

The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and beyond

Stephen C. Thaman

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The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond

Stephen C. Thaman

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I. Introduction

A. Prologue

The jury trial underwent a remarkable rebirth in Russia between 1993 and 1994.¹ That rebirth and the move from inquisitorial to adversarial procedure were central to the "Concept of Judicial Reform," which was passed nearly unanimously by the Supreme Soviet of the Russian Soviet Federated Socialist Republic (RSFSR) on October 21, 1991, as the Soviet Union was crumbling.² The reforms were seen to be prime catalysts for the democratization and humanization of the Soviet-Russian criminal justice system as the country moved from a totalitarian system with a command economy to democracy and capitalism.³

In the latter years of *perestroika*, the "restructuring" of the Soviet system undertaken by Mikhail S. Gorbachev, a broadening of the freedom of the press (so-called *glasnost* or transparency) led to widespread criticism of the Soviet-era court system for its inability to provide a quality of justice worthy of a civilized country.⁴ All Soviet trial courts were composed of one professional judge and two lay judges called "people's assessors." The latter were derisively called "noddors" because they were completely dependent on, and failed meaningfully to check, the power of the professional judge.⁵ The professional judge, in turn, was completely dependent on instructions from party or other local officials (so-called "telephone law")⁶

1. See generally Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995) (chronicling Russia's transition toward jury trials in the early 1990's).

2. *O Kontseptsii Sudebnoy Reformy*, VEDOMOSTI RSFSR, Issue No. 44, Item No. 1435 (1991), reprinted in KONTSEPTSIIA SUDEBNOY REFORMY V ROSSIYSKOY FEDERATSII (1992) [hereinafter *Concept of Judicial Reform*].

3. *Id.* at 40-41, 80, 85.

4. A study in 1986 reported that each year approximately 2,500 citizens were illegally arrested and more than 3,000 wrongfully prosecuted. Todd Foglesong, *Habeas Corpus or Who Has the Body? Judicial Review of Arrest and Pretrial Detention in Russia*, 14 WIS. INT'L L. J. 541, 547 (1996). Central to these revelations was the fact that many innocent people had been convicted. Emblematic of this situation was the conviction and sentencing to death of twelve innocent persons in Vitebsk for the crimes of Mikhasevich, a maniac who killed 33 women. At least one of the innocent was executed. V.V. MEL'NIK, ISKUSSTVO ZASHCHITY V SUDE PRISIAZHNYKH 25-26 (2003).

5. See Thaman, *supra* note 1, at 67. These "people's assessors" have also been called "pawns in the hands of the judge" and "wordless judges." V.V. MEL'NIK, ISKUSSTVO DOKAZAZVANIYA W SOSTIAZATEL'NOM UGOLOVNOM PROTSESSE 19 (2000).

6. In a 1988 survey of 120 judges, 60 reported that within the past year they had been approached by a party or government official with a suggestion as to how to decide a particular case. GORDON B. SMITH, REFORMING THE RUSSIAN LEGAL SYSTEM 68 (1996).

and the powerful public prosecutor's office (*prokuratura*). This resulted in routine rubber-stamping of the results of preliminary investigations and the virtual absence of acquittal judgments, despite universal recognition of the poor quality of police investigative work.⁷

Unable or unwilling properly to investigate crimes, investigative organs resorted to coercing confessions.⁸ There was virtually no adversarial challenge to the credibility of the evidence gathered in secrecy by law enforcement officials, as adversary procedure and the presumption of innocence had long been impugned as institutions of bourgeois legal culture.⁹ The trial judge would effectively prejudge the case in the pre-trial stage by deciding the sufficiency of the evidence, and then transform himself into a trier of fact at trial, armed with what was tantamount to a presumption of guilt.¹⁰ If the evidence turned out to be insufficient to establish guilt, the judge would send the case back to the investigating officials with the understanding that "new" evidence would need to be found. When such evidence was not found, the case would simply disappear without an acquittal to clear the name of the accused.¹¹

A new adversary system of jury trial was preliminarily introduced in 1993-1994 in nine political constituents of the Russian Federation.¹² The new Constitution of the Russian Federation of 1993 contained rights to jury trial, adversary procedure, the presumption of innocence, and the mandatory exclusion of illegally gathered evidence.¹³ Finally, the new Criminal Procedure Code of the Russian Federation, passed in December 2001, led to the extension of the jury trial to the entire Republic with the exception of Chechnya in 2003-2004. The same code also completely elim-

Another study estimated that party officials intervened in 10 to 12 percent of all cases. *Id.*

7. See Thaman, *supra* note 1, at 66-68.

8. ROBERT CONQUEST, *THE GREAT TERROR: A REASSESSMENT* 121-24 (1990).

9. I.L. PETRUKHIN, *TEORETICHESKIE OSNOVY REFORMY UGOLOVNOGO PROTSESSA V ROSSII* PART II 122 (2005).

10. For more on how this "file prejudice" poisoned the Soviet-Russian trial, see L. M. KARNOZOVA, *VOZROZHDENNIY SUD PRISIAZHNYKH* 155 (2000). For more on how it is the most important reason for the judge's prosecutorial bias, see MEL'NIK, *supra* note 5, at 35.

11. Peter H. Solomon, Jr., *The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice*, 39 *SOVIET STUDIES* 531, 547 (1987).

12. The 1993 Jury Law amended the 1960 Soviet era Code of Criminal Procedure. *UGOLOVNO-PROTSESSUAL'NIY KODEKS RSFSR S PRILOZHENIAMI* (N.P. Kipnis ed., 2d. ed. 2001) [hereinafter *UPK-RSFSR*].

13. Article 47 of the Constitution of the Russian Federation (adopted on December 12, 1993), guarantees right to trial by jury and Art. 20 the right to a jury trial in cases where capital punishment is threatened. *Konstitutsiia Rossiyskoy Federatsii*, KONSTITUTSII STRAN SNG (1999), at 262-296 [hereinafter *Const. RF*] (translated by the author). In 1996 Russia declared a moratorium on the imposition of capital punishment, but the penalty is still included in the Russian Penal Code. See Stephen C. Thaman, *Comparative Criminal Law and Enforcement: Russia*, in *ENCYCLOPEDIA OF CRIME & JUSTICE* 207, 215 (Joshua Dressler ed., 2d. ed. 2001). Art. 123(4) provides for adversary procedure; art. 49(1) guarantees the presumption of innocence; and finally, art. 50(2) requires exclusion of illegally gathered evidence. *Const. RF*, *supra* note 13. The aforementioned rights had actually already been included by amendment in the Soviet-era Constitution by 1992. See Thaman, *supra* note 1, at 77.

inated the Soviet-era mixed court with people's assessors.¹⁴ This article will explore the extent to which the Russian jury system has achieved certain goals crucial to the reformation of inquisitorial Soviet practices.

In Section II, I discuss how transferring the power to determine guilt from judges to lay jurors in criminal cases can promote the independence of Russian judges. After briefly describing the political influences on judges, I discuss legal and practical factors that effectively limit the number of cases that are actually tried in the jury court. These include limitations on the jurisdiction of the jury court, manipulation of charges to circumvent juries, and plea bargaining or waiver of the right to jury trial by the defendant.

Section III explores the extent to which the presumption of innocence, new rules of adversary procedure, and the exclusionary rule have curbed the prosecutor's dominance of the trial judge and promoted acquittals in cases involving insufficient evidence. Here, I emphasize the extent to which coerced confessions still find their way into Russian jury trials, the peculiar role of the victim as the prosecutor's "Trojan horse" in the new adversary procedure, the abusive remand of cases to investigators before the jury can reach a verdict, and the persistence of secret trials and secret evidence.

Section IV focuses on the extent to which the introduction of the jury system has humanized the administration of criminal justice. To this end, the jury alone should be responsible for deciding guilt and should acquit if the evidence is insufficient to establish guilt beyond a reasonable doubt. The reformers indeed felt that jurors should be able to avoid the strict application of the law and return verdicts of not guilty for humanitarian reasons, even if the evidence conclusively established guilt. They also gave the jury the power to prescribe lenient sentences consistent with their consciences.

Unfortunately, even in cases submitted to the jury for decision, the Supreme Court of the Russian Federation (SCRF) has effectively co-opted jurors' competence to decide guilt, reducing them to mere fact-finders while reposing the ultimate power to determine guilt in the judge. This division of labor strips the jury of a critical responsibility and undermines its function as a check on the power of the trial judge.

Section V details the factors contributing to the high reversal rate of acquittals in Russian jury cases. Acquittals may be appealed by the prosecutor or the aggrieved party, and Russian law does not require the appealing party to make a timely objection. Thus, the SCRF, which hears all appeals in cassation from jury court judgments, has virtually unfettered discretion to overturn the judgment of the trial court and, indeed, reverses the great majority of acquittals which are appealed. These liberal appeal rules enable the judge and prosecutor collusively to introduce trial errors,

14. *UGOLOVNO-PROTSESSUAL'NYY KODEKS ROSSIYSKOY FEDERATSII* (2005) [hereinafter *UPK-RF*] (adopted by the State Duma on November 22, 2001, approved by the Federation Council on December 5, 2001, and signed by the President of the Russian Federation on December 18, 2001).

in order to assure a grounds for reversal in the event of acquittal. Even without such collusion, the rules of adversary procedure and the exclusionary rule, along with the highly confusing Russian special jury verdict, allow the SCRF to turn against the defendants rules originally meant to protect them. This renders human rights guarantees ineffectual and essentially maintains the inquisitorial appellate practices that were the mainstay of the old Soviet "error-free" justice.

The introduction of the jury trial was aimed at expanding the participation of the citizenry in the administration of justice and democratizing the judicial branch of government. It was intended to school citizens in the rule of law and develop public confidence in the judiciary and the legal system. Section VI discusses the pros and cons of the complete elimination of the court with lay assessors, and whether that court could have been democratically transformed and maintained as the trial court for crimes of moderate seriousness. Section VI also discusses the attitude of the Russian citizenry toward jury duty, both prospectively and retrospectively.

My regrettable conclusion in Section VII is that these ambitious reforms increasingly appear to be democratic window-dressing for a system that functions in the same manner as its forerunner. Instead of allowing the jury to counteract the old acquittal-free criminal jurisprudence, the courts and the legislature have collaborated to nullify the Russian jury as an independent judicial organ. I will recommend reforms to rehabilitate the Russian jury system, which may also prove instructive for the former Soviet republics of Eurasia¹⁵ and for countries in the Asian Far East,¹⁶ where totalitarian or authoritarian or judge-dominated systems continue to produce significant numbers of erroneous convictions.¹⁷

Before beginning the analysis of the questions posed above, it is important briefly to trace Russia's earlier experiences with jury trial and the mixed court from 1864 through the collapse of the Soviet Union. Russia's experience in these years paralleled the rise and fall of the jury in continen-

15. The right to jury trial is guaranteed in the following post-Soviet constitutions: The Constitution of the Republic of Armenia, art. 91(2), KONSTITUTSII STRAN SNG (1999), at 66; The Constitution of Kazakhstan, art. 75(2), KONSTITUTSII STRAN SNG (1999), at 184; The Constitution of Ukraine, arts. 124(4), 127(1), 129(2), KONSTITUTSII STRAN SNG (1999), at 399-400; The Constitution of Georgia, art. 82(5), http://www.constcourt.gov.ge/?item_id=17&language_id=2. Legislation is already on the books to implement the jury trial in Azerbaijan, see *Ugolovno-protsessual'nyy kodeks Azerbaydzhanskoj Respubliki*, Law No. 907-II, §§ 24(1), 78(3), 79, 82, 362-80 (July 14, 2000) [hereinafter UPK-Azerbaijan] and Kazakhstan, see *Ugolovno-protsessual'nyy kodeks Respubliki Kazakhstan*, §§ 543-77 (Jan. 16, 2006) [hereinafter UPK-Kazakhstan]; *Zakon Respubliki Kazakhstan, O prisiazhnykh zasedateley*, No. 121 (Jan. 16, 2006) [hereinafter Jury Law-Kazakhstan].

16. Cite contributions in the same Cornell issue discussing reforms in Japan and Korea.

17. In relation to democratic Japan, see David T. Johnson, *Plea Bargaining in Japan*, in *THE JAPANESE ADVERSARY SYSTEM IN CONTEXT* 140, 161 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002). The low acquittal rate, accounting for .11 percent in 1992, has been attributed to Japan's "precision justice" (*seimitsu shihō*). Karl-Friedrich Lenz, *Länderbericht: Japan*, in *DIE BEWEISAUFNABME IM STRAFVERFAHRENSRECHT DES AUSLANDS* 195, 204 (Walter Perron ed., 1995).

tal Europe and the development of its inquisitorial relative, the mixed court with lay assessors. Its experiences are also important in analyzing the questions discussed in the body of the article. This brief history will be followed by an equally brief summary of Russian jury trial procedure.

B. Lay Participation in Continental European and Russian History

The issue of lay participation invariably touches separation of powers principles.¹⁸ The most repressive regimes throughout human history have always been supported by a professional career judiciary without lay participation, and an inquisitorial system in which the ideology of the search for truth had strict priority over human rights concerns. Democratic, egalitarian countries can exist without lay participation, but it is difficult for repressive dictatorships to exist *with it*, unless it is deformed into a kangaroo court of yes-sayers.¹⁹

Lay participation in the administration of justice has traditionally been seen as a "right-duty" of a democratic citizenry.²⁰ It serves to legitimize the imposition of criminal penalties, build public confidence in the criminal justice system, and educate individuals to be law-abiding citizens.²¹

In the late seventeenth and early eighteenth centuries, the right to trial by jury became a rallying cry of English religious dissidents and republicans in their struggles against repression.²² The transformation of the jury from an institution of customary law to a check on despotism accounts for the constitutionalization of the right to trial by jury in the United States,²³ and to its becoming a battle cry in the French Revolution and the anti-monarchist movements on the European Continent that followed.²⁴

The jury trial was introduced in France in 1789 and in most German states after the abortive revolutions of 1848 (though the Rhine States had maintained the institution since the time of Napoleonic occupation). It was extended to all of Germany through the unification of 1871. Russia introduced trial by jury in the great judicial reforms instituted by Tsar Alexander II in 1864, and nearly all European countries followed suit with the exception of the Netherlands.²⁵ But these reforms were not only politi-

18. De Tocqueville saw it primarily as a political institution. ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE*, Vol. I, 371-73 (1981).

19. *Id.* at 374 ("All the sovereigns who have wanted to base in themselves the source of their power and direct society rather than let themselves be directed by it, have destroyed the institution of the jury or weakened it.").

20. Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 *HASTINGS INT'L & COMP. L. REV.* 241, 265 (1998).

21. *Duncan v. Louisiana*, 391 U.S. 145, 187-188 (1968) (Harlan, J., dissenting).

22. THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* 153-355 (1985).

23. U.S. CONST. amend. VI.

24. FRANÇOISE LOMBARD, *LES JURÉS: JUSTICE REPRÉSENTATIVE ET REPRÉSENTATIONS DE LA JUSTICE* 146-50 (1989).

25. For a succinct list of the European and other countries which adopted trial by jury in wake of the French Revolution, see Neil Vidmar, *The Jury Elsewhere in the World*, in *WORLD JURY SYSTEMS* 428-32 (Neil Vidmar ed., 2000).

cal. Trial by jury was seen as preservative of the presumption of innocence, the principles of immediacy and the oral trial, and the evidentiary standard of *intime conviction* – all of which became recognized as indispensable in any civilized criminal justice system.²⁶

A competing form of lay participation in continental Europe was the court with lay assessors or “mixed court,” first introduced as the *Schöffengericht* in 1818 in Württemberg, and later included for the trial of lesser crimes in the 1871 German Code of Criminal Procedure. There, in its classic form, the mixed court comprised a panel of one professional judge and two lay assessors collegially deciding all questions of law, fact, and punishment.²⁷ Throughout Europe, the enemies of trial by jury sought to abolish the jury court, which they blamed for “scandalous acquittals” and “nullification of the law” based on popular emotion, ignorance, or outright rebellion. They also criticized the division of legal labor between judges of fact (jurors) and judges of the law (judges) as premised on an artificial distinction between factual and legal questions. Another problem with the jury was that the appeals process required reasoned judgments. Some German supporters of the mixed court used blatantly chauvinistic arguments: the *Schöffengerichte* was an ancient German institution, whereas the jury was an English-French institution with no “folk” roots.²⁸

The replacement of European monarchies by totalitarian dictatorships in the wake of World War I led to the abolition of the jury trial and its replacement with the German model of mixed court: in Russia in 1917 following the Bolshevik Revolution and in 1924 in Germany following a decree of the minister of justice. The Fascists in Italy eliminated jury trials in 1931, the dictator Francisco Franco in Spain followed suit in 1939, and the Vichy government in France, which collaborated with Nazi Germany, did the same in 1941. Italy and France maintained a mixed court which was still called an assizes court, whereas Spain eliminated all lay participation.²⁹

Prior to 1864, the Russian courts were subservient to notoriously corrupt provincial governors and doled out justice to the highest bidder.³⁰ The 1864 reforms set up the framework for a genuinely independent judiciary with life tenure and introduced trial by jury as a further guarantee of judicial liberation from control by the executive and local influences. The Bolshevik Decree on the Courts of December 7, 1917, however, put an end

26. See K.J. MITTERMAIER, *DAS VOLKSGERICHT IN GESTALT DER SCHWUR- UND SCHÖFFENGERICHTE* 21 (1866).

27. CHRISTOPH RENNIG, *DIE ENTSCHEIDUNGSFINDUNG DURCH SCHÖFFEN UND BERUF-RICHTER IN RECHTLICHER UND PSYCHOLOGISCHER SICHT* 33-34 (1993).

28. Peter Landau, *Schwurgerichte und Schöffengerichte in Deutschland im 19. Jahrhundert bis 1870*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY: 1700-1900* 292-302 (Antonio Padoa Schioppa ed., 1987). For a view linking the growing antipathy towards the jury and support for a mixed court to the triumph of positivism in Germany and the influence of Ferri and Garofalo, Italian theoreticians of social defense, see RICHARD VOGLER, *A WORLD VIEW OF CRIMINAL JUSTICE* 61-64, 236-38 (2006).

29. Stephen C. Thaman, *Europe's New Jury Systems*, in *WORLD JURY SYSTEMS*, *supra* note 25, at 324.

30. MEL'NIK, *supra* note 5, at 20-21.

to the independent judiciary and replaced the jury with a mixed court composed of one career judge, elected for a term of five years by the local party officials, and the two "people's assessors", selected by party-controlled worker, peasant, or housing collectives.³¹ Although the German *Schöfengericht* is the earliest modern model of a mixed court, the Bolshevik mixed court has been the most influential global model, serving as an example for mixed courts in the former Soviet republics, Eastern Europe, China and Vietnam.³²

C. An Outline of Procedure in Russian Jury Cases

Procedure today in the Russian jury courts is based on the 2001 UPK-RF and does not substantially differ from the procedure under the 1993 Jury Law.³³ Many of its characteristics have been borrowed from the Code of Criminal Procedure³⁴ and the Judicial Code³⁵ of 1864, which were effective until the Bolshevik Revolution of 1917.

The defendant has the right to trial by jury in Russia in all criminal cases subject to the jurisdiction of the second-level courts of original jurisdiction, which includes formerly capital offenses such as aggravated murder, other serious felonies, and some lesser crimes.³⁶ The right belongs to the defendant and must be asserted.³⁷

Jurors are drawn from registered voters in the territorial jurisdiction in which the crime was committed. They must be at least 25 years of age and have no pending criminal cases or unexpunged criminal convictions.³⁸ At least twenty prospective jurors must appear in court for jury selection to commence.³⁹ During jury selection, the parties, including the aggrieved

31. SAMUEL KUCHEROV, *THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION* 34-44 (1970).

32. See Stephen C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001 ST. LOUIS-WARSAW TRANSATL. L.J. 89, 91.

33. For a detailed description of jury selection and trial under the 1993 law, see Thaman, *supra* note 1, at 95-129.

34. *Ustav ugodnogo sudoproizvodstva* (signed by Tsar Alexander II on Nov. 20, 1864), reprinted in 8 ROSSIYSKOE ZAKONODATEL'STVO X-XX VEKOV 120-251 (B.V. Vilenskiy ed., 1991) [hereinafter UUS-1864].

35. *Uchrezhdenie Sudebnykh Ustanovlenii* (signed by Tsar Alexander II on Nov. 20, 1864), reprinted in 8 ROSSIYSKOE ZAKONODATEL'STVO X-XX VEKOV, *supra* note 35, at 32-82 [hereinafter USU-1864].

36. For a list of the crimes subject to trial by jury, see UPK-RF, *supra* note 14, § 31(3). Capital cases were tried by military courts from 1864 through 1917. SAMUEL KUCHEROV, *COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS* 204 (1953).

37. At the close of the preliminary investigation the investigator, a legally-trained official in the Ministry of the Interior, advises the accused of the right to jury trial and, in the alternative, of the right to be tried by a panel of three professional judges. UPK-RF, *supra* note 14, § 217 (5).

38. *Federal'nyy zakon, O prisiagzhnykh zasedateley federal'nykh sudov obshchey yurisdikzii Rossiyskoy Federatsii*, No. 113-F3, § 3(2)(1) (August 20, 2004), <http://www.garant.ru/law/12036631-000.htm> [hereinafter 2004 Law on Jurors]. Jurors in pre-revolutionary Russia had to be between 25 and 70 years of age. USU-1864, *supra* note 36, § 81(2).

39. UPK-RF, *supra* note 14, § 327(3).

party, may conduct individual *voir dire* of the prospective jurors, which takes place in closed session.⁴⁰ Following any challenges "for cause," if more than fourteen of the original twenty jurors remain, then the prosecution, followed by the defense, may exercise a peremptory challenge. If the aggrieved party has expressed its desire to participate in the trial, then it constitutes one of the prosecuting parties and has a right to exercise peremptory challenges along with the public prosecutor.⁴¹ If more than one defendant is on trial, the defendants must either vote on each peremptory challenge or divide the peremptory challenges equally among themselves.⁴² The jury is ultimately composed of twelve jurors and two alternates.⁴³

Russian jury trials begin with the reading of the accusatory pleading, whereupon the judge asks the defendant whether she understands the pleading and admits guilt or maintains innocence.⁴⁴ Next, the prosecution and the defense give opening statements.⁴⁵ If the defendant decides to testify, she may do so at any time during the trial.⁴⁶ If the defendant does not wish to testify at the beginning of trial, the prosecution parties first present their evidence, followed by the defense.⁴⁷ Unlike in the United States, the victim, or *poterpevshiy*, enjoys the rights of a full party. She may testify, present evidence, make motions, obtain professional legal representation, have full discovery of the contents of the preliminary investigation dossier, make a closing argument, and appeal a judgment of either acquittal or conviction.⁴⁸

The closing arguments are followed by the formulation of the special verdict, or question list, that is submitted to the jury.⁴⁹ The question list, explained in detail below, includes separate questions dealing with the *corpus delicti* of the offense, the identity of the accused, and the guilt or innocence of the defendant. It may also include questions related to excuses, justification, or aggravating or mitigating circumstances.⁵⁰ After closing arguments, the presiding judge makes a summation in which she summarizes the evidence and the positions of the parties and explains the applicable law and the rules of deliberation, emphasizing the presumption of innocence, the resolution of doubt in favor of the defendant, and the principle that neither the defendant's silence nor inadmissible evidence

40. *Id.* § 328(8), (23).

41. Thaman, *supra* note 1, at n.225. See Thaman, *supra* note 29, at 243-44 for a discussion of the role of the victim in Russian jury trials.

42. UPK-RF, *supra* note 14, § 328 (12)-(16).

43. *Id.* §§ 30(2), 328(21). The pre-revolution jury court consisted of twelve jurors presided over by three professional judges, as was typical in Continental Europe at the time. See Thaman, *supra* note 29, at n.28.

44. UPK-RF, *supra* note 14, § 273.

45. *Id.* § 335(1).

46. *Id.* § 274(3).

47. *Id.* § 274(2).

48. *Id.* § 42.

49. *Id.* §§ 336, 337.

50. *Id.* § 339. The parallel sections of the UUS-1864 will also be discussed *infra*.

may be used to prove guilt.⁵¹

The jury deliberations on the question of guilt must last for at least three hours unless the jury reaches a unanimous verdict sooner.⁵² If the jury is not able to reach unanimity after three hours, it may return a verdict by majority vote. Where the vote is tied, the question is deemed to be decided in the defendant's favor. The jury may recommend lenience, which compels a sentence below the maximum and sometimes below the mandatory statutory minimum.⁵³

Following deliberations, the trial judge prepares the judgment and, based on the answers to the special jury verdict, either acquits or attaches a legal qualification to the wrongful acts proved.⁵⁴ Judgments of guilt and acquittal may be appealed in cassation based on errors of law, violations of the rules of criminal procedure, incorrect application of the criminal law, or the "injustice of the judgment."⁵⁵ Final judgments, either of guilt or acquittal, which have proceeded through the cassational instance may be appealed to a review instance (*nadzor*) or re-opened due to rediscovery of new evidence.⁵⁶

II. The Dependence of the Judiciary and the Extent to Which Juries Have Replaced Judges in Determining Guilt

A. The Perceived Dependence and Corruption of the Judiciary

One of the main goals of judicial reform in Russia since *perestroyka* has been to create a judiciary truly independent of the executive branch. However, commentators have generally noted an increasing dependency of the judiciary on the office of the President of the Russian Federation, Vladimir Putin.⁵⁷ This has been achieved by substantial increases in salaries and the president's control of the chairpersons of the courts through his power of appointment.⁵⁸ One could say that there is a vertical dependency: lower district court judges are controlled by the chairpersons of

51. *Id.* § 340.

52. *Id.* § 343. These rules were derived from the pre-revolution code. Thaman, *supra* note 1, n.389.

53. *Id.* § 349(2) (referring to the Criminal Code of the Russian Federation (*Ugolovnyy Kodeks Rossiyskoy Federatsii*, § 65(1) (Prospekt 2005) [hereinafter UK-RF])).

54. UPK-RF, *supra* note 14, § 351.

55. *Id.* § 379(1).

56. *Id.* §§ 402-19.

57. Sergey Pashin, a former Moscow City Court judge and one of the most prominent reform voices in the Yel'tsin years, claims the new dominance of the presidency over the courts is a result of the influence of Dmitry Kozak, the Administration's head of judicial reform, who was also influential in the passage of the UPK-RF and other laws. Yevgeniy Natarov, *Sudy Bogdykhanov*, GAZETA.RU. (Nov. 26, 2003), available through DAYDZHEST TSENTRA SODEYSTVIA PRAVOSUDIUI PRI FONDE INDEM [hereinafter INDEM] (Nov. 14-30, 2003), <http://www.cja.ru/pages/index2.htm>.

58. According to Dmitry Kozak, the administration intended to raise judicial salary fourfold in 2006 in order to reduce dependence of judges on the regional government. Grigoriy Vdovin, *Razrabotka Reformy Zaniata Okolo Chetyrekh Mesiatsev*, STRANA.RU (May 26, 2001), <http://strana.ru/state/kremlin/2001/05/26/990875332.html>.

their respective courts,⁵⁹ who are controlled by the higher regional and territorial courts.⁶⁰ They, in turn, are controlled by the SCRF. Judges who contradict the will of the prosecutor or the judicial hierarchy are either reassigned to handle trivial cases or hounded out of the judiciary altogether.⁶¹

Another concern is corruption of the judiciary. Bribery, though perhaps more rampant in the civil and economic courts, also takes place in the criminal courts.⁶² Corruption is, even according to officials of the presidential administration, the main reason why public trust in the courts is abysmally low.⁶³

B. Undercharging the Case to Avoid Trial by Jury

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

59. The chairpersons of the courts, and now the new Judicial Administration, decides when judges can get money to remodel their apartments, etc. T.G. MORSHCHAKOVA, *ROSSIYSKOE PRAVOSUDIIE V KONTEKSTE SUDEBNOY REFORMY* 193 (2004).

60. According to Solomon and Foglesong, "stability of sentences" or the absence of verdict reversals determines whether a district court judge is promoted. PETER H. SOLOMON, JR. & TODD S. FOGLESONG, *COURTS AND TRANSITION IN RUSSIA* 49-51 (2000); cf. S. Pomorski, *Justice in Siberia: A Case Study of a Lower Criminal Court in the City of Krasnoyarsk*, 34 *COMMUNIST & POST-COMMUNIST STUD.* 447, 455 (2001) (arguing that there are two criteria which determine whether a district court judge is promoted: (1) stability of sentences and (2) "expeditious processing of cases"). Every judge and every district court has an appointed supervisor (*kurator*) in the higher level court who functions as both an informal mentor and official judge of their decisions in cassation. *Id.* at 50-51.

61. Sergey Pashin says he refused to follow the orders of members of the procuracy and the president of Moscow City Court, Yelena Yegorova, to ignore obvious signs of torture in the trial of three suspects for kidnapping a Russian businessman, and as a result he received no important cases and there were two efforts to dismiss him from the judiciary. Andrew Jack, *Justice System*, *FIN. TIMES*, Apr. 9, 2001, reprinted in *PERICLES RUSSIAN LAW LETTER* No. 9 (Pericles ABLE Project, Moscow, Russia). Moscow City Court Judge Ol'ga Kudeshkina revealed that the Procurator General was pressuring her colleagues to decide cases a certain way, and that Yegorova provided support by attempting to suspend any judges who resisted. *Supreme Court Upholds Dismissal of Judge for Criticizing Prosecutors*, RFE/RL NEWSLINE (RFE/RL, Prague, Czech Republic), Jan. 20, 2005, available at <http://www.rferl.org/newsline/2005/01/1-RUS/rus-200105.asp>. She also claimed that more than eighty judges had quit her court due to Yegorova's heavy-handed methods. Ol'ga Kudeshkina, *Otkrytoe pis'mo prezidentu RF V.V. Putinu*, *NOVAIA GAZETA*, March 14, 2005, <http://2005.novayagazeta.ru/nomer/2005/18n/n18n-s42.shtml>.

