2008

Jury Trial and Adversary Procedure in Russia: Reform of Soviet Inquisitorial Procedure or Democratic Window-Dressing?

Stephen C. Thaman
Saint Louis University School of Law

Recommended Citation
Thaman, Stephen C., Jury Trial and Adversary Procedure in Russia: Reform of Soviet Inquisitorial Procedure or Democratic Window-Dressing?. RUSSIA AND ITS CONSTITUTION, p. 141-180, (Gordon B. Smith & Robert Sharlet eds. 2008), (Marinus Njhoff, Leiden, Boston).

Bibliographic Information
Book Chapter

Title:	Russia and Its Constitution: Promise and Political Reality
Author:	Smith, Gordon B. and Robert Sharlet Eds.
Chapter Title:	Chapter 7: Jury Trial and Adversary Procedure in Russia: Reform of Soviet Inquisitorial Procedure or Democratic Window-Dressing?
Chapter Author:	Thaman, Stephen C.
Pages:	141-180
Publisher:	Koninklijke Brill NV
Place of Publication:	Leiden, The Netherlands
Date Published:	2008

Jury Trial and Adversary Procedure in Russia: Reform of Soviet Inquisitorial Procedure or Democratic Window-Dressing?

Stephen C. Thaman

Prologue
The Problem

The rebirth of jury trial and the move from inquisitorial to adversary procedure have been the centerpieces of the reform of the administration of justice in Russia, since they were first openly voiced during the waning years of Soviet *perestroika* under the leadership of Mikhail S. Gorbachev, systematically articulated by the Supreme Soviet of the Russian Soviet Federative Socialist Republic (RSFSR) on 21 October 1991, and finally put into practice with the Russian jury law of 1993. They were seen to be the prime catalysts for the democratization and humanization of the Soviet-Russian criminal justice system, as the country moved from a totalitarian system with a command economy to democracy and capitalism.

The broadening of freedom of the press (so-called *glasnost'*, or transparency) in the late 1980s led to widespread critique of the Soviet-era court system for its incapacity to provide a quality of justice worthy of a civilized country, indeed for its condemnation and execution of the innocent. All Soviet trial courts were composed of one professional judge and two "people's assessors", derisively called "nodders" because they were completely dependent on, and acted in no way as a check to the power of the professional judge. The professional judge, on the one hand, was completely dependent on instructions from Communist Party or other local officials (so-called "telephone law"), and on the considerably more powerful public prosecutor's office (*Prokuratura*) on the other, which resulted in a routinized rubber-stamping of the results of the preliminary investigation and the virtual absence of acquittal judgments, despite the universally recognized low quality and reliability of police investigative work.

Unable or unwilling to professionally investigate crimes, investigative organs resorted to coercing confessions, which were the centerpiece of nearly all prosecutions, despite their inherent unreliability as evidence. There was virtually no adversarial testing of the credibility of the evidence gathered in inquisitorial secrecy by law enforcement officials, adversary procedure and the presumption of innocence long having been impugned as institutions of bourgeois legal culture. The trial judge would effectively prejudge the case in the preparatory trial stage by establishing *a priori* the sufficiency of the evidence in the preliminary investigation dossier

Gordon B. Smith and Robert Sharlet, eds.
Russia and its Constitution: Promise and Political Reality 141-180

to prove guilt, and then would transform himself into a trier of fact in the evidentiary portion of the trial armed with what was tantamount to a presumption of guilt. If, as often occurred, the evidence produced in court turned out to be woefully insufficient to prove guilt, the judge would send the case back to the investigating officials with the clear understanding that "new" evidence would be found, or the case would disappear without an acquittal to clear the name of the accused. This was again a clear violation of the presumption of innocence.

A new adversary system of jury trial was introduced in 1993-1994, preliminarily in nine political subjects or constituencies of the Russian Federation, and the constitutional rights to jury trial, adversary procedure, the presumption of innocence, and the mandatory exclusion of illegally gathered evidence were incorporated into the new Constitution of the Russian Federation in December of 1993. Finally, the new Criminal Procedure Code of the Russian Federation, passed in December 2001, led to the extension of jury trial to the entire country with the exception of the Republic of Chechnia in 2003-2004. This chapter will explore the extent to which the Russian jury system and adversary procedure have humanized criminal procedure. The replacement of the judge-dominated mixed court by the jury was meant to eliminate the judiciary from the task of deciding guilt, replacing them with a group of citizens who were not caught in the web of dependence in which Russian judges found themselves. Insufficient, corrupt, or illegal evidence would, in theory, lead to acquittals and innocence would be protected.

A Continental European Model of Trial by Jury

The new Russian jury system is based on the Russian jury system (1864 until 1917), which was itself the product of great reforms throughout Europe in the late eighteenth and nineteenth centuries. In the late seventeenth and early eighteenth centuries the right to trial by jury became a rallying cry of English religious dissidents and republicans in their struggles against repression. It was this transformation of the jury from institution of customary law to a revolutionary check against arbitrary monarchical power that led to the constitutionalization of the right to trial by jury in the US, and to its becoming a battle cry in the French Revolution and the bourgeois anti-monarchist movements on the European Continent in its wake.

Jury trial was introduced in France in 1789 and in most German States after the abortive revolutions of 1848 (although the Rhine States had maintained the institution since the time of Napoleonic occupation). It was extended to all of Germany with its unification in 1871. Russia introduced trial by jury in the great judicial reforms instituted by Tsar

Alexander II in 1864, and nearly all European countries followed suit with the exception of Luxembourg and The Netherlands. But these reforms were not only political. Trial by jury was seen as a catalyst in strengthening the principles of orality, immediacy, presumption of innocence and the evidentiary standard of *intime conviction*, which all became recognized as indispensable in a civilized criminal procedure.

The rise of dictatorial regimes in Europe in the wake of World War I led to the abolition of jury trial and its replacement by the German model of mixed court; in Russia in 1917 following the Bolshevik Revolution, and in 1924 in Germany following a decree of the Minister of Justice. The Fascists in Italy eliminated jury trial in 1931, the dictator Francisco Franco in Spain in 1939, and the Vichy government in France, which collaborated with Nazi Germany, in 1941. Italy and France maintained a mixed court which was still called an assizes court (*Cour d'Assises, Corte d'Assise*), whereas Spain got rid of all lay participation. Until the Russians reintroduced jury trial in 1993, the only continental European countries that preserved their jury courts were Austria, Belgium, Norway and Denmark, although the Danish converted their jury court into a mixed court in 2006.

The issue of lay participation, however, is not purely a legal question, but rather a political question of the separation of powers. The most repressive regimes throughout human history have always been supported (willingly or grudgingly) by a professional career judiciary without lay participation and an inquisitorial system in which the ideology of the search for truth had strict priority over any concern for human rights. Democratic, egalitarian countries can exist without lay participation, but it is difficult for repressive dictatorships to exist *with it*, unless it is deformed into a 'kangaroo court of yes-sayers'.

Prior to 1864 the Russian courts were subservient to notoriously corrupt provincial governors and doled out justice to the highest bidder. The 1864 reforms set up the framework for a genuinely independent judiciary with life tenure and introduced trial by jury as a further guarantee of liberating judges from control by the executive and local influences. As in other continental European systems, the jury was composed of twelve citizens and presided over by three professional judges. Verdicts were by a simple majority and consisted of a list of questions, almost in the form of interrogatories, relating to the elements of the charged case and possible aggravating, mitigating or exculpatory factors. The Bolshevik Decree on the Courts of 7 December 1917, however, put an end to an independent judiciary and replaced the jury with 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 workers', peasants', or housing collectives.

An Outline of Modern Jury Trial Procedure in Russia

The procedure—under the 2001 Code of Criminal Procedure—does not substantially differ from the that under the 1993 Jury Law. Today, the defendant has the right to trial by jury in all criminal cases subject to the jurisdiction of the second-level courts of original jurisdiction, which include formerly capital offenses such as aggravated murder, other serious felonies and some lesser crimes. The right belongs to the defendant and may be waived.

Jurors are drawn from registered voters in the territorial jurisdiction in which the crime was committed. They must be at least twenty-five years of age and have no pending criminal cases or unexpunged criminal convictions. The parties, including the aggrieved party, may conduct individual *voir dire* of the prospective jurors during jury selection, which takes placed in closed session. If the aggrieved party has expressed his or her desire to participate in the trial, then she constitutes one of the prosecuting parties, and has a right to participate in exercising peremptory challenges along with the public prosecutor. The jury is finally composed of twelve jurors and two alternates.

Russian jury trials begin with the reading of the accusatory pleading and by the judge questioning the defendant as to whether she understands it and admits guilt or wishes to express her position in relation to the charges. This is followed by opening statements of the prosecutor and defense. If the defendant decides to testify, she may do so at any time during the trial. Otherwise, the prosecution parties first present their evidence, followed by that of the defense. Unlike in the US, the aggrieved party enjoys the rights of a full party, that is, to testify, present evidence, make motions, be represented by a lawyer, have full discovery of the contents of the preliminary investigation dossier, make a closing argument, and appeal a judgment, whether of acquittal or conviction.

In Russian jury trials, the closing arguments of the parties (including the aggrieved party) precede the formulation of the "question list" which is submitted to the jury. The presiding judge makes a summation which consists in a recounting of the evidence and the positions of the parties, an explication of the applicable law and the rules of deliberation with emphasis placed on the presumption of innocence, or the resolution of doubt in favor of the defendant, and the fact that neither the defendant's silence, nor evidence declared inadmissible may be used to prove guilt.

Factual or guilt questions which are unfavorable to the defendant must be answered with a simple majority of seven of the twelve votes. Six votes suffice to answer a question favorable to the defendant. The jury must try for at least three hours to reach a unanimous verdict as to guilt. If it is not able to reach unanimity during this time, it may return a verdict based on the aforementioned majorities. The jury may recommend lenience, which compels a sentence below the maximum and even sometimes below the mandatory statutory minimum.

The trial judge prepares the judgment and, based on the jury's answers to the question list, either acquits or attaches a legal qualification to the wrongful acts found proved by the jury. Judgments of guilt and acquittal may be appealed in cassation, that is, based on errors of law by both prosecution (including aggrieved party) and defense on the basis of lack of congruence between the arguments of the court in the judgment and the factual circumstances of the case, violations of the rules of criminal procedure, incorrect application of the criminal law, and "injustice of the judgment".

An Outline of this Chapter

Section I and II will discuss the problem of judicial dependency on the executive branch and how the modern Russian theory of adversary procedure—with its notion of a distinct separation of power between prosecution, defense and the decision, left to the judiciary (and juries)—was designed to counteract it. Section III will begin the discussion of the extent to which the jury is actually replacing the judge (or the now abolished mixed court) as the arbiter of the guilt issue. It will explore mechanisms that have been used for avoiding trial by jury, from manipulating the charges, to coercing waivers of the right to jury trial.

Section III, will focus on the extent to which the introduction of the jury system has humanized the handling of the individual case, *i.e.*, the extent to which the jury alone is responsible for deciding guilt. The reformers did believe that jurors should be able to nullify the law and return verdicts of not guilty for reasons of humanity, even if the evidence was actually sufficient to prove guilt. They also gave the jury the power to mandate leniency in sentencing in cases where they did find the defendant guilty.

The complicated nature of the question lists used in Russia has led to a marginalization of the jury as guilt-finder. The Russian jury must answer three principal questions in every case: (1) Was the *corpus delicti* proved? (2) Was the defendant the perpetrator of these criminal acts? And (3) Was the defendant guilty of the commission of these criminal acts? If

the jury answers the third question in the negative, after answering the first two affirmatively, one has a case of nullification. But the question list itself may contain other questions related to facts which may justify the act such as issues of self-defense, or partially excuse the act such as heat of passion. It may also contain questions related to aggravating and mitigating circumstances. The Supreme Court of the Russian Federation (SCRF) has unfortunately interpreted the jury provisions of both the 1993 and 2001 laws to limit the jury in many respects to only deciding issues of fact, and leaving it to the professional judge to "qualify" the answers the jury gives to the questions to determine whether the acts found proved by the jury constitute this or that criminal homicide (aggravated murder, murder in the heat of passion), or perhaps even justified self-defense. Thus, even though juries decide "guilt" it is interpreted only as guilt for having committed certain acts, and it is the judge who will decide whether those acts constitute a crime. This effectively deprives the jury of the power to determine guilt.

Section V will discuss the factors that have allowed a massive reversal of acquittals in Russian jury cases. The fact that judgments of acquittal may be appealed by the prosecutor or the aggrieved party, and that Russian law does not require the party appealing to have objected to the error, which lies at the base of the appeal during trial, mean that the SCRF, which hears all appeals in cassation from jury court judgments, may overturn virtually any judgment with which it disagrees, and, in reality the Supreme Court reverses the great majority of all acquittals. Indeed, the wide-open rules on appeal allow judge and prosecutor to collude during the trial to build in error, which will allow reversal in the event of an acquittal. Even without such collusion, the rules of adversary procedure and the exclusionary rule, along with the overly complicated nature of the Russian question list addressed to the jury, allow the SCRF to cynically turn the rules originally meant to protect defendants against them by claiming that their violation prejudiced the prosecutor or the aggrieved party. As a result of this perversion of human rights guarantees and the maintenance of inquisitorial appellate practices, the old Soviet practice of error-free justice has been resurrected.

My regrettable conclusion, in Section VI, is that these ambitious reforms are looking more and more like democratic window-dressing for a system that is continuing to function as it did in Soviet times. I have suggested some reforms which could save the institution from becoming a cynical "decoration" of an otherwise authoritarian Soviet-style criminal justice system.

