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The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries

James W. Diehm
Widener University School of Law

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Cover Page Footnote

Professor of Law, Widener University School of Law; J.D., Georgetown University Law Center. United States Attorney for the District of the Virgin Islands, 1983-87; Assistant Attorney General for the United States Virgin Islands, 1974-76; Assistant United States Attorney for the District of Columbia, 1970-74. In the summers of 1996, 1997, and 2000, Professor Diehm taught a course in Comparative Criminal Procedure in Geneva, Switzerland, in Widener's programs at the University of Geneva, Webster University, and the Graduate Institute for International Studies. In the fall of 1997, he was sent, as a legal specialist, by the United States Department of Justice and the American Bar Association on a three-month mission to Ukraine and Russia to start the Criminal Law Reform Project in Ukraine. The author would like to thank Scott P. Boylan, Esquire, Regional Director of the United States Department of Justice's Office of Overseas Prosecutorial Development, Assistance and Training, for his assistance in the preparation of this article. The opinions expressed in this article are solely those of the author.

THE INTRODUCTION OF JURY TRIALS AND ADVERSARIAL ELEMENTS INTO THE FORMER SOVIET UNION AND OTHER INQUISITORIAL COUNTRIES

JAMES W. DIEHM¹

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1. Professor of Law, Widener University School of Law; J.D., Georgetown University Law Center. United States Attorney for the District of the Virgin Islands, 1983-87; Assistant Attorney General for the United States Virgin Islands, 1974-76; Assistant United States Attorney for the District of Columbia, 1970-74. In the summers of 1996, 1997, and 2000, Professor Diehm taught a course in Comparative Criminal Procedure in Geneva, Switzerland, in Widener's programs at the University of Geneva, Webster University, and the Graduate Institute for International Studies. In the fall of 1997, he was sent, as a legal specialist, by the United States Department of Justice and the American Bar Association on a three-month mission to Ukraine and Russia to start the Criminal Law Reform Project in Ukraine. The author would like to thank Scott P. Boylan, Esquire, Regional Director of the United States Department of Justice's Office of Overseas Prosecutorial Development, Assistance and Training, for his assistance in the preparation of this article. The opinions expressed in this article are solely those of the author.

I. INTRODUCTION

Several years ago when I was teaching a course on Comparative Criminal Procedure in our summer program at the University of Geneva,² a Swiss professor remarked about America's interest in exporting her criminal justice system. Although unspoken, it was apparent that the professor had great confidence in, and a preference for, the inquisitorial system as it exists in the Canton of Geneva and most of Europe.³ I thought of his words often when, a year later, I was sent by our Department of Justice and the American Bar Association on a three-month mission to Ukraine and Russia to work with their governments on criminal justice reform.

It is difficult to overstate the importance of the work being done by the American Bar Association's Central and East European Law Initiative and the United States Department of Justice. These organizations are making an invaluable contribution to the establishment of the rule of law in Russia and the other newly independent states of Eastern Europe.⁴ I was privileged to have had the opportunity to participate in this endeavor and hope that I was able to, in some small way, contribute to its success. During this time I was continually impressed by the sensitivity of those involved in the project to the history, culture, and legal traditions of the countries of the former Soviet Union and their knowledge and understanding of the inquisitorial system of criminal justice.

The establishment of the rule of law is of paramount importance to the process of democratization. The acceptance of the precept that there is an independent body of law, and no one is above the law, is essential to the establishment of a government of and by the people. Only when presidents, kings, queens, and other rulers are subject to a higher law, can communism, fascism, and other dictatorships be eliminated and democracy prosper. If democracy is to be established in the countries of the former

2. *See id.*

3. As is evident from the discussion in Part II of this article, the inquisitorial system is quite different in theory and practice from our adversarial system of criminal justice. For purposes of contrasting the two systems in this article, the author will use the terms "inquisitorial system" and "adversarial system." While the latter is also occasionally referred to as the "accusatorial system," see, e.g., Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1213 (1989), it would appear that, as the words are defined, the terms "inquisitorial" and "adversarial" more accurately reflect the differences between the two systems.

4. These countries are hereinafter referred to as the "Newly Independent States" or "NIS countries."

Soviet Union and if those countries are to succeed economically, there must be a commitment to the rule of law.

It must then be determined what procedures will be put in place to establish the rule of law. This is particularly important in the area of criminal procedure. As was noted by the Swiss professor, the inquisitorial system is a fine system of criminal justice that has served well in democracies throughout the world, including nations such as France, Germany, and Switzerland. Although it is much different from our system, the inquisitorial system has won the respect and confidence of the citizens of these countries. We here in the United States, for good reason, tend to favor our adversarial system of criminal justice and, as the Swiss professor also noted, would like to see it adopted in other parts of the world. Although Russia did have some experience with jury trials at the end of the imperial rule of the czars, the criminal procedures of the countries of the former Soviet Union are generally similar to the procedures of other European countries and are inquisitorial in nature.⁵ With the exception of some

5. The recent developments in the former Soviet Union, including the reintroduction of jury trials, have led to a large number of books, articles, and news reports about the criminal justice system in that area. See, e.g., STEPHEN HANDELMAN, *COMRADE CRIMINAL* (1995); ROBERT RAND, *COMRADE LAWYER* (1991); Girish N. Bhat, *The Moralization of Guilt in Late Imperial Russian Trial by Jury: The Early Reform Era*, 15 L. & HIST. REV. 77 (1997); Scott P. Boylan, *Coffee from a Samovar: The Role of the Victim in the Criminal Procedure of Russia and the Proposed Victims Rights Amendment to the United States Constitution*, 4 U.C. DAVIS J. INT'L L. & POL'Y 103 (1998) [hereinafter Boylan I]; Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 999 (1996); Scott P. Boylan, *The Status of Judicial Reform in Russia*, 13 AM. U. INT'L L. REV. 1327 (1998) [hereinafter Boylan II]; Scott P. Boylan & Catherine L. Newcombe, *Parliamentary Immunity: A Comparison Between Established Democracies and Russia A Crisis of Democratic Legitimacy for Russia*, 3 J. INT'L LEGAL STUD. 205 (1997); Gary S. Gildin, *Trial by Jury in the New Russia: A Travelogue*, 15 DICK. J. INT'L L. 151 (1996); Sergei Pashin, *New Opportunities for Development of Russia's Judicial System*, CONSTITUTIONAL LAW: EASTERN EUROPEAN REVIEW, no. 2 (19) (1997); Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1 (1996); Steven R. Plotkin, *The Jury Trial in Russia*, 2 TUL. J. INT'L & COMP. L. 1 (1994); *Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 1 (2000) [hereinafter *Symposium*]; Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61 (1995); Vasily A. Vlasihin, *Towards a Bill of Rights for Russia: Progress and Roadblocks*, 17 NOVA L. REV. 1201 (1993); Richard T. Andrias, *Jury Trials, Russian Style*, 11 CRIM. JUST. 14 (1996); Justin Burke, *An Independent Judiciary and Jury Trials Are Needed*, CHRISTIAN SCIENCE MONITOR, Apr. 7, 1992, at 13 [hereinafter Burke I]; Justin Burke, *Crumbling Courtrooms Add to System Woes*, CHRISTIAN SCIENCE MONITOR, Apr. 7, 1992, at 12 [hereinafter Burke II]; Justin Burke, *In Russia, Jury Still Out on Trial by Jury*, CHRISTIAN SCIENCE MONITOR, Jun. 14, 1993, at 12 [hereinafter Burke III]; Carey Goldberg, *Mock Trial Gives Russia a Taste of the Jury System*, L.A. TIMES, Apr. 30, 1992, at A6; Marshall Ingwerson, *Russia's Juries Give Police an O.J.-style Rap*, CHRISTIAN SCIENCE MONITOR, Apr. 23, 1996, at 1, 7; Joseph M. Jones, *"Too Rough to Go Slow," Criminal Law Reform in Eastern Europe and the Former Soviet Union*, 9 CRIM. JUST. 26 (1994); Valeriy Rudnev,

Communist hardliners, everyone is in agreement that the criminal procedures of the Soviet era must be changed. The question for these countries then becomes whether it would be best to adhere to the inquisitorial system, change to the adversarial system, or develop a hybrid procedure.

Developments of the past few years have made it clear that Russia and the Newly Independent States will not be adopting, *in toto*, the adversarial system found in the United States. Consistent with their history and legal traditions, these countries will continue to base their criminal justice system on the inquisitorial model. However, on their own initiative, and at the suggestion of representatives from common law countries, the countries of the former Soviet Union are adopting and incorporating elements found in the criminal justice systems of adversarial countries such as the United States. This grafting of adversarial elements onto an inquisitorial system raises interesting questions and issues.

Some might argue that, in order to be effective, the adversarial system must be adopted as a whole. They could suggest that the adversarial model and trial by jury can only function properly where rules of evidence, direct and cross-examination by counsel, the possibility of a mistrial, finality of acquittal, and all of the other procedural rules and safeguards of the adversarial system are put into effect. Others will take the position that even though the basic inquisitorial structure is retained, elements of the adversarial system can be introduced into the criminal justice systems of Russia, the Newly Independent States, and other inquisitorial countries throughout the world. They would, no doubt, point to the apparent success of jury trials in Russia from 1864 to 1917 and the Russian jury trials that have been taking place since 1993.

The fact remains that adversarial elements are being introduced into the criminal justice systems of the former Soviet Union. In addition to advancing progress toward the rule of law, these developments constitute a fascinating experiment as to

Trial by Jury is Returning to Russia, IZVESTIYA, Nov. 26, 1992, at 3; *Soviet of Nationalities Rejects Draft Law on Nationwide Trial by Jury*, BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS, May 15, 1993, LEXIS, Nexis Library, BBC File (original source - ITAR-TASS NEWS AGENCY, Moscow) [hereinafter BBC]; Deborah Stead, *The Jury is Back*, L.A. TIMES MAGAZINE, Apr. 24, 1994, at 24; Alexander S. Vesselinovitch, *Criminal Trial, Russian Style: An American in Moscow*, 10 CRIM. JUST. 13 (1995).

whether a hybrid system can succeed and, if so, what adversarial elements can be accommodated in an inquisitorial system.⁶

The success or failure of these experiments in the former Soviet Union and elsewhere will depend on a number of factors, some of which are not directly related to the criminal justice system. We can evaluate the probability of successfully incorporating adversarial elements into a particular inquisitorial system only if we fully comprehend and consider these factors. In doing so we can also avoid the appearance of being ethnocentric and myopic, traits too often attributed to Americans operating in foreign cultures. The purpose of this article is to identify and explore some of these factors that will influence the success or failure of these experiments. Developments in the countries of the former Soviet Union provide excellent examples and will serve as the primary basis for this discussion. However, our intent is to explore issues and problems arising from the introduction of adversarial elements into an inquisitorial system, not only in the former Soviet Union, but in other countries as well.

II. THE INQUISITORIAL SYSTEM

A. Generally

Although it is one of the major, if not the major, criminal justice systems in the world, few Americans are acquainted with the inquisitorial system. All of our history and experience deals with the adversarial system, and we are, by virtue of our Constitution, history, and culture, inextricably wedded to those procedures. Nevertheless, at least some familiarity with the inquisitorial system is necessary to understand the issues that arise when adversarial elements are introduced into the inquisitorial process.⁷ One must be cautious in generalizing about

6. Russia's present system, although incorporating jury trials and other adversarial elements, remains primarily inquisitorial in nature. Boylan I, *supra* note 5, at 109-10; Boylan II, *supra* note 5, at 1331-32. The procedures in effect during the period of jury trials at the end of the rule of the czars were also a mixed system. Bhat, *supra* note 5, at 93-94. Historically, jury trials have also existed in France and Germany. *Id.* at 83; Thaman, *supra* note 5, at 65 n.19. Today other countries, in and out of Eastern Europe, are experimenting with systems that incorporate components of both inquisitorial and adversarial systems. Boylan I, *supra* note 5, at 109-10.

