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William Burnham

Wayne State University Law

Jeffrey D. Kahn

Southern Methodist University, Dedman School of Law

Author ORCID Identifier:

Jeffrey D. Kahn:  <https://orcid.org/0000-0002-8857-5647>

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Russia's Criminal Procedure Code Five Years Out

William Burnham and Jeffrey Kahn

Abstract

After a long delay in drafting, a new Criminal Procedure Code for Russia was passed in 2001 and went into effect in 2002. The new Code contains some striking innovations, most notably changes at the trial stage, which implement the constitutional requirement of adversarial principles. However, it also preserves several remnants of the past, particularly its preservation of the formal pretrial investigation, during which evidence is analyzed and compiled in a dossier, which then dominates the trial of the case. The result is that old and new constantly contend with each other. Implementation of the new adversarial procedures is also made difficult by the enormity of the changes demanded by them. This article examines these and other issues in the new Code's implementation over its first five years of operation.

Keywords

adversarial principles, Constitutional Court, criminal cases,
criminal investigator, criminal procedure, defense counsel,
equality of the parties, guilty pleas, judicial control, jury trial,
preliminary investigation, pretrial detention,
right to counsel, Supreme Court, Russia, trials

1. Introduction

Russia's legal system shares many of the characteristics of civil law systems. Its criminal procedure system has, therefore, naturally tended to follow the traditions of civil law countries. In the civil law tradition, the criminal process is dominated by a formal pretrial investigation phase, in which an official case file or dossier—which is expected to contain all of the evidence in the case—is compiled before trial by a judicial or quasi-judicial state official. To a degree that varies depending on the country involved, the case file's contents play a major role at trial. To the extent that evidence other than that contained in the case file is produced at trial, it is the judge who elicits it by summoning and questioning witnesses and the accused.

For lack of a better term, this system has been characterized as 'neo-inquisitorial' or 'investigatory', which reflects its main features and mode of operation: the state—objectively and on behalf of everyone concerned, including the accused—actively investigates the circumstances of a crime

to determine what happened. On the premise that the state conducts an objective and complete investigation intended to collect both inculpatory and exculpatory evidence, neither the early involvement of defense counsel nor other procedural protections for the rights of the suspect have traditionally been thought to be essential to the fairness of the process. However, greater procedural protections for suspects have been added in the modern era in most civil law countries because of Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

The alternative system, represented by the Anglo-American adversarial tradition, lacks the formal pretrial investigation phase. Rather, it is dominated by a single event—the trial. It is at this stage—and this stage alone—that evidence ‘counts’. If the mantra of the civil law tradition is ‘what is not in the file is not in the world’,¹ then the mantra of the adversarial tradition might well be ‘what is not proven by first-hand evidence presented at trial is not in the world’. Information may acquire weight as evidence of guilt only if it is accepted as evidence by a judge when presented in a public trial by witnesses who appear and testify in person. At the trial, it is the adversaries themselves—the prosecution and the defense—who play the most active roles, presenting the evidence for consideration by the judge or jury. Each party is expected to present only such evidence as supports its own view of the case. The judge is a relatively passive figure, intervening only as necessary to ensure that the parties follow proper procedures and enjoy equal rights in their presentation of evidence and their advocacy on behalf of their clients, the state and the accused.

Such organization of the trial naturally affects the pretrial stages of the case. *First*, it is the parties’ responsibility to conduct the necessary investigations and gather the evidence that each wishes to present at trial. Thus, there is no single, state-run pretrial investigation; rather, there are independent, separate and parallel prosecution and defense investigations. *Second*, since the sole test of any evidence is its ability to gain acceptance at trial, it does not matter how formal the investigative process is or who conducts it. *Third*, since the dynamic recognized by the adversarial approach is that the state is not neutral but has its own partisan interests in seeking to convict those it suspects of committing crimes, it is thought important for fairness that suspects have strong independent protections of their rights from the time of their very first contact with law enforcement officials.

¹ *Quod non est in actis, non est in mundo*. See Bernhard Grossfeld and Josef Hoeltzenbein, “Language, Poetry, and Law: Order Patents”, 10 *Law and Business Review of the Americas* (2004), 669-691, at 670.

The Russian system has long followed the civil law tradition in criminal procedure. So even a cursory glance at the 2001 Criminal Procedure Code (CrPC) and the provisions of Russia's 1993 Constitution that the Code implements discloses what appears to be a major break with the past.² Article 123(3) of the Constitution declares that "[j]udicial proceedings shall be conducted based on adversarial principles and equality of the parties" and Article 15 of the new Code declares these principles applicable to criminal cases. 'Adversarial principles' and 'equality of rights of the parties' are concepts with some room for interpretation and some continental definitions vary considerably from their understanding at common law.³ However, the Constitution and the new Code move Russia decisively towards the Anglo-American adversarial mode of proceeding. Unlike the old Code, which declared that the "[c]ourt, procurator, investigator and inquiry officer are required to take all measures provided by law for a complete, objective and full investigation of the circumstances of the case",⁴ Article 15(3) of the new Code requires the court to "create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them". Even before the new Code was passed,⁵ the Constitutional Court, relying on the Constitution, had

² See "Ugolovno-protsessual'nyi kodeks Rossiiskoi Federatsii" (as amended through 30 December 2006). A 2004 English translation of the Code (current through 4 July 2003) in parallel Russian and English columns, edited by Vasilii Vlasihin and William Burnham with commentary by William Burnham, is available from the US Department of Justice's OPDAT Program (see *infra* note 15). William Burnham and Vasilii Vlasihin (eds.), *The Russian Federation Code of Criminal Procedure as Amended through July 4, 2003* (US Department of Justice and US Embassy in Moscow, Moscow, 2004). A second edition current through 2007 is forthcoming. For a different English translation set alone, see William Burnham, "Criminal Procedure Code of the Russian Federation (as amended through June 29, 2004), English Translation with Commentary", 40(1-4) *Statutes and Decisions of the USSR and Successor States* (2004), 7-89, 5-97, 6-99 and 5-88.

³ For example, the European Court of Human Rights has interpreted the right to adversarial proceedings under the European Convention on Human Rights primarily as a protection of the right of the accused to be heard. The Court's case law has revolved around three rather specific issues: failures to take into account defense submissions; *ex parte* submissions by the prosecution to the court; and prosecution failures to disclose evidence to the defense. See Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, Oxford, 2005), 89-94. For a classic statement of the American view, see William Burnham, *Introduction to the Law and Legal System of the United States* (West Group, St Paul, MN, 4th ed. 2006), 80-85, defining adversarial proceedings as those: "(1) where the decision-maker is neutral and passive, and is charged solely with the responsibility of deciding the case; (2) the parties themselves develop and present the evidence and arguments on which the decision will be based; (3) the proceeding is concentrated, uninterrupted and otherwise designed to emphasize the clash of opposing evidence and arguments presented by the parties; and (4) the parties have equal opportunities to present and argue their cases to the decision-maker."

⁴ Art. 20, "Ugolovno-protsessual'nyi kodeks RSFSR", *Vedomosti Verkhovnogo Soveta RSFSR* (1960) No. 40 item 593 (as amended through 29 December 2001).

⁵ For a summary of the political origins of the new Code, see Peter H. Solomon, Jr., "The Criminal Procedure Code of 2001: Will it Make Russian Justice More Fair?", in William Alex Pridemore

held that a court “may not take upon itself what are the special procedural functions of the parties”.⁶ It further explained that “adversarial principles dictate that there be a strict separation of the functions of the court in its decision of the case and the function of the prosecution and defense, each of which is allocated its respective role in the process”.⁷

The 2001 Code defines these “special procedural functions of the parties” in ways that closely resemble the common law adversarial tradition. Live witness testimony at trial—not prior written statements given to an investigator—are generally required (although, as will be shown, with significant exceptions).⁸ It is the parties and not the judge who have the primary responsibility for calling and questioning the witnesses and presenting all the other evidence at trial, with the judge acting as a passive arbiter of the contest between the parties.⁹ Moreover, Russia has resurrected for some cases that most passive of all decision makers, the jury.¹⁰ The defense has the right to interview witnesses and collect other evidence and the judge has no right to refuse to permit testimony by

(ed.), *Ruling Russia: Law, Crime and Justice in a Changing Society* (Rowman and Littlefield, Lanham, MD 2005), 77-98, at 80-82.

⁶ Postanovlenie Konstitutsionnogo Suda No.19-P of 28 November 1996, *Vestnik Konstitutsionnogo Suda (VKS)* (1996) No.5, in which it was found that the ‘protocol’ method of handling minor cases that required the judge to formulate the charges and then handle the trial and decide on guilt and punishment is unconstitutional. See, also, Postanovlenie Konstitutsionnogo Suda No.7-P of 20 April 1999, *VKS* (1999) No.4, in which it was found that the court’s power to return *sua sponte* a poorly investigated case to the prosecution for supplemental investigation is unconstitutional; and Postanovlenie Konstitutsionnogo Suda No.1-P of 14 January 2000, *VKS* (2000) No.2 (petition of Smirnova), in which it was held that the power of a judge during the trial of one defendant to initiate a criminal case against a new defendant/suspect and order detention is unconstitutional.

⁷ Postanovlenie Konstitutsionnogo Suda No.1-P, *op.cit.* note 6. The history of the drafting of Art.123(3) of the 1993 Constitution on “adversarial principles” is unclear as to what the framers had in mind, as they seemed to assume that everyone knew what they were talking about. Discussions centered only on whether to include a proviso permitting exceptions to adversarial principles to be made by federal statute in certain kinds of cases, such as civil cases where parties relying on their own resources could well be mismatched. In place of the proviso, the phrase guaranteeing “equality of the parties” was inserted. *Konstitutsionnoe soveshchanie: Stenogrammy. Materialy. Dokumenty. 20 aprelia—10 noiabria 1993 g. v 20 tomakh*, Vol.13 (Iuridicheskaya literatura, Moscow, 1995-1996), 95-98, available at <<http://www.constitution.garant.ru/tom.php?pg=00000096&tom=13>>. At the very least, this history confirms that Russian adversarial principles include the notion that it is the parties or their representatives who have the major role in presenting evidence in judicial proceedings rather than the judge. See *ibid.*, at 97, in which Constitutional Court Judge Morshchakova acknowledges that inequality based on better lawyers is part of adversarial justice. It is not known how adding “equality of the parties” was intended to cure this problem. See Burnham, *op.cit.* note 3, 119, which states that “inequality of resources is a special problem in an adversary system where the parties have so many responsibilities for gathering evidence and presenting the case”.

⁸ See sections 3.4.1., 3.4.2. and 4.

⁹ *Id.*

¹⁰ See section 4.3.

defense witnesses who appear at trial." In addition, the Code recognizes the partisan nature of the investigation of suspects, who are, consequently, given a wide array of rights in their earliest contacts with law enforcement officials.¹²

Despite these major steps down the road towards an adversarial system of criminal procedure, the conversion has been incomplete in practice. One problem is the failure of the new Code to be sufficiently concrete and specific in setting out the new adversarial responsibilities of the participants, combined with a lack of training to develop the skills and traditions necessary to discharge those responsibilities. Another problem is that, while some parts of the new Code set out adversarial features, other parts of the Code work against them. In this category, the main problem is that the Code creates an adversarial structure for trial but retains the formal pretrial investigation stage and its product—the dossier or case file—which continues to dominate later judicial stages of the case.¹³

It is our purpose in this article to describe the principal features of the Code and its implementation five years after its entry into force,¹⁴ in the process highlighting some of these problems and outlining what we believe should be done about them. We discuss some of the relevant case law of both the Russian courts and the European Court of Human Rights (ECtHR) and several amendments that have been made to the Code since its enactment. Our analyses of the text and law are also informed by William Burnham's work since 1999 as a foreign law expert with the working group that drafted the 2001 Code, headed by then State *Duma* Deputy Elena B. Mizulina. This involved attendance at conferences and mark-up sessions held during 1999–2001 and at some of the 'monitoring' events held by the working group in various regions of Russia from 2002–2006. In addition, issues of the Code's implementation were discussed at a conference marking the fifth anniversary of the Code's passage, held in November 2006 at the Moscow State Law Academy.¹⁵ We were also informed by Jeffrey Kahn's research on Russia's compliance with the Eu-

¹¹ See section 3.4.4.

¹² *Id.*

¹³ See sections 3 and 4.

¹⁴ The new Code entered into force on 1 July 2002.

¹⁵ Attendance at these events was made possible by the US Department of Justice's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) program. Thomas Firestone, resident legal advisor and OPDAT representative at the US Embassy in Moscow, assisted with particular issues in this article. However, none of the opinions expressed here should be considered to represent the views of OPDAT or the US Government. The assistance of Nikolai M. Kipnis, a law professor at the Moscow State Law Academy and an advocate, for ongoing assistance with issues as they arose in writing this article is especially acknowledged.

ropean Convention on Human Rights, his experience training Russian lawyers on its application in Russia and his field research on the practical implementation of the Code by means of courtroom observations and interviews with Russian practitioners, judges and academics in Moscow and Krasnoiar'sk.¹⁶

2. Pretrial Procedure, Part I: Initiation and Control

2.1. Initiating a Criminal Case

Prosecution of crimes under the new Code is mandatory.¹⁷ This is a continuation of the Soviet practice and a reflection of Russia's civil law roots.¹⁸ Article 21, entitled 'Obligation to Prosecute', requires pursuit of every case in which evidence of a crime has come to light. This provision is enforced in two ways. *First*, Article 24(2) of the Constitution—which insures a right to information in the possession of the authorities that affects one's rights—has been held to permit a crime victim to view the information on which the refusal to initiate the case was based.¹⁹ *Second*, refusal can be appealed by the victim, first to the procurator and then in

¹⁶ Interviews and observations were conducted by Jeffrey Kahn between 15 October and 5 November 2005 for OPDAT. Of course, the extent to which practices observed by either of the authors or described by their interviewees and correspondents take place throughout Russia is not known. The professional breakdown of Jeffrey Kahn's interviews is as follows (although it should be noted that some interviewees possess multiple professional competences): twelve defense attorneys; three prosecutors or investigators; seven judges or former judges; six academics; and two others. Because some individuals expressed reluctance to speak candidly about sensitive aspects of the Russian criminal justice system, all but public figures were granted anonymity. All interviews and personal correspondence referenced in this article are on file with the authors.

¹⁷ Art. 21(2) and comment 1 on Art. 21(2) in Dmitrii N. Kozak and Elena B. Mizulina (eds.), *Kommentarii k ugolovno-protsessual'nomu kodeksu Rossiiskoi Federatsii* (Iurist", Moscow, 2003). Mizulina is the Duma member who led the effort to enact the new Code. Kozak was President Putin's special assistant on judicial reform, who worked with Mizulina to ensure that the president's wishes were taken into account in the drafting of the new Code.

¹⁸ See, for example, Art. 17(1), 1955 Law on Prosecutor's Supervision: the prosecutor must "take measures to the effect that not a single crime should remain undiscovered and not a single criminal avoid responsibility", cited in Samuel Kucherov, *The Organs of Soviet Administration of Justice: Their History and Operation* (Brill, Leiden, 1970), 430. For a discussion of Russia's civil law roots, see William Burnham, Peter B. Maggs and Gennady M. Danilenko, *Law and Legal System of the Russian Federation* (Juris, Huntington, NY, 3rd ed. 2004), 1-7.

¹⁹ See, Postanovlenie Konstitutsionnogo Suda No. 3-P of 18 February 2000, VKS (2000) No. 3 (petition of Kekhman). See, also, P.A. Lupinskaia (ed.), *Ugolovno-protsessual'noe pravo Rossiiskoi Federatsii* (Iurist", Moscow, 2003), which states that "anyone whose rights or freedoms are affected by refusal to initiate a criminal case has the right to review" the contents of the case file.

court. The decision not to initiate the case can be reversed if the refusal was “illegal or not well-founded”.²⁰

Mandatory prosecution rests on a rationale—commonly called the ‘legality principle’ in continental European systems—that is based on the idea that everyone should be equal before the law.²¹ This may be contrasted with the approach in adversarial systems, which grants broad discretion to the prosecutor as to whether to bring charges (and which charges to bring) against a suspect.²² The drafters of the Code consciously chose to continue mandatory prosecution given what they perceived to be the dangers associated with abuse of prosecutorial discretion as practiced in common-law systems.

Notwithstanding Russia’s rule of mandatory prosecution, the Russian Criminal Code provides that “an action (omission) does not constitute a crime, even though it formally includes the elements of an act proscribed by this Code, if it is not socially dangerous because of its insignificance”.²³ This has been used as a basis for the dismissal of at least some prosecutions.²⁴ However, “social danger” dismissal does not have ‘rehabilitative’ effects, as would a case dismissed for lack of proof of an element, thus suggesting that social danger is not really an element of a crime.²⁵ In any event, declining to initiate charges is most often justified simply for reasons of lack of sufficient proof of the more ordinary elements of the

²⁰ See Art.148(5 and 7), CrPC. The procedure is set out in Art.124 (procurator) and Art.125 (court), CrPC. Judicial review was held to be constitutionally required by *Postanovlenie Konstitutsionnogo Suda No.13-P* of 13 October 1995, *VKS* (1995) No.6 (petition of Samigullina).

²¹ Stephen C. Thaman, *Comparative Criminal Procedure: A Casebook Approach* (North Carolina Academic Press, Durham, NC 2002), 23, which states that: “[i]n Europe this is called the *legality principle*, in contrast to the *opportunity principle*, which reigns in France and in Common Law countries” (emphasis in original).

²² Robert H. Jackson, “The Federal Prosecutor”, 31(1) *Journal of Criminal Law and Criminology* (1940), 3-6, at 5, which states that: “[o]ne of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints [...] If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”

²³ See Art.14(2), “Ugolovnyi kodeks Rossiiskoi Federatsii”, Federal Law No.63-FZ, signed 13 June 1996 (as amended through 30 December 2006).

²⁴ *In re Isaikin, Gnatiev et al.*, cited in “Obzor sudebnoi praktiki”, *Biulleten’ Verkhovnogo Suda (BVS)* (1997) No.4, 10, in which the prosecution of juveniles for stealing USD 5 worth of watermelons was dismissed for absence of social danger.

²⁵ Arts.24(1) and 27(1), CrPC, which set out rehabilitative grounds; and *Postanovlenie Konstitutsionnogo Suda No.18-P* of 28 October 1996, *VKS* (1996) No.5, 11 (petition of Suhkov), in which the social danger dismissal is held not to be rehabilitative. Rehabilitation means that the person’s name is cleared and he is entitled to reparations for having been wrongfully prosecuted. See Burnham, Maggs and Danilenko, *op.cit.* note 18, 507 and 527.

case rather than lack of social danger.²⁶ While the ‘social danger’ concept remains in the Criminal Code, the Criminal Procedure Code’s only provision for dismissal of cases on this basis was repealed in 2003.²⁷ However, the Criminal Code is rather specific in its provision for “freedom from criminal liability” if an offender who commits a minor or medium gravity crime (up to five years in prison) “has voluntarily appeared and confessed, has facilitated the discovery of the crime, has compensated for the harm caused by the crime, and as a result of active repentance (деятельное раскаяние) (*raskaianie*) has ceased to be socially dangerous” or if the victim and the offender have agreed to a “settlement” (примирение) (*primerenie*) of the matter.²⁸ In addition, several crimes have their own circumstances under which liability will be reduced or abolished entirely.²⁹

There are two routes to the initiation of a criminal case: arrest first or investigation first. The former route applies to offenses committed *in flagrante delicto* or where there is ‘hot pursuit’ of the suspect. Article 91(1) of the Code permits a law enforcement officer to arrest a person “on suspicion of having committed a crime for which incarceration is a potential penalty” if the person “is caught in the act of committing or immediately after committing the crime [...] if victims or eyewitnesses point out the person as the one who committed the crime” or “if clear physical traces of the crime are found on the person’s body or clothes, in his possession or in his dwelling”.³⁰ After a brief detention and any urgent action needed to preserve evidence, the case is turned over to a criminal investigator and a formal case is initiated. This person is formally

²⁶ Postanovlenie Konstitutsionnogo Suda No.18-P, *op.cit.* note 25. Social danger as a concept in criminal law is discussed in Burnham, Maggs and Danilenko, *op.cit.* note 18, 550-554.

²⁷ See Art.26(1), CrPC (which authorizes one form of “social danger” dismissal), repealed by Art.1(1), Federal’nyi Zakon “O privedenii Uголовno-protsessual’nogo kodeksa RF i drugikh zakonodatel’nykh aktov v sootvetstvie s Federal’nym zakonom ‘O vnesenii izmenenii i dopolnenii v Uголовnyi kodeks RF’” No.161-FZ, signed 8 December 2003. Unlike the framers of the Criminal Code, who wholeheartedly approved of the concept (see William Burnham, “Russia’s New Criminal Code: A Window onto Democratic Russia”, 26(4) *Review of Central and East European Law* (2000), 365-424, at 370-375), many in the Criminal Procedure Code working group were opposed to it. Part of the reason is its Soviet pedigree, coming as it does from the concept of ‘class danger’.

²⁸ Art.75-76, Criminal Code RF. A more wide-open provision for relief from criminal liability for any first-time offender committing a minor or medium gravity crime was repealed in 2003. See Art.1(24), Federal’nyi Zakon “O vnesenii i dopolnenii v Uголовnyi kodeks RF” No.162-FZ, signed 8 December 2003.

²⁹ See Burnham, *op.cit.* note 27, 396-397.

³⁰ Limiting full custodial arrest solely to cases punishable by incarceration is not a universal rule. See, for example, *Arwater v. City of Lago Vista*, 532 US 318 (2001), in which the court upheld a driver’s full custodial arrest for not wearing a seatbelt, a misdemeanor offense punishable only by a fine.

considered a “suspect”(подозреваемый) (*podozrevaemyi*).³¹ When such a suspect has been arrested and a court order authorizing continued detention obtained, there must be a means of assuring that the authorities follow through with formal charges. Thus, an investigation sufficient to file charges must be conducted and the suspect formally charged under Article 171 within ten days of his or her arrest, or the suspect must be released.³² The filing of charges changes the status of the suspect to that of an accused (обвиняемый) (*obviniaemyi*).

The second route to initiation of a case is when the evidence does not come from a law enforcement official on the scene.³³ In these cases, an investigation must be conducted before the suspect is arrested. After investigating, the investigator may then decide to initiate a criminal case.³⁴ If continuing investigation reveals “sufficient evidence establishing grounds to charge a person with commission of a crime”, the investigator “shall issue an order charging such person as an accused”.³⁵ This order states that the person is being charged with a particular crime and sets out the facts of the crime as determined by the investigation thus far. The accused is then summoned to appear before the investigator so that the charges can be formally presented and the investigator can interrogate the accused.³⁶

Under both routes, a procurator is required to approve the initiation of the criminal case.³⁷ This is an innovation of the new Code. Many investigators view this change as a gratuitous slur on their competence and their reputations, given that one impetus for requiring approval was reports that investigators were engaged in ‘contract’ initiations of criminal cases, typically procured by business types as a means to harass competitors.³⁸ However, the procuracy believes it is a good idea and reports suc-

³¹ Art.94(1), CrPC provides: “[a] suspect must be released if: 1) the suspicions of the commission of a crime are not confirmed; 2) there are no grounds for pretrial detention; or 3) the arrest of the person was in violation of Art.91 of this Code.”

³² Art.100, CrPC.

³³ Sources include a written or oral complaint (Art.141), the voluntary surrender and confession of an offender (Art.142), an official report (Art.143) and information obtained through the mass media (Art.144(2)). See, generally, Arts.140-146, CrPC.

³⁴ Art.145, CrPC.

³⁵ Art.171(1), CrPC.

³⁶ Arts.171-172, CrPC. If the accused is already in custody (e.g., when a *flagrante* arrestee is suspected of other crimes) the accused is notified through the administration of the detention facility. Art.172(3-4), CrPC.

³⁷ Art.146(1), CrPC.

³⁸ Address of Boris Gavrilov, assistant head of the Investigative Committee of the Ministry of Internal Affairs, given at the Conference on the 5th Anniversary of the Criminal Procedure Code, Moscow State Law Academy, 16 November 2006.

cess in preventing almost 10% of “baseless” initiations of criminal cases.³⁹ Whatever the statistical truth of the matter, many believe that the police fabricate cases for a variety of reasons.⁴⁰ False arrests and fabricated cases are often attributed to unofficial or informal police quotas.⁴¹

Whether and to what extent greater control over investigations is thought necessary, as this article was going to press, the *Duma* passed new legislation lessening the control procurators have exercised over criminal investigations in the past, including eliminating the requirement of procurator approval of case initiation.⁴²

Initiation of a criminal case is important because it starts the clock running against the investigator to complete the preliminary investigation and deliver the matter to the procurator to be filed in court.⁴³ Generally

³⁹ Address of Anatolii P. Korotkov, head of the Methodological Administration of the Procurator General's Office, given at the Conference on the 5th Anniversary of the Criminal Procedure Code, Moscow State Law Academy, 16 November 2006. The Gavrilov-Korotkov debate is summarized at <<http://www.legislature.ru/monitor/upk/pressaseminarupk.html>>.

⁴⁰ In the 17 May issue of *Ezhenedel'nyi Zhurnal*, Iurii Sinel'shchikov, a former first deputy Moscow procurator, was quoted as saying that, while it is difficult to know what percentage of criminal cases are fabricated, it is a common practice. “For example, a businessman needs to be removed: his competitor can pay the police to fabricate a case against him. There are instances in which the police themselves want to extort money out of a businessman. Evidence is planted on him [...] after that, scare tactics are employed, such as detention, search, and arrest threats. The businessman buys them off.” See Charles Gurin, “Poll Discloses Rampant Police Abuse”, 1(16) *Jamestown Foundation Eurasia Daily Monitor* (2004).

⁴¹ Gurin further quotes prosecutor Sinel'shchikov in *ibid.*: “[s]ometimes it is necessary simply to raise the rate of solved crimes. For that purpose, a person is grabbed and put in prison.” Indeed, an anonymous active-duty Moscow policeman told *Ezhenedel'nyi Zhurnal* that the system still calls for each police precinct in the capital to solve 40–50 criminal cases per month. But in fact only 20–30 cases are solved, making it more likely that cases will be fabricated.” In general, the police do not fare well in surveys of public attitudes. An April 2007 poll of 1,600 respondents in 153 population centers in 46 regions of Russia by the respected Russian Public Opinion Research Center (VTSIOM) indicates that at least 50% of respondents do not approve of the work of organs of law enforcement, although this is an improvement from a negative rating by 58% of respondents a year ago. See VTSIOM, “Otnoshenie Rossiian k osnovnym obshchestvennym i gosudarstvennym institutam”, *VTSIOM Press Release* (25 May 2007) No.698, available at <<http://wciom.ru/novosti/press-vypuski/press-vypusk/single/8257.html>>.

⁴² Federal'nyi Zakon “O vnesenii izmenenii v Ugolovno-protsessual'nyi kodeks RF i Federal'nyi Zakon ‘O prokurature RF’” No.87-FZ, signed 5 June 2007; and Federal'nyi Zakon No.90-FZ, signed 6 June 2007, amending Art.37(2)(4) and Art.146(1), CrPC. However, even under the new law, the procuracy must be notified of the initiation of a new criminal case and has the power to declare the initiation “illegal” or “unfounded” within 24 hours. The new law also reorganizes procuracy investigators under an ‘Investigations Committee’, to be headed by a Deputy Procurator General specially appointed by the president and confirmed by the Federation Council. For a summary of the law, see Ekaterina Zapodinskaia, “Prokuroram vydaly uvol'nitel'niui,” *Kommersant* (10 July 2007) No.119, available at <<http://www.kommersant.ru/doc.aspx?DocsID=781371&NodesID=7>>. The measure is widely viewed as an anti-corruption measure, though it is not coincidental that it also serves to centralize power over criminal investigations under one person directly answerable to the president.

⁴³ Art.162(2), CrPC.

speaking, the investigator has two months to complete the preliminary investigation, though this is extendable.⁴⁴ US advisors queried why investigations should be limited this way. The response was that it is necessary to ensure that progress is made on investigations, both to enforce investigator job performance standards and to ensure that the object of the investigation is not under suspicion for an inordinately long period of time. However, it seems overly rigid to impose a time limit on all investigations and, moreover, to place such a limit in a statutory code as opposed to an internal regulation of some sort. It would also seem to unnecessarily encourage early arrests and greater overall reliance on confessions as a substitute for more careful investigation.

2.2. *Detention Pending Trial*

By whichever of the two ways a case is initiated, the next question that arises in the criminal prosecution is whether detention is warranted while the investigation is conducted pending trial. Article 22(2) of the Constitution provides that “no person may be detained for more than forty-eight hours” without a “judicial order”—a command repeated in Article 10(1) of the new Code and implemented by several other articles.⁴⁵ The old Soviet Code granted the final power to order pretrial detention to the procurator.⁴⁶ Amendments adopted in 1992 provided for judicial review of procurator decisions.⁴⁷ While this was an improvement, the obvious difficulties of mounting an appeal from jail and the need to stay in jail until a court hearing could be obtained made this an incomplete remedy. Moreover, nothing was done about the initial lengths of time an arrestee could be held. The procurator merely had to be *notified* that an arrestee was in detention within forty-eight hours, at which point he/she then had an additional forty-eight hours to act. Alternatively, the procurator could extend the period of detention pending charges for up to ten days

⁴⁴ Art.162(1), CrPC. The local procurator may extend the time permitted for the preliminary examination to up to six months. Art.162(4), CrPC. In “especially complex” cases, this time limit may be extended to twelve months by the chief procurator of the constituent unit of the Russian Federation in which the case has been opened. Art.162(5), CrPC. Thereafter, further extensions (without limit) may be made “only in exceptional cases” and only by the procurator general or his deputies. Art.162(3) excludes from this time period any time during which the preliminary investigation was suspended on grounds specified in the Code.

⁴⁵ See Arts.29(2), 91(2), 94(2-3), 101(1), 107(2) and 108(7), CrPC.

⁴⁶ See Arts.11, 89, 96 and 97, CrPC RSFSR.

⁴⁷ See Art.220(1-2), CrPC RSFSR, supplemented by Art.1389, Zakon RF “O vnesenii izmenenii i dopolnenii v ugovolno-protsessual’nyi kodeks RSFSR” No.2825-1, signed 23 May 1992. See, also, Supreme Court, Postanovlenie Plenuma Verkhovnogo Suda “O praktike sudebnoi proverki zakonnosti i obosnovannosti aresta ili prodleniia sroka sodержaniia pod strazhei” No.3 of 27 April 1993, *BVS* (1993) No.7, 6, which instructs courts on how to apply these provisions; and Todd Foglesong, “Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pre-trial Detention in Russia”, 14(3) *Wisconsin International Law Review* (1996), 541-585, at 548-549.

under “exceptional circumstances”.⁴⁸ The new Code, then, implemented the constitutional limit of forty-eight hours, took the power of ordering pretrial detention away from the procurator and switched from a system of *post hoc* judicial review that had to be instigated by the detainee to a system requiring an affirmative judicial authorization of detention pending trial in every case as an initial matter.

