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RUSSIA'S JUDICIAL SYSTEM

- ANALYSIS
Can President Medvedev Fix the Courts in Russia? The First Year 2
By Peter H. Solomon, Jr., Toronto
- ANALYSIS
The Second Trial of Mikhail Khodorkovsky 5
By Bill Bowring, London
- ANALYSIS
No Crime, No Punishment: On the End of the Anna Politkovskaya Murder Trial 8
By Angelika Nussberger and Yury Safoklov, Cologne
- OPINION POLL
What is Your Opinion of the Courts? (According to Surveys Conducted in Russia) 12

Analysis

Can President Medvedev Fix the Courts in Russia? The First Year

By Peter H. Solomon, Jr., Toronto

Abstract

President Dmitry Medvedev's reform of the judicial system does not address the real problems that the courts face. In practice, judges have little scope for independence in controversial or politically important cases because they are beholden to their superiors for promotions and a variety of perquisites. Likewise, there is a longstanding bias in favor of the prosecution. Medvedev's reforms seek to make judges more accountable, limit pretrial detention, and humanize criminal law, but they do not address the fundamental issue of judicial independence by decreasing the power of chairs of courts or increasing judges' sense of professionalism.

Disjunction between Reforms and Problems

One of the goals of Russia's 1993 Constitution was to make courts and judges independent so that they would deliver impartial judgments even in cases that were controversial or involved powerful players. Since the end of the Soviet era, Russia has put into place most of the institutional protections associated with judicial independence—including security of tenure with removal only for cause upon approval of peers; decent funding of the courts, including judicial salaries; and control by judges of organizational support for the courts. But, as of 2009, observers of justice in Russia, including President Dmitry Medvedev, recognized that, such institutional protections notwithstanding, many judges still faced pressures that could compromise their neutrality—both outside attempts to influence their decisions and systematic biases in the work of courts.

Arguably, the failure to achieve full and authentic independence for individual judges represents the greatest deficit in Russian justice today, a deficit that must be addressed before the courts in the Russian Federation (RF) will be trusted by most of the public. Medvedev seems to recognize this, but his many commitments on legal and judicial reform, while admirable, do not promise a remedy. I reach this conclusion after contrasting the sources and mechanisms of inappropriate pressures faced by judges with the president's judicial reform agenda as of spring 2009.

Informal Practices Limit Judicial Independence

How can one account for the failure of institutions in the Russian Federation to protect judges? One reason is the persistence of informal practices in the administration of justice that dilute the impact of institutional protections and shape the conduct of judges. Another is the limits on the practical meaning of judicial reform set by cultural factors and the larger political context.

Let us start with security of tenure as an example of what can happen once informal practices are taken into account. The law states that after a three-year probationary period judges who pass fresh scrutiny of their bureaucratic and political masters as well as their peers receive appointments for life. But if those judges ever seek promotion to a higher court or appointment to the post of chair or deputy chair of a court, they must face the same careful scrutiny by the same set of players, including the heads of the relevant high court and officials in the presidential administration. The result is that making a successful career as a judge requires meeting the expectations of the figure who must write the crucial recommendation (the chair of the court), as well as judges on higher courts. Suppose that our judge is not ambitious. Even so, she must avoid offending the chair of her court because in reality that figure can engineer the judge's dismissal. To be sure, a judicial qualification commission (JQC) must find in the judge's conduct grounds for dismissal, but the commissions are commonly under the thumb of the corresponding chair of the regional court, who in turn tends to respect the views of chairs of district courts, and the latter often find pretexts to dismiss judges whose real sin lies in lack of deference to the chair or to the informal norms of conduct for judges, such as the avoidance of acquittals. Last fall, the JQC of Volgograd region dismissed Judge Elena Guseva, who refused to provide regular reports to her chair on all cases in progress that involved officials or governmental bodies, a demand that she believed violated judicial independence. The Supreme Judicial Qualification actually supported the dismissal, but was overruled on April 2 by a RF Supreme Court panel that decided that Judge Guseva had been right after all. Then, the Court reinstated the judge, an act that commentators welcomed as a landmark.

Moreover, the power of chairs of courts over their judges plays a vital part in the process of outside influ-

ence on judges. It is common practice for powerful politicians or business people to approach the chairs of courts for favors, which the latter feel compelled to provide in order to maintain good working relations. Usually chairs can assign cases to judges known to be cooperative (although experiments with random case assignment could temper this). For their part, most judges acquiesce to the chair's bidding. Failure to do so could result in losing discretionary perks and in critical reference letters, if not also in disciplinary measures.

Another informal practice that affects judicial impartiality is the accusatory or prosecutorial bias, reflected in the avoidance of acquittals and use of alternatives such as compromise decisions and sending cases back to investigators or procurators for new evidence. In practice judges in Russia avoid acquittals because they lead to negative evaluations of the judge's performance. Judges are also expected to avoid overrules, a norm that encourages conformity with the anticipated view of higher court judges. These expectations are built into the system of evaluating the performance of judges. The rate of acquittal in judge-only trials remains less than one percent; in contrast to the 15 percent at trials by jury.

A Difficult Context

The development of informal practices that undermine the formal protections of judges has not taken place in a vacuum, but reflects contextual and cultural factors. One such factor is the attitudes of politicians and officials toward law and courts. Within public administration in the RF the status of law remains murky, and regulations are based less on the laws than on officials' involvement in networks of exchange. Many officials and politicians treat laws as instruments to serve the interests of those who can mobilize them. There are also problems with the mindsets and culture of judges. In part because of the organization of the judiciary in a bureaucratic hierarchy, in part because of deficiencies in training, judges in Russia lack a strong sense of professional identity. They see themselves more as functionaries than as professionals with a distinct mission. Yet, judges who thought of themselves as professionals would be more likely to care about the quality of reasoning in their decisions, and to resist inappropriate attempts to influence them.

The Content of Real Reform

So, what steps might be taken to improve the conduct and effectiveness of judges? I see as especially promising measures that would reduce the power held by the chairs of courts or increase the professionalism of judges

in Russia. Following a reform in 2002, chairs of courts now serve for two six-year terms (plus the remainder of previous terms). While the need for reappointment makes chairs accountable to their superiors, they remain bosses of their domains. I like the proposal made by jurists close to German Gref in 2006 to have chairs elected by their peers on the court (rather than appointed from above) and for terms of a mere three years. With the resulting rotation, chairs might turn into chief judges rather than bosses. To be sure, chairs would have less management experience, but this deficit could be remedied by shifting more administrative functions to court administrators, a position created only seven years ago. The latter would need higher status and pay to aid recruitment of skilled personnel. Moreover, the leaders of the judiciary would need to be convinced that gains in the independence of judges justified loss of power on their part.

