

Trial by Jury in Russia: From the Cornerstone of the Judicial Reform to the Constitutional History Artifact

Anna Gurinskaya

Purpose:

The article explores the process of gradual legislative encroachment on the constitutional right to be tried by jury in Russia that had started in 2008 when offenders accused of committing terrorist crimes were denied the right to opt for the jury. The objective is to show how the initial use of the security argument made possible further limitations of this right.

Design/Methods/Approach:

The research is based upon qualitative analysis of documents (drafts of legal bills, explanatory notes to the drafts, minutes of the Parliamentary hearings), decisions of the Constitutional Court of the Russian Federation and judges' dissenting opinions, statements of public officials, media reports.

Findings:

Jury trial that was once a cornerstone of the major judicial reform of the 1990-ies risks becoming a constitutional history artifact. The process of its curtailment came as a result of the inability of this institute to get adjusted to the realities of the Russian criminal process as well as of the need of the state to meet the challenges of the risk society. It is argued that the use of security argument allowed for the initial bill aimed at limiting this right for terrorists to be adopted swiftly and without much debate. It also opened the window of opportunity for further limitation of this right that came under vague agenda of victims' protection and case review system reform. The author demonstrates that decisions of the Constitutional Court of Russia have played a significant role in promoting limitations of jury trials.

Practical Implications:

The approach used in the article can be applied to researching other cases of limiting citizens' rights in the name of security.

Originality/Value:

The article represents an attempt to provide empirical evidence of the 'security paradoxes' described in the security literature.

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Keywords: trial by jury, comparative criminal justice, Russian criminal justice, security, human rights, fair trial

Sojenje pred poroto v Rusiji: od temelja sodne reforme do relikta ustavne zgodovine

Namen prispevka:

Članek obravnava postopek postopne zakonodajne omejitve ustavne pravice do sojenja pred poroto v Rusiji, ki je stopila v veljavo leta 2008. Tega leta je bila obtoženim za teroristična dejanja odvzeta možnost odločitve za sojenje pred poroto. Namen prispevka je predstaviti, kako je prvotni argument varnosti pozneje omogočil dodatne omejitve te pravice.

Metode:

Raziskava temelji na kvalitativni analizi virov (predlogov zakonov, obrazložitev predlogov, zapisnikov parlamentarnih zasedanj), odločb Ustavnega sodišča Ruske federacije in ločenih mnenj sodnikov, izjav javnih uradnikov ter novinarskih prispevkov.

Ugotovitve:

Sojenje pred poroto, ki je bilo osnova temeljite sodne preнове v devetdesetih, je v nevarnosti, da postane relikv ustavne zgodovine. Postopek njegove omejitve je rezultat njegove nesposobnosti prilagoditi se realnosti ruskega kazenskega postopka kot tudi potrebe države, da se prilagodi zahtevam družbe tveganja. Zatrjujemo, da je uporaba argumenta varnosti omogočila, da je bil prvoten zakon, ki je omejil pravice teroristov, sprejet hitro in brez argumentacije. S tem je tudi odprl možnosti za nadaljnje omejitve te pravice, ki so jih utemeljevali na nedoločnem argumentu zaščite žrtev in sistemske reforme obravnave primerov. Avtorica pokaže, da so odločitve Ustavnega sodišča Ruske federacije odigrale pomembno vlogo pri propagandi omejitev sojenja pred poroto.

Praktična uporabnost:

Pristop, ki je bil uporabljen v članku, je mogoče uporabiti tudi v raziskavah drugih primerov omejevanja državljanskih pravic v imenu varnosti.

Izvirnost/pomembnost prispevka:

Članek predstavlja poskus zagotoviti empirične dokaze varnostnega paradoksa, obravnavanega v varstvoslovni literaturi.

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Ključne besede: sojenje pred poroto, primerjalni kazenskopравни sistemi, ruski kazenskopравни sistem, varnost, človekove pravice, pošteno sojenje

1 INTRODUCTION

A novel history of the jury trial in Russia is an interesting phenomenon to study. On the one hand, it is a vivid illustration of a policy transfer failure. The model

that showed itself to be well working and quite efficient in many contexts, especially the Anglo-Saxon adversarial system of trial, appeared to be absolutely alien on the Russian soil. Most countries where jury is a deeply rooted part of the judicial process managed to retain this institute even in the face of terrorist threat (Kovalev, 2009) while Russia enthusiastically used the security argument to start the process of limiting access to the jury. It does seem that all attempts to plant the institute of jury and make it work that were undertaken during the last 20 years are leading nowhere. Most hopes that were attached to establishing the jury trials did not come, which led to a bitter disappointment and calls, if not to abandon this institute for good, but to at least study thoroughly the reasons for its failure (Tomin & Zinchenko, 2013: 69). In this sense, Russia demonstrates its difference from the countries where direct forms of citizens' participation in the judicial process proved to be an essential part of a democratic political process.

