THE FACES OF JUSTICE AND STATE AUTHORITY

A Comparative Approach to the Legal Process

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The continuing importance of the lay jury ensures that the American orientation to substantive justice remains strong and vital. Nor will judges who view themselves as political figures be likely to espouse a conception of the law in which political, ethical, and technical-legal considerations are sharply separated. True, the fact that American judges are regarded as guardians of the Constitution—the pivotal legal document—has often been seen as injecting legalistic attitudes into American social life. Many have observed that Americans tend to convert all sorts of problems into legal issues: even matters that are elsewhere perceived as not "legal" at all end up in American courts. In this Tocquevillian sense, American legal culture is undeniably "legalistic." But in a sense more germane to comparative concerns, it is the very centrality of the American Constitution that reinforces general antipathy to conceptions of the law as non-communitarian, specialized technique. It is precisely the Constitution, a document studded with broad standards of ethical and political significance, that makes sharp separation of the ethical, political, and legal-technical domains both unnatural and impracticable. Even today a fundamentally nontechnical conception of the law manages to hold its own in the struggle with the strong technocratic tendencies of an increasingly interventionist state.

Contemporary transformations of the American judicial apparatus will be addressed in the last chapter and need not be considered here. Suffice it to say that despite the trend toward bureaucratic centralization, coordinate features remain much more viable in America than in England. Indeed, if one were to set aside the broader comparative viewpoint, much of the difference between the English and the American judicial apparatuses could be expressed in terms of the opposition between hierarchical and coordinate structures: the English procedural authority is far more professionalized, hierarchically ordered, and committed to a technical conception of the law.[65] It is only when the horizons are further expanded that conspicuous internal differences between English and American judicial authority begin to recede and their family resemblances clearly emerge.

My purpose in the preceding section has been to show how the conceptual framework established earlier in this chapter can be used to shed new light on features that distinguish the Continental from the Anglo-American apparatus of justice. Having both defined the relevant categories and established a pied-à-terre for them in historical reality, the groundwork has been laid for the study of my central theme—the influence of procedural officialdom on the shape of the legal process. Reciprocities between procedural authority and procedural form will now be explored in more systematic fashion.

districts are as frequent as they are long-lasting. More important, even *within* a circuit, discrepancies of the case law are not a major cause of dismay, and accordingly internal mechanisms of the circuit courts designed to remove disagreements among its panels are quite weak. See *infra*, ch. 6, n. 113.

65. See P. S. Atiyah, *supra*, n. 62, 552–55.

II Process before Hierarchical and Coordinate Officialdom

This chapter will inquire first into procedural arrangements suitable for a hierarchical judicial apparatus, and second, forms suitable for an apparatus conforming to the coordinate ideal. What features of the legal process, or elements of its design, can be attributed to specific characteristics of hierarchical and coordinate organizations? What bearing do attitudes prevailing in one or another setting have on procedural form? These are the primary questions here. In pursuit of answers to these and similar questions, contours of two distinctive procedural styles will gradually come into view. I shall call one of them the *hierarchical* and the other the *coordinate* process, because their constituent elements will be "derived" from each respective type of authority.

The two styles, applicable across the lines that separate criminal, civil, and administrative proceedings, will not be related to the distinction between a process designed as an inquiry and a process designed as a contest of two sides before the decision maker. Although throughout this chapter I shall stress the level of ideal theory, I shall make sufficient reference to real-life proceedings to illustrate how the hierarchical style reflects salient characteristics of the legal process rooted in the Continental tradition, while the coordinate style similarly mirrors features of the legal process in the English tradition. More specific references to actual systems will be postponed until the final chapter. The discussion here seeks to demonstrate how the structure of procedural authority impinges on the legal process, and how wrong it is 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.

i. PROCEDURAL IMPLICATIONS OF THE HIERARCHICAL IDEAL

Methodical Succession of Stages

Let us begin our inquiry by considering one of the most obvious implications of the hierarchical apparatus for the design of the legal process: because hierarchy is

multilayered, proceedings must consist of several stages. And because this apparatus is also partial to functional specialization, it is normal to expect that the stages be assigned methodical subtasks. One stage can be devoted to the gathering and organization of relevant material, another to the initial decision, still another to hierarchical review, and so on, depending on the number of levels in the pyramid of authority. Accordingly, proceedings before the initial decision maker (trials) are merely one episode in an ongoing sequence and are thus an inept symbol for describing the total effort. In the hierarchical setting, Kafka's hero is not "tried," he is implicated in "proceedings."[1]

The Impact of Superior Review

Equally obvious is the connection between vertical ordering of authority and hierarchical review, a connection to which I have previously alluded. Here I shall look more closely at various ramifications of regular superior audits: not only do they reveal characteristic aspects of the hierarchical style, but they also prevent us from mistakenly extrapolating, from identical verbal formulae, true hierarchical review from its apocryphal forms, such as can be found in predominantly coordinate judicial organizations. This confusion is endemic to discourse between Continental and common lawyers, although it often passes unnoticed.

The first important point to recognize is that the reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of events. In well-integrated judicial hierarchies, such as the Soviet, supervision by higher-ups need not be conditioned—as it is in classical Continental systems—upon an appeal by a disaffected party; it can also take place as part of the official duty of higher judicial authorities. Far Eastern systems have been known to go even further: original decisions were treated as mere drafts of judgments that could be announced in definitive form only by superiors.[2] Observe that where review is routine, it is also normal to postpone enforcement of the original decision until the highest authority has spoken. Thus, in contrast to the situation in coordinate systems, where the initial decision is presumptively final, there is no need expressly to ask the primary adjudicator to postpone (stay) the execution of his decision pending review: until hierarchical supervision has been given the chance to run its course, the decision is not yet res judicata.

