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COMPARATIVE CRIMINAL LAW AND ENFORCEMENT: RUSSIA

Russia belongs to the continental European civil law tradition although its long history of autocracy and Soviet totalitarianism has left a distinct imprint on its system of criminal justice. Three great historical watersheds have left their imprint on Russian law: (1) the legal reforms of Tsar Alexander II in 1864; (2) the Bolshevik Revolution in 1917; and (3) the collapse of the Soviet Union in 1991 and the ensuing period of legal reform aimed at moving to a capitalist market economy, pluralist democracy, and a state under the rule of law and eliminating the worst abuses of the Soviet criminal justice system.

The modern reform movement commenced during *perestroika*, the attempt to transform the Soviet Union under the leadership of Mikhail Gorbachev (1985–1991). Its goals received their clearest expression in a document entitled the "Concept for Judicial Reform," which was approved by the Supreme Soviet of the Russian Federation on 21 October 1991 and which looked to the 1864 reforms for inspiration. The most important of these goals were: (1) creating an independent judiciary by reducing its dependence on local officials and making it self-governing; (2) introducing adversary procedure and trial by jury; (3) stripping the office of the public prosecutor or procuracy (*prokuratura*) of its oversight over the courts and its quasi-judicial powers to order invasions of constitutionally protected rights of the citizens; and (4) strengthening the right to counsel and the rights of defendants to protect against abusive practices by law enforcement organs.

Significant reform legislation was passed by the Supreme Soviet of the Russian Federation in 1992 and 1993 during the presidency of Boris Yeltsin. This consisted of amendments to the 1978 Constitution of the Russian Soviet Federated Socialist Republic (RSFSR) and, most notably, the Law on the Status of Judges, passed on 26 June 1992, and a law introducing trial by jury, passed on 16 July 1993 (Jury Law). After Yeltsin's violent dissolution of the Supreme Soviet in October of 1993 and the passage by referendum of the Constitution of the Russian Federation on 12 December 1993, strengthening presidential powers at the expense of a weakened bicameral legislature, the pace of reform slowed but the new lower house, the State Duma, continued to pass significant legislation, most notably, the Law on Operational Investigative Activities, passed on 12 August 1995, the Criminal Code of the Russian Federation, signed into law on 13 June 1996, and the Federal Constitutional Law on the Judicial System of the Russian Federation, signed on 31 December 1996. The long-awaited new draft Code of Criminal Procedure, which was presented to the Duma on 3 July 1995 (1995 Draft CCP), and passed first reading, has, as of early 2000, still not made it out of the lower house, leaving the heavily amended 1960 Code of Criminal Procedure of the RSFSR (CCP) in force.

Another important impulse for criminal justice reform in Russia, as in other post-socialist states of Europe, has been its petition for, and subsequent admission into, the Council of Europe, a condition of which was the signing of the European Convention on Human Rights, which took place on 28 February 1996. Article 15(4) of the Constitution gives this treaty, and the other most important human rights treaty, the United Nations International Covenant on Civil and Political Rights, which the Soviet Union signed in 1976, priority over domestic law and makes them directly applicable by the courts.

Criminal procedure

The principle of adversary procedure has been constitutionally rooted since 1992 and was codified in the 1993 Jury Law. Although the new jury system has been preliminarily limited to just nine of Russia's eighty-nine political subdivisions, the new provisions have begun to be applied in nonjury cases. Three of the prime aspects of the turn to adversary procedure that were at the heart of the reform movement were: (1) reducing the role of the procuracy to that of prosecutor of criminal cases with powers equal to that of the defense; (2) transforming the judge from an inquisitor, duty-bound to determine the truth and empowered to perform quasi-prosecutorial functions, into an impartial arbiter, who guarantees the equal rights of the parties during the trial; and (3) strengthening defense rights, including the right to counsel.

The criminal investigation

The criminal investigation in serious cases is divided into two stages: an informal inquest (*doznanie*), performed by the police (*militsiia*), and a formal preliminary investigation (*predvaritel'noe sledstvia*), usually conducted by a legally trained investigator (*sledovatel'*) who works for the Ministry of Internal Affairs but is subordinate to the procuracy. Less serious cases are investigated by the police and their reports are submitted in writing directly to the courts, bypassing the formal preliminary investigation. The investigator's role is similar to that of investigating magistrates in France or Spain, who are, however, part of the judiciary. The modern European trend, however, is to entrust the public prosecutor with the formal criminal investigation, this change having been made in Germany in 1974 and Italy in 1988.

The activity of the police during the inquest is supposed to be limited to arresting suspects, securing the crime scene, and taking initial statements from available suspects and witnesses. The police should inform the procuracy within twenty-four hours of the arrest of a suspect and the case should then be turned over to the investigator who decides whether to initiate a formal criminal investigation. The investigator's actions are limited by strict rules of evidence-gathering laid down in the CCP. All investigative acts are meticulously documented in writing and collected in an investigative dossier that follows the case into the courts and serves as a repository for vital evidence during trial and appeal. The procurator has forty-eight hours after notification to either issue an order of preventive detention or release the suspect.

