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Anatoly Fedorovich Koni

Liberal Jurist as Moralist

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"I never asked what the broad masses want and expect or how to please them. I always strived to express only what resonates in the soul as good and brings about justice."¹

On 10 February 1924, the Russian Academy of Sciences celebrated the eightieth birthday of its honorary member, the jurist and writer Anatoly Fedorovich Koni. A frail, scholarly man of Victorian sensibilities, Koni achieved prominence in the tsarist era as judge, senator, and member of the State Council, as well as essayist and literary critic. His first book, *Sudebnye rechi* (Courtroom Speeches) (1888), consisting of his celebrated trial speeches, instructions to jurors, and cassation decisions, gave Russians a first-hand look at the postreform judicial system. The book proved popular and was republished several times, establishing Koni's reputation as gifted stylist and orator. His multiple-volume work, *Na zhiznennom puti* (On Life's Path) (1912-1924) drew portraits of writers he had known—Dostoevsky, Tolstoy, Turgenev, and Chekhov—and less-heralded figures such as Fyodor Gaaz (Haas), the prison doctor who helped establish the more humane treatment of Russian convicts. Equally at home in literary salons and the halls of justice, Koni was a member of the St. Petersburg Juridical Society, the Russian Shakespeare Society, and Mikhail Stasiulevich's "round table" at the liberal journal, *Vestnik Evropy*. An ardent proponent of education and enlightenment, he found time in his busy life to teach law and ethics at St. Petersburg University and the School of Jurisprudence. In the words of a prerevolutionary Russian historian, Koni was a "true gentleman" who "combined

the great talents of an artist, poet, thinker, psychologist, scholar and critic."² A soviet critic wrote that Koni's "enviable success in jurisprudence, legislation, scholarship and literature made his un-Russian sounding name one of the most popular in all of Russia."³

The Academy of Science's two-day celebration of Koni's birthday, however, was not a nostalgic event, lamenting the passing of genteel civility, but rather an emotional outpouring of adulation and respect for a towering figure of moral stature. "In your judicial, social and literary work," the Russian historian Sergei Platonov told Koni in his opening address, "you always sought truth and justice, those principles of the human spirit without which humanity cannot exist, even when law and fraternity are forgotten."⁴ The official testimonial praised Koni for his "high moral qualities that unite the interests of the best representatives of Russian science and culture, regardless of their personal convictions and orientation."⁵ Sergei Oldenburg, secretary of the Academy, added that Koni tried to understand people in all their complexity, and for this reason "he made judgments about a person, but never judged or condemned the person himself."⁶ Many speakers at the festivities emphasized how successfully Koni had fused his moral principles with his public work as jurist and writer. Kornei Chukovsky reminisced that after the Bolshevik revolution had stripped Koni of his honors and earnings, he "would pick up his crutches and shuffle along to the furthest corners of Petrograd to read lectures to soldiers, students, and workers in unheated buildings...and no matter what theme he chose his lectures were always moral sermons about conscience and the joy of devoting oneself to the cause of good."⁷

The high-minded tone of the birthday celebration was punctuated by outbursts of untrammelled joy and sentimental musing. A young boy brought Koni to tears when he spoke of the old jurist's selfless dedication to Russia. A children's chorus triumphantly recited a patriotic poem by the writer T. L.

Shchepkina-Kupernik that extolled Koni's contributions to Russian life. But the surprise of the evening was a "mock trial" staged by the Movable Theater (*Peredvizhnoi teatr*). The "bureaucrat Koni," a jurist by education, was tried for illegally entering the world of art and science. Among the witnesses who testified about his "pernicious literary activities" were Tolstoy and Dostoevsky. The prosecution also accused Koni of being an "innate criminal," having been born into a literary-artistic family. The jury found him guilty, but the specific form of punishment was left to the "supreme court of history."⁸

Although the Bolshevik revolution destroyed the institutions Koni worked in, and swept away the judicial practices and principles he believed in, the new state generally treated Koni with respect and a degree of indulgence. To be sure, he was branded a "class enemy," and briefly detained in 1919. His tsarist medals and other valuables were confiscated, and he was left without a pension to fend for himself in war-ravaged Petrograd. Destitute, forced to sell his books and archival papers to buy daily necessities, the seventy-four-year-old Koni came to terms with the new regime. Although wary of the new soviet order, and highly critical of the 1922 Criminal Code and the growth of censorship, he refused to criticize the regime publicly or to emigrate, as many of his fellow jurists had done. Always a loyal citizen, he felt he could be more useful to Russia by remaining at home.

In a meeting with the Commissar of Education, A. V. Lunacharsky, shortly after the revolution, Koni expressed his willingness to serve the new state by lecturing and writing on judicial ethics and rhetoric, as well as on Russian culture and history. Lunacharsky was so taken by Koni's honesty and selfless dedication to Russia that he not only approved the request but also became Koni's "protector."⁹ Such patronage allowed Koni to become an active man of letters, and in the 1920s he wrote many of his memoirs. His death on 17 September 1927 saved him from virtually certain Soviet repression. Because Stalin's assault

on the bastions of prerevolutionary Russia had not yet gained full force, Koni was able to maintain a privileged position in the new Soviet cultural hierarchy. He was given a dignified Russian Orthodox funeral, and thousands of mourners lined the streets as his casket was taken to the Alexander Nevsky Monastery for burial. At the graveside orations by old Russian liberals, conservatives, and clerics, a young Communist party activist triumphantly declared that Koni belonged not just to the prerevolutionary intelligentsia but to the whole Russian nation.¹⁰ Even in death he was a figure who united opposing political forces.

In the Soviet era, Koni remained a respected figure, and his essays on Russian literature, theater, and culture were periodically republished. But his views on jurisprudence, moral philosophy, and liberal politics received little serious attention, and Soviet scholars did not analyze his works or place him in the context of Russian and European liberal thought.¹¹ With the fall of the Soviet regime, Koni is beginning to reemerge on the Russian legal stage as a major actor and thinker. His instructions to juries and his conduct as judge are now being discussed and studied by Russian jurists as they reconstitute the Russian jury system.¹² And in February 1994, 150 years after his birth, Koni was honored as "the knight of Russian law" with the unveiling of his statue at Moscow University.¹³

In this essay, I focus on Koni's development as a liberal jurist by examining the early influences on his life, his dissertation on the right of necessary defense, and the impact of moral values on his judicial work.¹⁴ My intention is to draw a portrait of Koni that helps explain his enduring popularity, his "centrist" role in Russian politics and culture, and his contribution to Russian liberal jurisprudence. It is noteworthy that in the ideologically charged Russian society of the nineteenth century, Koni combined a successful career in the tsarist government with active work in Russia's literary and cultural circles. It is remarkable that he maintained friendships with such politically diverse figures as

Dostoevsky, Turgenev, Ivan Goncharov, Chekhov, Vladimir Korolenko, Nikolai Nekrasov, Boris Chicherin, Konstantin Kavelin, Vladimir Soloviev, Count Petr Geiden (Heiden), and Maxim Kovalevskii. It is striking that Tolstoy, who detested the Russian court system and Western legalism, remained Koni's friend and confidant. Their extensive correspondence and frequent meetings at Yasnaya Poliana attest to Tolstoy's respect for Koni's professional achievements and moral character. It is astounding that the Bolshevik regime allowed an old tsarist *sanovnik*, who remained a staunch liberal and a Christian, to be honored publicly as a great figure of Russian culture. What qualities did Koni possess that made him palatable, even attractive, to principled conservatives, avowed liberals, maverick philosophers, and enlightened commissars? Was it the force of his personality? His unyielding commitment to moral principles and human dignity? Or his emotional and sometimes sentimental attachment to the classics of Russian literature? Does his "unifying spirit" suggest a firm "middle ground" between the conservative and leftist strains in Russian thought? Such questions guide my examination of Anatoly Koni.

Early Influences

In his writings, Koni identified many figures who had a lasting influence on his life. The jurist Dmitry Rovinskii instilled in Koni a belief in the 1864 Judicial Reform and an utter revulsion toward the prereform court system. His professors at Moscow University, Konstantin Kavelin and Nikita Krylov, imbued him with firm liberal principles and a deep respect for scholarly work. The German-born doctor Fyodor Gaaz (Haas) and the famous Russian surgeon and educator Nikolai Pirogov taught him the virtues of selfless work for the good of humanity. These men served as Koni's role models, and he venerated their

contributions to the development of a more civilized and humane Russia. But two "father figures" left the deepest imprint on young Koni and shaped his firmly held moral convictions: his own father, the writer Fyodor Koni (1809-1879), and his life-long mentor, the philosopher Boris Chicherin (1828-1904).

