William E. Butler, editor

Justice and Comparative Law

Anglo–Soviet Perspectives on Criminal Law, Evidence, Procedure and Sentencing Policy

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edited by

W.E. Butler

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TABLE OF CONTENTS

EDITORIAL INTRODUCTION

In March 1985 the Law Commission of England and Wales published a draft English criminal code for discussion, with the prefatory observation of the compilers that it was difficult to understand why England should remain one of the very few common law jurisdictions without a systematized and codified body of criminal law. This volume addresses an issue of equivalent magnitude in comparative legal studies: Can comparativists and specialists in 'justice law' (criminal law and procedure, civil procedure, court organisation) from the Anglo-American and socialist legal systems usefully study one another's system with a view to advancing theoretical and applied macro- and microcomparison in their own system and on the international level generally. The articles are revised versions of papers presented to the Anglo-Soviet Symposium on Justice and Comparative Law held at Moscow in September 1984.[1]

The September Symposium in turn was the second in a series being arranged under the Protocol on Scientific Co-operation Between the Faculty of Laws, University College London, and the Institute of State and Law of the USSR Academy of Sciences. The first Symposium, 'Comparative Law and Legal System,' was arranged at London in March 1984[2] and the third Symposium at Moscow in May 1985 on 'Labour Law and Comparative Law.' The first 'Direct Link' of its kind between an Academy institute and a Western law faculty, the Protocol also provides for the exchange of research scholars and scholarly publications and for other types or levels of working groups, seminars, colloquia, and the like. In 1986 a fourth symposium will be held in London on aspects of public law and state administration.

As the first Symposium had addressed itself to major and general issues of legal theory and legal system, the relationship between international and municipal legal systems, general approaches to comparative law, and an examination of controversial new branches of law that cut across traditional classifications of the legal system, the present Symposium pioneered in exploring the possibilities for comparative studies within discrete areas of law. Quite fortuitously it transpired that the draft report to the Law Commission on the proposed English criminal code was finished in time to give Soviet (and perhaps even English) colleagues the first in-

formed account of its objects. structure, and principles. Equally fortuitously it happened that several Soviet participants have been helping to draft a Model All-Union Criminal Code, so that the area of codification already formed common ground for discussion. But similarity is not the only stimulus to invention; so is divergence, and the reasons for it are not always apparent at first glance. Although collaborative macro- and microcomparison between the Anglo-American and socialist families of legal systems is still at a fledgling stage, it is already apparent that there are enormous opportunities for constructive and useful contributions to original legal scholarship. In this instance the Symposium has led to the formation of a Joint Working Group for the preparation of a collaborative Commentary on English and Soviet criminal law, in a commentary format and drawing as appropriate on model penal and procedural codes under discussion.

It is appropriate to acknowledge our indebtedness to a number of institutions whose support, moral and otherwise, has been essential: to the British Academy, under whose umbrella agreement with the USSR Academy of Sciences the Direct Link has been arranged; to the British Council for financial support of the Direct Link; and to the Soviet institutions and scholars who welcomed us so warmly in Moscow for the Symposium. Mr Brian Wrobel also wishes to acknowledge research support for his paper from the Nuffield Foundation. We are most obliged to the Editors of *Coexistence* for opening their pages to the Symposium papers. The Soviet contributions have all been translated from the Russian text by the Guest Editor utilising initial drafts prepared by Mr Rene Beermann.

W.E. Butler

NOTES

1. For a Soviet summary of the Symposium, see G.N. Vetrova, 'Iustitsiia i sravnitel'noe pravovedenie', Sovetskoe gosudarstvo i pravo, no. 3 (1985), pp. 145-146.
2. The papers are published in W.E. Butler and V.N. Kudriavtsev (eds.), Comparative Law and Legal System (1985).

SOVIET CRIMINAL LAW AND PROCEDURE IN ENGLISH PEDAGOGICAL PERSPECTIVE

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The title of this paper appears at first glance to touch upon an activity not central to the research orientation of the institutes of the USSR Academy of Sciences: the teaching of elements of a foreign legal system to students and postgraduates. English university law faculties have always been in the position of the Soviet Academy in its very earliest days, for when Peter the Great approved the Charter of the Russian Academy of Sciences in 1724, those appointed in law were expected to both teach the subject and engage in basic research.

