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Reform of the Procuracy and Bar in Russia

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Article

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I. INTRODUCTION

The reform of the procuracy and the bar in Russia may be examined from two perspectives: (1) that of their functions, in the administration of criminal justice and otherwise; and (2) that of power, expressed in the corporative interests of these two large institutions created, for different reasons, to serve the Communist dictatorship. Though very different, both were elite institutions. The procuracy, an immense hierarchy extending to every corner of the Soviet Union, was the watchdog of the Communist Party and near the top of the pyramid of power in exercising "supreme oversight" (*vysshii nadzor*) over the legality of acts of Soviet political, judicial, and administrative organs.[1] The bar, on the other hand, played a minor political role, but, by keeping its numbers low and monopolizing the rendering of legal aid, it allowed its members to enjoy, by Soviet standards, a rather lucrative profession with an enviable amount of professional independence, which made it one of the most preferred careers of graduating law students.[2]

Although we in the West think of the procuracy and the bar as parties with diametrically opposed interests, this characterization did not apply during Soviet times, nor does it today, as yet. There can be no truly adversarial jurisprudence in a totalitarian state, just as there can be no truly pluralistic politics, no free market of ideas or goods, and no

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1. For excellent studies of the Soviet Procuracy, see GLENN G. MORGAN, SOVIET ADMINISTRATIVE LEGALITY (1962); GORDON B. SMITH, THE SOVIET PROCURACY AND THE SUPERVISION OF ADMINISTRATION (1978).

2. Eugene Huskey, *Between Citizen and State: the Soviet Bar (Advokatura) under Gorbachev*, COLUM. J. TRASNAT'L L. 95, 110 (1990).

separation of powers, whether between the branches of government or in the administration of justice.

Political reforms—the end of Communist Party control of all aspects of economic and political life in Russia, the replacement of an administrative-command economy with market capitalism, the gradual development of pluralist democracy, and the reform of the legal system—have obviated most functions of the Russian procuracy. What remains is a role the procuracy does not desire: that of prosecutor, the responsibility of enforcing criminal laws and participating in adversarial criminal proceedings.

As far as the bar is concerned, the economic, social, and judicial reforms have opened up a plethora of new functions, some of which were wrongly in the hands of the procuracy. The bar's desire to protect its cozy monopoly over legal aid, however, has at the same time made it reluctant to adjust to the turn to adversarial criminal procedure, a regime which will require work and putting one's reputation on the line, but which, as of yet, pays little. This article will discuss recent efforts to reform these two institutions, the institutions' responses, and the problem of criminal procedure reform as it relates to them. Brief discussion of the history of these institutions, and the role they played in criminal procedure before and after the 1917 revolution, will be informative. History plays devious tricks on its actors: in the end, the absolute state and legal system built by Lenin and Stalin closely resembled those of the 18th and early 19th centuries, before the abolition of serfdom and the great reforms of 1864. Reformers engineering the transition from Soviet totalitarianism to capitalist liberalism look today to their predecessors in 1864 who built a judicial system for just such a transition, a system destroyed by the Bolsheviks.

The blueprint for reform of the administration of justice in the Russian Republic, "The Concept of Judicial Reform," was prepared by an authors' collective in the Legislative Committee of the Supreme Soviet of the Russian Republic and was adopted nearly unanimously by the Supreme Soviet on October 21, 1991.[3] "The Concept of Judicial

3. Kontseptsii sudebnoi reformy, Vedomosti RSFSR, Issue No. 44, Item No. 1435 (1991). Citations hereafter from KONTSEPTSIIA SUDEBNOI REFORMY V ROSSIISKOI FEDERATSII [THE CONCEPT OF JUDICIAL REFORM IN THE RUSSIAN FEDERATION] (1992).

Reform" based its reform proposals in great part on the ideas of the 1864 reforms, while following up on the searing critique of Soviet criminal justice that erupted as a result of Gorbachev's policies of *glasnost* and *perestroika*.[4]

II. REFORM OF THE PROCURACY: PROSECUTOR OR "EYE OF THE EXECUTIVE"?

Today's Russian procuracy has its roots in the office of the *fiskal* created by Peter the Great in 1711 to aid the monarch in enforcing decrees, collecting taxes, and controlling the police and civil servants. Renamed the procuracy (*prokuratura*) in 1722, the agency extended its oversight function to provincial and local levels and began to be known as the "eye of the Emperor" (*oko gosudarevo*).[5]

In pre-1864 Russia, the courts were widely scorned as corrupt instruments of executive power slavishly dependent on local government patronage and instructions. The majority of judges were without legal education, if not illiterate, and court decisions often turned on the amount of the bribe paid. The procuracy, though responsible for overseeing the criminal justice system, was unable to curb bribery and corruption because its energies were dissipated in a futile attempt to supervise a myriad of government agencies and perform an impossible number of tasks.[6]

The procurator was spared the task of prosecuting criminal cases. The police investigated criminal complaints under technical procuratorial supervision and the trial consisted in the judge reading the investigative dossier alone in his chambers and then acting as both prosecutor and

4. *See id.* at 8-30 for critique of the injustices of Soviet criminal procedure.

5. *Id.* at 57; SAMUEL KUCHEROV, THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE 404 (1970); MORGAN, *supra* note 1, at 9-11.

6. FRIEDHELM BERTHOLD KAISER, DIE RUSSISCHE JUSTIZREFORM VON 1864, 34-34 (1972). For an analysis of the state of the pre-1864 administration of justice in Tsarist Russia and the aims of the reformers, see *id.* at 1-89; SAMUEL KUCHEROV, COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS 1-18, 52-85 (1953). According to A.M. Larin and V.M. Savitskii, in their explanatory note to their Draft Federal Law on the Procuracy, the pre-1864 procuracy "whiled away its time in the courts of the Russian Empire" and "exercised no noticeable influence on the social life of the country." Poiasnitel'naia zapiska [Explanatory Note], Federal'nyi Zakon o Prokurature Rossiiskoi Federatsii. Proekt. [Draft Federal Law on the Procuracy of the Russian Federation], Feb. 2, 1995 (on file with the author).

defense. Having oversight over the courts, the procurator was theoretically responsible for representing the interests of the defendant.[7] No organized bar existed; legal representatives (*striapchie*) usually had no legal education and normally just helped defendants draft court documents after the initial trial court decision.[8]

The Reforms of 1864 eliminated all oversight functions of the procuracy except supervision of criminal prosecutions,[9] subordinated procurators to the Minister of Justice (who was simultaneously Procurator General), and attached them to the courts in which they prosecuted criminal cases.[10] Criminal investigation had in 1860 already been turned over to an investigating magistracy with judicial status, appointed by the Ministry of Justice.[11]

The 1864 reforms established an independent professional judiciary[12] and introduced trial by jury. Trials were entirely oral with a certain equality of arms and adversarial character.[13] The procuracy had become a prosecutorial agency along the centralized European model. Prosecutors had to have a legal education and in prosecuting cases were duty-bound to seek the truth, not victory at any cost.[14]

After the 1917 revolution, the Bolsheviks abolished the separation of the executive and judicial branches, as well as the clear delineation of roles in the criminal process achieved by the 1864 reforms. Decree No. 1 on the Courts of November 24, 1917 abolished the tsarist procuracy,

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7. KAISER, *supra* note 6, at 36.

8. KUCHEROV, *supra* note 6, at 108-09; EUGENE HUSKEY, RUSSIAN LAWYERS AND THE SOVIET STATE 11 (1986).

9. They were resurrected to some extent, however, by subsequent legislation. KUCHEROV, *supra* note 6, at 95.

10. Concept of Judicial Reform, *supra* note 3, at 58; KUCHEROV, *supra* note 5, at 405-06.

11. KUCHEROV, *supra* note 5, at 373.

12. The separation of power between executive and judicial branches was a vital aim of the 1864 reformers. KUCHEROV, *supra* note 6, at 26-36.

13. The prosecutor was not considered a pure party but rather a representative of the state, who should impartially oversee strict adherence to the law. KUCHEROV, *supra* note 5, at 406. The reformers rejected purely adversarial criminal trials for fear of leaving the outcome to the resourcefulness of the parties. KUCHEROV, *supra* note 6, at 41-43.

