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ANATOLY KONI ON CRIMINAL PROCEDURE IN EUROPEAN STATES IN THE SECOND HALF OF THE 19TH CENTURY

ABSTRACT. The organization of the trial in leading European countries at the end of the XIX century attracted close attention of Russian lawyers, scientists and practitioners. They drew samples for our justice in it. Among other things, Anatoly Koni was an active researcher of criminal proceedings. He ultimately used the European experience, as a rule, to justify the introduction of certain institutions in Russia. Recognizing and respecting the historical forms of the trial, Koni liked the English court system. Demonstrating the legal institutions of Russia borrowed from other countries, the senator noted those of them that surpassed the European models. The consideration of the European process in comparison and through the prism of Russian legal proceedings is of interest. This issue has never been studied in the scientific community.

KEYWORDS. A. Koni, criminal procedure, court of assize, jurors, Habeas Corpus Act, attorneys, Schöffen.

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АНАТОЛИЙ ФЁДОРОВИЧ КОНИ ОБ УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ ЕВРОПЕЙСКИХ ГОСУДАРСТВ ВТОРОЙ ПОЛОВИНЫ XIX ВЕКА

АННОТАЦИЯ. Организация судебного процесса в ведущих европейских странах в конце XIX в. вызвала пристальное внимание со стороны российских юристов — ученых и практиков. В ней они черпали образцы для нашей юстиции. В том числе активным исследователем уголовного судопроизводства выступал Анатолий Фёдорович. Он, в конечном счете, использовал европейский опыт, как правило, для обоснования введения тех или иных институтов в России. Признавая и уважая исторические формы процесса Кони симпатизировал английскому суду. Демонстрируя правовые институты России, заимствованные из других стран сенатор отмечал те из них, которые превосходили европейские модели. Интерес представляет рассмотрение европейского процесса в сравнении и через призму российского судопроизводства. В научной среде этот вопрос никогда не изучался.

КЛЮЧЕВЫЕ СЛОВА. А.Ф. Кони, уголовный процесс, суд ассиз, присяжные заседатели, Habeas corpus Act, адвокаты, шеффены.

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Introduction

At the turn of the 20th century, Russian lawyers shared a good tradition of collecting information about foreign, primarily European, legislation. The materials of countless commissions on the legal reform of the Empire always contained detailed multi-page analytical notes on the development of foreign legislation. Often such notes were compiled by leading Russian legal scholars, including A. Koni. Our protagonist went through certain stages of note-writing. He had been writing down lectures since his student days. He thoroughly studied various works and summarized them. Koni started to publish some of these notes already in his youth. For example, in 1866 Anatoly Koni published a review of a work by James Fitzjames Stephen (in Spasovich's translation) *A General View of the Criminal Law of England* [1, p. 371–389].

Results

After a long break, the young lawyer resumed his studies of the European legislation. In August 1879, while on holiday in Europe, Koni, then presiding judge of the St Petersburg District Court, analysed and took notes on the English judicial procedure based on the work by Professor Karcher (Woolwich).

Koni outlined the procedure's specificities and defined its basic principles. To these he referred the defendant's silence throughout the trial. After the arrest, the defendant must be presented to the judge within 24 hours. A wrongfully arrested person could invoke the Habeas Corpus Act, i.e., demand a court order for arrest. If threatened with "bodily pain," the injured party could summon the offender before a magistrate and force him or her to give an oath to "observe the King's peace." The magistrate demanded bail and sometimes a surety from the landlords. In minor cases the defendant was required to sign a promise to appear when summoned (the summons would come when his or her conduct appeared questionable).

There could be more than 12 jurors, but 12 of them had to be unanimous. The jurors were usually chosen from the tavern nearest to the scene of the crime. If the coroner was sure that the defendant was guilty, he would order his or her arrest and hand him or her over to the assizes. If no specific defendant was identified, an "open verdict" was pronounced: "If death followed from accidental or natural causes, the coroner's order concludes that the misfortune occurred 'by the Visitation of God.'" In the past, suicide was severely punished: the body was buried by a road without a cross and impaled with a stake. In the 1870s, the coroner buried suicides at a cemetery after 9 p.m. without Christian rites.

