings are widely used, it is difficult for QCJs to know how to respond to less significant forms of misconduct, such as minor traffic offences, that may require a response from the judicial disciplinary system, but for which dismissal seems an extreme option.

Comparative experiences

By way of comparison, French law provides for a wide range of sanctions to be imposed against judges in disciplinary proceedings: a reprimand registered in the file; transfer of office; revocation of certain functions; the prohibition to sit as a single judge for a period of maximum five years; a diminution in grade; temporary exclusion from functions of a period of maximum one year, with complete or partial deprivation of salary; demotion; retirement, with or without pension; and dismissal. Only one sanction may be imposed

[140] *Code Judiciaire,* art. 418.
[141] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, art. 50-3.
[142] The Law on the Status of Judges in the Russian Federation, art. 12.1(1); The Code of the Judicial Ethics, art. 11.1.
[143] The Code of the Judicial Ethics, art. 11.2; NB: The new proposed which is to be adopted Code of Ethics does not include as section on disciplinary responsibility of judges.

at any one time, although transfer of office can be attached to most other sanctions (but not to a reprimand or – logically – to retirement or dismissal).[144]

In Belgium, the law provides for *grosso modo* two types of disciplinary measures: minor and serious. Minor sanctions comprise a warning and reprimand. The serious sanctions are again subdivided into two categories: first and second degree. First-degree measures are deduction of pay; disciplinary suspension; repeal of the mandate; and disciplinary suspension with repeal of the mandate. Second-degree sanctions comprise *ex officio* dismissal and relief from function (or: deposition).[145] In the Netherlands, there are only three measures available: a written warning, suspension and dismissal (with suspension being an order issued pending a definitive decision on dismissal).[146]

Conclusions

Several aspects of the grounds of disciplinary action against judges appear to be highly problematic. These include the vague language of the legal provisions regarding the grounds for disciplinary action. "Bringing the judiciary to disrepute", for instance, may include a wide range of conduct including purely judicial conduct such as acquittals or instances of revocation of judgments. It is unclear which action will, or will not, fall under the grounds for disciplinary action.

Failure to draw the limits to the grounds for disciplinary action leads to arbitrariness and lack of predictability in the application of the law, whether from genuine lack of understanding or from deliberate abuse. As a result, disciplinary action can be used to put pressure on judges.

The unclear grounds for dismissal of judges in the Code of Ethics and the Law on the Status of Judges, as well as the inconsistent interpretation and application of these rules is further exacerbated by the absence of a statute of limitations. This seems to be an anomaly in the Russian law, which in practice leads to vulnerability of practically any judge at any level throughout his or her judicial career.

[144] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, arts. 45-46.
[145] *Code Judiciaire*, art. 405, paras. 1-2.
[146] *Wet Rechtspositie Rechterlijke Ambtenaren (Law on the Legal Position of Judicial Officials*) arts. 46c, 46f, 46l and 46m.

IV. THE DISCIPLINARY PROCESS

International Standards

The UN Basic Principles on the Independence of the Judiciary provide that complaints against judges should be processed expeditiously and fairly under an appropriate procedure in which a judge enjoys the right to a fair hearing.[147] Council of Europe standards stipulate that disciplinary proceedings should be conducted "with all the guarantees of a fair trial", providing the judge with the right to challenge the decision and the sanction.[148] In matters of judicial discipline, particular importance is attached to procedures guaranteeing full rights of defence.[149]

The Draft Universal Declaration on the Independence of Justice provides for complaints to be "processed expeditiously and fairly under an appropriate practice." It requires that "the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge".[150] The Declaration furthermore states that "the proceedings instituted against judges shall ensure fairness to the judge and the opportunity of a full hearing"[151] and that judgments in disciplinary proceedings shall be published, regardless of the public or *in camera* nature of the proceedings.[152] The Universal Charter of the Judge provides for "compliance with predetermined rules of procedure".[153]

Recommendation to initiate disciplinary proceedings

There does not appear to be an obligation for Court Presidents or judicial bodies to present any legal assessment of the facts and give detailed argumentation when making a recommendation for disciplinary action. There are also no relevant legal criteria, except for some sparse language in the Constitutional Court judgment concerning proportionality (it is not clear how much these are used – see Chapter III). Despite this, there does not seem to be a requirement under law to make such an assessment, neither are there any commonly used tests developed for this purpose.

For example, in a case relating to the appeal of a decision made by the QCJ, the Cassation Collegium of the Supreme Court found that: "[t]he decision of the Council of Judges of the Volgograd Oblast does not contain a request to bring judge G. to disciplinary responsibility, it does not specify what exactly the disciplinary misconduct was and what proof it was supported with. The content of the letter of the acting President of the Central District Court of Volgograd to the Chair of the Council of Judges of the Volgograd region does not allow to conclude that it is a proposal (представление) [for disciplinary action to be taken]. With such information the QCJ and the first instance court did not have basis to conclude that the QCJ of Volgograd region had at their

[147] The UN Basic Principles on the Independence of the Judiciary, Principle 17.
[148] The Council of Europe recommendation R(2010)12 of the Committee of Ministers, art. 69; See also the European Charter on the statute for judges, which refers to the need for «proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation.» The UN Human Rights Committee has stated that «judges should be removed only in accordance with an objective, independent procedure prescribed by law.» Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN Doc CCPR/CO/75/MDA, para.12.
[149] Opinion No. 1 (2001) of the Consultative Council of European Judges 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. 60(b).
[150] Draft Universal Declaration on the Independence of Justice, art. 26(a).
[151] *Ibid*, art. 28.
[152] *Ibid*, art. 29.
[153] The Universal Charter of the Judge, art. 11, third indent.

disposal the proposal (представление) of the relevant court president or an application (обращение) of a body of judicial society in order to decide the question of bringing judge G. to disciplinary responsibility".[154] In this case, the Supreme Court decided in favour of the applicant. However, the case highlighted a general problem of poor procedure, as the QCJ had dismissed the judge with all the procedural flaws described in the decision of the Supreme Court.