I. Russian Adversary Procedure: Theory and Practice

Russian Theories of Adversary Procedure

"Only in state service will you recognize truth"![1]

One must first analyze what the Russian legal reformers understood, when they mandated "adversary procedure" (*sostiazatel'nost'*) as the underlying concept for court procedure, both civil and criminal. Although the reform movement began in 1988-1989, towards the end of Gorbachev's *perestroika* reforms,[2] the main blueprint for the reforms was and remains the "Concept of Judicial Reform". Soviet theory, when it actually addressed the principle of adversary procedure, traditionally held that it could exist even with an active trial judge who was obligated to ascertain the truth. This was the understanding in Tsarist Russia even after the 1864 reforms which introduced trial by jury[3] and was also seconded by A.Ia. Vyshinskii when he was Minister of Justice during the late Stalinist period.[4] Some conservative voices in Russia today still supported this thesis well into the reform period.[5]

The theory, now entrenched in §15 Criminal Procedure Code of 2001 of the Russian Federation (UPK RF),[6] that the tri-partite division of labor between prosecution, defense, and court is the crucial factor in

1 A.P. Chekhov, *Sobranie Sochinenii* Vol. 7 (State Publishing House of Fictional Literature, Moscow, 1956), 199.

2 Stephen C. Thaman, "The Resurrection of Trial by Jury in Russia", 31 *Stanford Journal of International and Comparative Law* (1995), 70.

3 Samuel Kucherov, *Courts, Lawyers and Trials under the Last Three Tsars* (Praeger, New York, 1953), 43.

4 Henrike Franz, *Die Hauptverhandlung im Russischen Strafverfahren* (Dr. Köster, Berlin, 2000), 217; I.B. Mikhailovskaia, *Tseli, funktsii i printsipy Rossiiskogo ugolovnogo sudoproizvodstva* (Prospekt, Moscow, 2003), 69.

5 S.B. Romazin, "Die Strafprozeßordnung und die Rolle der Staatsanwaltschaft", *Recht in Ost und West* (1992) No.2, 53-56. Romazin headed up a group of experts in the Ministry of Justice in the early 1990s which prepared a draft Code of Criminal Procedure, which was eventually adopted on first reading by the State *Duma*, Franz, *op.cit.* note 4, 146-153, but was then shelved in favor of the 2001 Code.

6 §15 UPK RF reads: "(1) Criminal court procedure is realized on the basis of adversariality of the parties; (2) the functions of prosecution, defense and decision of the criminal case are separated one from the other and may not be attributed to one and the same organ or one and the same public official; (3) the court is not an organ of criminal prosecution and does not appear on either the side of the prosecution or the side of the defense. The court creates the necessary conditions for the parties' fulfillment of their procedural duties and the realization of the rights accorded them; (4) the prosecution and defense parties have equal rights before the court."

achieving adversariality, was championed by M.S. Strogovich in writings from 1939 into the 1950s,[7] but the term was omitted in the 1960 Criminal Procedure Code of the RSFSR (UPK RSFSR) and vanished from academic discussions for the most part until the late 1980s.[8] This theory was clearly articulated in some crucial decisions of the Constitutional Court of the RF (CCRF) before the enactment of the 2001 Code.[9]

This theory, of course, requires a passive judge, and that the procurator, in his/her role as public prosecutor, act as a party on equal footing with the defense.[10] In Soviet-Russian criminal procedure the procurator in criminal proceedings had a judge-like position, supposedly duty-bound to guarantee the legality of all proceedings, but, in reality, he/she ducked responsibility for the quality of the proceedings at every step. Apologists still claim that the procurator, even when acting as public prosecutor, is not a party[11] and is not responsible for the truth of the accusatory pleading, for it is filed by the investigator.[12]

The need to pronounce such a separation, which is axiomatic in a Common Law adversarial system, is based in the fact that the judge in Russian-Soviet inquisitorial procedure shared the same duty to ascertain the truth as did the police, the investigator and the public prosecutor or

7 I.L. Petrukhin, *Teoreticheskie osnovy reformy ugolovnogo protessa v Rossii* Part II (Prospekt, Moscow, 2005), 122; Mikhailovskaia, *op.cit.* note 4, 9 and 216-217.

8 Franz, *op. cit.* note 4, 221; Petrukhin, *op.cit.* note 7, 123.

9 For instance, in the Decision of the CCRF of 20 April 1999, republished in *Konstitutsionyi sud Rossiiskoi Federatsii: Postanovleniia.Opredeleniia 1999* (Iurist", Moscow, 2000), 78, the court explained the principle of adversary procedure in the following way: "This principle in criminal proceedings means above all a strict delimitation of the judicial function of deciding cases and the function of the prosecution which, thus, is realized by different subjects." For an English translation of the case, see Stephen C. Thaman, *Comparative Criminal Procedure: A Casebook Approach* (Carolina Academic Press, Durham, NC, 2002), 181.

10 "O kontseptsii sudebnoi reformy", *VVS RSFSR* (1991) No.44 item 1435, reprinted in *Kontseptsiia sudebnoi reformy v Rossiiskoi Federatsii* (Respublika, Moscow, 1992), 62 (hereinafter "Concept of Judicial Reform"); Mikhailovskaia, *op.cit.* note 4, 114-15; I. L. Petrukhin, "Sud prisiazhnykh: Problemy i perspektivy", *Gosudarstvo i pravo* (2001) No.3, 8.

11 The Germans share this view. See Claus Roxin, *Strafverfahrensrecht* (Beck, München, 24th ed. 1995), 50; Wolfgang Wohlers, *Entstehung und Funktion der Staatsanwaltschaft* (Duncker & Humblot, Berlin, 1994), 28-31.

12 This theory is still propagated, despite the fact that the procurator has the ability to reject the investigator's pleadings, send the case back for further investigation, etc. See I. F. Demidov, "Proekt UPK v svete ego osnovnykh poniatii", in *Sudebnaia reforma v Rossii: Problemy sovershenstvovaniia protsessual'nogo zakonodatel'stva* (Gorodets, Moscow, 2001), 233-235; L. A. Kurochkina, "O deiatel'nosti prokurora v stadii sudebnogo razbiratel'stva", in *id.*, 249.

procurator, or, in the words of §20 UPK RSFSR, to "take all measures provided by law towards the all-sided, complete and objective investigation of the circumstances necessary and sufficient to decide the case". This provision was not merely theoretical, for before the 1993 Jury Law required prosecutors to appear in all jury cases and the §246(1) UPK RF required them to appear in all non-jury cases as well, prosecutors did not even show up for trial in more than 50% of all cases, thus leaving the task of determining the truth to the trial judge, who became, in essence, an *ersatz* prosecutor who was compelled to prove the truth of the charge.[13]

II. Separation of Powers: Enabling the Judiciary to Acquit

Structurally Solidifying the Independence of the Judiciary

> "Do you know any of the Russian judges?" Anthony Kennedy asked Richard Goldstone. "They are so resilient." "I've met good and bad", Goldstone replied. "Now the court belongs to the President—Vladimir Putin." (Conversation between US Supreme Court Justice Anthony Kennedy and Richard Goldstone, South African Constitutional Court Judge and former Prosecutor of the International Tribunal for the Former Yugoslavia.)[14]

One of the main goals of judicial reform in Russia since *perestroika* has been that of creating a judiciary truly independent from the executive branch, whether in the form of a political party, as was the case in Soviet times, federal or local executive branch officials or the procuracy. Although judges in pre-revolutionary Russia enjoyed appointments for life, under Soviet law, judges were elected for five-year terms and would not be proposed for re-election by the Communist Party if they had not performed to its liking.[15] The 1992 Law on the Status of Judges and the 1993 Constitution of the Russian Federation (hereinafter "Const. RF") provided that the

[13] Thaman, *op.cit.* note 2, 67. Peter H. Solomon, Jr. and Todd S. Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform* (Westview, Boulder, CO, 2000), 126. Cf. "Concept of Judicial Reform", *op.cit.* note 10, 27; Franz, *op.cit.* note 4, 61. As late as 1998-1999, prosecutors were absent in anywhere from 53% to 64% of trials according to a study of certain courts in the city of Krasnoiarsk. Stanislaw Pomorski, "Justice in Siberia: A Case Study of a Lower Criminal Court in the city of Krasnoyarsk", 34 *Communist and Post-Communist Studies* (2001), 462. Soviet theory saw the judge as just another law enforcement official with the duty to determine the truth, and, as last in line he was obligated to ratify the results of the investigations conducted by police, investigator and prosecutor. T.G. Morshchakova, "O Rossiiskoi sudebnoi reforme", in *id., Rossiiskoe pravosudie v kontekste sudebnoi reformy* (R. Balent, Moscow, 2004), 178.

[14] Jeffrey Toobin, "Swing Shift", *New Yorker*, 12 September 2005, 48.

[15] Morshchakova, *op.cit.* note 13, 181-182.

President, and not local governmental authorities, would appoint judges at the local level so as to free judges from local tutelage, and provided for the non-transferability and non-removability of judges until the retirement age of sixty-five.[16] Housing was guaranteed so as to liberate judges from dependency on local officials who otherwise controlled the housing stock and could use this as a lever to influence judicial decision making, while judicial salaries were set at a comparatively high level.[17]

The promise of the 1992 law was undercut by amendments which introduced three-year probationary periods for judges which implicitly allows them to be removed, if they are not performing to the satisfaction of executive branch officials, the presiding judge of the court, or the higher judicial hierarchy.[18] The failure of the federal government to adequately fund the judiciary in the mid-to-late 1990s also caused judges to fall into renewed dependency on local government officials for housing, staffing and renovation of courthouses, etc.[19]

At the time of this writing, commentators generally see an increasing dependency of the judiciary on the Office of the President of the Russian Federation, Vladimir Putin.[20] This has been achieved by the presidency's

16 This was a recommendation of the "Concept of Judicial Reform", *op.cit.* note 10, 45.

17 Thaman, *op.cit.* note 2, 75-76.

18 Morshchakova, *op.cit.* note 13, 183.

19 Peter H. Solomon, Jr., "Putin's Judicial Reform: Making Judges Accountable as well as Independent", 11 *East European Constitutional Review* (2002), 119, talks of the "sponsorship" of courts by regional and local governments and private firms, and by compensation packages for individual judges that included bonuses and perks (such as apartments) arranged by the chairmen of courts and their friends in local government. Gordon B. Smith, *Reforming the Russian Legal System* (Cambridge University Press, Cambridge, UK, 1996), 16, cites a University of Toronto study that found that more than half of the 300 district court judges questioned received money from regional governments. In 1996 and 1997 58% of courts received some "help" from local governments and one out of 7 judges reported receiving aid from private sources. 7% of judges surveyed reported that specific demands accompanied the assistance they received and of those receiving support from private firms, 22% admitted that the support had some influence on their handling of cases. Sergei Pashin has reported that Moscow Mayor Iurii Luzhkov has been paying bonuses to all Moscow judges (apparently between 1,500 and 2,000 rubles for district level judges) several times a year. Human Rights Watch, *Confessions at Any Cost: Police Torture in Russia* (Human Rights Watch, New York, 1999), 115.

20 Sergei Pashin, a former Moscow City Court judge and one of the most prominent reform voices in the El'tsin years, claims the new dominance of the presidency over the courts is a result of the influence of Dmitrii Kozak, the Putin Administration's head of judicial reform, who was also influential in pushing through the UPK RF and other laws. Evgenii Natarov, "Sudy Bogdykhanov", *Gazeta.Ru.*, 26 November

control of the chairpersons of the courts through its power of appointment and of the rank and file through a substantial raising of salaries.[21] So, one could say there is a vertical of dependency: lower district court judges are controlled by the chairpersons of their respective courts,[22] and the courts themselves by the hierarchy in the second-level courts of general jurisdiction (the regional, territorial courts, the Moscow and St. Petersburg City Courts and the Republican Supreme Courts, the jury trial courts).[23] They in turn are controlled by the Supreme Court of the Russian Federation. Finally, the President has the last word on appointment power and the power of the purse.

In the individual case, four variants of "telephone law" are still persistent: influence by federal and local administrative officials; influence by the chairpersons of the courts; influence by the prosecutor's office; and the influence of private money, *i.e.*, bribery. There continue to be reports that local administration officials will call judges to suggest how they should best decide cases.[24]

In the trial courts, judges will either discuss a civil case with the chairperson of the court to determine the proper way of deciding it,[25] or, in criminal cases, sit down with the procurator and determine in advance

2003, available at <http://www.gazeta.ru/comments/expert/67544.shtml> (Indem: 11.14-30.03). A reform in 2001 reduced the term of the chairpersons of the various courts from life to six years, thus making them more dependent on the President's administration. "As Increasing Executive-Branch Influence on the Judiciary is Decried", *RFE-RL*, 11 August 2004.

21 According to Dmitrii Kozak, the administration intended to raise judicial salaries fourfold in 2006 in order to reduce the dependence of judges on regional government. Grigorii Vdovin, "Razrabotka reformy zaniala okolo chetyrekh mesiatsev", *Strana ru*, 26 May 2001, available at <http://strana.ru/state/kremlin/2001/05/26/9900875332.html>.

22 The chairpersons of courts and, now, the new Judicial Administration, decides when judges can get money to remodel their apartments, etc. Morshchakova, *op.cit.* note 13, 193.

23 According to Solomon and Foglesong, *op.cit.* note 13, 49-51, "stability of sentences" and absence of reversals determines whether a district court judge is promoted. Every judge and every district court has an appointed supervisor (*kurator*) in the higher level court who functions as an informal "mentor" and as the official judge of their decisions in cassation. Cf. Pomorski, *op.cit.* note 13, 455.

24 Pomorski, *op.cit.* note 13, 474-475, was made aware of this during his Krasnoiarsk study and concludes: "Behind a thin façade of a new legal ideology, the band plays an only slightly modified old tune." *Id.*, 476.

