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# *The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy*

STEPHEN C THAMAN

## I. INTRODUCTION

Our obtuse, our blinkered, our hulking brute of a judicial system can live only if it is infallible.

Alexander Solzhenitsyn, *The Gulag Archipelago*.<sup>1</sup>

**T**HE SOVIET CRIMINAL justice system fits squarely into the hierarchical, policy-implementing (and traditionally inquisitorial) model that Mirjan Damaška elaborated in his book *The Faces of Justice and State Authority*.<sup>2</sup> The overarching policy of Communist Party officialdom was one of no acquittals. This policy was dutifully carried out by its cadre of criminal justice officials from the police, criminal investigator (*sledovatel*), prosecutor (*prokuror*), and trial and appellate judge, as the raw material of the case, the *dossier*, made its way along the assembly line.<sup>3</sup>

The 15 republics which became independent after the collapse of the Soviet Union in 1991<sup>4</sup> inherited this system and are attempting to reform it

<sup>1</sup> A Solzhenitsyn, *The Gulag Archipelago* vol 3 (London, Fontana, 1979) 520.

<sup>2</sup> MR Damaška, *The Faces of Justice and State Authority* (New Haven, Yale University Press, 1986) 11–17.

<sup>3</sup> Many innocent suffered. According to a 1986 study, approximately 2,500 citizens were ‘illegally arrested’ and more than 3,000 wrongfully prosecuted each year. T Foglesong, ‘Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pretrial Detention in Russia’ (1996) 14 *Wisconsin International Law Journal* 541, 547–48.

<sup>4</sup> I will use the first two letters of these republics when referring to their codes and constitutions, which are listed in Appendix A: Armenia (AR), Azerbaijan (AZ), Belarus (BE),

by introducing institutions from what Damaška calls the co-ordinate, problem-solving (and largely non-inquisitorial, that is, adversarial) systems of justice modeled upon Anglo-American criminal procedure.<sup>5</sup>

This essay will focus on three of these institutions, adversary procedure, plea bargaining, and jury trial. Jury trial and adversary procedure were already articulated as principles for criminal justice reform during the Soviet *perestroika* period<sup>6</sup> and became the keystones of the 1991 Concept of Judicial Reform of the Russian Republic,<sup>7</sup> the most comprehensive blueprint for judicial reform to be drafted in post-Soviet lands. They sought to improve the quality of the evidence presented to the trier of fact through adversarial testing, and to liberate the trial judge from dependence on the prosecutor and executive organs. Juries would enable the court to acquit when the evidence was clearly insufficient to overcome the presumption of innocence. Plea-bargaining and guilty pleas were part of a later reform agenda and were introduced for reasons of procedural economy.<sup>8</sup> We will discuss the impact of these reforms and assess whether they have led to an improvement in the quality of the evidence presented to the trier of fact, a liberation of the trial and appellate judges from the juggernaut of hierarchical Soviet ‘crime control’ policies, and the development of a culture where acquittals of guilty and innocent will be tolerated when the evidence lacks credibility or is insufficient to constitute proof beyond a reasonable doubt.

## II. FROM INQUISITORIAL TO ADVERSARIAL TRIAL?

### The Preliminary Investigation and the Preparation of the Dossier

#### *The Lack of Adversariality in the Preliminary Investigation*

The raw material of the Soviet inquisitorial assembly line of pre-determined justice was the dossier, which each official inspected, added value to, and stamped for quality as it passed to the next stage of production. Each official, from police to trial and appellate judge, had the same duty: to ‘take all measures provided by law for the all-sided, complete

Estonia (ES), Georgia (GE), Kazakhstan (KA), Kyrgyzstan (KY), Latvia (LA), Lithuania (LI), Moldova (MO), Russia (RU), Tajikistan (TA), Turkmenistan (TU), Ukraine (UK), and Uzbekistan (UZ). I will also refer to the Model Code of Criminal Procedure for the Commonwealth of Independent States (1996), which had a great influence on the reforms in all but the Baltic Republics of Estonia, Latvia and Lithuania.

<sup>5</sup> Damaška, above n 2, at 11–17.

<sup>6</sup> See SC Thaman, ‘The Resurrection of Trial by Jury in Russia’ (1995) 31 *Stanford Journal of International Law* 61, 70.

<sup>7</sup> See *Ibid* 72–74, for a discussion of the ‘Concept of Judicial Reform.’

<sup>8</sup> MR Damaška, ‘Models of Criminal Procedure’ (2001) 51 *Zbornik (collected papers of Zagreb Law School)* 477, 485.

and objective investigation of the circumstances of the case' – that is, to ascertain the truth, the quintessential goal of inquisitorial justice.<sup>9</sup>

Today, the constitutions of several<sup>10</sup> and the Codes of Criminal Procedure of nearly all post-Soviet republics<sup>11</sup> prescribe 'adversarial procedure' (*sostiazatel'nost'*) and equality of arms as governing principles, but commentators tend to limit them to the trial stage of procedure.<sup>12</sup> No post-Soviet codes accord the defence broad adversarial rights at the preliminary investigation, and, in particular, do not allow the defence to be present when witnesses are being interviewed or other evidence gathered.<sup>13</sup> Few of the post-Soviet republics<sup>14</sup> have instituted pre-trial procedures to preserve witness testimony which guarantee the right to confrontation required by international conventions to which the post-Soviet republics are parties.<sup>15</sup>

<sup>9</sup> S 20 Ugolovno-protsessual'nyy kodeks RSFSR, Affirmed by Supreme Soviet of the RSFSR. 27 Oct 1960 published in *Zakony RSFSR I Postanovleniia Verkhovnogo soveta RSFSR* (Moskva, Verkhovnyy Sovet RSFSR, 1960). The CCP-RSFSR, virtually identical to the codes in force in the other 14 Soviet Republics, will be used as the Soviet-era model. Similar language is still found in CCP-TA s 15(1); CCP-draft-TU s 23; CCP-UZ s 15. The judge, as last in line, was obligated to ratify the results of the officials who preceded him. TG Morshchakova, *Rossiyskoe pravosudie v kontekste sudebnoy reformy* (2004) 178.

<sup>10</sup> Art 123(3) Const-RU provides that 'court procedure is realised on the basis of adversary procedure and equality of the parties.' For similar sections, see Art 148, Const-AZ, Art 115, para 1, Const-BE, Art 85(3) Const-GE, Art 129(3) Const-UK.

<sup>11</sup> CCP-AR s 23(1); CCP-AZ s 32(1); CCP-BE s 24(1); CCP-ES s 14(1); CCP-GE s 49; CCP-KA s 23(1); CCP-KY s 18(1); CCP-LI s 7(1); CCP-RU s 15; CCP-Draft-TU s 22(1); CCP-UK s 16–1.

<sup>12</sup> See IF Demidov, 'Proekt UPK v svete ego osnovnykh poniatii' in *Sudebnaia reforma v Rossii: problemy sovershenstvovaniia protsessual'nogo zakonodatel'stva* (Moskva, R Valent, 2001) 230, 236. On the inquisitorial nature of the American pre-trial, see *McNeil v Wisconsin*, 501 US 171, 181 (1991). Soviet theorists felt that the investigator could incorporate the roles of accuser, defender and judge within himself and maintain complete neutrality. Mikhaylovskaya, below n 52, at 9–10.

<sup>13</sup> A right to participate is usually granted only with 'permission' of the investigator: see Model Code s 104(1)(3), as well as CCP-AR s 73(1)(3); CCP-KA s 69(2); CCP-KY s 40(1)(11); CCP-UK s 48(4). In RU there is also no express right to counsel during confrontations between witnesses, CCP-RU s 192, or line-ups involving the defendant, CCP-RU s 193.

<sup>14</sup> For exceptions, see CCP-LI ss 179, 234; CCP-MO s 109(3). For a discussion on the trend to 'adversarialise' the preliminary hearing see SC Thaman, *Comparative Criminal Procedure: A Casebook Approach* (Durham, NC, Carolina Academic Press, 2002) 37–38.

<sup>15</sup> Art 6(3)(d) of the European Convention on Human Rights (hereafter ECHR) and Art 14(3)(e) of the International Covenant on Civil and Political Rights (hereafter ICCPR) guarantee the right to confront the state's witnesses. Armenia, Azerbaijan, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia and Ukraine are bound by the ECHR and all the republics are bound by the ICCPR.