The route to this change was not exactly straightforward, however. The ‘Transitional Provisions’ of Part II of the Constitution provided that “[u]ntil the criminal procedure legislation of the Russian Federation is brought into conformity with the provisions of this Constitution, the former procedure for arrest, custodial confinement and detention of persons suspected of committing crimes shall be preserved”.⁴⁹ Because of a lack of progress on a new criminal procedure code, the old detention regime had continued all through the 1990s. However, even when the 2001 Code was ready for passage, the drafters feared that the judicial system was not yet ready to handle the additional work, so they inserted a proviso delaying the effects of the new detention portions of the Code until 2004.⁵⁰

The Constitutional Court, however, held the delaying provisions unconstitutional in a 2002 decision, issued just a few months before the effective date of the new Code.⁵¹ In the *Malenkin* case, the Court held that Part II of the Constitution only contemplated a “period of time essential for [the] introduction of appropriate legislative amendments” and, given the passage of time, suggested that the “temporary norms are becoming permanent”.⁵² In support, the Court not only relied on the “direct effect” of Article 22(2) of the Constitution but also observed that, since the Constitution was ratified, Russia had taken on the additional obligation of implementing the ECHR.⁵³ The Court also emphasized that prompt

⁴⁸ Arts.122 and 90, CrPC RSFSR, as amended.

⁴⁹ “Konstitutsiia Rossiiskoi Federatsii, Vtoroi razdel, Zakliuchitel'nye i perekhodnye chasti”, proclaimed 12 December 1993. Russia lodged a two-part reservation at the time of its accession to the ECHR, both parts of which relate to the conformity of its Soviet-era laws to Art.5 of the Convention. The first concerns application of the Criminal Procedure Code to persons over whom the Russian courts have jurisdiction. The second concerns only military detention, in which case application to a Russian court is not always possible. See Jeffrey Kahn, “Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia”, 35 *University of Michigan Journal of Law Reform* (2002), 641-690, at 658-662.

⁵⁰ The resistance that produced this delay emanated not just from the procuracy but also, surprisingly, from some trial judges with whom the authors spoke during this period. See, for example, *infra* note 56.

⁵¹ Postanovlenie Konstitutsionnogo Suda No 6-P of 14 March 2002, VKS (2002) No.3 (petition of Malenkin).

⁵² *Ibid.*, 2-3.

⁵³ *Ibid.* The direct effect of constitutional rights and freedoms is covered by Art.18 of the Constitu-

action was particularly necessary, given the significance of the rights to personal security and freedom of movement that were being infringed.⁵⁴ It is probably significant that the Court had rejected an identical challenge filed two and a half years after the ratification of the Constitution on the grounds that it was premature.⁵⁵ The Court required the new provisions for arrest and detention to be implemented on 1 July 2002, along with the bulk of the new Code.⁵⁶

The mechanism chosen by the Code for gaining judicial approval for detention beyond forty-eight hours, as required by the *Malenkin* case, is a court order for pretrial detention.⁵⁷ The order must be obtained within forty-eight hours following the initial arrest or the suspect must be released. The Code also establishes strict time limits to which police, investigators and procurators must adhere during the forty-eight-hour period. An official record of detention must be made within three hours of a suspect being brought in, a procurator must be informed in writing within twelve hours of the suspect's arrest⁵⁸ and the authorities must inform a close relative of the arrestee of the arrest or permit the suspect to do so.⁵⁹ The suspect must be questioned, if at all, no later than twenty-four hours after the

tion. The relevant Convention provisions were Art.5(3-4), concerning prompt and exclusively judicial oversight of pretrial detention in pursuit of a trial within a reasonable time.

⁵⁴ *Ibid.*, 4.

⁵⁵ See *Opređenje Konstitutsionnogo Suda No.91-O of 2 April 2001, VKS (2001) No.4* (petition of Posokhov). Determinations (*определения*) (*opredeleniia*) are shorter than decisions (*постановления*) (*postanovleniia*) and usually deal with jurisdictional issues, though they can have positive content (*позитивное содержание*) (*pozitivnoe soderzhanie*) as well. Interestingly enough, Posokhov, the petitioner in this case, also filed an application with the European Court of Human Rights on the basis of the same facts but alleging that he had not been convicted by a "tribunal established by law" as required by Art.6(1) of the Convention because the judicial bench of a judge and two lay assessors had been composed in a manner contrary to Russian law. The European Court unanimously found a violation of Art.6 and awarded Posokhov EUR 500 in non-pecuniary damages. *Posokhov v. Russia*, No.63486/00 (Eur. Ct. H.R., 4 June 2003). See, also, Jeffrey Kahn, "Russia's 'Dictatorship of Law' and the European Court of Human Rights", 29(1) *Review of Central and East European Law* (2004), 1-14.

⁵⁶ *Postanovlenie Konstitutsionnogo Suda No 6-P, op.cit.* note 51, 4. Shortly after this decision was published, one of the authors met with five Russian judges who specialized in criminal cases. They were extremely critical of the decision. One argued that judicially-supervised detention would require a doubling of judges in the system. Another maintained that such a shift of power from procurator to judge was at present impossible. Neither set of officials, he said, had the education, experience or mentality for such an abrupt change. Interview by Jeffrey Kahn with judges from Azov, Rostov, Ulianovsk and Vologda, in Ann Arbor, Michigan, 13 March 2002, in Kahn, *op.cit.* note 49, 669 n.132.

⁵⁷ Art.94(2-3), CrPC.

⁵⁸ Art.92(1 and 3), CrPC.

⁵⁹ Art.96(1), CrPC.

point of his actual arrest and is entitled to a meeting with his attorney before interrogation of not less than two hours duration.⁶⁰

The Code, however, provides an exception to the forty-eight-hour limit. It is possible for a court to extend the period for an additional seventy-two hours if a party seeks time “to present additional evidence on whether pretrial detention is appropriate” and there is “a judicial finding that the arrest was legal and well-grounded”.⁶¹ This means that, despite the constitutional limit of forty-eight hours, a suspect may be held for up to five days. However, the Constitutional Court held the additional seventy-two hour period to be constitutional on the grounds that it is the judge—within the forty-eight-hour period required by the Constitution—who orders the additional period.⁶² Moreover, additional time is not always bad for the suspect, whose relatives or lawyer may need the additional time to gather information to present a better case for release, thus spending a small amount of additional time behind bars for a better chance to avoid a much longer time. Statistics on the extent of the use of the additional seventy-two hour period for the one-year period from mid-2002 to mid-2003 indicate that there were requests for more time in only around 3.5% of cases.⁶³ In the first half of 2006, the Judicial Department reported that such petitions accounted for 3.2% of the general number of petitions examined by district-level courts (a 4.3% decrease from the first half of 2005).⁶⁴

As for flouting of the time limits imposed, it is difficult to obtain reliable information on the degree of compliance. More than one defense lawyer volunteered that violations are a common occurrence. One attorney stated that the suspect may simply be handcuffed to a radiator in the police precinct house for a day before the protocol of arrest is drafted.⁶⁵

⁶⁰ See Art.92(4), CrPC (referencing Art.46(2), CrPC). See also *infra*, 36-39, where access to counsel is discussed.

⁶¹ Art.108(7)(3). The requirement that there be “a judicial finding that the arrest was legal and well-grounded” to order an extension of time is interesting, since the Code has no similar requirement if no extension is sought—only that the Court proceed to consider possible grounds for pretrial detention, which does not address the legality of the initial arrest.

⁶² *Opreделение Konstitutsionnogo Suda No.53-O*, “Ob otkaze v priniatii k rassmotreniiu zaprosa sudebnoi kollegii po ugovnym delam Murmanskogo oblastnogo suda o proverke konstitutsionnosti punkta 3 chasti sed'moi stat'i 108 Ugolovno-protsessual'nogo kodeksa Rossiiskoi Federatsii”, of 6 February 2004 (unpublished decision available on Garant).

⁶³ Boris Gavrilov, “Novelly ugovnogo protsessa na fone kriminal'noi statistiki”, *Rossiiskaia iustitsiia* (2003) No.10.

⁶⁴ See Supreme Court, “Obzor deiatel'nosti federal'nykh sudov obshchei iurisdiktsii i mirovykh sudei v pervom polugodii 2006 goda”, 3, available at <http://www.cdep.ru/material.asp?material_id=152>.

⁶⁵ Interview with defense counsel conducted 24 October 2005 by Jeffrey Kahn.

Cases in the European Court of Human Rights involving undocumented detention suggest problems as well. In the recent case of *Belevitskiy v. Russia*, the Court found that the petitioner-accused was held for a period of time for which there were no records, observing that “the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision”.⁶⁶ In *Menesheva v. Russia*, the Court noted that when the petitioner—a nineteen-year-old woman—was detained, for the first twenty hours of that detention there was no “record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it”. It held that this violated Article 5 of the Convention.⁶⁷

Another technique is to use detention for an administrative offense if a crime cannot be charged or to ‘stack’ criminal offense detention on top of administrative detention.⁶⁸ Manipulation of administrative charges was also involved in the above-mentioned case, *Menesheva v. Russia*. When Menesheva refused plainclothes police entry to her apartment, the police charged her with the administrative offense of resisting arrest, resulting in her continued detention for five days, thus using both detention pending trial on that charge and the sentence on it as a way of keeping her in custody. As the Court observed, “the true reason why she was taken to the police station was to force her to give information on I’s case and to make her surrender the key to her flat. Charging her with the administrative offense was clearly a mere pretext for having her available for that interrogation.”⁶⁹ Our own interviews confirmed similar misuse of administrative detention to avoid the forty-eight-hour limit.⁷⁰

2.3. Pretrial Restraint Measures

A major concern of the drafters of the new Code was to decrease the high level of pretrial detention in custody. Consequently, they devoted considerable attention to providing alternatives and procedures that would steer judges away from choosing such detention.

⁶⁶ *Belevitskiy v. Russia*, No.72967/01 (Eur. Ct. H.R., 1 March 2007), paras. 82-85. Article 5 of the European Convention protects the right to liberty and security of the individual and is the relevant provision for issues of arrest and detention.

⁶⁷ *Menesheva v. Russia*, No.59261/00 (Eur. Ct. H.R., 9 June 2006), para. 87. While these detentions were under the old Code, the requirement of detention records remains unchanged.

⁶⁸ Administrative offenses are similar to minor crimes (misdemeanors) in common-law countries. See Burnham, Maggs and Danilenko, *op.cit.* note 18, 554-556.

⁶⁹ *Menesheva v. Russia*, *op.cit.* note 67, para. 85.

⁷⁰ Interview conducted 21 October 2005 by Jeffrey Kahn.

2.3.1. Selection

The new Code provides an entire menu of seven measures permitted to ensure the defendant's attendance at any later proceedings: release on personal recognizance;⁷¹ personal surety; home or other supervision if the arrestee is a minor; military supervision for military personnel; bail; house arrest; and detention in custody.⁷² Article 108(1) provides that detention in custody is permissible only "if it is impossible to use a different, less-restrictive pretrial restraint measure".

For *any* of the seven measures of restraint to be imposed, Article 97 requires that there must be "sufficient grounds to believe" that the accused:

- "(1) will flee to avoid the inquiry, preliminary investigation or trial;
- (2) may continue to engage in criminal activities; or
- (3) may threaten a witness or other participants in the criminal proceedings, destroy evidence or otherwise obstruct proceedings in the criminal case."⁷³

After the judge determines under Article 97 that *some* form of restraint is necessary, Article 99 controls the issue of what *type* of restraint should be imposed. In making such a decision, a number of factors should be taken into account: "the seriousness of the charges brought, information on the character, age, health condition, family status, occupation and other circumstances of the accused."⁷⁴

Only two restraints—house arrest and custodial detention—require a court order.⁷⁵ The remainder may be imposed by a procurator on the request of the investigator, just as the old Code had provided earlier for all forms of restraint. House arrest—a new measure of restraint—institutes certain travel, associational and communication restrictions.⁷⁶

As for procedure, Article 108 requires that the prosecution's grounds for detention be set forth in a written motion with materials supporting

⁷¹ Literally this term is a "signed commitment not to leave" (подписка о невыезде) (*podpiska o nevyezde*). In Art.102, CrPC, what seems to be the same device is called a "commitment of non-flight and proper conduct". The concept is rendered here as simply "personal recognizance", the US term for signed commitments to appear at future hearings.

⁷² Art.98, CrPC. Each is explained in Arts.97-110, CrPC.

⁷³ Art.97, CrPC.

⁷⁴ Art.99, CrPC.

⁷⁵ Amendments in 2003 permit the court to order bail as an alternative. See Art.108(7)(i), CrPC.

⁷⁶ Art.107(1-2), CrPC. The Art.99 factors of "the person's age, health condition, family status and other circumstances" are repeated here, presumably for emphasis. House arrest prevents the accused from changing addresses, leaving home or communicating with anyone, including witnesses, others involved in the crime and relatives who are not living in the same home. Conditions of house arrest may be policed by the relevant investigative agency or by court bailiffs. See Art.11(i), Federal'nyi Zakon "O sudebnykh pristavakh" No.118-FZ, signed 21 July 1997 (as amended through 22 August 2004).

those grounds attached to the motion.⁷⁷ The defendant must be brought before the judge at the hearing on the motion and is entitled to respond to the motion after its presentation by the prosecution.⁷⁸ If the accused is in custody following an arrest, the motion must be made at least eight hours before the forty-eight-hour time limit on detention expires (unless an order extending the time period of the arrest has been entered based on the need to obtain further information, as noted above).⁷⁹ The defendant must be provided access to the investigation case file to search for information that might be helpful to his arguments for release or a lesser measure of pretrial restraint.⁸⁰ Repeat motions for detention are prohibited unless new circumstances have come to light since the previous motion.⁸¹ Responsibility for deciding requests for detention must be distributed among all the judges on the same basis that cases are assigned in general; having a single 'duty' judge handle all detention requests is prohibited.⁸² Pretrial detention orders may be appealed within three days of their issuance and the appellate decision must also be made within three days.⁸³

Statistics from the Ministry of Justice show a drop of 34.7% in the number of persons in pretrial detention between 2002 and 2003, thus suggesting judicial control of detention has had a positive effect. However,

⁷⁷ Art.108(3), CrPC.

⁷⁸ Art.108(4-6), CrPC. If an accused is not already in custody and, having been provided with notice, does not show up—as when the accused was not arrested or has already been released—arrest can be ordered. Art.113, CrPC. The word for this form of arrest (привод) (*privod*) is not the same as the more ordinary arrest following commission of a crime (задержание) (*zaderzhanie*). Привод (*privod*) is literally an 'escort' to the place one has been summoned to appear. It is the same procedure used when witnesses or others summoned to appear fail to do so. An *ex parte* judicial order for pretrial detention can be entered but only if the accused is the subject of an international fugitive search. Art.108(5), CrPC.

⁷⁹ Art.108(3), CrPC.

⁸⁰ *Opreделение Konstitutsionnogo Suda No.173-O of 12 May 2003, VKS (2003) No.5* (petition of Koval'). Ordinarily, the defense has the right to review the case file only when the investigation is over. Art.47(4)(12), CrPC. The cited determination was based on the Court's decision in an earlier case in which it gave victims access to the case file in order to contest refusal to initiate a criminal case.

⁸¹ Art.108(9), CrPC. See, also, Art.110, CrPC, which sets forth the procedure for revocation or alteration of pretrial restraint measures if the grounds for imposing a chosen restraint have changed.

⁸² Art.108(13), CrPC.

⁸³ Court challenges to pretrial detention orders entered by procurators were some of the first cases where the general jurisdiction courts began to apply the Constitution directly to hold statutes unconstitutional, much to the Constitutional Court's chagrin. See *Postanovlenie Konstitutsionnogo Suda No.4-P of 3 May 1995, VKS (1995) No.2-3* (petition of Avetian), discussed in Burnham, Maggs and Danilenko, *op.cit.* note 18, at 161. See, generally, William Burnham and Alexei Trochev, "Russia's War between the Courts: The Struggle over the Jurisdictional Boundary between the Constitutional Court and Regular Courts", 55 *American Journal of Comparative Law* (2007), 381-452.

the trend began earlier with a drop of 29.6% between 2001 and 2002. In fact, the rate of judicial denials of pretrial detention requests (currently 11.1%) is the same as the level of procurator denials under the old Code (11-12%). Clearly, what has changed is the number of investigator requests for detention. Cases in which investigators requested pretrial detention decreased from 144,000 in the first half of 2000 to 66,000 in the first half of 2003—a 220% decrease.⁸⁴ While one might think that the drastic reductions in requests resulted from investigators' fears that their motions would be denied by judges under the new Code's regime, the answer is simpler. Better explanations are found in a March 2001 change in the old Code permitting detention only if the crime charged is punishable by over two years imprisonment (up from one year) and an amendment to the Criminal Code effective in October of 2002 that reduced the maximum punishment for simple theft to two years or lower.⁸⁵ It is these absolute limitations on what crimes qualify for detention that is responsible for reductions in the number of detainees rather than judicial control.⁸⁶

Judges' application of those factors seemed to be a problem from the beginning. A Deputy Chairman of the Rostov *Oblast'* Court, Vladimir Zolotykh, conducted a study of the first months under the new procedures and standards as applied in the higher or subject-level trial courts, where all crimes are punishable by over two years imprisonment. He observed:

"Judicial practice [...] shows that in a number of cases of the work of judges [...] there appeared signs of a formal approach to the examination. Judges, at times, automatically complied with investigators' applications for the detention of a suspect or accused, and this attests to the fact that judges still are not inclined to examine the procedure for the selection of a measure of pretrial restraint as such a direction of their activity that is just as important and responsible as the determination of the merits of the case."⁸⁷

This situation was not helped by the fact that procurators made equally 'formal' arguments, despite the new Code's requirement that their motions

⁸⁴ Gavrilov, *op.cit.* note 63, 6. All statistics in this paragraph are from this article.

⁸⁵ Art.1, Federal'nyi Zakon "O vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RF, Ugolovno-protsessual'nyi kodeks RF i Kodeks RF ob administrativnykh pravonarusheniakh" No.133-FZ, signed 31 October 2002, amending Art.158 of the Criminal Code and Federal'nyi Zakon "O vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RF, Ugolovno-protsessual'nyi Kodeks RF, Ugolovno-ispolnitel'nyi kodeks RF i drugie zakonodatel'nye akty RF" No.25-FZ, signed 9 March 2001. Gavrilov points out that coincident with the 2002 change was an increase of 34.2% in 2003 of the number of arrestees who absconded from lesser measures of pretrial restraint. See *ibid.*

⁸⁶ Art.108(1), CrPC. Custodial detention is possible for crimes of less than two years imprisonment only for those who have violated the terms of less restrictive forms of restraint, who were fugitives, whose identity cannot be confirmed or who have no permanent address.

⁸⁷ Vladimir Zolotykh, "Zakliuchenie pod strazhei po resheniu suda: Obobshchenie praktiki primeneniia st. 108 UPK RF", *Rossiiskaia iustitsiia* (2002) No.11.

set out and substantiate why detention is the only appropriate measure. As Zolotkykh observed:

"Although procurators did participate [in the cases studied], their participation was not infrequently reduced to formality. In the consideration of eleven cases (which constituted 19.3% [of the cases studied]), procurators (and investigators participating in judicial proceedings) declared only that they supported their motion and in no way gave reasons for it. In the presence of such passivity by an organ of criminal prosecution, the court in nine of eleven cases granted the petitions for pretrial restraint, having carried out, as a matter of fact, the very function of the prosecution."⁸⁸

Problems like those noted by Judge Zolotkykh prompted a 2003 amendment that added a sentence to Article 108(1): "[w]hen ordering pretrial detention, the decision of the judge must point out the concrete factual circumstances that justify the decision."⁸⁹ The insertion of this sentence does not seem to have solved the problem, however. The European Court of Human Rights in *Mamedova v. Russia*⁹⁰ noticed the same practice in an opinion published three years later. Mamedova was accused of a large-scale financial fraud and was ordered to be placed in pretrial detention from July 2004 to August 2005 (*i.e.*, under the new Code). Mamedova "asked for a more lenient preventive measure" and:

"[P]etitioned the court to take into account that she was charged with a financial crime, that she had no criminal record, had a permanent place of residence and employment in Vladimir, family ties, a stable way of life and two minor children aged four and three. If she wished, she could have absconded after the search in her flat. The fact that she had not fled from justice proved that she had no such intention."⁹¹

This attempt and many subsequent attempts by Mamedova to seek release on bail (especially after the prosecution had searched her apartment and seized all of her papers, rendering it impossible for her to destroy any evidence) were all denied in cursory and boilerplate judicial orders.⁹² The Russian courts repeatedly accepted the prosecution's arguments that the complexity of the case, gravity of the charges and risk of flight or interference with the case necessitated continued detention.⁹³ The European Court observed that: "[i]n most decisions the domestic courts used the same summary formula and stereotyped wording" and sometimes refused

⁸⁸ *Ibid.*

⁸⁹ Art.1(5), Federal Law on Changes and Additions to the Criminal Code RF, *op.cit.* note 27. See, also, Supreme Court, Postanovlenie Plenuma Verkhovnogo Suda RF "O primenении sudami norm Ugolovno-protsessual'nogo kodeksa Rossiiskoi Federatsii", No.1 of 5 March 2004, *BVS* (2004) No.5, 4-8 (providing instruction on application of Art.108).

⁹⁰ *Mamedova v. Russia*, No.7064/05 (Eur. Ct. H.R., 1 June 2006).

⁹¹ *Ibid.*, para. 11.

⁹² *Ibid.*, para. 23.

⁹³ *Ibid.*, paras. 13, 16-19, 21-22, 24-25, 27 and 29.

even to hear the petitioner in opposition to the motions for extensions to the period of pretrial detention.⁹⁴ The European Court had no difficulty in finding a violation of the Convention's requirements concerning pretrial detention.⁹⁵

Even for judges who follow proper procedures and try to apply the appropriate factors, part of the problem may lie in the way the new Code has organized the factors. The Article 99 factors are only to be considered "when the grounds specified by Article 97 of this Code exist";⁹⁶ however, practitioners and courts tend to muddle the two sets of factors. If none of the three grounds set forth in Article 97 is present (flight risk, continued criminal activities or destruction of evidence), the inquiry is at an end and the detainee must be released. However, judges and procurators have found it hard to resist jumping ahead to consider "the seriousness of the charges"—an Article 99 factor—as an independent and sufficient basis for imposing detention.⁹⁷ Judge Zolotkykh noted the difficulty that his colleagues experienced in their first forays into deciding such motions: "[a]ll of these [Article 97] foundational bases and [Article 99] circumstances are set in 'one line' as the foundational basis for the election of pre-trial detention as the measure of restraint."⁹⁸

Procurators and defense lawyers confirmed that the specific factors and the wide variety of potential pretrial restraint measures were illusory. "There are always grounds for pretrial detention if you want to find them at the time of arrest", one procurator told us.⁹⁹ In this procurator's experience, the choice of pretrial restraint boils down to either personal recognizance or detention in custody.¹⁰⁰ One procurator colorfully explained why house arrest was beyond the technological means of that particular district. The procuracy office housed 260 officers in a three-story building. However, the 260 officers shared only one toilet—an outhouse several meters behind the building. Electronic monitoring or even telephone contacts under such primitive working conditions, the procurator felt, was a farfetched

⁹⁴ *Ibid.*, paras. 80-81.

⁹⁵ *Ibid.*, para. 84. See, also, *Kalashnikov v. Russia*, No.47095/99 (Eur. Ct. H.R., 15 July 2002), discussed *infra* in section 2.3.2. and note 119.

⁹⁶ *Ibid.*

⁹⁷ Not coincidentally, the seriousness of the charge could be the sole basis for detention under the old Code in the cases of some 60-odd crimes. See Art.96, CrPC RSFSR. This was not changed until the 2001 amendments to the old Code, effective in March of 2001.

⁹⁸ Zolotkykh, *op.cit.* note 87.

⁹⁹ Interview conducted 27 October 2005 by Jeffrey Kahn.

¹⁰⁰ Interview conducted 2 November 2005 by Jeffrey Kahn.

notion.¹⁰¹ Defense attorneys claimed that procurators routinely seek—and judges routinely grant—applications for detention in custody when less severe measures could be imposed, in violation of Article 108(1) of the Code. Judges, defense attorneys and procurators alike admitted to us that bail is rarely imposed; one procurator denied encountering a single case of bail in the last ten years, suggesting little change in practice despite the change in codes.¹⁰² Other options are also dismissed as unsatisfactory (*e.g.*, one judge warned us that defendants under house arrest could use their telephones to interfere with an ongoing investigation), impractical (cash bail leaves judges susceptible to allegations of bribery, claimed one defense attorney, and the absence of the institution of a bail bondsmen makes surety-based bail difficult) or otherwise ephemeral.¹⁰³

While salutary reductions in pretrial detention have been achieved by absolute limitations to offenses punishable by over two years, for those charged with more serious crimes, the ideal of judicial control of detention through the individualized application of multifaceted factors has not been achieved, notwithstanding the best efforts of the drafters to reform the process.

2.3.2. Duration and Conditions

The drafters of the new Code wished to reduce the traditional long terms of pretrial detention but were largely unsuccessful in doing so. As Deputy Elena Mizulina, a principal drafter of the Code, has commented: “such long periods of detention are the result of the overall system of criminal punishment in Russia, under which imprisonment can be for terms of 6 months to 30 years and more, and imprisonment for 3 to 5 years is not considered lengthy.”¹⁰⁴

The limits on pretrial detention, not surprisingly, parallel the limits on the duration of the preliminary investigation. Detention is not supposed to exceed two months. This deadline, however, is illusory. A district judge may extend this limit for up to six months if the investigation cannot be completed within the ordinary time period and “there is no basis for imposing a less restrictive form of restraint”. In cases of serious (up to ten years imprisonment) and very serious crimes (over ten years or the death penalty)¹⁰⁵ that are of “exceptional complexity”, the same court may further extend the limit up to a year by granting a motion filed in court by

¹⁰¹ Interview conducted 27 October 2005 by Jeffrey Kahn.

¹⁰² Interviews conducted 17, 21, 24, 25 and 27 October and 2 November 2005 by Jeffrey Kahn. Bail was authorized under prior law as well. See Art.99, CrPC RSFSR.

¹⁰³ *Ibid.*

¹⁰⁴ Mizulina, “Afterword”, in Lupinskaia, *op.cit.* note 19, 744.

¹⁰⁵ Art.15(4-5), Criminal Code RF.

the criminal investigator with the approval of a subject-level procurator.¹⁰⁶ Further, detention beyond twelve months and up to eighteen months may be approved “only in exceptional circumstances” by a subject-level court with the consent of the Procurator General of the Russian Federation or his or her deputy for defendants charged with very serious crimes.¹⁰⁷

Of course, even these time limits are of little use unless they are enforced. In the past, there have been massive violations.¹⁰⁸ One case decided by the European Court of Human Rights suggests that little has changed.¹⁰⁹ The petitioner, Khudoyorov, was charged in January 1999 with possession of three grams of hashish.¹¹⁰ He remained in pretrial detention until the end of May 2004, a period during which time his detention was extended sixteen times (ten of these occurring under the new Code).¹¹¹ Khudoyorov was then released because the prosecution had reduced the charges against him in the course of the trial then underway.¹¹²

Official statistics and individual accounts in interviews corroborate concerns about the scope and duration of pretrial detention. The Judicial Department of the RF Supreme Court noted a 29% increase in the number of petitions to extend the period of pretrial detention examined by federal district (район) (*raion*) courts during the first six months of 2006 in comparison with that period in 2005.¹¹³ Of that number, courts granted 98.2% of the petitions (up from 97.9% in the first six months of 2005).¹¹⁴

¹⁰⁶ Art.109(2), CrPC.

¹⁰⁷ Art.109(1-3), CrPC.

¹⁰⁸ A survey published by the Supreme Court in 1998 disclosed that, in some courts in Moscow, some defendants had been in detention waiting for trial for three years or more. In more ordinary cases, 25% of the Moscow cases in 1996 were tried within three to six months (compared to 10.7% in 1992) and 35.8% were tried more than six months after being initiated (compared to 6.9% in 1992). In the St. Petersburg area, 23% of the trials scheduled as of 1 April 1997 were scheduled in apparent violation of the required time limits and cases filed in 1996 were being given trial dates in the second half of 1997. In the Chitinskii Region in March 1997, of 578 defendants in detention, 114 waited more than a year for trial. In Kamchatka Region, of 527 criminal cases involving detainees, 235 took longer than 5 months to reach trial and 31 took over a year. See Supreme Court, “Obzor sudebnoi praktiki Verkhovnogo Suda Rossiiskoi Federatsii o subliudenii srokov rassmotreniia ugolovnykh del sudami Rossiiskoi Federatsii”, *BVS* (1998) No.2.

¹⁰⁹ *Khudoyorov v. Russia*, No.6847/02 (Eur. Ct. H.R., 12 April 2006).

¹¹⁰ *Ibid.*, para. 12. Other charges were brought as well but they were ultimately dropped or a judgment of acquittal was rendered as to them. *Ibid.*, paras. 51-54.

¹¹¹ *Ibid.*, paras. 13-49.

¹¹² *Ibid.* See, also, *Mamedova v. Russia*, *op.cit.* note 90, in which the Vladimir court extended detention eight times to a total of over a year; and *Popov v. Russia*, No.26853/04 (Eur. Ct. H.R., 11 December 2006), in which the Moscow court extended detention six times for a total of over a year.

¹¹³ See Supreme Court, *op.cit.* note 64.

¹¹⁴ *Ibid.*

Consistent with the same time period in 2005, 29.6% of defendants appearing in federal district courts in the first half of 2006 arrived directly from cellblocks where they waited under pretrial detention.¹¹⁵ One attorney told us that, in his experience, the length of detention could range between several months and four years.¹¹⁶ One senior judge in Krasnoïarsk told us that, for most criminal cases in which pretrial detention is ordered, the average time in detention is about six months, although some cases could extend up to two years.¹¹⁷

As for the conditions in pretrial detention facilities, excessive time in pretrial detention makes for crowded detention centers, which has an effect on conditions in those centers. The Supreme Court's 1998 survey reported that: "in many places, the number of persons held in detention centers exceeds the maximum permitted number by 2 to 3 times, which causes social-psychological stress in those places of detention. In Volgograd, in Detention Center No. 1, where there is a limit of 1,800 persons, each month over 3,000 are confined there."¹¹⁸ The most recent cases heard by the ECtHR indicate that little progress—if not some regression into even more abysmal and overcrowded conditions of confinement—has taken place since that time.¹¹⁹

Conditions of confinement were a large part of *Kalashnikov v. Russia*, one of the first cases to be decided on its merits against Russia by the European Court of Human Rights.¹²⁰ The petitioner, Kalashnikov, a banker in far-eastern Siberia charged with embezzlement, claimed that the conditions of his detention amounted to torture and inhuman or degrading treatment or punishment. He was in detention from June 1995 until being convicted in August 1999.¹²¹ The Court found that the inmates in

¹¹⁵ *Ibid.* The Judicial Department does not provide comparable information regarding the work of the subject-level (областные) (*oblastnye*) courts.

¹¹⁶ Interview conducted 24 October 2005 by Jeffrey Kahn.

¹¹⁷ Interview with Valentin Frantsevich Baranovskii, Judge, Krasnoïarsk *Krai* Court, conducted 25 October 2005 by Jeffrey Kahn.

¹¹⁸ Supreme Court, *op.cit.* note 108.

¹¹⁹ See, for example, *Belevitskiy v. Russia*, *op.cit.* note 66, which describes conditions in remand center No. IZ-77/3 in Moscow between July and November 2001 and April to October 2002; *Popov v. Russia*, *op.cit.* note 112, which describes conditions in remand prison SIZO 77/1 in Moscow between May 2002 and February 2004; *Mamedova v. Russia*, *op.cit.* note 90, which describes conditions in detention facility No. IZ-33/1 in Vladimir *Oblast'* between July 2004 and August 2005; and *Khudoyorov v. Russia*, *op.cit.* note 109, which describes conditions in detention facility OD-1/T-2 in Vladimir *Oblast'* between February 2000 and May 2004.