Anatoly Koni's family was of Finnish and German extraction. His grandfather had come to Russia in the early 1800s and established the first shop of optical instruments in Moscow. His father, in Anatoly's words, was a typical member of the Russian intelligentsia of the 1830s and 1840s. Educated initially as a doctor (together with Pirogov), Fyodor Koni abandoned medicine for Russian literature and became a popular satirical dramatist. Later he was a theater critic and editor of *Panteon i repertuar*, a teacher of history, a translator of French literature, a historian of eighteenth-century Germany, and an active member of cultural circles (*kruzhki*). Together with Anatoly Fedorovich's mother, the actress and writer Irina Sandunova, he formed a cultural oasis in St. Petersburg that brought together such Russian writers and thinkers as N. A. Nekrasov, L. A. Mei, D. V. Grigorovich, Ia. P. Polonskii, I. I. Lazhechnikov, and A. F. Veltman. The Koni family lived modestly; there was no country estate to provide money in times of need. Fyodor Koni and his wife supported their family by writing, translating, acting, and teaching, and often Fyodor Koni helped destitute Russian writers from his own meager earnings.¹⁵

The elder Koni was not overtly political, but as a witty poet and a friend of liberal writers, he was viewed with suspicion by tsarist officials. He was twice reprimanded by the Third Section for publishing provocative poetry and was kept under general police surveillance during the 1840s and 1850s.¹⁶ A man of high principles, Fyodor Koni was deeply committed to Russia's education and enlightenment. His moderate western views raised the hackles of both the "left" and the "right": Vissarion Belinsky considered him politically irrelevant, and such conservative critics as Faddei Bulgarin and Osip Senkovskii regarded him

as a dangerous revolutionary. Like many Russian idealists of his day, Fyodor Koni placed his hopes for a better Russia in the Great Reforms of Alexander II, and he instilled this "liberal ideal" in his son. In a letter to the jurist G. A. Dzhanshiev in the 1880s, Koni recalled how his father composed a passionate poem honoring the judicial reforms that "was perhaps weak in form, but strong in feeling."¹⁷

Like many Westernizers of the 1840s, Fyodor Koni believed Russia could evolve only through integration with European culture. He sent Anatoly to the German school in St. Petersburg, where he acquired a virtually native command of German and French and an affinity for German literature and philosophy, especially Goethe and Kant. Kant, not the more fashionable German romantic philosophers, was Fyodor Koni's guiding light. The elder Koni did not delve deeply into Kant's philosophy, but limited himself to Kant's basic moral principles and the notion of a "religion within the bounds of reason alone." Fyodor Koni tried to synthesize the new rationalism of science with a secularized spirituality and a religion based on moral verities and ethics. He imparted to young Anatoly a firm belief in human reason and morality as the fundamental values underlying one's personal and professional life. Anatoly Koni was a good pupil and throughout his life cited Kantian maxims that he learned at home, especially the categorical imperative: "Act so as to treat man, in your own person as well as in that of any one else, always as an end, never merely as the means." For Anatoly Koni, each human being required absolute respect because he was the bearer of "pure reason."¹⁸

Koni's parents did not have a happy marriage, but they nonetheless provided Anatoly with familial love and a superb education at home.¹⁹ A precocious youngster, Anatoly was well acquainted with his father's major academic works: a translation of Thiers' *Histoire du consulat et de l'empire* and a 700-page biography of Frederick the Great, which was partly translated into

German and for which Fyodor Koni received an honorary doctorate from Jena University. From his father, Anatoly Koni first learned about a *Rechtsstaat*, enlightened despotism, kingship as duty (with the ruler's untiring and conscientious labors in behalf of his people), and a professional judicial system. These concepts left a lasting impression on him, and for the rest of his life he was a firm believer in the state as the driving force behind social change and enlightenment.²⁰

Encouraged by his father, Anatoly applied to Moscow University in 1861 and was accepted to the law faculty with a stipend that paid his tuition.²¹ He earned money for his other needs by tutoring students and translating works from German and French. In his memoirs, Koni speaks warmly of his university days, drawing vivid portraits of professors who gave moral support and professional guidance, among them Nikita Krylov, Sergei Soloviev, and Sergei Barshev. But his deepest respect was reserved for his *nastavnik* (mentor), Boris Chicherin.²²

Koni enrolled in two of Chicherin's courses: *Kurs gosudarstvennoi nauki* (course on government science) and *Istoriia politicheskikh uchenii* (history of political studies). Chicherin introduced Koni to rigorous scholarship and the general principles of European politics and philosophy, which included such concepts as humaneness (*chelovechnost'*), justice, legal and moral self-consciousness of society, and the ideals of social life based on the rule of law. He cautioned his young student against pursuing "momentary popularity" and "the seductive paths of youthful imagination." In place of cheap radical solutions, Chicherin offered serious scholarship based "on a passionate love of truth and goodness." He stressed "the nobility of the mind and compassion for all humanity."²³

"Thirty-four years ago I attended your lectures at the university," Koni recalled in a letter to Chicherin in 1898, "and from your words I drew ideas of truth and justice; from your subsequent life and works I learned *how* to serve

those ideals....I sent you my books with anxiety, as a report on my activities.... Your warm, trusting attitude...led me to believe that I passed your life's examination [*zhiteiskii ekzamen*] and did not end up, as far as the eternal principles I heard in your classes, a 'lazy and malicious factotum'."²⁴ Three years later he wrote Chicherin: "You cannot help but feel the love I have toward you, the cultivator in me and the embodiment to this day of the highest ideals of a human being and citizen."²⁵

Boris Chicherin's influence on Koni extended to politics as well. "I have maintained the greatest respect for Chicherin," Koni wrote in his memoirs, "and admit that I am greatly indebted to him for my political development."²⁶ In 1905, he wrote to Chicherin's widow that he had attended a special church service for Chicherin and prayed with all his heart. "Chicherin gave us and nurtured in us those firm principles of 'civic mindedness' (*grazhdanstvennost*)," he emphasized, "that help one survive the mental anarchy that has seized Russian society."²⁷ Rejecting the conservative label given to Chicherin by his ideological foes, Koni praised his mentor for his independent views and willingness to swim against the political tide. He noted ironically that the "retrograde Chicherin" left the university, defending the dignity and independence of his academic colleagues, and was forced to resign as mayor of Moscow in 1883 for publicly acknowledging the need for independent society in Russia.²⁸

Koni advocated republishing Chicherin's works, calling them a necessary guide to Russia's political and social development.²⁹ He was particularly fond of Chicherin's book, *O narodnom predstavitel'stve* (On Popular Representation), that argued for the gradual evolution of political freedom, noting the need for the preconditions of liberty: the separation of government powers, an independent judiciary, a politically conscious middle class, and the broad acceptance of the rule of law.³⁰ It also raised the question of Russia's historical identity. At one point, Chicherin stated that "Russia is a European country, one which does not

elaborate any previously unknown principles, but develops like others, under the influence of the dominant forces in modern European history.³¹ But later in the book he balances this view by noting Russia's distinctive features, particularly its rejection of law and reliance on authoritarian power.³² This conception of Russia's historical duality deeply impressed Koni, and in his writings he often vacillated between a vision of a "European Russia" and a despondency about Russia's social backwardness and lack of legal consciousness.

At the core of Chicherin's philosophy that so profoundly influenced young Koni is the dual concept of individual freedom and responsibility to society. "Freedom does not consist in simply acquiring and expanding rights," Chicherin cautioned, for "a person has rights because he has responsibilities."³³ Drawing on Kant's "moral imperative," he asserted that "the significance of the human being, and the rights intrinsic to him, are based on the fact that man is a free reasoning being who carries within him the sense of a supreme moral law—the very idea of good."³⁴ The Kantian notion of "good" is expressed in the external world through social units that are bound by laws and political authority.³⁵ Each person is born into such a social entity and therefore has both fundamental rights (that must be respected by others) and responsibilities to that community. A person's freedom is inseparably tied to the freedom of others and is protected by law. "Authority and freedom are just as inextricably tied," Chicherin contended, "as are freedom and moral law."³⁶ And thus, he concluded, a citizen need not bow before every government, but for the sake of his own freedom must respect the essence of political power.