Magistrates in England were chosen among the gentry with at least J100 of income. They were entered into lists of magistrates by the Lord Chancellor. Magistrates could judge cases of husbands abusing their wives, which was punishable by imprisonment and hard labour. In general, judges were inclined to protect women as much as possible. Seduction was also subject for trial. Even "criminal conversation" was strictly judged and marriages were often entered into under duress, resulting in the high rate of bigamy. The nationwide percentage of bigamy was 5 % and in some places as high as 25 % (in Chester). These were cases of men having as many as seven wives. Koni marvelled at the concept of blood money (a reward for bringing a murderer to justice) in the amount of J300.

Koni studied the Grand Assizes that met in each county twice a year, or four or eight times in certain counties. The judges were divided by precincts and each time met in pairs (for criminal and civil cases). In total, there were three High Courts in England: Court of Common Pleas (5 members), Court of Exchequer (5 judges) and Court of Divorce and Probate. There were 16 high judges, plus a Lord Chancellor and

10 secondary judges (Vice Chancellor, etc). The position of Vice Chancellor required at least 15 years of legal practice. Usually, a judge was appointed from among the distinguished jurists of the ruling party.

There were barristers (who needed to pass an examination, pay a deposit and be certified by a judge), solicitors and attorneys. Senior members of the Bar were called Queen's Counsel. Professional associations for barristers were called Inns of Court and were governed by disciplinary councils made up of benchers, the most distinguished members of the bar. There was no Ministry of Justice, but there was a Solicitors' Department and a Department of Law. They defended the government's bills in the Parliament and argued the most serious criminal cases for the Crown. There was no Prosecutor's Office. The litigation was between the defendant and the Crown, as it were.

Before the assembly of the assizes, the sheriff would make a list of grand jurors from the parish rolls by St Michael's Day (November 21) and post it outside the church. The trial required at least 12 jurors, but there were usually 23 of them. The warden drew up a crown calendar mentioning all the prisoners. They had to be either convicted, or acquitted during the session. A postponement or discharge from prison could only be granted for very important reasons.

The trial was ceremonially opened. An honorary guard was present. The sheriff maintained order. The trial was preceded by a church service. An opening speech was made before the grand jury and the jurors were sworn in. At the end of each deliberation, the foreman drew up an indictment or "true bill." The jury could change the bill to increase the guilt in cases of robbery or plunder. After considering the bill, the foreman asked permission to retire.

Koni listed the defendant's guarantees. An unanimity of 12 grand and 12 petty jurors was required. The defendant could demand to be tried by a higher court by means of a special court order. The defendant had the right to remain silent.

Further, Anatoly Koni considered the procedure of the Court of Assize. Two main procedures were provided. The first involved the defendant pleading guilty. Despite the confession, the trial continued to establish the person's guilt. If the confession was proven, the judge imposed a punishment. The second involved a trial without the admission of guilt. Formal phrases were uttered. The participants in the trial repeatedly invoked God. The jury established evidence. An important part of the trial was the cross-examination by the prosecutor. The defendant was offered a defence counsel. During the trial the defendant remained silent, and if he or she had an attorney, he or she could not say a single word.

Witnesses were obliged to answer under threat of imprisonment and to appear under threat of a fine (J50). Wife and husband could not testify against each other. "Hearsay" witnessing was not allowed.

The presiding judge gave his summary. Jurors were isolated without fire, water or food. The verdict had to be unanimous. The jurors could not show mercy, they could only recommend it, but the judge was not bound by such recommendation. The judge had great freedom in sentencing, except in capital cases. The judge could increase the punishment.