Most suspects against whom a preliminary investigation is initiated remain in custody preventive detention facilities until trial. Although the maximum time for pretrial detention is fixed at two months, many extensions are available up to a maximum of eighteen months. Detention is authorized if there is fear the defendant will not appear for trial, will destroy evidence, commit more crimes, or just because of the seriousness of the offense. A Special Rapporteur for the United Nations has found that Russia's eighteen-month limit on pretrial detention violates Article 9(3) of the International Covenant on Civil and Political Rights and that the rate of detention is excessive (from 30 to 50 percent of persons facing at least one-year imprisonment). The figure in France, for comparison, is around 10 percent. The population in Russia's preventive detention centers rose from 238,000 in 1994 to about 300,000 in 1999.

Article 22(2) of the Constitution states that deprivation of liberty, including preventive detention, is only possible with a "judicial decision" and that such decision must be taken within forty-eight hours of arrest. Unfortunately, the Russian legislature has never enacted legislation implementing this constitutional protection. A halfway measure was enacted on 23 May 1992, which provided for the first time in modern Russian history a mechanism to appeal the procurator's decision on preventive detention to the courts. A detained person's petition for release must be conveyed to the court and procurator within twenty-four hours. Documents relevant for the decision of the case must be transferred to the court within an additional twenty-four hours (Art. 220.1 CCP). The judge must then decide the issue within three days of receiving the aforesaid documents (Art. 220.2 CCP). Although judges began granting such motions for release, officials of the procuracy and the Ministry of the Interior, which controls the police and prisoner transport, flouted the law and often refused to produce the prisoner or the papers required to decide the issue within the statutory time limit. They would also often re-arrest persons released by judges before they could leave the courtroom. On 14 June 1994, President Yeltsin himself violated the Constitution by issuing an edict on "immediate measures to defend the population from banditry and other manifestations of organized

crime" that allowed detention of suspects for up to thirty days without charges.

To protect suspects against being coerced to confess to crimes, a recurrent problem in Soviet times, a constitutional right to counsel from the moment of arrest or detention was introduced (Art. 48(2) Const. RF). In addition, Article 51 of the Constitution guarantees the right not to testify against oneself, and the Supreme Court has interpreted this to mean that the police, procurator, or investigator must advise a suspect of the right to remain silent and of the right to counsel before commencing an interrogation. Counsel will be appointed for the indigent. Unfortunately the police routinely coerce suspects into "waiving" their right to counsel. Even where investigators try to supply a suspect with appointed counsel, lawyers sometimes refuse to represent indigent defendants because of the low pay for court-appointed lawyers. If suspects refuse to give a statement they are often tortured. There have been estimates that around 40 percent or higher of all suspects are tortured, usually through beating, but also by asphyxiation or electric shock. Police give other inmates in the pretrial detention facilities special privileges to beat, rape, or otherwise force suspects into confessing. Just the veiled threat of torture induces suspects to confess, even sometimes to crimes they did not commit.

Article 23(2) of the Constitution requires a judicial decision for any invasions of the right to privacy in one's writings, telephone conversations, and postal or telegraphic communications, and Article 24 requires a judicial decision for invasions of the home. Despite this and comparable provisions in the European Convention of Human Rights, such searches and seizures may still be authorized by the procurator alone. To prevent crimes the 1995 Law on Operational Investigative Activities has also given the police broader powers than those enumerated in the CCP to engage in both open and secret investigative activities. The law includes provisions dealing with wiretapping, electronic interception of conversations, controlled deliveries and the use of undercover informants but lacks adequate guidelines for issuance of warrants, or notifying targets of the measures after they have been undertaken. Russia's failure to eliminate the procurator's power to authorize invasions of constitutionally protected citizens' rights, a power recognized as belonging exclusively to a judge in modern human rights documents, can be attributed to the procuracy's staunch opposition to all reforms aimed at undermining its power.

Created by Peter the Great in 1722, the procuracy came to be known as the "eye of the emperor" due to its exercise of oversight over all judicial and administrative bodies. Although the procuracy was stripped of these "supervisory" functions pursuant to the reforms of 1864, and restricted for the most part to the prosecution of criminal cases, the Bolsheviks resurrected the pre-1864 model of the procuracy in 1922, vesting it again with general powers to supervise the legality of acts of administrative officials and the courts. The Soviet procuracy was undoubtedly the most powerful institution in the administration of justice. When citizens complained of a violation of their rights, their remedy, ironically, was to appeal to the procurator, not a court, at a time when the procuracy itself was working closely with the Committee of State Security (KGB) in investigating, arresting, and prosecuting dissidents. The only success reformers have had in limiting the institutional power of the procuracy was the elimination of its oversight of the courts, which was accomplished by the Law on the Procuracy passed by the Supreme Soviet on 17 January 1992.

When the investigator determines that there is sufficient evidence to hold the accused to answer for trial he prepares an accusatory pleading and forwards it to the procurator for review. The accused and his counsel have, at this point, the right to full discovery of the entire contents of the investigative dossier. The procurator may dismiss the case, amend the pleading, or forward the case to the court for trial.

