THE STRUCTURE OF CRIMINAL PROCEDURE

Laws and Practice of France, the Soviet Union, China, and the United States

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Foreword by **JACQUES VERIN**

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To my parents, Lee and Margie Ingraham

FOREWORD

Criminal procedure, faithful handmaiden of criminal law, is often dreaded by students who regard it solely as a collection of forbidding provisions. The complexity and minutiae of its rules discourage comparative research by specialists, who often remain on the level of the purely technical, which in no way facilitates an in-depth understanding of the subject matter. How often writers take delight in ridiculing its quibbles and its quibblers!

However, "the code of honest people," as some have called the code of criminal procedure, in contrast to the penal code made for criminals, deserves a more just appreciation. It is one of Professor Ingraham's achievements to have elevated criminal procedure by providing it with a conceptual framework which makes it possible to take a view of the whole of this domain and to restore to its study the scientific temper which people tend to misunderstand.

Having posed as his hypothesis that there is a fundamental underlying structure to every procedural system and having created an analytical grid which takes account of the different tasks of criminal procedure, the author undertakes to test this model by comparing the criminal procedures of four nations which are notably different from one another and are representatives of major legal systems. What better test could one imagine?

I would like to mention here the essential points of the author's

thought and to bring out not only the uses he proposes for us to make of his analytical model but also the encouragement he provides for us to engage in new comparative studies or studies of individual systems in order to bring to light the interactions, the transfers of powers, buried beneath the surface.

But before going further, I must say how much I appreciate, with regard to French criminal procedure—others being more qualified than I to speak for other countries—the scrupulous precision, the profound knowledge, not only of the texts but of practice which the author evidences throughout his work. Were it only a comparative study of the procedural systems of the four nations concerned, perfectly up-to-date at the moment of its publication, this book would already be a valuable aid to knowledge. But it is much more than that, and I come now to that which constitutes its main interest and reflects its title aptly: the uncovering of the *structure* of criminal procedure. Professor Ingraham asks himself questions concerning the functions which criminal procedure is called upon to fulfill. Obviously, it is charged with giving full effect to the penal law itself and, consequently, to the investigation, prosecution, and conviction of the perpetrators of misdemeanors or crimes, whatever the objectives may be that we assign to the punishments pronounced—whether they be retribution, deterrence, rehabilitation, or, in addition, reconciliation of the criminal and society. But one would be mistaken, he believes, to limit the tasks pursued by the entire modern system of criminal procedure to the prevention and punishment of crime: it is also charged, and this is essential, with being awake to the fact that the task of protecting society and of restoring social harmony must be accomplished without doing injury to the fundamental values of our civilization. It must thus insure against the risks of judicial error, against the violation of human rights and more particularly the rights of defense, against the risk of the dehumanization of a bureaucratic process, the neglect of the interests of victims, the bypassing of the public interest, and so forth. The author arrives thus at establishing an explicit morphology for criminal procedure, comparable to that of vertebrates, which is common to all systems no matter how different they may appear to be. He thus places in relief in his comparative study the similarities of procedural systems much more than their differences. That is what makes for the originality of his work. Getting back to the analogy with zoology, he describes the skeleton common to all modern procedural systems, while at the same time noting that one can find significant differences in their muscles, viscera, and organs.

The traditional contrast between accusatorial procedure—a model inspired by conflicts in the private realm and by arbitration—and inquisitorial procedure—active investigations and prosecutions of the

guilt of criminals by public authorities—is blurred, not only because a pure system does not exist (the French example is there to show the variations possible from one model to another in passing through various mixed models), but also because there are identical functions to be performed and common problems to be resolved whichever procedural system is adopted.

These functions, according to the author, are six in number. One reads the author's analysis of these with the greatest interest, proceeding in chronological order from intake through appeal; passing from the examination and screening of cases to the beginning of the prosecution and the guarantees of sound justice (the sector where the differences are most marked according to political system and culture), the judgment as to guilt, and finally to the sentence and its execution.