14. KUCHEROV, *supra* note 6, at 96.

investigative magistracy, judiciary, and bar,[15] and replaced them with non-professionals with political credentials. During the Civil War the role of advocates was curtailed and virtually all cases in the newly-created Revolutionary Tribunals were heard without the benefit of either prosecutor or defender.[16]

In 1922 Lenin supported the establishment of a centralized, rigidly hierarchical procuracy similar to the pre-1864 tsarist institution. It was to oversee all judicial, legislative, administrative, and social organs of the Soviet state.[17]

The procuracy under Stalin became increasingly centralized, until procurators from the smallest town in the most distant Soviet Republic were answerable, through the hierarchy, to the Procurator General in Moscow. Although the Procuracy was not as powerful as such secret police agencies as the CHEKA and KGB, it functioned as the "eye of the party" through its expansive and politically motivated oversight. Though technically responsible for defending the civil rights of Soviet citizens against violation by government agencies, the procuracy more often tracked down and prosecuted the regime's critics.[18] As before the 1864 reforms, the need of the absolutist state to control all aspects of society led the procuracy to concentrate on oversight while neglecting the role of criminal prosecutor.

As a result of the politics of *glasnost*, the inadequacies and cruel injustices of Soviet criminal justice were discussed in the press[19] and in a plenary session of the Supreme Court of the USSR in 1986-1987.[20] The

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15. Sobranie Uzakonenii RSFSR, Item No. 50 (1917); KUCHEROV, *supra* note 5, at 407-08.

16. HUSKEY, *supra* note 8, at 65-67. Both prosecutors and defenders were drawn from newly-created collegia of legal defenders (*pravozastupniky*). *Id.* at 44.

17. *See* HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. 241-42 (1963). For background on the creation of the Soviet procuracy, see MORGAN, *supra* note 1, at 28-43.

18. See Yuri Feofanov, *Kuda zakonodatel' zastavit smotret' prokurora [Where will the Legislator Force the Procurator to Look]*, IZVESTIIA, Apr. 5, 1995, at 2.

19. Aloys Hastrich, *Die Diskussion über 'perestrojka' in der sowjetischen Rechtspflege*, 34 OST EUROPA RECHT 205 (1988).

20. *See* Decree No. 15. O dal'neishem ukreplenii zakonnosti pri osushchestvlenii pravosudiia [On Further Strengthening Legislation Toward the Realization of Criminal Justice], Dec. 5, 1986, Biull. Verkh. Suda SSSR, Item No. 1 (1987), *reprinted in* SBORNIK POSTANOVLENIY PLENUMOV VERKHOVNYKH SUDOV SSSR I RSFSR (ROSSIISKOI FEDERATSII)

Soviet justice system was pilloried not only for the conviction and even execution of innocent people but also for its daily violation of the rights of the criminally accused.[21] The procurator at that time oversaw an inquisitorial process[22] in which coerced confessions, politically motivated false prosecutions, and falsification of evidence were routine. Criminal suspects had virtually no protection against the often illegal methods of criminal investigators, as the right to counsel usually adhered only at the conclusion of the preliminary investigation. The decisions of the police, investigators, and prosecutors that infringed on rights theoretically protected by the Soviet constitution and laws, as well as by international covenants, were completely beyond the courts' control.

Nor were the courts capable of correcting pretrial injustices. Investigators concealed illegal police action, while the procurator consecrated in the indictment the results of a shoddy and often illegal investigation.[23] The procurator was the most powerful figure in the Soviet justice system, exercising "supreme oversight" over the courts and the administration of justice and enjoying a higher social, political and party status than the poorly paid and undereducated judges. The living and working conditions of the latter as well as their reappointment every fifth year were dependent upon local party bosses and government officials, whose telephone calls enjoyed greater probative value than anything presented in court.[24]

Acquittals were almost unknown. If the evidence was insufficient the court would nevertheless convict the defendant of a lesser offense and either sentence him to credit for time served or return the case to the

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PO UGOLOVNYM DELAM [Collection of Decisions of the Plenary Sessions of the Supreme Courts of the USSR and the RSFSR (Russian Federation) on Criminal Cases] 315-320 (1995).

21. Gordon B. Smith, *The Procuracy, Citizens' Rights and Legal Reform*, 28 COLUM. J. TRANSNAT'L L. 77, 79-82 (1990). This article documents the *perestroika*-era reforms aimed at transforming the procuracy.

22. *See* John Quigley, *Will the Inquisitorial System Wither Away? Perestroika in the Soviet Lock-up*, 8 ST. LOUIS U. PUB. L. REV. 121, 127 (1989).

23. CONCEPT OF JUDICIAL REFORM, *supra* note 3, at 26.

24. *See* John Quigley, *Law Reform and the Soviet Courts*, 28 COLUM. J. TRANSNAT'L L. 59, 66 (1990); Valerii Savitskii, *Perestrojka und Rechtsprechung in der USSR*, 34 RECHT IN OST UND WEST 61, 65 (1990); *see generally*, Friedrich-Christian Schroeder, *Die 'Perestrojka' im sowjetischen Strafprozeß*, 29 JAHRBUCH FÜR OSTRECHT 23, 26 ff. (1988).

investigator for "supplemental investigation," often a kind of pocket acquittal.[25] Judges were known for their prosecutorial bias and indeed assumed the accusatorial function in the nearly one-half of all criminal cases in which the procurator would present the indictment and disappear.[26] Even today it is permissible for the procurator to not participate in a trial (before a court with lay assessors), to make no objections to the way the trial is handled, and yet to protest the judgment if dissatisfied with it.[27]

The two people's assessors introduced by the Bolsheviks to replace the jury never functioned as a genuine popular counterweight to the professional judge. Theoretically possessing rights and powers equal to those of the judge, they were commonly called "the nodders" in Russia. Whether due to their selection from organizations controlled by the Communist Party, or to their deference to the professional judge, they virtually always agreed with the judge in their rulings.[28] The courts were an integral component of the administrative command system, "organs of repression applying ritualistic juridical reasoning to prearranged sentences."[29]

The following reforms, initiated by Gorbachev as part of *perestroika* and later included in the "Concept of Judicial Reform," have now been enacted into law and partially realized: (1) the strengthening of the independence of the judiciary;[30] (2) the requirement of judicial

25. *See* Peter H. Solomon, Jr., *The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice*, 39 SOVIET STUD. 531, 543 (1987).

26. Valerii Savitskii, *Sterzhnevaia funktsiia prokuratury—osushchestvlenie ugolovnogo presledovaniia* [Pivotal Function of the Procuracy—Criminal Prosecution], ROSS. IUST., No. 10, at 24, 27 (1994).

27. UPK RSFSR (1994), § 325.

28. *See* DINA KAMINSKAYA, FINAL JUDGMENT 55-56 (1978). Regarding the suggested increase in the number of lay assessors, the Concept of Judicial Reform commented: "As long as a court with lay assessors is preserved, in which professional judges and simple citizens deliberate and vote together, as long as the standards of the court of cassation are binding on the judge, who is responsible for the final judgment, a mechanical increase of heads, nodding in unison to the words of the presiding judge, is pointless." *Supra* note 3, at 32.

29. CONCEPT OF JUDICIAL REFORM, supra note 3, at 8.

30. KONST. RF (1993) arts. 120(1), 121(1); Zakon RSFSR o statuse sudei v Rossiiskoi Federatsii, [Law of the RSFSR on the Status of Judges in the RF], Jun. 26, 1992, Vedomosti RF, Issue No. 30, Item No. 1792 (1992). (The law provides for non-removability until retirement age and raises social and legal protections).

authorization for decisions previously within the competence of the procuracy and criminal investigators relating to invasions of citizens' constitutional rights through search, seizure, or detention;[31] (3) the right to counsel from the time of arrest;[32] (4) the introduction of adversary procedure in criminal cases;[33] (5) the statutory enactment of a presumption of innocence,[34] a privilege against self-incrimination,[35] an exclusionary rule for illegally seized evidence;[36] and (6) the right to trial by jury.[37]

The following proposals from the "Concept of Judicial Reform" to reform the procuracy have thus far been largely unsuccessful: (1) limiting procuratorial oversight and investigation to cases in which actual violations of the criminal law are suspected, or in which persons are impaired to such an extent that they cannot defend their own rights in the courts (e.g., juveniles); (2) eliminating the procuracy's designation as exerciser of "supreme oversight" over legality, and completely

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31. On 21 April 1992 the 6th Congress of People's Deputies amended the 1978 Constitution of the RSFSR to include these rights. KONST. RSFSR (1978) arts. 39, 40, 41. A proviso was passed suspending their implementation, however, until implementing legislation had been passed. Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 76-77 (1995). The 1993 Constitution of the RF included the same protections, KONST. RF (1993) arts. 23, 24, 25, but with a similar proviso, "Concluding and transitional provisions." KONST. RF (1993) part II, sec. 6. On 23 May 1992 the Supreme Soviet of the RF (SSRF) amended the Code of Criminal Procedure to provide for appeal to a judge upon imposition or continuation of preventive pretrial detention. UPK RSFSR (1994), §§ 220-1, 220-2.