Fair trial and independent judiciary

Article 120 of the Constitution proclaims that "judges are independent and are subordinate only to the Constitution of the Russian Federation and federal law." Article 6 of the European Convention of Human Rights also guarantees the right of every criminal defendant to an independent judge. Prior to 1864 the courts were subservient to notoriously corrupt provincial governors. The 1864 reforms set up the framework for a genuinely independent judiciary with life tenure and introduced trial by jury to further liberate judges from the influence of local officialdom. The Bolshevik Decree on the Courts of 7 December 1917, however, put an end to an independent judiciary and the jury court was eventually replaced by a mixed court composed of

one career judge, elected for a term of five years by local party officials, and two "people's assessors" also selected by party-controlled collectives. Although the Soviet mixed court looked superficially similar to the German *Schöffengericht*, the court became dependent on local officials (of the government and party), much as had the pre-1864 courts. The people's assessors were nicknamed the "nodders" because they virtually never outvoted the professional judge. The professional judge, on the other hand, relied on local officials for being nominated, retained in office, and for obtaining housing and technical and material support for the court's functioning. In controversial cases "telephone law" prevailed, that is, local officials would telephone the judge and indicate the way the case should be resolved.

The 1992 Law on the Status of Judges increased the social and legal protection of judges and, as amended, guaranteed their tenure in office until the retirement age of sixty-five, after a probationary period of three years. As in 1864, trial by jury was introduced in 1993 as a means of providing citizen participation in the administration of justice but also to insulate judges from outside influences. The reforms have not yet had their desired effects. In 1999 Russia had only 14,352 judges, about half the number of judges as in the Netherlands and far less than the projected number of 35,742. The Russian government has also refused to allocate sufficient budgetary resources to the court system to allow it to function properly. The situation was especially critical in 1998; when many courts were unable to pay their bills and electricity, telephone and other services were cut off. Many courts stopped hearing criminal and civil cases and the ancient Russian menace of judicial subservience to local officialdom resurfaced. As many as half of all district trial courts receive money and other support from regional or local governments or even private businesses, which usually is coupled with demands of the sponsoring parties. Bribery of judges is widespread. To ease the overburdening of the courts, which affects the quality of justice rendered, the 1996 Law on the Judicial System provided for a reinstitution of local justices of the peace (*mirovye sud'i*), a system introduced by the 1864 reforms, as the lowest level in the judicial hierarchy. Justices of the Peace would be competent to handle trials of minor civil and criminal cases and administrative law violations. The Draft Law on Justices of the Peace, however, was vetoed by President Yeltsin in March of 1998 for financial reasons.

Most criminal cases are tried in the district (*rayonnyy*) courts. Cases punishable by no more than five years imprisonment are tried by a single professional judge. Most cases punishable by from five to fifteen years imprisonment, and all juvenile cases, are tried by the Soviet-era mixed court of one professional judge and two "people's assessors." The "people's assessors" are no longer appointed by Communist-controlled collectives, of course, and it has become increasingly difficult to get them to attend court because of the meager pay they receive. The second-level trial courts (one in each of the eighty-nine political subdivisions of the country) hear cases of aggravated (capital) murder and selected other grave felonies. The cases are usually tried by the mixed court. In the areas in which trial by jury functions (as of 2000 only in Moscow, Ivanovo, Riazan, Saratov, Rostov-on-the-Don, and Ul'ianovsk regions and Altay, Krasnodar, and Stavropol territories), the defendant has a choice of being tried by a jury of twelve, presided over by one professional judge, by a panel of three professional judges, or by the mixed court with people's assessors. These courts handle appeals from the district courts as well. A special system of military courts exercises jurisdiction over crimes committed by military personnel.

Under the Jury Law, jurors are randomly selected from Russian citizens at least twenty-five years of age who are registered voters in the region in which the crime was committed. Jurors are required to serve only once a year for not more than ten days or for one case. They are paid one-half of the pro-rata salary of a judge, substantially higher than lay assessors, and this has helped guarantee their attendance at trial. Russia and Spain (1995) have been the only countries on the European continent to return to trial by jury after the institution was virtually eliminated by the totalitarian regimes of the first half of the twentieth century. Although the new constitutions of Belarus (Art. 114) and Kazakhstan (Art. 75(2)) provide for trial by jury, no implementing legislation has been passed.

Judgments and decisions of the second-level courts (whether acting as trial or appellate courts) may be appealed to the Supreme Court of the Russian Federation, the highest normal appellate court in civil and criminal matters. Appeals at all levels are heard by three professional judges without lay participation. The Supreme Court also hears a select number of cases as a trial court composed of one judge and two people's assessors. The Supreme Court consists of 115

judges, divided into criminal, civil, military and cassational panels. It has a governing body called the Presidium, consisting of the president and twelve other judges, which has a power of review over the decisions of the panels.

The Constitutional Court of the Russian Federation, modeled on that of the Federal Republic of Germany, was created in 1991, suspended following Yeltsin's attack on parliament in October of 1993, and reconstituted following the passage of the 1993 Constitution. It now consists of nineteen judges elected by the Federation Council, the upper house of the new parliament, upon nomination by the president. The Constitutional Court can decide the constitutionality of the application of the criminal law in particular cases upon a petition of a citizen or of a lower court in which the particular case is pending. On 31 October 1995, the Supreme Court articulated a policy that the regular courts had authority to determine whether laws, or their application in a particular case, were consistent with the Constitution and international human rights conventions. This power was codified in the 1996 Law on the Judicial System. A criminal defendant who has exhausted all remedies in the Russian courts may file a petition with the European Court of Human Rights in Strasbourg, France, if there is a claim that the authorities violated a right protected by the European Convention on Human Rights. In 1999 the European Court of Human Rights received more complaints from Russian citizens than from any other country, 972 of the 8,396 cases lodged.

