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BLOOD, ALCOHOL AND TEARS

Juries Again Ponder the Depths of the Russian Soul

Stephen C. Thaman

I. PROLOGUE

The Golden Age of Russian jurisprudence were the years 1864-1917, when, as a result of the legal reforms of Tsar Alexander II, Russia for the first time enjoyed an independent judiciary, a vigorous self-governed Bar and the right to trial by jury in most felony cases. The courts were a liberal "judicial republic" at the heart of the autocratic regime, a forum, where ideas could be advocated free of the omnipresent government censor. The closing arguments of famed lawyers like Plevako, Spasovich, and Aleksandrov were recorded and published in the newspapers. Classic 19th Century Russian literature showcased the jury trial in works such as Dostoyevsky's *Brothers Karamazov*, Tolstoy's *Resurrection* and in Chekhov's short stories. The acquittal of would-be assassin Vera Zasulich in 1878 shook the empire.

The revolutionary upsurge in the late 19th and early 20th Century led to a weakening of the Russian jury. Political cases were removed from its jurisdiction. The Tsarist "reactionaries" wanted to deprive the revolutionaries of the judicial pulpit they had so effectively used. Only with the October 1917 coup d'etat by the Bolsheviks was the death knell for the jury, the independent judiciary and the independent Bar sounded. After 75 years of the dictatorship of the Communist Party, efforts have been made to reform the Soviet judicial system, which, much like the Tsarist

system of the early 19th Century, was characterized by corruption, subservience of the courts to the will of the country's leaders ("telephone law"), and Draconian sentencing policies.



Though Gorbachev had suggested reinstating trial by jury in 1988, it was not until the collapse of the Soviet Union and the rise of Yeltsin that this dream became reality. A draft law pushed by the State Legal Department of the President was passed by the Supreme Soviet of the Russian Federation in July 1993, three months before Yeltsin blasted it out of existence. The law reintroduced trial by jury preliminarily in nine of Russia's some 84 political subdivisions: the regions of Moscow,

Ivanovo, Saratov, Riazan, Ul'ianovsk and Rostov-on-the-Don, and the territories of Stavropol, Krasnodar and Altay. I was fortunate to have been living in Moscow from 1992-1995 and participated in the discussions of the initial drafts of the legislation. I observed many of the first trials from December 1993 until October 1994 and did an in-depth study of the first 114 trials, based on my observations, interviews with judges and lawyers, and review of the files.

87 of the 109 cases I studied that went to verdict were capital murder cases, nearly all of them committed by severely inebriated defendants usually against victims in a similar condition. The modern Russian jury, like its pre-1917 precursor, consists of 12 citizens and 2 alternates. Under the new law they are chosen from voter registration rolls. Voir dire is conducted by the judge, and the parties may submit written questions to be asked at the discretion of the judge. The prosecution and defense each have two peremptory challenges, the procedure is rapid, and a jury is usually sworn within an hour or so. Verdicts are by a simple majority of 7 for guilt, 6 being sufficient for acquittal. Russian juries are not "death-qualified" as in the United States to remove persons opposed to capital punishment.

The first jury trials have seldom been defended by well-known big city lawyers, as they were before the revolution. They are too busy chasing

rubles and dollars in the boomtown atmosphere of market-mafia-Moscow (the Moscow Regional Court, serving the province surrounding Moscow, but not the city itself, is located in the capital), to take a court-appointment for a pittance to represent a drunken axe-murderer. The Russian police, considered by many to be in cahoots with mafia groups, have solved few if any of the numerous contract killings that have especially plagued businessmen, bankers, rival mafiosi, but also parliamentarians and journalists. Thus, the ambitious reform of Russian criminal procedure is taking place against a backdrop of the alcohol-drenched misery, the Russians would say *degradatsiia* (degradation) of the Russian provinces, where the jury courts are located. The drunken double-murder in the first Moscow Region case was defended by a young woman in her first felony trial. Defense counsel for one of the co-defendants in the triple-murder which constituted Krasnodar Territory's first trial was in his first case of any kind!