7. A number of excellent books and articles have been written about the inquisitorial system and its criminal justice process. See, e.g., CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* (2d ed. 1996); RENÉ DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (3d ed. 1985); *THE FRENCH CODE OF CRIMINAL PROCEDURE* (Gerald L. Kock & Richard S. Frase trans., rev. Fred B. Rothman & Co. 1988) (1964); BARTON L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE* (1987); JOHN H.

the inquisitorial system. Just as adversarial systems vary from country to country, there are also substantial differences among inquisitorial countries.⁸ There has even been some suggestion that the two systems are moving closer together.⁹ However, the inquisitorial system and the adversarial system remain two very different systems, both in theory and in practice.

The inquisitorial system, as the name implies, is in the nature of an inquiry, while the adversarial system is essentially a contest.¹⁰ In our system each party is represented by an attorney and, in accordance with established procedures, these attorneys engage in a battle before an impartial arbiter, the judge or the jury.¹¹ It is the attorneys who control and conduct most of the trial. The judge is, for the most part, passive and usually becomes involved only to instruct the jury or to rule on evidentiary matters, motions, or other legal issues. The jury, once selected, is totally passive. As with other contests, such as football games, cricket matches, or even pool, a large number of procedural rules are necessary to ensure that the contest will be well-run and fair to all sides.¹² As with other contests, fairness can be achieved only if the lawyers representing the respective parties are of equal ability and have equal resources. The inquiry in the inquisitorial system is, in virtually all respects, controlled and conducted by an impartial judge. The judge is quite active, and it is the lawyers who have a more passive role. Witnesses are called by the court, and the judges determine the order of trial and conduct most of the examinations.¹³ If experts are needed, it is the judge who designates and initially examines the expert.¹⁴ The proceedings

LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); *CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY* (Christine Van den Wyngaert et al. eds., 1993) [hereinafter *CRIMINAL PROCEDURE SYSTEMS*]; *THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY* (Edward M. Wise ed. & Joseph J. Darby trans., Fred B. Rothman & Co. 1987); Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171 (1993); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539 (1990) [hereinafter Frase]; Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317 (1995) [hereinafter Frase & Weigend].

8. See generally *CRIMINAL PROCEDURE SYSTEMS*, *supra* note 7.

9. See generally INGRAHAM, *supra* note 7, at 30-32; Bradley, *supra* note 7, at 219-20.

10. LANGBEIN, *supra* note 7, at 58.

11. *Id.* (noting that one author has contrasted the "fight theory" of the adversarial system with the "truth theory" of the non-adversarial systems).

12. INGRAHAM, *supra* note 7, at 26.

13. *Id.* at 27-30. LANGBEIN, *supra* note 7, at 13-32, 38; Frase & Weigend, *supra* note 7, at 342-44.

14. LANGBEIN, *supra* note 7, at 75-76.

are conducted in a fact-finding, less formal, and less confrontational manner. This form of dispute resolution requires fewer rules and is much less dependent on the establishment of procedural guidelines.

The theoretical history of the two systems is revealing. The historical basis of the adversarial system has been traced to ancient situations where the head of the clan was called upon to resolve the differences among its members. The parties would come before the impartial chieftain who would remain passive during the proceedings. One party would then accuse the other of wrongdoing and they would engage in a dispute before the arbiter, making arguments and possibly calling witnesses. At the conclusion of the proceedings, the chieftain would issue the decision.¹⁵ The origins of the inquisitorial system have been attributed to inquiries conducted by clerics into alleged wrongdoing, proceedings in which the arbiters initiated the investigation and remained in control of the trial. In these proceedings, the clerics called witnesses, conducted the questioning, and ultimately decided the issue.¹⁶ The name "inquisitorial system" conjures up images of the inquisition; but in its present form, it is an excellent system viewed by some American scholars and others as being superior to the adversarial system.¹⁷ One author, noting the coaching of favorable witnesses, intimidation of others on cross-examination, and similar practices prevalent in the adversarial system, has articulated as procedural models the "fight theory" of the adversarial system versus the "truth theory" of the inquisitorial system.¹⁸ The debate as to the relative merits of the two systems will be left to others. However, it is immediately apparent that the adversarial system and the inquisitorial system are much different systems that are, at least in some ways, polar opposites. The inquisitorial process continues to be a fact-finding endeavor in the form of an inquiry that, by its nature, requires few procedural rules. The emphasis is on substance rather than procedure.¹⁹ The adversarial system, on the other hand, remains a contest requiring strict compliance

15. INGRAHAM, *supra* note 7, at 25-27.

16. *See id.* at 27-30.

17. LANGBEIN, *supra* note 7, at 58, 147-51 and authorities cited therein. *Contra* Boylan II, *supra* note 5, at 1331 n.29 and accompanying text.

18. LANGBEIN, *supra* note 7, at 58 (quoting JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80 (1949)).

19. INGRAHAM, *supra* note 7, at 29.

with a large body of evidentiary and procedural rules, rules that are necessary to ensure the fairness of the proceedings.²⁰

B. Specific Aspects of the Inquisitorial System

Inquisitorial systems vary from country to country, and it is difficult to generalize about their procedures. Nonetheless, most, if not all, embody the following elements that are quite different from those encountered in adversarial jurisdictions:

1. Reliance on Code Provisions Rather than Case Precedent

Unlike common law systems that rely on case law, inquisitorial systems were historically generally code-based. We, in our common law adversarial system, frequently refer to prior cases and case precedents are of great importance. Our libraries and databases are filled with cases from all over the United States that we research and cite to with regularity. In the code countries of the inquisitorial system, decisions were made on a case-by-case basis solely by reference to and interpretation of the applicable code provisions or similar legislative materials.²¹ Court decisions generally did not create precedent.²² The next court that faced a similar issue would again refer only to the legislative materials and reach an independent judgment without direct reference to the courts' decisions in prior cases.²³ It has been noted that, in the past, a judicial official in a code country needed only a copy of the code and a very modest library in order to draft decisions at home.²⁴ Legislatures were viewed as having the prerogative to create law by the enactment of codes and statutes, and it was the judge's function to interpret those provisions and apply them to the case before the court.²⁵ The court's decision had no precedential value. This may seem strange or even inconceivable to common law lawyers who have been trained under the case method, have spent their careers

20. See *id.* at 26.

21. See, e.g., DADOMO & FARRAN, *supra* note 7, at 24-28, 41-43; Bradley, *supra* note 7, at 175, 219.

22. For example, Article 5 of the French Civil Code expressly prohibits the establishment of precedent by judges. DADOMO & FARRAN, *supra* note 7, at 41. See also INGRAHAM, *supra* note 7, at 7.

23. DAVID & BRIERLEY, *supra* note 7, at 136-37; Bradley, *supra* note 7, at 175, 219. It should be noted, however, that judges could, in their research, refer to doctrinal works that refer to cases or other compilations of cases. DAVID & BRIERLEY, *supra* note 7, at 133-34.

24. LANGBEIN, *supra* note 7, at 60.

25. DADOMO & FARRAN, *supra* note 7, at 41-42; DAVID & BRIERLEY, *supra* note 7, at 136-37.

researching cases, and are in constant pursuit of “controlling precedent.” By the same token, code country lawyers and judges found it extraordinary that we fill up libraries with volumes and volumes of cases and spend hours researching precedents when we could merely resort to the applicable code provision and use logic to extrapolate the appropriate decision for the particular case at issue. They even viewed the judicial creation of law by the establishment of court precedent to be, at least to some extent, an improper usurpation of a power reserved solely to the legislature.²⁶

The fact that inquisitorial countries were, for the most part, code-based jurisdictions had a number of significant effects. The legal education of lawyers and judges was and continues to be more theoretical than the case method generally employed in the United States.²⁷ As noted above, historically in many countries there was no citation to prior cases. In recent years, in many inquisitorial countries, changes have taken place and there is now, at least to some extent, resort to precedent and citation to prior cases.²⁸ However, it is important to understand and remember this code-based tradition when considering inquisitorial systems, a tradition that, in some situations, continues to the present day. Courts of general jurisdiction still may have no power to declare an act of the legislature, or other actions, unconstitutional. Constitutional issues may be required to be referred to a special constitutional court, and even that court may be limited as to actions it can take and the precedential value of its decisions.²⁹ This is obviously quite different from the common law adversarial system.

2. *Exclusionary Rules*

Consistent with their code system training and experience, inquisitorial judges are not inclined to create broad exclusionary

26. DADOMO & FARRAN, *supra* note 7, at 41-42; DAVID & BRIERLEY, *supra* note 7, at 136-37.

27. See DADOMO & FARRAN, *supra* note 7, at 117-19; THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 7, at xiv (Editor's Preface); Frase, *supra* note 7, at 561-62 n.90. It should also be noted that judgeships are lifetime careers, and candidates are usually selected to become judges immediately after completing their legal education. DADAMO & FARRAN, *supra* note 7, at 143; DAVID & BRIERLEY, *supra* note 7, at 139-40; LANGBEIN, *supra* note 7, at 59; Frase, *supra* note 7, at 564-67; Frase & Weigend, *supra* note 7, at 320.

28. See, e.g., Bradley, *supra* note 7.

29. DADOMO & FARRAN, *supra* note 7, at 112-13.

rules like those found in the United States.³⁰ In our country, the courts have found it appropriate to exclude evidence from trials based on a wide variety of violations of federal and state constitutional protections and code provisions.³¹ The effect of the exclusionary rule has been further expanded by the "fruit of the poisonous tree" doctrine.³² Exclusion has been deemed to be mandated even in cases where the protection is found in the interpretations of constitutional provisions rather than in the specific language of the Constitution itself.³³

Some inquisitorial countries are more inclined than others to develop exclusionary rules. Where they have been implemented, the rules of exclusion are generally more limited and somewhat different than those found in the United States.³⁴ Suppression of evidence is usually based on a finding that the authorities violated a specific rule set out in a code or constitution, and even then the evidence may not be excluded.³⁵ The granting or denial of exclusion may depend upon a balancing of individual privacy rights against the societal interest in presenting all of the evidence,³⁶ and the "poisonous tree" principle is generally not recognized.³⁷ Perhaps most important, since the cases resulting in suppression may have no precedential value, the decisions may be made on a case by case basis, with the result that there is no development of a coherent doctrine of exclusion.³⁸ While it has been suggested that there has been some movement towards the exclusionary rule in inquisitorial countries,³⁹ the concept, to the

30. LANGBEIN, *supra* note 7, at 68-70; Bradley, *supra* note 7, at 175, 219; Frase, *supra* note 7, at 586-87.

31. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 226-43 (1996).

32. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

33. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (holding that the prophylactic *Miranda* warnings are not rights protected by the Constitution). *But see Dickerson v. United States*, 530 U.S. 428, 440 (2000) (making it clear that the requirement of *Miranda* warnings is a constitutional rule).