25 Human Rights Watch, *op.cit.* note 19, 115-16. Smith, *op.cit.* note 19, 29, notes that all judges interested in appointment need to appear obedient and display loyalty to the chairperson of the court.

what the outcome will be.[26] Judges who buck the will of the prosecutor or the judicial hierarchy are either reassigned to handle trivial cases or hounded out of the judiciary altogether.[27] Moscow City Court judge Ol'ga Kudeshkina revealed on Moscow radio that the Office of the Procurator General was pressuring Moscow City Court judges to decide cases a certain way, and that Chairperson Elena Egorova was supporting them by attempting to suspend any judges who resisted.[28] She also claimed in an open letter to President Putin that more than eighty Moscow City Court judges had quit because of being unable to tolerate Egorova's heavy-handed methods.[29]

Political cases are routinely transferred to one of the compliant Moscow District Courts, such as that of the Basmanyi District, or to Moscow City Court, where judges are known to grant all of the prosecutor's motions and where Chairperson Egorova, who also controls the Qualifications *Collegia* which discipline judges, routinely has judges suspended or expelled

26 Pashin notes that fear of reversal induces judges to work out a solution in criminal cases that is acceptable to the procurator so there will be no appeal. Sergei Pashin, "Mertvye dushi?", *Novye izvestiia*, 11 September 2003; Human Rights Watch, *op.cit.* note 19, 115-117. A natural closeness between judges and prosecutors can also be explained by the fact that, as in the US, many judges are former prosecutors, police officials or investigators, at least 32% according to a recent study. Vladislav Kulikov, "Sud'i seli", *Rossiiskaia gazeta*, 28 January 2004 (Indem: 1.25-2.7.04). See, also, Tamara Morshchakova, "Printsip nezavisimosti i mekhanizm zavisimosti", *Gazeta.ru.*, 31 March 2005, available at <http://www/gazeta/ru/comments/2005/03/31_x_261669.shtml>, also emphasizes the fact that judges are afraid to rule against the procuracy and are transferred or suspended if they do.

27 Sergei Pashin says he refused to follow the orders of members of the procuracy and the president of the court to ignore obvious signs of torture in the trial of three suspects for kidnapping a Russian businessman and subsequently received no more serious cases, and was later expelled from the judiciary. Andrew Jack, "Justice System", *Financial Times*, 9 April 2001, reprinted in *Pericles Russian Law Letter*, available at <http:// www.pericles.ru>. For the story of three Novosibirsk judges who were removed after refusing to follow orders of the chairperson of the court, see Konstantin Poleskov, "Tudy-sudy: Tainy soveshchatel'nykh komnat", *Novaia gazeta*, 5-8 August 2004, 10-15, available at <http://www.novayagazeta.ru/data/2004/56/00.html>. Particularly notorious was Zhumabai Ramazanov, ex-president of Astrakhan Regional Court (and former judge of the SCRF and the Soviet Supreme Court), who never sat on a case or in any meeting of the presidium of the court, but evaluated cases and told judges how to decide them. Zoia Svetova, "Astrakhanskie uzly", *Russkii kur'er (web-sait)*, 28 August 2003 (Indem: 8.22-28.03).

28 "Supreme Court Upholds Dismissal of Judge for Criticizing Prosecutors", *RFE-RL*, 20 January 2005.

29 Ol'ga Kudeshkina, "Otkrytoe pis'mo prezidentu RF V.V. Putinu", *Novaia gazeta*, 14 March 2005, available at <http://2005/novayagazeta.ru/nomer/2005/18n/n18n-s42.shtml>.

from the judiciary if they refuse to accede to the prosecutor's demands.[30] In general, the chairperson of the court has unlimited power to assign any case to any particular judge, violating the right under Article 47(1) of the Russian Constitution to have one's case heard by "the court and judge to whose jurisdiction it is assigned by law".[31]

The fourth source of "telephone law" would be that of private bribery which, while perhaps more rampant in the civil and economic courts, also takes place in the criminal courts.[32] Corruption is, even according to officials of the presidential administration, the main reason why public trust in the courts is abysmally low.[33]

Furthermore, as we will see in the jury trial jurisprudence, the SCRF actively develops binding guidelines for lower court judges that, in principle, instruct them how to decide cases and wise trial judges will not challenge these norms for fear of either not advancing in the judicial hierarchy or of even not surviving their probationary period. The standards set by

30 Ekaterina Zapodinskaia, "Samyi Basmannyi Sud v Mire", *Kommersant" Vlast'*, 3 November 2003, available at <http://www.kommersant.ru/doc.aspx?docsid=424963>. This happened to Mikhail Khodorkovskii who was flown to Basmannyi District Court though it was not the closest district court. See, also, *Basmannoe pravosudie: Uroki somooborony. Posobie dlia advokatov* (Publichnaia Reputatsiia, Moscow, 2004), 83-84.

31 On this version of "judge shopping", see Solomon and Foglesong, *op.cit.* note 13, 47-48. In Germany, where the Art.101(1) of the Basic Law contains a similar provision, the courts are required to develop a plan to distribute cases which determines in advance to what court a case will go so it will not be subject to the discretion of the chairperson of the court. The chairperson, however, still has the power to determine which judge will be presiding judge or rapporteur in the case. Hans-Heiner Kühne, *Strafprozessrecht* (C.F. Müller, Heidelberg, 6th ed. 2003), 64-65.

32 For discussions of "price-lists", see Marina Gridneva, "Sud prodazhnykh", *Moskovskii komsomolets*, 3 July 2003 (Indem: 7.1-7.03).

33 Ivan Sukhov, "Nastorazhivaiushchii pokazatel'", *Vremia novostei*, 28 January 2004, available at <http://www.vremya.ru/2004/13/4/90137.html>. In early 2004, a poll found that 53% of the population felt the courts were ineffective and 17% had no confidence in them. *Id.* Later in the year, another poll found that 46% of respondents had a negative attitude toward judges and only 12% agreed that most judges are honest and incorruptible. 62% said that judges do not base their decisions solely on the law, but on "other considerations" as well. Of those who said so, 40% said those considerations include judges' personal interests, and 8% said they include political pressure from other branches of government. "Public Confidence in Judges Weak", *RFE-RL*, 18 October 2004. A poll in 2002 revealed that 78.6% of those questioned agreed with the statement: "Many people do not resort to the courts because they do not expect to find justice there." Mikhail Krasnov, "Is the 'Concept of Judicial Reform' Timely?", 11 *East European Constitutional Review* (2002), 94.

the SCRF continue to "zigzag" with the law enforcement policies of the government much as was the case in Soviet times.[34]

In the words of Stephen Holmes, Russia has created a "rule by law", rather than a "rule of law" system, in which power "is tightly held by a small social elite that uses the legal system to protect and consolidate its privileges and power", whereas in a "rule of law" system "power is fragmented and dispersed among rival social groups and organized interests, none being powerful enough to work its will by intimidation or force".[35]

Professional Judges' Continuing Unwillingness or Inability to Acquit

Of course, the clearest proof of a new independence of trial judges in the post-Soviet Russian system, would be a rise of the percentage of acquittals in criminal cases returned by professional courts (or courts with lay assessors before 2003) than existed before the reforms began. The rise in the rate of acquittals should be ineluctable considering the universal recognition that the quality of criminal investigations is still abysmally low, probably worse than it was in Soviet times, and public opinion reveals a complete lack of distrust of police and law enforcement officials.

Since the people's assessors in Russia had notoriously little if any effect on the guilt issue in criminal cases, we can treat the statistics relating to the court with lay assessors, and the cases tried by single judges and three-judge panels as one category in trying to determine whether the non-jury courts began to acquit more after the reforms, thus revealing an increased independence they did not enjoy or express during Soviet times. The authors of the "Concept of Judicial Reform" were aware that pre-revolutionary Tsarist courts acquitted around one-third of all defendants and the Soviet regular courts acquitted one in ten defendants even in Stalin's times.[36]

34 It is disputed whether the SCRF's "Explanations" are "exercises of statutory interpretation" or the development of "independent normative sources of law". While a 1981 law made them binding on all lower courts, a 1996 law has reduced them to mere persuasive authority. Peter Krug, "Departure From the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation", 37 *Virginia Journal of International Law* (1997), 735-736. Morshchakova, *op.cit.* note 13, 193, interprets the SCRF's Explanations as, however, being "quasi-normative" and still binding on the lower courts. For an opinion supporting the continuing use of "Guiding Explanations", but for eliminating the SCRF plenary's commentaries on judicial practice, see Solomon and Foglesong, *op.cit.* note 13, 53-54. (I fail to see the difference in the function of these two practices.)

35 Stephen Holmes, "Reforming Russia's Courts: Introduction", 11 *East European Constitutional Review* (2002), 90-91.

36 "Concept of Judicial Reform", *op.cit.* note 10, 11. But acquittals were less than 1% in 1991 at the time of its writing, and less than one-third of a percent were actually acquitted due to innocence.

Before the passage of the UPK RF in 2001, cases were handled by either the jury court, the mixed court with lay assessors, panels of three judges or a single judge.[37] Pomorski noted in his study of some Krasnoiarsk courts, in the late 1990s, that no court ever acquitted. In fact, there was a "no acquittal" policy. Though judges acknowledged the miserable quality of the preliminary investigation, they knew that all acquittals were overturned if the prosecutor (who hardly ever appeared in court) appealed. This converted the trial court, in reality, into a mere sentencing court, imposing the judgment sanctioned in advance by the prosecutor. As a result of their lack of power, many judges were actually eager for the introduction of jury trials, which began in January 2003.[38] The statistics for the three-judge panels are remarkable. From 1994 through 1998, 1,564 persons were tried before the rarely used three-judge panels (which were a possible alternative for trial by jury), and not one person was acquitted! Only twenty-two were not convicted because their cases were returned for further investigation.[39]

In the first three years following passage of the UPK RF in 2001, the overall acquittal rate (including jury trials) rose from 0.3% to 0.9%.[40] This, however, is still an infinitesimal rate when one bears in mind the lack of professionalism of criminal investigators, and the lack of credibility of the evidence they gather to support the prosecutions.

We will now evaluate whether the introduction of jury trial has helped in eliminating the reasons for "telephone law" and the crude subjugation of professional judges to the procuracy[41] by allocating to the jury, rather

37 Juries and three-judge panels heard cases punishable by more than fifteen years in prison or the death penalty (until a moratorium was declared in 1996). §15 UPK RSFSR. A mixed court of one judge and two lay assessors handled cases punishable by between five and fifteen years, and a single judge would hear cases where punishment did not exceed five years. §35 UPK RSFSR.

38 Pomorski, *op.cit.* note 13, 456-458. Human Rights Watch noted that the procuracy and the appellate courts go over acquittals meticulously to find any reason to reverse whereas guilty judgments are accepted with little scrutiny. To enforce this "no-acquittals" policy, the SCRF routinely reverses a much higher percentage of acquittals (which constitute less than one-half of 1% 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. Human Rights Watch, *op.cit.* note 19, 118-119.

39 V. V. Mel'nik, *Iskusstvo dokazavaniia v sostiazatel'nom protsesse* (Delo, Moscow, 2000), 42. The Ministry of Justice confirmed the lack of acquittals for the years 1994-1996. "Miniust podvodit itogi raboty sudov", *Rossiiskaia iustitsiia* (1996) No.8, 4.

40 Petrukhin, *op.cit.* note 7, 101. Sergei Pashin noted that district court judges acquitted only 0.73% of all defendants in 2002. Pashin, *op.cit.* note 27.

41 Another reason judges are afraid to acquit is that law enforcement organs will blatantly violate the law and re-arrest the defendant after the acquittal, and hold him

than the professional judge, the resolution of the most important issue in a criminal trial, that of guilt.[42]

III. Separation of Powers: Has the Jury as Independent Guilt-Finder Promoted the Toleration of Acquittals? Strategies to Avoid Trial by Jury and Insure that Judges Determine Guilt

Waiver of Trial by Jury

Despite the virtual impossibility of obtaining an acquittal in the non-jury courts, more Russian defendants subject to jury court jurisdiction have chosen to be tried by the court with lay assessors ("nodders") before 2003, or a three-judge or single judge court thereafter. In the first nine months of jury trial between 1 January and 1 September 1994, jury trials were requested in only 254 of the first 1,465 cases filed in the original nine jury trial jurisdictions. My original conclusion, after having interviewed many prosecutors, lawyers, and judges involved in the first cases, was that investigators, prosecutors and reluctant defense lawyers convinced the defendants to forego the new trial procedure, because of their reluctance to change their old ways and fear of the demands placed on them by the new system. In fact there is evidence that law enforcement officials pressure lawyers to get their clients to waive the right to jury trial.

Undercharging the Case to Avoid Trial by Jury

There is a long history in Europe of intentionally avoiding trial by jury by intentionally undercharging the case, so that it will not fit the criteria for trial by jury. This is done in England and Wales in relation to so-called "either-way" offenses that may be tried before a jury or the magistrate's court composed of three lay judges, or in France through a non-codified practice called *correctionnalisation*.[43]

on other trumped-up charges or until the case can be appealed. For a discussion of the *Litvinenko/Gusak case* (Moscow Military Court), where this happened on 26 November 1999, see "Pokushenie na nezavisimost' suda: Sovremennye khroniki", *Rossiiskaia iustitsiia* (2000) No.2, 3; I.L. Petrukhin, "Sudebnaia vlast', razdavlennaia politseiskim sapogom", *Rossiiskaia iustitsiia* (2000) No.2, 4-5.

42 According to former Ivanovo jury court judge and current judge on the Cassational Panel of the SCRF, Valerii Stepalin: "Ask a judge nowadays who tries cases in the jury courts and he answers, that it is just in that form of procedure that he feels he is a judge, and not a lackey of the prosecutor, required to rewrite the accusatory pleading in the judgment." V. Stepalin, "Sudebnyi marafon s prepiatstviiami", *Rossiiskaia iustitsiia* (1998) No.3, 7.

43 Thaman, *op.cit.* note 9, 141-143.

In Russia in the first full year of jury trial nearly all of the cases tried were for aggravated (potentially capital) murder, with only twelve of the first one hundred-nine trials involving a non-capital crime (bribery, etc.), which were also subject to the jury court's jurisdiction. One can only surmise that investigators and prosecutors were intentionally charging other offenses to avoid the jury court's jurisdiction, as was openly the case in Spain which also included some fairly minor crimes within the jury court's jurisdiction.[44] More recently, investigative journalists have reported that Russian investigators are explicitly engaging in this practice to avoid jury trials.[45]

IV. The Question of Jury Nullification

The "sphinx like" general verdict of "guilty" or "not guilty" in American and British jury trials and the non-appealability of acquittals, enable juries to sometimes render a verdict contrary to the facts and the law. But it must be remembered that juries are virtually never instructed as to their power to nullify the law.[46] The trifurcation of the guilt question in Russian special jury verdicts which allowed the jury to acquit even when all the elements of the crime had been proven, was criticized by Foinitskii as being French legalistic casuistry which had been rejected by Germany.[47]

44 Stephen C. Thaman, "Europe's New Jury Systems", in Neil Vidmar (ed.), *World Jury Systems* (Oxford University Press, Oxford, 2000), 325-326.

