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## Trial by Jury and the Constitutional Rights of the Accused in Russia

*Stephen C. Thaman*

For several years, the new Russia has been attempting to correct the severe injustices characteristic of the old Soviet criminal justice system. Recent amendments to the Russian Law on Court Organization, the Code of Criminal Procedure, the Criminal Code, and the Code on Administrative Infractions guarantee rights that had not been protected before, including the presumption of innocence and the privilege against self-incrimination. The formal and, to a limited extent, actual introduction of these rights is occurring in the context of a general move from the inquisitorial to the adversarial system of justice. Although these reforms provide protection for the criminally accused, both the substance and the application of the law fall short of desired and required levels of protection. One of the principal reasons for these shortcomings is the legacy of the old Communist legal system in the new laws.

### **The Soviet system and the move toward reform**

The Soviet criminal justice system was notorious for routinely violating the rights of the criminally accused as articulated in the United Nations Pact on Civil and Political Rights, ratified by the USSR in 1973. The investigative process, in particular, was subject to abuse. Coerced confessions and falsification of evidence were commonplace. Criminal suspects had virtually no remedy against methods employed by criminal investigators. The right to counsel was usually available only at the conclusion of the preliminary investigation.

Courts were incapable of correcting these abuses. To begin with, the decisions of the police, investigators, and prosecutors, which more often than not infringed on rights theoretically protected by the Soviet constitution as well as by laws and international covenants, were completely beyond the reach of the courts. Furthermore, investigators covered for the

illegal actions of the police. Prosecutors would then use the results of illegal investigations in preparing indictments presented to courts. Equally important, judges were biased in favor of the prosecutor. The judges' lack of independence—their jobs depended on their relationship with local Communist Party committees—was yet another reason for the notorious inability of courts to correct abuses.

The "people's assessors," created by the Bolsheviks to replace the 12-person jury, that had been introduced in the great judicial reforms of Alexander II in 1864, were never able to check the actions of judges or prevent the abuses of investigators. Theoretically possessing rights and powers equal to those of a judge, the people's assessors decided questions of law and fact in consultation with the professional judge. The people's assessors were commonly known as "noddors," because they virtually always agreed with the judge in their rulings. Perhaps they were so cooperative because they were selected from social organizations and workers' collectives previously controlled by the Communist Party, or perhaps because they were intimidated by judges or simply deferred to them out of respect.

Acquittals were almost unheard of. When evidence was insufficient to convict the defendant on the main charge, a court might nevertheless find the defendant guilty of some lesser crime. In the absence of evidence to convict, courts could also remand a case to the investigators for "supplementary investigation." Although a case might be quickly discontinued in such instances, there was no guarantee. Returning a case for "supplementary investigation" allowed investigators to manufacture evidence and offered them another opportunity to convict the defendant.

In 1988-89, Mikhail Gorbachev pushed for reforms to address these problems. He called for reintroducing jury trials, adopting an adversarial

criminal procedure, and enacting the presumption of innocence. These principles, along with the right to counsel during preliminary investigations, were included in the "Principles of the Law on Court Organization of the USSR and the Union Republics," enacted by the Supreme Soviet of the USSR in 1989.

As the Soviet Union was collapsing, the Supreme Soviet of the RSFSR on October 21, 1991, nearly unanimously approved the "Concept of Judicial Reform," a blueprint for reforming the Soviet criminal justice system. Hoping to steer Russia "back within the fold of world civilization," the authors of the Concept sought to bring the Constitution and laws of the Russian Federation into line with the requirements of international human rights conventions. To this end, they proposed establishing judicial control over all acts of police, investigators, and prosecutors that intrude upon constitutionally protected rights of citizens. They also suggested introducing the adversary procedure, recognizing the presumption of innocence and the right against self-incrimination, eliminating all accusatory functions of the judge, and reintroducing trial by jury.

The movement toward reform was given a further boost by the 1992 incorporation of the Declaration of Rights, first into the Brezhnev-era Constitution of the RSFSR and then into the new Constitution of the Russian Federation, enacted by referendum on December 12, 1993. Both documents affirmed the following rights of the accused, outlined in the Concept of Judicial Reform: the presumption of innocence (Art. 65, 1978 Const. RSFSR; Art. 49, Const. RF); the right to remain silent (Art. 67, 1978 Const. RSFSR; Art. 51, Const. RF); an exclusionary rule for illegally gathered evidence (Art. 65, 1978 Const. RSFSR, Art. 50, Const. RF); the right to counsel upon arrest, detention or initiation of criminal proceedings (Art. 67-1 of 1978 Const. RSFSR; Art. 48 of Const. RF. On May 23, 1992, this provision was enacted into the Code of Criminal Procedure [CCP] as sec. 47); the right to adversary procedure (Art. 168, 1978 Const. RSFSR; Art. 123 Const. RF); and the right to trial by jury (Art. 164, 1978 Const. RSFSR; Arts. 47, 123

Const. RF). The new constitution also stipulates that a death sentence may be imposed only in cases where the defendant has a right to a jury trial (Art. 20, Const. RF).

