“Tinkering with Tenure”: The Russian Constitutional Court in a Comparative Perspective

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While volumes have been written about the law and politics of judicial selection in American courts, very little is known about these aspects of judicial politics outside the US. One recent comparative study analyzes the rules of selection and appointment of justices for the high national courts in twenty-seven countries, and advocates a switch to a mandatory retirement age and a single non-renewable term in office, rather than life tenure, to attract “the best and the brightest” to the bench and to enhance judicial independence.

This controversial proposal is supported by the argument that a shorter stay on the bench allows justices to adjudicate honestly without fearing reprisals from the government of the day, whereas life tenure induces justices to behave strategically to avoid attacks from the political branches of government.

Leaving aside the endless debate of how and why judicial selection rules affect actual judicial behavior, this chapter examines the politics of only one aspect of judicial selection systems; namely, the efforts to modify the length of judicial tenure. Although the mechanism of tuning judicial appointments may seem to be a rather technical matter, the process of legislating the length of tenure of justices is not easy. It may provoke heated debates among lawmakers and paralyze the work of the courts.

The main argument of this chapter is that the very process of introducing “tenure” amendments may seriously affect the final outcome—the degree of independence of the high court from other political institutions. This process involves political actors from the legislative, executive and judicial branches of government, who focus on the personalities of current justices, rather than on the foundations of an independent judiciary. The legislative process of “tinkering with tenure” of justices may complicate the exact terms of judicial tenure and produce lasting intra-court divisions which may actually shift the court’s attention from adjudicating cases to pacifying justices and to lobbying politicians to leave the court alone.

This chapter traces the changes in the Russian Constitutional Court (RCC) Act during 1991-2001 when the politicians and justices set out the rules of judicial tenure four times (see Table 1). In 1991, the RCC justices were elected for an unlimited term subject, to a compulsory retirement age of sixty-five. In 1994-1995, RCC justices were appointed for a single

non-renewable term of twelve years, while their mandatory retirement age was raised to seventy. In February 2001, the time that constitutional justices could spend on the bench was increased from twelve to fifteen years, and the mandatory retirement age of seventy was abolished. However, ten months later, this mandatory retirement age of seventy was brought back. Finally, in early 2005, Russia abolished the fifteen-year term while keeping the mandatory retirement age of seventy. Thus, Russia’s experience of trying different ways to set the length of judicial tenure in the past decade may identify important questions and challenges for judicial reformers in other parts of the world.

While it is too early to assess whether these “tenure” amendments are likely to create and sustain “an (1) intellectually and legally distinguished and (2) politically independent bench” in Russia, it is useful to attempt to uncover the logic and politics behind the process of legislating terms of judicial tenure. Russian politicians and judges could express their views on judicial selection twice during 2001. Did they care about the principles of judicial independence? Or did they focus on winners and losers in this tenure reform? How did these “tenure” amendments influence judicial behavior in the short run? These questions will be addressed in the first two parts of this chapter.

The Russian experience of “adjusting” the terms of office of constitutional justices offers country-specific insights, a weak base for generalizations and wide-ranging conclusions. Yet Russian experiments with judicial selection of its highest court are not unique in the global “judicialization of politics” era of the past forty years. As will be shown in the third part of the chapter, more than a dozen countries, in addition to Russia, during the period of 1967-2003, attempted to modify the terms of judicial tenure de jure or de facto. Most of these attempts involved extensive bargaining between politicians and justices and resulted in changes in the actual length of judicial tenure. This shows that political majorities continue to keep the judiciary accountable albeit that the “global diffusion of judicial power” limits the range of choices available to political branches of government in their efforts to influence judicial decision-making. The quest for this shrinking range of choices or the balance between judicial independence and judicial accountability is likely to push the comparative research agenda beyond recounting the judicial selection rules and towards comparing the actual functioning of courts abroad under these rules.

2 Ibid.