Interview with Professor William E. Butler at the Law Faculty, University of Oslo

Oslo 8 November 2017

By Professor Alla Pozdnakova

A.P.: Thank you for coming to Oslo and participating in our conference, giving a keynote speech, and providing us with your valuable insights on many exciting questions.

W.B. Thank you. My first visit to Norway. And it has been an excellent introduction.

A.P. **I would like to ask you some questions and solicit your views on questions of Russian law, Russia and international law, and perhaps also Western world perspective on what Russia is today and what it was before.**

In your book on *The Soviet Union and the Law of the Sea* (1971) you mention in Preface that "the importance of Soviet legislation and treaty practice has often been overlooked by Western students of maritime affairs, and the significance of doctrinal writings misunderstood or exaggerated ...". Your own work over many years has contributed greatly to clarifying and explaining Soviet law and Russian law – so I would like to know:

What do you think about the state of knowledge (in the Western world) with respect to the contemporary Russian law and legal system, in 2017? In your opinion, are there significant gaps in this knowledge which may cause misperceptions about Russia's actions or policies (in general or in specific fields such as law of the sea)?

W.B.: Let me take your question and go back to your original observation about my book of 1971. It was in fact my second book, *The Soviet Union and the Law of the Sea*,[1] the first appeared four years earlier in 1967 on the law of Soviet territorial waters[2]. In both books I emphasized the importance of State practice rather than the doctrinal writings because in the law of the sea much of the Western commentary – in so far as we knew much at all about the Soviet approach to the Law of the Sea – was based on doctrinal writings and not on an

[1] William E Butler, *The Soviet Union and the Law of the Sea* (1971).
[2] Butler, *The Law of Soviet Territorial Waters* (1967).

analysis of State practice or of Soviet legislation, and of course the real attitude of a country is embodied in its legislation, in its practice, in its treaties with neighboring States, and so forth. What international lawyers may think about international law generally or the law of the sea in particular is their personal opinion. Even though in the Soviet period books were censored or had to pass the censorship in order to be published, that did not necessarily make them official statements. This was misunderstood in the West at the time. It was believed that everything emanating from the Soviet Union must be official because it had been considered to be at least minimally acceptable at the time for publication; those were two quite different things. That approach dominates a lot of western scholarship today and international law generally, and not only with respect to Russia. Many international lawyers are preoccupied with an analysis of doctrinal writings; there is nothing wrong with that; in itself this is valuable but not the same as State practice. This is not the heart of international law as such; it is merely opinions of international lawyers, publicists as we call ourselves. To be sure, we disagree with one another, and we perceive State practice differently. So what I was beginning to develop in my own thinking through these two books was that in order to understand patterns of Soviet practice, you had to understand Soviet legislation, you had to understand the legal system in which it originated. That is quite different from reading a textbook on public international law. This led me to further research on domestic Soviet law, which is where I ended up concentrating a great deal of my attention – but far from all of it – in recent years.

At the time, I was completing my Ph.D. dissertation on the Soviet Union and the Law of the Sea and had been appointed a Research Associate at Harvard Law School and invited to collaborate on teaching a course on Soviet, Chinese and Western approaches to international law. This was a Comparative Approaches to International Law course that we were inventing at the time. It was successful and offered for two years. Those who did the Chinese section went on to write a substantial amount of material on Chinese approaches to international law, and I continued to work on Soviet approaches.

Eventually I transcended maritime law and moved into Soviet law more generally; this ultimately led to producing the manual on the Soviet law.[3] But

[3] W. E. Butler, *Soviet Law* (London, 1983; 2d ed.; 1988).