*'Long Live the Queen!' Confessions as the Queen of Evidence*

The coerced confession was traditionally the centerpiece of nearly all Soviet-era prosecutions despite its inherent unreliability.<sup>16</sup> This has changed little in post-Soviet times.<sup>17</sup> The investigator assembles the rest of the dossier – witness statements, expert opinions, reports of investigative acts – to corroborate the ‘truth’ of the confession.

The move from inquisitorial to adversary procedure should signify a demotion of the search for truth, to the level of other important values protected by modern constitutions such as the right to privacy, the right to human dignity, the right to due process, etc.<sup>18</sup> Many of the post-Soviet republics have paid lip service to these rights by making exclusion of illegally gathered evidence a constitutional command;<sup>19</sup> and by enacting provisions broader than those in most countries, excluding evidence gathered in violation of constitutional<sup>20</sup> as well as mere statutory norms.<sup>21</sup>

But although the right to remain silent is guaranteed in nearly all the post-Soviet republics,<sup>22</sup> and defendants must be advised of this right and

<sup>16</sup> R Conquest, *The Great Terror: A Reassessment* (New York, OUP, 1990) 121–24. Vysinskiy and others have called the confession the ‘queen of evidence’. SC Thaman, ‘Miranda in Comparative Law’ (2001) 45 *Saint Louis University Law Journal* 581.

<sup>17</sup> In Russia, it has been estimated that up to 50% of all criminal defendants, and 80% of those who refuse to admit guilt, are subject to torture or ill-treatment. The practices include asphyxiation, beatings, electroshock, threats and use of fellow prisoners to mistreat uncooperative suspects. D Lohman, *Confessions at any cost: police torture in Russia* (New York, Human Rights Watch, 1999) 1, 21, 36. On the use of coerced confessions in Azerbaijan, Georgia and Ukraine, see NP Kovalev, *Lay Adjudication Reforms in the Transitional Criminal Justice Systems of the Commonwealth of Independent States* (Doctoral Dissertation, Belfast, Queen’s University, 2007) 136, 139, 347. For evidence that this practice exists in all post-Soviet republics, see ‘US State Department Country Reports on Human Rights Practices’ (2006), available at <<http://www.state.gov/g/drl/rls/hrrpt/2006/>> accessed 15 June 2008.

<sup>18</sup> On exclusionary rules related to the determination of truth, and those based in other important values, see MR Damaška, ‘Evidentiary Barriers to Conviction and Two Models of Criminal Procedure’ (1973) 121 *University of Pennsylvania Law Review* 506, 513.

<sup>19</sup> Art 42(2) Const-AR; Art 71(3) Const-AZ; Art 27(2) Const-BE; Art 42(7) Const-GE; Art 77(3)(9) Const-KA; Art 89(2) Const-KY; Art 50 Const-RU; Art 62(3) Const-UK.

<sup>20</sup> In CCP-LA s 130(2,3), the court will weigh whether a violation was ‘substantial’ and decide admissibility based thereon, unless the procedure involved use of force, threats, coercion, or violation of basic principles of criminal procedure.

<sup>21</sup> For provisions including mere statutory violations: CCP-BE s 105(4); CCP-GE s 7(6); CCP-KA s 116(4); CCP-KY s 6(3); CCP-LI s 19(4); CCP-RU s 75(1). For a comparison of modern approaches, see SC Thaman, ‘Wahrheit oder Rechtsstaatlichkeit: die Verwertung von verfassungswidrig erlangten Beweisgeständen im Strafverfahren’ in J Arnold *et al* (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70. Geburtstag* (München, CH Beck, 2005) 1042–44.

<sup>22</sup> Art 42(1) Const-AR; Art 74 Const-AZ; Art 27, para 1, Const-BE; Art. 22(3) Const-ES; Art. 42(8) Const.-GE; Art. 77(3)(7) Const-KA; Art. 51 Const-RU; Art. 63, para 1, Const-UK. It is statutorily guaranteed in: Model Code s 25(1) and CCP-AR s 20(1); CCP-AZ s 20(1); CCP-BE s 10(4); CCP-GE s 73(1)(b); CCP-KY s 12(2); CCP-MO s 21; CCP-RU s 47(4)(3); CCP-draft-TU s 25(1); CCP-UK s 63, para 1.

the right to counsel before being interrogated,<sup>23</sup> the right may be waived and police and investigators routinely use illegal methods to obtain such waivers. This fact led Russia to introduce a strict exclusionary rule which applies to confessions taken in the absence of counsel, if the defendant retracts the confession at trial.<sup>24</sup> Nevertheless, Russian police and investigators have found a way around this protection by using the so-called ‘pocket lawyer’ (*karmanyy advokat*), who actively work with the investigator or police in encouraging the suspect to confess and on occasion watch while the suspect is tortured.<sup>25</sup>

### **The File at Trial: Undermining the Presumption of Innocence and the Right to Confrontation**

Today, as in Soviet times, the trial judge is either the sole trier of fact, or clearly calls the shots as part of a collegial mixed court of ‘people’s assessors’ (commonly known as ‘nodders’), who are responsible for deciding all questions of fact, law, guilt and sentence.<sup>26</sup> The only exceptions are the tiny amount of jury trials provided for in Russian law.<sup>27</sup>

In Soviet theory, adversary procedure could co-exist with an active trial judge who was obligated to ascertain the truth<sup>28</sup> and this position still finds support today.<sup>29</sup> However, the predominant theory now entrenched in

<sup>23</sup> CCP-AR s 211(3); CCP-AZ ss 90(7)(10), 232(4); CCP-ES ss 34, 75(2); CCP-GE s 310(2,3); CCP-KA ss 114, 216(3), 217(2); CCP-KY s 191(2); CCP-LA ss 150, 265(1); CCP-MO ss 64(2), 104(1); CCP-RU ss 173, 47(4)(3,8); CCP-draft-TU s 255(3). See also Model Code ss 252(3), 253(8). Only in CCP-TA ss 53.1, 412.11 and CCP-UZ s 47, para 2, does one find the old Soviet admonition which is limited to the ‘right to give evidence’. Cf CCP-RSFSR s 47, para 2.

<sup>24</sup> CCP-RU s 75(2)(1). *Kommentariy* (2002), below n 49, at 206.

<sup>25</sup> The lawyer will then be a witness for the prosecution that no torture was used. *Confessions at any cost: police torture in Russia*, above n 17, at 66. Many ‘pocket lawyers’ actually share their fees with the investigators who invite them to perform such a role. Marogulova, above n 12, at 54.

<sup>26</sup> Thaman, above n 6, at 67. ‘People’s assessors’ have also been called ‘pawns in the hands of the judge’ and ‘wordless judges’. VV Mel’nik, *Iskusstvo dokazyvaniia w sostiazatel’nom ugolovnom protsesse* (Moskva, Delo, 2000) 19. On the ‘ritual’ of lay participation on the European Continent, see Damaška, above n 2, at 33. On how the Belarussian and Uzbek mixed courts have not been perceived to have gained independence since Soviet times, see N Kovalev, ‘Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent and Impartial Jury or a “Court of Noddors”?’ (2004) 11 *Journal of East European Law* 123, 136, 153–54.

<sup>27</sup> It has been estimated, following the Russian abolition of the mixed court and turn to jury trial, that there will be lay participation in only 0.8% of criminal cases. S Pashin, ‘Who Needs a Dependent Judge?’ *Moscow Times*, 2 July 2001, 10.

<sup>28</sup> This was the position of A. Ya. Vyshinskiy, Minister of Justice during the late Stalinist period. IB Mikhaylovskaya, *Tseli, funktsii i printsipy Rossiyskogo ugolovnogogo sudoproizvodstva* (Moskva, Prospekt, 2003) 69.