¹²⁰ *Kalashnikov v. Russia*, *op.cit.* note 95.

¹²¹ *Ibid.*, para. 13. The other part of his claim was about the length of confinement, on which he also prevailed before the Court. Over the course of his four-year, two-month detention, Kalashnikov filed more than fifteen motions for release and conducted a hunger strike; all his efforts at release

his cell were forced to sleep in eight hour shifts; Kalashnikov shared his bed with two other inmates, as the cells averaged 300% capacity. The cell was constantly kept lit, lacked adequate ventilation and was overrun with cockroaches and other insects; no anti-infestation treatment was effected in his cell. Kalashnikov was allowed outdoor activity for one or two hours a day, the rest of the time he was confined to his cell, with a very limited space for himself and a stuffy, smoke-filled atmosphere. Throughout his detention, the applicant contracted various skin diseases and fungal infections, scabies and lost his toenails and some fingernails; he was permitted a hot shower twice per month. The applicant was detained on occasions with persons suffering from syphilis and tuberculosis. The lavatory facilities were filthy and provided no privacy and inmates were forced to eat in close proximity to these facilities.¹²² Russia pled for a margin of appreciation for the economic difficulties faced by the country. Its representative argued that because Kalashnikov's conditions of confinement "did not differ from, or at least were no worse than those of most detainees in Russia", he could not be said to have suffered torture or inhuman or degrading treatment.¹²³ The Court experienced little difficulty in holding that Kalashnikov's treatment had violated numerous Convention articles and awarded him damages.¹²⁴

were refused on the same grounds, which routinely cited "the seriousness of the offence with which he was charged and the danger of his obstructing the establishment of the truth while at liberty". *Ibid.*, paras. 34, 38, 41, 43, 45, 46, 51, 60, 68, 70, 72, 73, 74 and 77. Kalashnikov also contended that, from August 1995 until November 1995, no investigative activity took place concerning his case (and the basis for his detention) as the two investigators in charge of the case were on holiday and the person to whom the case was temporarily assigned undertook no action. *Ibid.*, para. 35. Refusals continued even after the investigation of his case had been completed, which made it impossible to interfere with the "establishment of the truth". In one astonishingly Kafka-esque argument, the prosecution sought and received a further delay in Kalashnikov's trial in order to conduct a psychiatric evaluation of Kalashnikov's ability to undergo trial, "in view of the length of the applicant's detention". *Ibid.*, para. 71.

¹²² *Ibid.*, paras. 14-20, 97-103.

¹²³ *Ibid.*, paras. 93-94. Vasilii Vlasihin, one of three experts who appeared in Strasbourg on behalf of the Russian government in the case (see *ibid.*, para. 5(a)), later described the essence of the argument presented by the respondent as that "the conditions of confinement were Russian". E-mail correspondence between William Burnham and Vasilii Vlasihin, 26 May 2007 (on file with William Burnham).

¹²⁴ The Court found violations of Art.3 ("[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment"); Art.5(3) (prompt authorization of detention by a judge and trial within a reasonable time); and Art.6(1) ("everyone is entitled to a fair and public hearing within a reasonable time"). For all of Kalashnikov's troubles, the Court awarded him a meager EUR 8,000 in non-pecuniary damages, costs and expenses.

3. Pretrial Procedure, Part II: The Preliminary Investigation

3.1. The Criminal Investigator

The official in charge of the preliminary investigation is the criminal investigator (следователь) (*sledovatel'*).¹²⁵ Although the police and “operative investigators” (оперативники) (*operativniki*) are involved in the actual execution of most investigative actions, they act at the direction and under the supervision of the criminal investigator once a criminal case is initiated.¹²⁶ In turn, the criminal investigator is supervised by the procurator.

The historical model of the Russian criminal investigator is the investigating magistrate of Western Europe. Russian investigators are supposed to have the same higher legal education as practicing lawyers or judges and have been expected to conduct a “complete and objective investigation of all sides” of the case.¹²⁷ However, while all have some legal education, only 60% have graduated from the standard four- or five-year law curriculum.¹²⁸ Moreover, in terms of temperament and inclination, the Russian criminal investigator has also varied considerably from the continental Western European ideal.¹²⁹ Despite their charge to undertake

¹²⁵ Art.151, CrPC provides that criminal investigators be allocated to the following federal organizations: the procuracy (§2(1)); the Federal Security Service (FSB, successor to the KGB) (§2(2) and 4); the Ministry of Internal Affairs (§2(3)); or the Tax Police (§2(4)). Art.151(5-6) also suggests the possibility of investigation by criminal investigators “of the agency that detected” or “of the agency that has investigative jurisdiction over” crimes itemized in these sections. See, also, Boris Gavrilov, “Sledstvennyi apparat organov vnutrennykh del”, *Otechestvennye Zapiski* (2003) No.2, 11, available at <<http://www.strana-oz.ru/?numid=11&article=485>>.

¹²⁶ “Operativniki” also can act independently of the criminal investigator if there is no criminal case that has been initiated. See Federal'nyi Zakon “Ob operativno-rozysknoi deiatel'nosti” No.144-FZ, signed 12 August 1995. The results of tactical investigative operations (e.g., stings, ‘controlled buys’ of illegal substances, the use of informers or surveillance, etc.) “may not be used in the proof process unless those results meet the evidentiary requirements imposed by this Code”. Art.89, CrPC.

¹²⁷ Art.213(3), CrPC RSFSR.

¹²⁸ Often, criminal investigators are law students studying in the evening divisions of law schools or by correspondence. See Foglesong, *op.cit.* note 47, 552. There is also evidence of relatively lax supervision by lawyer-procurators, since, on average, one procurator supervises between fifteen and twenty investigators, each managing approximately fifteen cases. Federal agencies have had great difficulty in retaining qualified criminal investigators in recent years. Between 1993 and 2002, the number of persons who left criminal investigation agencies more than doubled. Although the number of persons with higher legal education remained the same (60%) in 2002, only 43% of personnel had over three years of criminal investigation experience, down from 55% in 1993. Gavrilov, *op.cit.* note 125.

¹²⁹ There are, of course, indications that continental Western European systems also depart from their own ideal in practice. Abraham Goldstein and Martin Marcus, “The Myth of Judicial Supervision in Three ‘Inquisitorial’ Systems: France, Italy and Germany”, 87(2) *Yale Law Journal* (1977), 240-283, at 266, which states that “prosecutors [...] have proven to be relatively passive

a comprehensive investigation of both incriminating and exculpatory evidence, few Russian criminal investigators have shown much interest in collecting anything other than incriminating evidence.

It is in part because of this reality that the new Code deletes the “complete and objective investigation” requirement and places the investigator on the “prosecution side” of the criminal process.¹³⁰ As Deputy Mizulina observed, these changes are simply an “admission that the investigator in the current criminal process is not an unbiased investigative judge”.¹³¹ The changes also reflect the Code’s removal from the “prosecution side” of its “judicial” duties of deciding on pretrial detention or the power to order searches of home or private correspondence. Both actions now require explicit judicial authorization.¹³² The investigator, however, still enjoys considerable quasi-judicial powers in conducting the preliminary investigation and compiling the dossier or case file.

3.2. *The Nature and Significance of the Case File*

Despite major changes in trial procedure and other reforms, the new Code retains the formal preliminary investigation and its end product—the dossier or case file. The case file contains evidence collected by the criminal investigator—statements of witnesses, real and documentary evidence, and records of searches and other investigative actions. It is compiled by decidedly non-adversarial methods. Records of interrogations and other actions are made in non-public sessions by the investigator without the participation of the defense, except for actions taken with the accused present or at the defense’s request.¹³³ However, there is no *per se* problem with any of this from the standpoint of adversarial principles and equal rights. As the US Supreme Court has observed, referring to the US system:

“Our system of justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition and reactive and have left it largely to the police to develop the facts to be entered in the dossier”.

¹³⁰ See Kozak and Mizulina, *op.cit.* note 17, General Part, Part I, comment 2.

¹³¹ Mizulina, *op.cit.* note 104, 744. See, also, Solomon, *op.cit.* note 5, 79-80, in which it is argued that subordination to the police and Ministry of Internal Affairs has made investigators “part of the culture of policing”; they “were expected to serve the struggle against crime and faced incentives, including performance evaluations, that emphasized indicting and convicting of-fenders”.

¹³² See Art.29(2), CrPC (powers of a court generally); Art.108 (pretrial detention); Art.165 (general procedures for judicial warrants); Art.182(3) (search of a dwelling); Art.185(2) (interception of correspondence); Art.186 (monitoring or recording communications).

¹³³ Art.47(4), CrPC (right to attend); Art.53(2) (permission of the investigator required for defense counsel to ask questions). Actually, it is more accurate to call these sessions ‘secret’, since it is a crime to reveal anything learned from them without the investigator’s express permission. See *infra* text accompanying notes 164 and 250.

is conceivable. Even if detectives were to bring impartial magistrates around with them to all interrogations, there would be no decision for the impartial magistrate to umpire.”¹³⁴

In general, adversarial principles and the equality of parties apply to trials and other court proceedings, not to investigations. However, if the products of the non-adversarial investigation—by reason of their having been processed through an investigative process—can be used at trial as evidence of guilt, then that *is* a violation of adversarial principles. When this happens, the ‘investigation’ process becomes more than just a vehicle for finding out information. It serves an ‘early trial’ function by transforming the information received into ‘pre-admitted’ evidence ready for use at trial. If the products of the investigator’s work were *really* only partisan information gathered by one side of the criminal proceedings, they should be no more admissible in evidence at trial than similar summaries of evidence or records of investigative activities drawn up by the defense.

In the traditional civil law system, materials in the file are relied on—to varying degrees depending on the country and the circumstances—as evidence of guilt. In some continental systems, “courts base their judgments [...] mainly on the dossier, which contains the results of the pre-trial investigation” and the trial is more a “verification of the results of the prior stages than an active inquiry” of its own.¹³⁵ In such countries, a trial would not typically involve live presentation of all or—in some cases—even any of the witnesses.¹³⁶ In common law adversarial systems, none of the contents of such a case file would be admissible in evidence. Only evidence presented first-hand at trial—where the right of cross-examination by the defense can be afforded—will count.¹³⁷

On the spectrum of immediacy and orality of trial proceedings, Russia is more towards the adversarial ‘live testimony’ end of the spectrum

¹³⁴ *McNeil v. Wisconsin*, 501 US 171, 181 n.2 (1991).

¹³⁵ This description of Dutch trials is from Christopher Harding, Phil Fennell, Nico Jorg and Bert Swart (eds.), *Criminal Justice in Europe: A Comparative Study* (Oxford University Press, Oxford, 1995), 287.

¹³⁶ Bron McKillop, “Readings and Hearings in French Criminal Justice: Five Cases in the Tribunal Correctionnel”, 46(4) *American Journal of Comparative Law* (1998), 757-783, at 774-775. In the five cases observed, “the statements of 17 people, apart from the defendants, were included in the dossiers but only one of those appeared at a hearing and that was because he was a civil party claiming damages”. See, also, Bron McKillop, “Anatomy of a French Murder Case”, 45(3) *American Journal of Comparative Law* (1997), 527-583, at 563. In the murder case, fourteen fact witness statements were in the case file but only two of those witnesses testified at trial.

¹³⁷ There is a limited amount of evidence that can be ‘pre-admitted’ in adversarial systems, such as prior testimony from a proceeding in which the defense had the right of cross examination. See, for example, Federal Rule of Evidence 804(b)(1), which holds that prior sworn testimony is admissible but only “if the party against whom the testimony is now offered [...] had an opportunity and similar motive to develop the testimony” by questioning the witness. The Federal Rules of Evidence are available at <<http://www.law.cornell.edu/rules/fre/>>.

than most countries in continental Europe.¹³⁸ However, Russia claims to have adopted adversarial principles as its standard. By that standard, its treatment of the case file contents falls short. Not only are adversarial principles and equality of treatment violated, but the secrecy with which the case file contents are gathered deprives the defendant and the public of the right to an open public trial.

It should be emphasized that the use of the contents of the case file as 'pre-admitted' evidence is not the only way a case file can dominate the trial. Judges read the case file before the trial starts, they have it in front of them to consult and ask questions from during the trial, and they use it for reference in the process of writing their decision in the case.¹³⁹ Whether the contents are ever actually presented formally at trial or used by the judge to justify a decision, they will have had their effect.

3.3. *Use of the Case File at Trial under the New Code*

Given these standards, how do provisions of the new Code fare? One can find both 'dossier system' and 'adversarial system' aspects. On the dossier system side is the fact that the new Code retains the case file and appears to give its contents a presumptive exalted status as evidence. Article 74(1) of the Code defines evidence as "any information that provides a basis for a court [...] to determine [...] the presence or absence of circumstances that are subject to proof in proceedings in a criminal case". It then lists all the items that are considered to be "admissible evidence", among them "testimony given by a victim or witness". However, testimony of a witness is defined in a specific way as "information communicated by a witness *during questioning conducted in the course of the pretrial process* in the criminal case *or in court* in accordance with the requirements of Articles 187-191".¹⁴⁰ The cited articles govern procedures for criminal investigator questioning of witnesses during the preliminary investigation.

The quasi-judicial screening and verification functions that the investigator performs are emphasized in the new Code's provisions on 'verification of evidence'. These provisions require not that the investigator just collect whatever information comes his or her way, but that the investigator go through the process of verifying the information

¹³⁸ See *supra* note 136 (French system), *infra* note 159 (Austrian, German and Italian systems) and text at *supra* note 135 (Dutch system). The ECHR defines "adversariality" rather narrowly. See Treschel, *op.cit.* note 3, as there discussed.

¹³⁹ At the decision-making stage, the influence of the case file's version of the facts is particularly strong, given that its only competition in the mind of the judge is what the judge might remember from the live testimony at trial. The judge has no verbatim trial record to consult, only non-verbatim summaries that the court secretary might have been able to jot down during the trial (the standard practice in civil law systems). See *infra* text at note 311.

¹⁴⁰ Art. 79(1), CrPC (emphasis added).

received. This presumably converts the information into 'admissible evidence'. Verification is performed "by comparing it to other evidence available in the criminal case file and also by identifying its source and obtaining other evidence that corroborates or contradicts the evidence being reviewed".¹⁴¹ Based on the foregoing, witness statements—having been 'verified' and converted into 'evidence' by the criminal investigator during the preliminary investigation—would seem to be sufficient alone to convict the defendant at trial.

On the other hand, the current Article 240(1) (and its predecessor provisions) establish the twin requirements of orality (устность) (*ustnost'*) and immediacy (непосредственность) (*neposredstvennost'*) as fundamental principles of the Russian trial. Article 240(1) provides:

"All evidence in the trial of a criminal case shall be subjected to first-hand examination [...] The court must hear the testimony of the defendant, the victim and witnesses, and findings of any expert, must inspect the physical evidence, must read aloud official records and other documents, and must conduct other judicial actions to examine the evidence."

However, Article 240 is not quite what it seems. The first sentence of Article 240(1) requires that evidence be subjected to "*first-hand examination*" at trial, not that it be *first-hand evidence*. The final phrase confirms this when it permits the court to "read aloud official records and other documents" in the case file. In addition, Article 285 provides that "official records of investigative actions", expert findings and "other documents included in the criminal case file may be read aloud" at trial, presumably including witness and victim statements and expert findings.¹⁴² In fact, Article 240 states only a general principle that is modified by later, more specific provisions. Certainly, Article 240's reference to "hearing [...] the findings of experts" is not read as requiring that the judge do anything more than 'hear' them as he or she reads them, since Article 285 explicitly states that expert findings can be read in place of live testimony.¹⁴³ Thus, to determine how particular items in the case file are treated, one has to consult more specific articles of the Code.

¹⁴¹ Art.87, CrPC.

¹⁴² This would include medical and other expert conclusions, official descriptions (protocols) of examinations of the crime scene, search and seizure results, line-ups and forensic experiments.

¹⁴³ Art.282 provides that the court has discretion, on its own motion or that of a party, to summon the expert to explain his or her findings in court once those findings have been read into evidence (but this is not required). See, also, Opređenje Konstitutsionnogo Suda No.202-O of 22 April 2005, at para. 2.2, (petition of Romanova) (unpublished decision available on Garant), in which it was found that it is not unconstitutional to accept expert findings in lieu of expert testimony, since defense has the right to make a motion to have the expert appear and give testimony.

Regarding the use of the testimony of witnesses or victims contained in the case file, the drafters of the new Code took to heart the adversarial critique outlined in the last section and wanted to seriously limit the practice. Indeed, the original provisions of the new Code on reading prior testimony effectively imposed a requirement that only live testimony be used at trial. Article 281 provided that case file testimony could be read at trial if the witnesses did not appear or contradicted themselves, but only if all the parties consented. The drafters figured that the defense was not likely to consent if the prosecution's witnesses did not show up, so this effectively ensured the defense the right to confront and examine all prosecution witnesses.¹⁴⁴ Courts hated the consent requirement and engaged in tortured interpretations to get around its requirements and there was a firestorm of criticism from law enforcement.¹⁴⁵ As a result, Article 281 was amended in 2003 restoring exceptions that had existed in the old Code that permitted reading the statements of witnesses that are unavailable.¹⁴⁶ There were problems with the drafter's original consent approach to the extent that it applied to witnesses who appeared at trial and testified contrary to their prior statement. Permission from the opposing party to confront its witness with the prior inconsistent statement would not likely ever be granted, making it impossible to impeach the witness with that prior statement. However, we would suggest that the drafters were otherwise on the right track in terms of adversarial principles in seeking to curtail the use of the contents of the case file at trial.¹⁴⁷

The amended and current version of Article 281 permits the reading of case file testimony of victims or witnesses under three circumstances. *First*, it can be read if the witness's failure to appear is due to death or severe illness, inability to execute a subpoena on a foreign national or

¹⁴⁴ Of course, if the defendant admitted guilt, the defense could well consent for tactical reasons. Consent could avoid more effective and emotional in-court oral testimony in the event the witness appeared at an adjourned trial date. Also, consent could help gain a more lenient sentence in return for such cooperation. However, see *infra* text accompanying note 157 (routine waiver by counsel).

¹⁴⁵ M. Adamaitis, "Soglasie storon ne tozhdestvenno soglasiu odnoi storony", *Rossiiskaia iustitsiia* (2003) No.2, which discusses judicial decisions that interpreted Art.281 to require the defense to give reasons justifying non-consent and as permitting reading on consent of only one party; one decision maintained that it violated adversarial principles *not* to permit reading of testimony. See, also, O. Pavlovskii, "Sostiazatel'noe pravosudie nuzhdaetsia v dopolnitel'nom istochnike prava", *Rossiiskaia iustitsiia* (2003) No.7, which points out how defense could be hurt by the consent requirement; and Iu. Briukov, "Novoe ugovolno-protsessual'noe zakonodatel'stvo i praktika prokurorskogo nadzora", *Rossiiskaia iustitsiia* (2003) No.6, which notes that the first deputy procurator general urged an amendment to permit reading, arguing that it is permitted under the ECHR.

¹⁴⁶ Art.1(71) (amending Art.281), Federal'nyi Zakon "O vnesenii i dopolnenii v Ugolovno-protsessual'nyi kodeks RF" No.92-FZ, signed 4 July 2003.

¹⁴⁷ However, see *infra* note 157 and accompanying text.

“natural disaster or other extraordinary circumstances precluding attendance in court”.¹⁴⁸ *Second*, if the witness or victim fails to appear at trial, the statement may be read aloud in open court “with the consent of the parties” (the former sole exception).¹⁴⁹ *Third*, on either party’s motion, the statement may be read if there are “substantial contradictions” between the live testimony offered in court and the prior statement.¹⁵⁰

By far the most commonly invoked exception is the first one, since it is a common occurrence for witnesses not to appear for trial. In Soviet times, the rate of witness appearances was quite high. However, with the passing of Soviet power and the general relaxation of public order and attitudes towards authority, the rate of witness appearances has gone down considerably.¹⁵¹ As a result, the pressure is on judges to find an exception permitting use of the written statement. In this respect, the open-ended “other extraordinary circumstance precluding attendance in court” of Article 281 has proven useful.¹⁵²

However, courts had long ago gotten used to just reading the case file contents without finding any exception. An example is a case from the mid-1990s, where the defendant was convicted of theft based on a confession in the case file that he gave before the criminal investigator, which he recanted at trial as coerced by “the application of improper investigative methods”. Not a single witness—including the alleged victim of the crime—appeared to testify at the trial and, the Supreme Court noted, there was “no indication of the reasons for their absence”. The Supreme Court Criminal Division reversed and ordered a new trial.¹⁵³

¹⁴⁸ Art.281(2), CrPC.

¹⁴⁹ Art.281(1), CrPC.

¹⁵⁰ Art.281(3), CrPC. The defendant’s prior testimony may be also be read when the defendant refuses to give testimony at trial after his earlier voluntary cooperation during the preliminary investigation (Art.276(1)(3)) and in the small number of criminal cases in which the defendant is tried *in absentia* per Art.247(4), CrPC.

¹⁵¹ See *infra* notes 156-158.

¹⁵² Opređenje Konstitutsionnogo Suda No.233-O of 27 October 2000, VKS (2001) No.2 (petition of Shchennikov), in which the Court suggested that the exception for unavailability is constitutionally based. It observed that, unless the witness were truly unavailable as defined by the law, reading the testimony of an absent witness would violate adversarial principles and equality of the parties and would constitute doubtful evidence that must be interpreted in the defendant’s favor, since the requisite certitude necessary for relying on the evidence is not present. Art.49(3) of the Constitution provides that “[a]ny remaining doubts about guilt shall be resolved in favor of the defendant”. The Court also noted that Art.6(3)(d) of the ECHR requires production of the witnesses against the defendant at trial but does not make clear whether in its view it would be a violation of the ECHR if the absent witness was unavailable for one of the reasons set out in the Code. Moreover, there is no distinction made between witnesses central to the prosecution’s cases and more peripheral witnesses.

¹⁵³ Supreme Court, *In re Zav’ialov*, Opređenje SK Verkhovnogo Suda of 15 September 1995, BVS (1996) No.11.

What is most telling about the case is that the conviction had earlier been affirmed by an intermediate appellate court, thereby suggesting that at least the lower courts did not exactly view this as an obvious error or an aberration. In a more recent case under the new amended Code, all the Supreme Court Criminal Division required to permit the reading of four witnesses' testimonies were the facts that the witnesses lived 650 kilometers away and that some efforts had been made to get them vouchers for transportation.¹⁵⁴ In another case, the Court reversed a jury acquittal because the judge had not permitted the reading of the testimony of eyewitnesses to murder, finding, at least as to one of the witnesses, that the court had not made a proper determination of whether one of the witnesses was too sick to attend.¹⁵⁵

Courtroom observations conducted in October 2003 in Moscow amply document the high frequency of non-appearance of witnesses.¹⁵⁶ Those observations also demonstrate difficulties with the second exception to live attendance and testimony discussed above—party consent. As suggested earlier, one would think that the defense would not often consent. Yet in the cases observed in the Basmann Inter-Municipal Court in Moscow, the appointed defense lawyers consented routinely.¹⁵⁷ In one rare case, the judge proposed to read the testimony of five absent witnesses and defense counsel gave consent, although the defendant himself objected.¹⁵⁸ These instances of blanket consent by appointed counsel suggests that, while consent is consistent with adversarial theory, the competence level of appointed defense lawyers makes the consent exception unrealistic in practice.

The problem with the third exception, which permits reading prior testimony in the event that there are contradictions, is in determining what constitutes a "substantial contradiction". Some judges consider that if a witness hesitates at all or leaves out anything that was in his or her prior statement to the investigator, then that is a sufficient "contradiction"

¹⁵⁴ Supreme Court, Kassatsionnoe opredelenie SK po ugovnym delam Verkhovnogo Suda No.89-006-40 of 10 November 2006.

¹⁵⁵ Supreme Court, *In re Tarasov et al.*, Opredelenie prezidiuma, "Po delu Tarasova i drugykh," (prigovor Dal'nostochnogo okružnogo voennogo suda) No.2-054/2002, "Obzor sudebnoi praktiki Verkhovnogo Suda za III kvartal 2005 goda utverzhen postanovleniem prizidiuma Verkhovnogo Suda ot 23 noiabria 2005 g.," BVS (2006) No.3.

¹⁵⁶ Karinna Moskalenko and Leonid Nikitinskii (eds.), *Basmannoe pravosudie: uroki samooborony. Posobie dlia advokotov (prochti i peredai drugomu)* (Publichaia reputatsiia, Moscow, 2004).

¹⁵⁷ *Ibid.*, 23, 27, 29, 60 and 67, in all of which no party objects to continuing the hearing in the absence of live witnesses; and *ibid.*, 52, 55 and 59, in which, while the defendant and defense counsel did not object to continuing the proceeding in the absence of witnesses, the court postponed the hearing on the insistence of the procurator.

¹⁵⁸ *Ibid.*, 21. The trial was postponed. Moreover, in this and other cases, judges did not read the witness statements aloud as required but simply noted that they were in the case file.

to read the whole written statement into evidence. However, abuse of this exception is perhaps not as problematic as is the case for the others, since the witness will be present in court and can be examined upon the contents of the earlier statement as well as any live testimony he or she might give.¹⁵⁹

Before leaving the issue of calling witnesses in person at trial to testify, a few words should be said about anonymous witnesses—an innovation of the new Code. Article 278(5) of the Code provides:

“When necessary for the security of a witness, his close relatives, other relatives or close associates, the court may, without disclosing the true information on the identity of the witness, question him out of the view of other participants in the court proceedings, which decision shall be in the form of an order or ruling.”

It goes without saying that this infringes on adversarial principles to the extent that it interferes with the defendant's right to confront the witness and test the witness' testimony through questioning. However, the use of anonymous witnesses is permitted by the European Court of Human Rights. Similarly to situations where witness statements are read, a conviction cannot be based “to a decisive extent” on anonymous testimony and “the handicaps under which the defence labours [must] be sufficiently counterbalanced by the procedures followed by the judicial authorities”.¹⁶⁰

¹⁵⁹ Separate and apart from any critique based on Russian constitutional rights to adversary principles, Russia's regime could also constitute a violation of Art. 6(3)(d), ECHR, which secures the right of defendants “to examine or have examined the witnesses against him”. The Strasbourg Court has made it clear that there is no requirement that “in order to be used in evidence statements of witnesses should always be made at a public hearing in court”. See *Kostovski v. Netherlands*, No.11454/85 (Eur.Ct.H.R., 22 November 1989), para. 4. Further, the Court has cautioned that “admissibility of evidence is primarily a matter for regulation by national law” and that all it does is “ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair”. *Van Mechelen and Others v. Netherlands*, Nos.21363/93, 21364/93, 21427/93 and 22056/93 (Eur.Ct.H.R., 23 April 1997). Further, reading statements obtained in the pretrial stage is not in itself inconsistent with the requirements of Art. 6(3)(d) but this is so only if “the rights of the defense are respected. As a rule, these rights require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him either when he was making his statements or at a later stage of the proceedings.” *Kostovski v. Netherlands*, *supra*, para. 41. See, also, *Unterpertinger v. Austria*, No.9120/80 (Eur.Ct.H.R., 24 November 1986), in which, when the victim refused to testify, the defendant was convicted based on the statement made by the victim to the police, a violation of Art.6(3)(d); *P.S. v. Germany*, No.33900/96 (Eur.Ct.H.R., 20 December 2001), in which an eight-year-old victim of sexual assault was not questioned either by the court or defense, a violation of Art.6(3)(d); and *A.M. v. Italy*, No.37019/97 (Eur.Ct.H.R., 14 December 1999), in which a conviction based solely on a pretrial deposition taken by a police officer was held to be a violation of Art.6(3)(d). Compare, however, *Artner v. Austria*, No.13161/87 (Eur.Ct.H.R., 28 July 1992), in which statements to police and the investigating judge corroborated by other evidence proved sufficient for conviction. See, generally, Trechsel, *op.cit.* note 3, 289–322; and Sarah J. Summers, “The Right to Confrontation after Crawford v. Washington: A ‘Continental European’ Perspective”, 2(3) *International Commentary on Evidence* (2004), which compares ECtHR jurisprudence with the US requirement of “confrontation”.

¹⁶⁰ *Van Mechelen v. Netherlands*, *op.cit.* note 159. See, also, *Kostovski v. Netherlands*, *op.cit.* note 159.

While Russia's Code does not set out these two qualifications, practice indicates that Russian courts nonetheless impose them.¹⁶¹

To summarize, Russian law may be more inclined towards the 'live testimony' end of the spectrum than some Western European continental systems. However, the law falls short of its adversarial and equal rights ideals to the extent that the case file is permitted to be used in place of first-hand evidence directly examined at trial and is allowed in other ways to dominate trial proceedings.¹⁶²

3.4. Components of the Investigation

3.4.1. Interrogating Witnesses

A 'witness' (свидетель) (*svidetel'*) is someone who has information about the crime under investigation. However, a suspect or an accused is not considered to be a witness, nor is the victim. Each category of participants has a set of different rights and obligations that applies to each case.

Interrogating witnesses is probably the most common activity of the investigator. As noted earlier, the criminal investigator in Russia has subpoena power to compel attendance of potential witnesses. Refusal to give testimony when summoned by the investigator is a criminal offense punishable by up to 90 days imprisonment.¹⁶³

It is also a negative factor if the anonymous witnesses are police officers rather than private citizens. See *Doorson v. Netherlands*, No.20524/92 (Eur.Ct.H.R., 26 March 1996).

¹⁶¹ Kassatsionnoe opredelenie SK po ugovolnym delam Verkhovnogo Suda No.43-006-9 of 14 June 2006, available at < http://www.supcourt.ru/arxiv_out/TEXT.PHP?id_text=72557&iitext>, in which it was held that the Code's provisions were not violated when the trial judge denied a defense motion to disclose the identity of a witness; the witness testified from an adjoining room through a computer program that disguised his voice and defense and other parties were permitted to ask questions and received exhaustive answers; and Nadzornoe opredelenie SK po ugovolnym delam Verkhovnogo Suda No.24-Do4-9 of 1 March 2005, *BVS* (2006) No.6, in which it was held that Art.6(3)(d), ECHR had been violated when the trial court did not permit defense counsel to confront anonymous witnesses with questions, when their evidence was relied on for conviction. If one compares the practice Russia requires with those used in some of the cases on anonymous witnesses decided by the ECtHR, then the Russian courts' interpretations of Art.6(3)(d) may be stricter than the Strasbourg court's interpretations.

¹⁶² The new Georgian Criminal Procedure Code (slated to be enacted in the fall of 2007) ensures that the case file will not dominate the trial by eliminating it altogether, requiring instead that the state present its evidence only at trial. See, for example, Art.20, Draft Criminal Procedure Code of the Republic of Georgia (unpublished), which states that "[a]ll evidence, save exceptions provided for by this Code, shall be examined directly and orally at the trial"; and "[o]nly the evidence examined at the trial, with both parties participating, shall form the basis for the court judgment". A draft Ukrainian Criminal Procedure Code prepared under the auspices of Judge Viktor Shishkin of the Constitutional Court of Ukraine appears headed in the same direction. Author William Burnham, once again with the sponsorship of OPDAT (see *supra* note 15), participated in drafting sessions involving both these draft codes.