Finally, I am convinced that measures to enhance judicial professionalism would help a lot. Judges with a sense of pride and commitment to an ethos of judging will be less likely to misbehave than judges for whom handling trials is simply a job and approval of superiors more important than standing in the profession. Judicial professionalism will come from changes *in recruitment* (more jurists from full time day faculties and unconventional work backgrounds), *in training* (a serious well designed program for new judges similar to the judges school in Bordeaux, France) and *from a transformation* of the system of evaluating judges. Instead of statistical measures of performance, assessment should be more skills-based (as in Germany) and put a premium on how judges do their work rather than on the content of their decisions. Perhaps, judgments could be more closely associated with particular judges, so that especially good ones develop public profiles (like Anatoly Koni in Tsarist times). The personal dimension of judicial activity, while less prominent in Europe than in North America, helps to make leading judges into figures of attention and respect in many Western countries, which in turn can lead to public veneration and the promotion of role models for young judges.

Medvedev's Actual Reforms

How, then, has Medvedev reacted to the situation in the courts? He began a year ago with strong statements in favor of judicial reform, and last fall he continued along these lines, first in the Annual address to the parliament (the *Poslanie*) and then in his appearance at the 7th Congress of Judges, where he committed himself to a series of reform initiatives, some of which have al-

ready become law. These included measures to enhance the accountability of judges, such as compulsory declarations of income and assets by not only the judge but also members of his family; and initiatives to improve the transparency and accessibility of courts, including compulsory publication of most court decisions starting in July 2010.

In addition, Medvedev supported four initiatives whose realization calls for major expenditures, which the Ministry of Finance is loathe to approve. These include a draft law that would give the Supreme Court the authority to hear complaints against delays in criminal trials that now go to the European Court of Human Rights in Strasbourg, along with funds to spend on awards to complainants—to which the Government on behalf of the ministry has already objected; a proposal to raise the salaries of court staff; and a plan to shift from governments of the subjects to the federal government responsibility for supporting the justices of the peace—a change that the federal government cannot presently afford. The president also called for the expansion of legal aid to better cover civil cases through the creation of new legal bureaux at the municipal level, an idea given detailed expression in a draft Conception of Legal Aid and a draft law submitted to the State Duma. If and when such a law gets passed, its impact will depend upon the level of funding provided.

Medvedev has also spoken repeatedly about the need to humanize the criminal law. Already the Supreme Court has called for a reduction in the use of pretrial detention (asking judges to be stingier in approving requests from procurators). At the same time, a team in the Ministry of Justice is preparing proposals for changes in the Criminal Code.

One Medvedev initiative connects to the reform agenda that I am promoting, that is the need to recruit more judges from backgrounds other than court secre-

tary, prosecutor or investigator. But overall, the president's program for the courts falls short of addressing most of the fundamental issues that prevent judges in Russia from gaining true independence. The president has not even mentioned measures to deprive chairs of their power, or for that matter of undercutting the power of the Supreme Court and High Arbitrazh court over their respective hierarchies (similar initiatives are being discussed in the Parliament of Ukraine). President Medvedev is surely aware of these problems, and he was reminded of these and other aspects of the "bureaucratic management of the courts" and its dysfunctions by Professor Tamara Morshchakova (retired justice of the RF Constitutional Court) in her presentation on April 15, 2009 to a meeting of the Council on Developing Civil Society and Human Rights chaired by the president personally.

Morshchakova also called for an expansion in trial by jury in the Russian Federation as a vehicle for improving criminal justice overall. Her argument had special irony, because of a new law from last December eliminated the jury option in cases involving terrorism and other political matters. Although the law was not associated directly with the president, he chose not to spend political capital opposing it.

In short, while President Medvedev cares about the state of the courts, the financial crisis and the interests of top judges and other state officials set limits on which reform measures the president pursues and what he can accomplish. One can hope that the president's personal interest will protect the courts from the savage budget cuts that they experienced during the financial crisis of the late 1990s. One can also hope that with time the voices within Russia that criticize the dependency still experienced by individual judges will influence the thinking and conduct of the president.

About the author

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Analysis

The Second Trial of Mikhail Khodorkovsky

By Bill Bowring, London

Abstract

After Mikhail Khodorkovsky served much of his original eight-year prison term, the authorities have filed a new set of charges against him. If, as the defense lawyers argue, these charges are absurd, then Khodorkovsky's second trial, like the first, is political and should be evaluated on that basis. In contrast to the other "oligarchs," Khodorkovsky openly challenged Vladimir Putin through his political and philanthropic activities. Although Khodorkovsky's vast wealth makes him unpopular with many Russian people, the Kremlin apparently fears that he would be able to manipulate Russia's corrupt system to his advantage.

A Second Trial on the Heels of the First

On 16 May 2005, Mikhail Borisovich Khodorkovsky was sentenced to nine years in prison. Later the Moscow City Court reduced this term to eight years, and he has been serving his sentence in a labor colony in Chita, in the far east of Russia. On 5 February 2007 further allegations were made against him, and new charges were brought on 30 June 2008. The authorities are now holding him in Matrosskaya Tishina (Sailor's Silence) pre-trial detention prison in Moscow. The preliminary hearing of the new charges began on 3 March 2009, and the trial proper started on 31 March. It will continue for some time to come, and can be followed on the "Khodorkovsky & Lebedev Communications Center", at <http://www.khodorkovskycenter.com/>, a site established by Khodorkovsky's and Lebedev's lawyers "to raise awareness of their status in Russia as political prisoners."

The conduct alleged in the new charges has been the subject of investigation since 2004, while the first trial was still underway. The prosecution placed the defense lawyers on notice of its intent to announce them as official charges on the same day the court completed reading the verdict, on 31 May 2005. The new charges were formally announced in February 2007, though the prosecution delayed going to trial for approximately 2 years. There has been much speculation as to the reasons for this delay.

The defense lawyers received the indictment or "accusatory conclusion" on 16 February 2009. It consisted of 14 volumes and 3,500 pages in files which comprise several cubic meters. The state charged Khodorkovsky of embezzling 350 million tons of oil worth \$20 million, and money laundering of \$21.4 million. That is: embezzling all oil produced by three YUKOS production subsidiaries for six years; embezzling shares held by a YUKOS subsidiary in one of the production companies and five other companies;

and money laundering resulting from the sale proceeds of the allegedly embezzled oil and the shares in the indirect subsidiaries.

According to the defense lawyers, the most obvious absurdity of the new charges is the concept that Khodorkovsky and Lebedev physically took possession of and embezzled approximately 350 million metric tons of oil. Where would they have put it? The lawyers argue that they can demonstrate that the proceeds of the sale of this oil was in fact properly expended on YUKOS activities.

A Rise to Riches

Who is Mikhail Khodorkovsky? He was born in 1963, the son of two chemical engineers, in an ordinary Moscow Jewish family. His nemesis, Vladimir Putin was born in 1952. The fact that Khodorkovsky is ten years younger than Putin is a significant factor in his downfall. In 2004, at the time of his arrest, he was the wealthiest man in Russia, and was reputedly the 16th wealthiest man in the world.

