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**JUSTICE IN SIBERIA:
A CASE STUDY OF A LOWER CRIMINAL COURT IN THE CITY
OF KRASNOYARSK**

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Executive summary

Our knowledge about realities of administration of justice in Russia “on the ground,” at the level of districts, towns, or regions is very skimpy and mostly based on anecdotal evidence, press reports or occasional interviews (mostly with highly placed dignitaries). This study represents a step toward filling this gap through an empirical investigation of the activity of a single criminal court of general jurisdiction located in the remote Siberian city of Krasnoyarsk.

Such findings could serve as groundwork for developing some hypotheses to be tested later in broader, more vigorously structured investigations. The overall task of the project was to discern and identify characteristic features of the trial level court’s day-to-day operations particularly in the quality of proceedings judged from the perspective of their efficiency as well as procedural and substantive fairness. Of particular interest were questions of whether judicial independence is a reality, whether prosecutorial bias of the presiding judge, a heavy legacy of the Soviet past, still persists, whether defendants are adequately represented, and how meaningful is lay participation in criminal cases.

Introduction

Administration of criminal justice in post-Soviet Russia deserves our close attention for several reasons. It is widely known that the country is engulfed by a high tide of criminality and official corruption which present a serious threat to its political and economic stability and tend to retard its progress towards the rule of law. Numerous Russian criminal organizations reach far beyond their national territory and present a menace to many foreign countries including the United States, as well as several countries of Europe.¹ The quality of justice administration, while being only one of many factors in Russia's "war on crime," under the circumstances, obviously deserves our close attention.

Moreover, the post-Soviet years witnessed substantial, if often faltering, efforts at overcoming the lawless and repressive Soviet legacy and joining the mainstream of progressive legal cultures. Unfortunately, according to a variety of sources, including reports of some respectable human rights organizations, the situation of individuals caught in the machinery of criminal justice is quite perilous and in some respects *worse* than under the Soviet rule.² Thus, administration of justice in contemporary Russia should be studied from the perspective of its effectiveness as a tool of implementation of penal policy as well as its compatibility with the requirements of the rule of law and protection of human rights.

A substantial body of literature in English devoted to legal developments in post-Soviet Russia in general, and to the on-going efforts of reforming administration of justice in particular, is already

¹Center for Strategic and International Studies Task Force Report, *Russian Organized Crime* (1997). As a clear sign of the growing concern about Russian organized crime, the FBI at the request of the Hungarian government, opened a full-fledged investigative operation in Budapest to fight the Russian mob. Raymond Bonner, "FBI Going to Budapest to Hunt the Mob," *The New York Times*, February 21, 2000, A-6. According to the opinions prevailing in the international business community, Russia is one of the world's most corrupt nations. Barbara Crossette, "Survey Ranks Nigeria as Most Corrupt Nation," *The New York Times*, August 3, 1997, A-3. The situation has not changed, so far, during the presidency of Mr. Putin. According to the most recent survey, Russia remains in the group of ten most corrupt countries. It shares this dubious distinction with Nigeria, Yugoslavia, Ukraine, Azerbaijan, Indonesia, Angola, Cameroon, Kenya and Mozambique. See Transparency International, *The 2000 Corruption Perception Index*, available on the Internet at www.transparency.org/documents/cpi/2000.html.

²See, for example, Amnesty International, *Torture in Russia. This Man-made Hell* (1997); Human Rights Watch, *Confessions at Any Cost. Police Torture in Russia* (1999).

available.³ Practically all of these writings deal with the subject matter at a general level, that is to say from the perspective of centrally promoted legal policies embodied in major legislative acts, governmental reform blueprints and rulings of the Russian high courts headquartered in Moscow. In particular, much attention has been devoted to constitutional developments. One can also learn much from this literature about various law reform related political debates among Moscow bureaucratic and academic elites. With very few exceptions,⁴ however, no empirical investigations have been reported.

In effect, our knowledge about the realities of administration of justice “on the ground,” at the level of districts, towns, or regions, is very skimpy and mostly based on anecdotal evidence, press reports or occasional interviews (mostly with highly placed dignitaries). This study represents a step toward filling this gap through an empirical investigation of the activity of a single criminal court of general jurisdiction, located in the remote Siberian city of Krasnoyarsk.

The case study

The case study of a single legal institution is a valid method of empirical legal research and has been successfully applied in the past with respect to a variety of such institutions⁵ including trial courts.⁶ Case studies are believed to be most productive where “very little is known about the general type of

³Among recent studies, one should mention: Gordon B. Smith, *Reforming the Russian Legal System* (1996); Peter H. Solomon and Todd S. Foglson, *Courts and Transition in Russia. The Challenge of Judicial Reform* (2000); Kathryn Hendley, “Remaking an Institution: The Transition in Russia From State Arbitrazh to Arbitrazh Courts,” 46 *American Journal of Comparative Law* 93 (1998); Scott P. Boylan, “The Status of Judicial Reform in Russia,” 13 *American U. Int. Law Rev.* 1327 (1998).

⁴Stephen C. Thaman, “The Resurrection of Trial by Jury in Russia,” 31 *Stanford J. Int. Law* 61 (1995), (Reporting direct observation of several jury trials); Sarah J. Reynolds, “Drawing Upon the Past: Jury Trials in Modern Russia” in *Reforming justice in Russia 1964-1996*, 374-396 (1997, Peter H. Solomon, ed.).

⁵Shari Seidman Diamond, “Methods for Empirical Study of Law” in *Law and Social Sciences* 637, 654 (1986, Leon Lipson et al. eds.).

⁶See, for example, Maureen Mileski, “Courtroom Encounters. An Observation Study of a Lower Criminal Court,” 5 *Law and Society Rev.* 473 (1971).

behavior in question” and, thus, could be an “especially revealing tool in socio-legal research.”⁷

Therefore, the case study method seems to be particularly suitable with respect to the functioning of lower criminal courts in deep provinces of Russia since our empirically based knowledge regarding this matter is almost non-existent.

Under the circumstances, materials gathered in the course of the study are valuable in their own right, although given the narrow empirical sample, which may or may not be representative, generalizations can be drawn only very cautiously. Nonetheless, the dearth of existing knowledge makes even such tentative findings useful as “eye openers.” Moreover, such findings could serve as groundwork for developing hypotheses to be tested later in broader, more vigorously structured investigations. The overall task of the project was to discern and identify characteristic features of the trial level court’s day-to-day operations, particularly in the quality of proceedings judged from the perspective of their efficiency as well as procedural and substantive fairness. Of particular interest were questions of whether judicial independence is a reality, whether prosecutorial bias of the presiding judge, a heavy legacy of the Soviet past, still persists, whether defendants are adequately represented, and how meaningful is lay participation in criminal cases.

With these objectives in mind, in the Fall of 1999 and in the Spring of 2000, I spent five weeks in Krasnoyarsk monitoring day-to-day operations of the Kirovskii District Court.⁸ According to the Russian law prevailing at the time of my field work, courts of this type had jurisdiction over all criminal offenses with the exception of relatively few crimes of special gravity which were triable before the courts of

⁷Diamond, *supra* note 5, 654.

⁸Krasnoyarsk, a city of about 900,000 residents and the capital of the vast *Krasnoyarsk Kray*, has seven district courts of general jurisdiction, each serving a different sector of the city.

higher order.⁹ Thus, the overwhelming majority of criminal cases, probably over 90 percent, were decided by the district courts.¹⁰

Most of my time was devoted to observation of criminal trials in the Kirovskii Court. Observation was conducted according to a plan spelled out on two forms: "The Trial Observation Form" and "The Trial Postponement Form." Each observed hearing was recorded on a separate form.¹¹ The trial observation form included not only purely factual information regarding each case, but also an assessment of the professional conduct of each actor of the trial. Since on most workdays, multiple hearings were held before different judges, I enlisted my local consultants¹² in the trial observation activity. Altogether my Russian collaborators and I observed proceedings in 75 cases, of which 30 were postponed and 45 (involving 50 defendants), were brought to a conclusion¹³ The length of the observation period, combined with the number and variety of proceedings, as well as the fact that we observed almost all the judges on active duty, gave me a good sense of the institutional routine at the Kirovskii Court.¹⁴

⁹The Code of Criminal Procedure of the RSFSR, amended as of March 1, 2000 (2000) (hereafter the CCP), arts. 35-38. See, however, the Law on Justices of the Peace in the Russian Federation, December 17, 1998, *Sobranie zakonov Rossiiskoi Federatsii* (hereafter S.Z.R.F.), No. 51, Item 6270, art. 3., transferring jurisdiction over offenses punishable by deprivation of freedom up to two years to justices of the peace. At the time of this writing (January 2001), justices of the peace have not commenced their activity in Krasnoyarsk. Oral communication from Chief Judge Letnikov, January 4, 2001.

¹⁰U.S. Department of State. *1999 Country Reports on Human Rights Practices. Russia*. February 25, 2000, available on the Internet, 26.

¹¹In cases involving two defendants, a separate form was used for each defendant.

¹²My work was greatly assisted by two professors from the University of Krasnoyarsk – Alexander S. Gorelik and Nikolai G. Stoiko. Gorelik holds the chair in criminal law, he is a highly respected member of the legal community there and chairs one of the local human rights groups. Stoiko, a much younger scholar, holds the chair in criminal procedure.

¹³These figures are too small to be statistically meaningful. The project was meant as qualitative rather than quantitative research. Consequently, any quantitative references in this paper are made for the illustrative purposes only.

¹⁴At the time of my field work, one judge was on a lengthy medical leave, another judge, whose term of office was about to run out, avoided monitoring under variety of excuses. Thus, out of the ten judges employed by the Kirovskii Court, eight were monitored and interviewed.

In addition to direct observation of the court proceedings, I conducted over twenty extensive interviews with members of all three branches of that legal profession, that is to say with judges, prosecutors and defense bar members. The purpose of the interviews was two-fold: first, to obtain information regarding professional biographies and practicalities of judicial independence under local conditions; second, to gather information about interviewees' *opinions* about a variety of relevant subjects. Detailed, albeit flexible, interview forms were prepared, a separate form for each professional group. The interviews were broad-based, and included questions regarding interviewees' professional biographies, their current work, their ideas about how administration of justice can and should be improved, as well as their views of other branches of the legal profession.