Initiation of the Proceedings: the investigation stage

When a Court President makes a recommendation for the termination of a judge's functions for an act of disciplinary misconduct, or where a referral comes from a judicial community body, this will be considered by the QCJ[155] where there is information in the materials that supports the allegations.[156] The QCJ may carry out additional checks of the materials presented, request supplementary documents and hear explanations from relevant people about the circumstances in which the alleged act of disciplinary misconduct was committed by the judge.[157] The QCJ can decide to verify the information itself or forward it for verification by a Court President of the relevant or higher court.[158]

Verification of Allegations

When verifying the allegations, the QCJ may involve judges, heads of courts, employees of the court apparatus, the Judicial Department, law enforcement and other state bodies.[159] In certain cases,[160] the complaint is returned to the applicant[161] and, if it contains information about the crimes committed, details are sent to the relevant state body in accordance with its competence,[162] while anonymous complaints are not considered.[163]

The outcome of the verification is forwarded to the President of the relevant court (or an upper instance court) to make a decision on submitting a motion or application (представления или обращения) to the QCJ for disciplinary action.[164]

The complaints or applications (сообщения) containing information about a judge's alleged disciplinary misconduct which have been received from persons not listed in Article 22(1) of the Law on the Bodies of the Judicial Community of the Russian Federation[165] or from citizens, are verified by the QCJ or forwarded to the President of the relevant court for verification.[166] The Supreme Court study has shown that such checks are not always objective. In practice, the the check conducted by Court Presidents is almost never verified by QCJs.[167] One dismissed judge described how, in his case, the Court President had made a recommendation for disciplinary action against

[154] The Cassation Collegium of the Supreme Court decision of 02.04.2009 №. КАС 09-30.
[155] The Law on the Status of Judges in the Russian Federation, art. 12.1(1).
[156] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 22(1).
[157] *Ibid*.
[158] Regulations on the Operation of the Qualification Collegium of Judges, art. 27.1.
[159] *Ibid*, art. 27.2.
[160] Absence of information in the complaint about committing disciplinary misconduct by the judge; appeal against a court decision; existence of obscene, insulting words or expressions or threats; in case the text can not be read; in case there has been a reply regarding the complaint, and the complaint does not contain any new arguments; in case the complaint contains secrets protected by the federal law.
[161] Regulations on the Operation of the Qualification Collegium of Judges, art. 27.3.
[162] *Ibid*, art. 27.4.
[163] *Ibid*, art. 27.5.
[164] *Ibid*, art. 27.6.
[165] President of a relevant or a higher court, or a judicial community body.
[166] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 22(2).
[167] Generalisation of the Practice of application by QCJs of legislation on disciplinary responsibility of judges, Romanets Y. V., http://vkks.ru/ss_detale.php?newid=278, part II, para. 2.1.

him. When this failed, the Court President made another recommendation for disciplinary action. However, the QCJ did not make its own inquiries into the allegations, instead choosing to take the documentation provided by the Court President for granted. It seems that there is a practice of placing heavy reliance on the evidence presented by Court Presidents in the initiation of proceedings.

In practice, it is often the case that complaints are made with requests not to forward the complaint to the Court President where the judge (against whom the complaint is made) works. However, such requests may be ignored. Moreover, in at least one reported case, the Court President had to consider a complaint against himself.[168]

|Proceedings are sometimes initiated after a complaint has been made by a person or body that does not have competence for such an action. For example, in a case from 2002, it is reported that a complaint made by a prosecutor was considered on its merits, although under the law prosecutors have no power to initiate a complaint.[169]

According to the law, in order to conduct a verification, the QCJ must create a commission comprised of members from the Council of Judges, representatives of the public and employees of the QCJ.[170] The Commission then reports the results of its inquiry at a session of the QCJ, which then makes a decision on the merits of the case.[171] The law does not regulate the quality of the verification or specify exactly what must be examined. By way of comparison, both French[172] and Belgian[173] legislation provide that the disciplinary body (or another body on its behalf) should carry out an investigation once it has been informed of the allegations.

In practice, both Court Presidents and Qualification Collegia seem to enjoy considerable discretion in deciding when they want to initiate proceedings against a judge. In fact the disciplinary punishment "may" be imposed rather then "must be" imposed for disciplinary misconduct.[174] For example, it has been reported by one expert that both the Collegia and persons having powers to initiate proceedings often return complaints to the complainants (members of the public) with reasoning that seems to be at odds with legislation on disciplinary procedure,[175] such as the following: "carrying out by the judge of an obviously unjust judicial act is a criminal offence, the question initiating a criminal case against a judge is decided on the basis of the submission of the Prosecutor General of the Russian Federation, such a submission has not been received".[176] Moscow Helsinki Group gave the example of Nizhniy Novgorod QC. According to a Moscow Helsinki Group's research, in a two-year period not a single disciplinary process was initiated against a judge as a result of a complaint made by a citizen. Instead, the President of the Nizhny Novgorod Court initiated all processes.

This breadth of discretion may facilitate arbitrariness and enable Court Presidents who are so inclined to abuse the procedure by deciding to bring complaints against a judge based on the arbitrary application of criteria, such as delays in handling cases (as outlined above).

