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REFORM OF THE JURY-SYSTEM IN EUROPE: RESULTS AND CONCLUSIONS

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A comparative survey of the reforms made in the jury-system of the European countries furnishes valuable lessons, ascertainable by studying the facts of experience in the various countries. Each one of us may draw his own conclusions, and may attach variant degrees of importance to specific aspects of change. We shall limit ourselves here to summarize the general features.

1. In the jury's organization there have been so many different plans that the Legislatures may well be embarrassed in their choice. However, after the centuries of experience in Great Britain, the jury's native place, in France, its adoptive home, and in other countries of Europe and America, one ought to be able to discern clearly certain results. Some of the plans have quite broken down and tend to disappear in the course of gradual reform. Others have been partially reformed, with greater or less success. Almost all have been or are being gradually changed, so that the name alone no longer signifies the original institution. The underlying causes for this general movement must involve some solid general trends that go to the very function of the institution.

What is that function?

The original idea was that the essential feature of the jury-system was the separation of *fact from law,* and therefore of jurors from judges, retaining only the minimum necessary connection between them. But practical experience has shown that this attempt to establish an artificial separation is what has caused most of the procedural complications and difficulties. For example, if the jurors believe that the accused is guilty, not of the offense charged, but of another one arising from the same evidence, they cannot (in the French system) find him guilty of the latter offense unless it has been alleged in the charge; otherwise they must acquit him. If the jurors are not clear on some important points, they are obliged to

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choose between the alternative answers "Yes" or "No"; and the negative course comes easier to them. If the jurors do not exactly understand the penalty provisions (which always give them concern), their answers may be based on erroneous grounds—to be regretted when it is too late. These are merely some of the mischiefs due to jurors being set apart from the judges and left without guidance—mischiefs constantly noticeable, and everywhere the object of remedial legislation.

The remedial measures have been of three principal types:

(*a*) *Passive participation of the judge in the jury's deliberations; i. e.,* ready to answer questions. This is the Geneva system—at first adopted in Serbia and in Italy but later discarded, and now introduced in Poland and Czechoslovakia. It provides a minimum of cooperation—only what is needed to assist the jurors' doubts. Against this method it has been objected that it is inferior to the judge's summing-up, because this is given in open court. But are we to assume that the judge's advice will be harmful? And that his mere presence in the jury-room will coerce the jurors? Are there not other secret and sinister influences against which there is greater need for their protection? The Genevans, a liberal and democratic community, are well satisfied with their method. And the smallness of its following in other countries is probably due to its being only a half-way measure; for a radical reform would involve a complete unlimited cooperation between judges and jurors.

(*b*) *Combination of jurors and judges to determine the penalty,* after a verdict of guilty—this is another device, also used in Geneva, and followed in Belgium and (now recently) in France. This device has its origin in the constant concern felt by juries as to the penalty that would follow their verdict. And it does prevent misunderstandings and groundless acquittals—though not entirely. It has certainly, by its cooperative feature, obviated the deplorable results that formerly took place.

But it is an illogical expedient, and this explains why few countries have adopted it. The very function and purpose of the jury has always been to establish *the facts,* and nothing else. But this measure gives the jurors a majority voice in determining the penalty and thus enlarges the jury's power at the expense of the judges'. Moreover, if cooperation is a good thing for determining the penalty, why not also for determining the facts? It is in the latter part of their task that they most need help; every difficult case reveals their incapacity.

(*c*) *Complete combination of judges and jurors.* This method

has long been employed in Portugal, Bulgaria, Tessin, and (now recently) in Germany and Berne. Under this system all the technicalities of procedure (involving risks of void judgments), all the uncertainties and misunderstandings of the orthodox system, disappear from the case. Once the jury is empaneled, the joint tribunal functions as simply as the bench of judges. The jurors' conclusions gain in certainty and regularity what they lose in arbitrary irrationality. The advantage of coöperation between the expert professional judge and the lay citizen is plain to be seen. In the ordinary jury, composed of individuals selected by mere lot, the conclusions are mostly shaped (as is well known) by one or more members who in one way or another acquire immediately a dominant influence; and this sort of influence, which always varies in value, will be counteracted by the superior experience of the judges. And the majority-number of the jurors should dispel any apprehension that the judges could coerce or sway them.

The theoretical objections that have been advanced by some jurists against this method are not tenable in view of the fact that the countries using this method have expressed themselves satisfied with it and have maintained it. And while many reformative measures have tended towards such coöperation between judges and jurors, none have gone in the opposite direction.