45 Georgii Tselms, "Gospoda prisiazhnye, zabud'te [...]", *Russkii kur'er*, 24 January 2004 (Indem: 1.25-2.7-04). Pashin notes that the investigator will charge, instead of murder with aggravating circumstances, "infliction of serious injuries to health causing the death of the victim" which is not subject to jury trial. Pashin interviewed in Leonid Nikitinskii, "Prestuplenie i opravdanie", *Moskovskie novosti*, 8 April 2003 (Indem: April 7-11.03), 152.

46 See *United States v. Dougherty*, 473 F2d 1113, 1132-37 (DCCir. 1972) for the classic enunciation of this principle.

47 I.Ia. Foinitskii, *Kurs ugolovnogo sudoproizvodstva* (Al'fa, St. Petersburg, 1996), reprint of 1910 edition. Vol.II, 457-458. Foinitskii was not in favor of recognizing the jury's power to nullify and was a proponent of amending the laws to prevent the influence of "public opinion" in the jury's guilt decisions. *Id.* 360-61. He cites later opinions of the Cassational Senate from 1904-1905 which held that the presiding judge had to instruct the jurors that they would violate their duties if they answered negatively as to guilt, if they were convinced that the defendant committed the criminal act and the act included the necessary elements of the crime. *Id.*, 452. The new Spanish jury law avoids these problems by declaring that such a verdict is legally contradictory, and in such a case the judge would have to return the jury to the jury room to correct the inconsistency. Stephen C. Thaman, "Spain Returns to Trial by Jury", 21 *Hastings International and Comparative Law Review* (1998), 377-378.

The official position of the pre-revolutionary Cassational Senate was that the third question relating to guilt was designed to relate to the classic excuses or justifications of the criminal law: insanity, unconsciousness, mistake, deception, or self-defense.[48] This position has been followed by some voices in the modern literature.[49]

But juries did nullify before the revolution, such as in the *Vera Zasulich case* in 1878, and such acquittals were welcomed by many in the legal community, including the famous judge in that case, A. F. Koni:

> "Jurors are asked not whether the defendant *committed* the criminal act, but whether he is *guilty* of having committed it; not the fact, but the inner aspect thereof and the personality of the defendant expressed therein, is for their decision. With its question as to guilt, the court establishes a general gap between fact and guilt and requests that the jury, based exclusively on the 'conviction of its conscience' and mindful of its great moral responsibility, bridges this gap with considerations, that determine whether the defendant is guilty or not-guilty."[50]

This broad approach to the jury's guilt decision is seconded by Bobrishchev-Pushkin who saw juries as "self-proclaimed legislators", and their verdict as "social facts" which should be considered by the actual legislators in revising outdated and unpopular laws. He wrote that the

> "[...] content of the word 'guilty' in the verdict of the jury, embraces such a countless quantity of aspects of the offense, particularities in the personality of the defendant, shades of the manifestations of his will, utilitarian and ethical considerations, which can possibly be contained in each separate case, that it can never be rendered precise either by the law, by morals or by a complete juridical understanding."[51]

Russian juries before the Bolshevik Revolution would exercise the power of so-called "nullification" typically in the following situations: (1) to prevent the enforcement of unpopular laws; (2) to apply popular social notions as

48 M. Selitrennikov, *O postanovke voprosov na sude ugolovnom, po resheniiam Kassatsionnogo Senata* (A.M. Kotomin, St. Petersburg, 1875), 254. Kucherov, *op.cit.* note 3, 66-67, claims that the Cassational Senate allowed nullification in a decision of 1870, but reversed itself in 1884. In 1894 it ordered judges to instruct juries that they must convict if convinced of guilt. Juries, of course, often ignored this.

49 Petrukhin, *op.cit.* note 7, 133, alludes that the third "guilt" question refers to the subjective side of the offense, the presence of negligence, self-defense, etc. See, also, Petrukhin, in *Kommentarii k Ugolovno-protsessual'nomu kodeksu Rossiiskoi Federatsii* (Kodeks, Moscow, 2003), 417.

50 A.F. Koni, *Sobranie sochinenii* Vol.4 (Iuridicheskaia literatura, Moscow, 1967), 201.

51 Bobrischev-Pushkin, *Empirecheskie zakony deiatel'nosti Russkogo suda prisiazhnykh* (A.I. Snegireva, Moscow, 1896), 38-39. Juries would "determine whether the act of the defendant was an evil which must be punished as a dangerous or immoral act, or just something prohibited by law. If this question is difficult or too controversial, they either acquit, or limit themselves to an exact establishment of factual details in their answers, leaving the decision on the question of law to the judge". *Id.*, 584-585. They also acquit at times just to prevent the judge from unjustly formulating the juridical consequences of the verdict. *Id.*, 380.

to the relative seriousness of certain conduct which differed from those expressed in the criminal law; (3) to prevent the imposition of what they viewed to be excessively severe sentences; (4) to correct for injustices in the administration of criminal justice which were sometimes unrelated to guilt or innocence; and (5) for reasons of social custom completely unrelated to the facts of the case. Several of these situations are described below.

Nullification Due to Social Attitudes Contrary to the Principles of the Criminal Law

The following description of the relation of drunkenness to criminality in Tsarist Russia could just as well apply to the social situation in today's Russia:

> "The question of the extraordinary use of alcoholic beverages represents one of the most serious social questions. Drunkenness as a vice in many cases in its most ruinous manifestation, is among things reflected in a great mass of different kinds of crimes committed primarily by simple people exclusively under the influence of their non-sober condition. Whoever has watched jury trials cannot but be struck by the huge number of cases in which drunkenness, a non-sober condition, reckless holiday drinking sprees, and different gross instincts arising due to the extravagant consumption of vodka, are the main, and sometimes the direct factors in the commission of the crime."[52]

Due to its connection with so much crime, Russian law has traditionally considered drunkenness to be an aggravating factor in the imposition of sentence.[53] But Tsarist juries viewed drunkenness at the moment of the commission of a crime in an entirely different way than did the old Russian penal code.[54] Russian juries were aware that excessive consumption of alcohol could affect volition and consciousness, and therefore negate the mental states necessary for the commission of certain crimes and they often tried to gauge how much had been drunk and to determine if it was sufficient to diminish the defendant's criminal responsibility.[55] In the first

[52] N.P. Timofeev, *Sud prisiazhnykh v Rossii: Sudebnye ocherki* (A.I. Mamontov, Moscow, 1881), 380. Bobrishchev-Pushkin, *op.cit.* note 51, 577, also notes the "overwhelming and specific meaning of drunkenness in Russian life".

[53] In Tsarist Russia, it was an aggravating circumstance if it could be shown that the defendant drank liquor to summon up courage to commit a crime. Timofeev, *op.cit.* note 52, 381. Former §39(10) of the UK RSFSR made drunkenness an aggravating circumstance in all cases. Ugolovnyy Kodeks RSFSR (1 January 1961), cited from *Zakony RSFSR i postanovleniia Verkhovnogo Soveta RSFSR* (Supreme Soviet RSFSR, Moscow, 1960), 75-76. This provision was eliminated from the new UK RF, enacted in 1995.

[54] *Ibid.*, 381. Bobrishchev-Pushkin, *op.cit.* note 51, 355-356.

[55] Timofeev, *op.cit.* note 52, 382. Timofeev, a prosecutor, recalled a case in which the jury acquitted the defendant of mayhem and answered: "No, not guilty, and not

year of modern Russian jury trials, the aggravating factor of drunkenness was alleged as to eighty-nine defendants in seventy-six of the first one hundred-nine trials to go to verdict. In forty-seven cases the defendants were convicted of lesser-included offenses or granted lenience.[56]

Cases in which battered and abused wives attacked their husbands have also been typically ones in which the jury has nullified or softened the law. In the *Kras'kina case*, a 1995 case out of Ivanovo, the jury answered the three crucial guilt questions in the following manner.

1) Was it proved, that on 17 October 1994, at around 4:00 p.m. in apartment No. 1, at 8, Ul. Ul'ianova, in the city of Navoloki, Kineshemskii Raion, the victim Iurii Anatol'evich Smirnov was caused serious bodily injury in the form of a knife-wound to the brain, complicated by spinal shock, which caused his death in a short time, in minutes? (Yes, proved, unanimous).
2) In the event of an affirmative answer to the first question, was it proved that the above wounds were administered to the victim, who was in a serious state of alcoholic intoxication, by the defendant. V.A. Kras'kina, who threw him to the ground and intentionally stabbed him once with a home-made knife, which she prepared specially for this purpose, having been dissatisfied with the conduct of her companion, who had expressed in a drunken stupor, profanity, and extorted money to buy alcohol? (Yes, proved, unanimous);
3) In the event of an affirmative answer to the second question, is V.A. Kras'kina guilty of the intentional infliction of the above bodily injuries on Iu.A. Smirnov, intending or knowingly allowing him to die? (No, not guilty, unanimous).

This clear acquittal of a battered woman, through the exercise of jury nullification (no legal justifications or excuses were offered in her defense), was upheld by the SCRF on appeal in an opinion which upheld the jury's right to nullify the law.[57] Although Tsarist juries usually did not acquit a woman

guilty, because he was not in a human shape", (*ne v chelovecheskom obraze*) *Id.*, 383. Bobrishchev-Pushkin, another prosecutor, also noted that drunkenness often led to juries not finding criminal intent in crimes of passion, but seldom in crimes of theft, unless the victim of the theft was also drunk. Bobrishchev-Pushkin, *op.cit.* note 51, 35 and 577-579.

56 Stephen C. Thaman, "The Jury as Catalyst for the Reform of Criminal Evidentiary Procedure in Continental Europe: The Cases of Russia and Spain", in J. F. Nijboer and J. M. Reijntjes (eds.), *Proceedings of the First World Conference on New Trends in Criminal Justice and Evidence* (Koninklijke Vermande, Lelystad, 1997), 405.

57 *Kras'kina case* (Ivanovo), Judgment 7.20.95. For an English translation of the verdict and the opinion of SCRF, see Thaman, *op.cit.* note 9, 197-198. Another alleged battered

when she killed her husband while sleeping, in one pre-revolution case the jury found a peasant woman guilty of the lesser offense of infliction of bodily injury resulting in death without intent to kill, although she poured an entire boiling samovar onto his genitals while he was sleeping, locked the door of their hut, and let him suffer for five days until he died.[58]

Tsarist juries would also tend to be exceedingly lenient and even acquit in cases in which the defendant gave a full judicial confession and expressed remorse before the jury.[59] Such in-court conduct was often more important for the jury than the evidence of past acts presented by the prosecutor.[60] Timofeev noted that before 1864 criminal investigators used all kinds of tricks to get the suspects to confess, including the use of priests, but after the introduction of trial by jury defendants veritably threw themselves at the mercy of the jury.[61] Vestiges of this old Russian tradition were evident in the third jury trial in Ivanovo, witnessed by the author, in which the defendant fully admitted guilt to all the charges in the accusatory pleadings, including attempted rape and aggravated murder, but claimed he did not remember doing any of them because of his drunkenness. The jury acquitted as to all of the most serious charges, most likely because the young man had no prior criminal record, had been a model village dweller, and appeared sincere in his remorse.[62]

woman did not fare so well, however. In the retrial of the *Shaiko case* (Ul'ianovsk), No.80-kp-096-33sp (9.24.96), the defendant was convicted of aggravated murder after her conviction for homicide in the heat of passion of her battering husband was overturned. In the retrial, the trial judge refused to allow the defendant to admit evidence of the bad character of her husband and his previous acts of violence, thus making a nullification or sympathy verdict more difficult. The SCRF refused to set aside the conviction. *Shaiko case* (Ulianovsk), No.80-kp-097-28sp (6.3.97).

58 Cited in Bobrishchev-Pushkin, *op.cit.* note 51, 389.

59 *Ibid.*, 207.

60 *Ibid.*, 32.

61 Timofeev, *op.cit.* note 52, 23-24. In one judicial district, 22 of 33 defendants pleaded guilty in front of the jury. *Id.*, 24. One attorney claimed that 26 of 84 clients pleaded guilty in the first year of jury trials, forty-two of one hundred-twelve in the second and fifty-nine of one hundred-six in the third. *Id.*, 23. Timofeev also tells the story of a sympathetic peasant woman who was on trial for trying to poison her tyrant husband. Jail-house lawyers told her to admit her guilt and the jury would surely acquit. She stubbornly asserted innocence and was found guilty. When asked about her unwise decision, she told her fellow cellmates that she preferred exile and hard labor to her "unwanted forced labor" with her husband. *Id.*, 24-25.

62 *Kulakov case* (Ivanovo), Judgment of 2.11.94, Upheld by SCRF, No.7-kp-094-7sp (4.20.94). See Thaman, *op.cit.* note 2, 104-105 and 159-160.

Sanction Nullification

Tsarist juries often acquitted because they felt the provisions of the sentencing rules of the code were too severe.[63] Theft by force, for instance, was punished much more severely than secret theft, yet many jurors saw the sneak thief as a more dangerous social menace. They would therefore often acquit the strong-arm robber. The same was true of burglary and theft when only something of insignificant value was stolen.[64]

Nullification to Correct for Injustices in the Administration of Criminal Justice

Juries in Tsarist Russia often acquitted the defendant in cases in which s/he had spent a long time in pre-trial detention, due to the snail's pace of criminal investigations at the time.[65] The "premature doing of time" was considered, in the eyes of the jury to be a completely adequate basis for acquitting defendants who, under other conditions, would be found guilty.[66] Attempts to make the defendant appear to be a victim of the system, despite having committed a serious crime, were certainly instrumental in the acquittal of O.J. Simpson and played a considerable role in the first modern Russian jury trials, in which defendants claimed that their confessions of guilt during the preliminary investigations were the results of police use of coercion, threats, or promises.[67] Such attempts by the defense to gain sympathy with the jury, but also to explain why they confessed to crimes they claimed they did not commit, have been greatly undermined by subsequent decisions of the SCRF which have reversed acquittals and otherwise pro-defense verdicts because the lawyer, the defendant, or witnesses have tried to convince the jury that the defendant's earlier incriminating statements had been the product of unlawful force,

63 Juries' knowledge of the severe punishments led them to return seemingly illogical verdicts. Minister of Justice N.V. Murav'ev attributed the high percentage of acquittals to "the cruel provisions of the Criminal Code which no longer meet the requirements of life". Kucherov, *op.cit.* note 3, 70-71. Pre-revolutionary theorists Butkovskii and Viktorskii also acknowledge that many acquittals were to avoid the "antiquated punishments" or lack of proportionality thereof. Discussed in L.M. Karnozova, *Vozrozhdennyi Sud Prisiazhnykh* (Nota Bene, Moscow, 2000), 225-226.