Law teachers in British universities and other educational institutions are responsible for most legal research done in the United Kingdom, for training future generations of lawyers, judges, legal researchers, civil servants, corporate managers, and political leaders, and for contributing in the form of advice and research to a multitude of legal policy bodies. More often than not they also are admitted to the practise of law in some jurisdiction and leaven their teaching and research with the experience of the day-to-day concerns of clients and their legal problems. This pattern of comprehensive interaction between the British university law teacher and the legal system as a whole is, I would suggest, a characteristic feature of the Anglo-American family of legal systems, although, to be sure, even within that family there are innumerable variations on the scope of the interaction and the mobility of law teachers.

The teaching of law in the Anglo-American legal tradition, in other words, is closely linked with legal research and legal practice, and this is no less true of the teaching of comparative law. And within the realm of comparative law, equally so of the teaching of Soviet law.

This paper examines some of what might be called the 'comparative law reasons' for the ways in which Soviet criminal law and procedure are approached in Anglo-American legal education: why the subject is taught; what materials have been developed for the purpose; what insights are expected to be obtained through the study of comparative criminal law and procedure. These observations are concerned exclusively with what falls within the scope of the union republic criminal codes and codes of criminal procedure and do not dwell on the separate but related areas of criminology and correctional-labour law.

Soviet criminal law and procedure in British comparative legal studies

Although an appreciable literature in England has developed over the past nearly seventy years regarding criminal policy in the Soviet Union, it is a literature for the most part based upon either printed resources such as textbooks, monographs, court reports, and the like published in the USSR, newspaper accounts, or, as in all countries, the personal recollections of those involved in some way in criminal proceedings. To the best of my knowledge, no British scholar has ever carried out sustained research on some aspect of criminal policy in the Soviet Union, and the unavailability of the basic indicia concerning patterns of criminality and the effectiveness of measures taken to eliminate crime has made meaningful comparative evaluations virtually impossible. This is all the more regrettable because, in the present writer's opinion, Soviet criminal policy has pioneered and experimented with a number of novel and distinctive approaches to criminal law and procedure of undoubted interest, for either their success or failure, to other countries.

So far as can be ascertained, the teaching of Soviet law in Britain originated in the postwar period, initially at Glasgow University where Dr Rudolf Schlesinger lectured on Soviet legal theory and institutions together with Mr R. Beermann. Criminal law and procedure were treated incidentally by Schlesinger, whose major concerns more reflected in the title of his principal work, *Soviet Legal Theory* (1945; 2d ed., 1946) engaged his attention. E.L. Johnson introduced English students to some basic aspects of criminal law in his *Introduction to the Soviet Legal System* (1968), and Professor Ivo Lapenna offered a Yugoslav critique in his *Soviet Penal Policy* (1968). Apart from Glasgow, where lectures on Soviet law were available primarily to students in the Institute of Soviet and East European Studies and the Department of Jurisprudence, the centre of Soviet law teaching has been the University of London, with its five law faculties. Informal evening lectures offered by E.L. Johnson in 1964-65 at University College London formed the basis of his book, cited above; Ivo Lapenna offered a course on Soviet Law to economics students as an option. Both Johnson and Lapenna collaborated in 1968 to introduce Soviet Law into the LL.M. degree, the first time, it is believed, a course on the subject became part of a postgraduate *law* degree in the United Kingdom. That course, transformed under the present writer's aegis to 'Soviet, East European, and Mongolian Law,' continues in the LL.M. with special sub-options available on criminal law and procedure and on criminology and correctional-labour law.