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[168] *Ibid*.
[169] *Ibid*, para. 3.1.
[170] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 22(2).
[171] *Ibid*, art. 22(2).
[172] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, art. 51-52.
[173] *Code Judiciaire*, art. 411.
[174] The Law on the Status of Judges, art. 12.1.1.
[175] See: Regulations on the Operation of the Qualification Collegium of Judges, art. 27.4.
[176] Generalisation of the Practice of application by QCJs of legislation on disciplinary responsibility of judges, Romanets Y. V., http://vkks.ru/ss_detale.php?newid=278, para. 2.2.

One expert told the mission that, although Court Presidents do not officially have the power to sanction judges, in practice it was they who took the final decision and 'investigated' the case. Once a Court President had made a complaint against a judge, he or she would develop the case themselves.

The Session of the Qualification Collegium of Judges

The Chair of the QCJ, or his or her deputy, is responsible for carrying out the preparatory work for the session, which includes deciding upon the time, place and the people to invite.[177] The Chair of the HQCJ informs the Presidents of the Supreme and High Arbitration Courts and the President of the Council of Judges about the issues that will be considered at the session of a QCJ, while the Chair of the QCJ informs presidents of other relevant courts. The judge who is the subject of the disciplinary action and other interested parties must be informed of the date, time and place of the session of a QCJ "within a period sufficient for their attendance of a session".[178]

The following persons may take part in sessions of the QCJ: Presidents and Deputy Presidents of courts; heads of the Judicial Department under the Supreme Court and the organs in its system; Presidents and Deputy Presidents of the Councils of Judges; those of other QCJs or their representatives.[179] The issue of participation by Court Presidents in the process – and, in particular, the participation of the Court President who had submitted the motion for disciplinary action against the judge in the case - has been challenged before the Constitutional Court, which decided that it was not contrary to the Constitution.[180]

According to the regulations, the burden of proof relating to an act of disciplinary misconduct should lie with the person who signed the recommendation for disciplinary action (представление или обращение) or with his or her representative.[181] Doubts in proving a commission of an act of disciplinary misconduct should be interpreted in favour of the judge.[182]

Public nature of the hearing

As a rule, the sessions of the QCJ are open.[183] Closed hearings are only conducted when this is necessary to protect state secrets or to protect the rights and interests of citizens, and in other cases as provided for by federal laws.[184] A (fully or partially) closed session may be held upon a motion of a judge against whom the complaint (представление или обращение) is being considered or on a reasoned motion of Prosecutor General or his or her representative[185] or on the majority vote of the QCJ.[186] Personal correspondence may be adduced at the hearing only with the consent of the correspondents.[187] In an open hearing, persons present have the right to make recordings using audio devices.[188] Visual devices are also allowed subject to the consent of the majority of the QCJ.[189]

[177] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(1).
[178] Regulations on the Operation of the Qualification Collegium of Judges, art. 28.3.
[179] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(6); The provision found to be constitutional by the Decision of the Constitutional Court of the RF of 09.10.2008 N 482-O-P; the Decision of the Constructional Court of the RF of 28.02.2008 N 3-П.
[180] Decision of the Constitutional Court of 28 February 2008, N 3-П, para. 5.4.
[181] Regulations on the Operation of the Qualification Collegium of Judges, art. 28.4.
[182] *Ibid*, art. 28.5.
[183] *Ibid*, art. 4.1.
[184] *Ibid*, art. 4.2.
[185] *Ibid*, art. 4.3.
[186] *Ibid*, art. 4.4.
[187] *Ibid*, art. 4.5.
[188] *Ibid*, art. 4.6.
[189] *Ibid*.

Procedure at the session

The Chair opens a session of a QCJ by announcing the material that is to be considered.[190] Motions by the participants in the process are then considered.[191] The consideration of the material starts with a report of the Chair of the session or a member of the QCJ (the rapporteur), who sets out the essence of the issue, the content of the written materials and reports on other data which are necessary for a decision to be made on the merits of the case.[192] The other members of the QCJ can put questions to the rapporteur.[193] Following the report, the session hears the explanations of the judge, persons who possess information about the materials considered and the opinions of an expert taking part in the session.[194] Documents, which include originals and verified copies, are then included with the material to be considered.[195]

The following persons are then asked to express their opinions on the issues discussed relevant to their area of expertise, before the QCJ starts its deliberations (совещание): the presidents and deputy presidents of the courts; heads of the Judicial Department under the Supreme Court and the bodies within its system; chairs and deputy chairs of the Councils of Judges; and those of other QCJs or their representatives.[196]After the examination of the materials, final statements (выступления) are made by the parties to the session.[197]

Many experts, lawyers and former judges met during the mission made unfavourable comparisons between the QCJ procedure and that of a court, in particular with regard to equality of arms between parties and the formality of the procedures. They pointed to a lack of clarity in the procedures and the arbitrariness inherent in the exercise of large discretion by individual QCJs. One former judge described it as "more reminiscent of [a Soviet communist] party meeting" than of a judicial process.

Hearing of Witnesses

As noted above, there is no provision in the law regarding witness testimony before QCJs. In practice, this means that the QCJ has complete discretion as to whether to hear witness testimony and, therefore, a judge subject to disciplinary proceedings may not be able to have his or her witnesses heard. Furthermore, the judge or his or her representatives may not have the opportunity to challenge witnesses who are key to allegations made against him or her, since they may not be called to give evidence. The mission heard examples of cases where the judges concerned alleged that this meant they did not have information about details of the allegations made against them, including the dates when the alleged act of misconduct was supposed to have occurred A lawyer who had represented a judge in disciplinary proceedings told us of a case in which the failure to call witnesses meant that the decision was made purely on the basis of written statements alleging sexual harassment by the judge. This meant that the judge was defending himself against allegations of potentially criminal character in a process lacking minimum procedural guarantees.