64 Timofeev, *op.cit.* note 52, 267-271.

65 Bobrishchev-Pushkin, *op.cit.* note 51, 207. Juries would also acquit if they were aware that the defendant's co-partner in crime had escaped punishment.

66 Timofeev, *op.cit.* note 52, 387.

67 On the allegations of coercion in the first year of modern Russian jury trials and of use of torture by Russian criminal investigators, see Thaman, *op.cit.* note 2, 103-104. In three of sixteen prosecutions for multiple murders, juries acquitted despite the fact of a previous confession. *Id.*, 137.

threats, or other tactics by the investigator.[68] Tsarist juries would base their verdicts on coerced confessions, which were also not uncommon then, if the admissions were corroborated by independent evidence.[69]

V. Nullification of Nullification: The Mass Reversal of Acquittals by the Supreme Court of the Russian Federation

> "Our obtuse, our blinkered, our hulking brute of a judicial system can live only if it is infallible."
>
> Alexander Solzhenitsyn, *The Gulag Archipelago*[70]

The Appealability of Acquittals and the Impossibility of Nullification

The ability of the jury to acquit on its *intime conviction* based on reasons perhaps unrelated to the technical legal proof of guilt is only possible if acquittals are, as in the US, not subject to appeal.[71] Although the SCRF has occasionally allowed a "nullifying" acquittal to stand, such as in the *Kras'kina case*, it has persistently reversed acquittals, especially in particularly heinous murder cases, often involving more than one victim, where the jury is clearly not nullifying, but doubts the quality of the prosecution evidence. This section will first discuss the lack of adversarial procedure at the appellate stage of proceedings, which allows the SCRF to comb the record of the trials and *sua sponte* select often pretextual reasons for overturning acquittals (and occasionally convictions), and will discuss how the procedure allows prosecutor and judge to actually connive to build in reversible error in cases at the pre-trial and trial level. It will then provide the statistics relating to reversals of acquittals in general and note how many of these reversals are in very serious murder cases. Finally, it will outline the way the SCRF has manipulated the new principles of adversary procedure to reverse acquittals based on denial of the adversarial and equal

68 See brief discussion in the Prologue dealing with exclusion of testimony as to coerced confessions and *infra*, in discussing reasons for reversals of acquittals.

69 Bobrishchev-Pushkin, *op.cit.* note 51, 527.

70 Alexander Solzhenitsyn, *The Gulag Archipelago* Vol.3 (Collins Fontana, Glasgow, 1979), 520.

71 One could restrict appeals of acquittals to instances where fraud was used to obtain them, but there is little precedent in Anglo-American jurisprudence in this respect. David S. Rudstein, "Double Jeopardy and the Fraudulently Obtained Acquittal", 60 *Modern Law Review* (1995), 607, 620-635. However, an Illinois court recently reversed an acquittal in a court trial procured through bribery, and the 7th Circuit let the decision stand. *People v. Aleman*, 667 NE2d 615, 623-27 (Ill. App. 1996); *Aleman v. Honorable Judges of Cook County Circuit Court*, 138 F3d 302, 307-08 (7th Cir. 1998).

protection rights of prosecutors and aggrieved parties, as well as on other grounds, such as jury selection and jury misconduct.

The Lack of Adversary Procedure in the Appellate Courts

Soviet trial courts avoided acquittals, not only so as not to incur the wrath of the all-powerful Procuracy, but also due to fear of being reversed by the higher courts. Soviet appellate courts acted more like administrative review agencies than courts, responding to pleadings by the contesting parties. Lower courts were under the tutelage of their superiors in the higher branches, who issued "recommendations" to lower courts on how to handle particular types of cases. This practice in Russia has been criticized by Solomon and Foglesong though they do not recommend that the SCRF cease the practice, citing the opinion of the judges that such recommendations are helpful.[72] Article 127 of the RF Constitution provides for adversary procedure in the courts and the Supreme Court and other appellate courts should be limited to deciding issues which are raised in concrete cases by the parties (the defendant, prosecutor, and the victim or aggrieved party).

The SCRF has used its unlimited power to review jury court decisions in cassation, to comb the file and to reverse jury verdicts (often acquittals) on grounds that were not even raised by the appellants (whether public prosecutor or victim).[73] The ability for appellate judges to thus substitute themselves for jurors in determining guilt was easier under the UPK-RSFSR because reversals could be based on "one-sidedness or incompleteness of the inquest, preliminary investigation, or trial",[74] which gave the SCRF in jury cases the power to determine that new evidence of guilt could have been introduced at trial.[75] This seems to be a complete violation of the

72 Solomon and Foglesong, *op.cit.* note 13, 54. I have personally overheard telephone conversations between judges of the Cassational Panel of the SCRF discussing the proper way to handle questions in jury cases with trial court judges during my visits to the SCRF.

73 Although Mikhailovskaia, *op.cit.* note 4, 109, claims that §360(2) UPK RF eliminated the SCRF's ability to go beyond the appellate issues raised, this is belied by §22 Postanovlenie No.1 Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 5 marta 2004 "O primenenii norm Ugolovno-protsessual'nogo Kodeksa RF", available at <http://www.supcourt.ru/vscourt_detale.php?id=1456> in which the doctrine is upheld.

74 §343 UPK RSFSR.

75 Mel'nik, *op.cit.* note 39, 58, felt that §343 UPK RSFSR and the appeal ground that "reasons in the court's judgment do not correspond to the factual circumstances of the case", §344 UPK RSFSR, §379(1)(1) UPK RF, "open a very wide field for arbitrary reversals of such [acquittal] judgments. He continued: "In such cases, the most important arbiters of questions of guilt are again professional judges, who in the cassational instance can determine the legality of the conclusions of the jury not

principle of adversary procedure.[76] I have found several such cases in my study of the practice of the Cassational Panel and the Presidium of the SCRF in its handling of Russian jury cases from 1993 to 1999.[77]

Giving the high courts complete inquisitorial-administrative power to change the decisions of adversarial lower courts might occasionally help an unfortunate innocent person who is serving a prison sentence, but will much more often be used to administratively control courts which have become too independent, too lenient, too acquittal-prone. The practice of the SCRF of reversing jury acquittals has greatly reduced the newly won independence of courts with lay participation. The inquisitorial powers of the review courts should be limited, so that the courts only decide legal questions raised by the parties, thus strengthening the constitutional principle of adversary procedure.[78] The SCRF also does not recognize a "harmless error" rule, for it has often reversed acquittals (and convictions) based on errors that could not have had an impact on the jury's decision as to guilt or innocence.[79]

on the basis of immediately heard evidence, but on the basis of paper, while studying the dossier."

76 Agreeing with my view are: P. A. Lupinskaia, "Poriadok obzhalovaniia, oprotestovaniia i proverki, ne vstupivshikh v zakonnuiu silu prigovorov i postanovlenii vynesennykh v usloviiakh al'ternativnoi formy sudoproizvodstva", in *Vestnik Saratovskoi gosudarstvennoi akademii prava* (1996) No.3, 240-241; M. Nemytina, "Sud prisiazhykh: Rossiiskaia traditsiia ili zapadnaia model'", *Vestnik Saratovskoi gosudarstvennoi akademii prava* (1996) No.3, 29. See, also, Solomon and Foglesong, *op.cit.* note 13, 50.

77 I visited the SCRF and reviewed the files of all reversed cases in these years. My special thanks go to Judges A. P. Shurygin and V. P. Stepalin for allowing me access to the files. Some examples: *Paziev* et al. *case* (Altai), No.51 kp-097-21 sp (4.24.97), in which Paziev appealed his conviction because he was tried by jury along with Beziakin and Pashkov although he had requested a three-judge panel. The SCRF unilaterally also reversed the acquittals of Beziakin and Pashkin based on jury misconduct, an issue not raised in the appellate briefs. One judge told Karnozova, that the SCRF reversed an acquittal in his court using a "thought-up" argument, precisely because it was an acquittal. Karnozova, *op.cit.* note 53, 158.

78 In the US, errors of constitutional magnitude may not be raised on appeal if they were not objected to by the parties during the trial, where they could have been corrected. On the so-called "raise or waive" doctrine, see Wayne R. LaFave *et al.*, *Criminal Procedure* (Thomson/West, St. Paul, MN, 5th ed. 2004), 1293-1294.

79 On the US harmless error doctrines, *ibid.*, 1298-1310. The following passage from Saltykov-Shchedrin quotes a Tsarist judicial official, shedding light on the old mentality which still seems to exist at the SCRF: "I don't look into my conscience, I don't consult with my own convictions; I look only as to whether all formalities were observed, and in this respect, strictly to the point of pedantry. If I have in my hands two witness statements, formulated in the appropriate manner, I am satisfied and write: they exist. If they do not exist, I am also satisfied and write: they don't exist. What does it concern me whether the crime was committed or not in reality!

The defendant, the procurator and the victim may appeal judgments at each level of the court structure.[80] The appellate courts, in panels of three professional judges, are empowered to review questions of fact as well as law. If the defendant 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 US, the procurator or the victim may appeal an acquittal.[81]

Since errors need not be raised in the trial court in order to preserve them for appeal, and since the appellate courts may cull the record for errors also not raised in the appellate briefs, prosecutors and judges can intentionally commit errors at the pretrial and trial stage and, in the event of an acquittal, later raise them on appeal. This is a tactic admittedly used by Russian judges.[82] One area where this tactic has been successfully used more than once is for the prosecutor to conceal the fact that he knows jurors have lied about or not volunteered the fact that family members have been charged or convicted of crimes and then bringing this fact up on appeal only in the case of an acquittal.[83]

I want to know, whether it was proved or not, and nothing else." Mel'nik, *op.cit.* note 39, 7.

80 §§19(2), 42(2)(19), 354(1) UPK RF.

81 §§ 370(1), 385 UPK RF.

82 Karnozova, *op.cit.* note 63, 152, interviewed a judge who said he intentionally does not refer to all the evidence in his summation at the end of the trial to give the prosecutor grounds for objection. She says there is a clear collusion between judge and prosecutor to create reversible error. The revival of the court's power to remand a case for further investigation in the decision of the CCRF of 12 December 2003, has also been criticized as giving prosecutors and judges leeway to build errors into the case so as to avoid possible acquittals by remanding the case. "KS razreshil sudam ispravliat' oshibki prokurorov", *Kolokol.Ru*. 9 December 2003 (Indem: Dec. 1-15, 2003).

83 Most recently this happened following the acquittal of "Iaponchik" in Moscow Regional Court, see Aleksei Sokovnin and Sergei Mashkin, "Viacheslav Ivan'kov opravdal opaseniia obvineniia", *Kommersant"*, 19 July 2005, 3, available at <http://www.kommersant.ru/doc.aspx?DocsID=591886>, where the prosecutor on the day after the verdict claimed that seven of the twelve jurors were thus "prejudiced". This has become a common ground for reversal of acquittals though being related to a felon does not disqualify a juror according to any statute of the RF. "Kollegiia nebespristrastnykh", *Kommersant"*, 29 July 2005, 3, available at <http://www.kommersant.ru/doc.aspx?docsid=592188>. The original investigator in the *"Iaponchik" case* publicly claimed he was sending the case to the courts intentionally with errors to facilitate reversal of an eventual acquittal, and was later fired for his indiscretion. Sokovnin and Mashkin, *id.* For other cases reversing acquittals due to belated revelation of juror bias: *BVS RF* (2002) No.5, available at <http://www.supcourt.

The Zeal in Reversing Acquittals

Despite the serious nature of the crimes tried in the jury courts, there has been a much higher rate of acquittals (around 15%) in those courts than in the regular courts with lay assessors or single judges (less than 1%).[84] It is generally recognized that juries acquit accused murderers because of the poor quality of the preliminary investigation and because they in many cases believed the defendants' allegations that confessions had been extorted by the use of coercion, threats, or even torture.[85]

The Cassational Panel of the SCRF has shown great zeal in reversing such jury acquittals. The statistics relating to acquittals in the first nine years of jury trial, when it was restricted to just nine regions of the RF,

ru/bullettin/02/02-057/6120.htm> (acquittal of double murder in Ul'ianovsk, where juror had once worked as investigative official for the Ministry of Interior); *Raikin* et al. *case* (Saratov), Thaman, *op.cit.* note 2, 116-117 (death sentence of Raikin and acquittals of two others for quadruple murder reversed because juror had prior unexpunged conviction); *Volkov case* (Moscow Region), No.4-kp-095-111sp, (7.6.96) (acquittal of double murder reversed because juror knew of circumstances of case, though prosecutor agreed in court to let her sit); *Paziev* et al. *case* (Altai), *op.cit.* note 77; *G. case* (Krasnodar) (acquittal of murder reversed because a juror did not reveal he had been sentenced to six months probation and had a brother who had been charged but not convicted of a crime), "Obzor sudebnoi praktiki rassmotreniia ugolovnykh del s uchastiem prisiazhnykh zasedatelelei", *BVS RF* (2002) No.7, available at <http://www.supcourt.ru/bullettin/02/02-07/6120.htm> (hereinafter "SCRF-Jury Review (2001)"); *P'ianzin case* (Mordovia), No.15-003-25spr (8.14.03) (acquittal of double murder reversed because foreperson did not reveal he had been charged with crime), *BVS RF* (2004) No.8, available at <http://www.supcourt.ru/vscourt_detale.php?id=1688&w[]=%CF%FC%FF%ED%E7%E8%ED>; *Tsereev case*, No.42-003-05 (acquittal reversed because juror did not reveal son had prior conviction). "Obzor sudebnoi praktiki Verkhovnogo Suda Rossiiskoi Federatsii za 4 Kvartal 2003 goda", available at <http://www.supcourt.ru/vscourt)_detale.php?id=153> (hereinafter "SCRF-Criminal Case Review (4th Quarter 2003)"); finally in *Slabochkov case* (Cheliabinsk), No.48-004-512p (6.30.04), (3) *BVS RF* (2005), available at <http://www.supcourt.ru/vscourt_detale.php?id=2529&w[]%D1%EB%E0%E1%EE%f7%EA%EE%E2> (acquittal of two *not reversed* where prosecutor withheld information that ten of twelve jurors had relatives who had been administratively fined by the police, claiming the jurors could not have known of this fact!).