The Law of July 16, 1993 ("On the introduction of changes and amendments to the Law of the RSFSR on Court Organization of the RSFSR, the Code of Criminal Procedure of the RSFSR, the Criminal Code of the RSFSR and the Code of the RSFSR on Administrative Infractions No. 33, 1313, 2238-2264, August 19, 1993), which reintroduced jury trials in Russia, incorporated the following important constitutional principles into the CCP: the principle of adversary procedure (Sec. 429, para. 1), the presumption of innocence (Sec. 451, the judge is obligated to instruct jurors about the presumption of innocence in summation), the privilege against self-incrimination (Sec. 446, the judge is required to advise a defendant of the right to give or withhold testimony; Sec. 451, duty of the judge to instruct jurors in summation that failure of the defendant to testify is not evidence of guilt), and the exclusion of evidence gathered in violation of the law (Sec. 69, para. 3). With the gradual inclusion of this important cluster of constitutional rights in legislation, Russian lawmakers have signaled their desire to turn from the traditional Continental European inquisitorial form of criminal procedure to the adversarial or accusatorial systems which has its roots in the Anglo-American legal tradition.

### **Adversary procedure and "supplementary investigations"**

The jury law of July 16, 1993, defines "adversary procedure" as follows: "The preliminary hearing and the jury trial are governed by the principle of adversariness. Equal rights are guaranteed to the parties, for whom the judge, maintaining objectivity and impartiality, creates the necessary conditions of a thorough and complete investigation of the facts of the case" (Sec. 429, para. 1). This law represents a conscious departure from the inquisitorial system where the judge acts as prosecutor and attempts to "ascertain the truth." The new law strips the judge of all accusatorial functions related to charging, dismissing, returning a case for sup-

plementary investigation, and conducting the prosecution of cases. Now the parties carry the burden of convincing the trier of fact to decide in their favor.

The new law also purports to give the people's assessors added authority. A court with people's assessors can, on its own motion, return a case for supplementary investigation (Sec. 221, para. 2), carry on the prosecution of a case either when a prosecutor moves to dismiss for insufficient evidence (see Sec. 259, which assigns the question of dismissal exclusively to the court) or when he fails to show up for the trial (Sec. 251, para.1), and even press new charges at trial, if the evidence warrants it (Sec. 255).

Although a judge may no longer, on his own motion, remand a case for a supplementary investigation, the law permits parties to do so during trial if new evidence is found (Sec. 429 para. 3). If an "aggrieved party" objects to the motion for dismissal, however, the judge may not dismiss. (Sec. 430, para. 2, the "aggrieved party," or *poterpevshiy*, possesses nearly as many procedural rights as a defendant. In murder cases, the "aggrieved party" is usually a relative of the deceased.)

The exception recognizing the rights of the aggrieved party may cause problems reminiscent of the injustices characteristic of the old Soviet system. This was illustrated in the second Moscow Regional Court jury trial. Three juveniles were charged with the aggravated murder of an alcoholic invalid. During the preliminary investigation, and at trial, the prosecution relied on the confession, later retracted, of one of the juveniles. No other evidence corroborated the confession. The self-incriminated juvenile testified at trial that he had confessed because he was beaten and because authorities promised to release him if he confessed. Two alcoholic witnesses claimed they had seen the victim the day after he was allegedly killed by the defendants, and the day before his body was found. This testimony conflicted with their earlier statements, during the preliminary investigation.

After taking evidence, the prosecutor moved to dismiss the case. In the absence of corroboration, he stated the confession of the juvenile was insufficient

to prove guilt (see Sec. 77). In addition, the prosecutor had doubts about the guilt of the defendants.

The murdered man's spouse, the "aggrieved party," opposed dismissal, however. Though she had no first hand knowledge of the circumstances of her husband's death, she asked that the case be returned for supplementary investigation. Over the objections of the prosecution and the defense, the judge returned the case to the investigator on grounds that new evidence, i.e., the contradictory statements of the alcoholics about when they had last seen the victim, had surfaced at trial. The judge then discharged the jury.

