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On the Public Model of Russian Criminal Procedure

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This article has appeared as an attempt to inform foreign scholars of the Public Model of Russian Criminal Procedure. Authors suppose that Russian lawmakers have made an unfounded decision to construct Russia's criminal procedure on adversarial foundations. Thus, authors attempt to describe the Public Model of Russian Criminal Procedure, which has arisen as a response to adversary reforms in Russia. In addition to the historical and political context of the Public Model's appearance, authors also demonstrate certain dimensions of this model. The article shows its essence and attitudes to this model. Moreover, certain scholars (Anatoly S. Barabash, Alexander A. Brester and Konstantin V. Skoblik) consider the Public Model as a research programme. The article also includes a comparison of the Public Model with other models (e.g. Crime Control, Due Process, Adversarial Justice and Inquisitorial Justice). The current research applies a historical method, a method of interpretation of law, deductive and inductive reasoning, argumentum ex contrario, contextual definitions and an interdisciplinary approach (criminal procedure, philosophy of science, theory of cognition and decision theory).

Keywords: Public Model of Russian Criminal Procedure, adversariness, public interest, fact-finding, factually guilty, factually innocent, research programme.

Research area: law.

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Historical and Political Context of Public Model

A criminal procedure is an essential element of human society. Given the fact that there is a wide variety of human societies it is possible to conclude that there is a huge diversity of unique criminal procedures, which reflect the features of the societies where they exist. The Russian criminal procedure and its model are also determined by the characteristics of Russian society.

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In general, models of criminal procedure constantly appear in the form of simplified representations which at the same time reflect the regularities of the said criminal procedure. As K. Roach has written “Models provide a useful way to cope with the complexity of the criminal process. They allow details to be simplified and common themes and trends to be highlighted” (Roach, 1998-1999).

In this article, we would like to describe one model of Russian criminal procedure, which was developing in the pre-revolutionary past (before 1917)¹.

It is a model of Russian criminal procedure, although it has connections with other models, such as H. Packer’s Crime Control Model and the Due Process Model (Packer, 1968), R. Vogler’s Adversarial Justice, Inquisitorial Justice and Popular Justice Models (Vogler, 2005). We would like to show the similarities and differences between our model and other examples.

Firstly, it is necessary to express some key points. Why should we take into account models of foreign criminal processes? The answer is simple and based on historical and political context. Since the collapse of the Soviet Union, our government and certain scholars (for example, D.N. Kozak, E.B. Mizulina, I.L. Petrukhin)² have started a campaign to implement a true adversary system into Russia’s criminal procedure. This “improvement” is an attempt to bring the alien “democratic” criminal justice practice into Russian criminal procedure and, as has been proclaimed, completely reject the Soviet Union’s totalitarianism. As a result, we have the principle of adversariness, enshrined in our CrPC’s Art. 15.

Thus, it is helpful to explore criminal process models of those states which use an adversarial criminal justice system (e.g. the USA). Models of these states’ scholars reflect the experience of thought regarding adversariness, which is valuable in terms of understanding the place of the adversarial system in our criminal procedure.

¹ One of scholars who was elaborating this model was I.Y. Foinitskii (Foinitskii, 1910). The Soviet past was the time when this criminal procedure model was displaced by doctrines of socialist legality, legalism and officiality. RSFSR’s Criminal Procedure Code declared the protection of the Soviet State interests instead of society interests. However, these reforms could not alter the nature of the criminal justice practice, which mainly complied with the prerevolutionary Statute of Criminal Procedure. It should not be interpreted from these sentences that we have a strong negative attitude towards the Soviet Union. This has left a diverse heritage, like any epoch, which should be subject to objective analysis.

² Moreover, these scholars believe that this adversariness allows a set of contradictory aims to be achieved, such as fact-finding, the defence of an individual from a government and fair decisions. However, scrutinizing theories of American adversary criminal trial, G. Goodpaster has concluded that “in this view, each univocal theory errs in undervaluing the systemic purposes that the other theories posit. To correct for this theoretic myopia, one could assert that the system has all of the purposes posited by these theories: truth finding, fair decision, protection from possible governmental abuse and norm generation. These purposes, however, co-exist in an unstable tension” (Goodpaster, 1987).

It will be logical to illustrate our attitude toward adversariness here and, against such a background, reveal the essence of our model.