Coöperation, in some form, is the main idea in all those countries which have sought to preserve the fundamental principle of the jury-system. And such must be the solution wherever public opinion is determined to preserve this ancient institution and at the same time to save it from committing suicide.

2. *The assessor-system.* But there is another feasible solution, *viz.*, if not the abolition of the jury, at least the substitution of the assessor-court for the jury-court; and a strong movement to this end is now under way. At the 1933 Congress of Criminology at Palermo the warm and brilliant debates on this subject will long be remembered by all who attended. The Italian delegates argued vigorously for their new assessor-system. The French delegates patriotically defended their jury-system, while conceding the need of amendment. The other delegations expounded their respective systems. It was plain to see that no single uniform solution could be deemed correct, and that the answer must depend much upon the local traditions and preferences of each country.

The debaters were sometimes at cross-purposes because of the lack of a common definition of the assessor-court, and because the idea of a jury was thought to apply only when the group of laymen

sit on a separate bench in the court room. But merely to put the jurors together with the judges on the same bench does not make them assessors in any real sense. Jurors are citizens selected from a list by lot and sitting for one or a few sessions only. Assessors are selected and nominated by the authorities and sit for a long fixed period (in Italy, for two years). There are of course several intermediate schemes. But the essential difference remains. The jurors, chosen by lot, are ephemeral and temporary; the assessors, appointed by authority, serve continuously.

The assessor-system has of late years gained much ground. It has replaced the jury-system in the Russian Republics, in Italy, and in Austria; in the French overseas possessions it has long been used. Compared with the original jury-system, its success is unquestionable. It has the advantage of simplicity, for it avoids all the formalities of selecting a jury at each session. It has not developed the short-comings charged against the jury. Nor has it shown any lack of independent spirit. A notable fact, indeed, is that it has succeeded alike under dictatorships and colonial governors and in democratic Switzerland. In the overseas regions, the native assessors are indispensable for knowledge of local customs and beliefs.

But the view is heard, in Italy and elsewhere, that the assessor-system is but a transitory one, destined to give place ultimately to the ordinary judges-court. This partly because experience is expected to show that these laymen will prove unsatisfactory, and partly because modern criminology will probably require specialized judges in criminal cases. At the Palermo Congress a resolution declared in favor of such specialization. And it is a noticeable fact that the countries that have preserved the judges-court pure and simple (Netherlands, for example) are almost the only ones in which no complaint is heard.

So it would seem that the trend of the future is towards a tribunal of specialized judges, well-trained for their task and guaranteed by law in that independence of judgment which is supposed to be the special virtue of jurors. When that day comes, will not the lay-juror and the lay-assessor be merely a superfluous and obstructive element in criminal justice?

3. *Typical Modifications of the Jury-System.* But in the meantime, apart from the substitution of assessor-courts, the jury-system proper has been modified along the following five lines:

(*a*) *Limitation of Jurisdiction.* Many countries have come to limit the jurisdiction of the juries to certain classes of offenses. This has taken place not only in countries preserving virtually intact the

original jury (Belgium, Spain), but also in those which have revised it (Bulgaria, Germany, Berne, Austria, Japan).

A procedure so formal, elaborate, and expensive as the jury-trial may well be reserved for serious offenses only, including press offenses. Nor is a mere legal definition of crimes decisive for this purpose; each case should be referred for recommendation by the indictment-branch of the court, as in Belgium and Berne; this flexible method is the only efficient one.

Furthermore, where the accused is ready to plead guilty, a jury-trial is not needed; only the question of penalty remains, and that is properly a matter for the judges. This has always been the practice in England, where the jury arose, and in Swiss Zurich and Vaud, where the democratic spirit prevails. In Berne, the law requires an express waiver of jury, by an accused pleading guilty. In Japan and in many of the United States of America the accused may in any case waive a jury; and in Scotland and (for some offenses) Japan, he gets a jury-trial only on his own demand.

(*b*) *Reducing the Number of Jurors.* The original and mystic number of 12 has no longer any good reason to be maintained. In all branches of government, reduction of personnel is the tendency. Why disturb the livelihood of 12 citizens, if a lesser number would suffice? Quality, not quantity, is the important thing. Large numbers merely make the jury's deliberations more burdensome and less conscientious; the strongminded ones lead, the others merely follow.

In Greece, the jury-number has been reduced to 10; in Vaud and Berne to 8; in Germany to 6; in Tessin to 5; in Denmark to 4 (only capital cases here go to a jury); and in Bulgaria to 3. The Congress of Palermo recommended that the jurors should always number at least twice as many as the judges, so as to ensure their predominance in a united bench. But it is only necessary that their number exceeds that of the judges, so as to ensure them a majority. If the jurors cannot stand up for themselves when they form a majority, this only shows that their opinions are of little value.