On the other hand, recent limitations of the jurisdiction of jury trials in Russia, when viewed not separately but along with other measures aimed at meeting the challenges of the new 'risk society' (Beck, 1992), seem to be in line with the international tendencies. In countries that are facing such problems as terrorism, transnational crime, illegal migration, and mass disorder, the system of criminal justice which is usually a mix of the 'crime control' and the 'due process' models (Packer, 1964) seems to be leaning towards the former increasing the efficiency of the assembly-line conveyor belt of the criminal process. In this sense Russia is not an outlier case. The curtailment of the right to a jury trial can certainly be (and usually is) explained by the authoritarian nature of the Russian political regime – by the political culture of power vertical and a lack of judicial independence (Kovalev & Smirnov, 2014: 129). However, this explanation does not seem to be completely plausible. It can be argued that in its crime and terrorism control policy Russia is not much more authoritarian than countries that claim to impersonate liberal democracy in its purest form. It can be argued that the factor that explains the nature and tendencies of the criminal justice system transformation is not the nature of the regime, but the nature of global risks of the 21st century, on the one hand, and the adherence of modern governments to neoliberal paradigm of governance, on the other. In Russia, as everywhere in the world, policy orientation towards crime control and security enhancing strategies serves as an example of triumphant technocratic depolitization – a move from democratic to technocratic society, from politics to governance (Morozov, 2009: 541). When security arguments come, first democracy tends to erode in favour of the development of a governmental politics without checks and balances (Bigo & Tsoukala, 2008: 2).

Finally, the history of jury trials in Russia is a vivid example of at least two of the 'security paradoxes' described by Zedner (2005: 513–516, 2009: 147–149). Imposing limits on the rights of a certain category of population in the name of security may later result into expanding these limitations on other groups of the population or possibly all citizens. When we agree to exchange the alleged terrorists' freedoms for our security we are risking to find ourselves in the situation when our freedom will be at stake and eventually our security will be jeopardized, this time not by the criminals or terrorists, but our own government. The limitation of the right to

opt for the jury trial in Russia began with excluding this possibility for defendants accused of committing an act of terrorism. Security arguments were crucial for the legislators and the Constitutional Court of the Russian Federation that upheld the law. This precedent opened the possibility to amend jury trials for other categories of defendants although these limitations were no longer explained by security demands but rather by the need of protecting the victims and optimize the work of the judges.

This paper is not aimed at addressing the problem of the constitutional nature of the right to be tried by the jury or assessing the effectiveness of this institute in Russia that could lead to arguing whether it should be abandoned or retained. Rather we would like to look specifically at the process of gradual narrowing of its jurisdiction in order to see how security arguments were used and what consequences it had led to. We shall briefly describe the history and main features of jury trials in Russia as well as some 'pro et contra' arguments regarding whether it fits Russian criminal justice process, legal and political culture. Then we shall look at the process of introducing a ban on jury trials for the terrorists in details and further expansion of this ban to other categories of crimes. We shall analyze legislation, jurisprudence of the Constitutional Court of Russia, notes filed by the initiators of the bills and opinions of the State Duma's committees, public speeches at the hearings in Duma, media news and reports.

2 ESTABLISHING JURY TRIALS

2.1 History, Experiment, Introduction in all Regions

Following the collapse of the Soviet Union in 1991 most institutions including the judicial system became a subject of major reforms that were aimed at establishing free-market economy, political pluralism, democracy, including direct forms of citizens' participation in public affairs. Trial by the jury was to become a cornerstone of the judicial reform. One of the key promoters of this reform in the 1990-ies Pashin (1995: 75) would even state that "trial by the jury serves as a precious legal form that is capable of changing human material to the better, transforming officials into lawyers of the highest standard and judicial proceedings into the act of higher truth".

The involvement of lay adjudicators in the trials was not something completely new and unknown for Russia. During Soviet times, citizens also had a chance to participate in the proceedings – two lay adjudicators (Rus. *narodnie zasedateli*) were hearing cases alongside with the professional judge. However, their participation was rather a mean to provide additional legitimacy to the judge's decisions than to really include citizens in the judicial process. In 1989 a specific provision was added to the law of USSR on judiciary. It stipulated that a number of these lay judges could be increased if the case could have resulted in death penalty or the imprisonment of over 10 years. This provision can be seen as a predecessor of the modern system of jury trial, but in fact the tradition dates back much further.

In 1864, the Emperor of Russia Alexander II signed Judicial Statutes according to which jury trials were introduced in Russia starting with the capital

cities' regions (St. Petersburg and Moscow). More than 400 types of offenses that were criminalized in the Statute on criminal and correctional punishments of 1845 granted people the right to opt for the jury trial (Voronin, 2004). Trial by the jury was depicted by Dostoyevsky (1881) in his novel "The brothers Karamazov". He also discussed the problems concerning jury trials in his "Writer's Diaries" written in 1873 (Dostoyevsky, 1873). Dostoyevsky (1873) suggested several explanations of the phenomenon which he called the "acquittal mania" of the Russian jury. One of them being a wish of the jurors to oppose themselves to the acting government and the other one – a compassionate character of the Russian people. However, he believed that there is a more plausible explanation. Since the right to be tried by the jury was given to the people as a gift by the Emperor, citizens lacked responsibility for their actions as jurors. Responsibility comes when a right is fought over, but when it is given at no cost it does not possess any value. Acquitting without second thought, according to the famous writer, was possible because jurors did not realize the meaning of the institute of lay justice and did not envision any possible negative consequences of their actions. Despite the "acquittal mania", a case of Vera Zasulich who was acquitted by the jurors after committing an attempt to kill the Governor of St. Petersburg F. Trepov serving as a one example of it, jury trials survived up to the revolution of 1917 when the idea of this type of lay justice was abandoned for almost a century.