For example, defense attorneys were questioned not only about their own work, but also about their opinions of the judiciary and the prosecutorial corps. The interviews thus yielded multi-perspective views and enabled me to counterbalance and cross-check one set of professional opinions against another, and to confront subjective views of the professionals with the results of direct observation.¹⁵ Moreover, I examined files of about thirty cases regarding judicial review of pretrial detention and gathered official data regarding justice administration in the city and province of Krasnoyarsk in general, and in the Kirovskii District Court in particular. A short visit to Norilsk allowed me a glimpse into the administration of criminal justice on the northern periphery of the vast Krasnoyarsk region. Finally, short visits to six remaining district courts in the city as well as to the appellate division of the Regional Court put the case study of the Kirovskii Court in a broader context.

¹⁵Most formal interviews were audio-taped with consent of the interviewees. Each interviewee was assured anonymity, that is to say that in any publication she/he will be identified by professional status only, for example, as a judge, a defense attorney or a prosecutor. References to such individual sources will be phrased, for example, as "interview with judge D" or interview with attorney A." In addition, I had a number of informal conversations with various professionals when assurances of anonymity were neither requested nor given. Moreover, I obtained some information about activities of the Kirovskii court from Chief Judge Iurii Letnikov in his administrative capacity; such information will be treated as derived from an official source.

Profile of the Kirovskii District Court

The Kirovskii District (in Russian – Kirovskii Rayon), located on the right bank of the Yenisei River, is fairly distant from the city center. Its origins go back to the early years of World War II when heavy industry was evacuated from the western and central provinces of the Soviet Union to its remote peripheries. At the time, several factories were relocated to Krasnoyarsk and hastily reset on the then empty right bank of the river. Soon thereafter, rudimentary living quarters for the workers and their families were built, and the life of the new sector of the city commenced. Today, the Kirovskii District is inhabited by some 115,000 people mostly belonging to the industrial working class. They are housed in typical Soviet-style apartment buildings: grey, rectangular, poorly maintained big boxes. The streets are wide, windy and heavily polluted by badly maintained vehicles.

On one such street, named after the renowned Soviet scientist Vavilov, sits the medium sized, compact, four-story building housing the Kirovskii District Court. The building was specifically designed for court use and in many respects compared favorably with the remaining district courts buildings in Krasnoyarsk:¹⁶ it did not show any signs of disrepair, its interior was reasonably clean and there were no restless crowds, conspicuous elsewhere, camping in the hallways or staircases.

At the time of my first visit in October-November 1999, the court had only four trial rooms, which created serious scheduling problems. As a consequence, many criminal trials and most hearings in civil cases were held in judges' offices.¹⁷ At the time of my second visit, I found the court's quarters expanded and the number of trial rooms increased from four to seven. Public areas of each trial room could accommodate 20-30 people. In accordance with government regulations, trial rooms were equipped with ugly iron cages in which defendants under arrest were locked for the duration of the trial. The cages gave rudimentary, but otherwise decently kept trial rooms, a somewhat depressing air and, one

¹⁶Most district courts in Krasnoyarsk are located in dilapidated apartment or office buildings hardly suitable as courthouses.

¹⁷I will have more to say about this subject a little later.

would suspect, could have a prejudicial effect upon the defendants. All judges had separate, albeit small offices, most of them equipped with personal computers. The court had a small law library.

The Kirovskii District Court employed ten full time judges, which made it the smallest district court in the city.¹⁸ Out of ten judges, seven were women, including the deputy chief judge. The court was chaired by the chief judge, a 38-year-old man, Iurii Sergeevich Letnikov. The gender composition of the bench as well as the allocation of administrative authority were typical of the district courts in the city in general: in all of them the majority of judges were women, while all chief judgeships, with one exception,¹⁹ belonged to men.

The age of the Kirovskii Court judges ranged from 31 to 49. All were of Russian ethnicity. All had higher legal education, though the majority either were graduates of correspondence law courses or of the evening division of the local law department. Many of these judges had gone through the course of legal studies while working full-time, typically as court secretaries.²⁰ According to my Russian consultants, Professors Gorelik and Stoiko, the quality of legal education provided by the evening division and, particularly, correspondence law courses was markedly inferior to that provided by the day division of the Law Department.

Most judges studied law during the Soviet period, and most were already on the bench under the old regime. Five out of ten judges of the Kirovskii Court had life appointments; the remaining five were at various stages of temporary appointments. With half of the judges holding life tenure, the job security at Kirovskii Court appeared to be better than average. By comparison, as of June 30, 1999, only 25

¹⁸The remaining district courts in the city employed from eleven to seventeen judges each. District courts in the Krasnoyarsk Region, located outside of the regional capital, were much smaller. According to the official statistics for the first 6 months of 1999, out of 62 district courts in the region, 42 employed 2-5 judges, 11 - 6-20 judges, only 8 courts (including six in the city of Krasnoyarsk) employed more than 10 judges. One district court employed a single judge. Memorandum from Professor A. Gorelik of October 1999.

¹⁹In the Sverdlovskii District Court, the chief judge as well as her deputy were women. In the Fall of 1999, seven district courts in the city of Krasnoyarsk employed 87 judges, including 58 women. All deputy chief judges were females.

percent of district court judges in the Krasnoyarsk Region at large held life appointments.²¹ Judges who served for a limited, probationary period were seeking or intending to seek re-appointments for life. Several judge interviewees, including some who held life appointments, indicated that obtaining a re-appointment involved a complex, extremely stressful and secretive process. Reportedly a decisive say in the process belongs to the court administrators at various levels, in particular to the chief judge of the Kirovskii Court as well as the administrators of the Regional Court. The Regional Legislative Assembly also provides important input, as it must endorse candidates for re-appointments. In the past, it vetoed judicial appointments in several instances.²² The judge interviewees were acutely aware that the good will of court administrators as well as local legislators was essential for their professional future.

Judges were salaried from the central budget and received their monthly pay regularly, not a trivial advantage in chaotic and impoverished Russia, where so many public employees waited for months or longer for their overdue wages. By comparison with other employees of the public sector, Russian judges were salaried adequately, particularly since September 1999, when their remuneration was raised from 5,500 to 7,500 rubles a month²³ and substantial benefits, including two months vacation annually, were added. It was reported that, during the same period, police detectives in Russia made only 1,500 to 2,000 rubles a month and traffic officers as little as 700 to 1,200 rubles.²⁴ Although the level of satisfaction among judges was uneven, several of them assessed their pay as “relatively good.” As one of them stated: “My sister-in-law, who works as a teacher, earns only 2,000 rubles a month. She considers

²⁰While work as a court secretary is an honorable way of making a living, it hardly gives the incumbent a high stature in the legal community.

²¹Memorandum from A. Gorelik, *supra* note 18. According to a recent study, as of January 1, 1998, only 12.3 percent of district court judges in Russia held life appointments. Solomon et al., *supra* note 3, 33.

²²Interviews with judges E. and H. on file with the author.

²³Memorandum from Chief Judge Letnikov, November 1999.

²⁴*Confessions at Any Cost*, *supra* note 2, 106. The average monthly wages for 1999 in the Krasnoyarsk Region was 2,287 rubles. *Doklad o polozhenii s pravami cheloveka v Krasnoyarskom krae za 1999 god* (“Report on Situation Regarding Human Rights in Krasnoyarsk Region in 1999”), 2, a manuscript on file with the author.

me an almost affluent person.”²⁵ The mandatory working hours for the judges, monitored by the court administration, were 9-5, Monday through Friday.

All in all, it was my distinct impression that judges of the Kirovskii Court considered their jobs to be desirable, and made every effort to keep them. The prospect of being dismissed was perceived as a serious threat to their well-being.

All judges of the Kirovskii Court handled civil as well as criminal cases.²⁶ Criminal cases were assigned to individual judges by the chief judge according to the loosely defined principle of equal burdens. Chief Judge Letnikov indicated that while making assignments, he also considered the personal abilities of individual judges. A system of assignment of cases by lot, jealously guarded in many democratic countries as a guarantee of an impartial tribunal, was unheard of.

The Kirovskii Court reported the following monthly caseload per judge for the calendar year 1999:

Criminal Cases:	13.3
Civil Cases:	51.6
Administrative Cases:	3.1 ²⁷

While the caseload in the criminal law area remained fairly steady in the course of the last few years,²⁸ just the opposite was true regarding civil cases, the volume of which was growing rapidly.²⁹ In 75 criminal cases monitored the following categories of offenses were charged:³⁰

²⁵Interview with judge K, on file with the author.

²⁶In some district courts in Krasnoyarsk, judges were divided into civil and criminal departments.

²⁷*Spravka o rabote Kirovskogo Rayonnago Suda g. Krasnoyarska za 12 mesatsev 1999 goda* (“Report on the Work of the Kirovskii District Court During the 12 Months of 1999”) on file with the author. By “administrative cases,” the Report meant appeals from penalties imposed by administrative agencies.

²⁸By comparison, an average monthly load of criminal cases per judge during previous three years was: 1996 - 14; 1997 - 13; 1998 - 12.7. *Spravka, supra* note 27.

²⁹The average monthly load of civil cases per judge was growing during previous three years as follows: 1996 - 29.4; 1997 - 42.8; 1998 - 49.5. In comparison with other district courts in the city, the Kirovskii Court judges

Crimes Against Property:	49
Drug Related Crimes:	19
Crimes Against Person:	16
Crimes Against Authority:	5
Other Crimes:	4
Total:	93

The categories of charges in the proceedings observed is consistent with the categories of charges officially reported by the Kirovskii Court for the three-year period 1997-1999. In particular, the official statistics show that during that period the single largest category was crimes against property, closely followed by drug related offenses.³¹

In the proceedings observed most defendants were men (70 out of 80), typically age 40 or younger, of Russian ethnicity.³² The majority of the defendants (49) were unemployed, and more than one third (31) had prior, or multiple, convictions.

Between written law and bureaucratic pressures

Russian judges, in theory and in law, are independent.³³ They are supposed to decide cases according to the rules of written law, free from outside pressures or influences, especially pressures from

handled a heavier caseload than average. Data for the first six months of 1999, for example, shows the following monthly load per judge in the city: criminal cases - 8.5; civil cases - 33.4; administrative cases - 7.7. *Svedeniia o sudakh po gorodu Krasnoyarsku za 6 mesiatsev 1999 gode po sravneniiu s 6 mesiatsumi 1998 goda* ("Information Regarding Courts in the City of Krasnoyarsk for Six Months 1999 in Comparison with Six Months of 1998), on file with the author.

³⁰The charges reported here were filed both in cases brought to a conclusion as well as in cases where trials were postponed. The total number of charges is higher than the number of cases observed since in many instances defendants were charged with more than one offense; moreover a few cases involved more than one defendant.

³¹"*Spravka*, *supra* note 27.

