

# **Rights and Restraints in Russia's Criminal Justice System**

## **Preliminary Results of the New Criminal Procedural Code**

PONARS Policy Memo 289

*Mark Kramer*  
*Harvard University*  
*May 2003*

One of the hardest tasks for the newly democratizing states in Central and Eastern Europe has been the establishment of fair and effective systems of criminal justice. During the Communist era, the judicial system in each of these states was dominated and manipulated by the Communist Party. The basic elements of the system, including the code of criminal procedure (the body of rules governing the investigation of crimes, the treatment of suspects, and the conduct of trials), were meant to serve the interests of the party, not the cause of justice. In a democratic polity, by contrast, a criminal procedure code plays a vital role in safeguarding the rights of the accused and in limiting the discretionary powers of police, prosecutors, and judges. The specific guidelines in the code are crucial, but even more important is the ethos of restraint that develops over time as the key participants in the criminal justice system learn to play by the rules of the game. In the Russian Federation, the criminal procedure code until recently was a relic from the Soviet era. During the first decade of the post-Soviet era, efforts by the Russian government to devise a new criminal procedure code were stymied by political maneuvering, opposition in the parliament, and vigorous lobbying by the Federal Security Service (FSB) and the Ministry of Internal Affairs (MVD), which wanted to retain the vast powers exercised by the Soviet security organs. After Vladimir Putin became president and established a close working relationship with the new parliament, he was able to secure passage of a thoroughly revised criminal procedure code. The bulk of the code entered force in July 2002, and provisions regarding jury trials are being phased in through 2004. A full assessment of the impact of the new code will not be possible until at least several more years have passed, but enough experience has accumulated by this point to allow for a preliminary evaluation. This memo looks at the most important features introduced by the new code and discusses some of the problems that have arisen. Thus far, the implementation of the new code has produced mixed results. Although some progress has been achieved, major improvements are needed before Russia will have a criminal justice system appropriate for a democratic polity. The obstacles to far-reaching change are formidable, and it remains to be seen whether these obstacles can be overcome. The new criminal procedure code in Russia is intended to transform the country's judicial system, but unless the code is rigorously enforced, it will not make a fundamental difference. In assessing the impact of the new code, it is important to consider not only its significance on paper, but also its practical effect.

## **Presumption of Innocence**

From 1917 on, individuals accused of crimes in the Soviet Union (and post-Soviet Russia) were assumed to be guilty unless they could prove their innocence. This was one of the reasons that 99.9 percent of criminal cases in the Soviet Union resulted in guilty verdicts. The rate of convictions declined very slightly in post-Soviet Russia in the late 1990s, but the difference was barely perceptible, with guilty verdicts in more than 99.6 percent of criminal cases in 1999–2001. (By way of comparison, the acquittal rate for criminal cases in Australia in 1999–2001 was 31 percent. The acquittal rate in the United States was slightly more than 17 percent in 1999–2001, and as high as 30 percent in large cities.)

Article 14 of Russia's new criminal procedure code is supposed to shift the burden of proof from the defense to the prosecution. In principle, defendants are now assumed to be innocent until proven guilty. In practice, however, the presumption of innocence has often been set aside. Non-governmental organizations in Russia and reports in the Russian press have suggested that most investigators, prosecutors, and judges still place a heavy burden on the accused. Even when lower courts have ruled in favor of acquittal, those verdicts have frequently been overturned by judges in higher courts, many of whom continue to embrace the Soviet style of criminal justice. According to Sergei Pashin of the Independent Council of Legal Experts, roughly 40 percent of acquittals in 2002 were reversed by higher courts, whereas only 0.05 percent of convictions were overturned. This pattern will likely discourage judges from even considering acquittals in the first place. When a judge's performance is evaluated by a judiciary board for possible promotion, one of the most important criteria is the percentage of rulings overturned by higher courts. To ensure a favorable performance rating, judges in lower courts realize that they must conform to the preferences of higher courts. In criminal cases, this means erring on the side of guilty verdicts.