62. See Kudeshkina, *supra* note 61, for discussion of "price-lists."

63. Ivan Sukhov, *Nastorazhivaiushchiy Pokazatel'*, *VREMIA NOVOSTEY*, Jan. 28, 2004. An early 2004 poll found that 58 % of the population believed courts to be ineffective and that 17% had no confidence in them. *Id.* Another poll, later that year, found that 46% of respondents had a negative attitude toward judges and only 12% believed that most judges are honest and incorruptible. 62% indicated that judges do not base their decisions solely on the law but on "other considerations" as well. Of those who said so, 40% said those considerations include judges' personal interests, and 8% said they include political pressure from other branches of government. *Public Confidence in Judges Weak*, RFE/RL NEWSLINE, Oct. 18, 2004.

codified practice called *correctionnalisation*.⁶⁴

In Russia, in the first year after reintroduction of the jury trial, nearly all of the cases tried were for murder, with only 12 of the first 109 trials involving non-capital crimes. This was common practice in Spain as well.⁶⁵ Some have reported that Russian investigators also explicitly engage in this practice to avoid jury trials.⁶⁶

C. Will Russia's Introduction of Guilty Pleas Lead to Avoidance of Jury Trials?

Russian legal reformers knew that the only way America could afford a system of trial by jury was to have a developed system of plea-bargaining, which disposed of more than 90% of all criminal cases.⁶⁷ The working group which drafted the UPK-RF actually enlisted aid from U.S. jurists, who were invited by the U.S. Department of Justice to help in drafting a chapter dedicated to consensual and abbreviated procedures.⁶⁸ This draft, presented to the Russian State Duma, originally included a procedure closely modeled after the Italian "application for punishment on request of the parties" or *patteggiamento*. This procedure applied to crimes that carried a maximum sentence of three years and gave the defendant a sentence reduction equal to one-third of what his or her sentence would have been.⁶⁹

Clearly, a system of abbreviated procedure that applied only to crimes carrying sentences of three years or fewer would not significantly reduce the number of cases tried in the Russian jury courts, which were primarily aggravated murders and serious felonies. In order to broaden its scope, the new Russian procedure was made applicable to all crimes authorizing sentences up to five years.⁷⁰ On July 4, 2003, the scope of the new abbreviated procedure system was further broadened with the passage of a federal

64. STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 141-43 (2002).

65. Thaman, *supra* note 29, at 325-26.

66. Georgiy Tselms, *Gospoda Prisiazhnye, Zabud'te...*, *RUSSKIY KUR'ER*, Jan. 24, 2004, available through INDEM, *supra* note 59 (Jan. 25 - Feb. 7, 2004). Pashin notes that the investigator will charge, instead of murder with aggravating circumstances, "infliction of serious injuries to health causing the death of the victim", which is not subject to jury trial. Leonid Nikitinskiy, "Prestuplenie i opravdanie," *MOSKOVSKIE NOVOSTI*, Apr. 8, 2003, available through INDEM, *supra* note 59 (April 7-11, 2003).

67. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE. AN ANALYSIS OF CASES AND CONCEPTS* 666 (4th ed. 2000).

68. I drafted the chapter for the Working Group in January, 2001, and presented it at a meeting of experts in March, 2001 in Moscow. On the American influence on plea-bargaining in Russia, see Matthew J. Spence, *The Complexity of Success: The U.S. Role in Russian Rule of Law Reform*, 60 *CARNEGIE PAPERS* 13 (2005), available at <http://www.carnegieendowment.org/files/CP60.spence.FINAL.pdf>.

69. On the *patteggiamento*, see THAMAN, *supra* note 64, at 153-58.

70. *Soglasie obvinamogo s pred'iavlennym emu obvineniem*. See KOMMENTARIYK UGOLOVNO-PROTSESSUAL'NOMU KODEKSU ROSSIYSKOY FEDERATSII 540-44 (D.N. Kozak & Ye. B. Mizulina eds., 2002) [hereinafter *Kommentariy-2002*]. The procedure did not require a "guilty plea" or a confession. Rather, the defendant simply stipulated that he did not contest the content of the accusatory pleading. *Id.* at 541.

law that made it applicable to all cases punishable by sentences up to ten years.⁷¹

The new Russian procedure also differs from its Italian ancestor in that parties may not appeal on any of the following grounds judgments rendered pursuant to agreements: inadequate evidentiary support (as the judge need not provide reasons for findings); a violation of the code of criminal procedure; improper application of the criminal law; or the unjust nature of the judgment.⁷² In light of the lack of independence of the Russian judiciary, the conversion of the original Italianate version, requiring judicial control and reasons, into a perfunctory American style plea-bargaining with virtually no right to appeal is a matter of great concern.⁷³ It is no secret that the smooth functioning of the American plea bargaining system is attributable to the Draconian sentences threatened for felonies in the federal system and most states which virtually compel everyone (including some innocent persons) to plead guilty.⁷⁴

The increased scope of the new procedure also means that it will now apply to a substantial number of the offenses subject to trial by jury. Although crimes carrying sentences in excess of ten years, including homicide,⁷⁵ attempted murder, murder of a public official,⁷⁶ terrorism or serious crimes against the state,⁷⁷ and serious war crimes or other crimes against humanity,⁷⁸ would not be subject to the consensual procedures, a large number of other crimes would be covered. These include obstruction of justice, bribery of a public official, negligent homicide, piracy, and offenses relating to organized crime.⁷⁹

71. UPK-RF, *supra* note 14, § 314(1). With the 2003 amendments, § 316(5) of the UPK-RF now reads: "The judge does not conduct an investigation and evaluation of the evidence collected in the criminal dossier."

72. *Id.* §§ 317, 379.

73. Sergey Pashin fears that "the conveyor belt to work over people into the condition of camp dust is especially effective in the summer when it is impossible to breathe in the pretrial detention centers and tuberculosis and consumption flourish. Then the detainee admits anything in order to be quickly punished and to go to the penal colony where it is easier to live." Sergey Pashin, *Novorozhdennomu na zubok*, NOVYE IZVESTIYA, July 23, 2003, available through INDEM, *supra* note 59 (July 8-17, 2003).

74. Stephen C. Thaman, *Gerechtigkeit und Verfahrensvielfalt. Logik der beschleunigten, konsuellen und vereinfachten Strafprozessmodelle*, in RECHT-GESELLSCHAFT-KOMMUNIKATION: FESTSCHRIFT FÜR KLAUS F. RÖHL 313 (2003); Mirjan Damaska, *Negotiated Justice in International Criminal Courts*, 2 J. INT'L CRIM. JUST. 1018, 1028 (2004).

75. Among those which involve homicide are: §§ 105(2), 126(3), 131(3). UK-RF, *supra* note 54. However, if the prosecutor intentionally undercharges to fit the crime under the ten-year threshold, then plea-bargaining is possible.

76. *Id.* §§ 277, 295, 317.

77. *Id.* §§ 205, 206(2)-(3), 209, 275, 276, 278, 279, 381.

78. *Id.* §§ 353, 357, 358.

79. *Id.* §§ 208(1) (forming criminal groups); 211(1) (hijacking without serious results); 212(1) (riot); 227 (non-aggravated piracy); 263(3) (violating rail-traffic rules leading to death); 267(3) (sabotage of transport causing death); 269(3) (violating rules in constructing pipelines causing death); 290(3) (official bribery); 294-305, 321 (all relating to obstruction of justice); 304 (provoking bribery in commercial context); 322(2) (unlawfully crossing state borders); 359 (non-aggravated activity as a mercenary); 360 (attack on person or institution with international protection). *Petrukhin esti-*

Whether the new system of consensual stipulations and discounts will constitute another end run around the jury system remains uncertain. Historical evidence suggests that admitting guilt in the Soviet-Russian non-jury system did not traditionally lead to a lesser punishment. Because of the exceptionally poor quality of criminal investigations, defendants who did not admit guilt often received lesser sentences and had their cases returned for further investigation.⁸⁰ Unlike the practices of other jurisdictions, the Russian Criminal Code does not regard an acceptance of guilt as a mitigating factor unless a person, by willfully appearing before officials, actively facilitates the arrest of co-defendants and the reparation of the damage caused by the crime.⁸¹

D. Waiver of Trial by Jury

The right of the accused to a jury trial must be asserted at the end of the preliminary investigation when charges are proffered,⁸² or the right is waived. An accused who has asserted the right, however, is given an opportunity to waive it at the preliminary hearing.⁸³ This was neither the case in pre-revolution Russia⁸⁴ nor in Spain's new system, where trial by jury is mandatory for all cases within the court's jurisdiction.⁸⁵ Despite the virtual impossibility of acquittal by the non-jury courts, the majority of pre-2003 Russian defendants entitled to jury court jurisdiction chose trial by the court with lay assessors—the “nodders” described above—rather than by the more lenient jury court. In the first eight months after reintroduction of the jury trial, between January 1 and September 1, 1994, defendants requested jury trials in only 254 of the first 1,465 cases filed in the original nine jury trial jurisdictions. Interviews with many prosecutors, lawyers and judges involved in the first cases led to my original conclusion that fear and concomitant reluctance to accept the new system's demands

mates that more than 200 criminal offenses are now subject to the consensual procedures. PETRUKHIN, *supra* note 9, at 105. Plea bargaining was used 1.5 times more often in 2005 than in 2004, with 2.4 percent of the “deals” taking place in the regional-level courts, which handle jury trials. *Statisticheskaya Spravka o Rabote Sudov Obshchey Yurisdikzii za 2005 God*, http://www.cdep.ru/material.asp?material_id=90 [hereinafter Court Statistics-2005].

80. V. Makhov & M. Peshkov, *Sdelka o Priznanii Viny*, 7 ROSSIYSKAYA YUSTITSIIA 17-18 (1998).

81. UK-RF, *supra* note 54, § 61(1)(i). Informal “bargaining,” however, did occur in Soviet criminal procedure, especially in relation to defendants who became informants and helped police solve other crimes. This usually resulted in not charging collaborators with certain crimes. S. Militsin, *Sdelki o Priznanii Viny: Vozmozen li Rossiyskiy Variant?* 12 ROSSIYSKAYA YUSTITSIIA 41-42 (1999).

82. UPK-RSFSR, *supra* note 12, § 424; UPK-RF, *supra* note 14, § 217(5).

83. UPK-RSFSR, *supra* note 12, § 432 (¶ 4-5); UPK-RF, *supra* note 14, § 325.

84. M.V. NEMYTINA, ROSSIYSKIY SUD PRISIAZHNYKH 24 (1995).

85. The Spanish Constitution does not accord the defendant the right to trial by jury, but article 125 of the Spanish constitution conceives of the jury trial as a manifestation of citizens' right to “participate in the administration of justice.” See Thaman, *supra* note 20, at 256-58. The Russian legislature could have based its argument on Const. RF article 32(5), which reads that “citizens of the Russian Federation have the right to participate in the administration of justice.”

caused investigators, prosecutors, and defense lawyers to convince the defendants to forego jury trials.⁸⁶

The percentage of defendants eligible for jury trial who exercised the right was a mere 20.4% in 1994, rising to 30.9% in 1995, 37.3% in 1996, and 37% in 1997.⁸⁷ Occasionally, defendants would prevail in their claims that they were coerced or confused into waiving trial by jury and get a second chance.⁸⁸ From 1997 to 2001, only 39% of those who could have opted for a jury trial did so, and only 23% actually proceeded to judgment in the jury court.⁸⁹

In 2003, following the passage of the UPK-RF in 2001, jury trials were held in 85 of the 98 subjects of the RF, with 62 of the new subjects coming on line on January 1, 2003 and 14 more on July 1, 2003. Only 18% of defendants chose jury trial in 2003,⁹⁰ 10.7% in 2004, and 12% in 2005,⁹¹ substantially less than in the two years prior to expansion.⁹²

III. The Independence of the Judge in the Adversary Jury Trial

A. Collusion of Judge and Prosecutor in "Truth-Seeking" and Acquittal Prevention

Under the old UPK-RSFSR, the duty of the judge to ascertain the truth was phrased in such a way that the judge could refuse to enter a judgment of acquittal based on reasonable doubt as to guilt if he or she could claim that there were further "measures provided by law" which could be pursued toward an "all-sided, complete and objective investigation of the circumstances necessary and sufficient to decide the case."⁹³ Thus, the judge could refuse to decide a case, claiming a lack of sufficient evidence, and return the case to the investigator to gather further evidence.

86. Thaman, *supra* note 1, at 87-88. Sergey Pashin has claimed that law enforcement officials pressure lawyers to get their clients to waive the right to a jury trial. Nikitinskiy, *supra* note 66.

87. Thaman, *supra* note 29, at 326.

88. Case of Zelikova, No. 170, 98 (Apr. 22, 1998).

89. *Obzor Sudebnoy Praktiki Rossmotreniia Ugolovnykh del s Uchastiem Prisiashnykh Zasedateley*, 7 BIULLETEN' VERKHOVNOGO SUDA ROSSIYSKOY FEDERATSII [hereinafter BVSRF] (2002), available at <http://www.supcourt.ru/bulletin/02/02-07/b120.htm> [hereinafter SCRF-Jury Review (2001)].

90. *Obzor po Delam Rassmotrennym Sudami s Uchastiem Prisiashnykh Zasedateley v 2003 Godu*, http://www.supcourt.ru/vscourt_detale.php?id=165 [hereinafter SCRF-Jury Review (2003)]. In 286 cases, representing 30% of all cases, defendants withdrew their motion for a jury trial at the preliminary hearing. 78 cases as to 174 defendants (7.3 percent of all cases) were returned to the prosecutor for further investigation. In the end, only 9 percent of all cases ended in a judgment in the jury courts, while 182 cases, concerning 421 defendants, were still pending at the end of the year. *Id.*

91. See Court Statistics-2005, *supra* note 79.

92. There was a motion for jury trial at the conclusion of the preliminary investigation in 33.6% of all cases in 2001, and 31% of cases in 2002, with 31.3% maintaining their choice of jury trial through the preliminary hearing in 2001 and 25.8% in 2002. *Obzor Praktiki Kassatsionnoy Palaty Verkhovnogo suda RF za 2002 god po Delam, Rassmotrennym Kraevymi i Oblastnymi Sudami s Uchastiem Prisiashnykh Zasedateley*, http://www.supcourt.ru/vscourt_detale.php?id=170 [hereinafter SCRF-Jury Review (2002)].

93. UPK-RSFSR, *supra* note 12, § 20.

In inquisitorial justice systems, there is typically no effective presumption of innocence, and the trial inquisitor could send a case back to the pretrial inquisitor whenever he or she thought there were gaps in the investigation or issues which could be clarified.⁹⁴ The Soviet Union was not alone in this respect.⁹⁵

Although cases could be returned to the investigative stage from the trial court before the revolution and in early Soviet law, the grounds for doing so were limited. Only in 1961 did this practice become widespread.⁹⁶ The return for further investigation routinely served to give the investigators another chance to prepare the case, or to allow the case to disappear without the stigma of an acquittal.⁹⁷

Cases with insufficient evidence were often resolved with guilty judgments for lesser-included offenses and a sentence for time-served, resulting in the immediate release of the defendant.⁹⁸ Acquittals were treated as signs that the system did not work and that the investigative organs had violated the rights of the suspect by holding her for lengthy periods of pretrial detention on insufficient evidence (and nearly all of the accused were held in pretrial detention). Since the procuracy supervised the investigations, this constituted an affront to the dignity of this most powerful agency in the administration of justice.⁹⁹

94. *Mikhaylovskaya* sees the trial judge's power to return a case for further investigation as a "fetishization" of truth-finding, which converts the court into an arm of the criminal investigation obliging it to redo that which the organs of the preliminary investigation and the prosecutor were unable to do properly. I.B. Mikhaylovskaya, *Sotsial'noe Naznachenie Ugolovnoy Yustitsii i Tsel' ugolovnogo Protsessa*, *GOSUDARSTVO I PRAVO* No. 5, 111, 116 (2005).

95. In the Netherlands, a case can still be bounced back and forth from the trial stage to the investigating magistrate, as in the old Soviet-Russian system. Stewart Field et al., *Prosecutors, Examining Judges, and Control of Police Investigations*, in *CRIMINAL JUSTICE IN EUROPE*, at 229-42. In France the trial judge may also order new acts of investigation to be performed by the investigating magistrate, the police, or a member of the court during the trial. C. PR. PEN. §§ 283, 463; JEAN PRADEL, *PROCÉDURE PENALE* 30, 317, 667 (9th ed. 1997).

96. See SOLOMON & FOGLESONG, *supra* note 60, at 144. The percentage of acquittals fell from 9% in 1945 to around 1% in 1970. HENRIKE FRANZ, *DIE HAUPTVERHANDLUNG IM RUSSISCHEN STRAFVERFAHREN* 54 (2000).

97. See Solomon, *supra* note 11, at 543-47, for the classic study of the practice in Soviet times. In the 1960's and 1970's the district courts returned around 80,000 to 90,000 cases per year for "supplemental investigation", representing 3.7% of all cases in 1967, 2.7% in 1968, 3.7% in 1969, 3.9% in 1970, 4.2% in 1971, and 4.6% in 1972. PETRUKHIN, *supra* note 9, at 88. 8.7% of cases were returned in 1988 and 8.1% in 1987. FRANZ, *supra* note 96, at 53.

98. Judges are widely perceived as lacking the courage to acquit and, in more than half of the cases returned for further investigation, they have found the defendant guilty on clearly insufficient evidence but sentenced them to credit for time served, resulting in their release. Human Rights Watch, *Confessions at any Cost: Police Torture in Russia*, 120-22 (1999). Pomorski observed cases returned as well as guilty judgments with a sentence of time served where there was clearly insufficient evidence to convict in the Krasnoyarsk courts. Pomorski, *supra* note 60, at 463-64.

99. In the "system of statistical evaluation of judicial activity" dominant in the USSR and Russia, an acquittal was seen as a "defect." MORSHCHAKOVA, *supra* note 59, at 178. In the words of Petrukhin, "innocent persons tried for years to get acquitted" only to have their cases returned for further investigation. *Id.* at 99-100. The quality of the criminal

Under Soviet-Russian law, returning the case for supplementary investigation was allowed before the trial began, during trial, or even post-judgment on appeal, if the appellate court believed the investigation was not "all-sided, complete and objective."¹⁰⁰ With the reintroduction of jury trials in 1993, the majority of cases returned for further investigation were returned before the jury was selected.¹⁰¹ With increasing frequency, however, prosecutors began to move to return the case to the investigator after the jury had been selected and had heard the bulk of the evidence. This was done, for instance, in the second modern trial in Moscow Regional Court that I observed in 1994.¹⁰² I sharply criticized this practice, which undermined the jury system, the presumption of innocence, and the protection against double jeopardy.¹⁰³ After retrial, that case resulted in a conviction, based on identical evidence but before a different judge.¹⁰⁴ Furthermore, the majority of cases that were returned for supplementary investigation in jury and non-jury cases after the promulgation of the jury law in 1993 came back for trial, thereby affording the prosecutor a second "bite at the apple."¹⁰⁵ With the increasing criticism of the institution, the number of jury and non-jury criminal cases returned to the investigator by the trial court for supplementary investigation fell from 9.7% in 1997 to 7.3% in 1998.¹⁰⁶

In April 1999, the CCRF finally took a step to limit the practice, declaring that judicial remand of a case for further investigation violated the presumption of innocence, in the absence of a motion by one of the parties.¹⁰⁷ The language of the decision of the CCRF is clear: if there is insufficient evidence to convict, then the trial court must direct a verdict of acquittal, regardless of whether the motion is made by the judge or by one of the prosecuting parties. Nevertheless, the SCRF, even after the 1999 CCRF decision, has on occasion used a trial judge's failure to grant the prosecutor's motion to return a case for further investigation as a justifica-

investigation was measured by the rate of convictions achieved. FRANZ, *supra* note 96, at 54. The lack of acquittals was justified in Soviet times by the correct conduct and all-sided nature of the preliminary investigation. I.B. MIKHAYLOVSKAIA, TSELI, FUNKTSII, I PRINTSIPY ROSSIYSKOGO UGOLOVNOGO SUDOPROIZVODSTVA 13 (2003).

100. UPK-RSFSR, *supra* note 12, § 343 (¶ 1).

101. Supplementary investigation was performed in 18% of all cases tried from November 1, 1993 to January 1, 1995. 36.1% of jury cases were returned for further investigation in 1994 and 36 percent, in 1995. The percentage fell to 25.8% in 1996 and 22.5% in 1997. Thaman, *supra* note 29, at 328.

102. See Thaman, *supra* note 1, at 99-101.

103. Stephen Thaman, *Formirovanie Skam'i Prisiashnykh v. Rossii i SShA*, 7 ROSSIYSKAIA YUSTITSIIA 5 (1994). For similar opinions, see Yu. Liakhov, *Sudebnoe Sledstvie v Sude Prisiashnykh*, in SOSTIAZATEL'NOE PRAVOSUDIIE 80-81 (S.A. Pashin & L.M. Karnozova eds., 1996), who sees the institution as being the result of "serious inadequacies of professional jurists" in properly investigating cases. See also FRANZ, *supra* note 96, at 53.

104. Thaman, *supra* note 1, at 100.

105. 88.5 percent were returned to court in 1997 and only 10 percent were dismissed. SOLOMON & FOGLESONG, *supra* note 60, at 160. The authors include elimination of this institution in their recommendations for reform of the Russian judicial system.

106. Human Rights Watch, *supra* note 98, at 120.

107. THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 64, at 181-83 (decision translated by the author).

tion for reversing a jury acquittal.¹⁰⁸

The 2001 Code took a long-awaited step and eliminated the return of the case for supplementary investigation in its traditional form. § 237 UPK RF limited the motion to the preliminary hearing. It also restricted its availability to errors that prevented a valid judgment from being rendered and to cases in which the accusatory pleading was not delivered to the accused. The procurator was given five days to cure these defects. The practice of returning a case for supplementary investigation was eliminated to “stimulate the quality of the investigation and to guarantee the right of the accused to be tried without unjust delays” so as to comport with Art. 5(3) ECHR.¹⁰⁹

Despite the clarity of § 237 UPK-RF, courts continued to send cases from the trial court back to the investigative stage and appeared to be reaching similar results as under the old practices.¹¹⁰ The prosecutor’s office criticized the section at the outset¹¹¹ and lobbied for its repeal.

The CCRF finally backed off his strong ruling of April 1999 and in December 2003 declared the unconstitutionality of § 237 UPK-RF, on the grounds that it violated the aggrieved party’s right to access to justice, thereby restoring the practice of returning the case to the procurator upon motion of one of the prosecuting parties.¹¹² This decision was a victory for the procuracy, which has finally succeeded in giving priority to the rights of the victim over those of the defendant.¹¹³ The heeling of the CCRF to the procuracy’s successful counter-revolution under CCRF President Valeriy Zor’kin was made evident when Zor’kin told President Putin that

108. See BVSRF, *supra* note 93, No. 1 (2002), <http://www.supcourt.ru/bulletin/02/02-050/b106.htm> (Bribery acquittal in Moscow Region overturned); Case of Chistiakov/Dimitrov (Rostov), No. 41-kp-098-61) (June 2, 1998) (aggravated murder acquittal reversed).

109. Kommentariy-2002, *supra* note 70, at 464 (text by L.B. Alekseeva).

110. In 2003, 32,161 cases, involving 42,719 persons, were returned to the prosecutor under this provision. But 28,430 cases, involving 37,390 persons (3.3% of all persons charged with crimes), were not returned within 5 days. In only 18% of cases were the errors eliminated within 5 days. In 54% of cases the statute was violated. In 12% of cases it was violated for more than one month and in 4 percent, for more than 3 months. The case was never returned in 28% of the cases. *Nekotorye voprosy praktiki primeneniia sudami ugolovno-protsessual'nykh norm pri osushchestvlenii pravosudiia*, in BVSRF, *supra* note 93, No. 8 (2004).

111. S.G. Kekhlerov, *Letter to Ye B. Mizulina, Vice-Chair Legislative Committee of the State Duma, Federal Assembly, Russian Federation*, Sept. 3, 2001, at 5-6 (on file with author) [hereinafter *Procuracy Letter*].

112. KONSTITUTIONNYY SUD ROSSIYSKOY FEDERATSII, POSTANOVLENIIA, OPREDELENIIA 4-5 (V.G. Strekozov ed., 2004).

113. A.D. Boykov, long-time director of the Procuracy Institute and head of a procuracy working group which produced a Draft UPK in the mid-1990’s, called for the priority of the rights of the aggrieved party over those of the defendant and for maintaining the practice of returning the case for further investigation. FRANZ, *supra* note 96, at 141-44. This position was advocated by Valentin Stepankov in 1992, when he was Procurator General. Aleksandr Larin, *Ataka na sudebnuu reformu*, IZVESTIIA, Jan. 21, 1993, at 5.

the UPK-RF needed amending to protect the rights of victims.¹¹⁴ As a result, the prosecution may now conduct sloppy investigations and still evade acquittals by falling back on the rights of those they have failed to protect due to bad faith or incompetence. Indeed, the investigative authorities can intentionally violate the rights of the victim during the preliminary investigation and then rely on the victim to reassert those rights during trial, after it becomes clear that the evidence will be insufficient for a conviction.¹¹⁵

If the aggrieved party is to be a full-fledged participant in the preliminary investigation and the trial, then she must assert her rights at the outset and the criminal procedure law must ensure that she is represented and able to defend those rights. If the law enforcement authorities do not enforce those rights, it is unfair then to punish the defendant by denying her a speedy trial or the presumption of innocence, or to place her again in jeopardy.

In the United States the concept of double jeopardy clearly prevents the prosecution from torpedoing a trial after it has begun in order to get a fresh chance to gather incriminating evidence, or a second chance to present the evidence to a more sympathetic judge or jury. As soon as the jury is sworn to hear a case, the case must be concluded in one sitting. According to the U.S. Supreme Court:

the "underlying idea [of the protection against double jeopardy], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."¹¹⁶

In the U.S., whenever the prosecution seeks a mistrial because of difficulties in proving guilt due to evidentiary weaknesses in the case, the principle of double jeopardy will prevent a retrial on the same charges.¹¹⁷

114. Igor' Kozhevnikov, *Novyy UPK zabyl o poterpevshykh*, VESTI.RU, Oct. 12, 2005, <http://www.rtr-vesti.ru>. Evidence of a veritable sea change in the CCRF's jurisprudence and concerns about the sanity of the President of the Court, Valeriy Zor'kin, were revealed in July 2004, when Zor'kin compared former Vice President of the CCRF, Tamara Morshchakova, the author of the April 1999 decision which limited returning the case for further investigation, one of the co-authors of the "Concept for Judicial Reform," and one of the most respected jurists in Russia, to the Bolsheviks, Nazis, and Jesuits, claiming her ideas would lead to "violence" and "firing squads." Valeriy Zor'kin, *Ostorozhno: pravorazrushitel'stvo! Po povodu interv'yu T. Morshchakovoy v 'Novoy gazete.'* NOVAIA GAZETA, July 22-25, 2004, at 8-9.

115. In a Krasnodar jury case, the prosecutor provoked a discharge of the jury five times, until the result was to his liking. Tselms, *supra* note 66. In 2005, 142,000 cases were sent back to the procurator per § 237 of the UPK-RF, 3.5% less than in 2004. Only 4.9% of these cases returned within 5 days, and 4.6%, in 2004. 15.8% of the cases returned to court only after a month, compared to 16% in 2004. Further, 12.1% never returned, about the same amount as in 2004. Court Statistics-2005, *supra* note 79.

116. *Green v. United States*, 355 U.S. 184, 187-88 (1967).

117. *Downum v. United States*, 372 U.S. 734, 737-38 (1963) (prosecutor failed to subpoena a crucial prosecution witness).

Unfortunately, the Russian high courts have not interpreted the double jeopardy clause of its Constitution¹¹⁸ in the same manner. Even though the SCRF has ruled that the returning of a case to the investigator after a jury had begun hearing the evidence is improper, it has merely reset the case for trial in front of a new jury, thus crowning the prosecution's attempted avoidance of a jury verdict with success.

B. The Use of Coerced Confessions

The quintessential inquisitorial form of evidence is the confession of the accused, gathered in secret by law enforcement officials, and called by Vyshinskiy and others the "queen of evidence."¹¹⁹ Russian officials have traditionally obtained confessions through the use of threats, psychological schemes, or even outright torture, which would render the resulting confessions inadmissible in nearly all civilized countries.¹²⁰ The practice continues today, as up to an estimated 50% of all criminal defendants are subject to torture or ill-treatment, and up to 80% of those who refuse to admit guilt are subject to such techniques. The practices include asphyxiation, beatings, electroshock, threats, and use of fellow prisoners to mistreat uncooperative suspects.¹²¹ The appalling conditions of pretrial detention in Russia (recently condemned as inhumane treatment by the European Court of Human Rights)¹²² is at times sufficiently coercive to induce suspects to confess just to secure transfer to better detention facilities.¹²³

The problem of coerced confessions has been addressed by the legislature in a surprisingly forthright fashion. Const. RF article 51 guarantees the right not to testify against oneself, and this right is implemented in section 47(4)(3) of the UPK-RF. Const. RF article 50(2) prohibits the "use of evidence gathered in violation of federal law and this exclusionary rule is also implemented in section 75(1) of the UPK-RF. Since the beginning of jury trials in 1993, the courts themselves began interpreting Const. RF article 51 and excluding admissions and confessions when investigators did not advise the defendant of his or her right to remain silent, thus judicially enforcing the kind of exclusionary rule set down by the U.S. Supreme

118. Const. RF, art. 50(1).

119. Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U.L.J. 581 (2001).

