

REVIEW ARTICLE

A POLITICAL ANALYSIS OF PROCEDURAL LAW

THE FACES OF JUSTICE AND STATE AUTHORITY. By MIRJAN R. DAMASKA. [Yale University Press, New-Haven & London—1986; 247 pp. with index. Hardback \$26.]

1. Introduction

The coexistence of the apparently common basic objectives of various judicial procedures around the world and of the striking diversities in arrangements and institutions through which substantive justice is administered in different states raises many important questions. If we are to agree that rectitude of judicial decisions is a most important common goal of all rationalist systems of adjudication,¹ the existing differences between Anglo-American “adversarial” and Continental “inquisitorial” procedures demand more than a simple “historical accident” explanation. An agreement on this basic procedural goal inevitably leads to the question which system is preferable and why? Radical differences may exist between multifarious social policies applied by different states through their legal systems. However, these differences embodied in substantive law can not affect the foremost aim of adjective law—providing tools for an accurate fact-determination: rectitude of judicial fact-finding is a prerequisite of the rational implementation of any kind of social norms and policies by means of law.²

This apparent independence of procedural goals from the socio-political content of substantive law provides a sound ground for comparative analysis and for the development of procedural theories. A great amount of legal literature has been devoted to the differences between inquisitorial and adversarial procedures.³ The contest form of the trial as a system of procedural rights given to the partisan litigants, and of a wide fact-discretion exercised by

¹ See, in general, W. L. Twining, “The Rationalist Tradition of Evidence Scholarship,” in E. Campbell & L. Waller (eds.), *Well and Truly Tried* (Sydney, 1982), p.211, esp. at pp.242–246.

² See, e.g. P. S. Atiyah & R. S. Summers, *Form and Substance in Anglo-American Law* (Oxford, 1987), at pp.157–158.

³ The most significant attempt at developing a general procedural theory has been made by Jeremy Bentham. See G. L. Postema, “The Principle of Utility and the Law of Procedure: Bentham’s Theory of Adjudication” (1977) 11 *Georgia Law Review* 1393; G. L. Postema, *Bentham and the Common Law Tradition* (Oxford, 1986), Chap. 10. On the modern general theorising on procedure see, *inter alia*, R. W. Millar, “The Formative Principles of Civil Procedure,” in A. Engelman (ed.), *History of Continental Civil Procedure, Continental Legal History Series, Vol. 7* (1927), at pp.3–81; L. L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 *Harvard Law Review* 353; M. D. Bayles, *Principles of Law* (Dordrecht, 1987), at pp.18–75. An excellent collection of general readings on this subject appears in R. M. Cover & O. M. Fiss, *The Structure of Procedure* (New York, 1979).

trial courts, has been opposed to the inquest form as a relatively rightless procedure, with judicial discretion subjected to rigorous appellate review.⁴ Continental procedural "efficiency" has been compared with the conspicuous "inefficiency" of the Anglo-American machinery of justice,⁵ which raises the question of what "procedural efficiency" is and how it is to be valued.⁶ Ideologically-oriented theorising on comparative criminal procedure and evidence has opposed the "Due Process Model" and the "Crime-Control Model."⁷ The civil-libertarian tradition has been opposed to Benthamite utilitarianism and its modern applications and elaborations.⁸ A theory of "process values" has been advanced, arguing that values such as fairness, dignity and participation ought to be impregnated into legal procedure independently of their effect on the accuracy of outcomes.⁹ According to this approach, result-oriented procedural efficiency is not the sole determinant of procedural quality; certain procedural arrangements are something to which people are deontologically entitled within the official process by which their affairs and lives can be affected.¹⁰ In civil procedure, two distinct models have also been offered, explaining the civil process as a dual-purpose institutionalised framework of (1) conflict-resolution and (2) behaviour-modification.¹¹ In the law of evidence, the Continental principle of free evaluation of evidence has been compared to the Anglo-American system of relatively

⁴ See, e.g. B. Kaplan, "Civil Procedure—Reflections on the Comparison of Systems" (1959–60) 9 *Buffalo Law Review* 409; L. L. Fuller, "The Adversary System," in H. J. Berman (ed.), *Talks on American Law* (2nd. ed., 1971), p.34; G. Williams, *The Proof of Guilt* (3rd ed., 1963), Chap. 2; R. Eggleston, "What is Wrong with the Adversary System?" (1975) 49 *Australian Law Journal* 428; S. Landsman, *The Adversary System: A Description and Defence* (1984); J. Resnik, "Managerial Judges" (1982) 96 *Harvard Law Review* 376; J. H. Langbein, "Land Without Plea Bargaining: How the Germans Do It" (1979) 78 *Michigan Law Review* 204; J. H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 *University of Chicago Law Review* 823.

⁵ See both articles by Langbein, *supra* n.4.

⁶ S. R. Gross, "The American Advantage: The Value of Inefficient Litigation" (1987) 85 *Michigan Law Review* 734.