Thus, although guilty-until-proven-innocent may no longer be the *de jure* assumption, it is still the *de facto* norm in most Russian criminal proceedings, especially those at higher levels. There are of course some notable exceptions, but overall the change mandated by the new code has not yet taken firm root.

## **Search and Arrest Warrants**

Until July 2002, the internal security organs in Russia were entitled to issue their own search, arrest, and wiretap warrants. The FSB and MVD were able to determine for themselves, without approval from a judge or magistrate, whether to carry out an intrusive search of a building or individual, whether to wiretap a phone, and whether to arrest a suspect. The lack of any restrictions on the FSB and MVD often led to arbitrary searches, the illegal acquisition of evidence, and prolonged detentions without trial.

The new criminal procedure code is supposed to deprive the FSB and MVD of the right to issue their own warrants. Search and arrest warrants now must be approved by a court. The security organs have sought ways around this restriction, but the large volume of complaints by senior FSB and MVD officials about the serious problems and unacceptable constraints they are facing without the power to issue their own warrants suggests that the provision is generally being observed. Nonetheless, many observers

expect that the FSB and MVD will eventually persuade the Duma to enact laws that would restore the security organs' prerogative to issue their own warrants for exceptionally dangerous (and perhaps certain other) cases. If such loopholes are created, they are likely to be abused. Unfortunately, however, pressure to revise the new warrant procedure has increased in the wake of the October 2002 Nord-Ost crisis. At least a few exceptions are very likely to be made.

## **Rights of Suspects**

Until July 2002, suspects in Russia were often held for long periods without charge and were not permitted to consult with an attorney before or during interrogation. It was common for the police to rely on beatings and torture to extract confessions. Confessions made under duress were fully admissible as evidence and could not be retracted. Nor were the accused guaranteed the right to counsel. In many cases, defendants (especially those who were too poor to afford an attorney) had to represent themselves.

The new criminal procedure code introduces a number of changes that are intended to eliminate these abuses and to prevent arbitrary detentions. The code is supposed to guarantee the right to counsel and to ensure that indigent suspects are provided with a defense attorney at the state's expense. Under Article 56 of the code, the first interrogation of a suspect must be conducted within 24 hours, and the suspect must be permitted consultations with a lawyer before and during the interrogation. Otherwise, the results are not admissible as evidence. By requiring a lawyer to be present during interrogation, the new code is supposed to prevent the security forces from using beatings or torture to secure confessions. To reinforce this provision, the code permits defendants to retract confessions, especially those obtained under duress, and prevents the prosecution from submitting retracted confessions as evidence.

Positive as these changes may appear on paper, their practical effect has been limited. Although indigent suspects are supposed to enjoy the right to counsel, the reality is that attorneys in many regions are unwilling to serve as public defenders because the local governments often fail to pay them. Moreover, pro bono work by established law firms is largely non-existent, especially outside Moscow and St. Petersburg. Judges in Moscow have sought the help of a professional legal association, the Center for Reform of Criminal Justice, to provide legal representation for the poor, but the association's efforts have been confined mainly to the capital. Although some NGOs have sought to line up attorneys in smaller cities to represent indigent defendants, the expense of preparing a competent legal defense has meant that many low-income suspects (especially ethnic Caucasian suspects) are forced to do without counsel.

Problems also have cropped up with the provisions regarding interrogations. Many reports have emerged of illegal interrogations, especially outside Moscow and St. Petersburg. A detainee who is beaten or tortured during interrogation must undergo a forensic medical examination to prove the abuse, but the only way to obtain an examination is by seeking a referral from the police or the prosecutor—a requirement that poses an obvious conflict of interest. Unfortunately, the Russian government has declined to pursue a law that would unequivocally prohibit torture and beatings by investigators. (A draft law to this effect was introduced by liberal deputies in 2002, but was soundly

rejected.) Reports of police torture remain common, and in many cases, the courts have ignored the abuses and refused to throw out coerced testimony. Detainees from ethnic minorities (especially Chechens) have been particularly vulnerable to abuse, but the problem has affected many Russians as well, and there is no sign that it will abate anytime soon.

