The Soviet Conception of the Presumption of Innocence

John Quigley
THE SOVIET CONCEPTION OF THE PRESUMPTION OF INNOCENCE

John Quigley*

I. INTRODUCTION

The presumption of innocence has received renewed attention in the Soviet Union in recent years as part of an effort to improve the quality of criminal justice. This effort is associated with the Soviet government's perestroika (restructuring) policy, which includes the aim of ensuring fairer treatment of the citizenry in the courts. It is also in part a product of the increasing openness (glasnost') that has led to press articles criticizing the courts. The current effort builds on a strong doctrinal development of the concept of presumption of innocence that began following World War II.

In the Western literature, the presumption of innocence in the U.S.S.R. has met with varied assessment. There is disagreement as to the existence of a presumption of innocence in Soviet law and, if it exists, as to its scope and function.

The Soviet system of criminal procedure presents several problems when comparing its presumption of innocence with that of common law procedure. The Soviet indictment is based on a standard of proof higher than that of probable cause; this creates difficulty in maintaining a presumption of innocence at trial. Second, the court in a Soviet trial, as will be indicated below, takes an active part in eliciting evidence. This function may make it difficult for judges to presume an accused to be innocent.

In 1978, the U.S.S.R. Supreme Court made a major declaration about the presumption of innocence. That declaration, which has major implications for the role of the presumption in Soviet law, has not been analyzed in detail. The declaration indicates a scope for the presumption of innocence that in some respects is broader than that of the presumption in the common law world.

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This article analyzes the status and meaning of the presumption of innocence in Soviet law, the differing interpretations of the Soviet presumption in the Western literature, current efforts in the U.S.S.R. to use the presumption for reform of criminal trials, and possible lessons for common law countries from the Soviet experience with the presumption.

II. Existence of a Presumption of Innocence in Soviet Law

In most common law and civil law jurisdictions, a presumption of innocence is said to exist at criminal trials, although typically it is not expressed in constitutions or legislation. Soviet jurists find a presumption of innocence in Soviet law. A leading Soviet proceduralist, V. M. Savitskii, declaring that a presumption of innocence is firmly established in Soviet law, castigates "bourgeois Sovietologists like George Fletcher, who denies the existence in the U.S.S.R. of a presumption of innocence, or like Harold Berman, in whose opinion 'Soviet law does and does not contain the doctrine of presumption of innocence.'" Fletcher and Berman have been leading commentators in the Western literature on the presumption of innocence in Soviet law.

Savitskii's quotation of Berman is from a 1980 article in which Berman found that the presumption plays a different role in Soviet trials because of differences between Continental and common law trial procedure. However, he considered it to exist in Soviet law, albeit not the same presumption of innocence that exists in American law. He wrote elsewhere: "Although the phrase 'presumption of innocence' is avoided in the codes, all that American jurists generally mean by that phrase is spelled out in Soviet law."


5. Id. at 622-23.

Savitskii’s citation to Fletcher is to a 1968 article. Fletcher there did not state that a presumption of innocence does not exist in Soviet law. He said that the matter was disputed among Soviet jurists, that its status in Soviet law was uncertain, but that certain aspects of the presumption do exist in Soviet criminal procedure legislation. In a 1984 article, he took a similar position. The dominant opinion in both the Western and Soviet literature is that a presumption of innocence is found in Soviet law.

A. Early Rejection of the Presumption of Innocence

During the period immediately following the 1917 Russian Revolution, the doctrine of dictatorship of the proletariat prevailed, and some jurists viewed the presumption of innocence as weighing too strongly in favor of the accused and against the state. Thus, V. S. Tadevosian argued against proponents of the presumption that by “placing on the shoulders of the state... the burden of proving the crime, freeing the accused of any obligations, proposing to construe any doubt to the benefit of the accused and to convict no one until the crime is proved like two times two equals four,” they “eloquently

in H. Berman & J. Spindler, Soviet Criminal Law and Procedure: The RSFSR Codes (1966). Id. at 59. Berman notes that a key component of the presumption of innocence—the rule that the prosecution bears the burden of proof—functions differently in Continental procedure than in common law procedure, since in Continental procedure the court, rather than the prosecutor, plays the primary role in questioning witnesses. H. Berman, Justice in the U.S.S.R., supra, at 399.

8. Id. at 1216-22.
defend the freedom and inviolability of the individual,” but down-play “the interests of the state and society.”

Tadevosian found that “in the laws in force in the U.S.S.R., there are no previously established presumptions of guilt or of innocence of citizens and there is no need of any previously determined presuppositions or presumptions.”

Other Soviet jurists of that period objected to a presumption of innocence on the grounds that it was excessively formal and abstract, linking it to the medieval system of formal proofs that had been used in Europe. They feared that it would allow a court an easy solution if proof-gathering in a case proved difficult. In such a case, the court could avoid difficult issues of fact by simply declaring that there was doubt and pronouncing a judgment of not guilty. They said, moreover, that its meaning was unclear. A prime desideratum in early Soviet legal thought was to make the law understandable to the public. Further, in light of its abstractness, the presumption was seen as conflicting with the Marxist concept of the concreteness of truth.

Contributing to the rejection of the presumption of innocence was a negative attitude toward individual rights grounded in the belief that such rights were developed by capitalist societies, where they were proclaimed to apply to all, but were realizable in fact only by the bourgeoisie. Rights were thus viewed as more useful even in the U.S.S.R. to the bourgeoisie than to the proletariat. Against the backdrop of the tendency to reject rights on this basis developed another tendency, which held that in Soviet society rights should be realizable by all classes. Thus, one adherent of the presumption of innocence said:

“It is not proper to deny the principle of the presumption of innocence in Soviet criminal procedure only be-


13. Id.


15. Golunskii, supra note 14, at 59. But see M. Strogovich, Obvinenie i Obvinyaemyi Na Predisvatel’nom Sledstvii i Na Sude [The Accusation and the Accused at the Preliminary Investigation and at Trial] 29-31 (1934) (stating that the issue is not to determine whether a presumption of innocence exists as an abstract principle, but to ensure that guilt is not presumed. Further, that the burden of proof rests on the prosecution, and that investigators seek exculpating as well as incriminating evidence).

cause it was first forwarded in bourgeois criminal procedure. If so, one would have to reject very many concepts and principles that externally have a certain similarity with bourgeois practices of the same name.\footnote{17}

\section*{B. The Emergence of a Presumption of Innocence}

In the 1940’s, support for a presumption of innocence grew as the doctrine of dictatorship of the proletariat lost its hold. In 1948, the U.S.S.R. supported the inclusion of a provision on presumption of innocence in the 1948 Universal Declaration of Human Rights.\footnote{18} By the late 1950’s, a consensus on the issue had emerged, spurred by a desire to strengthen rights as a counterweight to abuses of rights witnessed in the 1930’s and 1940’s.\footnote{19}

When new criminal procedure legislation was drafted in the late 1950’s, some proponents of the presumption tried to expressly write it into the legislation.\footnote{20} They were defeated by others who argued not that the presumption was inappropriate for Soviet law, but that its meaning was unclear, in part because it did not translate well into Russian. They contended, therefore, that it was better to spell out the ingredients of the presumption rather than to use a “declaratory formula” that might not be understood.\footnote{21} Some, like the

\begin{itemize}
\item \footnote{17} V. Lukashevich, \textit{supra} note 11, at 45-46.
\item \footnote{19} A. M. Larin, \textit{Presumptsiia Nevinovnosti [Presumption of Innocence]} 27 (1982); V. Kaminskaja, \textit{Uchenie o Pravovykh Prezumptsiakh v Ugolovnom Protsesse [A Study of Legal Presumptions in Criminal Procedure]} 100-01 (1948) (finding a presumption of innocence in Article 111—right to defense—of the 1936 Constitution and in various provisions of the 1923 Russian criminal procedure code).
\item \footnote{20} V. Lukashevich, \textit{supra} note 11, at 46.
proceduralist Trusov, argued against its inclusion on principle. Trusov used the example of a person caught in the act of committing a crime and said that one could not consider him innocent.22