Perhaps one could quarrel with the author in regard to the singling out of these different functions. If it is completely justified to group into one single task the sentence and its execution, which, despite the considerable practical importance that it has acquired, is only an extension of the judicial phase and deserves only that we recognize its judicial character, is it also satisfactory to unite the "charging and protecting" functions which answer to two different objectives? By the same token, shouldn't one place appeal in the same general function as protection from error and excess on the part of lower-court judges?

But this critical remark is, on the whole, a minor matter. The important thing is that the author's analysis does not leave in the shadows any essential function of procedure and that it furnishes a particularly useful model (even though it is susceptible to further refinement).

Chapter 9 discusses some of the possible uses of the analytical model. It should significantly facilitate the comparison of different rules and practices which seek to fulfill the same function, permit one to distinguish national differences in procedure which are functional from those which are explained solely by history and culture, free the reformer from the limitations of ethnocentricity and resistance to ideas coming from abroad, aid the historian in better appreciating the nature of changes introduced in the course of time, and facilitate the understanding of dysfunctions in the system.

But I think that it is not only the comparativists, the reformers, or the historians who can draw profit from Professor Ingraham's analytical model. Criminologists, notably those with a sociological background, cannot fail to be stimulated in their research by this conception of criminal procedure *as a system*. There exists, as for a living organism, a strict interdependence between the organs charged with fulfilling different tasks. If one is failing, another comes to the rescue and adjusts itself to perform the task in its place. The researcher is thus encouraged to closely study the model in action, to bring to the full light of day

phenomena disguised behind appearances which intervene so that the system can function: diversions, reinforcements, substitutions, etc.

I will give two illustrations of the usefulness of Professor Ingraham's analytical model drawn from French procedure. Following the liberation of France from Nazi occupation at the end of World War II, the legislator established a remarkable and very daring system of justice for juvenile offenders which departed considerably from the traditional, time-honored principles of criminal justice. In principle, educational measures replaced sanctions and punishments were supposed to be exceptional. The principle of the separation of investigation and of adjudication was abandoned since the juvenile judge could investigate a case, then decide on guilt, and impose an educational measure or certain sanctions.

Measures taken in regard to the juvenile ceased to be irrevocable, but, on the contrary, became always susceptible to revision depending on the progress of the delinquent. The public nature of court sessions was restricted. The juvenile judge, a professional magistrate and jurist like all of his colleagues, received, in addition, an initiation into the behavioral sciences and was provided with a team of social workers and psychologists as assistants, permitting him to take measures appropriate to the personality of the juvenile and to follow his development from the beginning to the end of the judicial intervention. Lay assessors later came to support him in forming the Juvenile Court, which was authorized to take the most serious measures.

This system, of which France was justly proud, has since the 1970s experienced a veritable crisis. The basic reason for this is that juvenile justice is resented as a foreign body within a penal system which remains classical. The spirit which animates it has not, as one might have hoped, impregnated criminal justice entirely. Quite the contrary, the separation of juvenile justice from the larger system was accentuated with the rejection of all coercive measures and the elimination of all the institutions of confinement. It is evident that society was no longer sufficiently protected against juvenile delinquents committing the most serious crimes. The function of "sanctioning" was no longer carried out seriously in their regard and it became necessary for other procedural mechanisms to come to the rescue of the failing organ. Thus, the prosecutor has progressively bypassed the juvenile judge in favor of an investigation judge and that incarceration for juveniles, an exception for a while, has now become very common.

Moreover, one observes in this corrective mechanism another change, which we are going to find more common for adults, and this will be my second example: detention before trial, decided by the investigation judge according to the needs of the inquest, has become in

practice a virtual punishment, to the considerable embarrassment of the jurists.