³²Krasnoyarsk is a multiethnic city, but Russians constitute an overwhelming majority of the population. Out of the total of 80 defendants, 64 were Russian.

public officials or governmental agencies. The prevailing law includes a number of safeguards designed for the protection of judicial independence.³⁴ Russian law also guarantees a number of rights for defendants in criminal cases, including the right to a public, speedy and fair trial before an impartial tribunal, the right against compelled self-incrimination, the right to defense and the presumption of innocence.³⁵

Judges, however, also belong to a legal bureaucracy which formulates and enforces its own standards regarding judicial behavior. Those judges who meet such official expectations are rewarded, whereas judges who do not meet them put their careers at risk. The relations between requirements of written law and bureaucratically enforced standards of judicial conduct are complex. Some bureaucratically enforced standards may overlap with or closely follow rules of written law. In such instances no conflict between written law and bureaucratic expectations should arise. Nonetheless, strict implementation of some *selected* legal standards can be achieved only by sacrificing others. Some bureaucratic requirements may completely subvert legal rules. For example, a strong bureaucratic pressure to convict may subvert the very idea of a fair trial, as well as a number of other procedural and substantive law rules.

My research suggests that there are two leading criteria by which court administrators evaluate judicial performance in the Krasnoyarsk Region: expeditious processing of cases and “stability of judgments,” as measured by the ratio of decisions appealed to decisions affirmed by the higher court. Judges of the Kirovskii Court were acutely aware of the fact that their professional prospects and hence

³³Constitution of the Russian Federation of 1993 (hereafter the Constitution), Art 120, Sec. 1 reads, “Judges shall be independent and shall be subordinate only to the Constitution and federal law.” For a further discussion see *Konstitutsiia Rossiiskoi Federatsii. Nauchno-prakticheskii kommentarii* (Constitution of the Russian Federation. Scholarly-practical commentary) 609-614 (1997, B.N. Topornin ed.) (hereafter Topornin).

³⁴The Constitution, Arts. 121-122. For a further discussion, see Topornin, *supra* note 33, 609-614; *Zakon o statute sudei v Rossiiskoi Federatsii. Kommentarii* 32-36 (1994, V.M. Savitskii ed).

³⁵The Constitution, Arts. 48-49, 51, 123; the CCP, arts. 16, 18-20, 46-51. For an extensive discussion of those and related provisions of Russian law see Topornin, *supra* note 33, 325-342; *Nauchno-prakticheskii kommentarii k*

their personal well-being largely depended upon satisfying the two criteria of success.³⁶ Therefore, the way criminal trials were conducted and cases decided was strongly influenced by a desire to show “good performance” on both prongs, that is to say to move cases expeditiously and to avoid being reversed by the Regional Court.

The Kirovskii Court was meeting successfully its heavy caseload. Official statistics show that during the period of 1997 through September of 1999, in only about 7 to 8 percent of criminal cases did violations of the statutory deadlines occur. That compares very favorably with the average performance of the courts in the Krasnoyarsk Region, where violations of the statutory deadlines in 1999 occurred in over 22 percent of cases. This achievement, however, was not cost-free. Pressure to handle cases rapidly imparted a tense, hectic pace to judicial work. Judges rushed from one professional task to another without much room for reading, reflection or mutual consultation. They seemed to be virtually obsessed with speed. Accusations of sluggish work or “foot dragging” (in Russian - *volokita*) were feared, as they could lead to dismissal even of judges with life appointment.³⁷

In the atmosphere of case chasing, there was scant room for dealing with factual or legal complexities. Complex cases had to be “simplified” in order to satisfy the need for speedy mass justice. As will be detailed below, procedural rules were often treated as obstacles to meeting quantitative output targets and either ignored or manipulated to create appearances of compliance. Facing a choice between expeditious conclusion of trials or procedural and substantive fairness, the judges more often than not opted for the former over the latter. Apparently, it was understood that it was easier to “get away” with qualitative flaws in the trials than with sluggish processing of cases.

Ugolovno-Protsessualnomu Kodeksu RSFSR (Scholarly practical commentary to the Code of Criminal Procedure of the RSFSR) 38-43, 78-97 (1998, V.M. Lebedev ed.) (hereafter *Kommentarii*).

³⁶Interviews with judges E, F, G, H, K.

³⁷Several interviewees complained about strong pressures to meet tight deadlines. Instances of dismissals for reasons of “sluggishness” were cited. Interviews with judge E and attorney A.

The second factor which strongly influenced judicial conduct was striving for “stability of judgments” which in the observed practice of the Kirovskii Court acquired a particularly troubling meaning. In the trials observed, not a single instance of full acquittal was registered. Taken in isolation, such a finding could be considered insignificant since the observation lasted only five weeks and even during that time covered only about half of all cases tried. But the official statistics of the Kirovskii Court for much longer periods show a virtually no acquittals as well.³⁸ Moreover, official data for the whole vast Krasnoyarsk Region likewise show a virtual absence of acquittals.³⁹

An innocent observer could interpret this remarkable phenomenon as evidence of excellent work by police investigators and prosecutors, who presumably present to the courts only water-tight cases. However, the broad consensus among the Kirovskii Court judges, as well as prosecutors and the defense bar members, was radically different. The quality of police investigations was rated from poor to dismal. Judges in unison complained that they regularly received cases very badly investigated, full of gaps as well as procedural violations.⁴⁰ As one of the judges put it, the quality of police investigation was “repulsive.” Several interviewees pointed out that police investigators were “legally illiterate.” The prosecutors’ trial performance was not rated much higher. Again, the judges complained about having “no help” from mostly passive, poorly prepared or plainly inept prosecutors.⁴¹ The trial observation fully supported this opinion: in the majority of the monitored proceedings the prosecution was either not represented at all or represented poorly.

³⁸During the whole year of 1998 the Kirovskii Court registered *one* judgement of acquittal, representing 0.06% of the total, whereas during the first nine months of 1999 there were no acquittals at all. Memorandum from Chief Judge Letnikov, *supra* note 22.

³⁹During first six months of 1998 judgments of acquittal rendered by all district courts of the Krasnoyarsk Region represented 0.1% of all judgements and in the comparable period of 1999 acquittals represented 0.2 of all judgements. Memorandum from A. Gorelik, *supra* note 18.

⁴⁰Interviews with judges E, F, G, I, J, K; interviews with attorneys A, B, C, E; interviews with prosecutors R, T, U.

⁴¹Interviews with judges D, F, G, J, K.

The whole situation, therefore, appeared paradoxical: on the one hand, poor work of the prosecutorial agencies, on the other, their unqualified success in court. Interviews with the judges shed a good deal of light upon this apparent paradox. The majority of judge interviewees explained that the Regional Court imposed and consistently enforced a no-acquittals policy. The policy has never been explicitly articulated since it blatantly violates the rules of written law both municipal as well as international.⁴² Nonetheless, it has been consistently applied, and the message was duly internalized by the trial judges.

According to five out of eight judge interviewees,⁴³ the Regional Court routinely reversed judgments of acquittal challenged by the procuracy. The ostensible ground was the lack of a “thorough, complete and objective analysis of the circumstances of the case” required by the Code of Criminal Procedure.⁴⁴ In practice to meet the standard of “thoroughness and completeness,” the trial judge would have to examine and reject all even remotely plausible theories of guilt, close all evidentiary loopholes and affirmatively demonstrate the defendant’s innocence. In the hectic schedule of the trial court, there was simply no time for building such water-tight cases. Judgements of acquittal falling short of this impossibly high standard were doomed to appellate cancellation.

Moreover, acquittals were subject to criticism by the Regional Court administrators at the monthly judicial conferences where trial judges who rendered them were called “on the carpet.” As one of the judge interviewees put it, under the circumstances, “only a fool would acquit,” meaning that such

⁴²See in particular the Constitution, Art. 49 spelling out the presumption of innocence. The presumption of innocence is guaranteed also by the two major international human rights instruments – the UN International Covenant on Civil and Political Rights, Art. 14 Sec. 2, and by the European Convention on Human Rights, Art. 6. Both instruments were ratified by Russia.

⁴³Interviews with judges E, G, H, I and J.

⁴⁴The CCP, art. 20.

decisions were futile, subject to reversal, as well as personally risky for the judge.⁴⁵ Another judge interviewee put it even more bluntly:

There are judges who *take a risk* and render judgements of acquittal, but practically not even one of them is left to stand on appeal, they are reversed, they say [the trial judge] did not investigate everything. Somebody gets beaten for that. So we think, we better send the file for an additional investigation, or we will play with the sentence – make it lenient or suspended so that the defendant would not complain, but we will not acquit... To acquit is *very frightening*⁴⁶ (emph. add).

The fact that the no acquittals policy has been pursued by the Regional Court was confirmed by several experienced defense attorneys.⁴⁷

In short, for a trial judge it was much easier and safer to convict rather than acquit.⁴⁸ Judges of the Kirovskii Court drew the conclusion that full acquittals are not a realistic option. The two remaining options were either to convict, in full or in part,⁴⁹ or to send the case back to the Procuracy for additional investigation.⁵⁰ Thus, the guilt of the indicted defendant is usually a foregone conclusion. Decisions

⁴⁵Interview with judge H.

⁴⁶Interview with judge E, transcript 6.

⁴⁷Interviews with attorneys B, E, F.

⁴⁸Similar experiences have been reported from other parts of Russia as well. *Confessions at Any Cost*, *supra* note 2, 118-119. Apparently, the Supreme Court of the Russian Federation has also been pursuing a *de facto* no acquittals policy. In 1997, the Supreme Court reversed over 33 percent of non-guilty verdicts while it overturned only 2.5 percent of guilty verdicts. In 1996, the proportion was 29.4 percent to 2.2 percent. *Ibid.*, 119.

⁴⁹In fact, partial acquittals were registered in a few of the observed trials. See, for example Cases of Mikhail, 5/25/00 (Judge Popova); Case of Garmanshchikov, 11/3/99 (Judge Zaroits).