## **Limits on the Prosecution**

Until July 2002, the criminal justice system in Russia was so heavily slanted in favor of the prosecution that prosecuting attorneys rarely bothered even to show up in court. They knew that they could count on judges to find the defendants guilty. The judges received case files from the prosecutor and then handled the courtroom interrogation themselves, relying solely on the information compiled by the prosecution. No other evidence was permitted. Even if the prosecutor did a poor job of preparing a case or if the evidence was very weak, the judge often refused to dismiss the charges and instead remanded the case to the prosecutor's office for further investigation. In the meantime, the accused had to remain behind bars. In some instances, a case was remanded to the prosecutor numerous times, allowing the detention of the accused to stretch out for years without trial. Even in the very few instances when a judge did dismiss the charges, the prosecutor could overturn the acquittal and keep the suspect in prison. The case would then resume from the beginning, and the prosecutor would seek new trials until a conviction was finally secured.

The new criminal procedure code is intended to rectify these egregious imbalances. It requires prosecutors to be present during all cases, and it separates the functions of prosecutors and judges. The code is supposed to establish a true adversarial system in which the judge serves as a neutral arbiter. In line with this change, the code also bars the remanding of cases to the prosecution for additional investigation. If the case presented by the prosecution is weak, the judge must dismiss the charges. Moreover, judges, rather than prosecutors, are now the only ones who can set bail. To prepare judges for their new role, the Russian Ministry of Justice sponsored nationwide training sessions in the first several months of 2002.

Welcome as these changes obviously are, the practical results have been disappointing thus far. Although many judges in Moscow have begun serving as disinterested arbiters, this is often not the case in other cities, where many judges have continued—if only inadvertently—to give undue leeway to prosecutors. Part of the problem is that many judges endure poor working conditions and are given inadequate support staff. Hence, they remain dependent on prosecutors for information on particular cases. Moreover, judges are woefully underpaid and are therefore susceptible to bribery, corruption, and intimidation, especially in high-profile cases. Because the position of judges in Russian society is not of high prestige, it has been difficult to recruit talented younger people into the profession. All of these circumstances work in favor of the prosecution. Judges have been especially tolerant of prosecutors who violate procedures in cases that are supposedly related to terrorism and espionage. The proceedings in such cases are kept secret, and the prosecutors are often given full discretion to determine what evidence can be admitted.

Over time, these abuses may well diminish, and fair hearings may become the norm, but the Russian judicial system is currently far short of that goal.

## **Powers of Defense Attorneys**

During the Soviet era, many suspects were brought to trial without counsel. Even when defense lawyers were present, they often did little more than facilitate the prosecution's case. Russia's new criminal procedure code is supposed to enable defense attorneys to put up the best possible case for their clients. Defense lawyers are now permitted to conduct their own investigations, rather than having to rely solely on evidence gathered by the police and prosecutors. Defense attorneys also are permitted to challenge the veracity and admissibility of evidence offered by the prosecution, and they are allowed to cross-examine witnesses.

Unfortunately, the impact of the changes mandated by the code has been undercut in many cases. According to the Independent Council of Legal Experts, defense lawyers in almost every region of Russia have been frequent targets of intimidation and coercion. The police and security forces have resorted to beatings and arrests to cow defense attorneys and cover up their own criminal behavior. Such abuses have been reported at every level of the judicial system—local, regional, and federal—but only in a few instances were the perpetrators held accountable. Until a climate exists in which defense attorneys no longer need to fear for their safety, the changes introduced by the new code will make little practical difference.