At the undergraduate level in law, lectures which include criminal law and procedure are offered to students at University College London as part of the course called 'Introduction to Socialist Legal Systems' (Professor W.E. Butler); in Kings College London in a course on 'The Soviet Legal System' (Mrs J. Giddings); and in the London School of Economics and Political Science in a course on 'A Comparison of Soviet and Yugoslav Law' (Professor Emeritus I. Lapenna). Criminal law and procedure also are treated in postgraduate courses on Soviet Law at the School of Slavonic and East European Studies in the University of London (Professor W.E.

Butler). At Surrey University a course offered to students of language and law contains the basic elements of criminal law and procedure (Mr A. Fainstein). In all of these subjects the basic text is now *Soviet Law* (Butterworths, 1983) by the present writer.

It will be evident from this enumeration that in all instances but one Soviet criminal law and procedure are taught as part of a general course on the Soviet legal system; the exception is the LL.M. course on 'Soviet, East European, and Mongolian Law', where those postgraduates who select the option of criminal law and procedure are expected to master those branches of law in some depth. This means necessarily that our treatment of criminal law and procedure must concentrate on selected elements of enduring comparative analytical interest, for we are not training specialists in Soviet criminal law and procedure, but rather English lawyers whose professional training and comprehension of law, the legal process, and their own legal system will be enhanced through exposure to the ways in which other very different legal cultures and systems endeavour to grapple with problems confronting our own. This is a *pedagogical* value of quite another order than that pursued in our postgraduate studies. Although even in one postgraduate subject an individual cannot master an entire foreign legal system, the emphasis is upon learning the substantive law of the jurisdiction concerned, in this case, Soviet Law. Postgraduates already have their basic legal training and skills and in LL.M. studies are undertaking to master a legal specialisation, which some may pursue yet further in a Ph.D. dissertation.

A knowledge of the Russian language is not required for these subjects at either the undergraduate or postgraduate level. This means that teaching must be based on English-language materials, and it can be stated quite categorically that there are more basic materials in the English language on the Soviet legal system than on any other continental European legal system, some produced here in the Soviet Union, but the great majority by western specialists.

There are particular reasons for this, and not merely a certain retardedness in the study of foreign languages. Whereas in Europe and to some extent the socialist legal systems the *cours* [kurs] has always been paramount as a thorough exposition of especially the conceptual infrastructure of a subject, the doctrine, the Anglo-American family of legal systems places enormous reliance on primary source materials for the teaching of law. Learned commentary has its place to be sure, but from the very outset an English law student is expected to master the cases, learn how to find the law, to distinguish 'holding' from 'dicta,' to think like a lawyer, to immerse himself in the raw materials of the law, and to give evidence of that mastery in socratic dialogue with his instructors and, ultimately, in a final anonymous written examination for each subject which normally will contain analytical problem questions.

That general approach to the teaching of law in the Anglo-American tradition, certain elements of which are more pronounced in North America, has not unnaturally had an impact both on the style of teaching Soviet Law, and indeed comparative law generally, and on the materials produced to teach the subject. In

the case of Soviet criminal law and procedure, those materials are of three basic kinds: (1) codes and legislative acts; (2) cases; and (3) doctrinal writings and commentary.

(1) *Codes* The first fully-fledged criminal code in the Soviet Union, the 1922 RSFSR Criminal Code, owes its sole English translation[1] to the improving Anglo-Russian relations in the early 1920s and not to pedagogical objectives. The translation was prepared by Mr O.T. Rayner, a graduate of Oriel College, Oxford, and at the time of the translation a barrister with the Foreign Office. The text was translated as amended to 31 December 1924 and is now a bibliographic rarity. Curiously, the 1926 RSFSR Criminal Code, despite all the criticisms levelled at it, did not find a translator until 1957, when a limited circulation mimeographed version was issued by the Library of Congress in the United States and translated by V. Gsovski.