Arguably, the "aggrieved party's" ability to compel "supplementary investigation" threatens the integrity of the criminal justice system. It subjects judge and jury to the emotions of a person probably unfamiliar with the law and its processes. More importantly, resorting to supplementary investigations is destructive of the presumption of innocence. In this sense, Russia's new law represents no improvement over an inquisitorial system that presumes the guilt of a defendant and gives law enforcement authorities repeated chances to prove that which is presumed: the defendant's guilt. The injustice of this practice is clear when one considers what eventually happened in this case. Although no new evidence was found during the "supplementary investigation" (18 months had passed since the murder), the case, championed by a new prosecutor, came back for trial before a new judge. Confessions suppressed by the first trial judge were admitted into evidence in the second trial and the two alcoholic witnesses changed their testimony. The defendants were all convicted.

### **The privilege against self-incrimination**

The new law helps secure an accused's privilege against self-incrimination, guaranteed by Art. 51 of the Constitution. For example, it provides for the exclusion of evidence gathered in violation of the CCP or the Constitution, such as forced confessions, at both the preliminary hearing (Sec. 432 CCP) and at trial (the judge has the duty to exclude illegally seized evidence at trial, Sec. 435, para. 3, CCP). In many recent jury trials, defendants have successfully

invoked provisions of the new law coupled with the privilege against self-incrimination guaranteed by Art. 51 of the Constitution and the right to counsel to prevent the introduction of pretrial statements into evidence.

The Russian Supreme Court, however, cast doubt on the future of such exclusions when it reversed an acquittal following a jury verdict of not guilty in a double murder case in the Altay Territorial Court. The trial judge had excluded all of the defendant's statements at the preliminary investigation on grounds that the defendant had not been informed of his privilege against self-incrimination. The Supreme Court, however, held that it is enough to advise a criminal suspect or defendant of his right to give a statement (Sec. 46, 52 CCP), for this implicitly conveys the right not to give a statement. Much of the law seems to support the Supreme Court holding. Provisions declaring the rights of the accused and suspects (Sec. 46, 52 CCP), and those governing the questioning of the accused at preliminary investigation (Sec. 150 CCP), are silent on a suspect's privilege against self-incrimination. Instead, they emphasize the right to provide "explanations" or "statements." When a person is questioned as a "witness," as many of the defendants in the Altay Territorial Court had initially been, he is advised of his duty to give a statement and of the penalties for perjury if he does not tell the truth (Sec. 158, CCP).

In the conventional Russian criminal case, defendants and witnesses are first asked by the judge to tell in narrative form all they know about the case. They are then questioned, primarily by the judge, though the parties may also submit questions to clarify aspects not covered in the judge's examination. In jury cases, the parties question the witnesses first, and the judge and jurors are given an opportunity to fill in any gaps afterwards (Sec. 446/3,4 CCP). In the first jury cases after the reforms, questioning usually began with a narrative by the defendant or witness. Some judges, however, have, from the beginning, turned the questioning over to the proponent of the evidence, and they

only rarely use their right to question witnesses. Gradually, judges are learning to conduct trials in an adversarial, rather than inquisitorial manner.

The problem of supplementary investigations might also appear in the self-incrimination context. If a judge finds at a preliminary hearing that a confession was obtained by coercion and no significant corroborative evidence existed, the judge could and should suppress the confession and dismiss the case for lack of evidence connecting the defendant to the commission of the crime (Sec. 433/1 CCP 1993, 221/5, 234, 208/2 CCP). This seems especially necessary. Because most cases in Russia go to trial anywhere from nine to 18 months after the crime, it will be impossible to gather additional physical evidence. But, as it stands, a judge could cite the same "substantial violation of the criminal procedure law by the investigative organs" and the "incompleteness of the investigation" (Sec. 433/1 CCP 1993, 221/2, 232/1,2 CCP) to return the case to the investigators who had violated the law. Thus, Russian lawyers often prefer to base their arguments to the jury on critical pieces of evidence gathered in violation of the law, rather than risk either having the case returned for further investigation or having a verdict of not guilty reversed, as happened in the sixth jury trial in the Altay Territorial Court.

Providing for rights against self-incrimination, turning to adversarial procedures, and reintroducing trial by jury are preliminary steps in reforming the Russian criminal justice system. Introducing a new model of criminal investigation and trial was necessary for eliminating the abuses of the previous system. The reforms, however, have not completely cured the criminal justice system of its ills. The new laws preserve elements of the previous criminal justice system, such as "supplementary investigation," that can be, and are, used to undermine the purpose of the new system. Parliament, which is now considering a new code of criminal procedure, should bear these difficulties in mind as it seeks to expand the protections for the criminally accused.