⁵⁰The CCP, arts. 232 and 258 mandates that in case of “incompleteness” or other legal deficiencies of the investigation, the trial court shall return the file to the Procuracy for additional investigation. Returning the case for reinvestigation gives the Procuracy a face-saving exit: the case can be either shored up and retried or the charges can be dropped thus leaving no blemish on the prosecutorial record. On April 20, 1999, the Russian Constitutional Court ruled that trial courts may not send cases for reinvestigation for reason of its incompleteness *sua sponte*. Under the ruling the trial court may return the case to the Procuracy only upon a motion made by the prosecution or the defense. S.Z.R.F., No. 17, Item 2205. The ruling has already created some difficulty: since trials are frequently held without counsel for either party or counsel are unwilling to make the requisite motion, the trial judge is faced with a difficult dilemma. As one of the judge interviewees put it “Now I *have neither the right to acquit* nor to return the case for reinvestigation.” Interview with judge G. In a trial observed by this writer, the file was returned to the Procuracy for reinvestigation in spite of the fact that counsel for both parties were absent. Case of Redkina, 10/21/99 (Judge Letnikov). I suspect that the requisite motion was somehow secured *ex post facto*, probably over the telephone. The Constitutional Court’s ruling was, no doubt well intentioned: its purpose was to press the trial

regarding guilt were in fact made by the Procuracy at the close of the investigation rather than by the trial court. The task of the trial court was merely to ratify such decisions by marshaling sufficient evidence at the hearing and subsequently reducing it to writing in the opinion supporting the judgment of conviction. By returning the case to the Procuracy for further investigation in instances when evidence of guilt is obviously insufficient, the judge communicated that the indictment was not yet ripe for ratification.

The no-acquittals doctrine left an unmistakable imprint upon the substance and style of the trial. It is only natural that judges who consider themselves duty bound to convict cannot be open to contestation of guilt. Consequently, such judges are likely to attach greater weight to incriminating than to exculpatory evidence, to resolve doubts in favor of the prosecution, to play down the rights of the defendant or to treat them as mere formality. The no-acquittals policy has had also a decisive impact upon judicial attitudes regarding investigative detention and police coercion – subjects which deserve separate, more extensive discussion.

With the no-acquittals policy effectively entrenched and enforced, the trial court functioned essentially as a sentencing tribunal. Some judges of the Kirovskii Court felt uncomfortable with their authority being so curtailed. That, *inter alia*, explains their enthusiasm for jury trials as proceedings before truly independent tribunals where the presiding judge is “shielded from responsibility” by the jurors.

Many characteristic features of the criminal trials at Kirovskii Court, as detailed below, can be attributed to the two factors discussed in this section: efforts to handle rapidly a heavy caseload within tight time limits and the no-acquittals doctrine.

courts to render judgements of not guilty when evidence of guilt is absent rather than giving the prosecution another chance. Whether the ruling will achieve this purpose is by no means certain. As the Human Rights Watch report perceptively observed:

The Constitutional Court’s decision is no doubt a major step in the right direction. However, in the current circumstances it is likely to make convictions without sufficient evidence even more frequent. *Confessions at Any Cost*, *supra* note 2, 122.

The right to a public hearing

The legal principle that criminal trials as well as appellate hearings should be public⁵¹ was routinely violated. Due to a shortage of trial rooms, many trials were held in chambers inaccessible to the public. I had a chance to observe two such trials.⁵² Judge interviewees indicated that they had to hold trials in their small offices quite frequently; according to one judge, she had to hold two or three trials every week in her office.⁵³ While this blatantly unlawful practice has recently become infrequent in the Kirovskii Court due to increased space, it remained a daily routine in several other district courts in the city.⁵⁴ One must sympathize with the plight of the judges who are expected to handle expeditiously heavy caseloads while lacking proper accommodations. Several judges complained about the necessity of trying criminal cases in their tiny offices with defendants breathing down their necks. They approached the whole matter in terms of personal hardship or inconvenience. It was striking, however, that not one perceived the phenomenon of criminal trials held *in camera* as a gross violation of the defendants' right to a public trial, as well as the public's right of a free access to judicial proceedings.

The legal principle that judicial proceedings in criminal cases should be open to the public was routinely violated by the appellate division of the Regional Court where *all hearings* were closed to the public. A police guard posted at the entrance to the appellate division screened out everybody whose name did not appear on a special list of interested parties prepared by the court clerical personnel. On May 30, 2000, during my visit to the appellate division, I had a chance to observe for about half an hour

⁵¹The Constitution, Art. 123 Sec. 1; the CCP, Art. 18. Exceptions to the general principle that hearings in criminal cases shall be open to the public are specifically defined by the CCP, Art. 18 Sec. 1 and 2.

⁵²Cases of Redkina, 10/12/99 (Judge Letnikov); Case of Shpulín, 12/21/99 (Judge Letnikov).

⁵³Interview with judge K.

⁵⁴On May 29 and 31, 2000, I was so advised by the court personnel during my unannounced visits to the Leninskii, Sovetskii and Railroad District Courts in Krasnoyarsk. Holding hearings in judges' offices in civil cases has been even more common. Reportedly, trials *in camera* were routinely practiced by the special courts with jurisdiction over commercial litigations. Kathryn Hendley, "Growing Pains: Balancing Justice and Efficiency in the Russian Economic Courts, 12 *Temp. Intl. and Comp. Law J.* 301, 315 (1998). A serious concern regarding Russian secret

this blatantly unlawful procedure. In fact, my own first attempt at entry was physically blocked by the policeman on duty, and relief came only after a court's secretary informed the guard that my visit had been cleared with the court administration. This has been an institutionalized practice of long standing, having the full endorsement of the Regional Court's leadership. Responding to my inquiry, the acting chief judge, Mr. Dvoekonko, explained that such a practice was necessary "considering the kind of public we have." He neither elaborated nor appeared to be embarrassed.

Two other encounters in the district courts of the city will further illustrate the point that the legal principle that court proceedings should be open to the public has been poorly internalized by the Krasnoyarsk judiciary. On May 31, 2000, about 11:00 am, I entered a dilapidated building at Lenin Street #58 which houses the Central District Court.⁵⁵ My visit was unannounced, my identity unknown to anybody in the building. I was informally dressed and, for all I could tell, I was passing for a "man from the street." On the second floor, through a half-opened trial room door, I noticed a middle-aged man seated behind the table engaged in a colloquy with two individuals standing in front of him. I quietly entered and seated myself on the bench next to the door. The judge immediately wanted to know who I was and what brought me to his trial room. His response to my explanation that I was merely a spectator was quick and stern: "We are in the middle of the proceedings. Leave the room!" My respectful inquiry whether court proceedings were open to the public visibly irritated the judge. He frowned and barked, "Get out and don't interfere!" (In Russian, "*Vyidite I ne meshaite*"). So much for the openness of the judicial proceedings in the Central District Court.

Intrigued by this experience, on the same day, I paid another unannounced, *incognito* visit to the Railroad District Court a few miles down the road from the Central Court. In the trial room #11, I found a defendant under guard locked in a familiar iron cage, a court secretary and an attorney. The trial

trials was recently raised in connection with Edmond Pope, convicted of espionage by a Moscow court. See "A Spy Conviction in Moscow," *The New York Times*, December 8, 2000, A-38.

⁵⁵According to my local informants, before the October Revolution the building served as a police headquarters where Lenin, exiled to the village of Shushenskoe, South of Krasnoyarsk, had to report periodically.

commenced shortly. The presiding judge wanted to know the reason of my presence. Having been informed that I was just a spectator, she warned me that I would not be allowed to leave the trial room during the proceedings in progress. It thus appeared that the right to attend trials in the Railroad District Court was burdened by temporary confinement of an unpredictable duration. Fortunately, in about half an hour a recess was announced and I regained my freedom.

In the Fall of 1999, during my first research visit, district courts in Krasnoyarsk were without any police protection. A recent noticeable change was the appearance of judicial police (in Russian – *pristavy*) in the district courts. Uniformed and armed *pristavy* have established their posts at entrances to the district courts. Typically for contemporary Russia, their behavior was inconsistent, if not erratic, and their mission far from clear. I have entered all of the seven district courts in the city without ever identifying myself or being searched for weapons. My numerous entries into the Kirovskii Court building were completely unimpeded – I entered without any verbal exchanges with *pristavy*, who simply ignored my comings and goings.

On my short visits to the remaining district courts in the city, in all instances but one, I was briefly stopped and questioned about my errand. Having explained that I came to observe criminal trials, I was allowed to enter without further obstacles. Apparently, *pristavy*, unlike some judges, were of the view that any adult individual is entitled to be a spectator in a criminal trial. On the other hand, while their inquisitiveness did not seem to serve any useful purpose, it could easily scare off less resolute persons. If one of the functions of the judicial police is protection of the court personnel against violence, the failure to search for weapons or explosives was an obvious security lapse. Thus, it appears that as security guards, *pristavy* were doing too little and too much at the same time.

Rapidity versus quality of the proceedings: prosecutorial bias of the court.

Judges of the Kirovskii Court worked under constant time pressure. They had to handle a heavy caseload within tight statutory deadlines. The Code of Criminal Procedure requires that a trial commence

within 28 days from the time an indictment is filed with the court.⁵⁶ The court administration places a high premium upon timely disposition of cases. As already mentioned, accusations of “sluggishness” pose a substantial career risk and can lead to demotion even of those judges who hold life appointments.

This difficult situation was further exacerbated by inadequate cooperation by other participants of the proceedings, which resulted in frequent postponements of the trials. Out of 75 proceedings observed, 30 were postponed often due to non-appearance of witnesses (in 13 instances) or defendants (in 5 cases). The court lacked the resources to efficiently deliver summonses, let alone to compel cooperation. Several judge interviewees pointed out that the lack of cooperation by other trial participants was one of the major difficulties in their work. The lack of cooperation was attributed, *inter alia*, to the low prestige of the court, which was neither respected nor feared.

An obvious way of handling a heavy caseload within tight time limits was to process cases rapidly. In fact, the observed trials proceeded at a high speed. The majority of the trials were completed within one hour, and in almost half of the cases, trials were over in 30 minutes or less.⁵⁷ To put it all in a proper perspective, one should consider the nature of the cases processed in such a rapid fashion. Most cases were factually as well as legally quite simple. The majority of the defendants did not contest their guilt and made full confessions in the open court. In those instances, the only real issue before the court was what kind of sentence should be imposed.⁵⁸ Such “open and shut” cases were unproblematic for the most part. The problems emerged, however, in cases of some complexity, legal and/or factual, where guilt of the defendant or at least its degree was seriously contested. Here, the desire to dispose of cases quickly combined with prosecutorial bias produced a troubling mix. Hurried and wary about displeasing

⁵⁶The CCP, arts. 223-1, 239. See also *Kommentarii*, *supra* note 35, 404, 419.

⁵⁷According to the observation sheets, 21 trials were concluded in 30 minutes or less while in another 11 cases the trial time did not exceed one hour. Only in 9 cases did trials take more than one hour and only 2 trials lasted over 2 hours.

⁵⁸Out of the total of 50 defendants tried, 34 did not contest their guilt.

supervising legal bureaucracy, judges had neither time nor desire to deal with complex issues. In such an atmosphere, legal rules were frequently treated as obstacles and either ignored or manipulated.