The 1960 RSFSR Criminal Code, on the contrary, has been translated into English primarily for pedagogical purposes. Professor H.J. Berman set a new standard in legal translation from Russian in collaboration with J.W. Spindler with his rendering of the Criminal Code and the Code of Criminal Procedure in an edition especially suited for classroom instruction. A second edition followed in 1972[2] and a third in 1980.[3] The present writer has prepared his own translation of the Criminal Code as amended to 31 August 1983,[4] in a volume specially developed for instructional use and a companion to *Soviet Law*. There also is a translation of the Ukrainian Criminal Code.[5] Even more readily available are translations of the Fundamental Principles of criminal law and procedure[6] and the principal USSR legislation on individual crimes or types of crime.[7]

(2) *Cases* The translation of Soviet criminal cases for teaching purposes is purely an Anglo-American phenomenon, so far as I am aware, and may be attributed directly to the Anglo-American tradition in law teaching described above. In the Anglo-American view, reading the codes, however essential and invaluable that may be, is not sufficient; students need to work with the same materials that Soviet jurists do – judicial decisions and rulings, guiding explanations adopted by the Plenum of the USSR and union republic supreme courts – in order to understand how the courts, the Procuracy, and defense counsel use the Codes. Accordingly, Western specialists have created two compilations of Soviet court decisions and related materials, 'case-books,' as we call them. The principal casebook has appeared in its 'fourth' edition: *The Soviet Legal System* (1984) prepared by W.E. Butler, J.N. Hazard, and P.B. Maggs. Another compilation, more comprehensive with respect to the Special Part of the Criminal Code, was prepared by the present writer in collaboration with H.J. Berman ('Cases on Criminal Law and Procedure,' *Soviet Statutes & Decisions*, vol. I, no. 4 (1965), pp. 1-154). Court cases also, of course, are in their own way a species of literature that the layman often enjoys reading; they offer insight into societal problems, values that societies cherish, human foibles, and the strategy and tactics of courtroom advocacy.

(3) *Doctrinal Writings and Commentary* We are less well-endowed with commentary on the criminal codes and codes of criminal procedure. It remains a serious gap in our literature, both for the student and the practitioner, that the Commentaries on the 1960 RSFSR Criminal Code and Code of Criminal Procedure have never been translated. They are large works, but essential to an understanding of the Code system, as too are examples of the 'Scientific-Practical commentary' on judicial practice in criminal cases. In Western literature we have F.J.M. Feldbrugge's analysis of the General Part of the Code,[8] Berman's account of the historical chronology of the codes and their amendments, but something on the scale of the magisterial six-volume *Kurs ugolovnogo prava v shesti tomakh* is wholly lacking. Dozens of specialised articles fill part of the gap.

Despite certain lacunae, from the pedagogical perspective the coverage is impressive when compared to what is available for all other non-English speaking foreign legal systems. The point to be stressed, however, is that the coverage that is available for comparative *research* purposes exists because of the pedagogical objectives and traditions of the Anglo-American family of legal systems.

At University College London, one more indispensable element is added to the primary source materials, namely a field course to the Soviet Union in order to visit legal institutions and become acquainted first-hand with legal personnel of all types and the societal context within which they work.

What insights are English law students expected to obtain through their introduction to Soviet criminal law and procedure? As already mentioned, they are *not* expected to become Soviet criminal law specialists; our concern is that they learn something of their own system and its premises through the prism of another. This means that we draw upon criminal law and procedure to develop certain larger issues, and at this point I must emphasise that henceforth I am speaking of my own personal approach to the matter, which may or may not be shared by other colleagues who teach the subject.

Criminal Law

In my own teaching, Soviet criminal law is the area of the syllabus where students are expected to read and become familiar with an entire code: its structure, its style, its arrangement, its purpose. It is one of the paradoxes of legal history that the English legal system, which has contributed in such original and imaginative ways to the theory of codification, should have herself accomplished nothing noteworthy whatever to date in practice. When M.M. Speranskii prepared the monumental systematisation and codification of Russian legislation in the early nineteenth century, he acknowledged his indebtness to two English jurists: Sir Francis Bacon and Jeremy Bentham. Bentham's close associates founded University College London in 1826 under his intellectual stimulus (the College is now publishing Bentham's *Collected Works*, including definitive texts of his writings about codification), and one of the Law Faculty's most distinguished professors, Sheldon Amos,

was among those who in the nineteenth century put forward concrete proposals for an English Code of Laws.[9] We have, therefore, as an institution done more than most in respect of codification, but the state of English law remains uncodified and poorly systematised.