⁷ H. L. Packer, *The Limits of the Criminal Sanction* (1968), part 2; H. L. Packer, "Two Models of the Criminal Process" (1964) 113 *University of Pennsylvania Law Review* 1; M. R. Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121 *University of Pennsylvania Law Review* 506; M. R. Damaska, "Structure of Authority and Comparative Criminal Procedure" (1975) 84 *Yale Law Journal* 480; A. S. Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure" (1974) 26 *Stanford Law Review* 1009; J. Griffiths, "Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process" (1970) 79 *Yale Law Journal* 359. See also K. N. Llewellyn, *Jurisprudence* (1962), pp.439, *et seq.*

⁸ W. L. Twining, *Theories of Evidence: Bentham & Wigmore* (1985), pp. 47–52, 88–108.

⁹ R. S. Summers, "Evaluating and Improving Legal Process—A Plea for 'Process Values'" (1974) 60 *Cornell Law Review* 1.

¹⁰ L. Tribe, *American Constitutional Law* (1978), pp.503–504; R. Dworkin, "Principle, Policy, Procedure," in C. H. F. Tapper (ed.) *Crime, Proof and Punishment*, (1981), p.193, later published in R. Dworkin, *A Matter of Principle* (1986), pp. 72–103.

¹¹ K. E. Scott, "Two Models of the Civil Process" (1974–75) 27 *Stanford Law Review* 937.

rigid evidentiary rules,¹² raising the question of the susceptibility of the fact-finding process to rule-determination, and examining the "optimistic," "pessimistic" and "realistic" assumptions regarding the cognitive competence of lay and of professional participants in process of adjudication.¹³

The sociological movement in law has offered several behavioural approaches to litigation, shifting the focus from legal rules to human interactions and negating the analytical independence of the "folk" legal concepts.¹⁴ Combined psychological-legal attempts to analyse fact-finding and bias in adjudication within the adversarial and inquisitorial procedural models through experimental groups of "triers of facts" have been undertaken,¹⁵ and further criticised and improved.¹⁶ A psychological typology of legal disputes as "cognitive conflicts," "conflicts of interest" and "mixed disputes" has been suggested for the purpose of applying different procedures in order to provide the most effective resolution of each kind of conflict.¹⁷ There have also been several attempts to develop an economic analysis of procedure and evidence, searching for the optimal solution of minimising the costs of judicial errors and the other direct and transaction costs, and of maximising the benefits of judicial process.¹⁸

This brief survey of the existing perspectives in theorising about procedure is not, of course, an all-inclusive one.¹⁹ However, it can

¹² See, e.g. K. H. Kunert, "Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure" (1966-67) 16 *Buffalo Law Review* 122. The above-mentioned Anglo-American "procedural union" is, of course, to be understood merely as a contrast to the Continental "freedom of proof." There are substantive differences within this "union." Thus, as demonstrated by Professors Atiyah and Summers, the English trial is, in general, more truth-oriented than the American (see *supra*, n.2, at pp.157-169).

¹³ L. J. Cohen, "Freedom of Proof," in W. L. Twining (ed.), *Facts in Law* (1983), p.1; Fact-scepticism is traditionally related to Jerome Frank due to his classical *Courts on Trial* (1949). On this subject, including the criticism of some ultra-sceptical interpretations of Frank's scepticism, see W. L. Twining, "Some Scepticism About Some Scepticisms" (1984) 11 *British Journal of Law and Society* 137, 285.

¹⁴ See, e.g. J. Griffiths, "The General Theory of Litigation—A First Step" (1983) 5 *Zeitschrift für Rechtssoziologie* 145.

¹⁵ J. Thibaut, W. L. Walker, A. E. Lind, "Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings" (1973) 71 *Michigan Law Review* 1129; J. Thibaut, W. L. Walker, A. E. Lind, "Adversary Presentation and Bias in Legal Decisionmaking" (1972) 86 *Harvard Law Review* 386.

¹⁶ M. R. Damaska, "Presentation of Evidence and Factfinding Precision" (1975) 123 *University of Pennsylvania Law Review* 1083; J. Thibaut, W. L. Walker, S. LaTour, P. Houlden, "Procedural Justice as Fairness" (1973-74) 26 *Stanford Law Review* 1271.

¹⁷ J. Thibaut & W. L. Walker, "A Theory of Procedure" (1978) 66 *California Law Review* 541.

¹⁸ R. A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2 *Journal of Legal Studies* 399; R.A. Posner, *Economic Analysis of Law* (3rd. ed., 1986), pp.517-557.

¹⁹ It should be added that the ADR (Alternative Dispute Resolution) movement is a necessary component of any meaningful theory of litigation. A general procedural theory should be a "... theory that catches the variety of types of trials, the complexity of each type, and the crucial interrelations between events at trial and pre-trial and post-trial decisions and events." (W. L. Twining, "The Boston Symposium: A Comment" (1986) 66 *Boston University Law Review* 391, 397). On the ADR movement and its achievements and limitations see S. B. Goldberg, E. D. Green, F. E. A. Sander, *Dispute Resolution* (1985).

be fairly stated that most existing procedural scholarship postulates, both normatively and descriptively, that the quality of a *rational* procedural framework is not dependent on possible political or socio-economical value judgments regarding the substantive justice served by this framework. The core of the attitude is a Benthamite one, as summarised by G. Postema:

“... we are to judge the adequacy of a system of judicial procedure not directly in terms of the Principle of Utility but rather in terms of the system’s success (or likely success) in properly executing the substantive law, and only indirectly in terms of the system utility.”²⁰

Maximising rectitude of judicial decisions is, undoubtedly, the main end of a rationalist adjective law, and “process values,” even if outcome-independent, are, at best, an exception to this basic principle.²¹

Professor M. R. Damaska’s *The Faces of Justice and State Authority—a Comparative Approach to the Legal Process* provides an original analytical framework for understanding the similarities and differences of various procedural systems. This framework is based on political criteria. It offers a political explanation of procedural arrangements and their variability, claiming that in most cases procedural systems are affected by prevailing political attitudes towards the legitimate functions of state authorities and their organisational structure. Damaska’s approach will be outlined below in general terms and will subsequently be discussed in relation to the rationalist tradition of adjective law.

