



A rally in support of Russian vocally oppose civil activist Ildar Dadin, political prisoner. (St. Petersburg, Russia; November 3, 2016. Photo: Akimov Igor /Shutterstock)

## Protest in Peril? Russia's Constitutional Court Upholds Article 212.1

By Jonathan Wiersema

On January 31, thousands of Russians across the country took to the streets for a second week in a row. Motivated by the arrest of Alexei Navalny and his recently released investigatory video, *A Palace for Putin*, this wave of demonstrations is squarely aimed against Putin's regime. Neither the freezing winter temperatures nor the continued dangers of the pandemic seem to dampen the demonstrators' resolve, leaving the Kremlin with questions on how to respond. The Kremlin's preferred method for deterring protest — pressing serious criminal charges against individuals — has recently been upheld by a pair of Constitutional Court decisions that at first reading seemed intended to limit the use of this tactic.

Video of Russian security officer's clubbing and dragging protesters away to detain them draws attention and condemnation. But it is the risk of prosecution under Russian law that may be the more alarming deterrent for ordinary citizens. Both Kremlin spokesperson Dmitri Peskov and the Moscow Ministry of Internal Affairs have stated that participants should be punished.<sup>1</sup> At minimum, participation in such unauthorized protests can result in an administrative offense, accompanied with a fine or short jail stint. These charges stem from Russia's Administrative Code that, in part, regulates lawful protest action and procedure. Importantly, administrative violations are not criminal offenses. Similar to the difference between a

misdemeanor and felony within the United States, administrative and criminal offenses in Russia differ in the degree of their punishments. Yet, the recent increase in convictions under Article 212.1 of Russia's Criminal Code risks blurring this distinction.

Article 212.1 makes it a crime to "repeatedly violate the established procedure for organizing or holding meetings (*sobraniia*), rallies (*mitingi*), demonstrations (*demonstratsii*), marches (*shestvie*), or pickets (*piketirovaniie*)."<sup>2</sup> Punishment for violating the law varies widely, depending on the judge's discretion: a fine of 600,000 to 1 million rubles (roughly \$8,000 to \$14,000 USD); 2 to 3 years' salary (*zarabotnaia plata*); 480 hours of compulsory work (*obiazatelnaia rabota*); 1 to 2 years of correctional work (*ispravitelnaia rabota*); up to 5 years of forced labor (*prinuditelnaia rabota*); or up to 5 years imprisonment.<sup>3</sup>

A plain reading of Article 212.1 states that three or more administrative violations allow authorities to charge violators with a more severe criminal offense. The Constitutional Court has issued two decisions intended to limit the state's ability to use Article 212.1 to target opponents, but ultimately stopped short of striking the law down. This Court's unwillingness to declare the statute unconstitutional has allowed authorities and lower courts to ignore the limiting principles outlined by the Court. With the Kremlin focused on suppressing dissent, this lack of adherence to the Court's decisions portends troubling consequences for would-be protestors. The question remains whether or not these legal repercussions will be enough to stifle the rising expressions of discontent in Russia.

## The Case of Ildar Dadin

For Ildar Dadin, seeing the rigged results of the 2011 parliamentary elections turned the former security guard into an activist.<sup>4</sup> Like many other Russians, he protested in 2011 and continued doing so years after. However, between August of 2014 and January of 2015, Dadin received several administrative fines that culminated in his arrest.<sup>5</sup>

On December 7, 2015, the Basmanny Moscow City Court found Dadin guilty of violating Article 212.1 and sentenced him to three years in prison, making him the first person to be convicted under the law.<sup>6</sup>

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The severity and novelty of the sentence under the criminal code brought widespread attention to the case, even prompting Russia's Presidential Council for Civil Society and Human Rights to call on the revocation of Article 212.1.<sup>7</sup> Later, on October 31, 2016, Dadin's attorney published a letter from his client that was smuggled out of prison alleging torture by prison guards.<sup>8</sup> News of this reached the Kremlin, with press secretary Dmitry Peskov telling reporters Putin would be notified and that "the case merited 'the closest attention.'"<sup>9</sup> The Constitutional Court, now under increased scrutiny from the Kremlin, had to decide the constitutional legality of Article 212.1.