Hierarchical review is not only regular, it is also comprehensive. There are few aspects of lower authority's decision making that are accorded immunity

1. Characteristically, the standard translation of Kafka's *Der Prozess* into English is "The Trial." One perceptive English observer of Continental trials has noticed their character as stages in an ongoing activity and was somewhat shocked by this discovery. See S. Bedford, *The Faces of Justice*, 123 (1961).

2. See M. Shapiro, *Courts: A Comparative and Political Analysis*, 180 (1981). In all countries that follow the Soviet model, chief judges of high courts can cause reconsideration of lower decisions *motu proprio*. See *RSFSR Code of Crim. Pro.* art. 371. Similar provisions exist for civil proceedings as well.

from supervision: fact, law, and logic are all fair game for scrutiny and possible correction.[3] Where reconsideration by superiors is so pervasive, it makes sense to require lower authority to make clear exactly what it has determined and why. Perfunctory and conclusory statements of grounds, so prevalent among trial judges in common-law jurisdictions, invite rebuke and reversal in a hierarchical judicial system.[4]

Once a lower official has spoken, the procedural episode conducted before him comes to an end (*functum officio*): corrections of his decision, if needed, can now be made only by higher-ups in the organization. Requests to reconsider addressed to the initial adjudicator are therefore misplaced; such requests will be seen to characterize the coordinate style. Simultaneous review of a judgment by different echelons of authority violates the hierarchical sense of order and rank: were such parallelism permitted, subordinates could try to conceal their mistakes or render the work of their superiors superfluous by setting their own decisions right. However, reversal or modification of a decision does not necessitate a finding that the subordinate decision maker had erred or committed a fault; even if impeccable at the time of rendition, a judgment can be changed by superiors. Thus if new evidence is discovered pending an appeal (casting doubts on the propriety of a decision, but no blame on the decision maker), it must be submitted to the reviewing authority rather than to the original adjudicator. Of course, if fault is found, hierarchical organizations have a battery of instruments at their disposal to teach the errant official a lesson. Given such great disciplinary powers, there is less need in hierarchical than in coordinate organizations to resort to the costly reversal of an otherwise proper decision in order to discourage official misconduct, but the calculation of the costs and benefits of such a reversal is not exactly alike in the two settings of authority. I shall return later to this point in several contexts.

The great significance attributed to "quality control" by superiors in a hierarchical organization inevitably detracts from the importance of original decision making: the latter acquires an aura of provisionality. It is thus a mortal sin for a comparativist to assume that the significance of trials is identical in proceedings before an officialdom gravitating toward the hierarchical or toward the coordinate ideal. On the other hand, the importance of quality control explains why a regular and comprehensive system of appeals is typically regarded in hierarchical judicial organizations as an essential guarantee of fair and orderly

3. In Continental systems, "logic" is tested in reviewing the reasons trial judges must advance for their findings of fact. Although there are no longer *legal* rules that can be violated in weighing evidence (the principle of free proof), grounds offered for reliance on one witness rather than another can be weak or incoherent, inviting reversal on grounds of faulty logic. The evaluation of evidence is truly free only in the very limited sphere of the surviving criminal jury, where jurors are invited to weigh evidence according to their unreviewable "intimate conviction." Of course, there are limits on effective supervision of fact-finding by lower officials: subordinates learn how to justify their decisions in ways that can "withstand" review by their superiors. This problem was noted in the first chapter, with regard to internal tensions between original and reviewing officials.

4. For the situation in American trial courts, see *infra*, n. 22 and accompanying text.

administration of justice, or as an essential component of personal "due process." It should not be surprising, therefore, to find the right to appeal enshrined in several constitutions as one of the basic rights of citizens.[5]

The File of the Case

A multistage hierarchical process needs a mechanism to integrate all its segments into a meaningful whole. Material gathered over time by various officials must be assembled for decision making, and traces of official activity must be preserved for future audits. Officials in charge of procedural stages are therefore expected to maintain files to ensure completeness and authenticity of documentation. Like tributaries of an ever larger river, files kept by lower officials are incorporated into the evermore encompassing files of their superiors.

In order not to confuse the file of the case with its false cognates, it is important to realize that hierarchical officials prefer to decide on the basis of written records. Documents contained in the file are not internal official documents, helping a particular official to organize his activity, but rather sources of information on which to base both original and reviewing decisions.[6] The higher the authority, the greater the ratio of information from the file to the total data base. And while the accuracy of information in the file is not unchallengeable, it commands considerable weight. Indeed, unless such weight were attributed to it, the very foundation of the hierarchical process would begin to tremble: a multistage process is put at risk if its main integrating mechanism is seriously questioned. In fact, a good test to assess the intensity of hierarchical attitudes is to propose the reduction of the evidentiary significance of official documentation. The greater the intensity, the more vehemently such reform proposals will be opposed. If the evidentiary significance of the file is totally and effectively denied, the hierarchical process is no more.

The previous chapter demonstrated that the top of the hierarchical pyramid cannot afford to be submerged into the sea of details of cases decided below, as is reflected in the character of documents contained in the file. They are succinct, summarized, whenever possible, and set out in standard sequences to facilitate quick handling. Brief accounts of interrogations performed are preferred to full transcripts. But even if full transcripts were made of all interrogations, the spoken word would still be replaced by a substitute text whose language is devoid of behavioral cues and traits, so that decision making on the basis of the "cold"

5. See, e.g., the *Yugoslav Constitution* of 1974, art. 180(2); compare also the *International Covenant on Economic Social and Cultural Rights*, art. 14(5), adopted by the UN General Assembly in 1966. For America, see *infra*, n. 22.