Many of the first trial judges are enthusiastic supporters of the jury system and, contrary to their practice in the conventional trials, in which the bench is also occupied by two docile lay "people's assessors," (derisively called "noddors" by the Russians), they are turning over the presentation of the evidence, and examination of the witnesses to the prosecutor and defense lawyer in true adversary fashion (the Jury Law also introduced adversary procedure, but did little to specify what that actually meant in practice). This has caught defense lawyers by surprise, but even more so the prosecutors, who were used to just submitting the indictment and leaving the court-

room, compelling the judge to marshal the evidence and reach the (not infrequently pre-ordained) verdict on her own.

I would now like to explain a few of the peculiarities of the Russian jury trial by referring to some remarkable cases steeped in the blood, alcohol and tears which permeate Russian provincial life.

II. COP A PLEA AND GO TO TRIAL

At the beginning of the trial, the defendant is asked in front of the jury how he or she pleads: guilty or not guilty, and is then asked if he or she wants to make a statement. Unlike in the United States, however, a plea of guilty does not result in judgment without trial. If the defendant admits the charge, that is considered merely a piece of evidence for the jury to consider. If there is no contradictory evidence, the case may be immediately submitted to the jury following argument of the parties.

On February 9, 1994, in the textile town of Ivanovo northeast of Moscow, 21 year-old Sergey Kulakov stood up at the beginning of his trial and admitted to having punched a man in the face, and then later in the evening, to having broken into the house of neighbors in the village of Khotomil', to having bludgeoned an elderly man to death with a wood-splitter, stolen some precious lacquer boxes, and attempted to rape the man's 17 year-old granddaughter. When asked if he wanted to make a statement he said he would, but he was so drunk on the night he did not remember anything. He apologized for all that he had done and sat down.

The evidence showed that the murdered man's daughter was awakened by a sound in the middle of the night and saw the drunken Kulakov standing with the wood-splitter in his hands, looking like a crazed animal. She screamed, waked her daughter, and ran to the neighbors to get help. When she returned, Kulakov was on top of her daughter with his pants down, strangling her. Perhaps out of modesty, mother and daughter did not testify they thought Kulakov was trying to rape her, only to kill her! After the neighbor and mother chased Kulakov out of the house, they found the grandfather dead in his bed with a shattered skull. His blood was found on the wood-splitter. The daughter knew the defendant, as his sister was one of her friends. The prosecution presented a videotape of Kulakov reluctantly reenacting the crime.

Kulakov's mother and the head of the collective farm in the village testified how Sergey had been designated the best young farmer in the collective and had won a trip to Norway. He had never gotten into trouble, until he was drafted into the Army and was sent to Moscow during the August 1991 coup attempt, and to Vladikavkaz, a so-called "hot spot" in the Caucasus. When he returned he began drinking heavily, and acting strangely.

Kulakov's veteran Ivanovo lawyer, Vladimir Arkharov, questioned in a wheezing whisper the deceased's daughter, who was the designated "victim's representative" in the trial, about some mysterious fires that had been occurring in the village, about an unexplained empty vodka bottle in the house, and a missing wallet.

In his closing argument, barely audible to the audience, Arkharov, in what was to be his first and last jury trial (he died some months later of a heart attack in his mid-50's), stressed what a good boy his client was, what a tragedy happened in the "pretty little village," and asked: who started the fires, who left the bottle in the house, where's the wallet? In her closing statement as "victim's representative," the deceased daughter exclaimed: "Even if there was someone else involved, he had no right to be in my house!" Arkharov: "Alas, you see it all wasn't so clear . . ."

The jury gave Kulakov a "plea bargain" by acquitting him of the murder and the theft, and finding him guilty of the earlier assault and simple assault on the girl, without intent to commit rape.

“ Unlike in the United States, however, a plea of guilty does not result in judgment without trial. If the defendant admits the charge, that is considered merely a piece of evidence for the jury to consider. ”

Whether Arkharov knew it or not, he had tapped into a secret of the Russian soul, which was known by Russian lawyers before the revolution: if you want the jury's sympathy, if you want an acquittal, *admit the crime!*

Though Sergey Kulakov was acquitted because of lingering

doubts as to *whether he committed the murder*, the form of the questions asked Russian juries allows them to nullify the law in a particular case, even though they have found the elements of the crime to have been proved. Both before the revolution and now, juries are asked three basic questions: (1) the *corpus delicti* question: was a particular criminal act committed against a particular person?; (2) the perpetration question: was defendant the one who committed the crime? and (3) the guilt question: is defendant guilty of committing the crime?