In 1991, the Concept of Judicial Reform by the Supreme Council of the Russian Soviet Federative Socialist Republic (RSFSR) (Decree of the Supreme Council of the RSFSR, 1991)¹ was adopted and the acting Constitution of the RSFSR (1978) was amended to include provisions reestablishing jury trials in Russia. The design of the new institute of the trial by the jury was only partially replicated from the 19th century model (Demichev, 2003). The Concept (Decree of the Supreme Council of the RSFSR, 1991) placed the need for recognition of the right to be tried by the jury as the second after creation of the new federal court system. It depicted the jury trial as the spirit of the justice machine and provided that it should be established for all cases when the punishment exceeds 1 year of imprisonment. According to the law it meant that jury will be introduced at the low level of the judicial system – at the district courts. It took two years to start implementing this idea. In 1993 a law of the Russian Federation was issued to provide amendments to the then-acting criminal, criminal procedure, administrative laws and laws on judiciary. It limited the jurisdiction of the jury trials to the regional level (the second highest level of the system).

The Constitution of the Russian Federation of 1993 adopted on December 12 states that the right to be tried by the jury shall be granted to those accused of committing especially grave crimes against life punishable by capital punishment (article 20, part 2). Other cases when the offender may opt for the jury trial are to be determined by the federal law (article 47, part 2; article 123, part 4). In 2001 a new Criminal Procedure Code of the Russian Federation was adopted that specified the jurisdiction and procedure of the jury trials. Article 30 stipulates that cases can be examined by a judge and 12 jurors but only when defendant files a petition.

¹ *Postanovlenie Verhovnogo Soveta RSFSR ot 24 oktjabra 1991 No. 1801-FZ "O koncepcii sudebnoj reformi v RSFSR"*

The list of crimes that entitle a defendant to a jury can be found in article 31 (part 3) that provides that their hearing falls under the jurisdiction of a regional court. Initially the list included 44 articles of the Criminal Procedure Code of the Russian Federation (2001) that prohibited murder, kidnapping, rape, act of terrorism, taking of hostages, banditry, mass riots, piracy, treason, espionage, violent seizure of power, armed rebellion, sabotage, bribery, a number of crimes against justice, and crimes against peace and security of humankind.

Initially, 5 Russian regions (Moscow oblast, Ivanovo, Ryazan, Saratov, and Stavropol) joined by 4 more in 1994 (Altay, Krasnodar, Rostov, and Uljanovsk) began the “experiment” of establishing jury trials. It was not until 2003 when all other regions finally joined the initiative (except Republic of Chechnya, which was the last where jury trials were introduced only in 2010). This situation became a formal reason for the Constitutional Court of Russia to introduce a ban on capital punishment in 1999 (Decision of the Constitutional Court of the Russian Federation No. 3-P, 1999). The ban had lasted till 2009 when it was reintroduced on different grounds (Decision of the Constitutional Court of the Russian Federation No. 1344-O-P, 2009²). The main reasons for such delay included financial ones, as well as the lack of support for the new type of process by the judicial community and prosecutors. Interestingly, it was noted that even the defendants that initially expressed a high interest in the new jury system after 10 years of its functioning were much less likely to opt for the jury trial in their case (Dorogin, 2009: 80).

Currently, jury trials function at the regional courts of all subjects of the Russian Federation. According to the statistics of the Judicial Department at the Supreme Court of Russian Federation (2013) 542 cases of 1412 defendants were tried by the jury as compared to 695417 cases of 754729 defendants that were tried by a judge alone. More than 2/3 of the cases tried by the judge were cases when the defendant had pleaded guilty before the trial in exchange for a more lenient sentence - the so called ‘special order’ cases. 194 defendants were acquitted by the jury in 2013 while for 765 they pronounced ‘guilty’ verdicts. Roughly it amounts to 20% of acquittal verdicts. The judges acquitted less than 1% of defendants. But if we exclude those who pleaded guilty the figure rises up to 4.2%.

2.2 Pro et Contra: Professional and Academic Debates

Trials by the jury are an old arrangement that has many opponents and proponents. The academic and the public discussions on the jury in Russia in general reflect discussions that happen in all jurisdictions where jury is a part of the system (Pakes, 2004: 112–113). In general, the arguments that came from both sides of the barricades were neither new nor original. However, it does seem that in Russia so many hopes were vested in this “extraordinary element of the system of checks and balances” (Kovalev & Smirnov, 2014: 117) that any critique or attack on it from the legislators’ or practitioners’ side was for a long time perceived as a turn away from the democratic pathway, a reactionary measure aimed at destroying all achievements of a new democracy.