In any event, the legislation of 1958-196023 included “guarantees expressing the presumption of innocence but did not contain the formula ‘presumption of innocence’ as such and did not use that term.”24 It incorporated those postulates generally considered to express the presumption of innocence: no proof burdens on the accused,25 conviction only on evidence presented at trial26 and no conviction based on supposition.27 Most criminal procedure codes of East European socialist countries include explicit provisions on the presumption of innocence.28 Consequently, Fletcher acknowledged that the new Soviet legislation incorporated certain aspects of the presumption,29 but inferred from the omission that a presumption of
innocence "probably does not exist" in Soviet law.\textsuperscript{50}

C. The Presumption of Innocence in the 1977 U.S.S.R. Constitution

A new Constitution was adopted in the U.S.S.R. in 1977. In a chapter on the courts in which certain individual rights are specified, the presumption of innocence is not expressly stated. Fletcher said this omission means that "maybe [the presumption] doesn't exist."\textsuperscript{53}

However, the Constitution includes two provisions that arguably incorporate the presumption. Article 158 states that the accused has a right to defense. Article 160 states that no one can be deemed guilty other than by a court judgment. In 1978, the U.S.S.R. Supreme Court, which had earlier invoked certain rules generally associated with the presumption of innocence,\textsuperscript{3} for the first time gave an extended interpretation of its meaning. It did so in an "explanation" of the law.\textsuperscript{3} The Court found a presumption of innocence in the Constitution, though it left it unclear precisely where it had found it.\textsuperscript{34}

The decree is titled "Right to Defense" and refers specifically to only one provision of the Constitution, namely Article 158, which guarantees a "right to defense."\textsuperscript{38} The Court's formulation is:

In order to ensure to the accused (or defendant) the right to defense, courts must strictly observe the constitutional principle that the accused (or defendant) is presumed innocent until his

\begin{itemize}
\item 30. Fletcher, \textit{supra} note 9, at 70.
\item 31. Fletcher, \textit{supra} note 9, at 70.
\item 32. \textit{See infra} note 78.
\item 33. The Court has the power to issue "explanations" outside the context of a particular case. While not considered formal sources of law, these explanations are binding on lower courts. Law on the Supreme Court of the USSR, art. 3, Nov. 30, 1979, \textit{Ved. Ver. Sov. SSSR} [Gazette of the Supreme Soviet of the USSR], No. 49, item 842 (1979). This provision gives Supreme Court explanations "general normative character." S. Zivs, \textit{ISTOCHNIKI PRAVA} [SOURCES OF LAW] 184-85 (1981). "The Supreme Court of the USSR and the supreme courts of the republics have the power to issue binding explanations of the law. They use this power to supplement the very general provisions of the codes and other laws with detailed rules for situations that arise frequently." O. \textit{IOFFE \& P. MAGGS, THE SOVIET ECONOMIC SYSTEM} 55 (1987).
\item 34. Decree No. 5, Plenum of the USSR Supreme Court, \textit{O Praktike Primenenii Sudami Zakonov, Obespechivayushchikh Obviniaemomy Pravo na Zashchitu} [On Court Practice in Applying Statutes Protecting the Right of the Accused to Defense], para. 2, \textit{BULL. VERKH. SUDA SSSR} [Bulletin of the USSR Supreme Court] 8 (No. 4, 1978) [hereinafter USSR Supreme Court].
\end{itemize}
guilt is proved in the manner provided by statutory law and is established by a court judgment that has entered into force.\footnote{36}

Since the "right to defense" is contained in Article 158, one might conclude that it is there that the Court finds a presumption of innocence. Yet the Court refers to the presumption as a "constitutional principle."\footnote{37} This suggests that it might be located elsewhere in the Constitution than in Article 158, but that it is subsumed as well under the "right to defense," a kind of umbrella provision that covers all rights available to the defense, including the Article 160 right not to be presumed guilty without a court judgment of guilt. If the presumption is located elsewhere in the Constitution, the only other logical choice is Article 160.

Soviet scholars find the presumption in Article 160, rather than in Article 158.\footnote{38} Moreover, a semiofficial commentary to the 1977 Constitution states that Article 160 "contains the important democratic proposition of the presumption of innocence."\footnote{39} One scholar who finds the presumption of innocence in Article 160 believes that the right to defense is included within the presumption of innocence, rather than vice versa. Petrukhin states that "it makes better sense logically" to say that "the right to defense is given to the accused or to the suspect precisely because the statutory law does not yet presume them guilty."\footnote{40}

\begin{footnotes}
\item[36] USSR Supreme Court, supra note 34, at 9 (para. 2).
\item[37] USSR Supreme Court, supra note 34, para. 1.
\item[38] Quigley, The Soviet Bar in Search of a New Role, 13 LAW & SOCIAL INQUIRY 201, 207 (1988). See, e.g., Linin, supra note 19, at 101-02; Libus, Presumptsiia Nevinovnosti i Prekrashchenie Ugolovnykh Del (Opravdanie) [The Presumption of Innocence and the Termination of Criminal Cases (Acquittal)], in SOVETSKOE GOSUDARSTVO I PRAVO 62 (No. 7, 1981); I. Libus, PREZUMPTSIIA NEVINOVNOSTI V SOVETSKOM UGOLOVnom PROTSESSE [THE PRESUMPTION OF INNOCENCE IN SOVIET CRIMINAL PROCEDURE] 54 (1981); Petrukhin, supra note 18, at 18; Strogovich, PREZUMPTSIIA NEVINOVNOSTI i Prekrashchenie Ugolovnykh del po Nereabilitiruuiushchim Osnovaniium [The Presumption of Innocence and Termination of Criminal Cases on Grounds That Do Not Rehabilitate], in SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 70 (No. 2, 1983); Strogovich, supra note 35, at 72. But see Fletcher, supra note 9, at 72; Gori, supra note 10, at 263, who state that the Court found the presumption in art. 158. See also I. Motovilovker, O Prezumptsi Neminovnosti i Priznani Liitza Vinovnym ne inache kak po Prigovoru Suda [The Presumption of Innocence and Recognizing a Person as Guilty Only by Court Judgement], in PROBLEMY PRAVOVOGO STATUSA LICHNOSTI V UGOLOVnom PROTSESSE [ISSUES IN THE LEGAL STATUS OF THE INDIVIDUAL IN CRIMINAL PROCEDURE] 57-58 (1981) (who does not find the presumption of innocence in art. 160, though he finds it to exist in Soviet law).
\item[40] Petrukhin, supra note 18, at 21.
\end{footnotes}
D. The Contemporary Status of the Presumption of Innocence

Since the adoption of the 1977 Constitution, writes one scholar, "statements of some authors have disappeared about the so-called 'bourgeois character' of the presumption of innocence, its methodological frailty, and its inappropriateness for Soviet criminal procedure."41