The verdict could be appealed in different ways. If there was a clear error ("a verdict in favour of the defendant"), the judge could send the verdict for re-deliberation, the second verdict being final. If the verdict was "against the defendant," the judge, without enforcing it, reported the case at a general meeting of Westminster judges. If they were in agreement that the jury's verdict was wrong, the case was transferred to the appellate court (established in 1861) — the Court of Exchequer Chamber. There had to be serious grounds for this: wrongful indictment, lack of punishability

of the defendant's actions or gross violation of form. The appeal was called a writ of error. The report and the deliberation were public[1].

In the same year, Anatoly Koni wrote a paper *O zaklyuchitelnom slove predsedatelya* ("On the Presiding Judge's Concluding Remarks"). The judge began with an overview of this concept in European states. He noted that the importance of the presiding judge's concluding remarks depended on the role given to the jury in passing the verdict. In England and the USA, the judge's concluding remarks ("charge") were very important because the jury, according to the custom and the law, judged the entire prosecution. Matters of the deed and the law were not separated. The jury responded to a charging document similar to a short indictment. In it, the grand jury stated what the defendant had done and indicated the law that had been broken. The petty jury validated the grand jury's verdict. The judge then meted out a punishment.

The jury influenced all aspects of the verdict. They therefore needed a good leader; the presiding judge's charge was extremely important. It consisted of: listing the evidence, assessing it, giving the act a legal qualification and indicating the order in which the case was discussed. In complicated cases the charge started with a brief reiteration of the case. Over the centuries, through the evidence theory English judges developed a strict form of the charge excluding subjectivism (exemplified by Judges Mansfield, Cox and Pollock). The judge did not express his opinion[2].

In 1880, Anatoly Koni made a report about jury courts (hereinafter referred to as JC) at the St Petersburg Legal Society. Arguing for the necessity of JC in Russia, Koni wanted to demonstrate the specificities of juries in Europe. Talking about England, he pointed out that there was an inseparable connection between society and JC stemming out of the population's needs. Attacks on JC were equal to attacks on England's entire legal system [2, p. 439–442].

On February 25, 1910, Koni reported to the State Council on a draft law on changing the procedure of explaining to the jury the defendant's punishment. The draft from the State Duma proposed that the presiding judge should be expressly obliged to inform the jury of such a measure. Koni welcomed this draft law. It stated that jurors are judges of the deed and not of the law. Information about the punishment could influence their decision. However, according to Koni, Russian jurors were also partly deciding on the issue of guilt. For example, in England there was no separation between the matters of the law and the deed, the jury was asked if it agreed with the indictment. In Scotland, the jury could also add the formulation of "not proven [3, p. 677–687]."

In 1915, Anatoly Koni prepared a commentary to Chapter 8 (on final deliberations in a judicial investigation), Book 2, Section 4 of the Statute of Criminal Procedure (hereinafter the SCP) (on district courts' procedure). As usual, analysing "his" chapter, Koni delved into the history of the issue and described European judicial procedure. In Anglo-Saxon countries, the prosecutor would make an opening speech stating what evidence he intended to use to prove the defendant's guilt. He then proceeded to give the prosecution's evidence. In Scotland, there was no speech for the prosecution, the defendant would instead receive the indictment in advance. Closing arguments, in a more or less similar form, existed in Russia, Germany, Scotland and partly in France[3] [4, p. 1206–1214].

Article 741 of the SCP dealt with the position of the private prosecutor in cases that were settled by reconciliation. Lack of expertise put such a prosecutor in a difficult position in court. In European countries (England, Scotland, Austria, Germany) the prose-

[1] Literary Museum of the Institute of Russian Literature. Manuscript Division. Archive 134. Series 1. Case 197. Sh. 1–4.

[2] State Archive of the Russian Federation. Archive 564. Series 1. Case 24. Sh. 14–22.

[3] State Archive of the Russian Federation. Archive 564. Series 1. Case 49.

cutor was often allowed to support the prosecution even if the private prosecutor refused or the prosecution would act in his stead from the beginning. There was an old notion that violation of personal rights violated public order in general [4, p. 1214–1221].