2. *The Framework for Comparison and Analysis—Defining the Ideal Types*

Damaska’s framework is based on an ideal-typical scheme of state political authority and on an ideal-typical scheme of social goals pursued by state authorities. Two sets of ideal types have been constructed. The organisation of authority is distinguished from its legitimate functions for the purposes of the examination of their mutual interaction: an ideal type of coordinate judiciary is opposed to a hierarchical type; a conflict-solving ideal type of justice is opposed to a policy-implementing ideal; and the realisation of each sort of justice is studied in detail in relation to each kind of officialdom. This approach is inspired by Max Weber’s “ideal types” of authority and his views about the possibility of explaining

²⁰ Postema, *supra* n.3. “The Principle of Utility and the Law of Procedure”, at pp.1396-1397.

²¹ It should be noted, that this kind of the deviation from the Benthamite model of adjudication does not contradict the relative independence of procedural goals: it is clear, that the enforcement of “process values,” even when leads to non-enforcement of a valid substantive law, does not deal with its content. It deals with the procedural goodness or fairness of a given system from the process-evaluating point of view. See Summers, *supra*, n.9.

differences among legal systems in terms of power relationships (p.9).

Dealing with the structure of authority, the author distinguishes between two basic types of judicial organisation divided by the following criteria:

- (1) attributes of officials;
- (2) their official interrelationship; and
- (3) their manner of making decisions.

The first type of judiciary consists of non-professional and transitory decision-makers, organised into a single level of authority, who make their decisions on the merits of each particular case by applying undifferentiated community standards rather than formal legal ones. The second type consists of legal professionals, organised into hierarchical echelons of authority, who make their decisions in accordance with technical legal standards. The former kind of judicial organisation constitutes the "coordinate" ideal type of officialdom, as distinguished from the latter "hierarchical" ideal type. Pragmatic legalism applied ad hoc by coordinately organised amateurs is opposed to the strict logical legalism rigorously preserved by a hierarchical judiciary. Non-exclusivity, readiness to accept the participation of outsiders in the process of adjudication and individualised decision-making of the former type of authority are analysed and compared with the spirit of exclusivity and the institutionalised thinking of the latter.

Accordingly, a superior review applied by a hierarchical officialdom includes an activist interference with the lower authorities' decisions: "fact, law, and logic are all fair game for scrutiny and possible correction" (p.49). The function of appeal within a hierarchical structure of judicial authority is not limited to elimination of errors and their correction. Appeal constitutes just one stage in a continuous hierarchical judicial process. This rigorous appellate review is compared with the relative finality of the individualised justice exercised by the lower echelons of a coordinate judicial apparatus. A horizontally allocated labour and a particularised decision-making limit, accordingly, the functions of appeal. The latter is used mainly for corrections of mistakes of law and only marginally for the reversal of previous decisions on the ground of a striking mistake of fact.

Each one of these distinct types of authority functions by means of a built-in procedural framework compatible with its structure, and due to this fact separate hierarchical and coordinate procedures arise. The main characteristics of a hierarchical procedure are piecemeal trials conducted by managerial judges, the reliance on written evidence carefully collected in a *file*, the relative absence of procedural rights of litigants, and rigorous appellate review as a part of the continuous adjudicative process. These characteristics are compared with the procedural features of coordinate adjudication: the concentration of proceedings, the concepts of "day in

court" and "mistrial," litigants' active participation in the trial process, procedural and evidentiary rights and rules, preferability of oral testimony subjected to cross-examination by interested parties, and the relative irreviewability of trial courts' decisions, grounded on their first-hand impressions regarding the particularities of the dispute, including factual data and the required individualised evaluations. From this, Damaska concludes, *inter alia*, that:

"... it is (wrong) to focus on the desirability of procedural form without asking whether such form is compatible with a particular judicial apparatus. The question is not only what sort of procedure we want but also what kind of officialdom we have" (p.47).

Within this context the existence of rules of evidence in the coordinate judicial procedure and the "freedom of proof" in the hierarchical one are apparently surprising, and the explanation given to these phenomena by the author is noteworthy. In the logically legalist milieu of a hierarchical organisation, judicial procedural discretion, including fact-discretion, can hardly be tolerated: the legal process as a whole is to be regulated by an internally consistent network of rigid *jus cogens* rules. As explained by Damaska, the Continental hierarchical apparatus initially developed a system of rigid evidentiary rules in accordance with its legalistic attitude, but, realising that "... for the moment, it was impossible to determine in advance the specific impact of various concrete configurations of evidence . . .," the "... rules of legal proof were finally discarded . . .," and this "... was not a retreat from bureaucratic-legalistic attitudes, but more than anything else an act of despair" (p.55). Damaska also demonstrates the elusiveness of the "freedom of proof" concept. Contrary to the widespread "Anglo-American" belief, the Continental "free evaluation of evidence" is not really free. Within the hierarchical process trial judges are obliged to give detailed justifications of their findings of fact and the cogency of their reasoning is subjected to rigorous scrutiny by appellate courts.²²