[190] *Ibid*, art. 16.2.
[191] *Ibid*, art. 16.5.
[192] *Ibid*, art. 16.6.
[193] *Ibid*.
[194] *Ibid*, art. 16.7.
[195] *Ibid*, art. 16.8.
[196] *Ibid*, art. 16.9.
[197] *Ibid*, art. 16.10.

Comparative experiences

In other, comparable jurisdictions the hearing of witnesses is provided for in law. For example, in France the rapporteur appointed to conduct the investigation within the High Council of the Judiciary when it sits as a disciplinary body, hears witnesses, as well as the complainant and respondent judge, during the investigation phase.[198] In Belgium, the authority that conducts the investigation can pose "all useful acts",[199] which comprises hearing witnesses. In the Netherlands, it is provided that the Supreme Court can call and hear witnesses in dismissal cases at the request of the prosecution, the respondent judge or of its own motion.[200]

Admissibility of Evidence

The requirements relating to the nature of evidence permitted in the disciplinary process remain virtually unregulated. It is not clear which evidence is considered to be relevant, admissible or sufficient and what criteria are used in order to consider them as such. Sometimes, due to lack of regulation, evidence with very obvious flaws is considered to be permissible, which would not be permissible in other legal procedures. For example, the QCJ considers anonymous complaints.[201] Furthermore, the Supreme Court has considered phone conversations to be admissible evidence before the QCJ, without consideration of whether they were obtained by lawful means.[202] Such evidence would not be admissible in criminal, administrative or civil procedure, but there are no requirements to exclude such evidence before QCJs. This potentially has further implications when considering the appeal before the DJP if a previous decision was based on such flawed evidence.

Rights of the Judge in the Disciplinary Process

Under the law, the judge against whom proceedings have been initiated must be informed of the time and place of the hearing with reasonable notice so that he or she able to make arrangements to attend.[203] The judge must be informed in person or by a registered letter with a copy of the complaint.[204] If a judge has been duly informed of the time and place of the hearing and subsequently does not appear, the session may proceed in his or her absence.[205] The judge has a right to a representative at the proceedings, but the absence of such a representative does not prevent consideration of the case.[206]

The judge has the right to familiarize him or herself with the materials and present any objections or remarks.[207] He or she can submit motions on the inclusion of documents and participation in the sessions by persons who possess information on the complaint (представление и обращение) being considered.[208]

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[198] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, art. 52
[199] *Code Judiciaire*, art. 419, second indent.
[200] *Wet Rechtspositie Rechterlijke Ambtenaren (Law on the Legal Position of Judicial Officials*), art. 46p(3).
[201] Supreme Court decision of 18 March 2008, No. ГКПИ08-220; case against judge Boronnikova N.V., http://vsrf.ru/stor_pdf.php?id=197066.
[202] Supreme Court decision of 12 April 2006, No. 71-Г06-116 case against judge Sh, http://www.lawrussia.ru/texts/legal_484/doc484a186x350.htm.
[203] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(3).
[204] Regulations on the Operation of the Qualification Collegium of Judges, art. 28.3.
[205] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(4).
[206] Regulations on the Operation of the Qualification Collegium of Judges, art. 16.4.
[207] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(2); Regulations on the Operation of the Qualification Collegium of Judges, art. 28.3.
[208] Regulations on the Operation of the Qualification Collegium of Judges, art. 28.3.

The powers of a judge may be suspended by the QCJ before making a decision on the merits of the case.[209] Such a decision can be made in the absence of the judge.[210] A judge who faces disciplinary action that may result in dismissal cannot resign until the disciplinary proceedings are concluded.[211]

There is neither a legal provision for equality of arms in judicial disciplinary proceedings, nor practice of ensuring equality of arms in the disciplinary process. While judges can and do in practice[212] act as representatives of the body initiating disciplinary proceedings, judges against whom the process has been initiated cannot have other judges as their representatives.[213] This is a serious issue, as sitting judges, especially those of higher courts, have significant influence on the decision making process and depriving one party in the process of such an opportunity automatically puts them at a disadvantage. Furthermore, current legislation does not allow for reimbursement of the legal costs of a judge subject to disciplinary proceedings, even if he or she is found not to have committed any act of disciplinary misconduct. Judges' representatives travel and find accommodation at their own expense, as well as sustaining other costs related to the case.

Comparative experiences

By way of comparative example, French law provides that a peer, or an advocate at the *Conseil d'Etat* and the Court of Cassation, or a lawyer inscribed on the roll, may assist the respondent judge, both during the investigation and the disciplinary proceedings.[214] Belgian law provides that the respondent, while being heard in the investigation phase, has the right to be assisted or represented by a person of his or her choice. The investigating authority may also order the personal appearance of the respondent, which does not exclude assistance.[215] The same rules apply during the proceedings.[216]

Decision Making of the QCJ: The Vote

A QCJ is empowered to take decisions if more than one half of its members are present at the session (заседание),[217] which is closed to the judge as well as to other participants.[218] Members of the QCJ may vote only if they have been present throughout the proceedings.[219] Abstention is not permitted.[220] A member of the QCJ is entitled to present his or her dissenting opinion in written form, which is annexed to the protocol of the hearing of the QCJ.[221] Each member has one vote and the chair votes last.[222] Under the regulations, absent or secret voting is not permitted in disciplinary proceedings leading to a warning.[223] However, the Law on the Bodies of the Judicial Community stipulates that a decision on the termination of the powers of a judge is taken by a