At the beginning of the trial, the presiding judge should explain to the defendant his rights.⁵⁹ An authoritative commentary emphasizes that mere recitation of rights is insufficient. The judge should elaborate on the relevant trial rights and make sure that the defendant understands them.⁶⁰ An adequate appraisal of rights becomes particularly important when defendants are poorly educated and appear in court unrepresented. That in fact was the lot of most defendants in the trials observed.⁶¹ In proceedings monitored by myself, the appraisal of rights was quite far from the requirements of the law. In most instances the list of the rights was read in a rapid monotone. No efforts were made at explaining their meaning or relevance for the case at bar. Defendants listened impassively and nodded sheepishly in response to the sacramental closing question whether “all was understood.”

Conspicuously absent from most judicial recitations of rights was the privilege against self-incrimination specifically guaranteed by the Russian Constitution.⁶² Out of eighteen trials personally observed, I noticed it mentioned only twice.⁶³ In the remaining cases defendants were called to testify without being warned that they had the right to remain silent. The constitutionally guaranteed privilege against incrimination of a close relative was violated at least in two cases. In the case of Redkina, her brother testified as a witness without being apprised of his right to excuse himself. In the case of Efimov,

⁵⁹The CCP, arts. 273. The judge is also duty bound to explain to other parties such as the victim or the civil plaintiff their respective rights. *Ibid.*, Art. 274.

⁶⁰*Kommentarii*, *supra* note 35, 436.

⁶¹Out of 50 defendants, 32 were unrepresented; only 5 defendants had higher education, 29 were high school graduates, 13 were high school dropouts, no information was recorded as to 3 defendants.

⁶²The Constitution, Art. 51, Sec. 1. The Russian Supreme Court decreed that the privilege against self-incrimination as well as the privilege against incrimination of a close family member should be explained to a person entitled to it prior to his/her testimony. Topornin, *supra* note 33, 340-41.

⁶³Case of Shtanko, 5/24/00 (Judge Popova); Case of Vergazov, 5/25/00 (Judge Granenkin).

charged with theft of his parents' property,⁶⁴ the defendants' mother and father both testified as witnesses without being apprised of this right.

Neither of the two judges could explain the reason for ignoring this constitutional rule. One can only speculate that, being under a pressure to convict, judges strongly disfavor any loss of evidence supporting the prosecution. Apprising defendants of their right to remain silent or close relatives of their testimonial privileges can eliminate the evidence indispensable for conviction or at least make a conviction more problematic. Probably for the same reason, the exclusion of evidence obtained by police coercion, mandated by law, has been unknown in the judicial practice of the Kirovskii Court,⁶⁵ in spite of the fact that all three groups of the legal profession believed that police were incompetent and lawless.

In the majority of the trials observed, prosecutors were absent.⁶⁶ In those instances when they attended, their trial performance was, in most cases, weak or worse. The same can be said about the trial work of the defense bar. Thus, the adversarial nature of the trials, with the burden of proof allocated to the prosecution, albeit earnestly declared by the law in books,⁶⁷ remained on almost unqualified fiction. In actual practice, the triangular structure of the trial postulated by written law – with two opposing advocates addressing a result-neutral, non-partisan court – was replaced by a binary structure. In most cases the court, guided by the policy of no-acquittals and without assistance from the prosecutor, confronted the defendant and tried to prove his guilt. As one of the most experienced judges of the Kirovskii Court told me: “It is not the prosecutor who is in charge of proving guilt, in fact I have to do it.” Such institutional orientation of judges decisively shaped the manner in which the trials were conducted.

⁶⁴Case of Efimov, 10/28/99 (Judge Batsunina).

⁶⁵The Constitution, Art. 50, Sec. 2, as well as the CCP, Art. 69, Sec. 3 mandate that evidence obtained by unlawful methods shall not be admissible in the court. According to judges as well as attorneys interviewees, the exclusion of such evidence has been unknown in the practice of the Kirovskii Court.

⁶⁶In 24 out of 45 trials observed the prosecution was not represented. According to the Kirovskii Court statistics in 1998, over 60 percent of trials were held without prosecutors and during first nine months of 1999 - over 64 percent of trials were so held. Memorandum from CJ Letnikov, *supra* note 23.

Strenuous efforts were made by the judges to present and evaluate evidence consistently with the allegations of the indictment. Inconsistencies were either “purged,” interpreted away, or ignored. Contestations of guilt, for the most part, fell on deaf ears. Several methods were at work here. In the case of Kaushan and Poliakov,⁶⁸ the defendants charged with aggravated assault contested their guilt. The presiding judge, instead of questioning crucial prosecution witnesses, read from the dossier their depositions before the investigator and asked the witnesses to confirm them. This gross violation of the Code of Criminal Procedure (CCP) met with no objections from the defense attorneys representing either defendant. In some cases, even slight hesitation by a witness led to prompting by the judge who reminded the witness of her statement made before the investigator and urged her to confirm it.⁶⁹

Another technique consisted of bending defendant’s confessions so as to make them fully consistent with the allegations of the indictments. In two cases,⁷⁰ defendants admitted their guilt in part, but challenged some aspects of the indictments (for example, the alleged monetary value of the property stolen). Here, the judge used her persuasive skills to convince the defendants that their reservations should be abandoned since they would make “no difference” in terms of severity of punishment. Apparently, the persuasion worked: the defendants “reconsidered” and confessed in full.

Still another method was at work when defendant’s trial testimony was grossly misrepresented in the judgment in order to justify the conviction. Illustrative is the case of Luchin and Grizian.⁷¹ The defendants were charged with aggravated theft of an automobile. Both prisoners, while admitting the unlawful taking of the vehicle, denied that they had acted with intent to steal it. The intent to steal, an

⁶⁷The Constitution, Arts. 49, 123 Sec. 3.

⁶⁸Case of Kaushn and Poliakov, 10/27/99 (Judge Zaroits).

⁶⁹Memorandum from Professor N.G. Stoiko discussing results of trial observation. November 1999.

⁷⁰Case Sokolov, 10/21/99 (Judge Batsunina); Case of Ryzhyi and Shchegolakov, 10/25/99 (Judge Batsunina); Memorandum from Stoiko, *supra* note 69.

⁷¹Case of Luchin and Grizian, 5/29/00 (Judge Striezsh).

essential element of the crime charged, remained the main point of controversy throughout the trial and was debated at the end of the trial by the prosecutor and the defense attorney. Conviction followed. In the judgment is an astounding statement that both defendants “fully admitted” their guilt, a gross misrepresentation of what actually took place.⁷²

Finally, in some proceedings observed, evidence of guilt was conspicuously absent. The judicial responses were of two kinds. First, files were sent back to the Procuracy for “additional investigation,” although it was clear that there was nothing left to investigate and that according to the written law defendants should have been acquitted.⁷³ The no-acquittals policy was obviously at work here. Illustrative for this method are the cases of Redkina⁷⁴ and Sedlov.⁷⁵

The second kind of response was a conviction against the weight of evidence. Illustrative is the case of Ufimtsev.⁷⁶ The defendant was charged with deadly assault committed under conditions of “excessive self-defense.” The court found as a matter of fact that the defendant and his girlfriend were repeatedly assaulted by two criminals, that they in vain sought police protection and that the defendant struck a deadly blow while being simultaneously attacked by the two armed thugs. One is completely at loss to understand how from these findings the judge could jump to a conclusion that Ufimtsev

⁷²The judgment of May 30, 2000, a copy on file with the author. It should be noted that the intent to steal the car could be inferred from independent evidence. Therefore, the distortion of the record was gratuitous.

⁷³The Constitution, Art. 49; see also komentarii, *supra* note 34, 422 (commentary to the CCP, art. 258).

⁷⁴*Supra* note 52. Redkina was charged with aiding two principal actors in a theft of some meat and cash. Both principals consistently testified that Redkina intentionally helped them only in stealing meat, but was unaware that they would also steal cash. No other evidence was presented. Thus according to the presumption of innocence Redkina should have been acquitted of complicity to the theft of money. Instead, the judge sent the file back to the Procuracy for reinvestigation.

⁷⁵Case of Sedlov, 10/14/99 (Judge Batsunina). Memorandum from Professor A. Gorelik. #2, November 1999.

⁷⁶Case of Ufimtsev, 10/14/99 (Judge Yakovleva).

“exceeded the limits of self-defense.” In fact, the judge made no effort to explain her position by pointing out *how* or *at which point* of the encounter boundaries of self-defense were exceeded.⁷⁷

A number of procedural shortcuts were taken by judges just in order to speed up the handling of the cases. The indictments were often not read out in their totality at the trial as required by the CCP, the content of the documentary evidence was almost never orally presented at the hearing, but documents were rather quickly listed as a part of the prosecution case.⁷⁸

The right to defense in theory and practice

Russian law guarantees the right to defense in criminal cases, including the right to an appointed counsel who should be provided free of charge to impecunious defendants.⁷⁹ The CCP stipulates that the participation of a defense counsel shall be *mandatory* in several types of cases including all trials held with the participation of the public prosecutor.⁸⁰ The right to counsel, including where participation is mandatory, may be waived, but only on a defendant’s own initiative. In this connection, the Russian Supreme Court ruled that a defendant may not waive his right to an appointed counsel unless his services are first actually secured. Otherwise, the waiver shall be deemed void as involuntary. In other words, the right to counsel whose participation is mandatory may be waived only in the presence of an attorney whose services are first secured. A violation of the standard is to be treated as a reversible error on appeal.⁸¹

⁷⁷Judgment of October 14, 1999 on file with the author. Adding an insult to an injury, the court sentenced Ufimtsev to the maximum term of imprisonment permitted by the statute (the Criminal Code, Art. 114); the defendant, who already had spent some time in pretrial detention, was rearrested in the trial room. The appellate brief initially filed by Ufimtsev’s trial counsel was later withdrawn for reasons unknown to this writer.

⁷⁸Comp. the CCP, Arts. 278, 292; see also *Kommentarii*, *supra* note 35, 422.

⁷⁹The Constitution, Art. 48, Sec. 1, Topornin, *supra* note 33, 328-329.

⁸⁰The CCP, art. 49.

⁸¹The CCP, Art. 50; *Kommentarii*, *supra* note 35, 94.

The correspondence between the right to defense counsel guaranteed by the written law and the mundane reality of the judicial practice in Krasnoyarsk is, to put it mildly, rather loose. Contemporary Russia does not have organizations analogous to American public defender's offices. Most defendants cannot afford to retain a lawyer while the system of court appointed attorneys simply does not work. In consequence, the impoverished population in Krasnoyarsk is deprived of meaningful defense in criminal cases.