By contrast, the existence of complex technical rules regulating the coordinate procedure and evidence in trials before amateurs "... is related to the symbiosis of coordinate authority with the caste of professional advocates" (p.64). This symbiosis apparently resembles the Benthamite "Judge & Co."—the corporation based on the sinister interests of its promoters which imposes on the rest of the community a deliberately mystified network of complex evidentiary and procedural rules in order to monopolise legal

²² Cf. Kunert, *supra* n.12. The "fact-avoidance" phenomenon observable in French civil procedure oriented to provide an efficient and cheap framework for conflict resolution at the expense of the accuracy in fact-finding is also notable in the present context. See J. Beardsley, "Proof of Fact in French Civil Procedure" (1986) 34 *American Journal of Comparative Law* 459. The implications of this phenomenon on the traditional Continental model of appellate decision-making are less clear.

affairs.²³ However, the nature of Damaska's symbiosis is totally different. Amateur officials' non-exclusivity and their readiness to allow a private forensic initiative give rise to appropriate rights and rules, including the rules intended to regulate the procedural conduct of litigants. Therefore the coordinate rules of adjective law, contrary to "Judge & Co."s professionalised rules of trial regulation, are flexible and are easily displaced "... by norms invoked by coordinate officials in their own discretion" (p.66).

For the purposes of fixing the ends of the legal process Damaska distinguishes between two political extremes: the reactive state and the activist state. The reactive state provides its citizens with a framework for pursuing their chosen goals, minimising its activities to taking the necessary measures needed for the protection of existing order. A state has to react by exercising its limited "reactive" powers only when the existing social equilibrium has been interrupted. The activist state manages its citizens' lives, striving towards "... a comprehensive theory of the good life . . .," and trying "... to use it as a basis for a conceptually all-encompassing program of material and moral betterment of its citizens" (p.80). Accordingly, the nature of justice within a reactive state is a conflict-solving one, whilst the activist state pursues, in general, a policy-implementing justice.

The procedural style of the former type of justice, conforming to the laissez-faire ideology, is based on providing the parties in dispute with a dispositive framework of adjudication which can be easily modified by their mutual consent. Litigants are left free to select the form of procedure which best suits their interests and a neutral conflict-resolver should react only in cases of the violation of agreed procedural norms or of official rules which have not been waived or modified by subsequent agreement. A conflict-solving procedural law, "... whether prefabricated by the state or tailored ad hoc by the litigants, acquires its own integrity and independence from substantive law. . . Judgments tend to be justified procedurally—that is, by victory in the forensic contest" (p.101). The main characteristics of this type of procedural justice are autonomous party control over proceedings, partisan formation of issues and presentation of evidence, judicial passivity and neutrality in resolving adjective issues, the formation of judicial decisions from *tabula rasa* through bipolar proof and arguments presented by the parties in contest, *i.e.* the most radical adversarial features. Substantively correct outcomes are relatively unimportant within conflict-solving litigation. It is more important, from the conflict-solving policy point of view, to preserve the stability of decisions, provided that each party was given a "fair-play" opportunity during his "day in court." Private disputes ought to be efficiently and finally settled. Possible inaccuracies in disposing of a conflict are

²³ W. L. Twining, *supra* n.8, at pp.75-82; H. L. A. Hart, "Bentham and the Mystification of the Law" (1973) 36 *Modern Law Review* 2.

psychologically compensated for by a forensic fairness designed to achieve the litigants' acceptance of verdicts and by practical and peaceful solutions.

The policy-implementing procedural machinery seeks to maximise the likelihood of substantively accurate outcomes. Within this system decisional rectitude is valued as a prerequisite for the proper implementation of state policy through the judicial apparatus. This standpoint does not permit the parties to litigation a free stipulation on the matters concerning procedure and fact-finding: this task ought to be performed exclusively by specially appointed state officials in the manner which suits best the state programme. Framing the issues of a case and the collection of evidence are subjected to the all-encompassing official control exercised by a managerial judge with or without the aid of the official state-interests-promoter, and no kind of private enterprise is included in the procedural lexicon of policy-implementing adjudication. Hence the whole process is an inquisitorial one: official investigation is always needed for the rational realisation of state policies. Accordingly, judicial decisions are reviewable and reconsiderable. They are to conform to the state programmes and, for example, ". . . a judgment correct at the time it was rendered should be reevaluated and altered if newly emerging circumstances make a different disposition now more desirable" (pp.178-179).

In the final part of his work Damaska conjoins the ideal types of authority with the ideal types of justice and analyses the resulting interactions. He demonstrates the policy-implementing suitability and the conflict-solving adequacy of the hierarchical model of procedure on the one hand, and the conflict-solving suitability and policy-implementing inadequacy of the coordinate model on the other. He also exposes the inherent problems involved in each kind of interaction.