On February 10, 2017, the Constitutional Court released its decision in Dadin's case. The Court began by discussing the importance of Article 31 of the Russian Constitution which guarantees the right to peacefully assemble — including voicing challenges and disagreements against the state.<sup>10</sup> However, the Court also clarified that the right “does not have an absolute character and can be limited by federal law...through the necessary principles of proportionality (*proportionalnost*) and adequacy (*sorazmernost*).”<sup>11</sup> The Court went on to uphold Article 212.1 based on the reasoning that repeated offenses may require increasing the punishment from administrative to criminal liability to deter harmful action.<sup>12</sup> Given Russia's track record involving civil liberties, it is tempting to interpret this as the Court kowtowing to the interests of the state. However, this legal reasoning is not that different from how certain offenses are treated in democratic states. Rather, the more important question is how the Court ruled on how to apply Article 212.1.

In its decision, the Court greatly limited the law's application. First, the Court ruled that committing three administrative offenses “is not enough on its own to bring on criminal liability.”<sup>13</sup> In other words, prosecutors cannot formulaically apply the law to guarantee convictions. Rather, there must be a showing of actual—or a real threat of—harm to the “health of citizens, property of individuals or legal entities, surrounding environment, public order, public security, or other constitutionally protected values.”<sup>14</sup> Likewise, this harm needs to be intended and not accidental.<sup>15</sup> In light of these standards, the Court found Dadin's conviction to be unconstitutional.<sup>16</sup> Following the Constitutional Court's ruling, Dadin's case was remanded to Russia's Supreme Court, where his conviction was

overturned.<sup>17</sup> Interestingly, at this point, Russia's Prosecutor General also called for Dadin's release.<sup>18</sup>

One interpretation of this episode is the state called for Dadin's release because his conviction served its intended purpose of creating a chilling effect on protest action. In other words, the Kremlin was more interested in sending a message to potential protesters than in imprisoning Dadin. The overturned prison sentence still acts as a reminder of the costs of dissent, while calling for his release strengthens the perception that the state is limited by law, even as it metes out selective prosecution and punishment of opponents. In fact, to this day Article 212.1 is widely referred to as Dadin's Law (*Dadinskaia Statya*), invoking the trials and tribulations he went through to achieve justice.

However, the Prosecutor General's support for Dadin's release surprised many people, including Dadin's lawyer, who expected a retrial instead of an immediate release.<sup>19</sup> Given that courts rely on other branches of government to adhere to and carry out their decisions, state support for the Constitutional Court's ruling strengthens the Court's credibility and independence.<sup>20</sup>

For Dadin, the decision boosted his resolve for activism.<sup>21</sup> Amnesty International's Denis Krivosheev neatly summed up the Constitutional Court's ruling, arguing that Dadin's case “represents a chink of light in an otherwise bleak outlook for the right to peaceful assembly in Russia.”<sup>22</sup> Unfortunately, this light would not last long.

## The Case of Konstantin Kotov

In 2019, with elections on the horizon, the pro-Kremlin United Russia party risked losing its

majority in the Moscow City Duma. In response, local officials refused to register multiple independent candidates, citing various technicalities and throwing out legitimate ballot signatures. This triggered street protests in the country's capital. Authorities responded with a series of spurious arrests, commonly known as the Moscow Case. Among those apprehended was activist Konstantin Kotov, who joined a protest walk on August 10, 2019 in support of free elections. With four prior administrative offenses under his belt, he was also charged under Article 212.1.<sup>23</sup>

On September 19, 2019, the Tverskoy District Court of Moscow sentenced Kotov to four years in prison — one year shy of the maximum sentence.<sup>24</sup> Soon after, civil society groups like Memorial

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renewed calls to abolish Article 212.1 and labeled Kotov a “political prisoner.”<sup>25</sup> The aggressive state response to the 2019 protests in Moscow drew additional condemnation from other groups in Russia. Over 100 Russian Orthodox priests signed an open letter calling on authorities to review the prison sentences relating to the Moscow Case.<sup>26</sup> The priests specifically mentioned Kotov's arrest and admonished the judge for her refusal to admit exculpatory video evidence and her reliance on testimony from police “who repeat each other verbatim.”<sup>27</sup> Whether through the work of civil society groups or the Orthodox Church, which

the Kremlin actually respects, these statements reportedly made their way to Putin, who ordered a “review of the legality and validity” of Kotov's guilty verdict on January 24, 2020.<sup>28</sup> The Constitutional Court heard the case right away.

