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The Status of Judicial Reform in Russia

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THE STATUS OF JUDICIAL REFORM IN RUSSIA

SCOTT P. BOYLAN*

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I. INTRODUCTION

In Soviet times, the Soviet judiciary was the least respected branch of the legal profession. Judges did not render judicial decisions until they cleared the result with the local Communist party boss or some other ranking *apparachtik*. Among the general Soviet population, this

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process was known as "telephone justice," and the judges who dispensed it were held in low esteem.¹

The Soviet legacy has made it difficult to establish an independent and respected judiciary in Russia.² Much of the former structure that enabled the Soviet government to control judge's decisions still exists, and Russians remain very suspicious of the judiciary. Despite the significant barriers to the creation of an independent judiciary, positive steps have recently been taken. Unfortunately, most of the judicial reforms—like the on-again, off-again privatization efforts in Russia—are incomplete, partial, and inconsistent. Although Russia is in the process of creating a rule-of-law state, significant problems remain for criminal defendants—especially for non-Russians.³ Nevertheless, progress has been made over the past year leading to some optimism about the future development of the Russian judiciary.

II. WHAT IS AN INDEPENDENT JUDICIARY?

While there is no single definition of what characterizes an independent judiciary, it is generally agreed that an independent judiciary is indispensable to a viable and functioning constitutional democracy.⁴ There are standards, however, that are useful in evaluating a judicial system and the extent of its independence.⁵ First, judicial leadership is essential in the creation and establishment of an independent judiciary.⁶ Second, the judiciary should function as a separate government branch that is equal in standing and status to the other government branches.⁷ The judiciary should, therefore, not

1. See Mark S. Ellis, *Getting Judges to Hang Up on 'Telephone Justice,'* WASH. POST, June 22, 1997, at C3.

2. See GORDON B. SMITH, *REFORMING THE RUSSIAN LEGAL SYSTEM* 129 (1996).

3. See Mumin Shakirov, *Judge Is Accuser, Arbiter*, MOSCOW TIMES, Apr. 3, 1998, § 1426.

4. See James G. Apple, *The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights*, in *THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 197, 199* (Eugene Cotran & Adel Omar Sherif eds., 1997).

5. See *Recommendation No. R (94) 12*, Council of Eur. Comm. of Ministers to Member States on the Independence, Efficiency and Role of Judges. (Oct. 13, 1994) [hereinafter *Recommendation No. R (94) 12*].

6. See Apple, *supra* note 4, at 201-02.

7. See *id.* at 208.

simply be a part of the Ministry or Department of Justice.⁸ As a separate entity, the judiciary should prepare and submit the budget for the judicial branch.⁹ Third, judges should be appointed for life and their salaries should never be reduced.¹⁰ At a minimum, the law should guarantee the term of office for a judge.¹¹ Judges' salaries should be sufficient and appropriate, relative to their rank and the salaries of other public officials in the nation they serve.¹² Judges should also have an adequate staff and should have ultimate control over court space and facilities.¹³

Fourth, an independent judiciary is self-policing.¹⁴ Judges should discipline other judges.¹⁵ The judiciary should enact and enforce codes of conduct that prohibit political activity by sitting judges.¹⁶ Judges should only be subject to removal for high crimes and misdemeanors, and only by impeachment.¹⁷ Judges should have the power of review and supervision over the day-to-day operations of the courts¹⁸ and should maintain a conference to administer the courts and the education of judges.¹⁹ Finally, elected officials must respect the courts and their decisions. Most importantly, the officials who run the government must be willing to uphold the decisions of their nation's courts, even when they disagree with the decision.

There have been, as discussed below, significant, albeit piecemeal, judicial reforms recently undertaken in Russia. These recent reforms tend to be positive and hopefully foreshadow further reforms that will increase judicial independence and the rule-of-law in Russia. It must be emphasized, however, that the recent progress is far from complete—many additional reforms are necessary.²⁰

8. *See id.* at 208-09.

9. *See id.* at 212-13.

10. *See id.* at 209-10.

11. *See Recommendation No. R (94) 12, supra* note 5.

12. *See Apple, supra* note 4, at 211.

13. *See id.* at 211, 215.

14. *See id.* at 211-12.

15. *See id.*

16. *See id.* at 215-16.

17. *See Apple, supra* note 4, at 210-11.

18. *See id.* at 212.