The compatibility of a hierarchical organisation for policy-implementing purposes is scarcely surprising: official inquiry, vertical division of labour, professionalism, institutionalised thinking and memory, bureaucratic efficiency and consistency in decision making are ". . . formidable instruments for the realization of state programs" (p.185). However, ". . . just as no marriages are truly made in heaven, this one is also not without its share of strife . . ." (*ibid.*), and in this context two kinds of potential tension are noteworthy. The first kind of tension is one which can develop between an activist government's preference for instrumental "means-end" decision-making, *i.e.* policy-implementing pragmatism, and the judicial habit of consistently applying unyielding legal standards, *i.e.* "logical legalism." The second kind of tension can be created by an activist state's striving to involve citizens in the realisation of its programme, favouring, *inter alia*, their participation in adjudicative process. This participation can hardly be tolerated by an exclusive hierarchical judiciary.

The deeply rooted policy-implementing features of a hierarchical officialdom are absent in a coordinate one which is generally unsuitable for the efficient realisation of state programmes. It is, therefore, hardly surprising that “. . . There is no precise analogue in conventional theory for the resulting coordinate activist style of proceeding . . .” (p.226).

The coordinate model of judicial authority is most compatible with the realisation of private enterprise in the milieu of procedural laissez-faire. A “. . . coordinate authority reinforces the morphology of contest which is demanded by the conflict-solving process” (p.215). This general view is subjected by Damaska to two principal reservations (pp.216–218), and the former one, which indicates a significant potential tension between coordinate authority and the conflict-solving ideal, is especially noteworthy. The wide judicial discretion exercised by a coordinate lay official is not restricted by any visible firm barriers. His passivity “. . . is located on pragmatic grounds: unfamiliar with the dispute, he is ill prepared to take charge of procedural action himself” (p.216). However, perceiving himself as a discretionist empowered to do justice on the merits “. . . like a dormant volcano, he may under certain circumstances erupt into vigorous activity” (p.216). His sympathy can be inspired by a weaker contestant or by a morally “right” though technically “wrong” party, and by doing equity between the parties he may deviate from the pure conflict-solving ideal.

A hierarchical judiciary facing pure conflict-solving tasks and being moved *ex lege* by litigants’ stipulations loses its managerial qualities and tends to be inert: “. . . where the perceived purpose of a proceeding requires that parties be masters of the lawsuit, hierarchical bureaucracies can preserve this private control with great rigidity” (p.206). However, hierarchical fact finding, even when it is privately initiated and framed, remains an official one: the evidence of a “private” case is collected and recorded in files by state officials. This “independent inquisitiveness of hierarchically organized officials . . .” is, according to Damaska, “. . . more threatening to the vision of self-governing society than is the search for the truth in the legal process before coordinate officials. . .,” and it “. . . must be kept on a shorter leash” (p.206).

Damaska’s ideal types, as he emphasises, are intellectual constructs which do not exist in the real world of legal procedure, but which, as ideas, are capable of describing concrete forms of justice. As demonstrated in detail in the book, the ideal types and their mixtures are omnipresent ingredients of the existing systems of adjudication, and their identification is most helpful in analysing and understanding similarities and differences in various judicial procedures. This approach might be more helpful than the traditional adversarial/inquisitorial taxonomy. According to Damaska, political factors, while not the sole determinants of procedural forms, play a central role in analysing these forms: after all, political regimes

legitimate themselves and realise their policies through systems of justice that they establish. The existing socio-economic data must also be taken into account. However, noting that totally different socio-economic policies can, in principle, be implemented through identical procedures, and focusing the comparative inquiry on the diversity of procedural forms of courts, the author places socio-economic concepts like "capitalism," "socialism," etc., beyond the central focus of his study (p.7).

3. *The Faces of Justice, State Authority and the Rationalist Tradition of Adjective Law*

I now discuss the relationship between Damaska's approach and the rationalist procedural tradition. As has already been mentioned, the rationalist tradition postulates that rectitude of judicial decision is the main end of adjective law and should be maximised, minimising the evils of misdecision and inefficiency.²⁴ These aspirations, even if not always realised within the actual operation of legal systems, characterise both the practical and theoretical dimensions of adjective law.²⁵

In my opinion, if the author's analysis of procedural arrangements has been done ". . . in the belief . . . , that political factors play a central role in accounting for the grand contours of procedural systems" (p.241), the actual causal links between existing political conceptions and procedures must be shown. Another commentator has said that, ". . . the absence of causal accounts is compensated for by the intellectual linking of what is often seen as an arcane and technical topic with broad political issues. . . ,"²⁶ and I agree. It is true that political regimes legitimate themselves, *inter alia*, through the law applied by the courts. It is also true that the ultimate product of the machinery of justice, *i.e.* the applied substantive law, bears very often a political character. However, it is far from certain that existing systems of processing a factual raw material prior to the substantive implementation of a state policy are also extensively influenced by prevailing political opinions. Rectitude of judicial decision may be ideologically independent, and it seems that a rational state interested in the proper execution of its policies by the courts aspires, in most cases, to minimise objective errors in adjudication. If the presumption in favour of the rationality of adjective law reflects, as I believe, a true state of

²⁴ For recent challenges to this assumption see S. R. Gross, *op. cit.*, n.6; S. R. Gross, "Loss of Innocence: Eyewitness Identification and Proof of Guilt" (1987) 16 *Journal of Legal Studies* 395; D. P. Leonard, "The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence" (1986-87) 58 *University of Colorado Law Review* 1, esp. at pp. 39-41.