¹⁶³ Art.308, Criminal Code RF. Witnesses and victims are warned of this criminal liability at the beginning of their questioning. See Art.164(5), Criminal Code RF. False testimony is likewise a criminal offense, of course, about which witnesses and victims are also warned. See Art.307,

The preliminary investigation is closed to the public and the contents of the investigator's files are secret. Any disclosure of information about—or obtained during—the preliminary investigation is at the discretion of the investigator or higher-level prosecutorial officials.¹⁶⁴ Unauthorized disclosure to the public is a criminal offense punishable, again, by up to 90 days imprisonment.¹⁶⁵

The record made of the interrogation is not a verbatim one but a summary called a 'protocol' (протокол) (*protokol*), which is drafted by the investigator (though stated in the first person) and verified by the witness by signing it and initialing each page. The term used to describe the statements given to the investigator and signed by the witness is 'testimony' (показание) (*pokazanie*), the same term used for what witnesses give at trial. A person who is questioned as a witness must be informed of his or her rights at the start of the questioning and the session must be conducted in the language in which the person being questioned wishes to speak.¹⁶⁶ The witness has the right to use documents and notes.¹⁶⁷ Also, he or she may request that photographs, sound and/or video recordings or filming of the questioning be made and kept with the case file as a sealed record.¹⁶⁸

As noted earlier, the defense has no right to be present during witness interrogations.¹⁶⁹ Unless defense counsel can persuade the investigator (or, if refusal is appealed, the judge) to give permission to attend an interrogation—an exceptionally rare circumstance—only the criminal

Criminal Code. The right against self-incrimination and incrimination of a spouse or close relative is constitutionally protected. See Art. 51, RF Constitution. The Code also provides statutory privileges that protect the witness or victim from testimony that would tend to incriminate a spouse or close relative; attorneys, priests and federal legislators also enjoy limited privileges concerning matters related to their professional activities. See Art. 56(3-4), CrPC.

¹⁶⁴ Art. 161(2), CrPC (referencing Art. 310, Criminal Code RF).

¹⁶⁵ Art. 161(3), CrPC (permission process for disclosure).

¹⁶⁶ Art. 189(1), CrPC. If a witness appears for questioning accompanied by an attorney, the attorney has the right to be present during the interrogation and may exercise all of the rights that a defense counsel possesses while providing legal assistance to a defendant during an investigative action. Art. 189(5), CrPC. However, if a witness arrives for questioning without counsel, there is no provision in the Code that would require the investigator to postpone the encounter until a later time.

¹⁶⁷ Art. 189(3), CrPC.

¹⁶⁸ Art. 189(4), CrPC. Several practitioners, academics and a retired judge in Moscow all expressed skepticism that an investigator would permit any electronic recording of an interrogation, regardless of any request and even if it were technically feasible to do so. Some practitioners doubted that such a recording would be of any benefit to the person being questioned. If the concern was with coercion, they said, that was easy enough to apply off camera. One investigator in Krasnoyarsk noted that, although all witnesses were informed of this right, the investigator could not recall a single witness who had ever exercised it.

¹⁶⁹ Defense counsel can be present when the accused gives testimony but the accused (and the victim) are not considered to be 'witnesses'.

investigator will be present.¹⁷⁰ The defense will have an opportunity to review the case file statements but only after the investigation is nearly complete.¹⁷¹ Anecdotal reports indicate that investigators are no more receptive under the new Code to defense requests to examine evidence or witnesses than they were under the old. To be sure, the investigator has little incentive to give consent.

3.4.2. Interrogation of the Suspect or Accused

A 'suspect' (подозреваемый) (*podozrevaemyi*) or an 'accused' (обвиняемый) (*obviniaemyi*) is interrogated and his or her statement taken in a similar manner to that of a witness. However, while the statements of a suspect or an accused—like those of a witness—are called 'testimony', neither the suspect nor the accused is under any legal obligation to tell the truth.¹⁷² Before interrogation begins, the criminal investigator must advise the suspect or accused of a whole list of rights, including the right "not to give explanations or testimony" regarding the charges or suspicions.¹⁷³ This is not as emphatic as a "right to silence" but the non-waivable right to counsel during interrogation, discussed below, compensates somewhat for the absence of bullet-point *Miranda*-style warnings of this sort.¹⁷⁴

Perhaps the single most important right a suspect or an accused faced with interrogation in any system can have is the right to counsel. The Constitution provides that every arrestee or accused is entitled to counsel and appointed counsel is provided for by statute.¹⁷⁵ Approximately 60% of criminal defendants in Moscow and St. Petersburg and 75-80% outside of these cities are represented by appointed counsel.¹⁷⁶

The right to counsel in pretrial stages of a case has evolved over time. The 1960 Code provided a right to counsel only after the entire preliminary

¹⁷⁰ See Art.53(1)(5), CrPC, which provides defense counsel with the right to participate in the questioning of the suspect or the accused—but not the questioning of witnesses—and the right to participate in "other investigative actions conducted with the participation of the suspect or accused or pursuant to [...] defense counsel's motion".

¹⁷¹ Art.53(1)(7), CrPC.

¹⁷² Compare Art.164(5) (on the witness) with Art.173(2 and 4) (on the accused), CrPC. A suspect is a person who has been placed under arrest, subjected to pretrial restraint or against whom a criminal case has been initiated. Art.46(1), CrPC. An accused is someone against whom criminal charges have been filed. Art.47(1), CrPC.

¹⁷³ Art.46(4)(2) (on the suspect) and Art.47(4)(3) (on the accused), CrPC. Somewhat strangely, the suspect or accused is told that what is said can be used against him or her only "upon agreeing to give testimony" (при согласии [подозреваемого/обвиняемого] дать показания) (*pri soglasii [podozrevaemogo/obviniaemogo] dat' pokazaniia*) and not before.

¹⁷⁴ See *infra* text accompanying note 189.

¹⁷⁵ Art.48(1-2), RF Constitution; and Art.50(2), CrPC. Like several other rights in the Constitution, the right to appointed counsel exists "in those situations specified by federal statute". Art.48(2), RF Constitution.

¹⁷⁶ Interview with Evgenii Semeniako, President, Federal Chamber of Advocates, in *Rossiiskii advokat* (2005) No.2, available at <<http://gra.litsa.ru/news.php?p=21>>.

investigation was completed and the file was transmitted to the accused to examine, the final step before it is presented to the procurator for approval to be filed in court.¹⁷⁷ Then, in 1972, counsel's access was possible with the permission of the procurator at the point that charges are presented but before the investigation was complete.¹⁷⁸ This did not work well, since there was no incentive for procurators ever to grant such permission. In 1992, the Code was changed to permit access to counsel for an accused when charges were presented (without any need for procurator permission) and for anyone else in custody for suspicion of having committed a crime or pending presentation of charges. However, the point at which the right arose was defined as being "from the moment that [the suspect] is served with a protocol of his arrest or the order imposing detention".¹⁷⁹ As a result, law enforcement officers seeking to interrogate a suspect or an accused without counsel would simply delay the preparation and presentation of the arrest or detention documents.

In a 2000 case, *Maslov*, however, the Constitutional Court held this tactic unconstitutional as a violation of Article 48(2) of the 1993 Constitution, which provides that everyone is entitled to counsel "from the point the person is arrested, detained in custody, or charged with a crime, whichever comes first".¹⁸⁰ The notice of the record of Maslov's arrest was prepared and served on him only after he had been detained in fact as an arrestee for an extended period of time and had been subjected to various investigative measures, including a line-up and interrogation. The Court required that counsel be provided at the point when authorities take actions "that actually restrict that person's personal security, including the right of movement"—without regard to any paperwork that might need to be completed or presented to the suspect. The 2001 Code codifies the *Maslov* decision by providing that the right to counsel attaches "from the point in time when a person suspected of committing a crime is actually arrested" or "from the point in time when any other coercive procedural actions or other procedural actions are taken that infringe on the rights

¹⁷⁷ Arts.47 and 49, CrPC RSFSR.

¹⁷⁸ Art.47, CrPC RSFSR, as amended by Prezidium Verkhovnogo Soveta, Ukaz "O vnesenii izmenenii i dopolnenii v ugovovno-protsessual'nyi kodeks RSFSR", signed 26 June 1972, 1. Earlier access to counsel was permitted in cases involving minors or the physically or mentally disabled.

¹⁷⁹ Art.47, CrPC RSFSR, as amended by the 1992 Statute on Changes and Additions to the Criminal Procedure Code of the RSFSR, 5. This same law amended Art.51 to permit defense counsel to be present at all investigative actions that require the participation of the accused or are performed at the request of the defense.

¹⁸⁰ Postanovlenie Konstitutsionnogo Suda No.11-P of 27 June 2000, VKS (2000) No.5 (petition of Maslov).

and freedoms of a suspect".¹⁸¹ It defines "point of actual arrest" as when the person "is in fact deprived of his freedom of movement".¹⁸²

The *Maslov* case also seeks to upset a favorite technique of criminal investigators the world over who enjoy the power to compel testimony from witnesses—interrogating someone who is really a suspect as a 'witness'. As a 'witness', the person need not be provided with counsel and is advised that giving testimony before the investigator is required under pain of criminal prosecution.¹⁸³ The Code provides an incomplete solution to the problem, however. It follows *Maslov* in its recognition that the official document stating that the person is being detained as a suspect cannot be the deciding factor, focusing instead on "deprivation of freedom of movement". However, real witnesses who are called in to testify are similarly not free to leave and the Code does not deal with how to distinguish between them and *de facto* suspects.¹⁸⁴ The *Maslov* decision does, however. The Court states that the restriction of movement must have been "taken with the goal of incriminating him or proving suspicions against him" or must constitute "prosecution activities directed towards a particular person".¹⁸⁵ A prominent professor of criminal procedure describes the crucial point as being when a witness "is in fact suspected by the interrogator of committing the crime and when the subject of the information sought from that person [...] concerns his or her participation in the crime".¹⁸⁶ While this is probably the only rule there could be, reconstructing what the investigator was thinking at any given point in the investigation is likely to be difficult, given that the investigator will likely claim not to have suspected the 'witness' at the point that damaging admissions were made.

Counsel is most important at the point in time when the suspect or accused is sought to be interrogated. Prior to being questioned for the first time, the new Code spells out that a suspect is entitled "to have a one-on-

¹⁸¹ Art.49(3)(5), CrPC.

¹⁸² Art.5(15), CrPC.

¹⁸³ See *supra* note 163.

¹⁸⁴ The problem of distinguishing between witnesses and suspects is not as great in systems where true witnesses (as opposed to someone suspected of wrongdoing) are not under compulsion to appear or say anything to aid the authorities. See, for example, US Supreme Court, *Davis v. Mississippi*, 394 US 721, 727 n.6 (1969), which states that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer".

¹⁸⁵ Postanovlenie Konstitutsionnogo Suda No.11-P, *op.cit.* note 180, 2.

¹⁸⁶ Lupinskaia, *op.cit.* note 19, 233. Whatever actions qualify, the *Maslov* court gives one circular statement of the crucial point—when the investigator provides an "explanation of the right under Art.51(1) [...] not to incriminate oneself". Postanovlenie Konstitutsionnogo Suda No.11-P, *op.cit.* note 180.

one meeting with [counsel] in a confidential setting”¹⁸⁷ and an “unlimited number of one-on-one meetings of unlimited duration in a confidential setting with defense counsel” are secured for the accused.¹⁸⁸ Article 92(4) provides that the meeting may not be limited to less than two hours, even if the suspect is needed to participate in investigative actions.

The right to counsel, however, can be waived, so long as the waiver is initiated by the suspect or accused and is provided in writing on a form to be filed in the case file.¹⁸⁹ A majority of the working group was concerned that the same coercive measures that could be applied to force confessions could also coerce waivers. To deal with this issue, Article 75(2)(1) defines as “inadmissible evidence”:

“[A]ny testimony of a suspect or accused that was given in the course of the pre-trial stages of a criminal case in the absence of defense counsel, including situations where there was a waiver of defense counsel, and not confirmed by such suspect or accused in court.”

Thus, if a defendant at trial repudiates his or her confession, the confession is inadmissible unless defense counsel was present when it was given—even if the defendant had waived his or her right to counsel.¹⁹⁰

This rather extraordinary provision was opposed by the procuracy representatives in the working group and the procuracy continues to seek its repeal.¹⁹¹ However, Article 75(2) is not a panacea and practices have developed to circumvent its protections.

The problem is that Article 75(2) covers only the time of the criminal investigator's interrogation, leaving the suspect or accused to the tender mercies of the police and jailers the rest of the time. Thus, coercive measures can be applied before formal interrogation by the investigator and after the confession is signed to ensure that the suspect sticks to it. It seems to be common knowledge, confirmed by our discussions with defense counsel, that the police routinely threaten and beat suspects prior to and during detention in an effort to force confessions from them.¹⁹² The

¹⁸⁷ Art.46(4)(3), CrPC.

¹⁸⁸ Art.47(4)(9), CrPC. An arrested suspect must be questioned within twenty-four hours of the point of his actual arrest (Art.46(2), CrPC), while an accused must be questioned “immediately after presenting the charges” (Art.173(1), CrPC).

¹⁸⁹ Art.52(1), CrPC.

¹⁹⁰ Among Western European countries, only the Italian system has a similar rule. See Thaman, *op.cit.* note 21, 82–83.

¹⁹¹ Korotkov, *op.cit.* note 39. In 2003, Art.276 was amended—at the behest of law enforcement—to permit prior statements of defendants to be read “when the defendant refuses to give testimony in court, if the provisions of Art.47(4)(3) of this Code have been observed”. However, Art.47(4)(3) provides an exception for “the circumstances provided by Art.75(2)(1)”, and the 2003 amendment did not change Art.75(2). See Art.1(14 and 70), Federal Law on Changes and Additions to the Criminal Procedure Code RF.

¹⁹² Interviews conducted 24 and 27 October 2005 by Jeffrey Kahn.

procurators we interviewed did not directly deny these claims but rather preferred to personally distance themselves from police brutality that they had only “heard about”.¹⁹³ One procurator, who explicitly requested anonymity in exchange for candor admitted that beatings did occur, which was precisely why police preferred detention to other forms of pretrial restraint—to extract confessions from a suspect in the total power of law enforcement. However, the procurator noted, defendants often lie about their treatment in custody.¹⁹⁴

Violence applied to suspects is confirmed by decisions of the European Court of Human Rights. Due to the long gestation periods of proceedings in that Court, most of these cases predate the implementation of the new Code. But the old Code also prohibited violence or threats against suspects. In one case, the petitioner had been questioned, apparently as a witness, in connection with an investigation into an act of hooliganism. The petitioner claimed that he was continuously beaten by police during a three-day confinement at the police station in an ultimately successful effort to extract a confession. The petitioner’s claims were corroborated by an undisputed medical examination completed hours after his release from custody.¹⁹⁵

Another problem with Article 75(2) as written is that it prohibits admission of the confession itself at trial but does not appear to limit the use of the information contained in it. As a result, procurators resorted to the tactic of calling as witnesses at trial the criminal investigator or police who might have been present when the defendant confessed to testify about the admissions made. In addition, information from a confession without counsel has been used to provide leads to admissible evidence. However, in a 2004 determination,¹⁹⁶ the Constitutional Court held that, while the Code permitted investigators and police to be called as witnesses at trial to testify to various investigative actions taken:

“Those provisions [...] do not [...] permit the court to question criminal investigators or police investigators about the content of testimony given by a suspect or accused in the pretrial process so as to permit reproducing the content of that testimony without compliance with the rule established by Article 75(2), point 1) [...] It is by means of those provisions that the law, based on the dictates of Article 50(2) of

¹⁹³ Interviews conducted 27 October and 2 November 2005 by Jeffrey Kahn.

¹⁹⁴ The procurator said the police even have a saying: “those whom we beat do not complain” (“Те, кого мы бём, не жалуются”) (“*Te, kogo my b'em, ne zhaluiutsia*”) Interview conducted 27 October 2005 by Jeffrey Kahn.

¹⁹⁵ *Shedayev v. Russia*, No.65859/01 (Eur.Ct.H.R., 7 December 2006). See, also, *Popov v. Russia*, *op.cit.* note 112; *Mamedova v. Russia*, *op.cit.* note 90; and *Khudoyorov v. Russia*, *op.cit.* note 109.

¹⁹⁶ *Opredelenie Konstitutsionnogo Suda No.44-O of 6 February 2004, VKS (2004) No.5* (petition of Dem'ianenko).

the Constitution [...], excludes the possibility of any use, direct or indirect, of the information in such testimony.”¹⁹⁷

In a 2006 case, the Supreme Court cited and followed this decision but extended it beyond reproducing testimony given before the criminal investigator. It held that “the same provisions of the statute exclude the possibility of *any use, direct or indirect, of the information* contained in” the confession.¹⁹⁸ Taken together, these decisions prevent investigators or any other witnesses from testifying to admissions made without counsel and prevent the information gained from being used to find other evidence.¹⁹⁹

Other methods have been used to interfere with a defendant's right to counsel. One lawyer in Krasnoiarsk stated that police will often refuse to contact counsel on the ground that the suspect cannot provide a specific phone number or address.²⁰⁰ Sometimes, one attorney said, the police simply will not tell defense counsel where a particular suspect is being held. Also, there may be rigidly fixed or inconvenient hours for visitation at the pretrial detention facility. The rules governing meetings, including the pass system for gaining admission to the place of detention, may change frequently, arbitrarily and without warning. For example, one day an attorney's license might be sufficient for admission; the next day, a letter of permission from the investigator might be deemed necessary for a visit.²⁰¹ Thus, the first contact an attorney may have with his client could be several days after the initial detention, by which time police pressure may have worked its toll in the form of testimony.²⁰²

¹⁹⁷ *Ibid.*, 2. Art.50(2) is the constitutional provision on illegally obtained evidence.

¹⁹⁸ *In re Kozlov & Liashenko*, Kassatsionnoe opredelenie SK po ugolovnym delam Verkhovnogo Suda No.47-006-17 of 21 March 2006, available at <http://www.supcourt.ru/arxiv_out/TEXT.PHP?id_text=69861&itext> (emphasis added).

¹⁹⁹ By way of comparison, the US rule is not as stringent. See US Supreme Court, *Miranda v. Arizona*, 384 US 436, 444-45 (1966), in which a waiver of the right to counsel after notice of rights was permitted; and *id.*, *United States v. Patane*, 542 US 630 (2004), in which a gun obtained as a result of interrogation without *Miranda* warnings was held admissible.

²⁰⁰ Interview conducted 24 October 2005 by Jeffrey Kahn. A suspect's family members, who are granted contact with the suspect at the discretion of the police, may be used as another lever to coerce statements, circumventing the primary purpose of access to counsel—to stop coercive questioning.

²⁰¹ It should be noted that these allegations were rejected by another experienced defense attorney in the same city, who asserted that an attorney's identification card is all that is required to meet with a detained client.

²⁰² Art.49(4) of the Code provides that defense counsel “shall be permitted to take part in a criminal case as defense counsel upon presenting an advocate's identification card and an assignment order” and the Constitutional Court has made clear that these two items are all that is required to gain access to clients in detention. *Postanovlenie Konstitutsionnogo Suda No.14-P of 25 October 2001, VKS (2002) No.1* (petition of Golomidov *et al.*), which held unconstitutional the practice of requiring the permission of authorities at the detention center. However, the

Another way of circumventing Article 75(2) is to appoint counsel but to use 'pocket' lawyers (карманные адвокаты) (*karmannye advokaty*), also called 'police' lawyers (милицейские адвокаты) (*militseiskie advokaty*).²⁰³ As the labels suggest, these are lawyers who are known to investigators to be especially pliable or even willing to knowingly violate their obligations to represent their client's interests, sometimes in exchange for bribes, side-payments or favors (including future appointments). Either the advocate attends the interrogation and does nothing or does not even attend and just signs a back-dated protocol certifying that he or she was present when the defendant confessed. Sometimes, the suspect already has retained a lawyer but when it comes time to interrogate the defendant, the retained lawyer is not notified of the interrogation date. Instead, other counsel is appointed for the purposes of the interrogation and retained counsel discovers the confession of his client only later, countersigned by appointed counsel.²⁰⁴

A senior judge in Krasnoiarsk described the use of 'pocket' lawyers as very common.²⁰⁵ An academic participant at a roundtable at the Moscow State Law Academy also acknowledged the practice.²⁰⁶ Also, a deputy procurator who requested anonymity in exchange for candor acknowledged awareness of the practice of pocket attorneys.²⁰⁷ Such attorneys, the procurator said, are usually former procurators and investigators. It is a horrible thing, perhaps, the procurator said, but it is a problem that is for the cadres in the Chambers of Advocates to resolve.²⁰⁸ Another procurator in another city acknowledged having heard of the practice of pocket attorneys but asserted a lack of any personal experience with the practice.²⁰⁹ The procurator opined that if a suspect's written testimony was secured in this manner, it should be admitted at trial since it was acquired in accordance with the strict letter of the Code.²¹⁰

persistence of anecdotal evidence of difficulties suggests that these requirements have still not filtered down to the local level.

²⁰³ Interviews conducted 20, 24 and 25 October 2005 by Jeffrey Kahn.

²⁰⁴ Correspondence with Moscow advocate conducted 1 July 2007 by William Burnham.

²⁰⁵ Interview with Valentin Frantsevich Baranovskii, Judge, Krasnoiarsk *Krai* Court, conducted 25 October 2005 by Jeffrey Kahn.

²⁰⁶ Interviews conducted 20 October 2005 by Jeffrey Kahn.

²⁰⁷ Interview conducted 27 October 2005 by Jeffrey Kahn.

²⁰⁸ Advocates are organized and governed by Chambers of Advocates. There is a separate chamber in every region (subject). See Burnham, Maggs and Danilenko, *op.cit.* note 18, 142-146.

²⁰⁹ Interview conducted 2 November 2005 by Jeffrey Kahn.

²¹⁰ *Ibid.*

Some Chambers of Advocates have tried to take action against pocket lawyers. At least in cases where the lawyer has signed the protocol but was not present when the confession was given, it is a serious matter, since making a false record in a criminal investigation is a criminal offense.²¹¹ However, proof is difficult unless the lawyer admits to not attending, given that the ethics committees of the Chambers of Advocates follow a 'presumption of good faith' on the part of the advocate involved that the complaining client must overcome. However, in an unusual case from Moscow, the disciplinary commission found violations of the code of ethics when a client complained that the advocate had signed the protocol but was not present and the lawyer admitted at least that he "periodically absented himself from the interrogation to deal with another case" during the interrogation. The Chamber Council disbarred the advocate.²¹² The commission also found that the lawyer, in accepting appointment in response to a direct request by the investigator (the investigator approached him in the hall at the local Ministry of Internal Affairs building), violated the rules of appointment of counsel in Moscow, which requires that all requests for appointments of counsel go through advocate organizations, not through direct contact with any particular advocate.²¹³ However, not all chambers of advocates in the other subjects of the Russian Federation have such a procedure for appointment of counsel.²¹⁴

²¹¹ Art.303(2-3), Criminal Code RF (punishable by up to three or seven years, depending on the seriousness of the consequences).

²¹² Moscow Chamber of Advocates, "Zakliuchenie Kvalifikatsionnoi komissii Palaty Advokatov goroda Moskvy po distsiplinarnomu proizvodstvu v otnoshenii advokata B.," 18 May 2007, Chamber Council Disbarment Decision of 24 May 2007. See All-Russia Congress of Advocates, Kodeks professional'noi etiki advokata (priniat Vserossiiskim s"ezdom advokatov), 31 January 2003 (with amendments and additions passed by the Second All-Russia Congress of Advocates on 8 April 2005), available at <<http://www.advokatymoscow.ru/kodeks.php>>. See, also, Art.7, Federal'nyi Zakon "Ob advokatskoi deiatel'nosti i advokature" No.63-FZ, signed 31 May 2002 (as amended through 20 December 2004), which states that "[a]n advocate has an obligation to assert the rights and legal interests of the client honestly, intelligently and in good faith by every means not prohibited by legislation of the Russian Federation".

²¹³ Moscow Chamber of Advocates, "Reshenie Soveta Advokatskoi palaty goroda Moskvy ob opredelenii poriadka okazaniia iuridicheskoi pomoshchi advokatami, uchastvuiushchi v kachestve zashchitnikov v ugovomom sudoproizvodstve po naznacheniiu" No.8, 25 March 2004, *Vestnik Advokatskoi palaty g. Moskvy* (2004) Vypusk No.3-4 (5-6), 16-18 (cited on the Moscow Chamber of Advocates website at <http://www.advokatymoscow.ru/vestnik7_2.php>). Point 1 of the decision states that: "[e]xcept when counsel has been retained by a person who is being prosecuted, there is no right to appointment of any particular lawyer chosen by that person. A request for legal assistance by appointed counsel does not go to a particular advocate, but to the advocate organization, which selects the next advocate in line who is not busy with retained representation."

²¹⁴ The Samara Region Chamber of Advocates is perhaps the strictest in adopting measures to avoid going out of order to pick particular advocates. See Chamber of Advocates of the Samara Region, "Reshenie Soveta Palaty advokatov Samarskoi oblasti" No.07-01-01/СП, available at <<http://back.paso.ru/docs/reshenie070101.doc>>.

Another tactic is for investigatory authorities to take the opportunity, should a retained lawyer be unable to appear for particular investigative action, to immediately appoint a different lawyer. This is in violation of the Code's requirement that the suspect first be given five days to retain another lawyer.²¹⁵

If the 'pocket' advocate attends the interrogation, it is more difficult to assess performance. In the Moscow case just discussed, the committee observed that "defense counsel does not just attend the interrogation, but participates in it", citing Article 51(2).²¹⁶ However, what the requisite 'participation' should involve is more difficult to say. The standard adversarial wisdom in the United States, for example, is that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances".²¹⁷ After this initial position, counsel will pursue a plea deal in which the client may agree to confess in exchange for some guarantees of lesser charges or a lower sentence.²¹⁸ Russian 'plea bargaining' is more limited, so, in many cases, the advantage of confessing is not as clear cut.²¹⁹ Also complicating matters is the fact that, in Russia, as in other civil law countries, both guilt and punishment are determined in one proceeding.²²⁰ While typically in common-law jurisdictions, guilt and punishment are determined in separate proceedings that often oc-

²¹⁵ Art.50(3). See Moscow City Court, *In re Il'in*, Kassatsionnoe opredelenie sudebnoi kollegii po ugovnym delam Gorodskogo suda goroda Moskvy No.22-2971 of 16 April 2007 (on file with author William Burnham), which reversed a conviction because the investigator, instead of informing the defendant of his right to engage other retained counsel within five days, appointed an advocate from Udmurt Republic. The Moscow Chamber of Advocates has prohibited its advocates from accepting appointments from any authorities outside of Moscow but nonetheless declined to discipline a Moscow advocate who was appointed by the Moscow Region authorities. The decision does urge the Moscow Chamber to recommend to the Federal Chamber that an appropriate regulation be adopted imposing the rule on all advocates. See Moscow Chamber of Advocates, "Zakliuchenie Kvalifikatsionnoi komissii Advokatskoi Palaty goroda Moskvy po distsiplinarnomu proizvodstvu v otnoshenii advokata B" of 16 February 2007, in which a Moscow Region advocate appeared at the request of the Moscow city authorities.

²¹⁶ Moscow Chamber of Advocates, *op.cit.* note 215, § 5. Art.51(2) provides: "[d]efense counsel participating in investigatory actions in the course of providing legal assistance to his or her client has the right to engage in short consultations with the client in the presence of the investigator, to ask, with the investigator's permission, questions of persons being interrogated, and to make written observations regarding the propriety and completeness of the written notes made in the record of the particular investigatory action."

²¹⁷ US Supreme Court, *Watts v. Indiana*, 338 US 49, 59 (1949) (Jackson, J., concurring).

²¹⁸ If one counts plea bargains, advice to confess in the US is the ultimate result in an overwhelming percentage of cases. Of all cases that are resolved on the merits, close to 95% involve the client pleading guilty, typically on the advice of counsel. See National Center for State Courts, "Court Statistics Project: 2001 Criminal Statistics", available at <http://www.ncsconline.org/D_RESEARCH/csp/2001_Files/2001_Criminal.pdf>.

²¹⁹ See *infra* section 5, where guilty pleas are discussed.

²²⁰ Art.302(7), CrPC.

cur weeks apart, there is no time in Russia to become contrite between conviction and sentence. Contrition must come earlier to do much good. Thus, advice to confess on the hope that some unspecified benefit in sentencing will be gained is not necessarily irrational advice, assuming the client is in fact guilty.²²¹

The arrangement for paying for appointed counsel suggests possible opportunities for manipulation based on the quality of counsel provided. If a court appoints a lawyer for trial, the courts pay. If an investigator appoints counsel for attendance at an investigative activity, the lawyer is paid from the investigative agency involved, such as the procuracy or the Ministry of Internal Affairs.²²² While the rule on inadmissibility of confessions without counsel, as interpreted by the courts, makes appointment a necessity, the amount paid and when it is paid could well be affected by how much 'trouble' a given advocate causes the investigator. The official rates of pay indicate that appointed counsel are paid by the day—about USD 11 a day usually—and should be paid for a full day even though the particular service performed does not last an entire day.²²³ However, this requirement is a new clarification in the payment regime and even now is often not observed. Thus, a lawyer who appears only for a one-hour pretrial investigation event could well receive pay only for the actual time spent.²²⁴

²²¹ Art.61(1)(i), Criminal Code RF. See, also, Arts.75–76.

²²² This is an inheritance from Soviet times. Currently, there is a dispute regarding who is responsible for paying for the appointed lawyer who appears at pretrial detention hearings. The courts insist that it is a stage of the preliminary investigation, so the investigative agencies should pay for it, while the investigative agencies argue that it is a judicial hearing, so the courts should pay. Communication with a Moscow advocate on 7 July 2007 (on file with William Burnham).

²²³ Ministerstvo Iustitsii Rossiiskoi Federatsii i Ministerstvo Finansov Rossiiskoi Federatsii Prikaz Nos.257 and 89n, "Ob utverzhdenii poriadka rascheta oplaty truda advokata, uchastvuiushchego v kachestve zashchitnika v ugolovnom sudoproizvodstve po naznacheniiu organov doznaniia, organov predvaritel'nogo sledstviia, prokurora ili suda, v zavisimosti ot slozhnosti ugolovnogo dela," signed 6 October 2003, published in *Rossiiskaia gazeta* (21 October 2003) and *Biulleten' Ministerstvo iustitsii RF* (2003) No.12. The basic amount is stated to be 25% of the minimum monthly wage used to calculate government benefits (MPOT) of RUB 1,100, which is RUB 275, calculated at RUB 25 to a dollar. This is an upgrade from 2003 when the amount was only RUB 150 or around USD 7 at the time. Higher amounts of up to 100% of the minimum wage for jury trials and other cases at the regional court level are permissible.

²²⁴ Communication from Moscow advocate, 10 July 2007. Compare Advocates of the City of Moscow, "Materialy Piatoi ezhegodnoi konferentsii advokatov g. Moskvy", 3 February 2007, published in *Vestnik Advokatskoi palaty* (2007) No.2-3, and available at <<http://www.advokaty-moscow.ru/vestnik23.php>>. Section 1.4 states that: "[w]hile the Judicial Department pays for all cases without delay, we see problems with payments to counsel appointed by the procuracy and particularly the Ministry of Internal Affairs." Disputes over amounts paid can be appealed to a judge.