6. Anglo-American commentators easily fall into the trap of associating the continental file of the case with files kept in America by officials participating in proceedings (e.g., by the public prosecutor in criminal prosecutions). See A. Goldstein and M. Marcus, "The Myth of Judicial Supervision in Three 'Inquisitorial Systems': France, Italy and Germany," 87 *Yale L.J.* 240, 255 (1977). For the widespread Continental practice of using the *whole* dossier of a case as evidence in another litigation, civil or criminal, see R. Schlesinger, *Comparative Law*, 4th ed., 423, 458 (1980).

file still implies substantial mediation of experience. Where only short summaries are drawn, the stylization of experience is, of course, quite considerable. And where experience is thus simplified and mediated by a text, decision making more readily lends itself to logical analysis than does dense, direct experience. From a slightly different angle, this confirms my previous suggestion that the higher reaches of procedural authority are easily attracted to syllogistic models of decision making and to logical legalism.

It will be claimed that modern recording technologies which minimize mediation (e.g., videotapes) may soon replace old-fashioned dossiers, so that hierarchical insulation from the unruly mass of data will inevitably come to an end. But in judicial organizations where superior review is at once regular and comprehensive, the hierarchical summit may be expected to develop new instruments of condensation to protect itself against the danger of drowning in the sea of details generated by proceedings before lower officials. It is only in systems where review is sporadic and limited in scope, as in American law, that one can more freely engage in the luxury of full transcript and the exposure to particulars.

While few would be prepared to deny that the reliance on terse documents gives the Continental appellate process its distinctive tone and flavor, the role of the file in first-instance proceedings is more uncertain, even controversial. I shall return to this theme after considering the mode of trial that suits judicial hierarchies.

Piecemeal Trials

Two designs for first-instance proceedings can be distinguished. In the one variant, which I shall call the "day-in-court" model or "trial" strictly speaking, all material bearing on the case is preferably considered in a single block of time. In the other variant, proceedings develop through separate sessions at which material is gradually assembled in a piecemeal, or installment style.[7] This latter style presupposes the capacity of the official apparatus for sustained action and requires that the results of scattered and temporarily discrete activities be preserved. Bureaucratic organizations are capable of meeting both requirements, and it may seem at first that they should be indifferent to which of the two alternative trial designs is employed. Yet closer scrutiny of the corollaries of judicial professionalization suggests a different answer.

A genuinely concentrated trial, even if well prepared, requires that decisions be based largely on fresh impressions, including surprise, shock, the spell of superficial rhetoric, and perhaps even theatrics. A bureaucrat dislikes to decide on such grounds. He fears that first impressions might collapse like a soufflé upon unhurried reflection and that additional investigation or argument may be necessary. It seems preferable to him to proceed as would a dentist—in discrete installments: after a matter has been considered at one session, new points can

7. See A. T. von Mehren and J. R. Gordley, *The Civil Law System*, 2d. ed., 203 (1977).

emerge to be the subject of another session, and so on, until that issue seems thoroughly clear. A final session can then be devoted to pulling all strands together, reviewing interim results, and calmly reaching a decision. But even this last session is only presumptively final: any sudden development or surprise can necessitate a postponement and still another session. This bureaucratic preference for the installment style is reinforced by the existence of regular review mechanisms. It makes little sense to require the early crescendo of a day-in-court trial if it is routinely to be followed by the diminuendo of appellate procedural "rounds." Accordingly, unless concentrated trials are imposed on judicial bureaucracies, they are likely to adopt the piecemeal style.

Extreme examples of first-instance proceedings without concentrated presentation of evidence and similar "trial" activity are found in the Far East,[8] but for more common cases it is enough to cast a quick glance at continental European systems where since the Middle Ages the installment style has predominated in both civil or criminal cases. The passing of the initial judgment was typically preceded by a conference among professional judges who debated material in documentary form as generated by episodic judicial inquiries. The file of the case was generally proclaimed to be the vehicle of the judge to arrive at the decision (*vehiculum judicis ad sententiam*). In civil cases, this traditional arrangement survived the reforms of the French Revolution and still flourishes in Continental systems. Since civil justice remained the exclusive domain of the professional judiciary, this is scarcely surprising.[9]

In criminal matters, the situation is more complex. The ideological currents that led the revolutionaries to import the criminal jury from England mandated that a public trial be made the focal point of the whole process. So strong was the revolutionary ideology that even where the jury trial was not adopted, professional judges were no longer permitted to decide solely or even primarily on evidentiary items contained in the file. The principle was adopted that all evidence had to be adduced in original form rather than in distilled documentation. What followed illustrates the destiny of procedural arrangements transplanted to an inhospitable environment: outwardly, the doctrine reigned supreme that witnesses must be heard by the trial court, but the record of preliminary proceedings continued nevertheless to play a crucial role. Presiding judges would study the file and at trial make frequent reference to material contained in it. As any visitor to a contemporary Continental courtroom notices, examination of witnesses is still routinely conducted so that information from

8. For Communist China during Mao's rule, see W. C. Jones, "A Possible Model for the Criminal Trial in the People's Republic of China," 24 *Am. J. Comp. L.*, 229, 232 (1976).

9. Only very recently, experimentation has begun in a few Continental jurisdictions with concentrated trials for simple cases of little importance, always on condition that complexities not suddenly arise in the course of proceedings. This recent development is linked to the overcrowding of dockets and corresponding pressures for efficient case-flow management. For experimentation in West Germany, see R. Schlesinger, *supra*, n. 6, 440–41. See also the West German Code of Civil Procedure, ¶272, as amended in 1977.

the written record must almost constantly surface. What has been well said of the Russian procedure applies with minor modifications to classical Continental systems as well: the file remains in the wings of the trial like the prompter at an amateur play.[10] The Continental trial is, then, actually not the doctrinally proclaimed event of paramount importance that generates all material for disposition of the criminal case quite independently from prior (piecemeal) proceedings. This fact is especially striking to Anglo-American observers to whom the European trial appears to be essentially an audit of work done before or an appeal from the findings of preliminary investigation.[11] Not unexpectedly, there are few unforeseen developments in the courtroom, and if surprise should mar the orderly progress of the trial, continuances are readily granted until the dust has settled.