Like a number of his fellow "oligarchs", he started his career in the Komsomol, the Young Communists. He opened his first business, a private café, in 1986. This was one of many such enterprises made possible by Mikhail Gorbachev's revolution, carried out under the slogans of perestroika (rebuilding) and glasnost (openness), which ended with the collapse of the USSR. In 1987 Khodorkovsky and his partners opened a "Center for Scientific and Technical Creativity of the Youth". The Center was involved in importing and reselling computers, and trading a wide range of other products. By 1988 Khodorkovsky had built an import-export business with a turnover of 80 million rubles a year (about \$10 million USD). With the cash earned through trading, Khodorkovsky and his partners used their international connections to obtain a banking license to create "Bank Menatep" in 1989.

This was one of Russia's first privately owned banks. The collapse of the USSR in 1991 brought opportunities for Khodorkovsky and others to become fabulously wealthy.

Putin's Path to Power

Vladimir Putin became acting president of Russia on the stroke of midnight 1 January 2000. His first act was to carry out the task which had been entrusted to him: to grant immunity from prosecution to outgoing President Boris Yeltsin and his family. Putin had been bankrolled by a group of "oligarchs", Russia's wealthiest businessmen, led by Boris Berezovsky. However, during the election campaign leading to his victory on 26 March 2000, and in his State of the Nation address of 8 July 2000, Putin began to speak of the need to distance government from big business. He broke from Berezovsky. Indeed, he talked, echoing Stalin's campaign in 1929 to "liquidate the kulaks as a class," of his aspiration to "liquidate the oligarchs as a class."

This assault on the oligarchs "as a class" was renewed in the run-up to the December 2003 parliamentary elections and the March 2004 presidential campaign. The target this time was Khodorkovsky and the YUKOS oil company. On 2 July 2003 Platon Lebedev, the head of Bank Menatep, which owned YUKOS, was arrested in connection with US\$280 million worth of share acquisitions in 1994, in the country's largest fertilizer company, Apatit. The charges against him were of large-scale fraud. The campaign against YUKOS culminated in Khodorkovsky's arrest on 25 October 2003 in a dawn raid on his plane in Novosibirsk. The planned merger between YUKOS and Sibneft to create one of the world's largest oil companies was suspended. YUKOS has now been broken up and its assets seized by the Kremlin.

Putin's political instincts proved correct. According to the polling organization VTsIOM-A (now Levada Center), the arrest of Khodorkovsky had the effect of boosting Putin's popularity from a high 73 percent in October 2003 to an unassailable 82 percent in November 2003. The poll of 1,600 Russians was conducted between 13th and 16th November 2003. According to the founder of VTsIOM, Yuri Levada: "This event had a strong influence on the president's job approval rating. His rating grew. The majority of the population approved of the attack against YUKOS and Khodorkovsky because the very rich are extremely disliked in this country and people are ready to believe any accusation against them. Because of this, in a measurable period of time, Putin's job approval rating grew significantly."

A Political Clash

Why was Khodorkovsky singled out, together with his colleagues in YUKOS, and YUKOS itself? In the words of William Tompson, a professor at the School of Slavonic and East European Studies (UCL), Khodorkovsky "... had clashed with both the Kremlin and a number of companies linked to it. Alone among the oligarchs, he had allowed himself publicly to contradict the president, doing so on at least one occasion to Putin's face. He had also publicly hinted at future political ambitions of his own, leading many to suspect that he wished to succeed Putin... In short, the Yukos chief seemed no longer to regard himself as bound by any bargain, implicit or explicit, to stay out of politics."

All this was reflected in Khodorkovsky's final statement in his first trial, delivered to the Court on 11 April 2005. He emphasized his Russian patriotism; he viewed all the events surrounding YUKOS and himself in terms of the interests and values of Russia. He was particularly proud of the fact that he was one of the first advocates for transparency in business, and a champion of best practice in corporate governance. His support for independent media and a variety of political forces was motivated by his desire for a free and fair country, and he had no regrets whatsoever for this. He concluded:

"I hope very much that the court proceedings which conclude today will help to change both the situation and public opinion. The publicity and attention to the trial from the whole of Russian society and lawyers from all over the world provide all the grounds for this to happen. I believe that my country, Russia, will be a country of justice and law."

Many commentators believe that Putin really feared Khodorkovsky. This fear was based on the following reasons. First, Putin believed that in a country as corrupt as Russia money can buy great influence, and Khodorkovsky was enormously rich. He had excellent connections with the governors and presidents in the 89 subjects of the Russian Federation.

Next, Khodorkovsky presented himself as a Russian patriot, through his sponsorship of culture, education and science – for example, planning to spend \$100m over ten years to develop the (prestigious and progressive) Russian State University for the Humanities in Moscow. The Open Russia Foundation, founded by Khodorkovsky, was officially launched in December 2001 in London with an endowment of £10 million. Khodorkovsky said that the motivation for the establishment of the Open Russia Foundation was to foster openness, understanding, and integration between the people of Russia and the rest of the world. The US

launch took place in the US Library of Congress on 18 September 2002. It was the first-ever international corporate philanthropic foundation in Russia's history.

Khodorkovsky also had influence in the media. In September 2003, using Open Russia as a vehicle, he purchased the prestigious weekly newspaper *Moscow News* and installed the charismatic television commentator Yevgenii Kiselyov there as editor.

He had allies in the West. In the eyes of many Western commentators and politicians he was the symbol of Russian liberal capitalism. He frequently dealt directly with foreign firms and even governments. Thus, in the United States he reportedly had meetings with senior military officers and the Vice-President, and hired former Clinton administration official Stuart Eisenstadt to help him lobby effectively. He had begun to "do things that in Russia only the president can do."

And he was young, 10 years younger than Putin, and could have been a more serious competitor in 2008. Many regarded him as a brilliant manager, who was working to clean up his image. While his wealth made him unpopular with the mass of the population, he tried to use some of his income to support causes that would ensure him the backing of some parts of the population.

There is increasing support for the view that the prosecution of Khodorkovsky, Lebedev, and more than 40 of their associates, including foreign citizens, was politically motivated. One such source is the Council of Europe. On 15th March 2004 the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly (PACE) appointed Sabine Leutheusser-Schnarrenberger, a former German Minister of Justice, as its Special Rapporteur on the circumstances surrounding the arrest and prosecution of

leading YUKOS executives. Following her investigations in Russia, on 25 January 2005, PACE passed a Resolution expressing the view that "the circumstances of the arrest and prosecution of leading Yukos executives suggest that the interest of the state's action in these cases goes beyond the mere pursuit of criminal justice, and includes elements such as the weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets."

There have now been a number of unsuccessful attempts by Russia to extradite Khodorkovsky's associates living in exile in Britain. On 18 March 2005, in his judgment in one of these cases, Senior District Judge Timothy Workman said "I am satisfied... that Mr Khodorkovsky was seen as a powerful political opponent of Mr Putin. In view of the facts I have outlined I am satisfied that it is more likely than not that the prosecution of Mr Khodorkovsky is politically motivated."