The admissibility of evidence

Upon receipt of the case the trial judge reviews the accusatory pleading and, depending on the sufficiency of the evidence, may set the case for trial, return the case to the investigator for further investigation, or dismiss all or some of the charges. This pretrial hearing is often the setting for motions to suppress evidence due to violations of the law committed by investigative officials. The prohibition against the use of illegally seized evidence has been constitutionally based since 1992 (Art. 50(2) Const. RF) and was codified as part of the 1993 Jury Law (Art. 69(para. 3) CCP). In jury cases there is a special preliminary hearing before trial at which motions to suppress illegally seized evidence may be made based on the documents in the investigative dossier (Art. 433 (para. 3) CCP). Motions to suppress evidence have been common in jury trials and are beginning to be made in nonjury trials. The Supreme Court has ruled, for instance, that a statement made by a suspect without having been advised of the right to remain silent or without waiving the right to counsel must be excluded from the trial, a ruling quite similar to the famous decision of the U.S. Supreme Court in *Miranda v. Arizona*. Courts have also routinely excluded evidence seized following unlawful searches or other procedural violations. The Russian exclusionary rule applies to evidence gathered in violation of a statute, even if the violation was not of constitutional magnitude.

The exclusionary rule has not been effectively applied, especially in relation to alleged use of torture or other coercion to compel confessions by suspects. Allegations of the use of improper methods are commonly rejected by the trial judge after at most a perfunctory investigation by the procuracy. The Supreme Court has also ruled that a finding by the trial judge that a confession was voluntary will preclude the defendant or other witnesses from testifying before the jury that the confession was the product of torture, threats, violence, promises, or other inducements and should not therefore be believed.

The criminal trial and the presumption of innocence

In Russian criminal trials, the victim (*poterpevshiy*) has rights equal to the defendant and prosecutor to attend the trial, make a statement, summon witnesses, examine witnesses, argue at the time of sentencing, and even prosecute the case (in jury trials) if he or she disagrees with the procurator's motion to dismiss. As in other European countries, the victim, or anyone else suffering a loss as a result of the allegedly criminal acts of the defendant, has the right to file a civil suit for monetary damages or restitution that will be heard along with the criminal case. The civil party may then join civil defendants other than the accused to answer the claim, such as an insurance company or guardian of the accused.

In jury cases, the trial judge summons twenty prospective jurors selected at random from the jury lists to appear in court on the trial date. The judge questions the jurors to make sure they are qualified and the parties (including the victim) may submit questions in writing to be posed by the judge to determine whether the jurors are biased and thus subject to challenge. The prosecution and defense each have two peremptory challenges that may be used to exclude jurors

without cause. The jury is composed, in the end, of twelve jurors with two alternates.

After the reading of the accusatory pleading the defendant is then asked to enter a plea. If the defendant pleads guilty, this does not end the case as it does in the United States. A guilty plea is just considered to be a piece of evidence and the procurator must present other evidence to corroborate the guilty plea. In jury trials, however, upon an admission of guilt by the defendant, the court may then proceed to closing arguments if there is no dispute about the evidence and the defense and prosecution agree. Legislation was proposed in 1998 to extend this procedure to normal trials but it was defeated in the State Duma. In the late 1990s much interest was shown in introducing some kind of plea-bargaining to reduce court caseloads.

After entry of a plea the defendant is given an opportunity to make a statement. Before doing so, the judge advises the defendant of the constitutional right to remain silent. While defendants usually give their testimony at the beginning of the trial (this is common practice in continental European countries), some judges in jury cases have allowed the defendant to testify later in the proceedings. After the defendant makes a statement (they rarely remain silent), the witnesses and experts testify. In standard inquisitorial fashion it is normally the judge who calls the witnesses and asks them to narrate what they know about the facts that are the subject of the criminal charge. This is quite different from the question-and-answer format followed in direct examination in common law trials. Only after the judge finishes asking follow-up questions to the witnesses, do the other parties have a chance to formulate questions. In Russian mixed courts the lay assessors may also ask questions of the defendant and witnesses, but rarely do. In jury courts, the jurors may submit written questions to be formulated by the presiding judge. The new principle of adversary procedure has led, especially in jury trials, to the judge taking a more passive role and allowing the parties to summon witnesses and do the bulk of the questioning. The 1995 Draft CCP also provides for party control of the summoning and questioning of witnesses.

During Soviet times the presumption of innocence was considered to be "bourgeois nonsense" inconsistent with the inquisitorial nature of Soviet criminal procedure. Although Article 49 of the Constitution now guarantees the presumption of innocence in criminal cases certain old practices persist that seem to contradict such a presumption. One is having the defendant speak first. Another is the provision requiring the trial judge to review the entire investigative dossier before trial to determine whether there is sufficient evidence to convict the defendant. In nonjury cases this ensures that the judge, whether deciding the case alone or as the dominant force in the mixed court, will be practically unable to give the defendant the benefit of a presumption of innocence when the trial begins. For this reason Italian judges are not permitted to read the investigative dossier. The most problematic procedural rule, however, is the power of the trial judge to return the case to the investigator to perform supplementary investigative acts after the trial has begun, in a jury case requiring dissolution of the jury. In Soviet times this rule enabled judges, in cases where there was insufficient evidence to convict, to avoid having to acquit the defendant and thereby impugn the integrity of the investigative organs. On 20 April 1999, the Constitutional Court ruled that this practice violates the constitutional presumption of innocence and the right to adversary procedure. The Constitutional Court indicated that courts should acquit the defendant in such situations.