19. *See id.*

20. *See Shakirov, supra* note 3, § 1426 (discussing the continuing practice of judges who simultaneously act as public prosecutors and chief arbitrators in viola-

III. COMPARISON OF THE INQUISITORIAL AND ADVERSARIAL SYSTEMS

The current Russian judicial system is based on European continental civil law, or the inquisitorial system.²¹ The Soviet criminal justice system had its roots in the inquisitorial system.²² In addition, the Russian judicial system still contains authoritarian aspects from its Soviet and Imperialist past. Whether under the Bolivars or Bolsheviks, the Russian courts have always been part of a repressive system.²³ In the inquisitorial system, as distinguished from the adversarial practice employed in the United States, the judge assumes the primary role as the weigher of evidence and determines the truth and veracity of testimony.²⁴ A trial under the inquisitorial system that predominates criminal trials in Russia today,

may be considered an authoritarian and paternalistic process dominated by an official. It is centered on the pervasive power of the judge to conduct a hierarchically organized search for the truth. The accused find themselves in the position of subordinates²⁵ whose possibilities of defense are severely restricted by official control.

Although Russian prosecution and defense attorneys pose questions to witnesses, their roles are much more passive than in an adversarial system.²⁶

The equality of the defense and prosecution, in their ability to enter and proffer evidence during a trial, distinguishes the adversarial sys-

tion of Article 123 of the Russian Constitution, yet in compliance with Article 35 of the Criminal Procedure Code).

21. See Joachim Herrmann, *Models for the Reform of the Criminal Trial in East and Southeast European Countries: Comparative Remarks from a German Perspective*, in THE AMERICAN BAR ASSOCIATION CENTRAL AND EAST EUROPEAN LAW INITIATIVE, ANALYSIS OF THE DRAFT CRIMINAL PROCEDURE CODE FOR THE RUSSIAN FEDERATION, app. C, at 2 (1996).

22. See *id.*

23. See Marshall Ingwerson, *Russia's Juries Give Police an O.J.-Style Rap*, CHRISTIAN SCI. MONITOR, Apr. 23, 1996, at 1 (stating that there are no juries in most Russian courts and that the judges consider any evidence that is presented).

24. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 127 (2d ed. 1985).

25. *Id.*

26. See Herrmann, *supra* note 21, at 2.

tem from the inquisitorial system.²⁷ In an adversarial proceeding, the judge is relatively passive.²⁸ The adversarial system is also considered more democratic and supportive of a civil society.²⁹ In Russia, the prosecutor frequently does not attend trials and the judge acts as both prosecutor and judge.³⁰ This practice, from Soviet times, severely contradicts the Russian Constitution that states that the prosecution and defense should be on an equal footing.³¹

Over the past century there "has been a steady movement on the European continent from the inquisitorial to the adversarial trial."³² Many European nations have reformed their criminal justice systems and are now more adversarial in nature.³³ The Czech Republic, perceived by many to be at the forefront of democratic reform among the former Communist nations, has worked to introduce the adversarial system into its criminal justice system. Moving away from the inquisitorial system is a means by which the Czechs have attempted to distance themselves and their legal system from Soviet/Russian domination.³⁴

While the Russian system has adopted the jury trial, a hallmark of the adversarial system, jury trials are conducted in only a small fraction of the criminal cases in Russia. By adopting a limited jury trial system, the Russians have injected an element of the adversarial sys-

27. See MERRYMAN, *supra* note 24, at 129.

28. See *id.*

29. See Herrmann, *supra* note 21, at 3 (noting that the adversarial system "evidences democratic values not only because the case may be decided by a jury but also because two principally equal parties enter into competition before the judge").

30. See Shakirov, *supra* note 3, § 1426.

31. See *id.*

32. Herrmann, *supra* note 21, at 3.

33. See Avv. Giuseppe Bianchi, *How Aspects of the Adversarial System Are Incorporated in the Inquisitorial System Under the Old and New Italian Criminal Procedure Code*, in THE AMERICAN BAR ASSOCIATION CENTRAL AND EAST EUROPEAN LAW INITIATIVE, ANALYSIS OF THE DRAFT CRIMINAL PROCEDURE CODE FOR THE RUSSIAN FEDERATION, app. B, at 2 (an analysis is available from ABA-CEELI, 740 15th Street, N.W., Washington, D.C. 20005) (noting that Italy adopted adversarial procedures as part of its anti-corruption reforms in the early part of this decade). Spain has also begun an experiment with the jury trial. See *id.* at 2-3.

34. The author was country director for the American Bar Association Central and East European Law Initiative's Rule of Law program in the Czech Republic and actively assisted in reforming the Czech criminal justice system during 1995 and 1996.

tem into what has been an inquisitorial system for over seventy years. The Russian system, however, remains predominantly inquisitorial and authoritarian in nature.