34. LANGBEIN, *supra* note 7, at 68-70; Frase, *supra* note 7, at 386-87. See generally Bradley, *supra* note 7, at 203-19. It should be pointed out, however, that in certain cases, exclusionary rules imposed in inquisitorial countries can be broader than the analogous rule in the United States, especially when a remedy is provided to protect privacy guaranteed by a specific constitutional provision. See Bradley, *supra* note 7, at 211-16; Frase & Weigend, *supra* note 7, at 334-35.

35. Bradley, *supra* note 7, at 145; Frase, *supra* note 7, at 586 n.254.

36. Bradley, *supra* note 7, at 211; Frase, *supra* note 7, at 586 n.254; Frase & Weigend, *supra* note 7, at 335-36.

37. Frase, *supra* note 7, at 586 n.254; Frase & Weigend, *supra* note 7, at 337 n.134.

38. DADOMO & FARRAN, *supra* note 7, at 41-43.

39. Bradley, *supra* note 7, at 219-20.

extent that it exists, is much different than ours, and it has not been universally accepted.

3. *Investigatory and Pretrial Procedures*

The investigatory and pretrial procedures in inquisitorial countries vary greatly. As in the United States, the investigation is usually accomplished by the police working in conjunction with the prosecutor's office.⁴⁰ In some countries, the prosecutor is deemed to be, at least in theory, less of an advocate and more of an impartial participant in the investigation and trial.⁴¹ In more serious cases, the investigation of the matter may be referred by the prosecutor to an investigating magistrate. This is a judicial officer who conducts the investigation, interviews witnesses, seeks and obtains other evidence, and ultimately decides whether charges should be brought against the suspect.⁴² During the investigatory process an extensive file or dossier is prepared that contains witness statements, accounts of investigatory actions, and other records pertaining to the case. The suspects are questioned,⁴³ and lawyers and defendants in inquisitorial countries are generally more inclined to cooperate with the investigation and give statements.⁴⁴ There is liberal discovery, and the defense attorney is given access to the documents in the dossier.⁴⁵ Depending on the country and the seriousness of the conduct, the charges may be brought by the prosecutor or a body of judges who serve a function similar to our grand jury.⁴⁶

4. *Absence of Pleas of Guilty and Plea Bargaining*

Traditionally, pleas of guilty and plea bargaining were unknown in inquisitorial countries.⁴⁷ All cases went to trial,

40. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 108-11; Frase & Weigend, *supra* note 7, at 322-23.

41. LANGBEIN, *supra* note 7, at 90-92.

42. In France, for example, this investigating magistrate is known as the *juge d'instruction* and has broad investigative powers. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 110, 125-26; DADOMO & FARRAN, *supra* note 7, at 203-09.

43. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 128-29.

44. See INGRAHAM, *supra* note 7, at 80 (noting, in the context of a discussion regarding the privilege against self-incrimination, that lawyers reared in the civil law tradition are more inclined to participate in the pretrial investigation and provide exculpatory information).

45. Frase, *supra* note 7, at 672; Frase & Weigend, *supra* note 7, at 355.

46. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 126; DADOMO & FARRAN, *supra* note 7, at 210-11; INGRAHAM, *supra* note 7, at 50.

47. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 157 (under German principles of instruction and legality there is no room for plea bargaining in the strict sense); INGRAHAM, *supra* note 7, at 50-51 (the guilty plea as we know it does not exist in the

during which the evidence against the defendant was presented to the court. The judge then reached a verdict and, in the event of conviction, imposed a sentence. Inquisitorial scholars rejected the concept of guilty pleas and were particularly critical of the American practice of taking pleas of guilty to lesser offenses or granting leniency in order to avoid the trouble and expense of a trial.⁴⁸ In recent years there has been a tendency to move to short trials or the reduction of charges that bear similarities to guilty pleas. There is even an acknowledgment that, in complex cases, some defendants may be getting consideration in exchange for shortening the proceedings.⁴⁹ Nonetheless, the aversion to pleas of guilty and plea bargaining continues in inquisitorial countries.⁵⁰

5. Trials

The trial of the criminal case in inquisitorial jurisdictions is much different than the trial in adversarial countries, in both theory and practice. As noted above, it is more in the nature of an inquiry than a contest. The trial is conducted by the judge or judges, who may sit alone or with jurors, also known as lay judges.⁵¹ There is no independent jury, and the lay judges sit and deliberate with the professional judges.⁵² This situation creates a

inquisitorial system and all cases must go to trial); Frase, *supra* note 7, at 627 (at least some American scholars take the position that continental countries have effectively avoided the overt form of plea bargaining).

48. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 157 (scholars in Germany are strenuously opposed to strategies that are eroding the prohibition against plea bargaining).

49. *Id.* (informal agreements have developed in Germany to the effect that the client will confess to certain elements and the court will not give a sentence in excess of a certain term); Frase, *supra* note 7, at 626-39 (at least some plea bargain analogues exist in France); *Symposium*, *supra* note 5, at 8-14 (discussing the abbreviated proceedings and other plea bargaining analogies used in Germany, Italy, and France). *But see* INGRAHAM, *supra* note 7, at 51-52 (noting that at least one author argues convincingly that plea bargaining does not underlie the French prosecutors' practice of reducing felonies to misdemeanors); LANGBEIN, *supra* note 7, at 97-98 (taking the position that the German use of the penal order does not constitute plea bargaining); Frase & Weigend, *supra* note 7, at 344-46, 354 (some forms of agreements tantamount to plea bargaining are now being introduced into the German system, but also noting that they are not as significant or abusive as the practices in the United States).

50. *See supra* notes 47-48 and accompanying text.

51. In some courts the professional judge may sit alone, while in others there may be a panel of judges. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 113-14 (France), 142 (Germany), 227-28 (Italy); DADOMO & FARRAN, *supra* note 7, at 73-74 (France); LANGBEIN, *supra* note 7, at 62-63 (Germany); Frase & Weigend, *supra* note 7, at 321-22, 344 (Germany).

52. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 113-14, 126-27 (France), 142 (Germany), 228 (Italy); DADOMO & FARRAN, *supra* note 7, at 73-74 (France); LANGBEIN, *supra* note 7, at 63 (Germany); Frase & Weigend, *supra* note 7, at 321-22, 344 (Germany).

much different dynamic and may give the professional judges more control over the outcome.⁵³

It is the professional judges, not the attorneys, who control the proceedings. The judge determines which witnesses will be called and the order of proof, and it is usually the judge who conducts the initial questioning of the witness.⁵⁴ After the judge has concluded his or her examination, the other parties may examine the witnesses, but the questioning is generally less confrontational and there is no formal direct and cross-examination.⁵⁵ It is also the presiding judge, not the lawyers, who decides whether experts will be necessary and designates the experts who will be called.⁵⁶ Since there is no independent jury and the judge controls the questioning, there are few rules of evidence. Determinations as to whether particular items of evidence will be admitted are generally entrusted to the discretion of the judge.⁵⁷ There is no separate sentencing procedure, and, for the most part, evidence regarding the defendant's work history, family situation, and similar matters is admitted at the trial.⁵⁸ There is also less of a tendency to require live testimony, and witness statements from the dossier and other hearsay evidence may, in some instances, be considered.⁵⁹ Although defendants are not required to testify, in most cases

53. LANGBEIN, *supra* note 7, at 119-41 (discussion of the influence of lay judges in German criminal trials, including studies by other scholars); Frase & Weigend, *supra* note 7, at 344 (noting the influence that the professional judges have on the lay judges in Germany).

54. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 126-27 (France); DADOMO & FARRAN, *supra* note 7, at 212-13 (France); LANGBEIN, *supra* note 7, at 62 (Germany).

55. DADOMO & FARRAN, *supra* note 7, at 212-13 (France); INGRAHAM, *supra* note 7, at 87 (the court examines first and vigorous cross-examination, if there is any, is more likely to be conducted by the court than by the lawyers); LANGBEIN, *supra* note 7, at 13-32 (the account of a German murder trial), 64.

56. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 127 (France), 250-51 (Italy); LANGBEIN, *supra* note 7, at 75-76 (Germany) (but noting that the government may have some influence in this regard).

57. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 147 (in Germany there are, in principle, no rules of evidence); Frase, *supra* note 7, at 677-78 (in France the trial procedures and the evidentiary rules are more relaxed than in the United States).

58. LANGBEIN, *supra* note 7, at 38, 70 (since Continental courts decide sentencing issues simultaneously with issues of guilt, the scope of relevancy is quite broader); *id.* at 13-32 (the account of the German trial); Frase, *supra* note 7, at 680-81 (noting the significance of the absence of a separate sentencing proceeding in French defendants' decision to testify).

59. INGRAHAM, *supra* note 7, at 87 (in the French courts, other than the assize court, judges may rely on evidence in the dossier); Frase, *supra* note 7, at 677 n.704 (in French courts there are few formal rules governing the admissibility of evidence, hearsay and documents are frequently admitted) (citing George W. Pugh, *The Administration of Criminal Justice in France, An Introductory Analysis*, 23 LA. L. REV. 1, 22-24, 26 (1962) (arguing that the court may consider all properly acquired material within the dossier)).

they do. There appears to be more of a tradition of defendants testifying at trial, and, since they have usually given an admissible pre-trial statement, they feel somewhat compelled to explain their position in open court.⁶⁰ Judges may, and frequently do, call the defendant to testify first.⁶¹ Unlike other witnesses, the defendant's statements are not given under oath,⁶² but the fact that the defendant is called upon to give his or her version first may affect the nature of the trial and the strategies of both the defense and the prosecution.⁶³

The victim may be, and often is, represented by an attorney who participates in the proceedings and questions witnesses.⁶⁴ This practice can, in effect, add another prosecutor to the proceedings. If a civil action is brought on behalf of the victim, it may be joined with the criminal case and both cases will be litigated at the same trial.⁶⁵

At the conclusion of the trial, the attorneys present final arguments, and the defendant has the last word.⁶⁶ The professional judges, along with any lay judges, deliberate and render a verdict, and, in the event of a guilty verdict, they pass sentence on the defendant.⁶⁷ If civil action has been joined to the

60. LANGBEIN, *supra* note 7, at 72-74 (Germany); Frase, *supra* note 7, at 677-80 (France); *id.* at 680 n.729 (citing Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973) (claiming that "almost all continental defendants choose to testify")); Frase & Weigend, *supra* note 7, at 343 (noting that most German defendants waive their right to remain silent).

61. DADOMO & FARRAN, *supra* note 7, at 212-13 (France); INGRAHAM, *supra* note 7, at 87 (France); LANGBEIN, *supra* note 7, at 38 (Germany); Frase, *supra* note 7, at 679 (France).

62. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 154 (Germany); Frase, *supra* note 7, at 679-80 (France).

63. Frase, *supra* note 7, at 679-80 (noting that in France the defendant is called as the first witness in every trial, the defendant must answer or stand mute while asked about his or her guilt, and French law does not forbid an adverse inference from the defendant's silence; and also noting the possible strategic disadvantages that the defendant may suffer by being required to testify first).

64. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 115 (France), 232 (Italy); DADOMO & FARRAN, *supra* note 7, at 213 (France); LANGBEIN, *supra* note 7, at 65 (Germany); Frase, *supra* note 7, at 669-71 (France); Frase & Weigend, *supra* note 7, at 350 (Germany).

65. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 233 (Italy); DADOMO & FARRAN, *supra* note 7, at 201-03, 213 (France); LANGBEIN, *supra* note 7, at 111-15 (discussing the availability of the procedure in France and Germany and further noting that it is seldom used in the latter); Frase & Weigend, *supra* note 7, at 351 (noting that although Germany grants victims the right to file a claim for civil damages in the criminal process, the procedure is rarely used); Frase, *supra* note 7, at 669-71 (France).