32. KONST. RSFSR (1978) art. 67(1); KONST. RF (1993) art. 48; UPK RSFSR (1992), § 47.

33. KONST. RSFSR (1978) art. 168; KONST. RF (1993), art. 123; UPK RSFSR (1994), § 429.

34. KONST. RSFSR (1978) art. 65; KONST. RF (1993) art. 49; UPK RSFSR (1994), § 451.

35. KONST. RSFSR (1978) art. 66; KONST. RF (1993) art. 51; UPK RSFSR (1994), §§ 446, 451.

36. KONST. RSFSR (1978) art. 65; KONST. RF (1993) art. 50; UPK RSFSR (1994), §§ 69, 432, 435.

37. KONST. RSFSR (1978) art. 164; KONST. RF (1993) arts. 20, 47, 123; Zakon Rossiiskoi Federatsii, O vnesenii izmenenii i dopolnenii v Zakon RSFSR O sudoustroistve RSFSR, Ugolovno-protsessual'nyi kodeks RSFSR, Ugolovnyi kodeks RSFSR i Kodeks RSFSR ob administrativnykh pravonarusheniiakh [Law of the RF 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] (hereinafter referred to as "Jury Law"), June 7, 1993, Vedomosti RF, Issue No. 33, Item Nos. 1313, 2238-2264 (1993).

eliminating its oversight over the courts; (3) creating a new investigative committee separate from the procuracy to carry out criminal investigations, while allowing the procuracy to maintain its supervision; and (4) emphasizing the role of prosecutor in adversary criminal proceedings under conditions of equality of arms with the defense.[38]

The procuracy has stalwartly opposed reforms in criminal procedure that would either undermine its control over intrusions into the freedoms of citizens or necessitate its assumption of the role of prosecutor in criminal cases. It has fought ferociously any attempt to strip it of its most archaic role, that of general oversight over the application of the laws by both governmental and non-governmental organizations.

Since the abortive coup d'etat staged by members of Gorbachev's cabinet in August 1991 and the collapse of the Soviet Union, three consecutive Procurators General of the RF, all assuming power as so-called reformist democrats with the blessing of President Yeltsin, have been converted by this enormous, powerful, and conservative bureaucracy into loyal supporters, opposing virtually all reforms affecting its perceived interests.

Valentin G. Stepankov, appointed Procurator General of the RSFSR on 6 April 1991, sided with Yeltsin in August 1991 and was instrumental in the decision of the Supreme Soviet of the RSFSR, of which he was simultaneously a member, to abolish the USSR Procuracy on 22 November 1991 and transfer its functions to the RSFSR Procuracy. Though acting as a reformer in other areas, he pushed the new Law on the Procuracy of the RSFSR, drafted under his supervision, through the Supreme Soviet of the RF on 17 January 1992. The law maintained the "supreme oversight" of the Procuracy over all government and non-government agencies and organizations, eliminating only its supervision over the judicial system.

According to the 1992 law, the procuracy, "to the end of guaranteeing the supremacy of law, the unity and strengthening of

38. CONCEPT OF JUDICIAL REFORM, *supra* note 3, at 49-51.

legality, the socio-economic, political and other rights and freedoms of citizens . . . exercises oversight . . . ."[39]

The following were subject to this oversight: "the execution of the law by local Soviets of People's Deputies, local administration, ministries, agencies, other organs of state and economic administration and control, enterprises, institutions, organizations and clubs independent of their affiliations, organs of military administration, military bases and institutions, social and political organizations and movements, public officials, and also legal regulations issued by them in accordance with the law."[40]

Stepankov was also instrumental in achieving the proviso which suspended the constitutional requirement of judicial approval for search warrants and other invasions into the privacy of citizens.[41] Finally, Stepankov was the major opponent of the reintroduction of trial by jury, claiming that the rise in crime and the inadequacy of personnel in the procuracy made it inopportune to require prosecutors to participate in all serious trials.[42] In defending his position, Stepankov criticized the courts for being slow, violating statutory time limits, excessively releasing criminals with their new judicial review over detention, and being so incompetent that the procuracy had protested and achieved the reversal or modification of tens of thousands of judicial decisions over the previous two years.[43]

Article 176 of the 1978 RSFSR Constitution, which contained the same language as to oversight functions of the procuracy as did sections

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39. Zakon Rossiiskoi Federatsii, O prokurature Rossiiskoi Federatsii, [Law on the Procuracy of the RF], Jan. 17, 1992, Vedomosti RSFSR, Issue No. 47, Item No. 8 (1992).

40. *Id.* § 20.

41. *Supra* note 31.

42. On his opposition to judicial reform, and trial by jury in particular, *see* Aleksandr Larin, *Ataka na sudebnuiu reformu [Attack on Judicial Reform]*, IZVESTIIA, Jan. 21, 1993, at 5; Aleksey Kirpichnikov, *Parlament zablokiroval vvedeniie suda prisiazhnykh. Rossiyskaia prokuratura atakuet sudebnuiu reformu [Parliament blocks introduction of jury trial. The Russian procuracy attacks judicial reform]*, SEGODNIA, Mar. 10, 1993, at 3; Valerii Rudnev, *Generalnyy prokuror protiv suda prisiazhnykh [The Procurator General is against Jury Trials]*, IZVESTIIA, Mar. 10, 1993, at 5.

43. Valentin Stepankov, *Deistvuiushchee zakonodatel'stvo otstalo ot zhizni [Current legislation is devoid of life]*, NEZAVISIMAIA GAZETA, Mar. 16, 1993, at 6.

2 and 20 of the 1992 Law on the Procuracy,[44] was considered in need of amendment by both the Supreme Soviet's Constitutional Commission (which had been founded and chaired by Yeltsin until his break with the parliament) and the Constitutional Assembly, organized by the President to write *his* draft Constitution in the Spring of 1993. The Supreme Soviet's draft constitution restricted the procuracy to the supervision of criminal investigations carried out by a new federal investigative committee and the prosecution of criminal cases.[45] The President's draft also originally endorsed the same concept.[46]

When Yeltsin dissolved Parliament and finally subdued it by military force in September and October 1993, Stepankov sided with Parliament. Yeltsin removed Stepankov by emergency decree and replaced him with Aleksei Kazannik, a professor, old friend, and outsider to the procuracy.[47] On the eve of the publication of the Draft Constitution proposed by the President's Constitutional Assembly, Kazannik wrote an article criticizing the draft's intention of eliminating the procuracy's oversight powers,[48] and this led to a secret changing of art. 129 by the President's apparatus without consultation with the Constitutional Assembly.[49]

The final text of art. 129, which became part of the Constitution following the successful referendum of 12 December 1993, retained the procuracy as a unified, centralized system with strict hierarchical

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44. And essentially the same language as the Regulations on the Procuracy of 1922 (art. 2), the Constitution of the USSR of 1936 (art. 113), the Regulations on Procuratorial Oversight of the USSR of 1955 (§§ 1, 2), the Constitution of the USSR of 1977 (art. 164) and the Law on the Procuracy of the USSR of 1979 (art. 1). *See* Savitskiy, *supra* note 27, at 24.

45. KONST. RF (1993) art. 109. Proekt. [Draft Constitution of the Russian Federation]. Prepared by the Constitutional Commission of the Congress of People's Deputies of the Russian Federation. Documents and Materials. Moscow. 1993. This draft also calls for the Supreme Soviet to appoint the General Procurator, upon nomination by the President of the Russian Federation. Art. 87(1(*l*)).