As R. Vogler has noted "...whilst the new international regimes of criminal justice are to be welcomed and whilst the underlying traditions of criminal justice are truly universal, it remains a matter for each nation to develop its own particular regime in accordance with local traditions and bearing in mind the guiding principles of procedure" (Vogler, 2005). Therefore, there are some scholars (Azarov, 2003; Volodina, 2016) who negatively assess these excessively rapid adversarial reforms. Some of them consider that Russian lawmakers have made an unfounded decision to construct Russia's criminal procedure on adversarial foundations. A reason for this collapse is that a group of drafters has made a decision based on their ideological guidelines without the objective analysis of the evolution history of the Russian ethnos and state, or understanding of the regularities in their development (Barabash, 2009)¹.

Thus, our model (the Public Model of Criminal Procedure) has been formed as the opposite to adversarial provisions adopted by Russian Criminal Procedure Code. The keystone of this model is a premise that the committing of crime concerns society as a whole and it is in the interests of society as a whole to find the factually guilty element. On this ground, it is essential "to elicit and reconstruct what actually took place in an alleged criminal event" (Packer, 1968). In contrast, the aim of participants in the adversary system is not finding a perpetrator factually guilty, but rather the persuasion of a judge including the use of emotional arguments and sophistry. The essence of the adversarial system is a struggle, a fight, but not finding somebody factually guilty². That is the reason why we do not have great enthusiasm about the adversarial reform in our country. We consider that the public interest of Russian society requires a

¹ Thinking about the theory of American adversary criminal trial, G. Goodpaster has argued "Many of the activities in our legal system are overtly adversarial, and virtually all of our public legal decisions are processed in an adversarial fashion. The adversary premise also underlies all of our law and our thinking about law. This premise is a foundational axiom so embedded in our thought processes and actions that we build on it without questioning why we use this footing" (Goodpaster, 1987). Fortunately, we cannot make such a conclusion regarding Russian law, thought about law, thought processes and actions.

² G. Goodpaster has pointed out that "The most common view of the purpose of the adversary system is that in matters relating to human, as opposed to scientific, affairs it is the best truth-finding system we can devise... The simplest formulation of this view assumes that the principal issue of an adversary trial is to discover "what happened," that is, historical fact, and that a competitive contest over what happened is the best way to accomplish this goal. This view is easy to debunk as an unequivocal explanation of an adversary criminal trial... it is doubtful that many people think that an adversary contest is the best way to discover what actually happened. Neither scientists, engineers, historians nor scholars from any other discipline use bi-polar adversary trials to determine facts. Following the space shuttle explosion, for example, no one proposed that the investigating Presidential Commission adopt the procedures of adversary civil or criminal trials. Indeed, the suggestion that a commission investigating any disaster might wish to follow such procedures seems quite strange, and many people would react incredulously were such procedures adopted" (Goodpaster, 1987).

factually guilty element to be found and rejects a situation, which is quite possible in the adversarial system, when a factually innocent element is convicted, but the factually guilty one is not¹. In this place, we would talk about Findley's Reliability Model, because it raises similar issues as our model and proposes similar remedies.

Describing the Reliability Model, K.A. Findley points out that "Thus, while the Innocence Movement is largely perceived as a defense-oriented movement, its rhetoric includes respect for fundamental crime control value. At its most basic level, this is reflected in the Movement's focus on ascertaining factual truth, and in the interest in apprehending the true perpetrator" (Findley, 2008). Here we see this model, as the Public Model, purporting to protect the innocent and help to convict the guilty, which is impossible without fact-finding².

There is a paradox here. The Russian Criminal Procedure Code tried to adopt the adversariality model and reject the aim of the fact-finding, but American scholars talk about a renewed popular commitment to the accuracy of fact-gathering³. Furthermore, where is the sense here? Russia relies on the adversary system to eliminate its problems, but countries which have already experienced such adversariness, also have the same problems. This is a vicious circle.

M. Kramer, who has positively evaluated our new criminal procedure code, has noted that "The new criminal procedure code in Russia is intended to transform the country's judicial system, but unless the code is rigorously enforced, it will not make a fundamental difference... Although indigent suspects are supposed to enjoy the right to counsel, the reality is that attorneys in many regions are unwilling to serve as public defenders because the local governments often fail to pay them" (Kramer, 2003). However, Judge Richard Posner, who arises the same issue of defence counsels in the USA (where there is an adversarial system), also points out that "If the law entitles a defendant to effective assistance of counsel, then paying lawyers too little to attract

¹ Reflecting on the Rights Theory of Adversary Criminal Trial, G. Goodpaster has also noted "Because adversary trials are neither an accurate nor dependable way of determining facts, there is a great risk of error in trial verdicts. Both parties in court run that risk: trials may produce erroneous convictions or erroneous acquittals" (Goodpaster, 1987).