On the other hand, Fletcher declares that three scholars published articles in 1979-1981 denying the existence of a presumption of innocence in Soviet law.42 However, Fletcher relies on an account of the three writers by Strogovich, who states that the three reject the presumption.43 But of the three writers Strogovich names, only one rejects the presumption (V. D. Arsen'ev).44 The other two, A. P. Guliaev and Ia. O. Motovilovker, both state that the presumption exists in Soviet law. Strogovich disagrees with Guliaev's view that the presumption is not violated by pretrial diversion into a lay court, which occurs upon a finding of guilt by the investigator and procurator.45 He objects that Motovilovker finds the presumption not in Ar-
article 160 of the Constitution,\textsuperscript{46} but elsewhere.\textsuperscript{47}

A presumption of innocence can be said to exist in the U.S.S.R. by one other route. In 1973, the U.S.S.R. ratified the International Covenant on Civil and Political Rights.\textsuperscript{48} This treaty states: “Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”\textsuperscript{49} A 1978 Soviet statute on treaties provided for the first time in Soviet law that “state agencies within whose competence the matters regulated by international treaties of the U.S.S.R. fall shall ensure fulfillment of the obligations undertaken under the treaties by the Soviet side.”\textsuperscript{50} Since the U.S.S.R. is obliged under the Covenant to follow the presumption of innocence, that obligation must be carried out by the courts.\textsuperscript{51}

\textsuperscript{46} M. Strogovich, \textit{supra} note 35, at 79-80; Strogovich, \textit{supra} note 38, at 73 (both citing Motovilovker, \textit{supra} note 38, at 57-58).

\textsuperscript{47} Fletcher finds one other basis on which to doubt the existence of a presumption of innocence in Soviet law. He refers to pre-trial diversion procedures, which are indicated by criminal legislation as applying to persons who have “committed a crime,” \textit{Russia, Criminal Code} (1960), art. 52, and which are referred to in the literature as relief from criminal liability on “non-rehabilitating” grounds. Fletcher, \textit{supra} note 9, at 73. Fletcher says that diversion thus involves a finding that the person committed a crime, which violates the presumption of innocence. His view follows that of Petrukhin, who argues that a court should find the person guilty prior to diversion. \textit{See supra} note 18, at 22-25. Furthermore, Fletcher states that if there is truly a presumption of innocence, diversion would not claim to be done on “non-rehabilitating” grounds, since there would be no need to “rehabilitate” an innocent person. Fletcher’s view here overlooks two factors. First, the cited statutory language was amended in 1981 to remove the words suggesting that pre-trial diversion implies a finding that the person committed a crime. Strogovich, \textit{supra} note 38, at 75; \textit{Ved. Ver. Sov. SSSR} [\textit{Gazette of the Supreme Soviet of the USSR}], No. 7, item 118 (1981). A person released on a “non-rehabilitating” ground is not considered to have a criminal conviction. \textit{Russia, Criminal Code} (1960), art. 57. Second, the term “non-rehabilitating” grounds is found only in the literature, e.g., Petrukhin, \textit{supra} note 18, at 22, rather than in legislation. It is an infelicitous term for the reason Fletcher indicates, but its use hardly suggests that no presumption of innocence exists, since Petrukhin clearly finds one to exist.


\textsuperscript{51} R. Mullerson, \textit{Konstitutsiia SSSR i Voprosy Sootnoshenii Mezhdunarodnogo i Natsional’nogo Prava} 42 (1980). That result follows under prevailing interpretation as it stood prior to the 1978 statute, which held that treaties constitute
E. The Function of the Presumption of Innocence in Soviet Law

As perceived by Soviet analysts, the presumption of innocence provides a general protection to the accused. It also encompasses other more specific protective norms. Savitskii views it as a “generalized, integrated expression of all procedural guarantees that the law has established to protect the lawful interests of the accused.” Strogovich wrote of it that

the issue is not about a single, though important, procedural norm, but about the principle of all the procedural activity directly connected with the adversary nature of the trial and the right of the accused to defense. The entire system of criminal procedure, the entire content of procedural relations, depends on resolving one way or another the issue of presumption of innocence.  

Fletcher views the function of the presumption in Soviet law more narrowly. He finds as the major issue a struggle for supremacy between the courts and the prosecuting agency (procuracy). "Behind the doctrinal moves in the debate lies buried an important institutional struggle between the procuracy and the courts." "The struggle," he writes,

is for influence over the outcome of cases, and the contenders are the two dominant branches of the Soviet legal system: the procuracy and the courts . . . . The problem is whether the procuracy’s pre-trial conclusion should influence the judge’s evaluation at trial. The system is more efficient if the judge can rely on the judgment of the procuracy as he might rely on the judgment of an expert witness. Yet to the extent that the judiciary defers to the procuracy, the trial is that much less a safeguard against convicting the innocent.  

III. U.S.S.R. SUPREME COURT’S READING OF THE PRESUMPTION OF INNOCENCE

Fletcher bases his conclusion that the issue is primarily a

domestic law, according to one view automatically, and according to another if they are self-executing in character. W. Butler, supra note 10, at 344.

52. Savitskii, supra note 3, at 25.


54. Fletcher, supra note 9, at 71.

55. Fletcher, supra note 7, at 1217. Fletcher’s narrow reading of the scope of the presumption and his analysis that it manifests a court-procuracy struggle is shared by Gorlé, supra note 10, at 263.
procuracy-court struggle in part on the 1978 U.S.S.R. Supreme Court decree on the presumption of innocence. Since that decree provides the most authoritative statement on the Soviet presumption of innocence, its relevant language bears quoting:

In order to eliminate shortcomings in the work of the courts, and as result of questions that have arisen in application of legislation, the Plenary Session of the Supreme Court of the U.S.S.R. decrees:

1. To draw the attention of the court to the fact that ensuring the accused (or defendant) the right to defense is a constitutional principle and must be strictly carried out at all stages of the criminal process as an important guarantee for establishing truth and issuing a legally-based, well-founded, and just judgment. Therefore the courts must observe the procedural rights of the accused (or defendant); examine the case file fully and objectively, viewing it from all sides; seek out circumstances not only incriminating but exculpating the accused (or defendant), including those mitigating and aggravating his liability; carefully check out whatever theories of the case there may be; and ensure the equality of rights of participants in the trial as regards presentation and examination of evidence and the making of motions.

In accordance with Article 158 of the U.S.S.R. Constitution and Article 13 of the Fundamental Principles of Criminal Procedure Legislation of the U.S.S.R. and the Union Republics, the courts must ensure to the defendant the opportunity to defend himself from the accusation preferred by all methods and means established by statutory law.

2. In order to ensure to the accused (or defendant) the right to defense, courts must strictly observe the constitutional principle that the accused (or defendant) is presumed innocent until his guilt is proved in the manner provided by statutory law and is established by a court judgment that has entered into force.

On the basis of the statutory law, the obligation of proving the indictment lies on the accuser. As a consequence, it is im-

56. "Accused" (obviniaemyi) refers to a person against whom a state investigator has filed a formal charge. When the "accused" is indicted and bound over to a court for a decision as to whether a trial should be held, he becomes a "defendant" (podsudimyi). RUSSIA, CRIMINAL PROCEDURE CODE (1960), art. 46. By using both terms, the Court indicates that the presumption of innocence applies at both the pre-trial and trial stages.

57. "Judgment" (prigovor) is the trial court's decision, including both a determination as to guilt or innocence, and (in case of guilt) a setting of sentence.

58. USSR Supreme Court, supra note 34, at 8 (para. 1).
permissible to impose on the accused (defendant) the proof of his innocence. A judgment of conviction may not be based on supposition. All doubts that cannot be eliminated must be construed to the benefit of the accused (defendant).  

Fletcher states that the Court stresses the obligation of trial courts to guarantee the equality of rights among all participants. He reads this statement (doubtless accurately) as an injunction that trial courts allow the accused to exercise the rights given to it by procedural law. It means, he says, that "the procuracy has no claim to superior influence."  