[209] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(4).
[210] *Ibid*.
[211] *Ibid*, art. 22(3).
[212] See Aulov: «Procedural Equality of Arms as an Anticorrpution Component of the Disciplinary Process», 2011.
[213] Law on the Status of Judges in the Russian Federation, art. 3.3(6).
[214] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature*, arts. 52 and 54.
[215] *Code Judiciaire*, arts. 419, indent 3 and 4.
[216] *Ibid,* art. 421, indent 1 and 3.
[217] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 23(1).
[218] *Ibid*, art. 23(2).
[219] Regulations on the Operation of the Qualification Collegium of Judges, art. 18.3.
[220] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 21(5); Regulations on the Operation of the Qualification Collegium of Judges, art. 18.2.
[221] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 23(2).
[222] Regulations on the Operation of the Qualification Collegium of Judges, art. 18.6.
[223] *Ibid*, art. 18.4.

secret vote[224] of the members of the QCJ.[225] Decisions to terminate the powers of a judge must contain reasons.[226] Some experts told the mission that there was a need for a secret vote to ensure that Court Presidents are not able to exert undue influence on members of QCJs. It is however unlikely that this would improve the process if other problematic aspects are not addressed.

Comparative experiences

By comparison, in France the deliberation takes place behind closed doors, whereas the decision is pronounced in public and must contain reasons,[227] of which the respondent is then notified.[228] Legislation applying in the Netherlands provides that the Supreme Court, in case of removal, pronounces the reasons for its decision in public. The decision is notified to the hierarchy of the respondent and to the Minister of Justice.[229] In Belgium, the reasons for a decision are sent by registered mail to the respondent and, where a serious sanction is appropriate, also to the authority that is competent to impose that sanction (i.e. the judge's direct hierarchy). The decision mentions the right to appeal and the applicable time limitations and procedure. If the sanction is the direct consequence of a complaint, the complainant is notified of the operative part of the decision.[230]

The QCJ decision is announced directly after its adoption.[231] The QCJ may also announce only the operative part, in which case its full text is prepared within ten working days.[232] The decision of the QCJ states that no less than two thirds of the judges who took part in the session voted for the termination of the powers of a judge.[233] Neither the deliberations of the QCJ nor the results of the vote (number of pros and cons) are made public or reflected in the official records.[234]

A QCJ may impose a disciplinary penalty (взыскание) in the form of a premature termination of the powers of a judge or a warning regardless of the requested punishment in the complaint (представление или обращение).[235] When a decision to prematurely terminate the powers of a judge is made, a decision is made to deprive the judge of the rank ("qualification class") of a judge.[236] In case of a refusal to impose any penalty, the QCJ can draw the judge's attention to the legal and ethical norms violated if it has sufficient reasons to do so.[237]

Dismissal from the Court President position is not considered to be a disciplinary penalty and does not entail the same legal consequences as the premature termination of the powers of a judge.[238]

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[224] Secret vote was confirmed as an additional guarantee of independence, irremovability and inviolability of judges in the procedures related to premature termination of powers. See the Decision of the Constitutional Court of 28.02.2008, N 3-П.
[225] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 23(2.1).
[226] *Ibid*, art. 23(2.2).
[227] *Ordonnance No. 58-1270 de 22.12.1958 portant loi organique relative au statut de la magistrature,* art. 57.
[228] *Ibid,* art. 58.
[229] *Wet Rechtspositie Rechterlijke Ambtenaren (Law on the Legal Position of Judicial Officials*), art. 46p.
[230] *Code Judiciaire*, art. 424.
[231] Regulations on the Operation of the Qualification Collegium of Judges, art. 19.4.
[232] *Ibid*.
[233] *Ibid*, art. 19.3.
[234] *Ibid*, art. 18.7.
[235] *Ibid*, art. 28.6.
[236] *Ibid*, art. 28.7.
[237] *Ibid*, art. 28.9.
[238] *Ibid*, art. 29.5.

Record of the Session of QCJ

A record is kept during the session of the QCJ.[239] The chair and the secretary must sign the record no later than 10 days after the session.[240] The subject may submit their comments on the report within three days of receiving the record.[241] These comments are then to be considered by the chair or the secretary who took part in the session and their written agreement or disagreement is attached to the record.[242]

Regarding each of the hearings, a separate record must be maintained in which all the necessary information about the conduct of the hearing is recorded.[243] The judge concerned and the person who initiated the proceedings (лицо внесшее представление) have a right within a prescribed period to submit a written request to the QCJ to consult the record of the session, and to comment on it.[244] These comments are then annexed to the record of the QCJ session.[245] The materials submitted to the HQCJ must be considered no later than three months after their arrival to the Collegium, or one month for materials submitted to the QCJ, unless other deadlines are provided for by federal laws.[246]

Appeals

In general, decisions of a QCJ may be appealed either to a court or, with regard to the decisions of the regional QCJs, to the HQCJ by the person about whom the decision was issued.[247] However, decisions of HQCJ or QCJ to dismiss a judge on disciplinary grounds cannot be appealed to the ordinary courts, but only to the DJP. The decisions of the HQCJ and QCJ relating to the suspension or termination of the powers of a judge (with the exception of termination for disciplinary misconduct) or termination of a resignation may be appealed to the Supreme Court of the Russian Federation.[248] The decisions on premature termination of the powers of a judge, disciplinary responsibility, suspension or termination of resignation (reinstatement) of a judge, can be appealed by the interested persons within ten days of obtaining a copy of the decision.[249] This is a new provision that did not exist in the previous legislation, under which only the person concerned could appeal against a decision. Now it can be appealed by Presidents of the Supreme Court and High Arbitration Court.[250] This appears problematic as the DJP judges are themselves judges of those courts, placing them in a potentially difficult position if they have to rule against the position of their own Court President or against the heads of their respective jurisdictions.