3.4.3. Other Investigative Actions

Other than acquiring testimony from victims, witnesses, suspects or the accused, the criminal investigator conducts or oversees a variety of other activities: crime-scene investigations, police line-ups, confrontations, etc. The investigator is also responsible for obtaining expert reports and analysis of evidence by forensic specialists (*e.g.*, analysis of fingerprints, blood, ballistics, etc.). Other activities are conducted either by investigators or by operatives under their direction: searches and seizures, electronic surveillance and compelled disclosure of documents.²²⁵ For each such action, the investigator is to prepare a 'protocol' recording the actions taken and what was observed or discovered.²²⁶ As noted earlier, this official record is considered 'pre-admitted' evidence by virtue of its placement in the case file. In other words, neither the author of the report nor any participants in the actions therein described will appear at trial to testify to what happened or be subjected thereby to questioning by the defense.²²⁷

Most of the procedures for these other investigative actions have not changed in any major way. However, a major change is that judicial warrants are required for important categories of searches and seizures:

- (a) Searches of the person other than incident to arrest;
- (b) Searches of dwellings;
- (c) Searches of bank records;
- (d) Surveillance of communications; and
- (e) Seizures of objects or money used or received in connection with the commission of a crime.²²⁸

All other searches and seizures (*e.g.*, in a place of business, an office, a warehouse, etc.) are conducted on the order of the investigator (as before). While the dwelling part of the judicial warrant requirement is required by the Constitution, searches of bank records are less clearly so.²²⁹ An

²²⁵ See, generally, Arts.176-186, CrPC.

²²⁶ Art.166, CrPC.

²²⁷ As discussed earlier, *supra* at text accompanying note 142, expert findings will also be read from the case file without any mandatory attendance and testimony by the expert.

²²⁸ See Art.29(2)(6) (personal searches), (4) and (5) (dwellings), (7) (bank records), (8) and (11) (communications); and Art.104(1)(1) (seizure of property connected with crime). The last category of seizures of property was only added in 2006 when the Criminal Code was amended to permit such seizures. Federal'nyi Zakon "O vnesenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v sviazi s priniatiem Federal'nogo zakona 'O ratifikatsii Konventsii Soveta Evropy o preduprezhdenii terroizma' i Federal'nogo zakona 'O protivodeistvii terrorizmu'" No.153-FZ, signed 27 July 2006. See, also, Art.165(1-4) (procedure for obtaining a warrant); and Art.182 (general procedure for searches).

²²⁹ See Art.25, Constitution, which states that "[n]o one has the right to enter a dwelling against

exception from the judicial warrant requirement is provided for searches of dwellings or of the person and seizures of objects or money used or received in connection with the commission of a crime when “exceptional circumstances” exist and there is insufficient time to get a warrant. However, even then, the investigator must seek judicial approval of the search within twenty-four hours after the search is conducted. If the search or seizure is not approved in this ‘post-warrant’ procedure, its products are not admissible in evidence.²³⁰

An innovation of the new Code is that it addresses the admissibility of evidence obtained by “operational investigative activity” (оперативно-розыскная деятельность) (*operativno-rozysknaia deiatel'nost'*). This activity is what might be called ‘real’ investigation in the sense that its purpose is to find out things, not a means of recording evidence in the case file. In fact, it is the operative investigators (оперативники) (*operativniki*) who usually find the evidence that is then collected, examined and verified by the criminal investigator in order to be included in the case file.²³¹ The new Code makes clear, however, that the results of operative investigative activity may not be used as evidence unless they “meet the evidentiary requirements imposed by this Code”.²³² This makes it necessary that such information be obtained through procedures specified for the preliminary investigation process before it can be used as proof.

3.4.4. Defense Investigation

There are two kinds of defense investigation. The *first* is what might be called ‘mediate’ investigation, whereby defense counsel finds out about leads to witnesses or other evidence and tries to convince the criminal investigator to process them through the official investigation. Mediate investigation is what defense counsel are generally limited to doing in civil law countries²³³ and was proper under prior law. The *second* type of defense

the will of those living there except in circumstances established by federal statute or pursuant to a judicial order”; and Art.23(2), which states that: “[e]veryone has the right to privacy of their correspondence, telephone calls, mail, telegraph and other communications. Limitations on this right are permitted only on the basis of a judicial decision.”

²³⁰ Art.165(5), CrPC. Interestingly, defense counsel or the lawyer for the owner of the premises has the right to be present during the search. Art.182(11), CrPC.

²³¹ The legal basis for these activities is the 1995 Federal Law on Operational Investigative Activities, *op.cit.* note 126. Before that time, such activities took place but it was not until 1995 that an express legal basis for them was created.

²³² Art.89, CrPC.

²³³ See, generally, Thaman, *op.cit.* note 21, 32-33, which states that “[d]efense lawyers in Europe do not normally investigate their own cases but are supposed to rely, by and large, on the objective, impartial inquiries of investigative judges or public prosecutors and their powers to compel testimony and collect evidence to get the exculpatory evidence into the *investigative dossier*” (emphasis in original).

investigation is 'direct' investigation, which was for the first time recognized and legitimized—though rather timidly—by the new Code. Under this, the defense develops leads itself, directly collects the evidence and seeks to use it at trial without going through the criminal investigator.

Mediate investigation will involve the defense using informal contacts with the investigator, its right to make written and oral comments on investigatory actions taken, and formal requests during the preliminary investigation to try to convince the investigator to interrogate certain witnesses or obtain certain documents helpful to the defense. The law states that the criminal investigator "can not deny any requests if the circumstances [that the defense] seeks to ascertain by means of such requests are relevant to the criminal case".²³⁴ However, if the investigator disagrees on relevance, the defense must work its way through two levels of administrative review before being able to get review in the district court.²³⁵ Investigation by this route is 'mediate' because all the requested investigative actions—if permitted—are performed and controlled by the criminal investigator. While permitted to attend an interrogation that was requested by the defense, defense counsel may ask questions only with the investigator's permission.²³⁶ If a defense request for an expert analysis is approved, the criminal investigator also retains control over it. These will always be conducted by the state's apparatus and the investigator is in charge, not the defense counsel at whose request the action is taken.²³⁷

Though requests for investigation can be made at any time, a final opportunity is afforded when the entire case file is made available to the defense once it is completed and the defense can "make written comments on the accuracy and completeness of what is written in the official record of a particular investigative action".²³⁸ However, it is difficult for

²³⁴ Art.159(2), CrPC.

²³⁵ Art.159(4), CrPC. First, defense counsel must make a written complaint to the supervisor of the investigative agency. See Art.124(1), CrPC. A decision by the supervisor favorable to the defense may itself be appealed by the criminal investigator to a higher supervisor. See Art.124(4), CrPC. A final decision unfavorable to the defense may then be appealed to the district court in the venue of the preliminary investigation. See Art.125(1), CrPC. If the defense wishes to *prevent* an action from taking place, the filing of a complaint does not by itself result in suspension of the intended operation, unless the supervising investigator or the court determines that suspension is necessary. See Art.125(7), CrPC. One investigator in Krasnoiarsk asserted that investigators always grant defense motions for additional questions or investigative actions because if the motion is denied, the investigator must provide grounds in the official record for denying these requests. Interview conducted 27 October 2005 by Jeffrey Kahn. However, defense counsel could not confirm the practice.

²³⁶ Art.53(1)(5) (attendance) and 53(2) (questions), CrPC. If the investigator chooses to prohibit questions of defense counsel, the investigator must include the excluded questions in the official record.

²³⁷ Art.198(1)(5) (attendance only with investigator permission), CrPC.

²³⁸ Art.53(3), CrPC. See, also, Art.217, CrPC. Actually, the defense must be granted earlier access

the defense to assess and question the “accuracy and completeness” of the contents of those documents if no access is provided to the working materials that they are based on. Certainly, the defense cannot determine if a witness statement written out by the investigator is “accurate and complete” if the defense did not hear the interrogation. As a senior judge on the Krasnoiarsk subject-level court, Judge V.F. Baranovskii, explained, the working materials of the investigator are not shared with the defense counsel, who is only permitted to see the protocols summarizing witness testimony and the conclusions of forensic examiners and experts, etc.²³⁹ A practitioner in Krasnoiarsk confirmed that when he makes a motion to see the *basis* of an expert’s conclusion, the motion is denied on the grounds that the working material is not in evidence.²⁴⁰

While some defense lawyers might rail against the defense’s lack of power to compel the investigator to interrogate additional witnesses, obtain documents and order forensic examinations of evidence, some defense lawyers believe that improving ‘mediate’ efforts of this sort would not be that helpful. As one defense attorney in Moscow pointed out, it is not really very useful to insist that investigators call certain witnesses or to include particular questions in their interrogation of a witness unless the witness really does have exonerating information, since the action could easily place the client in a worse position than before.²⁴¹ Moreover, the defense must keep in mind that interrogation by a skeptical and sometimes hostile criminal investigator is not a good way to obtain information that is in the defense’s favor.

A more fruitful route might be ‘direct’ defense investigation. What little the new Code says is set out in Articles 53(1) and 86(3). For the first time, the Code makes clear that the defense has the right “to gather and present such evidence as is necessary to provide legal representation”.²⁴² Article 86(3) states:

“Defense counsel has the right to gather evidence by:

- (1) obtaining objects, documents and other information;
- (2) interviewing persons with their consent; and
- (3) requesting information memoranda, references and other documents from government agencies, agencies of local self-government, nongovernmental associa-

to the case file for the purpose of arguing in opposition to a motion for pretrial detention. See *Postanovlenie Konstitutsionnogo Suda No.11-P*, *op.cit.* note 180, 4. See, also, *Opreделение Konstitutsionnogo Suda No.173-O*, *op.cit.* note 80.

²³⁹ Interview with Valentin Frantsevich Baranovskii, Judge, Krasnoiarsk *Krai* Court, conducted 25 October 2005 by Jeffrey Kahn.

²⁴⁰ Interview conducted 24 October 2005 by Jeffrey Kahn.

²⁴¹ Interview conducted 3 November 2005 by Jeffrey Kahn.

²⁴² Art.53(1)(2), CrPC. It is not clear what the final phrase “as is necessary to provide legal representation” means, unless it is meant as a limit, thus emphasizing that evidence gathered by the defense is not includable in the case file.

tions and organizations, which shall be obliged to provide documents requested or copies thereof.”

No enforcement procedure is provided, though the general provisions of the Code authorizing motions in court would seem to provide a basis for seeking an order for the production of documents under point (3) above.²⁴³ If information is obtained, however, the Code is less than clear on what can be done with it. Article 86(2) ambiguously states that the defense “shall have the right to [...] present written documents and objects to be included in the criminal case file as evidence”. The text is unclear as to whether this *requires* inclusion in the case file or only that it can be submitted to the investigator for *possible* inclusion.²⁴⁴ Certainly, evidence gathered by the defense is not on the list of “admissible evidence” set out in Article 74(2), unless it comes under the catch-all heading of “other documents”.²⁴⁵ On the other hand, Article 86(2) states that what defense counsel has the right to “gather” is “evidence”, not just information. Article 86(2) does refer, however, only to the ability to “submit written documents and objects” for inclusion in the case file. Commentators seem to agree that any evidence gathered by the defense may be included in the case file only if the investigator first verifies it and consents to its inclusion. Certainly, evidence from a witness found by the defense can be included in the case file only by way of the investigator interrogating the witness and writing out a summary statement in the usual manner.²⁴⁶

²⁴³ See Arts.119-120, CrPC.

²⁴⁴ The Russian is “право [...] представить [...] для приобщения их к уголовному делу” (*pravo [...] predstavit' [...] dlia priobsheniia ikh k ugolovnomu delu*). See E. Kariakin, “Dopustimost' dokazatel'stv, sobrannykh zashchitnikom”, *Rossiiskaia iustitsiia* (2003) No.6, which discusses various possibilities but suggests that Art.17, CrPC, which provides for “free evaluation of evidence”, should permit some use of defense-gathered witness statements. See, also, V. Rudnev and G. Ben'iaev, “Vozmozhno li uchastie notariusa v ugolovnov sudoproizvodstve?”, *Rossiiskaia iustitsiia* (2002) No.8, 28-29, which discusses the possibility of permitting a defense witness' statement made before a notary to be included in the case file or used at trial.

²⁴⁵ See *supra* text at section 3.3.

²⁴⁶ The new article on “verification” of evidence was discussed *supra* at section 3.3. One commentary points out that only written documents and objects can be included in the file and that, even then, “including these written documents and items in the case file, which would mean they acquired the status of evidence, depends on the decision made by the person or agency conducting proceedings in the criminal case” (e.g., the investigator). Kozak and Mizulina, *op.cit.* note 17, comment 7 to Art.86. A commentary edited by a Supreme Court judge observes: “[t]he power to verify evidence is vested in the participants on the prosecution side: the investigator, inquiry officer or procurator [...] The defense side has the right to participate in the verification of evidence. This right is realized by means of the making of motions, presentation of supplemental items, documents, etc.” V. E. Radchenko, *Kommentarii k Ugolovno-protsessual'nomu kodeksu Rossiiskoi Federatsii* (Iurialit-Izdat, Moscow, 2nd ed. 2006), comment 3 to Art.87. See, also, V. L. Kudriavtsev, “Konstitutsionnoe pravo na poluchenie kvalifitsirovannoi iuridicheskoi pomoshchi i nekotorye formy ee realizatsii v kontekste deiatel'nosti advokata-zashchitnika: Zakonodatel'stvo, pravovye pozitsii KS RF, teoriia”, *Rossiiskaia iustitsiia* (2006) No.4, which

Even if inclusion in the case file is not possible, direct use of the witness at trial is possible. Article 231(2)(4) provides that the judge is to determine “what persons should be subpoenaed to appear at the trial *according to the lists submitted by the parties*”. Under prior law, there was no reference to party lists and the witnesses called were usually only those called by the criminal investigator during the preliminary investigation.²⁴⁷ However, defense requests are often denied. More importantly, as discussed below when trials are considered, Article 271(4) provides that the “court may not deny a motion to permit a witness or forensic specialist to be questioned at trial if that person has appeared in court at the request of the parties”.²⁴⁸ Thus, assuming that the defense can get the witness or specialist to court on the day of trial, he or she must be permitted to testify.²⁴⁹

Article 271(4) can also serve to spur investigators to agree to undertake investigatory actions regarding defense evidence. Criminal investigators who decline defense requests that they question particular witnesses or forensic specialists give up any advance warning of the content of testimony the defense may offer at trial, not to mention the opportunity to examine the future witness or specialist with an eye towards impeachment at trial.

There does not seem to be any problem with defense counsel using Article 271(4) without first telling the criminal investigator about the witness or specialist before trial. Such ‘sandbagging’ is seemingly constitutionally protected. In a 2004 case, the Constitutional Court held Article 234(6) of the new Code unconstitutional. Article 234(6) had required that an accused provide notice during the preliminary investigation of any alibi witnesses he or she expected to call at trial, on pain of losing the right to call them at trial, unless the defense could show that the existence of such a witness only became known to the defendant after completion of the preliminary investigation. The Constitutional Court held that Article 234(6) violated the right to defend oneself in court (Arts.45(1) and 46(2), Constitution) and the requirement for conviction of proof beyond a reasonable doubt (Art.49(2), Constitution).²⁵⁰

states that the defense’s “activity in gathering evidence does not entail recognition of the admissibility of evidence received”, as is the case of evidence gathered by the prosecution.

²⁴⁷ Art.228(4), CrPC RSFSR.

²⁴⁸ Although the language of this section is ambiguous and may be read to require a request by *all* parties in agreement, it is understood by most judges to refer to witnesses appearing at the request of *any* party. See V. Ulianov, “Voprosy gosudarstvennogo obvineniia k novomu UPK”, *Rossiiskaia iustitsiia* (2002) No.10; A. Davletov, “Pravo zashchitnikov sobrat’ dokazatel’sstva”, *Rossiiskaia iustitsiia* (2003) No.7.

²⁴⁹ For more on Art.271(4) at trial, see *infra*, 66.

²⁵⁰ Postanovlenie Konstitutsionnogo Suda No.13-P of 29 June 2004, VKS (2004) No.4. The idea to require notice came from US law. Federal Rules of Criminal Procedure 12.1 and 12.2 require

A potential problem with interviewing witnesses with their consent is the fact that it may be necessary to reveal at least some information that the defense might have learned from looking at the case file or attending the few investigative actions the defense is permitted to attend. Unauthorized disclosure to the public is a criminal offense punishable by up to three months imprisonment,²⁵¹ and Article 53(3) specifically prohibits defense counsel from “communicating information from the preliminary investigation that was learned in connection with defense of a client”. So far, to our knowledge, no problems have arisen with this conflict.²⁵²

Expert witnesses are not included within Article 271(4)’s requirement that the court permit defense witnesses to testify at trial, though it does include forensic specialists. However, even if the experts were included, both specialists and experts are hard for the defense to find on its own.²⁵³ No funding for either is provided to indigent defendants. Nor is there sufficient demand to establish a private industry of experts and specialists. The forensic specialists and experts who conduct autopsies, fingerprint analyses or work with photographic or audio/visual records all work at state-run bureaus of judicial or medical experts (бюро судебной (медицинской) экспертизы) (*biuro sudebnoi (meditsinskoï) ekspertizy*) that are independent agencies of the Ministry of Justice. Theoretically, they could develop their own private client base. However, one investigator in Krasnoiarsk maintained that the defense has no right to independently contact experts there.²⁵⁴ One practitioner described how he brought an expert witness and written expert’s conclusions to a jury trial. The Court rejected this evidentiary proffer on the grounds that there was no basis not to trust the expertise provided by the criminal investigator in the case file.²⁵⁵ A practitioner in Krasnoiarsk volunteered that if the defense does find an expert, the best result the defense can hope for is that the court might order a second expert to be appointed who would conduct another examination under the direction of the criminal investigator.²⁵⁶

Some resourceful defense lawyers have used Article 271(4) to bring to trial experts ‘disguised’ as forensic specialists, who do come within Article 271(4). While most forensic specialists are technical people who

pretrial notice of intent to claim alibi or insanity as defenses. The Federal Rules of Criminal Procedure are available at <<http://www.law.cornell.edu/rules/frcrmp/>>.

²⁵¹ Art.161(2), CrPC (referencing Art.310 of the Criminal Code RF).

²⁵² Actually, it is within the discretion of the investigator to permit disclosure. Art.161(3).

²⁵³ Interview conducted 21 October 2005 by Jeffrey Kahn.

²⁵⁴ Interview conducted 27 October 2005 by Jeffrey Kahn.

²⁵⁵ Interview conducted 24 October 2005 by Jeffrey Kahn.

²⁵⁶ Interview conducted 24 October 2005 by Jeffrey Kahn. See Art.198(1)(3), CrPC.

do scientific examination and analysis of items of evidence, they can also be called on to “explain to the parties and the court issues that fall within their special competence”.²⁵⁷ In one case, a professor of medicine was called as a specialist by the defense to critique the autopsy report in the case file that had been read at trial. The ‘specialist’ professor had taught the doctor who prepared the autopsy report and, after a withering critique of the report, remarked that its author “always was a weak student”.²⁵⁸ Even without this creative use of specialists, it is a major advance that the defense can use specialists to analyze evidence and that the court must permit them to testify. So far, however, defense specialists have not often been used.

The reason that the working group decided to keep direct defense investigation rights modest was the concern that rich defendants could utilize such rights while poor defendants could not. Thus, the idea of a more comprehensive set of rights and the possible label ‘parallel investigation’ were rejected. It is, of course, one of the by-products of the adversarial system that giving the parties themselves greater rights and control will mean that some will be able to take greater advantage of those rights than others.²⁵⁹ Nonetheless, the Code does authorize specific additional defense rights to gather evidence and further provides that defense counsel may “use other ways and means of defense not prohibited by this Code”.²⁶⁰

The real problem with any court judicial enforcement of direct defense investigation rights and with all mediate defense investigation is that the materials are not turned over to the defense but go to the court or investigator involved. This operates as a mandatory and immediate disclosure to the prosecution of any such defense discovery. This prospect will make the defense reticent to use any such procedures unless they are absolutely sure that the material will be helpful. This is another example of the inequality of the parties at trial. Unlike the defense, the investigator need not disclose the ‘raw’ materials it obtains but can pick and choose among them and decide which to include in the case file for the defense’s later viewing. By contrast, any materials the defense requests will immediately be turned over to the prosecution.²⁶¹

By whatever means defense evidence is gathered, its source seems to taint it. The problem, as explained by one investigator in Krasnoïarsk, is

²⁵⁷ Art.58(i), CrPC.

²⁵⁸ The use of the technique in this case was related by prominent defense lawyer, Elena Levina.

²⁵⁹ See Burnham, *op.cit.* note 3, 119-120.

²⁶⁰ Art.53(i)(11), CrPC.

²⁶¹ See the discussion *supra*, 47-49.

that if a defense attorney independently gathers evidence, there is a danger that this activity could adversely influence the witnesses involved.²⁶² Even defense counsel seemed to believe that a certain bias against defense-procured evidence is only natural and to be expected, since defense counsel are paid by their clients for effective representation.²⁶³ No one seemed concerned that the same biases and propensity for taint apply equally to the prosecution side, whose police and other investigators have strong interests of their own in the outcome of the case. However, respondents doubted that the investigator or police would have a sufficient stake in the outcome of any particular case to skew investigation results.²⁶⁴

While some advocates feel constrained by the Code's limited means for defense investigation in representation of their clients, many others fail to avail themselves of even the most elementary steps available to them to investigate and prepare the defense of their case for trial. As noted in the following section on trials, many defense counsel—mainly appointed counsel—appear at trial without having interviewed their clients, without having conducted pretrial investigative work of any kind or without even having read the case file.²⁶⁵

Upon completion of the preliminary investigation, the investigator declares the investigation closed, at which point the state may not carry out any further investigative actions.²⁶⁶ The final form of the charges that appear warranted is drawn up by the investigator and the entire case is passed on to the procuracy, which has the power to approve, modify or dismiss the charges. If formal charges are approved by the procurator, the case is filed in court.²⁶⁷

Once filed, the case proceeds to the preliminary hearing stage before the judge, an innovation of the Code. The court must hold a preliminary hearing if a party has filed a timely motion to exclude evidence or a request for a jury trial.²⁶⁸ Motions by the defense to suppress illegally obtained evidence are the most common issues of substance heard at this hearing.

²⁶² Interview conducted 27 October 2005 by Jeffrey Kahn.

²⁶³ Interview conducted 17 October 2005 by Jeffrey Kahn.

²⁶⁴ Interview conducted 19 October 2005 by Jeffrey Kahn.

²⁶⁵ See *infra*, 73.

²⁶⁶ See Arts. 215–220, CrPC.

²⁶⁷ Art. 222, CrPC.

²⁶⁸ Art. 229(2)(1 and 4), CrPC. Other grounds are if there are problems with the case necessitating sending it back for correction of procedural errors or if the case should be dismissed.

3.5. Rulings on Admissibility of Evidence

Article 50(2) of the 1993 Constitution provides that “the use of evidence obtained in violation of federal law is not permitted”. Article 75 of the new Code provides that “[e]vidence obtained in violation of this Code is inadmissible”.²⁶⁹

There are two ways of policing improper evidence—exclusionary and justificatory. In the former case, the improper evidence is actually physically excluded so that the decision makers who determine guilt—usually a jury—never see or hear it. Under a justificatory model, no attempt is made to physically exclude the evidence. Instead, it is sufficient that the decision maker not use that evidence as a justification for his or her decision. Indeed, it is hard to practice exclusion in systems where the judge who decides on admissibility, thereby being exposed to the improper evidence, is the same judge who goes on to decide guilt at trial.

If a jury is used, it is generally thought necessary to physically exclude the evidence.²⁷⁰ In fact, in a system in which jurors do not have to give reasons for their verdict, physical exclusion is the only way to ensure that the jury's verdict was not based on the excluded evidence. However, when the case is tried by judges, those judges must justify their determination of guilt in a written decision in which they must indicate what evidence they relied on to support their decision. This is thought to be sufficient protection against improper use of the evidence, since judges' legal training and professionalism will allow them to exclude it from their minds and justify their decisions solely with proper evidence. A justificatory solution to the problem of improper evidence is relied on in most continental systems without juries and even bench trials in common law systems.²⁷¹

The critique of the justificatory model is that judges, like jurors, are affected by any improper evidence they have seen, regardless of what other evidence they use to justify their decisions.²⁷² Motivated by this, several

²⁶⁹ This has been the law since the 1993 Constitution went into effect. See Art.68, CrPC.

²⁷⁰ See US Supreme Court, *Jackson v. Denno*, 378 US 368 (1964), which states that it is a violation of due process to permit the jury to decide on the voluntariness of a confession and, if the jury determines that the confession is not voluntary, to go on to decide guilt based on other evidence in the case.

²⁷¹ See, for example, New York Court of Appeals, *People v. Moreno*, 70 NY2d 403, 516 NE2d 200 (1987), in which a judge heard a suppression motion of the co-defendant's confession that implicated the defendant. The court held that: “[u]nlike a lay jury, a Judge ‘by reasons of [...] learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination’ based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision.” *Ibid.*, 202.

²⁷² See Michael J. Saks, “What Do Jury Experiments Tell us About How Juries (Should) Make Decisions?”, 6(1) *South California Interdisciplinary Law Journal* 1, 27 n.86 (1997), which states that “empirical studies on judges’ ability to ‘disregard [...] inadmissible information’ suggest that judges may be no better than juries at ‘bas[ing] their decisions squarely on legally admissible information’”. See, also, US Court of Appeals 3rd Circuit, *United States v. Walker*, 473 F.2d 136,

continental systems have sought to shield the trial judge from its influence, including the use of a 'double dossier' system in which a separate second sanitized case file is created for use at trial.²⁷³

In jury trials in Russia, a rule of physical exclusion is practiced.²⁷⁴ Jurors are not allowed to see a full copy of the case file, though they may be shown particular documents from it that the judge has determined beforehand are admissible at trial. In addition, even without a motion to exclude, the Code prohibits any mention of prior convictions or evidence of the defendant's character in jury trials.²⁷⁵ Other problems with keeping inadmissible evidence from the jury at trial are discussed below in the section on jury trials.²⁷⁶

As for non-jury trials, the Code does not say what should happen with evidence that is determined to be inadmissible at trial. Perhaps an argument could be made that exclusion is required, given the strong constitutional prohibition on inadmissible evidence.²⁷⁷ However, since judges must state precisely what evidence they relied on in their decisions,²⁷⁸

138 (3rd Cir. 1972), which states that, although a "[j]udge is presumed to have a trained and disciplined judicial intellect [...], even the most austere intellect has a subconscious".

²⁷³ Solutions take several forms. In France, to the extent that preliminary hearings are still held, a different judge presides at the bench trial to avoid the influence of preconceived opinions that would result from exposure to the case file at this earlier stage. See Richard S. Frase, "France", in Craig M. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (Carolina Academic Press, Durham, NC 1999), 167-169. In Spain (following Italy), a 'double dossier' system has been created in which the original case file is filtered through a preliminary hearing to create a new case file for use at trial. See Stephen C. Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia", 62(2) *Law and Contemporary Problems* (1999), 233-260, at 241. Italy, as noted above, also employs a 'double dossier' system in which: "[t]o ensure judicial impartiality, judges do not receive the complete dossier of the pretrial investigations. Only transcripts and reports of evidence that will no longer be available at the trial may be annexed to the charge." Joachim Herrmann, "Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective", 1996 *St. Louis-Warsaw Transatlantic Law Journal* (1996), 127-152, at 138.

²⁷⁴ Art.335(5-6), CrPC, requiring that the judge "exclude" inadmissible evidence.

²⁷⁵ Art.335(8), CrPC. This was true under the original 1993 law on the jury as well.

²⁷⁶ See *infra*, section 4.3.

²⁷⁷ On the other hand, Art.50(2) of the Constitution states that "*use* is prohibited" (не допускается использование) (*ne dopuskaetsia ispol'zovanie*), which is perhaps ambiguous. Art.75(1) of the Code goes somewhat further but uses similar terms: after declaring illegal evidence to be "inadmissible", it states that "[i]nadmissible evidence has no legal effect and may not be used as the basis for criminal charges or as proof" of requisite facts in a criminal case. A lawyer with a common-law background might think that the term "inadmissible" is a sufficient basis for a rule of exclusion, since in a common-law trial documentary evidence has to be formally "admitted into evidence". However, the judge must see the evidence to make a ruling on admissibility and even if it is deemed inadmissible, the evidence, "marked for identification", becomes part of the case file. Otherwise, appellate review of evidentiary rulings would be impossible.

²⁷⁸ See Art.307(2), CrPC, which states that: "[t]he narrative-rationale part of a judgment of conviction must contain the evidence on which the court's findings regarding the defendant are based and the reasons the court rejected other evidence."

the justificatory system is used for judge trials. While the working group discussed possible use of a 'double dossier' system, it was never seriously considered.²⁷⁹ Under current practice, if something is placed in the case file, it stays in the case file even if it has been ruled inadmissible.²⁸⁰ In any event, confessions or other documents would be hard to physically exclude since the documents in it are numbered sequentially and sewn into the case file.²⁸¹

A related question on inadmissible evidence is the possibility of the defense moving at trial, pursuant to Articles 240(1) and 281(2), to declare inadmissible the witness statements of any witness who did not appear at trial and for whom there was no exception for unavailability. One attorney felt that there was little point in making such a motion, since the likely result would be an adjournment of the case with renewed serious efforts to find the witness. Incriminating testimony would only be strengthened, he felt, by the emotional delivery of a live witness.²⁸² Even if the witness did not appear on the adjourned trial date, one attorney felt that such a motion to dismiss would be rejected. Judges are weak in this regard, he complained, and the much preferred approach is to keep adjourning the trial until the witness appears, the statute of limitations has run or there is a satisfactory agreement between the parties.²⁸³ There is nothing in the Code that limits the number of adjournments that the judge can grant, so it is not known how many continuances are too many and require dismissal.²⁸⁴ In an adversarial system, it is expected that the state will be able to concentrate its vast power to ensure that it is ready to present its case on a particular day. If, with all the power it can summon, it is not ready, simple fairness requires that the case be dismissed.²⁸⁵

3.6. *Supplemental Investigation*

Under the old Code, if a trial revealed that the evidence for conviction was not strong enough, rather than acquit the defendant the court could (and often would) halt the proceedings and return the case file to the

²⁷⁹ Part of the reason was that it would not work well, since word of the fact that the defendant confessed and perhaps even a copy of the confession would get around informally among the judges, especially when there were only a few judges in the district or region.

²⁸⁰ Interviews with roundtable of scholars and practitioners at Moscow State Law Academy conducted 20 October 2005 by Jeffrey Kahn.

²⁸¹ Interview of Judge V. F. Baranovskii conducted 25 October 2005 by Jeffrey Kahn.

²⁸² Interview conducted 17 October 2005 by Jeffrey Kahn.

²⁸³ Interview conducted 17 October 2005 by Jeffrey Kahn.

²⁸⁴ Interview conducted 19 October 2005 by Jeffrey Kahn.

²⁸⁵ The issue of adjournments is revisited in the next section, where supplementary investigations are discussed.

investigator for ‘supplemental investigation’ to gather more evidence. The Constitutional Court held this practice unconstitutional in 1999 as a violation of adversarial principles in Article 123(3) of the Constitution.²⁸⁶ Even before this case was decided, the drafters of the new Code had set their sights on eliminating supplemental investigation, though they believed that—at least in some circumstances—there should be a way to send the case back to the procurator to correct legal technical errors necessary for the case to be tried—such as problems of improper joinder, lack of necessary signatures on the charging document and the like. The result was Article 237(1), which provides that a court may return a case to the procurator for the “removal of obstacles” (устранение препятствий) (*ustraneniia prepiatstvii*) “whenever [...] the indictment [...] has been drawn up in violation of the requirements of this Code in a way that precludes the court from entering a judgment or other decision on the basis of such indictment”. A five-day limit for making corrections was imposed on the procurator. Then, for good measure, 2003 amendments to Article 237 provided that the procurator could not “conduct any form of investigative or other procedural actions that are not specified in this Article” (the technical errors) and that “any evidence obtained after the expiration of the [five-day] limit [...] or through procedural actions not specified in this article shall be inadmissible”.²⁸⁷

The Constitutional Court, however, held these limits to be unconstitutional to the extent that they did not permit correction of *all* potential procedural violations that had occurred.²⁸⁸ The Court distinguished between “procedural violations”, noting that “remedying them does not contemplate supplementing the charges already brought”. Thus, it made a distinction between procedural violations, regarding which a court “may on the motion of a party or on its own initiative return the case to the procurator” to correct, and sending the case back in order to “supplement any incompleteness of the inquiry or preliminary investigation”. According to the Court, “the correction of the violations contemplates carrying out any investigatory and other procedural actions necessary for that purpose”.