According to Fletcher, paragraph one grounds the presumption on the right to defense.

This grounding of the presumption suggests that its function in Soviet legal thinking is to support the aim of equalizing the role of the procuracy and of the defense in conducting the trial. The presumption serves this goal, it seems, by admonishing the court not to defer to the procuracy's pretrial determination of guilt.  

This reading of the 1978 decree exaggerates the issue of procuracy-court relations and the related issue of the evidential weight of the indictment. As viewed by the Court, these are not the only or main aspects of the presumption of innocence. The Court points to a number of additional functions served by the presumption of innocence.

A. *Proof in the Manner Provided by Statutory Law*

One aspect of the presumption, in the Court's view, is that guilt must be proved "in the manner provided by statutory law." This means, says Savitskii, that "guilt must be proved only in the manner provided by statutory law, that is, using types of evidence enumerated in the statutory law and observing procedural forms indicated by statutory law; otherwise information received may not have any evidential weight." Thus, among other consequences, the presumption of innocence inevitably results in a rule requiring the exclusion of illegally obtained evidence.

The rule requiring exclusion of illegally obtained evidence was stated more explicitly in a subsequent decree of the Court: "A court's

59. USSR Supreme Court, *supra* note 34, at 9 (para. 2).
60. Fletcher, *supra* note 9, at 72.
61. Fletcher, *supra* note 9, at 72.
62. USSR Supreme Court, *supra* note 34, at 8 (para. 1).
conclusions may not be based on evidence obtained in violation of the procedural rules for its collection." This rule was applied by the Russian Republic Supreme Court to exclude evidence obtained in a search during which the lay observers required by statute were not present. The U.S.S.R. Supreme Court's inclusion of the exclusionary rule within the presumption of innocence renders that rule a constitutionally mandated one.

The rule that proof must be offered in the manner provided by statutory law has a significance beyond that of illegally obtained evidence. It imports into the presumption of innocence the entire complex of statutory safeguards for the accused. The fact that an accused is presumed innocent means that the state must observe all statutory rules at the pretrial and trial stages, and even, as will be indicated below, beyond the trial stage. This includes protections against coerced confessions, the right to silence, the right to counsel, and the quite liberal discovery rules that permit an accused to view the prosecution’s entire case, including transcripts of statements of all witnesses who will appear at trial, at the end of the preliminary investigation. It also includes, as indicated more fully below, that the indictment carries no evidential weight. Thus, in effect, the U.S.S.R. Supreme Court “constitutionalized” what had formerly been only statutory rules governing the criminal process.

64. Decree No. 15, O dal'neishem Ukreplenii Zakonnosti pri Osushchestvenii Pravosudia [Further Strengthening of Legality in the Administration of Justice], Dec. 5, 1986, in BULLETPN' VERKHOVNOGO SUDA SSSR [Bulletin of the Supreme Court of the USSR] 8, 10 (No. 1, 1987) [hereinafter Decree No. 15].
65. Case of Gieov, BULLETPN' VERKHOVNOGO SUDA RSFSR [Bulletin of the Supreme Court of the RSFSR] 5 (No. 11, 1981) (cartridges found during apartment search cannot be used as basis for conviction of unlawful weapons possession where cartridges were found by investigator in presence of a single lay witness—statute requires two lay witnesses—and in absence of an adult member of the suspect’s household, whose presence is also required by statute). ACCORD, NAUCHNO-PRAKTICHESKII KOMMENTARIU UGOLOVNO-PROTSERESSU NOGO KODEKSA RSFSR [SCHOLARLY-PRACTICAL COMMENTARY TO THE CRIMINAL PROCEDURE CODE OF THE RSFSR] 100 (L. Smirnov ed.1970).
66. RUSSIA, CRIMINAL CODE (1960), art. 179 (prohibition against gaining testimony by threat or other illegal means); RUSSIA, CRIMINAL PROCEDURE CODE (1960), art. 150 (interrogation may not be conducted at night); V. STREMOVSKII, UCHASTNIKI PREDVARITEL'NOGO SLEDSTVIIA [THE PARTICIPANTS IN THE PRELIMINARY INVESTIGATION] 129 (1966).
67. V. STREMOVSKII, suprA note 66, at 108, 129.
68. RUSSIA, CRIMINAL PROCEDURE CODE (1960), arts. 47-50. The right attaches there, for most accused persons, only after the investigator has completed the preliminary investigation.
69. Id., art. 201.
70. See infra text accompanying notes 98-100.
B. Burden of Proof

The Court links the question of burden of proof to the presumption of innocence, stating that the burden lies on the accuser and that the accused may not be required to prove innocence. Thus, burden of proof is another aspect of the presumption of innocence in Soviet law.\textsuperscript{71} “In this decree it is indicated that the rules on burden of proof flow from the constitutional principle of presumption of innocence.”\textsuperscript{72}

The Court’s statement has a broad meaning in Soviet law. It means that the accuser continues to bear the burden of proof, even if the accused pleads guilty prior to or at the beginning of trial. Whereas, in the common law system, a guilty plea leads almost automatically to a finding of guilt,\textsuperscript{73} it has no procedural significance in Soviet law (as in Continental law generally).

Further, in Soviet law the burden of persuasion may not be placed on the accused for any facts relevant to guilt, even those facts raising a defense for the accused. In common law countries, practice on this issue varies. For example, in England the accused is considered to bear the burden of persuasion on an insanity defense.\textsuperscript{74} In many jurisdictions in the United States, the accused bears the burden of proving excuse defenses.\textsuperscript{75} In Soviet procedure, however, the accused does not bear the burden of persuasion for any defense.\textsuperscript{76} Soviet law does not even permit shifting to the accused those presumptions affecting the burden of production, as is the case in common law countries.\textsuperscript{77} Thus, in Soviet law, such factual circumstances as possession of burglar tools or of recently stolen goods do not shift to...
the accused the burden of producing evidence negating the offense.°

Soviet scholars charge that Western countries violate the presumption of innocence by placing such proof burdens on the accused.°

In a 1948 Soviet criminal case, a man named Kalinin, who was responsible for handling cash receipts at his place of employment, was charged with theft after substantial shortages were discovered. The shortages were the only evidence in the prosecution’s case. Kalinin acknowledged the shortages, but said that the money had been stolen from him in a streetcar. He presented no evidence to substantiate that claim. A trial court convicted him of theft. The Criminal Division of the U.S.S.R. Supreme Court confirmed his conviction, stating: “Kalinin, not the state investigative agency, had to prove his claim.” The full bench of the U.S.S.R. Supreme Court, however, reversed the conviction. It held that the quoted statement of the Criminal Division

not only is not based on the statutory law but seriously contradicts the basic principles of Soviet criminal procedure, according to which any accused person is considered innocent until his guilt is proved in the manner established by statutory law. By the content and spirit of Soviet statutory law, it is not the accused who must prove his innocence, but the agencies of accusation that must prove the correctness of the indictment.°

The Court’s 1978 statement that “on the basis of the statutory law, the burden of proof lies on the accuser”°° is significant. When it uses the term “accuser” (obvinitel’), the Court must be referring to the procurator, or the “state accuser” when appearing at trial to support an accusation.°°° But statutory law is not clear on whether

° supra note 11, at 45. Kasumov, supra note 10, at 9.