The decisions of the HQCJ and the QCJ on the premature termination of judicial powers on disciplinary grounds can be appealed to the DJP[251] according to the Federal Constitutional Law.[252] Such an appeal can be lodged either by the judge concerned, or

[239] *Ibid*, art. 20.1.
[240] *Ibid*, art. 20.2.
[241] *Ibid*, art. 20.4.
[242] *Ibid*, art. 20.5.
[243] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 24.1.
[244] *Ibid*, art. 24.2.
[245] *Ibid*.
[246] *Ibid*, art. 25.
[247] *Ibid*, art. 26.1.
[248] *Ibid*, art. 26.3; Regulations on the Operation of the Qualification Collegium of Judges, art. 31.2.
[249] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 26.2; Regulations on the Operation of the Qualification Collegium of Judges, art. 31.1.
[250] Law on Disciplinary Judicial Presence, art. 6.1(2).
[251] The Law on the Status of Judges in the Russian Federation, art. 12.1(1).
[252] The Law on the Bodies of the Judicial Community in the Russian Federation, art. 26.5.

by the Presidents of Supreme and High Arbitration.[253] Other decisions under items 1 and 2 of Article 26 of the law (see above and footnotes) can be appealed only on procedural grounds.[254]

Newly Discovered Evidence

The decision may be revoked and the procedure resumed in circumstances where newly discovered evidence is submitted.[255] The decision can be reconsidered regardless of the time when the previous decision was issued.[256] The motion to reconsider the case can be filed by the judge involved as well as court presidents, judicial bodies, and the prosecutor.[257] Judicial appeal does not prevent reconsideration of the case based on newly discovered evidence.[258] The procedure for reconsidering the case based on newly discovered evidence conducted in the same order as the regular one.[259] Lack of time limitations discussed above in this regard creates additional pressure on judges who were not dismissed. A risk of revoking 'an acquittal' always remains.

Procedure in the Disciplinary Judicial Presence

Communications (жалобы и обращения) to the DJP are considered after the it examines the information presented by the HQCJ and the QCJ as well as information about the judge concerned.[260] The communications are considered within two months.[261] If it is necessary to carry out an additional check, the consideration can be suspended for a period not exceeding six months.[262]

Hearings of the DJP are led by the chair of the DJP who is elected for each of the hearings.[263] At least five (out of six) of its members must be present.[264] The vote is open and decisions are made by majority.[265] The vote is carried out in the absence of the parties.[266] Abstention is not allowed.[267] In case of an equal vote, the complaint of a judge is considered to be satisfied and the complaint of a judicial body is considered to be rejected.[268] It was also confirmed to the mission that a mechanism by which a split vote is always in favour of the judge has led to greater protection against dismissals.

The DJP decision is final and is not subject to appeals.[269]A member of the DJP can present in written form his or her dissenting opinion (особое мнение), which is annexed to the decision of the DJP.[270]

The procedure before the DJP is much better regulated than those of the QCJ and HQCJ and is similar to a hearing before the ordinary courts. One view heard during the mission was that the DJP procedure is even more "progressive" than those of the ordinary

[253] *Ibid*, art. 26.5.
[254] *Ibid*, art. 26.6.
[255] Regulations on the Operation of the Qualification Collegium of Judges, art. 32.1.
[256] *Ibid*, art. 32.3.
[257] *Ibid*, art. 32.4.
[258] *Ibid*, art. 32.7.
[259] *Ibid*, art. 32.8.
[260] The Constitutional Law on the Disciplinary Judicial Presence, art. 7.1.
[261] *Ibid*, art. 7.3.
[262] *Ibid*, art. 7.4.
[263] *Ibid*, art. 8.1.
[264] *Ibid*, art. 8.2.
[265] *Ibid*, art. 8.3.
[266] *Ibid*, art. 8.5.
[267] *Ibid*, art. 8.4.
[268] *Ibid*, art. 8.3.
[269] *Ibid*, art. 8.9.
[270] *Ibid*, art. 8.7.

courts. For example, the DJP records its meeting and provides copies of the record to parties at their request. In the ordinary Russian courts, it is difficult to ensure that such audio recordings are always made.

The DJP has now become a significant model for reform of the judicial disciplinary system. A new law is being discussed in the Ministry of Justice that would establish a system of DJP tribunals to take on the functions of QCJs as regards judicial discipline at all levels, as well as the creation of a High Disciplinary Board to replace the High Qualification Collegium for judicial disciplinary matters. This would separate out the functions of judicial appointment (which would continue to be exercised by QCJs) from judicial discipline (See above Chapter II).

A controversial aspect of the Draft Law is that, by replacing QCJs with a model based on the DJP, which includes only judges, members of the public will be excluded from the disciplinary decision-making process. Notably, the Supreme Court has objected to the exclusion of members of the public from the proposed new tribunal, raising concerns about inclusivity and transparency.

Conclusions

The rules of procedure for disciplinary action are devoid of precision. The procedures lack full guarantees for the rights of the parties to the process. These shortcomings have many negative consequences. In particular, they make it easier to institute proceedings against a judge without real grounds against him or her and mean that it can almost be guaranteed that once proceedings are initiated, they will result in dismissal of a judge. Other factors, such as composition of the QCJs discussed above, ensure that Court Presidents are rarely challenged when they submit their applications against judges to the QCJs.