120. For a comparative analysis, see Stephen C. Thaman, *Wahrheit oder Rechtsstaatlichkeit: die Verwertung von verfassungswidrig Erlangten Beweisgegenständen im Strafverfahren*, in MENSCHENGERECHTES STRAFRECHT: FESTSCHRIFT FÜR ALBIN ESER ZUM 70. GEBURTSTAG 1041, 1049-50 (Jörg Arnold et al. eds., 2005).

121. Human Rights Watch, *supra* note 98, at 1, 21, 36; See also I. Petrukhin, *Rol' priznaniia Obviniaemogo v Ugolovnom Protsesse*, 2 ROSSIYSKAYA YUSTITSIYA 24 (2003). The European Court of Human Rights recently found Russia in violation of article 3 of the ECHR, which prohibits cruel and inhumane treatment, in the case of a man who claimed he was tortured with electroshock and beaten and who ended up paralyzed after jumping out of a window to escape the mistreatment. *Mikheyev v. Russia* (Application no. 77617/01) (Jan. 26, 2006), www.echr.coe.int.

122. *Kalashnikov v. Russia*, 36 E.H.H.R. 34 (2003).

123. Leonard Orland, *A Russian Legal Revolution: The 2002 Criminal Procedure Code*, 18 CONN. J. INT'L L. 133, 140 (2002).

Court in *Miranda v. Arizona*.¹²⁴ This practice was ratified and made binding on the courts in a declaratory opinion of the SCRF in 1995.¹²⁵ Thereafter the SCRF has on occasion reversed murder convictions of defendants because they were based on confessions taken in the absence of the required warnings.¹²⁶

The UPK-RF requires the interrogator to advise the defendant of the right to remain silent and the right to counsel during the preliminary investigation but does not mandate counsel's presence during an interrogation.¹²⁷ The new code also prevents the inquisitor from interrogating a defendant after she has invoked her right to remain silent.¹²⁸ The most radical innovation in the UPK-RF, however, was a provision excluding any statement taken by a suspect or defendant in the absence of counsel if the defendant retracts the statement during trial, even if the defendant had waived the right to counsel before making the statement.¹²⁹ The legislature designed this provision to prevent police, investigators, and public prosecutors from coercing, threatening, or deceiving the suspect into waiving her right to counsel.¹³⁰

Despite the apparently seamless protection against improper coercive or deceptive practices provided by § 75(2)(1) UPK-RF, the resourceful Russian police and investigators have also circumvented this protection through the so-called "pocket lawyer," or *karmany advokat*. The "pocket

124. 384 U.S. 436 (1966). I discuss the development of this practice in *Resurrection*. Thaman, *supra* note 1, at 90-94. Cf. FRANZ, *supra* note 96, at 133-34. For the early practice in the Saratov courts, see Ye. Druzin, *Obviniaemyy priglasil zashchitnika*, 9 ROSSIYSKAYA YUSTITSIYA 43, 43-44 (1997). Nearly all European countries now require what Americans call the *Miranda* warnings before interrogating criminal suspects. Thaman, *supra* note 120.

125. Decision No. 8, Plenum Verkhovnogo Suda RF, *O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiyskoy Federatsii pri osushchestvlenii pravosudiia*, 1 BIULL. VERKH. SUDA RF 3, 6 (¶ 18) (1996).

126. Case of Dzamaldaev et al. (Stavropol'), No. 19 kp-096-37sp (June 4, 1996); Case of Iovin et al. (Krasnodar), No. 18 kp-096-47 sp (June 25, 1996); Case of Savinskiy (Moscow Region), No. 4-kp-096-40sp (Dec. 19, 1995); Case of Guziev et al. (Stavropol'), No. 19/1-kp-096-18 sp (Apr. 11, 1995).

127. UPK-RF, *supra* note 14, §§ 173, 47(3)-(4), (8). Prior to the UPK-RF, underpaid court-appointed lawyers would actually encourage suspects and defendants to waive the right to counsel. Pomorski, *supra* note 57, at 467. Druzin, *Obviniaemyy*, *supra* note 124, at 43-44.

128. UPK-RF, *supra* note 14, § 173(4) ("Repeat questioning of the accused as to the same charge in the case of his refusal to give a statement during the first questioning may only be conducted upon the request of the accused himself."). In the U.S., police may again attempt to question a suspect after invocation of the right to remain silent if there has been a sufficient break in circumstances. *Michigan v. Mosley*, 423 U.S. 96, 104-105 (1975).

129. UPK-RF, *supra* note 14, § 75(2)(1). The typical Russian trial involves the defendant's confession, followed by his subsequent retraction thereof at trial. FRANZ, *supra* note 96, at 70-71.

130. The authors of the Russian legislation have emphasized that the rule is needed because statements given in the absence of counsel "give rise to completely justified doubt as to the voluntariness of these statements, that they were gathered without application of physical or psychic coercion by the interrogator." *Kommentariy-2002*, *supra* note 70, at 206. This protection thus exceeds that accorded by the *Miranda* decision itself, which expressly permits waiver of the right to counsel.

lawyer” works with investigators in encouraging the suspect to confess and sometimes even watches while the suspect is tortured.¹³¹ These lawyers betray their clients, either because they owe their salary to such appointments,¹³² or because they are former police officers or prosecutors themselves and sympathize with the interrogators.

In the U.S., as in Russia, the jury is not present during the hearing to determine whether an allegedly coerced confession has been obtained in violation of the constitution. When a Russian defendant alleges torture or other form of duress, the judge will often call the interrogators in to testify and usually request the prosecutor’s office to investigate. The prosecutor’s office, however, never substantiates the validity of the complaints, and judges therefore feel constrained to admit the confession or face reversal.¹³³ Despite the myriad allegations of torture and its documented widespread use, judges seldom suppress statements.¹³⁴

When a judge in the U.S. rules that the defense has not proven the coercive acts of the police and allows the jury to hear the confession, the defendant may still argue the coercive conduct to prove to the jury that the confession is not reliable. Shockingly, this is not the case in Russia. The SCRF has ruled that no evidence of allegedly illegal investigative methods, such as torture, beatings, or threats, may be adduced in court by the defense to demonstrate coercion or to challenge the veracity of the confession.¹³⁵ The ruling effectively prevents the defense from arguing that there were reasons for his false confession.

This doctrine puts the defendant in the difficult position of risking reversal of a favorable verdict if she raises “otherwise relevant” evidence in trying to avoid conviction.¹³⁶ The SCRF defended its decision by asserting that “[t]he procedural moments of interrogations of suspects and accused do not relate to the factual circumstances of the case and, consequently,

131. The lawyer, converted into a witness for the prosecution, will then testify that the police obtained the confession without torture. Human Rights Watch, *supra* note 98, at 66. In December, 2004, the Moscow Lawyer’s Panel expelled a lawyer who allowed his client, whose jaw had just been broken by the police in a beating, to confess, and its President, Genri Reznik, said the bar must eliminate lawyers who during questioning “play into the hands” of their friends, the investigators who invite them to take part in questioning. Yekaterina Zapodinskaia, *Advokaty Moskvy podveli itogi nezavisimosti*, KOMMERSANT, Dec. 12, 2004, available through INDEM, *supra* note 59 (Dec. 4, 2004-Feb. 5, 2005).

132. Many “pocket lawyers” actually share their fees with the investigators who invite them. I.L. Marogulova, *Nekotorye voprosy sudebnoy reformy*, in SUDEBNAIA REFORMA V ROSSII: PROBLEMY SOVERSHENSTVOVANIIA PROTSESSUAL’NOGO ZAKONODATEL’SITVA 54 (2001).

133. Human Rights Watch, *supra* note 98, at 7, 76.

134. Human Rights Watch is aware of no case of judicial suppression of coerced statements, even where medical testimony corroborates the complaint. *Id.* at 68, 76. Judges have allegedly estimated that at least one-third, and probably more, of all convictions are based on coerced confessions. Peter Finn, *For Russians, Police Rampage Fuels Fear*, WASH. POST, March 27, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A4009-2005-Mar26.html>.

135. A. Shurygin, *Zashchita v Sudoproizvodstve s Uchastiem Kollegii Prisiazhnykh Zasedateley*, Part II, 9 ROSSIYSKAYA YUSTITSIIA 5, 6 (1997).

136. The large number of acquittals reversed by the SCRF on this ground will be discussed *infra*.

cannot be the object of investigation by the jury.”¹³⁷ This astonishing doctrine indirectly amounts to a kind of unassailability of the quality of the evidence gathered during the preliminary investigation once the trial judge has ruled it admissible.¹³⁸ The SCRF rulings in this area have been the subject of much criticism.¹³⁹

C. Secret Trial and Secret Evidence

An increasing number of modern Russian jury and non-jury trials are now being conducted in secrecy, thus depriving the defendant of a public trial and also denying the community and the press of the ability to assess the reliability of convictions and the fairness of court proceedings. A public trial is guaranteed by Art. 123(1) Const. RF but the code provides for the possibility of a closed trial to protect state secrets.¹⁴⁰ Despite this limitation, many judges routinely lock their courtrooms and make it difficult for the public to gain entry even in routine trials in the district court. Sometimes the excuse is that the courtrooms are too small to accommodate the public, while at other times no reasons are given.¹⁴¹ Judges in Moscow's Basmany District Court repeatedly require visitors to get permission from the presiding judge before attending court proceedings, and at least one judge has claimed that all of her trials are closed to the public.¹⁴²

In higher level political trials in the jury courts the prosecution invariably claims that the public must be excluded to protect “state secrets.” This argument appears facially plausible, given the increasing number of espionage trials now heard by juries in Moscow and elsewhere.¹⁴³ But it is unclear why (i) the trial of Mikhayl Khodorkovskiy, charged with tax evasion allegedly committed 10 years before the trial; (ii) the trial of Viacheslav Ivan'kov (a.k.a. Yaponchik), a gangster accused of a double murder who had just been released from an eight-year prison sentence in the U.S.¹⁴⁴; and finally, (iii) a trial involving a bombing of a market in Astrakhan attributed to either Chechen terrorists or gangsters seeking control of the mar-

137. Case of Kniazev (Moscow Region), No. 4-kp-098-17sp, at 2, 3 (Feb. 24, 1998).

138. For instance, a jury acquittal of murder was reversed in 2004 because defense counsel asked more than 30 questions calling into question the validity of investigative acts, including questioning the signatures on witness statements that were read in court. Case of Os'mukhin (Lipetsk), *Obzor kassatsionnoy praktiki sudebnoy kollegii po ugolovnym delam verkhovnogo suda Rossiyskoy Federatsii za 2004 god*, in BVSFRF, *supra* note 93, No. 8 (2005), http://www.supcourt.ru/vscourt_detale.php?id=2759 [hereinafter SCRF-Criminal Case Review-2004].

139. KARNZOVA, *supra* note 10, at 352, n.19; Nikitinskiy, *supra* note 66.

140. UPK-RF, *supra* note 14, § 241(2)(1).

141. Pomorski, *supra* note 60, at 458-60.

142. BASMANNOE PRAVOSUDIIE, UROKI SAMOOBORONY. POSOBIE DLIA ADVOKATOV 10, 19, 73-74 (2004).

143. In the Sutyagin espionage trial in Moscow City Court before a jury, the contents of the question list or verdict form were even kept secret. See Leonid Zlotin, *Pravosudie na vere*, GAZETA.RU, April 6, 2004, http://www.gazeta.ru/comments/2004/04a_100414.shtml.

144. Aleksey Sokovnin & Sergey Mashkin, *Viacheslav Ivan'kov Opravdal Opaseniia Obvineniia*, KOMMERSANT 3 (July 19, 2005).

ket¹⁴⁵ should have been closed to the public.

One theory is that since the preliminary investigation in criminal cases is itself “secret,” all of the results of the investigation are “state secrets” and may not be disclosed to the public. This theory has been applied to exclude reporters from trials, where there were allegations of the use of torture and coercive methods by police and investigators during interrogations.¹⁴⁶

IV. Humanization of the Judgment: Control of the Questions of Guilt and Punishment

A. Judicial Nullification of the Jury’s Power to Determine Guilt

1. Introduction

The key to judicial co-opting of the guilt question lies in the complicated special verdicts returned by Russian juries and the jurisprudence of the SCRF in interpreting them. To fully comprehend the modern system and its pathologies, it is helpful to consider the pre-1917 Russian jury system, which struggled with whether the jury or the judge should determine guilt.

2. General Structure of the Question Lists

Both before and after the October Revolution, Russian legislators rejected the Anglo-American general verdict, where the jury simply answers “guilty” or “not-guilty,” in favor of the French model, adopted by most Continental European countries in the nineteenth century, which involved a list of questions or propositions for the jury to answer. Those answers, in theory, would form the basis of the judge’s decision. The UPK-RF of 2001, like its 1993 predecessor, requires that three basic questions be asked with respect to each crime charged: (1) has it been proved that the charged offense was committed?; (2) has it been proved that the offense was committed by the defendant?; and (3) is the defendant guilty of having committed the offense? The court may also pose only “one basic question as to the guilt of the defendant representing a consolidation of the three basic questions.”¹⁴⁷

The current jury law follows the same basic structure of questions lists under the Jury Law of 1864:

Questions as to whether the criminal acts were committed, whether they were the acts of the defendant and whether guilt therefor should be imputed to him, are united into one collective question as to the guilt of the defendant, if no doubt has arisen as to whether the criminal acts were committed, nor as to whether guilt therefore should be imputed to the defendant if they were found to be his acts. In the case of any doubt as to any of the questions

145. Vladimir Voronov, *Juries on Trial*, RUSSIAN LIFE, Nov.-Dec. 2004, at 48-54.

146. Georgiy Tselms, *Izbiение podozrevaemogo—tayna sledstviia*, RUSSKIY KUR’ER, Mar. 18, 2004, available through INDEM, *supra* note 59 (Mar 13-19, 2004).

147. UPK-RF, *supra* note 14, § 339; UPK-RSFSR, *supra* note 12, § 449.

they should be posed separately.¹⁴⁸

After the trifurcated or unitary guilt question, both the current law and that of 1864 provide for subsidiary questions relating to facts which modify guilt. "After the principal question of the defendant's guilt particular questions are posed as to those circumstances which aggravate or mitigate the level of guilt, or modify its character or lead to the exoneration of the defendant from responsibility."¹⁴⁹ Finally, the current law removes certain questions from the purview of the jury that involve:

juridical qualification of the status of the defendant (as to his prior convictions, as to the fact he has been declared to be an especially dangerous recidivist, as to the duties of his official position) or also *other questions requiring strict juridical evaluation in the jury's rendering of the verdict*, may not be posed, neither separately, nor as part of other questions.¹⁵⁰

The SCRF has interpreted the language italicized above to eliminate from the question list "the use of such juridical terms as murder, murder with exceptional cruelty, murder with hooliganistic motivation or for personal gain, murder in a state of sudden heat of passion, murder using excessive force in self-defense, rape, robbery, etc."¹⁵¹

3. What Does the Jury's Finding of Guilt Actually Mean?

The jury in English and American cases has been called a "procedural Sphinx,"¹⁵² inasmuch as a laconic "guilty" or "not-guilty" verdict reveals little of the logic or thought-processes which underlie the jury's decision. In Continental European trials "(t)he trial judge is obligated in a written opinion to articulate which items of evidence support each finding and what chains of inference lead from these items to specific factual determinations."¹⁵³ Russian criminal judgments must be reasoned,¹⁵⁴ and the

148. UUS-1864, *supra* note 34, at 168-69 (§ 754).

149. UPK-RF, *supra* note 14, § 339(2); UPK-RSFSR, *supra* note 12, § 449. This language is virtually identical to that of § 755 of the UUS-1864. UUS-1864, *supra* note 34, at 169.

150. UPK-RF, *supra* note 14, § 339(5); UPK-RSFSR, *supra* note 12, § 449(13) (emphasis added).

151. "Postanovlenie Plenuma Verkhovnogo Suda Rossiyskoy Federatsii ot 22 noiabria 2005 g. N. 23 g. Moskva "O primenenii sudami norm Ugolovno-protsessual'nogo kodeksa Rossiyskoy Federatsii, reguliruiushchikh sudoproizvodstvo s uchastiem prisiazhnykh zasedatelei." ROSSIYSKAIA GAZETA, Dec. 2, 2005, at § 29(2), available at <http://www.rg.ru/2005/12/02/sud-dok.html> [hereinafter SCRF, Decision No. 23 (2005)]. This decision repeats nearly verbatim § 18: "Postanovlenie Plenuma Verkhovnogo Suda Rossiyskoy Federatsii: 'O nekotorykh voprosakh primeneniia sudami ugolovno-protsessual'nykh norm, reglamentiruiushchikh proizvodstvo v sude prisiazhnykh.'" SBORNIK POSTANOVLENIY PLENUMOV VERKHOVNYKH SUDOV SSSR I RSFSR (ROSSIYSKOY FEDERATSII) PO UGOLOVNYM DELAM 569-80 (1995) [hereinafter SCRF, Decision No. 9]. The earlier decision, however, included the terms "intentional or negligent murder" in those which could not be included in questions posed to the jury. *See id.*

152. MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 44 (1997). *See also* A.M. BOBRISHCHEV-PUSHKIN, EMPIRICHESKIE ZAKONY DEIATEL'NOSTI RUSSKOGO SUDA PRISIASHNYKH 12 (1896) (claiming the Russian tsarist jury was the same "sphinx" in 1896 as it was in 1864 when the new system was introduced).

153. DAMASKA, *supra* note 152, at 45.

European special jury verdicts were intended to facilitate reasoned judgment. The three-pronged guilt question in Russia allows the sentencing judge to know, in the case of an acquittal, whether the jury found that the *corpus delicti* of the charged offense was simply not proved, whether they had doubts as to the defendant's authorship of the crime, or whether the defendant's action could be excused (such as in duress or insanity), or justified (such as in self-defense).¹⁵⁵

Since the nature of the questions as to *corpus delicti* and authorship are rather straightforward, it is important to focus on the nature of the guilt question, the third and crucial component of the jury's verdict. This analysis addresses the following issues: (i) how is the guilt prong different than the material elements of *corpus delicti* and *authorship*?; (ii) how should questions about mitigating or exculpatory evidence be phrased in relation to the guilt question; (iii) to what extent are aggravating and mitigating circumstances and mental state questions of fact for the jury or of law for the judge?; (iv) did the Russian legislators intend to give the jury the power to nullify the law and vote for guilt, despite the proof of *corpus delicti* and authorship?

4. *Formulation and Resolution of the Guilt Question*

a) One Question or Three?

In the majority of the cases heard in the first year of modern Russian jury trials, the court asked the three basic questions as to each charged offense.¹⁵⁶ Famous pre-revolutionary judge and theorist A.F. Koni supported a move to the simple English verdict form in which the jury votes guilty or not-guilty without submission of a list of specific questions,¹⁵⁷ and it is apparent from the language of § 754 UUS that the old Russian jury law favored uniting the three elements of the guilt question into one in which there was no question as to *corpus delicti* or authorship.¹⁵⁸

In its early jurisprudence, the SCRF, however, indicated a preference for the formulation of all three questions and insisted that if the court formulates just one question it must contain the elements of *corpus delicti*,

154. UPK-RF, *supra* note 14, §§ 305, 307.

155. The problem of acquittals on non-legal or meta-legal grounds, so-called jury nullification, will be discussed *infra* Part IV.B.

156. I analyzed the question lists from 80 cases of murder or attempted murder. In 59 of these cases, all three questions were asked. Thaman, *supra* note 1, n.333.

157. A.F. KONI, *SOBRANIE SOCHINENII*, Vol. 4, 273 (1967). Also supporting the idea of posing one question to the jury were pre-revolution jurists V.K. Sluchevskiy and V.D. Spasovich. See S.A. NASONOV & S.M. YAROSH, *VERDIKT PRISIAZHNYKH ZASEDATELEY* 50 (2003).

158. NEMYTINA, *ROSSIYSKIY SUD PRISIAZHNYKH*, *supra* note 84, at 79, gives an example of the pre-revolution one-question approach: "Is the petty bourgeois Aleksey Andreev Krasnikov guilty, that on the night of March 7, 1905 in the city of Tsaritsyn, while irritated or angered, but with intent, struck the petty bourgeois Semen Belousov with a heavy blunt instrument causing him head injuries and contusions, as a result of which injuries Belousov died in the same night?"

authorship, and guilt.¹⁵⁹ The SCRF reversed two aggravated murder judgments entered by a Rostov judge because he asked one simple question as to guilt after having instructed the jury on the applicable law.¹⁶⁰

Despite its alleged preference for three questions, the SCRF has affirmed cases in which one fact-laden question, formulated in the precise terms of the accusatory pleading, has been asked. For example, the following question was affirmed by SCRF:

"Is the defendant D.N. Obukhov guilty of an attempt on the life of divisional police inspector A.A. Borovoy, committed in the following circumstances: On July 26, 1994, around 7:20 p.m. on the territory of Zernogradskiy Rayon, Rostov Region, D.N. Obukhov, while drunk and driving his TMZ-5402 motorcycle, committed a serious violation of the Vehicle Code (leaving his motorcycle at the entrance to the Horse Factory No. 157, near a dangerous turn with less than 100 meters visibility, therefore threatening traffic safety). When divisional inspector of Zernogradskiy Police A.A. Borovoy, while fulfilling his official duties, tried to remove the motorcycle from the entrance to the highway, he, D.N. Obukhov, knowing that A.A. Borovoy was a policeman, and with intent to kill him, took out a knife, located in the carriage of the motorcycle, and tried to stab A.A. Borovoy in vital organs, however, due to reasons independent of D.N. Obukhov's will, he did not commit murder, but inflicted him a cut on the left hip joint."¹⁶¹

b) Relative Factual Detail of the Questions

The SCRF has ruled that the court, in writing the judgment, may only refer to facts found to be true by the jury¹⁶² and has reversed several cases, including a death sentence, for failing to do so.¹⁶³ The pre-revolutionary Cassational Senate also required questions to include all facts in the lengthy indictments which could be relevant to guilt and punishment.¹⁶⁴

159. See SCRF, Decision No. 9, *supra* note 151, § 17. Mel'nik also prefers the three-question approach because one fact-laden question would be too cumbersome and confusing for the jury. MEL'NIK, *supra* note 5, at 98. The SCRF seems, however, to have retreated from this preference. SCRF, Decision No. 23, *supra* note 151, § 28.

160. Case of Butakov/Zimov (Rostov), No. 41-kp-094-106sp (Nov. 28, 1994); *cf.* Case of Stoianenko/Shishkov (Rostov), No. 41-kp-094-108sp (Nov. 22, 1994).

161. A.P. Shurygin, *Pravoprimeritel'naia praktika rassmotreniia del s uchastiem kollegii prisiazhnykh zasedateley*, in BVS RF, *supra* note 93, No. 2, at 20 (1997). See also A.I. Galkin et al., *Postanovka voprosov, podlezhashchikh razresheniiu kollegiei prisiazhnykh zasedateley*, in SOSTIAZATEL'NOE PRAVOSUDIIE, *supra* note 103, at 184-85; PETRUKHIN, *supra* note 9, at 138 (favoring asking one question, when the circumstances of the case are not difficult, the act is connected with a concrete person, the defense did not raise a significant number of alternatives, other than an assertion of innocence, and where all defendants completely admit their guilt).

162. SCRF Decision No. 9, *supra* note 151, § 24.

163. Case of Brovkin/Minkin (Stavropol'), No.19-kp-094-42sk sp (Nov. 13, 1994); Case of Gokorian/Artunian (Stavropol'), No.19-kp-094-8lsp (Dec. 26, 1994); Case of Sogokon' (Moscow Region), No. 4-kp-094-143sp (Dec. 13, 1994).

164. M. SELITRENNIKOV, O POSTANOVKE VOPROSOV NA SUDE UGOLOVNOM, PO RESHENIIM KASSATSIONNOGO SENATA 14 (1875). This was so "the judgment of the court can be based in an exact and positive sense on the decision of the jury, with no supplementation, expansion or limitation of this decision on the part of the court itself in any respect touching on the factual side of the case." *Id.* Compare this empowerment of the jury to decide all factors which could aggravate the sentence with the recent jurisprudence of

Some judges have held that each factor which must be addressed in the descriptive part of the judgment must be found true in the jury's special verdict.¹⁶⁵ This has led to very complicated questions often phrased precisely in the terms of the indictment, including detail not crucial to the jurors' answering of the three fundamental questions which are their responsibility.¹⁶⁶ These are formulated either in one fact-laden question reproducing the narrative of the accusatory pleading, or in a series of shorter questions which chop the facts into smaller bite-size pieces for the jury. Either way, A.F. Koni accused the courts of trying to bury jurors in a morass of concrete facts in which the essential and the non-essential were indistinguishable.¹⁶⁷ Excessive detail relating to historical facts not directly related to the elements of the offense complicates the jury's decision-making process, for a majority may agree as to some of the facts and not others.¹⁶⁸

The approach of some courts in presenting virtually the entire text of the indictment to the jury for affirmation or rejection could be condemned as leading the jurors to rubberstamp the prosecution's theory. Pre-revolution theorists felt that questions phrased in terms of the Russian indictment, with its excess of detail, often led to acquittals, because the jurors often found collateral details therein had not been proved. This would be avoided with simple English-style indictments.¹⁶⁹ Bobrishchev-Pushkin criticized the "multi-layered and difficult-to-understand questions" which he attributed to the outdated criminal code and the "casuistic jurisprudence of the Cassational Senate."¹⁷⁰ An example of a flawed question presenting a multitude of facts, some of which could be affirmed and others negated, comes from the trial of the accused murderer of Prince Arenberg in St. Petersburg:

the U.S. Supreme Court, which has rebuffed attempts by state and federal legislatures to categorize factual elements of offenses as "sentencing factors" to be decided by the judge by a preponderance of the evidence, instead of by the jury beyond a reasonable doubt. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

165. UPK-RF, *supra* note 14, §§ 220, 307; UPK-RSFSR, *supra* note 12, §§ 314 (¶ 1), 462. UPK-RF § 307 requires: a "description of the criminal act, found proved by the court, indicating the place, time, means of commission, forms of guilt, motives, intent and consequences of the crime;" the evidence upon which the conclusions of the court are based, and the reasons why the court rejected other evidence; "indications of circumstances mitigating and aggravating the punishment," etc. UPK-RF, *supra* note 14. For an opinion that the jury should not determine aggravating or mitigating circumstances relating to the defendant's person, see S.A. Pashin, *Postanovka voprosov pered kollegiei prisiazhnykh zasedateley*, in *SOSTIAZATEL'NOE PRAVOSUDIIE*, *supra* note 103, at 103.

166. §754 did not allow questions as to "circumstances which only influence the imposition of punishment for the same level of crime." UUS-1864, *supra*, note 34, at 168-69.

167. KONI, *supra* note 157, at 273.

168. "... [I]n the entire dense woods of concrete facts, often supplemented by questions posed by the jurors, it is not difficult to get lost." SELITRENNIKOV, *supra* note 164, at 72.

169. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 348-49.

170. *Id.* at 542.

"Is the defendant guilty of the fact, that, having conspired with another to steal property from Prince Arenberg, he went with this other person to his apartment, and, not being able to take all that they wanted, waited for Prince Arenberg to return home, hid in his bedroom, and when Prince Arenberg fell asleep, he was awakened by noise in his room, and according to a preconceived plan under such conditions, tied him and gagged his mouth and threw themselves on him, strangling him, broke the bone in his throat and held his mouth and nose, causing his death, and, departing from the apartment of Prince Arenberg, took part of the property which belonged to him?"¹⁷¹

In a regrettable example of the failure of modern Russian judges to learn from the rich pre-revolutionary discussion of the problem and from the ten years of experience since 1993, the judge in the first modern Moscow City Court jury trial virtually transcribed the accusatory pleading into both the *corpus delicti* and the authorship questions. Not surprisingly, the jury acquitted.¹⁷²

Jurors have at times been asked to determine the exact number, type, and seriousness of the wounds inflicted in homicide cases,¹⁷³ the exact number of items stolen in theft counts, the precise sequence of the defendant's acts, and the presence or absence of statutory aggravating factors, such as whether or not the defendant was drunk.¹⁷⁴ The SCRF has gone so far as to reverse acquittals for aggravated murder because the judge did not phrase the questions verbatim in terms of the accusatory pleading, but adapted the questions to conform to the testimony at trial. In one such case the jury was asked whether the defendant fired one shot at the victim, whereas the accusatory pleading alleged that at least three shots were fired.¹⁷⁵ On the other hand, the SCRF has reversed a number of judgments because the judge, in fashioning the question list, simply reproduced the language of the accusatory pleading. Indeed, the "lack of clarity of questions and cumbersome formulation" made it "difficult for jurors to return a

171. SELITRENNIKOV, *supra* note 165, at 73 (quoting from Decision 454/1870 of the Cassational Senate, and criticizing the question for uniting facts as to two crimes, burglary and murder, and the aggravating circumstance of conspiracy, into one question).

172. Peter Baker, *Russia Tests Juries by Trial and Error*, WASH. POST, Sept. 2, 2003, at A1. The ridiculously fact-laden, run-on second question on authorship ran for 61 lines and contained 946 words in only three sentences. Case of Bortnikov (Moscow City), Question List (Aug. 13, 2003) (On file with the author).

173. Karnozova has noted that Russian judges are more inclined to ask jurors questions phrased in forensic-medical terms regarding the wounds which caused death than about the mental state of the defendant, which is actually relevant to guilt. KARNOZOVA, *supra* note 10, at 212.