°°° The Court uses the term “considered” (schitaetsia) in the language quoted. This is the term typically used by Soviet writers in stating the presumption of innocence. It has led to confusion regarding the presumption, since it connotes an actual belief. Some Soviet writers who question the presumption of innocence argue that a prosecutor taking a case to trial cannot “consider” the accused innocent (in the sense of an actual belief in innocence). Others reply that the presumption of innocence does not mean an actual belief in the innocence of the accused.

°°° USSR Supreme Court, supra note 34, at 9 (para. 2).

°°° Kasumov, Spravedlivost’ i Realizatsiia Printsipa Presumptsii Nevinnovnosti na Praktike [Justice and Effectuation in Practice of the Principle of the Presumption of Inno-
the procurator is the sole bearer of the burden of proof. The relevant provision of the criminal procedure statute states that "[t]he court, procurator, investigator, and the person conducting a criminal inquiry shall not have the right to transfer to the accused the obligation of proof." While that provision makes it clear that the burden may not rest on the accused, it does not state precisely where it lies. While many Soviet scholars argue that it lies on the procurator, certain factors make that conclusion less than obvious. In many less serious cases, no procurator or other prosecuting official even appears. If the burden of proof lies on the procurator, who bears it when there is no procurator? Further, where the procurator renounces an accusation at trial, the court is obliged by statute to consider whether, despite the renunciation, there is evidence to support a conviction. In this situation, the procurator is no longer bearing a burden of proof, but the trial nevertheless continues. In addition, at a Soviet trial, statutory law requires the judge, not the procurator, to conduct the primary questioning of witnesses, thereby taking an active role in fact finding.

By its statement that the burden of proof lies with the accuser, the Court must be focusing on cases in which a procurator appears and does not renounce the accusation. Its probable aim is to heighten the significance of the presumption of innocence. For if the court is considered to bear part of the burden of proof, it is more difficult for the court to maintain a presumption of innocence. It is easier for the court to presume innocence where it is considering the evidence passively, rather than actively eliciting information.

The problem with the Court's position, of course, is that the court does take an active role. It does not idly observe the proceedings and accept the evidence presented by others. What the Court must be saying is that even though a court is obliged to actively elicit evidence, it does not bear a burden of proof. In any event, it should not be difficult to maintain a rule that the burden of proof may not

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84. RUSSIA, CRIMINAL PROCEDURE CODE (1960), art. 20.
86. Berman, supra note 4, at 618.
87. RUSSIA, CRIMINAL PROCEDURE CODE (1960), art. 248 ("renunciation by procurator of the accusation does not free the court of its obligation to continue the trial and to decide on general principles the question of guilt or innocence of the defendant").
88. This is a problem for all civil law countries since in civil law countries the court takes the lead in fact-finding.
be placed on the accused. Whether the burden of proof rests on the procurator alone or on the procurator and the court together, the presumption of innocence, as reflected in the cited provision of the criminal procedure statute, does not permit transfer of any proof burden to the accused.  

C. Standard of Proof

The Court also includes under the presumption of innocence the rule that a judgment of conviction may not be based on supposition. This means that guilt must be proved “with exhaustive fullness.” Thus, the presumption of innocence is related to a standard of proof. This issue has been the subject of heated controversy in the U.S.S.R. During the 1930’s, the notion prevailed that “maximum probability” was all that could be demanded. By the 1950’s, this was replaced by a more absolutist standard, referred to as “objective truth.” The latter standard was deemed more consonant with Marxist theories of cognition and better geared to protecting against unjustified convictions associated with Stalinism.

D. In Dubio Pro Reo

Where there is doubt as to whether this standard of proof has been met, the Court holds that an acquittal must follow. This is the meaning of its statement that doubts as to guilt must be construed to the benefit of the accused. The Court thus incorporates within the presumption of innocence the well established civilian maxim, in dubio pro reo. Savitskii finds that this aspect of the presumption of innocence is related to the prohibition of convictions based on supposition, but that it also has a separate meaning. “The rule in dubio pro reo,” he says, “serves as an additional stimulus” to the court “maximally, fully and precisely to clear up all circumstances of the case, to eliminate any possible doubts in the correctness of its

89. Gorgone considers, to the contrary, that if the proof burden does not clearly rest on the procurator, there is no presumption of innocence. Gorgone, Soviet Criminal Procedure Legislation: A Dissenting Perspective, 28 AM. J. COMP. L. 577, 607-08 (1980).
93. Ginsburgs, supra note 92, at 60.
94. Ginsburgs, supra note 92, at 60.
95. USSR Supreme Court, supra note 34, at 9 (para. 2).
96. Savitskii, supra note 3, at 32. Kasumov, supra note 10, at 70.
conclusions.\textsuperscript{97}

**E. Right of Appeal**

The Court also states that the presumption of innocence means that innocence is presumed until a judgment of conviction has entered into force.\textsuperscript{98} A judgment of conviction is entered into force under Soviet law not at the time it is rendered, but only after appeals have been heard or, if there is no appeal, when the time for filing an appeal has expired.\textsuperscript{99} Thus, an additional aspect of the presumption of innocence is that it protects the right of the accused to appeal a conviction. "A convicted person is presumed guilty only after the judgment of conviction has entered into legal force," states Savitskii, reciting this as a consequence of the presumption of innocence.\textsuperscript{100} Judges hearing an appeal are governed by the presumption of innocence and must, as a result, "carefully study the arguments raised in the appeal" and "hear out the explanations of the accused and of the defense attorney at oral argument."\textsuperscript{101} The appellate court is governed by the principle \textit{in dubio pro reo}. Therefore, if it is not certain that the truth was established and that it showed guilt, it must reverse.\textsuperscript{102}

The idea that the presumption of innocence survives a judgment of guilt is illogical, according to opponents of the presumption of innocence, since it means that a court pronouncing a judgment of guilty must continue to presume the person being convicted to be innocent.\textsuperscript{103}

**F. Evidential Weight of the Indictment**

Proof must be made, says the Court, only in the manner pro-

\textsuperscript{97} Savitskii, \textit{supra} note 3, at 32.

\textsuperscript{98} USSR Supreme Court, \textit{supra} note 34, at 9 (para. 2).

\textsuperscript{99} Russia, \textit{Criminal Procedure Code} (1960), art. 356.

\textsuperscript{100} Savitskii, \textit{supra} note 3, at 35 (emphasis in original). \textit{Accord}, Kasumov, \textit{supra} note 10, at 107. Appeal here refers to appeal as of right. A person convicted has a right to appeal to the next higher instance. Further review is discretionary, not a matter of right. If, as not infrequently occurs in serious cases, the trial is held in the supreme court of a union republic, then all review is discretionary. Russia, \textit{Criminal Procedure Code} (1960), art. 325.

\textsuperscript{101} \textit{Teoria Dokazatel'stv}, \textit{supra} note 71, at 445.

\textsuperscript{102} \textit{Teoria Dokazatel'stv}, \textit{supra} note 71, at 445. Some scholars suggest that the presumption extends beyond the appeal stage into discretionary review and review on newly disclosed circumstances. V. Lukashevich, \textit{supra} note 11, at 53. Iakub, \textit{supra} note 21, at 120. \textit{But see Teoria Dokazatel'stv}, \textit{supra} note 71, at 445-46, saying that after entry into force, "the guilt of the convicted person is considered to be established."