the notion of Comparative Approaches to International Law has stayed with me. I moved on to speak more generally of just Comparative International Law. I gave lectures at the Hague Academy of International Law in 1985 on this subject, an early synthesis, shall we say, of materials at the time. I am now working on a larger volume that will complement the volume called *Comparative Perspectives on International Law* (1980).[4] It was a successful volume and has been out of print for decades. I want to re-approach that issue and produce a substantial collection of articles, some of which will be mine and some from others that deal with the larger issue of comparative international law. For me, of course, with my background, I will use the experience of Russia and other post-Soviet legal systems, all of them, including the Baltic, as exemplars of how comparative international law can be useful. The universal application of the comparative method should be not just to national law; people perhaps underestimate the importance of the comparative method. Of course, we use comparative method as international lawyers; we cannot engage in international law without the use of comparison, but it is quite another matter to ask whether comparative law as a discipline has something to contribute to public international law. I think that it does; I believe that it is indispensable because in comparative law we traditionally analyse domestic or national legal systems; we do much more than merely analyse the law, although that is part of what the application of the comparative method to domestic legal systems is about. We also analyse the legal profession, legal education, law reform and legal change, and the importance of all in contributing to the mentality of the lawyer, including the international lawyer.

Every international lawyer is trained first in a domestic law. One cannot get to the stage of international law without passing through municipal legal education, which in turn leaves its own imprint on our mentality as lawyers. As international lawyers, we are products of municipal systems of legal education; that imprint persists. Legal advisors in government ministries are people practicing international law for their governments, but they are products of their own domestic legal culture and legal tradition. This affects how they conceptualize and approach their job. The same would apply to international arbitrators and international judges. So many of the questions we ask about

[4] W. E. Butler (ed.), *Comparative Perspectives on International Law* (1980).

domestic legal systems we need to carry over to our understanding of public international law. When I speak of comparative international law, that is what I have in view.

A.P. Thank you. That brings me to my next question about importance of comparative law, but more from the Russian lawyers' perspective. Is there interest in comparative law in today's Russia in your experience, in academic circles but also among legal practitioners, among the legislators or lawyers working for legislators?

W.B.: Comparative law in Russia has had an unusual history. In the nineteenth century Russian lawyers did important and pioneering work in comparative legal studies with respect to their own system, to indigenous peoples in Russia, and to foreign legal systems. The Soviet period was not hospitable to comparative legal studies; basically, Soviet jurists were asked to study and criticize "bourgeois legal systems". The very term prejudiced the process of comparison and led to ideological rather than professional lines of inquiry. Another distinctive feature of comparative law in Russia that persists, indeed dominates, although there are some signs its influence may be attenuating, is that comparative theoretical studies fall within the ambit of chairs of theory of State and law. There is usually no separate chair of comparative law, as found in most European and North American universities. Although there is a history of the development of such Chairs, the outcome is that comparative legal studies end up being sublimated to larger theoretical issues and are not in a position to prosper and bloom as would happen if they had an autonomous existence in law faculties.

This observation applies to all post-Soviet legal systems; there is some indication, for example in Ukraine, that the position is changing, and perhaps in Kazakhstan. People are beginning to see the limitations that exist in this respect. As a result, there has been a tangible impact on a range of comparative research undertaken because the legal theoreticians are partly comparatists and partly not, but they are not by training and inclination classical comparative lawyers. There is no reason you should expect them to be, but, on the other hand, they have a veritable monopoly over the comparative method at the theoretical level and that is not wise.

We are getting good applied studies from Russia; many Russian jurists are studying in Europe, America, Australia, and elsewhere, and now China; although they are producing excellent comparative work, they do not have a home. And they need a home in the Universities.

A.P. Let me put another question of a more personal character. How did your interest in Russian law or, at the time, Soviet law arise? Did it arise in relation to your research work, did it arise before that or what were you interested in first: Russian language or Russian law?

W.B. I am of the generation of American university graduates who are products of the Sputnik era. The launching of Sputnik by the Soviet Union transformed Soviet area studies in the United States. They rapidly transitioned from being virtually non-existent to something of national importance. I was always for some reason inclined to combine law and international affairs. I started with international affairs. I did my bachelor's degree at The American University School of International Service in Washington D. C. and took the Russian Language. Not being a natural linguist, the first year of language study was difficult. In the summer of 1960 I went to Soviet Union with a group of eleven other Americans; we spent six weeks in the Soviet Union, including three weeks in a sports camp at Sochi. My Russian improved greatly; my Russian teacher did not recognize me when I returned.