174. See KARNOZOVA, *supra* note 10, at 172, 198. Drunkenness was an aggravating factor per § 39(10) of the now superseded Ugolovnyy kodeks RSFSR [hereinafter UK-RSFSR]. This factor has been eliminated from the UK-RF enacted in 1995. UK-RF, *supra* note 54.

175. Case of Shveydel', *Obzor kassatsionnoy praktiki Sudebnoy kollegii po ugolovnym delam Verkhovnogo suda Rossiyskoy Federatsii za 2002 god*, in BVSFR, *supra* note 93, No. 8 (2003) [hereinafter SCRF-Criminal Case Review (2002)]. Petrukhin observes that excessively fact-laden questions might lead a jury to refuse to answer a question because they "believe, that not three, but two blows were administered and not in the rib cage but in the chest, and not by a Finnish, but a table knife, etc." PETRUKHIN, *supra* note 9, at 137.

verdict.”¹⁷⁶

Questions uniting the facts of multiple charged crimes have also compelled judges to reverse acquittals. For example, in a trial of a man for murder and attempted murder, the Presidium reasoned:

“Uniting in one question circumstances relating to two acts, murder of Puzyrev and attempted murder of Gvozdkov, and the cumbersome and difficult formulation of the question using a large quantity of medical terms not understandable to the jury could influence the jurors in reaching a correct decision and did not exclude the receiving of an . . . unclear answer.”¹⁷⁷

As to the propriety of asking a multitude of shorter questions, Selitrennikov cautioned against chopping up questions into myriad chunks, for it allowed the jury to find “guilt” as to an act which did not constitute a criminal offense.¹⁷⁸ Foynitskiy felt that the courts deliberately engaged in this “chopping up of questions” in order to reserve the final determination of guilt for themselves.¹⁷⁹ In the modern era, the number of questions has sometimes been staggering. In one murder case, 19 questions were asked relating to one murder count in which the aggravating factor, the defendant’s recidivist status, was not even before the jury. In three other 1994 cases, the court asked 41, 52, and 87 questions respectively.¹⁸⁰ The question list in a case heard in Krasnodar in 1998 contained nearly 1100 questions.¹⁸¹ The SCRF has reversed several aggravated murder acquittals, claiming that splitting up questions as to the various acts of the defendants confused the jury.¹⁸²

The acquittal of two defendants for robbery-murder was reversed because the trial judge did not include factual aspects of a robbery-murder in the *corpus delicti* question, choosing instead to put them into the second question relating to authorship.¹⁸³ Foynitskiy stressed that questions

176. Case of Mukhanin/Saraliev (Stavropol’), in SCRF-Jury Review (2001), *supra* note 89.

177. Case of Pavlov, No. 919p01pr, *Obzor sudebnoy praktiki Verkhovnogo Suda Rossiyskoy Federatsii za IV Kvartal 2001 goda po ugovnym delam*, in BVSFR, *supra* note 93, No. 2 (2002), <http://www.supcourt.ru/bulletin/02/02-08/b111.htm> [hereinafter SCRF-Judicial Practice Review (4th Quarter-2001)]. Pashin suggests asking more than one question when two aspects of a narrative question could produce contradictory answers. Pashin, *supra* note 103, at 95.

178. SELITRENNIKOV, *supra* note 164, at 71-72.

179. I.YA. FOYNITSKIY, *KURS UGOLOVNOGO SUDOPROIZVODSTVA - 1910*, Vol. 1, 364 (1996). V.D. Spasovich also shared this opinion. NASONOV & YAROSH, *supra* note 157, at 50.

180. Thaman, *supra* note 1, 116-17; cf. Case of Raykin (Saratov), No. 32 kp-096-5 sk sp. (Sep. 20, 1996) (99 questions); Case of Almamedov et al. (Rostov), No. 41 kp-097-22 sp. (Mar. 20, 1997) (99 questions); Case of Perfil’ev (Ul’ianovsk), No.80 kp-097-19 sp (Apr. 10, 1997) (60 questions).

181. KARNOZOVA, *supra* note 10, at 297.

182. Case of Kushchenko/Kushchenko (Stavropol’), No.19-kp 002-9 sp, SCRF-Jury Review (2002), *supra* note 92.

183. “Among other things, the formulation of the first question – ‘Has it been proved that on May 11, 1997 in the forest strip Fevralev died of a knife wound and his automobile was stolen’ – does not contain all substantive circumstances of the act for which the convicted persons were charged. . . .” Thus, in this question it was not mentioned that Fevralev was taken by force, while being threatened with a knife to his throat, to the

should be restricted to facts relating to the legal elements of the charged offenses and should be phrased in understandable language rather than technical jargon.¹⁸⁴ This has also been suggested by modern Russian scholars¹⁸⁵ and was followed by a minority of courts in the first year of the new Russian jury system.¹⁸⁶

5. *Formulation of Questions as to Excuse, Justification, and Mitigating Circumstances*

The formulation of questions related to affirmative defenses or lesser-included offenses raised problems in the first trials under the 1993 law. The Moscow and Ivanovo courts treated lesser homicides committed in the heat of passion, or using excessive force in self-defense,¹⁸⁷ as full-blown crimes with constituent elements that had to be proved to the jury just like the charged capital crimes. Question lists first addressed the basic three questions relevant to an intentional homicide, and then asked questions relating to the elements of lesser homicide offenses, or justifiable homicide in self-defense. Questions relating to defenses were formulated requiring positive proof that the victim committed an act upon which self-defense or heat of passion could be predicated. For example, has it been proved that the victim attacked the defendant?¹⁸⁸ In the first Saratov cases, questions related to affirmative defenses were framed in the following manner: "Is it *probable* that the acts of Artur Martynov were carried out in self-defense?" In later cases, this form was also used in relation to defenses of alibi, accident, and heat of passion. If the jury answered in the affirmative, then the judge, following the verdict, qualified the crime as a lesser offense or, in the event of justifiable self-defense, an acquittal.¹⁸⁹

Phrasing the question in terms of probability was initially considered to be more in conformity with the presumption of innocence and the prosecution's burden of proof,¹⁹⁰ but Saratov judges discontinued using this form in favor of the following phraseology: "Has it been established that [Gavrilenko] committed the violent act described in Question 5 because [Chernov] had earlier beaten him?"¹⁹¹ The SCRF has ruled that questions

forest strip where he was killed, where he was administered four slash and puncture wounds to the chest and stomach, and that, after he died from the knife wounds to the throat, his body was taken deep into the strip and hidden, and that his car was stolen." Case of Daudov/Vatsaev (Rostov), No. 41-kp-098-38sp (Apr. 14, 1998).

184. FOYNITSKIY, *supra* note 179, at 453-54.

185. I.B. Mikhaylovskaya, in L.B. ALEKSEVA ET AL., *SUD PRISIAZHNYKH: POSOBIE DLIA SUDEI* 96-97 (1994); KARNOZOVA, *supra* note 10, at 192, 212.

186. See Thaman, *supra* note 1, at 115-20.

187. UK-RSFSR, *supra* note 182, §§ 104, 105 (now codified in UK-RF §§ 107, 109, *supra* note 54).

188. Thaman, *supra* note 1, at 119.

189. Case of Martynov (Saratov) Judgment (Dec. 17, 1993); *id.* at 119.

190. S.A. Pashin, in *SUD PRISIAZHNYKH: NAUCHNO-PRAKTICHESKIY SBORNIK* 282 (1994).

191. Case of Gavrilenko (Saratov) Judgment (Mar. 14 1994); Thaman, *supra* note 1, at 119.

should not be formulated in terms of probability¹⁹², in much the same way that the Cassational Senate had done before the revolution.¹⁹³

Both modern and pre-revolution statutes have sown confusion because they appear to require the question of "guilt" to be answered before the jury evaluates lesser-included offenses or affirmative defenses such as excuse or justification. When the jury is asked to find a defendant guilty or not guilty of a violation of a certain section of the criminal code, as in the United States, then no ambiguity is possible. Problems arise, however, if the jury is asked to determine whether a certain set of facts charged in the indictment, or adduced in court, has been proved, and whether the defendant is guilty thereof. In these instances, the fact situation may fail to encompass all the elements of the charged offense, or to negate possible affirmative defenses. If the facts are insufficient in either of these respects, no criminal guilt may ensue.¹⁹⁴

Such confusion arose in several Moscow trials, where the jury first had to determine that the defendant did not intentionally kill the victim in order to even get to the defense questions. In one case, the jury found that the defendant was guilty of intentionally killing the victim by a simple majority, but found unanimously that the killing followed a quarrel. The finding that the intentional killing occurred after a quarrel moved the case into the realm of statutory aggravation and foreclosed the jury from answering any of the eleven questions pertaining to affirmative defenses or non-intentional homicide. This was the case even though the testimony was uncontradicted that the victim had started a fight with the defendant and then lunged at him before the defendant stabbed him. Despite the clear inconsistency of the verdict, the SCRF affirmed the conviction.¹⁹⁵ In another case, the SCRF upheld an attempted murder conviction in a case in which the judge's instructions precluded the jury from reaching the self-defense issue if they found intent.¹⁹⁶ The pre-revolutionary Cassational Senate ruled that posing self-defense questions in such a manner was reversible error.¹⁹⁷ Judges in the first modern Saratov cases usually formu-

192. SCRF, Decision No. 23 (2005), *supra* note 1521, § 29 (repeating language of SCRF, Dec. No. 9 (1995), *supra* note 1521).

193. SELITRENNIKOV, *supra* note 164, at 130-31.

194. Because jurors were not asked outright about guilt, the judge had to make sure that the question of guilt contained all the legal elements of the crime, so an affirmative answer from the jury would buttress a judgment of guilt as to the charged crime. V.N. PALAUSOV, *POSTANOVKA VOPROSOV PRISIAZHNYM ZASEDATELIAM PO RUSSKOMU PRAVU* 84, 87 (1885).

195. Case of Bogatyrev (Moscow Region) Judgment (Jan. 25 1994), *affirmed by* No. 4-kp-094-61sp (Apr. 26 1994). See Thaman, *supra* note 1, at 118, 175-76.

196. Case of Sokolov (Rostov) Judgment (Aug. 19, 1994), *affirmed by* No. 41-kp-094-124sp (Dec. 26, 1994). See S.C. Thaman, *The Jury as Catalyst for the Reform of Criminal Evidentiary Procedure in Continental Europe: The Cases of Russia and Spain*, in *PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE* 393, 397-98 (J.F. Nijboer & J.M. Reijntjes eds., 1997).

197. See SELITRENNIKOV, *supra* note 164, at 264-65, for a pre-revolution example of proper question phrasing that reveals that it was the defense's burden to prove self-defense: (1) "Was the death of the forest warden of the Yerevan transit post Avdey Luk'ianov, caused by gunshot wound in the night of the 22nd to the 23rd of August,

lated the question of guilt in relation to the homicidal act without precluding the questions relating to mental state and affirmative defenses. If the jury found the defendant guilty of the homicidal act, then, depending on the answers to the questions related to affirmative defenses, the judge would find the defendant guilty either of murder as charged, or lesser charges of murder in the heat of passion or using excessive force in self-defense.¹⁹⁸

Problems arose, however, in a case in which the jury wanted to acquit the defendant of murder on grounds that he acted in self-defense. The jury found the defendant "guilty" of stabbing the victim to death, but in subsequent questions found that the victim had previously acted "incorrectly," and that the defendant's acts were justified. When confronted with this contradictory "guilty" verdict, the judge reformulated the question list, with the defense questions preceding and precluding the question of guilt if answered in the affirmative. After reformulation of the questions, the jury unanimously acquitted the defendant. The SCRF reversed the acquittal, holding that it was error to phrase the self-defense questions in relation to the conduct of the victim, and that the questions of self-defense and excessive force are legal questions for the judge and not the jury.¹⁹⁹

From the *Yefremov* Case it appears that juries should only determine facts—and the judge should determine guilt—by accepting or rejecting affirmative defenses. The Case of *Kuz'kin* (Moscow Region) was reversed by the SCRF for similar reasons.²⁰⁰ After the reversal in *Kuz'kin*, judges in

1869 by Moses Vartanov, 36 years-old? (2) If it was, then has it been proved that the death of Luk'ianov was caused by the defendant Vartanov as a result of necessary self-defense to ward off a danger which threatened his life, in which there was no chance to turn to the local police for defense? (3) If not proved, is Vartanov guilty of the crime, described in the first question, committed by him, though without a preconceived intent, while irritated, but not accidentally, and knowing that he threatened the life of another?"

198. Pashin, *supra* note 103, at 99. Pashin believes defense-theory questions should be posed before the guilt question. Otherwise, the jury might leave the self-defense question unanswered. He also thinks that the jury, and not the judge, should decide the issue of imperfect self-defense, by answering a question such as the following: "Were the means used by Sofronov to defend himself from the attack clearly disproportionate with the character of the danger of the attack?"

199. Case of *Yefremov* (Saratov) Judgment (May 20, 1994) reversed by, No. 32-kp-094-30sp (July 28, 1994). Thaman, *supra* note 1, at 119-120.

200. The jury found "K" guilty of homicide in the "heat of passion," i.e., voluntary manslaughter, but the SCRF reversed, claiming the jury could not decide "legal questions" such as heat of passion. Upon retrial, the trial judge asked the jury only whether D intentionally killed the victim but asked no direct question on heat of passion. The "factual" question, question number three, was phrased in the following manner: "Was it proved that before K inflicted the indicated wounds on O, O called K a 'goat' and 'fag,' which were serious insults for K?" In the instructions the judge explained the law on "heat of passion" but intentionally crafted question three to indicate a state of facts insufficient in law to constitute heat of passion. The bewildered jury, which wanted to find voluntary manslaughter, found "guilt" of an intentional killing which the judge then qualified as murder and not manslaughter. According to Karnozova, the judge "actually used the position of the defense 'for its own goals' as a 'trampoline to an affirmative answer to the question of guilt of intentional murder,'" thereby "coercing the jury" to return an affirmative answer as to the guilt of K. KARNOZOVA, *supra* note 10, at 186.

the Moscow Region began refusing to pose questions related to lesser-included offenses or heat of passion for fear of reversal.²⁰¹ In other cases, however, the SCRF has reversed acquittals (often for aggravated murder) because the trial judge failed either to instruct the jury *sua sponte* or to include a question related to a possible lesser-included offense which was alleged by the defense,²⁰² or because the trial judge refused lesser-included instructions requested by the public prosecutor.²⁰³ Such flip-flopping, which has sowed confusion among judges, seems driven more by the desire to overturn acquittals than by doctrinal concerns.²⁰⁴

Another strategy used in some cases is for the judge to draft two alternative questions, one tracking the indictment, and the other tracking the theory of the defense. Pashin has opined that alternative questions should only be used if the positions of the prosecution are clear and diametrically opposed.²⁰⁵ He finds that using the alternate method is less effective and confuses jurors if there are a number of possible resolutions to the case, ranging, for instance, from aggravated murder down to use of excessive force in self-defense.²⁰⁶ The SCRF found such confusion in reversing an acquittal for aggravated murder where alternate questions were proposed, stating that the trial was of the defendant rather than the victim.²⁰⁷

201. For examples of such cases, see *id.* at 196, 206-210.

202. A. Shurygin, *supra* note 135, at 6. Case of Karakaev (Krasnodar), No.18 kp-096-87 sp (Nov. 13, 1996). Case of Troitskiy (Ivanovo), No. 7 kp 002-26 sp (in which jury acquitted, finding no intent to kill and SCRF claimed an instruction on reckless homicide should have been given); SCRF-Jury Review (2002), *supra* note 92; Case of Kondrashin (Riazan'), in BVSFRF, *supra* note 93, No. 9, at 9 (1998), translated in WILLIAM BURNHAM ET AL., *THE RUSSIAN LEGAL SYSTEM* 537 (3rd ed. 2004). According to Karnozova, since the SCRF could not reverse an acquittal due to denial of defendant's rights, it found the verdict "contradictory," because the jury found the *corpus delicti* of negligent or reckless homicide, yet voted "not guilty." KARNOZOVA, *supra* note 10, at 218-21. This case illustrates the principle that, in serious cases, there must be some kind of guilty verdict. *Id.*

203. Two such cases are Case of Tikunov (Rostov), No. 40-kp-096-26sp (Apr. 10, 1996) and Case of Baykov (Moscow Region), No. 4-kp-097-25sp (Feb. 6, 1997). For a discussion of another similar Moscow Region decision and how such decisions conflict with other SCRF decisions, see KARNOZOVA, *supra* note 10, at 218-19.

204. For a discussion of the zig-zags of the SCRF jurisprudence, see NASONOV & YAROSH, *supra* note 157, at 53-54.

205. S.A. Pashin, *supra* note 103, at 97. Cf. PETRUKHIN, *supra* note 9, at 138 (suggesting alternative questions when the defense has staked out a different position with respect to *mens rea*).

206. S.A. Pashin, *supra* note 103, at 117-18 (distinguishing "algorithmic" question lists, which proceed logically, from more serious propositions to lesser-included offenses, and "gradational" lists, which pose two or more different alternatives to the fact situations).

207. In the Case of Kuznetsov (Moscow Region), No. 4 kp 002-124 sp, discussed in SCRF-Jury Review (2002), *supra* note 92, the following two questions were proposed: (1) "Has it been proved, that on January 12, 2002, around 8:00 p.m., after drinking alcoholic beverages together in the apartment at the address: 6 Sadovaia Street, Apartment 15, Village of Pervomayskiy, City of Korolev, Moscow Region, the aggrieved party Pogorelov was administered many blows in the area of the face, neck, neck by a sharp piece of glass from a bottle, and no less than 6 blows by a sharp object not identified by the investigator in the region of the ribcage and lower back after which the aggrieved party Pogorelov, trying to save himself, ran into the street, but he was chased and pulled

6. *Mental State and Aggravating Circumstances: Questions of Law or Fact?*

a) The Dispute as to Separation of Questions of Law and Fact

The SCRF's interpretation of "other questions requiring strict juridical evaluation in the jury's rendering of the verdict"²⁰⁸ has signaled a return to the early French theory of the separation of powers between the jury and the judge, according to which the jurors:

"provide answers not as to guilt of the defendant of the charged crimes, but as to separate factual elements, articulated by the presiding judge in his questions, from which not they, but the presiding judge reaches a conclusion as to the presence or absence of criminal guilt in the defendant's act."²⁰⁹

According to the most prominent Russian jurists, the early theory that the jury only answers questions of fact and the judge then applies the law was decisively rejected in the 1864 Russian Code and the 1871 German Code of Criminal Procedure:

A different theory, that of *guilt and punishment* was proposed to, and finally did take its place, according to which jurors decide the question of guilt in its full magnitude, from both the factual and legal perspective, and the judges apply the established punishment to the guilty person and decide those procedural questions which arise in the case.²¹⁰

According to the prevailing pre-revolution view, the jurors' decision on the question of guilt must encompass an application of the law to the facts that were found to be true. The jury determined guilt and the professional judges, as in the United States, decided on the appropriate punishment. In the words of Selitrennikov:

"Statutory terms usually contain general legal norms, general elements of the crime, as to which concrete facts must be related, and asking jurors to decide such elements, we ask them to make a juridical evaluation of facts,

back into the apartment and administered one blow with a hammer in the head, as a result of which acts bodily injury was inflicted on Pogorelov from which his death ensued?" (Answer: Yes, Proved); (2) "If an affirmative answer was given as to the first question, then has it been proved that the acts listed in it were committed by Kusnetsov under the following circumstances: Pogorelov grabbed a piece of a bottle and lunged at Kuznetsov with it. Kuznetsov kicked the piece of bottle from the hand of the aggrieved party with his leg, threw him to the ground and administered him many blows in different parts of the body of the aggrieved party, the aggrieved party hit Kuznetsov with his hands in the chest, Kuznetsov broke the bottle, took a piece and administered no less than 6 blows to the aggrieved party." (Answer: Yes, Proved. Unanimously).

208. UPK-RF, *supra* note 14, § 339(5); UPK-RSFSR, *supra* note 12, § 449; see text accompanying note 152.

209. FOYNITSKIY, *supra* note 179, at 450. Cf. BURNHAM ET AL., *supra* note 202, at 538-39. NASONOV & YAROSH, *supra* note 157, at 19, 40, note that the French deviated from *Montesquieu's* concept and actually insisted that the jury determine guilt of the charged crime. They therefore see the Russian model, which allows the judge to "qualify" the verdict of the jury and actually determine which crime the defendant is guilty of, to be a third type of verdict, compared to the Anglo-American general verdict and the French-German special verdict with explicit guilt-finding.

210. *Id.*

the decision of a question of law.”²¹¹

Although the pre-revolution Cassational Senate was bound by the language of the UUS-1864 that required the jury to determine guilt, it interpreted §760 UUS-1864, which required questions be formulated in language understandable to the jury,²¹² as prohibiting judges from using much of the statutory language of the Criminal Code. Among the words and phrases that could not be used in jury questions were: “attempt,” “theft,” “intent,” “personal gain,” “robbery,” “false denunciation,” “rape,” “embezzlement,” “aiding and abetting,” “complicity,” “incitement,” and “main perpetrator.”²¹³ The replacement of such “juridical terms” with sometimes more abstruse terms was ridiculed by critics.²¹⁴ The intent of the legislator was not, however, to restrict the jurors to answering questions of naked fact. To the contrary, it was to popularize the abstruse juridical language describing the elements of the offense rather than to replace it.²¹⁵ According to the prevailing view of Russian scholars, the approach of the Cassational Senate was not based in any solid source of statutory authority²¹⁶ and served to create a “strained, even sometimes hostile relationship between jurors and judges, inasmuch as the attempt at all costs to separate questions of fact and questions of law cannot have another result than the invasion of the crown element into the region reserved to the jury.”²¹⁷

While the SCRF insists that the jury must determine guilt,²¹⁸ it has interpreted the prohibition against the jury determining “other questions requiring juridical evaluation” as applying to some basic questions relating to guilt, thus effectively removing the guilt determination from the jury and

211. SELITRENNIKOV, *supra* note 164, at 22. See also FOYNITSKIY, *supra* note 179, at 451; BOBRISHCHEV-PUSHKIN, *supra* note 152, at 583; PALAUSOV, *supra* note 194, at 52-59 (providing a detailed analysis of how the French moved from restricting jurors to naked factual questions to entrusting them with the guilt decision, thereby leaving only the question of sentence to the professional bench).

212. § 760 of the UUS-1864 reads: “In cases decided with the participation of jurors, the questions posed them shall be formulated in commonly used expressions as to the substantive elements of the crimes and the guilt of the defendant, and not in the terms used in the statute.” UUS-1864, *supra* note 34, at 169.

213. See SELITRENNIKOV, *supra* note 164, at 12, 53.

214. *Id.* Selitrennikov points out how the Cassational Senate in its decisions allowed the technical word “*rastratil*” (embezzle) to be replaced with “*izrashkodoval*” (expend) or “used for his needs.” It was also held permissible to replace the phrase “openly purloined” with “*otnial*” (took away). “*Krazha*” (theft) could be replaced with “*taynoe pokhishchenie*” (secret taking) and “*shayka*” (gang) replaced with “according to a preconceived plan with other persons engaging together in theft.” “*s umyslom*” (with intent) could be replaced by “*zhelaia etogo*” (wanting to do it), and “*zavedomo*” (knowingly) could be replaced with “knowing the results of his acts, understanding what he is doing.” *Id.* at 53. Another odd example was replacing The word “rape” with “deprived of innocence.” Marina Nemytina, *Sud prisiazhnykh: rossiyskaia traditsiia ili zapadnaia model*, VESTNIK SARATOVSKOY GORUDARSTVENNOY AKADEMII PRAVA, No. 3, 26 (1996).

215. PALAUSOV, *supra* note 194, at 79.

216. SELITRENNIKOV, *supra* note 164, at 18.

217. FOYNITSKIY, *supra* note 179, at 451.

218. It reversed the first jury death penalty verdict due to the court’s failure to include the guilt question. Case of Panchishkin/Filippov (Rostov), No. 41-kp-094-3-sk sp (July 12, 1994).

arguably violating Articles 20 and 47 of the Russian Constitution.²¹⁹ The SCRF's decision also contradicts the law requiring the presiding judge in summation to, *inter alia*, "read the content of the accusatory pleading [and] explain the content of the criminal statute [that] provides for responsibility for the commission of the crime of which defendant is charged."²²⁰ Pre-revolution law provided for a similarly detailed explanation of the law to the jurors.²²¹ If the jury is not responsible for applying the law to the facts then the provisions are senseless, as was pointed out by legal scholars critical of the practice of the Cassational Senate before the revolution.²²²

The confusion caused by the SCRF's interpretation becomes clear when one compares the three basic questions answered by the jury under the old code as per § 449 UPK RSFSR and the questions answered by a single judge, or a court with lay assessors, under the old system. In reaching its judgment, the non-jury court must determine, in order, the following: whether the charged criminal act was committed; whether it contains the elements of a particular crime; whether the defendant committed the act; and whether the defendant is guilty of committing the crime.²²³

In fact, the trial judge must sometimes review the dossier before trial to determine whether the charged act contains the elements of a crime before trial may even be set.²²⁴ There is a good argument, therefore, that the division of labor in jury cases is intended to allocate the guilt question to the jury and the rest of the questions, i.e., whether defendant should be sentenced, the magnitude of the sentence, resolution of the civil suit, etc.,²²⁵ to the professional judge. Palausov makes this argument in relation to the pre-revolution law,²²⁶ claiming that the meaning of "guilt" cannot be different if decided by jurors than if decided by a court without jury. It is

219. Article 20 of the Const. RF, grants criminal defendants the right to trial by jury when threatened with capital punishment; Article 47 grants criminal defendants the right to trial by jury to the extent provided by law.

220. UPK-RF, *supra* note 14, § 340(3); UPK-RSFSR, *supra* note 12, § 451.

221. UUS-1864, *supra* note 34, at 174 (§ 801) ("In cases heard with a jury, the presiding judge, at the time of handing the foreperson the question list, explains to them: (1) the substantive circumstances of the case and the laws relating to determining the character of the felony or misdemeanor before the court, and (2) the general juridical basis for judgment of the strength of the evidence introduced in favor of and against the defendant.").

222. FOYNITSKIY, *supra* note 179, at 451-52; SELITRENNIKOV, *supra* note 164, at 29-30 ("Why, after all, all this long part of the speech about laws, about their true meaning, when the discussion of the facts from the point of view of the law is forbidden fruit for the jurors?").

223. UPK-RF, *supra* note 14, § 299(1)(1-4); UPK-RSFSR, *supra* note 12, § 303 (¶¶ 1-5). BURNHAM ET AL., *supra* note 202, at 539 (noting that § 339(1) and (3) of the UPK-RF and § 449(1)-(3) of the UPK-RSFSR require the jury to find the defendant "guilty of the commission of the act" and not the "commission of the crime" as in § 299(1) of the UPK-RF and § 303(1)-(4) of the UPK-RSFSR).

224. § 220(1), (3), and (4) of the UPK-RF require the accusatory pleading to contain the circumstances surrounding the commission of the charged acts and their juridical qualification; the committal order for trial must also point to the charged offense. UPK-RF, *supra* note 14, § 231(3); cf. UPK-RSFSR, *supra* note 12, §§ 433, 5(2), 221-22.

225. UPK-RSFSR, *supra* note 12, § 303(5)-(10).

226. PALAUSOV, *supra* note 194, at 95-97.

incumbent upon the trial judge to formulate the three basic questions so that they contain all of the required elements of the charged crime(s).²²⁷ It is also the judge's duty to ensure that the jury knows, either from the summation or from the text of the questions themselves, that by answering the questions as posed in the affirmative they are convicting the defendant of the charged crimes or lesser included offenses.²²⁸ The judge would only be called upon to "qualify" the verdict if the jury crosses out or changes the text of the basic questions, or refuses to find aggravating circumstances.²²⁹

As it turns out, the SCRF has reversed both convictions and acquittals on the grounds that the jurors were asked "questions of law," which are reserved for the judge. In one case, it was considered error that jurors were asked to determine whether the defendant "raped" the victim.²³⁰ In a similar case, the SCRF held that it was the province of the judge to determine whether the victim had been "robbed"²³¹ by the defendant. Many commentators have criticized the SCRF for assuming that jurors cannot understand terms used in the codified definitions of criminal offenses.²³² If the jury is to perform its function, it must be able to answer questions that correspond to the proof or disproof of the elements of the crime, either the *actus reus* or the *mens rea*.²³³

Finally, the recent jury trials of scientists accused of espionage appear to be a throwback to the practice of English judges in the late seventeenth and eighteenth centuries, who tried to confine the purview of the jury to the issue of "publication" in seditious libel cases, while co-opting the deter-

227. FOYNITSKIY, *supra* note 179, at 459.

228. The facts established by the jury are not just "facts of real life" but "juridical questions" corresponding to the "ideal model" of the crime. KARNOZOVA, *supra* note 10, at 251.

229. SELITRENNIKOV, *supra* note 164, at 20. In a recent case, when the jury amended the questions to eliminate some of the charged acts, the SCRF reversed the ensuing acquittal, claiming the jury, in changing the place of the commission of the crime, "went beyond the limits of the trial" and that their act was tantamount to amending the accusatory pleading. Case of Poliakov (Saratov), No. 32 kp-099-6sp (Feb. 16, 1999).

230. Case of Garibian/Rubenian (Stavropol'), No. 19-kp-095-94 sp. (Oct. 5, 1995) (conviction for rape and murder reversed for using terms "rape" and "murder").

231. An acquittal of robbery-murder was reversed in Case of Boytsov et al., because the jury was asked to determine whether defendants "intended to steal" and had intent to kill or were reckless as to whether death would ensue. SCRF-Jury Review, *supra* note 90.