The 'logic of a Code,' therefore, must be found for teaching purposes in a foreign legal system. In the Soviet criminal code, moreover, we encounter something else absent in parliamentary enactments: a formal statement of the purpose of the Code or the branch of law which it represents. Criminal law is especially well suited to pursue this idea, with overlapping and sometimes conflicting theories of retribution, reform, education, and deterrence to be explored. Of equal interest is the relationship between the General Part and the Special Part, the role of general principles and definitions and their particular applications, the concept of the 'constituent elements' of an offence as called for by the Code. It is here, perhaps, that the lack of a Commentary is most keenly felt, for, of course, the Soviet advocate works not exclusively with the Code itself, but also with a doctrinal gloss that integrates judicial practice and guiding explanations of the supreme courts.

It may be wondered why the criminal code is chosen for these general purposes rather than the Civil Code. The answer lies again in the distinctiveness of the Anglo-American system of legal education, where there is no single course on the civil law nor, for that matter, chair or department of civil law. Certain components of the civil law – contracts, torts, property, succession – are taught as individual subjects, but others – corporations and business associations, copyright, inventions – are offered only as options or not at all. For pedagogical reasons, therefore, it has been preferable to select a branch of law which all students must encounter as part of their legal training. Moreover, the controversy between civil law and economic law in the USSR also makes it difficult to treat the civil code as a prototype for our purposes.

Time allows only selective treatment of the Special Part of the Criminal Code. Cases are used to illustrate both the processes of decision-making and the 'difficult' or 'fringe' areas of the application of law. Examples are given for offences which have direct analogies in English law (homicide, theft, etc.), which have no obvious counterpart in English law (for example, economic crimes of a certain type), and which seem to have partial resemblance to one another in both legal systems (for example, crimes against the State, official crimes). The emphasis is upon a juridical analysis of the case, the reasoning of the inferior and superior courts, the classification of the offence under the Code, and the processes of applying the Code under the facts stated.

Criminal Procedure

To the Anglo-American lawyer the continental model of criminal procedure represents a fundamentally different approach, antithetical at several key points to some of the most deeply-rooted attitudes in Anglo-American legal experience with regard

to the proper role of the State in society and principles of human liberty. Soviet criminal procedure offers an introduction to this procedural model that combines the classical features of the Romano-Germanic continental European tradition and novel principles, especially in respect of the educational role of the proceedings, in a manner that other Western European continental legal systems do not.

The elements of the procedural model that are selected for pedagogical reasons, again with a view to encouraging students to ponder the basic premises of the Anglo-American model, are, first, the concept of a procedural model as a whole, that is, the inter-locking character of the preliminary investigation, conclusion to indict, trial, appeal, and review by way of supervision with every participant charged at every stage with ascertaining the objective truth. Dilemmas and conundrums abound in the Anglo-American lawyer's mind: can the preliminary investigator in principle conduct a thorough, comprehensive, and impartial investigation of a case and properly evaluate evidence both for and against the accused, and, if so, could not the investigative function be better performed if an adversary element in the form of defence counsel were admitted to all preliminary investigations? Note that the second issue requires the Anglo-American lawyer to identify with some precision the respective roles of defence counsel in the so-called 'adversary' and 'inquisitorial' procedural models. Indeed, a departure from the 'adversary' approach demands an evaluation of all the components of criminal procedure, for its quickly becomes evident that apparently identical procedural elements in both systems may have very different roles to play in one overall system as compared with the other.

Two aspects of criminal procedure are singled out for examination in some depth. First is the concept of the presumption of innocence in both systems. The expression in the English language, whatever its precise content, evokes a powerful positive emotion rooted in our legal heritage. Whether in reality the presumption is a legal rule, or merely a rhetorical device to reinforce the allocation of the burden of persuasion, or a presumption of fact, or some combination of these in English law continues to be the object of searching scrutiny. In Soviet Law, of course, the issue has been debated extensively in recent years, as well as being the object of a Guiding Explanation of the Plenum of the USSR Supreme Court. The course of that debate, the provisions of Soviet legislation and of the Guiding Explanation, and the dynamics of the Soviet procedural model offer a fascinating backdrop against which to evaluate what the presumption of innocence is juridically and how it operates within an adversary procedural model.