In an interview published on 11 March 2009 the pundit Gleb Pavlovskiy gave his opinion that the second round of the prosecution of Khodorkovsky and Lebedev gave rise to great doubts. In Pavlovskiy's words: "Politically this is a certain type of trap. After all, the case has long since lost its topicality for the majority of people. It is being brought back to the people artificially. This is extremely disadvantageous for Medvedev and Putin, inasmuch as however the trial ends it will lead to the discrediting of the tandem. In the end someone is going to answer for this politically. Even if Khodorkovsky is acquitted, the question arises: What is this, five years ago it was not possible to evade taxes and now it is?... It marks a trend toward turning the YUKOS case into a Russian Guantanamo, where all those who are in prison are guilty, but politically their arrests were not right."

About the author

Bill Bowring is a professor at Birkbeck College, University of London. He was an expert witness in the extradition proceedings in which Senior District Judge Timothy Workman ruled that he viewed the first Khodorkovsky trial as politically motivated.

Analysis

No Crime, No Punishment: On the End of the Anna Politkovskaya Murder Trial

By Angelika Nussberger and Yury Safoklov, Cologne

Abstract

From November 2008 to February 2009, the Moscow military tribunal heard the case of the murder of prominent journalist Anna Politkovskaya. However, those sitting in the dock were not the main perpetrators, but only suspected accomplices to the act. All four suspects were acquitted of murder, since the prosecution's evidence failed to convince the jury. The case had many shortcomings in terms of the rule of law, but the jury's decision was ultimately a convincing application of the presumption of innocence.

The Issues at Stake

In Russian criminal trials, acquittals are rare. The most famous acquittal is associated with Vera Zasulich. She had shot the governor of St Petersburg, who was generally hated for his cruelty, at close range and seriously injured him. Although there was no doubt as to her participation in the crime, she was acquitted by a jury on 11 April 1878. The jurors' assessment of the perpetrator and the victim was based on moral rather than legal considerations, giving rise to a fundamental debate over the introduction of trial by jury as part of the judicial reforms initiated by Alexander II and over larger matters of the law and justice in Russian society at the end of the 19th century.

The trial in the case of the murder of Russian journalist and human rights activist Anna Politkovskaya also reflects the way society deals with matters of the law and justice and has been regarded as a litmus test for the state of the rule of law in Russia. The crux of the matter was not whether the trial would result in conviction or acquittal, but rather the way in which the court would arrive at its result and the underlying reasoning. Both the Russian population and the broader global public therefore followed the trial with great interest. While one may regard the acquittal as justified, the handling of the points of law will likely meet with disapproval.

Starting Point: Murder

In her news stories, Anna Politkovskaya discussed grievances concerning the highest echelons of national politics. Her last reports were dedicated to criticizing the Chechen government and the instability prevalent across the entire Caucasus region. It was no secret that her research and analysis, which pulled no punches, won her many enemies. Observers described Politkovskaya's case as the "chronicle of a murder foretold".

On 7 October 2006, Politkovskaya was shot dead in the elevator of her house on Lesnaya Street in Moscow.

While searching the scene of the crime, investigators recovered four spent shells; what type of weapon was used remained unclear. The way in which the murder was committed indicated a contract killing. The state prosecutor's office initiated a murder investigation under Art. 105, section 2b of the Russian Federation's criminal code ("Murder of a person or their relatives in connection with this person's official activity or the discharge of his or her public duty").

Preparations for the Court Case

On 8 October 2007, the state prosecutor in charge, Petros Garibian, told the Russian news agency Interfax that the murder of Anna Politkovskaya had been solved. The responsible parties had been identified and arrested, and had already been arraigned on murder charges. These remarks, however, referred not to the actual instigators, but to persons who had allegedly prepared and coordinated the deed. Initially, reference was made to 11 suspects, ten of whom were charged with murder. This statement was later revised after one of the accused had filed a complaint against his detention. State prosecutor Vyacheslav Smirnov, who was responsible for dealing with the complaint, later referred to nine defendants. In the further course of the investigation, another five individuals were released from detention due to "lack of criminal actions", so that only four defendants remained in prison.

Three suspects – Sergei Khadzhikurbanov as well as the brothers Dzhabrail and Ibragim Makhmudov – were indicted on murder charges. The fourth suspect, Federal Security Service (FSB) Lieutenant-Colonel Pavel Ryaguzov, was initially also charged with murder, but this charge was later changed to exceeding his official powers (Art. 286 of the Criminal Code) and extortion (Art. 163). These accusations, too, were changed once more; Ryaguzov and Khadzhikurbanov were charged with having jointly committed assault and battery dur-

ing the course of their official duties; however, these charges referred to another case and victim. Rustam Makhmudov, the brother of Dzhabrail and Ibragim, was identified as the actual gunman who was alleged to have shot Politkovskaya. He was (and remains to this day) a fugitive, however, and the Russian state prosecutor's office is pursuing separate proceedings against him.

The attorney-general's office had approved the indictment. It is safe to say that there had been a great deal of political pressure finally to present the perpetrators, since even foreign politicians had on many occasions denounced the lack of urgency on the part of state bodies in solving the case. However, the fact that the trial in the case of this contract killing was begun without the arrest of either the contract killers or the people who planned the killing was unusual.

The Trial

From the start, there was disagreement as to whether the trial ought to be held in an "ordinary" criminal court or in a military court. Since Pavel Ryaguzov was a member of the FSB and had originally been charged with murder along with the other suspects, jurisdiction lay with the military courts. Politkovskaya's family applied for the case to be handed over to a general criminal court, since they feared that a military judge might be prejudiced and that it would be easier to hold the trial behind closed doors if it were held in a military court. The state attorney did not accede to their request, however, and handed the case to the Moscow regional military court, which had earlier already handled the case relating to the murder of journalist Dmitry Kholodov.

Closed Session

As it turned out, these concerns regarding the possibility of the public being excluded from a closed court session were not entirely unfounded. The state prosecution applied for closed hearings, contending that its evidence included state secrets. Initially, military judge Evgeniy Zubov refused this application. That changed, however, when the defense applied for a trial by jury. To the great surprise of many, the judge approved this request in preliminary proceedings. While trials by jury had been frequently held before ordinary criminal courts due to a number of changes to the law between 1993 and 2004, there was no precedent for a jury trial in military courts. The military judge imposed the condition that the proceedings would be held in closed session, arguing that the jurors would come under pressure.