For Chicherin, unremitting opposition to political authority—so common among Russian radicals—was a sign of political puerility. His political essays were often directed against the Russian penchant for doctrinaire reasoning and anarchic freedom. As a society matures and realizes the full potential and responsibility of freedom, he argued, it gravitates toward the rule of law. "The

essence of 'conservative liberalism' (*okhranitelnyi liberalizm*)," Chicherin noted, "is the reconciliation of freedom with authority and law. In political life its message is: liberal measures and strong authority."³⁷ By liberalism, Chicherin meant respect for an individual's freedom and right to participate in public life. By pursuing private interests (including economic gain) and public concerns, citizens create an independent society not controlled by the state. Strong government, in contrast, is responsible for the political unity of the country, the protection of individual rights through law and order, national defense, and the suppression of extremist groups on the left and right of the political spectrum. Personally, Chicherin felt most comfortable with the enlightened conservatism of William Pitt the Younger, Sir Robert Peel, François Guizot, and Friedrich Karl von Savigny, but he understood that a healthy society also needed principled liberal forces. "Where there is no progressive party, a nation stagnates," he wrote, "but where there is no conservative party, social life expresses itself in mindless chaos, eternal restlessness, and anarchy—and this is inconceivable within a reasonable community (*razumnoe obshchestvie*)." ³⁸

From Chicherin, Koni drew the notion of *nравственность* (morality) as the underlying conception of ethics and justice. In his *Court Speeches*, he stated that "moral principles are inextricably interwoven with true justice."³⁹ Although Koni recognized the formal separation of judicial law from moral law, he felt that true justice could be rendered only by a judge who derives moral duty and rational humaneness (*razumnaia chelovechnost'*) from an understanding of the human motivations of crime. These motivations include psychological, anthropological, social, economic, ethnographic, and pathological factors. In Koni's view, the judge is not an administrator following the letter of the law, but rather the embodiment of legality, firmly anchored in both juridical law and morality.⁴⁰

Morality, the basic fabric of Koni's life, informed his idealism and shaped his legal, political, literary, and cultural activities. Koni's concern for

abused children, young criminals, and the "injured and insulted" of Russian life, for example, forged his friendship with Dostoevsky, Chekhov, Nekrasov, and other Russian writers. His biographies of such paragons of virtue as Dr. Gaaz (Haas) established his reputation as a moral authority in Russia. His work on behalf of persecuted religious minorities fostered his close ties to Tolstoy. "I have decided to give a series of lectures on judicial morality (*sudeiskaia npravstvennost'*)," Koni wrote Tolstoy, "and, citing my own tortured experiences, show young law students how to see the defendant as a living human being."⁴¹

The concept of morality led Koni directly to the notion of individual freedom and human dignity. "Any violation of man's dignity," Koni asserted, "is a violation of one's conscience and a deviation from moral law."⁴² Following Kant and Chicherin, he maintained that individual freedom is inseparably tied to law. Hence the best way to secure the inviolability of the individual is through a *Rechtsstaat*, in which "law infuses the very essence of government, and puts its seal on all governmental actions, as well as the manifestations of social activity."⁴³ Through such legal norms, Koni noted, "the State creates conditions in which an individual personality (*lichnost' cheloveka*) can realize his best traits (*luchshie svoistva*) and satisfy his needs, without violating the just needs and interests of others."⁴⁴ This closely follows Kant's assertion that "freedom (independence from the constraint of another's will), in so far as it is compatible with the freedom of everyone else in accordance with a universal law, is the sole and original right that belongs to every human being by virtue of his humanity."⁴⁵ Thus, by determining the boundaries of personal freedom through lawful relations, the state creates the structure for a rule-of-law society. Central to this notion is the politically conscious individual who enjoys freedom delimited by law and carries social responsibilities. Such an individual is stifled by autocracy and, Koni added presciently, would fare no better under a government

of radical revolutionaries.⁴⁶ Individual freedom can best be ensured through a constitutional state that embodies civil, economic, and political rights.

Koni followed in Chicherin's moderate political stead. He was a "good son" of the 1860s, and not the "rebellious son" depicted in Turgenev's famous novel. Guided by the ideals of the 1840s, he venerated the "liberal intent" of the Great Reforms and dedicated his life to their implementation. Seeing a growing rift between the radical intelligentsia and the autocracy, he sought the "middle ground" that condemned extralegal measures, and he favored gradual evolution toward a constitutional monarchy. A rational, "rooted intellectual," he had little patience for Russian flights of philosophical fancy or visions of political utopia. He stressed the rule of law, respect for the individual, religious tolerance, liberal education, and the implementation of reforms as the building blocks of a just and free civil society. In a letter to his childhood friend Sergei Moroshkin, Koni wrote: "a person of moderate political views, who scorns brute force, no matter where it comes from...cannot find himself a place in Russia, or any satisfaction, recognition or justice. Here one has to belong to a party, of one stripe or another, where frenetic activity and nastiness take the place of organization."⁴⁷ And "where is there such a party to which an honest person could belong?" he asked Chicherin, "I look with inexpressible disgust at both our retrogrades and our radicals. Both groups, at least as far as their leaders are concerned, are equally dishonest in their methods, shortsighted in their goals, and improper and horrible in their means....there is no one we can lean on, and sometimes one becomes despondent seeing how alien to Russia are legal freedom and conscious love for one's fatherland."⁴⁸

Both Chicherin and Koni were "reforming personalities," to use Gary Hamburg's apt term, who were psychologically attached to Russia's cultural traditions, but were repelled by harsh autocratic rule and sought political amelioration through gradual reform.⁴⁹ Hamburg traces Chicherin's understanding

of political change to the moderate Westernizers of the 1840s, primarily to his professors, P. G. Redkin and T. N. Granovskii. In Koni's case, the foundation for such views was laid by his father, who was himself a moderate Westernizer of the 1840s. Koni's belief in the moral basis of gradual political change was reconfirmed and strengthened by Chicherin's lectures at the university, and his subsequent reading of Chicherin's philosophical and political works. "The deepest source of Koni's motivations," the soviet scholar B. I. Syromiatnikov writes, is embedded in "the traditions and spirit of the Idealist philosophy of the 1840s."⁵⁰

Koni maintained an extensive correspondence with Chicherin and visited him at his estate, where they engaged in lengthy conversations about political and social conditions in Russia and exchanged books and articles. Koni's preface to the fourth edition of *Sudebnye rechi* (1905), dedicated to the memory of Chicherin, draws a portrait of a man who served as a model for others. Koni notes that Chicherin's personal life was consonant with the principles of truth and high morality, and his deep convictions about the sanctity of the individual did not change under the pressure of popular opinion. Chicherin was dedicated to scholarship and legal writings and preserved an unwavering commitment to the peaceful evolution of the Great Reforms of the 1860s. This depiction of Chicherin is a *nравственный образ*, a "moral icon" in keeping with the idealism of the 1840s.⁵¹ Koni does not analyze Chicherin's philosophy or place him within a context of Russian liberalism, but rather treats his moral philosophy as a personal guide to life. "I am very, very much saddened by the death of Chicherin, my friend and mentor," he wrote to the lawyer K. K. Arseniev on 4 February 1904, "I started to write about him, but couldn't. The wound is still too fresh."⁵²

Philosophical Principles

Koni's understanding of moral law, political authority, and fundamental human rights finds expression in his doctoral dissertation: *O prave neobkhodimoi oborony* (The Right of Necessary Defense) (1865), which is based on the German juridical concept of *das Recht der Notwehr*.⁵³ Koni begins with the notion of self-protection (*samosokhranenie*):

The feeling of self-protection is inherent to man both as a moral-reasoning being (*nравственно-разумное существо*) and as the highest form of creation in the animal kingdom. This feeling, so deeply imbedded by nature, never leaves man. He strives toward self-protection instinctually, as well as from a sense of his right (*pravo*) to exist. This is an innate right (*Urrecht*).⁵⁴

Drawing on Chicherin's notions of statehood, Koni argues that man creates society and government to protect his basic right to exist. In the early stages of civilization, he avers, man was strong, and the government weak, but over time the state grew in power at the expense of the individual. Eventually, the free man, who was solely responsible for his protection in a brutal world, became a citizen with "firmly determined rights by law, and, correspondingly, responsibilities to the State. Civil freedom replaced lawlessness (*proizvol*)."⁵⁵ Koni accepts Chicherin's principle of rights and responsibilities as the theoretical basis of a mature civil society, but in his dissertation explores the practical question: What are man's rights when the state is unable (or unwilling) to protect the citizen?

A proponent of a strong state as the precondition for civil order (*grazhdanskii poriadok*), Koni rejects lynch law (*samosud*) and personal revenge.

Only the state has the right to threaten would-be violators of the law and punish convicted criminals; hence it must suppress any manifestation of personal arbitrariness (*samoupravstvo*). "But there are instances," Koni asserts, "when the legal code must grant a certain amount of personal arbitrary rule. This must be allowed precisely out of respect for rights that might otherwise be frequently violated with impunity. These are instances of necessary defense."⁵⁶ And if the individual is incapable of providing for his own defense, he must have the right to call on others to assist him, for he finds himself in a "situation requiring necessary defense."⁵⁷ In short, man must have the legal right to protect himself for he cannot count on the state to do so in every instance.

