IS THE INDEPENDENCE OF THE JUDICIARY ACHIEVABLE? (CASE STUDY OF MAGISTRATES IN MOSCOW, RUSSIA)

ABSTRACT: The given article raises the problem of mechanisms which could be used to achieve the independence of the judiciary in present-day Russia. The article offers a case study of magistrates (or justices of the peace) in Moscow: the order of their appointment and the specifics of their work are analyzed. The author conducted an independent sociological study among different age and professional groups and drew conclusions based on it. It is proposed to move to the electivity of magistrates, and the voters can become residents of the relevant judicial district. It is also proposed to raise the age of justices of the peace from 25 to 40 years and increase the number of justices of the peace, dividing them by specialization (civil, family, administrative, etc. disputes). These proposals can contribute to building a model of deliberative democracy in Russia, in which a civil society with a developed sense of justice is the most important factor in achieving the independence of the judiciary.

KEYWORDS: Russia. Magistrates. Independence. Deliberative democracy.

DATA DE RECEBIMENTO: 15/01/2021
DATA DE APROVAÇÃO: 15/03/2021

INTRODUCTION

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[1] The given paper raises the dilemma of overcoming unlawful influences, pressure, or interference in the activities of the magistrates or justices of the peace in Moscow. The extent of responsibilities this court unit has been tasked with, actively demonstrate its value in the judicial system of present-day Russia.[2] The job of ensuring an independent judiciary was set in the Federal Program:

[1] **Basic Principles on the Independence of the Judiciary.** Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. Accessed on: 15 jan. 2021.

[2] **Justices of the peace are promised life sentences**. Kommersant, Moscow, N 35, 27.02.2019. Available at <https://www.kommersant.ru/doc/3895680>. Accessed on 25 dec. 2020.

Development of the Russian Judicial System for 2013-2020, and it can be argued that this task is more vital now than ever before.[3]

There are 440 magistrates currently working in Moscow who have been charged with the handling of nearly half of all criminal trials, 70% of civil court cases, and 80% of administrative cases. Justices of the peace in Moscow are appointed and reappointed by the Moscow City Duma (regional parliament) based on proposals of the President of the Moscow City Court and the conclusions of the Qualified Collegium of Judges of Moscow. It should be noted that the Venice Commission found the appointment of judges by parliamentary vote unacceptable.[4]

1 HYPOTHESES OF THE ARTICLE

The given paper hypothesizes that the current procedure for appointing the magistrates in Moscow, where the executive branch of government play the primary role, reduces the independence of the institution and increases the risks of interference in the work of justices of the peace. Moving from the executive or court apparatus to the position of judges while at the same time relying on the decisions of regional parliaments, these individuals remain in the same social group, where their former colleagues can contact them for the help. Such a situation gives rise to a conflict of interests presenting the possibility of impartiality of their decisions.[5]

At the same time, the Federal Law "Justices of the peace in the Russian Federation" also allows for the use of the electoral mechanism, in which residents of the corresponding judicial district can become voters.[6] Thus, the transition to the principle of electivity will not require the adoption of a new regulatory legal act. Election should be accompanied by periodic reporting of judges and the possibility of their recall by voters in case of poor performance of judges' duties. The very

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[3] **Government Decree** of December 27, 2012 No. 1406 .Collected Legislation of the Russian Federation. January 7, 2013, N 1, Art. 13.

[4] **Judicial Appointments** Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), p. 3. Available at <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e>. Accessed on 15 jan. 2021..

[5] **There is pressure on judges, and this is bad**. Interview of the Chairman of the Supreme Court of the Russian Federation V.M. Lebedev Available at <https://pravo.ru/news/view/52774/>. Accessed on: 15 jan. 2021.

[6] **Federal Law** of December 17, 1998 N 188-FZ **"On Justices of the Peace in the Russian Federation"** Art. 6, Collected Legislation of the Russian Federation. December 21, 1998, N 51, Art. 6270.

possibility of recall (and hence the loss of employment) profoundly affects the increase in responsibility when making decisions. In addition, it is possible to determine the quality level of a judge's work and choose one or another candidate for this position, for example, by introducing the practice of annual reports to the population. The criterion for “bad” or “good” performance of duties can be the number of court judges’ decisions, against which cassation and appeal complaints have been filed.[7] This allows judges to be guided in their activities not by a narrow corporate but by public interests, and also to feel more autonomous from the undue influence of executive officials of the entities of the Russian Federation, from pressure and threats of higher judicial bodies (for example, supervisors). Elections will also allow us to end the practice of appointing office employees of the courts as judges; a practice that is currently widespread in Russia.[8] Another aspect of the hypothesis is the assumption of raising the age of justices of the peace from 25 to 40, increasing professionalism and moral resistance to possible corruption. An analysis of law application practice demonstrates a turn towards social justice as the most important principle of law in present-day Russia.