²⁵ Twining, *supra* n.13.

²⁶ P. Lewis, Book Review (1987) 14 *Journal of Law and Society* 502. For other reviews of Damaska's book see A. T. von Mehren, "The Importance of Structures and Ideologies for the Administration of Justice" (1987) 97 *Yale Law Journal* 341; M. Shapiro, Book Review, (1987) 35 *American Journal of Comparative Law* 835.

affairs, it would be worthwhile to use at the first stage of comparative analysis a rationalist and ideologically unbounded model of procedure. In real life, most states manage a complex of "mixed economies,"²⁷ and it seems, in addition, that the analysis of possible deviations from the rationalist model of adjudication is capable of capturing a wider range of factors influencing the existing procedural designs.

The procedural model of aspiration to the best achievable fact-finding and law-applying efficiency is, therefore, proposed as an ideal model for comparison. It is submitted that any kind of substantial diversities in procedural arrangements can exist only as a matter of deviation from the proposed ideal model. It is obvious, in my opinion, that substantial differences can not exist between non-deviating procedural systems. It is arguable that different procedural techniques, say the adversarial and the inquisitorial systems of adjudication, would appear as capable of producing the same good results, but in this case one can not contend that these systems are substantially different. Within our context the difference in substance is a tangible difference between outcome-efficiency levels of the compared procedural systems. A deviation from the proposed ideal model would appear only when the outcome-efficiency level of a system under examination is tangibly lower than the ideal level of efficiency. It is plain, in my opinion, that understanding the causes of discovered deviations is necessary for an assessment of procedural systems.

It should be noted that both theoretical and practical difficulties are involved in the examination of procedural outcome-efficiency. First, it can be said, it is as easy to define the aspirations of the best-efficiency procedural ideal, as is difficult to construct a proper machinery for their realisation. Secondly, empirical data regarding the truthfulness of judicial decisions are not generally found.

Despite these reservations it should be widely agreed that decisional rectitude can, in general, be maximised by creating an impartial and competent judicial apparatus capable of: (1) accurately determining relevant facts in accordance with fair and predictable decisional standards; and (2) correctly and consistently applying valid substantive laws to ascertained facts.²⁸ Since an exhaustive study of various aspects of rationalist fact-finding and law-application is beyond the limits of this review, the exact features of the best-efficiency ideal will not be itemised. For present purposes it will suffice to note that the submitted ideal model has been represented above as an aspiration to the best achievable outcome-efficiency. The following discussion on deviations from this model will be confined, accordingly, to the detection of outcome-efficiency

²⁷ See, W. L. Twining, "Evidence and Proof in Anglo-American Litigation" (forthcoming).

²⁸ Twining, *supra* n.8, at pp.15-16.

non-maximisations. In many cases the said non-maximisations are detectable despite the absence of a detailed list of features of the best-efficiency ideal.

According to Damaska, substantial differences in procedural arrangements and institutions are to be politically explained, at least in most cases. As stated above, I am inclined to think that the substantivity of diversities in procedural arrangements is dependent on their "deviating qualities" in comparison to the proposed ideal. The proposed ideal is apolitical, and, in my opinion, possible deviations from this ideal should not be understood as necessarily connected with political factors, *e.g.* the existent "managerial" or "reactive" policies.

The deviation can be, for instance, a result of a particular resource-allocation policy executed by a state of limited resources. It can derive from the impregnation of "process values" into the adjudicative process, whilst the impregnated values are not necessarily qualifiable by means of the "policy-implementing"/"conflict-solving" taxonomy. The said deviation may be a function of an instrumentally different outlook regarding the achievement of outcome-efficiency. The deviation may equally be caused by the application of different policies regarding the distribution of risks of judicial misdecision between prospective litigants, and the possible reasons behind this risk-distribution can be neither "policy-implementing," nor "conflict-solving" ones. The said deviation may be, finally, an unintentional one.

Furthermore, even when a particular deviation from the best-efficiency ideal ought to be directly connected to the political nature of a certain state, the inquiry is to be moved from the rationale of that deviation to the discovered political factors, but not vice versa. In short, there is no presumption in favour of the centrality of political or any other deviating factors.

I will refer now to Damaska's procedural models. This will be done in order to demonstrate in brief the proposed method of analysing procedure and to show that a rationalist and ideologically unburdened procedural model can be applied to different states with different political structures.

Damaska's "conflict-solving" model, deviating from the proposed ideal type, does not deal with the fact-finding and law-applying efficiency of the courts. It represents a framework of intrinsic laissez-faire process values within which the arena of a "free-choice" forensic contest is provided by a reactive state to the parties in dispute. Are the privatised procedural arrangements of this model necessitated by the reactive policy of an extremely liberal state?

Suppose that the existing social equilibrium legally protected by a reactive state has been unlawfully interrupted, and a person which has suffered from the said unlawful act is now seeking to enforce her rights and to re-establish the equilibrium. It is obvious

that these rights can be effectively waived or modified by our person's voluntary stipulation, but she is legitimately wishing to enforce them in strict accordance with the law. In this case any procedural obstacle which will obstruct the realisation of our person's rights is to be justified separately.