The line between correcting procedural errors and supplementing incompleteness, however, is hard to draw. At least one of the fact situations represented in the case illustrates the problem. Victims were denied their right during the pretrial stages to review the case file and to file motions and present supplemental evidence in the case. True, this involves a procedural

²⁸⁶ See *supra* note 6.

²⁸⁷ Art. 237(4-5).

²⁸⁸ See Postanovlenie Konstitutsionnogo Suda No.18-P of 8 December 2003, VKS (2004) No.1.

violation but the result of 'correcting' it is to permit supplementation of the case file.²⁸⁹ There are other requirements of the Code that the police or the criminal investigator are supposed to follow that, if corrected later, would involve supplementation of the case file. The Court has not resolved the considerable confusion generated by its decision.²⁹⁰

The difficulty that the Constitutional Court had with supplemental investigations in the original 1999 case was the fact that, under the old Code, the trial court acted on its own initiative and was supposed to state specifically what the weaknesses were in the procurator's case. This, the Court held, violated adversarial principles, which required a "strict separation of the functions of the court in its decision of the case and the function of the prosecution" and required the court to act as a procurator.²⁹¹ The provisions of the new Code would seem to satisfy this specific adversarial objection to the process, which raises the question of what the current basis is for the Court to insist that supplementing the investigation is unconstitutional—to prohibit the procurator from "supplementing any incompleteness of the inquiry or preliminary investigation". Though the Court does not address the question, it would seem that the real reason is that permitting the state multiple attempts to convict an accused also violates adversarial principles. Thus, there should be one chance on a given trial date and the procurator should be prepared to proceed on that day. Once that day is set and the trial starts, the trial should be seen through to completion or the prosecution should suffer a dismissal.²⁹²

²⁸⁹ The other two fact situations involved an unsigned initial charging document (*obvinenie*) and the defendant having been denied the right to receive qualified legal assistance from his lawyers, to examine the case file and to make motions. At least the latter could well involve supplementing the case file with evidence against the defendant if the prosecution needs to respond to the defense's commentary on the case file and motions.

²⁹⁰ See, for example, *Opredelenie Konstitutsionnogo Suda No.389-O of 21 December 2004* (unpublished decision available on Garant) (petition of Kurilko), in which the court refused to accept a petition to clarify an earlier decision; and *Opredelenie Konstitutsionnogo Suda No.57-O of 2 February 2006, VKS (2006) No.3*.

²⁹¹ See 1996 Decision, *supra* note 6 (Decision of the Constitutional Court No.19-P of 28 November 1996, VKS (1996) No.5).

²⁹² This might be thought to constitute an attempt by the state to try a person twice for the same offense. However, the Russian Constitution only provides that "[n]o one may be convicted twice for the same crime", see Art.50(1) RF Constitution. The ECHR provides in Art.4 that no one may be "tried or punished" for the same offense but it says that it is for an offense that the person "has already been finally acquitted or convicted". So, under both these standards, it would seem proper to retry someone any number of times as long as the earlier trials did not end in final decisions and did not violate the right "to be tried without undue delay" under Art.6(1), ECHR. Art.6(1) violations tend to involve longer delays than typically are involved with trial adjournments in Russia. See, generally, Trechsel, *op.cit.* note 3, 381-402 (on double jeopardy) and 134-149 (on undue delay). By contrast, in the US, being tried twice requires only a first attempt to try the person—"jeopardy" is said to "attach" when the first trial starts—after which point no later trial is possible. See Burnham, *op.cit.* note 3, 310-313.

If this is the principle involved, then the practice now used to permit supplementation of the prosecution's proofs at trial would seem to violate it. This is the practice of granting liberal adjournments of trials when the prosecution is not ready to proceed because of the absence of witnesses. Article 253 permits the postponement and suspension of the trial. Our observations and interviews, as well as those of Russian courtroom observers, confirm the widespread use of this practice.²⁹³

4. The Trial

4.1. Setting of the Trial and Participants

Criminal trials can be held in the Justice of the Peace courts, district courts or subject-level (usually called 'regional') courts, depending on the seriousness of the offense.²⁹⁴ The Justice of the Peace and district courts are single-judge courts. In regional (subject-level) federal courts, trials can be held before a single judge or a panel of three professional judges or before a jury and a single presiding judge.²⁹⁵ Unlike Soviet times, when judges just wore suits, Russian judges today wear robes. They are referred to as 'your honor' (ваша честь) (*vasha chest*).²⁹⁶

A procurator must attend the trial, unlike the rule under the old Code.²⁹⁷ Procurators are entitled to wear military style uniforms but, when appearing as a procurator at trials in the 1990s, many chose to wear ordinary business suits. However, procurators tell us that the word came down from the procurator general's office that they were to wear their uniforms at all trials, so they now do so.

The defendant, at this point called the "person on trial" (подсудимый) (*podsudimyi*), sits or stands in a 'prisoner's dock', as in the English system, guarded by armed bailiffs. In more serious cases, the defendant is confined in a barred cage in the courtroom. Whether in a dock or a cage, the defendant is usually some distance from defense counsel, making attorney-client consultation somewhat difficult and the need for it a public matter.

²⁹³ See interviews conducted 19 and 20 October 2005 by Jeffrey Kahn; see, also, Moskalenko and Nikitinskii, *op.cit.* note 156, 19-20.

²⁹⁴ For more detail on jurisdictional divisions among trials courts, see Burnham, Maggs and Danilenko, *op.cit.* note 18, 70-77; and Art.31(1-4), CrPC.

²⁹⁵ The court of a judge and two lay assessors, the mainstay of Soviet times, was used until January 2004. In one of the first cases decided against Russia in the European Court of Human Rights, that Court held that Russia violated Art.6(1) of the Convention requiring "a fair [...] hearing [...] by [a] tribunal established by law" when it used lay assessors who were not picked at random nor limited in their terms. *Posokhov v. Russia*, *op.cit.* note 55.

²⁹⁶ Art.257(3), CrPC.

²⁹⁷ Art.246, CrPC.

Defense counsel is not required for all trials but to proceed without counsel there must be a clear waiver from the defendant. It is not enough that no counsel appears and the defendant just agrees to go ahead without counsel.²⁹⁸ The physical separation of the defendant and defense counsel reflects their separate status as parties. Thus, in the course of the trial, the defendant and the defense lawyer are often asked separately by the court what their respective positions are. If there is a conflict between the two, the defendant's position prevails. Defendants usually go along with their counsel's position but, when the issue is a complex legal one, defendants often do not know what to say when they are separately asked by the judge for their position on the issue.

The victim is officially a party on the prosecution side of the case²⁹⁹ and may be represented by his or her own counsel. The victim has a right to testify,³⁰⁰ to ask questions of the defendant and witnesses,³⁰¹ and the right to appeal the judgment or sentence in the case.³⁰² Often the only evidence victims have is relevant only to the impact the crime has had on their lives but their lack of personal knowledge of the circumstances of the crime is often no barrier. It is fair to say that victims generally use their right to appear, testify and make arguments to obvious and profoundly negative effect on the defendant's case. Judges will invariably consult victims on the issue of punishment. Victims may also join a civil claim for damages to be tried along with the criminal charges.³⁰³

The Constitutional Court has been particularly supportive of victims' rights. As discussed earlier, victims can appeal dismissal of a criminal case during the preliminary investigation.³⁰⁴ The old Code did not allow the victim to participate in closing arguments except in a narrow category of cases (*e.g.*, assault, slander) in which the impact of the crime on the victim was directly relevant; however, in 1999, the Court struck down this limitation as a violation of victims' rights.³⁰⁵ Then, in a 2003 case, the Court

²⁹⁸ Supreme Court Criminal Division, *In re Kravchuk*, decision of 11 June 1996, *BVS* (1997) No.4, 5; and Lupinskaia, *op.cit.* note 19, 466.

²⁹⁹ Art.42, CrPC (set forth at Chapter 6: 'Participants in Criminal Proceedings on the Prosecution Side').

³⁰⁰ Art.277(2), CrPC.

³⁰¹ Art.275(3), CrPC, which provides for questioning by the court of the defendant "after he has been questioned by the parties"; and Art.278(3), CrPC (providing for the same).

³⁰² Art.42(2)(19), CrPC.

³⁰³ Art.42(3), CrPC.

³⁰⁴ See, *supra*, section 2.1. Victims can also appeal refusal to initiate a case. See, *supra*, text accompanying notes 19 and 20.

³⁰⁵ Postanovlenie Konstitutsionnogo Suda No.1-P of 15 January 1999 (petition of Kliuev), *VKS* (1999) No.2, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii (SZ RF)* (1999) No.4 item 602. The

examined the provisions of the new Code, which provided that a case must be dismissed if the procurator declines to proceed for lack of sufficient evidence and that dismissal on this basis was judicially reviewable only if there were new or newly discovered circumstances. The Constitutional Court interpreted the Code as requiring that the procurator state sufficient legal reasons for the decision not to proceed or to reduce the charge and held the limited ground for review of such dismissals to be unconstitutional.³⁰⁶ Then, in 2005, the Court held unconstitutional Article 405 of the new Code, which prohibited supervisory review of final judgments on any ground that would worsen the defendant's position—a prohibition on what the Code referred to as a “turn for the worse” (поворот к худшему) (*povorot k khudshemu*).³⁰⁷ The Court offered several bases for its decision but the main one was that Article 405 violated the principle of equality of the parties secured by Article 123(3) of the Constitution, since defendants could seek reversal of their convictions without any limitation.³⁰⁸ However, all systems give rights to criminal defendants that parties on the prosecution side do not have. That is the whole idea behind securing the rights of individuals against government power. To the extent that these rights handicap the victim or the state procurator in proving their case, then all of them violate strict equality of the parties. If the Court is serious about this basis for its decision, then many of the rights of defendants in criminal cases are potentially unconstitutional.

Bailiffs are present to assist the presiding judge in keeping order, to provide general security for the court and to handle specific security needs associated with a detained defendant's attendance in court.³⁰⁹

principal constitutional ground was the victim's right of “access to justice”. Art.52 provides: “[t]he rights of victims of crimes or abuses of power shall be protected by law. The state shall guarantee such victims access to justice and compensation for damage inflicted.” Other grounds were the right to judicial protection. See Art.46(1) and the adversarial principles guaranteed by Art.123(3).

³⁰⁶ Postanovlenie Konstitutsionnogo Suda No.18-P, *op.cit.* note 288, 7.

³⁰⁷ Postanovlenie Konstitutsionnogo Suda No.5-P of 11 May 2005, SZ RF (2005) No.22 item 2194. Art.405 applied only to supervisory review, which is third instance review of a decision that is considered final following appellate or cassational review (or the opportunity for it).

³⁰⁸ Art.123 is quoted, *supra*, in the text accompanying note 3.

³⁰⁹ Art.257. The bailiff service was formed in 1997 and replaces the former Interior Ministry troops as providers of court security. See Federal Law on Court Bailiffs. Judges have the power to exclude persons from the court room or to fine them for obstreperous behavior (Arts.117 and 258, CrPC), such as failure to show up or showing up late when summoned, or to impose administrative sanctions (see Art.17(3), Kodeks RF “Ob Administrativnykh pravonarusheniakh” No.195-FZ, signed 30 December 2001, as amended by Federal Law No. 120-FZ, signed 22 July 2005). Criminal liability is even possible for offensive statements made to the judge or other participants (Art.297, Criminal Code RF) with up to four to six months of detention (*apetr*) (*arest*).

Consistent with continental practice, there is no verbatim transcript of the trial, only a summary, called a 'protocol', kept by the court 'secretary' in longhand. The new Code beefs up the requirement, requiring that the secretary make a "complete and accurate" account of the actions of everyone in court,³¹⁰ including "detailed content of testimony" and "questions asked of those who were questioned and their answers"³¹¹ but provides no better means of discharging these responsibilities than existed before. Various means of taking down testimony are suggested, including "stenographic" and other "technical means" but none are required and, from our observations, none have been provided. As a result, trial 'protocols' look as sketchy as they always have.³¹² The parties have the right to review the record and make corrections and additions but any changes must be approved by the judge.³¹³ Judges are resistant to verbatim recordings of 'their' trials and hearings, since that would place them under more exacting scrutiny. However, it would seem that a record that would permit a higher reviewing court or even the general public to find out exactly what happened in a particular trial would substantially advance the interest in openness and accuracy of judicial proceedings and judicial accountability. In this respect, an important amendment to the new Code was passed in 2003 establishing that anyone present in the courtroom "has the right to make an audio recording" of the proceedings.³¹⁴ Some defense lawyers have taken to routinely recording trials for the protection of their clients and themselves.³¹⁵

³¹⁰ Art.245, CrPC.

³¹¹ Art.259(3)(10-11), CrPC. The "complete and accurate" part and the requirement that the secretary take down "questions asked of those who were questioned and their answers" are new. Compare Art.264, CrPC RSFSR.

³¹² See, for example, Moskalenko and Nikitinskii, *op.cit.* note 156, 29, which states that: "[t]he observer noted that in the course of the above dialogue the court secretary recorded next to nothing of what occurred."

³¹³ Arguments can arise over what changes or additions can be made and the ultimate decision is for the judge to make. In complicated cases, many hours and sometimes days can be spent trying to "settle the record" for appeal. In the recent Khlebnikov murder case, several weeks were spent on it with no satisfactory resolution. Everyone remembered different versions of what happened and the judge had already made some efforts to "clean up" the record that other participants disagreed with. Interview with Larissa Maslenikova, counsel for the victims, Moscow, 2 October 2006. The acquittal in the case was reversed by the Supreme Court without the record ever having been finally settled.

³¹⁴ Art.241(5), CrPC (as amended by the Federal Law on Bringing the CrPC into Compliance). Photographs or video recordings are possible as well but require the permission of the presiding judge. The original version of Art.241 had provided that "making audio recordings is not permitted if it interferes with the trial", which meant that permission had to be sought from the judge.

³¹⁵ In one case, defense counsel's audiotape of his interaction with a judge figured prominently in his successfully defending against disciplinary charges brought by a judge. See Moscow Chamber of Advocates, "Zakliuchenie kavalifikatsionnoi kommissii advokatskoi palaty goroda Moskvyy

A September 2006 decree of the Russian government has indicated an interest in “the implementation of required audio-recording of judicial proceedings” as part of its plan for development of the judicial system over the next four years. It expresses the hope that such action would “have an effect on compliance with procedural rules, would improve the level of civility and forestall complaints about settlement of trial records”.³¹⁶ So far, however, the law has not been changed to require any form of verbatim record of trials.

4.2. Trial Procedure

Article 15 of the Code provides:

- “1) Judicial proceedings in criminal cases shall be conducted in accordance with adversarial principles.
- 2) The functions of prosecution, defense, and adjudication of a criminal case shall be separate from each other and those functions may not be allocated to any single agency or official.
- 3) A court is not an organ of criminal prosecution and shall not take the prosecution or defense side in a case. The court shall create the conditions necessary for the parties to perform their procedural duties and to exercise the rights granted to them.
- 4) The prosecution and the defense shall have equal rights before the court.”

Article 244 of the Code fleshes out the nature of the “equal rights” bestowed when it requires that:

“In judicial proceedings, the prosecution and the defense shall enjoy equal rights to make challenges and file motions, present evidence and take part in the examination thereof, take part in closing arguments, submit written questions to the court on the issues [relevant to proof of the crime charged] and take part in the examination of all other issues that arise during the trial.”³¹⁷

After the presiding judge announces the case to be tried, the court reporter verifies for the record the presence of all the participants, the presiding judge addresses them with a long list of their various rights during the

po distsiplinarnomy proizvodstvu v otnoshenii advokata P.”, 20 May 2005. One of the charges rejected by the disciplinary commission was that the advocate “used an audio recorder without having warned the presiding judge” or “participants at the trial”.

³¹⁶ See Postanovlenie Pravitel'stva Rossiiskoi Federatsii “O federal'noi tselevoi programme ‘Razvitiie sudebnoi sistemy Rossii’ na 2007-2011” No.583, signed 21 September 2006, *Rossiiskaia gazeta* (3 October 2006) available at <<http://www.rg.ru/2006/10/03/sud-dok.html>>.

³¹⁷ Art.15 of the Constitution makes adversarial principles applicable to “judicial proceedings” and the context makes clear that the reference is intended to refer to proceedings in courts before judges. See, also, *supra*, note 7. Art.1 of the Code uses the same term, however (судопроизводство) (*sudoproizvodstvo*), and defines it as including both “pretrial and judicial proceeding in a criminal case”. Art.5(56), CrPC. Since the Code clearly does not establish a preliminary investigation stage that is at all adversarial, this understanding of ‘судопроизводство’ can be doubted. However, compare Postanovlenie Konstitutsionnogo Suda No.2-P of 14 February 2000, *SZ RF* (2000) No.8 item 991 (petition of Aulov), which states that “[a]dversarial principles extend to all stages of the criminal process”.

trial.³¹⁸ Witnesses are then sequestered and the court proceeds to “establish the identity of the accused” and whether the accused received a copy of the indictment at least seven days before trial.³¹⁹ The court then deals with issues of new witnesses, experts or specialists, or motions to exclude evidence will be raised and disposed of at this time, including motions that had been raised before trial and denied.³²⁰

Once these preliminaries are taken care of, the trial proper begins with the procurator setting out the substance of the charges against the defendant.³²¹ Then the judge asks the defendant (not his counsel) “whether he understands the charge, whether he admits his guilt and whether he or his defense counsel wishes to state the defense position with regard to the charges that were presented”.³²²

The Code then requires that the prosecution present its evidence first. Only after such presentation does the defense present its case in opposition.³²³ As for the internal organization of the prosecution or defense case, these are determined by the prosecution or defense as they see it to their best advantage and the order must be accepted by the court.³²⁴ However, even under the new Code, the defendant “may give testimony at any point in the trial” with the court’s permission.³²⁵

At whatever point witnesses testify, the first party to question the witness is the party who called the witness. Then the opposing party and other parties ask questions, followed finally by the judge.³²⁶ The defendant testifies while standing in the prisoner’s dock or cage. Witnesses testify

³¹⁸ Some of the lists of rights are rather lengthy (the Code lists twenty-two separate rights for the victim and twenty-one for the defendant) and the recitation of them takes on the air of ritual, given the impossibility of anyone remembering all of them. No written explanation of rights is required to be distributed.

³¹⁹ Art.265, CrPC.

³²⁰ Art.271, CrPC.

³²¹ Compare Art.335(1), CrPC, which states that “[a] jury trial shall begin with opening statements [вступительные заявления] [*vstupitel'nye zaiavleniia*] made by the public prosecutor and defense counsel”; with Art.273(1), CrPC, which states that “[a] trial shall begin with the public prosecutor setting out the charge against the defendant”. However, advocates with whom we spoke indicate that the same in-person questions are asked of the defendant in jury trials before opening statements take place. E-mail communication from Nikolai Kipnis, 10 July 2007, in consultation with other advocates. See *infra*, 83-84.

³²² Art.273(2), CrPC.

³²³ Art.274(2), CrPC.

³²⁴ Art.274(1), CrPC. Under the old Code, the court could order presentation of evidence in any order and it was traditional that the defendant testified first.

³²⁵ Art.274(3), CrPC.

³²⁶ Art.278(3), CrPC. Witnesses are also required to testify out of earshot of each other. Art.278(1), CrPC.

while standing at a lectern. Any questioning by the judge, procurator or defense lawyer is generally done while they are seated. All others traditionally stand to ask a question. Witnesses and defendants may use notes while testifying. After giving testimony, witnesses may remain in the courtroom or, with the permission of the court, they may leave.³²⁷

A major change in terms of adversarial party-control principles is the new Code's relaxation of the power of the court to control what witnesses will be called to testify at trial. As noted earlier, under Article 271(4), the court "may not deny a motion to permit a witness or forensic specialist to testify at trial if that person has appeared at the request of the parties".³²⁸ Under prior law, in conformity with the tradition in civil law countries, the question of which witnesses may testify at trial was determined by the judge; and the judge's selection was, in turn, controlled by what witnesses the criminal investigator called during the pretrial investigation.

However, while Article 271(4) is useful, it falls short of a guarantee of compulsory process for the defense. Reluctant defense witnesses or even defense witnesses who need to show a subpoena to get time off work will not attend. By contrast, the prosecution has full subpoena power to compel its witnesses to come—a serious violation of the requisite equality of rights of the parties at trial.³²⁹

Witnesses do not take an oath to tell the truth but are advised that refusal to testify and giving false testimony are criminally punishable and sign a written statement of these obligations.³³⁰ The defendant is not considered a 'witness' even if he or she chooses to testify and no criminal liability attaches to anything the defendant states at trial. As for the order of questioning witnesses, "the party who requested that the witness be called into court shall be the first to ask questions of the witness".³³¹ Similarly, when the accused testifies, the first to ask questions is defense

³²⁷ Arts.275(2) and 279, CrPC.

³²⁸ Although the language of this section is ambiguous and may be read to require a request by *all* parties in agreement, it is understood by most judges to refer to witnesses appearing at the request of *any* party. See Ulianov, *op.cit.* note 248; and Davletov, *op.cit.* note 248.

³²⁹ Compare Art.6(3)(d), ECHR, which lays out the right "to obtain the attendance and examination of witnesses on his behalf on the same condition as witnesses against him"; and *Bricmont v. Belgium*, No.10857/84 (Eur.Ct.H.R., 7 July 1989), 89, which states that it is normal "for the national courts to decide whether it is necessary or advisable to call a witness". See, generally, Trechsel, *op.cit.* note 3, 322-326.

³³⁰ Art.278(2), CrPC. Under Art.56, a witness "may not give false testimony knowingly or refuse to give testimony" other than as provided by established privileges against incriminating himself, his spouse or close relatives. Arts.56(6)(2) and 56(4)(1), CrPC. A witness may otherwise be compelled to testify and "shall be liable" for "knowingly giving false testimony or for refusing to testify". Art.56(7-8), CrPC. This is a criminal liability that is punishable by a fine, corrective labor or up to 90 days arrest. See Art.308, Criminal Code RF.

³³¹ Art.278(3), CrPC.

counsel, followed by the procurator and any other parties and finally the court.³³²

As discussed earlier when the role of the case file at trial was discussed, the Code seems to require oral, first-hand testimony of witnesses—with the exceptions discussed earlier. Traditionally, the testimony of the defendant and witnesses has been given in narrative form, followed by any necessary clarifying questions. The narrative was usually prompted by a general invitation by the judge to “tell us everything you know that is relevant to this case”. However, testimony under the new Code is supposed to be elicited by the parties.³³³ The drafters contemplated that the judge would simply turn presentation of the testimony over to the parties, who would present the evidence in question and answer format. However, “if defendants express their wish to tell about the circumstances of the case on their own, [...] they must be given the opportunity”. Otherwise their right to defense will be compromised.³³⁴

Lawyers from common-law countries often ask if ‘cross examination’ exists in Russian trials. The answer is ‘yes and no’. Certainly, there is nothing denominated as such and the principal form of question that is used on cross examination—the leading question (наводящий вопрос) (*navodiashchii vopros*)—is prohibited at trial.³³⁵ However, the ban is not what it seems. In fact, leading questions not unlike those used in a common-law style cross examination are asked all the time as ‘clarifying questions’ (уточняющие вопросы) (*utochniaiushchie voprosy*), though neither form of question is defined anywhere in the Code.³³⁶ Whether under the rubric of ‘clarifying questions’ or otherwise, it is not uncommon to see what common-law lawyers would recognize as cross examination take place in Russian trials.

³³² Art.275(1), CrPC.

³³³ Kozak and Mizulina, *op.cit.* note 17, comment 2 to Art.278.

³³⁴ *Ibid.*, comment 1 to Art.275.

³³⁵ Art.275(1), CrPC. Actually, Art.275(1) only prohibits asking leading questions of the *defendant*. There appears to be no similar ban on leading questions asked of witnesses, victims or other participants, though they are banned during the investigation. See Art.189(2), CrPC. However, this is likely an oversight and in practice the ban is treated as applying to witnesses and victims at trial as well.

³³⁶ When Russian lawyers and judges are asked to explain the difference between an impermissible leading and a permissible clarifying question, they often give different answers. The most oft-heard explanation is that a leading question is a question that suggests the desired answer, while a clarifying question is a form of leading question that follows up on and seeks to clarify a witness's earlier answer to an earlier open, non-leading question. Thus, the key to asking leading questions would seem to be that questioners must link those questions to an answer the witness gave to an earlier open-ended question. However, whether that open-ended question must have been asked by that very questioner or by some other questioner is not clear.

Somewhat surprising for an otherwise mainly adversarial trial regime, the presiding judge excludes improper questions *sua sponte* without waiting or requiring any objection to be voiced by a party. In practice, the ban on leading questions, such that it is, is almost exclusively enforced by the judge.³³⁷

If the evidence as it develops at trial is different from that gathered in the preliminary investigation, the presiding judge can change the charge against the defendant. However, the charge cannot be changed for the worse or in such a major way that there is little overlap with the evidence supporting the original charge.³³⁸ If the procurator and the victim decline to prosecute, the judge may not step in and continue the prosecution.³³⁹ If, in the process of trial, evidence of other crimes committed either by the accused or by others is revealed, the court may not order initiation of a criminal case.³⁴⁰

Following presentation of the evidence are the closing arguments, called *прения* (*preniia*) or 'debate'. For the defense, closing arguments can be tricky because both guilt and sentence will be decided in the trial. Thus, in cases in which there is an argument that the defendant is not guilty, it is difficult to avoid some rhetorical inconsistency in arguing both that the defendant did not commit the offense and that, if he did, he is sincerely sorry and should be granted leniency in his punishment.

In addition to closing arguments, the defendant himself has the right to a 'final word' (*последнее слово*) (*poslednee slovo*). During the final word, no questions or interruptions are permitted, nor may it be limited by the court in duration, except for clear abuse, unseemly conduct or utter

³³⁷ Art.275(1) provides that "the presiding judge shall disallow [отклоняет] [*otkloniaet*] leading questions and questions that are irrelevant to the case". This could be read as consistent with requiring an objection from a party first but, in practice, it is not so interpreted.

³³⁸ Art.252(2), CrPC; and Lupinskaia, *op.cit.* note 19, 468. However, the prohibition on a change in charges that would worsen the defendant's position is of doubtful constitutionality after two Constitutional Court decisions: *Postanovlenie Konstitutsionnogo Suda No.5-P, op.cit.* note 307, which held that Art.404's ban on supervisory review that worsens the defendant's position is unconstitutional; and *Postanovlenie Konstitutsionnogo Suda No.6-P* of 16 May 2007, *VKS* (2007) No.3, which held that changing an assault charge to murder after the victim had died after a judgment of guilty of assault must be permitted and that Art.413, which bans reopening a case based on new facts unless the criminal nature or punishability of the act, violates the victim's right to justice.

³³⁹ This power existed under the old Code but was held unconstitutional by the Constitutional Court as a violation of adversarial principles. See, *supra*, note 7. On the other hand, if the prosecution declines to prosecute, grounds must be stated and the decision is reviewable by the court at the instance of the victim. See, *supra*, section 2.1.

³⁴⁰ This power existed under the old Code but the Constitutional Court held that it violated adversary principles. *Postanovlenie Konstitutsionnogo Suda No.1-P, op.cit.* note 6.

lack of relevance to the trial.³⁴¹ The right is considered so valuable that reversal of the conviction is possible unless a clear indication of waiver is indicated in the record. The final word is not evidence and, therefore, may not be relied upon as a basis for guilt or innocence, although this lack of evidentiary value is not explicitly set forth in the Code. Should new and relevant information be referenced in the final word, the trial may be reopened for the introduction of the evidence.³⁴²

The changes made by the new Code in trial procedure are clearly an advance for adversarial principles but they fall short. First and foremost, witness statements and other contents of the case file are 'pre-admitted' for use at trial, which makes the right of the defense to ask questions of witnesses at trial of considerably reduced value. The right to ask questions and challenge the contents of such records are for naught if the witnesses in question and the officials who participated in the investigative actions and produced the reports in the case file are not going to appear at trial.

The other problem is with implementing those adversarial trial procedures that the Code does establish. In some trials, those procedures work as they were designed to work. However, in many trials, the observer could justifiably think that trials had not changed that much from the way they were in Soviet times. Part of the problem is that the lawyers lack the skills necessary to discharge their new adversarial duties. The essence of adversarial presentation of evidence—the ability to organize proof and to use questions and answers to elicit a persuasive story from one's own witnesses or to make a point in one's favor with opposing witnesses—is not an inborn trait.³⁴³ The weak and unconfident trial skills of the lawyers combine with judges who are used to dominating the courtroom, causing party control and presentation to quickly fall by the wayside.

The Code does require that the prosecution go first with its evidence, as befits a system that places the burden of proof at trial on the prosecution and permits the judge to ask questions of the defendant only *after* the defendant has been questioned by the parties.³⁴⁴ However, the Code continues judicial domination of the trial from its earliest points, reinforced by the pre-Code legacy of opening the trial with judicial inter-

³⁴¹ Art.293, CrPC.

³⁴² Art.294, CrPC.

³⁴³ One of the authors has extensive experience teaching trial advocacy to lawyers from and other former republics of the Soviet Union. See Uilliam Bernam [William Burnham], Irina V. Reshetnikova and Alexei Proshliakov, *Sudebnaia advokatura* (St. Petersburg University Press, St. Petersburg, 1996), which provides text and materials for a trial advocacy course taught in the style of the US National Institute for Trial Advocacy.

³⁴⁴ Art.275(3), CrPC.

rogation of the defendant.³⁴⁵ It provides that the defendant has the *right* to give testimony at any time³⁴⁶ and requires that the judge at the very beginning of the trial “interrogate the accused about whether the charges are clear to him, whether he admits his guilt and whether he wishes or his counsel wishes to express their position with respect to the charges presented”.³⁴⁷ Given that the defendants’ emotions can go into high gear when the accusations against them are set out—often fueled by impatience from long pretrial confinement under adverse conditions—this preliminary colloquy can easily metamorphose into a full dialogue on the substance of the case, defense counsel’s instructions to the defendant to the contrary notwithstanding.³⁴⁸ The defendant’s right to testify first has almost become a requirement by sheer force of old habits.³⁴⁹

Similarly with witnesses, the Code’s requirement that the judge first “establish the identity of the witness [and] clarify his relationship to the defendant and the victim”³⁵⁰ makes it easy for the judge to then move seamlessly into more substantive matters. Often even judges who try to follow the Code and turn questioning over to the lawyers after this preliminary exchange find that the parties are not up to the task, so they take over the questioning. The lawyers, whether from relief or resignation, do not assert their rights; and, suddenly, one has a pre-reform trial in which judicial interrogation of witnesses predominates.

Whether through innocent slippage or direct violation of the Code’s requirements, we observed trials in which the judge routinely asked substantive questions directly of the defendant and the victim, often bypassing the procurator and defense counsel entirely. In other cases, with each witness, the judge offered the defendant and victim the opportunity to ask questions before offering the same opportunity to defense counsel.³⁵¹

³⁴⁵ See Thaman, *op.cit.* note 273, 105.