84 Thaman, "Europe's New Jury Systems", *op.cit.* note 44, 348. If one includes partial acquittals, *i.e.*, of some counts or of the charged offense in favor of a lesser offense, lawyer Sergei Nasonov estimates that from 20-40% of defendants before juries are acquitted. Georgii Tselms, *op.cit.* note 45.

85 *Ibid.* See, also, Human Rights Watch, *op.cit.* note 19, 21; Mel'nik, *op.cit.* note 39, 46; Iu. Liakhav and V. Zolotykh, "Sud prisiazhnykh—put' k spravedlivoi iustitsii", *Rossiiskaia iustitsiia* (1997) No.3, 9, claim that juries are more careful in analyzing evidence, more objective as to whether the indictment has been proved and do not go along with the prosecutor blindly and close their eyes to insufficiencies of the preliminary investigation.

are revealing. In 1994, one hundred-seventy-three cases were tried by the jury courts in relation to two hundred-forty-one defendants. 18.2% ended in acquittal, in comparison to an only 1% acquittal rate in trials without juries. Yet according to the author's investigation, of the nineteen judgments reversed by the SCRF, nine were acquittals, and only one acquittal that was appealed by the public prosecutor was not overturned.[86] In 1995, three hundred cases were tried with respect to five hundred-forty-four defendants and the acquittal rate fell to 14%. 17.3% of these acquittals were reversed. In 1996, three hundred-thirty-six cases were tried in relation to six hundred-twenty-two defendants and the acquittal rate rose to 19.1% (eighty acquittals as to one hundred-eighteen defendants). The SCRF reversed fifty-five acquittals, that is, 34.2% of all that were challenged on appeal. In 1997, four hundred-nineteen cases were tried in the nine regions/territories as to eight hundred-twenty-five defendants. The acquittal rate rose to 22.9% (one hundred-nine acquittals as to one hundred-eighty-nine defendants). The SCRF reversed fifty acquittals, 48.6% of all those appealed.[87] Finally, in 1998, four hundred-six cases were tried in relation to eight hundred defendants, and the acquittal rate was 20.6%, (eighty-six acquittals involving one hundred-sixty-five defendants). The SCRF reversed 66% of the acquittals, however.[88] In 2000, the acquittal rate fell to 15.2%, and it was 15.6% in 2001.[89] In 2001, the SCRF reversed 43% of acquittals as opposed to only 6.7% of convictions. 32.4% of all acquittals were reversed in 2002 as opposed to 5.9% of all convictions.[90] By 2003, in the first year of trials after jury trial began expanding throughout Russia, courts heard 492 trials in relation to 1,000 defendants.[91] SCRF reversed

86 Stephen C. Thaman, "Geschworenengerichte in Ost und West: Die klassische Jury und das adversarische Verfahren im Strafverfahren Russlands und Spaniens", in 41 *Recht in Ost und West* (1997), 80.

87 "Spravka o praktike rassmotrenii ugolovnykh del sudami prisiazhnykh v 1997 godu", 21 March 1998. Copy on file with author. (Hereinafter "SCRF-Jury-Spravka (1997)".) The figures for 1994-1996 were from another Spravka given to the author by President of the Cassational Panel of the SCRF, A.P. Shurygin (on file with the author).

88 "Spravka po resul'tatam izucheniia prichin otmeny i izmeneniia prigovorov suda prisiazhnykh, rassmotrennykh Verkhovnym Sudom Rossiiskoi Federatsii v 1998 godu" (1999), 3, 6-7. Copy on file with the author. (Hereinafter "SCRF-Jury-Spravka (1998)".) 42.9% of all acquittals were reversed whereas only 1.85% of convictions were reversed in the same year. A. Gagarskii, "Rabota sudov Rossiiskoi Federatsii v 1998 godu", *Rossiiskaia iustitsiia* (1999) No.8, 54.

89 SCRF-Jury Review (2001), *op.cit.* note 83.

90 "Obzor praktiki Kassatsionnoi palaty Verkhovnogo suda RF za 2002 god po delam, rassmotrennym kraevymi i oblastnymi sudami s uchastiem prisiazhnykh zasedatelei", available at <hppt://www.supcourt.ru/vscourt_detale.php?od=170> (hereinafter "SCRF-Jury Review (2002)").

91 Kulikov, *op.cit.* note 26, quoting Viacheslav Lebedev, President of the SCRF.

24% of those acquitted as opposed to 5% of convictions.[92] Finally, 549 jury cases were heard in 2004 in relation to 1,017 defendants. Eighty-four acquittals were reversed, 53.5% of all those appealed.[93]

I believe that one factor pushing the SCRF to reverse so many acquittals, despite the acknowledged incompetence of investigative organs and their inability to present credible inculpatory evidence, is the ugly fact that the murder rate in Russia has risen progressively since jury trials began in 1993 and the SCRF is unwilling to release alleged murderers who often have killed more than one person in very cruel and brutal manners. Of the jury acquittals[94] reversed by the SCRF, at least twenty were in cases involving two murder victims,[95] at least two in cases involv-

92 *BVS RF* (2003) No.8, 14. Cf. William Burnham (ed.), *The Russian Code of Criminal Procedure* (USDOJ, Moscow, 2004), 67. E.B. Mizulina cites that from 1997 to 2001 the SCRF reversed over 50% of acquittals and only 15-16% of guilty verdicts. In the Krasnoiarsk Territorial Court ten jury trials were held from 1 January 2003 through 23 July 2004. Of the five acquittals, four were reversed and the fifth was still pending appeal before the Cassational Panel. Discussion with judges of the Krasnoiarsk Territorial Court, 23 July 2004, Krasnoiarsk Territorial Court, Krasnoiarsk, Russia.

93 Among all cases heard by the SCRF on appeal, 3.9% of convictions and 45.8% of acquittals were reversed. In the first quarter of 2004, there were 21% acquittals in jury trials but only 0.5% in non-jury trials. Andrei Sharov, "12 stul'ev'", *Rossiiskaia gazeta*, 11 November 2004, available at <http://www.rg.ru/2004/11/11/prisyazhnye.html> (Indem: 11.4-12.4.04).

94 I will note when the case involved a complete acquittal, or the finding of a lesser offense, such as manslaughter or inflicting injuries leading to death.

95 *Viazovets case* (Rostov), No.41 kp-094-109sp (11.24.94); *Bulochnikov case* (Altai), No.51-kp-094-68sp (9.1.94); *Sushko case* (Stavropol') No.19 kp-096-87 sp. (10.31.96) (second acquittal); *Minakhmedov case* (Stavropol') No.19 kp-097-81 sp (10.31.96) (lesser-included offense); *Bulychev case* (Saratov), No.32 kp-096-55 sp. (10.8.96); *Likhonin* et al. *case* (Saratov), No.32 kp-095-76 sp (1.23.96); *Volkov case* (Moscow Region), M.V. Nemytina, *Rossiiskii sud prisiazhnykh* (Beck, Moscow, 1995), 32; *Baikov case* (Moscow Region), No.4-kp-097-25sp (2.6.97); *Kurnosikov case* (Moscow Region), No.4 kp-097-44sp (5.15.97); *Reznik/Borozdin case* (Moscow Region), No.4 kp-099-45sp (4.21.99); *Marchenko* et al. *case* (Moscow Region), No.4 kp-099-49sp (5.18.99); *Kuznetsov case* (Krasnodar), No.18 kp-099-26sp (4.29.99); *Aliev case* (Moscow Region), No.4 kp-098-141sp, (8.27.98); *Topchii case* (Krasnodar), No.18-kp-098-103sp (10.28.98); *Karzhemanov* et al. *case* and *Kruglov case*, "Obzor po delam rassmotrennym sudami s uchastiem priasizhnykh zasedateli v 2003 godu", available at <http://www.supcourt.ru/vscourt_detale.php?id=165> (hereinafter "SCRF-Jury Review (2003)"); *P'ianzin case*, *op.cit.* note 83; *Belichenko* et al. *case* (Moscow Region), No.1268p96pr. Acquittal affirmed by Cassational Panel, reversed by Presidium of SCRF (1.29.97); *Kh. case* (Moscow Region), Karnozova, *op.cit.* note 63, 197.

ing three victims,[96] four in cases involving four victims[97] and at least one case involving more victims.[98] There have also been further acquittals in multi-body cases recently and it is unclear whether they have yet been reversed. The chances are, however, that they will.[99]

Converting Adversarial Procedure into a Weapon Against the Defense: Pretextual Reversal of Acquittals Based in the Complexity of the Rules of Adversary and Jury Procedure

"Errors" in the Formulation of Question List

The most common reason for reversals of jury judgments (and especially acquittal judgments) has been errors in the formulation of the question list by trial judges.[100] 43% of all reversals were related to these problems in the first three years of jury trial.[101] The same was true in 1997.[102] Question list "errors" played a comparable role in reversals in 2002 and 2003.[103] In 1998, however, the SCRF reversed more cases due to improper attempts by the defense to influence the jurors (by complaining of coercive tactics by investigators), improper exclusion of incriminating evidence, and violations of the rights of victims, all of which tend to result in acquittals.[104]

96 *Vlasov* et al. *case* (Rostov), No.41 kp-097-32 sp (4.16.97); *Denisov case* (Moscow Region), No.4 kp-098-201 sp) (1.20.99).

97 *Shpeko* et al. *case* (Krasnodar), No.18 kp-096-8 sp (9.3.96); *Garkusha/Logachev case* (Krasnodar), No.18 kp-097-21 sp (3.18.97); *Makarov* et al. *case* (Moscow Region), No.4 kp-098-172 sp (11.26.98) (those who were acquitted had acquittals reversed); *Kornilov* et al. *case* (Rostov), No.41 kp-096-39 sp (5.14.96) (three trials, in which judge dismissed jury in first case, convicted in second, but reversed, and acquitted in third, also reversed), L.F. Markina, *Prava cheloveka v Rossii: Informatsionnaia set'* (1997) No.25, 17-21.

98 *Ulman case* (Stavropol') (6 Chechen civilian victims), Vladimir Voronov, "Juries on Trial", *Russian Life*, November/December 2004, 53-54.

99 *Slobodchikov case* (Cheliabinsk) (2 bodies), "V Cheliabinske sud prisiazhnykh vynes svoy pervyy prigovor: Opravdatel'nyi", *Polit.Ru*, 27 February 2003 (Indem: 2.24-28.03); *Skripnikov case* (Kemerovo) (3 bodies), Viktor Vernii, "Logika samozashchity", *Trud*, 18 February 2004 (Indem: 2-19-19-2004).

100 For a general discussion of the mass confusion created by the question lists and the SCRF's interpretation thereof, see Karnozova, *op.cit.* note 63.

101 A. Shurygin, "Zashchita, v sudoproizvodstve s uchastiem kollegii prisiazhnykh zasedatelei", Part I, *Rossiiskaia iustitsiia* (1997) No.8, 6.

102 SCRF-Jury-Spravka (1997), *op.cit.* note 87.

103 44.8% of all reversals in 2002, SCRF-Jury Review (2002), *op.cit.* note 90. As to 2003, see SCRF-Jury Review (2003), *op.cit.* note 95.

104 SCRF-Jury Review (1998), *op.cit.* note 88, 9.

The SCRF has seized not infrequently on the failure of the trial court to return the verdict to the jury to correct errors in the question list, in order to reverse acquittals.[105] This is a questionable reason for reversal, for the judge can intentionally not return the case to build in reversible error when juries are determined to acquit.[106] Many of the other question list errors noted have led, if they were not indeed recognized for that purpose, to reversals of acquittals, for instance, for uniting questions relating to more than one crime in a single question,[107] for not formulating the question verbatim in the terms of the accusatory pleading,[108] or for doing it,[109] for asking a number of separate questions instead of uniting the questions into one,[110] for not asking a lesser-included question upon which the jury could have hung its hat,[111] and finally for using "legal terms" in questions, relating, for instance, to *mens rea*, aggravating circumstances, the *nomen juris* of the crime.[112]

[105] *Drygin case* (Saratov), No.41 kp-099-135sp (1.20.99) (acquittal of aggravated murder and rape); *Kovalev case* (Saratov), No.32 kp-096-28sp (6.10.96) (reversal of attempted aggravated murder). In the first modern Moscow City Court jury trial, the judge sent the jury back five times, in vain trying to coax a guilty verdict. The jury foreman, obviously thinking the jury was at fault, sighed: "It's the first time. The first pancake is always messed up." Peter Baker, "Russia Tests Juries By Trial and Error", *Washington Post*, 2 September 2003, A1.

[106] Karnozova, *op.cit.* note 63, 231-234, notes that when the presiding judge "sees an acquittal or lenient verdict, he has to declare it to be unclear and contradictory and ask supplementary questions" and "do this until at least some guilty verdict is accepted". This gives the judge a "loophole" because he knows acquittals will be reversed.

[107] *Pavlov case*, No.919p01pr: "Obzor sudebnoi praktiki Verkhovnogo Suda Rossiiskoi Federatsii za IV Kvartal 2001 goda po ugolovnym delam", *BVS RF* (2002) No.2, available at <http://www.supcourt.ru/bullettin/02/02-08/b111.htm> (hereinafter "SCRF-Judicial Practice Review (4th. Quarter-2001)").

