
Book Reviews

COMPARATIVE LAW

CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE. By A. V. Sheehan. Edinburgh: Her Majesty's Stationary Office, 1975. Pp. 228.

*Reviewed by Mirjan Damaska**

This is a modest book, actually a preliminary to a truly comparative study of Scottish and French criminal procedure: the reader is offered a parallel description of the two systems, along with basic information about the various categories of institutional personnel involved in the administration of criminal justice in the respective two countries. Comparative law requires more than this parallel presentation. If a book-keeping metaphor is permitted, compiling credits and debits will not do. There must also be a balancing of accounts. It is for this reason that the book's subtitle, "a comparative study," makes a false promise.

Let us review the parallel presentation. Its most obvious characteristic is its synoptic ambition: the reader is offered a panoramic view. It is equally clear that the author has no interpretative or theoretical aspirations: an almost exclusive photographic realism is attempted. The product is a monochrome of legal detail. This snapshot will seem quite normal for those from highly formalistic legal cultures, but seems to lack depth for those with the current taste for the cultural location of legal themes. Within these narrow limits the book under review is quite valuable.

The first part of the book deals with the French criminal process, an alien system to the author. Struggling to find a proper counterweight to his native understanding of the practical functioning of Scottish criminal procedure, the author obviously took great pains to inform himself about the actual enforcement of criminal laws in France. There are frequent and welcome departures from black letter law and institutional ideology, especially in the book's treatment of the police state and of the relationship between public prosecutor and investigating judge. Nevertheless the presentation does not compare in practical insight to the account of the author's native system. Contrast for instance the clear and insightful portrayal of Scottish police interrogations (p. 134 ff.) with the treatment of its French counter-

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part. In both situations, one suspects, essentially identical phenomena are involved, leading to similar tensions and possible evasive practices: the police, representing the "id" of the criminal justice system with its need for information, struggle with the system's "super ego" as represented by the legislative and judicial constraints on the manner of obtaining information. It would probably serve as a provocative parallel to the present Scottish police practice—which proceeds *praeter legem*—if the author had included in his presentation a brief historical account of the now defunct *enquête officieuse*.

Notwithstanding the possible lack of balance with the second part of the book, embracing what to the author is *materia propinqua*, the synoptic description of the French process teems with useful information. Its main novelty however resides in a very skillful organization of the material, laced with eloquent illustrations, for the cognitive needs of the reader. The same applies to the useful appendices with practical examples, as well as to sporadic, quite revealing statistics.

Of much greater interest is the succinct insider's report on the operation of the Scottish system which comprises Part Two. Orientation and the contrasting of procedural arrangements are facilitated by a comprehensive table of contents, logically structured and rigorously symmetrical for the two countries. Together with strategically placed cross-references, the table greatly compensates for the astonishing absence of an index, so important for a book with informational aspirations. Many useful data remain hard to retrieve however. How is one to expect for instance that the French law on extradition is tucked under a description of the *chambre d'accusation*?

As the author shuns theory, the weaker points in the book are naturally those sporadic passages devoted to themes from which conceptual analysis cannot completely be exorcised. These passages are deceptively simple, possibly even misleading. Consider the author's handling of themes such as the presumption of innocence, onus of proof, or appeals in France. Wrongly I think, the equivalence of the legal vocabularies in the two countries has been assumed. There is also no intimation of the various possible meanings these terms can assume, of their subtly divergent accents, perhaps even their discrepant affective colorations. It is probably due to these reasons that a few isolated passages may quite easily mislead the reader. In what sense can one say that the French refuse to admit hearsay (p. 28)? Is it true that French appeals must concern a point of procedure (p. 92)? It is true however that a panoramic snapshot with few, if any, theoretical shadings, should not be judged on the basis of such sporadic passages. As Voltaire has suggested, one should not be convicted for the good things one has not attempted. Emphasis on such minutiae as specific items to be included in legal documents clearly shows that the author's primary intention was to provide the legal profession with a practically-oriented manual. In this he has largely succeeded and even displayed a certain mastery of surfaces.

To the scholar the part devoted to the Scottish system is much the more interesting, and may even prove to be an unexpected mine

of unusual, hybrid procedural arrangements. It is true that the general etiology of this hybridization à l'écossaise is well known. It has been studied mainly on the private law side however, in connection with the influence of the pre-codification continental law on the Scottish legal system. In the less familiar administration of criminal justice, continental carryovers, while not so common, are perhaps all the more striking, because the Scots have largely escaped the experience of a strong, centralized state, so important a shaper of European institutions. Let me single out a few curious "collages" resulting from the commingling of the continental and common law procedural idioms.