Sporadic suggestions for effectively lifting the documentary curtain have been vigorously resisted by the Continental law enforcement machinery. Officials argue that observations made at trial must be checked against information methodically assembled over time and preserved in the written record. To decide independently from the file, solely on first impressions, is to decide with inadequate preparation, on flimsy and uncertain grounds.

Exclusivity of the Official Process

Hierarchical officialdom is subject to Parkinson's law and tends to expand its sphere of activity. Because it sharply separates internal from external spheres, it strives to monopolize procedural action: the "farming out" of procedural steps is considered a dereliction of responsibility. Members of the private bar are denied a variety of functions in the legal process which, in proceedings before coordinate authority, are routinely performed by lawyers. Nor do other functionaries of ambiguous status—part private, part official—find a niche in the hierarchical process: the "private attorney general" and similar procedural actors are creatures of a coordinate setting of authority.

Such is the bias of bureaucratic sentiment that private procedural enterprise is generally discouraged. It is seen as too much tainted by possible self-interest to be credible, perhaps not sufficiently "serious" for such an important pursuit as the meting out of justice. For example, if a witness is interviewed by private lawyers, his testimony is viewed with great suspicion—he has been "tampered with." It is no coincidence, then, that Continental lawyers seldom

10. G. Feifer, *Justice in Moscow*, (1964). Even in those Continental systems that are least permissive in the use of materials from the file, at least some documents can be used for substantive rather than mere impeachment purposes. The extent to which evidence allegedly used for mere impeachment *actually* influences the substantive decision remains an open question. On the so-called principle of immediacy, see M. Damaška, "Evidentiary Barriers to Conviction," 121 *U. Pa. Law Rev.* 506, 517 (1973). For contrasts with America, see R. Schlesinger, *supra*, n. 6, 458, n. 5; 31 *A.L.R.* 913 (1984).

11. For this external perspective on Continental trials, see, e.g., J. N. Hazard, *Settling Disputes in Soviet Society*, 26 (1960).

engage in independent investigative activity, even if clearly permitted to do so, as they are in civil cases.[12] Nor is it surprising that expert witnesses are seldom called by private parties, even where this possibility exists on paper. "Experts" are treated as judicial assistants, and it seems normal that they be appointed by the judge, preferably from among persons accustomed to bureaucratic court routine—hence, Continental "permanent" or professional court experts. Where higher courts retain their own experts, a veritable minihierarchy of court assistants can arise: "superexperts" review the estimates and opinions of ordinary experts.[13]

With the ethos of official exclusivity stifling private procedural action, the hierarchical apparatus seeks to develop proper incentives for professionals to perform their functions. In cases where interests of the state are engaged, these incentives are not lacking, but difficulties can arise in matters of narrow private concern. Here, officials continue to enjoy the monopoly of procedural functions, but can be inert or otherwise ineffective. Supplementing inadequate official motivations with private action creates problems reminiscent of difficulties that arise in economic affairs when state monopoly is combined with admixtures of private enterprise. Private actors either can be unaccustomed to take initiative or can be frustrated by the pervasive official monopoly. Some perplexing aspects of the Continental civil process can be explained in terms of such "lazy" official monopolists, as subsequent chapters will show.

One final consequence of official exclusivity deserves attention here: the hierarchical legal process is identified with action performed by officials personally in charge of a procedural segment or at least with activity performed in their presence and under their direct supervision. It follows that actions performed in their absence are not part of the hierarchical process. One example is depositions taken from witnesses by lawyers, even if in the presence of a court reporter. Nor should the implications of this understanding of legal process be taken lightly: where procedural authority is wedded to logical legalism, logical entailment of certain "principled" positions can assume a persuasive power unequaled in more pragmatic official environments.

Logical Legalism and Procedural Regulation

In a hierarchical organization where the spirit of logical legalism reigns, it is considered ideal that the legal process be regulated by an internally consistent

12. In criminal cases, once an official investigation is under way "private" interviews of witnesses by lawyers come close to the dangerous zone of criminal tampering with the administration of justice. It is plain that a hierarchical authority is opposed to the role private bail bondsmen play in the American criminal justice system: my comments about bureaucratic hostility to private enterprise in matters of justice apply as well to bondsmen and their power to bring a fugitive to justice.

13. Institutions such as medical schools are favorite superexperts in many Continental countries, with "institutional" opinions signed by the director. Given the penchant for documentation, expert opinions are typically in writing. The oral examination of the expert then proceeds in court against the background of this document.

network of unbending rules. In reality, of course, there is no denying that one must often make do with mere guidelines—directive rather than mandatory—or, worse yet, that some matters have to be left unregulated—in the official's discretion. But in a logically legalist milieu such guidelines and discretion are tolerated only as a regrettable means of last resort, and only so long as satisfactory rigid regulation cannot be devised. The example of regulating the weight of evidence is instructive here. I have observed that early on, the Continental judicial apparatus developed quite elaborate rules of proof necessary for fact-finding in both civil and criminal cases. Legalistic attitudes mandated that the cogency of evidence not be left for the adjudicator freely to determine. When rules of legal proof were finally discarded, this was not a retreat from bureaucratic-legalistic attitudes, but more than anything else an act of despair. It was realized that, for the moment, it was impossible to determine in advance the specific impact of various concrete configurations of evidence.[14] Contrary to what is often said, even today the Continental "free evaluation of evidence" is not really free: as befits the hierarchical process, trial judges are required to justify their findings of fact, and the cogency of their reasoning is scrutinized by appellate courts. Clearly, if there were no regularities to be observed in finding facts, appeals for "factual error" would be deprived of any basis.[15]