The jury acquitted Vera Zasulich of the attempted murder of a Tsarist official in 1878, though she had admitted the act. The one-minute closing argument of F.N. Plevako, which led to the acquittal of an old provincial priest, who had admitted to embezzling 10,000 rubles in church money, is a classic of pre-1917 jury trial lore:

During 30 years, one year after the other, you gentlemen of the jury came to priest Kudriavtsev for confession and also as many times he absolved your sins. Now, once in 30 years, the repentant sinner comes to you for pardon with words of sorrow, repentance and entreaty. Won't you also absolve his sin?

In another 19th Century case, a woman was accused of attempting to poison her alcoholic, abusive husband after years of torment. Her lawyer told her to admit the crime and throw herself on the mercy of the jury and they would let her free. She insisted on denying the crime

and fighting the charges. She was convicted and sentenced to hard labor in Siberia. When the lawyer asked her why she had insisted on such a flawed strategy, she replied, that an acquittal would have meant returning to her husband. She preferred hard labor in Siberia."

A 1995 Ivanovo case showed the continuing applicability of Russian "nullification-plea-bargaining." Olga Kraskina was sick of her drunken, abusive husband, who used all of their money on vodka and beat her when she wouldn't give it to him. She decided to kill him. She fashioned a homemade knife, and when he came home drunk one night and cursed at her, she knocked him down and slit his throat. She called the police, turned herself in, and confessed. At trial in the Ivanovo Regional Court she admitted her guilt and expected a sentence of 15 years. The jury answered the *corpus delicti* and perpetration questions in the affirmative, but found her not guilty of the crime.

Yelena Zaytseva was not so fortunate, however. Cherkasskii, the alcoholic, abusive boyfriend of her mother, passed out at her sister's birthday party and the petite Zaytseva, who was also drunk and had been beaten up by him as well, took an axe, tapped him on the side and asked him: "How long are you going to torture us?" Before he could mutter a response, she hit him three times in the neck with the axe, killing him. She then dragged him into the courtyard of the farm and dismem-

bered his body with the axe. She put the body parts into a bag and rode on her bicycle with her boyfriend to a nearby lake and dumped his body in the lake. An Altay jury found her guilty of aggravated murder, indicating the limits of even a Russian jury's strain of mercy.

III. LOOK MA! NO HANDS

In Russia it is not only not polite to point at other people, but to ever extend one's finger to point at anything. In the first Riazan trial all fingers pointed to the guilt of Nikolay Artiukhov, a 51-year-old collective farm employee, in the death of 83 year-old A.S. Sergevin. Artiukhov allegedly got drunk with two young men, Nazartsev and Melekhov, in the village of Siberka. When the vodka ran out, they went next door to buy vodka from Sergevin, who brought it in from Riazan and sold it at a mark-up. The young men told police that, when Sergevin refused to sell them vodka, Artiukhov hit him with a log and strangled him to death. They threw his body in a pond and took four bottles of vodka, which they went home and drank.

During the police investigation, Artiukhov denied, claiming the young men did the killing, and raised a defense of impossibility: he had no fingers! Indeed, he had lost all of his fingers to frostbite many years before when he had passed out drunk in the snow in Siberka. An ironclad defense! Not in Russia—Artiukhov had a prior conviction for murder of another octogenarian ten years earlier in Moscow Region. The man had refused to give him money for vodka

and he had strangled him . . . with the same digitless stumps!

In Russian jury trials, prior convictions are *per se* inadmissible character evidence, and the judge was in a quandary as to what to do, if Artiukhov repeated his impossibility defense at trial. The trial unfolded with the testimony of Nazartsev, a sullen young man stinking of manure, and Melekhov, quiet, with the shaved head of a prisoner, as he had in the interim been arrested himself for triple-murder when he, in a drunken stupor, burned down his own house, killing his two children and his mother-in-law. Both refused to implicate Artiukhov as they had during the preliminary examination: the police had beaten them into testifying against him. As they were testifying, Artiukhov gestured at them with his stumps, claiming they had done the killing. Nazartsev's mother, who was sitting next to me in the audience, and also reeked of cow manure, stood up, pointed at Artiukhov and screamed out: "Monk (Artiukhov's nickname) did it, and he's killed before!" Despite the new law's exclusionary rule, the defendant's prior convictions invariably come before the jury—usually when the victim's representative, a policeman, or a witness blurts them out, often also out of the mouth of the "repentant" defendant.