46. Art. 129. Proekt Konstitutsii Rossiyskoy Federatsii. *Published in* IZVESTIIA, July, 16, 1993, at 5.

47. Valeriy Rudnev, *General'nym Prokurorom naznachen poklonnik Prezidenta [A Supporter of the President named Procurator General]*, IZVESTIIA, Oct. 7, 1993, at 1-2.

48. Aleksei Kazannik, *Proekt Konstitutsii Rossii mozhet stat' ubiistvennym dlia prokuratury [The Draft Constitution of Russia Could be Lethal to the Procuracy]*, IZVESTIIA, Nov. 6, 1993, at 5.

49. *See* Savitskii, *supra* note 26, at 25.

subordination, but left the "competence, organization and functions of the procuracy of the Russian Federation to be determined by law."[50]

The future of the procuracy was thus left to be fought out in the legislative arena. Kazannik fell out of favor with the President by executing the new State Duma's amnesty of the 1991 coup participants and the October 1993 "mutineers," after the President's closest advisers had secretly met with him to pressure him to annul the amnesty. This led to his resignation.[51]

The President then appointed Aleksey Il'iushenko as acting Prosecutor General, but his nomination was never confirmed by the State Duma, which supported Kazannik and originally refused even to accept his resignation.[52] Il'iushenko was rewarded for his loyalty to Yeltsin[53] and he, like Kazannik and Stepankov, began energetically representing the institutional interests of this giant bureaucracy. In June of 1994 Il'iushenko called for procuratorial coordination of the work of all law enforcement agencies, including the courts, in the war against

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50. KONST. RF (1993) art. 129.

51. The meeting with head of the President's secret service Aleksandr Korzhakov, Minister of the Interior Viktor Yerin, and others took place on 25 February 1994. Leonid Nikitinskii, *Kazannik ob''iasniaet svoiu otstavku tem, chto ot nego trebovali "narushit' zakon" [Kazannik Explains his Resignation by the Fact that they Demanded that he "Violate the Law"]* IZVESTIIA, Mar. 1, 1994, at 2; and, by the same author, *Pervaia zhertva amnistii [The First Victim of the Amnesty]*, IZVESTIIA, Mar. 5, 1994, at 4.

52. Leonid Nikitinskiy, *U nas net tret'ei vlasti, zato est' dva general'nykh prokurora [We Have No Third Branch of Power, but We Have Two Procurators General]*, IZVESTIIA, Apr. 8, 1994, at 2.

53. Il'iushenko played a key role in the "war of the suitcases" in 1993 between President Yeltsin and Vice-President Aleksandr Rutskoi. Rutskoi, as head of a presidential commission to investigate corruption, came up with 11 suitcases of allegedly compromising evidence against members of Yeltsin's entourage. Yeltsin then appointed an Inter-agency Commission for the War against Crime and Corruption, headed by Il'iushenko among others. The Commission produced forged documents implicating Rutskoi in the theft of several million dollars. The case against Rutskoi was dismissed upon proof of the forgery, but Il'iushenko reactivated the case after his appointment. Igor' Korol'kov, *Zakony bessil'ny, kogda General'nyi prokuror ne znaet, chto "mozhno", a chto "nel'zia" [Laws are Powerless, when the Procurator General Doesn't Know What is "Permitted" and What is "Forbidden"]* IZVESTIIA, Aug. 1, 1995, at 5.

crime,[54] and declared in a meeting with high Presidential staff members that the fight against crime did not leave time to reform the procuracy.[55]

Two draft laws on the procuracy were submitted to the State Duma in April 1995. The procuracy's draft, introduced by President Yeltsin himself, merely amended the old law to provide for appointment of the Procurator General by the upper house of parliament, the Federation Council, following nomination by the President, but otherwise maintained "general oversight" unchanged.[56] A concurring draft followed the "Concept of Judicial Reform" in eliminating "general oversight" to the end of harnessing the immense resources of the procuracy to fight crime and perform its prosecutorial functions.[57]

In the "Explanatory Note," and in a news conference held before the State Duma session entitled "Why is the procuracy not involved in the fight against crime?," the authors of the alternate draft and Vice-Chairman of the Duma Legislative Committee Boris Zolotukhin, who introduced it, roundly criticized the procuracy's draft.[58] The procuracy was called "the most conservative branch of the former Soviet apparatus," wasting two-thirds of its personnel and effort on so-called oversight activities carried out in an amateur fashion and completely useless in the context of current economic, political, and legal changes. Instead of participating in criminal investigations (of which they conduct only approximately 10%) or trials (in which they appear less than 50% of the time), procurators were said to participate in "countless inspections, meetings, conferences, collegia, presidiums, generating

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54. *See* Savitskii, *supra* note 26, at 27 (citing an unspecified article in Rossiiskaia Gazeta of June 29, 1994).

55. Leonid Nikitinskii, *Prestupnost' ne ostavliaet vremeni dlia reformy prokuratury [Crime Leaves No Time for Reforming the Procuracy]*, IZVESTIIA, June 25, 1994, at 2.

56. O Prokurature Rossiiskoi Federatsii, art. 11(1). Proekt. [Draft Law on the Procuracy of the Russian Federation, art. 11(1)]. Drafted by the Procuracy and Presented to the State Duma by the President of the RF on Dec. 4, 1995 (unpublished draft). Art. 2(l) merely adds the supervision of Presidential decrees to list of areas subject to "procuratorial oversight."

57. Draft Federal Law on the Procuracy, *supra* note 6.

58. Leonid Nikitinskii, *Nuzhno li Rossii 'gosudarevo oko?' [Does Russia Need the Eye of the Emperor?]*, MOSKOVSKIE NOVOSTI, Apr. 2-9, 1995, at 8. Andrey Kirpichnikov, *V Dume khotiat, chtoby Genprokuratura borolas' s prestupnost'iu [In the Duma They Want the Procuracy General to Fight Crime]*, SEGODNIA, Mar. 31, 1995, at 2. Feofanov, *supra* note 18.

endless memoranda, protests, representations and warnings."[59] According to alternative draft author A.M. Larin, criminal investigation "is dangerous and nerve-wracking work, which many workers of the procuracy around retirement age don't want to do, but still want to receive their large procuracy pensions."[60] Oversight was characterized as antithetical to democratic pluralism and perhaps even violative of the constitutional rights of private organizations subject thereto.[61] Furthermore, the authors of the draft declared, the prosecutor's supposed role of protecting the human rights of citizens has always been a fiction, and can better be carried out by the courts with the aid of legal aid groups, advocates, and the newly-created Ombudsman for Human Rights.[62]

Novelties in the alternate draft include designation of the Procuracy as the chief coordinator of the war against crime and provision for appointment of a special outside prosecutor in cases involving the office of the General Procurator in a conflict of interest.[63] The alternate draft proposes in its transitional provisions to allow the Procuracy to continue its protests on behalf of citizens whose rights have been violated until the office of the Ombudsman becomes effective[64] and to continue utilizing its own criminal investigators until the new Federal Investigative Committee is established.[65]

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59. Savitskiy, *supra* note 26, at 25. Examples of procuratorial areas of concern which prevented the agency from prosecuting criminal cases were those of "discipline in distributing fuel," the "fight against drunkenness," the "degree of overloadedness of traincars," the problems of commercial banks, etc. *See, e.g.*, Nikitinskiy, *supra* note 58, at 8; Kirpichnikov, *supra* note 58, at 2. As for the "mysterious figure" of the procurator, Feofanov writes, "All know who he is, but few know what he does, because he does 'all.'" Feofanov, *supra* note 18.

60. Reported in Yekaterina Zapodinskaia, *Prokurorskiy nadzor neobkhodim, khotia i bezrezul'taten [Procuratorial Oversight Is Necessary, Although Pointless]*, KOMMERSANT, Mar. 31, 1995, at 14.

61. Nikitinskii, *supra* note 58.

62. Feofanov, *supra* note 18.

63. Draft Federal Law on the Procuracy, *supra* note 6, §§ 7, 49-50.

64. Sergei Kovalev, under whose chairmanship of the Committee for Human Rights in the old Supreme Soviet of the RF the position was created, and who was named the first Ombudsman, was relieved by the State Duma as a result of his investigation of human rights violations in the war in Chechnya in March 1995. Evgeniia Al'bats, *Chuzhoi [A Foreign Person]*, IZVESTIIA, Aug. 25, 1995, at 7.