Three days later, the Constitutional Court handed down its decision. The Court reiterated the necessary factors for conviction outlined in the Dadin case and explicitly stated that the application of the criminal statute “by public authorities, including courts, should be carried out only in accordance with [the Constitutional Court's previous decision.]”<sup>29</sup>

Furthermore, the Court clarified its earlier ruling, now requiring lower courts to support determinations of harm with “specific actions subject to criminal prosecution” such as “provocative calls for violating current legislation.”<sup>30</sup> Moreover, normal inconveniences associated with public demonstrations, like disruption of traffic, cannot constitute a “real threat of harm” and thereby support conviction under Article 212.1.<sup>31</sup> Both of these principles built off of the Dadin decision and further limited the application of the law, providing another instance in which the Court acted contrary to political expediency.

However, this potential example of judicial independence needs to be considered in light of what the Court did *not* do. Kotov's attorneys argued that since lower courts ignored the Court's binding decision in the Dadin case, the “norm” surrounding Article 212.1 renders it unconstitutional.<sup>32</sup> Rather than take up this line of reasoning, the Court concluded that lower courts did not adequately consider whether Kotov's actions constituted “a real threat of harm” and remanded the case for retrial.<sup>33</sup> Additionally, the Court reminded lower

courts that ignoring its decisions is “unacceptable (*nedopustimo*)” and unconstitutional.<sup>34</sup> At best, this represented a desire to give lower courts another chance to conform to its ruling and, at worst, a lack of confidence in its institutional strength to hand down a more sweeping decision invalidating the law. Regardless of the Court’s motivations, the ensuing response to its decision casts doubt on its effectiveness and legitimacy as an institution.

Following the Court’s ruling, a Moscow City Court reconsidered the case, leaving Kotov’s guilty verdict intact but reducing his sentence to 1.5 years.<sup>35</sup> This, of course, did not meet the demands of civil society groups and Kotov’s lawyers to drop the charges. More surprisingly, the new verdict did not fulfil the

Prosecutor General’s recommendation to reduce the sentence to one year.<sup>36</sup> Recently, on December 16, 2020, Kotov completed his sentence and was released.<sup>37</sup>

A week later, a Moscow court convicted activist and municipal deputy Yulia Galyamina under Article 212.1 due to her work in organizing demonstrations against the recently passed Constitutional amendments.<sup>38</sup> Taken together, the unwillingness of lower courts to dismiss Kotov’s case and their continued misuse of the law to stifle those critical of the state signal that authorities are unlikely to follow the Constitutional Court’s rulings limiting Article 212.1’s application.



Journalists stand near the building of the Moscow City Court. Photo: Pavel L Photo and Video/shutterstock.com

## Conclusion

The two Constitutional Court decisions surrounding Article 212.1 seem to indicate a judiciary attempting to reign in the Russian state in its abusive use of the courts to punish political opponents. This attempt, in and of itself, is somewhat unexpected in Russia, especially in politically sensitive cases like those involving Dadin and Kotov. However, both the Kotov case and the more recent conviction of Yulia Galyamina show a refusal by lower courts to properly apply the Court's rulings. According to researchers at OVD-Info, these cases demonstrate that lower courts "do not understand or deliberately ignore the decisions of the Constitutional Court."<sup>39</sup>

Despite the knowledge that courts are more likely to sentence than protect them, Russians continued to take to the streets earlier this year. Many cities even saw an increase in participation between the January 23 and 31 protests.<sup>40</sup> Thousands of protestors have already been detained and, in the aftermath of the January 31 demonstrations, four new Article 212.1 cases have been opened against participants.<sup>41</sup>

The evolution of Article 212.1's application makes clear the deficiencies of Russia's legal system and the lengths that the government will go to punish protestors. Yet, the continued commitment by Russians across the country to come out and voice their demands for change implies that the threat of imprisonment no longer carries the same weight that it once did. If repressive laws are no longer sufficient for the Kremlin's purpose, the government's natural response will be to escalate its use of force.

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The opinions expressed in this article are those solely of the author.

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