2 THE RESEARCH METHODS

Systematic, historical, and comparative legal, formal legal and sociological methods were used. A theoretical analysis was carried out based on some scientific publications, court decisions of justices of the peace in Moscow, statistical data. Four in-depth interviews with legal experts were conducted, providing the qualitative characteristics of the sociological method. Simultaneously, quantitative methods were also used: according to self-prepared questionnaires, two surveys distributed to groups divided by age and professional criteria (students and professors) were administered. The survey of students was carried out at the International Law Faculty of the Russian Foreign Trade Academy and covered 50 students from 19 to 21 years old. A survey of professors was administered at the Moscow State (Lomonosov) University, comprising 25 professors, ages 35 to 75 years.

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[7] For example, the Moscow City Court annuls on average 20% of decisions of lower courts in civil cases, 25% in administrative cases, 10% in criminal cases. Available at <https://echo.msk.ru/programs/court/709698-echo/>. Accessed on 15 jan. 2021..

[8] 84% of judges in Russia are former security officials. Over the past three years, judges are increasingly recruited among court employers (71%) and less often among lawyers (2%) Available at <https://www.proekt.media/research/nezavisimost-sudey/>. Accessed on 15 jan. 2021

3 THE RESEARCH RESULTS

The results of the study can be divided into two groups: the results of sociological surveys and interviews and the results of theoretical analysis of scientific, statistical and other publications. The opinion poll used in the research showed unanimous support of the principle of elective judges of the peace; in both groups, 100% of the respondents spoke in favor of elections for justices of the peace, believing it may contribute to the achievement of greater autonomy for the judges. The respondents answered that they, themselves, would take part in such elections (87% among students and 95% among professors), the principle of recalling judges was supported by 70% of students and 90% of professors. However, at the same time, young respondents showed an insufficient level of awareness regarding practical activities of justices of the peace: only 20% of students answered that they knew the current procedure of appointing judges to office and that they had personally encountered their work; 30% of students could not name a single authority of the magistrate. Such results somewhat diminish optimism about the objectivity of the election procedure, although it is precisely elections that continue to remain the central institution of democratic regimes, and democracy - one of the basic principles of the European constitutional heritage, which guides the Venice Commission in its work. “In a democratic state, ultimately, the rule of the people belongs to the will of the people, expressed through a proper democratic process (the sovereignty of the people),” as the Conclusion of the Advisory Council of European Judges has stated (2015).[9]

Only 50% of professors consider the age of a judge to be a factor that could influence the independence and impartiality of decisions. Additionally, the same percentage of professors considered the principle of separation of powers as a viable recourse to ensure the judiciary’s autonomy. Respondents were asked to list some factors they felt contributed to judicial autonomy and impartiality. Among the factors listed, respondents named: an increase in the number of justices of the peace, control over the preliminary investigation, the presence of real political opposition, the rejection of the life status of judges, the introduction of the compulsory filing of

[9] **Conclusion of the Consultative Council of European Judges** for the Committee of Ministers of the Council of Europe N 18 (2015) "The state of the judicial system and its interaction with other branches of government in a modern democratic state", Bulletin of the European Court of Human Rights. Russian edition. N 12, 2016.

income declarations for judges and their family members, wider involvement judges to the legislative initiative on issues of their jurisdiction. Through in-depth interviews with legal experts, among whom were three Ph. D (in Law) and one Dr. (in Law), special attention was paid to the fact that the problem of independence of justices of the peace cannot be considered separately from other social problems. “Modern society opposes itself to the state, regarding it as an “enforcement mechanism”, and that’s why the society is quite loyal to the illegal actions of its members, justifying their actions by the fact that the state is on the other side of the barricade. That is why Russians consider it shameful to cooperate with the investigation officers and the court, do not inform the law enforcement bodies about the facts of offenses known to them (unless the case is about very serious crimes), or being a jury, they are inclined to acquit criminals, etc.", - said one expert. Thus, we can definitively say that the insufficient efficiency of the work of the Russian courts is largely due to the low level of legal awareness of the citizens themselves; their legal nihilism.