65. Draft Federal Law on the Procuracy, *supra* note 6, §§ 51, 52.

Another aspect of "juridical atavism" which the alternate draft would eliminate is the procurator's role of submitting "conclusions" in civil cases. This function was introduced during the NEP in the 1920s to enable the Party to control excesses of the market economy.[66]

In the procuracy's rival news conference before the Duma session, entitled "Does a great power need a strong procuracy?,"[67] a procuracy official stressed its purported role in the defense of the rights of Russian citizens, claiming that it had investigated 1.5 million citizen's complaints, uncovered 14,000 violations of privatization and property laws, and overturned 15,500 illegal acts of representative and executive organs. Sixty thousand protests of criminal judgments had been filed, 23,000 resulting in reversals.[68] The procuracy official claimed that a "Damocles Sword of budget cuts" would undermine the fight against crime,[69] to which critics responded that the two-thirds of procuracy personnel involved in wasteful oversight, or protests on behalf of citizens, should be converted to work in law enforcement.[70]

An institution of a "totalitarian regime,"[71] the "eye of the emperor" is apparently still considered necessary, as evidenced by the President's newly won support for maintaining the procuracy's oversight powers, and the necessity for supervision of the execution of his decrees, the

66. As to this participation of the state in private legal affairs, Lenin said: "We do not recognize anything 'private' . . . It is necessary to strengthen the interference of the state in 'private-legal' relationships." Explanatory Note, Draft Federal Law on the Procuracy, *supra* note 6, at 4.

67. *See* Nikitinskii, *supra* note 58.

68. Artem Vetrov, *Genprokuratura zashchishchaet svoe pravo na nadzor za sobliudeniem zakonnosti* [Procuracy General defends its Right to Oversight of Legality], SEGODNIA, Mar. 31, 1995, at 2.

69. *See* Zapodinskaia, *supra* note 60

70. *See* Nikitinskii, *supra* note 58. A leading jurist in the Research Institute of the Procuracy General, though recognizing that the oversight function is unnecessary in a democratic society with a functioning market economy, finds that Russia has not yet reached this stage and therefore still needs the procuracy to carry out this function. The conversion of personnel involved in oversight to work in criminal prosecution would be impossible, for they have not been so trained. Iu. Korenevskii, *Otmeniat' obshchiy nadzor prokuratury—prezhdevremenno [It is premature to eliminate the procuracy's oversight function]*, ROSS. IUST., No. 4 at 38-9 (1995).

71. Feofanov, *supra* note 18.

main tool of his power.[72] As a dutiful "eye of the president," acting Procurator General Il'iushenko brought criminal charges of insulting the President against independent television station NTV for its July 1995 airing of a satirical puppet show which, in criticizing the meager new minimum wage, depicted Yeltsin and Prime Minister Chernomyrdin as drunken flophouse louts in a take-off on a familiar Gogol story.[73]

Despite his unwavering support of the new President, and most likely because of the searing critique thereof in the media, Aleksey Il'iushenko was forced to resign as Procurator General of the Russian Federation.[74] The charges against the "Kukly" puppet show were immediately dropped.[75] Yeltsin's appointee to replace Il'iushenko, Yuri Skuratov, won quick and unanimous confirmation by the Federation Council on October 24, 1995.[76] On the heels of Skuratov's appointment, the Procuracy's Draft Law on the Procuracy was passed with minor changes by the legislature and signed by President Yeltsin on November 17, 1995.[77] The charges against former Vice-President

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72. That one could now call the procuracy the "eye of the president" is confirmed in recent discussions. *See* N. Kostenko, *Prokuratura—opora presidentskoy vlasti* [The Procuracy—Support of Presidential Power], ROSS. IUST., No. 11 at 25-6 (1994), proposing that, as a consequence of the president's role as head of state and guarantor of the constitution and human rights, the procuracy "should be an important and necessary support of presidential power, which is especially necessary under the current conditions of unstable legal relations in society." On the role of the presidency as a surrogate for the party in the new system, see Eugene Huskey, *Russian Judicial Reform after Communism*, in REFORMING JUSTICE IN RUSSIA, 1864-1994 (Peter H. Solomon ed., forthcoming).

73. *Yeltsin Displays His Health on TV*, N.Y. TIMES, July 19, 1995, at A1, A8. The article also sees the criminal charges against an NTV news reporter for refusing to turn over tapes of her interview with the Chechen rebel leader who had led the hostage-taking raid on Budennovsk as a part of the government's larger attack on NTV for its critical reporting of the Chechen conflict.

74. Allesandra Stanley, *Harried by Yeltsin, Attorney General Bows Out*, N.Y. TIMES, Oct. 9, 1995, at A7.

75. *See* 1 Open Media Research Institute (OMRI) Daily Digest, No. 200, Oct. 13, 1995, *available on* WORLD WIDE WEB *at* www.omri.cz/Publications/Digests/Digest.951013.html.

76. 1 OMRI Daily Digest No. 208, Oct. 25, 1995, *available on* WORLD WIDE WEB *at* www.omri.cz/Publications/Digests/Digest. 951025.html.

77. Federal'nyi zakon o prokuratore RF, Nov. 20, 1995, Sobranie Zakonodatel'stvo RF, No. 47, Art. 472 (1995). Article 1 of the new law, while maintaining procuratorial oversight functions, does not allude to oversight of the execution of presidentail decrees as did the original draft. *See supra* note 56. Skuratov was Director of the Procuracy's Scientific-Research Institute for Problems of Strengthening Legality and the Legal Order, has a doctorate in law, and, perhaps not coincidentally, has as one of his specialities:

Rutskoi[78] were again dismissed.[79] Il'iushenko himself was arrested and charged with bribery and abuse of office on February 15, 1996.[80]

Preliminary reintroduction of trial by jury in nine of the political subdivisions of the Russian Federation[81] has placed new burdens on the procuracy with respect to its heretofore spurned role as criminal prosecutor. The Jury Law[82] for the first time introduced the following principles into the CCP: adversary procedure, the presumption of innocence, the privilege against self-incrimination, and the exclusion of evidence gathered in violation of the law.[83]

The main objective of the turn to adversary procedure is to change the judge's role as primary seeker of truth. The new language adumbrates the judge's new role:

> The preliminary hearing and the jury trial are based on the principle of adversariness. Equal rights are guaranteed the parties, for whom the judge, while maintaining objectivity and impartiality, creates the necessary conditions for a thorough and complete investigation of the facts of the case.[84]

The new law attempts to strip the judge of all accusatorial functions in a trial before the court with people's assessors. The court with people's assessors may on its own motion return a case for

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"procuratorial supervision." Yuri Senatorov, *O predlagaemom Yuri Skuratove, [On the Appointee Yuri Skuratov]*, IZVESTIIA, Oct. 18, 1995, at 1.

78. *See supra* note 53.

79. *I Genprokuratura mozhet vziat' slova obratno [Even the Procurator General Can Go Back On His Word]*, IZVESTIA, Dec. 14, 1995 (electronic version).

80. Georgii Rozhnov, *Aleksei Il'iushenko vernulsia v prokuraturu [Aleksei Il'iushenko Returns to the Procuracy]*, OGONEK, Feb. 1996, at 34-35. The article guardedly raises the possibilty that Il'iushenko's arrest was motivated by Yeltsin's bid for re-election.

81. As of Jan. 11, 1993 in Ivanovo, Moscow, Riazan and Saratov Regions and Stavropol Territory and as of Jan. 1, 1994 in Rostov-on-the-Don and Ul'ianovsk Regions and Altai and Krasnodar Territories.

82. *Supra* note 37. For an account of the genesis of the Jury Law, see Thaman, *supra* note 31, at 64-82.

83. See *supra* notes 33-36.

84. UPK RSFSR (1993), § 429.

supplementary investigation,[85] carry on the proceedings despite a prosecutor's motion to dismiss for insufficient evidence[86] or failure to appear at trial,[87] or even initiate new charges at trial if the evidence warrants it.[88] The court with people's assessors had assumed a quasi-prosecutorial role in being the first to question the defendant, witnesses and experts.[89] All these aspects have been eliminated or restricted by the Jury Law.

Moreover, the judge is bound to grant the prosecutor's motion to dismiss for insufficiency of evidence, if the victim does not object.[90] The prosecutor and defense must also participate in all jury trials from the time of the advisement of the right to jury trial at the conclusion of the preliminary investigation through to judgment,[91] thus eliminating the burden on the judge to act as prosecutor when the prosecutor did not appear.