A jury trial in Russia resembles a jury trial in the United States, except for noticeable differences that stem from the fact that the judges, lawyers, and prosecutors have been indoctrinated in the inquisitorial system of practice. Russian jury trials suffer from the same problems that they did in Czarist times, and defense attorneys are still hampered by the inquisitorial aspects that remain. For example, the Russian defense attorney still has little opportunity for involvement in the pre-trial investigation and, therefore, the system places more emphasis on closing arguments to the jury than in the United States.³⁵

IV. RUSSIAN JUDICIAL REFORMS

A. LIFETIME APPOINTMENT

Russia is currently in the process of granting lifetime appointments to its judges.³⁶ Judges in regional trial courts are initially appointed for a five-year term and then are re-appointed for life.³⁷ Eventually, all of the judges on the courts of general jurisdiction will be appointed for life and will experience a corresponding increase in independence. Judges in the separate commercial courts, or *Arbitrazh* courts,³⁸ are also receiving lifetime tenure.³⁹ Members of the Con-

35. See Girish N. Bhat, *The Moralization of Guilt in Late Imperial Russian Trial by Jury: The Early Reform Era*, 15 LAW & HIST. REV. 77, 93-94 (1997).

36. See KONST. RF (1993) art. 121.

37. See Zakon RF o statute sudei v RF, Vedomosti Fed. Sobr. RF, 1992, No. 9, Item No. 223, art. 11(3) [hereinafter Law on the Status of Judges]. Law students and young lawyers in Russia, like their colleagues in most of Europe, decide early in their legal careers to pursue a judicial career path. They usually gain experience by working as staff lawyers for courts. The Russian Constitution only requires that judges have five years of legal experience, possess a law degree, and have attained the age of twenty-five. See KONST. RF (1993) art. 119.

38. See Glenn P. Hendrix, *Business Litigation and Arbitration in Russia*, 31 INT'L LAW. 1075, 1084-1100 (1997) (providing an overview of how *Arbitrazh* courts function).

39. See Zakon ob arbitrazhnom [Arbitrazh Court Act] Vedomostiizmenenii I dopolnenii v zakon RSFSR, Ob arbitrazhom sude [Amendment to the RF Arbitrazh Court Act], Vedomosti Fed. Sobr. RF, 1992, No. 34, Item No. 1965, art. 20., cited in *id.* at 1084-1100.

stitutional Court are appointed for twelve-year terms,⁴⁰ and judges on the Supreme Court and Supreme Arbitration (Commercial) Court are appointed to life terms.⁴¹

Despite this new appointment process, there have not been any purges nor anything resembling a purge in the bureaucracies of Russia, including the ranks of the Russian judiciary. Most Russian bureaucrats, including judges, occupied their same or similar positions when the Soviet Union was intact and the Communist Party reigned supreme. The 1993 Russian Constitution states that "Justices are independent and are subordinate only to the Constitution of the Russian Federation and to federal law."⁴² However, the concept of judicial independence is new in Russia and is only now beginning to develop.

As of the writing of this essay, only about twenty percent of Russian judges were appointed for life.⁴³ The rest are serving out a variety of terms with the hope of a future lifetime appointment. Therefore, the vast majority of the Russian bench is still subject to subtle and not so subtle influence from both government officials and the politically powerful who may have a say in whether or not a judge is re-appointed to the bench for life. This flaw will eventually be cured as more judges receive lifetime appointments.

The current situation in Russia is actually more analogous to the current situation in the United States. In the United States, federal judges are appointed for life and are correspondingly viewed as the most independent. In the special federal courts, such as the United States Court of Federal Claims and the United States Tax Court, judges are appointed for fifteen-year terms. Practitioners in these courts complain that judges who are nearing the end of a term and are seeking re-appointment are usually much more sympathetic to the government's position.⁴⁴

40. See Sergei Pashin, *New Opportunities for Development of Russia's Judicial System*, CONST. L. E. EUR. REV. 1, 4 (1997).

41. See Law on the Status of Judges, *supra* note 37, art. 11.

42. KONST. RF (1993) § I, ch. 7, art. 120.

43. See Pashin, *supra* note 40, at 19 (stating that judges in courts of general jurisdiction had varying terms of office).

44. See Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 997-99, 1016-17 (1991); cf. David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17,

The bulk of the United States judiciary sits in the state courts. State court judges in the United States are selected by different methods depending upon the state, ranging from appointment, to appointment with retention elections, to direct election. Assuming that the reform process continues, all Russian judges will eventually be appointed for life. Upon the completion of this reform process, Russians will be able to make a very good argument that their judiciary, as a whole, is more independent than the judiciary in the United States.