Second is a consideration of the basic rules of jury trial in England and of the people's assessors in the Soviet Union. The juxtaposition has become more pertinent because, in England, many senior judges believe the time has now come to do away with trial by jury in most, if not all, civil cases and in minor criminal cases. These sentiments may at first impression suggest to the Soviet jurist that English law reformers should examine the special proceedings available under the RSFSR Code of Criminal Procedure for petty hooliganism and the like. But if British law is to attenuate the possibility of trial by jury while retaining the other essential

features of the adversary system, rules governing the admissability of evidence no longer, presumably, need operate to preclude the jury, as triers of fact, from hearing in court what they should not. In this respect the rules governing the admissability of material derive, or should derive, from the dynamics of the adversary procedural model before a jury, not the adversary model *per se*, and we are then confronted with the issue of why a professional experienced judge deciding both fact and law should not simply hear what he deems relevant and then be obliged to weigh that evidence and point to its probity in his judgment in accordance with more general canons of the law of evidence. Necessarily the example is oversimplified, but the challenge posed to the English law student through the prism of another legal system is doubtless clear.

The two preceding aspects of criminal procedure might be studied in comparison with most any of the modern continental European systems. Soviet Law would remain distinctive for placing the investigator under the jurisdiction of the Procurator, but for the most part the basic model is similar to the continental, or so our Western European colleagues insist.

Where the Soviet procedural model departs, in the present writer's view, from its Anglo-American and Western European counterparts is in its explicit stress upon the educational role of the proceedings, especially at the trial stage. All procedural models have an educational dimension, be it positive or negative, because they leave an impression, an imprint, upon the psyche of those on trial and those present. Whether the impression is one of respect, contrition, anger, frustration, deceit, resentment, remorse, derision, majesty, justness, humaneness, understanding, sternness, or whatever depends in significant measure on the atmosphere and course of the proceedings as it does on the substance of what act was allegedly committed, by whom, and what rules of law are applicable. The Soviet procedural model goes to unusual lengths to develop both dimensions of the proceedings, and, in doing so, both departs from the continental model and poses for the English student the question of to what extent his own system does the same, either explicitly, implicitly, or inadvertently.

Conclusions

In concentrating on the close link in British comparative studies of Soviet law between research and teaching and upon the use of comparative law to enhance one's knowledge of one's own legal system and its fundamental premises, it is not intended to diminish the significance of other objectives of studying a foreign legal system. Soviet criminal law and procedure is studied in Britain in connection with law reform, legal information services, human rights, legal practice, international trade, the legal status of foreigners, the drafting of international conventions, comparative penology and criminology, contemporary theories of Marxism, among others, and all of these have made their contribution in their own way to the literature on the subject. But pedagogy has led the way in the English language and

hopefully will inspire the eradication of the lacunae that still exist in respect of some types of material.

NOTES

1. The Criminal Code of the Russian Socialist Federative Soviet Republic, No. 15, Article 153 of the Collection of Laws, 1922, Supplemented by Amendments Issued Up to December 31, 1924, transl. O.T. Rayner (1925).
2. Berman, H.J., Spindler, J.W. (transl.), Soviet Criminal Law and Procedure: The RSFSR Codes (1965,2d ed., 1972).
3. Transl. in W.B. Simons (ed.), The Soviet Codes of Law (1980).
4. W.E. Butler, Basic Documents on the Soviet Legal System (1983).
5. W.E. Butler, Collected Legislation of the USSR and Constituent Union Republics (1982).
6. Butler, ibid., vols 1-4.
7. Ibid.
8. F.J.M. Feldbrugge, Soviet Criminal Law: General Part (1964).
9. S. Amos, An English Code: Its Difficulties and the Modes of Overcoming Them (1873).