In his analysis of the legal forms of necessary defense, Koni relies on the theoretical writings of German professors of law, primarily Albert Friedrich Berner, Heinrich Zoepfl, Karl Geib, Karl Joseph Mittermaier, and Paul von Feuerbach (father of the philosopher Ludwig Feuerbach). By focusing on non-Russian sources, and analyzing issues in a Western legal context, Koni is free to indulge in abstract speculation. He rejects, for instance, Feuerbach's assertion that a person convicted of a crime loses the protection of the state, and hence the right to necessary defense. "This is completely false," Koni asserts, "the State can never deny a person his basic human rights (*obshchechelovecheskie prava*)."⁵⁸ Such reasoning leads Koni to the notion that a person has the right to self-defense not only from private individuals, but also from government officials who are trying to take away his or her civil freedom. "Necessary defense," he concludes, "is the protection of rights (*pravozashchishchenie*) in the broadest sense."⁵⁹

"What is *pravo*?" Koni then asks.⁶⁰ Drawing on Kantian principles, he asserts that the essence of human life is the conscious striving toward the realization of morally reasonable (*nравственно разумные*) goals. To attain them, a person must enjoy certain conditions, relating to personal freedom, health,

honor and property. "Man *eo ipso* can demand the opportunity to lead a morally reasonable life," Koni notes, "and hence he can and must defend those conditions without which such a life would be impossible. And the totality of these conditions constitutes *pravo*."⁶¹

Immersed in the world of abstract notions, Koni tackles the question of human rights boldly and enthusiastically. Citing the German scholar Albert Friedrich Berner, he asserts that "necessary defense applies to absolutely all human rights, including social and political rights."⁶² If, Koni states, a government tries to take away existing human rights, then the people, "on the strength of the legal basis of necessary defense, have the right of revolution (*pravo revoliutsii*)."⁶³ This may seem a radical call to revolt, but in Koni's tempered reasoning, revolution is justified only when people are defending their existing rights, not when they are demanding new rights. "A revolution," Koni concludes, "is the last means of defense," and not a way of acquiring new rights.⁶⁴

After a thorough examination of the Western notions of necessary defense, Koni briefly explores the Russian legal codes from the Kievan period to the nineteenth century. This cursory look leads him to the conclusion that the concept of necessary defense existed in Russia, but in a primitive form that evolved slowly and fitfully over the centuries. His intention here is not to provide an analysis of Russian juridical practice but to voice general agreement with the more conservative legal scholars at Moscow University who venerated older traditions of Russian law. Under the influence of his adviser, S. I. Barshev, Koni acknowledges that by the mid-nineteenth century Russia had developed a base for incorporating Western legal concepts. "*Pravo* cannot be created suddenly and simply transplanted from one country to another," he writes, "it grows organically, and external conditions can either speed up or slow down its development."⁶⁵

Koni's dissertation concludes with the assertion that the 1864 Judicial Reform was a dramatic breakthrough in the evolution of Russian legal history. "Examining the current decrees about necessary defense [in the 1864 Statues]," he writes, "one cannot help but come to the conclusion that they are fully in keeping with contemporary theories of necessary defense...and our legal code, concerning necessary defense, can serve as a model among European judicial systems."⁶⁶ The judicial reform provides the framework for Russia's development as a modern nation. The task of Russian jurisprudence, Koni notes, is to unite juridical science, legislation, and courtroom practice in an effort to perfect the fundamental system established by the reforms of Alexander II.

The law faculty of Moscow University judged Koni's dissertation a superior work of scholarship (*ves'ma pochtennyi trud*), and the academic council published it in the appendix of *Moskovskie universitetskie izvestiia* (1865), along with Vasily Kliuchevsky's dissertation about foreigners' accounts of their travels in Muscovy Russia. But one year later, on 20 May 1866, a censor in the Ministry of the Interior found the dissertation inappropriate for publication.⁶⁷ He took exception to the general thrust of the work—the rights and dignity of the individual—and specifically objected to Koni's belief in the inviolability of a person's home and his notion of necessary defense against the unlawful actions of state officials. Despite the general upsurge of liberalism in the 1860s, tsarist officials were wary of ideas questioning the sanctity of autocratic rule. "Such teachings," the report concluded, "are hardly convenient at the present time."⁶⁸

The tsarist censorship forbade the distribution of the dissertation, but this did not derail Koni's career. A twenty-one-year-old graduate of Moscow University, Koni already had the reputation of being one of Russia's finest young judicial scholars. "In spite of his youthful age," the Russian legal scholar A. Zhizhilenko wrote, "Koni displayed broad erudition and skill in dissecting complex legal issues and providing fine analysis of legal questions."⁶⁹ Koni's

remarkable talents were recognized by the faculty at Moscow University: He was given an opportunity to continue his legal studies in Leipzig and join the faculty as a professor of criminal law. But after Dmitry Karakazov's attempted assassination of Alexander II in 1866, study in Europe was curtailed, and Koni was forced to turn to practical legal work. He began his juridical career in the Ministry of Justice and quickly rose to the rank of prosecutor, judge, and later member of the senate. He felt at home amid the hubbub of courtroom activity, and never seriously regretted abandoning a traditional academic career.

Although political philosophy and judicial scholarship were important for Koni, and he read broadly in psychology, history, and the social sciences, he was not strictly a theoretical thinker. He believed the study of government should be tempered by real, everyday political problems; otherwise it would become sterile and devolve into a mindless pursuit of unattainable goals or hazy theories.⁷⁰ Echoing the words of the jurist Alexander Gradovskii, Koni wrote that "an individual's moral and legal development (*pravovoe razvitiie*) is based on serving society."⁷¹ Koni's conviction that scholarship and active participation in government were interdependent determined his path in life. Unlike his mentors, who were writers and philosophers, Koni was a practitioner, wholeheartedly dedicated to the implementation of the rule of law in Russia. But as an introspective intellectual, he reflected on his actions, questioned his assumptions, and carefully scrutinized his decisions. No area better illustrates Koni's combination of practical work and moral values than his conception of the judge in Russia. An exemplary courtroom judge himself, he was also a legal thinker who explored the theoretical underpinnings of a judge's decision and the nature of judicial authority.

Role of Judge

Koni's conception of a judge is embedded in his essay, "On Moral Principles in Criminal Proceedings" (1902). One passage from this essay deserves to be cited at length because it communicates succinctly Koni's reasoning and emotional commitment to the notion of morality in jurisprudence.

According to the elevated and profound teachings of Kant, the practical mind—one turned not outward, but toward the analysis of the impulses of the human will—uncovers in our soul the *moral law (nравstvennyi zakon)* that is absolute, independent of external demands, but subordinated to inner necessity. At the core of Kant's teachings are not personal happiness, the abstracted goals of world development, or the successful struggle for existence, which entail the sacrifice of an individual, but *the happiness of our neighbors, and our own moral perfection*. Striving toward these two goals forms the moral duty of man, who must act in such a way that his behavior can form the principles guiding the actions of others. That is, they could be elevated to a general law applicable to all. The realization of the absolute requirements of moral duty is expressed above all in respect for human dignity and love for man as the vessel of moral law, that very law whose creation, together with the starry night, filled Kant with joy and faith in the immortality of the human soul.

From this comes the just attitude toward man, expressed in the conscious and impartial putting of oneself in the place of another in every given instance and the resistance of making a thinking creature the *means* of some unrelated or personal striving, and not the *goal* he should be. In the realization of justice and in its connection with *active* love, moral duty merges with the governing principles of Christianity,

directing man to love his neighbor as he loves himself. That is why the jurist's moral duty emerges, alongside his professional duties. This moral duty tells the jurist never to forget that the object of his actions is, above all else, *the human being*, who is endowed with the inalienable right of human dignity. Any violation of this human dignity is inevitably a violation of one's own soul in its highest manifestation—its conscience. Such violation does not pass without consequences. Sooner or later it emerges in excruciatingly oppressive images that cannot be extinguished by even some belated correction of the earlier deviation from the moral law.

Justice cannot be separated from fairness, for the latter does not consist in simply applying lawful measures of punishment to proved actions. The jurist must strive to realize this moral law in all his actions concerning people, toward whose deeds he must apply his mind, labor and power. By forgetting the living human being, his brother in Christ, his fellow human on this earth capable of compassion, the jurist negates his mind and talent, and the *external* usefulness of his work. No matter how different his social position may be from those brought to his court, no matter how irreproachable he may consider himself in a formal and even moral sense, in the jurist's soul must be heard that wonderful Hindu expression as a living reminder of his ties to the surrounding world: "tat twam asi—*that is you too*, you in shame, you in misfortune, you in ignorance, poverty, error, you in the arms of passion!"⁷²

This passage reveals several key points of Koni's moral reasoning. Koni acknowledges Kant's imperatives of moral duty and the need to provide for the happiness of others by treating man with dignity and respect. Because it is the judicial system that has the legal authority to impose its will on human beings,

and to punish them for their transgressions, the judge—as the highest representative of that body—must be the public exponent of moral law. He must achieve justice and fairness, and he can do so only by understanding the human being brought before him in court. That understanding comes from the Kantian realization that all human beings carry within them a "divine spark" that manifests itself in their capacity to reason.

Koni's emphasis on morality is grounded in a religious sensibility. In his letters and essays he sometimes remarked that he was a believing Christian who celebrated Orthodox holidays, but like many of his intellectual peers, he relegated personal religious feelings to his private life. In his public statements he was generally critical of the Orthodox Church, primarily for its intolerance of other religions and reliance on heavy-handed administrative methods to inculcate religious values. "The Russian clergy," he noted with typical indignation, "established and strengthened the dominance of the Church [in the Baltic region] not so much by example, teaching or raising the level of people's morality and religious consciousness but by imposing administrative penalties and judicial sentences, preferring police measures over spiritual understanding."⁷³ Because Koni advocated, above all else, personal human dignity and freedom of choice in spiritual matters, he drew little, if any sustenance from the state-dominated Orthodox Church, and he found the wellsprings of morality in classical Russian literature and in the writings of Western philosophers such as Kant.