<sup>29</sup> VI Zazhitskiy, ‘*Istina i sredstva ee ustanovleniia v UPK RF: teoretiko-pravovoy analiz*’ (2005) 6 *Gosudarstvo i Pravo*, at 67. According to a commentary edited by, among others,

Russia and the majority of the post-Soviet republics is that a tri-partite division of labour between prosecution, defence and court, is the crucial factor in achieving adversariality.<sup>30</sup> This theory, of course, requires a passive judge no longer responsible for the ascertainment of truth in the matter.<sup>31</sup>

The turn to adversary procedure, however, has not led to a change in the trial role of the judge sufficient to guarantee the required neutrality in most of the new codes. It is still the trial judge, who in nearly all trials is also the trier of the facts, who is obligated to read the entire dossier of the preliminary investigation and certify that the evidence is sufficient legally and factually for the trial court to potentially return a guilty judgment.<sup>32</sup> This procedure undermines the presumption of innocence by requiring a 'pre-judging' of the merits of the case which should disqualify the judge as a trier of fact at the trial.<sup>33</sup>

Today the parties decide which evidence is presented at trial, whereas in Soviet times this role was carried out by the judge, who was in effect an ersatz prosecutor in more than half of all criminal cases because the prosecutor was not obligated to appear.<sup>34</sup> Most codes no longer require the trial judge to ascertain the truth, but rather to 'create the necessary conditions for the fulfillment by the parties of their procedural duties and the realisation of the rights accorded them.'<sup>35</sup> Observers in Russia,

the presidents of the Supreme Court and Constitutional Council of Kazakhstan, one can even have adversary procedure if the prosecutor does not appear in court and the defendant must defend himself alone in front of the judge! II Rogov, 'St 23-Osushchestvlenie sudoproizvodstva na osnove sostizatel'nosti i ravnopraviia storon' in II Rogov, SF Bychkova and KA Mami (eds), *Ugolovno-protsessual'nyy kodeks Respublika Kazakhstan (Obshchaia chast')* *Kommentariy* (Almaty, Zheti Zharfy, 2002) 67–8.

<sup>30</sup> Model Code s 28; CCP-AR s 23; CCP-BE s 24; CCP-KA s 23; CCP-Draft-TU s 22; CCP-UK s 16–1. The separation of powers aspect is stressed in CCP-ES s 14(1), CCP-LA s 17, CCP-LI s 7(2); CCP-MO s 24; CCP-RU s 15. The phrase 'adversary procedure' is not mentioned in the codes of LA and MO.

<sup>31</sup> Damaška, above n 2, at 3.

<sup>32</sup> CCP-RSFSR s 222. This procedure was recommended in Model Code s 221(1) and still is found in CCP-AR s 292; CCP-LI s 228(1); CCP-RU ss 227–231; CCP-TA s 222; CCP-draft-TU s 330(2); CCP-UK s 245.

<sup>33</sup> On this 'preconceived opinion as to guilt' imbued by study of the dossier, see KJ Mittermaier, *Das Volksgericht in Gestalt der Schwur- und Schöffengerichte* (Berlin, CG Lüderitz, 1866) 22. As to whether Continental European systems take the presumption of innocence 'somewhat less seriously' due to such trial arrangements, see Damaška, above n 8, at 491. There was no question of this in the USSR, where the presumption of innocence was impugned as 'bourgeois.' IL Petrukhin, *Teoreticheskie osnovy reformy ugolovnogo protsessa v Rossii: Part II* (Moskva, Prospekt, 2005) 122. On how this 'file prejudice' poisoned the Soviet-Russian trial, see LM Karnozova, *Vozrozhdeniyy Sud Prisiakhnykh* (Moskva, Nota Bene, 2000) 155.

<sup>34</sup> Thaman, above n 6, at 67.

<sup>35</sup> See Model Code s 28(4), and CCP-AR s 23(4); CCP-BE s 24(5); CCP-GE s 15(5); CCP-KA s 23(6); CCP-KY s 18(6); CCP-MO s 314(2); CCP-RU s 15; CCP-draft-TU s 22(1)(6); CCP-UK s 16–1; CCP-UZ s 25, para 6.

however, report that judges still do the lion's share of questioning of defendants and witnesses in patent disregard for the new procedure.<sup>36</sup>

The trial still opens in most post-Soviet republics by asking the defendant whether he admits the charges, and wants to testify; usually preceded by an admonition of the right to remain silent.<sup>37</sup> This procedure is problematic in light of the defendant's presumption of innocence<sup>38</sup> and the prosecution's burden to prove guilt. In Soviet times the defendant nearly always testified, either admitting guilt and hoping for lenience in sentencing in the unified guilt and penalty phase proceedings<sup>39</sup> or retracting his pre-trial confession and contesting the charges.<sup>40</sup> Little has changed in this respect.<sup>41</sup> The often coerced pre-trial confession of the defendant is read in court, whether or not the defendant remains silent or contests its validity,<sup>42</sup> because trial courts uniformly refuse to suppress them despite the widely-acknowledged use of torture and other coercion.<sup>43</sup> In Russia, the defence may not even attack the credibility of the prior statement at trial by alleging unlawful methods, for the Supreme Court of Russia (SCRF) has ruled that such allegations are grounds for reversing acquittal judgments.<sup>44</sup>

As in Soviet times, the new codes do not treat the reading of the written material in the investigative dossier as a violation of the otherwise-guaranteed principles of an 'oral' and 'immediate' trial.<sup>45</sup> All reports of

<sup>36</sup> *Basmannoe pravosudie: Uroki samooborony. Posobie dlia advokatov* (2004) 25 (a study of one Moscow court in October 2003).

<sup>37</sup> CCP-RSFSR s 278. CCP-AR s 334(2); CCP-GE s 472; CCP-KA s 346; CCP-LI ss 267, 268; CCP-RU ss 273–275; CCP-TA s 280, para 3; CCP-draft-TU s 388; CCP-UK s 299. On this tradition of inquisitorial procedure, see Damaška, above n 18, at 506, 525.

<sup>38</sup> The presumption of innocence has constitutional and statutory protection in most republics. See Art 41, Const-AR; Art 71(1,2) Const-AZ; Art 40 Const-GE; Art 77(3)(1) Const-KA; Art 92 Const-LA; Art 31(1) Const-LI; Art 21 Const-MO; Art 49(1) Const-RU; Art 62 Const-UK; and CCP-BE s 16; CCP-ES s 7; CCP-KY s 15; CCP-draft-TU s 18(1).

<sup>39</sup> On how the pressure of a single phase trial leads nearly all continental European defendants to testify at trial, see Damaška, above n 18, at 527.

<sup>40</sup> The typical Russian trial consisted in the defendant's confession to investigative authorities and his subsequent retraction thereof at trial: H Franz, *Die Hauptverhandlung im russischen Strafverfahren* (Berlin, Verlag Dr. Köster, 2000) 70–72.

<sup>41</sup> *Basmannoe pravosudie*, above n 36, at 76.

<sup>42</sup> See for example, CCP-AR s 337(1); CCP-KA s 349(1); CCP-KY s 289(1); CCP-MO s 368(1); CCP-RU s 276(1); CCP-Draft-TU s 391.

<sup>43</sup> Kovalev, above n 17, at 136. As to this practice in Armenia, Azerbaijan, Tajikistan, see USDOS, above n 17; *Confessions*, above n 17, at 7, 68, 76. Judges have estimated that at least one-third and probably more of all convictions are based on coerced confessions. P Finn, 'For Russians, Police Rampage Fuels Fear' *Washington Post*, 27 Mar 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A4009-2005Mar26.html>.

<sup>44</sup> On the massive reversal of acquittals on this basis, see SC Thaman, 'The Nullification of the Russian Jury: Lessons for Jury Inspired Reform in Eurasia and Beyond' (2007) 40 *Cornell International Law Journal* 357, at 377–78!; See Karnozova, above n 33, at 352 n 19; For a similar ruling regarding commenting on coercion used against witnesses to induce their pre-trial statements, *Kovalev*, above n 17, at 347.

