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BRITISH AND RUSSIAN CRIMINAL JURISPRUDENCE.*

Any comparison of the British and the Russian systems of criminal jurisprudence must of necessity take into consideration three outstanding factors. The first of these consists of the fact that the British system, like the British Constitution, is a growth, while the Russian system, like the Russian Constitution, is a fabric. The former is merely one of the many manifestations of the . . . spiritual development of the people; the latter is a machine created for the purpose of meeting a present emergency. The second factor is racial and geographic. Great Britain is an island of no great size, isolated to a considerable extent from the rest of the world. At the time in which its system of jurisprudence underwent its most important development, the various races constituting its population had become fused into a homogeneous unit. Standards of conduct had become uniform. Traditions had been formed and solidified and the jurisprudence was naturally moulded by and conformed to those traditions and standards. Russia, on the other hand, is an enormous country, peopled by many races, of many creeds and having widely differing standards of conduct. This second factor may prove of much greater importance in its effect upon jurisprudence in the future than appears to-day. To impose uniform standards of conduct upon peoples of differing races, creeds and traditions requires the iron hand of a very powerful and single-minded executive; in effect, a despotism. Whether a despotism can exist for a period of time long enough to substitute the new standards for the old, lies in the realm of prophecy.

The third factor is the difference in point of view. The Russian rulers of to-day have no illusions on the subject of the rights of the individual. To them one consideration, and one only, is of import-

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ance—the preservation of the existing scheme of government. Their system of jurisprudence is, therefore, naturally and logically designed to give effect to this mental attitude.

In our system the first consideration is the rights of the individual. The welfare of the *pro tempore* Government is entirely outside judicial concern. The Russian looks upon the judiciary as a weapon in the hands of the executive; we view it as a shield on the arm of the subject.

I do not consider it necessary to give any description of our system to a gathering of British lawyers. We are all familiar with at least its essential elements. It has its strength and its weakness, but on the whole seems to suit admirably our ideals and our traditions.

When the old regime in Russia fell, those who came to power, following, whether consciously or unconsciously, the example of the French Revolutionists, discarded all old systems and built anew from the ground up. There is, therefore, nothing to be gained by a study of the system that existed in Russia before the Revolution. Indeed there is nothing to be gained by a consideration of the period of experimentation that covered the first five years following the Revolution. It is with the system that exists to-day, constructed during the past decade, the machine now functioning, that we are concerned. We ought indeed to be concerned with it from a motive far deeper than mere curiosity.

Politically, Russia consists of a number of independent republics joined together in a more or less loosely knit union. The sovereignty of each republic is carefully preserved. The union, or as we might term it, the Federal Authority, controls Foreign Affairs, War and Marine, Trade, Transport and Posts and Telegraphs. Each of the constituent republics, therefore, has its own judicial system, but for the purposes of this paper it is expedient to consider only that obtaining in the largest of the republics, the Russian Socialist Federal Soviet Republic, since it is typical of them all.

The court system in that republic, which I shall hereinafter refer to as the Russian system, is a three-story edifice. The highest story of this edifice is the Supreme Court. It has control over every phase of judicial activity. At its head is the President of the Court, corresponding to our Chief Justice, who has a deputy, and at the head of each department is a president.

All these officers are appointed directly by the All-Russian Central Executive Committee. The other judges are also appointed by this Committee, but on the nomination of the Commissariat of

Justice, with the consent of the President of the Court. The judges may be recalled by the body appointing them.

The Plenum of the Supreme Court, consisting of all its judges along with the Procurator of the Republic and his first assistant, is the highest authority on all judicial matters and has entire supervision over all other courts. It may modify verdicts, sentences and decisions of any of its own departments or of any other Court. It is through the exercise of these wide powers by the Plenum of the Supreme Court that uniformity is sought to be brought into Russian jurisprudence. The Presidium of the Supreme Court, consisting of the President, his deputy and the presidents of the three departments, is an administrative and supervisory body. Among its many duties are the assigning of judges to the various departments, the inspection and investigation of other courts and the suggestion of changes in the personnel of courts. In effect it is the executive branch of the Supreme Court.