2 *Opredelenie Konstitutsionnogo Suda RF ot 19 noiabria 2009 No. 1344-O-P*

The proponents were to declare that trial by the jury should be viewed as a crucial step from a closed, centralized (neo)inquisitorial system of the criminal justice process towards transparent, decentralized and adversarial. It was argued that the jury plays a constructive role in forming the feeling of justice, serves as a guarantee from any attempts to infringe upon judge's impartiality, provides safeguards for citizens against unjustified accusations (Bobotov, 1995). Karnozova (2000: 303) argued that it should produce a paradigm shift in the understanding of justice. There were hopes that a 'threat' of an acquittal verdict might stimulate investigators and prosecutors to improve their performance and respect defendant's rights. In the political system that was characterized by a low citizens' trust in the state institutions including the police and the judiciary and a low efficiency of government it was argued that the jury would allow to enhance citizens participation and provide them with an effective mechanism of oversight (Kovalev & Smirnov, 2014: 117–118). Esakov (2013) suggested that jury trials are capable of positively affecting the substance of the criminal law because they allow to see its defects and alarm the legislator that the citizens approve or disapprove of certain norms.

The opponents of the jury trials in Russia, on the contrary, shared a view that the trial by the jury should be treated as a threat to Russian legal system (Alexeyev, 2005; Belkin, 2007; Bozhjev, 2006). The arguments supporting this point of view can be divided into two distinct groups.

The first group is concerned with the deficiencies in legal provisions that specify the jury trial model in Russia. The critique includes limited capacity of jury to explore the case stipulated by the law, i.e., the jury is not allowed to learn about the socio-economic status of the defendant, his alcohol or drug addictions, prior convictions, etc. Esakov (2013) argues that it seems that "the legislative authority as well as the Supreme Court of the Russian Federation are so afraid of the citizens that they do not allow in the courtroom simple human feelings and emotions". Another heavily used argument includes the insecurity of the jurors and a low level of their protection compared to other participants in the criminal trial.

The second group of arguments addresses a lack of professionalism and knowledge of legal matters, low legal culture, subjectivity and, hence, the alleged incompetence of the jurors. This incompetence is especially crucial for dealing with economic and organized crime, cases with many defendants and other complicated cases and is believed to result in the high rate of the acquittal decisions, unpredictability of the jurors' verdicts (both "guilty" as well as "not guilty"). Ryabtseva (2008) claims that one should be alarmed not with a high number of acquittals in the cases involving trial by the jury, but rather with a higher proportion of the reversals of such decisions in comparison with the non-jury cases that proves, as she believes, the low quality of verdicts. The acquittal 'bias' of the jury is heavily criticized not just by academics, but by the judges. As the research by Karnozova (2010: 371) has shown they do not understand the meaning of the institute of the jury trial considering it to be just a way to show the Western world that Russia is following democratic pathway. They believe that the jury is a hindrance for delivering justice, are not willing to share the judicial function with the lay people guided by emotions and are upset with the inability

to influence the verdict. Trying to address the 'lack of professionalism' argument Karnozova (2000) underlines that this 'presumption of incompetence' comes from a misunderstanding of the role of the jury in the proceeding that is shared by law-enforcement community. The jurors are viewed as a mere substitute for a professional judge who carry out the same task whereas they should be perceived as fulfilling a different function – to look at the case and make their judgments using trivial, commonplace models of reasoning about human behavior.

After 20 years of functioning of jury trials in Russia it does seem that the idealistic view of its potential is gone. Even consistent critics of the contemporary judicial system do not list the expansion of the jury jurisdiction as a measure of enhancing judicial independence and promoting rule-of-law (Volkov, Paneyakh, Pozdnyakov, & Titaev, 2012). Bezlepkin (2013: 259) argues that jury trials are better suited not for transitional periods, but for the times of stability and social justice, and does not believe that jury is capable of treating multiple disease of criminal justice.

3 LIMITING JURY TRIALS

3.1 No Jury for the Terrorists: The Use of Security Argument

On December 30, 2008 a Federal law No. 321-FZ was adopted. It amended article 30 of the Criminal Procedure Code (2001) excluding from the jurisdiction of the jury trials a list of 9 crimes including terrorism and crimes against the state. This law was aimed at improving anti-terrorism legislation and its adoption was initiated by a group of Duma's deputies, former Ministry of Internal Affairs and Federal Security Services officials.