Artiukhov was acquitted with a 9-3 vote. The majority of the jury believed that the younger men could have done the killing. But they also believed the police had

beaten them into giving statements incriminatory of Artiukhov. Though drunkenness is a statutory aggravating factor in sentencing, and the capital crime of "murder with hooliganistic motivation" (i.e., with no good reason) was enacted to deal largely with the homicidal acts of the inebriated, Russian juries both before the revolution and now, tend to treat drunkenness as mitigating in the sense of reducing the level of the crime, or warranting lenience in sentencing. Indeed, Russian juries may recommend "lenience" or "special lenience" to reduce the sentencing options of the trial judge. "Lenience" negates the death penalty and limits the maximum sentence to the mid-range of prison sentences. "Special lenience" mandates a sentence to lower than the minimum penalty.

“When the lawyer asked her why she had insisted on such a flawed strategy, she replied, that an acquittal would have meant returning to her husband. She preferred hard labor in Siberia.”

Russian juries have found "lenience" or "special lenience" in many of the first trials and, as a result of this and a general judicial reluctance to impose capital punishment, only 3 of the first 95 capital cases ended in death sentences, and the Supreme Court reversed all three on appeal.

IV. VICTIM'S BILL OF RIGHTS

During the discussion of the draft jury trial legislation, I spoke out against giving the victim or, in homicide cases, the "victim's representative," full adversary capacity in the trial. As a former public defender, I felt it would stack the deck against the defense, giving the prosecution two voices, two arguments, two moral positions. Then I sat down and watched the first trial in Moscow Region (the second in all of Russia), that of Konstantin Slonchakov for the murders of Kulagin and Novikov, in December 1993.

The evidence showed that Kulagin's wife ran to her neighbor Slonchakov for help against her husband, who was drunk and beating her to get money for vodka. Slonchakov, who was also drunk, put on his slippers in the subzero weather of December 1989 and accompanied her to her home in the town of Pavlovsky Posad. Kulagin was drunk and threatening to rape his own daughter who was also there with her husband. Slonchakov and the husband attacked Kulagin, held him down, and Slonchakov allegedly strangled him to death with a cord. They put his body on a sled, dragged it to the Kliazma River, cut a hole in the ice, put rocks in the corpse's pockets and submerged the body.

No one reported the death. Then in April of 1993, Slonchakov was again drunk, but this time with his girlfriend at the house of her

father, Novikov. Novikov was drunk and threatening his daughter for vodka money and Slonchakov knocked him down and strangled him to death. His body was thrown in the Vokhna River. Slonchakov was arrested for Novikov's murder and the killing of Kulagin then came to light.

“Despite the new law’s exclusionary rule, the defendant’s prior convictions invariably come before the jury—usually when the victim’s representative, a policeman, or a witness blurts them out, often also out of the mouth of the “repentant” defendant.”

At the trial, young Svetlana Yermakova defended Slonchakov in her first felony trial. The veteran prosecutor Mark Gaisinovich sat closest to the jury, the widows of Kulagin and Novikov behind him as "victim's representatives." Yermakova, intimidated, had scarcely posed a question or made an objection in the trial, until Kulagin's widow testified. She asked about her life with Kulagin and she told of the drunkenness, the beatings. When asked how her life was since the murder of her husband, she responded: "Much better, thank you."

During the aggressive cross-examination by Gaisinovich of Slonchakov about Novikov's killing, the prosecutor honed in: "Novikov was completely drunk and helpless,

and when he was lying on his back, you strangled him to death. He was not a good man, *but he was a human being!*" Novikov's widow leaped up, and screamed at the prosecutor: "You said my husband was a human being! He was not a human being, he was an animal! They should have hanged him four times and shot him five times!" And she bowed to the defendant, thanking him for killing her husband.