Although Koni always advocated highly structured judicial proceedings and a strict rule of law, he rejected the notion of justice as a mechanical function and saw it as an expression of living human beings. In such a schema, the judge emerges as a central figure, the "teacher" whose judicial behavior must serve as a model for others. Thus the judge needs "moral education" (or "judicial ethics" as Koni sometimes called it) because "morality" allows a judge to understand defendants and treat them fairly. His freedom of inner conviction, Koni cautions,

"exists in *relation to each piece of evidence*...and the judge must follow what is *logically inevitable and morally binding*....Hence the judge can never say *sic volo, sic iubeo*, but like Luther, must say: '*Ich kann nicht anders.*' "74

In his essay Koni assumes that Russia, following Europe's lead, has incorporated the "mechanical process" of modern judicial proceedings: public courts, jury trials, oral arguments, open evaluation of evidence, and the adversarial method. "Our current trial system," Koni wrote, "places the judge face to face with a living human being. Openness (*glasnost*) and oral arguments have introduced into the judicial process the principle of direct examination of evidence. They have swept away the heaps of papers, reports, protocols, projected resolutions, etc. that buried the living human being, making him merely a 'case number.' Man has arisen from this pile of written documents, which muted the colors of his personality, and now stands before the judge together with his accusers and defenders."⁷⁵ What is left, Koni argues, is the need to address the question of morality:

The primary focus, with full justification will shift to the study of moral principles in criminal proceedings, and the locus of analysis of legal procedures will move from court proceedings to the ethical and social-legal work of the judge....At different stages of the criminal trial, when the judge is investigating the crime, trying to understand the personality of the defendant, assessing his guilt and applying to it the proper means of punishment, and making sure that the verdict follows rules intended to protect both society and the defendant—he is called upon to apply all the powers of his mind and conscience, knowledge and experience in order to arrive at both the 'everyday' (*zhiteiskoe*) and 'judicial' (*iuridicheskoe*) truth of the matter.⁷⁶

Throughout his long judicial career, Koni was concerned with how a court determines the truth of a case. Although always a strong supporter of proper judicial proceedings, he felt that the judge's inner convictions, moral nature, and code of ethical behavior played the decisive role in adjudicating cases. "A judge must combine legal and moral requirements," Koni added. "How courtroom procedures actually function reveals the inner workings of the judge's soul (*vnutrennii stroi dushi*). Every courtroom action raises two questions: *What* must be done? and the equally important, *How* should it be done? To escape the fate of an automaton, the judge must inject his soul into the case (*vnosit' svoiu dushu*) and his actions must be governed not only by the law but also by the absolute and eternal postulates of the human spirit."⁷⁷ In Koni's conception, the judge is a paragon of enlightenment. He dispenses justice, and through his behavior in court sets a high moral standard and inculcates lofty principles of "social living" (*obshchezhitie*).

However abstract Koni's notions of judicial morality may have been, his understanding of jurisprudence was always grounded in practical experience. He was a practicing judge, and he exemplified in the courtroom the moral values that he preached so passionately in lecture halls and on the pages of Russia's liberal journals. Although Koni participated in many celebrated cases, none brought him greater fame (or notoriety) than the Vera Zasulich trial. This case illustrates how successfully he merged theory and praxis.

On 24 January 1878, Koni was named head of the St. Petersburg Circuit Court. That same day, Vera Zasulich, a young revolutionary, shot the Governor of St. Petersburg, Fyodor Trepov, to avenge the flogging of a young prisoner, Arkhip Bogoliubov. Zasulich was arrested immediately, and the case was tried by a jury on 31 March. A dedicated proponent of the 1864 Judicial Reform, Koni tried to be an impartial judge. He allowed the defense to present its strongest case, and that included emotional testimony about the squalid living conditions

of young students detained for distributing revolutionary literature. The jurors, deeply affected by the harrowing descriptions of the persecution and beating of student revolutionaries, in effect condemned Trepov and arbitrary autocratic rule by acquitting Zasulich.⁷⁸ This decision caused an uproar in tsarist circles, and the trial became a watershed in Russian legal history.

Koni found himself in a political maelstrom. The unexpected acquittal of Vera Zasulich exposed public discontent with the increasingly repressive policies of the government and provided a moral boost to the nascent revolutionary movement. Equally, it outraged the tsarist government and galvanized its efforts to curb the more liberal aspects of the Russian judicial system, primarily the trial by jury and the irrevocable tenure of judges. This left Koni in the precarious "political middle." He espoused the rule of law and an independent judiciary and rejected both the increasingly reactionary policies and extralegal measures of Alexander III and the revolutionary programs of Russian socialists. Specifically, the Zasulich case forced him to defend the judge's role in Russia's new legal system.

The role of judge had changed radically in 1864. In the prereform system, "judges were intermediaries," Richard Wortman reminds us, "who applied the monarch's law...and whose discretion should be as limited as possible."⁷⁹ They were usually retired generals who had a cursory knowledge of legal codes. They did not exercise independent judgment and merely served as the tsar's representatives. After the enactment of the Judicial Reform, however, the judge had to have a solid legal education, experience in the courtroom, and publicly recognized high moral standards. He was given the right to adjudicate cases and was protected from political pressure by a legal code. No longer a mere bureaucrat, serving at the whim of the tsar, the judge was an independent legal authority. Article 295 of the "Foundation of the Judicial Statutes" (*Uchrezhdenie sudebnykh ustanovlenii*) specified that a judge could be removed

from office only for criminal cause, and then by a decision of a council of peers, the Higher Disciplinary Office of the Governing Senate (*Vysshee distsiplinarnoe prisustvie Pravitel'stviushchego senata*).⁸⁰

Judicial independence was not readily accepted by many tsarist officials and conservative thinkers. The Minister of Justice, Count Pahlen, for instance, felt more comfortable with the patrimonial principle of the tsar as the source of all legal authority. Although Pahlen and other ministers paid lip service to the new legal code, they referred to legal procedures as theories that could be ignored for *raison d'etat*.⁸¹ A more invidious attack on the independence of judges came from Konstantin Pobedonostsev. A professor of civil law in the 1860s, the tutor of Alexander III and Nicholas II, and the lay head of the Orthodox Church, Pobedonostsev was outraged by the Zasluch case and used it to justify a proposal for dismantling the entire Russian judicial system. In an official memorandum to the tsar on 30 October 1885, he wrote:

Experience has proved to a sufficient degree the disparity between the current judicial system and court procedures on the one hand, and the needs of the people and their social conditions, as well as the general government structure, on the other. These shortcomings should be corrected, without harming the real improvements of the new system of justice. It's obvious that improvements cannot be implemented right away, but should be introduced gradually, according to a well developed plan.⁸²

At the heart of Pobedonostsev's proposal was the need "to bring the judiciary under direct government control...since in Russia there cannot be any authority (*vlast'*) separate from central State power."⁸³ To achieve this goal, Pobedonostsev advocated making judges civil servants. He considered the irrevocable tenure of judges a "strange anomaly, and in no way justifiable, since in Russian history

there was no separate judicial class, strong in knowledge, loyalty, experience and bound by a sense of corporate honor."⁸⁴

Indifference to the law and preference for administrative measures by the Ministry of Justice forced Koni to assume the role of defender of the Judicial Reform and to be an advocate for independent courts. Until the Zasulich trial, he had been a naively enthusiastic young jurist, who was intoxicated by legal change and convinced that Russia was well on its way toward becoming a rule-of-law state. Now he had to convince a skeptical Ministry of Justice that a judge was not a bureaucrat in the tsarist administration. To a high-ranking colleague at the ministry who followed the prevailing political winds, Koni retorted: "You are not a bureaucrat in the administration; you're a judge! A Senator!"⁸⁵ Rejecting Pahlen's notion that the outcome of a jury trial depended on the judge's power of persuasion, Koni asserted that the task of a judge "consisted in following the law impartially. There is no place for rhetoric, for a judge's summation of the case must be impartial and unemotional."⁸⁶ Later he told Pahlen that "the head of the court is a judge, and he does not take sides in a case. In directing a criminal trial, he holds 'the chalice with the holy sacraments,' and does not dare tilt it in either direction for fear of spilling those sacraments."⁸⁷

Privately, Koni conceded that Vera Zasulich should have been found guilty, with extenuating circumstances mitigating her punishment. But as judge, he was impartial, leaving justice in the hands of the jurors. Elizabeth Naryshkin-Kurakin, Lady-in-Waiting to the Grand Duchess, attended the Zasulich trial and recalled that "Koni tried to be as unbiased as possible as Chairman [judge]."⁸⁸ The prominent Russian lawyer O. O. Gruzenberg wrote that Koni's "summation for the jury was and remains a masterpiece of this most difficult kind of judicial work, surpassed by no one....He carefully treated the interest of the defendant and tried to recreate before the court the conditions of life which

brought her into conflict with the law."⁸⁹ Koni, however, was aware of the fickle nature of Russian juries, noting that "sincerity is not truth, and sentences handed down by Russian juries are always honorable for their sincerity, but do not always live up to the absolute truth...[and] at times it is difficult to agree with them."⁹⁰ Immediately after the trial, when a high-ranking official greeted Koni with the words: "this is the happiest day in Russian justice," Koni retorted: "You're mistaken. This is its saddest day."⁹¹ But despite such misgivings about the acquittal, Koni accepted it as a just verdict that had the force of law.