66. DADOMO & FARRAN, *supra* note 7, at 213 (France).

67. *Id.* at 213-14 (France); LANGBEIN, *supra* note 7, at 80-81 (Germany).

case, the professional judges will also render a decision on those issues.⁶⁸

6. *Appellate Procedures*

The appellate procedures in inquisitorial countries take many forms.⁶⁹ On some levels in some countries, there is the possibility of a trial de novo.⁷⁰ Perhaps most significant is the fact that either the defendant or the prosecution can take an appeal,⁷¹ and in certain situations the victim may also seek appellate review.⁷² In the United States, although the prosecutor can generally appeal pre-trial rulings excluding evidence,⁷³ the prosecutor is barred on double jeopardy grounds from taking an appeal from an acquittal on the merits.⁷⁴ This constitutes a major difference between the inquisitorial system and the adversarial system.

III. HISTORY, CULTURE, AND POLITICAL TRADITIONS

A. *Generally*

As lawyers and scholars considering issues relating to comparative criminal procedure, we have a tendency to focus solely on the criminal justice system and sometimes fail to adequately take into account factors that may be even more important, such as the history, culture, and political traditions of

68. INGRAHAM, *supra* note 7, at 87 (noting that in France the civil action is decided by the professional judges alone).

69. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 134-35 (France), 160-61 (Germany), 256-58 (Italy); DADOMO & FARRAN, *supra* note 7, at 219-21 (France); INGRAHAM, *supra* note 7, at 111-12 (France); LANGBEIN, *supra* note 7, at 82-85 (Germany); Frase, *supra* note 7, at 682-83 (France); Frase & Weigend, *supra* note 7, at 344, 348-49, 356 (Germany).

70. CRIMINAL PROCEDURE SYSTEMS, *supra* note 7, at 160 (Germany); LANGBEIN, *supra* note 7, at 82-83 (Germany); Frase, *supra* note 7, at 682 (France); Frase & Weigend, *supra* note 7, at 348-49, 356 (Germany).

71. DADOMO & FARRAN, *supra* note 7, at 219-20 (France); LANGBEIN, *supra* note 7, at 84-85 (Germany); Frase, *supra* note 7, at 682-83 (France); Frase & Weigend, *supra* note 7, at 344, 348-49, 356 (Germany).

72. DADOMO & FARRAN, *supra* note 7, at 219-20 (France).

73. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1147-51 (2d ed. 1992).

74. *Kepner v. United States*, 195 U.S. 100 (1904). As a matter of historical interest, this could have well been decided differently in the *Kepner* case. As Professors LaFave and Israel note in their treatise, in his dissent Justice Holmes formulated a concept of "continuing jeopardy" that would have established the principle that jeopardy continues through the proceedings. This would have permitted the government to appeal from an acquittal of the defendant. LAFAVE & ISRAEL, *supra* note 73, at 1062-63; LANGBEIN, *supra* note 7, at 85-86.

the country. Legal systems do not develop or function in a vacuum, and these elements can have a much greater impact on whether a legal system will succeed than the nature of the trial procedures or the parties' rights to appeal. We in the United States have a history and tradition of democracy and free enterprise that dates back hundreds of years. We have developed, and we have ingrained in us, a culture that expects the government to be elected by, and be responsive to, the people. We also expect our government officials to be honest, and we abhor and seek to extirpate corruption. The separation of powers among the legislative, executive, and judicial branches of government is a given in our political system and has been for centuries. Our common law adversarial system is uniquely suited to an environment where the courts are independent of the other branches of government, corruption is not tolerated, citizens are accustomed to making decisions that affect their community, individual rights are respected and protected, the people have confidence in their government, and democracy is firmly rooted. This is certainly not true of all nations.

B. *The Russian Experience*

One need only consider the history, culture, and political traditions of Russia to understand the differences that one can encounter in other parts of the world. For over a thousand years Russia has been under autocratic rule, and its citizens have had little or no experience with democracy, elected government, or the rule of law. For a millennium they have been subject to the control of foreign rulers, kings, czars, and most recently, Communist dictators such as Lenin and Stalin.⁷⁵ Even during the "enlightened period" of Peter the Great purges and torture were common, corruption was rampant, and anyone who had the temerity to question the authority of the czar was dealt with severely.⁷⁶ Stalin's purges remind us that strict autocratic rule continued well into the twentieth century,⁷⁷ and the corruption that has existed since the time of Peter the Great continues to be a fact of life.⁷⁸

75. DAVID & BRIERLEY, *supra* note 7, at 160-63 (noting that early in Russian history "[t]he sentiment took root that those who governed, and whose whim was law, were all-powerful.")

76. See generally ROBERT K. MASSIE, *PETER THE GREAT* (Ballantine Books ed. 1981).

77. DAVID & BRIERLEY, *supra* note 7, at 193.

78. See generally HANDELMAN, *supra* note 5.

For most of the twentieth century Russia was under communism,⁷⁹ a political system that is not well understood by many Americans. However, an understanding of this form of government is necessary to comprehend the thinking and psyche of the Russian people today. It must be remembered that only a few years ago only members of the Communist Party could be judges, lawyers, legislators, or hold other positions of power.⁸⁰ For generations the Russian people have been inculcated with Marxist-Leninist dogma and even today a majority of the politicians are Communists or "former Communists."⁸¹ Since the recent political changes in Russia did not involve a violent revolution, those members of the Communist Party who were the judges, prosecutors, lawyers, and legislators under the old system, remain in those positions today.

Communist theory is primarily an economic theory that seeks to eliminate class struggle by eliminating the exploitation of the working class.⁸² It is thought that if this can be accomplished, it will ultimately result in a classless society in which individuals will live in harmony and voluntarily observe societal values. This will, according to Marxist-Leninist theory, lead to the day when law, courts, and even government will be unnecessary. However, the state must first pass through a period of socialism.⁸³ During this period the state will be charged with the responsibility of ensuring that the economic situation is progressing satisfactorily and there is total conformity with Communist ideology and Communist principles.⁸⁴ In the economic area this requires a planned economy, the elimination of free enterprise, collectivization of the means of production, and government control of industrial output.⁸⁵ Private individuals may not carry

79. According to Marxist-Leninist theory this was really socialism: the scientific socialism that will ultimately lead to communism. DAVID & BRIERLEY, *supra* note 7, at 170, 175-76.

80. It was up to this elite group, which constituted a rather small percentage of the population, to convert a disciplined social organization into a society that conformed to societal standards as a matter of conscience rather than on the basis of outside coercion. *Id.* at 193.

81. Boylan II, *supra* note 5, at 1343.

82. DAVID & BRIERLEY, *supra* note 7, at 172-75. It is a point often missed that communism considers morality to be subordinate to economics while the opposite is true in our political system. *Id.* at 180, 191-92.

83. *Id.* at 155, 170-76, 188. It is interesting to note that shortly after the October Revolution of 1917, there was a period when there appeared to be an attempt to immediately move to a Communist state, skipping the socialist period forecast by Marx. However, this proved to be unrealistic. *Id.* at 184-85. Under Communist theory, in the international area non-socialist states represent a threat to humanity. *Id.* at 177-78.

84. *Id.* at 176-78.

85. *Id.* at 186-87, 191-92, 233-34.

on any business. To do so would constitute the crime of speculation.⁸⁶

Although communism involves primarily economic theory, it has great political implications. In fact, many Americans view it as primarily a political doctrine. From the Communist perspective, the totalitarian regime was not a cause for embarrassment or shame. To the contrary, this was an essential and important step in the evolution of society towards the ultimate goal – the establishment of the Communist state. For the Communist, the requirement of total state control was self-evident and non-debatable. The power must be reposed in one central authority. The socialist government must reign supreme and unchallenged, and concepts such as separation of powers and rule of law are antithetical to Marxist-Leninist principles. Governmental power cannot be dispersed or separated and nothing, including rule of law, can be permitted to rival the authority of the state. Authoritarian control is essential to ensure that the country is progressing satisfactorily on the road to communism.⁸⁷

It is clear that the culture and thousand-year history of autocratic rule in Russia did not create a hospitable environment for democracy and rule of law. This is in sharp contrast to our culture and the political history of other democracies of the former Soviet Union that have made great strides toward the development of democratic rule.⁸⁸ This is not to suggest that the goal of democratization cannot be accomplished or that we should be pessimistic about its prospects. However, the cultural and political history are factors that must be considered.

C. The Effect of Cultural, Historical, and Political Traditions on the Introduction of Adversarial Elements into the Inquisitorial Systems of Other Countries

Although Russia and the former Soviet Union have been discussed at length, they serve only as an example of the importance of considering the cultural, historical, and political traditions of the particular area. These will vary from continent to continent and from country to country. It has been noted, for example, that due to political history and culture, some countries of the former Soviet Union are progressing much more rapidly

86. *Id.* at 187.

87. DAVID & BRIERLEY, *supra* note 7, at 155, 226-27, 282-83; INGRAHAM *supra* note 7, at 4.

88. Boylan II, *supra* note 5, at 1331.

than others on the road to democracy and the rule of law.⁸⁹ Based solely on cultural and political traditions, a criminal justice system that is well suited to an Asian country may not succeed in Switzerland or a system that functions well in Switzerland may be a failure in Uganda. To ignore these considerations is tantamount to ignoring the climate and the soil in which a tree is to be planted.

IV. THE LEGAL TRADITION

A. Generally

Equally important are the legal traditions of the country. Criminal justice systems vary as to their theories of law, objectives, and procedures. We have a tradition in the English common law adversarial system that dates back over three hundred years in this country alone, and it existed in England long before that. Along with it we inherited our treasured legacy of individual rights, due process, and trial by jury. The democracy that we enjoy has provided fertile ground for the criminal justice system that has served us so well.

Other countries have inherited a legal tradition quite different from ours. In the United States, Continental Europe, and England, law is viewed to be a natural complement to morality,⁹⁰ while in other countries there is a deeply rooted tradition that those who govern are all powerful and “the law” is subject to their whim and caprice.⁹¹ We, in our free market democracy, seek to protect, preserve, and defend the rule of law, while it is the objective of other political systems to arrive at a point where law no longer exists.⁹² Many nations, including some in the former Soviet Union have a strong legal tradition,⁹³ while in others the

89. *Id.* (noting that the Czech Republic, which had a history and culture of democratic institutions, is at the forefront of democratic reforms); see also DAVID & BRIERLEY, *supra* note 7, at 201 (noting that even during the Communist period in Poland some free enterprise existed, the land was not nationalized, and the greater part of the agricultural production was carried out by individuals); *id.* at 283 (discussing the fact that in Czechoslovakia the tradition of criticism of government continued at least until the 1968 crack down by the Communist Party).

90. DAVID & BRIERLEY, *supra* note 7, at 165.

91. *Id.* at 162, 165-66.

92. *Id.* at 155, 173-74, 188 (referring to Marxist-Leninist doctrine).

