CJM
CRIMINAL JUSTICE MATTERS

CUSTODY IN THE USSR

Recent Changes

The current interest in the problems of criminal procedure prompts us to look abroad for ideas and comparisons. One source of inspiration which has been little tapped in the past is the Soviet legal system. Recent reforms have not only made information about their criminal justice system more accessible, but have brought their procedure more in line with systems of countries in western Europe and hence more amenable to comparison.

It is interesting to see that two major topics of recent concern in Soviet criminal procedure are ones which have also been subjects of discussion and reform in England. These are firstly, the right of access to a lawyer whilst in custody, and secondly, the time period that a suspect can be held in custody before trial. Here, these issues have been highlighted by revision of the PACE (Police and Criminal Evidence Act) Codes of Practice, and by provisions in the Prosecution of Offences Act 1985 which allow the Secretary of State to set maximum limits on pre-trial custody. In the Soviet Union, they have come into prominence as a result of major reforms in the existing pre-trial criminal procedure, in line with the Soviet government's stated aim of ensuring a right to defence and the presumption of innocence.

By tradition, Soviet criminal procedure is more like the French (inquisitorial or investigative) than the Anglo-American (adversarial or accusatorial). Depending on the seriousness of the offence, there will be an 'inquiry' usually conducted by the police, followed for more serious crime by a 'preliminary investigation'. Unlike France, where the preliminary investigation is supervised by a judge (albeit a junior-level judge), in the Soviet Union the investigative stage is under the overall supervision of the Procuracy. The Procuracy as an institution is almost unique to the Soviet legal system, and combines the role of state prosecutor with that of ombudsman and general guardian of legality. The aim of the 'preliminary inquiry' stage is to ascertain the truth as to what happened. Until recently, the official view was that the agency of inquiry which conducts the investigation - usually the police - could and would be objective in the way that it investigated the facts.

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This attitude justified the restriction that used to exist on the right of access to a defence counsel. If the investigator is merely objectively discerning the truth, why does the accused need the services of a lawyer? Before we scoff too much, we might remember that very similar reasoning was used in England to justify the fact that, before the 1836 Trial for Felony Act, a defendant accused of felony did not even have the right to legal representation at trial.

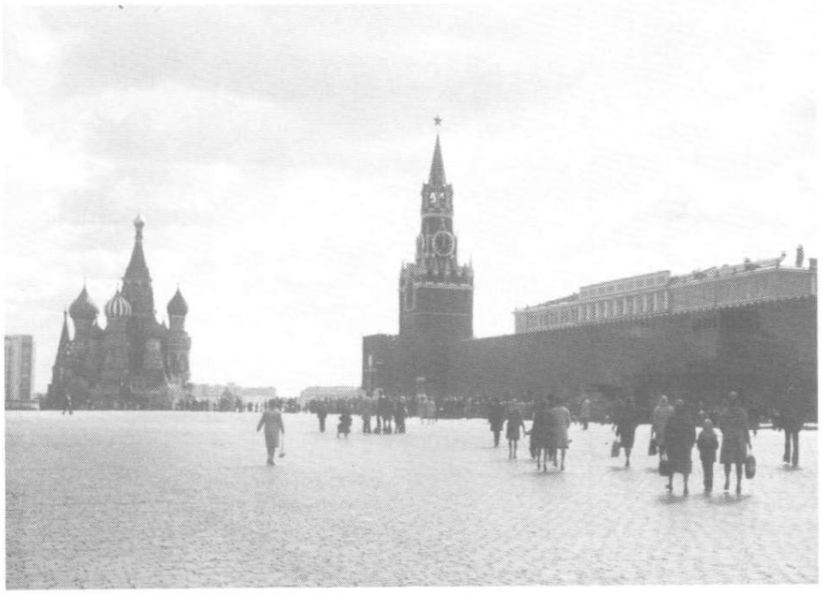
In 1972, Soviet procedure was altered to allow the possibility of defence counsel being present during the preliminary investigation stage. Unfortunately, the express permission of the Procuracy was needed, unless the defendant was suffering from some form of disability. However, in practice, it was rare for the accused to get defence counsel's assistance at that stage. More usually, their first sight of a lawyer would be after the conclusion of the preliminary inquiry, when all the materials had been gathered and the decision formally taken that the case must go forward to trial. The Russian Code of Criminal Procedure specified that there had to be at least three days between the conclusion of the preliminary inquiry and the trial, to give the defence time to familiarise themselves with the materials of the case.

New Rights of the Accused

This changed in April 1990. Legislation endowed the accused with the right to defence counsel from the 'moment of presentation of the accusation' - that is the beginning rather than the end of the preliminary investigation. Further, if the accused is in custody before that moment, he is allowed access to defence counsel within twenty-four hours of being restrained in custody at the latest. Provision was also made to help to find a lawyer, and to assist with costs, although if convicted there may be a duty to recompense. According to the law, defence counsel has the right '... after the first interrogation ... to have meetings privately without restriction of their quantity or duration'.

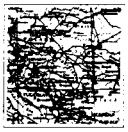
The reforms, although grudging in some aspects, go further than many had expected in opening up the investigation stage to defence scrutiny. This radically alters the balance of the procedure, and gives defence counsel a new role that will be unfamiliar to most of them. It is too early yet to judge how the extended rights to a lawyer will work in practice: there are many lessons to be learned and years of past practice to overcome.

The second area of reform in Soviet



Martin Farrell

Red Square and the Kremlin



criminal procedure which mirrors our own concerns is to do with custody limits. Here however, the two systems seem to be diverging, as we begin to think of imposing absolute limits, and the Soviets move towards extending their existing limits and removing an absolute maximum.

There are two aspects of Soviet procedure subject to time limits. One is the period of 'confinement under guard'; that is, remand in custody whilst inquiry and investigation take place. The other is the period of the preliminary investigation itself. These clearly may be related, but separate provisions exist for each. In both cases, the possible period has been lengthened.

In USSR, the normal period for the preliminary investigation is now set at three months (formerly two), with the possibility of permission for extension by a further three (again, rather than two). There is no upper absolute limit for the length of time that the preliminary investigation may take, but a long investigation with the accused in custody might fall foul of the other set of time limits.

Soviet legislation at the end of 1989 extended the custody time limits. Before that, there was a theoretical absolute maximum of nine months, requiring the permission of the highest Procurator in the land for such a long pre-trial custody. Now, his deputy may permit confinement up to a year, and the Procurator-General himself, up to a year and a half. Further extension is not permitted: in such cases the accused '... shall be subject to immediate release'. However in the past there was no sanction if the time limits were exceeded. The procedure for complaint was by petition to the Procuracy, but since it was the Procuracy which was overseeing the confinement, such petition seemed futile.

These long limits may be contrasted with the experimental limits that are being tried in some areas of England, following Scottish experience. The result of exceeding them may also be contrasted with the Soviet provision for immediate release. S.22(4) of the Prosecution of Offences Act 1985 contains the extraordinary provision that where limits have been set and are exceeded. ' ... the accused shall be treated, for all purposes, as having been acquitted of that offence.' The pragmatic Soviets allow their accused out, but not to walk free of the accusation.

Time will tell for both legal systems how the reforms will work. In England, the Secretary of State has not yet imposed nationwide limits. In the Soviet Union, the possibility of extended custody has been mitigated by the right to legal advice throughout the period. It will be interesting to see if the eventual result in either country appears to make justice more accessible.

Jane Henderson *is Lecturer in the Laws of Eastern Europe, Centre of European Law, Kings College London.*