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Soviet Criminal Jurisprudence*

The difference between Soviet Jurisprudence and Western Law is evident in all the cases tried in Russia, from the great Shakhta treason trial to the petty squabbles of the soldiers and priests. In the West, the basic purpose of Law is the protection of Person and Property. In Russia it is the protection of the State. Western law safeguards the individual, Russian law the community.

This distinction is probably much older than the Bolshevik Revolution. In strict legality, there was no more right of private property under the Tsar than under the Soviet, no more individual freedom. In legal theory the Tsar was master and lord of his subjects' property and their lives. They kept both by his grace, and his anger could take either at will. For Russia has never been a free country.

After a revolution was made in the name of Freedom, the Bolsheviks replaced the limitless power of the Tsar by the limitless power of the State, and for the sake of the Communism gave to the community an authority over the individual which no Tsar had ever dared to claim. The Tsar could and did deal in arbitrary fashion with the mighty, but *de minimis non curat lex*; so that small folk might seek the aid of law or be caught in its meshes in the same way as their equals in the Western world.

The Bolsheviks have gone further. According to Soviet Law it is the social factor that predominates. In the preamble to the Soviet legal code there is a significant phrase: "In case of doubt the decision shall be determined by the revolutionary conscience of the judges." Originally, perhaps, this was meant to imply that the ignorant and humble should be protected against the strong and the wise. In practice it now makes the interest of the community the ultimate criterion. The State is everything, the

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individual nothing.

This fundamental difference between Western and Soviet conception of Law is reinforced by another, older than the Tsars themselves; the difference between the jurisprudence of Europe and Asia.

From the days of Solomon—or, if one likes, Khammurabi—the Oriental ideal has been the Wise Judge, deciding each case on its merits, settling the disputes of the people fairly but despotically. On this principle acted the *cadis* of the Arabian Nights and the good Khalif Haroun-al-Raschid himself. The famous story of Solomon's judgment in the case of two women disputing one baby is the quintessence of the Oriental ideal.

But Western jurisprudence, founded on the logic that was Rome and the right of the individual as a free man among his peers which is the heritage of north-European races, has refused to admit the kindly wisdom of the despot. For us it is the letter of the law that is significant, and when doubt occurs we summon precedent, the lesson of the past, to guide decisions.

In Russia, where East and West meet, there is a struggle between the two systems. There is a constant tendency on the part of the lower courts, the People's Courts, as they are called, to follow the Eastern method, whereas the higher tribunals seem anxious to guide their decisions by the legal code. This produces confusion, and legal authorities have stated that in some provinces more than half of the decisions of the lower courts are upset on appeal. The demand is growing for a greater knowledge and closer application of the legal code by the People's Courts, but it will be many years before the Asiatic system disappears. It is unnecessary to add that it frequently leads to corruption, and that there have been many cases of judges being dismissed or even imprisoned.

There is a third difference between Western and Soviet Law which is especially evident in treason trials, such as the Shakhta process. In the West an accused man is presumed innocent until he is proved to be guilty. In Russia the fact that he is brought to trial is *prima facie* evidence

of his guilt. The purpose of the trial is firstly to determine the degree of culpability and secondly to inflict the appropriate penalty.

The Russian method is partly due to the basic theory of Law as state protection, but it is further to be explained by the Soviet system of preliminary inquiry, which diverges sharply from the regular procedure in Anglo-Saxon countries (although it is followed in their courts-martial and is not far removed from the regular procedure of France).

The persons accused of treason against the Soviet are held in OGPU [secret police] prisons, subject to inquiry by OGPU magistrates, without the right of access to counsel or legal advice of any kind, until the act of accusation against them has been formulated, that is to say, until the examining magistrate has already reached a *Presumption* of their guilt.

Although the procedure in France is similar, the accused person may have the support of counsel during the preliminary inquiry, and in some cases may benefit by newspaper publicity, despite the fact that theoretically it is forbidden to divulge what passes before the examining magistrate has decided whether to order a public trial or to dismiss the case.

In Russia, on the other hand, the strictest secrecy is maintained until the trial itself is held, and the accused persons often spend months in prison before the bare fact of their arrest is permitted to be published.

It would be idle to pretend that the placing of such arbitrary powers in the hands of the OGPU does not lead to abuse. With the best intentions in the world, no police organization whose duty it is to arrest suspects and prepare the cases against them can avoid the natural human impulse to justify its action by finding that they are guilty and must stand trial. The Bolsheviki attempt to excuse their system by the plea that their country is still virtually in a state of war ("class war"), and that they are compelled to apply to enemies of the People the same methods that Western courts-martial use. The excuse is a shallow one. It is manifestly improper to confound the functions of ex-

aming magistrates and policemen.

The Shakhta trial revealed the defects of the OGPU system. On several occasions it was clear that undue pressure had been used. In that affair there was doubt from the outset that many of the accused men were guilty, for a number of them had made full confession. But the prosecution weakened its own cause by trying to prove too much, and by using for that purpose methods and evidence of the most unsavory character.

On the other hand it can fairly be said that in no other country in the world is it so hard for a guilty person to evade punishment as in Russia today. Everyone who is familiar with the delays, laxities and loopholes of American criminal procedure must sometimes wish that the guilty were punished more surely and swiftly, even though that should involve in rare cases hardship to the innocent.

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