\textsuperscript{103} Martynchik, \textit{supra} note 44, at 78. Trusov, \textit{supra} note 22, at 156 (quoting a 1958 statement of USSR Supreme Soviet Deputy B. S. Sharkov).
vided by statutory law.\textsuperscript{104} Statutory law permits a court to base a conviction only on "evidence" received in court.\textsuperscript{105} Types of evidence are legislatively enumerated to include witness statements and material evidence, but do not include the indictment or any opinion of the prosecuting authorities.\textsuperscript{106} Thus, the statutory law prohibits attributing evidential weight to the indictment.\textsuperscript{107}

Even prior to the 1978 decree, Fletcher viewed the presumption of innocence issue primarily as a court-procuracy struggle in reliance on his reading of Soviet proceduralist N. N. Polianskii. In Fletcher's 1968 article, he cites Polianskii as "the leading advocate of the view that the pre-trial finding of guilt does displace the presumption of innocence."\textsuperscript{108} In fact, Polianskii did not take that view. Fletcher quotes Polianskii as follows:

\begin{quote}
It is therefore impermissible to think that the court alone decides the question of guilt. Both investigator and procurator in turn (and in the prescribed form with the appropriate consequences) answer the same question and both, before they can answer the question affirmatively, are bound to overcome every reasonable doubt as to the suspect's innocence.\textsuperscript{109}
\end{quote}

Fletcher suggests that this language means the procurator's decision as to guilt must be accorded evidential weight at trial\textsuperscript{110} and that by this language Polianskii "demoted the courts and furthered the procuracy."\textsuperscript{111}

However, Polianskii neither in this passage nor elsewhere suggested that the decision of the procurator carries evidentiary weight at trial. The fact that the procurator makes a decision as to guilt does not imply that the court should consider that decision as evidence of guilt. In the language quoted above, Polianskii did not in fact say that the investigator and procurator answer the question of guilt "in turn." Fletcher's translation is imprecise. The Russian term

\textsuperscript{104} See supra note 62 and accompanying text.

\textsuperscript{105} Russia, Criminal Procedure Code (1960), art. 301; Russia, Criminal Procedure Code (1923), art. 319.

\textsuperscript{106} Russia, Criminal Procedure Code (1960), arts. 68-88; Russia, Criminal Procedure Code (1923), arts. 57-76.

\textsuperscript{107} Fletcher, supra note 7, at 1221.

\textsuperscript{108} Fletcher, supra note 7, at 1218.

\textsuperscript{109} Fletcher, supra note 7, at 1219. N. Polianskii, Voprosy Teorii Sovetskogo Ugolovnogo Protesssa [Issues in the Theory of Soviet Criminal Procedure] 188 (1956). The word translated by Fletcher as "suspect" at the end of the quoted language is in fact the word "accused."

\textsuperscript{110} Fletcher, supra note 7, at 1218.

\textsuperscript{111} Fletcher, supra note 7, at 1219.
SOVIET PRESUMPTION OF INNOCENCE

means “each in his own way.” The difference is significant, because Polianskii distinguished the decisions made by the procurator and by the court on the basis of the procedural function of each. Polianskii so indicated in a footnote he appended to the quoted language (but which Fletcher omits), in which he states:

It is scarcely necessary to note by way of reservation that the significance of the decision on the question of guilt by the investigator and procurator, on the one hand, and by the court, on the other, is different, since a positive answer by the investigator or procurator on the question of guilt has only procedural consequences, while a positive answer by the court is accompanied by a very important material consequence—assignment of punishment.

Polianskii, writing in 1956, found the presumption of innocence to derive from the provision in the 1936 U.S.S.R. Constitution on the “right to defense,” which clearly applied at the trial stage, and on Article 326 of the 1923 Russian Criminal Procedure Code, which required acquittal if insufficient evidence were presented at trial. Polianskii thus found the presumption to operate at trial.

In a 1949 article, Polianskii made it clear that the presumption prohibits attributing evidentiary weight to the indictment:

The presumption of innocence is directed against preconceptions, against a one-sided approach in evaluating the circumstances of a case, against bias as result of circumstances taken as proof of the guilt of the accused without placing them against other circumstances that cast doubt on the evidentiary significance of the former.

Thus, in Polianskii’s view, the presumption of innocence cautions the court not to accept incriminating facts in the indictment at face

112. The term is po-svoemu.

113. N. POLIANSKII, supra note 109, at 188. “Procedural consequences” means that the only significance of the procurator’s decision is that it moves the case to court. Fletcher cites V. Arsen’ev as “agreeing” with Polianskii that the investigator “decides” the question of guilt, citing V. Arsen’ev, VOPROSY OBSCHEI TEORII SUDENNYKH DOKAZATEL’STV [ISSUES IN THE GENERAL THEORY OF JUDICIAL EVIDENCE] 134 (1964). However, Arsen’ev also makes it clear that the decisions made at various stages are different “in their extent” and that the decisions by the investigator and procurator have procedural consequences only. Id.

114. N. POLIANSKII, supra note 109, at 185.

115. N. POLIANSKII, supra note 109, at 185. See to same effect Polianskii, K Voprosu o Prezumptsi Nevinovnosti v Sovetsknom Ugolnovnom Protesse [The Issue of the Presumption of Innocence in Soviet Criminal Procedure], in SOVETSKOE GOSUDARSTVO I PRAVO [SOVIET STATE AND LAW] 57, 59 (No. 9, 1949). See also for disagreement with Fletcher’s reading of Polianskii, Berman & Quigley, supra note 21, at 1237-38.

116. Polianskii, supra note 115, at 63-64.
The issue of the evidentiary weight of the indictment is more difficult in Soviet law than in most other legal systems, since according to the prevailing view, the procurator must be “convinced” of guilt before endorsing the indictment. This standard is higher than the probable cause standard used in other countries. A high standard for indictment is desirable if the objective is to keep the innocent from being placed on trial. But it makes it more difficult to presume the accused innocent at trial.

Nonetheless, Soviet scholarship today uniformly holds that the indictment carries no evidential weight at trial. “The conviction of the investigator and of the procurator who endorsed the indictment, does not mean that the accused is really guilty and that the presumption of innocence no longer functions.” The fact that the procurator is certain as to guilt “is not a feasible basis for a final conclusion as to guilt.” “For the court an indictment confirmed by a procurator,” states one scholar, “is only a basis for discussing the question of putting the accused on trial.”

and the file of the preliminary investigation, which are studied by the judges, cannot but give them a certain impression about the case. . . . . This being so, the presumption of innocence is one guarantee that the court will approach objectively and without preconceptions its examination and evaluation of the facts and its checking of the file of the preliminary investigation.

Furthermore, a 1966 procuracy treatise on evidence states:

the conviction of the procurator (and investigator) about the guilt of the accused does not mean that the accused is really

117. N. Polianskii, supra note 109, at 187. Teoriiia Dokazatel'stv, supra note 71, at 442. V. Lukashevich, supra note 11, at 52. Libus, The Presumption of Innocence and the Termination of Criminal Cases (Acquittal), supra note 38, at 62. Criminal procedure legislation, curiously, does not specify the standard to govern the procurator's decision to endorse an indictment. See Russia, Criminal Procedure Code (1960), art. 214(1) (stating only that procurator is to endorse if “bases exist to send the case to court”). W. Butler, supra note 10, at 316.

118. Martynchik, supra note 44, at 78-79, 83.

119. Petrukhin, supra note 18, at 21.

120. Libus, The Presumption of Innocence and the Termination of Criminal Cases (Acquittal), supra note 38, at 62.

121. A. Larin, supra note 19, at 35. Trial judges “must operate on the basis of the presumption of innocence,” states one author, “despite the conclusion of the investigator and procurator that the guilt of the accused has been proved beyond doubt.” V. Lukashevich, supra note 11, at 55.