² The notion of "truth-finding" has not been deliberately used by us in Russia's criminal procedure. The latter is an activity and we know the aim of the activity should be clearly determined. If this requirement is not fulfilled, subjects cannot effectively operate. A vague goal leads to vague results. The goal of truth-finding is unclear as there are so many concepts of truth depending on the school of philosophy (for example, the materialism, idealism, dialectic, correspondence, coherence and pragmatist theories). Therefore, we prefer using "fact-finding", which exactly corresponds to officials' duties to establish the circumstances of Russian CrPC's Art. 73.

³ Darryl Brown has noted that "Accordingly, adversarial process will not be a politically sustainable means for assuring the accuracy of fact-gathering. Partisan challenges brought by defense counsel against the state's evidence must become – and are becoming – less dominant tools for serving a renewed popular commitment to accuracy" (cited in Findley, 2008).

competent lawyers to the defense of indigent defendants may cost the system more in the long run by leading to retrials following a determination that the defendant's lawyer at his first trial was incompetent" (cited in Findley, 2008).

Then, M. Kramer writes that "Many reports have emerged of illegal interrogations, especially outside Moscow and St. Petersburg... Reports of police torture remain common, and in many cases, the courts have ignored the abuses and refused to throw out coerced testimony" (Kramer, 2003). However, K. Findley, who proposes reforms to prevent false confessions in the USA, also mentions that "Standard police interrogation training teaches police a very aggressive, guilt-presuming approach whose goal is to obtain a confession, not elicit information. The most common variant of this approach, known as the Reid Technique, teaches police to isolate and break down a suspect, making him feel hopeless by convincing him that he will be convicted (by, for example, cutting off all denials of guilt and telling him about overwhelming evidence against him, whether real or fabricated)" (Findley, 2008). It is obvious, if the same problems remain in countries with adversariality and without it, an adversarial system is not a remedy for these issues.

We have already expressed the opinion of adversariality in Russia and it has allowed the keystone of the Public Criminal Procedure Model to be elicited – that is the public interest¹ demanding to find the factually guilty party. This principle is clarified by a set of attitudes, which are as follows:

- 1) a crime is a concern of all society, not only victims;
- 2) the Russian State is historically a defender and protector of its citizens²;
- 3) the factually guilty must be convicted, but the factually innocent must be exonerated;
- 4) it is the Russian State responsibility to fulfil point no. 3 only by legal means.

¹ In this article, we often mention the concept of public interest and readers can understand that the public interest subordinates the private one. There is something true in it and, in this sense, the Public Model differs from the Due Process Model, which at the level of values, focuses on the protection of an individual. However, it would be wrong to think that the Public Model does not defend individuals. It protects because the public interest restricts itself. It must take into account the private one. As Seyyed Jafar Es-haghi and Mahdi Sheidaean have pointed out, "Finally, to provide a definition on public interest, one should remove relevant paradoxes on individuals and groups; the relationship between public and private interests and the relationship between idea and structure. For example, a modern public interest theory cannot neglect the individuality of people in society or cannot victimize private interests in the name of protecting collective ones. Also, it is not justified to neglect public interest for the priority of private interests (Alamdari, 1999: 197)" (Seyyed, Mahdi, 2016).

² The Public Model resembles the Parental Model in this statement, as K. Roach has denoted: "A parental model of criminal justice rejects Packer's assumption that the individual and the state have fundamentally opposed interests" (Roach, 1998-1999).

Dimensions of Public Model

The Public Criminal Procedure Model primarily focuses on the fact-finding process: the fact-finding process as it is and as it should be. These are the first and second dimension of the Public Model. Scholars who adhere to this model examine the current criminal justice practice, elaborate a prescriptive ideal and suggest means for turning due decision-making process into the real practice of criminal justice organizations. We propose that determining such an ideal has great significance because the presence of such an ideal allows a government to guide criminal process reforms. Th.J. Bernard and R.Sh. Engel have argued that "...criminal justice theories and research historically have incorporated, either explicitly or implicitly, prescriptive ideals that are used to assess the legitimacy of what criminal justice agents and organizations should be doing... We suggest that, for all three types of dependent variables, prescriptive ideals in the form of discussions of legitimacy should be made explicit rather than left implicit. This step forms the basis of any reformist implications for criminal justice theory and research" (Bernard, Engel, 2001).