When all the evidence has been presented, the parties give their closing summations. The last word in the trial is always personally that of the defendant. In jury trials the judge also instructs the jury on the law that is to be applied in the case and must summarize all the evidence that supports both the prosecution and defense theories of the case. It is reversible error for the judge to in any way indicate his or her opinion as to the guilt or innocence of the defendant in doing so.

In cases before the mixed court, the professional judge and the two lay assessors retire to deliberate together, where they must collegially decide all questions of law and fact relating to guilt and sentence. A majority vote is sufficient, whereupon the professional judge formulates a written judgment including the reasons for the findings on guilt and sentence. Prior to deliberation in jury cases the judge formulates a list of questions that the jury must answer. The list must minimally contain questions dealing with whether the acts constituting the crime were committed, whether the defendant was the person who committed them, and whether the defendant is guilty of their commission. Questions are asked separately as to each defendant and some judges formulate separate questions relat-

ing to all relevant conduct charged against the defendant as well as to all excuses or justifications raised by the defense and all aggravating or mitigating factors. In one case over one thousand questions were asked of the jury. Such "question lists" were typical in continental European jury systems during the nineteenth and early twentieth centuries and were meant to give the professional judge the possibility of formulating a reasoned judgment after a jury verdict. Guilty verdicts or answers unfavorable to the defendant require seven votes; not guilty verdicts or answers favorable to the defendant require six votes to be valid. After the jury reaches a verdict, the presiding judge evaluates the legal sufficiency of the jury's answers to the questions and enters a judgment of guilty or not guilty as to each charge. The Supreme Court has ruled that the jury must only decide questions of fact and has reversed many cases because the trial judge has formulated questions that call for legal conclusions.

The shakiness of the presumption of innocence in Russian criminal trials is reflected by the fact that acquittals are almost nonexistent. They occurred in only 0.36 percent of all cases in 1998. During the *perestroika* years the Soviet public was shocked by many stories of innocent people having been convicted due to coerced or tortured confessions and this was one reason why reforms were pushed, among them, that of returning to trial by jury. Indeed, juries have acquitted substantially more than nonjury courts, anywhere from 18–22 percent of the time. A disturbing development has been the refusal of law enforcement organs to accept acquittals. For instance, in November 1999 in Moscow, officers of the Federal Security Service, the successor of the KGB, entered a courtroom in camouflage uniforms and black masks and re-arrested two defendants who had been acquitted at trial by a military court. Such occurrences are not rare.

Review of judgments

The defendant, the procurator, and the victim may appeal judgments at each level of the court structure. The appellate courts are empowered to review questions of fact as well as law. If the accused appeals, the appellate court may not find the defendant guilty of a more serious offense or impose a more severe punishment. The procurator or the victim may appeal, however, and seek to have the judgment overturned, and a more severe punishment may be imposed upon retrial. Unlike in the United States the procurator or the victim may appeal an acquittal. (This is also allowed in many continental European countries.)

The procuracy is quick to appeal nearly every acquittal and the Supreme Court is just as quick to reverse them. In 1997, for instance, the Supreme Court reversed 33.1 percent of all acquittals and only 2.5 percent of guilty verdicts. The Cassational Panel of the Supreme Court, responsible for hearing appeals of jury cases, overturned 66 percent of all jury acquittals in 1998. In a few jury cases persons have been acquitted two or three times, only to have their acquittals reversed and new trials ordered by the Supreme Court. Grounds for reversals of jury acquittals have been faulty preparation of the question list, defense testimony relating to unlawful methods used by the police to obtain confessions, and erroneous exclusion of incriminating evidence (i.e., a confession), thus depriving the state of the right to a fair trial. Although many of the acquittals were for atrocious murders, the Supreme Court seems to be reversing acquittals as an obedient warrior in the battle against crime, not as an impartial institution of the rule of law as it was supposed to become as a result of the democratic reforms.

The appellate courts may also reverse a lower court judgment on grounds not pleaded by the parties. Finally, final judgments may still be subject to "review" (*nadzor*). Pursuant to this procedure, higher courts may, on their own initiative or upon petition of the procurator (but not the defense), review final judgments of lower courts, and court presidiums may review decisions of their own panels and overturn them if they are not to their liking. This inquisitorial mode of review has been criticized as being in violation of the constitutional right to adversary procedure and equality of the parties in the trial. It is also a tool used by the higher courts to enforce conformity in decision-making in the lower courts and to discipline judges who seek to be independent in their resolution of cases. At least one of the successor states of the Soviet Union, Georgia, has abolished this type of "review" in its new Code of Criminal Procedure.

Substantive criminal law

The de-sovietization of criminal law began during the latter years of *perestroika* when the Penal Code of 1960 was heavily amended to eliminate offenses such as anti-Soviet agitation,

defaming the Soviet State, and parasitism, alleged violations of which had sent hundreds of thousands of Soviet citizens to the Gulag. But the code was also obsolete, especially due to the profound economic changes triggered by the massive privatization of state property and the move to a capitalist market economy. The 1996 Criminal Code is divided into a General Part, containing general principles relating to criminal responsibility and assessment of punishment, and a Special Part, listing the various offenses and the punishments threatened for the commission thereof. Although Russians continue to define crime, as in Soviet times, as a "socially dangerous act," the "goals" of the code and the interests it protects are no longer related to "the socialist legal order" as was the case under the old code. In most Western countries neither a substantive general definition of crime, nor a list of protected interests is provided. A purely formal notion prevails, whereby any act punishable in the criminal code is a crime. The new Russian code incorporates universally recognized principles of criminal law such as that of no punishment without a written law, no retroactive laws, and so on.