On 19 November 2008, the public was refused access to the courtroom. The reason given was that the ju-

rors refused to enter the courtroom as long as representatives of the media were present. In justifying this ruling, the judge cited Art. 241, section 2., no. 4 of the Criminal Procedure Code ("guaranteeing security for the participants in the judicial proceedings, for their close relatives, relations or near persons"). One of the jurors, Evgeniy Kolesov, publicly and vehemently disputed the official account according to which the jurors had called for a closed session. Furthermore, he claimed that the jurors had been told to sign a statement to this effect before the beginning of the trial, but all had refused to do so. One of the defense lawyers regarded these statements by Kolesov, who was celebrated as a "hero" by the media, as sufficient cause to dissolve the jury. It was debated whether Kolesov should be removed from the jury due to "illegal communication with persons who are not part of the composition of the court, which deals with the circumstances of the criminal case under examination" (Art. 333 section 2, no. 3 of the Criminal Procedure Code). This became a moot point, however, as Kolesov withdrew from the jury at his own request; later, another four jurors were replaced for various reasons. The decision on the exclusion of the public was withdrawn on 25 November 2008; however, procedural issues would continue to be decided without members of the media present.

The State Attorney Applies to Disqualify the Judge

As soon as the public was readmitted to the trial, the state attorney accused military judge Zubov of bias and applied to have him replaced with another judge. This request was controversial because, according to the Criminal Procedure Code, the decision in the matter of disqualifying Zubov as the presiding judge lay with Zubov himself – in other words, he was responsible for assessing his own possible bias. In the end, he ruled against the request, arguing that the charges of prejudice were not grounded on substantiated facts.

The Charges

The state attorney's office then brought charges based on the following version of events: Allegedly, Sergei Khadzhikurbanov had been contracted to kill Anna Politkovskaya. He had bought the murder weapon, handed it over to the killer, and planned the details of the crime with help from his accomplice Pavel Ryaguzov, who had found Politkovskaya's address in the FSB database and passed it on to Khadzhikurbanov. Since the journalist had moved in the meantime, Khadzhikurbanov had used the Makhmudov brothers to tail her. On 3, 4,

and 5 October 2006, they had gone to Politkovskaya's house with another brother, Rustam, who ultimately carried out the crime, for a "dry run" at the scene of the eventual killing. On the day of the murder, 7 October 2006, Dzhabrail is alleged also to have taken his brother Rustam to Politkovskaya's residence.

Incriminating Evidence Presented by the State Attorney

The state attorney presented testimony concerning threats that Politkovskaya had received. In particular, the editor of *Novaya Gazeta*, where the journalist had been working, confirmed that threats had been received and cited sources according to whom the defendants had been involved in the murder. The victim's children also cited threats and testified to the presence of "strange people" in their house about whom Politkovskaya had always warned them.

A witness who, being shielded by a witness protection program, did not have to testify in public, had allegedly told the judge about a conversation with Khadzhikurbanov in which the latter had stated his intention to gather information on Politkovskaya. However, in meetings with the media, the defense denied that any such claim had been made. The prosecution tried to show that the defendants knew one another by presenting a printout of the address book in Dzhabrail Makhmudov's mobile phone. The list included the telephone numbers of Ibragim Makhmudov, Sergei Khadzhikurbanov, and Pavel Ryuguzov.

Furthermore, the prosecution presented to the jury the bullet shells, pictures and sketches of the scene of the crime, and video footage, in particular the footage taken from a surveillance camera outside the house entrance that had recorded the alleged killer and his car. Expert testimony confirmed that fabric fibers found on the murder weapon were also present in the car used by the defendants. The prosecution further claimed to have proof that on the day of the murder, the Makhmudov brothers had placed a telephone call within the city quarter where Politkovskaya lived.

Exonerating Evidence Presented by the Defense

The defense pointed out a large number of discrepancies and contradictions in the version presented by the prosecution. The attorneys argued that the provenance of the murder weapon was unclear, the fiber analysis was incomplete and unconvincing, and the exact time of the shooting had not been verified unequivocally; accordingly, it was possible to draw various conclusions from

the evidence presented. They also called into doubt the video footage allegedly showing the crime, as the events it purported to show did not match the timeline presented. The defense also rejected the assumption that the fugitive "gunman" Rustam Makhmudov had been involved in the killing, as his physique did not match that of the person shown in the video footage; in its final argument, the state prosecution only referred to him as the driver of one of the witnesses and no longer mentioned the murder charges. As far as the defense was concerned, all of the accused had credible alibis. Furthermore, they had not used the car depicted in the video on the day of the killing. Khadzhikurbanov, the alleged main organizer, had only been released from prison two weeks before the murder and had had no time to plan and prepare the shooting.

One particular slip-up by the prosecution in the hearing of its evidence was that it lost the decisive video presentation during the trial, so that investigators could only present a copy to the state prosecutor's office. This delayed the entire trial.

The Verdict

The verdict was announced on 19 February 2009. The jurors unanimously found the defendants not guilty. They did not believe it had been proven that Ibragim and Dzhabrail Makhmudov, Sergei Khadzhikurbanov, and Pavel Ryuguzov had made the respective contributions to the murder that they had been accused of. The defendants were immediately released in the courtroom after the verdict.

Reactions

The Russian media unanimously criticized the unsatisfactory quality of the state prosecutor's investigations and discussed the negative effects of such "slipshod" criminal proceedings on the protection of free speech and the press. Furthermore, as expected, the verdict set off a new round of debates over the pros and cons of jury trials, which were rebuked as subjective on the one hand, while on the other hand being praised for their bold and clear judgment.

Further Course of Proceedings

The "not guilty" verdict did not mark the end of the proceedings. As soon as the defendants had been released, the prosecution announced its intention to appeal, as military judge Zubov had allegedly violated the Code of criminal proceedings. A request to this effect was lodged with the court of appeal on 27 February 2009, so that the verdict handed down by the court of first instance

did not take effect. The defendants' lawyers are greatly concerned that – as statistical evidence would lead one to expect – the acquittal could be overruled by a higher court. The children of the murdered journalist, who are joint plaintiffs, did not intend the hearing to challenge the acquittal; their aim is to find the real culprits.

The investigation against Rustam Makhmudov and against the unidentified mastermind who ordered the killing continues.

Conclusion

There can be no doubt that the trial is one of the most embarrassing episodes in the history of the Russian state

prosecution service, and is also a blemish on the record of the military judge, who was most likely overtaxed as a single judge in a case of such importance. The jurors, on the other hand, gave a highly creditable performance and proved both their legal expertise and their moral courage; they took the presumption of innocence seriously. This constitutes a glimmer of hope and a step towards a strengthening of the rule of law that President Medvedev has so eloquently called for.

It remains to be hoped that the true perpetrators will receive their just deserts. Real crime must be met with real punishment.