232. Moscow Region judge Natal'ia Grigor'eva, who presided over many of the first jury trials in that court, felt that the word "murder" was understandable to jurors and that it was nonsensical to replace the technical word for "intentionally" (*umyshlenno*) with another word that means the same thing (*namerenno*). N.V. Grigor'eva, *Naputstvennoe slovo predsedatel'stviushchego sud'i*, in SOSTIAZATEL'NOE PRAVOSUDIIE, *supra* note 103, at 166-67. In the first modern trials, before the confusing SCRF jurisprudence, judges used the terms in the code and clarified them with instructions, and there was no indication that jurors did not understand their meaning. NEMYTINA, ROSSIYSKIY SUD PRISIAZHNYKH, *supra* note 84, at 82-84 (dealing with the concept of "heat of passion."); KARNOZOVA, *supra* note 10, at 175-76.

233. MEL'NIK, *supra* note 5, at 97; KARNOZOVA, *supra*, note 10, at 192, 260 (noting that answering questions of intent should be the main issue for the jury. "[F]or in this area one needs life experience, common sense, understanding of life, ability to understand a person as an equal.").

mination of the seditious nature of the writings or speeches.²³⁴ In the trial of Igor' Sutiagin in Moscow City Court in April 2004, the court only asked the jury whether the defendant passed certain material to representatives of a British firm and included no question about whether the material was classified.²³⁵

7. *Treatment of Aggravating Circumstances in Modern Russian Jurisprudence*

The SCRF's dogma limiting the competence of the jury is critically important when it comes to the aggravating circumstances that formerly converted an intentional killing into a capital murder²³⁶ and which presently trigger a sentence of life imprisonment.²³⁷ This can be illustrated by examining the SCRF's treatment of two aggravating circumstances common in modern Russian capital murder cases: "hooliganistic motivation" and "exceptional cruelty."²³⁸

In the first year of jury trials, the majority of judges formulated the questions relating to these aggravating circumstances to allow the jury either directly or indirectly to decide whether the conduct of the defendant fell within the statutory definition. In some cases the jury was first asked whether it had been proved that the defendant committed the charged homicides, listing the precise acts perpetrated and injuries inflicted, and then whether the murder was committed out of "hooliganistic motivation" or with "exceptional cruelty." The definitions of these crimes, usually drawn from opinions of the SCRF or UPK commentaries, were then read to the jury during the judge's summation.²³⁹ Other judges, by formulating the questions in cases of "hooliganistic motivation" in relation to the motive or lack thereof, allowed the jury indirectly to determine the aggravating circumstances. One such question was formulated as follows: "Has it been proved, that Kashuba committed the above-described acts (including shooting the victim to death) in the absence of any provocation from Vorozhbet or his friends?"²⁴⁰ Another was formulated thus: "Has it been proved that Brazhin killed the victims using the insignificant reason of their just demands that he leave their apartment (after he had broken in in order to drink vodka)?"²⁴¹

234. GREEN, *supra* note 22, at 318-55.

235. Sergey Ivashko, *Sutiagin priznan shpionom*, GAZETA.RU, Apr. 5, 2004, available at http://www.gazeta.ru/print/2004/04/05/oa_116909.shtml.

236. See THAMAN, *supra* note 13, at 215.

237. UK-RF, *supra* note 54, § 105(2).

238. UK-RSFSR, *supra* note 182, § 102(b), (g) (currently UK RF § 105(2)(d), (i)).

239. According to an opinion of the Plenum of the USSR Supreme Court of September 22, 1989, murder out of hooliganistic motivation is accompanied by a "clear lack of respect for society, a gross violation of the rules of collective living and morality." They are killings out of mischief, foolhardiness, daring, or in response to insignificant affronts. Thaman, *supra* note 1, at 104.

240. Case of Kashuba/Bykov (Saratov) Judgment (July 8, 1994).

241. Case of Brazhin (Saratov) Judgment (Aug. 3, 1994); cf. Case of Trofimov et al. (Ivanovo), No. 7 kp-098-23sp, 3-4 (Oct. 10, 1998) (holding that questions of hooliganis-

In cases of alleged exceptional cruelty, questions were asked in relation to whether the defendant, in inflicting the bodily injuries that led to the victim's death, harbored the intent to "inflict exceptional pain and suffering" on the victim. Other judges formulated factual questions to the jury relating to the precise manner in which a murder was committed, and arrogated to themselves the determination of whether hooliganistic motivation or exceptional cruelty existed.²⁴²

The SCRF reversed a conviction for non-aggravated murder and sent the case back for retrial on a charge of aggravated murder with exceptional cruelty because the jury negatively answered the question as to whether the defendant "knew and desired to inflict pain and special suffering" upon the victim when he stabbed him 101 times.²⁴³ The SCRF continues to reverse convictions for non-aggravated murder when the jury, specifically asked to determine whether a murder was committed with "exceptional cruelty" or "hooliganistic motivation," responded in the negative.

8. *Treatment of Mens Rea in Russian Question Lists*

An immutable tenet of the criminal law, accepted in all common and civil law jurisdictions, is that *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).²⁴⁴ Thus, the definition of any criminal offense must include the prohibited acts or omissions (*actus reus*), and the mental state that makes the acts criminal (*mens rea*). The Model Penal Code has tried to harmonize the sometimes archaic and confused descriptions of mental state in the common law and settled on four classic types of *mens rea* making an act criminal: purposefully (with intent); knowingly (knowing the nature of one's acts or the existence of attendant circumstances); recklessly (awareness of a substantial risk); and negligently (action generating a substantial risk of which one should have been, but was not, aware).²⁴⁵

Under the 1864 law, juries were explicitly instructed to determine the defendant's mental state as part of the guilt decision. § 811 UUS, which guided judges in instructing juries, provided:

The decision as to each question should consist in an affirmative "yes" or a negative "no," coupled with that word, which contains the substance of the answer. Thus, as to the questions: "Was the crime committed? Is the defen-

tic motivation including the term "violated social order" (*narushili obshchestvennyy poriadok*) were legal questions for the judge).

242. For instance, "Is Bortsov guilty, that on May 23, 1993 at about midnight near the cultural palace 'Peace' in the city of Saratov, following Zakopaylo's refusal to engage in sexual intercourse with him, he dealt her a multitude of blows with his hands and feet and with an empty bottle on different parts of her body, crushed the organs in her neck, hit her with a wooden object in the area of her eyes, with the intent to kill her, causing the bodily injuries described in Question 1, which led to the death of Zakopaylo?" Upon an affirmative answer, the judge decided that the situation constituted exceptional cruelty, but not hooliganistic motivation. Case of Bortsov (Saratov) Judgment (Feb. 18, 1994). See Thaman, *supra* note 1, at 120-21.

243. Case of Cherkashin (Stavropol'), No.19 kp-096-101 sp (Dec. 14, 1996).

244. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 212 (2d ed. 1986).

245. *Id.* at 214.

dant guilty thereof? Did he act with premeditation?" The affirmative answers should be: "Yes, it was committed; Yes, he was guilty; Yes, he acted with premeditation."²⁴⁶

Furthermore, § 812 UUS provided:

When the jurors assert that it is impossible to express with exactitude their opinion with a mere affirmation or negation, they may give the appropriate meaning to their answer by adding some words to the established expression, for instance: "Yes, guilty, but without premeditation."²⁴⁷

Despite the apparent clarity of the law, the pre-revolution Cassational Senate held that the list of questions only had to include a narrative describing the external facts of the crime charged and did not have to explain the mental element for the jury to decide. The court could then find the charged crime or lesser-included offenses based on the jury's answers.²⁴⁸ Critics, such as Palausov, harshly criticized the ambivalence of the Cassational Senate, and maintained that the question of guilt had to include the question of imputability. If it did not, the questions submitted to the jury would "exclude even the concept of a criminal offense in a legal sense."²⁴⁹ Moreover, Selitrennikov provides a formulation of questions in a case that involves an insanity defense, which was also approved by the Cassational Senate:

(1) Was the violent killing of Ivan Grigorev committed by a person close to him on June 11, 1869 in the city of Rostov in the cottage of the peasant Advota Fedorova, and, to wit, by his wife, Matrena Trofimova, who was at this time 17 years, 2 months and 24 days old? (2) If it was committed, has it been proved that the defendant Matrena Trofimova was, at the time of the commission of the aforementioned crime, in the throes of an illness, which led her to delirium or to complete unconsciousness? (3) If it has not been proved, then is the defendant Matrena Trofimova guilty of the crime mentioned in the first question? (4) If she is guilty, was the crime committed by her with premeditation?²⁵⁰

Pre-revolution Russian jurors struggled with questions of *mens rea*. Bobrishchev-Pushkin emphasized the special problems juries encountered when they were instructed, for example, that intent to kill could be imputed based upon the number of stab wounds in the area of vital organs of the victim, even though the victim testified that he or she did not intend to kill.²⁵¹ Jurors would often find a lack of intent due to drunkenness, espe-

246. UUS-1864, *supra* note 34, at 175 (§ 811).

247. *Id.* (§ 812).

248. *Id.* at 77.

249. PALAUSOV, *supra* note 194, at 112 (arguing that the jury should decide questions of insanity, self-defense, and also questions of carelessness or intent); *cf.* NEMYTINA, ROSSISKIY SUD PRISIAZHNYKH, *supra* note 84, at 80 (discussing the pre-revolution practice).

250. SELITRENNIKOV, *supra* note 164, at 259. The question of insanity was explicitly excluded from the competence of the jury in the modern Russian jury laws. If the question of insanity arises, the judge is to discharge the jury and institute psychiatric commitment proceedings. UPK-RSFSR, *supra* note 12, §§ 461(2), 403-414; UPK-RF, *supra* note 14, §§ 433-446.

251. BOBRISHEV-PUSHKIN, *supra* note 152, at 543. Jurors in the first modern Spanish jury trials struggled with precisely the same issue, especially when the judge did not

cially in the context of domestic violence clouded by jealousy or anger.²⁵²

Early in its jurisprudence, the SCRF began to treat the mental elements of crimes as "questions of law,"²⁵³ and to place them solely within the competence of the professional judge to decide as "questions requiring strictly juridical evaluation." This jurisprudence has led to the reversal of a number of acquittals and judgments of conviction for lesser-included crimes of homicide, often when the jury has expressly found that the defendant did not harbor the intent to kill²⁵⁴ or killed in the heat of passion.²⁵⁵

B. The Question of Jury Nullification

The "sphinx-like" general verdict of "guilty" or "not guilty" in American and British jury trials, coupled with the non-appealability of acquittals, enable juries sometimes to render verdicts contrary to the facts and the law. The trifurcation of the guilt question in Russian special jury verdicts, which also allows the jury to acquit even when all the elements of the crime have been proven, was criticized by Foynitskiy as being French legalistic casuistry and had been rejected by Germany.²⁵⁶

The official position of the pre-revolution Cassational Senate was that the third question related to guilt embodied the classic excuses or justifica-

give them the option of basing murder on a theory of recklessness. See Thaman, *supra* note 20, at 394.

252. In the Case of Filimonov (1880), the jury answered that the 21 year-old defendant who tried to kill his wife was "guilty" but "without knowing intent." BOBRISHEV-PUSHKIN, *supra* note 152, at 355-56.

253. See Thaman, *supra* note 1, at 122. Pre-revolutionary writers also treated questions of sanity and intent as "serious questions of law" but never doubted that they were for the jury to decide. BOBRISHEV-PUSHKIN, *supra* note 152, at 338.

254. Case of Shchepakina (Rostov), No.41-kp-094-112sp (Nov. 24, 1994) (reversing negligent homicide judgment); Case of Manukian (Stavropol'), No.19 kp-096-75 sp. (Oct. 29, 1996); Case of Solomatov/Kharitonov (Stavropol'), No. 4-kp-096-28sp (Mar. 20, 1996) (reversing a conviction of a lesser homicide offense); Case of Poliakov (Riazan), No. 6-kp-096-10 sp (May 13, 1996) (reversing acquittal of murder on this ground). Procuracy Institute, *Informatsionnoe pis'mo o nekotorykh voprosakh obespecheniia gosudarstvennogo obvineniia v sude s uchastiem kollegii prisiazhnykh zasedateley*, No. 12/13-96, 7-8 (May 16, 1996); Case of Markelov (Ul'ianovsk), No. 80-kp-097-4 sp. (Feb. 13, 1997), reversing conviction of lesser-included homicide offense; Case of Perfil'ev et al. (Ul'ianovsk), *supra* note 180 (reversing lesser homicide charges).

255. Case of Riazanov (Altay) No. 51-kp-096-6sp (Mar 5, 1996); Case of Khachaturov (Stavropol'), No. 19-kp-096-23sp (Apr. 11, 1996); Case of Kuz'kin (Moscow Region), No. 4-kp-095-114sp (Oct. 18, 1995); Case of Shayko (Ul'ianovsk), No. 80-kp-096-33sp (Sep. 24, 1996). All were convicted of §104 of the UK-RSFSR. The jury in the Shayko Case held that the defendant had killed her husband "probably in a condition of a sudden heat of passion or emotional stress, resulting from the serious insult from the victim."

256. FOYNITSKIY, *supra* note 179, at 457-58. Foynitskiy was a proponent of amending the laws to prevent the influence of "public opinion" in the jury's guilt decisions. *Id.* at 360-61. He cites later opinions of the Cassational Senate from 1904-1905, which required the presiding judge to instruct the jurors that they had to answer positively as to guilt if they had done so in relation to the *corpus delicti* and authorship questions. *Id.* at 452. The new Spanish jury law avoids these problems by declaring that such a verdict is legally contradictory and in such a case the judge would require the jury to correct the inconsistency. Thaman, *supra* note 20, at 377-78.

tions of the criminal law: insanity, unconsciousness, mistake, deception, and self-defense.²⁵⁷ This position has been followed by some voices in the modern literature.²⁵⁸

But juries did indeed nullify before the Revolution, such as in the case of *Vera Zasulich* in 1878, and such acquittals were welcomed by the famous judge in that case, A.F. Koni:

Jurors are asked not whether defendant *committed* the criminal act, but whether he is *guilty* of having committed it; not the fact, but the inner aspect thereof and the personality of the defendant expressed therein, is for their decision. With its question as to guilt, the court establishes a general gap between fact and guilt and requests that the jury, based exclusively on the 'conviction of its conscience' and mindful of its great moral responsibility, bridges this gap with considerations that determine whether the defendant is guilty or not-guilty.²⁵⁹

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

content of the word "guilty" in the verdict of the jury, embraces such a countless quantity of aspects of the offense, particularities in the personality of the defendant, shades of the manifestations of his will, utilitarian and ethical considerations, which can possibly be contained in each separate case, that it can never be rendered precise either by the law, by morals or by a complete juridical understanding.²⁶⁰

Russian juries before the Revolution would typically exercise the power of so-called "nullification" in the following situations: (1) to prevent the enforcement of unpopular laws; (2) to apply popular social notions of the seriousness of conduct, where it differed from those expressed in the criminal law; (3) to prevent the imposition of sentences perceived as excessive; (4) to correct injustices in the administration of criminal justice that were sometimes unrelated to guilt or innocence; and (5) for reasons of social custom completely unrelated to the facts of the case.

257. SELITRENNIKOV, *supra* note 164, at 254; see also KUCHEROV, *supra* note 36, at 66-67 (claiming that the Cassational Senate allowed nullification in a decision of 1870, but reversed itself in 1884).

258. PETRUKHIN, *supra* note 9, at 133 (stating that the third "guilt" question refers to the subjective side of the offense, the presence of negligence, self-defense, etc).

259. KONI, *supra* note 157, at 201.

260. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 38-39. Juries would "determine whether the act of the defendant was an evil which must be punished as a dangerous or immoral act, or just something prohibited by law. If this question is difficult or too controversial, they either acquit or limit themselves to an exact establishment of factual details in their answers, leaving the decision on the question of law to the judge." *Id.* at 584-85. Also, juries occasionally acquit merely to prevent the judge from unjustly formulating the juridical consequences of the verdict. *Id.* at 380.

1. *The Nullification of Unpopular Laws*

Russian juries have a history of nullifying unpopular laws. Just as colonial American juries nullified the effect of British tax, customs and seditious libel laws,²⁶¹ pre-Revolution Russian juries refused to enforce the repressive passport laws.²⁶² Juries often refused to convict defendants in minor cases of bribery or public corruption, because they believed that the entire system was corrupt and knew it was difficult to be honest in such a system.²⁶³ Acquittals were common in cases of passing forged money, because the jury viewed the defendant as a victim for having paid good money for bad.²⁶⁴

Sergey Pashin and his colleagues, who authored the 1993 jury law, were aware that the tripartite formulation of the guilt question would permit jury nullification. Pashin interprets a finding of "not-guilty" following affirmative answers to the first two parts of the guilt question in the following way: "the act contains all the elements of the crime in its totality, but the jury, for reasons known to them, deprived the state of the right to achieve a conviction and apply the sanctions of the special part of the Penal Code."²⁶⁵

2. *Nullification Due to Social Attitudes Contrary to Criminal Law Principles*

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

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

261. Albert W. Alschuler & Albert W. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

262. N.P. TIMOFEEV, *SUD PRISIAZHNYKH V ROSSII SUDEBnye OCHERKI* 278-79 (1881). It was almost impossible for simple people to get a passport, and violations of the laws resulted in the loss of all civil rights and long mandatory imprisonment. *Id.*; cf. MEL'NIK, *supra* note 5, at 266-67.

263. BOBRISCHEV-PUSHKIN, *supra* note 152, at 291 (modern Russian juries likely have the same attitude). The defendants in the only two bribery cases tried by jury in the first year of the new Russian jury system were both acquitted. *See id.* at 152-53; Case of Shcherbakov (Moscow Region) Judgment (Apr. 22, 1994); Thaman, *supra* note 1, at 182-83; Case of Es'kov (Altai) Judgment (July 1, 1994).

264. BOBRISCHEV-PUSHKIN, *supra* note 152, at 292-94. In the first year of modern Russian jury trials, two of the six trials for passing counterfeit money ended in acquittals, one in a conviction for a lesser-offense, and the jury recommended special lenience in the remaining three. Thaman, *supra* note 1, at 137-38.

265. Pashin, *supra* note 103, 90-91.

the crime.²⁶⁶

Due to its connection with so much crime, Russian law has traditionally considered drunkenness to be an aggravating factor in the imposition of sentence.²⁶⁷ Tsarist juries, however, viewed drunkenness at the moment of the commission of a crime in an entirely different way than did the Old Russian Penal Code. Since Russian juries were aware that excessive consumption of alcohol could affect volition and consciousness, and therefore negate the mental states necessary for the commission of certain crimes, they often tried to gauge how much the defendant had drunk to determine if it was sufficient to diminish the defendant's criminal responsibility.²⁶⁸ In the first year of modern Russian jury trials, the aggravating factor of drunkenness was alleged as to 89 defendants in 76 of the first 109 trials to go to verdict. In 47 cases the defendants were convicted of lesser-included offenses or granted lenience.²⁶⁹

Also, it has been common for the jury to nullify or soften the law in cases in which battered and abused wives have attacked their husbands. For example, in the Case of Kraskina (Ivanovo Region) in 1995, the jury found that the defendant threw her drunk male companion to the ground and intentionally stabbed him in the brain "with a home-made knife, which she prepared specially for this purpose, having been dissatisfied with the conduct of her companion, who had expressed in a drunken stupor profanity, and extorted money to buy alcohol." Even though the defendant never claimed self-defense, the jury nonetheless acquitted.

The SCRF upheld this acquittal of an allegedly battered woman on appeal in an opinion that also upheld the jury's right to nullify the law.²⁷⁰ Although Tsarist juries usually did not acquit a woman when she killed her husband while sleeping, in the Case of Kuz'mina, the jury found a peasant woman guilty of the lesser-offense of infliction of bodily injury resulting in death without intent to kill after she poured an entire boiling samovar onto his genitals while he was sleeping, locked the door of their hut, and let him

266. TIMOFEEV, *supra* note 262, at 380; BOBRISHCHEV-PUSHKIN, *supra* note 152, at 577 (noting the "overwhelming and specific meaning of drunkenness in Russian life.").

267. In Tsarist Russia it was an aggravating circumstance if it could be shown that the defendant drank liquor to summon up courage to commit a crime. TIMOFEEV, *supra* note 262, at 381.

268. *Id.* at 381-82. Timofeev, a prosecutor, recalled a case in which the jury acquitted the defendant of mayhem and answered: "No, not guilty, and not guilty, because he was not in a human shape." (*ne v chelovecheskom obraze*). *Id.* at 383. Bobrishchev-Pushkin, another prosecutor, also noted that drunkenness often led juries to not find criminal intent in crimes of passion, but seldom in crimes of theft, unless the victim of the theft was also drunk. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 35, 355-56, 577-79.

269. Thaman, *supra* note 196, at 405.

270. Case of Kraskina (Ivanovo) Judgment (July 20, 1995); THAMAN, *supra* note 64, at 197-98. Another alleged battered woman, however, did not fare so well. In the retrial of the Case of Shayko, *supra* note 255, the defendant was convicted of aggravated murder after her conviction for homicide in the heat of passion of her abusive husband was overturned. In the retrial, the trial judge refused to allow the defendant to admit evidence of the bad character of her husband and his previous acts of violence, thus making a nullification or sympathy verdict more difficult. *Id.* The SCRF refused to set aside the conviction. Case of Shayko (Ul'ianovsk) No. 80-kp-097-28sp (June 3, 1997).

suffer for 5 days until he died.²⁷¹

Tsarist juries also tended to be exceedingly lenient and even acquit defendants in cases in which the defendant gave a full judicial confession and expressed remorse before the jury.²⁷² Timofeev noted that before 1864 criminal investigators engaged in questionable techniques to procure confessions, including the use of priests.²⁷³ In contrast, after the introduction of trial by jury, defendants were quick to confess during trials and frequently threw themselves at the mercy of the jury.²⁷⁴ The Russian tradition of leniency by juries was particularly apparent during an early jury trial in Ivanovo, witnessed by the author, in which the defendant fully admitted guilt to all the charges, including attempted rape and aggravated murder, but claimed he did not remember committing any of the alleged acts because of his drunkenness.²⁷⁵ The jury acquitted as to all of the most serious charges, most likely because the young man had no prior criminal record, was a model village dweller, and appeared sincere in his remorse.²⁷⁶

3. *Sanction Nullification*

Tsarist juries often acquitted because they felt that the sentencing provisions of the criminal code were too severe.²⁷⁷ Theft by force, for instance, was punished much more severely than secret theft, yet many jurors saw the sneak thief as a more dangerous social menace. They would therefore often acquit the strong-arm robber. The same was true of burglary and theft when only something of insignificant value was stolen.²⁷⁸

4. *Nullification to Correct for Injustices in the Administration of Criminal Justice*

Juries in Tsarist Russia often acquitted defendants in cases in which the defendant had already spent a significant amount of time in pre-trial

271. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 389.

272. *Id.* at 32, 207.

273. TIMOFEEV, *supra* note 262, at 23-24. In one judicial district, 22 of 33 defendants pleaded guilty in front of the jury. *Id.* at 24. One attorney claimed that 26 of 84 clients pleaded guilty in the first year of jury trials, 42 of 112 in the second, and 59 of 106 in the third. *Id.* at 23.

274. *Id.* Timofeev also tells the story of a sympathetic peasant woman who was on trial for trying to poison her tyrant husband. Jail-house lawyers told her to admit her guilt and the jury would surely acquit. She stubbornly asserted innocence and was found guilty. When asked about her unwise decision, she told her fellow cellmates that she preferred exile and hard labor to her "unwanted forced labor" with her husband. *Id.* at 24-25.

275. Thaman, *supra* note 1, at 104.

276. Case of Kulakov (Ivanovo), Judgment (Feb. 11, 1994), *affirmed by SCRF*, No. 7-kp-094-7sp (Apr. 20, 1994); *See also* Thaman, *supra* note 1, at 104-105, 159-60.

277. Minister of Justice N.V. Murav'ev attributed the high percentage of acquittals to "the cruel provisions of the Criminal Code which no longer meet the requirements of life." KUCHEROV, *supra* note 36, at 70-71. Pre-revolution theorists Butkovskiy and Viktor-skiy also acknowledge that many acquittals were to avoid the "antiquated punishments" or lack of proportionality thereof. KARNOZOVA, *supra* note 10, at 225-26.

278. TIMOFEEV, *supra* note 262, at 267-71.

detention, due to the slow pace of criminal investigations.²⁷⁹ The "premature doing of time" was considered, in the eyes of the jury, to be an adequate basis for acquitting defendants whom they would have otherwise found guilty.²⁸⁰

5. *Reasons for Nullification Unrelated to the Facts of the Case*

Russian juries also acquitted defendants for reasons entirely unrelated to the presentation of a defendant's case. Perhaps most notably, juries would invariably acquit defendants in the first and fourth weeks, and in the Passion Week of the Great Fast, because their religious beliefs required them to ask for forgiveness for their sins and prohibited them from convicting others.²⁸¹ Similarly, they would also acquit on days when the dead were remembered or in August, when the winter grain was planted. At the latter time, they believed that God would not deliver a good harvest if they exhibited any form of anger. Defendants responded to these patterns by attempting to get their cases heard in August.²⁸² Juries would also acquit during extremely hot weather, when the unventilated courtrooms would sometimes reach a temperature of 40 degrees Celsius. On one hot day, four trials ended in acquittals before the prosecutor challenged the sitting jurors. After the challenge, however, eleven of the sixteen subsequent cases still ended in acquittal.²⁸³

C. The Jury's Role in Sentencing

Proponents of the mixed court often claim that the "common sense" of lay judges may be most appropriate in criminal cases at the time of sentencing.²⁸⁴ Many think that the beginning of the end of the French jury system came with the reforms of 1932, when the jury joined with the professional judges to take part in the sentencing decision.²⁸⁵ The express reason for this change was to prevent "scandalous acquittals" by allowing the juries to convict but mitigate the sentence, especially by avoiding capital punishment.²⁸⁶

279. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 207. Juries would also acquit if the defendant's co-partner in crime had escaped punishment. *Id.* at 254.

280. TIMOFEEV, *supra* note 262, at 387.

281. *Id.* at 135.

282. *Id.* at 136-38.

283. *Id.* at 147.

284. A study of the German mixed court revealed that lay assessors disagree with professional judges more over issues of punishment than guilt and innocence. Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 152-55 (1972).

285. LOMBARD, *supra* note 24, at 273-75.

286. *Id.* at 273-74. A law of April 28, 1832 gave the jury the power to find mitigating circumstances to avoid acquittals (*id.* at 226), which was arguably the source of the provision in the pre-Revolution Russian jury law. § 804 of the UUS-1864 allowed for a jury finding of lenience, which permitted the judge to reduce the sentence no less than one nor more than two levels. UUS-1864, *supra* note 34. Pre-revolution juries often found lenience to avoid the severity of the Russian criminal code. TIMOFEEV, *supra* note 262, at 340-41; BOBRISHCHEV-PUSHKIN, *supra* note 152, at 215-17; *see also* BURNHAM ET AL.,

In Russia, under the 1993 jury law, jurors, when returning a guilty verdict, could recommend "lenience" or "special lenience," which limited the sentencing alternatives available to the professional judge.²⁸⁷ With a finding of "lenience," the sentence could not exceed the mid-level between minimum and maximum punishments, and the death penalty, applicable in the early years of the modern jury system, could not be imposed. With a finding of "special lenience" the judge was required to sentence below the minimum punishment or impose a lesser form of punishment.²⁸⁸

From 1993 to 1994, during the first year of jury trials, my investigations indicated that juries worked to mitigate the severity of the statutory punishments. All but 12 of the first 114 cases were potentially capital cases. Of these 102 cases, the jury found the capital charge to be proved but recommended lenience in 28 cases and special lenience in six more. An additional 23 defendants were convicted of lesser offenses, with ten of these receiving lenience and six special lenience. Lenience or special lenience was recommended in nine of the ten cases involving rape of a minor. In the twelve non-capital cases, six defendants were acquitted, two were convicted of lesser offenses, and the jury recommended lenience in all cases where they convicted the defendants as charged.²⁸⁹

Since 2001, the category of "special lenience" has been dropped.²⁹⁰ A finding of "lenience" now permits sentencing below the statutory minimum in "extraordinary circumstances,"²⁹¹ eliminates the death penalty or life imprisonment where applicable, or limits the punishment to two-thirds of the statutory maximum.²⁹²

These provisions have been criticized because the jury is being asked to determine lenience based only on the evidence relating to the commission of the charged offenses and is prevented from knowing of the defendant's prior criminal record²⁹³ or character evidence in general.²⁹⁴ Some

supra note 202, at 544 (suggesting that the lenience power facilitates compromise verdicts).

287. Thaman, *supra* note 1 at 126-27.

288. UPK-RSFSR, *supra* note 12, § 460.

289. *Id.* at 135-38; See also Yu. A. Liakhov, *Sokrashchennoe sudebnoe sledstvie v sude prisiazhnykh Rossiyskoy Federatsii*, VESTNIK SARATOVSKOY GOSUDARSTVENNOY AKADEMII PRAVA No. 3, 200, 207 (1996) (claiming that juries recommended lenience in 56 percent of all cases in the first year of the new system). Overall figures of 50.5 percent lenience findings and 20 percent of special lenience (MEL'NIK, *supra* note 5, at 48) and 40 percent of lenience in general (Sergey Pashin, *Sudite Sami*, VERSTY, Mar. 5, 2003, available through INDEM, *supra* note 59 (Mar. 1-7, 2003)) have been reported. I WOULD BRIEFLY DESCRIBE AND DISTINGUISH THE MEANING "LENIENCE FINDINGS," "SPECIAL LENIENCE" FINDINGS, A ND "LENIENCE IN GENERAL." I WOULD ALSO CLARIFY WHAT EACH OF THE SPECIFIED PERCENTAGES REFER TO – 50.5% OF WHAT? 50.5% ALL JURY VERDICTS?