Throughout the 1st decade of the XXI century especially after the events of September 11, 2001 in New York Russia was redefining its identity as an equal partner of the western countries in their fight against terrorism (Morozov, 2009). Russia's own military campaign in the Republic of Chechnya that had started in 1999 after two civilian buildings in Moscow were blown up by the terrorists was being portrayed as the crusade against Islamic terrorism. The newly elected President Putin was very determined to use any measures required to put an end to the terrorist attacks in the Russian cities. Those measures were both legal and political. A special Federal law "On countering terrorism" was adopted in 2006 to substitute the previous 1998 Federal law "On fighting terrorism". It allowed to introduce a special anti-terrorist emergency regime (the regime of contra-terrorist operation) in the regions where terrorist activity was high. Under this regime it was possible to limit certain rights of the citizens and what is more important – to destroy alleged terrorists using military weapons. Political measures were aimed at building a strong administrative vertical power that was seen to be critical to maintain order and stability in the huge country with lethal terrorist threats coming from both inside and outside. After the tragic terrorist attack on the school in the city of Beslan in 2004, these measures included abolition of the governor's elections – governors were now to be appointed directly from Moscow. In the light of this consistent and tough anti-terrorist policy, the decision to limit the

jurisdiction of the jury trial for the terrorist cases did not come as a complete surprise and did not seem to be illogical given all the critique of these trials.

The explanatory note that accompanied the draft of the bill filed to the Duma on November 10, 2008 (State Duma, 2008a) did not contain any specific reasons for its adoption. They can be found only in the Opinion of the Security Committee of the State Duma that was filed later – after the draft had been registered at the Duma (State Duma, 2008b). Main argument in favor of the abolishment of the jury trial for terrorists was that acquittal verdicts pronounced by the jury in the terrorism cases became more often in southern regions of Russia. At the Parliamentary Hearings Head of the Security Committee A. Vasilyev provided statistics that in 2005–2008 in the Republic of Dagestan and the Republic of Kabardino-Balkaria (both are in the North Caucasus region of Russia) 12 out of 26 verdicts acquitted the defendants who were accused of committing grave crimes including terrorism (State Duma, 2008c). He claimed the region was characterized by close familial ties between citizens, often the jury members were distant relatives of the defendants and therefore biased. Vasilyev also provided several examples of cases when persons formerly acquitted by the jury had later participated in the organization and commission of terrorist crimes. He also mentioned that North Caucasus republics have even asked for suspension of jury trials in the region.

Mythen (2014: 99) analyzes how contemporary crime control policy is being shaped by the risk prevention paradigm suggests that threat assessments have become future-centric and highly speculative. They are drawing on possible rather than probable happenings. These observations can describe strategies used by supporters of the bill of 2008 in Russia. In his interview at the press-conference Vasilyev tried to convince journalists that the swift adoption of the law was a matter of life and death – he told without providing any details that there is a case pending in one of the courts and if the trial system does not change terrorists might be released (Surnacheva, 2008).

It is worth noting that the draft was not unanimously supported by the deputies. Several alternatives to limiting the jurisdiction of the juries were proposed to include temporal suspension of the jury trials in emergency situations, transferring the hearing of the case to a different region, ensuring participation of ombudsmen in such trials instead of the jury. However, alternative suggestions did not gain any support and were not thoroughly discussed. And despite the fact that neither in the documents nor during the hearing almost no arguments were provided to exclude the jury for the cases of crimes against the state these crimes followed the fate of terrorism.

Media claimed that the law was an attempt of the Federal Security Service to ‘privatize’ the courts and ensure that they do not pronounce decisions unfavorable to the interests of the agency (Ginzburg, 2008). An Open letter to the President of Russia was signed by a number of prominent human rights activists, participants of the program that supported the development of the jury system in Russia “Jury club”, jurors, lawyers, academics, and journalists who expressed their deep disagreement with the new bill (Open letter, 2008). Federal Bar Association of Russia also criticized the law stating that ungrounded acquittals were much less dangerous for the society than the lack of certainty that every person who was

accused is really guilty (Federal Bar Association, 2009). Very thorough analysis of the law was presented by the Public Chamber of the Russian Federation, whose goal is to connect civil society and government. It claimed that the bill was not grounded on any evidence – there was no data provided by the deputies that the jurors unreasonably acquitted defendants, nor was there data supporting the claim that the jurors were threatened (Public Chamber of the Russian Federation, 2008). This argument seems to be particularly important since similar situation happened with the 2010 initiative of Moscow State Duma to abolish the jury for the hate crimes. Without any proof the proponents of this idea claimed that the prejudiced jury acquits native Russians defendants who have committed crimes against ethnic minority victims. The research by Kovalev (2011) based on thorough analysis of several case studies showed that this was clearly not the case. The jury pronounced acquittal verdicts because they had reasonable doubt in the offender's guilt and not because they were biased.

Despite lack of evidence of the necessity of the measure and all critical voices that sounded inside and outside of the Duma the bill passed swiftly. It took just a month to adopt it by the Lower Chamber of the Parliament and two more weeks to be approved by a Council of Federation and signed by the President D. Medvedev. The principle of certainty of punishment won over the principle of due process.