I then did a two year master's degree at the Johns Hopkins School of Advanced International Studies, then a J.D. at Harvard Law School, and upon completing law studies, returned to SAIS and commenced a PhD at Johns Hopkins. That culminated in my work on the Soviet Union and the Law of the Sea, but all had started at Harvard Law School because in those days a third year paper of law review length and quality was required. I wrote on Soviet territorial waters and won the Addison Brown Prize for that paper. It was published as an article in the *American Journal of International Law*. I then expanded the paper into a monograph on the Law of Soviet Territorial Waters (1967). I returned to the Law School in 1968 for two more years as Research Associate in Law; finished up writing my PhD there – a wonderful library – and defended at Johns Hopkins in February 1970. I was then appointed in London to the Readership in Comparative Law in the University of London (tenable at University College London). There I enlarged my range of interests from the Law of the Sea to

comparative international law more generally and to Soviet law in all of its aspects.

To me, this is all part of the continuum; there have never been sharp changes of direction; there has been, at least in my perception, a maturing of an original idea into something more substantial.

A.P. Yesterday [at the Russian Revolution in the Nordic Perspective conference] we discussed the development of the legal system of Russia before and after the 1917 Revolution and also contemporary Russia. So would you repeat and expand on your points – your opinion about the legal system of contemporary Russia. Is it a transitional legal system, is it some kind of other legal system?

W.B. There are two levels at which I can address your question. In a sense the first level is what I addressed in my remarks yesterday. I consider Russia to be what I call a transitional legal system, but that does not mean I know what it is transitioning towards. I do know what it is transitioning away from, but not where they intend to end up. I am not sure they know themselves where they want to be. Of course, they want to be a more market-oriented system, but that is not enough in and of itself. They have to define the balance that they prefer between being a rule of law society, a democratic society, and a social State. I am confident that they will find their own balance in all of these matters; it will be a Russian balance; it will probably differ a bit from others. For various reasons they will strike a different balance, but they will share the same core values that Russians will share, most of which are embodied in human rights covenants, and elsewhere. That is one aspect.

But there is a larger issue implicit in your question. European colleagues like to classify legal systems; they are attracted by the concept of families of legal systems, for example. This is not the only possible classification, but it is a widely shared one. When you ask: what is Russian law? For example, is it Romanist or Germanic, is it still socialist, is it transitional, is it Slavonic, is it something else – My reaction is “that is the wrong question”; it is not whether Russian law is one or the other – it is whether Russian law is all of them. If you put the question differently: “in what respects is Russian law Romanist or Germanic”, “in what respects is Russian law Slavonic”, “in what respects is

Russian law Anglo-American", "in what respects is it still Socialist", "in what respects is it none of those", "in what respects is Russian law something else", you are asking a genuinely analytical question. It is possible that the answer will change from week to week, month to month, year to year – just because the legal system is constantly changing. The legal system is probably changing for reasons unrelated to classification, but one way or the other the factor of change has to be accommodated. It is not merely the reality of change, a reality present in every legal system, but rather how changes are perceived. I have come to prefer the metaphor of a sophisticated kaleidoscope, where with every small twist of the kaleidoscope you see something different. That is helpful in identifying similarities and differences in legal systems. These classifications should not be treated as a fact – they are a perspective, they are a prism through which you see things accentuated that are not so visible unless you concentrate on them. But they exist. All these elements are probably present in Russian law, along with others not mentioned; that would be true of any legal system. One may look at English law the same way, American law, French law, Norwegian law as the case may be, because all legal systems historically are part of each other, one way or the other, often in ways we cannot precisely trace. But the similarities are there. So either we are faced with a task of identifying how they were transmitted, or, if they were not, how they were invented or created. How many times did lawyers reinvent the wheel just because they believed that in the particular context in which they were working something seemed to be a good idea. Had they done their homework and investigated the experiences of other legal systems, they might have been more efficient in reaching their conclusion because they would not have to dream it up by themselves, if in fact that is what they did.

A.P. Thank you. That's a very interesting answer; definitely something to reflect upon in the future.

W.B. If you are attracted by that line of thought, it would substantially affect the way you approach comparative law.