The Supreme Court itself is divided into three departments, the judicial, the cassational and the disciplinary.

The Judicial Department of the Supreme Court is the highest court of original jurisdiction in the republic. Its particular function seems to be the trial of offences committed by public officers and Judges.

The Cassational Department is the appellate division. Its powers are somewhat wider than those enjoyed by our appellate courts. It may reduce a sentence imposed by a lower court even below the limit fixed by the Criminal Code. Ordinarily its decisions are final, but in extraordinary cases an appeal lies to the Plenum, or, as we might say, to the Court en banc, and its findings may in some instances be appealed to the All-Russian Central Executive Committee.

The function of the Disciplinary Department is to take charge of proceedings against members of the judiciary.

The story next below consists of the Provincial, Regional and Circuit Courts. In constitution they are similar to the Supreme Court. As the name implies, the Provincial and Regional Courts have jurisdiction within a certain territory. In some parts of the republic new administrative units have been established, called Regions. These Regions in some instances embrace a number of Provinces. In the Regions the Regional and Circuit Courts take the place of the Provincial Courts. The Circuit Courts were formed to take care of the surplus work of the Regional Courts and are subordinate to them. In constitution and functions the Regional and

Circuit Courts are identical with the Provincial Courts, except that the Circuit Court has no department of cassation.

The lowest but the most important story is the People's Court. This was the original court of the Soviet Republic. It was intended to be the only court dealing with criminal cases, but with the development of Russian Jurisprudence a considerable portion of its powers has been transferred to the Provincial and Regional Courts, and at present it has jurisdiction over only the less serious offences, although of late a tendency to extend that jurisdiction has appeared through the transfer of cases from the Provincial Courts. Despite this curtailing of its powers, the People's Court tries nearly ninety per cent. of all criminal cases. In this respect at least it bears a resemblance to our Police Courts. A People's Court consists of one permanent judge and two temporary co-judges. The permanent judge is elected for a period of one year by the Provincial Executive Committee, or in some cases by the City Soviet on the nomination of the Provincial Court or of the Commissariat of Justice. He is elegible for re-election and may be recalled by the body electing him. In order to hold the position of permanent judge a citizen must have the right to vote and a record of two years' service in a governmental institution or in a workingman's, a peasant's, a social or a professional organization, or three years' service in a position not lower than People's Inquisitor.

The temporary co-judges are elected as follows: A roll of the names of those elegible for the office is prepared for each district, made up so as to give working men fifty per cent. of the names on the roll, peasants thirty-five per cent., and the military fifteen per cent. From the names on this roll the factory, village and military committees select the number assigned to them to serve as temporary judges. A special commission assigns them to their respective turns of duty. The position of co-judge may be held by any Soviet citizen who has the right to vote and who has not been expelled from an organization for misconduct.

No co-judge is permitted to sit for more than six consecutive days in any one year. No special qualification or training is required, although the co-judge is expected to attend conferences and special evening classes in preparation for his duties. When his turn of office of six days or less expires, the co-judge returns to his factory, village or barracks and another workman, peasant or soldier takes his place.

An appeal lies from the People's Court to the Cassational Department of the Provincial or Regional Court, and from it to that of the Supreme Court.

In addition to these Courts in each republic there exists the Supreme Court of the Union. Unlike our Supreme Court, it is not merely an appellate court; it is under the jurisdiction of the Central Executive Committee of the Union, and its duties are:

(a) To give to the Supreme Court of the constituent republics authoritative interpretations of federal legislation.

(b) To examine, at the request of the Procurator of the Union, the decisions of the Supreme Courts of the constituent republics to ascertain if they contain any infraction of federal laws or anything harmful to another republic.

(c) To pass upon the constitutionality of the laws enacted by the republics.