The bill was not the first to limit citizens' rights for the sake of security and effective anti-terrorist policy. Amendments to the Federal Law "On funeral and burial issues" (Federal Law of December 11, 2002 No. 170-FZ) stipulated that the relatives of those who were allegedly terrorists and died as a result of a counter-terrorist operation did not have the right to bury them in accordance with their religious and national traditions. The bodies were to be buried by the state. The Constitutional Court of the Russian Federation in its Decision of June 28, 2007 No. 8-P upheld this law on the grounds that in the times of fighting with terrorism such measures are aimed to protect constitutional values and are necessary to provide public peace and security, protect public order, health, and morality. Court's arguments can be described as focused on future possible, but not probable events that could happen if alleged terrorists were buried according to their religious traditions. It can be argued that the use of such arguments opened floor for similar tactics that was successfully employed by deputies in 2008. This decision had a Dissenting Opinion by the Justice G. Gadzhiev and was heavily criticized by the public (Koroteev, 2009). However, it was cited by the Duma's Security Committee in its opinion regarding the Federal Law of 2008 giving weight to its assessment of the necessity of the draft's adoption.

In 2009, 5 defendants who were accused of committing a number of crimes including acts of terrorism, participation in the military riot, preparation to the military seizure of power filed separate application to the Constitutional Court of the Russian Federation asking to assess constitutionality of the amendments of 2008. These applications were combined into one case and on April 19, 2010 a decision No. 8-P (Decision of the Constitutional Court, 2010) was pronounced that upheld the law of 2008. The Court grounded its decision in the norms of

international law and jurisprudence of the European Court of Human Rights. It held that the right to be tried by the jury has a special constitutional value but is not a mandatory constituent part of the right to fair trial and is not a mandatory condition for providing judicial protection of rights and freedoms of man and citizen. It had stated that the right to change the jurisdiction of the jury trial belongs to the federal legislative branch of government which does not have an obligation to provide the right to jury trial even to the defendants in the capital cases since capital punishment cannot be applied in Russia. However, the discretion of government is not absolute and it should be guided by the principles of justice, equality, and non-discrimination. The Court has also provided arguments that were not interpreting basic constitutional principles, but were grounded in the Court's assessment of the complexity of the current situation in Russia. The Court believed that the continuous terrorist threat required dismissing the jury from hearing the terrorism cases.

This decision was adopted by a majority of Justices. However, two of them, G. Gadzhiyev and V. Yaroslavtsev expressed their dissent. Justice Yaroslavtsev referred to the decision of the Parliament as arbitrary and argued that government's discontent with the acquittal verdicts cannot serve as a constitutionally appropriate substantiation for limiting citizens' rights to judicial protection. He also supported the view that the change of territorial jurisdiction could solve the problem of jurors' bias in the regions where citizens were members of familial clans and armed conflicts were not ceasing.

It is worth noting that, due to the nature of the proceedings in the Russian Constitutional Court that does not allow to review any parts of the law without applicant's request, the Court upheld the 321-FZ Federal Law (2008) only for limiting the jury's jurisdiction in the case of the three crimes that the applicants were accused of. However later an application was filed requesting to the Court to review the law in respect of other crimes, namely article 212 of the Criminal Code that prohibits mass riots (the applicant and 44 inmates of a prison for juvenile delinquents were accused of participating in a riot and disorganizing the normal operation of prison). The Court (Decision of June 28, 2012 No. 1274-O) dismissed the application and confirmed its position that change of the jurisdiction of criminal cases by a federal legislative authority does not interfere with the essence of the right to be judged by a court determined by law and should not be viewed as a limitation of the right to judicial protection. This decision also had a dissenting opinion by the Justice K. Aranovsky, who had mentioned that the jury trial is a valuable institution that promotes the principle of judicial independence in criminal trial and public acknowledgement of this trial. He also stated its importance for the development of the adversarial system of criminal process. Finally, Justice Aranovsky expressed his uncertainty that the goals of fighting with terrorism that were used by the Court as a solid ground for its 2010 decision can justify the same limitations of jury in other cases, namely mass riots that can happen in prison or at the football game and should not be equated with the acts of terrorism.

3.2 Jury Trials as 'Collateral Damage' of the Appellate System Reform

The Federal law of 2008 is often referred to as a law that opened the Pandora box for the further limitations of the right to jury trial. In just two years after its adoption a new bill was introduced to limit the jury's jurisdiction. However, in this case security argument did not sound.

On December 29, 2010 a Federal Law No. 433-FZ was issued to come in force on January 1, 2013. This law created a new system of the judicial review to substitute the limited cassation procedure with an appealation that allowed for a more thorough review of the case. It was a part of the judicial reform aimed at bringing the review process in accordance with international due process standards. However, the authors of the bill envisioning the increase in the caseload of the Supreme Court due to the introduction of the new system proposed to limit their jurisdiction and exclude a number of articles of the Criminal Code (1996) from it (traffic violations, violation of building construction safety requirements, bribery, crimes against justice, prison riot, illegal crossing of the border, etc.). Automatically it led to the exclusion of the possibility of requesting a jury trial for the defendants accused of these crimes. Neither the explanatory note to the draft of the bill mentions the word "jury" (State Duma, 2010a) nor the deputies at Parliamentary hearings raise the issue (State Duma, 2010b). It seems that in this case jury trial became a «collateral damage» of the reform aimed at solving technical organizational problems of the judicial system. The draft of the bill was criticized on the grounds that its provisions contradicted the position that the goals of enhancing rational organization of the branches of government cannot serve as a ground for limiting rights and freedoms as it was expressed in a number of decisions of the Constitutional Court of Russia (Smirnov, 2011). However, the bill has not attracted much attention of the public.