A.P. I definitely agree with that. Another question – going back to 1917 and your keynote speech- please correct if I formulate your point wrongly but I recall you asking, "Did anything useful emerge from the Revolution of 1917; was there anything worthy at all?" Can you please expand on your opinion?

W.B. I did put the question this way and you did not misquote what I was suggesting at the time. But in any event of that magnitude – the 1917 Revolution was truly an event of enormous magnitude, the effects of which we will continue to feel for a long time – there are good things and there are bad things. And the perception of those may change over time because you may have a different angle of vision on something you might thought was bad and this turns out to be not so bad and *vice versa*. What you thought was good at the time proves not to be. But that is part of any comparative lawyer's intellectual arsenal.

The inclination has been, particularly outside Russia, to condemn the excesses of Revolution as we understand them to be measured by our values. Probably that approach has dominated over the past century in the Western treatment of Russia; it has not been the only treatment. There have been people who admired Russia for what happened, for ideological reasons, for other reasons, as the case may be, but from the legal perspective the Russian Revolution was an experiment. Some things they did went badly wrong; some were misconceived from the outset, but not everything. It becomes a challenge to decide – to consider, at least – what positive came from the Revolution, and why? The important reason in comparative analysis is always "why"; that is the interesting part, what people saw in their perception of these things. It may turn out they have frivolous reasons for their opinion, but it may turn out that they have insightful and persuasive reasons for their opinion.

A.P. Let me turn to the law of the sea in a today's world. Do you see any significant discrepancies between or among States such as Russia, United States, China, perhaps other States in their understanding of the law of the sea? And if you notice such discrepancies, can you expand a little on them? And also reflect if they may have implications for the law of the sea in practice, for the world, for Norway (in the Arctic context)?

W.B. The law of the sea discussions from the late 1960s onwards, perhaps unexpectedly, were related to the branch of international law where there was a substantial coincidence of interest among the great powers, so that the United States and the Soviet Union worked closely together in the law of the sea discussions and by and large shared a similar approach to these matters, as did Britain and France. Perhaps to a lesser extent also China, but she was

present in all of this. The Law of the Sea Conference took well over a decade to complete and was a kind of laboratory for East-West consultation and collaboration that we have not seen in many other areas of international law which meant so much in practical terms to the legal regime of the oceans.

The United States was not content with the ultimate result and still has not ratified the 1983 Law of the Sea Convention. Professionally speaking, not politically in the American context, that was an inappropriate move on our part; I think it is in the interests of the United States to be party to the Convention, especially with the revisions that we succeeded in getting at a later stage. Most States are party to the convention; that for which we bargained so strenuously – transit passage through international straits – we have not secured because we are not parties to the Convention. Many States that stayed out of the Convention are strait States; they will not recognize transit passage until we complete ratification. The United States Navy is aware of this. Rather unusually, they have said so publicly at various times; I am not aware that the position has changed.

I have recently supervised a dissertation at my University on Turkey and the Law of the Sea.[5] Turkey is not a party to the Convention; the reason she is not the party has mostly to do with her desire to settle bilateral issues with her neighbours. I suppose there are a few other States who find themselves in that position. But there are 168 parties to that Convention out of 194 + States. That's not bad as universal conventions go. There are no fundamental issues separating the States which are parties and those which are not parties to the law of the sea convention. What issues remain would dissolve overnight if the United States ratified, and to the extent such issues continue to persist, I would have thought they are fairly easily resolved. But time will tell whether that proves to be the case.

A.P. The United States and other countries have stressed the importance of the law of the sea – the importance of the United Nations Convention on the Law of the Sea – even though United States, as you have mentioned, has not ratified it.

[5] E. Korkut, *Turkey and the International Law of the Sea* (London, 2017).

W.B. The United States publicly said in 1982 that we will regard the provisions of the Convention as customary international law, except for the deep sea bed provisions. But of course that is misleading. The fact that we regard them as customary international law does not make them customary international law.