Koni's independent behavior on the bench unleashed a virulent conservative reaction against the new court system. Only days after the Zasulich trial, Count Pahlen summoned Koni to his office. "Do you realize," he told Koni, "that you are being accused of the most egregious violations of your duties: justifying Zasulich's actions in your summation, helping that scoundrel Alexandrov [the defense attorney], calling up those witnesses who shamed Trepov, allowing the scandalous behavior of spectators, giving out court passes to radicals. Everyone is saying this wasn't a court, but a demonstration."⁹² Pahlen concluded his tirade by saying that he expected the tsar to demand Koni's resignation.

The removal of a judge from office without legal cause was a clear violation of the law. Koni's immediate response was to refuse to answer Pahlen's charges, stating that "by law, a judge is not required to justify his actions to the Minister of Justice," and that he would answer only those charges that were "legally formulated" (*zakonno formulirovan*).⁹³ Although he could earn more as a private attorney, Koni knew his resignation under pressure would gravely weaken the principle of irrevocable tenure, which was, in his words, "the best guarantee and finest adornment of a judge's calling."⁹⁴ It would deliver a "cruel and moral (*npravstvennyi*) blow at the very heart of the justice system."⁹⁵ After all, Koni mused, "the belief in justice rests not on those thousands of cases that

are decidedly fairly, but on those rare instances when one fears that the court could become servile, pandering and fawning—but remains independent."⁹⁶

Koni's argument with Pahlen was more than a question of principle; it was a matter of law. If Russia adhered to the new system of justice, then Koni could be removed from office only through a legally sanctioned process. If, on the other hand, Russia was still ruled by political exigency, then the tsar could violate the law and remove Koni from office. Pahlen, brought up in the old administrative order, was convinced that Alexander would rise above the law to assert his autocratic prerogatives. But the tsar did not, even though he disapproved of Koni's conduct at the trial. Koni remained a judge, but he was subjected to public vilification and private disdain, and several years later he was transferred to the Civil Cassation Department.

The Zasluch case reveals Koni's fighting spirit (*boevaia natura*). A self-described *vox clamantis in deserto* (a voice in the wilderness), he struggled to establish a rule-of-law state in Russia. Writing to his childhood friend Sergei Moroshkin, he noted: "as is so often the case, I managed to go against so-called public opinion, against the Ministry of Justice, and against the Senate itself, which timidly acquiesced to my views."⁹⁷ Koni believed passionately in the independence of the judiciary, for only if a judge is independent can he exercise moral authority and achieve justice. Bureaucrats follow orders; judges must adjudicate cases in a fair and honest manner. Hence for Koni, each legal case was important. If it was decided fairly it would be a building block of a just and civilized society; if it was subjected to age-old Russian *proizvol* (lawlessness), it would retard Russia's fitful evolution into a modern state. Koni readily acknowledged that the 1864 Judicial Statute provided the framework and institutions of a rule-of-law state, but he believed the success of liberal reform depended on the honest work of judges who decide cases every day. To this task he devoted his fifty-year career in the Russian judiciary.

Role in Russian Society

On 11 October 1927, at a meeting of the Society of Russian Literature in Leningrad, the writer and theater critic R. M. Khin-Goldovskaia reminisced about her friend Anatoly Koni and tried to describe his personality. She recalled how her lawyer, Prince A. I. Urusov, first directed her to Koni, calling him an "enticing master of virtue." She sought his help in dealing with new legal sanctions against Jews that were emerging in the era of the Counter Reforms. Koni had a superb reputation as a defender of religious minorities, but Khin-Goldovskaia expected to find a cold, rational bureaucrat who would dismiss her after a perfunctory meeting. To her surprise she found behind the formal exterior of a tsarist *sanovnik* a warm and engaging man. When Koni started to speak, she exclaimed:

I thought of one thing, that he may go on forever. This was not a speech or a conversation, but a masterly improvisation. Before me, as if in a living panorama, stretched all of Russia, her fates, the expanse of the land, our confusing wealth and wild poverty, our incomparable literature and barbaric ignorance....Anatolii Fedorovich was a living center...all kinds of people—from the rich and famous to poor students from the provinces—gravitated toward him, seeking support, approval, intercession, or simply the joy of a short meeting.⁹⁸

Koni's charisma was noted by all who met with him. Khin-Goldovskaia valued his "incisive, analytical mind"; Goncharov was taken by Koni's kindness, wit, and vivacious character; Sergei Platonov spoke of his erudition, individualism, and idealism; and Kornei Chukovsky stressed Koni's unpretentious life and

natural ability to understand people from all walks of life. But in all descriptions of Koni, one general characteristic predominated: his belief in moral principles.

Koni's "moralism" can be seen in sharper focus if we consider briefly Isaiah Berlin's famous juxtaposition of two distinct moral attitudes, arbitrarily labeled "French" and "Russian." In the French attitude toward art and life, which separates the "maker" from the "product," "the artist's private life is of no more concern to the public than the private life of a carpenter." What is most valuable is the quality of the product. The Russian attitude, Berlin contends, is different. For Russians

man is one, and what he does, he does with his whole personality. It is the duty of men to do what is good, speak the truth, and produce beautiful objects...This idea of total integrity, of total commitment, is the heart of the romantic attitude....and it is ultimately a moral attitude.⁹⁹

In Berlin's dialectic, the Russian approach relies on sincerity of effort and nobility of intention. The product itself, although important, is inextricably tied to its creator.

If we accept Isaiah Berlin's characterization of Russian intellectual life, then Koni emerges as a true Russian *intellectual*. Although Koni received a thoroughly European education and was both a Germanophile and a Francophile, he brought to his professional life a distinctly Russian flavor. He accepted Kantian moral principles absolutely and dedicated himself to "the truth of the liberal reforms of the 1860s." He evaluated the role of the judge in terms of his moral behavior. He often said proudly that there was nothing in his professional life that would cause him embarrassment. Jurisprudence was not merely a profession for him, a way of making a comfortable living, but a sacred calling. "My personal fate," he wrote Tolstoy in 1888, "was cast long ago in those happy

days when it seemed the transition from the dark forces of lawlessness to the courts of conscience and inner conviction would completely transform society....I sought truth in jurisprudence."¹⁰⁰ Having chosen a career generally scorned by the Russian intelligentsia for its caviling casuistry, Koni became an ardent missionary of justice and human dignity. He clothed his juridical work in the language of morality and ethics, and that allowed him to communicate easily with different strata of Russian society.

Koni's relationship with Tolstoy serves as a good illustration. Put baldly, Tolstoy and Koni had fundamentally different conceptions of social and political life. Tolstoy generally rejected the very values Koni espoused: a sense of civic responsibility; belief in the natural sciences as the path to truth; political reform; democracy; material progress; secularism; and modern education.¹⁰¹ In his "Letter to a student concerning law" (1909), he identified law with the commands of a sovereign and adopted the socialist critique of law as simply an instrument of oppression. "For those in power," Tolstoy wrote, "law means the authorization, which they have given themselves, to do everything which is advantageous to themselves while for those subject to them law means permission to do whatever is not forbidden to them."¹⁰² Such fundamental legal nihilism made him especially critical of the modern judicial system. "I read your *Judicial Ethics*," Tolstoy wrote Koni, "and, although I think these ideas coming from such an authoritative person as yourself will benefit our youth, I personally cannot help but believe that as soon as Kant's higher law is accepted, the very notion of a court system will disappear."¹⁰³ Tolstoy even went so far as to take a court case related to him by Koni—the story of Rozaliia Oni—and used it as the basis for *Resurrection*, a novel that mocks the Russian judicial system.

Although Koni fervently believed in liberal Western jurisprudence and even saw Kant's moral law as the foundation of the judicial process, he found common ground with Tolstoy. "How long has it been since we've seen each

other," Koni wrote Tolstoy, "and how long has it been since I had the joy of hearing your voice and cleansing myself spiritually in your company."¹⁰⁴ Koni spoke of Tolstoy as a "moral judge," "the keeper of human conscience," "the comforter of human travails," and the "force of moral disinfection" (*dezinfektsiia dushi*) and "just mercy." They worked closely together for many years, helping persecuted members of religious sects and victims of tsarist oppression. Despite their social and political differences, they both served the higher cause of truth and justice; in Koni's words, the desire "to raise the level of morality in our society."¹⁰⁵ "You know it is not personal gain that keeps me at my job," Koni noted in one of his many letters to Tolstoy, "but the desire to be useful."¹⁰⁶ The venerated role of moralism in Russian intellectual life, so clearly expressed in the classics of Russian literature, united Tolstoy and Koni and indeed secured Koni a place in the pantheon of Russian thinkers.