Scientific research conducted within the Public Model in order to construct an ideal fact-finding process concentrates on determining the gnoseology of the Russian criminal procedure, eliciting the method of the Russian criminal procedure, studying decision-making by officials, creating rules for determining facts, and defining the notion "sufficiency of evidence" via an interaction of formal and dialectical logic laws.

This is an appropriate place to describe another dimension of our model.

I. Lakatos has asserted the competition between research programmes (Lakatos, 2001), but we can maintain the competition between criminal procedure models, which reflect more than the real and ideal criminal justice system, but give researchers the methodology and provide a way of thinking about scientific problems and identifying them.

Thus, the Public Model of Russian Criminal Procedure is also our research programme (the third dimension). Scholars who adhere to this model use similar methods of argumentation and their findings are based on philosophical and historical "first principles"¹, which differ from the background of other models. We have mentioned them above (points 1-4) evolving the demand of public interest to find those who are factually guilty.

¹ I. Lakatos has invented this term to cover assumptions ("hard core") which are shared by researchers of the specific research programme without evidence and deliberations. "Hard core" is contained in each theory of the specific research programme.

Research in the formal and dialectical logic field (Ilyenkov, 2014; Bencivenga, 2015), the psychology of uncertainty (Baldwin, 1997; Ehud, Alon, 2008), the sociology of law (Skolnick, 2012), and a realm of the Fourth Industrial Revolution (Schwab, 2017) are actively used for constructing our model. There are three primary monographs describing the Public Criminal Procedure Model, namely “The Public Origin of the Russian Criminal Procedure”, “Basic, Extra and Subsidiary Fact-Finding Processes within Stages of the Preliminary Investigation and Trial” by A.S. Barabash and “The Method of the Russian Criminal Procedure” by A.S. Barabash and A.A. Brester. A.S. Barabash has elaborated the basic concepts “the public origin of the Russian criminal procedure”, “the destination of the Russian criminal procedure” and “the goal of the Russian criminal procedure”. His theses are stipulated by the history of the development of the Russian society and state. Historical and cultural regularities show that adversariality is alien to the Russian national spirit. The research “Basic, Extra and Subsidiary Fact-Finding Processes within Stages of the Preliminary Investigation and Trial” evolves the Public Model ideas and determines fact-finding and decision-making schemes for the reconstruction of “what actually happened”, application of restraints and imposition of punishment.

A. Brester has developed the concept of “the method of the Russian criminal procedure”. He has used a concept of the scientific method, which was combined with the laws and principles of dialectical logic. Obviously, dialectical logic is associated with the philosophical basis of the Soviet Union’s totalitarianism¹. However, if we distinguish scientific provisions from political or ideological ones, dialectical logic can give favourable results.

Describing our model, it is also very important to demarcate the Inquisitorial Justice Model and our one here. Thinking about the new scientific jurisprudence of France, R. Vogler has noted that “Torture was not antithetical to the new method of forensic inquisitorial enquiry but in fact central to its operation. Absolute power over the body and the mind of the ‘patient’, absolute terror to defeat resistance was essential to the new Cartesian jurisprudence... This potent coupling of science and terror was born in the succinct wording of the 1670 code and in its early form was worked out in the instruction chambers and torture chambers of the French *sénéchausées* and *tournelles*”

¹ Criticizing Dialectic, K. Popper has written that “Marx, who admired him (Hegel), but who was of very different political temperament, was in need of a theory on which to base his political opinions. We can understand that it was, for him, a rather fascinating discovery to find that Hegel’s own dialectical philosophy could easily be *turned against its own master* – that dialectic is in favour of a revolutionary rather than of a conservative and apologetic political theory” (Popper, 1940).

(Vogler, 2005). If a scientific element as a part of criminal procedure serves the interests of bureaucracy in the Inquisitorial System, science serves the public interest of Russian society in the Public Model. Science is only a tool of criminal procedure which can be used by the state either negatively or positively, in our case, for reconstructing events of the past. If the scientific enquiry is used for the benefits of state bureaucracy, we term it “officiality”. If it is used for the benefits of society, this condition is termed “publicity”. It is necessary to distinguish our publicity, which means a focus of official actions in the criminal procedure on the public service, from the publicity in the meaning of transparency of criminal procedure for the civil society. We have emphasized this idea in order to reduce negative associations of the scientific element, the use of the scientific method in criminal procedure with the Inquisitorial System.