290. UPK-RF, *supra* note 14, § 339(4).

291. *Id.* § 349(2) (referring to § 64 of the UK-RF).

292. *Id.* (referring to § 65(1) of the UK-RF).

293. UPK-RSFSR, *supra* note 12, § 446(¶ 6); UPK-RF, *supra* note 14, § 335(8).

294. In ¶ 16 of SCRF Dec. No. 9 (1995), *supra* note 151, the SCRF decided that character evidence could not be put before the jury to influence their decision as to guilt or lenience. This decision has been heavily criticized. Liakhov, *Sudebnoe*, *supra* note 103, at 65-66; Liakhov, *supra* note 289, at 206-207; PETRUKHIN, *supra* note 9, at 143; S.A.

critics have suggested that the jury determine guilt first and then hear evidence of the defendant's criminal record or bad character evidence before deciding the issue of lenience.²⁹⁵

V. Nullification of Nullification: The Rampant Reversal of Acquittals

"Our obtuse, our blinkered, our hulking brute of a judicial system can live only if it is infallible." Alexander Solzhenitsyn, *The Gulag Archipelago*.²⁹⁶

A. The Problem: a System Without Acquittals

Before the passage of the UPK-RF in 2001, cases were handled by either the jury court, the mixed court with lay assessors, panels of three judges, or a single judge.²⁹⁷ Pomorski noted in his study of some Krasnoyarsk courts in the late 1990's that a "no acquittal" policy was *de facto* in place. Although judges acknowledged the miserable quality of the preliminary investigation, they knew that all acquittals would be overturned if the prosecutor appealed. This converted the trial court into a mere sentencing court, imposing the judgment sanctioned in advance by the prosecutor. As a result of their lack of power, many judges were actually eager for the introduction of jury trials, which began in January, 2003.²⁹⁸ The statistics for the three-judge panels are remarkable. From 1994 through 1998, 1,564 persons were tried before the rarely used three-judge panels, and not one person was acquitted. Only 22 were not convicted because their cases were returned for further investigation.²⁹⁹ In the first three years following passage of the UPK-RF in 2001, the overall acquittal rate, including jury trials, rose from 0.3% to 0.9%.³⁰⁰

Pashin, *Dokazatel'stva v rossiyskom ugolovnom protsesse*, in SOSTIAZATEL'NOE PRAVOSUDIIE Vol. II, *supra* note 103, at 385.

295. MEL'NIK, *supra* note 5, at 49.

296. ALEXANDER SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 520 (1979).

297. Juries and three-judge panels heard cases punishable by more than 15 years in prison or the death penalty (until a moratorium was declared in 1996). UPK-RSFSR, *supra* note 12, § 15. A mixed court of one judge and two lay assessors handled cases punishable by between five and fifteen years, and a single judge would hear cases where punishment did not exceed five years. UPK-RSFSR, *supra* note 12, § 35.

298. Pomorski, *supra* note 60, at 456-58. Human Rights Watch noted that the procuracy and the appellate courts go over acquittals meticulously to find any reason to reverse, whereas guilty judgments are accepted with little scrutiny. To enforce this "no-acquittals" policy, the SCRF routinely reverses a much higher percentage of acquittals (which constitute less than 1/2 of one percent of all judgments) convictions. For instance, in 1996 it reversed 29.4 percent of acquittals and only 2.2 percent of convictions, and in 1997, 33.1 percent of acquittals and only 2.5 percent of convictions. Human Rights Watch, *supra* note 98, at 118-19.

299. MEL'NIK, *supra* note 5, at 42. The Ministry of Justice confirmed the lack of acquittals for the years 1994-1996. *Miniust podvodit itogi raboty sudov*, ROSSIYSKAYA YUSTITSIYA No. 8, 4 (1996).

300. PETRUKHIN, *supra* note 9, at 101. Sergey Pashin noted that district court judges acquitted only 0.72 percent of all defendants in 2002. Sergey Pashin, *Mertvye dushi?*, NOVYE IZVESTIYA, Sept. 11, 2003.

B. The Lack of Adversary Procedure in the Appellate Courts

Soviet trial courts avoided acquittals not only to avoid the wrath of the all-powerful procuracy, but also due to fear of being reversed by the higher courts. In Russia there is no "raise or waive" rule,³⁰¹ and the SCRF is not limited to consideration of the issues raised by the contesting parties. This enables it to comb the file and to reverse jury verdicts, often acquittals, *sua sponte* for any reason whatsoever. This seems to be a complete violation of the principle of adversary procedure.³⁰² The ability of appellate judges to override the jury's determination of guilt was easier under the UPK-RSFSR because reversals could be based on "one-sidedness or incompleteness of the inquest, preliminary investigation or trial."³⁰³ This gave the SCRF in jury cases the power to determine that new evidence of guilt could have been introduced at trial.³⁰⁴ I found several such cases in my study of the practice of the Cassational Panel and the Presidium of the SCRF and its handling of Russian jury cases from 1993 to 1999.³⁰⁵ The SCRF also does not recognize a "harmless error" rule, for it has often reversed acquittals, and even convictions, based on errors that could not have had an impact on the jury's decision as to guilt or innocence.³⁰⁶

The defendant, the procurator, and the victim may appeal judgments

301. In the U.S., errors of constitutional magnitude may not be raised on appeal if they were not objected to by the parties during the trial, where they could have been corrected. On the so-called "raise or waive" doctrine, see WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1293-94 (5th ed. 2004).

302. For others who agree with my view, see P.A. Lupinskaia, *Poriadok obzhalovaniia, oprotestovaniia i proverki, ne vstupivshikh v zakonnuu silu prigovorov i postanovlenii, vnesennykh v usloviakh al'ternativnoy formy sudoproizvodstva*, in *VESTNIK SARATOVSKOY GOSUDARSTVENNOY AKADEMII PRAVA* Vol. 3, 239, 240-41 (1996); Nemytina, *supra* note 214, at 29; SOLOMON & FOGLESONG, *supra* note 60, at 50.

303. UPK-RSFSR, *supra* note 12, § 343.

304. Mel'nik felt that the combination of UPK-RSFSR section 343, the appeal ground that the "reasons in the court's judgment do not correspond to the factual circumstances of the case," and sections 344 and 379(1)(1) of the UPK-RF, "open a very wide field for arbitrary reversals of [acquittals]." MEL'NIK, *supra* note 5, at 58. He continued: "In such cases, the most important arbiters of questions of guilt are again professional judges, who in the cassational instance can determine the legality of the conclusions of the jury, not on the basis of immediately heard evidence, but on the basis of paper, while studying the dossier." *Id.*

305. The author visited the SCRF and reviewed the files of all reversed cases in these years. My special thanks to Judges A.P. Shurygin and V.P. Stepalin for allowing me access to the files. In *Case of Paziev et al. (Altay)*, No. 51kp-097-21 sp. (Apr. 24, 1997), the SCRF unilaterally reversed the acquittals of Beziakin and Pashkov based on jury misconduct, an issue not raised in the appellate briefs. One judge told Karnozova that the SCRF reversed an acquittal in his court using a "thought-up" argument, precisely because it was an acquittal. KARNOZOVA, *supra* note 10, at 158.

306. On the U.S. harmless error doctrine, see LA FAVE ET AL., *supra*, note 301, at 1298-1310. Saltykov-Shchedrin quotes a Tsarist judicial official, shedding light on the old mentality which still seems to exist at the SCRF: "I don't look into my conscience, I don't consult with my own convictions; I look only as to whether all formalities were observed, and in this respect, strictly to the point of pedantry. If I have in my hands two witness statements, formulated in the appropriate manner, I am satisfied and write 'they exist.' If they do not exist, I am also satisfied and write 'they don't exist.' What does it concern me whether the crime was committed or not in reality? I want to know whether it was proved or not, and nothing else." MEL'NIK, *supra* note 5, at 7.

of conviction or acquittal at each level of the court structure.³⁰⁷ The appellate courts, composed of panels of three professional judges, are empowered to review questions of both fact and law. If the accused appeals, the appellate court may not find the defendant guilty of a more serious offense or impose a more severe punishment. The procurator or the victim, however, may appeal and seek to have the judgment overturned, and a more severe punishment may be imposed upon retrial.

Since errors need not be raised in the trial court in order to preserve them for appeal, and since the appellate courts may also cull the record for errors not raised in the appellate briefs, prosecutors and judges can intentionally commit errors at the pretrial and trial stage and, in the event of an acquittal, later raise them on appeal. Judges have acknowledged their successful use of this tactic.³⁰⁸ For example, the prosecutor might fail to object to seating a juror who has not revealed that his family members have been convicted of crimes. The prosecutor is not barred from bringing up this fact on appeal if the case ends in acquittal.³⁰⁹

307. UPK-RF, *supra* note 14, §§ 19(2), 42(2), 42(19), 354(1), 370(1), 385.

308. KARNOZOVA, *supra*, note 10, at 152, interviewed a judge who said he intentionally does not refer to all the evidence in his summation at the end of the trial to give the prosecutor grounds for objection. She says there is clearly collusion between judges and prosecutors to create reversible error. The revival of the court's power to remand a case for further investigation in the decision of the CCRF of Dec. 12, 2003 has also been criticized as giving prosecutors and judges leeway to plant errors in cases to avoid acquittals. See *KS razreshil sudam ispravliat' oshibki prokurorov*, KOLOKOL.RU., Dec. 9, 2003, available through INDEM, *supra* note 59 (Dec. 1-15, 2003).

309. This recently happened following the acquittal of "Yaponchik" in Moscow Region, where the prosecutor on the day after the verdict claimed that 7 of the 12 jurors were thus "prejudiced." Sokovnin & Mashkin, *supra* note 144. This has become a common ground for reversal of acquittals, even though being related to a felon would not statutorily disqualify a juror. *Kollegiia nebespristrastnykh*, KOMMERSANT, July 20, 2005, at 3. For other cases reversing acquittals due to belated revelation of juror bias, see BVSRF, *supra* note 93, No. 2, at 5 (2002), <http://www.supcourt.ru/bulletin/02/02-050/b107.htm> (acquittal of double murder in Ul'ianovsk, where juror had once worked as an investigative official for the Ministry of Interior); Case of Raykin et al. (Saratov), *supra* note 180 (death sentence of Raykin and acquittals of two others for quadruple murder reversed because juror had prior unexpunged conviction); Case of Volkov (Moscow Region), No. 4-kp-095-111sp (July 6, 1996) (acquittal of double murder reversed because juror knew circumstances of case, though prosecutor agreed in court to let her sit); Case of Paziev et al. (Altay), *supra* note 306; Case of P. (Krasnodar), SCRF-Jury Review (2001), *supra* note 89 (acquittal of murder reversed because a juror did not reveal he had been sentenced to six months probation and had a brother who had been charged but not convicted of a crime); Case of P'ianzin (Mordovia), No. 15-003-25spr (Aug. 14, 2003) (acquittal of double murder reversed because foreperson did not reveal he had been charged with crime); BVSRF, *supra* note 93, No. 8 (2004), http://www.supcourt.ru/vscourt_detale.php?id=1688; Case of Tsereev, No. 42-003-05, in *Obzor sudebnoy praktiki Verkhovnogo Suda Rossiyskoy Federatsii za 4 Kvartal 2003 Goda*, http://www.supcourt.ru/vscourt_detale.php?id=153 [hereinafter SCRF-Criminal Case Review (4th Quarter 2003)] (acquittal reversed because juror did not reveal son had a prior conviction); Case of Slabochkov (Cheliabinsk), No. 48-004-512p (6.30.04), in BVSRF, *supra* note 93, No. 3 (2005), http://www.supcourt.ru/vscourt_detale.php?id=2529 (acquittal of two *not reversed* where prosecutor withheld information that 10 or 12 jurors had relatives who had been administratively fined by the police, claiming the jurors could not have known of this fact!).

C. Zeal in Reversing Acquittals

Despite the serious nature of the crimes tried in the jury courts, the acquittal rate in those courts has been much higher (around 15%) than in the regular courts with lay assessors or single judges (less than 1%).³¹⁰ It is generally recognized that juries acquit accused murderers because of the poor quality of the preliminary investigation and because jurors in many cases believe the defendants' allegations that confessions had been extorted by the use of coercion, threats, or even torture.³¹¹

The SCRF has shown great zeal in reversing such jury acquittals. The statistics relating to acquittals in the first nine years of jury trial, when it was restricted to just nine regions of the RF, are revealing. In 1994, 18.2% of jury cases ended in acquittal, in comparison to only 1% in non-jury trials. Yet, according to the author's investigation, of the 19 judgments reversed by the SCRF, nine were acquittals, and only one acquittal was upheld on appeal.³¹² In 1995 the acquittal rate fell to 14.3%. 17.3% of these acquittals were reversed. In 1996 the acquittal rate rose to 19.1%, but the SCRF reversed 34.2% of those challenged on appeal. In 1997 the acquittal rate rose to 22.9% but the SCRF reversed 48.6% of those appealed.³¹³ Finally, in 1998, the acquittal rate fell slightly to 20.6%, but 66% of those were overturned on appeal.³¹⁴ In 2000 the acquittal rate fell to 15.2%, and was 15.6% in 2001.³¹⁵ In 2001, the SCRF reversed 43% of acquittals as opposed to only 6.7% of convictions. 32.4% of all acquittals were reversed in 2002 as opposed to 5.9% of all convictions.³¹⁶ By 2003, the first year that the jury trial began expanding throughout Russia, only 15% of cases ended in acquittal, yet the SCRF reversed 24% of those as

310. Thaman, *supra* note 29, at 348. If one includes partial acquittals, i.e., of some counts or of the charged offense in favor of a lesser offense, Sergey Nasonov, an attorney, estimates that from 20-40 percent of defendants before juries are acquitted. Georgiy Tselms, *Gospoda prisiazhnye*, *supra* note 66. In 2005, juries heard only 600 of the 1.1 million criminal cases. They acquitted in 18 percent of those cases, whereas professional judges acquitted in only 3 percent of cases. This was, however, a rise from earlier years. Kim Murphy, *In Russia, Juries Must Try, Try Again*, LOS ANGELES TIMES, Sept. 30, 2006, <http://www.latimes.com/news/printedition/la-fg-jury30sep30,1,4595798.story?ctrack=1&cset=true>.

311. For a description of some methods of torture, see Human Rights Watch, *supra* note 98, at 21; MEL'NIK, *supra* note 5, at 46.

312. Stephen C. Thaman, *Geschworenengerichte in Ost und West: Die klassische Jury und das adversarische Verfahren im Strafverfahren Russlands und Spaniens*, in 41 RECHT IN OST UND WEST 73, 80 (1997).

313. *Spravka o praktike rassmotrenii ugolovnykh del sudami prisiazhnykh v 1997 godu* (Mar. 21, 1998) (on file with author) [hereinafter SCRF-Jury-Spravka (1997)]. The figures for 1994-1996 were from another *Spravka* given the author by President of the Cassational Panel of the SCRF, A.P. Shurygin (on file with the author).

314. *Spravka po rezul'tatam izucheniia prichin otmeny i izmeneniia prigovorov suda prisiazhnykh, rassmotrennykh Verkhovnym Sudom Rossiyskoy Federatsii v 1998 godu* (1999), at 3, 6-7 (on file with author) [hereinafter, SCRF-Jury-Spravka (1998)]. 42.9 percent of all acquittals were reversed whereas only 1.85 percent of convictions were reversed in the same year. A. Gagarskiy, *Rabota sudov Rossiyskoy Federatsii v 1998 godu*, ROSSIYSKAIA YUSTITSIIA Vol. 8, 52, 54 (1999).

315. SCRF-Jury Review (2001), *supra* note 89.

316. SCRF-Jury Review (2002), *supra* note 92.

opposed to only 5% of convictions.³¹⁷ The trend continued in 2004 when 53.5% of all acquittals were reversed.³¹⁸

The author believes that one factor pushing the SCRF to reverse so many acquittals, despite the acknowledged incompetence of investigative organs and their inability to present credible inculpatory evidence, is the ugly fact that the murder rate in Russia has risen progressively since jury trials began in 1993, and that the SCRF is unwilling to release alleged murderers who are charged with brutally killing more than one person. Of the jury acquittals reversed by the SCRF, the author has discovered at least 20 cases involving two murder victims, at least two involving three victims, and four involving four victims, and at least one case involving more than four victims.³¹⁹

D. Converting Adversarial Procedure into a Weapon Against the Defense: Reversal of Acquittals Based on the Complexity of the Rules of Adversary and Jury Procedure

1. "Errors" in the Formulation of the Question List

The most common reason for reversals of jury judgments, especially acquittals, has been purported errors in the formulation of the question list by trial judges.³²⁰ 43% of all reversals were related to these problems in the first three years of jury trial.³²¹ The same was true in 1997.³²² Question list "errors" played a comparable role in reversals in 2002 and

317. BVSFR, *supra* note 93, No. 8, at 14 (2003). Cf. Burnham, in THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE 67 (William Burnham ed., 2004). Burnham cites Ye. B. Mizulina for the proposition that from 1997 to 2001 the SCRF reversed over 50 percent of acquittals and only 15-16 percent of guilty verdicts. In Krasnoyarsk Territorial Court, ten jury trials were held from January 1, 2003 through July 23, 2004. Of the five acquittals granted, four were reversed and the fifth was still pending appeal before the SCRF. *Discussion with judges of Krasnoyarsk Territorial Court on July 23, 2004*, Krasnoyarsk Territorial Court, Krasnoyarsk, Russia.

318. Among all cases heard by the SCRF on appeal, 3.9 percent of convictions and 45.8 percent of acquittals were reversed. SCRF-Criminal Case Review (2004), *supra* note 138. In the first quarter of 2004, there were 21 percent acquittals in jury trials but only 0.5 percent in non-jury trials. Andrei Sharov, '12 stul'ev', ROSSIYSKAIA GAZETA, Nov. 11, 2004, available through INDEM, *supra* note 59 (Nov. 4-Dec. 4, 2004). In 2005, the acquittal rates for all cases in regional-level courts subject to jury trial was 3.6 percent, whereas juries acquitted in 17.6 percent of cases. Court Statistics-2005, *supra* note 79. In the first nine months of 2006, the acquittal rate in the regional-level courts remained steady at 3.8 percent and juries acquitted at a rate of 18.1 percent. *Statisticheskie svedeniia o rabote sudov obshchey yurisdikzii za 9 mesiatsev 2006 g.*, http://www.cdep.ru/statistics.asp?search_frm_auto=1&dept_id=8. In that same time period, the SCRF reversed 40 percent of the acquittals it reviewed. Steven Lee Myers, *Russia Overturns Acquittal In Killing of Forbes Editor*, N.Y. TIMES, Nov. 10, 2006, at A6.

319. See Case of Ulman (Stavropol') (6 Chechen civilian victims); Vladimir Voronov, *supra* note 145, at 53-54. These statistics are very rough and greatly understate the number of reversed acquittals in each category. These are merely the cases that have come to the author's attention.

320. For a discussion of the mass confusion created by the question lists and the SCRF's interpretation thereof, see *infra* IV.A.

321. A. Shurygin, *Zashchita v sudoproizvodstve s uchastiem kollegii prisiazhnykh zasedateley*, Part I, ROSSIYSKAIA YUSTITSIIA, No. 8, 6 (1997).

322. SCRF-Jury-Spravka (1997), *supra* note 313.

2003.³²³ In 1998, however, the SCRF reversed more cases due to improper attempts by the defense to influence the jurors (by complaining of coercive tactics by investigators), improper exclusion of incriminating evidence, and violations of the rights of victims, all of which tended to result in reversals of acquittals.³²⁴

Frequently, the SCRF has seized on the failure of the trial court to return the verdict to the jury to correct errors in the question list, in order to reverse acquittals.³²⁵ Judges have intentionally violated this norm to build in reversible error when juries are determined to acquit.³²⁶ Many of the other question list errors noted above have led, both intentionally and unintentionally to reversals of acquittals.³²⁷

2. *Erroneous Exclusion of Evidence*

Russia's new and seemingly categorical rule excluding all evidence obtained in violation of the law was aimed at protecting defendants from the rampant human rights violations that characterized Soviet procedure. But this rule has been turned on its head, for when a defendant today successfully suppresses illegally gathered evidence and is acquitted, the prosecutor or the aggrieved party will invariably complain that their procedural rights have been violated and will frequently obtain a reversal.³²⁸ Simi-

323. This matter accounted for 44.8 percent of all reversals in 2002. SCRF-Jury Review (2002), *supra* note 92. For information on the impact of question list errors in 2003, see SCRF-Jury-Review (2003), *supra* note 90.

324. *Spravka po rezul'tatam izucheniia prichin otmeny i izmeneniia prigovorov suda pri-siaznykh, rassmotrennykh Verkhovnym Sudom Rossiyskoy Federatsii v 1998 godu* (1999), at 9 (on file with author) [hereinafter SCRF-Jury-Spravka (1998)].

325. Case of Drygin (Saratov), No.41-kp-099-135sp (Jan. 20, 1999) (acquittal of aggravated murder and rape); Case of Kovalev (Saratov), No. 32-kp-096-28sp (June 10, 1996) (reversal of attempted aggravated murder). In the first modern Moscow City Court jury trial, the judge sent the jury back five times, trying in vain to coax a guilty verdict. The jury foreman, obviously thinking the jury was at fault, sighed: "It's the first time. The first pancake is always messed up." Baker, *supra* note 172, at A1.

326. KARNZOVA, *supra* note 10, at 231-34.

327. See *infra* IV.A.2-8, *supra*, which include many examples of reversed acquittals.

328. Case of Nikitin et al. (Moscow Region), No. 4 kp-097-13 sp. (Jan. 26, 1997) (exclusion of report of search of the scene and seized knife leading to reversal of acquittal for attempted murder); Case of Kurnosikov (Moscow Region), No. 4 kp097-44sp, (May 15, 1997) (reversal of murder acquittal due to exclusion of autopsy report); Case of Kozyrialin (Stavropol'), No. 19-kp-096-115 sp. (Jan. 28, 1997) (conviction of lesser homicide reversed due to admission of defendant's alleged report of the crime); Case of Samoylov (Saratov), No. 32 kp-099-16sp (Mar. 23, 1999) (murder acquittal reversed due to suppression of report of search of a house); Case of Kurochkin et al. (Moscow Region), No. 4 kp-098-130sp (Aug. 6, 1998) (murder acquittals reversed due to exclusion of report of photographic identification and "clean-hearted" confession due to lack of reasons); Case of Aliev (Moscow Region), No. 4 kp-098-141sp (Aug. 27, 1998) (murder acquittals reversed due to exclusion of report of forensic-ballistic expert and of a confrontation between the defendant and a witness); Case of Bulochnikov (Altay), No.51-kp-094-68sp (Sep. 1, 1994) (acquittal of double murder reversed due to exclusion of defendant's statements); Case of Viazovets (Rostov), No. 41-kp-094-109sp (Nov. 24, 1994) (acquittal of double murder due to exclusion of testimony of aggrieved party and a witness who did not appear for court reversed); Case of Uvarov/Sosiurko (Moscow Region), No. 4kp-003-188 sp (Jan. 8, 2004), in BVSFRF, *supra* note 93, No. 10 (2004), <http://www.supcourt.ru/bulletin/2004/2004-11/4.htm> (acquittal of bribery reversed

larly, the reform of confession law in Russia, the implementation of *Miranda* rights, and exclusionary rules relating to confessions obtained through illegal means have been bizarrely turned against defendants by the SCRF's doctrine excluding evidence to impeach the credibility of such confessions. As noted above, this has led to the frequent reversal of acquittals.³²⁹

Fear of reversal of any acquittal has inspired some lawyers to refuse to make suppression motions in order to deprive the prosecution of grounds to appeal or to return the case to the investigator for supplementary investigation to fill gaps left by the suppressed evidence.³³⁰

3. Ignoring the Adversarial Rights of the Aggrieved Party and the Prosecutor

We have already discussed how the CCRF has allowed the aggrieved party to claim that his or her rights were violated at the pretrial stage in order to torpedo an ongoing jury trial and return the case for further investigation. As one might expect, the SCRF has not hesitated to reverse jury acquittals when the aggrieved party has complained of an alleged violation of his or her rights. Typically, the SCRF will reverse acquittals when law enforcement organs or the courts have not notified the aggrieved party of

due to exclusion of confessions); Case of Darchuk (Saratov) (reversal of murder acquittal due to exclusion of defendant's report of crime) and Case of Mediantsev (Altay), Procuracy Institute, *Informatsionnoe pis'mo*, *supra* note 254, at 3-4, http://www.supcourt.ru/vscourt_detale.php?id=2759 (reverse of murder acquittal due to exclusion of forensic medical examination of weapon based on chain of custody problems); Case of Novikov (Yaroslavl), SCRF-Criminal Case Review (2004), *supra* note 138, http://www.supcourt.ru/vscourt_detale.php?id=2759 (acquittal of murder solicitation reversed due to suppression of taped solicitation of bribe because it had too many swear words in it).

329. Case of Kornilov et al. (Rostov), No. 41-kp-096-39sp (May 14, 1996); Case of Zhevak (Rostov), No. 41-kp-096-24sp (Apr. 10, 1996); Case of Popov (Saratov), No. 32 kp-097-21 sp. (May 29, 1997); Case of Antipov (Rostov), No. 41-kp-097-27sp (Apr. 9, 1997); Case of Grigor'ev (Altay), No. 51 kp-097-26sp (May 7, 1997); Case of Aleshin et al. (Moscow), No. 4-kp-098-94sp (June 3, 1998); Case of Grafov (Moscow Region), No. 4-kp-098-179sp (Nov. 25, 1998); Case of Kurochkin et al. (Krasnodar), No. 18-kp-098-81sp (Sep. 22, 1998); Case of Topchiy (Krasnodar), No. 18-kp-098-103sp (Nov. 28, 1998); Case of Lipkin et al. (Moscow Region), No. 4-kp-099-9sp (Feb. 24, 1999); Case of Agafonov et al. (Stavropol'), No. 19-kp-099-48sp (May 5, 1999); Case of Yermolaev/Drachenko (Rostov), No. 41-kp-099-15sp (Mar. 10, 1999); Case of Arustamov (Stavropol'), SCRF-Criminal Case Review (2002), *supra* note 175; Case of Morozov (Ivanovo) and K (Krasnodar), SCRF-Jury Review (2001), *supra* note 89; Case of Isakov (Altay), SCRF-Jury Review (2003), *supra* note 90; Case of Pomazan (Volgograd), No. 16-004-36sp (July 14, 2004), in BVS RF, *supra* note 93, No. 2 (2005), <http://www.supcourt.ru/bulletin/2005/2005-02/18.htm>; Case of Turischev et al. (Volgograd), SCRF-Criminal Case Review (2004), *supra* note 139.

330. See Thaman, *supra* note 1, at 94 (noting the potential for "dramatic" effects from exclusion of all illegally obtained evidence). Lupinskaia suggests that requiring the judge to give reasons for excluding or failing to exclude evidence would serve to prevent some of the abuses of the new exclusion jurisprudence, such as the motions for supplemental investigation. P.A. Lupinskaia, *Nekotorye voprosy, vznikaiushchie v praktike primeneniia ugolovno-protsessual'nogo zakonodatel'stva pri rassmotrenii ugovolnykh del sudom prisiaznykh*, 3 VESTNIK SARATOVSKOY GOSUDARSTVENNOY AKADEMII PRAVA 70-76 (1996).

the day of the trial or have prevented it from participating in procedural acts.³³¹ Although violations of the rights of the aggrieved party are used as a reason to reverse acquittals, the courts and law enforcement organs make virtually no effort to ensure that aggrieved parties are represented or know what their roles are at trial.³³² Indeed, identifying the aggrieved party as a victim before the jury has proven guilt beyond a reasonable doubt violates the presumption of innocence and makes the defendant's rights subject to those of a person who is particularly biased and often motivated by revenge.³³³ Similarly, the SCRF has reversed acquittals because the trial court denied the prosecutor and the aggrieved party's motions to read the prior testimony of witnesses who had failed to appear in court, or because the trial court refused to grant a continuance to enable them to appear.³³⁴

4. *Defense Mentioning of Facts Not in Evidence*

The SCRF theory for reversing acquittals involving suppressed confessions is based on the fact that the defense is mentioning facts not in evidence. The SCRF has also overturned acquittals or judgments favorable to the accused due to other alleged comments that the defense lawyer made during closing argument,³³⁵ or that the defendant made during his or her

331. Case of Karakaev (Krasnodar) (reversing murder acquittal because aggrieved party was sick, did not come to court, and the judge made no effort to get her into court); Case of Bulychev (Saratov), No. 32 kp-096-55 sp. (Oct. 8, 1996) (reversing acquittal of double murder because conducted without aggrieved party and court made no attempt to find out his whereabouts); Case of Likhonin et al. (Saratov), No. 32 kp-095-76sp (Jan. 23, 1996) (denying aggrieved party chance to express opinion about partial refusal of prosecutor to dismiss murder charges against two of defendants); Case of Kulemin (Moscow Region), No.4-kp-098-155sp (Oct. 7, 1998) (reversing acquittal of aggravated murder because aggrieved party was not notified of the day of the preliminary hearing or the trial, could not participate in jury selection, and when she did appear, was not allowed to participate in examining evidence); Case of Bogatov (Moscow Region), No. 4 kp-098-196sp (Dec. 30, 1998) (reversing aggravated murder acquittal of victim not advised of the day of his trial); Case of Pomazan (Volgograd), *supra* note 329 (reversing murder acquittal due to failure to advise victim of date of trial, and the defendant's inability to participate in jury selection and questioning of some witnesses).