The court (or at the earlier stages of the process an investigator or a prosecutor), in theory, has the legal authority to appoint defense counsel from among the bar members. Lawyers so appointed have a corresponding duty to provide the defense. An appointed attorney should be compensated for his work by the government. The reality, however, is different. By most accounts, monetary compensation has been either non-existent or so minuscule that it was hardly worth the time needed to fill out the necessary applications. Interviewed bar members considered this kind of defense work as an unpaid labor unfairly imposed on them.⁸² Judges of the Kirovskii Court almost in unison complained that attorneys have been doing their best to avoid the burden and that the judiciary has no effective means to impose it on the unwilling.

Moreover, according to several judges, the quality of defense work by court appointed lawyers was poor, much inferior to the representation by those privately retained. In the trials observed, most defendants (32 out of 50) appeared before the court unrepresented. The principle of "mandatory representation" stipulated by the written law was perversely caricatured in practice. Lawyers called upon to fulfill the function often make *pro forma* appearances only to use their persuasive skills to convince indigent defendants that they should waive their right to counsel and/or to validate such waivers by their

⁸²Interviews with attorneys A, B, C. The phenomenon that attorneys appointed to represent indigent defendants are either paid inadequately or not paid at all has been nationwide. See Topornin, *supra* note 33, 328.

presence.⁸³ These waivers are duly recorded in the minutes of the trial in order to shield the trial court from being reversed on appeal: it would appear on the record that a trial counsel was “secured” and therefore the waiver was not imposed on the defendant.

Such waivers also benefit attorneys by freeing them from unpaid labor while earning them some credit for being helpful to the court. I was unable to find out what possibly drew the defendants into the game. Perhaps they were promised, *sub rosa* or otherwise, some leniency in return or advised that the participation of an attorney wouldn’t make any difference. This collective game of appearances and evasions is called in the local professional jargon the “system of insurance” (In Russian - *podstrakhovka*), an allusion to insuring trial courts from being reversed on appeal. The immortal idea of Prince Potemkin has resurfaced.

In several observed cases tried with participation of public prosecutors, defendants were not represented.⁸⁴ The trials nonetheless proceeded in clear violation of the CCP. Whether in this instance judges simply thought that the judgments would not be appealed and they could “get away” with the violations or whether fictitious participation of attorneys was later entered into the record to cover up the violations is anybody’s guess. The quality of the defense counsel trial performance was, with very few exceptions, unimpressive and sometimes plainly incompetent. In several cases defense counsel missed rather obvious legal arguments while concentrating on irrelevancies.⁸⁵

Moreover, in the already mentioned case of Kaushan et al., an attorney for the first defendant arrived in the court room about 45 minutes late and missed a good part of his client’s testimony. The trial

⁸³Case of Luchin et al. *supra* note 71; Case of Ryzhyi and Shchegolakov *supra* note 70; Case of Bakariukin, 10/29/99 (Judge Batsunina); Case of Zigmunt, 10/27/99 (Judge Striezkh).

⁸⁴Case of Ivanchenko, 10/13/99 (Judge Yakovleva); Case of Baranova, 10/13/99 (Judge Yakoleva); Case of Solovlev, 10/26/99 (Judge Yakovleva).

⁸⁵Case of Garmanshchikov, 11/3/99 (Judge Zaroits). In this case counsel missed the obvious point that his client did not entertain the intent to defraud; the judge raised it *ex officio*. Instead, counsel argued that, but for the victim’s complaint, police would never have found out about the crime. The argument was obviously nonsensical. Case of Mikhail, 5/25/00 (Judge Popova). Trial counsel missed an obvious legally relevant point regarding a charge of

proceeded as if his absence were of no consequence. Having arrived late, the attorney divided his time between operating his noisy beeper and repeated trips out of the courtroom. All of the above was completely ignored by the presiding judge who was nervously rushing the case to its conclusion. One should add that the charges in the case were serious, the case involved substantial factual controversy and the stakes were high. Kaushan was convicted and sentenced to sixteen years of imprisonment.⁸⁶

Prejudicial errors committed by a judge or a prosecutor were tolerated without objections.⁸⁷ Some judges, in their efforts to dispose of cases expeditiously, showed little regard for the defendant's right to choose an attorney. Illustrative is the case of Fatykha.⁸⁸ The attorney retained by the defendant did not appear due to an illness. The defendant refused an offer by the judge to proceed with a substitute attorney who was just found in a hallway, was unfamiliar with the case and whom the defendant had never seen before. The substitute lawyer offered her services, apparently as a courtesy to the court, without consulting the defendant. The judge sternly questioned Fatykha whether he *categorically* refused to proceed in the absence of his retained counsel. In spite of the pressure, the defendant ultimately prevailed; the trial was postponed, to the visible chagrin of the judge whose main concern was to dispose of the case quickly.

A good deal of light on the issues related to the right to defense was shed by the interviews with judges as well as members of the defense bars. The majority of judge interviewees characterized the defense bar as professionally weak. In the opinion of some, only about 10-15 percent of defense attorneys worked conscientiously and competently. The remaining ones were of "little or no use." Many

destruction of property. Again the issue was raised *sua sponte* by the judge who properly dismissed irrelevant argument made by the counsel.

⁸⁶Case of Kaushan and Poliakov, *supra* note 69.

⁸⁷As mentioned earlier, in case of Kaushan and Poliakov, *supra* note 69, neither of two defense counsel objected to grossly improper presentation of evidence by the presiding judge.

⁸⁸Case of Fatykha, 5/26/00 (Judge Popova). The trial was postponed due to the absence of an attorney retained by the defendant.

lawyers resorted to unethical methods, such as lying to their clients, tricking the judges, etc.⁸⁹ A serious concern about unethical or even corrupt conduct among attorneys was voiced by some eminent bar members as well. In their view, the standards of admission to the bar organizations⁹⁰ are too low, allowing some unworthy individuals to become licensed to practice law. There is also no quality control over attorneys' work. Some lawyers with "connections" "fix cases" and "share their fees" with investigators. In other words, some lawyers serve as conduits for bribery.⁹¹

There are very serious difficulties with securing defense counsel for the indigent. While the need for such services is enormous, attorneys by appointment often do not show up for trials, forcing postponements.⁹² Some manage to persuade defendants to waive their services.⁹³ All judge interviewees, with one exception, emphasized that representation by appointed attorneys is of a very poor quality: they come to trials unprepared, do not question witnesses, deliver closing arguments full of cliché and lacking in factual and legal analysis. In essence, they are figureheads of no help to the defendants.⁹⁴

⁸⁹Five judge interviewees characterized the defense bar as professionally weak; two of them complained about unethical practices by attorneys.

⁹⁰Lawyers practicing in the city of Krasnoyarsk belong to several bar organizations. The majority, 184 attorneys, belong to the "traditional" Regional Bar Organization (in Russian – *Kraevaya Kollegia Advokatov*), a carry-over from the Soviet era. Those attorneys work in eight law firms (in Russian – *iuridicheskie konsultatsii*) which in theory at least, are supervised by the traditional bar organization. In addition, there are 102 attorneys in the city who belong to several "alternative" bar organizations headquartered in Moscow or in St. Petersburg. Members of the "alternative" bar organizations established five law firms in the city of Krasnoyarsk. Memorandum from Professor Gorelik #3, November 1999. There is definitely some antagonism between the "traditionalists" and the "alternatives"; the former feel that the alternative bar organizations maintain law standards of admission or no standards at all.

⁹¹Interviews with attorneys A and C.

⁹²Interview with judge I.

⁹³Interviews with judge K and attorney B.

⁹⁴Similar views were expressed by several prisoners awaiting trial in the detention facility (known as SIZO) in Norilsk. Most of the inmates with whom I had a chance to talk in November 1999 did not retain lawyers due to lack of funds. To my question why they didn't ask the court to appoint a lawyer, each prisoner replied promptly "such lawyers are of no help" or "they are useless, they just sit there."

Even though there is some overlap between the opinions of judges and members of the practicing bar, the latter group tells a very different story.⁹⁵ Their view boils down to the following essential points. The right to defense is severely curtailed both by the prevailing law and by the existing judicial and administrative practice:

a) The law does not allow a defense attorney to investigate his client's case, interview witnesses, call an independent expert, etc.;

b) Judges show a strong prosecutorial bias: as a highly respected *advokat* put it they "read the prosecutor's lips." There is the policy of no-acquittals imposed by the Regional Court. In effect, judges are afraid to render judgments of acquittal;

c) Under the circumstances, the defense counsel is perceived by judges as an "obstacle," treated with distrust, if not hostility. Equality of arms between the prosecution and the defense, the adversarial nature of the trial postulated by law – both are unmitigated fictions;

d) Involuntary confessions extracted by police through beatings, torture, or intimidation are very common.⁹⁶ Nevertheless, judges almost never exclude such evidence. Inquiries into police abuses are extremely perfunctory. The law mandating exclusion of evidence obtained by unlawful methods⁹⁷ remains for all practical purposes a dead letter;

e) Investigators often convince the suspects, whose right to counsel attaches at the time of arrest or at the time of presentation of formal charges,⁹⁸ to waive this right. Again, participation of a defense counsel is viewed as an obstacle;

f). Defense bar members have to work in very poor professional conditions. Neither their law firms nor bar organizations provide any technical support such as computers, photocopying machines, or

⁹⁵Based on interviews with seven members of the defense bar.

⁹⁶This subject deserves a separate, more extensive discussion.

⁹⁷The Constitution, Art. 50, Sec. 2; the CCP, art. 69, Sec. 3.

professional literature. All of the above have to be purchased from personal funds; moreover such expenses are not considered tax deductible. In most courts, attorneys can study case files only in the presence of a judge and only during office hours. (The Kirovskii Court is in this regard more accommodating than other courts.); and

g). The function of the defense counsel is neither appreciated nor properly understood in governmental circles or in society at large. Defense attorneys are still perceived as “allies of criminals.” The attitudinal legacy of the Soviet era is still heavy.⁹⁹

It is my overall impression that there is strong antagonism between the judges of the Kirovskii Court and the defense bar. Mutual recriminations were present in the course of most interviews. On the other hand, there is a key area on which their views substantially overlap: both groups agreed that there is a standing policy of no-acquittals. Both were of the opinion that displeasing the legal bureaucracy or the notables of the local government creates a career risk for judges who, therefore, are not free to decide cases according to the evidence presented, the rules of written law and their conscience. There is consensus regarding the low social prestige of courts. Both judges and attorneys recognize that there is a desperate need for free legal services for the impoverished residents of the city. There is also an area of “corporate solidarity,” in which both groups cooperate in order to move forward a heavy case load using insufficient resources. Creating the largely fictitious mechanism of defense work by appointment is a part of this game.