On the level of institutional structures, one finds in Scotland an unusual pastiche of continental "bureaucratic" ideas with the traditional common law institutions. The ultimate French inspiration of the office of the Scottish public prosecutor is unmistakable, notwithstanding the fact that the office was centralized only after the wave of continental influence had long subsided. The prosecutorial organization manifests all the essential attributes of a hierarchical bureaucratic institution. Its powers are quite surprising in view of the dominance of common law features in the total system. For instance, it is the prosecutor who decides whether a case will be tried to a judge or to a jury. The significance of this decision is far-reaching. As there are no appeals from jury acquittals but there is such possibility following trials to a judge, it is the prosecutor who decides whether there will be a possibility to correct "false negatives." Nor is this the most important consequence. Since the punishment for many offenses is not fixed by law, the maximum penalty will frequently depend on the maximum powers given to the court in which the crime is tried. Now, as the prosecutor can choose the court, he can *ipso facto* determine the ceiling of the penalty that can be imposed in the case at bar. As on the Continent, so in Scotland, the prosecutor is expected to be impartial (a quasi-judicial attitude), and there seems in fact to be far less agonistic confrontation between the prosecution and the defense than in America.

While the prosecutorial arm in Scotland thus displays affinities with its continental counterpart, the judiciary is of the classic common law type. Judges are selected from among prominent members of the Bar, with all the usual consequences this entails for the judicial sensibility. Naturally there is virtually no interchange between the judicial and prosecutorial personnel, and even prosecutors with long service are thought unsuitable for judicial office.

Turning to processing forms, the common law idiom is manifestly decisive. There is no comprehensive pre-trial investigation with its accompanying dossier, and the need for trial can be obviated by the defendant's plea of guilty. As can be expected in view of the important prosecutorial powers, the great majority of cases are disposed of by pleas of guilty, following "plea bargaining." (See interesting statistics on p. 119.) Nevertheless, even trial forms betray contrasting

common law and continental impulses. Some resulting mixtures are *curiosa*, especially where the continental cosmopolitan law of the pre-codification period still seems to survive. Two examples should suffice in order to whet the appetite of the scholar.

Following the sixteenth-century metamorphoses, the common law jury trial developed rules of proof-admissibility rather than rules of proof-evaluation. The trial thus became tied to the formal minuet of introducing evidence. In contrast, the continental criminal process had developed three centuries earlier an evidentiary system with emphasis on proof-evaluation but few, if any, admissibility rules. Consider now the curious amalgam of Scottish law where no person can be convicted of a crime unless there is evidence of at least two witnesses implicating the defendant. The jury thus operates under a system of proof-evaluation rules, coexisting with the traditional common law emphasis on controlling the flow of information to the jury through admissibility rules. It is true that Scottish proof-evaluation rules do not dictate compulsory conviction under certain conditions, as was the case on the Continent for many centuries. But these rules preclude the possibility of conviction before the required minimum of proof is adduced, establishing what may be termed a general corroboration rule. Continental theorists used to speak here of "the negative system of legal proof" as contrasted with its older, "positive" variant.

This leads to the second curious feature of the Scottish criminal procedure, the so-called verdict of *not proven* which exists in addition to the verdicts of not guilty and of innocent. Attempts to trace a *via media* between conviction and acquittal are not inextricably rooted in rules of proof-evaluation. A triad of verdicts was known already in classical Rome in the context of jury trials free of rules concerning the weight to be accorded to evidence. The famous Roman *non liquet* verdict probably expressed the state of mind of jurors neither convinced that the defendant was guilty nor persuaded that he was innocent.¹ But in order to find closer analogues to the Scottish *not proven* verdict one must turn to systems which espouse legal rules concerning proof-evaluation. Continental inquisitorial procedure of the *Ancien Régime* furnishes a parallel example. Already in the late thirteenth century practice of the Italian *Podestà*, the judge often faced the dilemma of what to do when the legal proof failed but he was subjectively persuaded of the defendant's guilt. The dilemma turned cosmopolitan with the transmontane dissemination of inquisitorial procedural forms. What to do with a defendant whom the judge believed guilty (or "vehemently suspicious") although the legally required proof could not be adduced thus became one of the perennial

1. An attenuated modern form of such verdict is the contemporary Italian judgment of acquittal "*per insufficienza di prove*." In the practice of some continental countries permitting only two verdicts on the merits, the grounds that accompany an acquittal sometimes distinguish cases where innocence was established from those where guilt has not been proven. This seems to be a remote echo from the days when the middle of the road verdict still existed.

themes of procedural literature from the days of Albertus Gandinus until the turbulent years of the French revolution. Sometimes statutory law would help in solving the dilemma. The famous French *Ordonnance criminelle* of 1670 went so far as to distinguish three types of acquittal. But more often than not at the mercy of scholarly authority, practice wavered and hesitated between a conviction to a lesser punishment (*poena extraordinaria*) and a special verdict "absolving" the defendant from the court (*absolutio ab instantia*)—not to be confused with acquittal pure and simple.