A.P. Let me ask you questions relating to Svalbard Treaty, or Spitsbergen Treaty. You have written on that, together with other colleagues, and I would like to ask you about your opinion on the dispute relating to the interpretation of the Svalbard Treaty where Norway has a different position from many other States. What do you think personally, professionally – politically perhaps also – should Norway continue to stand its ground when it comes to this treaty (which would be then that it is geographically only applicable within the territorial waters, not beyond that) should it try to perhaps renegotiate the treaty – well, this is hypothetical at this point of time; would the approach Norway has taken for now eventually bring it to an international court where the question of the scope of Svalbard treaty would be then discussed; are there any alternative ways to settle this issue so that everyone is happy – or most States are happy?

W.B. I am not in a position to criticize the Norwegian position. I do not know well enough the rationale for it but it does seem to me that Norway in a larger sense of the word is in a rather interesting situation. Norway may prefer to look at the Svalbard question in the context of what should be a larger approach to the international legal regime of the Arctic; there are extra legal factors, so to speak, in my perception at work here.

One is that the Svalbard Treaty is a multinational treaty, and a number of States-parties are not Arctic powers; they do not border the Arctic. The international community is going to be in a position during the next couple of decades of having to resolve the issue of who is going to determine the Arctic legal regime. Is it going to be the Arctic powers or will the non-Arctic powers and Arctic powers together do so. Clearly the non-Arctic powers alone will not do so. So it will be one combination or the other, and that means we have developments such as Arctic Council which has admitted non-Arctic powers as observers. China has declared a long-term interest in the Arctic, including the Northeast Passage and has announced its willingness to invest substantial sums of money in the infrastructure necessary to secure navigation safety in that

area and no doubt seek other investment opportunities that would come from infrastructure investments. Other Asian States may join. If that comes to fruition, then of course they will want a voice in the regime of the Arctic; they will say, not unreasonably, that they have a stake, a direct stake in how the regime actually works, and that may bring them into the conflict with the Arctic powers themselves, and not only Russia, or the United States as well, but possibly all of them.

It is conceivable that Norway could re-approach Svalbard in that larger context of what should be the optimal international legal regime for the Arctic generally and who should determine what it is. If the Arctic powers decided that it would be them alone, they could do so. They have the geographic proximity and the naval force, but it may well be that if they were to do that, this would make the area unattractive to international shipping. This is something they will have to bear in mind and balance one way or the other in making their approach. It is conceivable that Svalbard could either become a factor in that larger determination of the international legal regime or alternatively could be a model for a legal regime. If it were to be a model, then the Arctic powers who are parties to the Svalbard Convention would have to decide which components of the model are attractive and acceptable, and which are not. I do not think that Svalbard would pass the test for an acceptable model, I may be wrong about that. That is my response to your question. It is that Svalbard could potentially operate as a factor to reconsider the entire international legal regime and come up with something more acceptable to one or both groups concerned.

A.P. Thank you. My next question relates again to Russia today, contemporary Russia, and its relationship with international law – or interrelation. Yesterday you pointed out that in your view the accession of the Soviet Union to the 1966 Human Rights Covenants was one of the essential factors in the Soviet Union's demise. Do you think that in light of Russia's skepticism or seeming skepticism towards human rights instruments that we see today (one example may be the 2015 decision to allow the Constitutional Court to set aside rulings from the European Court for Human Rights if they contradict the Russian Constitution). Do these developments indicate that the Russian Federation is concerned with the corresponding

issues relating to its territorial integrity today? Or is this just an expression of something entirely different?

W.B. I do not think this has anything to do with territorial integrity. Russia is not the only State unhappy with individual decisions that have come from Strasbourg. The United Kingdom is among those countries too. It would be entirely unreasonable that every State that loses a case – and everybody has lost them – is unhappy with the Court because they lost. They must have thought they were right because they fought the case instead of settling it to begin with. So I admire the Court for its forthrightness, but this does not mean that I necessarily agree with every single decision the Court has made. Some matters brought to that Court are matters on which European States culturally are divided; some take a stricter view than others on individual issues, or what they understand to be their interest.