It appears that even Vladimir Putin was not exactly aware of how far the reform of the jury system had gone. He addressed the issue of diminishing jurisdiction of the jury trial in 2012 at the meeting of the President's Council on the development of civil society and human rights. He claimed that since the state currently does not have the capacity to provide protection of the jurors they inevitably will have an incentive to acquit the defendant. He also doubted that any of those present at the meeting would agree to participate as a juror somewhere in the south of the country where one would have to hold someone responsible for committing an act of terrorism and then walk out of the courtroom and think of his own safety and safety of his family because of such decision. Therefore he reasserted the Parliament's decision of 2008 that envisioned limitation of the jury's jurisdiction as a measure aimed at protecting the public from terrorism which is the duty of the state (President of the Russian Federation, 2012). He explicitly stated his belief that the jury trials should be used widely and it did seem that he was sincerely surprised to learn that their jurisdiction was not expanding contrary to his knowledge. It would be naive to claim that President Putin has nothing to do with the anti-jury reform and it is quite evident from his statements that he approves of limiting the access to jury for the terrorists. However, claims that the outcome of the reform depends mainly or solely on his decision (Kovalev & Smirnov, 2014: 129) seem to be an overstatement.

3.3 Death Penalty is no Longer an Argument: Abolishing the Jury for Women, Minors, Old Men and Pedophiles

The next wave of attack on the jury came in 2013. According to the Federal Law No. 217-FZ adopted on July 23, 2013, the defendants accused of committing crimes that were punishable by death penalty or life imprisonment were denied the right to jury trial if capital punishment or life imprisonment could not be applied to them as stipulated by the law. According to articles 57 (part 2) and 59 (part 2) of the Criminal Code (1996) these sentences were not to be applied to women, minors under 18 at the moment of committing a crime, and men who were over 65 at the moment when sentencing decision was pronounced. Article 62 (part 4) of the Code also provides that death penalty and life imprisonment are not to be applied in the case when a pretrial cooperation agreement has been signed by the defendant. Article 66 (part 4) guarantees that these punishments will not be applied in cases when a person was accused of preparing to commit a crime. By the same Federal Law the jury trial was also excluded for those accused of raping the minor. The bill was initiated by the Supreme Court of the Russian Federation. The main argument for its adoption was again the need to improve organizational structure of the judicial system and to reduce the caseload of the Supreme Court as well as regional courts after the new procedure of appeal was introduced. As for the sex crimes against minors it was argued that the hearing of such cases leads to intrusions in the private lives of citizens and is particularly difficult when child victims are involved. Therefore deciding on such cases should be left to professional judges (State Duma, 2013a). During Parliamentary hearings there was much less disagreement among the deputies than in 2008 when the jurisdiction of the jury was limited for the 1st time. Communist party spoke against adoption of this law, but did not provide any alternatives to solve the problem that the bill was aiming at (State Duma, 2013d).

Then came another Federal Law No. 432-FZ. Adopted on December 28, 2013, it was titled "On amending a number of legal acts of the Russian Federation in order to improve the rights of victims in criminal proceedings". This law excluded the jury from hearing cases where death was caused as a result of a rape, where victims of the sex crime were under 14 years old or the defendant was a recidivists who had been previously convicted of committing a sex crime. Federal law left these crimes under jurisdiction of the regional courts, but excluded them from jury's jurisdiction. As was stated in the note that accompanied the draft of the bill it was aimed at protecting child victims from extra psychological suffering because of the public hearing of their case and multiple reiteration of the information regarding the violent actions against a child (State Duma, 2013c). It was also alleged that members of the jury do not have special knowledge about psychological status of children which is crucial for deciding the case. This change of jurisdiction was just one out of many other measures proposed in the bill to protect rights and interests of crime victims (especially children) ensuring their full participation in the trial and some pre-trial procedures including deciding on pre-trial detention.

Deputy Irina Yarovaya, who was one of the initiators of the bill, at the Parliamentary hearings again expressed the idea that had won the hearts of

the deputies in 2008 that jury trials should be limited because jurors acquit too many defendants (State Duma, 2013b). She did not provide any exact numbers, but claimed that the absolute majority of verdicts in the cases of sexual violence against children are acquittal and explained it by the special manipulative abilities of the perpetrators. Yarovaya believed that defendants in such cases impose psychological pressure on the child and turn the trial into a television series, a show that does not protect the rights of a child victim. This time no questions or concerns were raised by the deputies and the bill was adopted.