B. INDEPENDENT AND ADEQUATE BUDGET

During the Soviet era, the Ministry of Justice administered the budget for the court system. The Russian system has always considered judges part of the executive branch.⁴⁵ When the democratic reforms began in Russia, many reformers claimed that the courts should maintain their own budget and should not be beholden to the executive branch for financing judicial operations and paying the judges' salaries.

A major proponent of an independent budget for the court system is Vyacheslav Lebedev, Chief Justice of the Russian Supreme Court. The new Law on the Judiciary,⁴⁶ enacted in early 1997, took steps in this direction. The law establishes an independent and self-administering budget for the Russian Supreme Court. However, the remaining bulk of Russian courts are subject to financial budgeting and assistance from executive agencies in Moscow and in the regions. Therefore, the courts are still subject to influence from the central and local governments.

An independent and self-administered budget is imperative if Russia is to advance judicial reform. Some argue that viable democracies

24-25 (1995) (analyzing the appointment process of judges to the United States Tax Court and the alleged bias these judges exhibit toward the government).

45. See BARTON L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES* 5 (1987) (stating that courts in the Soviet Union are administrative agencies of the central government).

46. See Federal Constitutional Law No. 1-FKZ of Dec. 31, 1996 on the Judicial System of the Russian Federation, GARANT Database (1997) <[http://www.securities.com/cgi-bin/...judicial\)+and+\(system\)+and+\(1-FKZ\)](http://www.securities.com/cgi-bin/...judicial)+and+(system)+and+(1-FKZ)>)> [hereinafter Law on the Judicial System].

in Western Europe administer court budgets through the Ministry of Justice and the Russian system is, therefore, consistent with practices in France and Germany. These arguments, however, ignore history. In France and Germany, the courts are respected by the general public and maintain a history and tradition of independence. In contrast, the courts in Russia have a history of government and party control and enjoy little respect from the general population.

In order to break from its history, Russia must go beyond copying what is done in other countries and take steps to demonstrate that its courts are truly independent and free from overt influence from the government. For this reason, it is imperative that the independent budgetary authority, now enjoyed by the Russian Supreme Court, be extended to the entire court system.

Comparisons of the sizes of judicial budgets and salaries in different countries can be misleading and distorting. Nevertheless, it is undisputed that the courts in Russia are severely under-financed.⁴⁷ This condition is detrimental to the creation of a viable rule-of-law state in Russia.⁴⁸ For example, a Russian judge makes a little over 500 dollars a month.⁴⁹ In contrast, a United States District Court judge is paid over 133,000 dollars a year.⁵⁰

Russian court facilities are uniformly poor and fail to create the sense of awe that courts of justice in the United States tend to inspire. United States courts are built to reflect the idea that the rule-of-law is supreme. The "rule-of-law architecture" in Russia is in need of reform. By enhancing the physical condition of Russian court buildings, reformers will demonstrate to all Russians that the law is central to the new Russia.

47. See NATIONS IN TRANSIT: CIVIL SOCIETY, DEMOCRACY AND MARKETS IN EAST CENTRAL EUROPE AND THE NEWLY INDEPENDENT STATES 321 (Adrian Karatnycy et al. eds., 1997) (stating that "the independence of the judiciary is threatened by chronic underfunding and by its subordinate position").

48. See *id.* Underfunding makes the judiciary more susceptible to corruption, obstructs the efficiency of the judicial system, and constrains judicial growth. See *id.*

49. Russian judges make an average of two million rubles (US\$ 375) per month. See Bronwyn McLaren, *Beleagured Judges Get 65 Percent Pay Raise*, MOSCOW TIMES, July 30, 1997, § 1260. With the pay raise, Russian judges make an average of US\$ 533 per month. See *id.*

50. See Chief Justice William Rehnquist, *1996 Year-End Report on the Federal Judiciary* (visited May 20, 1998) <<http://www.uscourts.gov/cj96.htm>>.

C. COURT BAILIFFS: SECURITY AND ENFORCEMENT OF JUDGMENTS

Two primary concerns of Russian judges are security and the enforcement of court orders. Recently passed legislation created a new system of court bailiffs to provide security for courts and judges and to enforce judgments.⁵¹ The Russian bailiffs system was modeled after the United States Marshals system, with some notable exceptions.