The QCJ procedure is neither judicial nor quasi-judicial. The usual guarantees related to the status and rights of witnesses, collection of evidence against judges and lawfulness of evidence, equality of arms and adversarial procedure are not applied to the QCJ procedures where cases are heard against judges in the first instance. With such poor procedure, a judge can appeal only on 'procedural' grounds - thus it becomes impossible to raise the issue of the merits of the case, which result from the absence of judicial guarantees.

Strong procedural guarantees, implemented in practice, are key to protecting judges against arbitrary or abusive discipline or constant undue pressure. In the view of the ICJ, the current procedure for judicial disciplinary responsibility needs considerable reform aimed at building greater protection for judges, in particular greater legal certainty, consistency, and enhanced safeguards and protection for judges from arbitrary dismissal.

V. CONCLUSIONS AND RECOMMENDATIONS

The deficiencies of the judicial disciplinary system in the Russian Federation reflect wider problems within the Russian judiciary, as it continues to struggle with long-standing institutional and cultural legacies that are difficult to reconcile with a strong, independent judiciary. The current legal and administrative framework for the judiciary in the Russian Federation is unable to protect judges from undue influence and does not effectively uphold judicial independence. Problems persist in many aspects of the functioning of the judiciary, including selection, appointment procedure, promotion, and security of tenure and disciplining of judges. Although outside pressure on the judiciary can often be visible and traceable, it is the internal mechanisms which are most effective in stripping judges of protection. In particular, the disciplinary system can and does operate to undermine judicial independence.

Comprehensive reforms of the system are needed to establish a judiciary that is an effective guardian of the Rule of Law, complies with international standards on judicial independence, and is a reliable guarantor of the right to a fair hearing in which the public has high confidence. Reform of the disciplinary system, to ensure fair, consistent and predictable application of disciplinary sanctions and protect security of tenure, is an essential part of this project.

The ultimate objective of an effective disciplinary system is to improve the administration of justice, to preserve and enhance an independent and impartial judiciary. The disciplinary system protects the quality of the judiciary, its ethics and integrity. It is also a vital safeguard for the independence of the judiciary, in protecting the security of tenure of judges. Any reform must have these purposes in mind.

Reform of the disciplinary system must be seen in the context of the judicial system as a whole. There is a key ingredient of judicial independence that cannot be secured principally through legislation. It concerns the internalization of the judicial function and authority by members of the judiciary. Judges must see themselves not as State officials, but rather as independent, autonomous holders of the judicial power with a responsibility to protect the rule of law, and act accordingly. A deeper and broad-based culture of respect for the judiciary and its independence, in all institutions of the State, and within the judiciary itself, needs to be developed in Russia. For this culture to emerge, life tenure must become a reality and the disciplinary system must not operate as the sword of Damocles for judges who act independently, against the wishes of the judicial hierarchy, or other state or non-state interests. This is a prerequisite for true separation of powers and judicial independence.

The ICJ stresses the important contribution made to judicial reform by Russian civil society, including NGOs, lawyers and academic experts. The Human Rights Council under the President of the Russian Federation has played a particularly important role in proposing and developing reforms, which should continue. The ICJ recommends that, in the continuing development of reforms of the judiciary, and in particular in regard to reforms of the disciplinary process, the government, as well as the governing bodies of the judiciary:

- put in place procedures for consultation with relevant civil society organizations and individuals, academic and legal experts, as well as with the judiciary at all levels on the reforms proposed;
- promote understanding of comparative experiences, taking into account legislation and practice from other jurisdictions
- involve in the debate relevant intergovernmental and nongovernmental international actors, including, for example, the UN Special Rapporteur on the

Independence of Judges and Lawyers, the Venice Commission for Democracy through Law, and the ICJ.

The ICJ makes the following recommendations as regards the judicial disciplinary system in the Russian Federation.

As to the structure and roles of judicial disciplinary bodies

The ICJ supports in principle the creation of new specialized disciplinary bodies on the model of the Disciplinary Judicial Presence (DJP) at regional level, provided that their structure, composition and procedure provide strong guarantees of independence. If such bodies are created, as is currently proposed, then they should be subject to the following safeguards.

- It must be ensured in law and in practice that there is a transparent process of appointment or election to the new bodies, subject to meaningful public scrutiny. This process must be free from manipulation by Court Presidents or other influential figures within or outside the judiciary and must be capable of inspiring confidence through transparency of the procedure and high professional integrity and legal competence of its members.

- Any new bodies that are established must be subject to effective safeguards to protect their independence and to prevent undue influence from both State and non-State interests and pressures, including those from within the judicial hierarchy. In particular, any new mechanism must ensure that Court Presidents do not exercise any undue influence in law or in practice over recommendations for dismissals of judges or over the decision-making process of the disciplinary bodies.

- In respect of any new judicial disciplinary bodies established at a regional level, particular safeguards must be established to prevent undue influence on their members by the Court Presidents of the region. Safeguarding measures should include, for example, appointing judges or retired judges from other districts or regions as members of the new bodies. A further important safeguard would be to limit the powers of regional tribunals in relation to dismissals and suspensions, allowing them only to make recommendations in this regard to the federal level DJP, which would then make the final decision. Regional level tribunals would retain the power to issue warnings, as well as any other disciplinary penalties established under new legislation. This would help to decrease the number of abusive dismissals and establish a predictable mechanism with consistent practice and standards.