³⁴⁶ Art.274(3), CrPC. Permission of the presiding judge is required, however.

³⁴⁷ Art.273(2), CrPC.

³⁴⁸ Courtroom observers have reported violations of even this most basic requirement that the defendant hear the charges against him prior to giving testimony. In one case, “the procurator noted that she would not read the bill of indictment until the defendant gave his testimony”. With no objection by his counsel (who had been willing to proceed with the case in the absence of witnesses), the defendant acknowledged his guilt for the unstated crime and stated his readiness to give testimony. See Moskalenko and Nikitinskii, *op.cit.* note 156, 23.

³⁴⁹ It is not just the force of judicial habits. Some defense counsel believe that it is an advantage for the defendant to testify first, even if the interrogation is by the judge.

³⁵⁰ Art.278(2), CrPC.

³⁵¹ The problem with the weak trial skills of lawyers starts with legal education. It is not only a matter of there being no trial advocacy courses. Perhaps most important is that, as in most civil law countries, law students are taught the law from the standpoint of becoming judges, not advocates. Thus, the emphasis is on knowing what the law is (often from memory) and

Procurators have the advantage of receiving formal training in trial skills from the Procuracy Academy in Moscow and its affiliates, which includes role-play exercises and a final full jury trial. However, their trainers, other than occasional visiting American prosecutors, tend to be academics from the Academy who have no trial experience to speak of.³⁵² In addition, there is an absence of short role-play exercises to permit development of specific skills in isolation (e.g., impeachment of a witness with a prior inconsistent statement, case analysis, use of demonstrative aids) before expecting the student procurator to employ them in a longer exercise. However, the real problem with the effectiveness of procurators in trials is their lack of a history or tradition from Soviet times of doing much at trial. They only appeared in about 60% of cases and in those cases they viewed their role as neutral supervisors of legality, not as advocates. This causes procurators in trials to act less as advocates for their 'client'—the state—and more like quasi-judicial helpers, seeking to get all the facts out. As such, their closing arguments in cases are delivered more in a pontifical than a persuasive style.

The federal Chamber of Advocates has outlined a program for continuing legal education (called 'повышение квалификации' (*повыshenie kvalifikatsii*), literally 'raising one's qualifications') but it does not include an interactive trial advocacy component.³⁵³ However, as might be expected, advocates are much better than procurators in terms of seeking to advance their client's point of view. Some are true 'naturals' at closing arguments. However, the advocates seem to have difficulty presenting the facts needed to support those arguments.³⁵⁴

coming up with the 'correct' answer to legal problems, not on thinking critically and learning how to argue all sides of a question.

³⁵² The US Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) has, since 2005, cooperated with the Legal Academy in its trial advocacy trainings. These impressions are from attending one of those trial advocacy training sessions.

³⁵³ Reshenie Soveta Federal'noi palaty advokatov Rossiiskoi Federatsii (Protocol No.7) "O professional'noi podgotovke i perepodgotovke advokatov, pomoshchnikov advokatov i stazherov advokatov", signed 25 June 2004 (unpublished decision available on Garant); and e-mail from Nikolai Kipnis, 10 July 2007. Another dynamic that works against providing trial skills training in Russia is that advocates who are good in court view what they do as a professional secret, thus making them reluctant to assist their potential competitors. By contrast, being asked to reach (often for free) at continuing legal education events in the US is considered an honor. The American Bar Association's Central and Eastern European Law Initiative (CEELI) has conducted some jury trial advocacy trainings for advocates in some regions of the country. However, these efforts do not reach even a substantial minority of advocates.

³⁵⁴ Tsarist advocates and prosecutors were renowned for their advocacy skills. Even a casual glance of the legal section of any bookstore will disclose several books on famous closing arguments by Tsarist-era lawyers. See, for example, S. M. Kazantsev (ed.), *Sud prisiazhnykh v Rossii: Gromkie ugolovnye protsessy 1864-1917* (Lenizdat, St. Petersburg, 1991), which provides closing arguments and biographical sketches of famous Tsarist-era trial lawyers and an article on jury trials by the most famous Russian lawyer in history, Anatolii F. Koni.

The enormity of what the new Code tries to do with trials must be emphasized before an overly critical attitude is adopted. What the Code attempts is no less than a sea change in the basic concept of a trial. Russia has, essentially, gone from a system of trials run by judges to trials run by lawyers. However, though the law has changed, many of the other things necessary for the law to work well in practice are not in place. There has been insufficient effort made to ensure that the lawyers are actually prepared for their new adversarial responsibilities and that judges are prepared to repudiate their active ways. Given the enormity of the changes mandated by the new Code and the strength of the opposing concepts and mindsets of the participants, it is in some ways surprising that many trials are as adversarial as they are.³⁵⁵

In cases with appointed defense counsel, low pay provides few incentives for proper preparation for and performance at trial. While the situation with pay has improved, it is still low. The basic pay for defense counsel is RUB 275 (or about USD 11) for one day in court.³⁵⁶ However, this is only for time spent in court (referred to as 'судодень' (*sudoden*) or 'court day'). There is no payment provided for time spent on case investigation, legal research, studying the case file, writing motions or trial preparation. As discussed earlier, recent versions of the federal regulation on defense counsel pay make clear that any part of a day is to be counted as a whole day; but advocates report that they are sometimes paid only for the fraction of the day that the hearing or trial took.³⁵⁷ There is no reimbursement for travel expenses or time.³⁵⁸

³⁵⁵ It is hard even in common-law systems for judges to get used to their new role of being passive arbiters of what is really the lawyers' show. The difficulties are reflected in the oft-told story of an English barrister who was newly appointed to the bench. He asked a senior judicial colleague to observe him preside over some of his first trials and give him some feedback. The senior colleague's suggestion was to do what he had done when he first went on the bench—to place in front of himself on the bench a sign that only he could see reading "SHUT UP".

³⁵⁶ See, *supra*, note 223. The official amount is sometimes supplemented from a fund containing mandatory donations by lawyers who do not want to be appointed in criminal cases. In Moscow, the amount of the donation is RUB 1,130 or around USD 45 a month. See Proceedings of the Moscow Bar (unpublished), para. 9 (effective 1 February 2007) (on file with William Burnham). We were unable to find information on how money from this fund is distributed, though we were told that it is primarily intended to cover civil legal services that advocates are required by law to provide for which they get no payment from the government. See Art.26(1), Law on Advocate's Practice and Advocates, which addresses the civil legal problems of pensioners and veterans, alimony and child support, death of a breadwinner and labor health and safety cases.

³⁵⁷ Communication from Moscow advocate received by William Burnham, 6 July 2007.

³⁵⁸ When advocates complain about the rates of pay, says Evgenii Semeniako, head of the Federal Chamber of Advocates, government officials accuse advocates of 'egotism' and of shirking their 'social role'. Interview by William Burnham with Evgenii V. Semeniako, President, Federal Chamber of Advocates, and Anastasiia M. Loginova, Public Relations Assistant for the Chamber, Moscow, 15 May 2004. An interesting recent development relevant to free counsel

A major problem with defense representation at trial is the system of appointed counsel used in some jurisdictions, including Moscow. Instead of appointing counsel to represent the client from the beginning to the end of the case, a 'duty advocate' (дежурный адвокат) (*dezhurnyi advokat*) defense counsel will be sent to a particular courtroom to handle all the trials that take place there on a given day. Under such a system, the lawyer representing the person at trial will not be the same lawyer who attended pretrial investigation activities. Also, if the trial needs to be adjourned to a different day (other than perhaps the next day), a different lawyer will handle the trial from that point on. The result of this system is that lawyers arrive in court on a given day without having met or interviewed their client and without having familiarized themselves with the case file or any of the earlier trial proceedings. The Samara Region Chamber of Advocates has taken steps to ensure that the same advocate represents the defendant from beginning to end but Moscow has not done so.³⁵⁹

A different problem that seriously undercuts the adversarial trial process set out in the new Code is the practice of procurators and judges circumventing those protections entirely by engaging in *ex parte* contacts about the case—procurators going to the judge in chambers and discussing the merits of cases without defense counsel being present.³⁶⁰ When we raised the issue of *ex parte* contact with procurators, they were nonchalant about it. One procurator, who requested anonymity in exchange for candor, asserted that procurators speak privately with the assigned judge before a case is heard in court "ninety to one hundred per cent of the time".³⁶¹ This procurator felt that this was "all just part of the adversarial process", though readily acknowledging that such meetings gave the procurator certain advantages over the defense. As the procurator put it:

"I myself meet with the judge and discuss some criminal cases rather often. I explain my opinions and the circumstances of the case. But the judge would not give me his opinion; he will only consider my opinion. I did not want to force my opinion [at these *ex parte* meetings]. I was just lobbying. This was not during the trial but before the trial. And I would say the same thing at the trial. [...] I've never forced the judge to make an unlawful decision, so my conscience is clean."³⁶²

in criminal cases is the Supreme Court's approval of a system to obtain reimbursement of the cost of appointed counsel from convicted defendants. Vladislav Kulikov, "Tiuremnyi schet za besplatnogo advokata", *Rossiiskaia gazeta* (9 August 2005).

³⁵⁹ See, *supra*, note 214 (Samara rules). It should be emphasized that the 'duty advocate' system used in Moscow is not the direct choice of the chamber. All appointments go to law firms, not individuals, and law firms then choose how they discharge their duties to the client.

³⁶⁰ *Ex parte* contacts would seem to violate even the ECHR's narrow concept of adversariality. See, *supra*, note 3.

³⁶¹ Interview conducted 27 October 2005 by Jeffrey Kahn.

³⁶² *Ibid.*

Asked whether this viewpoint conflicted with the adversarial principles set forth in the Code, the procurator expressed puzzlement. A defense attorney could do the same thing, this procurator said, if he knew the judge. Of course, the procurator conceded, this would be very rare indeed. As another procurator observed, “the defense attorney is considered an enemy [враг] [vrag]”.³⁶³ Procurators in other cities confirmed the practice.³⁶⁴ As one explained, “for a long time we were on the same side”. Besides, the procurator continued, “it is not forbidden [by the Code]”.³⁶⁵ This prosecutor also asserted that there was nothing in the Code that prevented a defense attorney from doing the same thing, while admitting that such meetings were very rare.

There are some indications that *ex parte* contact has come under critical review. A September 2006 Russian government decree noted an interest in the “introduction of required procedures for judges to disclose at the start of a judicial proceeding all informal contacts they had had regarding the case”.³⁶⁶ Whether anything will come of it—or whether a prosecutor’s contact with a judge would qualify as a prohibited “informal contact” at all—remains to be seen. The decree is proffered as an anti-corruption measure, thus suggesting that prosecutor contacts with judges may well not be within its purview. Moreover, as stated in the decree, what is planned is a reporting requirement, not a prohibition on such contacts.

4.3. Trial by Jury

Trial by jury was one of the major emphases of the Concept of Judicial Reform.³⁶⁷ Articles 47(2), 123(4) and 20(2) of the 1993 Constitution secure the right to trial by jury. The first two constitutional provisions provide for a right to trial by jury “in cases provided for by federal statute”, while Article 20(2) directly requires a jury trial in all death penalty cases.³⁶⁸ After

³⁶³ Interview conducted 19 October 2005 by Jeffrey Kahn.

³⁶⁴ Interview conducted 2 November 2005 by Jeffrey Kahn.

³⁶⁵ *Ibid.*

³⁶⁶ Government Decree on the Development of the Judicial System, *op.cit.* note 316.

³⁶⁷ Russian Federation, “Kontseptsiiia sudebnoi reformy v Rossiiskoi Federatsii”, *Vedomosti Verkhovnogo Soveta RSFSR* (1991) No.44 item 1435. Although the 1991 Concept was not intended to be a legally binding document, it was officially approved by the parliament. The Russian terms for ‘jury trial’ are ‘суд присяжных’ (*sud prisiazhnykh*) (literally, ‘court of jurors’ or ‘jury court’) or ‘суд с участием присяжных заседателей’ (*sud s uchastiem prisiazhnykh zasedatelei*) (literally, ‘court with the participation of jurors’). The term for a juror, ‘присяжный заседатель’ (*prisiazhnyi zasedatel*) or simply ‘присяжный’ (*prisiazhnyi*) refers to someone who sits under oath (присяга) (*prisiaga*). This is similar to the English words ‘jury’ and ‘juror’, which both derive from the Old French ‘*jurée*’, for oath. See *Webster’s New International Dictionary of the English Language, Unabridged* (Merriam-Webster, Springfield, MA, 2nd ed. 1956), 1348.

³⁶⁸ See Postanovlenie Konstitutsionnogo Suda No.3-P of 2 February 1999, VKS (1999) No.3, which

considerable debate and political compromise in the State *Duma*, legislation was passed in July of 1993 implementing the right for more serious offenses to be handled by the subject-level (regional) courts in nine subjects of the country.³⁶⁹ Under this 'experiment', as it was called, the first Russian jury trial in over 75 years was held in Saratov in December of 1993.³⁷⁰

The 2001 Code extended jury trials to the regional courts of the rest of Russia, with juries available in all but Chechnia as of 1 January 2004, with Chechnia scheduled to be included in 2007.³⁷¹ In 2006, jury trials accounted for 13.7% of subject-level court cases and in 2005 for 11.9%.³⁷²

At the end of the preliminary investigation, investigators must inform defendants in cases involving jury-qualified offenses of the nature of the jury trial and their right to request a jury trial. A preliminary hearing is mandatory when a jury request is made, and the defendant will be asked to confirm the request at the preliminary hearing. Once confirmed at that point, the request becomes irrevocable. In cases of multiple defendants, a request for a jury by any one of them results in a jury trial for all of them, unless the case can be conveniently severed into multiple cases.³⁷³

held it a violation of equal protection to impose the death penalty when jury trials are available in only nine regions of the country.

³⁶⁹ Subject-level courts handle more aggravated forms of ordinary crimes (e.g., aggravated murder, as opposed to ordinary murder, which is handled by district courts) and crimes against state institutions, such as treason, espionage, falsification of evidence and obstruction of justice. Over 75% of criminal cases in subject-level courts are some form of aggravated murder. See Burnham, Maggs and Danilenko, *op.cit.* note 18, 73-76.

³⁷⁰ Russia had a jury trial system in criminal cases during the period 1865-1917. See "Sudebnye ustavy", signed 20 November 1864, Arts.200-828; and Samuel Kucherov, *Courts, Lawyers and Trials under the Last Three Tsars* (Praeger, New York, 1953). For a description and analysis of the first jury trials held under the new law, see Thaman, *op.cit.* note 273. Good Russian-language sources on Russian juries include M.V. Nemytina, *Rossiiskii sud prisiazhnykh* (Izdatel'svo BEK, Moscow, 1991); V.M. Lebedev, *Rasmotrenie del sudom prisiazhnykh* (Iuridicheskaiia literatura, Moscow, 1998); L.M. Karznova, *Vozrozhdenyi sud prisiazhnykh* (Nota Bene, Moscow, 2000); S.A. Nasonov, *Sudebnoe sledstvie v sude prisiazhnykh: zakonodatel'stvo, teoriia, praktika* (R. Valent, Moscow, 2001). See, also, Thaman, *op.cit.* note 21, 145 and 198.

³⁷¹ The delay of their introduction in Chechnia was upheld as constitutional by the Constitutional Court. Postanovlenie Konstitutsionnogo Suda No.3-P of 6 April 2006, VKS (2006) No.3 (petition of Tuburova).

³⁷² See the website of the Judicial Department of the Supreme Court, available at <http://www.cdep.ru/material.asp?material_id=217>.

³⁷³ Arts.217(5) and 325(2), CrPC. In jury cases in Krasnoiarsk (and perhaps other regions), assistant chief judges select a judge to hear each jury trial from a special list of qualified judges. Interview with Judge V.F. Baranovskii conducted 25 October 2005 by Jeffrey Kahn. In Krasnoiarsk, out of the fifty judges on the subject-level court who hear criminal cases, only fifteen generally younger judges have been qualified by special training to hear jury trials, so they get all the jury trials even if a different judge was assigned before a jury request was made. Some believe this violates the Code requirement in Art.242 that the composition of a court not be altered once it is constituted. Interview with former Constitutional Court Judge, Tamara Morshchakova, conducted 3 November 2005 by Jeffrey Kahn.

The Russian jury, like the traditional common law jury, has twelve members chosen at random from the community, who deliberate in secret and independently from the judge. Thus, the Russian jury is structured for more independent decision making than the mixed courts of Soviet times or continental Europe and even the French jury. Statistics confirm this independence. While the non-jury acquittal rate has traditionally been below 1%,³⁷⁴ the acquittal rate for juries ran to around 20% in the initial round of cases.³⁷⁵ The rate dropped in 2000 and 2001 to around 15% and in 2002 to 8.5%.³⁷⁶ However, in more recent years, it has returned to its former levels, with a 22% rate for 2006.³⁷⁷

A complete picture of the independence of the Russian jury as an institution is impossible, however, without examining appellate judicial control. The Code prohibits a reviewing court from reversing a verdict based on the court's disagreement with the jury's determination of the facts. However, the higher court can reverse for legal error.³⁷⁸ The statistics on reversals of jury verdicts suggest that the intensity of the search for *legal* error is influenced by hostility to the jury's view of the evidence. *Duma* Deputy Mizulina, while praising the expansion of jury trials into other regions under the new Code, noted the "dismal evidence" that "the Cassational Panel of the RF Supreme Court [...] during the period 1997-2000 reversed over 50% of jury acquittals and only 15-16% of guilty

³⁷⁴ In 2002, the reported acquittal rate in trials in the district courts, where there is no right to a jury trial, was 0.71%. "Sudebnaia statistika", *Rossiiskaia iustitsiia* (2003) No.8, 69-78, at 74. For 2006, the acquittal rate in the district courts was 0.5%. See the website of the Judicial Department of the Supreme Court, available at <<http://www.cdep.ru/uploaded-files/statistics/analiz%20ostatistiki%2012%20mes%202006r.xml>>.

³⁷⁵ Steven Thaman, "The Resurrection of Trial by Jury in Russia", 31 *Stanford Journal of International Law* (1995), 61-274, at 270-271.

³⁷⁶ Supreme Court, "Obzor praktiki kassatsionnoi palaty Verkhovnogo Suda RF za 2002 god po delam, rassmotrennym kraevymi i oblastnymi sudami s uchastiiem prisiazhnykh zasedatelei", *BVS* (2003) No.5, 21; Supreme Court, "Obzor sudebnoi praktiki rassmotreniia ugolovnykh del s uchastiem prisiazhnykh zasedatelei", *BVS* (2002) No.7, 18; and Supreme Court, "Sudebnaia Statistika za pervoe polugodie 2002 goda", *Rossiiskaia iustitsiia* (2003) No.1, 71.

³⁷⁷ See the website of the Judicial Department of the Supreme Court, available at <http://www.cdep.ru/material.asp?material_id=217>. Cross-system comparisons of acquittal rates should be undertaken with caution. Counting guilty plea cases, 0.99% of US defendants whose cases are adjudicated on the merits (whether by trial or plea) are acquitted. This is a higher rate but not radically higher than Russia's. The acquittal rate in the tiny percent of cases that are tried to a jury (about 4% of the total) is 17%. See US Department of Justice, "Compendium of Federal Justice Statistics for 75 Largest Counties", (1997), Table 3.2. By contrast, Russia's guilty plea procedure applies to only a small fraction of jury-qualified cases, so a wider range of cases get tried. See, *infra*, 88-89, and *supra*, note 369. In France, a 7.3% acquittal rate for French jury trials is reported, at least in Paris, described as a "more indulgent jurisdiction". Roderick Munday, "What do the French Think of Their Jury? Views from Poitiers and Paris", 15(1) *Legal Studies* (1995), 65-87, at 73.

³⁷⁸ See Arts.385(2) and 379(2), CrPC.

verdicts".³⁷⁹ More recent statistics indicate a gradual drop in the differential rate, though reversals of jury acquittals still outpace reversals of jury convictions by over five times. In 2001, the Supreme Court reversed 43% of acquittals and 6.7% of convictions. In 2002, the rate was 32.4% of acquittals and 5.9% of convictions.³⁸⁰ This compares to rates in non-jury cases of 23.1% of acquittals and 5.4% of convictions in 2002.³⁸¹ The experience of practitioners in Krasnoiarsk was consistent with this. One defense attorney asserted that out of approximately twenty-five criminal jury trials held in the *krai*, half resulted in initial acquittals but all acquittals were subsequently overturned following cassational review.³⁸² Judge Baranovskii, on the other hand, put the number at fifty jury trials with twenty acquittals, all ultimately overturned following appeal.³⁸³ A third estimate was provided by the deputy chairwoman of the Krasnoiarsk *Krai* court, Judge T.F. Merkusheva, who stated that between January 2003 and June 2005, there had been twenty-one jury cases, of which ten had been overturned. Seven of those ten cases were acquittals, she said, and three were convictions. Of the eleven not overturned, one was an acquittal and ten were convictions.³⁸⁴

The form of the Russian jury verdict is unlike the general verdict of 'guilty' or 'not guilty' rendered by the Anglo-American criminal jury. Article 339 of the Code provides:

"(1) Three basic questions shall be asked [of the jury] as to each of the acts the defendant is charged with committing:

- 1) was it proven that the act charged took place;
- 2) was it proven that the defendant committed that act;
- 3) is the defendant guilty of committing that act.

(2) The question list may instead contain one basic question about the guilt of the defendant, which question shall be a combination of the questions referred to in paragraph 1 of this Article."

The jury is to answer each question with 'yes, proven' or 'no, not proven'.

The remarkable thing about Article 339(1) is that it separates the question of whether the defendant 'did it' from the question of whether the defendant is 'guilty'. This provision invites a 'yes, yes, no' verdict in

³⁷⁹ Mizulina, *op.cit.* note 104, 744.

³⁸⁰ Supreme Court, "Obzor praktiki kassatsionnoi ...", *op.cit.* note 376, 21.

³⁸¹ Supreme Court, "Obzor kassatsionnoi praktiki sudebnoi kollegii po ugolovnym delam Verkhovnogo Suda Rossiiskoi Federatsii za 2002 god", *BVS* (2003) No.8, 14. Unfortunately, more recent statistics on cassational review of jury acquittals are not available.

³⁸² Interview conducted 24 October 2005 by Jeffrey Kahn.

³⁸³ Interview conducted 25 October 2005 by Jeffrey Kahn.

³⁸⁴ Interview conducted 27 October 2005 by Jeffrey Kahn.

a form of officially sanctioned jury nullification.³⁸⁵ The 1864 law on jury trials, on which the current law is based, had similar provisions.³⁸⁶

The Code, however, has other provisions that seem to run counter to this, and the Russian Supreme Court has interpreted them in a way that permits the presiding judge and reviewing courts to exercise greater control over jury determinations and seeks to confine juries to determining only issues of 'naked' facts.³⁸⁷ Article 335(5) states that the jury only determines the "factual circumstances of the criminal case" when it resolves the three issues and responds to a question list, provided for in Article 339(3). That article states:

"(3) The basic question about the guilt of the defendant may be followed by separate questions about such circumstances as affect the degree of guilt or modify its nature, or absolve the defendant of liability."

Even though Article 339(3) states that such additional questions *may* be used (могут составиться) (*mogut stavitsia*), the Supreme Court has interpreted Article 339 to require that trial courts use them. In addition, Article 339(5) provides:

"(5) No questions may be asked, whether separately or as part of other questions, that require the jury [...] to provide what is essentially a legal evaluation in rendering its verdict."

This means, according to the Supreme Court (this is not in the Code), that a trial judge may not pose questions that use:

"[S]uch legal terms as intentional or negligent murder, intentional murder with special cruelty, intentional murder from hooliganistic motivations or for personal

³⁸⁵ Jury nullification is where a jury acquits despite strong evidence of guilt, thereby effectively 'nullifying' the operation of the applicable law. See Burnham, *op.cit.* note 3, 87-88.

³⁸⁶ See Art. 754, 1864 Judicial Charter, *op.cit.* note 370. See, also, Kuchero, *op.cit.* note 370, 65-71; and Steven Thaman, "Questions of Fact and Law in Russian Jury Trials: The Practice of the Cassational Courts under the Jury Laws of 1864 and 1993", 72(1-2) *International Review of Penal Law* (2001), 415-450, at 439-448. The most notable instance of nullification in Tsarist times was the acquittal of the revolutionary Vera Zasulich. The jury acquitted her of shooting and wounding a general who had ordered that a political prisoner be flogged severely for not doffing his hat quickly enough when the general inspected a prison—despite the fact that she admitted the shooting. See Kuchero, *op.cit.* note 370, 214-225. As was perhaps to be expected, the acquittal was set aside on appeal because the trial judge had admitted evidence on the circumstances of the beating of the prisoner. For the reflections of A.F. Koni, who presided at the trial, see A.F. Koni, *Izbrannyye proizvedeniia*, Vol. 2 (Gosudarstvennoe izdatel'stvo iuridicheskoi literatury, Moscow, 1959). A report to a Commission of the Ministry of Justice by the Imperial Senate noted that: "not less than one half of the 19,000 acquittals of accused persons in courts with jurors in 1897 were based on the fact that the jury had taken into consideration [...] all the circumstances which create the difference between the concepts of 'perpetration' and 'guilt'." See Kuchero, *op.cit.* note 370, 66-67.

³⁸⁷ See, generally, Thaman, *op.cit.* note 386.

gain, intentional murder committed in the heat of passion, murder using excessive force during self-defense, rape, robbery, etc.”³⁸⁸

Finally, Article 347 provides for the parties to meet after a jury verdict for a “discussion of the effects of the verdict”. This includes “examination of the circumstances connected with the categorization of the act of the defendant”.³⁸⁹ Also, Article 351 provides that the final judgment in the case is to be pronounced by the judge.

The Supreme Court has used these provisions to develop a model of the jury as a decider solely of issues of historical fact. Once these facts are determined, then the judge must decide what they mean.

There is much to contradict the Supreme Court's narrow view of the jury as simply a determiner of historical fact. *First*, jurors take an oath “to decide the criminal case”, not solely to resolve factual issues.³⁹⁰ Moreover, the law explicitly states that a “jury acquittal is binding on the judge and requires the court to enter a judgment of acquittal”.³⁹¹ This should render any “discussion of the effects of” a not guilty verdict rather short.³⁹² *Second*, whatever the reference to “factual circumstances” and the prohibition on the jury “provid[ing] what is essentially a legal evaluation” mean, Article 339(1) requires the jury to determine whether the defendant is “guilty”—separate from the question of whether the defendant “committed the act”. This clearly requires application of the law to the facts found, not just answering some questions on the facts of the case. *Third*, Article 340(3)(3) supports this view when it requires that the judge “convey the contents of the criminal statute specifying liability for the commission of the crime the defendant is charged with” in his final instructions to the jury. There would be no need for the judge to convey such legal knowledge unless the jury is expected to apply the law to the facts. There is perhaps no great harm in thinking of this as a determination of the “factual circumstances”, but what is necessarily happening when the jury decides the

³⁸⁸ See Postanovlenie Plenuma Verkhovnogo Suda RF “O primenении sudami norm” No.23 of 22 November 2005. This ruling supplanted an earlier ruling that adopted the same position. See Postanovlenie Plenuma Verkhovnogo Suda RF “O primenении sudami norm Ugolovno-protsessual'ogo kodeksa Rossiiskoi Federatsii, reguliruiushchikh sudoproizvodstvo s uchastiem prisiazhnykh zasedatelei” No.9 of 20 December 1994, *BVS* (1995), No. 3, at 3.

³⁸⁹ Art.347(3), CrPC.

³⁹⁰ Art.332(1), CrPC (emphasis added). The Russian phrase is “*Torzhestvenno klianus' [...] razreshat' ugolovnoe delo*”.

³⁹¹ Art.348(1), CrPC.

³⁹² In the case of a guilty verdict, there is more to do in “discussing the effects of the verdict”: determining the proper “categorization” of the offense, the proper sentence to be imposed and disposition of the civil suit. Art.347(3), CrPC. However, the legal discussion involved is likely to be a simple mechanical exercise of attaching a particular offense category and article number from the Criminal Code to the jury's verdict.

case and determines whether the defendant is guilty is that it is applying the law to the facts.³⁹³

Certainly, it was the sense of the 1864 law, on which the current law is based, that this was the case then. The famous Tsarist-era expert on criminal procedure, Ivan Foinitskii, wrote that: "jurors decide the question of guilt in its full magnitude, from both the factual and legal perspective, and the judges apply the established punishment to the defendant and decide such procedural questions as arise in the case."³⁹⁴ This, he noted, was in contrast to jurors under the French Criminal Procedure Code of 1808, who: "provide answers not as to the defendant's guilt in the crimes charged, but as to separate factual elements specified by the presiding judge in his questions, from which it is not the jury, but the presiding judge who reaches a conclusion as to the presence or absence of criminal guilt in the defendant's actions."³⁹⁵

Even with the Supreme Court's attempts to confine the jury only to facts and to rationalize their verdicts with specific questions, there have been some rather striking cases that clearly involved jury nullification. One such acquittal was affirmed by the Supreme Court in 1995 in *In re Kraskina*, a case in which a woman killed her abusive boyfriend even though the facts failed to disclose a legally sufficient justification or excuse defense.³⁹⁶ However, in *In re Shaiko*, a similar verdict was vacated on appeal and at the retrial, the trial judge refused to permit evidence of the abusive husband's bad character and acts of violence. The Supreme Court affirmed her conviction after retrial.³⁹⁷ More controversial cases in the news are the acquittals of a Russian Army captain charged with ordering the shooting of Chechen civilians, of skinhead defendants in two ethnically motivated murders and of the defendants in the murder of Paul Khlebnikov, the editor of the Russian edition of *Forbes* magazine. This spate of acquittals has led some to call for cutbacks to the jury's powers.³⁹⁸ In some of these

³⁹³ It is also noteworthy that Art.335(7)'s injunction is to decide only "the factual circumstances, proof of which are established by the jury in connection with its powers set out in Art.334 of this Code". Art.334(1), in turn, cross references Art.229, which repeats the three questions in Art.339(1), quoted, *supra*, 78.

³⁹⁴ Ivan Ia. Foinitskii, *Kurs ugolovnogo sudoproizvodstva*, Vol.2 (Tipografia Stasiulevicha, St. Petersburg, 3rd ed. 1910, reprinted by Izdatel'stvo "Al'fa", St. Petersburg, 1996), 451.

³⁹⁵ *Ibid* 450. For a thorough analysis of the relationship between Tsarist and current Russian jury trial theory and practice on this point, see Thaman, *op.cit.* note 386, 430-448.

³⁹⁶ Ivanovo Regional Court, 20 July 1995, cited in *ibid.*, 443.

³⁹⁷ Ul'ianovsk Regional Court, 26 September 1996, cited in *ibid.*, 439 and 443.

³⁹⁸ Andrei Kolesnikov, "Is Russian Ready for Jury Trials?", *RIA Novosti*, 3 August 2006, available at <<http://en.rian.ru/analysis/20060803/52236722.html>>.

acquittals, it was clear that the investigations were botched and proof was weak; but, in other cases, evidence of guilt was quite strong.³⁹⁹

Even if the jury decides the defendant is guilty, the Code gives it another means of mitigating the effects of overly strict laws—the power to find that the defendant deserves leniency. If the jury elects leniency, the judge may not impose the death penalty or life imprisonment, and the defendant's sentence can be no higher than two-thirds of the maximum sentence provided for the offense.⁴⁰⁰ To facilitate an informed decision on leniency, the judge tells the jury of the possible range of sentences (including the death penalty). This is unlike the Anglo-American jury, which is not permitted to hear information about possible punishment for fear that it will improperly influence its decision on the guilt issue.