## **Double Jeopardy**

Until July 2002, individuals in Russia who were found innocent of criminal charges could be (and often were) held in jail and retried on the same charges. This practice, known as double jeopardy, is explicitly forbidden in the United States under the Fifth Amendment to the Constitution. Article 405 of Russia's new criminal procedure code prohibits double jeopardy in Russia as well. Prosecutors and police have complained about their inability to retry suspects on the same charges, and they have sought to get around the ban by bringing ostensibly different (but in reality much the same) charges against those who have been acquitted. Although higher courts have tended to discourage blatant attempts to circumvent Article 405, the protection against double jeopardy has been difficult to enforce thus far.

## **Trial by Jury**

During Soviet times, defendants were tried by judges or three-member judicial tribunals, which routinely issued guilty verdicts. Conviction rates in many cities, year after year, were 100 percent. The accused were not entitled to a trial before a jury of their peers. Not a single jury trial was held in Russia from late 1917 to 1993. In 1993, the Russian government introduced jury trials on an experimental basis in nine of Russia's eighty-nine regions for serious criminal cases (i.e., those in which the defendant could be sentenced to at least three years in prison). Although the jury trials held in these regions constituted less than 2 percent of the total criminal cases in Russia, they were a starting point for a nationwide system. From 1993 to 2002, the average acquittal rate in jury trials

was 15 percent. In some years, the acquittal rate reached nearly 20 percent, or roughly 80 times higher than the overall acquittal rate in Russia.

The new criminal procedure code originally called for the introduction of jury trials for serious criminal cases in all 89 regions of Russia as of January 2003, but that provision was scaled back by a law adopted in December 2002. The amending law requires jury trials in only 70 regions (including the 9 originally covered) in 2003 and 18 additional regions (including the city of Moscow) in 2004. In Chechnya, jury trials will not begin until 2007 at the earliest. After the new criminal procedure code was adopted, the Russian government scrambled to adapt courtrooms for juries and to train judges and attorneys for their new roles. Experts who had been following the decade-long experience with jury trials in the 9 original regions used their findings to compile a training film for judges and lawyers elsewhere in the country.

Despite these preparations, the expanded system of jury trials has encountered obstacles. The number of qualified judges and attorneys is far too small, and many courts built during the Soviet era have not yet been equipped with adequate facilities (jury boxes, microphones, etc.). Citizens in many regions have been unwilling to serve as jurors because of the paltry (or non-existent) compensation. Furthermore, the FSB and MVD, as well as many prosecutors, have condemned the relatively high acquittal rates of jury trials, arguing that they “give free rein to dangerous criminals.” In February 2003, Internal Affairs Minister Boris Gryzlov argued that the new system “fails to balance the rights and duties of the parties involved,” and that “the hands of investigators are tied.” Although important restrictions have already been imposed on jury trials—such trials are held only for “serious” criminal cases and are not yet permitted in Moscow and numerous other regions—the security forces and prosecutors have urged the parliament to establish further limits. Some FSB officials have even called for the outright abandonment of the new system. Although it is highly unlikely that Putin will go along with these drastic proposals to eliminate jury trials, he may well agree to expand the MVD’s and FSB’s investigative powers in return for keeping the jury system.

## **Conclusion**

The new code has made it much easier for the United States to cooperate with Russia in criminal matters, including anti-terrorist operations, under the 1999 Mutual Legal Assistance Treaty. In addition, the code has been a big step forward for U.S. efforts to promote democratization in Russia. The fate of Russia’s legal system ultimately will depend on the outcome of broader democratic reforms, but the enactment of the code has itself been a laudable achievement.

Unfortunately, the United States has given mixed signals about enforcement of the new code. Concerns about terrorism in the wake of the September 2001 attacks have caused U.S. officials to overlook Russia’s violations of human rights in Chechnya. On the other hand, U.S. agencies have actively worked with the Ministry of Justice in Russia to facilitate implementation of the code—assistance that has partly compensated for the undue leeway given to Putin in Chechnya. Even if U.S. assistance makes only a very limited difference, it is well worth the effort.