93. *Id.* at 167 (Hungary, Poland, Czechoslovakia, Slovenia, and Croatia have a strong legal tradition consistent with that in Germany, Austria, and France).

attachment to legal principles is extremely weak.⁹⁴ Criminal procedures will also vary. They may be adversarial in nature, inquisitorial, or mixed,⁹⁵ and may or may not include an independent jury. Some countries are moving toward the adoption of the jury as an independent trier of fact,⁹⁶ while other countries, such as Germany and France, have implemented the system and then abolished it.⁹⁷ Even England, which has a long tradition of trial by jury, may soon remove serious fraud trials from the jury's competence.⁹⁸

B. *The Russian Experience*

In considering the history and culture of Russia, it is difficult to imagine a legal tradition more different from our own. We view law to be a natural complement of morality, while, with their autocratic history, Russians have viewed the law to be merely the instrument and whim of the ruler in power.⁹⁹ We have treasured and protected the rule of law, while for the past millennium in Russia, the rule of law has been seen as antithetical to the ineluctable rule of the state.¹⁰⁰ We have a very strong legal tradition, while the Russians have had a weak attachment to legal principles.¹⁰¹ Our criminal justice system is adversarial, while the Russian system is primarily inquisitorial in nature.¹⁰² We have a history of independent juries going back hundreds of years, while, with the exception of approximately forty years at the end of imperial rule, the use of the jury as an independent trier of fact has been unknown in Russia.¹⁰³

Throughout virtually the entire history of the Russian people, the primary purpose of the criminal justice system has been to serve the ends of the totalitarian regime. In the words of a

94. *Id.* at 165, 167 (noting that the legal tradition and idea of law are extremely weak in Russia, but the legal traditions in Albania, Bulgaria, Rumania, and Serbia are even weaker than in Russia).

95. *See supra* notes 7-20 and accompanying text.

96. *See infra* notes 111-17, 170-91 and accompanying text.

97. Thaman, *supra* note 5, at 65 n.19 and accompanying text.

98. *Id.* at n.20 and accompanying text.

99. DAVID & BRIERLEY, *supra* note 7, at 161-62, 165-66, 181; Vlasihin, *supra* note 5, at 1206 (a modern Russian scholar notes that in the public consciousness of Russia "the law is like the shaft of a wagon, it goes wherever you turn it").

100. DAVID & BRIERLEY, *supra* note 7, at 161-62, 165-66, 212-14.

101. *Id.* at 165-66.

102. *Id.* at 164; Boylan I, *supra* note 5, at 109-10; Boylan II, *supra* note 5, at 1330.

103. *See infra* notes 111-17, 171 and accompanying text.

prominent Russian judge and scholar: "Our courts have always been part of a repressive system."¹⁰⁴

Russian legal history actually begins in Kiev, Ukraine, when a tribe known as the Varangians established domination over the Russia of Kiev in 892. Perhaps the most important historical event of the time occurred when the tribe was converted to Christianity in 989 during the reign of St. Vladimir. In the West, the Church observed Roman law, but Byzantine law had an important place in the Russia of Kiev. The Mongol domination by the Golden Horde from 1236 until 1480 kept Russia isolated, and it was separated from its western neighbors by its adherence to the Orthodox faith. After 1480 Russia endured the despotic rule of the czars, serfdom was established, and the sentiment that obedience to law involved submission to the will of the despot took root.¹⁰⁵ In 1722, Peter the Great created the *Prokuratura* to serve as "the eyes of the monarch" to ensure that the acts of administrators were in conformity with the law and the orders of the czar.¹⁰⁶ Bribery and corruption were rampant. Prior to Peter the Great the judicial system ran on the principle of "feedings" under which judges' compensation came from litigants.¹⁰⁷ Even after this practice was abolished, bribery was pervasive. Many examples exist, including an account that, in the middle of the nineteenth century, a Minister of Justice bribed a subordinate to facilitate the delivery of a deed.¹⁰⁸ A Russian author described the Russian court system before 1864 as being corrupted by excessive bribery in every judicial district, having staff members of low morals and intellect, using social class as the basis for the system of justice, and being slavishly dependant on the administration.¹⁰⁹ Due to a number of factors, the corruption of the officials went unexposed.¹¹⁰

The Russian criminal justice system has been, and continues to be, an inquisitorial system.¹¹¹ However, a mixed system that included jury trials was introduced in 1866 under judicial reforms

104. Ingwerson, *supra* note 5, at 1 (quoting Moscow judge and legal scholar Sergej Pashin).

105. DAVID & BRIERLEY, *supra* note 7, at 160-63.

106. *Id.* at 216-17.

107. Plank, *supra* note 5, at 42 and authorities cited therein at nn.141-43.

108. *Id.* at n.143 and accompanying text.

109. *Id.* at 40-41 (citing V.N. Bochkarev, *Doreformennyi Sud [The Pre-Reform Court]*, in 1 SUDEBNAYA REFORMA [THE JUDICIAL REFORM] 205 (N.V. Davydov & N.N. Polyanski eds., 1915) (the criticisms listed above comprise only a partial list of the those enumerated in the text)).

110. *Id.* at 43.

111. DAVID & BRIERLEY, *supra* note 7, at 155-56.

implemented by Czar Alexander II.¹¹² All of these reforms, including the right to jury trial, were abolished when the Bolsheviks came to power in 1917.¹¹³ This period of approximately fifty years provides interesting insights into the possibility of effectively introducing an independent jury into an inquisitorial system, and specifically the Russian system. It must be kept in mind that the czars were still in power and continued the autocracy, and the effect of the reforms should not be exaggerated. It does appear that the reforms generally, and the jury trials in particular, were at least to some extent successful, and examples are cited of cases where juries made decisions that went against the obvious wishes of the czar.¹¹⁴ The procedures and evidentiary rules were rather liberal,¹¹⁵ there were able defense attorneys, and juries were permitted to make moral judgments that included a form of jury nullification.¹¹⁶ However, decrees could be reversed or quashed by the Senate.¹¹⁷

All of this changed dramatically when the Communists overthrew the Czar and seized control of the government during the October Revolution of 1917.¹¹⁸ Along with the revolution came new theories about the law that had a monumental effect, not only upon the legal system, but also on the country as a whole. Under Communist theory, if the classless economic system could be established, there would no longer be any need for law.¹¹⁹ In order to arrive at that point, the government would have to exercise total control to guide the country from socialism to the Communist state.¹²⁰ Unlike Western nations, law would not be linked to morality, but instead would serve only to facilitate the

112. These were enacted under the Judicial Reform Act of 1864, and the first jury trial was held in 1866. Bhat, *supra* note 5, at 77, 93-94; Gilden, *supra* note 5, at 151; Plank, *supra* note 5, at 45-46; Plotkin, *supra* note 5, at 1-2; Thaman *supra* note 5, at 64; Stead, *supra* note 5, at 26; Vesselinovitch, *supra* note 5, at 13. As a matter of interest, the Judicial Reforms introduced into the system an examining magistrate similar to the French *juge d'instruction*. See *supra* note 42 and accompanying text; Plank, *supra* note 5, at 49.

113. Gilden, *supra* note 5, at 151; Plotkin, *supra* note 5, at 1; Jones, *supra* note 5, at 26; Vesselinovitch, *supra* note 5, at 13.

114. See, e.g., Bhat, *supra* note 5, at 94-113. Particularly noteworthy is the acquittal of the revolutionary Vera Zasulich who was found not guilty on charges involving the attempted murder of the municipal governor of St. Petersburg. *Id.* at 110-12.

115. *Id.* at 93-94, 97.

116. *Id.* at 87; 94-113; Boylan II, *supra* note 5, at 1339.

117. Plank, *supra* note 5, at 49.

118. See Gilden, *supra* note 5, at 151; Plotkin, *supra* note 5, at 1; Jones, *supra* note 5, at 26; Vesselinovitch, *supra* note 5, at 13.

119. DAVID & BRIERLEY, *supra* note 7, at 173-74, 214-15.

120. *Id.* at 188.

economic changes necessary to arrive at the goal.¹²¹ This would, of necessity, include ensuring that the will of the Communist regime was carried out. Such was the nature and *raison d'être* of "socialist legality."¹²² There was a constitution guaranteeing Soviet citizens a multitude of rights, but it was little more than a piece of paper.¹²³ The need for law, and law itself, would eventually disappear. In the interim, law would serve only to maintain control and ensure that the final objective was achieved.¹²⁴

The fact that the law and the court systems were merely the instruments of the government was not viewed by the Communists as a source of embarrassment. To the contrary, it was both consistent with and required by Marxist-Leninist doctrine.¹²⁵ Lenin himself reinstated the *Prokuratura* as the guardian of socialist legality in all areas of Soviet life, including the court.¹²⁶ In the criminal area, the procurator functioned as the prosecutor and much more. If, in the view of the procurator, the court was taking a position contrary to socialist legality, he or she could file a protest that would suspend the proceedings until the court changed its ruling or the procurator appealed to a higher court. The procuracy seldom, if ever, lost these appeals.¹²⁷ Individuals could be detained by the procurator and held for months without being charged.¹²⁸ Under communism, the criminal court and the criminal law were viewed to have a pedagogical function to ensure that perpetrators were educated and guided towards behavior consistent with their obligations as a citizen of a socialist country.¹²⁹

Everyone in the judicial process, like everyone else in a position of responsibility, was a member of the Communist Party.¹³⁰ Judges and lawyers were poorly paid and held in low esteem.¹³¹ The judiciary was subject to the direct supervision of

121. *Id.* at 176-77, 188, 191-92, 214-15.

122. *Id.* at 209.

123. Boylan II, *supra* note 5, at 1339; Thaman, *supra* note 5, at 66.

124. DAVID & BRIERLEY, *supra* note 7, at 176-77, 188.

125. *Id.* at 212.

126. *Id.* at 216-18.

127. *Id.* at 217-20; INGRAHAM, *supra* note 7, at 39.

128. Burke I, *supra* note 5, at 13; Thaman, *supra* note 5, at 66.

129. DAVID & BRIERLEY, *supra* note 7, at 194-95.

130. *See id.* at 193.

131. Boylan II, *supra* note 5, at 1327-28 (the judiciary was the least respected branch of the legal profession); Gilden, *supra* note 5, at 156-57 (within the legal system the procurator stood at the pinnacle, followed by investigators, criminal defense attorneys, and at the nadir, judges); Thaman, *supra* note 5, at 66 (judges were poorly paid and often

the *Prokuratura*, and Communist Party leaders would routinely call judges on the telephone and advise them how to rule in particular cases. This practice became known as "telephone justice."¹³² Defense lawyers were available to represent criminal clients, but all attorneys were first and foremost servants of socialist legality.¹³³

While the theory and objectives of the Soviet criminal justice system were obviously much different than those found in Western Europe,¹³⁴ the procedure was inquisitorial in nature. Primary reliance was placed upon the codes and cases had no precedential value.¹³⁵ Defense attorneys and defendants were, as they are in other inquisitorial countries, encouraged to and inclined to provide statements and cooperate with the investigation.¹³⁶ At trial, the cases were decided by professional judges sitting alone or with lay judges.¹³⁷ However, the lay judges were clearly under the control of the professional judges and became known as "noddors," either because of their constant agreement with the professional judges or their membership in the Communist Party.¹³⁸ The victim or the victim's representative was permitted to actively participate in the trial.¹³⁹

The trial procedures were similar to those in inquisitorial countries. The professional judge controlled the proceedings and would customarily call upon the defendant to testify first.¹⁴⁰ There was one significant difference. Western inquisitorial systems require that once the proceedings are started, the trial must proceed uninterrupted to a conclusion.¹⁴¹ However, in the Soviet system, if the court determined that there was a need for more evidence, the trial could be terminated at that point, and the matter be referred back to the procurator and the police for further investigation. The case could later be rebrought on the

under-educated); Andrias, *supra* note 5, at 18 (the judge was seen as an extension of the prosecutor and the government bureaucracy).