The general part. Persons are subject to the criminal law when they reach the age of sixteen years for normal crimes, and fourteen years for murder and other grave crimes. Persons who are insane at the time of commission of a crime may not be convicted thereof. A person is insane under the Russian Criminal Code if he or she "could not understand the factual character and social dangerousness of his acts (omissions) or control them as a result of chronic psychic disturbance, temporary psychic disturbance, imbecility or any other sick state of the psyche" (Art. 21 CC). Though Soviet criminal law did not recognize any form of diminished criminal responsibility for those who suffered from mental illness but were not legally insane, this has been included in the new code, but only as a mitigating factor in sentencing. Due to the staggering rate of alcohol-induced violent criminality throughout Russian history, being intoxicated has never been admissible to diminish criminal responsibility or mitigate punishment. While this remains true under the new code, being drunk is no longer an aggravating circumstances in sentencing as it was under the old code.

The new Criminal Code introduces some new factors that exclude guilt to go along with traditional justifications such as self-defense or necessity, or excuses such as duress. These include "innocent infliction of harm," by persons who, due to objective or subjective (mental) circumstances, could not have appreciated the dangerousness of their acts or have prevented the harm (Art. 28 CC), or who inflict harm while taking a socially useful justified risk (Art. 41 CC). Other innovations are that first-time offenders who commit less serious crimes can be freed of criminal responsibility if they engage in "active remorse" in the form of turning themselves in, aiding in the solving of the crime, or making restitution (Art. 75 CC). Reconciliation with the victim (Art. 76 CC) or a change in conditions that has caused either the offender or the crime to no longer be socially dangerous (Art. 77 CC) will also lead to release from criminal responsibility. Prosecutors have used these provisions to fashion bargains with offenders to work with the authorities in exchange for a dismissal, practices that compensate for the lack of statutorily recognized plea bargaining and a relative lack of prosecutorial discretion.

The goal of punishment under the new code is the re-establishment of social justice, the rehabilitation of the convicted person, and the prevention of the commission of new crimes (Art. 43 CC). The widely used Soviet punishment of banishment was abolished toward the end of the *perestroika* period, but the 1996 Criminal Code still includes the death penalty and other common forms of punishment: fine, prohibition to engage in a profession, confiscation of property, and deprivation of liberty among others. The death penalty can only be imposed for especially grave crimes against life and may not be imposed against women, men under eighteen years of age at the time of the commission of the offense, or men over sixty years of age at the time of judgment (Art. 59 UK). Whereas fifteen years was the maximum period of imprisonment under the old code, the 1996 code introduces life imprisonment as an alternative to the death penalty, and a maximum imprisonment of twenty years for noncapital crimes and thirty years if a person is sentenced for multiple crimes.

The death penalty. Although Empress Elizabeth was one of the first monarchs to abolish the death penalty in 1753, the ban remained in force only for a short time. Besides the extrajudicial murders of millions by Soviet authorities during its rule, death sentences were handed down by Soviet courts often and not only as punishment for murder. Because the Soviet Union did not publish criminal justice statistics it is difficult to know how many people were judicially executed

until the *glasnost* reforms instituted under Mikhail Gorbachev. Executions decreased during the *perestroika* years from 770 in 1985 to 195 in 1990. It was only in 1991 that the death penalty was eliminated for economic crimes, such as theft of socialist property, bribery, and illegal currency transactions, and not until 1994 that it was eliminated as a punishment for counterfeiting. The number of executions during Yeltsin's presidency fluctuated depending on presidential politics. In 1992 the president established a Clemency Commission that commuted 337 of the 378 death sentences submitted to it. Suddenly, however, Yeltsin proclaimed a tougher policy in the fight against crime and only five of 129 death sentences were commuted, and fifty-six persons were executed in 1996 after Russia had declared a moratorium on executions as a condition of its entry into the Council of Europe. Russia was strongly criticized by the Council of Europe and no executions have apparently taken place since August of 1996. The Sixth Protocol of the European Convention of Human Rights declares the death penalty to be a violation of the right to life.

Between 1989 and 1992 most of the former socialist countries of non-Soviet Europe abolished the death penalty. With respect to the successor states to the Soviet Union, Latvia declared a moratorium on executions in 1996 and finally eliminated the death penalty in 1999. The Lithuanian Constitutional Court struck down the death penalty in 1998 and eliminated it from its Criminal Code in 1999. Both countries, as well as Estonia, which has declared a moratorium on the death penalty, are full members of the Council of Europe. Like Russia, Ukraine agreed to a moratorium on executions as a condition of entering the Council of Europe, but outraged that body by secretly executing thirteen people in 1997. The Ukrainian parliament finally eliminated the death penalty in February of 2000. Membership in the Council of Europe has also pushed Moldavia (1995), Georgia (1997), and Azerbaijan (1998) to abolish the death penalty and Armenia to abide by an unofficial moratorium. Belarus, which has still not been accepted into the Council of Europe, executed thirty persons in 1997 and still enforces the death penalty. In Soviet Asia, Kyrgystan declared a moratorium (December 1998), though courts continued to impose death sentences as of January 2000. Turkmenistan executed around four hundred persons in 1996 and sentenced seven hundred to death in 1997, mostly for drug-related crimes. In 1999, however, it also declared an official moratorium. In 1996 Kazakhstan executed forty-two persons and made a reduced number of offenses punishable by death in its new Criminal Code, which went into effect 1 January 1998. Death sentences continue to be imposed and executed in Tadjikistan and Uzbekistan as well, six having been executed in the latter republic in January 2000. All Soviet Asian states with the exception of Kyrgystan still impose the death penalty for drug trafficking.