Daily practice of lay participation

According to the prevailing rules of Russian criminal procedure, personal composition of the trial court at the district level is of two kinds. First, cases involving crimes punishable by deprivation of freedom up to five years may be tried before a single judge. Second, when a crime charged is punishable

⁹⁸The Constitution, Art. 48, Sec. 2.

by deprivation of freedom in excess of five years, the trial court shall consist of a panel including a presiding professional judge and two “people’s assessors” (in Russian – *narodnye zasedateli*).¹⁰⁰

Assessors are endowed with equal legal authority with the judge: they should participate in deciding all factual and legal issues that arise at the trial, and they are legally independent.¹⁰¹

Since the dissolution of the Soviet Union, the rules regarding participation of lay assessors have changed significantly. Under Soviet law, lay assessors were to participate in *all criminal trials*. The principle was solemnly declared by both the 1936 and the 1976¹⁰² Constitutions and proclaimed by legal propagandists as evidence of “genuine power by the people,” “the true democracy,” etc. The number of people’s assessors in the USSR was astronomical: in 1984 it was reported at 700,000.¹⁰³ The process of selection of assessors sitting in district courts was based primarily on places of employment, as well as, to a lesser extent, places of residence. This rather chaotic process was presented as “elections by open ballot.” Assessors for specific trials were handpicked by court personnel from lists formed by such “elections.” Their trial attendance was assured by cooperation between court employees and organizational networks at the places of their employment (Communist Party cells, trade unions, management of state enterprises). Assessors were guaranteed full pay by their employers for the days spent in court.¹⁰⁴

With the fall of the Soviet Union, the organizational networks which assured selection and trial attendance of lay assessors crumbled quickly. There were no more party cells or trade unions to whom

⁹⁹Interview with attorney B.

¹⁰⁰The CCP, arts. 15, sec. 1, 35. A panel consisting of a judge and two assessors is mandated also in all cases where defendants are juveniles.

¹⁰¹*Ibid.*, art. 15, sec. 4.

¹⁰²The 1936 Constitution of the USSR, Art. 103; the 1976 Constitution of the USSR, Art. 154.

¹⁰³See for example, V.M. Semenov, *Sud i pravosudie v sssr* (Court and administration of justice in the USSR) 47-48 (1984); M.T. Ponedelkov, *Uchastie narodnykh zasedatelei v rassmatrenii ugolovnykh del* (Participation of people’s assessors in criminal cases) 6-7 (1978).

court personnel could turn for help. Profit seeking employers were unwilling to excuse their workers for court duty, let alone to pay them for the time spent on trials. From the very beginning of the post-Soviet era courts ran into organizational difficulties with the recruitment of lay assessors. To their rescue soon came the legislature. During the past decade, the law on lay participation (arts. 15 and 35 of the CCP) was amended twice – first in May 1992 and again in December 1996. Both amendments substantially shrank the requirement of lay participation at the district level and correspondingly expanded the decision-making authority of a single judge to its current level.¹⁰⁵

However, even within the altered legislative framework, difficulties with securing assessors' participation persisted: employers remained unwilling to excuse their workers let alone pay them for the days spent in court. In impoverished Russia, plagued by high unemployment, people lucky enough to have jobs were unwilling to jeopardize them for the sake of attending to a civic duty. In any case, the sense of the civic duty is barely alive. At the same time, courts have been too weak to force compliance upon the unwilling.

Thus, Russian courts faced a serious problem in meeting the legal requirement of lay participation in these changed circumstances. Seeking a practical solution, courts turned to a segment of the population that was eager to cooperate – pensioners. In this regard, the practices described below in the Kirovskii Court seem to be typical not only for the city of Krasnoyarsk, but for the country at large.¹⁰⁶ According to chief judge Letnikov, the Kirovskii Court, which serves an urban district of 115,000 residents, maintained a list of 32 persons eligible to serve as lay assessors, all of whom were pensioners. The list was originally

¹⁰⁴Semenov, *supra* note 103.

¹⁰⁵V.N. Savitskii, "Novyi UK i staryi UPK: problemy vzaimodeistvia" (The New Criminal Code and the Old Code of Criminal Procedure: Problems of Interaction) in *Ugolovno-protsessual'nyi kodeks RSFSR* (The code of criminal procedure of the RSFSR), xxxiv (1997).

¹⁰⁶N. Radutnaia, "Formirovaniie sostava narodnykh zasedatelei" (Formation of the Corps of People's Assessors). *Rossiiskaia iustitsiia* 2000, No. 4, 14.

proposed by the chief judge, who selected the candidates on the ground of their past performance. The final appointment was made by head of the district administration.

The pensioners assessors were paid 55 rubles per day for their time spent in court. The average monthly allowance per assessor was between 300 and 350 rubles. Considering that an average pension was about 400 rubles a month, the allowance paid by the court must have been financially significant for most lay assessors. They were called for duty and assigned to individual judges by the chief judge at his discretion. They were also occasionally used as carriers delivering court summonses. In effect, lay assessors were turned into semi-professionals, heavily dependent upon good will of the chief judge as well as his fellow judges. They certainly did not represent a fair cross-section of the local community, nor could they function as an effective check on the legal professionals. Out of the total of 45 trials observed, assessors sat in 24; moreover, out of 30 trials postponed they were present in 14. Thus out of the total of 75 proceedings observed, assessors were present in 38 cases.

In these proceedings we registered 21 individuals serving as lay assessors. Consistent with the information from the chief judge, all assessors sitting in the monitored proceedings were pensioners, the youngest was 55, the oldest, 84; the great majority (18) were women. In 24 trials brought to a conclusion, (with the participation of 18 individuals serving as lay assessors) we had a chance to observe their behavior during the trial, including their interaction with the judges. The judges, while reasonably polite toward lay panelists, usually did not pay any attention to them either. Only very exceptionally (in 3 instances) were there any noticeable efforts made by the judges to encourage assessors' active participation. In the great majority of cases such efforts were conspicuously absent. Typically, assessors remained entirely passive throughout the trial and did not show any interest in the cases heard. In about a half dozen cases, one of the assessors asked a single question mostly of marginal significance. In only one case out of 24, was a truly active involvement by one of the assessors observed.

Needless to say, observation of trials tells only one part of the story regarding assessors' involvement in the process. By observing their behavior in public, one still cannot tell how assessors

behave during secret deliberations and how they vote on the issues of guilt and punishment. Regarding these subjects, judges have unique opportunities to observe and evaluate assessors' real input in the court's decisions. Here, the opinions of the judges were nearly unanimous: all judge interviewees, with a single exception, considered lay assessors' input to be close to non-existent and their participation to be useless – a sheer facade, lip service paid to the formal requirement of law. According to judges, assessors *never* influence decisions on guilt and *exceedingly rarely* sentencing decisions. Several judges mentioned that they had *never* changed their minds *on any issue* in the process of deliberations with lay assessors.

Fairly typical is the following statement by one of the judges:

The function of an assessor boils down to this: to agree [with a judge], to register his presence in the court, to sign a judgement. They exert absolutely no influence.¹⁰⁷

Another judge volunteered that lay assessors being recruited exclusively from pensioners:

are coming regularly and even eagerly; they are bored at home, they had plenty of time, they are paid. There were incidents when an assessor fell asleep during the trial. I sat with one who even loudly snored. I was horrified.”¹⁰⁸

And yet, most judges were not against the *very idea* of lay participation in the administration of criminal justice, however critical they might be about its current implementation. Indeed, most of the interviewees were quite enthusiastic about the jury system, so far absent from the Krasnoyarsk region as well as from most of Russia.¹⁰⁹ In order to test their real sentiments about lay participation, I confronted them with the following hypothetical:

Suppose that someone close to you personally, for example a member of your family or a good friend, is bound for a trial on serious, contested charges. What kind of a tribunal would you prefer as giving the best hope for a fair result? In particular, would you prefer that the trial be held before a single judge, a panel of three judges, a mixed tribunal composed of one judge and two lay assessors, or before a jury?”¹¹⁰

¹⁰⁷Interview with judge J.

¹⁰⁸Interview with judge G.

¹⁰⁹*Kommentarii*, *supra* note 35, 682.

¹¹⁰For this hypothetical, I am indebted to the authors of a major Polish empirical study on the subject. *Comp. udział lawników w posepowaniu karnym* (Participation of lay judges in criminal proceedings) (1970).

In response, all judges but two expressed preference for a trial by jury as a superior way of guilt adjudication on two principal grounds. First, jurors enjoy genuine independence and therefore are able to render verdicts consistent with their conscience and presumption of innocence. They are neutral, free from prosecutorial bias and therefore able to express their position without fear of consequences. This quality of genuine independence and neutrality of the jury several judges juxtaposed and contrasted with their own situation of dependence and fear of the consequences from rendering decisions displeasing superior legal bureaucracy. Second, jurors, who come from all walks of life, are not confined by legalistic, stereotypical thinking characteristic of professional judges. Thus, jurors are better able to appreciate the unique facts of each case and, in some circumstances, refuse to apply the letter of the law in order to avoid unjust, inequitable results in concrete cases.

All of the interviewed defense attorneys expressed opinions identical with or very similar to those of the judges. They also regarded lay participation in its present form as thoroughly discredited. In their view, lay assessors are meaningless "pawns," "noddors" (in Russian - *kivaly*), financially dependent on the court administrators and totally subservient. In actual practice, decisions are made by judges, with whom assessors invariably agree. An assessor voicing her disagreement would never be called again and would, therefore, lose her allowance. In some districts of the city, courts' clerical employees were serving as lay assessors. As one of the attorney interviewees, a former judge, put it, lay assessors "are merely *present*, but do not really *participate*."¹¹¹ All members of the defense bar expressed their strong preference for trial by jury. The main virtue of the jury was seen in jurors' genuine independence and the absence of prosecutorial bias attributed to judges.

All of the interviewed prosecutors were likewise very critical about lay participation as practiced in its present form. Lay assessors were again criticized as meaningless pawns devoid of any real influence in the decision-making process. Some prosecutor interviewees proposed to abolish the very

¹¹¹Interview with attorney A.

institution of lay assessors as an obsolete carry-over from the Soviet era. Those expressed strong preference for the jury system. Others believe that the institution of lay assessors should be reformed and perfected rather than abolished, since the jury system is “inappropriate for Russia.” Those prosecutors believe that lay assessors, if properly selected and prepared, would be capable of fulfilling their mission, that is to say, to put a check on professional judges and inject community values in the process of adjudication.