Translated from German by Christopher Findlay

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Further reading

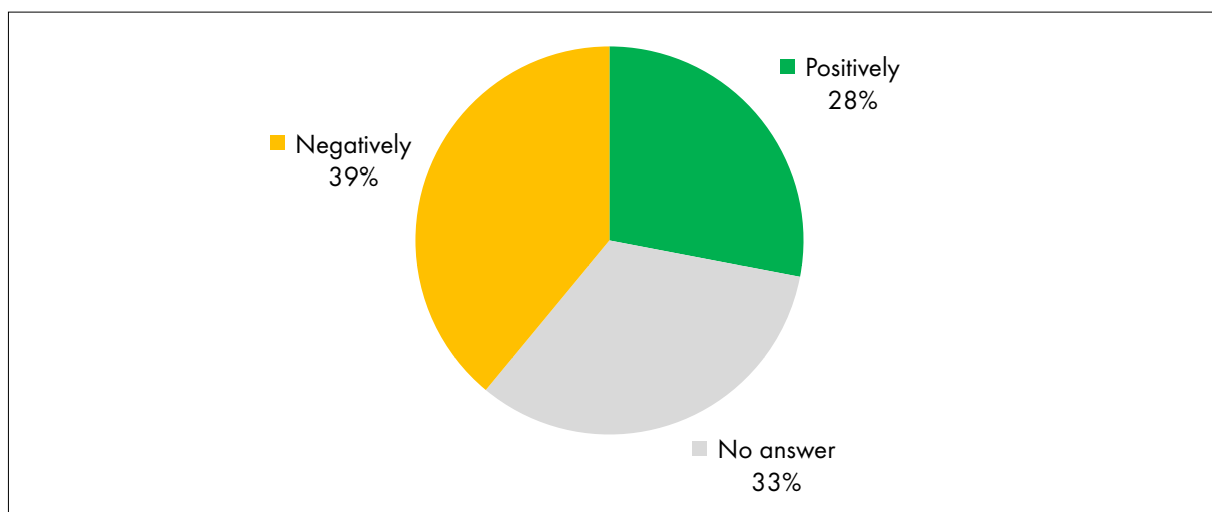
- Raul Khatymovich Yakupov, *Ugolovnyi protsess: uchebnyk dlya vusov* [The Criminal Trial: A College Textbook], fifth edition, TEIS publishers, Moscow 2005.
- Anna Politkovskaya, *A Small Corner of Hell: Dispatches from Chechnya*, Chicago: The University of Chicago Press, 2003.
- Anna Politkovskaya, *Putin's Russia*, New York: Metropolitan Books, 2005.
- Elfie Siegel, "On the death of Anna Politkovskaya," Russian Analytical Digest No. 9, 7 December 2006.

Opinion Poll

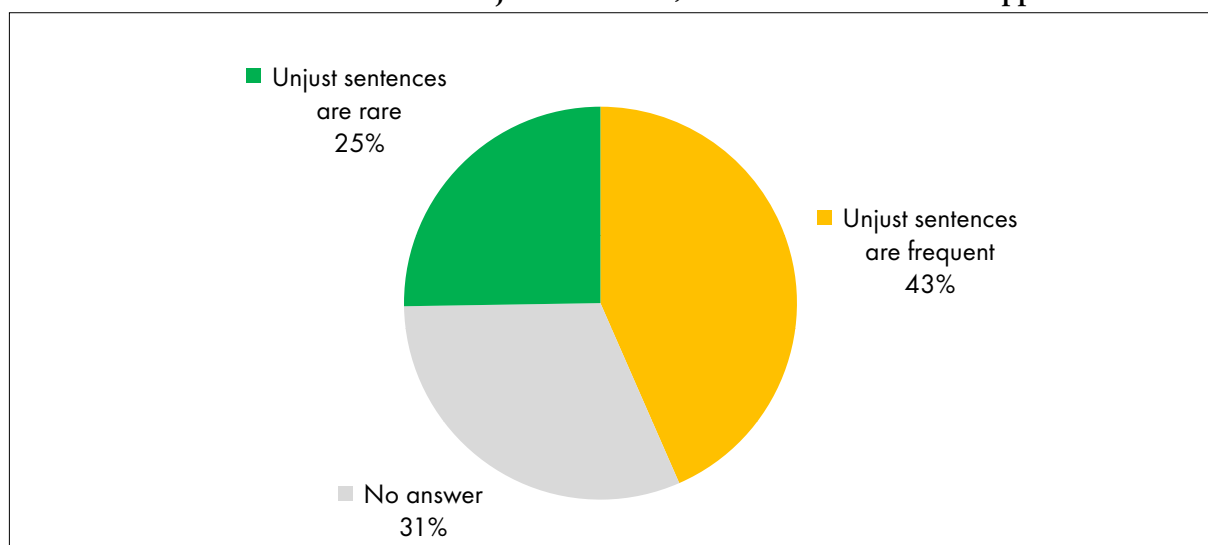
What is Your Opinion of the Courts? (According to Surveys Conducted in Russia)

Opinion Polls of the “Public Opinion Fund” 2008

How Do You Assess the Work of Russian Courts?

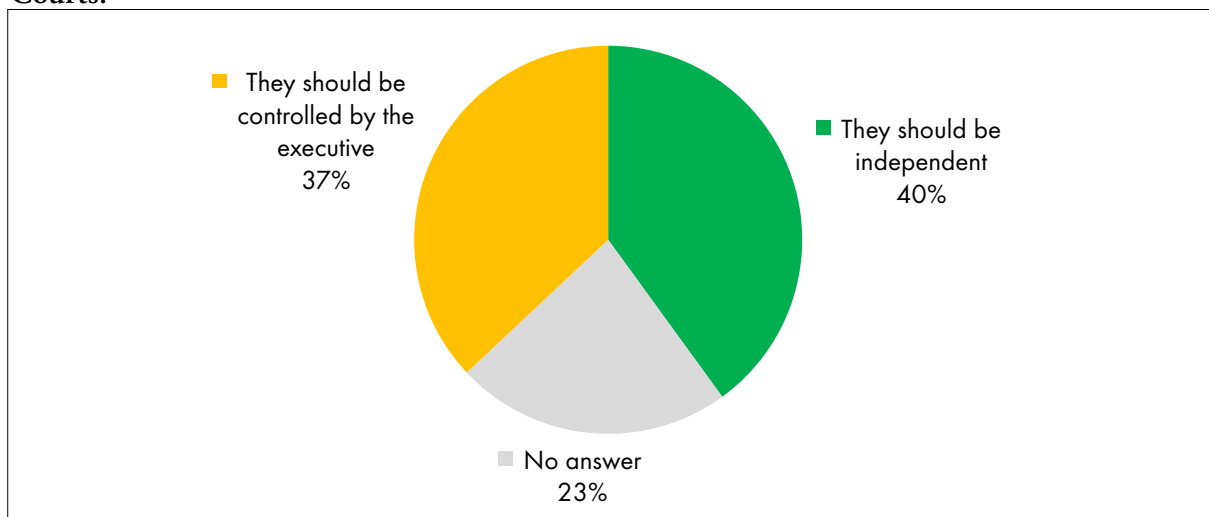


Do the Russian Courts Often Pass Unjust Sentences, or Does This Seldom Happen?