(d) To settle legal disputes between republics.

(e) To examine and possibly try charges against high officials relative to the performance of their duties.

This Court, however, plays a very small, if any, part in the Russian system of criminal jurisprudence.

In this necessarily brief and somewhat sketchy description of the constitution and functions of the Russian Courts one can see little that is antagonistic to our ideas of a proper court system. It supplies a complete equipment of superior and inferior courts, with adequate right of appeal.

No description of the Russian court system would be complete without some reference to an official whose prototype with us is entirely divorced from the constitution of the court. The Procurator forms an integral part of the Russian judicial system. He is joined with the presidents in making up the Plenum of the Supreme Court. He is often chosen from the working class, but usually has some professional training. His functions are preparing criminal cases for trial and prosecuting the more serious ones in court, upholding the interests of the State and safeguarding justice in civil cases.

Every branch of the Soviet Government is supervised by some industrial organization or by some popular body, and the Procurator is directly responsible to the electorate. "Representatives of the workers attend at the Procurator's office when they are off duty and see that the work is conducted in accordance with Communist principles. They are concerned with the political and not with the legal aspects, and the aim is to secure what is there regarded as the virtue and what we would regard as the evil of class bias in justice."

Every prosecution for a criminal offence, unless it be a very minor one, begins in the office of the Procurator.

Under the Procurator are investigators who make a preliminary investigation in all criminal cases except the very minor ones and report to the court.

Before any charge is laid or any arrest is made, the investigator assigned to the case makes a very thorough and apparently impartial investigation. Statements of all witnesses are taken and every possible avenue of enquiry is followed in order that the fullest information as to the facts, both for and against the accused, may be obtained. So soon, in the course of the investigation, as there appears to be a definite case against any person, a charge is drawn up by the investigator, and the accused is summoned to appear before him, and the charge is read to the accused. He is not at this stage permitted counsel, but is not compelled to give evidence, although he may be, and often is, questioned.

Up to this point the investigation is private. If the investigator is of the opinion that the case is one that ought to go to trial, he so informs the accused, who may demand that further witnesses be examined. The investigator then draws up a history of the case, which he submits to the Procurator, who, if he considers it a proper case, sets it down for trial. The investigator's report or history of the case, which contains all the relevant facts, both for and against the accused, takes the place of our formal charge or indictment, and a copy of it is furnished to the accused. He and his counsel have full access to the record and a right to make copies of any part of it.

In serious cases the actual conduct of the case in court is in the hands of the Procurator or of one of his assistants. In most of the minor cases, which seem to include nearly all offences not aimed at the Soviet regime, the prosecution is not represented. The full particulars contained in the charge and the active part taken in the trial by the judges render participation by the Procurator's office unnecessary.

The actual trial differs from a British trial in many particulars. The judges take an active part. They often question witnesses before counsel for either side; but this does not preclude counsel from the fullest examination.

The accused or his counsel has the last word under any circumstances, and the accused may address the court even when represented by counsel. He may also challenge a judge for cause. Having in mind the fact that many of the judges are selected from the working, peasant and military classes and that a judge may conceivably come from the same factory or village as the accused, this provision seems essential. The accused may register objections to

the tentative decision, which is read to him before the final decision is given.

Witnesses are not sworn, a simple warning to tell the truth being substituted for the oath. There are no rules of evidence. Even hearsay, if relevant, may be admitted. Apart from the absence of rules of evidence, which may cut both ways, the proceedings seem to be devised so as to safeguard the interests of the accused to even a greater extent than does our system.

It is freely stated, however, by writers on the subject, that in cases of offences detrimental to the Soviet regime, such as we would consider treason or sedition, the same careful attention is not given to the interests of the accused.