In effect, at the very moment of playing its adjudicative role, the court finds itself, to a considerable degree, confronted with a fait accompli. In the case of petty and middle-grade offenses the court is limited to confirming the sanction which has already been carried out in prison, and in any event, is forced to choose that type of punishment rather than the substitutes for incarceration which the legislator has wracked his brain to place at his disposal. This procedural deformity is less scandalous than it may seem if one interprets it in the light of Professor Ingraham's analytical model; there again one can note a weakness: adjudication and imposition of the sanction are so slow that society would not be protected unless other mechanisms come to the aid of the failing organs. The prosecutor and investigating magistrate have now come to fill, tacitly, these indispensable tasks, thanks to temporary detention. One can thus uncover and scientifically examine the underlying system alongside the formal judicial organization and evaluate the merits, faults, and consequences, both foreseen and unforeseen, of the replacement mechanisms.

These two examples will give the reader an idea, I believe, of the dynamic aspect of Professor Ingraham's work, which, by its way of welding tightly together criminal law and criminal procedure into one coherent and well-analyzed system, can only advance both the concept and the study of criminal policy.

—Jacques Verin
Magistrate and Secretary General of the
International Society of Criminology and
of the Center for Research on Social Policy

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I do not know about the experience of other authors, nor can I speak for them, but for me getting a book published has always been a long, arduous trek, with many hazards and traps, disappointments and defeats, relieved by sudden miraculous turns of good fortune. That is why a helping hand and good advice are appreciated so much when they are offered.

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land, College Park; Lore Rutz, graduate student, Institute of Criminal Justice and Criminology, University of Maryland, College Park; and Rosemarie Culmone, secretary, Institute of Criminal Justice and Criminology, University of Maryland, College Park.

ABBREVIATIONS

PC, RSFSR	Penal Code of the RSFSR [Russian Soviet Federated Socialist Republic] in Harold J. Berman, *Soviet Criminal Law and Procedure: The RSFSR Codes*. 2d ed. Translated by Harold J. Berman and James W. Spindler. Cambridge, Mass.: Harvard University Press, 1972.
CCP, RSFSR	Code of Criminal Procedure of the RSFSR. Berman, *Soviet Criminal Law and Procedure.*
CL, PRC	The Criminal Law of the People's Republic of China, adopted July 1, 1979. Translated into English by Jerome A. Cohen, Timothy A. Gelatt, and Florence M. Li, in *Journal of Criminal Law and Criminology* 73 (Spring, 1982): 138–70.
CPD	*Code Pénal, Dalloz ed.* (Paris: Dalloz, 1983–1984).
CPL, PRC	The Criminal Procedure Law of the People's Republic of China, adopted July 1, 1979. Translated into English by Cohen, Gelatt, and Li, *Journal of Criminal Law and Criminology* 73 (Spring, 1982): 171–203.
CPPD	*Code de Procédure Pénale, Dalloz ed.* (Paris: Dalloz, 1983–1984).
FBIS	Foreign Broadcast Information Service.

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INTRODUCTION

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OPENING REMARKS

Comparison is the only method for understanding the range of variation in phenomena of a particular type, as well as noting what is common to all of them.[1] It is the first step in theory building.[2] Ideally, in order to achieve this knowledge of the full range of exhibited variation, one should study and compare all known members of a species;[3] but, frequently, that is impractical and one is constrained merely to examine selected members who are known in advance to reveal very different characteristics.

In this search for an underlying structure in modern criminal procedure, I have chosen four modern societies which differ substantially from one another in their cultures and in their political and legal perspectives. Two are "Western" democracies—France and the United States—but, while sharing certain general cultural and legal traditions, they differ from one another in the manner in which cases are processed through the courts, the former using "inquisitorial" methods while the latter uses adversarial methods.[4] The other two—the Soviet Union and the People's Republic of China—share a common political philosophy (Marxist socialism) but have very different cultural traditions and perspectives toward law. Although there has been some borrowing and diffusion, the cultures of all four nations are significantly different although perhaps not as different from one another as they might be from some developing nations of the Third World.[5]