On January 26, 1892, Koni reported to the St Petersburg society on the first days of the judicial reform in Russia. In order to emphasize the importance of the reform, he turned to foreign experience. Anatoly Koni gave a detailed account of the history of Palais de Justice in Paris. The foundations of the palace had already existed at the time of the Merovingians (on an island on the Seine). Subsequently the palace was rebuilt several times. Since the 14th century, it housed the Parisian parliament, while the kings stopped living there in the 16th century. The Palais was a combination of judicial, legislative and commercial institutions. It was dominated by *le barreau* (a legal corporation similar to the Bar). After a series of fires, at the end of the 18th century the Palais was rebuilt. Between 1835 and 1870, the grand restoration of the Palais proceeded to rid it of all its superfluous elements. During the Paris Commune, much of the Palais was destroyed. Anatoly Koni went on to describe in detail the contemporary structure and interior of the Palais. He highlighted and emphasized the role of the judiciary, whose members had been passing their posts on to their children for centuries. He gives a detailed account of the ceremonies of the Palais. The judicial corporation associated with the Palais gradually disappeared in the 18th and 19th centuries [5, p. 461–470].

In France, the introduction of JC at the turn of the century was severely criticized, including by Napoleon. Yet the legislators still kept the jury courts. JC's so-called tendency to acquit was in fact a special tactic of the jurors to acquit the accused when they could not mitigate the sentence (French JC could either acquit or convict). After they were granted the right to mitigate sentences in 1836, the number of unfounded verdicts decreased. Attacks on JC ceased[4].

The French procedure greatly interested the Chief Prosecutor of the Senate. In the aforementioned article *O zaklyuchitelnom slove predsedatelya* ("On the Presiding Judge's Concluding Remarks"), Koni reported that in France the judge in his concluding remarks (*rŭsumŭ*) pointed out to the jury the evidence "for" or "against" the defendant, reminded them of their duties and posed questions. Unlike in England, in France the judge summed up to the jury the evidence he had established. The judge had great power: he could personally evaluate the prosecution's case, point out the circumstances that increased the defendant's guilt and explain to the jury the consequences of their verdict. In general, the judge acted as a party to the trial, bringing in witnesses, gathering evidence, etc. As a result, his *rŭsumŭ* was subjective. The jury was only the judge of the deed[5]. In France, after reading the indictment, the presiding judge would again remind the defendant of what he had heard. Koni considered this pointless[6] [4, p. 1206–1214].

In Germany, JC was introduced under Napoleon and reintroduced after 1848. At first scholars continued arguing. But after the war of 1870–1871, JC came to be seen as a hostile French innovation. People called for the revival of the *Schuffen* court – and it was revived (in 1879). But JC remained and retained all its powers. German scholars, including the famous Binding and Jhering, continued to criticise JC harshly. The former felt that it did not stand up to scrutiny from the legal standpoint, while the latter felt that JC was a political institution and its time was over [2, p. 439–442].

The German procedure was the most criticised by Anatoly Koni, primarily due to its (the procedure's) cabinet nature and formalism. In Germany, the 1877 Code of

[4] State Archive of the Russian Federation. Archive 564. Series 1. Case 24. Sh. 14–22.
[5] Ibid.
[6] Ibid. Case 49. Sh. 1–8.

Criminal Procedure gave jurors a broad mandate. They participated in asking questions. Without going into the evaluation of the evidence, the presiding judge had to instruct the jurors on the legal points of view that they had to take into consideration when deciding the case (*Belehrung*). He was limited by the *Belehrung* and had to make it flawless. As a consequence, it became a dry, formal text[7].

On December 10, 1894, Anatoly Koni gave a report on the new trends in criminal procedure in Italy and Germany.

Germany became the first country to campaign against JC; it was gradually being replaced by the *Schuffen* court borrowed from the Middle Ages. To a significant extent, the *Schuffen* transferred their powers to the crown judge. Koni analysed the draft amendment to the German criminal procedure (1893) and noted its "machine-like spirit" of pushing individual rights into the background. The possibility of appealing a sentence was to be widened, but at the same time the guarantees of the rights of the accused were to be curtailed. The right to timely notification of the indictment, the right to challenge the judge, the right to submit new evidence etc. were all at risk. There were plans to drastically reduce cassation. The composition of the court was reduced, etc. The power of the presiding judge, the court administration (Ministry of Justice) and the chancellor over the courts was greatly increased.