<sup>45</sup> CCP-RSFSR s 240, para 1. Compare CCP-BE s 286; CCP-GE s 440(1); CCP-KA s 311(1); CCP-KY s 253(1); CCP-LA s 449(3); CCP-LI s 237(1); CCP-RU s 240; CCP-TA



investigative acts (arrests, searches, etc) and documents may be read to the trier of fact,<sup>46</sup> along with statements of witnesses who do not appear in court.<sup>47</sup> This unreformed approach to the use of hearsay and written evidence which has been prepared in inquisitorial secrecy by law enforcement organs appears to violate the rights to equality of arms and confrontation.<sup>48</sup>

In 2001 the CCP-RU 2001 took a hopeful step by excluding all prior statements of witnesses or victims if they failed to appear at trial, unless both parties stipulated otherwise,<sup>49</sup> but pressure by the procuracy led to a return to the old Soviet rule.<sup>50</sup> The file thus continues to act ‘in the wings of the trial like the prompter at an amateur play.’<sup>51</sup>

### Returning the Case for Supplementary Investigation to Avoid Acquittals

Under the Soviet-era codes a judge could refuse to acquit when there was clearly insufficient evidence of guilt if he/she was not convinced of the defendant’s innocence and felt further investigation was required for an ‘all-sided, complete and objective investigation of the circumstances necessary and sufficient to decide the case.’ The case would then be returned to the investigator to look for such hypothetical evidence.<sup>52</sup> The issue was

s 241; CCP-draft-TU s 351; CCP-UZ s 26. This is also the approach of German law, see C Roxin, *Strafverfahrensrecht* 24 edn (München, Beck, 1995) 335. ‘Immediacy means that the trier of fact should directly hear the evidence. *Ibid.*

<sup>46</sup> See CCP-RSFSR ss 69, para 2, 87, 88, 292, which was included in Model Code ss 142(2), 156(2), 396 and is virtually replicated in: CCP-AR ss 104(2)(8,9), 121(2); CCP-AZ ss 124(2)(4,5), 134(2); CCP-BE ss 88(2), 338; CCP-GE s 110(2)(f,g); CCP-KA ss 122(1), 357; CCP-KY ss 81(2)(4,5), 89, 90, 299; CCP-LA ss 135, 137, 229(1); CCP-LI ss 92(1)(1), 286; CCP-MO ss 93(2)(4,5), 373; CCP-RU ss 83, 84; CCP-TA ss 62, 295; CCP-draft-TU ss 124(2)(4,5), 400; CCP-UZ ss 81, 443.

<sup>47</sup> See Model Code s 391(1), and CCP-AR ss 337(1), 342(1); CCP-AZ s 329(1) CCP-BE s 333; CCP-ES s 291 CCP-GE s 481(1); CCP-KA s 353; CCP-KY s 294 CCP-LA s 501; CCP-LI s 272; CCP-MO s 371; CCP-RU s 281; CCP-TA s 289; CCP-draft-TU s 395(1); CCP-UK s 306; CCP-UZ s 104.

<sup>48</sup> Which the ECHR and ICCPR make binding on all republics. See above n 15. The US also prohibits the reading of prior statements that have not been subject to cross-examination by the defence. *Crawford v Washington*, 541 US 36 (2004).

<sup>49</sup> CCP-RU s 281 (2001), in DN Kozak & YB Mizulina (eds), *Kommentariy k ugolovno-protsessual’nomu kodeksu Rossiyskoy Federatsii* (Moskva, Yurist’, 2002) 309.

<sup>50</sup> CCP-RU s 281(2). See S Pomorski, ‘Modern Russian Criminal Procedure: The Adversarial Principle and Guilty Plea’ (2006) 17 *Criminal Law Forum* 129, 144, who calls the changes a ‘throwback to the Soviet past’.

<sup>51</sup> Damaška, above n 2, at 50, 53. Pomorski, above n 50, at 142, calls it the ‘backbone’ of the trial.

<sup>52</sup> See PH Solomon Jr, ‘The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice’ (1987) 39 *Soviet Studies* 531. For a characterisation of the practice as a ‘fetishisation’ of truth-finding obliging the court to redo that which the organs of

phrased as an ‘insufficiency of evidence’ upon which to acquit a defendant.<sup>53</sup> Acquittals were seen as a blemish on the work of law enforcement organs and required compensation of those acquitted for unlawful pre-trial detention,<sup>54</sup> so cases with insufficient evidence either disappeared upon return to the investigative stage, or ended with guilty judgments for unfounded lesser offences.<sup>55</sup>

The Criminal Code of Procedure of Russia of 2001 eliminated the return of the case for supplementary investigation in its traditional form,<sup>56</sup> inspired by an April 1999 decision of the Russian Constitutional Court (CCRF) which declared that, among other principles, it violated the presumption of innocence and the right to adversary procedure.<sup>57</sup> In December 2003, however, the CCRF backed off its earlier ruling and declared the unconstitutionality of the new provision on the grounds that it violates the victim’s right to access to justice.<sup>58</sup> Now the victim or prosecutor may seek to remove a case from the trier of fact to ‘restore rights of the victim or the accused violated by law enforcement agencies.’<sup>59</sup> This was a clear victory for the prosecutor’s office, which has finally succeeded in giving priority to the rights of the victim over those of the defendant.<sup>60</sup> Law enforcement organs can now intentionally violate the

the preliminary investigation were unable to do properly do. IB Mikhaylovskaya, ‘*Sotsial’noe naznachenie ugolovnoy yustitsii i tsel’ ugolovnogo protsesssa*’ (2005) 5 *Gosudarstvo i pravo*, 111, 116.

<sup>53</sup> This language is still found in: CCP-BE s 302(5); CCP-GE ss 426(1)(a), 501. For an excellent discussion of the Soviet concept of doubts ‘that cannot be eliminated during the pre-trial investigation and trial (*neustranimye somnenniia*)’ see *Kovalev*, above n 17, at 351–53.

<sup>54</sup> In the ‘system of statistical evaluation of judicial activity’ which dominated in the USSR and Russia, an acquittal was seen as a ‘defect.’ Morshchakova, above n 9, at 178.

<sup>55</sup> In more than half of the cases returned for further investigation judges find the defendant guilty on clearly insufficient evidence but sentence them to credit for time served, resulting in their release. See *Confessions ...*, above n 17, at 120–22.

<sup>56</sup> CCP-RU s 237 limited such motions to the stage of the preliminary hearing and restricted the substance of such motions to the correction of errors which prevent a valid judgment from being rendered, or to cases where the accusatory pleading was not handed to the accused. The procurator was given five days to cure these defects.

<sup>57</sup> See *Thaman*, above n 14, at 181–83.

<sup>58</sup> Now that Russia’s reform has been aborted, the procedure, found in Model Code ss 348, 362, continues to exist in CCP-AR ss 297, 311, 363; CCP-BE s 302(5); CCP-GE ss 426(1)(a), 501; CCP-KA ss 303, 323(1); CCP-KY s 244(3); CCP-LA s 462(3) (when prosecutor wants to amend charges during trial to detriment of defendant); CCP-TA ss 233, 260, 310; CCP-UK s 281; CCP-UZ s 419. The European Court of Human Rights condemned Ukraine for violating the ECHR right to a fair trial, in part on a complaint that returning the case for further investigation violated the right to a fair trial. *Salov v Ukraine*, paras 78–98 (decision of 6 Sept 2005).

<sup>59</sup> Decision of 8 Dec 2003, reprinted in VG Strezkov (ed) *Konstitutsionnyi sud Rossiyskoy Federatsii, Postanovleniia, Opredeleniia* (Moskva, Yurist’, 2003) 4–5.

<sup>60</sup> On the long-time quest of a noted professor in the institute of the procuracy to establish the priority of the rights of the victim over those of the defendant and for maintaining the returning of the case for further investigation. See *Franz*, above n 40, at 141–44.

rights of the victim and then rely on the victim to reassert those rights during trial, after it becomes clear that the evidence will be insufficient for a conviction.

### The Acquittal-Free Post-Soviet Landscape

A 'no-acquittals' policy still exists in Russia, and effectively converts the trial court into a mere sentencing court which imposes the judgment sanctioned in advance by the prosecutor in the accusatory pleading.<sup>61</sup> This turn away from the spirit of the Concept of Judicial Reform could be a result of the nearly total domination of Russian democracy by the executive branch under President Putin and its 'power ministries' (*siloviki*) such as the FSB (successor to the KGB), and, for purposes of criminal procedure, the procuracy, and the unwillingness or incapacity of the judiciary to buck this trend.