To sum up: Trial observation, information obtained from the court administration, as well as interviews with legal professionals demonstrate that lay participation as currently practiced has been a sham. And yet, most interviewees were not against the *very idea* of lay participation, however critical they might be about its current implementation. Indeed, most interviewees were quite enthusiastic about the jury system, so far absent not only from the Krasnoyarsk region, but from most of Russia. Its chief merit was seen as jurors’ genuine independence, their ability to decide cases freely, without administrative or political pressures, and without “fear of consequences.”

Unfortunately, nothing in the current developments in Russia suggests that the right to a trial by jury, promised by the 1993 Constitution,¹¹² will be implemented soon, if at all. For now, trial by jury remains beyond the reach of the overwhelming majority of criminal defendants. First of all, the prevailing legislation does not allow for jury trials at the district court level, meaning that about 95 percent of criminal cases are excluded as a matter of general rule.¹¹³ Second, even within such narrow jurisdictional limits, trials by jury have been instituted in only nine out of eighty-nine Russian provinces, and no new developments on this front have been registered since July 1993.¹¹⁴ For all practical purposes, the jury system exists only on paper with no progress in view.

¹¹²The Constitution, Art. 47, Sec. 2. This provision because of its flexibility actually guarantees next to nothing since the determination of the scope of the right is delegated entirely to ordinary legislation.

¹¹³The CCP, arts. 36 and 421. See also *Kommentarii*, *supra* note 35, 682.

¹¹⁴*Ibid.*

Instead, the legislature tried recently to resuscitate the old system of lay participation by adopting the Law on People's Assessors of Federal Courts of General Jurisdiction in the Russian Federation.¹¹⁵ The statute tries to eliminate the discredited practice of using pensioners or other hand picked semi-professional figureheads as lay assessors. It requires that lists of persons eligible to serve as lay assessors be broad-based so as to reflect a cross-section of the local communities; the lists shall be issued by the local representative bodies according to the detailed procedure provided for by the statute (art. 2). Assessors for specific cases are to be randomly selected by judges from such lists (art. 5). No one should be called to serve as a lay assessor more often than once a year for a maximum period of 14 days (art. 9); assessors are guaranteed an average pay at their places of employment for the time spent in court (art. 11).

The statute includes also a number of other provisions whose purpose is to ensure assessors' independence as decision makers.¹¹⁶ Reportedly, the passage of the law, thoughtlessly adopted without any transitional provisions allowing for a gradual phasing out of the old system, "paralyzed" Russian courts for a certain period.¹¹⁷ To the rescue came a presidential edict allowing courts to continue the existing practice during a loosely defined period of transition.¹¹⁸ Thus, the operation of the new statute was effectively suspended almost as soon as it was adopted. Whether the well-intentioned and fairly complex new law will be faithfully implemented is anybody's guess. The socio-economic conditions prevailing in Russia are anything but favorable for its effective implementation. A wait-and-see attitude seems to be the only reasonable one at this point.

¹¹⁵The statute was signed into law by the reigning President Putin on January 2, 2000, *Sobranie zakonodatel'stva RF* No. 2, Item 158.

¹¹⁶*Ibid.*, art. 12. For a further discussion see Kuchinaia, *supra* note 106.

¹¹⁷Konstantin Katanyan, "Putin Helps to Arrest New Backlogs in the Court System." *Izvestia*, January 29, 2000, 3, available on Lexis-Nexis.

¹¹⁸Edict of January 25, 2000, SZRF No. 15, Item 473. The edict extended tenure of lay assessors selected under the old system until courts receive new "registers of people's assessors" approved by the local representative bodies.

Court administrators, in view of past experience, seem to regard the new law with a good deal of skepticism. During my second research trip to Krasnoyarsk in late May 2000, the old mechanism of selection of lay assessors was still in operation. The chief judge of the Kirovskii Court was hopeful that it would remain in place for a long time, since the new, fine-tuned legislative scheme promised nothing so much as an administrative nightmare. Reportedly, the prediction fully materialized. The new system, theoretically made operational in Krasnoyarsk since October 2000, proved totally unworkable.¹¹⁹

Concluding remarks

1. In comparison with other district courts in Krasnoyarsk, the Kirovskii Court was run well. The chief judge was an able and hardworking administrator, who enjoyed an excellent reputation among his fellow judges, as well in a larger legal community. Most judges of the Kirovskii Court are hard-working individuals. The housing conditions as well as technical support here were superior to those of sister courts in the city. Therefore, the flaws in the process discussed in this paper, in my opinion, cannot be attributed to the shortcomings of the individuals involved or to the deficiencies of the particular court. There is no reason to believe that proceedings were conducted differently elsewhere in the city district courts. To the contrary, it is my strong impression that the flaws described here were rather systemic. This hypothesis, of course, based on a limited empirical sample, needs to be verified in a broader based and more rigorously structured study.

2. A longer period of monitoring could give an observer a reasonably good sense about the “normal” functioning of the institution. Although a five-week period of observation did not eliminate all “accidentalities” in the functioning of the court, nonetheless, it was long enough to convey a picture of the institutional routine. In this connection, it should be emphasized that the present investigation covered proceedings conducted by eight judges, the great majority of the judges of the Kirovskii Court.

¹¹⁹Oral communications: May 26, 2000; January 4, 2001.

Therefore, the relevant characteristics of the process can be attributed to the established institutional pattern, rather than to personal habits of individual judges.

3. The official status of Russian judges has improved compared to their situation under Soviet rule. A growing number of judges have life appointments – in Kirovskii Court, five judges out of ten have been so appointed; the overall situation in the Krasnoyarsk district courts approximates that level.¹²⁰ Judges are better paid, particularly since September 1999, when judicial salaries were significantly increased, they enjoy other employment benefits, for example, long vacations, relatively high pensions, as well as legally guaranteed immunities.¹²¹ Crude interference with adjudication by power holders, known as “telephone justice,” has largely disappeared or has taken on more subtle forms.

Nonetheless, judicial independence is still far from triumphant, since various new dependencies have emerged. First of all, judges are heavily dependent upon court administrators at several levels, in particular upon the chief judge of the district court and the superior court administrators. Moreover, judges are dependent upon the regional legislature which has the authority to endorse or to veto judicial re-appointments. Reportedly, telephone calls from deputies to the regional assembly, asking judges to consider with “great care” particular cases still occur. Finally, courts are financially dependent upon the good will of the district administrators, who may grant or deny contributions to the courts’ notoriously money starved operating budgets.

Displeasing the superior legal bureaucracy still carries a serious career risk. Consequently, judges do not feel free to render decisions according to the requirements of written law and their conscience when such decisions would violate policies imposed by the Regional Court. As some of them put it candidly, they are intimidated. In particular, two policies left their unmistakable imprint upon judicial decision-making. First, as previously discussed in detail, the doctrine of no-acquittals

¹²⁰According to official statistics as of June 30, 1999, slightly over 44 percent of all district court judges in the city of Krasnoyarsk held life appointments. *Svedeniia o sudakh ze 6 mesiatsev 1999*, *supra* note 29.

substantially tainted the whole process of adjudication. Second, the policy of deference to prosecutorial decisions regarding pre-trial detention turned legally mandated judicial review of such decisions into empty formality. In fact, judges in unison declared their lack of authority in monitoring factual justification of pretrial detention in spite of clear statutory language to the contrary.¹²² For related reasons, allegations of confessions coerced by police have been met with judicial indifference. Even though some judges recognize that brutal methods of interrogation by police detectives have been a problem, the institutional memory of the Kirovskii Court has not registered even a single instance of exclusion of a confession as involuntary. Unfortunately, lay assessors, for reasons explained in the proceeding section, are unable to put a check on biased judges.

4. The docility of judges, their deferential attitude toward court administrators and the Procuracy, and their lack of assertiveness cannot be attributed to bureaucratic pressures alone. The arrogance of the court administrators and local politicians and the docility of judges have grown, to a large extent, from the same tradition – all are parts of the attitudinal legacy of the Soviet era. This factor, to some extent inherent in every period of transition, was in Krasnoyarsk, and, one surmises, in Russia generally, strengthened by continuity of personnel. The Regional Court administrators in Krasnoyarsk had been members of the Soviet *nomenklatura*. In fact, Roman D. Khlebnikov, until recently the powerful chief judge of that court, occupied the same position under the old regime.¹²³ His successor, acting chief judge Dvoekonko, also has a long record of service in the Soviet bureaucracy. Most judges of the Kirovskii Court either held judicial appointments or worked as court clerks under the old regime. That life

¹²¹See note 22 *supra* and the accompanying text.

¹²²The CCP, Art. 220-1, Sec. 1, gives courts the authority to review not only “legality” (in Russian - *zakonnost'*), but also “well foundedness” (in Russian - *obosnovannost'*) of the prosecutors decisions in this regard.

¹²³Khlebnikov was forced to retirement amidst allegations of serious financial irregularities. *Doklad o polozhenii s pravami cheloveka v Krasnoyarskom krae za 1999*, *supra* note 26, 10.

experience must have influenced their views regarding the nature and function of the judiciary; it certainly could not build attitudes of independence and assertiveness.

Moreover, the professional stature of the judges appears to be rather weak – most of them received legal education of an inferior kind and never held professional jobs outside of the court system. It is only natural that this kind of person feels more vulnerable vis-a-vis superior legal bureaucracy. This raises a much broader question of whether reforming the Russian judiciary on the basis of Soviet incumbency was the best way to proceed. How realistic was it to expect that Soviet judges and Soviet court administrators would be quickly converted to a new, democratic legal ideology and would become a mainstay of the rule of law. Already at the end of the Soviet era an alternative solution was proposed. At the First International Sakharov Memorial Congress, in May 1991, for example, a proposal was submitted to the effect that the Russian court system should be built anew rather than reformed since the Soviet Union never had a court system worthy of the name.¹²⁴

That route was much more difficult since professionally qualified candidates for judicial offices untainted by service in the Soviet bureaucracy were few and far between. Should such anticipated difficulties prevent the reformers from trying is still, from the perspective of the past decade, a nagging question. Whether such an endeavor would succeed, or would rather be crushed by a combination of inertia and vested interests of the incumbents is another question.

My overall impression is that the rule of law has made rather limited inroads into the day-to-day operations of criminal courts in the deep Russian provinces. The correspondence between earnestly declared legal principles and the mundane reality of judicial practice is loose and at some crucial junctions, plainly non-existent. Behind a thin facade of a new legal ideology, the band plays an only slightly modified old tune.

¹²⁴Recommendations and Proposals of Experts, “Reform of Legal Institutions – Recommendations Regarding Judiciary” on file with the author.