132. Boylan II, *supra* note 5, at 1327-28; Plank, *supra* note 5, at 4 n.6; Thaman, *supra* note 5, at 66; Andrias, *supra* note 5, at 18; Burke II, *supra* note 5, at 12; Burke III, *supra* note 5, at 12.

133. DAVID & BRIERLEY, *supra* note 7, at 222-23.

134. *Id.* at 281.

135. *Id.* at 225, 244, 261-63; INGRAHAM, *supra* note 7, at 5.

136. INGRAHAM, *supra* note 7, at 80.

137. *Id.* at 88; DAVID & BRIERLEY, *supra* note 7, at 245.

138. DAVID & BRIERLEY, *supra* note 7, at 247-48; Boylan II, *supra* note 5, at 1339; Thaman, *supra* note 5, at 67; Andrias, *supra* note 5, at 18; Jones, *supra* note 5, at 27.

139. Boylan I, *supra* note 5, at 105.

140. INGRAHAM, *supra* note 7, at 88; Plotkin, *supra* note 5, at 4-5.

141. See THE FRENCH CODE OF CRIMINAL PROCEDURE, *supra* note 7, at 25 (noting that in France, once the trial is commenced, it "must continue without interruption to judgment and may only be recessed to allow the court to eat and sleep").

basis of newly discovered evidence.¹⁴² As a result, acquittals were extremely rare. Virtually all trials resulted in conviction of some offense or, infrequently, the matter was referred back for further investigation.¹⁴³ Not surprisingly, the prosecutor could appeal from court decisions and acquittals, and could also seek what was called "supervisory review" by an appellate panel.¹⁴⁴

Thus, for most of the last century, Russia endured a criminal justice system that was established to make certain that the wishes and objectives of the Communist Party were carried out. Separation of powers,¹⁴⁵ an attorney's duty to zealously represent his or her client,¹⁴⁶ and an independent judiciary were out of the question.¹⁴⁷ The criminal justice system, along with the economy and the entire nation, was under the firm control of the regime.¹⁴⁸ This was, in the purest sense, the rule of the state rather than the rule of law.¹⁴⁹ It was the procurator, not the judges or lawyers, who possessed the power and were held in high esteem.¹⁵⁰ From our perspective, this was an inquisitorial system that was debased and corrupted to serve the ends of the party in power. However, to the Communists the system was legitimate, and a very effective instrument in achieving the final goal.

As difficult as it may be for us to comprehend these principles, and as repugnant as they may be to our ideals, we must understand the theory in order to understand the situation with which we are dealing when we attempt to affect events in the former Soviet Union. Virtually everyone in the former Soviet Union was educated and indoctrinated in these principles. Only

142. Thaman, *supra* note 5, at 67; Andrias, *supra* note 5, at 18.

143. Thaman, *supra* note 5, at 67; Burke I, *supra* note 5, at 13 (noting that conviction rates ran about 99%).

144. INGRAHAM, *supra* note 7, at 112.

145. DAVID & BRIERLEY, *supra* note 7, at 226-28.

146. *Id.* at 222-23; INGRAHAM, *supra* note 7, at 5-6.

147. It is rather interesting that the 1936 Constitution of the former Soviet Socialist Republics stated that "Judges shall be independent and subordinate to law" when in fact the Communist Party regularly dictated the results to judicial officials. Plank, *supra* note 5, at 4 (citing U.S.S.R. CONST. art. 112 (1936) (replaced 1977), *quoted in and translated by* ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 154 (1982)). *See also* INGRAHAM, *supra* note 7, at 5 (noting that an independent judiciary is antithetical to the Soviet system).

148. DAVID & BRIERLEY, *supra* note 7, at 288 (noting that activities having an adverse effect upon government control of the economy such as purchases for resale, failure to accomplish the minimum amount of work due to the *kolhoz*, and failure to perform a contract in the collectivized sector carried penal sanctions).

149. *Id.* at 212; Boylan II, *supra* note 5, at 1339.

150. Gildin, *supra* note 5, at 156-57 ("within the legal system, the procurator stood at the pinnacle, followed by investigators, criminal defense attorneys, and at the nadir, judges."); Thaman, *supra* note 5, at 66 (the procurator was the most powerful figure in the Soviet justice system); Jones, *supra* note 5, at 26.

those who accepted communism, or at least claimed to accept it, could gain an education and become a respected member of society. Only members of the Communist Party became judges, lawyers, or politicians. Even today, many, if not most, of the judges, lawyers, and politicians in Russia are Communists or former Communists. They have spent their entire lives in a society that, as a matter of political principle, rejected the independence of the courts, free enterprise, the right to dissent, and other individual rights that we may sometimes take for granted. Corruption in the court system and elsewhere continued to be, as it has been for centuries, if not accepted, at least a fact of life.

*C. The Effect of Legal Tradition on the Introduction of
Adversarial Elements into the Inquisitorial Systems of Other
Countries*

Law is, to a great extent, based on custom.¹⁵¹ Custom develops over a long period of time and is ingrained in the society. It has been recognized that it borders on folly to attempt to import the entire criminal justice system of one nation into another that has a totally different legal culture and history.¹⁵² Just as a human body will reject foreign organs or tissue from another body that is incompatible with its physiology, a society will not be receptive to a foreign legal system that is inconsonant with its customs and traditions. The Russian legal culture provides an excellent example of a firmly rooted legal tradition that, not surprisingly, is consistent with its autocratic political history. However, the example has universal significance. In order to evaluate whether adversarial elements will be accepted or rejected in any inquisitorial system, we must be well acquainted with the society's legal culture and traditions. This is not only true of Russia, it is true of any nation in the world.

151. See generally MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 46-47 (2d ed. 1994); DAVID & BRIERLEY, *supra* note 7, at 274.

152. Bhat, *supra* note 5, at 80 (referring to the importation of European judicial practices into Russia in the 1860s).

V. DEVELOPMENTS IN POST-SOVIET RUSSIA

A. Background

In the years since the collapse of the Soviet Union, there has been a commendable effort on the part of the Central and East European Law Initiative and others to assist Russia and other NIS countries to move toward democracy and establish the rule of law. Perhaps the largest obstacles to progress have been the historical and cultural factors discussed above. The alteration of the autocratic tradition, history, and culture that has been developed over the past millennium will not be an easy task for the citizens of Russia and the Newly Independent States. Real and permanent change may come slowly. The problem was perhaps best expressed by the Russian Head of U.S. Legal Studies of the U.S. & Canadian Studies of the Russian Academy of Sciences, Vasily Vlasihin, who noted in an article:

I would like to quote from an American authority, with whom I wholeheartedly concur. After his visit to the Union of Soviet Socialist Republic in 1990, the United States Attorney General Dick Thornburgh, delivering remarks in Philadelphia, said:

What is really missing [in the Soviet Union] is what might be called a "legal culture." Time and again, we found a naive belief that all that was needed was to pass the correct statutes to get the right laws on the books to create a "rule of law."

It is going to take a commitment to the lawful, democratic process, and we tried to emphasize legal process - due process of law - even over substantive rights, as the true safeguard of the people's liberties. Again they asked us often, and in much confusion, about separation of powers. The idea of deliberately building in a tension between separate branches of government - our concept of checks and balances -

was extremely puzzling to them and, to some, incomprehensible.

All too many people in Russia think that once you get the right statutes on the books, you automatically qualify to enter the realm of the Rule of Law. But, Russians still do not trust the law itself. It is a great pity that the old Russian saying, "the law is like the shaft of a wagon, it goes wherever you turn it," maintains a firm grasp on public consciousness, reflecting the failure of the legal system to provide ultimate protections to the people against abuses of government. . . .

Many things related to the Rule of Law that are widely accepted and known in the West from time immemorial are just incomprehensible for Russians. The minds of the people brought up in the spirit of "the-rule-of-the-state-law" are not capable of absorbing to the fullest extent the ideas of limited government, decentralized government, checks and balances within the mechanism of the separation of powers, the judicial supremacy, and the priority of individual rights and liberties over interests of the state. It is quite a task to implant ideas of judicial review when a criminal justice official seriously stated in a newspaper that when the judiciary assumes the duty of interpreting statutes and the Constitution, this is the first obvious sign of a totalitarian regime.¹⁵³

While this was written in 1993 and progress has been made, Professor Vlasihin's comments provide the Russian perspective and make it clear that overcoming a thousand years of history will be a challenge. More important, however, are his observations that superficial changes will not be successful and that real change must be effected from the ground up by first establishing a respect for the law and a legal culture that comprehends and embraces the rule of law. That certainly has been, and continues to be, a primary objective of the Central and East European Law Initiative.

153. Vlasihin, *supra* note 5, at 1205-06 (footnotes omitted). The author had the privilege of meeting and working with Professor Vlasihin at a seminar in Moscow in the fall of 1997.

B. The Introduction of Adversarial Elements into the Russian Criminal Justice System

1. Generally

The success or failure on the part of Russians and others to introduce adversarial elements, including the right to jury trial, into the Russian criminal justice system will have profound implications for the Russian people and the entire world. However, it also provides an interesting experiment as to whether a mixed system can succeed in the Russian environment. The Russian criminal justice system continues to be primarily an inquisitorial system.¹⁵⁴ Present day Russians have inherited an autocratic tradition and a history of over seventy years of Communist domination.¹⁵⁵ For more than one thousand years there has been a weak legal culture, and courts have existed solely to carry out the wishes of the party in power.¹⁵⁶ Corruption has always been rampant, and is so today.¹⁵⁷ Judges and lawyers continue to be held in low esteem, and the courts are suffering from an acute lack of resources.¹⁵⁸ Many, if not most, of the judges, lawyers, and politicians are Communists, former Communists, or re-labeled Communists.¹⁵⁹ There is substantial resistance to the introduction of adversarial elements and to change generally.¹⁶⁰ On the other hand, many Russians favor these measures, and the transition is going forward.¹⁶¹ A number of characteristics of that system deserve consideration when implementing these reforms.

Russia continues to be a code country in the inquisitorial tradition. Judges, in reaching decisions rely primarily on the code or other legislative materials, and court decisions have no precedential value.¹⁶² Following the tradition of the Communist

154. Boylan I, *supra* note 5, at 110; Boylan II, *supra* note 5, at 1330-32.

155. *See supra* notes 75-78, 118-50 and accompanying text.

156. *See supra* notes 75-78, 99-150 and accompanying text.

157. *See generally* HANDELMAN, *supra*, note 5.

158. Vlasihin, *supra* note 5, at 1207 (providing a revealing comparison of the responses of American and Russian school children regarding their views of lawyers); Andrias, *supra* note 5, at 23 (in Russia the executive branch has the dominant role, the legislative branch is struggling to be heard and the judicial branch ranks a far distant third).

159. Boylan II, *supra* note 5, at 1333, 1343.

160. Andrias, *supra* note 5, at 20 (noting the staunch resistance of a surprisingly large number of judges to the introduction of jury trials or change generally).

161. *Id.* (noting that many judges are also vigorous proponents of change).