Women have been made eligible for jury-service (but usually in number less than the men) in Great Britain, the United States, Germany, Austria, Spain, and elsewhere. There is no good reason for excluding them, at least as long as jurors are selected by mere lot without any inquiry into fitness.

(*c*) *Revision of Verdict on Appeal.* This is an essential guaranty of justice in serious offenses. No one can maintain that jurors

are less fallible than other persons; why should their verdicts be accorded a conclusive finality?

In some countries a revision is now allowed, either by sending back cases deemed doubtful to another jury for re-trial (as in Norway, Spain, and the United States) or by reviewing the verdict in an appellate court of judges (England and Denmark). Portugal allows a review for the penalty only.

(*d*) *Improving the Selection.* The resolution of the Palermo Congress recommended that jurors be selected from all classes of citizens, provided they are qualified as to mental and moral capacity. This double requirement is not easy to satisfy; for it involves the eternal conflict between quantity and quality. And the reforms based on this idea have varied with the several political systems. The democratic countries have enlarged jury-service to include all citizens not disqualified by conviction of crime (including domestic servants, by the French law of Feb. 13, 1932). The countries of opposite tendencies have provided for select jury-lists, as in the case of assessors. The earlier method of limiting to taxpayers tends to disappear. A more rational method is to require a certain minimum of social worthiness (to be evidenced by lack of a criminal record) and a certain minimum of intelligence (to be evidenced by some educational qualification). On this principle, the only requirement in France is the ability to read and write. Other countries are more exacting—notably in Portugal, Rumania, and certain of the United States of America. In England, a certain amount of respectability is required. In Belgium (since 1931) the ordinary lists are enlarged by adding persons holding certain educational degrees and persons of certain special classes (aldermen, chamber of commerce members, etc.). For the democratic theories of today must not cause us to forget that not all citizens are equally qualified to administer justice, and that an efficient justice requires a special competency.

All the foregoing reformative measures are usually found realized in the assessor-courts. The limitation of jurisdiction is there not a problem of importance. The reduction of numbers is not a problem, because the numbers are already small (varying between 2 and 5). The revision of the verdict by a superior tribunal is generally provided. The list of eligibles is usually a limited one, and far more select than the jury-list. In all these respects the unreformed jury-system is inferior to the assessor-system. Still, this inferiority can be lessened; if not substantially removed, by the foregoing changes, as already achieved in many countries.

(*e*) *Formulating the Grounds of the Verdict.* To formulate in

writing the grounds of the verdict, so as to prevent it from being purely emotional or irrational, would be another desirable step—but one much more difficult to take. It has not been done (and cannot be) except where the jury sits in one body with the judges. The jury's tendency to let emotion displace cold reasoning and to repudiate the law of the case is all the more dangerous, in the orthodox jury-system, because it does not have to show itself in the verdict. Moreover, if a reasoned formulation were required, the appellate revision could function more effectively.

So, in conclusion, we perceive that much has been done by way of reform, in various countries, and that in France much remains to do. On all hands it can be seen that the original jury-system no longer answers the needs of the administration of justice. On all hands fault is found with it. Only the inertia of custom keeps it alive.

Three types of remedies are available to the legislature:

(1) Reforming the jury-system, by combining the jurors with the judges, by limiting their jurisdiction, by reducing their number, by improving their selection, and by providing for revision of the verdict; or

(2) Substituting the assessor-court; or

(3) Reverting to the tribunal of judges only, with specialized qualifications.

Unfortunately, a jurist's choice between these measures is easier than the Legislature's choice. The Legislature has to consider many other aspects—local traditions, national bias, political sentiment, and (sometimes also) constitutional limitations. In England, for example, national tradition enshrines the jury-court, while German tradition calls for the assessor-court. In France (1848), in Rumania (1866, 1923), in Greece, in Poland (1921), and in Czechoslovakia, the constitution provides for jury-trial. In Italy the judge-court is the natural system, the assessor-court being looked upon as a transitory measure.

But to insist on the preservation of jury-trial is not to forbid its amendment. Nor will petty reforms of details accomplish anything substantial; a complete renovation is needed. Our task in France can be assisted by observing what has been effected elsewhere; we should profit by those lessons and not hesitate to adopt measures which have been successful. Today is a period of progressive change of institutions in every nation. The improvement of the administration of justice is a task which demands our highest devotion.