[108] *Shveidel' case*, "Obzor kassatsionnoi praktiki Sudebnoi kollegii po ugolovnym delam Verkhovnogo Suda Rossiiskoi Federatsii za 2002 god", *BVS RF* (2003) No.8 (hereinafter "SCRF-Criminal Case Review (2002)"); *Abdullov* et al. *case* (Ul'ianovsk), No.80-kp-098-35 sp (7.30.98); *Volodin/Kotenko case* (Saratov), No.32-kp-098-53 sp (10.22.98); *Trofimov* et al. *case* (Ivanovo), No.7-kp-002-9 sp, SCRF-Jury Review (2002), *op.cit.* note 90; *Kharchevnikov case* (Ivanovo), No.7 kp-002-15 sp, SCRF-Jury Review (2002), *ibid.*

[109] SCRF-Jury Review (2001), *op.cit.* note 83.

[110] *Kushchenko/Kushchenko case* (Stavropol') No.19 kp-002-9 sp, SCRF-Jury Review (2002), *op.cit.* note 90.

[111] *Karakaev case* (Krasnodar), No.18 kp-096-87 sp (11.13.96); *Baykov case* (Moscow Region), *op.cit.* note 95; *Troitskii case* (Ivanovo), No.7 kp-002-26 sp; *Kondrashin case* (Riazan'), *BVS RF* (1998) No.9, 9, translated in William Burnham, Peter Maggs and Gennady Danilenko, *Law and Legal System of the Russian Federation* (Juris Publishing, Huntington, NY, 3rd ed. 2004), 537.

[112] *Manukian case* (Stavropol'), No.19 kp-096-75 sp (10.29.96); *Solomatov/Kharitonov case* (Stavropol'), No.4 kp-096-28 sp (3.30.96); *Kuz'kin case* (Moscow Region), see Kar-

Erroneous Exclusion of Evidence

Not only has the jury question list been manipulated by the courts to nullify the verdicts (usually those of acquittal) which they find not to their liking. The new adversary rules of evidence, introduced to protect defendants in criminal trials have also been turned against them to nullify verdicts favorable to them. Thus when a defendant successfully suppresses illegally gathered evidence under the new Russian exclusionary rule, it is not infrequently the prosecutor or the aggrieved party which complains that their adversary rights or rights to equality of arms have been violated, resulting in the reversal of acquittals.[113] Similarly, the reform of confession

nozova, *op.cit.* note 63, 168-188; *Zhila case* (Krasnodar), No.18 kp-097-17 sp. (3.11.97); *Garkusha/Logachev* et al. *case* (Krasnodar), *op.cit.* note 97; *Markelov case* (Ul'ianovsk), No.80 kp-097-4 sp (2.13.97) (reversal of negligent homicide); *Perfil'ev case* (Ul'ianovsk) et al., No.80 kp-097-19 sp (4.10.97) (reversing lesser homicide charges); *Boitsov* et al. *case*, SCRF-Jury Review (2003), *op. cit.* note 95; *Shchepakin case* (Rostov), No.41 kp-094-112 sp (11.24.94); *Riazanov case* (Altai), No.51 kp 096-6 sp (3.5.96) (reversal of homicide in the heat of passion).

[113] *Nikitin* et al. *case* (Moscow Region), No.4 kp -097-13 sp. (1.26.97) (exclusion of report of search of the scene and a knife leads to reverse of acquittal for attempted murder); *Kurnosikov case* (Moscow Region), *op.cit.* note 95 (reversal of murder acquittal due to exclusion of autopsy report); *Kozyrialin case* (Stavropol'), No.19 kp-096-115 sp (1.28.97) (conviction of lesser homicide reversed due to exclusion of defendant's alleged report of the crime); *Samoilov case* (Saratov), No.32 kp-099-16 sp (3.23.99) (murder acquittal reversed due to suppression of report of search of a house); *Kurochkin* et al. *case* (Moscow Region), No.4 kp-098-130 sp (8.6.98) (murder acquittals reversed due to exclusion of report of photographic identification and "clean-hearted" confession due to lack of reasons); *Aliev case* (Moscow Region), *op.cit.* note 95 (murder acquittals reversed due to exclusion of report of forensic-ballistic expert and of a confrontation between the defendant and a witness; *Bulochnikov case* (Altai), *op.cit.* note 95 (acquittal of double murder reversed due to exclusion of defendant's statements); *Viazovets case* (Rostov), *op.cit.* note 95 (acquittal of double murder reversed due to exclusion of testimony of aggrieved party and a witness who did not appear for court); *Uvarov/Sosiurko case* (Moscow Region), No.4 kp-003-188 sp (1.8.04), *BVS RF* (2004) No.10, available at <http://www.supcourt.ru/bulletin/2004/2004-11/3.htm> (acquittals of bribery reversed due to exclusion of confessions); *Darchuk case* (Saratov) (reversal of murder acquittal due to exclusion of defendant's report of crime) and *Mediantsev case* (Altai) (reversed of murder acquittal due to exclusion of forensic medical examination of weapon based on chain of custody problems), Procuracy Institute, "Informatsionnoe pis'mo, 'O nekotorykh voprosakh obespecheniia gosudarstvennogo obvineniia v sude s uchastiem kollegii prisiazhnykh zasedatelei'", No.12/13-96 (5.16.96), 3-4; SCRF-Criminal Case Review (2004), *op. cit.* note 93; *Novikov case* (Iaroslavl) (acquittal of murder solicitation reversed due to suppression of taped solicitation of bribe because it had too many swear words in it), *id.*; *Nazarov* et al. *case* (Buriatiia), a non-jury case in which an acquittal was reversed because judge excluded allegedly coerced confession and reenactment of the crime, "Obzor kassatsionnoi praktiki sudebnoi kollegii po ugolovnym delam Verkhovnogo Suda Rossiiskoi Federatsii za 2004 god", *BVS RF* (2005) No.8, available at <http://www.supcourt.ru/vscourt_detale.php?id=2759> (hereinafter "SCRF-Criminal Case Review (2004)").

law in Russia, the implementation of Miranda rights and exclusionary rules relating to confessions obtained through illegal means have bizarrely been turned against the defendant by virtue of the rule fabricated by the SCRF which makes it reversible error for defendants or their lawyers to allege the use of torture or other illegal methods to obtain confessions. This rule has, as was noted, also led to a massive reversal of acquittals when violated.[114]

Due to fear of having jury acquittals reversed, some lawyers in the first modern jury trials even refused to make suppression motions so as to deprive the prosecution of a reason to ask the SCRF to reverse the acquittal, or to prevent the prosecutor from moving to return the case to the investigator for "supplementary investigation" to fill the gaps left by the suppressed evidence.[115]

Errors in the Presiding Judge's Summation

Following the formulation of the question list the presiding judge is required to instruct the jury on the principles of criminal law related to answering the questions on the question list, and on the procedural rules applicable to their deliberations.[116] Unlike in the US, however, the Russian trial judge is required to summarize the evidence presented by the parties[117]

[114] *Kornilov* et al. *case* (Rostov), *op.cit.* note 97; *Zhevak case* (Rostov), No.41 kp-096-24 sp (4.10.96); *Popov case* (Saratov), No.32 kp-097-21 sp (5.29.97); *Antipov case* (Rostov), No.41 kp-097-27 sp (4.9.97); *Grigor'ev case* (Altai), No.51 kp-097-26 sp (5.7.97); *Aleshin* et al. *case* (Moscow), No.4 kp-098-94 sp (6.3.98); *Grafov case* (Moscow Region), No.4 kp-098-179 sp (11.25.98); *Topchii case* (Krasnodar), *op.cit.* note 95; *Lipkin* et al. *case* (Moscow Region), No.4 kp-099-9 sp (2.23.99); *Agafonov* et al. *case* (Stavropol'), No.19 kp-099-48 sp (5.5.99); *Ermolaev/Drachenko case* (Rostov), No.41 kp-099-15 sp (3.10.99); *Arustamov case* (Stavropol'), SCRF-Criminal Case Review (2002), *op.cit.* note 108; *Morozov case* (Ivanovo) and *K. case* (Krasnodar), SCRF-Jury Review (2001), *op.cit.* note 83; *Isakov case* (Altai), SCRF-Jury Review (2003), *op.cit.*, note 95; *Pomazan case* (Volgograd), No.16 kp-004-36 sp (7.14.04), *BVS RF* (2005) No.2, available at <http://www.supcourt.ru/bullettin/2005/2005-02/18.htm>; *Turischev* et al. *case* (Volgograd), SCRF-Criminal Case Review (2004), *op.cit.* note 113.

[115] Thaman, *op.cit.* note 2, 94. It was suggested that requiring the judge to give reasons for excluding or failing to exclude evidence would serve to prevent some of the abuses of the new exclusion jurisprudence, such as the motions for supplemental investigation. P.A. Lupinskaia, "Nekotorye voprosy, voznikaiushchie v praktike primeneniia ugolovno protsessual'nogo zakonodatel'stva pri rassmotrenii ugolovnykh del sudom prisiazhnykh" in *Vestnik Saratovskoi gosudarstvennoi akademii prava* (1996) No.3, 70-76.

[116] §340(3)(2, 5) UPK RF; § 451(3, 5) UPK RSFSR.

[117] §340(3)(3,4) UPK RF; § 451(3) UPK RSFSR; the summation of the facts and the law relevant to the case also was required in the pre-revolutionary Russian jury system, whereas in nineteenth-century Germany only the legal side was explained, and in nineteenth-century Italy only the factual side. Kucherov, *op.cit.* note 3, 60.

and in doing so must not reveal his or her opinion as to what facts were proved or what verdict should ensue.[118] Under the 1993 jury provisions, if one of the parties believed the judge was biased or otherwise lacked impartiality in the summation, the party had to raise an objection at the time or the issue could not serve as a reason for appealing the judgment.[119] This is the only explicit area where the Russian jury laws have included a "raise or waive" limitation on the right to appeal.

Alleged "errors" in the judge's summation have led to reversals of some convictions,[120] but, most importantly, a number of acquittals.[121] Acquittals have even been reversed when the trial judge was compelled to mention to the jury that there was no evidence to support a conviction, because it had all been suppressed in defense motions.[122] Several Moscow Region

[118] §340(3) UPK RF; §451(5) UPK RSFSR.

[119] §451(9) UPK RSFSR. On the provisions of the 1993 law and how they were applied in the first year of Russian jury trials, see Thaman, *op.cit.* note 2, 123-124. This was the only explicit area where the Russian jury law included a "raise or waive" limitation on the right of appeal. The requirement was removed, however, in § 340(6) UPK RF in 2001.

[120] *Syropiatov/Eterle case* (Rostov), No.51 kp-096-40 sp (7.4.96), *Obzor zakonodatel'sta i sudebnoi praktiki Verkhovnogo Suda Rossiikskoi Federatsii za Tretii i Chetvertyi Kvartaly 1996 goda* (Moscow, 1997), 45; *Nikolaev/Buntov case* (Moscow Region), No.4 kp-095-125 sp (12.13.95); *Sokolov/Gladkikh case* (Altai), No.52 kp-097-9 sp (3.4.97); *P.* et al. *case* (Moscow Region), No.4- kp-096-157 sp, discussed along with *Sokolov/Gladkikh case*, in "Zashchita v sudoproizvodstve s uchastiem kollegii prisiazhnykh zasedatelei", Part II, *Rossiiskaia iustitsiia* (1997) No.9, 7.

[121] *Minakhmedov case* (Stavropol'), *op.cit.* note 95 (reversal of conviction of lesser-included offense to murder because not clear in record that judge summarized prosecutor's position); *Kustov/Sobolevskii case* (Moscow Region), No.4 kp-096-10 sp (3.7.96) (acquittals of aggravated murder reversed, *inter alia* because not clear that judge summarized prosecutor's position); *Shevchenko/Shevchenko case* (Rostov), No.41 kp-095-103 sp (1.29.96) (SCRF found that position of one defendant, who was found guilty of lesser offense to murder was not properly summarized by judge, but reversed both the conviction for a lesser offense and the aggravated murder acquittal of the other defendant!); *Nemchikov case* (Moscow Region), No.4 kp-095-94 sp (9.7. 95) (acquittal of attempted murder reversed because judge called prosecution evidence into question, *Obzor zakonodatel'stva i sudebnoi praktiki Verkhovnogo Suda Rossiiskoi Federatsii za IV Kvartal 1995 goda* (Moscow, 1996) (hereinafter "SCRF-Review of Legislation and Judicial Practice (4th Quarter 1995)") (for the judge's critique of the SCRF decisions, see N.V. Grigor'eva, "Naputstvennoe slovo predsedatel'stuvuiushchego sud'i", in S.A. Pashin and L.M Karnozova, *Sostiazatel'noe pravosudie* Vol. I (Mezhdunarodnyi komitet sodeistviia pravovoi reforme, Moscow, 1996), 171-172); *P. case* (Moscow Region) and *K. case* (Krasnodar) (murder acquittals reversed), SCRF-Jury Review (2001), *op.cit.* note 83.

[122] Karnozova, *op.cit.* note 63, 293-294, mentioning cases tried by Nataliia Grigor'eva in Moscow Region and V.V. Zolotykh in Rostov.

convictions were also reversed because the judge did not give the parties a chance to object to the summation in front of the jury.[123] The rules as to the summation have unfortunately allowed the trial judge to plant the seeds for the reversal of what might seem as a looming acquittal due to the weakness of the prosecution's evidence, by negligently or intentionally recounting the prosecution's evidence in an incomplete or skewed manner. Observers have also witnessed cases, in which the trial judge made comments clearly prejudicial to the defense, but then excluded those remarks from the copy of the summation which becomes part of the official record, making it difficult to allege error.[124]

Double Jeopardy and Limitations on the Reversibility of Acquittals

The surest way to guarantee that the Russian jury will be autonomous and that the verdicts they reach will be respected is to disallow appeals of acquittals.[125] Although jury acquittals may not be appealed in England[126] and the US, they may be appealed in Russia, Spain and other European countries. In 1997 the Spanish Supreme Court reversed the acquittal of a young Basque sympathizer with the independence movement for the murder of two policemen, arguably because of the social uproar the verdict brought in its wake.[127]

The reluctance of the SCRF to accept jury acquittals has, as has been discussed above, led to their mass reversal. This practice alone should

123 *Gushchin/Zhirnov case* (Moscow Region), No.4 kp-095-42 vt sp (11.15.95); *Kuz'kin case* (Moscow Region), No.4 kp-095-114 sp (10.18.95); *Obusov case* (Moscow Region), No.4 kp-95-106 sp (10.11.95). Nataliia Grigor'eva, the judge who presided over the first Moscow Region jury trial, criticized such rulings and also noted that this ground was not even mentioned in the appellate briefs. Grigor'eva, *op.cit.* note 121, 177-78; Chair of the Cassational Panel of the SCRF, A.P. Shurygin, citing Profs. I.L. Petrukhin and P.A. Lupinskaia as support, defends the court's position. Shurygin, "Zashchita", Part II, *op.cit.* note 120, 7-8.