In the first three years following passage of the CCP-RU in 2001, the overall acquittal rate (including jury trials) rose from 0.3 per cent to 0.9 per cent.<sup>62</sup> Acquittal rates are likely not higher in other post-Soviet republics.<sup>63</sup> Since post-Soviet reform efforts to bolster the independence of the judiciary from executive organs and the procuracy have largely proved unsuccessful,<sup>64</sup> and because the Soviet-era mixed courts with their 'nodding' people's assessors are an ineffective counterweight to politically dependent judges, the classic jury still appears to be the only means to facilitate acquittals in cases which lack sufficient credible evidence of guilt.

<sup>61</sup> S Pomorski, 'Justice in Siberia: a case study of a lower criminal court in the city of Krasnoyarsk' (2001) 34 *Communist and Post-Communist Studies* 447, 456–58. Three-judge panels in Russia, an alternative to trial by jury, acquitted none of the 1,564 persons coming before them in the years 1994–1998. Mel'nik, above n 26, at 42. To enforce this 'no-acquittals' policy, the SCRF routinely reverses a much higher percentage of acquittals (which constitute less than 0.5 % of all judgments) than they do of convictions. For instance, in 1996 it reversed 29.4% of acquittals and only 2.2% of convictions and in 1997, 33.1% of acquittals and only 2.5% of convictions. *Confessions*, above n 17, at 118–19.

<sup>62</sup> Petrukhin, above n 33, at 101.

<sup>63</sup> For some sample acquittal rates: 0.25% in Armenia in 2003, 0.27% and 0.26% in Ukraine in 2002 and 2003; less than 0.5% in Belarus in 1998; 0.57% and 0.81% in Kazakhstan in 2002 and 2003; 0.45%, 0.47%, 0.67% and 0.74% in Georgia in the years 2000–2003, see Kovalev, above n 17, at 135. A no acquittal policy is also rigidly enforced in Turkmenistan. *Ibid* 125.

<sup>64</sup> USDOS, above n 17, report on nearly universal corruptness of the judiciary and its dependence on the executive branch and/or procuracy in all except the Baltic republics, and problems with corruption in Latvia. Compare, Kovalev, above n 17, at 123–25.

### III. PLEA BARGAINING: EMPOWERMENT OF THE DEFENCE OR INQUISITORIAL INDUCEMENT TO CONFESS?

#### Introduction

As Damaška has noted, the inducement of confessions through procedural arrangements in the hierarchical inquisitorial procedures of the European continent, made it unnecessary for those countries to engage in American style bargaining for guilty pleas.<sup>65</sup> The procedurally induced confession was only 'evidence,' from which the court could infer guilt, for a defendant in the civil law realm could not herself usurp the judicial role by stamping herself as guilty with a plea. Yet, now, many of the post-Soviet republics have introduced new consensual procedures designed to waive their new, albeit flawed, adversarial trial procedures. Are they a natural result of the move to adversarial procedure,<sup>66</sup> or a procedural replacement of inquisitorial truth-seeking judge with his confession-inducing procedural arsenal?

#### Avoiding the Trial through Confession or Stipulation to the Truth of the Charges

On the European continent, the first inroads into the principle of legality, which required the judge to determine the correct legal qualification of the charged criminal acts and the legal appropriateness of the sentence based strictly on the adduced evidence, were allowed only in the adjudication of minor crimes. Several of the post-Soviet republics have followed this trend and permit conditional dismissals (diversion),<sup>67</sup> penal orders,<sup>68</sup> and victim-offender conciliation (which usually applies only in relation to minor crimes subject to private prosecution).<sup>69</sup> But our emphasis will be on the procedures relating to more serious criminal offences.<sup>70</sup>

<sup>65</sup> MR Damaška, 'Negotiated Justice in International Criminal Courts' (2004) 2 *Journal of International Criminal Justice* 1018, 1022.

<sup>66</sup> See M Langer, 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure' (2004) 45 *Harvard International Law Journal* 1, 6, 10, who traces this common law adversarial institution through its 'translation' into the inquisitorial language of erstwhile inquisitorial countries.

<sup>67</sup> CCP-MO ss 510–511 (requiring a confession); CCP-ES s 202(1).

<sup>68</sup> CCP-ES s 261 ff; CCP-LI s 425 ff.

<sup>69</sup> It was already included in the CCP-RSFSR s 5(6), relating to cases initiated by complaint of the victim; see also Model Code s 36(1)(6)); CCP-AR s 36; CCP-BE ss 26(2), 29(1)(5), 30(1)(2); CCP-LA ss 536–38; CCP-LI ss 207, 420; CCP-RU ss 20(2), 319(5); CCP-TA ss 5, para 1, (3); CCP-UZ ss 582–86 CCP.

<sup>70</sup> For a comprehensive analysis of the genesis and application of these forms throughout Europe and America, see SC Thaman, 'Plea-Bargaining, Negotiating Confessions, and

In more serious cases, the first clear turn to consensual procedures in modern Europe,<sup>71</sup> came with the Italian Code of Criminal Procedure of 1988 with the introduction of the ‘application for punishment upon request of the parties’, which provided for up to one third discount on punishment if the bargained sentence was no longer than two years deprivation of liberty. The *patteggiamento* was the model for Russia’s new form of guilt-stipulation.<sup>72</sup> There is a tendency, however, to extend the new consensual procedures to more serious criminal offences. The *patteggiamento* was extended in 2003 to cases punishable by up to five years (after the up to one-third sentence reduction).<sup>73</sup> The Russian provision, applicable to crimes punishable by no more than five years in the CCP-RU of 2001, was extended in 2003 to apply to crimes punishable by up to 10 years imprisonment.<sup>74</sup> Guilty plea procedures also apply to all but the most serious crimes in Estonia and Moldova.<sup>75</sup>

However, more wide-open, American-style negotiation of charge and sentence between prosecution, defence and victim, without statutory discounts, exists in the new Estonian ‘settlement proceedings.’<sup>76</sup> American-inspired ‘co-operation agreements,’ which link plea or sentence bargaining to the defendant’s aid in the prosecution of others, have found their way into Georgia, Latvia and Moldova.<sup>77</sup> Estonia and Latvia have also adopted a procedure similar to the *giudizio abbreviato* introduced in Italy in 1988,<sup>78</sup> where the maximum sentence in the event of conviction is reduced by one-third if the defendant agrees to a ‘trial’ based in the written material in the investigative dossier. This ‘trial’ is an ironic replica of the classic written inquisitorial trial of the late Middle Ages, mitigated only by the

Consensual Resolution of Criminal Cases’ in K Boele Woelki & S Van Erp (eds), *General Reports of the XVII Congress of the International Academy of Comparative Law* (2007) 951, 964–71.

<sup>71</sup> Since the 19th century Spain has allowed a defendant to express his or her conformity (*conformidad*) with the pleadings and be punished without trial if the threatened punishment did not exceed six years. See SC Thaman, ‘Spain Returns to Trial by Jury’ (1998) *Hastings International Comparative Law Review* 309–16.

<sup>72</sup> I included a procedure based on the Italian model in a chapter on consensual procedures I drafted for the authors of the CCP-RU of 2001, which was eventually adopted in modified form. The one-third discount model exists in Russia and Lithuania. CCP-RU s 316(7); CCP-LI s 440(1).

<sup>73</sup> Langer, above n 66, at 49–50.

<sup>74</sup> CCP-RU s 314.

<sup>75</sup> CCP-ES s 239; CCP-MO s 504(2).

<sup>76</sup> CCP-ES ss 245, 248.

<sup>77</sup> In CCP-GE s 679–1 ‘co-operation’ in the prosecution of corruption and other serious crimes can lead to reduction or even dismissal of charges. See also CP-LI s 210; CCP-MO s 505(1)(1).