Slonchakov was acquitted of Kulagin's killing and convicted of the killing of Novikov without aggravating circumstances. He was granted "lenience" by the jury and sentenced to six years on the murder and an unrelated burglary.

V. DOUBLE JEOPARDY

Unlike in Common Law jurisdictions, Russian verdicts of acquittal may be appealed if a substantial error of law was made during the trial. In the first year of jury trials there has been an acquittal rate of approximately 20%, around twenty times higher than the acquittal rate before the courts with people's assessors. But the Supreme Court Panel, which hears appeals from jury trials, reversed eight of the nine acquittals that were appealed in this time. I am convinced that the world's record for pyrrhic victories before juries is held by Vladimir Laputina, a veteran lawyer from Barnaul, the capital of Altay Territory near the Mongolian border in Siberia.

Laputina represented Yury Denisov, who was charged with attempting to murder four men who

had come to his apartment to confront him after a previous argument. The defendant fired at them from his apartment window with a shotgun, wounding all four. On April 26, 1994, a Barnaul jury acquitted him of the charges. Unbeknownst to the parties, however, the two alternate jurors had accidentally sat in on the deliberations and had also voted for acquittal! Exactly a month later, Laputina defended Sergey Bulochnikov against charges that, while drunk, he killed V.A. Seniushkin and N.K. Marushkin on May 14, 1993, with an axe in two different incidents. During the police investigation, Bulochnikov confessed to the killings, but later made a credible claim that he had been beaten into confessing. The judge ruled at trial that the confessions were inadmissible because of the coercion used by the police, and because Bulochnikov was not advised of his right to remain silent as required by Article 51 of the Russian Constitution. Bulochnikov was acquitted as well.

Both acquittals were appealed. The Supreme Court reversed the Denisov acquittal because of the participation of the two alternates in deliberations. The Bulochnikov acquittal was reversed, because the Supreme Court ruled that the exclusion of the confessions was a violation of the law. The Court was not willing to read a *Miranda*-type requirement into the Russian Constitution. I interviewed Vladimir Laputina in Barnaul as both of these reversals became known in early September, 1994. He mused on the meaning of his

short-lived victories. First, he told me, he would get another acquittal in the Denisov case. "I convinced 14 jurors last time, 12 will be no problem." Secondly, regarding the Bulochnikov case, he said: "I'm for letting all evidence before the jury, the good and the bad, prior convictions, police brutality, etc., and let the cards fall where they fall." Indeed, Krasnodar lawyer Mikhail Gin achieved an acquittal in a murder case by refusing to suppress statements, afraid that the ruling would give the Supreme Court a reason to reverse if an acquittal was achieved.

The Denisov case was retried and Laputina achieved a second acquittal. But on January 18, 1995, the Supreme Court reversed that conviction because of a perceived error in the formulation of the questions for the jury. What happened in the Bulochnikov retrial has not reached me yet from behind the Urals.

VI. EPILOGUE

The jury trials in Russia are a fascinating example of reintroduction of adversary principles into a continental European, neo-inquisitorial criminal procedure. The experiment has not, however, expanded beyond the original nine regions. Some judges do not want to lose their dominating role in the trial, and prosecutors and many lawyers do not like the fact that they now have to work, and in the case of the lawyers, for pitiful recompense. There have been attempts to expand to the cities of Moscow and St. Petersburg, the Republic of Karelia and the

Chelyabinsk Region, but the two State Dumas that have come on the heels of the Supreme Soviet chased out by Yeltsin, are even more conservative and wary of any kind of reforms.

While it is difficult to predict the future developments in Russia in the political, economic and judicial realms, the life of the common people continues as it has for a thousand years: poverty and powerlessness wash in a sea of blood, alcohol and tears. ❧

Stephen C. Thaman is an Associate Professor at Saint Louis University School of Law. For a full discussion of the re-establishment of jury trials in Russia by Prof. Thaman, see The Resurrection of Trial by Jury in Russia, Stanford Journal of International Law, Winter, 1995.

Illustration by Dan Adel, New York.

The friends and adversaries of the plan of the constitutional convention, if they agree in nothing else, concur at least in the value they set upon trial by jury; the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

*--Alexander Hamilton
(1788)*