124 One judge told the jury that the guilt question "usually raises no doubt", and that the main issue was that of leniency. In another case the judge said the jury could find the defendant not-guilty due to self-defense "in the case of extreme necessity", but then indicated that this was not present in the instant case. Karnozova, *op.cit.* note 83, 137-138.

125 See Solomon and Foglesong, *op.cit.* note 13, 189, who suggest that Russia not allow appeals of jury acquittals.

126 Richard Hatchard, "Criminal Procedure in England and Wales", in Richard Hatchard *et al.*, *Comparative Criminal Procedure* (British Institute of International and Comparative Law, London, 1996), 204.

127 On the *Otegi case*, see Thaman, *op.cit.* note 47, 405-412 and 497-503; for an English translation of the *Otegi* verdict and Supreme Court decision reversing the acquittal, see Thaman, *op.cit.* note 9, 189-195.

make many criminal defendants think twice before exercising their constitutional right to trial by jury. The idea that retrial of acquittals could violate the principle of double jeopardy was first brought before the CCRF in a case where the Cassational Panel of the SCRF affirmed the acquittal and it became final, only to be overturned by the Presidium of the SCRF in a procedure to review final judgments (so-called *nadzor*).[128] The CCRF refused to hear the case, but remanded it, saying that the trial court should decide the case in accordance with the United Nations International Pact for Civil and Political Rights (IPCPR). The case was thereby dismissed in Moscow Regional Court, only to have the Presidium of the SCRF again reverse the dismissal and send the case back to trial.[129] The evil in the *nadzor* procedure is that presidents of the courts could themselves trigger review of final judgments, and then serve as the judges on their own motions. In this capacity they often worked hand in hand with prosecutors to overturn acquittals that had become final.[130]

The 2001 UPK RF made some first steps to prevent the reversal of acquittals on review, thus following the recommendation of the "Concept of Judicial Reform" that there should be no judicial role in appealing acquittals[131] nor any appeals in cassation which would worsen the position of the defendant.[132] §405 UPK RF in the original version clearly prohibited appeals of acquittals which had become final under the review procedure as well as the worsening of the defendant's situation upon review of guilty judgments.[133]

This step forwards in permitting the occasional acquittal which became final was sabotaged by a CCRF decision of 11 May 2005, which allows the victim to move to reopen a final judgment of acquittal or conviction using the review procedure. Thus the CCRF has heeled precisely to the position of the prosecution's original criticisms of the limitations on review in the original draft of the 2001 Code.[134] A group of sixty victims

128 *Belichenko* et al. *case*, *op.cit.* note 95.

129 For a discussion, see Karnozova, *op.cit.* note 63, 354 (note 46).

130 I.L. Petrukhin, *Teoreticheskie osnovy reformy ugolovnogo protsessa v Rossii* Part I (Prospekt, Moscow, 2004), 128.

131 "Concept of Judicial Reform", *op.cit.* note 10, 85.

132 *Ibid.*, 98

133 § 405 UPK RF, *Kommentarii*, D.N. Kozak and E.B. Mizulina (eds.), *Kommentarii k ugolovno-protsessual'nomu kodeksu Rossiiskoi Federatsii* (Iurist", Moscow, 2002), 651. Review of final judgments of acquittal were also not allowed under the 1864 code. §21 Ustav ugolovnogo sudoproizvodstva, 20 November 1864, recently published in *Sudoustroistvo i ugolovnyi protsess Rossii, 1864 god: Sbornik normativnykh aktov* (Moscow, 1997), 73-238 (all translations by the author).

134 S.G. Kekhlerov, Letter to E.B. Mizulina, Vice-Chair, Legislative Committee of the

supported by the human rights ombudsman successfully petitioned the CCRF to declare the unconstitutionality of §405 UPK RF, claiming it violated the rights of victims to access to justice.[135] Again, the victim has become the Trojan horse for the prosecution in the quest to undermine and ultimately repeal the aspects of the 2001 UPK RF which sought to protect defendants from the depredations of Soviet-era procedure. E.B. Mizulina, former State *Duma* Deputy, Professor of Criminal Procedure and chair of the working group that drafted the UPK RF called the decision "primitive", and thought it signaled a "step back, approximately fifty years".[136]

The real question is: will the Russian judicial *nomenklatura* permit a truly independent jury system as a check on the corruption and incompetence of law enforcement, or will the jury just be a piece of democratic window dressing in a justice system that still in many ways functions as it did in Soviet times, with lower court judges taking orders from their superiors, on up to the SCRF, which could take any case it sought fit, order any case to be reheard, and reverse any acquittal it does not like?

VI. Conclusion: Democratic Reform or Window Dressing?

> "Our social life is like a 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."
>
> V. D. Spasovich[137]

> "We have a strange symbiosis of a democratic model of institutions and a Stalinist model of their functioning."
>
> Sergei Stepashin[138]

State *Duma*, Federal Assembly, *RF*, 3 September 2001, 2-4 (on file with author) (hereinafter "Procuracy Letter"), in which S.G. Kekhlerov explicitly calls for allowing the victim to petition for review of acquittals within one year and notes that this would not violate Protocol 7(4) of the European Court of Human Rights.

135 Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii po delu o proverke konstitutsionnosti stat'i 405 Ugolovno-protsessual'nogo kodeksa Rossiiskoi Federatsii v sviazi s zaprosom Kurganskogo oblastnogo suda, zhalobami Upolnomochennogo po pravam cheloveka v Rossiiksoi Federatsii, proizvostvenno-technicheskogo kooperativa "Sodeistvie", obshchestva s ogranichennoi otvetstvennost'iu "Kareliia" i riada grazhdam, 11 May 2005.

136 Anna Zakatnova, "Ugolovnye problemy", *Rossiiskaia gazeta*, 12 May 2005, available at <http://www.rg.ru/2005/05/12/ks.html>.

137 Cited in Bobrishchev-Pushkin, *op.cit.* note 51, 13.

138 S. Stepashin, "Protiv kriminalizatsii Rossii", *Rossiiskaia iustitsiia* (2000) No.1, 2.

Today one is faced with a seeming contradiction. The 2001 UPK RF led to the consolidation of jury trial throughout the Russian Federation,[139] yet the elimination of the mixed court and the simultaneous expansion of the cases subject to trial by a single judge,[140] combined with the undermining of the jury's power to determine guilt or to acquit by the jurisprudence of the SCRF have made the jury largely unable to fulfill the functions envisioned for it by the reformers: that of acting as a catalyst for the implementation of adversary procedure and allowing independent popular notions of justice and truth to correct the prosecutorial-inclinations of the Russian "no-acquittal" justice system.

In order to ensure the future of lay participation in general, in Russia, as a counterweight to the domination by the still dependent and unreliable Russian judiciary, the mixed court should be reintroduced to handle all mid-level criminal cases and the lay assessors should be chosen as are jurors, from the voter's rolls and for one case only. The jury should be made mandatory for the most serious offenses, such as murder, as is the case in Spain, in order to avoid pressures exercised on the defendant by lawyers, investigators, prosecutors, and judges to waive the right.

One could argue that jury trials should not be called for in certain sensitive cases involving state secrets, or in cases involving terrorism or violent organized crime. This was the approach Spain took in leaving such cases to the jurisdiction of a special National Court composed exclusively of professional judges.[141] The Procuracy and the successor of the *KGB*, the Federal Security Service (*FSB*), sought to eliminate jury trials in espionage cases[142] after the acquittal of Valentin Danilov in Krasnoiarsk on 30 December 2003,[143] and before the jury trial of Igor' Sutiagin in Moscow

139 It was never assured that the jury trial would spread beyond the nine participants in the "experiment" begun in 1993-1994. The Russian government refused to fund an extension to twelve further regions in 1995-1996 and certain of the regions, notably Riazan' and Altai, even threatened to stop hearing jury cases due to lack of funds. Irina Dline and Olga Schwartz, "The Jury Is Still Out on the Future of Jury Trials in Russia", 11 *East European Constitutional Review* (2002), 105-106.

140 The turn to a capitalist, privatized economy led to a failure of bosses to allow employees to sit on the mixed court. Solomon and Foglesong, *op.cit.* note 13, 120-121 and 131-132. For this reason, single-judge courts were introduced in 1992. Franz, *op.cit.* note 4, 44. Pashin opines that, following the implementation of the UPK RF, there will be lay participation in only eighty-nine of Russia's 2,500 courts and in only 0.8% of criminal cases. Sergei Pashin, "Who Needs a Dependent Judge?", *Moscow Times*, 2 July 2001, 10.

141 Sec. 72, Ley Orgánuca del Poder Judicial, available at <http://www.porticolegal.com/int/int_ley79.html>.

142 Pavel Aptekar', "Iuristy otnosiatsia k prisiazhnym luchshe, chem FSB", *Stolichnaia vecherniaia gazeta*, 20 February 2004 (Indem: 2.19-29.04).

143 Seth Mydans, "Rare Russian Jury Acquits Scientist in Spy Case", *New York Times*, 30 December 2003. Of course, Danilov's acquittal was reversed due to "pressures

City Court. This step has not yet been taken, likely because Sutiagin was acquitted in a secret trial,[144] with a secret question list, where the jury was not allowed to decide whether the defendant was, or was not, a spy. In Russia's case, I do not believe espionage cases should be taken from the jurisdiction of the jury court. *First*, the defendants in the Russian cases are typically harmless scientists who in no way could intimidate the jurors. *Secondly*, it appears that the state is using these cases to intimidate those critical of Russian policy and, like the eighteenth-century English seditious libel trials, are precisely the types of cases where a jury should intervene.

In the case of trials of terrorists or members of violent gangs, jury trials have sometimes become excessively cumbersome in Russia due to the number of defendants, and the ensuing questions the jury must decide. Here, too, jurors could justifiably be afraid of reprisals from the Russian gang members who are among the most ruthless and violent in the world. However, again the slipshod nature of criminal investigations in Russia and the inability to trust the professional judiciary to fairly evaluate the evidence produced in such investigations, militates against entrusting such cases to a purely professional court, other than, perhaps, the SCRF itself, located in Moscow and enjoying greater protection, and thus, hopefully, greater ability to resist intimidation than local judges.

Either the Russian jury should adopt the Anglo-American general verdict, or should explicitly instruct jurors as to the juridical meaning of each of the questions asked in the special verdict or question list so that they will know precisely what crime or crimes the defendant will be convicted or acquitted of if they answer in a given way. Juries *should* apply the law explained to them in the judge's summation, to the facts they find to have been proved, and they—not the professional judges—should determine guilt. Guilty verdicts should be by qualified majority, at least nine or ten of the twelve jurors.[145]

Russia must also definitely introduce a "raise or waive" rule for bringing appeals, as well as a harmless error rule for deciding whether an error will lead to reversal of a conviction. The SCRF should be bound by the

being placed on the jury" by defense counsel, and he was convicted in a secret trial in September 2004. Voronov, *op.cit.* note 98, 52.

144 "Jury Convicts Scientist of Espionage", *RFE-RL*, 6 April 2004. Sutiagin was later declared to be a political prisoner by Amnesty International, and has appealed to the European Court of Human Rights. "Sutyagin Declared Political Prisoner", *RFE-RL*, 27 April 2004; "Sutyagin Loses Another Appeal", *RFE-RL*, 18 August 2004.

145 Mel'nik *op.cit.* note 39, 121, suggests raising the votes necessary for a guilty judgment to eight from seven. Petrukhin, "Sudebnaia vlast'", *op. cit.* note 41, 11, supports unanimous, or at least qualified verdicts.

appellate issues which were objected to at the trial court level and raised by appellate counsel. Acquittals should be final and not subject to reversal. Otherwise, the SCRF will continue to overturn any acquittals which displease it on any reasons it sees fit, and the jury will continue to appear as an irrelevant decorative institution.

The aggrieved party or victim in Russian criminal trials should only play the role of the civil party seeking civil damages, and not that of a party with equal rights to the defendant as is now the case. But if the Russian legislator insists on allowing the aggrieved party to be a collateral prosecutor, then he or she should be required to hire counsel, or have court-appointed counsel as in Spain, and be responsible for raising all issues at the pre-trial or trial stages of proceedings, or forfeit the chance of raising them in the event of an acquittal. The recent decisions of the CCRF which treat the aggrieved party like a helpless juvenile and use the (often intentional) violation of their rights as a pretext to overturn acquittals or return shoddy cases to the prosecutor for further investigation, are scandalous and completely undermine the equality of arms and adversary procedure mandated by the RF Constitution.

Finally, the Russian courts must take the issue of torture seriously and discontinue the practice of tacitly tolerating it, by preventing defendants from alleging improper interrogation tactics before the jury in their attempts to explain why they confessed to a crime they claim they did not commit.

The "Concept of Judicial Reform" of 1991 remains an excellent blueprint for judicial and criminal procedure reform, and the courts and executive and legislative branches should once again use it as their compass in moving toward a criminal procedure that comports with internationally accepted principles of due process and human rights.[146]

Finally, the reform voices in Russia must not cede the initiative to President Putin as they did in 2000 and 2001 because there are serious doubts whether Putin is genuinely committed to democracy and democratic change. There are indications that he has used the attractive issue of jury trial (and adversary procedure) as window-dressing to palliate the West as he violently and ruthlessly pursues his policy in Chechnia, and his consolidation of presidential power.[147]

[146] Krasnov, *op.cit.* note 33, 93, maintains that approximately 95 of the 160 clearly articulated positions in the "Concept", or 59% remain unrealized.

[147] Matthew J. Spence, "The Complexity of Success: The US Role in Russian Rule of Law Reform", *Carnegie Papers* No.60 (Carnegie Endowment for International Peace, Washington, DC, 2005), 23.