162. Boylan II, *supra* note 5, at 1341-42; Vlasihin, *supra* note 5, at 1210 (Russian courts are not empowered to exercise judicial review of legislative or executive

period, constitutional provisions and other legislative acts are often not implemented or simply ignored.¹⁶³ While illegally obtained evidence may be suppressed on the basis of constitutional or code provisions, exclusion is based on the provisions themselves rather than prior case law. The implementation of the exclusionary rule is in the developmental stage, and the wide-open nature of the trial makes it difficult to prevent the illegally seized evidence from ultimately coming to the attention of the judge or the jury.¹⁶⁴ Bail is unheard of, and the release of the defendant before trial is very rare.¹⁶⁵ During the preliminary investigation the Russian suspect usually must provide an interview or statement.¹⁶⁶ At the time that the preliminary investigation is concluded, the defendant does have

enactments); Andrias, *supra* note 5, at 22 (cases do not have precedential value and, while attorneys refer to the Code of Criminal Procedure, they rarely refer to a case); *id.* at 23 (since there are no precedents evidentiary issues are determined on a case by case basis). The Russian Constitution provides for a Constitutional Court. Upon motion of an interested governmental organization, the Constitutional Court may give its interpretation of a constitutional provision or hold a statute or executive regulation unconstitutional. Whenever an issue regarding the constitutionality of an act arises in a case before a court of general jurisdiction, those proceedings are suspended and the issue is referred to the Constitutional Court for a decision. Memorandum from Vasilii A. Vlasihin on the Introduction to the Legal System of Russia (July 1997) (on file with author). *But see* Boylan II, *supra* note 5, at 1340-42 (discussing the fact that Russian trial courts are now, at least in some instances, applying the Constitution to their cases, but also noting that these cases have no precedential value).

163. Boylan II, *supra* note 5, at 1331 (in contravention of the Russian Constitution which provides that the prosecutor and the defense attorney should be on equal footing, the prosecutor frequently does not attend the trial and the judge acts as both prosecutor and judge); *id.* at 1339 (noting that although the Constitution of the Soviet era provided for a multitude of rights, the rights were never enforced); *id.* at 1344 (although the Constitution provides for the right to jury trial throughout Russia the Russian parliament has not been willing to enact enabling legislation). *See also* Plank, *supra* note 5, at 4 (although the 1936 Constitution of the former Soviet Union provided that judges were to be independent and subordinate to law, party officials regularly interfered in judicial decisions); Thaman, *supra* note 5, at 66 (the Soviet regime routinely violated the rights of the accused in contravention of the laws and the Soviet Constitution); *id.* at 78 (in 1994, President Yeltsin violated his own Constitution by promulgating a decree allowing for the detention of certain individuals for up to thirty days without judicial approval). While in Russia, Professor Thaman criticized the practice of returning the case for supplementary investigation as violative of the Russian Constitution. *Id.* at 66.

164. Gildin, *supra* note 5, at 154-55; Thaman, *supra* note 5, at 90, 106. Since the government can take an appeal from an acquittal, defense lawyers have usually forgone the right to ask the judge to exclude the evidence and argued the validity of the evidence in front of the jury. This decision arises out of a concern that the judge may dismiss the case and return it to the procurator to be re-brought later. It may also be prompted by a concern that the appellate court may reverse a not guilty verdict because of the improper suppression of the evidence. *Id.* at 92 n.198 and accompanying text.

165. Boylan II, *supra* note 5, at 1342-43 (the accused can be held for months or even years while awaiting trial); *see also* Christopher Lehmann, *Bail Reform in Ukraine: Transplanting Western Legal Concepts to Post-Soviet Legal Systems*, 13 HARV. HUM. RTS. J. 191 (2000).

166. Vesselinovitch, *supra* note 5, at 52.

the right to counsel, and if the defendant cannot afford an attorney, one is provided by the state. Appointed counsel represent defendants in the overwhelming majority of cases and these attorneys are generally inexperienced, poorly paid, and sometimes assume representation only a few days before trial.¹⁶⁷ Defense attorneys have no knowledge as to how to investigate a case and are prohibited from doing so. In the past, defense attorneys who interviewed witnesses have even been arrested for witness tampering.¹⁶⁸ Consistent with the inquisitorial tradition, there is no plea bargaining, and all cases go to trial.¹⁶⁹

2. Jury Trials

a. Generally

The recent reinstatement of jury trials in the Russian criminal justice system has attracted a great deal of attention and comment.¹⁷⁰ As noted above, Russia had some experience with independent juries from 1866 until 1917 when the Bolsheviks seized power and abolished the jury system.¹⁷¹ The right to jury trial is now guaranteed by the Russian Constitution;¹⁷² the Russian Supreme Soviet passed enabling legislation on July 16, 1993,¹⁷³ and on December 15, 1993, the first Russian jury trial in modern times was convened in the Saratov region.¹⁷⁴

While this event is significant, the jury system is still inchoate. The concept almost died aborning. Procurators, Communists, and conservatives were staunchly opposed to the use of juries, and initial attempts to pass enabling legislation went down in defeat.¹⁷⁵ When the measure did pass in 1993, jury trials were authorized in only nine of Russia's eighty-nine regions or oblasts,¹⁷⁶ and even in those regions only defendants charged

167. Thaman, *supra* note 5, at 87.

168. It is the exclusive right of the procurator to investigate the case. Boylan II, *supra* note 5, at 1332; Stead, *supra* note 5, at 25.

169. Boylan II, *supra* note 5, at 1343; Gildin, *supra* note 5, at 168; Thaman, *supra* note 5, at 104 (there is a procedure for an abbreviated trial if the defendant admits his or her guilt, but the procedure is not used).

170. See generally sources cited *supra* note 5.

171. Bhat, *supra* note 5, at 77; Gildin, *supra* note 5, at 151; Plotkin, *supra* note 5, at

1.

172. Boylan II, *supra* note 5, at 1343-44.

173. Gildin, *supra* note 5, at 151; Thaman, *supra* note 5, at 80.

174. Thaman, *supra* note 5, at 62.

175. Burke III, *supra* note 5, at 12; BBC, *supra* note 5.

176. Boylan II, *supra* note 5, at 1337; Gildin, *supra* note 5, at 151; Thaman, *supra* note 5, at 80.

with very serious offenses have the right to a jury trial.¹⁷⁷ As a result, the vast majority of cases are still tried before professional judges, or a judge sitting with people's deputies.¹⁷⁸ At those trials the procurator receives a great deal of assistance from the judge. In over half of the cases the procurator does not even appear, and the judge acts as both judge and prosecutor.¹⁷⁹ The judge will have the dossier of the investigation well before the trial begins and may be inclined to view the procurator's reports as the facts of the case.¹⁸⁰ Not surprisingly, most non-jury trials result in conviction.¹⁸¹ During the proceedings in both jury trials and non-jury trials the defendant is confined in a cage that is located in the courtroom.¹⁸²

Resistance to the concept of jury trials continues among legislators, judges, and even defense attorneys.¹⁸³ Even though the right to trial by jury is guaranteed by the Russian Constitution, implementing legislation to expand the system to twelve additional oblasts has been stalled in the Russian Duma.¹⁸⁴ Critics contend that the system is too expensive for the overtaxed budget.¹⁸⁵ In spite of predominately favorable results for the defense in the first cases to come before the courts,¹⁸⁶ defendants have not been inclined to exercise their right to jury

177. Thaman, *supra* note 5, at 70 (in the oblasts where the procedure has been implemented, jury trials are available only in cases where the crimes are punishable by death or deprivation of liberty in excess of ten years). In the United States the broad right to jury trial and the inability of the system to provide a jury trial to all defendants has led to plea bargaining, and it is interesting to note that most Russian reformers want to avoid that situation. *Id.* at 85 n.150.

178. Boylan II, *supra* note 5, at 1339 (a panel of three judges may decide criminal cases and a defendant can be convicted on the vote of two of the three); *Symposium, supra* note 5, at 74-75 (noting that the trial may be decided by a panel of one judge and two lay assessors called people's deputies who are also referred to as "nodding people").

179. Boylan I, *supra* note 5, at 111 n.56 and accompanying text.

180. *Id.* at 110-11.

181. Andrias, *supra* note 5, at 18 (the overall acquittal rate in Russia is .0046%); *id.* at 26 (due to the extensive pretrial investigation and the confessions obtained during that period, most defendants do not deny committing the offense, and the only issues at trial involve matters pertaining to mitigation).

182. *Id.* at 15, 24-25; Boylan I, *supra* note 5, at 157.

183. Andrias, *supra* note 5, at 21. During the author's meetings with older lawyers and members of the judiciary they were almost hostile to the concept of jury trials. One judge stated that he and his colleagues were convinced that juries would return unlawful verdicts and, in his view, Russians were not ready for jury trials. The judge asserted that he would not preside over a jury trial. *Id.*

184. Boylan II, *supra* note 5, at 1338, 1344.

185. *Id.* at 1338.

186. Thaman, *supra* note 5, at 90; Andrias, *supra* note 5, at 18 (the overall acquittal rate in Russia is .0046%, while in jury trials the rate is 21% and 30% in some regions).

trial,¹⁸⁷ and defense attorneys have been reluctant to recommend the procedure. This may be due, at least in part, to anxiety about the new procedure and the very low fee paid to court-appointed counsel.¹⁸⁸ Courts have not received adequate funding,¹⁸⁹ and it appears that the Duma is, at least for the present, disinclined to pass the legislation necessary to extend the right to other regions.¹⁹⁰ On occasion even jurors have expressed misgivings about the system.¹⁹¹ In spite of the best efforts of Russian reformers and others, the future of the right to jury trial for all Russians is not yet assured.

b. Procedures

While the independent jury trial now exists in Russia, the procedures and general nature of the trial are quite different from those in the United States. This is due in part to the inquisitorial nature of the proceedings, and in part to aspects that are unique to the Russian system. The procedure continues to be primarily inquisitorial.¹⁹² The judge determines the order of trial and conducts the initial examination of each witness.¹⁹³ The attorneys, and particularly the defense attorneys, remain more passive than those in the United States.¹⁹⁴ Rather than observing our formal procedure of direct and cross-examination by non-leading and leading questions, lawyers generally engage in general questioning, and witnesses respond in a narrative

187. Thaman, *supra* note 5, at 87 (noting that between January 1 and September 1, 1994, defendants elected a jury trial in only 254 of the 1465 cases filed in the nine regional and territorial courts).

188. *Id.* at 87-88, 90 (noting that it has been suggested that investigators may be discouraging defendants from demanding jury trials before they meet with their attorneys).

189. Pashin, *supra*, note 5, at 10 (jury trials are not getting enough financial support and judges have been known to pay jurors out of their own pockets).

190. Boylan II, *supra* note 5, at 1343-44; Pashin, *supra*, note 5, at 10.

191. Stead, *supra* note 5, at 44 (relating that after a trial one juror was put off by the defense attorneys' desire to acquit their clients "because one can't start declaring the murderer to be fully innocent," and another juror's statement that "[i]t's not time to start jury trial in Russia."); see also Duncan DeVillie, *Essay: Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial*, 32 GEO. WASH. J. INT'L L. & ECON. 73, 94-101 (1999) (discussing Russian concerns about the re-introduction of jury trials, particularly in organized crime cases).

192. Boylan I, *supra* note 5, at 110.

193. Boylan I, *supra* note 5, at 112; Gildin, *supra* note 5, at 163; Plotkin, *supra* note 5, at 4-5; Thaman, *supra* note 5, at 103, 105-06 (the judge in consultation with the parties decides the order of trial). On occasion another party may conduct the initial examination. Vesselinovitch, *supra* note 5, at 40 (the prosecutor conducted the initial examination of the defendants).