But there is a larger issue at stake. It is not an issue that is going to disappear, and has nothing to do with human rights. It has everything to do with the interrelationship between the international legal system and municipal legal systems, and the place of treaties within municipal legal system. I happen to think that the fathers of the Russian Constitution got it right when they drafted Article 15 of the Constitution, and that, of course, is where the attack these days is directed. Russia is not the only country in which this issue arises. It has arisen frequently in the past 200+ years in the United States, for example. It has arisen in the United Kingdom and I believe that it has arisen in every seriously democratic country in Western Europe because treaties do sometimes conflict with domestic rules or can come to conflict with them, and the decision has to be made whether to give priority to treaties. I gave a paper recently in which I pointed out that two States which entered into a loan contract with one another and used English law as the applicable law would end up under English conflicts rules with public international law being applied to the legal capacity of the countries to enter into such a contract. I am sure that would have come as a surprise to the borrower and to the lender in this situation. In the example I happen to give the English court decision which determined that outcome created a precedent: that was the first time in English law that this question had been decided.

A.P. Thank you. I interpret your answer also **as showing that it is important in order to understand how international law works in our situation – the Russian legal system – but in any domestic legal system, it is not sufficient just to look at that legal system, a broader comparative perspective would be useful to set things in a bigger perspective.**

W.B. Absolutely right. To carry on your thought for a moment, this means that if you are interested in asking how national legal systems interact with the international legal system, the answer is going to be different for every country.

A.P. My last question relates to your experience in teaching and researching on Russian and Soviet law, but more specifically on teaching. Perhaps you could say something about your experience in teaching Russian law and comparative law, perhaps from your own example or a more general example of how the system works.

W.B. I've had the pleasure of teaching in three major legal educational traditions: I have taught for 35 years at the University of London, at University College (48 years counting the external program), I have taught in the United States, I have been back now for about 13 years and taught before I went to England, so I have taught for 17 years or so in the United States. Then I founded a Law Faculty in Moscow in 1993 where we offer the Master's degree of the University of Manchester. This is an institution called the Moscow Higher School of Social and Economic Sciences attached to the Academy of National Economy of the Russian Federation. Thus, an American, Anglo-American law professor and Dean teaching Russian students who already had a degree in law and were doing an advanced programme.

When I came to London my experience was, of course, with the American model, which in law schools is the Socratic method. In England I learned something more of the magisterial lecture, which is the traditional English way, and my English colleagues were generous enough to allow me to teach my course in "Introduction to the Socialist Legal Systems", as it was originally called, as I preferred to do. And since, with minor exceptions, I never had large numbers of students, I taught a combination of the Socratic method lecture and seminar, and I have always done so. Given the way I teach, from my point

of view, you have to ask students whether I am a good lecturer; they will have their own insight into all of this, but from my point of view, it works. Just because it works for me, does not mean that it would work for others. Other lecturers have different talents and different ways of working and interacting with the students.

A.P. Thank you. That was my last question. Perhaps you can reflect a bit more on what we were discussing up to now?

You have touched upon a number of central areas for any experienced University professor. You have touched upon aspects that require me to reflect upon issues of my own intellectual development, and those, of course, influenced immensely my approach to teaching and research, and vice versa. I have always said that because I am a product of the Harvard Law School, in the field of international law I am a product of the documentary school, the documentary approach, which means that I believe in working with primary sources. I think, for example, when I teach Russian law – and I have written the basic book on the subject, but I also have a book which consists of my translations of Russian legislation. I want them to work with the original material. Given that it will not be possible for students to work in the Russian language, I want them to work with translations which are mine because I want them to understand that as professional lawyers they are going to work with translations in their own law firms, their own law practice, and they are going to have problems with their client and with foreign law. I have written extensively on the approaches to legal translation; I consider legal translation to be the foundation of comparative law. At the translation level we are working with texts in the original language which are inaccessible to the person having to use it, so he is relying entirely on someone's perception of what has been written. If that perception is wrong, then so will the advice be wrong, or so will the transaction being negotiated not end up where the parties thought. And I have dozen of anecdotes that lead in my opinion to conclusions about all of this. So to me, that is an inevitable part of teaching and research, and it has been a major pillar in my approach to the subject.

A.P. Thank you.

W.B My pleasure. Thank you.