If officials are to be guided by rules and if the exercise of official discretion is to be contained, then the regulation of the legal process must be highly differentiated and well adjusted to the goals pursued. Otherwise, the rigidity of procedural regulation could lead to unacceptable results. As an illustration, consider the regulation of discovery. An organization that welcomes official discretion can be satisfied with according officials sweeping powers to enforce discovery requests, leaving it to their judgment to decide when broad discovery is in harmony with procedural goals and when not. A logically legalist organization, however, requires more differentiated regulation. To the extent it can be predicted that broad discovery would advance the policy-implementing goal, but could be counterproductive for the resolution of disputes (that is, the information sought could broaden the conflict), procedural regulation will expressly permit sweeping discovery for the former but not for the latter class of cases.[16] In subsequent chapters, this characteristic of logically legalistic regulation will assume importance for analysis of activist and reactive legal processes. The internal variations of activist and reactive justice can be explained in terms of the different character

14. This attitude was shared by both Jeremy Bentham and Montesquieu. See *Works of Jeremy Bentham*, vol. 6, 216 (London, 1838–43); Montesquieu, *De l'esprit des lois*, book 12, ch. 3.

15. See *supra*, n. 3.

16. Another example is adjudicative power to grant relief. A system less attracted to rules can simply provide that a civil judge has discretion to grant relief which a plaintiff has not requested, leaving it to the judge to decide when this is appropriate. Judges will seldom take advantage of this possibility in those cases where they believe they are confronted with a self-contained, private dispute. A logically legalist regulation is likely to be more discriminating, expressly prohibiting the adjudicator from disregarding prayers for relief in private law litigation.

of officialdom, and therein a key to several bizarre comparative law paradoxes will be obtained.

Because logical legalism aspires to principled consistency, inherited procedural arrangements vulnerable to serious analytical criticism have little santity and slim chances of survival: pressures mount to overhaul the system. To illustrate the point, imagine a logical legalist confronted with an arrangement whereby a person can be arrested upon probable cause that he committed a crime and is then detained, but must invariably be set at liberty if bail is posted. The arrangement would be criticized as incoherent, especially in a society that values liberty. Of course, probable cause that a person has committed a crime justifies the initiation of criminal proceedings against him, but not his arrest and detention. These drastic measures require additional supporting grounds, such as the danger of flight, intimidation of witnesses, and the like. If arrest is to serve a symbolic function underscoring the state's assumption of jurisdiction, so that all suspects should be arrested, the arrested person should be released—without bail—as soon as the symbolic message has been brought home. The automatic release on bail would also come under attack, because the mere posting of security need not be an antidote for those dangers that can truly justify pretrial detention. If told that in such cases the judge could adjust the amount of bail so that the suspect cannot post it, the logical legalist would respond that this is a roundabout way to achieve what can be gotten more directly by "rational" regulation. We need not follow the argument further to recognize in it the Continental critique of the traditional American law of arrest and the apology usually advanced for traditional Anglo-American arrangements.[17]

Summary

In retrospect, thus far this chapter has provided the outline of a legal process adapted to the spirit and methodology of hierarchical authority. The distinctive mark of such hierarchical proceedings is that they are structured as a succession of stages, unfolding before officials locked in a chain of subordination. Original decision making is not a focal point, overshadowing in importance whatever preceded it and whatever might follow it. The file of the case is the nerve center of the whole process, integrating various levels of decision making. If, as a case moves from one stage to the next, information contained in the written record were to be cut off from officials, the hierarchical process would become disoriented. The equation of procedural action with action under direct official superintendence is also typical of hierarchical proceedings. Delegation of any procedural step to outsiders is inappropriate or even repugnant. Private procedural enterprise is thus almost an oxymoron in the lexicon of hierarchical authority.

17. It should be noted that traditional arrangements are increasingly transformed by statutes. See, e.g., the Federal Bail Reform Act of 1984, 36 CrL 3017 (1984). For a further illustrations of logically legalistic criticism of American procedural arrangements, see *infra*, n. 31.

ii. PROCEDURAL IMPLICATIONS OF THE COORDINATE IDEAL

Concentration of Proceedings

When judicial authority is structured as a single undifferentiated echelon, there are no specialized court officials charged with the preliminary task of gathering, sifting, and preserving procedural material, nor are there higher officials before whom proceedings continue after the initial judgment has been rendered. An essentially homogeneous single level of authority spawns proceedings that center around the original and presumptively final adjudicator. In short, trial is a proper synecdoche for the legal process as a whole.

The affinity of the Anglo-American administration of justice with such a compressed procedural model is still striking to a foreign observer. He perceives at once not only the relatively weak character of appellate review but also the conspicuous absence of a stage truly comparable to the preparatory proceedings on the Continent. The historical roots of this contrast lie in the traditional structure of procedural authority. As I have noted, the Continental judiciary had already evolved its own investigative branch in the late Middle Ages: in both civil and criminal cases, specialized court officials were charged with gathering material for the decision, including technically competent evidence. This evidence was "frozen," as it were, in the file and thus preserved for later use by the decision makers.[18] England followed a different path. Only a moderate degree of investigative elements was injected into criminal prosecutions by justices of the peace, who were charged with binding suspects over for trial; on the whole, they were more like traffic controllers at the gates of the justice system than investigators assiduously collecting evidence. Police and prosecutorial functions remained mainly in the hands of private individuals until the middle of the nineteenth century.[19] In the civil process, preparatory stages (pleadings) were concerned with the formation of issues rather than with the search of material to resolve them. Information-gathering activities were again in private hands.