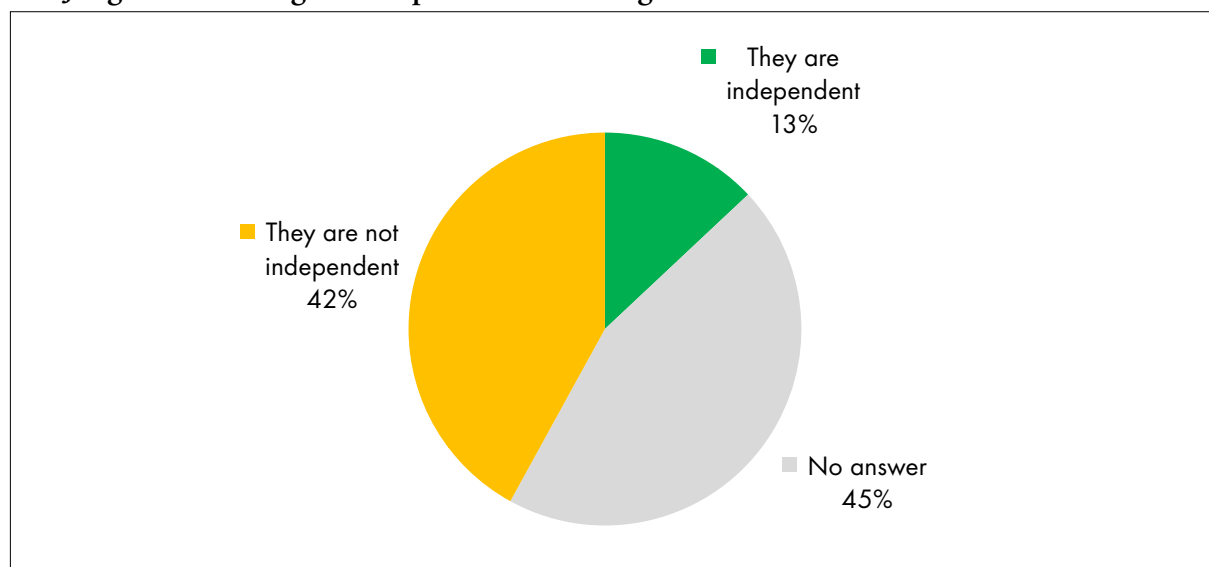


Source: representative poll of the Russian population conducted by the “Public Opinion Fund” (FOM), 5–6 June 2008
<http://bd.fom.ru/report/map/dominant/dom0823/d082322>

Should the Courts Be Independent of the Executive or Should the Executive Control the Courts?



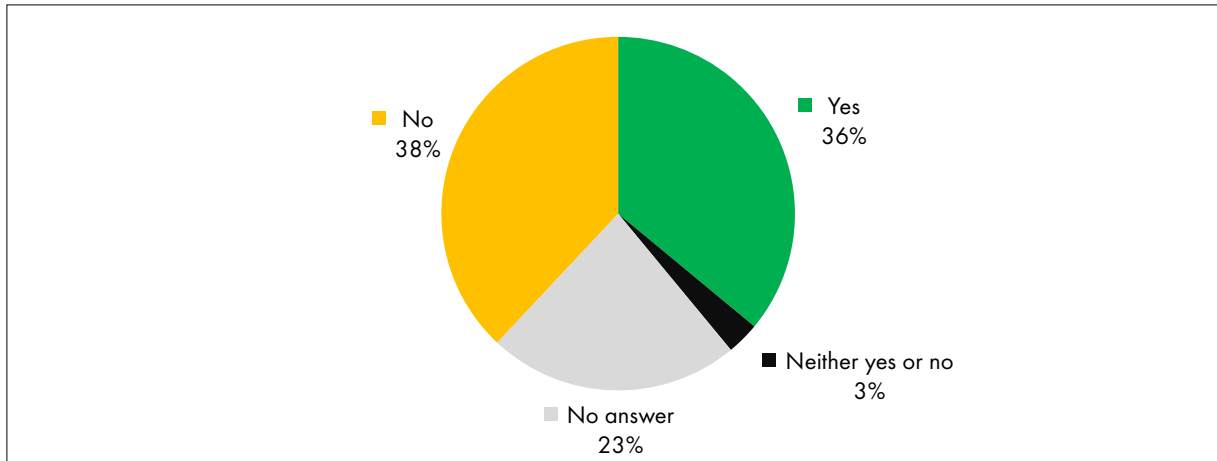
Are Judges in Your Region Independent of the Regional Government?



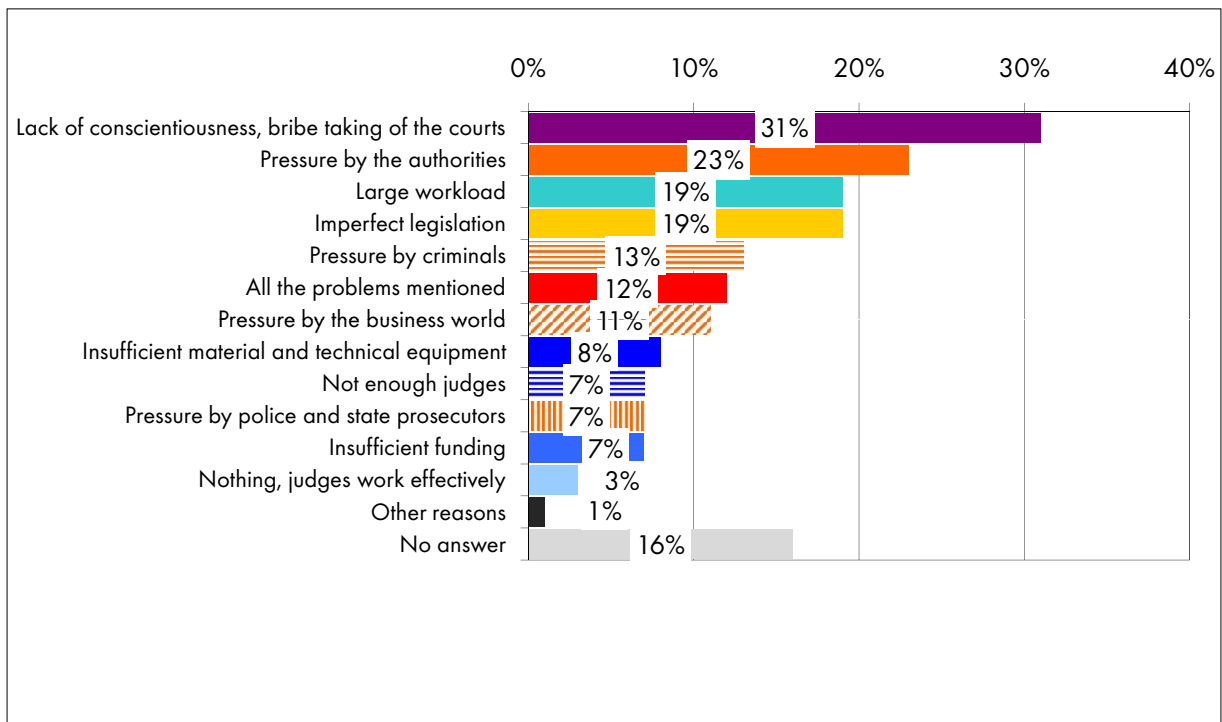
Source: representative poll of the Russian population conducted by the "Public Opinion Fund" (FOM), 5–6 June 2008
<http://bd.fom.ru/report/map/dominant/dom0823/d082322>

Opinion Polls of VTsIOM 2007

Are the Courts in Your Opinion an Efficient Means of Defending Citizens' Rights?