What is remarkable about Koni, and unusual for a member of the Russian intelligentsia, was his sense of moderation. Most Russian intellectuals gravitated toward political extremism and remained wary of the rule of law. Koni, in contrast, was wholeheartedly committed to gradual political evolution toward a western-style state. He was deeply skeptical of revolution and rejected utopia out of hand. "You know that for the current conditions of Russian society I accept autocracy as the best form of government," Koni wrote to Moroshkin, "but an autocracy where absolute power is tied to a striving for omniscience, not where absolute power is wielded by boors who have become ministers and who form an impregnable wall around a stubborn and limited monarch. Such an autocracy is a disaster for our country...and what lawlessness we see everywhere."¹⁰⁷ It was precisely the rule of law that Koni valued as the foundation of a healthy society. "In our society," he added, "they do not understand that one can grumble about the government and remain a friend of law and order, and be indignant about

both the extralegal measures of the government and the terrorist activities of revolutionaries." ¹⁰⁸

Despite his moderate conservatism, Koni sensed that by the early twentieth century Russian society was ready to play an active role in politics. In a 22 December 1904 letter to the liberal reformer Dmitry Miliutin, he expounded on his views:

The current situation in Russia is strange and, I dare say, frightening. Society is bursting out of its swaddling clothes, in which it was forcibly kept and which dulled its mind and atrophied any feelings of self dignity. But it already wants to run, although it doesn't yet know how to walk, and indeed how to stand on its own feet. As a consequence we hear at festive dinners grand words, noisy protestations and resolutions of fundamental political questions—about the war, the internal structure of Russia, and its form of government. The ardor of the motley crowd that attends these dinners is matched by the immaturity of its views. And next to this is a whole series of mistakes by the government, which is acting chaotically, rejecting today the principles it relied upon yesterday. And with every day, indeed with the publication of every newspaper, it further loses the trust of the people. And amid all this is a new factor—the masses, which sense that armed with violence they are emboldened to demand more and more. And everything is lit up by the bloody glow of Port-Arthur, and everyone, lamenting and crying, is trying to find the real culprits of this ill-fated war. Quite invariably one remembers the words of Thiers: 'L'injustice n'est pas sterile—elle a aussi des enfants—et ils sont dignes de leur mere.' ¹⁰⁹

Koni understood that Russia was squeezed by revolutionaries on one side and the reactionary government on the other. Unlike the majority of Russian

intelligentsia, Koni preferred the political middle ground, firmly anchored in Western notions of order and legality. What was needed was reason, patience and political compromise. Only in this way could Russia become a constitutional state.

Despite profound disillusionment in tsarist rule, Koni continued serving in the Senate and Council of State. In a letter to Chicherin in 1903, he confided proudly that he had received 853 of 932 votes for a seat in the St. Petersburg City Duma, and he was intent on being an active member because that was his "civic duty."¹¹⁰ As a leading Russian jurist, he was a member of many legal commissions and cast decisive votes on specific government projects. As a senior member of the Muraviev Commission in the 1890s, he played a key role in helping preserve the jury trial system. He belonged to Count Heiden's small political group, *Partiia mirnogo obnovlenie* (Party of Peaceful Renewal) that occupied the political "center." In a letter to an old friend in 1906, Koni confided that it was his strong sense of moral duty that compelled him to remain "at his post" through years of sorrow and frustration. What sustained him, he said, was a firm rejection of political extremes and a belief "in the path of liberal reforms, whose stability and longevity are guaranteed by a constitution." If Russia is to avoid bloody confrontations, he concluded, autocratic government must be "circumscribed by legal order" (*pravovoi poriadok*). A constitution must be established even if it "is incomplete and contains some mistakes. The constitution can always be improved over time by a Government Duma."¹¹¹

In short, Koni appears a fascinating figure on the Russian intellectual landscape. A moderate liberal, he believed in such Western concepts as the rule of law, civic education, and a rationally ordered society that respected the individuality and dignity of all citizens. A patriotic Russian, he believed that Russian culture contained the necessary values—compassion, mercy, humility, ethics—that could lead to the flowering of a great nation. He bridged these beliefs

by adopting "morality" as the essence of his life. Koni's "morality" combined the Kantian notions of duty, order, and work for the common weal with the Russian search for spiritual and psychological truth, so deeply embedded in the classics of literature. He captures this set of beliefs in a rare self-portrait:

The tsarist government barely tolerated me among its civil servants. It relied on my talents, knowledge, and hard work, seeing in me a Don Quixote who voluntarily carried the yoke of bureaucracy, when his pen and word could have brought him independence and wealth in the free professions. In its myopia, the government would on occasion punish me, denying me medals and awards, and on occasion reward me, even when that went against my personal wishes. But *Russian society* always treated me differently. It understood my *service* to Russia and considered me *the bearer of moral principles*.¹¹²

Notes

I thank Marc Raeff, Professor Emeritus at Columbia University, who first introduced me to Koni and has been a friend and mentor for more than twenty years; the Kennan Institute at the Woodrow Wilson Center, and its director, Blair Ruble, for providing warm hospitality and a wonderful setting for conducting research; and my wife, Susanne Sternthal, for being a critical and incisive reader of my Koni project and a supportive friend.

1. This was one of Koni's favorite quotations from Goethe. Quoted in a 28 January 1927 letter to A. I. Iuzhin-Sumbatov published in A. F. Koni, *Sobranie sochinenii*, Volume 8 (Moscow: Iuridecheskaia literatura, 1966-1969), 343.
2. P. Voronov, "Anatolii Fedorovich Koni," *Russkaia starina* 164 (1915): iii.
3. See N. N. Polianskii and B. I. Syromiatnikov, *Na sluzhbe pravu* (Moscow: Pravo i Zhizn', 1928), 7.
4. *Anatolii Fedorovich Koni, 1844-1924: Iubileinyi sbornik* (Leningrad: Atenei, 1925), 10.
5. *Anatolii Fedorovich Koni, 1844-1924: Iubileinyi sbornik*, 11.
6. *Anatolii Fedorovich Koni, 1844-1924: Iubileinyi sbornik*, 16.
7. Kornei Chukovskii, *Iz vospominanii* (Moscow: Sovetskii pisatel', 1958), 279-281.
8. See V. I. Smoliarchuk, *A. F. Koni* (Moscow: Iuridicheskaja literatura, 1990), 387-388; Sergei Vysotskii, *Koni* (Moscow, 1988), 138; A. F. Koni, *Sobranie sochinenii*, 320.
9. See A. V. Lunacharskii, "Tri vstrechi," *Ogonyok*, 40 (2 October 1927), 5-7.
10. See Vysotskii, *Koni*, 424-426. In the 1930s, Koni's grave was moved to *literaturnye mostki* in the Volkov Cemetery.

11. See Vysotskii and Smoliarchuk. The most ambitious publication of Koni's works in the Soviet period is *Sobranie sochinenii*, 8 volumes (1966-1969), which contain most of Koni's important essays and several hundred letters.
12. This observation is based on my discussions with Russian jurists and American specialists on Russian law in 1993 and 1994. It appears Koni is held in highest regard in contemporary Russia.
13. See *Izvestiia*, 5 January 1994, 3.
14. There have been no published works on Koni in English. There is one unpublished dissertation: Elizabeth Ballantine, *A. F. Koni and the Russian Judiciary, 1864-1917* (Yale University, 1987). This is a short survey of Koni's life and major works.
15. In 1841, Nikolai Nekrasov wrote to Fyodor Koni, thanking him for helping him when he was in dire straits. "Could I have managed to survive without your help. I am not embarrassed to admit that I owe you everything." Quoted in Vysotskii, *Koni*, 16.
16. See Vysotskii, *Koni*, 16-17.
17. See "Perepiska G. A. Dzhanshieva s A. F. Koni," in G. A. Dzhanshiev, *Sbornik statei* (Moscow, 1914), 496.
18. For some insights into Kant's significance for Russian intellectual life, see Martin Malia, *The Soviet Tragedy: A History of Socialism in Russia, 1917-1991* (New York: Free Press, 1994), 28-29.
19. See Vysotskii, *Koni*, 20-25, 39.
20. Koni's mother, a staunch supporter of tsarist rule, exerted a more conservative influence on Anatoly. See Vysotskii, *Koni*, 34.
21. In his memoirs, Koni notes that his father did not urge him to become a jurist and generally had a low opinion of prereform Russian courts. Koni decided to study law after he discovered D. I. Meier's *Russkoe grazhdanskoe pravo* (1862). Koni bought the book in a small shop on Nevsky Prospekt. "I came home, got into bed, and immersed myself in the book. A whole world of new concepts opened up before me. Much of what I had thought of as simple facts became relationships, caused by the conditions of human community (*liudskoe*

obshchezhitie). These relationships were based on general philosophical principles and presented in a rigorous and elegant system. I was carried away by this new world that gave special meaning and significance to different manifestations of social and personal life. I read the entire book in one sitting." Shortly afterward, Koni enrolled in the law faculty of Moscow University. See A. F. Koni, "Iz let iunosti i starosti," *Sobranie sochinenii*, Volume 7, 83-84.