Because of this absence of official investigators, the preparatory stages of the Anglo-American process in both civil and criminal matters were never as tightly integrated into the subsequent proceedings as was the case with Continental preliminary stages. Even today it is difficult in common-law systems to generate competent evidence out of court in advance of the trial. Investigative

18. In most Continental criminal justice systems, investigating judges seem of late to have lost ground to police and prosecutorial investigators. Nevertheless, the tradition continues that the products of investigative labors constitute usable evidence and can be "introduced" in the formal process. In civil matters many Continental jurisdictions continue to charge a single member of the court with gathering evidence (*juge en charge de la mise en état*), while the judgment is rendered by a panel of judges.

19. See J. Langbein, "The Origin of the Public Prosecution at Common Law," 17 *Am. J. Leg. Hist.* 313, 326 (1973).

action still leads more often to information of use in obtaining evidence than to evidence itself, properly speaking.[20]

Ramifications of a Single Decision-Making Level

Legal remedies against judgments of common-law decision makers are a bizarre world for Continental lawyers to contemplate. While much of what they find is vaguely familiar, it is bathed in an atmosphere in which even easily recognizable objects assume a strange surrealist quality. Much of their enigmatic character can be dispelled if Anglo-American legal remedies are interpreted as reflecting a continuing attachment to the ideal of one-level decision making upon which bits and pieces of hierarchical quality control have been grafted. I shall now explore the principal ramifications of single-level decision making in order to convey a sense of the legal landscape into which fragments of hierarchical supervision have been introduced.

In a horizontal apparatus of justice the fact that original decisions are presumptively final does not imply that they are all vested with guillotine finality and immediately enforced. With nobody to look over his shoulder, the decision maker can decide provisionally or conditionally: he can change his mind. Hence, one possibility for altering decisions is to induce the adjudicator to take a second look at his own decision or to permit a new hearing. Motions for reconsideration, so intriguing to one accustomed to a different setting of authority, are as normal and prevalent in the coordinate apparatus of authority as are requests for superior review in hierarchical judicial organizations. Another possibility, even more curious to outsiders, is for affected parties to take advantage of the horizontal relationship among coordinate officials, and to try to frustrate the enforcement of decisions that are immune from "direct" attack. Without waiting for proceedings to run their full course to an anticipated unfavorable outcome, these persons can institute another action, pursuing roughly the same issue before another official in the hope that the second decision, favorable to them, may lead to the nullification of the effects of the first. Observe that in an organization dominated by lay officials the notion of what issues are "identical" to those already pending in court is not likely to be rigid. Yet another strategy is for the disaffected party to request a parallel official to block the enforcement of a decision rendered by a colleague. To a mind accustomed to hierarchical ordering of authority, such procedural moves can be taken as distressing signs of a seriously flawed judicial organization, but to a mind embracing the ideal of wide distribution of adjudicative powers, such blocking maneuvers are a small price to pay for the realization of desirable power relations.

Despite such instruments for permitting modification of judgments, it is characteristic of the process before a single echelon of authority that procedural devices designed to ensure decisional rectitude (quality control) *precede* rather than *follow* the initial decision. Only at this early point do procedural actors feel they can truly control events; they can ill afford to wait and see whether a procedural lapse will negatively affect a presumptively final judgment, or, in the affirmative, place their trust in later persuading the decision maker to change his mind. A procedural misstep early on can therefore require that a trial be aborted and that proceedings begin anew. The resulting idea of "mistrial" can be puzzling to lawyers used to a machinery of justice that is less in need of such "prophylactic" devices, to whom mistrials and similar mechanisms appear wasteful, merely ritualistic or otherwise irrational.

It hardly needs emphasis that such arrangements, natural in a single-level judicial organization, still characterize the process of many common-law jurisdictions, especially in America. Stepping away from ideal theory, let us now contemplate the impact on legal remedies of the loosely hierarchical, essentially one-level organization I have sketched in the previous chapter. Here the legal process still ends preferably with the announcement of the decision by the primary decision maker. Far from being a regular sequel to the trial, or a normally anticipated further stage of the process, superior review is more in the nature of an extraordinary and independent proceeding. The resulting procedural arrangements come even closer to those that common lawyers usually unreflectively accept, while they strike Continental observers as poor form or as simply bizarre.

Because of the extraordinary character of superior review, it still makes sense to treat the original judgment as res judicata and to permit its enforcement. The sporadic appeal is merely a ground on the basis of which execution can be postponed. It also seems appropriate to let the trial court's judgment lead immediately to a variety of collateral consequences. Because the fundamental notion has not really been discarded that the judgment of the trial court terminates criminal proceedings, review of acquittals is perceived as unfair, new or double jeopardy, rather than mere continuation of the original one. Furthermore, where a conviction is reversed the new trial is regarded as in many senses independent, a new proceeding, rather than as part and parcel of an ongoing process. Thus upon resentencing, the court need not credit defendants for time served under the original sentence: the perception of a single unitary proceeding within which both sentences were imposed is weak or absent.[21]

In this hybrid but basically coordinate system, judgments can be attacked only where the presumptively final decision maker has failed in such a serious way that his decision is in some sense perverse and his jurisdiction, as it were,

20. This is true of course, with only minor exceptions, for depositions of witnesses in the discovery stages of the civil process. Depositions of witnesses made in the preliminary criminal examination can be used with greater ease in English trials than in America, but still with much greater difficulty than in Continental systems. This is especially the case with statements recorded by the police (police records) that still tend to be excluded as inadmissible hearsay. See 31 *A.L.R.* 913 (1984). These residual differences between the Continent and most common-law countries explain divergent attitudes toward actual and potential witnesses. For example, where evidence is "canned" early on, as it is on the Continent, intimidation of witnesses is deprived of much of its motivation: the prosecution can often make its case even if a witness has disappeared or changed his story at the time of trial. See M. Damaška, *supra,* n. 10, 519–20.