Koni noted that in the German and Austro-Hungarian empires appeals grew more fashionable to the detriment of the guarantees of individual rights. Many German lawyers were inclined to leave it to the jury to decide matters of the deed and to take away the matter of imputation or let a higher court decide on it.

Summing up, Koni argued that the Italian procedure, despite its mistakes, was "remarkable for its vitality," whereas the German one was characterized by the stifling of guarantees through the expansion of appeals. Comparing these drafts and the current codes to the SCP, Koni proudly pointed out that the Russian legislation was better and more respectful of individual rights [6, p. 29–30].

The lawyer noted that the Italian Code of Criminal Procedure imitated the French one. Italy, which owed much to France, sought to match it. But it was not long before Southern Roman legal procedure began to develop on its own. In the 1880s, the Ministry of Justice of the Kingdom of Italy began to propose bills that extended the rights of the accused and increased the number of justiciable cases.

The 1889 law On the Organization of Public Security brought about a radical reform. It introduced a unified criminal court of cassation in Rome, limited the mandate of the jury court and extended the mandate of the praetor, the judge of first instance. In the 1890s, Italian lawyers had already begun discussing the abolition of appellate proceedings and limiting the jury's mandate. It was intended to limit the number of defenders of the accused.

Koni resented the spread of ideas of the anthropological school and putting neurasthenics in prison hospitals. He rejoiced at the abolition of the "parliamentary" voting by the jurors of the Italian court, which allowed them to vote "for," "against" and "abstain" (white tickets) (!). The white tickets were counted as votes cast "for" the defendant. If there were six or more of them, the case was sent to a re-trial. Thus, the defendant's fate could be decided by the votes of three or four jurors. The relevant articles 504 and 507 of the Code were abolished [6, p. 1–30].

Conclusions

When listing the features of the German, English, French and Italian procedures, Anatoly Koni distinguished three main trends: Anglo-Saxon (popular, in his words),

[7] State Archive of the Russian Federation. Archive 564. Series 1. Case 24. Sh. 14–22.

German – academic, perfunctory, formalistic, sceptical and distrustful of the parties, and Franco-Italian (Roman), "a livelier one," as Koni put it. The senator searched for the historical roots of the procedure. Historicism gave justice a popular, organic nature. Judicial procedures were most closely linked to popular culture in England. Southern temperament made the procedure in the Romanic countries unique. Cold German rationalism led to the development of strict judicial procedure that killed ethics and soul. Anatoly Koni was convinced that the Russian procedure corresponded to modern European standards and in some respects surpassed them. This was a consequence of the Great Reform of 1864.

References

1. Koni A.F. Book Review. Stephen J.F. (Translated by V. Spasovich). General View of the Criminal Law of England. *Zhurnal Ministerstva Yustitsii = Journal of the Ministry of Justice*, 1866, vol. 27, no. 2, pp. 371–389. (In Russian).

2. Koni A.F. *Judicial Reform and Jury Courts. In Recent Years*. Saint Petersburg, 1896, 623 p.

3. Koni A.F. Permission to Explain to the Jury the Defendant's Possible Punishment. In *On the Path of Life*. Saint Petersburg, 1912, vol. 2, pp. 677–687. (In Russian).

4. Gernet M.N. (ed.). *Statute of Criminal Procedure. Systematic Commentary*. Moscow, M.M. ZivaPubl., 1915, iss. 4. 1278 p.

5. Koni A.F. *New Skins and New Wine. In Recent Years*. Saint Petersburg, 1896. 623 p.

6. Koni A.F. *Memorial Service for Law and on New Trends in Criminal Procedure in Italy and Germany*. Saint Petersburg, 1895. 30 p.

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Contribution of the Authors

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