Beyond the question of the precise scope of jury competence, there have been problems with the submission of factual questions to the jury. The questions the Supreme Court has required to be posed are specific and extensive. Despite the fact that Article 339(2) requires just three questions and specifically authorizes substituting “one basic question about the guilt of the defendant”, the Supreme Court reversed the trial court in one case for instructing the jury on the elements of the murder and other applicable law and then posing the single question: “[i]s M.A. Butakov guilty of murdering M.P. Aleshina with the complicity of P.I. Simov on 27 May 1993?”⁴⁰¹ In another case, the Supreme Court corrected the trial court's formulation of the first question under Article 339(1) regarding whether the crime had taken place:

“Among other things, the formulation of the first question—has it been proven that on 11 May 1997, in a forest strip Fevralev died of a knife wound and his automobile was stolen—does not contain all the substantive circumstances of the act for which the defendants were charged. Thus, in this question, it was not mentioned that Fevralev was taken by force while being threatened with a knife to his throat to the forest strip where he was killed, where was administered four slashes and puncture wounds to the chest and stomach, and that, after he died from the knife wounds to the throat, his body was taken into the strip and hidden, and that his car was stolen.”⁴⁰²

³⁹⁹ The Khlebnikov acquittal was reversed by the Supreme Court.

⁴⁰⁰ Arts. 339(4) and 349(2), CrPC (referencing Art. 65(1), Criminal Code RF). Under prior law, the jury had the additional option of determining that the defendant deserved *special* leniency, in which case the defendant could not be sentenced to more than the minimum sentence. While this option is retained in Art. 65(2) of the Criminal Code, it is no longer possible under the Criminal Procedure Code.

⁴⁰¹ Stiven Teiman [Stephen Thaman], “Postanovka voprosov pered kollegiei prisiazhnykh”, *Rossiiskaia iustitsiia* (1995) No. 10, 8.

⁴⁰² Supreme Court, *In re Daudov and Others*, No. 41-kp-098-38sp of 14 April 1998, as cited and reported by Thaman, *op.cit.* note 386, 426 n.49.

If any single detail of the court's suggested version of the question has not been proven, the jury must presumably answer 'no' to the entire question, though juries have been responding in a way that indicates what they agree with and what they do not.

Before the verdict is announced, the judge must check the jury's answers to the questions for problems and "shall point out to the jury where it is unclear or contradictory and invite them to return to the deliberation room to clarify the question list".⁴⁰³ Also, the judge can restart the trial if the jury has doubts about the answers to any of the questions.⁴⁰⁴ Aside from the fact that many of the details in the required questions are irrelevant to the charges being tried, the usual problem with posing questions of this sort is anticipating what issues will have meaning for the jury. In one case where the defendant was charged with murder by setting his wife on fire with gasoline, the only question with regard to state of mind that was asked related solely to the offense—whether he did it intentionally. The jury answered 'no' and acquitted the defendant, though it volunteered that he had in fact thrown the match, though without the intention of starting the fire and killing her. Calling this verdict "contradictory", the Supreme Court reversed the decision.⁴⁰⁵

The result of the Supreme Court's insistence on specific questions has been that juries are swamped with scores of factual determinations to make, many of which are not essential to the three-pronged finding that the Code requires. Thaman reports a total of 19 questions in a simple one-count murder case and 41, 52 and 87 questions posed in each of three other cases involving multiple counts and multiple defendants. In one case, there were 1,047 questions. It is no wonder that 44.8% of reversals in jury trial cases in 2002 involved problems with the question list.⁴⁰⁶ This is not a new problem. The great Russian jurist, A.F. Koni, accused the imperial courts in the late nineteenth century of "trying to bury jurors in a morass of concrete facts in which essential and non-essential were indistinguishable".⁴⁰⁷

The procedure in non-jury trials implements adversarial principles in many ways and all these provisions apply generally to jury trials.⁴⁰⁸

⁴⁰³ Art.345(2), CrPC.

⁴⁰⁴ Art.344(5), CrPC.

⁴⁰⁵ Supreme Court Cassational Division, *In re Kondrashin*, *Opredelenie Kassatsionnoi palaty Verkhovnogo Suda RF "Nevypolnenie trebovaniy st. 456 UPK RSFSR povleklo otmenu opravdatelnogo prigovora suda prisiazhnykh"* of 19 June 1997, *BVS* (1998) No.2, 9.

⁴⁰⁶ See Supreme Court, *op.cit.* note 381, para. 3.

⁴⁰⁷ As quoted by Thaman, *op.cit.* note 387, 425.

⁴⁰⁸ See discussion, *supra*, section 4.2.

However, there are additional features of jury trials that make them even more adversarial. The most important is the fact that jurors do not have access to the case file that is provided in advance to the judge in bench trials. This works as a far more effective enforcement of Article 240's requirement of orality and directness and its requirement that decisions be based solely on the evidence presented at the trial.⁴⁰⁹ Should the issue of the admissibility of evidence arise during the trial, the issue must be resolved in the absence of the jury.⁴¹⁰

There is an additional problem with jury trial procedure in the way the trial starts. According to the Code, a jury trial "begins with opening statements of the state procurator and defense counsel".⁴¹¹ The rule in a non-jury trial—where the judge has already read the case file—is that the trial begins with the judge personally "interrogating the defendant about whether he admits his guilt and whether he or his counsel wishes to state the defense position with regard to the charges".⁴¹² As with non-jury trials, as discussed earlier, anything that emphasizes the judge's active role in interrogating the defendant can upset the model of party control.⁴¹³ However, apparently this personal interrogation of the defendant by the judge takes place in jury trials as well,⁴¹⁴ which presents an additional problem. To the extent that the exchange between the judge and the defendant takes place in the presence of the jury, it seems contrary to the presumption of innocence. It refocuses the issue at trial from one of 'can the prosecution prove any of these charges with evidence?' to one of 'how can the defendant explain his actions?' Certainly, at the beginning of the trial, when no evidence of guilt has yet been presented, the assumption that the defendant did anything that requires explanation is directly contrary to the presumption of innocence.⁴¹⁵

An important difference between bench and jury trials is found in Article 335(8), which provides that in a jury trial "information about the defendant's character" may generally not be presented to the jury.⁴¹⁶ Ar-

⁴⁰⁹ See *supra* 29. Nor will they be privileged by *ex parte* visits to chambers by the prosecutor to 'explain' the case to them. See, *supra*, 73-74.

⁴¹⁰ Art.335(6), CrPC.

⁴¹¹ Art.335(1), CrPC.

⁴¹² Art.273(2), CrPC.

⁴¹³ See, *supra*, 70-71.

⁴¹⁴ Communication between William Burnham and Russian advocates, 13 July 2007.

⁴¹⁵ As a matter of statutory interpretation, the exchange with the defendant is superfluous in jury trials where opening statements outlining the positions of the parties and what they intend to prove are already required as the first thing in the trial.

⁴¹⁶ Art.335(8), CrPC. Character evidence is admissible "to the extent that it is essential for the determination of particular elements of the crime with which the defendant is charged".

article 338(8) specifically prohibits “information about prior convictions, the defendant’s status as a chronic alcoholic or drug addict, or other information that may prejudice the jury against the defendant”. By contrast, in a non-jury trial, all this evidence is before the judge in the case file and will be gone into by the judge as the first step of the trial in the process of ‘identifying’ the defendant.⁴¹⁷ However, the ban on character evidence in jury trials applies to evidence of good character as well as to bad.⁴¹⁸ Thus, unlike the common-law trial, it is impermissible for the Russian defendant to try to prove that he or she is not the kind of person who could have committed the crime charged.

An important evidentiary limitation that works more completely against the defendant is one created by the Supreme Court in a series of cases that prohibits a defendant or defense counsel from asserting that the defendant’s confession was procured by violence or threats. Thus, in *In re Kniazev*, the Supreme Court held that the defendant’s repeated statements at trial that his admissions in police custody were the product of physical coercion were not proper.⁴¹⁹ The basis for this was that “[p]rocedural issues of interrogation of a suspect or an accused have nothing to do with the factual circumstances of the case” and that the issues of admissibility of evidence are for the judge to decide without the presence of the jury.⁴²⁰

The Supreme Court’s position, however, ignores the fundamental distinction between the admissibility of evidence, which the judge decides, and its weight and credibility, which the jury determines. One of the “factual circumstances” that the jury must decide is whether it has been proven that the act was committed by the defendant. Deciding whether or to what extent to believe a defendant’s earlier confession or his testimony in court denying involvement is directly pertinent to that question. The circumstances under which the confession was made are essential to

⁴¹⁷ See Art.265(1), CrPC, and *supra* 70-71.

⁴¹⁸ See Supreme Court, *In re D.*, Kassatsionnoe Opredelenie SK po ugovolnym delam Verkhovnogo Suda No.53-005-46SP of 8 June 2005 (unpublished decision available on Garant), in which evidence admitted on the poor state of the defendant’s health, his family and his work with the Communist Party was listed among the grounds for reversal of the jury acquittal.

⁴¹⁹ Supreme Court Criminal Division, *In re Kniazev*, Kassatsionnoe Opredelenie SK po ugovolnym delam, *BVS* (1999) No.3, 14. For another example of the effect of this ruling, see Fred Weir, “Russia Embraces Trial by Peers”, *Christian Science Monitor*, 5 March 2003. In the case covered therein, the defendant’s attorney complained that: “the court has forbidden her to mention her client’s claim that his confession was coerced, because a police commission concluded that his facial injuries were the result of a ‘fall down stairs’. The judge has ordered [counsel] to stick to ‘proven facts’ only.”

⁴²⁰ Art.335(5 and 7), CrPC. In fact, *Kniazev* referred to the old articles but the content is the same.

evaluate the two contradictory statements.⁴²¹ In addition, Article 333(1) states that jurors “shall have the right [...] to take part in the examination of all the circumstances of the criminal case”. As one commentator explained, a trial judge who permits testimony about the circumstances of the confession “does not ask the jury to decide that illegal methods were used but placed before them the question: do you believe or not believe in the trustworthiness” of the confession given during the preliminary investigation?⁴²² By excluding any such information that would undercut the believability of the confession, the Supreme Court is essentially saying that if the confession is admissible, the jury has no option to disbelieve it. The defense cannot even ask the defendant why he or she confessed if the answer will be that it was because of violence, threats of violence or other pressure.

Perhaps the real reason behind the Supreme Court's approach is the fact that threats and violence at the hands of the police are so common in Russia that juries often believe defendants who make such allegations. If so, then better means exist to deal with the problem—videotaping confessions, mandatory medical examinations of suspects who are interrogated and prompt investigations of suspects' complaints of any brutality or the threat of it and severe disciplinary action or criminal prosecution. Certainly, in the US, the conduct of law enforcement officials is always potentially subject to scrutiny by a jury, so those officials are careful not to do anything that might alienate a jury. It seems likely that litigating police tactics in front of the jury—at least to the extent that they affect the credibility and weight of the evidence obtained thereby—would do more to improve the situation than hiding them. As it is, jurors presently seem to assume the worst, so even the slightest hint of irregularity is enough for them to assume that it was the usual coerced confession.⁴²³

⁴²¹ See Nikolai M. Kipnis, “Spornye voprosy teorii i praktiki dopustimosti dokazatel'stv”, in V.A. Vlasihin (ed.), *Dokazivanie v уголовном процессе* (Jurist, Moscow, 2000), at 196-198.

⁴²² N.I. Stabrov, “Rassmotrenie khodataistv o nedopustimosti dokazatel'stv v RF v sude prisiazhnykh”, *Zhurnal Rossiiskogo prava* (2006) No.11.

⁴²³ See Bernam [Burnham], Reshetnikova and Proshliakov, *op.cit.* note 343, 129, which describes how, in the first jury trial in Saratov in 1993, the jury foreperson, a “solid-citizen” manager of a factory, in explaining why he believed the defendant, stated “I got in trouble a lot as a kid and every time the police caught me, I got a beating”. One trial judge in Moscow recently described the facts of a murder case scheduled for jury trial before her. It could possibly be an acquittal, she said. The police had the defendant's confession (with counsel present) and a videotape of the defendant taking the police to the place where the murder weapon was buried, at which point it was dug up. The judge thought it entirely possible that if the defendant claimed he was innocent and was framed, a majority of the jury could well believe him. Remarks of Thomas Firestone, US Department of Justice Resident Legal Advisor at the US Embassy, Moscow, at the Roundtable on Russian Jury Trials, Moscow, 19 July 2007. We are grateful to Tom for his insight, based on many years as a federal prosecutor, about the degree to which possible jury reactions affect law enforcement officials' conduct in the investigation of criminal cases in the

A major problem with jury trials in terms of inadmissible evidence and commentary is the absence of tight control by the judge over the proceedings. Stephen C. Thaman collected several examples of witnesses (often sitting in the public gallery) blurting out inadmissible evidence, such as “[i]t’s the second person he’s killed and he says he didn’t kill!”⁴²⁴ In another account of a jury trial, the victim’s father repeatedly rose from the galleries to “scream at the defendant, ‘You are a scoundrel! You are the devil! You murdered my daughter and sent her to hell!’” The father, the author later learned, had been in a distant city at the time of the murders and based his interjections on hearsay from others.⁴²⁵ If an exclusionary rule of inadmissible evidence is to work at all in jury trials or, for that matter, if proper adversarial conduct of cases is to take place at all, there must be better judicial control over trial proceedings.

Often single outbursts lead to more general tumult, as opposing parties and their allies and spectators feel the need to respond, followed by surrebuttal. Our observations indicate that the reaction to outbursts in the court are most often ‘dealt with’ by letting them play themselves out, usually with the most persistent and loudest getting the last word. The passive responses of judges are not for lack of power. In addition to criminal contempt of court and administrative responsibility for contempt of court,⁴²⁶ the Code provides for “money exactions” (денежные взыскания) (*denezhnye vzyiskania*) or fines of up to RUB 27,500 (about USD 1,100) to be levied by the judge directly, without any need to go through the prosecution and investigation process, as well as broad powers to order the removal of offending participants from the courtroom.⁴²⁷ One lawyer acquaintance of one of the authors from Moscow suggested that the problem is that none of these measures works well. The problem with threatening criminal prosecution is that investigators are too busy with ‘real’ criminal cases to initiate and prosecute contempt of court, so most cases are quietly dismissed. Judges are uncomfortable with fining people directly under the Code, as this institute has always puzzled them, being

US federal system.

⁴²⁴ See Thaman, *op.cit.* note 370, 107.

⁴²⁵ Scott P. Boylan, “Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution”, 4(i) *University of California Davis Journal of International Law and Policy* (1998), 103-118, at 116.

⁴²⁶ See Arts.97 (contempt of court) and 94 (interference with court proceedings), Criminal Code RF.

⁴²⁷ Art.258, CrPC. The amount as stated in the Code is twenty-five times the minimum monthly wage, currently RUB 1,100. The earlier Code had similar provisions. See, also, Art.243(2) (judge to “assure that order in the court is kept”) and Art.257(4) (court bailiffs are to “keep order in during court hearings and enforce the orders of the presiding judge”; “directions of the court bailiff related to keeping order are binding on all in the courtroom”).

neither administrative nor civil nor criminal. Also, in any event, this lawyer observed, warnings and threats from judges are ineffective because “[i]n our country nobody is afraid of the justice system”.⁴²⁸

One provision of the Code that encourages some disorder and is problematic from the standpoint of enforcing exclusionary rules is the fact that the Code permits the defendant and the victim, with the permission of the presiding judge, to “give testimony at any moment during the trial”.⁴²⁹ Such testimony is not elicited in question and answer form but is a volunteered statement, usually in response to an event that has just taken place that is not to their liking. A somewhat similar practice with witnesses is also problematic. After witnesses have finished testifying, they can stay in the courtroom and are sometimes required to stay. If additional issues arise as a result of later testimony, they may be questioned out of turn from their place in the public seating. This most often involves apparent inconsistencies generated by successive witnesses’ testimony. Since the witness in the gallery is often sitting near witnesses or family members linked to opposing parties, the practice cannot help but encourage responsive statements or heckling from the audience.⁴³⁰

While jury trial procedure—both as set out in the Code and as applied—more closely approximates adversarial ideals than does non-jury trial procedure, much is still necessary to achieve an orderly adversarial trial. The balance between judicial and party activity still falls too much on the judicial side. The Code retains some of the more flexible trial organization of the old Code and fails to impose the necessary rigid trial structure that would insure orderly alternating opportunities for both sides to present proofs and arguments.

5. Guilty Pleas

The possibility of defendants, in effect, pleading guilty to the charges against them and, thereby, foregoing the necessity of a full trial is an innovation of the new Code. In common-law jurisdictions, the right to plead guilty is considered perfectly normal and follows directly from the principle of party control over litigation—that a party has control over both *how vigorously* he or she litigates and *whether* to litigate at all. The guilty plea is largely seen to perform three functions. *First*, it promotes

⁴²⁸ Communication from Moscow lawyer Olga Svarts received by William Burnham on 10 July 2007; being from Moscow may have influenced her remark.

⁴²⁹ Arts.274(3) (defendant) and 277(2) (victim), CrPC.

⁴³⁰ Art.278(4), CrPC provides that witnesses “who have been questioned may leave the courtroom before the end of the trial with the permission of the presiding judge, who, before excusing such witnesses, shall consider the views of the parties”.

judicial efficiency. The economies are especially great in common-law adversarial systems because the usual alternative, a jury trial, is complex and expensive. *Second*, accepting responsibility for one's transgressions is thought to be the first step down the road to effective rehabilitation. *Finally*, guilty pleas with a discounted sentence can be a way of coaxing defendants to provide evidence against co-conspirators or others, which promotes the effectiveness of law enforcement.⁴³¹

The "special trial procedure" (особый порядок судебного разбирательства) (*osobyi poriadok sudebnogo razbiratel'stva*) that is the Russian version of the guilty plea was debated vigorously by members of the working group on the Criminal Procedure Code. The most commonly made objections were three: the tradition and efficacy of the 'legality principle' of mandatory prosecution; an aversion to reliance solely on confessions as proof (based on negative historical experiences, both in European inquisitorial systems and in Soviet times); and the related perception of the obligation of the state to satisfy itself in every case that the defendant committed the crime regardless of the defendant's wishes. Given these concerns, the drafters thought that the difficulties could be tolerated better if guilty pleas were limited to relatively minor cases.

In light of the concerns expressed, it is not surprising that the Russian procedure was copied more from continental than common-law systems—in particular, the Italian procedure, called *patteggiamento* or 'deal'.⁴³² Italian commentaries make the point that the accused is not pleading guilty. Instead, the accused is acceding to the charges and requesting punishment. It remains for the *court* to determine guilt with the aid of the dossier, not based on the defendant's unsubstantiated plea. So, too, in the Russian approach. *Patteggiamento* in Italian procedure is also limited to cases involving up to three years imprisonment.⁴³³ So, as originally approved by the working group and passed by the legislature, the procedure applied only

⁴³¹ Of course, an adversary system dominated by guilty pleas and plea bargains could be criticized as not worthy of the name. Certainly, the foundational principle of an adversarial system—that a public contest between parties will produce a fair hearing of all evidence relevant for judgment—is weakened. Geraldine Szott Moohr, "Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model", 8(1) *Buffalo Criminal Law Review* (2004), 165-220.

⁴³² See Art. 444(1-2), Criminal Procedure Code of Italy.

⁴³³ *Ibid.* Italian guilty pleas of this type, where punishment is based on agreeing to the charges, are limited to cases in which no more than two years imprisonment is possible after application of a one-third discount applied (*i.e.*, crimes punishable by a maximum of three years) as an incentive for the defendant to make the plea. Other forms of guilty pleas apply to more serious cases.

to crimes punishable by up to five years. However, the limit was quietly raised to ten years in 2003.⁴³⁴

Guilty plea cases must go through the same full investigation required for every other case, so the procedure in those cases up through issuance of the indictment by the procurator and filing of the case in court for trial are the same. The request, made to the court by a motion, cannot be presented prior to the submission of the case file to the court.⁴³⁵ Indeed, as noted earlier, these motions are not called 'guilty pleas' but rather 'special trial procedures'.⁴³⁶ At the close of the investigation, the investigator must explain to the defendant the right to request the special trial procedure.⁴³⁷

This request takes the form of a "motion for entry of judgment of guilty and sentence without trial based on the defendant's stipulation to the charges brought". The defendant can only file this motion if represented by counsel and waivers of counsel are not permitted.⁴³⁸ An important limitation is that the victim must give his or her consent.⁴³⁹ Appeal is limited to legal errors and is prohibited if based on the ground that the judgment does not correspond with the underlying facts.⁴⁴⁰ In addition to getting the sentence discounted, costs may not be imposed on the defendant.

The motion is then heard at the preliminary hearing, the main purpose of which is to determine "whether [the defendant] understands the

⁴³⁴ Art.314(1), CrPC, as amended by the Federal Law No.92-FZ, signed 4 July 2003, point 73 of Article 1. For a discussion of the Russian system in operation with comparative comments, see Stanislaw Pomorski, "Consensual Justice in Russia: Guilty Pleas under the 2001 Code of Criminal Procedure", in Robert Sharlet and Ferdinand Feldbrugge (eds.), *Public Policy and Law in Russia: In Search of a Unified Legal and Political Space. Essays in Honor of Donald D. Barry*, William B. Simons (ed.), *Law in Eastern Europe*, No.55 (Martinus Nijhoff, Leiden, Boston, 2005), 187-198.

⁴³⁵ Art.315(2), CrPC, which provides that the accused has the right to make the motion either after completing his or her review of the case file or at a preliminary hearing. See, also, Art.229(3), CrPC.

⁴³⁶ Chapter 40 (Arts.314-317), CrPC, *passim*.

⁴³⁷ Art.217(5)(2), CrPC.

⁴³⁸ Art.315, CrPC.

⁴³⁹ Art.314(4), CrPC.

⁴⁴⁰ Art.317, CrPC. A recent Supreme Court Plenum Decree on guilty pleas is: Postanovlenie Plenuma Verkhovnogo Suda "O primenении sudami osobogo poriadka sudebnogo razbiratel'stva ugolovnykh del" No.60 of 5 December 2006, *BVS* (2007) No.2, available at <http://www.supcourt.ru/news_detale.php?id=4650>. A simplified trial procedure similar to a guilty plea was provided for in the original 1993 jury trial law. It permitted the judge to jump ahead to the point of closing arguments in the event that the confession was free from doubt. However, the jury would continue to make a decision on guilt based on the confession of the defendant and any corroborating evidence. This procedure was eliminated in favor of the current guilty plea procedure.

charges, whether he agrees with the charges made and whether he supports his motion for entry of judgment without trial, whether the motion is made voluntarily and after consultation with the defense counsel, and whether he understands the consequences of entry of a judgment without trial".⁴⁴¹ The judge may not conduct a hearing or evaluation of the evidence gathered in the criminal case. However, "any circumstances illuminating the character of the defendant and any circumstances mitigating or aggravating punishment may be examined".⁴⁴² Only if the judge "concludes that the charges, that the defendant has stipulated to, are well-founded and supported by the evidence gathered in the criminal case file" may the judge enter a judgment of conviction. The sentence imposed may not exceed two-thirds of the maximum term. There is a complete judgment in the case, the narrative-rationale part of which "must contain a description of the criminal conduct with which the defendant is charged and to which he has stipulated, as well as the findings of the court regarding compliance with the conditions for rendering the judgment without trial". However, "no analysis or evaluation of the evidence by the judge shall be reflected in the judgment".⁴⁴³

There is, arguably, a contradiction between prohibiting the judge from conducting an "evaluation of the evidence gathered in the criminal case" and the requirement that the judge conclude that the charges are "supported by the evidence gathered in the criminal case file". The sense seems to be that, although basic principles of justice require the judge to satisfy himself or herself that there is some basis for the charges (and may do so through an examination of the dossier), the judge should not engage in a close scrutiny of the evidence in light of the willingness of the defendant to proceed in this fashion. In this respect, the "special trial procedure" is not unlike the common-law guilty plea or *nolo contendere* hearing, during which the judges will often consult police reports or interrogate counsel to satisfy themselves that evidence exists to support the plea beyond the admissions of the defendant.

For 2006, in the Justice of the Peace courts, 108,000 cases were decided using guilty pleas, which constituted 22.4% of all decided cases, up from 72,000 and 17.1% in 2005⁴⁴⁴ and this up from only 20,000 and 12% in 2003.⁴⁴⁵ In the district courts, in 2006, special procedures disposed of

⁴⁴¹ Art.316(4), CrPC.

⁴⁴² Art.316(5), CrPC.

⁴⁴³ Art.316(7-8), CrPC.

⁴⁴⁴ See the website of the Judicial Department of the Supreme Court, available at <http://www.cdep.ru/material.asp?material_id=217>.

⁴⁴⁵ See the website of the Judicial Department of the Supreme Court, available at <http://www.cdep.ru/material.asp?material_id=217>.

213,800 criminal cases or 37.5% of the total number of decided cases, up from 168,100 or 30% in 2005.⁴⁴⁶ The largest portion of such cases consisted of theft (42.2%), robbery (30.5%) and unlawful activity with drugs (40.6%).⁴⁴⁷ In the subject-level courts, only about 2% of decided cases were disposed of on this basis, although the number of guilty pleas in these courts is increasing as well.⁴⁴⁸ The low number of guilty plea cases in the subject-level courts is attributable to the fact that a high percentage of cases in these courts involve maximum sentences of over ten years, thus making them ineligible for guilty pleas. The relatively modest use of guilty pleas in the Justice of the Peace courts is probably attributable to the fact that the offenses tried there are so minor and involve low penalties. Thus, it is probably easier to just go ahead and try them than go through the special procedures.

In terms of economy of judicial resources, the procedure may economize in the wrong courts. It is the subject-level courts—where the more complicated cases and the only jury trials are held—that need the extra breathing room, not the district courts. Yet, the rate of cases disposed of by guilty pleas in the subject-level courts is only 2%. If the ten-year limit were raised, this would change, of course.

The flat one-third discount on the sentence is another impediment to the full realization of the benefits of guilty pleas. *First*, in common-law systems, the amount of the discount from the original charge or sentence is within the discretion of the prosecutor and, ultimately, the judge, thus allowing consent to a greater discount in return for information that will help law enforcement. *Second*, some Russian judges have suggested that a one-third discount is neither a sufficient reward for the economies gained nor a sufficient incentive to attract guilty pleas.⁴⁴⁹ Some manipulation of the discount is always possible via procuratorial manipulation of the final version of the charges that are brought, thus keeping the maximum within the ten-year maximum. However, alert judges with the legality principle firmly in mind could well derail such efforts if examination of the facts in the case file discloses a major disconnect between facts and charges brought.

cdep.ru/material.asp?material_id=3>.

⁴⁴⁶ See the website of the Judicial Department of the Supreme Court, available at <http://www.cdep.ru/material.asp?material_id=217>.

⁴⁴⁷ See the website of the Judicial Department of the Supreme Court, *op.cit.* note 445.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Monitoring meeting, Sochi, 2 October 2006. One judge suggested that a one-half discount would be better.

6. Conclusion: The Future of Reform

Five years after the implementation of the new Code is an appropriate time to take stock but it is an insufficient amount of time to draw firm conclusions about the ultimate reception of adversarial principles in Russia. While the new Code contains some striking innovations, it falls short in other respects, particularly in its retention of the formal pretrial investigation and the dominant force that this has over the trial of the case. There are also other instances of practices that remain unchanged and now are in a constant battle with more adversarial reforms.

The problems with implementation of the reforms that were made by the new Code are largely a story of redefining the respective roles of the lawyers and judges in the process. To accomplish as fundamental a change as the one that this Code and the 1993 Constitution envision will take some considerably greater time, effort and funding than has so far been expended. Appropriate skills training is needed. For the majority of cases that involve appointed defense counsel, better funding is needed. Also, for both prosecution and defense, at least some substantive standards of conduct spelling out their adversarial duties and obligations must be developed and implemented.

Future steps towards more complete adversariality do not seem to be looming on the horizon. The enthusiasm of the early 1990s for reform has largely disappeared, replaced by the interests of law enforcement agencies. Elena Mizulina, though undimmed in her enthusiasm for continued reform, lost her seat in the *Duma* in the 2003 election. Experts from former times who held important government policy positions, such as Sergei Pashin, author of the jury trial law, have been largely marginalized.⁴⁵⁰ Moreover, the Constitutional Court seems to have changed. After a long string of progressive decisions protecting the rights of criminal defendants that were gradually reforming the old Criminal Procedure Code, the Court has taken a decidedly pro-prosecution turn under the guise of helping victims.⁴⁵¹

⁴⁵⁰ Mizulina is now the representative of the *Duma* in the Constitutional Court and Pashin teaches at the Moscow Institute of Economics, Politics and Law. Pashin does have an interesting television show in Moscow, in which he plays the judge in a mock criminal trials.

⁴⁵¹ See, *supra*, 62-63. There are indications that this direction is likely to continue. In a meeting between President Putin and Chief Judge Valerii Zor'kin—one of a series of presidential meetings held throughout the year with the chief judges of all three court systems—Zor'kin commented that he had just informed the president about the 15,000 petitions his court has received about the Criminal Procedure Code. He commented that “having turned its attention to the protection of defendants, the Criminal Procedure Code seems to have forgotten the victims of crime”. *Vremia-Novosti*, “Zhalobnyi kodeks: Valerii Zor'kin rasskazal prezidentu o kharaktere obrashchenii v KS” No.190, 13 October 2005.

There is some talk of reforming the pretrial stages and of expanding guilty pleas, but nothing specific has yet been proposed.⁴⁵²

One bright spot seems to be jury trials, which—whatever their difficulties have been—have forced proceedings to be more adversarial. Most important, they supply for the first time a truly neutral tribunal before which the state can be held to its burden of proof. In a country where the president seems to set the tone for many things, it is encouraging to hear him tell law enforcement officials complaining about jury acquittals that, “in my view, many of these problems have to do with the low quality of preliminary investigations and prosecutions in court”.⁴⁵³ However, as we note here, jury trials have their own problems and may require some adjustment. Some of the problems with Russian juries—such as their ingrained negative attitudes towards law enforcement—are problems that are more deeply rooted in Russian society and will take longer to work out.

⁴⁵² Author William Burnham attended meetings of the working group in April 2006, which were devoted to a discussion of future directions for reform of the pretrial stages. As this article went to press, a draft law was introduced in the *Duma* that would authorize written agreements between suspects and the prosecution for even more lenient treatment in return for pleading guilty if they also rendered substantial assistance in pursuing criminal cases against others. The baseline benefit for such cooperating defendants would be one-half the maximum sentence and in some cases they would qualify for conditional sentences and even for complete exemption from punishment. See Proekt Federal'nogo Zakona “O vvedenii osobogo poriadka vneseniia sudebnogo resheniia pri zakliuchenii dosudebnogo soglasheniia o sotrudnichestve” (introduced 31 October 2007) (on file with author William Burnham). For a summary of the bill, see <<http://www.kommersant.ru/doc.aspx?DocsID=821068&print=true>>.

⁴⁵³ The full passage was: “[t]he new, for our legal system, institution of trial by jury has exposed several problems. However, in my view, many of these problems are linked to the low quality of preliminary investigations and state prosecutions in court. Appropriate note of this must be taken without delay.” Vladimir Putin, “Vstupitel'noe slovo na Vserossiiskom soveshchanii rukovoditelei pravookhranitel'nyh organov”, 21 November 2006, available at <<http://www.president.kremlin.ru/text/news/2006/11/114256.shtml>>.