The procuracy and the bar were not ready for the increased demands that adversary proceedings placed on them.[92] Judges have begun to play a more passive role, turning all questioning and presentation of evidence over to the parties. The presence of a jury has put the burden of proving the case, and arguing it before the jury, on the procurator and defense. The prosecutor, by having the power to dismiss

85. UPK RSFSR (1994), §§ 221(2), 258.

86. See UPK RSFSR (1994), § 259, which leaves question of dismissal to the court alone.

87. UPK RSFSR(1994), § 251.

88. UPK RSFSR (1994), § 255.

89. UPK RSFSR (1994), §§ 280, 283, 289.

90. UPK RSFSR (1993), § 430.

91. UPK RSFSR (1993), § 428.

92. When not otherwise noted, remarks on the performance of prosecutors and defense counsel come from the author's study of the first 114 jury trials held in Russia since the reintroduction of jury trial, *see* Thaman, *supra* note 75, at 84-138. On the unpreparedness of prosecutors in the first trials, *see* V.I. Baskov, *Poderzhanie gosudarstvennogo obvineniia v sude prisiazhnykh [Acting as State Prosecutor in the Jury Court]*, 11 VESTNIK MOSKOVSKOGO UNIVERSITETA 5, 64, 73-74 (1994).

regardless of the views of the judge, has gained increased responsibility for the indictment.[93]

The critical responses of the first juries to the often sloppy and illegal methods of investigators has also forced prosecutors to take a more critical look at the file in cases set for jury trial, which has led to prosecutors themselves moving to exclude illegally seized evidence or amending the indictment to charge lesser offenses.[94]

III. REFORM OF THE BAR

The 1864 judicial reforms created an independent bar of "sworn attorneys" (*prisiazhnye poverennye*) in which only persons of high moral standing with a legal education and five years of experience as a lawyer-trainee or in another legal profession were admitted.[95] The elite bar of "sworn attorneys" functioned mainly in the capitals and large cities such as Moscow, St. Petersburg, Kiev, and Warsaw, and mainly in the Circuit Courts in which jury trials were held. In 1874 the tsarist government passed legislation allowing so-called "private attorneys" (*chastnye poverennye*) to practice in specific courts in order to alleviate shortage in the countryside. Private attorneys did not have to be legally trained and were seen as a counterweight to the politically conscious "sworn bar."[96]

This separation of the legal profession into an elite group of sworn attorneys and a less prestigious caste of private attorneys handling the more mundane aspects of the profession resembled the distinction in the English legal profession between barristers and solicitors.[97] This elitism

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93. As noted above, however, the prosecutor may still sit through a trial, not object as to the rulings of the trial judge, and then claim error in a cassational protest. Thus, a certain amount of lack of responsibility for the prosecutor's conduct of the trial is still built into the system. *See supra* note 27 and accompanying text; *UPK* RSFSR (1994), § 325.

94. V. Voskresenskiy, *Problemy dokazyvaniia obvineniia* [Problems of Proving Guilt], ROSS. IUST., No. 4, at 3, 4 (1995).

95. HUSKEY, *supra* note 8, at 12-13.

96. Over one-half of all sworn attorneys and only 11.2% of private attorneys worked in the capital cities. *Id.* at 20. In 1910-1913 2.5 million criminal cases were heard, but only 5% were heard by the circuit courts with jury. The rest were heard by local tribunals without extensive procedural safeguards. *Id.* at 17.

97. However, in 1910 there was only one attorney for every 17,900 people in Russia, whereas England had one attorney for every 1,684 people. *Id.* at 18.

and bifurcation of the bar remains an issue in Russian politics surrounding the reform of the bar. During the 50 years between the judicial reforms and the 1917 Revolution, the Russian bar was an influential presence in the Empire. Leading lawyers were known throughout the country and their closing arguments were published in newspapers, making the criminal trial one of the few podiums from which the tsarist government could be openly criticized. Though the bar achieved fame in defending revolutionaries, they were mainly liberal thinkers belonging to the Cadet party and opposed to the coup d'etat of the Bolsheviks in 1917.[98]

Decree No. 1 on the Courts[99] abolished the Russian bar in 1917, both due to the political leanings of its members and because the Bolsheviks, while benefiting from the subversive role of the bar in the tsarist autocracy, did not want it to play the same role in the regime they were building.[100] By allowing those without a legal education to practice law and by repressing the "bourgeois" sworn attorneys, the Bolsheviks opened the door for the more politically malleable former private attorneys to enter the profession on an equal footing with the more liberal and independent sworn attorneys.[101] But the three main goals of the Bolsheviks in relation to the bar were to (1) Sovietize bourgeois lawyers; (2) transform self-governing colleges into compliant instruments of party rule; and (3) redefine the role of legal representation so defenders could not undermine the authority of the state.[102]

After a number of purges, attempted collectivizations, and formation of the aforementioned collegia of defenders,[103] the Russian bar (*advokatura*) acquired the basic organizational structure it retains today.

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98. Many were also members of the provisional government of Aleksandr Kerenskii, himself a sworn attorney. *Id.* at 21-31.

99. Sobranie Uzakonenii RSFSR, *supra* note 15.

100. KUCHEROV, *supra* note 5, at 447-449; HUSKEY, *supra* note 8, at 38-42. Lenin once remarked: "One must rule the advocate with an iron hand and keep him in a state of siege, for this intellectual scum often plays dirty." HUSKEY, *supra* note 8, at 38.

101. HUSKEY, *supra* note 8, at 26.

102. *Id.* at 94-95.

103. *See id.* at 149-99; KUCHEROV, *supra* note 5, at 454-59.

The 1939 USSR Statute on the Bar[104] abolished private practice and replaced the collectives with law consultation offices (*iuriskonsul'tatsii*), which were united in each region or territory of the country into collegia of advocates, supervised and directed by the USSR Minister of Justice.[105] Persons without legal education were still eligible and the party stacked the new collegia with poorly educated but politically reliable "movers-up" (*vydvizhentsii*). By the end of the 1950s, 70% of the bar were party members.[106] The 1962 RSFSR Statute on the Bar[107] finally introduced a requirement of a higher legal education. The 1979 Law of the USSR on Bar maintained the organization of the bar in collegia but made the collegia again dependent on the revived Ministry of Justice, which was responsible for promulgating instructions, procedural recommendations, and payment procedures, and could veto policy decisions of the ruling organs of the bar.[108] The legal consultation offices belonging to the collegia were self-financed. Advocates retained approximately 80% of the fees paid by the clients, the remaining 20% going to office overhead and collegium dues.[109]

When the process of reforming the Bar began during *perestroika*, there were approximately 27,000 advocates, fewer per capita than in pre-Revolutionary Russia.[110] It was at this time that the issues in the institution's reform were articulated.

The Bar aimed at freeing itself from domination by the Ministry of Justice and from restrictive fee schedules that had resulted in the bulk of its income coming from illegal, under-the-table payments from clients, a

104. Polozhenie ob advokature SSSR [Decree on the Bar of the USSR], SP SSSR, Issue No. 49, Item No. 394 (1939).

105. KUCHEROV, *supra* note 5, at 460-65.

106. HUSKEY, *supra* note 8, at 218.

107. Polozhenie ob advokature RSFSR [Decree on the Bar of RSFSR], Vedomosti RSFSR, Issue No. 29, Item No. 450 (1962).

108. Zakon SSSR, Ob advokature SSSR [USSR Law on the Bar], Vedomosti SSSR, Issue No. 49, Item No. 846 (1979), art. 16.

109. ROBERT RAND, COMRADE LAWYER 12 (1991).

110. Huskey, *supra* note 2, at 106.

payment system that left them open to criminal prosecution.[111] The Ministry of Justice, in the meantime, was intent on maintaining its supervision of the bar while destroying the bar's monopoly, which had kept the number of advocates artificially low and made it particularly difficult to find advocates to defend the indigent in criminal cases. This shortage became especially crucial when the right to counsel from the time of arrest (thus for the duration of the preliminary investigation), was enacted in the "Fundamentals of Legislation of the USSR and Union Republics on Court Organization" in 1989.[112] The Bar opposed the passage and implementation of this important right of the accused, claiming that they did not have enough personnel to fill the courts' needs and were not compensated for this representation.[113]

To break the monopoly of the bar, the Ministry of Justice permitted the formation of legal cooperatives, in which persons with a legal education could provide legal services without being accepted into the collegium of advocates. The prohibition on negotiating fee contracts with clients was also lifted.[114] The pre-Revolutionary bifurcation of the bar was thus revived. To defend its interests the collegia of advocates united to form the Union of Advocates of the USSR in 1989. To counter this move the Ministry of Justice organized in 1989 the Union of Jurists of the USSR, which included other jurists and a part of the Bar as well.[115]

Within the context of these conflicts the "Concept of Judicial Reform" advocated both the independence of the bar from the Ministry of Justice and the opening of its ranks to facilitate early participation in criminal proceedings. To this end the document suggested opening the courts to non-advocates, as long as they had a high moral character and legal education and apprenticeship. It also emphasized the necessity of a

111. So-called MIKST ("maximum utilization of the client in excess of the statutory fees"). KAMINSKAYA, *supra* note 28, at 29-30; RAND, *supra* note 109, at 12; KUCHEROV, *supra* note 5, at 501-03.