<sup>78</sup> Thaman, above n 14, at 159–61.

right given to the defendant, subject to rebuttal by prosecutor and judge, to testify or to introduce supplementary evidence.<sup>79</sup>

In Belarus, Kazakhstan, Lithuania and in the Turkmenistan-draft, if the defendant admits the charges when questioned by the judge, the court, depending on the seriousness of the charge, may truncate the evidence to a questioning of the defendant and the victim, move directly to closing arguments, or even directly to the imposition of sentence.<sup>80</sup>

### Consensual Procedures in Practice

By 2002, 59.8 per cent of all cases in Estonia were handled with the 'simplified proceedings' which were in force from 1996 until 2004.<sup>81</sup> The use of the Russian consensual procedure has also grown exponentially since it was introduced in mid-2002 and has 'taken root'.<sup>82</sup> The same can be said for Moldova, where plea bargaining resolved around 8.6 per cent of cases in 2004, 35 per cent in 2005 and 49 per cent in 2006.<sup>83</sup>

Wide-open American-inspired plea bargaining in Georgia, has been, however, an unmitigated disaster. An American advisor who worked on reforming the Georgian law has called it an 'institutionalised form of bribery'.<sup>84</sup> After the 'Rose Revolution' the new government of Mikheil Saakashvili began targeting members of the *ancien regime* on corruption charges and would routinely dismiss charges under the new law if the accused paid a large amount of money to the government, without even requiring a guilty admission, much less any kind of 'co-operation' which the original law was intended to encourage.<sup>85</sup> A condition of many 'plea

<sup>79</sup> In Estonia, a 1/3 discount is possible in all cases except those punished by life imprisonment. CCP-ES ss 233, 238. In Latvia, the accused may 'agree to not require the taking of evidence during the trial,' but without statutory discount. CCP-LA s 71(6).

<sup>80</sup> CCP-BE s 326(1); CCP-KA s 363; CCP-LI s 269; CCP-draft-TU s 406. Prior to the 2004 CCP-ES, Estonian 'proceedings' followed this model. M Sillaots, 'Admission and Confession of Guilt in Settlement Proceedings under Estonian Criminal Procedure' (2004) 9 *Juridica International* 116, 117–18. A similar provision was introduced in the 1993 Russian jury law but was seldom used and disappeared in the CCP-RU of 2001. Thaman, above n 6, at 103–104.

<sup>81</sup> Sillaots, above n 80, at 115–16.

<sup>82</sup> It was applied in 0.9% of all criminal cases in 2002 rising to 14.3% in 2003 and 2004. Pomorski, above n 50, at 141. In 2005 the procedure was used in 37.5% of peace court (misdemeanor) cases, 30% of district court and 2.4% of jury court cases. 'Statisticheskaya spravka o rabote sudov obshcheiy yurisdiksiy za 2005 god' available at [http://www.cdep.ru/material.asp?material\\_id=90](http://www.cdep.ru/material.asp?material_id=90).

<sup>83</sup> 'Statistics of the Procurator General of the Republic of Moldova,' conveyed to the author by Alla Panici per e-mail.

<sup>84</sup> JD Reichelt, 'A Hobson's Experiment: Plea Bargaining in the Republic of Georgia' (2004) 11 *Journal of East European Law* 159, 185.

<sup>85</sup> *Ibid* 170–177.

agreements' was also the abandonment of allegations of torture or other unlawful coercion during the preliminary investigation.<sup>86</sup>

### III. THE JURY AS ACQUITTAL CATALYST

The ice is breaking, ladies and gentlemen of the jury! The ice is breaking.<sup>87</sup>

#### Juries and Mixed Courts in the Post-Soviet Republics

For the authors of the Concept of Judicial Reform, the logical answer to the subservient Soviet judiciary and the 'nodding' lay assessors, was the classic jury which would relieve the judge of the duty of determining guilt, provide the foundation for adversary procedure, and make acquittals possible. They suggested juries be used in all cases punishable by more than one year deprivation of liberty,<sup>88</sup> and that the 'nodding' mixed courts be abolished.

A number of former Soviet republics eliminated the lay assessors in the years after independence.<sup>89</sup> Constitutional provisions providing for trial by jury were adopted in Russia, Armenia, Kazakhstan and Ukraine.<sup>90</sup> Provisions for jury trial were also contained in a 'concept of judicial reform' in Belarus in 1992 and were included in the 1999 CCP-BE, only to be removed later at the behest of authoritarian President Aleksander Lukashenka.<sup>91</sup> Other than Russia, only Azerbaijan has actually enacted legislation providing for trial by jury, but its implementation continues to be postponed, allegedly on fiscal grounds.<sup>92</sup> There is, however, new interest in jury trial since the 'colour' revolutions in Georgia ('rose'),<sup>93</sup> Ukraine ('orange'),<sup>94</sup> and Kyrgyzstan ('tulip').<sup>95</sup>

<sup>86</sup> *Ibid* 180–81. See also USDOJ, above n 17.

<sup>87</sup> Famous winged phrase of the rogue Ostap Bender in the 1928 Soviet novel *The Twelve Chairs*, see *Il'ia Il'f & Yevgeniy Petrov, Dvenadtsat' stul'ev* (Moskva, Eksmo, 2005) 49.

<sup>88</sup> 'O kontseptsii sudebnoy reformy' (1991) 44 *Vedomosti RSFSR*, Item No 1435, reprinted in *Kontseptsiiia sudebnoy reformy v Rossiyskoy Federatsii* (Moskva, Verkhovnyy Sovet Rossiyskoy Federatsii, 1992) 41.

<sup>89</sup> The mixed court has been abolished in Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Lithuania and Moldova. JD Jackson and NP Kovalev, 'Lay Adjudication and Human Rights in Europe' (2006) 13 *Columbia Journal of European Law* 83, 94.

<sup>90</sup> Art 92, para 2, Const-AR; Art 75(2) Const-KA; Art. 47 Const-RU; Arts 124, para 4, 127 para 1, 129, para 2, Const-UK.

<sup>91</sup> Kovalev, above n 26, at 132–33.

<sup>92</sup> *Ibid* 129.

<sup>93</sup> Art 82(5) Const-GE providing for jury trial was added by law in 6 Feb 2004 and a draft CCP providing for an American style jury system has been submitted to parliament.

<sup>94</sup> Jackson and Kovalev, above n 89, at 120.

<sup>95</sup> I have recently received a new draft law proposing the introduction of a classic jury system: *Proekt. Zakon Kyrgyzskoy Respubliki 'O vnesenii izmeneniy i dopolneniy v nekotorye zakonodatel'nye akty Kyrgyzskoy Respubliki po vprosam uchastiia prisiazhnykh zasedateley v ugovnom sudoproizvodstve'* (hereafter: Draft Jury Law-KY-2007).

Kazakhstan has taken a path of compromise by introducing a 'jury court,' which began functioning in January of 2007<sup>96</sup> and is patterned on the French *cour d'assise*, consisting in a 'jury' of nine presided over by two professional judges, but in which 'jurors' and judges deliberate together as in a mixed court.<sup>97</sup>

Based on the successes and failures of the Russian jury system, which functioned in nine of its regions and territories from 1993 through 2003 and now exists everywhere except in Chechnya, we can attempt to predict the viability of the future post-Soviet jury systems if they do finally become a reality.

### Avoidance of the Jury in Russia

In Russia and in the prospective systems in other republics, jury trials are substantively limited to cases of aggravated murder and a smattering of other crimes.<sup>98</sup> In Russia and in all systems, the right to trial by jury belongs to the defendant and may be waived.<sup>99</sup> Despite the virtual impossibility of obtaining an acquittal in the non-jury courts, a majority of eligible Russian defendants have waived jury trial, choosing ineluctable conviction before professional judges. In the years 1994–2001, only 23 per cent of those eligible proceeded to judgment before the jury court.<sup>100</sup> Since the expansion of jury trial to the rest of the republic defence motions to have their cases heard by juries have declined to around 18 per cent in 2003<sup>101</sup> and to even lower percentages in 2004 and 2005.<sup>102</sup> It is clear that investigators, prosecutors and even defence lawyers pressure defendants to

<sup>96</sup> *Sud prisiazhnykh v Kazakhstane: pervyy god ne vyshel komom*, TSENTRASIA 19 June 2008 <http://www.centrasia.ru/newsA.php?st=1213858500> mentions the passage of the law, its going into effect on 1 Jan 2007 and some news of its success.

<sup>97</sup> CCP-KA ss 544, 568, 569.

<sup>98</sup> CCP-RU s 31(3); CCP-AZ s 362; CCP-KY s 240, as amended by Draft Jury Law-KY (2007).