In 1997, in addition to the bailiffs law, a companion law on the enforcement of judgments was also enacted.⁵² Under this new law, bailiffs will receive a percentage of the judgments they collect. This "bounty" type system could lead Russian bailiffs to ignore procedural safeguards in order to satisfy their own financial interests. However, because the government's budget is severely constricted, the drafters' reasons for creating a partially self-financing system of enforcing judgments is clear. While the potential for abuse is significant and individuals have expressed concern,⁵³ the new bailiffs should be given a chance to perform before the bounty system is criticized.

D. RESPECT FOR THE JUDICIARY BY OTHER BRANCHES OF GOVERNMENT

The judiciary in the United States relies on the good faith of the executive and legislative branches of government to enforce the decisions of the courts. In Russia, however, elected members of parliament, as well as executive officials and local political leaders, have frequently been unwilling to abide by the decisions of Russian courts.

A recent example involves the issuance of residency permits. During the Soviet era, permits were required in order to live in certain areas or certain cities, a practice known as the "pass system." This was one of the fundamental human rights violations of the Soviet authorities, and it was quickly prohibited by the Russian Constitution of 1993. Today, however, Yuri Luzhkov, the Mayor of Moscow, stubbornly attempts to preserve the pass system to prevent

51. See Russian Federal Law No. 118-FZ of July 21, 1997 on the Officers of Justice, GARANT Database 11801340 (Bailiff's or Marshall's Law).

52. See Russian Federal Law No. 119-FZ of July 21, 1997 on the Executive Procedure, GARANT Database 11801339 (Law on Enforcement of Judgments).

53. See Ethan S. Burger, *New Legislation on Enforcement of Judicial and Arbitral Decisions in Russia*, RUSS. BUS. WATCH 23, 26 (1997).

people from moving to the capital city, in spite of repeated rulings by the Constitutional Court of Russia declaring the pass system unconstitutional.⁵⁴ This is but one example of the lack of respect Russian officials have exhibited for the rulings of Russian courts and correspondingly, the rule-of-law in Russia.⁵⁵ If Russia is ever to create a true democracy, this attitude must change. The burden rests with the Russian voter. Voters must convey to their elected representatives that government officials must acquiesce in the face of clear judicial rulings and be guided in all of their activities by the rules laid out in the new Russian Constitution.

E. THE JURY TRIAL

One of the early reforms of the Russian judicial system was the reintroduction of the jury trial. Legislation was initially passed on an experimental basis. Nine of the eighty-nine regions in Russia were given the right to hold jury trials.⁵⁶ Soon after this experiment was implemented, the new Russian Constitution was drafted to include the right to a jury trial with the requirement that the Russian parliament implement legislation for the jury trial.⁵⁷

54. See David Hoffman, *Moscow Mayor Defies Court on Residence Rights*, WASH. POST, Mar. 13, 1998, at A19.

For the second time in two years, Russia's Constitutional Court has upheld the right to freedom of movement, which was denied during the totalitarian Soviet era. But the powerful mayor of Moscow, Yuri Luzhkov, has refused to comply with the ruling of Russia's highest court. The notorious propiska, or residence permit, governed where a person could live, and in Soviet times, it was the purview of the Communist Party to tell people where to work and reside. Dissident writers were banished to the provinces as punishment; permits to live in Moscow—always the most desirable—were strictly controlled.

Id.

55. See *id.* (quoting Diederik Lohman, Moscow Director for Human Rights Watch). "Luzhkov doesn't seem to consider himself bound by the rulings of the highest court in the country, which obviously doesn't do very much for promoting the rule of law, the separation of powers, and democracy." *Id.*

56. See David Hoffman, *Russia Slowly Reviving the Jury System*, S.F. CHRON., Nov. 18, 1995, at A12.

57. See KONST. RF (1993) § I, ch. 2, art. 123(4) ("Anyone charged with a crime has the right to have his or her case reviewed by a court of law with the participation of jurors in cases stipulated by the federal law."); *Russia Lawless*, ECONOMIST, Apr. 19, 1997, at 52 (reporting that when Yeltsin was facing a rebellious parliament in 1993, a law was approved for jury trials to begin in nine regions); Hoffman, *supra* note 56, at A12; see also KONST. RF (1993) § II, art. 47.

Today, despite this legislative effort, jury trials are only held in the nine regions that participated in the experiment. Implementing legislation to expand the system to twelve additional regions has been stalled in the Russian Duma.⁵⁸ Critics argue that the jury system is too expensive for an already overtaxed budget. Resistance to the jury system and its democratizing effect is apparent from Communists controlling the Lower House of the Russian Parliament. It was the Bolsheviks, after all, who abandoned jury trials soon after seizing power at the end of the Russian Revolution. Communists and various anti-democratic factions and groups in the Russian Parliament inherently distrust the jury system.