Does such a procedural dismissal of our person's claim re-establish the interrupted social equilibrium? It is clear that the answer to this question is in the negative and that the justification of our procedural judgment must be sought elsewhere.

Is the "fair forensic contest" as a value in itself capable of justifying our procedural judgment? The premise of this question is doubtful: the contest ideology of procedure can hardly be supported independently of its ends. One of the possible results of this ideology—the frustration of laissez-faire substantial justice, *e.g.* the *pacta sunt servanda* principle, by a procedural laissez-faire rule—is no less doubtful. Moreover, a compromise, as an alternative dispute resolution openly promoted by the conflict-solving model of adjudication, seems to be ethically problematic within an outcome-inefficient system. Free will as a basis of a compromise is not really free when exercised by litigants with unequal bargaining powers,²⁹ as frequently happens within a pure contest litigation. In addition, a standard pre-compromise calculation for defining a potential zone of parties' agreement³⁰ is frequently affected by the outcome-inefficiency of a contest litigation. Outcome-inefficiency decreases both parties' ability to predict the results of their trial and it affects at random the parties' "reservation prices" of a future compromise.³¹ It seems to be clear that the two last factors indicate, *inter alia*, the conflict-solving inefficiency of the contest ideology of procedure.

The contest model can also be justified as necessitated by privacy protecting considerations. It is obvious that this explanation is an inadequate one. The protection of privacy can be impregnated into judicial procedure as a "process value," but this does not necessarily require extreme contest litigation. The very existence of social order presupposes the imposition of appropriate limitations on privacy.³² Even within an ultra "let-alone-ism" social order, substantive law can be restricted procedurally for privacy-protecting reasons only in exceptional cases. It seems to be untenable, for example, that substantive privacy-protecting laws can be systematically frustrated by privacy-protecting adjective laws.

The other possible justification of the contest model is an economic one. The contest model, as the cheapest plausible form

²⁹ Cf. *Dispute Resolution*, *supra* n.19, at pp.20-21, 24-33. See also O. M. Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073.

³⁰ H. Raiffa, *The Art and Science of Negotiation* (1982), pp.33-49, partly reprinted in *Dispute Resolution*, *supra* n.19, at pp.33-45.

³¹ H. Raiffa, *op. cit.*

³² See, in general, R. Gavison, "Privacy and the Limits of Law" (1980) 89 *Yale Law Journal* 421.

of adjudication from the reactive state's point of view, is intended to save public resources. A private procedural enterprise can create ad hoc a more efficient and a more expensive form of adjudication, but it will never be subsidised by public funds. In that case the contest model, as a function of the prevailing economic opinion regarding the proper distribution of limited public resources, does not represent the ideology of contest. The ideologically unburdened procedural model is modifiable in accordance with existing economic data and opinions. The economically compelled system of adjudication will, therefore, aspire to minimise the evils of misdecision, consonantly with the rationalist tradition and contrary to the pure ideal of contest.

In general, procedural judgments and behavioural messages accompanying them can constitute an incentive to behave not according to what is lawful, but according to what is procedurally achievable in the courts.³³ It is doubtful whether the benefits of the pure contest model outweigh the costs imposed on a reactive state by the last evil. It is true that a policy of deterrence is alien to the spirit of the corrective justice exercised by a reactive state. This does not mean, however, that a reactive state is, or ought to be, indifferent to the creation of negative incentives capable of interrupting its social equilibrium. To summarise, a reactive state has no inherent reason to deviate from the proposed best outcome-efficiency ideal model.

Our procedural judgment can be supported only by general outcome-efficiency considerations. It is arguable that the contest form of adjudication, as a part of the all-encompassing laissez-faire ideology, is capable of achieving correct results in most cases. This argument falls short of being proved, especially in relation to the extreme model of contest litigation. According to Damaska's exposition of the model, it does not aim to maximise objective decisional rectitude. In any case, the outcome-efficiency argument is a mere restatement of the proposed ideal model. According to the logic of the argument, the contest form of litigation is a mere tool, not a political ideology. In that case the contest form of litigation should be tested instrumentally and not intrinsically.

The last conclusion and our previous discussion apply, *mutatis mutandis*, to the other ideal types of justice and authority. The policy-implementing model of procedure, forming a part of a rationalist adjudication, should conform to the best outcome-efficiency ideal. The crude limitation of private procedural rights,

³³ Cf. C. Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts" (1985) 98 *Harvard Law Review* 1357, 1359-1368; and for criticism of Nesson's argument see R. A. Allen, "Rationality, Mythology, and the 'Acceptability of Verdicts' Thesis" (1986) 66 *Boston University Law Review* 541. The argument against procedural judgments should be distinguished from Professor Nesson's "Acceptability Theory." The former argument does not include any claim regarding the interrelationship between judgments as statements about actual events and the assimilation of relevant legal norms by the public. Cf. Allen, *op. cit.*, at p.545.

as a part of the policy-implementing model, does not constitute in itself a deviation from the proposed ideal. According to the proposed ideal, only instrumentally necessitated rights should be enforced. Typically, "Due Process" procedural rights not susceptible to instrumental justification are connected, as "process values," to political ideologies.³⁴ The said connection, however, is not automatically displayable in all cases of non-recognition of these exceptional rights. It does not exist within the proposed procedural model. This model is capable of serving any type of substantive justice, thus weakening a possible connection between procedure and politics.