<sup>99</sup> CCP-RU ss 217(5), 325; CCP-KA s 546, ss 402–5, 402–6 Draft Jury Law-KY (2007); CCP-AZ s 24(1), and s 13 Draft Jury Law-GE (2005). Trial by jury was mandatory in pre-revolution Russia, *MV Nemytina, Rossiyskiy sud prisiazhnykh* 24 (Moskva, Bek, 1995), as it is in Spain's new jury system. SC Thaman, *Spain Returns to Trial by Jury*, 21 *Hastings Int'l & Comp L Rev* 241, 256–58 (1998).

<sup>100</sup> In the years 1997–2001 only 39.2% of eligible cases ended up in the jury courts. *Obzor sudebnoy praktiki rossmotreniia ugolovnykh del s uchastiem prisiazhnykh zasedateley*, Biulleten' verkhovnogo suda Rossiyskoy Federatsii, No. 7 (29 July 2002) [http://www.supcourt.ru/vscourt\\_detale.php?id=2098](http://www.supcourt.ru/vscourt_detale.php?id=2098).

<sup>101</sup> 'Obzor po delam rassmotrennym sudami s uchastiem prisiazhnykh zasedateley v 2003 godu,' <[http://www.supcourt.ru/vscourt\\_detale.php?id=165](http://www.supcourt.ru/vscourt_detale.php?id=165)> accessed 15 June 2008 (SCRF-Jury Review-2003).

<sup>102</sup> 10.7% in 2004 and 12% in 2005. 'Statisticheskaia spravka o rabote sudov obshcheiy yurisdiktzii za 2005 god' [http://www.cdep.ru/material.asp?material\\_id=90](http://www.cdep.ru/material.asp?material_id=90).



waive jury trial.<sup>103</sup> Cases have also been undercharged, so that they will not be subject to the jurisdiction of the jury courts.<sup>104</sup>

The raising of the maximum punishability to ten years under the Russian consensual procedures will not affect trials for aggravated murder or other grievous offences, but a large swath of lesser crimes will now be subject to the new consensual procedures, facilitating the avoidance of jury trial.<sup>105</sup>

### Judicial Nullification of the Jury's Power to Determine Guilt

The Russian legislator rejected the Anglo-American general verdict of 'guilty' or 'not-guilty,' in favour of a special verdict consisting in a list of questions, which was adopted by most Continental European countries in the 19th century.<sup>106</sup> The CCP-RU requires that three basic questions be asked with respect to each crime charged by the public prosecutor: (i) has it been proved, that the charged offence was committed; (ii) has it been proved, that the offence was committed by the defendant; and (iii) is the defendant guilty of having committed the offence. After the trifurcated guilt question, questions may be asked which modify guilt.<sup>107</sup>

Such special verdicts fit well in a Continental European system which requires reasoned judgments, for they compel professional judges, in writing the judgment, to adhere to the logic of the jurors' decision.<sup>108</sup> They also make juries more accountable, especially when rendering a guilty verdict in a serious case.<sup>109</sup> The Russian and Azerbaijani codes and the Georgian and Kyrgyz drafts allow the jury to compel lenience in sentencing

<sup>103</sup> Thaman, above n 6, at 87–88. Sergey Pashin, chief author of the 1993 Russian jury law, shares this view. L Nikitinskiy, '*Prestuplenie i opravdanie*' *Moskovskie novosti*, 8 Apr 2003. Defence lawyers' reluctance to insist on the procedural form more likely to result in an acquittal can only be explained by: (1) fear that a conviction will be interpreted as an indication of their lack of skill as a lawyer, which would hurt their career; (2) their succumbing to pressure on the part of the investigator; or (3) the fact that they are 'pocket lawyers.'

<sup>104</sup> SC Thaman, 'Europe's New Jury Systems: The Cases of Spain and Russia' in N Vidmar (ed), *World Jury Systems* (New York, OUP, 2000) 319, 325–26.

<sup>105</sup> For an estimate that more than 200 criminal offences are now subject to the consensual procedures, *Petrukhin*, above n 33, at 105.

<sup>106</sup> Thaman, above n 104, at 338.

<sup>107</sup> CCP-RU s 339. The identical verdict form may be found in CCP-KA s 566; and s 402–22 Draft Jury Law-KY (2007).

<sup>108</sup> SC Thaman, 'Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures' (2001–2002) *St Louis-Warsaw Transatlantic Law Journal* 89, 110.

<sup>109</sup> JD Jackson, 'Making Juries Accountable' (2002) 50 *American Journal of Comparative Law* 477, 520 (2002).

by the judge which encourages guilty verdicts instead of jury nullification when jurors fear Draconian judges or sentencing schemes.<sup>110</sup>

Unfortunately, the SCRF has undermined the jury's authority to decide guilt by interpreting the law to restrict jurors to answering questions related to the factual aspects of *actus reus*, and thus arrogating to the professional bench the power to decide *mens rea* and thereby, the question of criminal guilt.<sup>111</sup> It has also articulated such a confused and contradictory line of cases on which 'factual' questions the jury may answer and which 'legal' questions are for the professional judge, that errors in formulating the question list have been the main reason for reversals of jury judgments, especially of acquittals.<sup>112</sup>

The Azerbaijani jury law has abandoned the complicated Russian question list in favour of two simple questions, one of guilt and another as to whether the defendant should receive a lenient sentence; and the parties may request supplemental questions related to lesser-included offences and mitigating circumstances.<sup>113</sup> The most recent draft of the future Georgian CCP goes the furthest, however, in introducing an American style general verdict of 'guilty' or 'not guilty' as to each charge.<sup>114</sup> The Georgian draft also follows American law in making jury acquittals final and not subject to appeal.<sup>115</sup>

Post-Soviet juries will never function autonomously, as true juries, unless their (acquittal) verdicts are not subject to arbitrary reversal by the higher courts. Unlike in the US, the procurator and the victim may appeal judgments of acquittal.<sup>116</sup> Since errors need not be raised in the trial court to preserve them for appeal, a number of prosecutors and judges have

<sup>110</sup> CCP-RU ss 349(2); CCP-AZ s 379(6)(2) allow sentencing below the statutory minimum; whereas CCP-draft-GE s 248 and s 402–31(3) CCP-KY, as amended by Draft Jury Law-KY(2001), prohibit sentencing to more than 2/3 of the statutory maximum. For a return to jury sentencing in the US, see A Lanni, 'Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?' (1999) 108 *Yale Law Journal* 1775.

<sup>111</sup> Thaman, above n 104, at 339–40. For a detailed account of the court's methodology in doing so, see Thaman, above n 44.

<sup>112</sup> *Ibid.* See also Karnozova, above n 33, 168–260 at 43% of all reversals were related thereto in the first three years of jury trial and the trend has continued through 2003. SCRF, above n 101.

<sup>113</sup> CCP-AZ ss 369–370. The Ukrainian draft has also followed this model. See Jackson and Kovalev, above n 89, at 120.

<sup>114</sup> The most recent draft of the 'Special Part' of the proposed CCP includes such a verdict in CCP-draft-GE s 243.

<sup>115</sup> CCP-draft-GE s 251.

<sup>116</sup> Victims can universally lodge appeal whether for review on the facts (*appellatsiia*) or in cassation (ie, on mistakes in the application of the law or on procedural errors). For some of the provisions, see Model Code § 468(1)(3). See also CCP-AR s 404; AR-AZ s 409(1)(2); CCP-BE s 370(1); CCP-KA s 396(2); CCP-KY s 332(2); CCP-LA s 562(2); CCP-LI s 365(1); CCP-RU ss 354(1), 370(1), 385; CCP-TA s 329; CCP-draft-TU s 436(2); CCP-UK s 498.

intentionally committed errors at the pre-trial and trial stage so that, in the event of an acquittal, the errors may be later raised on appeal.<sup>117</sup>

Despite the serious nature of the crimes tried in the jury courts, there has been a much higher rate of acquittals (around 15 per cent) in those courts than in the regular courts (less than 1 per cent).<sup>118</sup> Yet the SCRF has reversed acquittals at an astonishingly high rate in comparison to convictions: from 1997–2001 it reversed approximately 50 per cent of all acquittals and only 16–17 per cent of convictions.<sup>119</sup> The trend continued in 2004 with the SCRF reversing 45.8 per cent of all acquittals which were appealed as opposed to 3.9 per cent of convictions.<sup>120</sup>

Russian courts have cleverly turned the new rules of adversarial procedure, introduced to protect defendants from Soviet-era abuses, into vehicles for overturning acquittals and other defence-favourable verdicts. Thus when a defendant successfully suppresses illegally gathered evidence under the new Russian exclusionary rule it is not infrequent that the prosecutor or the victim appeals on grounds that their adversary rights have been violated.<sup>121</sup> Once the victim is granted ‘equality of arms’ in an adversary trial,<sup>122</sup> the prosecution has a Trojan horse it can send into the arena to undermine the adversarial rights of the defendant. The SCRF has not hesitated to reverse jury acquittals when the aggrieved party has complained of a supposed violation of his or her rights.<sup>123</sup>

## CONCLUSION

Our social life is like swampy, shaky ground. No matter how wonderful a building is erected on this ground, it vanishes in an unseen manner into this ground, little by little it is sucked up by this soil.