It would not be fitting to leave this phase of our subject without some reference to the position of our profession in the Russian system. Like industry and trade, the legal profession has been nationalized. The advocates are all members of a college, which assigns them to their cases and pays them a salary based upon ability and the demand for their services. All fees go into the funds of the college, but one writer states that instances of secret retainers being paid to advocates are not by any means unknown. An accused may retain counsel if he wish and can pay; otherwise counsel will be assigned.

The function of an advocate in court is very different from that of counsel with us. "The idea is abandoned that a suit is a contest between the parties, with the judge holding the scales. Everybody in court must seek to get at a just result." The judge has the power, seldom exercised, of forbidding an advocate to speak, which power, if exercised without great discretion, may result in prejudice to an unpopular cause.

It is plain that there are many points of difference between the Russian system and ours, and I propose to deal with those that appear to me to be the most important.

In the Russian system there is neither Grand nor Petit Jury. The place of the former is taken by the investigation made by the Procurator's office and that of the latter, to some extent, by the co-judges.

There is in Russia no preliminary hearing before a justice. This, at least from the standpoint of the accused, seems to me a weakness. However careful and impartial in theory the investigation by the Procurator's office may be, it must frequently in practice be tinged with one-sidedness and is not as likely to protect an accused against

improper prosecutions as a public hearing before an impartial justice, at which the accused may be represented by counsel.

The difference between the Russian indictment and ours is worthy of notice. The detailed information given in the Russian accusation makes it appear at first sight to be preferable to ours. As the courts there are at present constituted, this does away with demands for particulars and motions to amend. There is, however, always the possibility of the courts at some time becoming professionalized. If that should happen, the attempt to give the fullest information in the indictment may result in defeating the ends of justice. We know the state of affairs in this regard in England before indictments were simplified, and the conditions that exist in many of the States of the American Union where indictments are frequently quashed because some possibly unimportant detail has been omitted from the indictment.

Many of the judges in Russia are not lawyers, and those in the courts that try the majority of criminal cases are elected from what we call the common people. All, whether appointed or elected, are under the supervision of some lay body, may be recalled, and must account for their actions to the people. This element of the Russian system makes it certain that judgments must frequently be swayed by pressure from the executive or by public clamour. Whether the use of untrained judges be an advantage or a disadvantage, only time will tell. We divide the functions of the court between the judge and the jury in those cases in which a jury sits. The tendency with us for some years has been toward a less frequent use of juries in criminal cases, and it may very well be that experience will bring about a similar result in Russia and trained judges will be substituted for untrained. On the face of it, however, to impose upon working men, peasants and soldiers the difficult duty of weighing evidence and deciding questions of law seems on a par with placing a blacksmith in charge of a shoe factory.

I desire to state, however, that changing conditions have brought about a great improvement in the capacity of juries. The telephone, the motor car, the radio, more and better vocational journals, have resulted in an improvement in the general education of the classes from which juries are selected. Those classes are to-day, through closer contact with the world at large, practically as conversant with all phases of life as any other class.

The result is—and I state it without hesitation—that mistaken verdicts upon the facts from untrained juries are, at least, no more frequent than mistaken rulings on the law from trained judges.

With regard to the difference in methods of appointing judges, there cannot be two opinions. Freedom from interference by the executive or the electorate and security in tenure of office are absolutely essential to an unbiased administration of justice. We know from conditions in the United States to-day the result of an elected judiciary and elected law-enforcement officers. When, as seems to me inevitable, the Russian population splits into parties of equal or nearly equal strength, will not the same result follow and the courts become mere cogs in a political machine, administering justice only occasionally and incidentally? In fact does not this element in the constitution of the courts even now make them the mere tools of the executive? The Russian courts are, and are intended to be, an arm of the executive, one of the most important functions of which is to preserve the existing Government. The courts there stand behind and in support of the executive. In Britain they stand between the executive and the subject and are intended to and do act as a check upon the misuse of power.

The Procurator, who is a prototype of our Crown Prosecutor, is under the supervision of the populace. This appears to me to be as grave a weakness as supervision of or dictation to the courts. From a long experience as Crown Prosecutor I know something, not only of the great power entrusted to his hands, but of the necessity for the exercise of his proper discretion being untrammelled by interference from any outside sources.