112. Osnovy zakonodatel'stva Soiuza SSR i soiuznykh respublik o sudoustroystve [Fundamentals of Legislation of the USSR and Union Republics on Court Organization], Nov. 13, 1989, Vedomosti SSSR, Issue No. 23, Item No. 441 (1989), § 14.

113. RAND, *supra* note 109, at 34-35.

114. RAND, *supra* note 109, at 9, 141-42 n.3.

115. Huskey, *supra* note 2, at 98-104.

free vote to elect bar officials, and autonomous determination of questions relating to the number, admission, dismissal, expulsion, and disciplinary responsibility of lawyers.[116]

After the collapse of the USSR, Russian lawyers from the Union of Advocates formed the Russian Union of Advocates and those in the Union of Jurists formed the Russian Association of Advocates. These two organizations finally combined in late 1994 to form the Federal Union of Advocates of Russia.

The struggle over the future form of the bar began in 1992 when two competing laws on the bar were submitted to the Supreme Soviet of the Russian Federation. One, the Ministry of Justice draft, contemplated maintaining ministry supervision over licensing of advocates and sought to open up the ranks of the bar by allowing non-members of the collegia with a legal education to practice law. A competing draft, prepared by Moscow lawyer Mikhail Gofsteyn and a well-known Professor from the Procuracy Institute, A.D. Boikov, and originally commissioned by Minister of Justice Nikolai Fedorov, was supported by both the Russian Union and Association of Advocates. The draft rejected Ministry of Justice licensing and supported a self-governing collegia, but would have allowed private law offices to exist parallel to the law consultation offices.[117] These two drafts were combined in the Legislative Committee of the Supreme Soviet of the Russian Federation and the amalgam proposed to re-create the bifurcated bar of pre-Revolutionary times. One branch (*advokatura*) was to be subject to the self-governing collegia of advocates, while the branch of attorneys (*poverennye*, the term applied to pre-Revolutionary advocates), was to be subject to the Ministry of Justice for licensing and supervision.[118] This partition of the bar was furthered by a 1992 decision of the Ministry of Justice to create parallel collegia of advocates alongside the long-standing ones. By the beginning of 1994, 25 such alternative collegia existed in Russia, seven in Moscow alone. This situation provided the Ministry of Justice with a

116. Concept of Judicial Reform, *supra* note 4, at 67-69.

117. A.D. Boikov, *Advokatura—kakoi ei byt'? [The Bar—what will it be in the future?]*, 24 ADVOKAT No. 6 (1994).

118. The author participated in the meetings of the Legislative Committee of the Supreme Soviet when these drafts were discussed in their united form in September of 1992.

pretext for issuing a new order to regulate the qualification and licensing of these lawyers.[119]

The combined draft law died in the Legislative Committee of the Supreme Soviet. Minister of Justice Nikolai Fedorov, who took a hard-line position against the bar,[120] resigned and was replaced by Yuri Kalmykov, who took a more conciliatory line. The serious differences were reconciled and a majority of advocates attending a Congress of the Federal Union of Advocates in November 1994 supported a new draft law prepared by the Ministry of Justice.[121] As of Spring 1995, the final compromise draft of the Ministry of Justice and the bar would maintain the monopoly of the collegia, allow advocates to decide whether to work in law consultation offices or form their own private offices or associations, and limit the Ministry of Justice to improving the qualifications of advocates and ensuring their legal protection.[122]

In the meantime, yet another draft law on the bar, renaming the collegia "guilds of advocates," was prepared by lawyer and State Duma member A.M. Traspov. Traspov's version would allow anyone with a legal education who passed a qualifying examination to practice law and become a member of the guild automatically. Entrance to the bar would be independent of guild control and no state or bar organization would control the formation of law offices.[123]

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119. G. Ptitsyn, *Advokatov zagoniaiut v kolkhoz?* [Are advocates being chased into collective farms?], ROSS. IUST., No. 7, at 47-8 (1994).

120. He also suggested abolishing the procuracy and integrating its prosecutorial functions into the Ministry of Justice.

121. I. Sukharev, *Byt' li v Rossii professional'noi advokature?* [Will there be a professional bar in Russia?], ROSS. IUST., No. 3, at 41(1995).

122. Ob Advokature v Rossiiskoi Federatsii. Proekt. [Draft Law on the Bar of the Russian Federation]. Jan. 13, 1995 (on file in the offices of this journal). This draft resulted from a compromise between the last Ministry of Justice Draft and a 1993 draft by Professor Yuri Stetsovskii of the State Legal Department of the President. It was approved by the newly-created Presidential Council for Judicial Reform (Sovet po sudebnoi reforme pri Prezidente RF). *Odobrim proekt federal'nogo zakona 'Ob advokature Rossiyskoi Federatsii'* [We approve the draft of the federal law 'On the Bar of the Russian Federation'], ROSS. IUST., Feb. 1995, at 2-3 [hereinafter *Approval of the Bar RF*].

123. Federal'nyi Zakon Rossiiskoi Federatsii, Ob advokatakh i advokatskikh ob''edineniiakh. Proekt. [Draft Federal Law of the RF on Advocates and Advocates' Organizations] (unpublished). Introduced by Deputy of the State Duma A.M. Traspov.

With respect to the organization of the collegia and guilds, the drafts are remarkably similar. There can only be one collegium in each political subdivision of the Russian Federation. Each is to be composed of a general assembly wherein officers of the governing body (called "presidium" in the Ministry of Justice draft and "administration," or *upravlenie*, in the Duma draft) are elected by secret ballot and the charter for the organization is adopted. Qualifications Collegia or Commissions would be attached in both drafts to the collegia to prepare the examination for entrance and to decide related questions.

The differences between the two drafts are minor and the Head of Section for Collaboration with the Bar of the Ministry of Justice[124] and the newly formed President's Council for Judicial Reform have invited Deputy Traspov to join them in reconciling the two documents.[125]

Although the bar styles itself as an organization dedicated to defending people's legal rights, it has in fact been a minor actor in the reform of the criminal justice system. It has fought the expansion of the rights of criminal defendants when such expansion has not included pecuniary guarantees for the bar. The bar's opposition during *perestroika* to expansion of the right to counsel as of arrest was described above. Similarly, during the drafting of the Jury Law, the bar's only official input concerned the provision covering payment of defense counsel for court-appointed defense.[126]

The accused must be represented by counsel from the time the investigator advises him, at the conclusion of the preliminary investigation, of his right to trial by jury.[127] If the accused cannot retain counsel, counsel is appointed by the government and paid one-quarter of

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124. Sukharev, *supra* note 121, at 41.

125. *See Approval of the Bar RF*, *supra* note 122, at 2. This was the first decision of the council on December 16, 1994.

126. The author attended meetings of all interested agencies during the discussions of the draft Jury Law in November 1992 at the State Legal Department of the President. Aleksei Galoganov, President of the Russian Union of Advocates, addressed only this issue.