122. Iakub, supra note 21, at 120.
guilty and that the presumption of innocence is inoperative with respect to him. The conclusions of the indictment must be verified by the court, which is also governed by the presumption of innocence.\textsuperscript{123}

G. Other Aspects of the Presumption of Innocence

Some Soviet scholars find ramifications of the presumption of innocence even beyond the confines of criminal procedure law.\textsuperscript{124} Some would apply it to a broader range of pretrial matters than indicated by the Supreme Court.\textsuperscript{125} That approach is consistent with the historic origin of the presumption of innocence in Continental law. The presumption first appeared there in France's Declaration of the Rights of Man and Citizen as a pretrial protection.\textsuperscript{126} More rigorous application of the presumption at the pretrial stage could significantly impact on Soviet procedure, particularly as regards right to counsel and pretrial incarceration. Soviet suspects in most situations are entitled to counsel only after the investigation has been completed,\textsuperscript{127} and a high percentage are denied release pending trial.\textsuperscript{128}

IV. THE PRESUMPTION OF INNOCENCE IN PRACTICE

Judges are criticized by Soviet defense attorneys for discriminating against them in trials. The U.S.S.R. Supreme Court has confirmed their perception. The Court in 1986 called on judges "to stop showing disrespect for the defense in criminal cases."\textsuperscript{129}

Many Soviet jurists are concerned that judges do not place the presumption of innocence into practice, and that they convict on insufficient evidence. A 1982-1983 survey of 305 judges found that forty percent disagreed with the statement: "It is better to acquit ten guilty persons than to convict one innocent person," a question

\textsuperscript{123} Teor`ha Dokazatel'stv, supra note 71, at 442.
\textsuperscript{124} E.g., a prohibition against eviction from an apartment or dismissal from a job, negative pretrial publicity. A. Larin, supra note 19, at 38-44.
\textsuperscript{125} E.g., decisions about pretrial incarceration, decisions to charge and to indict are to be made with awareness of the presumption of innocence. Iakub, supra note 21, at 119. Teor`ha Dokazatel'stv, supra note 71, at 439-43. Kasumov, supra note 10, at 81-83.
\textsuperscript{126} Berman, supra note 4, at 622.
\textsuperscript{127} See supra note 68.
\textsuperscript{128} Pretrial confinement is authorized for a large number of serious offenses on the basis of the seriousness of the offense alone, without a need for a finding that the accused is likely to escape or obstruct the investigation if released. Russia, Criminal Procedure Code, art. 96 (1960).
\textsuperscript{129} Decree No. 15, supra note 64, at 8.
designed by the surveyors to express in "polemical form" the issue of presumption of innocence. In another survey, 200 Moscow defense attorneys were asked whether in the year 1985 they had represented a client they believed innocent who was found guilty at trial. Eighty-three percent said they had. A survey of Soviet defense attorneys who emigrated to the West elicited similar answers.

Many Soviet defense attorneys say that judges are often unwilling to acquit innocent defendants. They say that in the mid-1960's there developed "an increase in bias towards the prosecution" on the part of trial judges. "There were departures from the principle of construing doubts in favor of the accused, not-guilty judgments have practically 'died out,' and criminal repression has increased."

The Chief Justice of the U.S.S.R. Supreme Court, V. I. Terebilov, echoed these sentiments in a 1986 speech decrying the frequency with which courts unjustifiably convict the accused. He said that trial judges questioned about dubious guilty verdicts reply that "it is a matter of evaluating," or "the evidence in the case was contradictory," or "the evidence in the case was lost as result of poor conduct of the preliminary investigation." Terebilov asked why, in such situations, the court's doubts are construed not in favor of the defendant, but in favor of the accusation. There exists, Terebilov complained,

a presumption of innocence. It is written into our statutes and into explanations of the plenary session of the U.S.S.R. Supreme Court. In the theory of criminal law it is generally recognized that all doubts as to whether the accusation was proved, if they cannot be eliminated, are construed in favor of

130. The survey was of 105 chief judges of large rural people's courts throughout the USSR, of 131 chief judges of people's courts in the Russian and Ukrainian republics, and of sixty-nine appellate judges. Reznik, Advokat: Prestizh Professii [The Advocate: Prestige of the Profession], in ADVOKATURA i SOVREMENNOST', supra note 3, at 57, 61-62.

131. Reznik, supra note 130, at 62-63. The surveyor acknowledges possible bias and self-interest in these responses.


133. Reznik, supra note 130, at 60.

134. XXVII S'ed KPSS i Zdachi po Sovremennosti Sudebnoi Deiatel'nosti: Doklad Predsedatelia Verkhovnogo Suda SSSR V. I. Terebilova na Plenume Verkhovnogo Suda SSSR ot 16 Aprelia 1986 g. [The 27th Congress of the CPSU and Tasks to Improve Court Work: Report of the Chair of the Supreme Court of the USSR V. I. Terebilov at the Plenary Session of the Supreme Court of the USSR, April 16, 1986], BIULETEN' VERKHOVNOGO SUDA SSSR [Bulletin of the Supreme Court of the USSR] 4, 6 (No. 3, 1986).

135. An evident reference to 1978 Decree, supra note 34. Terebilov evidently means that a presumption of innocence is implied in statutes since it is not stated expressly.
the defendant. But for certain judges all this is still not clear.\textsuperscript{136}

Judge Terebilov said elsewhere that many trial judges who realize they should not convict, but who are reluctant to acquit, send the case back to the procurator for additional investigation. He said that there are only several hundred acquittals per year in Soviet courts.\textsuperscript{137} The U.S.S.R. Supreme Court has called for “elimination of the practice that has developed in some courts of remanding cases for additional investigation when evidence is lacking to confirm the accusation and all possibilities for getting additional evidence have been exhausted. Under such circumstances the court is obliged to enter an acquittal.”\textsuperscript{138} The Court also called for “elimination from court practice of unjustified conviction, which is a serious violation of socialist legality that infringes the rights of citizens and undermines respect for the system of justice.”\textsuperscript{139}

Even the Central Committee of the Communist Party of the Soviet Union has criticized trial judges for bias. In 1986, that body called for an end “to a preconceived, tendentious approach in criminal inquiry, preliminary investigation, and court trials, to delay, and to a hardened indifference to the fate of people.”\textsuperscript{140} The Party Conference held in 1988 called for closer following of the presumption of innocence and criticized “prosecutorial bias” in the courts.\textsuperscript{141}

Terebilov also criticized judges for convicting on the basis of the investigator’s file by giving substantial evidential weight to the indictment.\textsuperscript{142} Terebilov’s predecessor, A. F. Gorkin, stated that some judges simply “stamp the indictment.”\textsuperscript{143}

Terebilov said that many judges do not scrutinize evidence where the defendant has confessed, although under the criminal procedure statute, a confession must be

\begin{itemize}
\item \textsuperscript{136} Terebilov, \textit{supra} note 134.
\item \textsuperscript{137} Interview of V. I. Terebilov on Moscow Television program entitled \textit{Pravosudie i Sovest’} [\textit{Administration of Justice and Conscience}], Jan. 23, 1987, 7:40 to 8:40 p.m. Moscow time.
\item \textsuperscript{138} Decree No. 15, \textit{supra} note 64, at 9-10.
\item \textsuperscript{139} Decree No. 15, \textit{supra} note 64, at 9.
\item \textsuperscript{140} Central Committee, Communist Party of the Soviet Union, \textit{O dal’neishem Ukreplении Sotsialisticheskoi Zakonnosti i Pravoporiadka, Usilenii Okhrany Prav i Zakonykh Interesov Grazhdan} [\textit{On Further Strengthening of Socialist Legality and Legal Order and on Improving the Protection of Rights and Legal Interests of Citizens}], Pravda, Nov. 30, 1986, at 1. The Pravda text is close to a verbatim text of the Central Committee decision.
\item \textsuperscript{141} \textit{Rezoliutsii XIX Vsesoiuznoi Konferentsii KPSS: O Pravovoi Reforme} [\textit{Resolutions of the 19th All-Union Conference of the CPSU: On Legal Reform}], Izvestiia, July 5, 1988, at 3, col. 1.
\item \textsuperscript{142} Terebilov, \textit{supra} note 137.
\item \textsuperscript{143} Quoted in A. Larin, \textit{supra} note 19, at 75, and characterized as “serious violation of presumption of innocence.”
\end{itemize}
confirmed by the totality of the evidence.144

V. CAUSES AND SOLUTIONS

Even though a presumption of innocence was not expressly stated in the 1958-1960 criminal procedure codes, or in the 1977 Constitution, many Soviet jurists have continued to call for such an explicit provision.146 Their aim is to pressure trial judges to be more impartial in assessing evidence. The Central Committee of the Communist Party now stands firmly behind the jurists in this endeavor.