There is in Russia, in some cases, an appeal from the courts to the Central Executive Committee. To us this is an astounding state of affairs. With us, only by the exercise of legislation may the executive interfere with a decision of a competent court.

In the Russian courts witnesses are not sworn. I feel this to be an improvement upon our system. I do not believe that the administering of the oath has at present any effect in so far as compelling the truth is concerned. The truthful witness needs no compulsion, while the untruthful witness is not to be deterred by fear of angering an outraged Deity. There are two motives which actuate a witness—the desire to do right, and fear of punishment. With those who desire to do right the sanction of the oath is unnecessary. With regard to fear of punishment, that punishment can come from only two sources, the Deity and the State. Punishment by the State is far from being certain, and one of the reasons that this is so is that the Crown must prove the formality of the oath. Were our Code amended so as to make false statements in courts or in affidavits punishable, whether the oath had been administered or not, punish-

ment would follow more swiftly and more certainly, and, therefore, with a greater deterrent effect. So far as punishment in some future life is concerned, doubts of the existence of such a life are common, and even those who believe in a system of reward and punishment after death also believe that punishment may be avoided by repentance even in the last hour of life. The fear of a punishment, the likelihood of which is entirely problematic, is not a very strong factor in impelling the truth. Then there are witnesses who honestly believe that if they kiss a thumb or the air and do not touch the Bible with their lips they are neither violating the law nor their consciences. A mere warning to tell the truth, with a statement that failure to do so will render the witness liable to punishment here, not hereafter, is much more likely to result in the truth being told than reliance upon a superstitious awe that is rapidly disappearing.

Absence of rules of evidence is one of the most outstanding differences between the two systems. Our rules of evidence are mostly common law or judicial law, and some of them are in a very unsatisfactory state. For instance the rules with regard to the admission of confessions or statements made by an accused after arrest are not binding upon any judge, and perhaps too much is left to his discretion. The result is that statements rejected by one judge may be admitted by another. So, too, with regard to evidence of other similar acts. While the principles which ought to guide a court in admitting or rejecting such evidence are clear, their application to concrete cases is exceedingly difficult. The guiding principles, however, are there, whereas in Russia even the principles are absent. This must result in lack of uniformity in the rulings on the admission of evidence. While it is true uniformity is sought to be obtained by supervision by the higher courts, how can one be certain that those higher courts, unhampered by rules of evidence, will themselves be uniform in their review of the decisions of the lower courts? This defect in the Russian system becomes even more grave in view of the fact that, while cases are reported, they are not only not regarded as binding upon the courts, but are not even cited as precedents.

If the theory that obtains in Russia that an action is not a contest between the parties and that everyone in court must assist in arriving at a just decision is workable in practice, it is one we might well adopt. After all, that justice may be done is the ultimate aim of all courts. To expect, however, that an accused and his counsel shall, in cases in which they both know the accused to be guilty, collaborate with the prosecution in establishing that guilt is, I fear, asking too much of human nature.

There is another notable difference between the Russian system and ours. In Russia an accused's antecedents are carefully investigated, and it goes harder with him if he is of a family of the former bourgeoisie or intelligentsia.

Having explained the Russian system and compared it with ours, I shall state the conclusions to which I have come.

It is evident that the intention of the rulers of Russia was to establish a system entirely different from those obtaining in other countries. To a great extent they have succeeded. Certainly their system bears little resemblance to ours. It deserves of us, however, careful study that we may answer intelligently two questions: (1) Is it, as a whole, superior to ours? (2) Is there anything in it which we might advantageously adopt?