22. See Koni, *Sobranie sochinenii*, Volume 7, 89-94.

23. These remarks are from Chicherin's inaugural lecture of 28 October 1861, which, according to Sergei Platonov, Koni acknowledged as a formative influence. Through Chicherin, Koni traced his philosophical lineage to Timofei Granovskii and the idealists of the 1840s. He noted that "the memory of Granovskii was always alive and sacred in Chicherin's soul" and that Chicherin's famous speech of 28 October 1861 ended with an evocation of Granovskii's belief in scholarship, truth, and civic responsibility. See *Pamiati A. F. Koni* (Leningrad, 1929), 15 and A. F. Koni, *Sudebnye rechi* (St. Petersburg: A. S. Suvorov, 1905), vii-xiv.

24. See Koni, *Sobranie sochinenii*, Volume 8, 143-145.

25. Letter to Chicherin, 12 February 1901. See Koni, *Sobranie sochinenii*, Volume 8, 172.

26. See Koni, *Sobranie sochinenii*, Volume 7, 92.

27. Letter to A. A. Chicherina, 4 February 1905, published in Koni, *Sobranie sochinenii*, Volume 8, 216.

28. Koni, *Sobranie sochinenii*, Volume 7, 91.

29. Koni, *Sobranie sochinenii*, Volume 8, 169-172.

30. See G. M. Hamburg, *Boris Chicherin and Early Russian Liberalism* (Stanford: Stanford University Press, 1992), 335.

31. Quoted in Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (Notre Dame: University of Notre Dame Press, 1992), 119.

32. Walicki, *Legal Philosophies of Russian Liberalism*, 120.

33. "Razlichnye vidy liberalizma," in B. N. Chicherin, *Neskol'ko sovremennykh voprosov* (Moscow, 1862), 197.
34. Chicherin, *Neskol'ko sovremennykh voprosov*, 197.
35. For Chicherin's debt to Kant, see his book *Politicheskie mysliteli* (Moscow, 1897), 174-179.
36. Chicherin, *Neskol'ko sovremennykh voprosov*, 198.
37. Chicherin, *Neskol'ko sovremennykh voprosov*, 199-200.
38. Chicherin, "Chto takoe okhranitelnye nachala," in *Neskol'ko sovremennykh voprosov*, 150.
39. Koni, *Sudebnye rechi*, lxvi-lxvii.
40. See Koni, *Sobranie sochinenii*, Volume 4, 50-51.
41. Letter to Tolstoy, 23 December 1900, in Koni, *Sobranie sochinenii*, Volume 8, 167.
42. Koni, *Sobranie sochinenii*, Volume 4, 50-51.
43. Koni, *Na zhiznennom puti*, (Berlin-Reval, 1923), IV, 205.
44. Koni, *Na zhiznennom puti*, IV, 205.
45. Quoted in Walicki, *Legal Philosophies of Russian Liberalism*, 138.
46. Koni, *Na zhiznennom puti*, IV, 206.
47. Letter to S. F. Moroshkin, 26 July 1883, published in Koni, *Sobranie sochinenii*, Volume 8, 64.
48. Letter to B. N. Chicherin, 12 August 1883, published in *Sobranie sochinenii*, Volume 8, 67.
49. Hamburg, *Boris Chicherin and Early Russian Liberalism*, 332.

50. Polianskii and Syromiatnikov, *Na sluzhbe pravu*, 34.

51. In this text, and in much of his writing, Koni relies on frequent use of words or phrases denoting moral qualities. We find, for example, "*nrvstvennaia krasota v liudiakh*" (moral beauty in people); "*glubokoe nrvstvennoe naslazhdenie*" (deep moral pleasure); "*nachala pravdy i vysokoi nrvstvennosti*" (principles of truth and high morality); "*blagorodstvo prirody cheloveka*" (the nobility of human nature); "*ego odushevliata liubov' k istine*" (he was animated by a love of truth); and so forth. See Koni, *Sudebnye rechi*, vii-xiv.

52. Koni, *Sobranie sochinenii*, Volume 8, 204.

53. "O prave neobkhodimoi oborony. Razsuzhdenie studenta Anatoliia Koni, napisannoe dlia poluchenii stepeni kandidata po iuridicheskomu fakul'tetu," published in *Moskovskie universitetskie izvestiia*, Nos. 8/9 (Prilozhenie), (Moscow, 1866). Hereafter this is cited as "O prave."

54. "O prave," 193.

55. "O prave," 194.

56. "O prave," 195.

57. "O prave," 196.

58. "O prave," 217.

59. "O prave," 207.

60. "O prave," 232-235.

61. "O prave," 233.

62. "O prave," 234.

63. "O prave," 234.

64. "O prave," 236.

65. "O prave," 269.
66. "O prave," 269.
67. See *Anatolii Fedorovich Koni, 1844-1924: Iubileinyi sbornik*, 76-78, and Smoliarchuk, *Koni*, 22-26.
68. Quoted in Smoliarchuk, *Koni*, 23. Because Koni's dissertation appeared in a university publication with a small circulation, he was not subjected to disciplinary action and his career did not suffer a setback.
69. Quoted in Smoliarchuk, *Koni*, 29.
70. See Koni, *Na zhiznennom puti*, IV, 207.
71. Koni, *Na zhiznennom puti*, IV, 208.
72. Koni, *Sobranie sochinenii*, Volume 4, 50-51.
73. Koni, "Pastorskie dela," in *Na zhiznennom puti*, I, 4th ed. (Berlin: Revel, 1924), 651.
74. Koni, *Sobranie sochinenii*, Volume 4, 39-40.
75. Koni, "Alexander Ivanovich Chuprov," in *Na zhiznennom puti*, II (St. Petersburg: Trud, 1913), 149.
76. Koni, *Sobranie sochinenii*, Volume 4, 34.
77. Koni, *Na zhiznennom puti*, II, 150.
78. See Jay Bergson, *Vera Zasulich: A Biography* (Stanford: Stanford University Press, 1983), 45.
79. Richard S. Wortman, *The Development of a Legal Consciousness in Russia* (Chicago: University of Chicago, 1976), 10.
80. *Sudebnye ustavy Imperatora Aleksandra II* (St. Petersburg: Zakonovedenie, 1914), 140. See also pages 64-70 and 114-140.

81. See Koni, *Sobranie sochinenii*, Volume 2, 31.
82. K. P. Pobedonostsev, *K. P. Pobedonostsev i ego korrespondenty*, Volume 1, Part 2 (Moscow–Petrograd, 1923), 508.
83. Pobedonostsev, 508.
84. Pobedonostsev, 508.
85. Koni, *Sobranie sochinenii*, Volume 2, 36.
86. Koni, *Sobranie sochinenii*, Volume 2, 85.
87. Koni, *Sobranie sochinenii*, Volume 2, 86.
88. Elizabeth Narishkin-Kurakin, *Under Three Tsars* (The Memoirs of the Lady-in-Waiting) (New York: Dutton), 54.
89. Quoted in Samuel Kucherov, *Courts, Lawyers and Trials under the Last Three Tsars* (New York: Praeger, 1953), 224.
90. Koni, *Sobranie sochinenii*, Volume 2, 75.
91. Incident related by Ivan Aksakov. See I. V. Gessen, *Sudebnaia reforma* (St. Petersburg: Vaisberg i Gershun, 1905), 167.
92. Koni, *Sobranie sochinenii*, Volume 2, 193.
93. Koni, *Sobranie sochinenii*, Volume 2, 193.
94. Koni, *Sobranie sochinenii*, Volume 2, 204.
95. Koni, *Sobranie sochinenii*, Volume 2, 206.
96. Koni, *Sobranie sochinenii*, Volume 2, 198.
97. Letter to S. F. Moroshkin, 18 March 1887, published in Koni, *Sobranie sochinenii*, Volume 8, 90-91.

98. See R. M. Khin-Goldovskaia, *Pamiati Anatoliia Fedorovicha Koni* (Leningrad, 1929), 59-60.
99. Isaiah Berlin, "Birth of the Russian Intelligentsia," in *Russian Thinkers* (New York, 1978), 128-131.
100. Letter to L. N. Tolstoy, 14 May 1888, published in Koni, *Sobranie sochinenii*, Volume 8, 104.
101. See Berlin, *Russian Thinkers*, 239.
102. Quoted in Walicki, *Legal Philosophies of Russian Liberalism*, 81.
103. Letter to Koni, 1 May 1904, published in L. N. Tolstoy, *Sobranie sochinenii*, Volumes 19 and 20 (Moscow: Khudozhestvennaia literatura, 1984), 569.
104. Koni, *Sobranie sochinenii*, Volume 8, 129.
105. Koni, *Sobranie sochinenii*, Volume 8, 202.
106. Koni, *Sobranie sochinenii*, Volume 8, 129.
107. Koni, *Sobranie sochinenii*, Volume 8, 99-100.
108. Koni, *Sobranie sochinenii*, Volume 8, 101.
109. Koni, *Sobranie sochinenii*, Volume 8, 213.
110. Letter to B. N. Chicherin, 30 December 1903, published in Koni, *Sobranie sochinenii*, Volume 8, 200.
111. Koni, *Sobranie sochinenii*, Volume 8, 232-234.
112. Koni, *Sobranie sochinenii*, Volume 8, 234-235

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