Terebilov gave several explanations for the tendency of judges to convict on less than sufficient evidence. Some judges are not "sufficiently principled" or lack "civic courage." In some cases "lack of objectivity is the result of the influence of officials, or a consequence of the artificial fanning of public opinion by the press or by other means."148 The Supreme Court put the onus on judges to resist outside interference, calling on them "to cut off any attempts at interference in the resolution of specific court cases and to ask appropriate agencies to call such officials to strict account."147 The Central Committee instructed Party agencies not to try to influence judges on specific court cases.148

The problem of Party interference is seen as two-sided. Weaker judges, it is argued, are more likely to follow improper suggestions of Party officials. Until recently, judges were elected in general elections for a term of five years.149 They were renominated by local Party officials, hence their dependence on them. In order to reduce judges' dependence on local Party officials, the Supreme Soviet in 1988 increased judicial terms with nomination at a higher level.150

VI. INSTITUTIONAL FORCES IN THE DISCUSSION OF THE PRESUMPTION OF INNOCENCE

The presumption of innocence has played a major role in the U.S.S.R. in efforts since the 1940's to improve legal safeguards for the accused in the criminal process. The presumption in the 1940's

144. Terebilov, supra note 137. RUSSIA, CRIMINAL PROCEDURE CODE (1960), art. 77.
146. Terebilov, supra note 134, at 6.
147. Decree No. 15, supra note 64, at 9.
148. Central Committee, supra note 140.
149. USSR CONST., art. 152.
150. Id. (as amended Dec. 1, 1988 (terms of ten years)).
and 1950's was a rallying cry for better rights protection. Currently, it continues to play a similar role. Those advocating explicit incorporation of the presumption in legislation evidently find in it what Fletcher calls its "rhetorical function."\textsuperscript{151} They think that if the criminal procedure code's language explicitly states "presumption of innocence," trial judges are likely to be fairer to the accused, even if such a legislative statement would not add measurably to the many individual current legislative provisions that incorporate aspects of the presumption.

The institutional forces at work in the discussion of the presumption shed light on the presumption's real or desired function in Soviet law. Fletcher finds it to be, as indicated, a struggle between the courts (supporting the presumption) and the procuracy (opposing it). In a 1968 article, George Ginsburgs also saw a struggle, but he found it to be between the legal professionals (as champions of judicial independence supporting the presumption) and "the Party bureaucrats (who, through the procuracy, want to retain direct control of the judicial process)."\textsuperscript{152}

The fact that the 1958-1960 criminal procedure codes effectively accepted the presumption would seem to blunt the sharpness of either perceived struggle.\textsuperscript{153} Incorporation of the presumption by the Supreme Court in 1978 would seem to blunt it further still. Moreover, in 1986 the Communist Party condemned judges for bias against the accused.\textsuperscript{154} With both the Supreme Court and the Communist Party exhorting trial judges to be more fair, it is hard to see the judges as the champions of the presumption and the Communist Party as its opponent. Furthermore, the procuracy appears to support the presumption.\textsuperscript{155}

There are certainly some jurists in the U.S.S.R. who promote the presumption of innocence more strongly than others. This is true among academics, judges, and even defense attorneys. But no clear institutional lines on the issue can be drawn.

\textbf{VII. LESSONS FROM THE SOVIET EXPERIENCE}

The presumption of innocence is viewed by the U.S.S.R. Su-
preme Court and by Soviet scholars as playing a broad role in ensuring fairness in criminal trials. They read into the presumption more than is generally attributed to it in other countries. Both common law and other civil law jurisdictions typically find in the presumption prohibitions against (1) according evidential weight to the indictment, (2) placing proof burdens on the accused, (3) convicting on other than a high standard of proof, and (4) convicting where it is not clear that the proof standard has been met.  

However, the Soviet approach finds in the presumption of innocence certain safeguards for the accused not found in the presumption as understood in common law countries. The Soviet approach includes, for example, a prohibition against admissibility at trial of illegally obtained evidence. This is an issue that in common law countries has not been linked to the presumption, although in the United States, at least, there is protection against admissibility of illegally obtained evidence. It also includes broad discovery rights for the accused, rights broader than those found in common law countries. It further includes a right to have guilt determined through evidence-taking, even after the accused has pled guilty. In common law countries such evidence-taking is also required, but is typically perfunctory. The Soviet presumption also includes the right to appeal from a conviction. Common law jurisdictions normally provide one appeal as of right, but the United States Supreme Court has held that a convicted person does not have a constitutional right to an appeal.

In Soviet law the presumption of innocence prohibits imposition of proof burdens on the accused, even for defenses. In common law jurisdictions, the accused bears the burden of persuasion on many

156. Patarin, supra note 2, at 14-24. J. Wigmore, supra note 2, at 530.
157. See supra text accompanying notes 63-65.
159. See supra note 69.
160. In the United States statutory rights of discovery vary by state and typically include the right to be informed about certain incriminating evidence. An accused in the United States has a constitutional right to pretrial disclosure of exculpatory information in the prosecution's possession, Brady v. Maryland, 373 U.S. 83, 87 (1963), but not of incriminating information that will be used at trial. Weatherford v. Bursey, 429 U.S. 545, 555 (1977).
161. See supra text accompanying note 73.
162. Fed. R. Crim. P. 11 states that "[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."
163. See supra text accompanying note 98-102.
defenses. In common law jurisdictions the accused also bears the burden of production on certain defenses. In Soviet procedure, the rules on burden of proof, incorporated within the presumption, do not allow even that burden.

Finally, with the issuance of the U.S.S.R. Supreme Court's 1978 decree, the presumption of innocence became constitutionalized in Soviet law. The United States Supreme Court has never found the presumption constitutionally required, though it has found in the United States Constitution important elements of the presumption, namely rules on standard of proof and burden of proof.

VIII. CONCLUSION

Currently, there is little controversy in the Soviet Union over the legal status or scope of the presumption of innocence. The presumption appears solidly established as a matter of constitutional law, though it is not expressed explicitly in legislation. Current discussion of the presumption in the U.S.S.R. relates less to theoretical aspects than to practical aspects. The presumption is viewed as a useful educational device to convince judges to conduct trials fairly.

In Soviet law the presumption of innocence encompasses a wide variety of norms protecting the accused. This broad meaning of the presumption holds potential lessons for common law jurisdictions.

165. See supra note 75.
166. Strogovich, supra note 53, at 270 (noting that Vyshinskii disagreed with this view); Arsen'ev, supra note 113, at 68 (in Soviet procedure accused is "not obliged even to mention his sources of evidence," but state investigator and court are obliged to investigate the issue).