Two experts noted the practice of deep professional specialization of courts in different countries (for example, in Germany) where judges specialize in labor, family, civil, criminal issues. A high level of professionalism among judges combined with the development of legal awareness among the populous (civil society), as opposed to institutional reform, helps to ensure the impartiality of the proceedings and the absence of interference in the activities of justices of the peace, - this is the conclusion of the experts. It can be assumed that the deep professional specialization of justices of the peace can also reduce the pressure from the supervisors and higher officials. This point of view is supported in numerous peer-reviewed works authored by various academics. “We believe that within the framework of classifying the judiciary as a kind of a state power, all talks about its independence lose all meaning, since one power, which is a branch of another power, cannot be completely independent of it, even if it is institutionalized into an independent system”, - writes I.V. Dikova.[10]

Other scientists adhere to a similar point of view.[11] The Russian law doctrine regards the judiciary as a state power, which entails the fundamental impossibility of

[10] DIKOVA, I.V. **The independence of the judiciary: a modern view,** Siberian Legal Review, Irkutsk, July-September 2019, N 3, p. 420.
[11] LEBEDEV, V.M. **Guarantees of the independence of the judiciary in the Russian Federation: concept, history of formation and the current state**, Journal of Russian Law, Moscow, November

ensuring the independence of the judiciary overall. Together with a positivist understanding of law, this approach leads to the understanding that the law and the judiciary are a phenomenon derived only from the state, and therefore, without an independent social nature. The different interests, claims, and positions of the participants of disputes are not reflected in this approach. So it distorts the very nature of law as a social phenomenon, and of the court, as a social institution and mechanism for legal implementation. The court's role is undoubtedly broader than the ideas concerning it as a result of the activities of state power only. "Today, for the parties of a dispute, as well as for society as a whole, the trial is becoming a kind of democratic tribune, where arguments are exchanged between public groups and the authorities and issues of common interest are discussed," the Conclusion of the Advisory Council of European Judges stated.[12]

Therefore, a narrow state approach should gradually be replaced by a new understanding of the essence of law and the judiciary as phenomena with an independent nature and social value, the source of which is, first of all, society, people, and not the state.[13]

It is these sentiments that are reflected in the polls, conducted when respondents unanimously support the election of justices of the peace.

4 PRACTICAL SUGGESTIONS FOR SOLVING THE PROBLEM

The possibility of election of justices of the peace as a lower level of the judiciary is contained in the Federal Law "On Justices of the Peace in the Russian Federation" and corresponds Art. 3 of the Constitution of Russia. It states that the

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2019, N 11, pp. 5-24; MAMONTOV, A.G. **Independence and legality of a modern court: myth and reality,** History of State and Law, Moscow, 2012, N 11, pp. 39-42.

[12] **Conclusion of the Consultative Council of European Judges** for the Committee of Ministers of the Council of Europe N 18 (2015) "The state of the judicial system and its interaction with other branches of government in a modern democratic state", Bulletin of the European Court of Human Rights. Russian edition. N 12, 2016.

[13]CRIADO de Diego, M. **Sobre el concepto de representación política: lineamientos para un estudio de las transformaciones de la democracia representativa**. Revista Derecho del Estado. 28 (jun. 2012), pp. 77-114 CONCI, ARCARO Luiz Guilherme (Ed.).**Crise das democracias liberais** Perspectivas para os direitos fundamentais e a separação de Poderes. Sao Paolo: Editora Lumen Juris, 2019; PRZEWORSKI**,** A. **Crises of Democracy**. Cambridge: Cambridge University Press, 2019.

people are the exclusive source of power, and "free elections are the highest direct expression of the power of the people."[14]

The principle of elections with the possibility of recalling judges after their annual reports, which can be published on the judicial districts' website, should become the main one in solving the problem of eliminating pressure, threats and interference in the activities of justices of the peace. This practical proposal was supported by 100% of respondents in the survey carried out by the author in June, 2020. It is also possible to propose to raise the age of justices of the peace from 25 to 40 years, as a relevant and experienced professional will be more resistant to undue influence; as well as to increase the number of justices of the peace, dividing them by specialization (civil, family, administrative, etc. disputes).

The model of the transition to a deliberative democracy[15] in which the most important actors in political and legal processes are citizens themselves, who have a high level of legal awareness and legal culture, can significantly expand the transparency of justice and free judges from influence, especially from the executive branch of power. It is exactly at the level of justices of the peace that the direct participation of civil society in the formation of the judiciary can be achieved. The ancient peasant community in Russia was called "the peace" for a reason.

The given proposals can be viewed as some possible options for building a model of deliberative democracy in Russia, in which a civil society with a developed legal consciousness is the most important factor in achieving independence of the judiciary, which "exercises its powers on behalf of society as a whole."[16]

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[14] **Constitution of the Russian Federation**, Art. 3 Available at <http://www.constitution.ru/10003000/10003000-3.htm>. Accessed on 10 jan. 2021.

[15] GASTL J., LEVINE P**. Deliberative Democracy Handbook. Strategies for Effective Civic Engagement in the 21st Century** / ed. by John Gastl and Peter Levine. San Francisco, 2005; PAVLOVA T.V. **Deliberation as a factor in the constitution of the field of modern politics**. Political Science, Moscow, 2018, N 2, pp. 73-94.

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