127. UPK RSFSR (1993), § 426. Actually the accused should be represented by counsel during the entire preliminary investigation in death penalty cases, all of which are subject to jury trial jurisdiction. UPK RSFSR (1994), § 49. However, investigators have found ways to circumvent this procedural requirement.

the minimum monthly wage per day in court.[128] The overwhelming majority of the capital cases before Russian juries have been defended by appointed counsel, who are often assigned to their clients only a few days before the beginning of the trial.[129] The Russian bar is extremely critical of the low pay afforded appointed counsel,[130] which results in the majority of cases being defended by relatively inexperienced lawyers.[131]

In only 379 (20%) of the 1860 cases filed in the nine regional and territorial courts in 1994 did the defendant opt for trial by jury.[132] The reason for this startling lack of requests has been attributed to manipulation by criminal investigators, but a more likely explanation is the advocates' own reluctance to support the new procedure, despite the clear benefits to the defense.[133] In 83 (21.8%) of the 379 cases with jury requests that had been filed as of 1 January 1995, defendants withdrew their requests at the preliminary hearing.[134] In one Krasnodar case, the court had complained that it would cost the court too much time and money to try a capital case charging three murders which involved witnesses from outlying areas, and impressed upon out-of-town defense counsel how much his Krasnodar hotel room would cost in the event of a jury trial. The court and defense lawyer convinced the

128. UPK RSFSR (1993), § 427.

129. Thaman, *supra* note 31, at 87.

130. According to I.I. Markov, President of the Riazan Regional Collegium of Advocates, a court-appointed advocate nets the equivalent of about $1.57 per day in jury cases. Interview, Dec. 8, 1994, in Riazan. *See* Thaman, *supra* note 31, at 87 n. 168.

131. This situation was lamented by A.P. Galoganov, President of the newly-formed Federal Union of Advocates, on April 10, 1994, at a Jury Trial Conference in Sochi, which the author attended. Yet it is the leading cadres in the collegia and legal consultation offices that appoint the particular lawyer to represent in these cases, and they are not appointing the more experienced lawyers, who prefer to represent wealthy clients in civil cases.

132. Jury Trial Statistics as of January 1, 1995. Compiled by the Supreme Court of the Russian Federation (unpublished), summarized in Valerii Rudnev, *Prisiazhnye zasedateli—eto ne "dobren'kie diadi" [Jurors—They aren't "Kind Uncles"]*, IZVESTIIA, Mar. 16, 1995, at 5.

133. The author has met with advocates from all nine regions or territories and discerned a clear lack of interest on the part of the majority regarding trial by jury. The main complaint has been the miserable fee for court-appointments, but conservative resistance to the adversarial features of trial by jury, requiring much more active participation by defense lawyers, most certainly plays a part. *See* Thaman, *supra* note 31, at 88 and fn. 170.

134. *See* Rudnev, *supra* note 132.

defendant to withdraw his motion for a jury, and the defendant was sentenced to death by a court with lay assessors.[135]

The Jury Law has finally given defense lawyers a truly meaningful profession. For the first time since the revolution they can exercise genuine influence on the trier of fact and achieve that which was virtually impossible to achieve in the Soviet criminal justice system: an acquittal, mercy or lenience.[136] The lukewarm support given the reform by the regional collegia of advocates has thus been startling and disappointing. Nevertheless, many of the lawyers who have tried the first cases, and a small group of experienced advocates versed in the pre-Revolutionary tradition, are vocal proponents of the new procedure.[137]

Because of the small number of advocates in relation to the population,[138] the extreme rise in crime, and the progressive impoverishment of a sector of the population caused by the radical changes in the economy,[139] it has become increasingly difficult to find advocates to represent defendants during the preliminary investigation and at trial. This has led the Ministry of Justice[140] and the All-Russian

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135. Conversation with Judge S.N. Tkachev, on September 13, 1994, in Krasnodar about the Tkachenko Case, which was heard in the court of Judge V.P. Lazovskii. Judge B.A. Nikolaev, Head of the Section on Jury Trial of the Rostov Regional Court, confirmed that both defense counsel and judges in his court have talked defendants out of exercising their right to trial by jury. Sept. 15, 1994, at the Russian Law Academy Jury Trial Conference, Moscow. Thaman, *supra* note 31, at 89-90 and fn. 184.

136. Approximately 20% of jury trials end in acquittal, compared to only about 1% of cases before courts with lay assessors. *See* Rudnev, *supra* note 132. The number of acquittals before the regular courts is rising, however. Valerii Rudnev, *Novye rekordy rossiiskogo pravosudiia [New Records of Russian Administration of Justice]*, IZVESTIIA, Apr. 14, 1995, at 4 (Russian courts returned 3,557 acquittals in 1994 as opposed to only 2,699 in 1993. In 1994, however, 976,000 criminal cases made it to court).

137. *See* Genri Reznik, *Ya—za sud prisiazhnykh [I am for the Jury System]*, 23 ADVOKAT No. 5, at 7 (1993); Thaman, *supra* note 31, at 140.

138. A Vice-Minister of Justice estimated that there were 17,200 advocates organized in 106 collegia for a population of 160 million in 1994, and compared it with Germany (60,000 for a population of 91 million) and the U.S. (400,000 for a population of 252 million). A. Stepanov, *Kakim byt' Zakonu ob advokature Rossii? [What will the Law on the Bar of Russia be like?]*, ROSS. IUST., No. 3, at 11 (1994). As of January 1, 1995, the Ministry of Justice reported the existence of 120 collegia of advocates with a membership of 21,382 lawyers. *Advokaty prinimaiut poruchenіia [Advocates accept mandates]*, ROSS. IUST., No. 6, at 54 (1995).

139. A.D. Boikov, *Sudebnaia reforma: obreteniia i proschetu [Judicial Reform: Gains and Losses]*, 6 GOS. I PRAVO 13, 22 (1994).

140. *See* Sukharev, *supra* note 121, at 22.

Congress of Judges to call for the creation of "public defender offices" along the lines of those in the United States.[141] The bar has vigorously opposed the suggestion, fearing it will lead to a rival bar controlled by the Ministry of Justice and lower the quality of representation.[142]

IV. CONCLUSION

The intense lobbying of the procuracy and bar has ensured that few changes were included in the legislative proposals submitted to the State Duma. Procuratorial oversight will endure, thus rendering it difficult for the procuracy to free personnel for the demands generated by the turn to adversarial procedure and trial by jury. The procuracy still purports to carry out functions that in a democratic state typically belong to the Constitutional Court, the Ombudsman for Human Rights, or the bar. Though the procuracy, when challenged, emphasizes its defense of the citizens' civil rights, this function has always been window-dressing for its traditional role as executive control apparatus ensuring the subordination of government agencies to the executive.

The bar will be opened up to more flexible forms of organization, but the collegia will maintain their hegemony over law practice, thus perpetuating the elitism that has made it unwilling to guarantee adequate defense of the criminally accused in court-appointed cases. In fairness to the bar, however, legislation should correct the miserly pay for court-appointed advocates, if qualified defense is to be accorded in the absence of a public defender's office.[143]

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141. *Resoliutsiia soveshchaniia predsedatelei Sovetov sudei subektov Rossiyskoi Federatsii* [Resolution of the Meeting of the Presidents of the Councils of Judges of the Subjects of the Russian Federation], ROSS. IUST., No. 4, at 1 (1995).

142. Author's interviews with Aleksei Galaganov, President of Russian Union of Advocates, Georgii Voskresenskii, President of the International Union (Commonwealth) of Advocates, Genri Reznik, Director, Scientific Research Institute for Judicial Defense of the International Union of (Commonwealth) of Advocates, all in Spring, 1993 in Moscow. (On file with the author).

143. It is interesting to note that the pay for court appointed jury cases was halved at the urging of Vice-Chairman of the Legislative Committee of the Supreme Soviet, Boris Zolotukhin, the spiritual father of the "Concept of Judicial Reform." Though a lawyer, Zolotukhin's "impartiality" in questions relating to procuracy and Bar can perhaps be explained by the fact that he was expelled from the procuracy for refusing to agree with the criminal charging policy of his superior, and later twice expelled from the Bar, the first time for requesting the acquittal of the dissident Aleksandr Ginzburg in the 1960s.

In the short run, however, it can be expected that defense lawyers and prosecutors will continue to conspire to avoid the more time-consuming and professionally demanding jury trials by finding reasons to return cases for further investigation, or by convincing the defendants to forgo or withdraw their requests for jury trial.[144]

Author's interview with Boris Zolotukhin (4.9.93) in Moscow (on file with the author); KAMINSKAYA, *supra* note 28, at 319.

144. American-style plea-bargaining, which achieves similar results, is not yet countenanced in Russia.