It is arguable that a managerial state interested in the enforcement of its activist policies by the courts may invest more resources in procedures connected with issues of policy rather than in procedures related to mere private issues. Expensive pre-trial and trial procedures in criminal matters are an example. However, this kind of resource-allocation executed by a state of limited resources does not exclusively characterise managerial states. The new-created procedural framework may indicate, for example, a desire to minimise the evils of certain errors in applying the minimalist criminal justice of a reactive state rather than to construct a formidable managerial system of adjudication. Furthermore, a deviation from the proposed model occurs in our resource-allocating example in relation to the underfunded conflict-solving procedures, and, as mentioned above, this situation is modifiable in accordance with economic, not merely ideological, conditions. It is preferable, therefore, that our inquiry moves from the rationale of the deviation from the proposed ideal to the political factors, if detected, and not vice versa.

A self-evident policy-implementing model of procedure can exist only as one which deliberately restricts the aspiration to decisional rectitude, *i.e.* outcome-efficiency, increasing policy-implementing efficiency. For example, judicial nullification of a negligent driver's licence is less efficient for policy-implementing purposes than the nullification of that licence by unilateral police decision. Generally speaking, the latter decision appears to be less accurate than the impartially decided judicial determination of guilt, and we can indicate, accordingly, the policy-implementing deviation from the proposed ideal.

It is not easy to decide whether judicial coordinate organisation, in comparison to hierarchical organisation, constitutes a deviation from the proposed model, and whether the character of this deviation, if it exists, is necessarily a political one. The absence of rigorous appellate review within a coordinate system is explicable by the advantage of the primary triers of fact in comparison with appellate judges. The former are impressed directly by evidentiary

³⁴ See *supra*, n.9.

sources and data, whilst the latter, relying merely on a written file, can effectively eliminate the errors of a pure logical factual inference and the errors of law committed by trial courts. It is questionable whether an all-encompassing appellate review is the *sine qua non* of the rationalist model of adjudication.

It is also debatable whether coordinate discretion and pragmatic legalism, as opposed to hierarchical logical legalism, constitute a deviation from the best outcome-efficiency ideal. Both pragmatic and logical legalism operate mainly in the area of substantive law and the differences between them affect only a small amount of disputed cases. The application by non-professional adjudicators of the current standards of their community³⁵ to their fellowmen is significant only in cases in which the institutionalised thinking and the logical legalism of professionals dictate different results. However, in the vast majority of simple cases, like "loan received but not returned" or "damage caused but not compensated," the results of amateurs and professionals seem to be more or less similar, and the same applies to criminal cases. The process of adjudication occurs mainly in the "core" area of legal norms rather than in the dim "penumbra," and it should be obvious that procedural arrangements should be designed in order to serve the first category of not hard cases rather than the second.

It seems therefore that the choice between the coordinate and the hierarchical judicial apparatus is, or at least may be in many cases, outcome-oriented rather than political. This choice is a difficult one. Thus, it is not at all clear whether a coordinate procedural discretion is preferable to hierarchical procedural legalism, or whether experienced hierarchical professionals are cognitively more competent than amateurs in deciding questions of fact. It is equally unclear whether the institutionalised thinking of professionals threatens to develop a prejudicial stock of unwritten knowledge.

These difficult problems may be resolved ideologically, *e.g.* on the basis of prevailing political opinion. As mentioned above, the last possibility should be tested ad hoc as one of the possible factors influencing the design of procedural forms, and there is no place for any presumption in favour of this possibility.

Moreover, it is submitted that the main path of testing procedural arrangements should be a priori outcome-oriented. It should be positively presumed, consonantly with both the normative and descriptive claims of the rationalist tradition, that a given adjective law, as an accessory one, is aimed, and ought to be aimed, at maximising the correct applications of its principal, the substantive law. Political factors may play, in general, a central role in determining the intrinsic "process values" of procedural systems,

³⁵ See P. Devlin, *Trial by Jury* (1966), at pp.141-144, 148-149, 151-155; A. A. S. Zuckerman, "Law, Fact or Justice" (1986) 66 *Boston University Law Review* 487, 494, etc.

but not in creating their fact-finding tools. This presumption in favour of the apolitical rationalism of procedural systems is, of course, a rebuttable one, and as such it seems to represent the procedural aspirations of most systems.

Our discussion is subject to the following caveat. A claim that most procedural designs are outcome-oriented, and that they are to be tested instrumentally through the politically colourless best-efficiency ideal, may oversimplify the problem of existing procedural diversity. A procedural system may be both ideological and outcome-oriented. For instance, a prevailing political opinion can directly influence the formation of the epistemological belief behind procedural arrangements, and Damaska's excellent account of the criminal process of Soviet Union and Mao's China (pp.194-199) illustrates this point. As stated above, the proposed alternative method of analysing procedures takes into account the instrumentally different attitudes towards outcome-efficiency maximisation. In testing these attitudes, one must remember that what counts as a deviation from the best outcome-efficiency ideal is relative to the epistemological standpoint of the constructors of that ideal. The outcome-oriented ideological belief (political, religious, etc.) is, undoubtedly, an important factor in examining a concrete adjective law. What is argued here is that this belief should be considered as one of the possible factors of a complex procedural design. There is no presumption in favour of the centrality of this belief or any other political factors.

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