21. Until recently this was the prevailing American practice. But see *North Carolina* v. *Pearce* 395 U.S. 74 (1969).

forfeited. If decisions could be reversed on the simple ground that they might be wrong, review would of course cease to be an exceptional remedy. An offshoot of this practice of limiting review is that original decision makers are unlikely to be required to provide clear and expansive justifications for their findings, as is still the case with trial judges in most common-law systems. Where supervision is sporadic and confined to the most egregious blunders, fragmentary and conclusory reasons for decision ordinarily suffice. Another consequence of this situation is that where it takes place, review assumes an *indirect* character: rather than directly checking the propriety of reasoned decisions, superior authority tries to reconstruct what was actually decided, and it speculates whether a reasonable adjudicator would have reached the outcome attacked by the appellant.

Significantly, mechanisms for superior review supplement, but do not replace, instruments designed to cause reconsideration by the original adjudicator. It may even happen that he be asked to modify a decision after it has been sustained on appeal—a deplorable form, in the view of hierarchical authority concerned to maintain clear distinctions in rank. New evidence discovered before the time limit for appeal has expired constitutes a ground for reconsideration by the original adjudicator rather than an appellate ground: because the new evidence was not part of the original decision, the adjudicator has not failed at all, let alone so seriously erred that superior review is warranted.

In a very general sense, the right of appeal is not exalted as central to due process. Thus it is not shocking that appeal be made dependent—as it often is in England—on obtaining leave either from the trial or from the superior court. But this hybrid system need not be pursued in tedious technical detail: in what I have suggested so far, a style is clearly visible that is superimposed on a coordinate substratum. This style is distinctively Anglo-American: although obscured by the twisting route by which its implications have been circumvented, Anglo-American jurisdictions still display an attachment to the ideal of one-level adjudication. Appellate remedies came late to the common-law world, and if one is to speak of common-law tradition, it is not one that embraced regular avenues of appeal.[22]

22. As suggested in the first chapter, while regular appellate mechanisms were a feature of the Continental machinery of justice from its inception, in England they were created only by late Victorian reforms. In the sixteenth century, Thomas Smith still proudly proclaimed that there were no "dilatorv appeals" in the realm of England (T. Smith, *De Republica Anglorum*, Third Book, ch. 2, p. 111 [London, 1583]). Very limited correction of judgments was possible by way of writ of error, but even this writ did not issue as of right until the eighteenth century. Of course, the finality of verdicts had much to do with the jury, but the whole machinery of justice was essentially a series of single-level courts. In America, appellate courts were established after the revolution; they are comparatively old by common-law standards. Yet they were a far cry from their Continental counterparts and incorporated into an environment hostile to hierarchization, being creatures of statute rather than common law. For their weakness and peculiar features, see L. B. Orfield, *Criminal Appeals in America*, 215 (1939). To the present day, no matter how serious the case, the right to appeal is not regarded as of constitutional stature. See 27 *Stan. L. Rev.* 945 (1975). Nor are various devices to facilitate or encourage appeals nearly so strong as on the Continent. Until very recently, a criminal defendant could receive a harsher sentence upon appeal in almost all American jurisdictions. On the Continent, since the fall of the ancien régime this practice has been branded an unfair deterrent for the accused to take his case before higher courts.

Reliance on Oral Communication and Live Testimony

Reasons for a preference for live witnesses are not difficult to see, quite apart from a possible belief in greater reliability. In the coordinate process there are no widely scattered procedural steps that must be integrated through a file; traces of prior procedural action need not be preserved to establish a firm basis for superior review. Moreover, in an organization of temporary lay officials, long institutional memory need not be cultivated: consistency is contemplated over relatively short temporal horizons. It may also be true that readiness to decide on the basis of cold files requires skills and dispositions generated only in bureaucratic organizations. To a layman, recorded testimony appears as a lifeless residue of reality. Nor does a coordinate system incorporate a class of minor bureaucrats who can be entrusted with the production, preservation, and retrieval of documents.

Consider some implications of the reluctance to rely on the written record. It becomes difficult or impossible to obtain competent evidence early on, and to disinter it, when obtained, after long entombment in the file. The disappearance of a single witness can ruin even a carefully prepared case. Various mechanisms must therefore be developed to ensure that witnesses are available at the time of trial—hence the notion of "material" witnesses, hardly known in Europe; hence also frequent grants of immunity to witnesses in exchange for their testimony. Unlike the hierarchical process, statements made by a witness at trial cannot be compared with his officially recorded prior declarations in an effort to decide what to believe. Consequently the coordinate process must develop "powerful engines" to challenge witnesses as they testify before the adjudicator. More than does hierarchical authority, coordinate officialdom must also rely on the threat of prosecution for perjury or similar deterrents against false testimony.

For many centuries, Continental and English administration of justice had been strikingly distinguishable on these grounds—the one relying on records in the file, the other on oral communication.[23] Although this contrast has lost its sharpness in more recent times, the degree of rapprochement between them can easily be exaggerated. While it is true that documents have assumed an increased importance in common-law proceedings, no real counterpart has emerged of the official file as the chief repository of information on which the adjudicators can predicate their judgment. The files maintained by officials participating in com-

23. Concerning sixteenth-century criminal trials in England, Thomas Smith remarked, "It will seem straunge to all nations that doe use the civill Lawe of the Romane Emperours, that for life and death there is nothing put in writing but the enditment only" (Smith, *supra*, n. 22, Book II, ch. 23, p. 101. On the Continent, the maxim appeared that "what is not in the file does not exist." To compensate for the lack of live testimony, a special file was developed containing observations on witnesses' and parties' facial expressions as they testified (*Gebärdeprotokol*). The greater attachment of Anglo-American systems to testimony under oath will be discussed in chapter 4.

mon-law proceedings (not by judges!) are mainly in the nature of "extraneous" material which merely helps them organize their procedural action.