In June of 1997, a roundtable discussion in Minsk addressed the adoption of the jury trial in Belarus. A dictator, who was formerly a collective farm manager, currently controls Belarus—one of, if not the most, repressive regimes in the former Soviet Union. Surprisingly, high level Belarusian officials at the roundtable discussion were interested in discussing the adoption of the jury trial. In fact, the Belarusian Constitution calls for the adoption of the jury trial.⁵⁹ The dictatorial government of Belarus, however, frequently ignores the rules of its Constitution.

During the course of the discussion, the Chief Justice of the Belarusian Supreme Court expressed his opposition to the jury trial. He related the story of an old Czarist era trial in which a jury acquitted a man who was charged with murdering a Russian noble.⁶⁰ The noble had raped the gunman's girlfriend and the Czarist prosecutors and police were unwilling to charge the noble. The gunman turned to self-help and shot the noble. The Chief Justice argued that this example clearly demonstrated why the jury trial should not be adopted. Czarist juries were, in fact, known for their leniency and had a conviction rate that was below their English and European contemporaries.⁶¹

58. The Duma is the lower house of the Russian Parliament.

59. See BELARUS CONST., ch. 6, art. 114 ("In accordance with the law, a jury considers certain categories of cases.").

60. See Chief Justice V. Sukhala, Remarks at the Minsk Roundtable Discussion (June 1997) (discussing the case of Verzasulich).

61. See Bhat, *supra* note 35, at 82-83.

At times, jury nullification has been a problem in the United States, but the idea of a collective view of justice by a group of ordinary citizens injects democratic vitality into the legal system. Indeed, there is historical precedent for Russian juries to make law through moralizing.⁶² When the Czar introduced the jury trial into the inquisitorial system, there were some unexpected results. Juries began making moral decisions that were technically outside the law, but were perceived as just by the members of the jury.⁶³ The likelihood of moralizing by juries is especially great for today's Russian legal system due to Russia's long history of repression. Additionally, the Russian judiciary faces a skeptical public as a result of this repression.

Most cases in Russia, however, are tried before a panel of judges, not a jury. Prior to recent reforms, criminal cases would be tried before a professional judge and two lay assessors. In Soviet days, the lay assessors were notoriously regarded as tools of the regime. They came to be known by the derogatory term "noddors."⁶⁴ This nickname arose from their obvious intention to agree with whatever the judge said. However, not all lay assessors were noddors; some acted independently. Nevertheless, the general reputation remains, and noddors are no longer employed in criminal cases. Instead, a panel of three professional judges sits in criminal cases—one judge presides and the other two judges ask questions and vote on a verdict. Two out of the three can convict, and the dissenter may write an opinion stating the reasons for disagreeing with the majority.

F. APPLICATION OF THE CONSTITUTION BY THE COURTS

During the Soviet Era, the Constitution was not a living document. Although the Soviet Constitution provided guarantees for a myriad of rights, in practice, few of these rights were ever enforced, and the Soviet courts rarely invalidated government action based upon constitutionality. The Soviet system was an authoritarian dictatorship where the rule-of-law did not prevail. Laws, rules, and sentences to labor camps could all be changed at the whim of a Communist official. The Soviets "could twist the law anyway they liked. When your

62. *See id.* at 79-81.

63. *See id.* at 78-79.

64. *See* ROBERT RAND, *COMRADE LAWYER* 3-4, 41-42 (1991).

ten years were up they could say good, have another ten. Or pack you off to some godforsaken place of exile."⁶⁵

This Soviet history of paper rights that were never enforced led to one of the most significant developments in current Russian legal reform: trial courts are now applying the Russian Constitution to their cases.⁶⁶ In a recent case, a foreigner objected to paying a higher room rate based solely upon her status as a foreigner. In Russia, different prices for foreigners and Russians for hotels, trains, airplane tickets, and museum admissions are still common. The prices charged to Russians are much lower. This practice is a holdover from Soviet days when it was used as a method to gouge hard currency from visiting tourists and Western businessmen. In this recent case, the foreign plaintiff sued a Russian hotel in Yekaterinburg based upon the Equal Protection Clause of the Russian Constitution.⁶⁷ The Court awarded her damages amounting to the difference between the Russian and foreigner room rate. "Moral damages," similar to punitive damages in the United States, were also awarded.⁶⁸

In an even more significant case, a Russian judge challenged conventional thought on the constitutionality of a fundamental procedure of Russian criminal law.⁶⁹ The judge declared that the practice of allowing prosecutors to appeal acquittals in Russia violated the Double Jeopardy Clause of the Russian Constitution.⁷⁰ In Russia, it is not uncommon for prosecutors to repeatedly appeal acquittals in an effort to have repeated chances for a conviction. Under this system, it can take years before a case is finally concluded, with the defendant stagnat-

65. ALEXANDER SOLZHENITSYN, *ONE DAY IN THE LIFE OF IVAN DENISOVICH* 60-61 (1995).

66. Beginning on January 1, 1997, Russian judges were authorized to apply the Constitution to matters before them. *See* Law on the Judicial System, *supra* note 46.