332. According to one study, the aggrieved party did not participate at all in 66 percent of jury cases and played a passive role in 60 percent of the remaining cases. In 78 percent of cases the aggrieved party did not suggest any changes in the question list and, in 94 percent of acquittals, no lawyer represented the aggrieved party. MEL'NIK, *supra* note 5, at 56-57.

333. MORSHCHAKOVA, *supra* note 59, at 219.

334. Case of Khachaturov (Stavropol'), *supra* note 255 (reversing conviction of lesser offense of murder in the heat of passion); Cases of Shut'ko and Paron'ko/Antonenko, SCRF-Jury Review (2003), *supra* note 93. The 2006 acquittal of the alleged murders in 2004 of the Moscow editor of *Forbes* magazine, Paul Klebnikov, was based on appeals by the defendant's widow and sibling alleging "blatant procedural irregularities." Myers, *supra* note 318.

335. Case of Gusiev/Poliakov (Stavropol'), No.19 kp-097-15 sp (Apr. 30, 1997) (reversing acquittal of robbery-murder because defense lawyer mentioned history of defendant's illnesses and his earlier conviction had been reversed); Case of B(Rostov) (reversing aggravated murder acquittal because defense lawyer mentioned expert testimony which had been excluded), SCRF-Jury Review (2001), *supra* note 89; Case of Zaletov (Altay), No. 51-kp-002-113sp, SCRF-Jury Review (2002), *supra* note 95 (reversing acquittal because defense counsel mentioned illegal investigation methods, other

testimony or last word,³³⁶ especially when the trial judge did not interrupt the offender or advise the jury to disregard the comments. The SCRF has also reversed acquittals merely because the defense has called into question the credibility of the prosecution's evidence.³³⁷

5. *Errors in the Presiding Judge's Summation*

Unlike in the United States, the Russian trial judge is required not only to instruct the jury on the law but also to summarize the evidence presented by the parties,³³⁸ and in doing so, the judge must not reveal his or her opinion as to which facts were proved or the proper verdict.³³⁹ Alleged errors in the judge's summation have often led to the SCRF reversing acquittals.³⁴⁰ Courts have even reversed acquittals when the trial judge was compelled to mention to the jury that there was no evidence to support a conviction, because all the evidence had been suppressed in defense motions.³⁴¹ Several Moscow Region convictions were also reversed because the judge did not give the parties a chance to object to the

evidence, and a witness's prior arrests); Case of Tipikin (Stavropol'), No. 19-004-6sp (Feb. 4, 2004), in BVSRF, *supra* note 93, No. 5 (2005) (reversing aggravated murder acquittal because lawyer mentioned testimony of witnesses not subpoenaed, reports not read into evidence, etc.); Case of Os'mukhin (Lipetsk), SCRF-Criminal Case Review-2004, *supra* note 145 (reversing double murder acquittal because counsel called into question character of witness by mentioning his prior convictions).

336. Case of Denisov (Moscow Region), No. 4 kp-098-201sp (Jan. 20, 1999) (reversing acquittal of triple murder because defendant mentioned illegal methods of law enforcement during the investigation and many other pieces of inadmissible evidence).

337. Case of Surin (Moscow Region) (May 25, 2004), in BVSRF, *supra* note 93, No. 5 (2005), available at http://www.supcourt.ru/vscourt_detale.php?id=2628 (reversing acquittal of juvenile for killing another juvenile because the defense lawyer called into question whether the defendant's slingshot had a hole in it).

338. UPK-RF, *supra* note 14, § 340(3)(2-5); UPK-RSFSR, *supra* note 12, § 451(3, 5). A summation of the facts and the law relevant to the case by the Judge was also required in the pre-revolution Russian jury system, whereas in nineteenth century Germany the judge only had to explain the legal elements, and in nineteenth century Italy, only the factual evidence. KUCHEROV, *supra* note 36, at 60.

339. UPK-RF, *supra* note 14, § 340(3)(2); UPK-RSFSR, *supra* note 12, § 451(5).

340. Case of Minakhmedov (Stavropol'), No. 19 kp-097-81 sp (Oct. 31, 1996) (reversing conviction of lesser-included offense to murder because it was not clear in the record whether the judge summarized the prosecutor's position); Case of Kustov/Sobolevskiy (Moscow Region), No. 4 kp-096-10 sp (Mar. 7, 1996) (reversing acquittals of aggravated murder, *inter alia*, because it was not clear that the judge summarized prosecutor's position); Case of Shevshenko/Shevshenko (Rostov), No. 41-kp-095-103 sp (Jan. 29, 1996) (finding that position of one defendant, who was found guilty of lesser offense to murder was not properly summarized by judge, but reversing both the conviction for a lesser offense and the aggravated murder acquittal of the other defendant.); Case of Nemchikov (Moscow Region), No. 4-kp-095-94 sp (Sep. 7, 1995) (reversing acquittal of attempted murder because judge called prosecution evidence into question). *See also* *Obzor zakonodatel'stva i sudebnoy praktiki verkhovnogo Suda Rossiyskoy Federatsii za IV Kvartal 1995 Goda* (4th Qtr. 1995) [hereinafter SCRF-Review of Legislation and Judicial Practice] (for the judge's critique of the SCRF decision, see Grigor'eva, *supra* note 232, at 171-72); Cases of P (Moscow Region) and K (Krasnodar), SCRF-Jury Review (2001), *supra* note 89 (reversing murder acquittals).

341. KARNOZOVA, *supra* note 10, at 293-94 (mentioning cases tried by Natal'ya Grigor'eva in Moscow Region and V.V. Zolotikh in Rostov).

summation in front of the jury.³⁴²

Judges have, on occasion, intentionally built error into their summations to plant the seeds for reversal in the event of an acquittal, by recounting the prosecution's evidence or position in an incomplete or skewed manner. Observers have also witnessed cases in which the trial judge made comments clearly prejudicial to the defense, but then excluded those remarks from the copy of the summation which becomes part of the official record, making it difficult to allege error.³⁴³

6. *Errors in Jury Selection, Juror Misconduct, and Errors During Deliberation*

Errors in compiling jury lists or assessing juror eligibility have led to reversals and are clear examples of how the state's own negligence or misconduct can lead to the reversal of verdicts in favor of the defendant.³⁴⁴ Indeed, the widespread violation by administrative officials of the rules for compiling jury lists could build reversible error into any case the SCRF desires to reverse.³⁴⁵ Allegedly, certain courts have encouraged citizens to volunteer for jury duty in clear violation of the law.³⁴⁶ In some recent high

342. Case of Gushchin/Zhirnov (Moscow Region), No. 4-kp-095-42 vt sp (Nov. 15, 1995); Case of Kuz'kin (Moscow Region), No. 4-kp-095-114sp (Oct. 18, 1995); Case of Obusov (Moscow Region), No. 4-kp-95-106 sp. (Oct. 11, 1995). Natal'ya Grigor'eva, the judge who presided over the first Moscow Region jury trial, criticized such rulings and also noted that this ground was not even mentioned in the appellate briefs. Grigor'eva, *supra* note 232, at 177-78. The Chair of the Cassational Panel of the SCRF, A.P. Shurygin, defends the court's position. See Shurygin, *supra* note 135, at 7-8 (citing Professors I.L. Petrukhin and P.A. Lupinskaia).

343. One judge told the jury that the guilt question "usually raises no doubts" and that the main issue was that of leniency. In another case the judge said the jury could find defendant not guilty due to self-defense "in the case of extreme necessity" but then indicated that this was not present in the instant case. KARNOZOVA, *supra* note 10, at 147-58.

344. Case of Anufriev (Ul'ianovsk), No. 80 kp-096-7sp (Mar. 7, 1996) (reversing acquittal of rape-murder because 1995 list of jurors from City of Dimitrovgrad unlawfully included 269 persons from the 1994 list. Six thereof sat on the jury); Case of Kaplunov et al. (Rostov), No. 41-kp-099-7sp (Feb. 12, 1999) (reversing judgments of acquittal and conviction for four murders attributed to gangs because one juror unlawfully served twice in one year); Case of Smirnov/Medvedev (Stavropol'), No. 19 kp-099-25sp (Mar. 18, 1999) (reversing acquittal of two police officers for extortion because two jurors were sitting on their second case in the same year and one, the foreperson, on his third. In one of the previous cases he was also foreperson and the jury acquitted).

345. Ombudsman for Human Rights Vladimir Lukin has alleged that the procedure for selecting juries is not transparent and is subject to manipulation. Sharov, *supra* note 317. Persons are twice included on the same lists, lists contain the dead or people who no longer live in the district, and 30 percent of persons on lists do not meet eligibility requirements. *Id.* The European Court of Human Rights has already condemned such practices in relation to the selection of lay assessors in the old mixed court trials, where lay assessors had been sitting for 88 days rather than the fourteen day maximum that the law imposed. Posokhov v. Russia, E.C.H.R. 21, ¶¶ 28, 40-41, 43 (Mar. 4, 2004).

346. When Governor Aman Tuleev allegedly determined that the jury list in Kuzbass contained criminals and village idiots, he ordered that officials seek out only orderly, intelligent, and good people to become jurors. Due to the errors in the list, the first Kuzbass jury trial had to be postponed. Anatoliy Yarmoliuk, *Segodnia ty, a zavtra—ya*, VERSTY, Feb. 6, 2003, available through INDEM, *supra* note 59 (July, 2003).

profile political cases, parties have alleged that the courts have permitted the “stacking” of conviction-prone juries. This was evident in the espionage trial in Moscow City Court of Igor’ Sutyagin, who was convicted in April of 2004. In that case, a former KGB agent was allowed secretly to sit on the jury.³⁴⁷ This was also alleged in the case of Alexey Pichugin, ex-associate of Mikhail Khodorkovskiy, whom the jury convicted of murder.³⁴⁸

The SCRF has also reversed a number of acquittals due to seemingly technical errors during jury selection.³⁴⁹ A common trivial error leading to reversal has been the jury’s violation of its duty to deliberate for three hours before returning with a majority (as opposed to unanimous) verdict.³⁵⁰ This first happened in the first jury trial in Riazan’ in 1994, when the jury returned with a majority acquittal verdict of aggravated murder before three hours had elapsed. The prosecutor did not object, and the trial judge neither called the jury’s attention to the error nor returned them to deliberate for the additional time.³⁵¹ This easily avoidable error has led to the reversal of convictions³⁵² as well as acquittals. The SCRF has also

347. The Moscow Military District Court allegedly added the former agent, Grigorii Yakimishen, to the jury pool. Despite these allegations, the SCRF upheld the conviction. *Sutyagin Lawyers Charge That Juror Was Secret-Service Agent*, RFE/RL NEWSLINE, Oct. 26, 2004 at ¶ 15, <http://www.rferl.org/newsline/2004/10/1-RUS/rus-261004.asp>. See also *Law on Jurors*, *supra* note 38.

348. The judge dismissed the jury after it indicated that it was going to acquit and replaced it with a new jury. *Yukos Official Appeals Murder Conviction to Supreme Court*, RFE/RL NEWSLINE, Apr. 5, 2005, at ¶ 10, <http://www.rferl.org/newsline/2005/04/1-RUS/rus-050405.asp>.

349. In *Case of Shpeko et al. (Krasnodar)*, No. 18 kp-096-8 sp (Sep. 3, 1996), the court reversed an acquittal for quadruple murder because, *inter alia*, the parties were given a list of the jurors with full information as to their residence and place of work, for which the law did not provide. The court deemed that this could have influenced their decision to acquit. In *Case of Puchkov/Savchenko (Stavropol’)*, No. 19/1 kp-095-131 sp (Dec. 14, 1995), the jury selection began with 19 instead of the 20 jurors required by the jury law. In a 1998 case, the Presidium of the SCRF reversed an acquittal that had been affirmed by the Cassational Panel because the Presidium found that an alternate juror, “Medvedeva”, who replaced one of the original jurors, had never been sworn, though the actual reason was that the secretary of the court had written “Ledvedev” in the file in error. See *Interview with A.P. Shurygin*, in SCRF (Moscow, Aug. 19, 1998).

350. UPK-RF, *supra* note 14, § 343(1); UPK-RSFSR, *supra* note 12, § 453(2).

351. *Case of Artiukhov (Riazan’)*, No. 6-kp-094-13sp (Apr. 19, 1994). For discussion of this case, see *Thaman*, *supra* note 1, at 125.

352. *Case of Dzalmadaev et al. (Stavropol’)*, No. 19 kp-096-37 sp (June 4, 1996); *Case of Uzhakov (Moscow Region)*, No. 4-kp-095-90sp (Aug. 10, 1995) (reversing because the jury did not deliberate for three hours on issue of lenience); *cf.* *Case of Kukhtenkov*, SCRF-Review of Legislation and Judicial Practice (4th Quarter 1995), *supra* note 340; *Case of Puchkov/Savchenko (Stavropol’)*, No. 19/1 kp-095-131 sp (Dec. 14, 1995) (reversing conviction because deliberations started at noon and jury returned with majority verdict at 3:20 p.m., but jury had asked for some explanations at 1:30 p.m. and record did not reflect how long these explanations took); *Case of Alekseenko (Rostov)*, No. 41 kp-097-38 sp. (Apr. 30, 1997) (reversing conviction because some questions were not answered unanimously); *Case of Kudriashov (Riazan’)*, No. 6-kp-094-17sp, *Obzor zakonodatel’sтва i sudebnoy praktiki Verkhovnogo Suda Rossiyskoy Federatsii za IV. kvartal 1994 goda*, at 23 (Moscow, 1995) (reversing conviction because no unanimity on the question of lenience) [hereinafter SCRF-Review of Legislation and Judicial Practice (4th Qtr. 1994)].

reversed acquittals when the jury did not deliberate for three *additional* hours after the jury's deliberation had been interrupted to adduce a piece of new evidence.³⁵³

The SCRF has not infrequently reversed judgments because of violations of the confidentiality of jury deliberations or other instances of alleged jury misconduct. It has reversed acquittals because the two alternate jurors sat in during deliberations³⁵⁴ and also because the alternates allegedly left the jury room during deliberations or communicated with non-jurors during deliberations.³⁵⁵ Other acquittals were reversed because jurors allegedly spoke with counsel or family members of the defendant during the trial,³⁵⁶ independently investigated the case,³⁵⁷ or in one case, questioned a defendant directly rather than in written form mediated by the trial judge, as required by law.³⁵⁸

7. *Judicial Errors in Giving Reasons for the Judgment*

Most continental European criminal justice systems permit reversal of a judgment if the reasoning was inadequate,³⁵⁹ but only two classic jury systems, Spain and Austria, require the jury to provide reasons for the verdict. In Spain, inadequate reasoning by the jury can lead to the reversal of an acquittal.³⁶⁰

353. After the jury had deliberated for two hours and ten minutes, the trial was reopened to read a report of a view of the scene of the crime. The jury then deliberated another hour and ten minutes. BVSRF, *supra* note 93, No. 6 (2002), <http://www.supcourt.ru/bulletin/02/02-06/b112.htm>.

354. Case of Denisov (Altay), No.51-kp-094-61sp (June 28, 1994) (all 14 jurors voted for acquittal). *See also* Thaman, *supra* note 1, at 129. At least two other acquittals were reversed for the same reason. Case of Sherstnev (Krasnodar), No. 18-kp-095-55sp (Feb. 14, 1995). For another acquittal reversed for the same reason, see Shurygin, *supra* note 161, at 20.

355. Case of Zhevak (Rostov), *supra* note 329 (reversing acquittal because, *inter alia*, male jurors left jury room to smoke).

356. In Case of Shpeko (Krasnodar), *supra* note 349, the prosecutor alleged that the jurors talked with the defendant's relatives and that seven of the jurors spoke with the defendant's girlfriend in the bathroom. *See also* Case of Metskhvarishvili (Moscow Region), No.4-kp-098-105sp (June 25, 1998) (reversing acquittal for forcible sodomy because foreperson chatted with defendant's lawyer); *Obzor zakonodatel'stva i sudebnoy praktiki Verkhovnogo Suda Rossiyskoy Federatsii za pervoe polugodie 1995 goda* 45 (1995); Case of B (Krasnodar), No. 18 kp 002-71 sp vt, SCRF-Jury Review (2002), *supra* note 92 (judge dissolved jury after it had reached acquittal due to alleged violation of the confidentiality of deliberations).

357. Case of P (Saratov), SCRF-Jury Review (2001), *supra* note 89 (foreperson became convinced of innocence after visiting the scene, and convinced other jurors).

358. Case of Titov (Moscow Region), No.4kp-003-13sp (Mar. 5, 2003) (defendant also answered some of the questions by volunteering allegedly inadmissible evidence); BVSRF, *supra* note 93, No. 7 (2004), http://www.supcourt.ru/vscourt_detale.php?id=1670.

359. For examples, see THAMAN, COMPARATIVE CRIMINAL PROCEDURE, *supra* note 64, at 187-213.

360. *Id.* at 193-95. The Spanish Constitutional Court has upheld the requirement that juries give reasons for verdicts of acquittal. STC 2004 of Dec.20, 2004, <http://www.tribunalconstitucional.es/JC.htm>.

In Russia, the professional judge, while bound by the jury's answers to the questions in the question list, must give a reasoned judgment subject to appellate review.³⁶¹ In both the German mixed court and the Russian jury court, it is possible for the professional judge to create error in the judgment reasons and thereby lay the groundwork for the reversal of a judgment with which he disagrees.³⁶² The Russian appellate court often bends over backwards to find error in the trial judge's reasoning so that it may set aside a jury verdict that itself may have been error-free.³⁶³ The SCRF has recently ruled that in giving reasons for an acquittal, the trial judge need only state which of the three special verdict questions the jury answered in the negative. Thus, the reviewing court now will only correct the judgment to reflect whether it was due to of the absence of any criminal conduct, inadequate proof of the identity of the perpetrator, or the jury's failure to find guilt.³⁶⁴

E. Are There Cases Where No Result Other Than a Conviction is Acceptable?

Several cases suggest that sometimes the SCRF will not permit acquittal, no matter how many times the case is tried. One of the most well-known multiple-acquittal cases is the Case of Lipkin, et al., which involved the assassination of State Duma deputy S.G. Skorochkin on February 2, 1995. The first trial in the Moscow Regional Court resulted in acquittal of Lipkin and his five co-defendants after Lipkin had spent 3.5 years in pre-trial custody. The SCRF reversed the acquittal, citing the exclusion of several pieces of evidence favorable to the prosecution's case, and the fact that the defendant and defense witnesses called the jury's attention to the use of unlawful methods by investigators during pretrial interrogations.³⁶⁵

361. UPK-RF, *supra* note 14, §§ 351, 305, 307; UPK-RSFSR, *supra* note 12, § 462.

362. In the celebrated German case of *Monika Weimar* it was speculated that the professional judge who wrote the reasons for the acquittal in a case of double murder intentionally left them inadequate, allowing the judgment to be reversed upon appeal in cassation. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 64, at 202-08.

363. The SCRF has reversed acquittals or convictions of substantially lesser, included offenses based on this reason. Case of Kondzhariia et al. (Saratov), No. 32 kp-096-22 sp (June 4, 1996), SCRF-Review of Legislation and Judicial Practice (4th Qtr. 1994), *supra* note 340 (setting aside verdict of negligent homicide because the killing was described as if it were an intentional murder); Case of Fliagin (Saratov), No. 32-004-5sp (Mar. 16, 2004), in BVS RF, *supra* note 93, No. 10 (2004), http://www.supcourt.ru/vscourt_detale.php?id=1731 (acquittal of attempted murder reversed based on judge's inadequate reasons for finding no intent to kill).

364. Case of Liuyma/Romanov (Ul'ianovsk), No. 80-kp003-42-sp-1 (Dec. 29, 2003), in BVS RF, *supra* note 93, No. 8 (2004), http://www.supcourt.ru/vscourt_detale.php?id=1685. Critics have noted that requiring reasons for an acquittal other than lack of proof tends to violate the defendant's presumption of innocence. In Russia, the provision of reasoning is required because an acquitted person is subject to full rehabilitation and compensation as an innocent person. Martin Fincke, *Die Reform des Strafprozesses in Russland*, in *DIE NEUEN KODIFIKATIONEN IN RUßLAND* 207 (F.C. Schroeder ed., 1997).

365. Case of Lipkin et al. (Moscow Region), *supra* note 329 (the long pre-trial incarceration was circumstantial evidence of problems encountered while investigating the case).

The case was tried again, and on December 5, 2000, it again ended with an acquittal. In the second trial one of the defendants, Lopukhov, claimed that he had satisfied all debts to the victim, Skorochkin, and introduced a note substantiating this fact. On the second appeal, the prosecutor claimed that the trial judge had violated the prosecutor's adversarial rights by (a) refusing to grant a continuance to conduct a handwriting analysis of the note, and (b) refusing to admit the report that a machine gun and pistol were found during a search of Lopukhov's home.³⁶⁶ On May 7, 2003, the defendants were again acquitted, but the SCRF again reversed, citing a long list of erroneously excluded evidence by the trial judge and repeated mention of the illegality of police interrogation techniques.³⁶⁷

Acquittals in Russia sometimes suggest a troublesome type of ethnic prejudice. In several recent cases, courts acquitted Russians of the murder of Chechens. These acquittals have been compared to jury verdicts in the American South, where whites were routinely acquitted after murdering blacks. The most high-profile case of this type was that of Eduard Ul'man and four co-defendants. The five Russian were tried before a jury in the North Caucasus Military Court for murdering six Chechen civilians during the Chechen War. After their first trial, they were acquitted by a jury, but the SCRF reversed the acquittal four months later. Ul'man and his codefendants were again tried and acquitted,³⁶⁸ but the Military Panel of the SCRF reversed the second acquittal, too.³⁶⁹ In a similar case, two Russian servicemen accused of murdering three Chechen construction workers were also twice acquitted by juries in the North Caucasus Military Court only to have the Military Panel of the SCRF overturn each acquittal.³⁷⁰

Multiple reversals of acquittals have also occurred frequently in less overtly political cases. In the Case of Nikitin, et al., four men killed a woman to acquire her apartment, a common crime in the 1990's directly following the privatization of most Russian apartments. The men were

366. Case of Lipkin et al. (Moscow Region), No. 4-kp-001-31sp (May 30, 2001) (two of the same SCRF judges who reversed the first acquittal, Judges Kozin and Kudriavtseva, sat on the second appeal as well).

367. Case of Lipkin et al. (Moscow Region), No. No. 4-kp-003-84sp (July 10, 2003). Again, Judge Kozin made up part of the panel which overturned the third acquittal, along with Judge Ivanov who participated in the second decision.

368. Sokovnin & Mashkin, *supra* note 144.

369. *Million Russians Back Officer Charged With Killing Chechen Civilians*, RFE/RL NEWSLINE, Nov. 14, 2006; see also *Russian Court Quashes Servicemen's Acquittal in Chechen Killings*, RFE/RL NEWSLINE, Aug. 31, 2005. Despite a petition with one million signatories demanding Ul'man's release, the third trial began on November 2, 2006, in Rostov-on-the-Don.

370. *Chechen Official Deplores Acquittal of Russian Servicemen*, RFE/RL NEWSLINE, Oct. 7, 2005. The first acquittal took place in June 2004 and the second on October 6, 2005. More recently, St. Petersburg juries acquitted two defendants in separate cases, each charged with a murder based on racial or ethnic hatred. In March 2006, a jury acquitted a teenage boy of murder of a nine year-old Tajik girl, Khursheda Sultanova, and in July 2006, a jury acquitted four young men of the murder of a 29 year-old Congolese student, Roland Eposak, to the cheers of some 50 supporters of the alleged killers. Yelena Gorlanova, *Negry v Peterburge umiraiut sami*, GAZETA.RU, July 26, 2006 http://www.gazeta.ru/2006/07/25/oa_209453.shtml.

acquitted, but the SCRF reversed the acquittal soon after, claiming that the trial judge erroneously excluded evidence.³⁷¹ Upon retrial they were acquitted again, but the case was again reversed, apparently due to erroneous exclusion of the same evidence.³⁷²

Although not all second or third acquittals are reversed by the SCRF,³⁷³ one may comfortably surmise that the reversals may be the result of a "no-acquittals" policy rather than substantive errors during the trials.³⁷⁴ In another multiple acquittal case, the defendant was accused of bombing a market in Astrakhan, killing eight people. After two separate juries had acquitted the defendant, and two additional trials ended in mistrials, the defendant, Magomed Isakov, now believes that he will be repeatedly tried until he is convicted. Isakov's second acquittal, while affirmed by the Cassational Panel of the SCRF, was reversed by the SCRF's Presidium.³⁷⁵

F. The Appellate Policy of the SCRF in Comparative Perspective

Tsarist juries also had a high acquittal rate. Of the 918 verdicts over a fourteen year period studied by Bobrishchev-Pushkin, 590 ended in acquittals, 96 of which were cases in which the defendant completely admitted

371. Case of Nikitin et al. (Moscow Region), *supra* note 328.

372. Case of Nikitin et al. (Moscow Region), No. 4 kp-098-159sp (Oct. 2, 1998).

373. In Case of Sushko (Stavropol'), No. 19-kp-094-72sp (Dec. 13, 1994) (a first acquittal for aggravated murder of two persons was reversed due to allegedly erroneous exclusion of evidence). *See also* Thaman, *supra* note 1, at 261-62. The second acquittal was affirmed. Case of Sushko (Stavropol'), No. 19 kp-096-87 sp (Oct. 31, 1996). In Case of Yes'kov (Altay), the defendant was first acquitted of accepting bribes as a police officer and the acquittal was reversed by the SCRF. Thaman, *supra* note 1, at 152-53. Upon being acquitted for a second time, however, the SCRF upheld the judgment. Case of Yes'kov (Altay), No. 51 kp-096-61 sp (Nov. 14, 1996). For another case involving multiple acquittals of a defendant in Krasnodar who threw a grenade at a police station, see Irina Dline & Olga Schwartz, *The Jury Is Still Out on the Future of Jury Trials in Russia*, 11 EAST EUROPEAN CONST. REV. 104, 108 (2002).

374. For instance, in Case of Denisov (Altay), *supra* note 354, defendant was acquitted of attempted murder of four persons. The acquittal was reversed because the two alternate jurors deliberated and voted for acquittal. The defendant was again acquitted, but the judgment was again reversed because of a contradictory verdict; the jury found that the defendant acted in self-defense, but erroneously also found that he had not committed the charged act. Case of Denisov (Altay), No. 51-kp-094-61sp (Jan. 18, 1995). In Case of Luk'ianov (Moscow Region), No. 4-kp-094-145 (June 12, 1994), the defendant was acquitted of rape of a minor, and convicted of a lesser offense but the case was reversed because the judge posed a "question of law," i.e., whether the defendant was guilty of "rape." Thaman, *supra* note 1, at 198. The jury reached the same verdict in the second trial, but the SCRF again reversed because the judge disqualified the acts found true by the jury and excluded a transcript of the defendant's prior testimony. Case of Luk'ianov (Moscow Region), No. 4-kp-095-126 sp (Jan. 10, 1996). In Case of Kurochkin (Krasnodar), *supra* note 329, the defendants were acquitted of rape. The SCRF reversed the acquittal and a second jury acquitted the defendants again. The SCRF found a new reason to reverse: an error in the question list. Case of Kurochkin et al. (Krasnodar), No. 18-k-099-3sp (Jan. 28, 1999). Finally, in Case of Afanas'ev (Buriatiia), *supra* note 336, defendant's acquittal of a double murder was reversed because his lawyer called into question the character of a witness and mentioned to the jury his prior acquittal!

375. Murphy, *supra* note 310.

his or her guilt.³⁷⁶ Timofeev found that in one regional court there were 103 acquittals (28% of cases) over a six month period, eighteen due to long pretrial detentions, fourteen due to insufficient evidence of guilt, eight due to sympathy for a defendant in bad economic straits, twelve for other reasons (e.g., youth, relationship of the defendant to the victim, restitution having been made, mental retardation, etc.).³⁷⁷

Harmless error analysis may limit the need to reverse acquittals. Critics of the Tsarist Cassational Senate often lamented the fact that, due to the inconsistency and lack of precedential value of appellate rulings, jurors had to deal with the facts of the case "through a difficult, sometimes impenetrable cassational forest."³⁷⁸ Nonetheless, the Cassational Senate employed a type of harmless error analysis, which meant that not every error in the question lists led to reversal of an acquittal. Though the Cassational Senate prohibited the use of "juridical terms," it would not reverse a verdict: (1) where the jurors were instructed clearly and in a detailed fashion as to the meaning of the terms used in the question and in the accusatory pleading; (2) where the Cassational Senate was convinced of the correctness of the answers given; (3) where the parties did not object to the questions and the jury verdict was understandable and reached without problem; (4) where the juridical terms had the same meaning in everyday conversation; (5) where questions containing juridical terms were left unanswered; (6) where, along with juridical terms, factual elements were included "from which the meaning of the used terms can be divined"; or (7) where the question was susceptible to being understood by everyone.³⁷⁹

The SCRF, in going out of its way to reverse acquittals, has neither cited any authority for its rulings nor attempted to explore the wealth of pre-revolution jurisprudence and scholarly writing on the subject of acquittals. The ineluctable conclusion of this analysis is that the SCRF is acting to deprive the jury of its historically and statutorily rooted competence to determine guilt. The SCRF is acting as a political rather than a judicial institution. Its goal appears to be to fight crime by annulling "scandalous" jury acquittals.³⁸⁰ The practices of the old Soviet professional judges are being carried on in the "robes of the new procedure,"³⁸¹ and the SCRF is spearheading the sabotage of the "most important and liberal" provisions of the UPK-RF.³⁸²

376. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 204-205. In 494 of the acquittals the defendant admitted to some of the charged conduct. *Id.*

377. TIMOFEEV, *supra* note 262, at 391-92.

378. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 383.