Even after Russian executions stopped in August 1996, trial courts continued to sentence people to death in aggravated murder cases and these sentences were often affirmed by the Supreme Court. On 2 February 1999, however, the Constitutional Court declared that the death penalty could no longer be imposed on equal protection grounds. Inasmuch as Article 20 of the Constitution guarantees the right to trial by jury for anyone facing the death penalty and the jury system only functions in nine Russian regions and territories, the Court held that no death sentences could be imposed anywhere until trial by jury was available throughout Russia.

The special part of the criminal code. The Criminal Code contains a typical list of crimes against the person (homicide, sexual offenses, assaultive conduct), but also includes an offense punishing the transmission of venereal diseases or the HIV virus (Arts. 121–122 UK). Chapter 19 of the Criminal Code punishes violations against "the constitutional rights and freedoms of the person and citizen," among them acts infringing on the inviolability of one's private life, correspondence, and dwelling or on the liberty of confession or assembly, rights that went unprotected in Soviet times.

Among the most radical changes in the 1996 Criminal Code are those contained in Section VIII relating to "Crimes in the Economic Sphere." Under Soviet Law all types of private enterprise were illegal and, at times, severely punished. Theft of state property was considered a more serious crime than theft of private property. Entrepreneurial activity is now protected by the Constitution and regulated in the criminal law, with offenses punishing the hindering of legal entrepreneurial activity, but also engaging in illegal business dealings such as money laundering, restricting competition, false advertising, securities or credit fraud, fraudulent bankruptcy, tax evasion, and consumer fraud. Drafters of these provisions used the American Model Penal Code as a model. New provisions punish "ecological crimes" and "crimes in the sphere of com-

puter information," including hacking and creating viruses (Arts. 272, 273 CC). Russia has suffered disastrous ecological consequences from the near complete absence of laws regulating defense and heavy industry during Soviet times. The new code punishes seventeen separate environmental crimes, some relating to general violation of rules, others to improper handling of dangerous substances such as biological agents or toxins, still others protecting distinct resources such as water, the atmosphere, the sea, the continental shelf, the soil, the subsoil, and flora and fauna (Arts. 248, 250–262 CC).

The new code punishes incitement to national, racial, or religious hatred (Art. 282 CC), an important provision in a racially, ethnically, and religiously diverse country with a history of conflict among the various groups. Chapter 30 punishes abuse of public office, bribery, and so on (Arts. 285–293 UK). Despite the rampant corruption at all levels of Russian government there have been no prosecutions during the Yeltsin years of the ruling political elite connected with the corrupt privatization of Soviet industry and the granting of sweetheart export and customs privileges. Nor have the provisions of Chapter 31 relating to "crimes against the administration of justice" (Arts. 294–316 CC) been enforced, despite the open refusal of executive organs of the administration of justice to abide by judicial decisions and the increase of violent attacks on judges.

Finally, the 1996 Code has aimed to strengthen the provisions designed to fight organized crime. The general part of the code provides for aggravation of sentences if a crime is committed by a group of persons pursuant to a conspiracy, by an organized group or criminal organization (Art. 35 CC). Chapter 24 punishes individual "crimes against social security" such as terrorism, taking hostages, organizing an illegal armed group, and formation of a criminal organization. In 1998, 28,633 crimes were committed by organized groups or criminal organizations (including 152 contract killings).

Sentencing and the prison system

On 1 July 1997, the "Criminal-Execution Code of the Russian Federation" was passed. In light of the notoriously brutal conditions in prison camps during Soviet times, the new Code explicitly lays out the rights and duties of prisoners. With some exception, persons sentenced to imprisonment are required to serve their sentences in correctional institutions within the territory of the Russian Federation in which they lived or were sentenced. Most sentenced prisoners do their time performing hard labor in "correctional colonies" with various levels of regimes depending on the severity of the crime committed.

In 1998 Russia imprisoned 700 persons per 100,000 population, the second highest rate in the world after Rwanda, slightly higher than the United States (668 per 100,000) and around fifteen times higher than in most European countries. As of 1 July 1997, the total prison population in Russia was 1,017,848, of which 275,567 were in pretrial detention centers intended for a maximum of 182,358 detainees. To alleviate the overcrowding of Russia's prisons the State Duma adopted an amnesty law on 18 June 1999 to compel the release of around 100,000 detainees and prisoners. Tuberculosis caused the death of 178 prisoners out of every 100,000 in 1995. In 1998 nearly 100,000 prisoners were diagnosed as being infected with the disease, 10 percent of the total number of inmates, and thirty thousand have an untreatable and deadly form thereof. Overall, 720 of every 100,000 prisoners died in confinement in 1995, a great number thereof from tuberculosis, asphyxiation, and suicide.