194. Andrias, *supra* note 5, at 26 (noting that at the trial the lawyers were very passive).

fashion.¹⁹⁵ Jurors may submit questions for the witness to the judge, who then decides whether they are appropriate.¹⁹⁶ The trial usually begins with the court calling upon the defendant to give his or her version of the events.¹⁹⁷ The victim is permitted to have a representative present and, unlike Western Europe, the representative is usually not an attorney. Frequently the representative of the victim is a relative untrained in the law.¹⁹⁸ Like the inquisitorial systems in the West, the rules of evidence, to the extent that they exist at all, are extremely lax.¹⁹⁹ Charges that are unrelated may be charged together and joined for trial.²⁰⁰ The courts retain the uniquely Russian practice of halting the trial and referring the case back to the procurator for further investigation, with the prospect that the case may be brought again at a later time.²⁰¹ At the conclusion of the trial the jury is called upon to render a verdict on four issues: 1) Whether a crime was committed; 2) Whether the defendant committed the acts charged in the indictment; 3) Whether the defendant is guilty of the crime; and 4) Whether the defendant merits lenience.²⁰² The twelve jurors first attempt to reach unanimity, but if after three hours of deliberation they are unable to do so, a majority vote on each of the four issues will be sufficient to return a verdict.²⁰³ As

195. Gildin, *supra* note 5, at 163-64; Plotkin, *supra* note 5, at 12-14; Andrias, *supra* note 5, at 23.

196. Plotkin, *supra* note 5, at 12-14; Thaman, *supra* note 5, at 105-06.

197. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 106.

198. Boylan I, *supra* note 5, at 112, 114-15; Thaman, *supra* note 5, at 95 n.212 (as in Western Europe, the court may attach a civil suit to the criminal case); *id.* at 107-08 (relating that, in a case where the aggrieved did hire an attorney, the attorney appeared to assist the defendant); Andrias, *supra* note 5, at 15-16 (the victim and the victim's representative, her sister, participated in a rape trial); *id.* at 22 (also noting that issues relating to civil damages may be tried in the criminal case); *id.* at 24 (the homicide victim's aunt was designated as legal representative when the widow could not be present).

199. Gildin, *supra* note 5, at 155; Plotkin, *supra* note 5, at 14 (stating that other than evidence suppressed because it was illegally obtained, all evidence is admissible except evidence relating to privileged information and the defendant's criminal record); Thaman, *supra* note 5, at 106-08.

200. Thaman, *supra* note 5, at 111; Andrias, *supra* note 5, at 24.

201. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 92, 99; Andrias, *supra* note 5, at 27 (relating that in 1995 approximately nine percent of all criminal cases were referred back for additional investigation).

202. Gildin, *supra* note 5, at 167-68; Plotkin, *supra* note 5, at 15; Thaman, *supra* note 5, at 108, 114.

203. Thaman, *supra* note 5, at 125 (relating that ties inure to the defendant's benefit); *id.* at 126 (noting that after a verdict of guilty the court may, on sufficient grounds, order a new trial or grant a motion for acquittal); *id.* at 127 (stating that if a civil suit has been joined to the criminal case, the judge rules on that case and determines damages).

in other inquisitorial jurisdictions, the prosecutor can appeal an acquittal.²⁰⁴

Although this may appear to be similar to the procedure in the United States, the dynamics and the process are much different. The tenor of the trial changes dramatically when it is the judge, and not the lawyers, who controls the proceedings and begins the questioning of each witness.²⁰⁵ This difference is enhanced by the narrative testimony and the absence of cross-examination by leading questions.²⁰⁶ It is difficult to overstate the importance of the order of trial, and specifically the stage at which the defendant is called upon to testify. If, as in the Russian system, the defendant is called first and gives his or her version, there will usually be few issues left to determine.²⁰⁷ If, however, the government is required to prove its case beyond a reasonable doubt and withstand a motion for judgment of acquittal before the defendant decides whether to testify, the result is much different.²⁰⁸ In our country this situation has led to issues of constitutional proportion that have ultimately been decided by the United States Supreme Court.²⁰⁹ The presence of the victim and/or a victim's representative who is not legally trained leads to outbursts, improper comments, and other incidents that unfairly prejudice the defendant.²¹⁰ The laxity of the evidentiary rules opens the door to incidents where the jury is exposed to inadmissible evidence, including the defendant's criminal record or evidence that has been suppressed by the court.²¹¹ It also appears that the prosecutors join unrelated charges for trial

204. *Id.* at 91, 127-28 (noting that the victim or the victim's representative may appeal); Plotkin, *supra* note 5, at 20-21; Andrias, *supra* note 5, at 22.

205. Boylan I, *supra* note 5, at 112; Gildin, *supra* note 5, at 163.

206. Gildin, *supra* note 5, at 163.

207. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 106.

208. *See* Frase, *supra* note 7, at 80.

209. *See* Brooks v. Tennessee, 406 U.S. 605 (1972) (defendant cannot be made to testify first in the defense case).

210. Boylan I, *supra* note 5, at 115-16; Thaman, *supra* note 5, at 107-08 (in his closing argument the aggrieved brother of the decedent illegally revealed the defendant's criminal record); Andrias, *supra* note 5, at 22, 24-25 (noting that both the victim's aunt and his widow shouted out during the proceedings); Vesselinovitch, *supra* note 5, at 52 (noting the emotional impact of a next-of-kin confronting a defendant or crying at a murder trial).

211. Gildin, *supra* note 5, at 155 (relating an incident where the admissibility of certain statement was debated in front of the jury); Thaman, *supra* note 5, at 106-08 (noting that illegally gathered evidence and defendant's criminal record have come before the jury); *id.* at 107-08 (relating that witnesses relate hearsay, transcripts from the preliminary hearing are read, and friends in the audience have helped witnesses remember events); *id.* at 112 (stating that the aggrieved brother of the deceased illegally revealed the criminal record of the defendant in his closing argument); Andrias, *supra* note 5, at 23, 26 (at a trial there were no side bar conferences and evidentiary issues were argued).

merely to get prejudicial information before the jury.²¹² These problems are exacerbated by the fact that there are no mistrials and, even in the most egregious situations, the trial will continue.²¹³ The practice of referring the case back for further investigation is reminiscent of the Soviet era and undoubtedly deprives defendants of a final favorable decision in cases where an acquittal is merited.²¹⁴

The nature of the verdict is quite different from ours and appears to permit, if not invite, jury nullification.²¹⁵ It is interesting, and a source of criticism, that the jurors address the issue of leniency without knowledge of the defendant's criminal record or other information generally viewed as important to a determination of the sentence.²¹⁶ The prospect that a verdict can be returned by only a majority of the twelve jurors affects both the defense and the prosecution and effectively eliminates the defense strategy of attempting to create a hung jury.

Although theoretically sound,²¹⁷ permitting the prosecutor to appeal has important ramifications, including some that are not obvious.²¹⁸ For example, it has been noted that Russian defense attorneys will intentionally forgo meritorious pretrial motions to suppress evidence in order to eliminate the prospect that an acquittal may be later overturned by an appellate court's ruling that suppression was improperly granted.²¹⁹ While each of these factors independently has great significance, when taken together

212. Thaman, *supra* note 5, at 111 (in one case procurators joined a 1988 knife assault that had previously been dismissed with 1993 shooting and a 1991 hooliganism incident).

213. *Id.* at 112 (even though the revelation of the defendant's record was extremely prejudicial and was likely to affect the verdict, the trial continued after a cautionary instruction); Vesselinovitch, *supra* note 5, at 52 (mistrial motions do not exist in Russia and all trials continue to conclusion).

214. Boylan I, *supra* note 5, at 112; Thaman, *supra* note 5, at 92 (defendants frequently forgo meritorious pretrial motions to suppress because of a concern that, if granted, the judge may merely refer the case back to the procurator for further investigation); *id.* at 99-101 (the power to return cases for supplementary investigation may compromise the presumption of innocence and the equality of the defense and prosecution).

215. Thaman, *supra* note 5, at 114 (allowing the jury to find a defendant not guilty despite a determination that the defendant committed the charged conduct is tantamount to jury nullification).

216. Andrias, *supra* note 5, at 26.

217. *See supra* note 74 and authorities cited therein.

218. Thaman, *supra* note 5, at 91 (the reversal of the acquittal cast doubt on the vitality of an exclusionary rule); *id.* at 120 (reversal of acquittal included holding that questions of self-defense and excessive force were questions of law for the judge not the jury).

219. *Id.* at 92 n.198.

it becomes very clear that the Russian jury system is much different than our own.²²⁰

3. *The Future of the Russian Criminal Justice System*

We are all hopeful that democracy, free enterprise, and the rule of law will succeed in Russia. With regard to the criminal justice system, it will be very interesting to see whether adversarial elements and independent juries will be universally accepted into the system and whether they will be successful.²²¹ It will not be enough to merely introduce new procedures. Consideration must also be given to the history, culture, custom, and legal traditions of the country. Real and lasting change will come only when a culture and tradition exists that is receptive to the elements of reform and welcomes them into the system. The words of Learned Hand, quoted by the Russian scholar Professor Vlasihin, are significant in this regard:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.²²²

220. At the time this article was completed, Scott P. Boylan, Esquire, Regional Director of the Office of Overseas Prosecutorial Development Assistance and Training of the Criminal Division of the United States Department of Justice advised the author that there is presently legislation pending before the Russian Duma that would make significant changes in Russian criminal procedure. Although it would affect a number of areas, there are three key elements in this legislation. First, search and arrest warrants would require judicial approval; second, the right to jury trial in serious offenses would be provided in all regions of Russia; and finally, a plea bargaining procedure would be instituted in cases involving offenses punishable by three years in prison or less. If enacted, elements of this legislation will go into effect early in 2002.

221. With regard to jury trials, it is encouraging that for a period of approximately forty years, independent juries did exist, and were apparently successful, in Russia. See *supra* text accompanying notes 111-17. Also, juries may be seen as a moral force helpful in addressing the skepticism that developed during years of oppression. Boylan II, *supra* note 5, at 1339.

222. Vlasihin, *supra* note 5, at 1210 (quoting Learned Hand, Address at the "I am American Day" ceremony (May 21, 1944), in *SPIRIT OF LIBERTY* 189-90 (Irving Dillard ed. 1960)) (citation omitted).

These words are even more significant when one considers that they were quoted by a distinguished Russian scholar regarding the situation in his native land. We must, to the maximum extent possible, continue to assist the Russian people to create the institutions and attitudes necessary to establish permanent changes in the system, institutions and attitudes that will, over time, lead to a tradition of democracy and rule of law.

VI. CONCLUSION

The legal system, and particularly the criminal procedure, of any country is derived from, and rooted in, the customs, history, and legal and political traditions of its people. A criminal justice system can be effective and legitimate only if it reflects the country's culture and traditions. These considerations are of paramount importance whenever an attempt is made to alter the criminal procedure of a nation or introduce a new element. The changes that are now taking place in the former Soviet Union provide an excellent example. The introduction of adversarial elements into the inquisitorial systems of those countries will succeed only if the new elements are compatible with the country's values, customs, and background. For this reason, it is important that those who are attempting to assist the citizens of any nation in the process of democratization and criminal justice reform acquaint themselves with that country's legal and historical traditions. The failure to do so will lead to perceptions of insensitivity, misunderstandings, and ultimate failure. If, however, we are sensitive to the legal, political, and social culture, we can provide invaluable assistance that will be welcomed by our friends in those countries and lead to positive and permanent change that will be of great benefit to all of us in the years to come.