The adoption of this law led to another proceeding in the Constitutional Court of Russia. A defendant who was accused of committing a number of crimes including rape and murder and who has not reached the age of 18 at the moment of his trial was denied the right to be tried by the jury. He filed an application to the Constitutional Court asking whether the provisions of the new Federal Law No. 217-FZ of 2013 met constitutional standards of human rights protection. In its majority Decision of the Constitutional Court of May 20, 2014 No. 16-P the Court cited its previous position expressed in 2010 and 2012 decisions discussed above, but provided additional reasons that justified limitations of the right to be tried by the jury imposed by the legislative branch. First, it claimed that since the legislator had used an objective criteria such as the type of punishment that could or could not be applied to the accused, it was not discriminating against certain categories of citizens based on their age or gender. Second, it provided arguments that limiting the right to be tried by the jury for minors was actually aimed at enhancing and not diminishing their right to judicial protection. The Court suggested that hearing a case by a professional judge could ensure confidentiality and give minor defendant a chance to appeal the decision using standard procedure and grounds (according to the Russian rules of criminal procedure decisions that were based on jury's verdicts can be appealed only on the ground of a failure to apply the law properly, but not on the factual grounds). It was also stressed out that a minor was given the opportunity to request that his case is heard by three professional judges instead of the jury. In the opinion of the Court it served as an additional procedural safeguard of a lawful, objective, impartial and just judgment. This time the decision was unanimous, no dissenting opinions were submitted.

This Decision of the Constitutional Court (2014) clearly demonstrates that the jury trial is not a valuable and trusted institution. Any other concern is privileged over the right to be tried by the jury: security, administrative convenience, victim's rights. Even the defendant's right to appeal the decision is placed higher on the scale of rights that his right to choose the type of proceeding that he believes is better for protecting his own rights. The defendant is portrayed as a person who is not capable of making the best choice and therefore the state will make this decision for him.

4 CONCLUSION

It was not our intention to answer the question why the jury trial system does not seem to be successful in Russia. However, a few things should be noted because they appear to be important if one wants to understand why this institute was so

eagerly sacrificed in the face of uncertain security threats and why its limitation did not end there. First of all, it is worth noting that Russian post-soviet system of criminal trial was not molded upon the Anglo-Saxon adversarial system model. Rather it inherited distinctive traits of the German and French continental inquisitorial systems (Smirnov, 2000). However, instead of using their models of a mixed tribunal when a judge decides the case together with a few laypersons Russia opted for a 'classical' jury system. Secondly, given the current state of the judicial system it comes as no surprise that the acquittal verdicts by the jury are perceived as a threat to it. The low proportion of acquittal decisions by the Russian judges is not to be explained by the accusatory bias itself or lack of independence of the judges *per se*. It is an effect of the legal and institutional design of the law-enforcement system in Russia and the rules of criminal procedure. One of the consequences is the incorporation of the judicial system into a broader system of law-enforcement agencies that leads to the situation when the court serves not as an independent body that is to decide the guilt of the offender but as a last link in the chain of agencies that in fact approves the decisions of the previous chains on that matter (for details see Volkov, 2012; Volkov & Paneyakh, 2013). As during Soviet times the judges now view themselves as a part of the crime control mechanism and not just mere arbiters between the sides of prosecution and defense. This criminal trial system operates smoothly, orderly and efficiently, a small number of acquittal decisions allowing to correct for the inevitable mistakes in the work of the police and Investigative Committee. But jury trials with their acquittal rates of about 20% create disorder and even chaos in this efficient system. Therefore judges meet every acquittal verdict with disappointment (Karnozova, 2000: 291). And it does seem that in the political system that officially proclaims that stability and order are the main values to be promoted there is not much space for chaos especially when security is at stake.

The use of the security argument proved to be a very powerful tool of undermining undesirable and controversial institute of the jury trial. It allowed to abolish jury trials for the terrorists and state criminals and simultaneously opened the window of opportunity to expand these limitations on other cases. Decisions of the Constitutional Court of 2007 and 2010 have played a crucial role in the process. The former has created a precedent of upholding laws that limited the rights of terrorists for the sake of security. The latter (founded on the decisions regarding moratorium on the death penalty) has constructed the right to a jury trial as not being an indispensable part of the right to judicial protection but as a legacy of the times when death penalty could be applied to offenders. And it should not be surprising that such interpretation of this right might lead to a conclusion that the jury trial is better suited for the museum of constitutional history artifacts than for the real life.

Drafters of the bills aiming at the jury trial limitations did not bother to provide much evidence that the reform will reduce the risk of terrorism, protect child victims more effectively, or ensure better respect for the rights of young offenders accused of committing grave crimes. The only self-evident argument presented was the predicted decrease in the Supreme Court's caseload as a result of the reform. This demonstrates the technocratic nature of the political process

in Russia which is guided by the logic of promoting order and security even if it requires limiting human rights of the few (that eventually become many). The balance between liberty and security has clearly tipped towards the latter.

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About the Author:

Anna Gurinskaya, Ph.D., Associate Professor, Department of Liberal Arts and Sciences, St. Petersburg State University; Department of Law, Herzen State Pedagogical University of Russia. E-mail: anna.gurinskaya@gmail.com