In order to arrive at a correct conclusion with regard to the first question, we must first answer this: Is the Russian system likely to prove permanent? By permanent I mean everlasting in its essentials, with only minor alterations to meet changing conditions. That, I believe, is a permanency we may justly claim for our system. I gravely doubt the longevity of the Russian. At present Russia is wholly under the control of the Communist Party. Their judicial system is the creature and one of the strongest weapons of that party. The time must inevitably come when the individual will no longer submit to the curbing of his natural ambitions in the interest of a more or less visionary idealism. The human race is made up of individuals of all grades of mental and physical powers. No legislation, no exercise of despotic power, can for long suspend the operation of the law of the survival of the fittest. It is impossible so to change the human race, at least by the exercise of political power, as to bring all men to one level of mental and physical fitness. Consequently, in time, individualism will assert itself, even in Russia. A revolt against Communism will be the inevitable result. There may not be an actual revolution, as we ordinarily use the word, although that is not beyond possibility, but parties antagonistic to Communism will be formed and gradually attain to a measure of power among the people. When, in course of time, that state of affairs comes into being, the people cannot and will not tolerate a judicial system whose main aim is to perpetuate the rule of Communism.

In arriving at the opinion that the Russian system is not likely to prove permanent, one is assisted by consideration of the fact that the present form of government in Russia is, in theory, what one may well call the extreme of democracy, a government of the people

by the people and for the people. However such a government might succeed in Great Britain, with its homogeneous population and uniform standards of conduct, it is exceedingly doubtful if it can continue, except by force, in a country whose population is not only heterogeneous, but contains so large an Oriental element. I doubt if any Oriental race is capable of establishing and continuing a democratic form of government. Those races are contented under and understand only a despotism. They must be ruled, not merely guided.

While Soviet rule in Russia is in theory a pure democracy, it is in reality a despotism imposed by the Communist Party for apparently idealistic ends, and it seems inevitable that the spread of those ideals among the people must bring about the downfall of the government. A despotism and Communism are irreconcilable. Should the resurrection of individualism result in an actual revolution, the successful party will undoubtedly follow the example of all other revolutionists and make a clean sweep of the former system, including the judicial.

One is, therefore, justified in the conclusion that, taken as a whole, the Russian system is inferior to ours.

There are, however, some things we might adopt from the Russian system to our advantage.

The first of these is simplicity of procedure. This applies more forcibly to civil than to criminal procedure. Many legislative attempts have been made to simplify our civil procedure, but to the shame of our profession be it said, those attempts have proven largely abortive.

With regard to criminal procedure, about the only elements we might borrow from Russia are the abolition of the oath and of legal chicanery. With the first of these I have already dealt at some length. Russia attempts to bring about the abolition of legal chicanery by the imposition of an idealistic duty upon all persons in court. This attempt is doomed to failure. We might, however, go a considerable distance along this line by the appointment of properly trained and impartial Public Defenders.

Time forbids my dealing with the Russian system of punishment for crime. Suffice it is to say that, at least along a narrow line, they make an earnest effort to reform rather than to punish the offender When I say that the effort is along a narrow line I mean that the effort is directed toward making the offender a good Soviet citizen according to the idea of the Communist Party as to what constitutes a good Soviet citizen.

While I have come to the foregoing conclusions, others may, with equal justification, form a quite different opinion. It behooves us, therefore, not only to familiarize ourselves with this revolutionary system of jurisprudence, but, so far as we possibly can, to observe its workings and results. It will not do for us to rest content with what we have accomplished. Conditions change and men change with them, and it may possibly come to pass that our system must change too. By studying and watching other systems, by holding fast to what is good in ours and adopting what is better in others, we shall be able to assure that any change that must come shall come by growth and not by decay.

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NOTE.—I desire to express my obligation to the following published articles for information obtained therefrom:

Article by D. N. Pritt, K.C., in *"Twelve Studies in Soviet Russia."*

Article by an unknown writer in *The Law Journal,* Sept. 19th and 26th, 1932.

Article by Prof. John L. Gillan of the University of Wisconsin in the *Journal of Criminal Law and Criminology* for May-June, 1933.