67. *See* Chloe Arnold, *Court Bans Gouging of Foreigners*, *MOSCOW TIMES*, § 1439 (noting that "Article 426.2 of the [Russian] Civil Code . . . states that prices of goods and services should be the same for all consumers, regardless of their nationality"); KONST. RF (1993) § 1, ch. 2, art. 19(1) ("All people shall be equal before the law and in the court of law.").

68. *See* Arnold, *supra* note 67, § 1439.

69. *See* Judge N. Sneigerova, Moscow City Court, Presentation at DOJ/CEELI Criminal Law Reform Workshop, City Court, Saint Petersburg, Russia (Jan. 29-31, 1998) [hereinafter Presentation of Judge N. Sneigerova].

70. *See* KONST. RF (1993) § 1, ch. 2, art. 50(1) ("No one may be repeatedly convicted for the same offense.").

ing in jail the entire time.⁷¹ The judge claimed that this practice of allowing the prosecution to repeatedly appeal acquittals violates the Due Process Clause of the Russian Constitution because, based upon international standards, the prevailing interpretation renders the clause null and void.⁷²

Russian judges have also discussed whether the failure to conduct jury trials in all Russian regions is a violation of the Equal Protection Clause of the Russian Constitution. The Russian Constitution states, in pertinent part, that: "Anyone accused of having committed a crime has the right to have the case against him heard by a court and jury as provided by federal law."⁷³ Jury trials are presently conducted in only nine of the eighty-nine political subdivisions that comprise the Russian Federation.⁷⁴ Russian judges argue that all defendants who wish to have their case heard before a jury should be given a jury trial, that the opportunity for a jury trial should not depend on the mere fortuitousness of having a trial in one of the nine jury-trial regions.

With the weakened political will of the Yeltsin administration and the failure of the Russian legislature to expand the jury trial to other jurisdictions, it appears that reform can only come from the Russian judiciary itself. Russian judges defying long-held beliefs and practices based upon the rule of law is a very positive development.⁷⁵ The impact of these cases should not, however, be exaggerated. The Russian justice system, like most continental European systems, is code-based, and, as a result, *stare decisis* is not a principle of Russian jurisprudence. Therefore, these cases have little or no precedential

71. See INTERNATIONAL COMMISSION OF JURISTS TRIAL OBSERVERS MISSION TO MOSCOW: REPORT ON THE TRIAL OF AJU MARIAM IN THE GAGARINSKI INTER-MUNICIPAL COURT IN MOSCOW (Dec. 1997). A Nigerian defendant was held in pre-trial detention for twenty-two months before her trial was concluded. See *id.* at 10.

72. See Presentation of Judge N. Sneigerova, *supra* note 69; cf. Chloe Arnold, *Russians Debate Need For the Death Penalty*, MOSCOW TIMES, Mar. 12, 1998, at 4 (suggesting that the Russian Duma's recent ratification of the European Convention on Human Rights has facilitated the application of international human rights standards in Russian courts).

73. KONST. RF (1993) § I, ch. 2, art. 47(2).

74. See Hoffman, *supra* note 56, at A12.

75. See Apple, *supra* note 4, at 203.

value. Moreover, Russia lacks a system for reporting judicial decisions.⁷⁶

What these decisions do reflect is a significant attitudinal change among some members of the Russian judiciary. These judges are no longer beholden to government power or deferential to government practice; they are evidencing a degree of independence by applying the law without consideration of whether the law should be tailored to conform to government policies. This is a positive development that if it continues and spreads to other courtrooms and judges in Russia, is a significant indication that the rule of law is taking hold in Russia.