Regarding the Disciplinary Judicial Presence, the ICJ makes the following recommendations:

- Although the DJP appears to have had a generally positive impact on the disciplinary system, further safeguards are needed to guarantee its independence. The authority and independence of the DJP would be strengthened by the inclusion of one or more judges of the Constitutional Court in the membership of the DJP. This would also be appropriate for the purpose of reflecting the important constitutional role of the DJP as a guardian of judicial independence.

- Given that the DJP has functioned well as an appeal body in regard to dismissals of judges, its jurisdiction should now be extended to other forms of disciplinary

penalties against judges, beyond dismissals. An integrated system should be in place to guarantee coherent and consistent application of all disciplinary measures against judges.

As to the grounds for disciplinary action and the limitation period for such action

The unclear grounds for dismissal of judges in the Code of Ethics and the Law on the Status of Judges, as well as the inconsistent interpretation and application of these rules, facilitates abuse of the system and the arbitrary sanctioning of judges. Such abuse is further exacerbated by the absence of a statute of limitations. To remediate these deficiencies, the ICJ makes the following recommendations:

- Judges and judicial bodies must be able to rely on and must be made aware of, clear legal standards on judicial ethics and the precise type and forms of conduct that can trigger disciplinary action. Although it is not possible to specify exhaustively every action that may lead to disciplinary action, at a minimum, clear and predictable grounds for disciplinary action must be established in legislation and applied in practice.

- The criteria used to qualify a judge's conduct as falling under given grounds for disciplinary action must be applied equally and consistently to all judges, regardless of their position or rank in accordance with the legislation of the Russian Federation and other relevant documents.

- The provision of guidelines and information are necessary to ensure that the grounds for disciplinary action as established in law are interpreted and applied consistently across the Russian Federation. Any room for arbitrariness in the application or interpretation of the grounds for dismissals should be eliminated through an effective and transparent system of guidance and review.

- The Code of Ethics, as well as other standards and the practice of disciplinary tribunals, must make clear that the fact that a decision of a judge is overturned by a higher instance court is not in itself a valid ground for disciplinary action. This standard must apply to all cases, including when a decision is controversial or when a judge makes a series of decisions that are statistically at variance with those of other members of the judiciary. Judges must be free to decide cases based on their independent assessment of the facts and the law; it is the role of appeal courts, not the disciplinary system, to correct any judicial errors.

- Action amounting to judicial misconduct should be sufficiently precisely defined in legislation that a reasonable judge, guided by publically known principles of judicial conduct and ethics, can avoid disciplinary action. Broadly, disciplinary offences may include, for example failure to act impartially, undue consultations with governmental officials, bias, use of information from undisclosed sources, influence over another judge, interference with the decision of another judge, disclosure of confidential information, improper attitude towards parties in a judicial process, undue use of a judicial position to gain benefits or avoid duty or responsibility and other such behaviour which fails to uphold judicial authority, impartiality and independence.

- The range of sanctions for disciplinary misconduct should be developed so that disciplinary sanctions correspond appropriately to the particular act of misconduct. Sanctions should include those aimed at improving the performance of judges, enhancing the integrity of the judiciary and bringing judicial conduct into line with the rules of judicial ethics.. The variety of sanctions should be

sufficient to minimize the use of dismissals. In accordance with the principle of proportionality, dismissal should be a sanction of last resort where other measures have failed or are clearly inadequate to uphold the integrity of the judiciary. Sanctions may include additional training, short-term suspension, change of rank or transfer to a lower court or to a different court of the same level.

- The law should be amended to introduce a statute of limitations for misconduct of judges that is reasonable and is no longer than the periods of limitation in comparable legislation such as the Russian Federation Labour Code. A justifiable statute of limitations would be one year from the commission of an act of disciplinary misconduct or another period specified in comparable legislation in Russia.

As to the procedures before judicial disciplinary bodies

Strong and effective procedural guarantees, implemented in practice, are indispensable to protecting judges against arbitrary or abusive discipline or constant undue pressure. The current procedure for judicial disciplinary responsibility needs considerable reform aimed at building greater protection for judges, in particular greater legal certainty, consistency, and enhanced safeguards and protection for judges from arbitrary dismissal.

The ICJ therefore makes the following recommendations:

- Recommendations to dismiss a judge must be filed in accordance with clearly prescribed procedures and standards. There should be established a legal requirement that recommendations for disciplinary action must be subject to fully reasoned [and publicized] justification. More prescriptive standards as to what constitutes a disciplinary offence (see above Chapter III) would also assist in clarifying when a recommendation to dismiss a judge may be justified.

- The principle of equality of arms must be fully safeguarded. In this respect, clear rules and procedures for the hearing and admission of evidence, including examination and cross-examination of witnesses, must be introduced at every level of the disciplinary process and must conform to principles of fair procedures. Irrespective of the structure of disciplinary bodies that is in place or adopted, rules similar to those for the hearing of civil cases in the ordinary courts should apply.

- The powers of Court Presidents, both official and unofficial, over the disciplinary process and their role in it should be constrained and limited to their formal role in the process, as prescribed in the law and regulations. Exercise of powers beyond those prescribed in the law should be regarded as abuse of judicial office. The system must not allow an all-powerful Court President to control the disciplinary procedure either openly or behind the scenes. Both the law and practice must ensure that it is competent judicial bodies (the QCJs or equivalent disciplinary tribunals) that decide whether there is enough evidence to initiate proceedings, assess whether misconduct is established according to objective standards of proof, and identify the appropriate sanction. Any informal influence of Court Presidents in the disciplinary process should be considered contrary to the judicial ethics code, the Law on the Status of Judges as well as other relevant legislation and should itself be subject to disciplinary, administrative or criminal sanctions as appropriate.

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