The author of the book under review does not tell us enough about the situations in which the Scottish jury must return the *not proven* verdict to enable one to compare this verdict with *absolutio ab instantia*.² Nor does my next-to-complete ignorance of the actual historical development permit me more than to suspect that the continental pre-codification legal theory and practice may have played a part in shaping the Scottish *tertium quid*. But it is one of the luxuries of ignorance to justify us in letting our imagination loose to wander. Let me then offer a thought on the relationship of the *not proven* verdict to the cluster of values usually associated with the presumption of innocence, against the background of my uncertainty about the precise circumstances in which the verdict is returned in actual practice.

A system adopting the general corroboration rule (or the negative system of legal proof) cannot totally avoid situations in which the adjudicator cannot legally convict, irrespective of his grave doubts or even subjective convictions as to the defendant's guilt. He may be persuaded by a single witness that the defendant is actually guilty, but may disbelieve another "corroborating" witness for the prosecution. As the supporting testimony of two witnesses is required, there cannot legally be a conviction. Now if the Scottish jury renders the *not proven* verdict solely in situations where legal proof failed although the majority of jurors believe that the defendant is guilty—an unlikely hypothesis—then the verdict does not run counter to the presumption of innocence in one of its accepted meanings. But if the verdict is also returned in cases where, in the absence of legal proof, jurors entertain only a *suspicion* that the defendant may be guilty, then at least certain aspects of the presumption of innocence, untouched by the author, have an uncertain status in Scottish jury trials. All attempts at tracing a *via media* between a conviction and full acquittal seem to have a dubious relationship to political values expressed in the maxim that the defendant's innocence is presumed in criminal procedure. For if the adjudicator is not fully convinced of the guilt of the defendant, then the presumption has not been rebutted, and an acquittal *tout court* seems to be in order.

2. We know however that the Scottish verdict does not carry all the detrimental consequences which flowed from the "absolutio ab instantia" (e.g. police surveillance, double jeopardy, etc.). The only difference between a verdict of acquittal and of *not proven* seems to be a slur on the character of the defendant attached to the latter verdict (p. 168).

One could easily continue mining the peculiar procedural and evidentiary forms presented in this book. But what I have said so far is enough. Even rough data contained in the book stimulate the fancy of the comparativist. They also dramatize the difficulty confronting the scholar who pursues "ideal types" with the hope of organizing our perception of the empirical richness of procedural arrangements.

LEGAL HISTORY

PROSECUTING CRIME IN THE RENAISSANCE. ENGLAND, GERMANY, FRANCE. By John H. Langbein. Cambridge: Harvard University Press, 1974. Pp. 322.

*Reviewed by Thomas G. Barnes**

Professor Langbein's monograph is very much in a class by itself: it is the first major study of comparative English-Continental legal history since Professor John Dawson's *A History of Lay Judges* (1960). It bears comparison to the master's work, and by virtue of a more limited purview and a finer focus it succeeds in advancing our knowledge of the institutions and structures which Dawson first brought to our attention. Dawson's thesis, that the "active agent in driving out lay judges in France was the Roman-canonist system of procedure, especially its modes of investigation and proof,"¹ is implicitly Langbein's starting point for his study of the principal legislative directives in England, the Empire, and France in the sixteenth century instituting or at least refining the process of investigation and prosecution of crime. This is an ambitious undertaking: either the Marian statutes on bail and committal (England, 1554-1555) or the *Carolina* (Empire, 1532) or the *Ordonnance de Villers-Cotterets* (France, 1539) would be enough to make a worthy book. The author's choice of an avowedly comparative method is admirable. He recognizes the hazards; some unevenness in depth of treatment is inevitable, for as Langbein points out "the French have left their enormous resources of archive material largely unworked" with consequent problems for the "foreign comparativist" (211). Despite the hazards (and the shortcomings) the effort was worth it, because the comparative approach reveals dissimilarities in the prosecutorial and investigative modes of the three systems much more than similarities and consequently reveals the existence of a common problem solved by uncommon means. Any nail driven into the coffin of that peculiarly academic, nineteenth-century Whiggish intellectual contrivance called "The Reception" is

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1. Dawson, *A History of Lay Judges* 68 (1960).