379. SELITRENNIKOV, *supra* note 164, at 12-13.

380. This, indeed, was a recognized task of the Soviet and Republican Supreme Courts in Soviet times. I.L. Petrukhin, *Sudebnye Garantii Prav Lichnosti (v ugovolnom protsesse)*, in AKTUAL'NYE VOPROSY BOR'BY S PRESTUPHOSt'IU V ROSSII I ZA RUBEZHOM, No. 8, 13-14 (1992). The U.S. Supreme Court has also been accused of being a "loyal foot soldier in the Executive's fight against crime." *California v. Acevedo*, 500 U.S. 565 (1991) (Stevens, J., dissenting).

381. KARNOZOVA, *supra* note 10, at 14-15.

382. Tamara Morshchakova, *quoted in* Leonid Nikitinskiy, . . . I suda net. *Diagnoz doktora Morshchakovoy*, NOVAIA GAZETA, July 19-21, 2004, at 7.

G. Double Jeopardy and Limitations on the Reversibility of Acquittals

The reluctance of the SCRF to accept jury acquittals may make many criminal defendants think twice before exercising their constitutional right to a jury trial. The idea that retrial of acquittals could violate the principle of double jeopardy was first brought before the CCRF in a case where the Cassational Panel of the SCRF affirmed an acquittal and it became final, only to be overturned by the Presidium of the SCRF in a procedure to review final judgments (so-called *nadzor*).³⁸³ The CCRF refused to hear, and then remanded, the case, declaring that the trial court should decide the case in accordance with the United Nations International Pact for Civil and Political Rights (IPCPR). Moscow regional court then dismissed the case, only to have the Presidium of the SCRF again reverse the dismissal and send the case back to trial.³⁸⁴ The evil in the *nadzor* procedure is that presidents of the courts could themselves trigger review of final judgments, and then be the judges on their own motions. In this capacity they often worked hand in hand with prosecutors to overturn acquittals that had become final.³⁸⁵

The UPK-RF of 2001 took steps to prevent the reversal of acquittals on review, thus following the recommendation of the Concept of Judicial Reform denying the judiciary any role in appealing acquittals³⁸⁶ or in any appeals in cassation which could worsen the position of the defendant.³⁸⁷ § 405 UPK-RF, in the original 2001 version, clearly prohibited use of the review procedure to appeal acquittals or to alter the posture of the case in any manner detrimental to the defendant.³⁸⁸

A CCRF decision of May 11, 2005 entitling the victim to move to re-open a final judgment of acquittal using the review procedure sabotaged this step forward. Thus, the CCRF has effectively adopted the position of the prosecution, which criticized the limited review prescribed in the original draft of the 2001 code.³⁸⁹ A group of sixty victims supported by the human rights ombudsman successfully petitioned the CCRF to declare the unconstitutionality of § 405 UPK RF, claiming it violated victims' rights to justice.³⁹⁰ Again, the victim was the Trojan horse for the prosecution in the

383. Case of Belichenko et al. (Moscow Region), No.1268p96pr (acquittal affirmed by Cassational Panel, reversed by Presidium of SCRF (Jan. 29, 1997).

384. For a discussion, see KARNOZOVA, *supra* note 10, n.46.

385. I.L. PETRUKHIN, TEORETICHESKIE OSNOVY REFORMY UGOLOVNOGO PROTSESSA V ROSSII Part I, 128 (2004).

386. Concept of Judicial Reform, *supra* note 2, at 85.

387. *Id.* at 98.

388. UPK-RF, *supra* note 14, § 405; Kommentariy-2002, *supra* note 70, at 651. The 1864 code also prohibited review of final judgments of acquittal. UUS-1864, *supra* note 34, § 21.

389. Procuracy Letter, *supra* note 111, at 2-4, in which S.G. Kekhlerov explicitly calls for allowing the victim to petition for review of acquittals within one year and notes that this would not violate Protocol 7(4) of ECHR.

390. Postanovlenie Konstitutsionnogo suda Rossiyskoy Federatsii po delu o provere konstitutsionnosti stat'i 405 Ugolovno-protsessual'nogo kodeksa Rossiyskoy Federatsii v sviazi s zaprosom Kurganskogo oblastnogo suda, zhalobami Upolnomochennogo po pravam cheloveka v Rossiyskoy Federatsii, proizvodvenno-technicheskogo kooperativa

quest to undermine and ultimately repeal the aspects of the 2001 UPK-RF that sought to protect defendants from the depredations of Soviet era procedure. Ye B. Mizulina, former State Duma Deputy and chair of the working group that drafted the UPK-RF, labeled the decision “primitive” and a “step back, approximately fifty years.”³⁹¹

VI. Has the Elimination of the Mixed Court and the Expansion of the Jury in Russia Provided an Opportunity for Citizens to Participate in a “School for Democracy” and the Rule of Law?

A. Reduction in Lay Participation with the 2001 Code?

Today one is faced with a seeming contradiction. The UPK-RF of 2001 led to the consolidation of jury trial throughout the republic,³⁹² but the simultaneous elimination of the mixed court has resulted in a substantial expansion of the cases subject to trial by a single judge.³⁹³ This has largely prevented the jury from performing the functions the reformers envisioned for it, including acting as a catalyst for the implementation of adversary procedure and allowing independent popular notions of justice and truth to correct the prosecutorial-inclinations of the Russian “no-acquittal” justice system.

Voices in the Russian literature cognizant of this trend, however, have called for expansion of the jurisdiction of the jury courts, which the “Concept of Judicial Reform” recommended for cases punishable by more than one year imprisonment,³⁹⁴ and even the reintroduction of a reformed mixed court to expand lay participation.³⁹⁵ Some have called for the expansion of the number of lay assessors so that they may more easily assert their independence from the professional judge³⁹⁶ and conduct

“Sodeystvie”, obshchestva s ogranichennoy otvetstvennost’iu “Kareliia” i riada grazhdan (May 11, 2005).

391. Anna Zakatnova, *Ugolovnye problemy*, ROSSIYSKAIA GAZETA, May 12, 2005, available at <http://www.rg.ru/2005/05/12/ks.html>.

392. It was never assured that the jury trial would spread beyond the nine participants in the “experiment” begun in 1993. The Russian government refused to fund an extension to twelve further regions in 1995-1996, and some of the regions, notably Riazan’ and Altay, even threatened to stop hearing jury cases due to lack of funds. Dline & Schwarz, *supra* note 373, at 105-06.

393. The turn to a capitalist, privatized economy led to a reluctance among employers to allow employees to sit on the mixed court. SOLOMON & FOGLESONG, *supra* note 60, at 120-21, 131-32. For this reason, single-judge courts were introduced in 1992. FRANZ, *supra* note 96, at 44. Pashin opined that, following the implementation of the UPK-RF, there would be lay participation in only 89 of Russia’s 2,500 courts and in 0.8 percent of criminal cases. Sergei Pashin, *Who Needs a Dependent Judge?*, MOSCOW TIMES, July 2, 2001, at 10.

394. Concept of Judicial Reform, *supra* note 2, at 41. Only in America are jury trials available for an even broader range of offenses, those punishable by more than six months imprisonment. See *Baldwin v. New York*, 399 U.S. 60 (1970).

395. Yuriy Kolesov, *Vmesto reformy sudebnoy sistemy my zakrepili yee poroki*, VREMIA NOVOSTEY. No. 29, available through INDEM, *supra* note 59 (Feb. 10-29, 2004).

396. A.A. Demichev suggests a court with one professional judge and five lay assessors. *Perspektivy rossiyskogo suda prisiazhnykh*, GOSUDARSTVO I PRAVO, Vol. 11, 101-1004

more transparent deliberations,³⁹⁷ such as by including their reasoning in their responses to question lists.³⁹⁸

B. Has Jury Trial Been a "School for Democracy" in the Eyes of the Jurors Themselves?

It has been difficult to assess the extent to which jurors are satisfied with their participation in the new Russian system. An early study in Saratov showed a high level of juror satisfaction, though this was conducted in the heady early years of the system in a region that was especially enthusiastic about its introduction.³⁹⁹ More recently, 200 jurors were surveyed who served in jury trials in 2004-2005. Before participating as a juror, most of those surveyed (72%) were confident that the jury was a more humane judicial institution. After their experience, however, the figure dropped to 61% while the number of those who disagreed rose significantly from 29% to 48%.⁴⁰⁰

To commence jury selection the trial court must summon at least 20 prospective jurors.⁴⁰¹ In the first year or two of Russian jury trials, courts seldom had to postpone trial due to the failure of jurors to respond to their summons.⁴⁰² Unfortunately, the difficulty of summoning jurors to participate seems to belie the research indicating that jury duty is popular. Since

(2002). I suggested to the Japanese a mixed court of one professional judge and at least six lay assessors. Thaman, *supra* note 32, at 98-99. The future Japanese court with lay assessors (*saiban-in*) will consist of three professional judges and six lay assessors, and will begin its work in 2009. Hiroshi Matsubara, *Quasi-Jury System Earns Diet Approval*, JAPAN TIMES, May 22, 2004, available at [/www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20050522a2.htm](http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20050522a2.htm).

397. In a late Soviet writing, Petrukhin suggested having the mixed court deliberate in the courtroom to prevent professional judges from browbeating the people's assessors. I.L. Petrukhin, *Die Oeffentlichkeit (glasnost') im sowjetischen Strafprozess*, in 4 DEUTSCH-SOWJETISCHES KOLLOQUIUM 129, 134 (1989).

398. Yu. V. Korenevskiy believes that the question list would "de-automatize" the making of judicial decisions. *Aktual'nye problemy dokazyvaniia v ugodovnom protsesse*, GOSUDARSTVO I PRAVO No. 2, 62 (1999), cited in KARNOZOVA, *supra* note 10, at 260. I suggested that the Japanese introduce a question list as well as a public instruction of the lay assessors on the principles of law applicable to the questions at issue to provide transparency and avoid the utter secrecy inherent in the German mixed court model. Thaman, *supra* note 32, at 110.

399. M.V. Sadomtseva reports of a study in which all jurors who participated in Saratov from February 1994 until October 1995 were given questionnaires. *Problemy otnosheniia grazhdan k obiazannostiam prisiazhnogo zasedatelia i vospriatiia imi protsedury sudebnogo razbiratel'stva*, VESTNIK SARATOVSKOY GOSUDARSTVENNOY AKADEMII PRAVA, Vol. 3 120, 123-25 (1996). 354 of 434 jurors filled them out and 91.8 percent approved of their experience. 66.7 percent indicated their desire to participate again.

400. U.S. Embassy, Law Enforcement Section, *Sociological Survey Report: Survey of jurors' opinions of the Russian system of criminal justice*, 9 (2005) (unpublished, on file with author).

401. UPK-RF, *supra* note 14, § 327(3); UPK-RSFSR, *supra* note 12, § 434.

402. In this period, Saratov had nearly 100 percent attendance of jurors. Sadomtseva, *supra* note 399, at 125. No trial in Saratov had to be postponed for this reason. Nemytina, *Sud prisiazhnykh*, *supra* note 214, at 29. Throughout the nine regions in 1994, 92 percent of those called to jury duty appeared. The number began to fall when financing for the jury courts was cut and jurors were less secure in getting their stipend. *Interview with Sergey Pashin by Lev Roytman, Peredacha 'Fakty i mneniia'. Prisiazhnye v Rossii sud'i*

the early days it has become increasingly difficult for courts to summon the 20 jurors required to begin jury selection in Russian cases.⁴⁰³ In 2003, for example, when the Moscow Regional Court was faced with the task of assembling sufficient prospective jurors for four jury trials that were to begin around the same time, only 60 of the 1200 candidates agreed to come to court.⁴⁰⁴

VII. Conclusion: Can an Independent Russian Jury be Resurrected and Serve as a Model for Eurasia and Elsewhere?

"Our social life is like swampy, shaky ground. No matter how wonderful a building is erected on this ground, it vanishes in an unseen manner into this ground, little by little it is sucked up by this soil."⁴⁰⁵

V.D. Spasovich

"We have a strange symbiosis of a democratic model of institutions and a Stalinist model of their functioning."⁴⁰⁶

Sergey Stepashin

A. Mandatory Jurisdiction of the Lay Participation Courts

In Russia, a jury trial should be mandatory for the most serious offenses, such as murder, as is the case in Spain, in order to prevent lawyers, investigators, prosecutors, and judges from pressuring defendants to waive this right. Arguably, jury trials are inappropriate in certain sensitive cases involving state secrets, terrorism, or violent organized crime. Spain took this approach in leaving these cases to the jurisdiction of a special National Court composed exclusively of professional judges.⁴⁰⁷ The procuracy and the successor of the KGB, the Federal Security Service (FSB), sought to eliminate jury trials in espionage cases⁴⁰⁸ after the acquit-

ili zalozhniki?", RADIO SVOBODA (WEB-SAYT), Jan. 17, 2003, available through INDEM, *supra* note 59 (Feb.1-7, 2003).

403. Only 5-10 percent of those summoned show up in some regions. KARNOZOVA, *supra* note 10, at 297-98.

404. Vladimir Perekrest, *Narodnaia Femida*, IZVESTIIA, July 2, 2003. See also Kira Remneva, *Sud iz ulitsy*, EZHENEDEL'NYI ZHURNAL, May 8, 2003, available through INDEM, *supra* note 59 (Apr. 27-May 11, 2003) (claiming that only 1 in 16 prospective jurors in Riazan' Region actually responds). A 90 percent failure-to-appear rate has been noted in Moscow Region and 84 percent in Altay Territory, while Ivanovo Region has reported only a 10 percent rate of failure to appear. Paul J. DeMuniz, *Judicial Reform in Russia: Russia Looks to the Past to Create a New Adversarial System of Criminal Justice*, 11 WILLAMETTE J. INT'L L. & DISPUTE RES. 81, 115 (2004); cf. Sharov, *supra* note 318 (5-10 percent appearance rate in some regions).

405. BOBRISHCHEV-PUSHKIN, *supra* note 152, at 13.

406. S. Stepashin, *Protiv kriminalizatsii Rossii*, ROSSIYSKAIA YUSTITSIIA Vol. 1, 2 (2000).

407. Ley Órgánica 6/ 1985 del 1 de julio del Poder Judicial, §§ 63, 65, available at http://www.juridicas.com/base_datos/Admin/lo6-1985.11t4.html

408. Pavel Aptekar', *Yuristy otnosiatsia k prisiazhnym luchshe, chem FSB*, STOLICHNAIA VERCHERNAIA GAZETA, Feb. 20, 2004, available through INDEM, *supra* note 59 (Feb.19-29, 2004).

tal of Valentin Danilov in Krasnoyarsk on December 30, 2003,⁴⁰⁹ but these efforts stopped after the conviction of Igor Sutiagin in Moscow City Court for espionage.

In Russia's case, I do not believe espionage cases should be taken from the jurisdiction of the jury court. First, the defendants in the Russian cases are typically scientists, who probably could not intimidate jurors. Second, these cases, like the seditious libel cases in eighteenth century England, are quintessentially political cases where a jury should intervene.

In the case of trials of terrorists or members of violent gangs, jury trials have sometimes become excessively cumbersome in Russia due to the number of defendants and the ensuing number of questions that the jury must decide. Here, too, jurors could be justifiably afraid of reprisals from Russian gang members, who are among the most ruthless and violent in the world. Again, however, the slipshod nature of criminal investigations in Russia and the inability to trust the professional judiciary to evaluate fairly the evidence produced in such investigations militate against entrusting such cases to a purely professional court.

Once an exception is made for cases involving "national security" or "terrorism," officials will try to squeeze controversial cases under such rubrics and a dual system of justice may result, in which outsiders, enemy combatants, etc., would be deprived of due process.⁴¹⁰

B. The Use of More Independent Mixed Courts in Instances of Less-Serious Offenses

I believe that Russia would benefit by maintaining the mixed court system in district court trials where the defendant faces imprisonment for more than 5 years.⁴¹¹ Lesser crimes could be tried by a single judge. The German Code of Criminal Procedure of 1871 provided for a jury trial in instances of serious capital crimes and for a mixed court for lesser crimes (until the jury was eliminated in 1924).⁴¹² Austria⁴¹³ and Norway⁴¹⁴ continue to provide jury trials for the most serious crimes, mixed courts for

409. Seth Mydans, *Rare Russian Jury Acquits Scientist in Spy Case*, N.Y. TIMES, Dec. 30, 2003, available at <http://www.nytimes.com/2002/12/30/international/europe/30RUSS.htm>. Of course, Danilov's acquittal was reversed due to "pressures being placed on the jury" by defense counsel, and he was convicted in a secret trial in September 2004. Voronov, *supra* note 145, at 52.

410. The 1864 Russian laws were amended in 1881 and 1907 to remove all political and capital cases from the jurisdiction of the jury court and try them in military or other secret courts. KUCHEROV, *supra* note 36, at 204-06. The parallels with the military commissions of President George W. Bush for "enemy combatants" also come to mind. See generally Stephen C. Thaman, *L'impatto dell'11 Settembre sulla procedura penale americana*, CASSAZIONE PENALE No. 1, 251, 263-54 (2006).

411. The main author of the 1993 jury law, Sergey Pashin has also criticized the elimination of the mixed courts and maintained his work with lay assessors in Moscow City Court for five years was a "good experience." Natarov, *supra* note 57.

412. Markus Dirk Dubber, *The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology*, 43 AM. J. COMP. L. 227, 235-37 (1995).

413. A mixed court of two professional judges and two lay assessors hears cases punishable by more than five years, and a jury of three professional judges and ten jurors hears cases punishable by more than five years when the maximum exceeds ten years.

the mid-range offenses, and single judge courts for the least serious offenses.

Ironically, the Soviet form of mixed court had much more actual resonance throughout the world than its much touted German prototype.⁴¹⁵ It became a fixture nearly everywhere in the Socialist Bloc, and still exists in remaining socialist or communist countries, such as China, Vietnam, and Cuba, as well as in post-socialist countries such as Poland, Hungary, the Czech Republic, Croatia, Ukraine, Belarus, Estonia, and Latvia (where it has functioned more like the German mixed court since the end of Communist party domination).

The important question is whether the Soviet mixed court system can be transformed into a court that can guarantee real judicial independence, given that many of the Communist-era judges still sit on the bench.⁴¹⁶

Modern systems of mixed courts should require random selection of lay assessors from the general public to ensure a fair cross-section of the community and independence from political parties and the establishment. Such independence did not exist in the old "key man" system of picking juries in the United States,⁴¹⁷ nor in the Communist Party-controlled selection of lay assessors in the old Soviet Bloc.⁴¹⁸ Such independence is also absent in the party-dominated system of "vetting" candidates, which exists in Germany⁴¹⁹ and other European countries.⁴²⁰ In contrast, lay assessors are drawn randomly from voter lists in the new Venezuelan

Strafprozessordnung, in STRAFPROZESSORDNUNG KURZKOMMENTAR, §§ 13, 14 (Manz. 8th ed. 2000).

414. In reality, trials in the first instance are all heard by mixed court of either one professional judge and two lay assessors, or in cases of more serious crimes, by two professional judges and three lay assessors. Serious crimes punishable by an excess of six years are then subject to trial by jury but only on appeal. Asbjorn Strandbakken, *Lay Participation in Norway*, 72 REV. INT'L DE DROIT PÉNAL 230-36 (2001).

415. That is, real resonance. Among theoretical proponents of mixed courts, it is the German *Schöffengericht* that serves as the model, not the more prevalent variations of the Soviet "court with people's assessors." See John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* 1981 AM. BAR. FOUNDATION RESEARCH J. 195.

416. For a recent sociological study of the Russian mixed court in the Rostov Region shortly before its abolition, a time when the lay assessors were chosen at random and were given access to case files, see Stefan Machura, *Fairness, Justice and Legitimacy: Experiences of People's Judges in South Russia*, 2 LAW & POLICY 123-47 (2003). Machura notes that the lay assessors decided cases rapidly, with little time to understand their intricacies. For a more negative assessment, calling the lay assessors "snoring grandnannies," see SOLOMON & FOGLESONG, *supra* note 60, at 120-21. On the persistent lack of influence of the pensioner-lay assessors, see Pomorski, *supra* note 60, at 469-71.

417. LA FAVE ET AL., *supra* note 301, at 1044.

418. Thaman, *supra* note 1, at 67.

419. STRAFPROZESSORDNUNG 1381-1533 (Kleinknecht & Meyer-Goßner eds., 43rd ed. 1997) [hereinafter GVG-Germany].

420. For instance, Denmark and Norway. Hiroshi Sato, *Designing the Lay Judge System in Japan*, in THE ROLE OF THE JUDICIARY IN CHANGING SOCIETY (symposium of the Japanese Association of Sociology of Law, Tokyo, Japan) (June 9-10, 2001) (on file with the author).

system,⁴²¹ in France,⁴²² and will be so chosen in the mixed courts to be introduced in Kazakhstan on January 1, 2007.⁴²³ The Russian system was modified in 2002 to introduce the same selection process.⁴²⁴

It is also recommended that lay assessors only sit on a single case every year,⁴²⁵ as will be the case in the new Japanese mixed court, which will take effect in 2009.⁴²⁶ This restriction prevents "case-hardening," but, more importantly, prevents the formation of close relationships between assessors and the judges, which undermine the independence of assessors. Lay assessors sit for four years in Germany⁴²⁷ and may re-volunteer or be re-elected to indefinite successive terms, thus becoming more like English lay magistrates.⁴²⁸ Such a system also existed in the Soviet Union and still exists in Sweden, where lay judges are elected by local councils for a six year period.⁴²⁹ Lay assessors, if limited to one case, will offer a fresh and independent perspective, and will act less like the "noddors" of the former

421. COPP-Venezuela-2001, § 155. Cf. Stephen C. Thaman, *Latin America's First Modern System of Lay Participation*, in STRAFRECHT, STRAFPROZESSRECHT UND MENSCHENRECHTE: Festschrift für Stefan Trechsel 768-69 (Andreas Donatsch et al. eds., 2002).

422. LOMBARD, *supra* note 24, at 292.

423. Zakon Respubliki Kazakhstan of Jan. 16, 2006, No. 121, § 6(1)(1), available at http://www.minjust.kz/site/index_rus.php?mod=arefphp&DataTextId=10&TableName=laws ("O prisiashnykh zasedateley").

424. O narodnykh zasedateliakh federal'nykh sudov obshchey yurisdiktsii v Rossiyskoy Federatsii, Federal'nyy Zakon of 2 January 2000, No. 37-F3, SOB. ZAK. RF, §§ 2(1), 5(2), 9(1) (2000), reprinted in UGOLOVNO-PROTSESSUAL'NYY KODEKS RSFSR S PRILOZHENIAMI 256-60 (N.P. Kipnis ed., 2d. ed. 2001) [hereinafter, Law on People's Assessors-RF].

425. The 2000 Russian reforms also provided that lay assessors only sit for a total of fourteen days, or not more than one case, whichever was longer. Law on People's Assessors-RF, *supra* note 424, § 9(1). Unfortunately, some courts routinely violated this law. Georgiy Tselms, *Nashe mesto lish' na skam'e podsudimyykh*, RUSSKIY KUR'ER, March 15, 2004, available through INDEM, *supra* note 59 (Mar.13-19, 2004). Such a violation led to Russia being condemned in the European Court of Human Rights in *Posokhov*, *supra* note 345. For Support of the maintenance of the new Russian mixed court, and noting that famous pre-revolution judge A.F. Koni held that professional judges should never be in a position to deprive anyone of liberty, see V.P. Bozh'ev, *O sovershenstvovanii ugolovnogo-protsessual'nogo zakonodatel'stva*, in SUDEBNAIA REFORMA V ROSSII, *supra* note 132, at 225. This was also the position of the Concept of Judicial Reform, *supra* note 2, at 51 (no imprisonment or, at most, up to one year).

426. See *Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century*, reprinted in 2000-2001 ST. LOUIS-WARSAW TRANSATL. L. J. 215 [hereinafter Japan Recommendations].

427. German *Schöffen* are elected for four terms and sit for no more than twelve regular court sessions each year. It should be noted the committees should strive to include "all groups of the population" in the lists. §§ 42, 43 GVG-Germany, *supra* note 419.

428. ERIC LORENZO PÉREZ SARMIENTO, COMENTARIOS AL CÓDIGO ORGÁNICO PROCESAL PENAL 215 (3rd ed. 2000) (commenting on the Venezuelan method of selecting lay assessors for just one case, noted that "a lay judge elected for two years, with the unlimited possibility of being re-elected, as occurred in the now disappeared USSR, ends by being professionalized, and converting himself into a political figure.").

429. THE SWEDISH CODE OF JUDICIAL PROCEDURE, Ch. II, §§ 7-8; The National Council for Crime Prevention, Report No. 16 (1985). In Sweden it is not uncommon for a lay assessor to have served for as many as 20 years. Sato, *supra* note 420, at 12.

Soviet Union or the “ornaments” in Germany⁴³⁰, Hungary,⁴³¹ and other countries.⁴³² This limitation also gives a greater part of the population the chance to participate in the administration of justice, which should be one of the key aims of the system. The goal of greater inclusion is also promoted by mixed courts containing more than just two lay assessors, such as in the classic German and Soviet models. Kazakhstan has opted for a mixed court composed of two professional judges and nine lay assessors.⁴³³

C. Limiting the Adversarial Rights of the Victim

The role of aggrieved party or victim in Russian criminal trials should be limited to that of a civil complainant seeking damages and not to that of a party with process rights equal to the defendant (as is now the case). But if the Russian legislature continues to allow the aggrieved party to be a collateral prosecutor, then she should be required to hire counsel or have court-appointed counsel, as is done in Spain. The aggrieved party should be responsible for raising at the pre-trial or trial stages all issues it later relies on in the appeals process. Recent decisions of the CCRF, which treat the aggrieved party as a completely helpless and blameless party, use the often intentional violation of their rights as a pretext to overturn acquittals or return shoddy cases to the prosecutor for further investigation. Such decisions are inappropriate and undermine the adversary procedure mandated by the Russian Constitution.

D. Simplification of the Verdict Form

The Russian jury should either adopt the Anglo-American general verdict,⁴³⁴ or should explicitly instruct jurors as to the juridical meaning of each of the questions asked in the special verdict or question list. The jury must understand precisely what crime or crimes the defendant will be convicted or acquitted of if they answer in a given way. Juries should apply the law that is explained to them in the judge’s summation to the facts that

430. In Germany, some have used the word *Schöffenatrappe* (lay assessor as stage prop). RENNIG, *supra* note 27, at 273.

431. Attila Badó, *Reforming the Hungarian Lay Justice System*, at 10 (Paper presented at Law and Society Meeting, Budapest, July 4-7, 2001) (on file with author).

432. For an argument that the American jury trial system has been reduced to an “ornament” due to its displacement by plea-bargaining, see DAMASKA, *supra* note 152, at 128-29.

433. Ugolovno-protsessual’nyy kodeks Respubliki Kazakhstan § 544, added Jan. 16, 2006, goes into effect, January 1, 2007.

434. The Republic of Georgia appears to be headed towards adopting the classic American jury court, composed of 12 jurors and one professional judge and using a general verdict form. Draft Code of Criminal Procedure of the Republic of Georgia §§ 241, 243 (on file with author) [hereinafter 2006 Draft CCP-Georgia]. I would like to thank Professor William Burnham, who is working with the Georgians on their new code, for providing me with a 2006 draft. The Azerbaijan jury law also provides for submitting just two simple questions, as to guilt and lenience, to their 12 person jury, which will then decide based on a simple majority of votes. Ugolovno-protsessual’nyy kodeks Azerbaydzhanskoy Respubliki, No. 907-IG, §§ 79(2), 369, 370, 375(4)(1) (confirmed by a law of July 14, 2000, but not yet in effect).

they find proved, and they alone should determine guilt. Guilty verdicts should be by qualified majority—at least nine or ten of the twelve jurors.⁴³⁵

E. Limitation of the Appellate Jurisdiction of the Second Instance Courts

Russia should also introduce a “raise or waive” rule for bringing appeals and a harmless error rule. The SCRF should be limited in its review to the issues that were properly preserved (through timely objection) at the trial court level and raised by appellate counsel. Acquittals should be final and not subject to appeal⁴³⁶ except, perhaps, where the verdict was procured through corrupt means.⁴³⁷ Without these changes, the SCRF will continue to overturn any acquittals that displease it for any reasons it sees fit, and the jury will continue to function as an irrelevant, decorative institution.

435. Mel'nik suggests raising the votes necessary for a guilty judgment to eight from seven. MEL'NIK, *supra* note 5, at 121. Petrukhin supports unanimous, or at least qualified majority, verdicts. Petrukhin, *Sudebnye Garantii*, *supra* note 380, at 11. Draft CCP-Georgia, § 245, *supra* note 434, would require nine of twelve votes for a conviction.

436. See SOLOMON & FOGLESONG, *supra* note 60, at 189 (suggesting that Russia should not allow appeals of jury acquittals). Draft CCP-Georgia, *supra* note 434, § 251 would make jury acquittals final and not subject to appeal.

437. There is little precedent in Anglo-American jurisprudence to allow an appeal of a fraudulently acquired acquittal. David S. Rudstein, *Double Jeopardy and the Fraudulently Obtained Acquittal*, 60 MO. L. REV. 607, 620-35 (1995). However, an Illinois court recently reversed an acquittal in a court trial procured through bribery, and the 7th Circuit let the decision stand. *People v. Aleman*, 667 N.E.2d 615, 623-27 (Ill. App. 1996); *Aleman v. Honorable Judges of Cook County Circuit Court*, 138 F.3d 302, 307-08 (7th Cir. 1998).