G. PRE-TRIAL DETENTION IN RUSSIA

Pre-trial detention in Russia is a fundamental human rights violation. In recent years, tens of thousands of detainees and inmates have died in Russian pre-trial detention and prison facilities.⁷⁷ Conditions in Russian prisons are deplorable; some say they are even worse than they were under Stalin.⁷⁸ Human rights groups have strongly criticized the overcrowded and unsanitary conditions in these facilities and have described incarceration in Russian jails as "torture."⁷⁹ Compounding this problem is the fact that few people are released before their trial. The use of bail is unheard of, and release before trial is very rare.⁸⁰ The accused can be held awaiting trial for months

76. A worthwhile technical assistance project would be to help the Russian courts build a nationwide reporting system of judicial decisions and laws. Regional courts frequently complain that there is a significant delay in receiving new laws.

77. See 1997 U.S. DEP'T OF STATE HUMAN RIGHTS COUNTRY REPORTS, 1996: RUSSIA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996. "[B]etween 10,000 and 20,000 detainees and prison inmates died in penitentiary facilities throughout Russia, some due to beatings, but most as a result of overcrowding, inferior sanitary conditions, or lack of medical care." *Id.*

78. See Alessandra Stanley, *Russians Lament the Crime of Punishment*, N.Y. TIMES, Jan. 8, 1998, at A1, A6.

79. See AMNESTY INT'L, TORTURE IN RUSSIA: "THIS MAN-MADE HELL," AI Index: EUR 46/04/97 (Apr. 1997) (describing conditions in facilities as uniformly deplorable). Conditions, "particularly for those awaiting trial, remain appalling and amount to cruel, inhuman or degrading treatment." *Id.*

80. See 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, 544-46 (1996).

or even years.⁸¹ The vast majority of Russian judges recognize that something must be done to improve the over-crowded and lamentable conditions of Russian jails.

One step that should be taken to remedy the situation is the institution of an effective system of bail.⁸² Adding to the overcrowding problem is the lack of a system for guilty pleas and plea-bargaining. Defendants who have confessed to a crime can wait months before they are tried, and because there is no system for making pleas, every case must be tried. This burdens the Russian courts with trials that are simply unnecessary.

In Moscow, the city court has recently requested that the Russian Parliament enact legislation that would enable it to experiment with a system of plea-bargaining. This could be a very positive step. Many in the United States claim that if plea-bargaining were not available, the United States criminal justice system would collapse. Despite this sentiment, plea-bargaining is generally not a highly regarded process in the United States. Nevertheless, Russia is considering the use of such a system. Russians, legal professionals, and lay people are all suspicious of any system in which "confessions" are the basis for imprisonment. Soviet history is the obvious reason for this suspicion and distrust. Russian judges recognize, however, that they need to improve the situation in pre-trial detention facilities. The timely resolution of cases where guilt is not disputed may be part of a solution.

V. OUTLOOK FOR THE FUTURE

The past year could lead one toward cautious optimism on the likelihood of the development of an independent judiciary in Russia. As discussed above, progress has been made in judicial reform. However, opposition to judicial reform still exists and will continue as long as the legislature is controlled by Communists, former Communists, and re-labeled Communists. The question of whether judicial reforms in Russia will continue is ultimately a political one. The introduction of the jury trial, one of the major reforms, is stalled de-

81. See INTERNATIONAL COMM'N OF JURISTS, TRIAL OBSERVERS MISSION TO MOSCOW, REPORT ON THE TRIAL OF AJU MARIAM IN THE GAGARINSKI INTER-MUNICIPAL COURT IN MOSCOW (Dec. 1997).

82. See Foglesong, *supra* note 80, at 554-48.

spite the fact that the right to a jury trial is a right enumerated in the Russian Constitution. This right is contingent, in effect, on the passage of implementing legislation that the Duma presently does not appear willing to enact. If Western governments, interested Russian citizens, and legal practitioners do not steadfastly encourage the introduction of the jury trial to all of Russia, it may never happen even though the right to jury trial was included in the new Russian Constitution that was adopted in 1993. This casual jettisoning of a recently adopted constitutional right does not bode well for the construction of a rule-of-law society in Russia.

The path of judicial reform that has been followed this past year should continue and its scope should expand. More judges should be appointed to the bench for life. The Russian lower courts should administer their own budgets just as the Supreme Court of Russia does. Russian judges, rather than the Ministry of Justice, should train other judges and should be responsive to judges' needs.

The budget for the Russian courts must be increased and facilities must be improved so that the Russian population at large realizes that the courts of justice are important and deserving of their respect. This is central to the construction of a rule-of-law state.

Finally, there needs to be an attitudinal change in the elected leadership of Russia. The Russian judiciary must be considered an equal branch of government. Elected representatives must respect the rulings of Russian courts, and the Russian Constitution must be viewed as the supreme law of the land, not the structure or means to achieve power. Unfortunately, centuries of authoritarian history and culture are working against these developments.