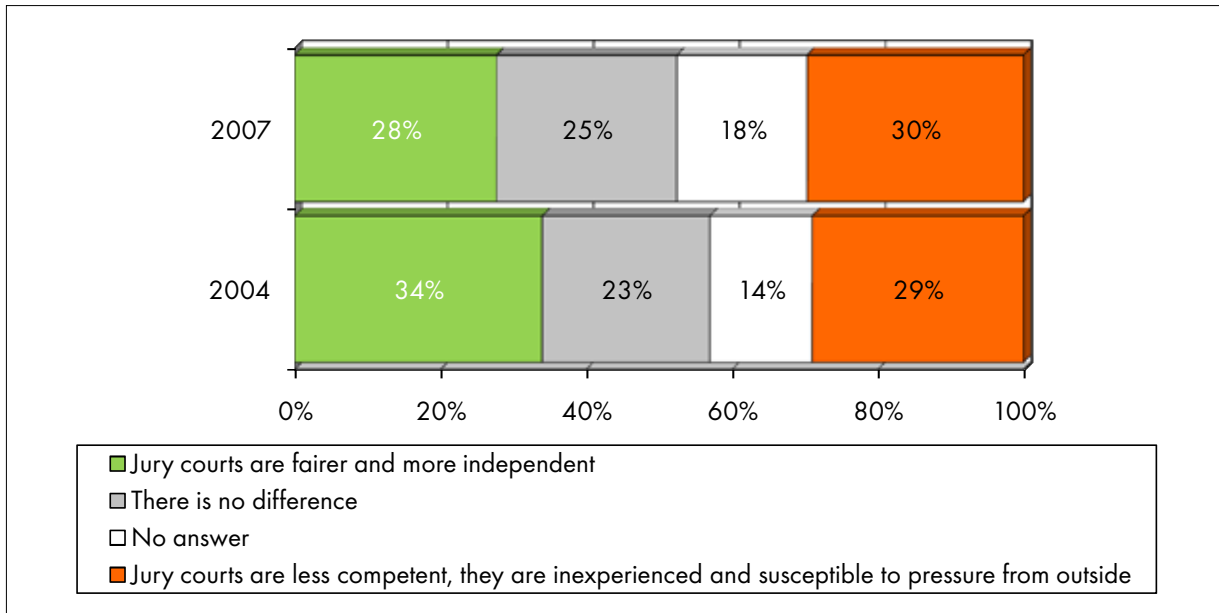
In Your Opinion, What Prevents the Courts From Handling Citizens' Legal Actions More Effectively?



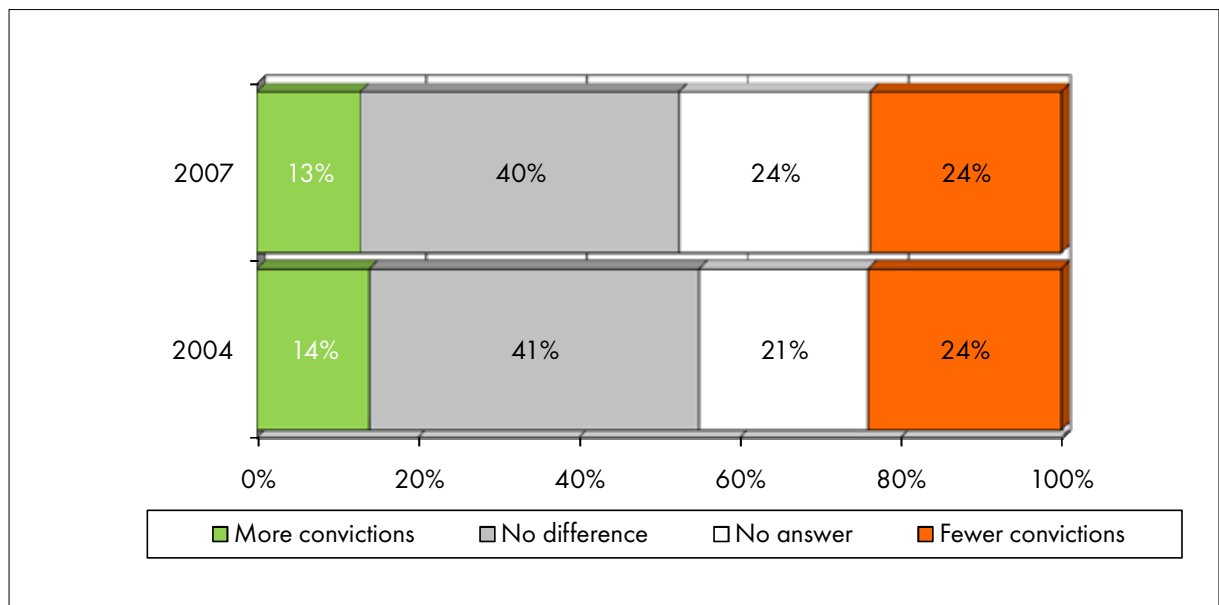
Source: representative poll of the Russian population conducted by VTsIOM on 3–4 Nov. 2007
<http://wciom.ru/novosti/press-vypuski/press-vypusk/single/9934.html>

What Is Your Opinion of Jury Courts? (2004 vs. 2007)
Opinion Polls of the Levada Center

How Do You Rate Jury Courts in Comparison to Normal Courts?



Will the Introduction of Jury Courts Lead to More Convictions?



Source: representative polls of the Russian population conducted by the Levada Center on 23–27 April 2004 <http://www.levada.ru/press/2004051106.html> and 12–16 Oct. 2007 <http://www.levada.ru/press/2007102907.html>

About the Russian Analytical Digest

Editors: Matthias Neumann, Robert Ortung, Jeronim Perović, Heiko Pleines, Hans-Henning Schröder

The Russian Analytical Digest is a bi-weekly internet publication jointly produced by the Research Centre for East European Studies [Forschungsstelle Osteuropa] at the University of Bremen (www.forschungsstelle.uni-bremen.de) and the Center for Security Studies (CSS) at the Swiss Federal Institute of Technology Zurich (ETH Zurich). It is supported by the German Association for East European Studies (DGO). The Digest draws on contributions to the German-language *Russlandanalysen* (www.laender-analysen.de/russland), the CSS analytical network on Russia and Eurasia (www.res.ethz.ch), and the Russian Regional Report. The Russian Analytical Digest covers political, economic, and social developments in Russia and its regions, and looks at Russia's role in international relations.

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