*VD Spasovich*<sup>124</sup>

<sup>117</sup> Judges have admitted doing this in Russia. Karnozova, above n 33, at 152.

<sup>118</sup> Thaman, above n 104, at 348.

<sup>119</sup> W Burnham (ed), *The Russian Federation Code of Criminal Procedure* (2004) 67.

<sup>120</sup> ‘*Obzor kassatsionnoy praktiki sudebnoy kollegii po ugovolnym delam verkhovnogo suda Rossiyskoy Federatsii za 2004 god*,’ <[http://www.supcourt.ru/vscourt\\_detale.php?id=2759](http://www.supcourt.ru/vscourt_detale.php?id=2759)> accessed 15 June 2008.

<sup>121</sup> For at least 14 acquittal-reversals on this ground, see Thaman, above n 44.

<sup>122</sup> For some of the provisions giving victims the same adversarial rights as defendants, see Model Code ss 91,358 CCP-BE ss 50,292; CCP-KY s 50; CCP-LA ss 97, 99, 454(2),455; CCP-LI s 27(2); CCP-MO ss 59(7–13), 315; CCP-RU s 42; CCP-TA s 54; CCP-Draft-TU s 351; CCP-UK s 267.

<sup>123</sup> Typically, the SCRF will reverse acquittals when law enforcement organs or the court have not notified the aggrieved party of the day of the trial or have not allowed them to engage in some procedural acts. Thaman, above n 44.

<sup>124</sup> Quote of famous pre-revolution Russian lawyer, in AM Bobrishchev-Pushkin, *Empiricheskie zakony deiatel'nosti Russkogo suda prisiabnykh* (Moskva, AI Snegirova, 1896) 13.

Can one change the hierarchic, inquisitorial Soviet system of justice by introducing alien institutions from the co-ordinate common law legal sphere? Is a process of 'Americanisation' going on, especially in light of the many American advisers<sup>125</sup> who have been involved in the reforms in many of the former Soviet republics? Can we talk of transplants or translations of these co-ordinate institutions,<sup>126</sup> or merely of their use as democratic legitimisation for systems reluctant to allow these institutions to be catalysts for real change? Will the face of justice in these countries reveal in the end an adversarial American smile, or the 'two-faced' smirk of the entrenched bureaucrats dressed in their new democratic clothes?<sup>127</sup>

The fact that Russia, where all decry the abysmal quality of criminal investigations,<sup>128</sup> can maintain its acquittal-free system despite the introduction of adversary procedure and jury trial leads one to ask whether this 'co-ordinate' edifice is actually only a *Potemkin* village behind which the coerced confession and the perfunctory benediction of contents of the file and accusatory pleading will continue to shape Russia's criminal justice reality.<sup>129</sup> More frightening is the notion that, with the expansion of guilty pleas, the charade of an oral, immediate trial will also be dispensed with and adjudication will recede behind closed doors as in the times of Stalinist terror. If Russian defendants can be coerced or inveigled into waiving a 15–20 per cent chance of getting an acquittal for the inevitable conviction, there is no reason to believe that their waivers of trial and acceptance of the discounted sentence upon guilty plea will be any more voluntary.

A plea bargaining system can only reach just and verifiable results in the post-Soviet world if it is based on evidence gathered pre-trial that has been subject to adversarial testing, which can really provide a factual basis for guilt.<sup>130</sup> The post-Soviet codes provide the framework for exclusion of

<sup>125</sup> The author has consulted on law reform efforts in Russia, Georgia, Latvia, Kyrgyzstan, Kazakhstan and Uzbekistan in relation to jury trial, plea-bargaining and adversary procedure. For criticisms that reforms were instituted just to 'please foreign experts,' see Pomorski, above n 50, at 136.

<sup>126</sup> On the 'Americanization' thesis and the notion of 'translations' in relation to plea-bargaining, Langer, above n 66, at 4–5.

<sup>127</sup> Will the 'internal dispositions' among the organs responsible for implementing the reforms lead to distortion of the original meaning. See Langer, above n 66, at 12.

<sup>128</sup> Thaman, above n 6, at 66–68; Pomorski, above n 50, at 146.

<sup>129</sup> See Damaška, above n 18, at 544. See B Schünemann, 'Reflexionen über die Zukunft des deutschen Strafverfahrens' in *Strafrecht, Unternehmensrecht, Anwaltsrecht: Festschrift für Gerd Pfeiffer* (Köln, C Heymann, 1988) 482–83, for the opinion that Germany's trial is a 'Potemkin facade,' an 'orchestrated blessing of the results of the preliminary investigation.'

<sup>130</sup> For a provocative model of making an adversarial preliminary investigation the centerpiece of a consensual based model of adjudication, see, J Wolter, *Aspekte einer Strafprozessreform bis 2007* (München, CH Beck, 1991) 79–91; T Weigend, *Die Reform des Strafverfahrens: Europäische und deutsche Tendenzen und Probleme* (1992) 104 *Zeitschrift der gesamten Strafrechtswissenschaft* 486, 506–11. For a similar suggestion, see Bernd Schünemann, 'Reflexionen über die Zukunft des deutschen Strafverfahrens' in *Strafrecht, Unternehmensrecht, Anwaltsrecht. Festschrift für Gerd Pfeiffer* (1988) 482.

illegally seized evidence but have in no way changed the inquisitorial pre-trial pre-packaging of the evidence by the prosecuting organs, despite token and ineffectual grants to the defence of the right to collect evidence by themselves.<sup>131</sup> Although the one-third discount model of consensual procedure is not as inherently coercive as the wide-open American model,<sup>132</sup> defendants will have no ‘bargaining chip’ until juries become autonomous co-ordinate decision-makers, not just decoration at an intermediate step in the hierarchical juggernaut of conviction.

The pseudo-oral and pseudo-immediate trial based on the dossier and guided by its truth-seeking judicial trier of fact, and its procedural inducements of confessions, which itself has been characterised by some writers as a form of plea or sentence bargaining,<sup>133</sup> at least requires an in-court confession subject to adversarial testing and a written judgment founded in the materials of the investigative dossier.<sup>134</sup> The more perfunctory the guilty plea and the review of its factual basis, the more risk that innocent persons will end up at the other end of the conveyor belt.<sup>135</sup>

<sup>131</sup> Kovaley, above n 17, at 319–20.

<sup>132</sup> For a discussion on how the latent coerciveness of a ‘bargain’ grows with the greater gap between maximum punishment and tendered offer see Damaška, above n 65, at 1027–28.

<sup>133</sup> In relation to Japan, see DT Johnson, ‘Plea Bargaining in Japan’ in M M Feeley & Setsuo Miyazana (eds), *The Japanese Adversary System in Context: Controversies and Comparisons* (New York, Palgrave Macmillan, 2002) 142–45.

<sup>134</sup> Modern German confession-bargains (*Absprachen*), are a more honest recognition of how the inquisitorial trial was really a form of such bargaining. See Thaman, above n 14 at 144–52. See also Langer, above n 66, at 39–46.

<sup>135</sup> For a view that negotiation of an in-court confession, rather than a perfunctory American-style guilty plea better serves the interests of justice in international criminal tribunals, see Damaška, above n 65, at 1037–38.