Distinguishing the Public Model from H. Packer’s Crime Control Model, we highlight that the Public Model relies on the fact-finding process in the pre-trial and trial criminal procedure stages. H. Packer has noted that “It is that subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding... In this model, as I have suggested, the center of gravity of the process lies in the early, administrative fact-finding stages. The complementary proposition is that the subsequent stages are relatively unimportant and should be truncated as much as possible” (Packer, 1968). In contrast with Packer’s model, our one does not give priority to any stage of the process because each stage has its specific conditions which are not identical or interchangeable. Thus, the preliminary investigation takes place in secrecy, whereas the trial gives a judge, prosecutor, defence attorney and defendant an opportunity to examine evidence avowedly and openly. However, despite different activity conditions, the above-mentioned stages have a shared goal which is the accurate reconstruction of an alleged criminal event.

It is also necessary to note that our model shares the idea of cooperation between investigators, prosecutors, judges and criminal defence attorneys because the opposite attitude (a contest) leads to the consideration of a wrongdoer as an enemy, ignoring other evidence except evidence against the defendant and obtaining forced confessions (Barabash, 2012)¹. This cooperation also positively influences on the ethos of criminal

¹ This idea of cooperation is contrary to the Due Process Model, which “... encourages the offender to deny responsibility for the crime and because of its professional and adversarial orientation alienates the offender, the victim and the larger community” (Roach, 1998-1999).

trial attorneys. They should start to think of the government not as an enemy and, hereby, not use their rights, ignoring the fact-finding goal, to win.

It would be wrong to interpret our cooperation proposal as a call to spread plea-bargaining because the continual use of this practise distracts from the fact-finding orientation. The plea-bargaining practice is not a tool for fact-finding, but it is the only tool for the compromise-finding between the prosecution and defence. Furthermore, this compromise will not necessarily tell us “what actually happened”¹.

Cooperation within the Public Model is a valuable orientation which unites all criminal justice participants at the level of interpersonal relationships. It would be impossible to achieve the aim of reconstruction without this idea.

Thus, comparing models of criminal justice, we have described the key ideas of the Public Model of the Russian Criminal Procedure. Obviously, the current article has been written in broad strokes. We hope this brief review may spark readers’ interest in the Public Model and its theory, which is constantly developing just like everything else in the world.

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¹ Using other arguments, the Punitive Model of Victim’s Rights also doubts that the guilty plea is a faultless construction. K. Roach has noted that “Demands by crime victims and their supporters for standing in the criminal trial can disrupt the efficiency of a crime control assembly line designed to encourage the accused and the prosecutor to agree to a guilty plea. Plea bargaining, despite its centrality in the crime control model, is suspect because it does not include victims or meet their expectations. The assertion of rights, as represented by victims’ bills of rights and victims’ claims to constitutional security, participatory, and equality rights, encourages the expression of grievances, both at crime, and the state’s treatment of crime victims” (Roach, 1998-1999).

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О публичной модели российского уголовного процесса

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Эта статья – попытка рассказать иностранным ученым о публичной модели российского уголовного процесса. Утверждается, что российский законодатель принял необоснованное решение о построении уголовного процесса на состязательном фундаменте. В итоге авторы описывают публичную модель как ответ, возникший на состязательные реформы в РФ. Помимо исторического и политического контекста появления этой модели в статье рассказывается о ее измерениях. Публичная модель анализируется так же, как научно-исследовательская программа ряда ученых (А.С. Барабаш, А.А. Брестер, К.В. Скоблик). Сравнивается она и с другими моделями процесса (например, борьба с преступностью, надлежащая правовая процедура, состязательное и инквизиционное правосудие). В исследовании применялись: исторический метод, метод толкования права, дедуктивное и индуктивное обоснование, рассуждение от противного, контекстуальные определения, междисциплинарный подход (уголовный процесс, философия науки, теория познания, теория принятия решений).

Ключевые слова: публичная модель российского уголовного процесса, состязательность, публичный интерес, доказывание, действительно виновный, действительно невиновный, научно-исследовательская программа.

Научная специальность: 12.00.00 – юридические науки.