Crime in post-Soviet Russia

According to Soviet ideology, crime was a "bourgeois" phenomenon, an excrescence of capitalist society that would disappear in a mature communist system. Crime statistics were not published until Gorbachev's *glasnost* reforms so one does not have a clear idea of the level of crime in Soviet society. But there is little doubt that crime has risen dramatically since the dismantling of the Soviet administrative-command economy. Not only is corruption rampant at every level of local and national government, but the new capitalist economy is widely controlled either by organized crime or by so-called oligarchs who obtained large chunks of the former state economy for a fraction of their value in exchange for sweetheart relationships with government officials at all levels. Russia's immense wealth is being pillaged through the selling off of former state assets and natural resources as well as transfer-pricing and stock manipulations, and the proceeds are being invested overseas instead of in Russia. Organized criminal gangs, estimated in the mid-1990s to number around three thousand (in about fifty overarching syndicates),

are active throughout Russia. The catastrophic fall in gross national product, the inability to collect taxes, and two devastating and costly wars in the breakaway Republic of Chechnya have left the Russian government in a continuing fiscal crisis. The number of registered crimes was 16.3 percent higher in 1999 than in 1998 and has risen every year since the early 1990s. Violent crimes, and especially murders, have reached shocking proportions. The number of intentional murders reported in 1999 was 31,140 (in a population of around 147 million), compared with "only" 16,910 in the United States in 1998 (in a population of around 270 million). The government of Vladimir Putin, elected to succeed Boris Yeltsin as president of the Russian Federation on 26 March 2000, must redirect the executive branch of government to fighting crime, instead of participating in it, to strengthening the judicial branch of government, instead of sabotaging its enforcement of the presumption of innocence and the right to a fair trial, and to pushing to perfect the reforms, instead of obstructing them at every step of the way.

STEPHEN C. THAMAN

See also ADVERSARY SYSTEM; COMPARATIVE CRIMINAL LAW AND ENFORCEMENT: CHINA; CRIMINAL LAW REFORM: CONTINENTAL EUROPE; CRIMINAL PROCEDURE: COMPARATIVE ASPECTS; PROSECUTION: COMPARATIVE ASPECTS.

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COMPETENCY TO STAND TRIAL

If at any time in the criminal proceedings the defendant appears to be suffering from a mental illness, the issue of competence to proceed may be raised. This may occur when the defendant seeks to plead guilty or to stand trial. It may occur when the defendant seeks to waive certain constitutional rights, such as the Fifth Amendment or *Miranda v. Arizona*, 384 U.S. 436 (1966), or the Sixth Amendment right to counsel or to a jury trial. Even after conviction, the issue may be raised at a sentencing hearing, or when the government seeks to administer punishment, including capital punishment. The issue usually is raised by defense counsel by oral or written motion, but also may be raised by the prosecution or by the court itself, even over the objection of the defendant, who may prefer to proceed despite the existence of mental illness.

Several studies conclude that the vast majority of defendants are referred inappropriately for competency evaluation and have suggested that the competency process often is invoked for strategic purposes. The issue may be raised by both sides to obtain delay, by prosecutors to avoid bail or an expected insanity acquittal, or to bring about hospitalization that might not otherwise be available under the state's civil commitment statute, or by defense attorneys to obtain mental health recommendations for use in making an insanity defense, in plea bargaining, or in sentencing.

Under *Drope v. Missouri*, 420 U.S. 162 (1975), and *Pate v. Robinson*, 383 U.S. 375 (1966), the court must conduct an inquiry into competence whenever a bona fide doubt is raised concerning the issue. Even after the criminal trial has commenced, the court must order a competency evaluation when reasonable grounds emerge to question the defendant's competence. If this does not occur even though a bona fide question of competence exists, any resulting conviction will violate due process.

When is such a bona fide doubt raised? According to *Drope v. Missouri*, "[e]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." The Court noted that there are "no fixed or immutable signs which invariably indicate the need for further inquiry;" instead, "the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated" (p. 180). As a result of *Drope* and the rule of *Pate* that due process is violated if an incompetent defendant is subjected to trial, courts typically order a formal competency evaluation in virtually every case in which doubt about the issue is raised.

What happens when the court fails to order a competency determination when the evidence raises a bona fide question concerning the issue? When the defendant is subjected to trial in the absence of such a determination, any ensuing conviction would violate due process and must be reversed under *Pate v. Robinson*. Can a court retrospectively conduct the needed inquiry into competence after the trial has occurred? Although *Pate* seemed to indicate that an automatic reversal of such a conviction would be required, lower courts have sometimes permitted such a retrospective competency assessment when such a determination is thought to be feasible in the circumstances.

The competency standard and its application

Mental illness alone, even a diagnosis of schizophrenia, will not automatically result in a finding of incompetence. The question is the degree of functional impairment produced by such illness. To be found incompetent, such mental illness must prevent the defendant from understanding the nature of the proceedings or from assisting counsel in the making of the defense. This standard focuses upon the defendant's mental state at the time of trial. By contrast, the legal insanity defense focuses upon the defendant's mental state at the time when the criminal act occurred, and seeks to ascertain whether he or she should be relieved of criminal responsibility as a result. The Supreme Court's classic formulation of the standard for incompetency in the