The "Day in Court"

I have already discussed the concentration of proceedings in connection with the absence of multiple levels of adjudication. Further compression of proceedings results from the character of the officials who compose the single echelon of authority. An organization composed of part-time laymen prefers to dispose of judicial business in a continuous block of time, or at least without lengthy interruptions. The reason for this preference is again not hard to see: if proceedings were of the installment variety, by the time of the next episode it could be inconvenient or impossible to reconvene the officials who sat at a prior judicial installment. Of course, newly recruited officials would be deprived—at least in part—of the benefit of live proceedings. Chopping up the trial into separate sessions is thus not an ideal arrangement in the coordinate process.

The day-in-court trial can be packed with excitement and drama: the vivacity of first impressions is not adversely affected by a documentary curtain over the trial. Surprises and unpredictable turns of events are commonplace, but coordinate officials are accustomed to deciding on the basis of what might be called "astonished reflection." The dramatic courtroom atmosphere is enhanced by the possible finality of the trial court's judgment: no punches can be pulled in reliance on a next procedural round before a higher authority. Another complex facet of the trial deserves attention here. The fact that the adjudicators are unfamiliar with the case, as well as the fact that the trial is a continuously unfolding event, makes the cognitive needs of both the decision maker and the attending public identical: informing and persuading the former implies informing and persuading the latter as well. Under favorable conditions, trials can thus truly become events where, in the setting of a public performance, social norms are articulated, or those already articulated are solemnly affirmed.

The link between the traditional attachment of Anglo-American justice to day-in-court proceedings and the trial by jury has often been noted. But it can also be argued that justices of the peace, acting alone, were similarly attracted to concentrated trials. Alternating between private and official pursuits, they must have favored prompt disposition of cases. Private individuals, on whose participation at trials they counted, were also not easy to reassemble for several discrete trial episodes.

The more recent professionalization of the judiciary and the complexities of contemporary litigation have combined to produce installment-type trials in some Anglo-American countries. Nevertheless, piecemeal proceedings are here not a reflection of an ideal of gradual and methodical action, but a concession to necessity. Nor is the tendency to proceed in installments so widespread and deeply ingrained as it is in the setting of the Continental career judiciary.[24]

24. For contrast with civil proceedings in Europe, see *supra*, n. 9 and accompanying text.

Legitimacy of Private Procedural Action

Amateur officials draw no rigid lines between official and private domains. Accordingly, procedural steps can be taken informally in a private setting and can be interlaced with unofficial activity. An early example of this pleasant mix of *otium* and *negotium*—play and work—was the business transacted by the English country gentlemen commissioned by the Elizabethan chancery to examine witnesses: they would set about their work in country inns, with frequent interludes of wining and dining.[25] But this example draws attention to another facet of coordinate proceedings—the readiness of the apparatus of authority to farm out procedural actions. As suggested in the previous chapter, if paradigmatic adjudicators are themselves amateurs, recruited to dispense justice ad hoc, there can be little principled opposition to expanding "adhocracy" a little further.

Where the private bar exists, its members are obvious candidates to whom procedural steps may be entrusted. Many ministerial functions that are the exclusive province of minor bureaucrats in hierarchical systems can thus be transferred to lawyers. For example, American attorneys can issue summonses, take depositions, command the assistance of local sheriffs, and even be relied upon to prepare orders and judgments for the judge to sign.[26]

The task of enforcing state policies in court can be entrusted to private individuals with much greater ease than in systems possessed by the spirit of official exclusivity. Relator actions in England and Australia, or private attorneys general in America, illustrate this tendency.[27] Various amici curiae are welcome assistants rather than somewhat tiresome meddlers disrupting official routine.

Almost naturally, the coordinate apparatus comes to rely upon private parties to prepare the material for consideration at trial. In the absence of official investigators, there would seem to be no other alternative. And since the decision makers themselves are unprepared, the parties also assume important functions at the trial in presenting the material they have assembled. Evidence produced by one party can be challenged by the other, who can in turn produce his own evidence, and so on. Of course, where a case involves a very serious clash of interests, the trial can produce heated and noisy arguments, especially where the production of evidence is in the hands of the interested parties rather than their lawyers. A good example of this style of proceeding was the English criminal trial before lawyers were permitted to participate. Thomas Smith described such trials to his French audience quite aptly as "altercations."[28] However, when lawyers assume control over the presentation of the assembled material, proceedings can

25. See W. J. Jones, *The Elizabethean Court of Chancery*, 240, 287 (1967).

26. For semiofficial activities of American attorneys, see *In re Griffith*, 413 U.S. 717 (1973). Lawyers not only draft judgments and orders, but often also submit drafts of findings of fact and conclusions of law to the judge. See *Railex Corp.* v. *Speed Check Co.*, 457 F2.d 1040, 1041–42 (5th Cir. 1972).

27. See M. Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation," 73 *Mich. L. Rev.* 794, 849 (1975).

28. Smith, *supra*, n. 22, Lib. II, ch. 23, p. 100.

be transformed—as they were in England—into an exquisite minuet of confrontational steps.

A general consequence of the interpenetration of official and private action in coordinate proceedings deserves to be emphasized. It is often exceedingly difficult to state without equivocation when the proceedings commence, or what is, strictly speaking, part of the legal process. In contrast to the hierarchical mode, proceedings cannot clearly be identified with each step taken under direct supervision of authoritative governmental officials.

Substantive Justice and Procedural Regulation

In coordinate systems, one often finds complex technical rules regulating the conduct of trial protagonists before the lay decision maker. The genesis of these rules is related to the symbiosis of coordinate authority with a cast of professional advocates, a phenomenon of which I have already spoken. Growing out of eminently practical concerns and reflecting minutiae of accumulated professional experience, these rules defy easy summation and can be called unsurveyable, even arcane. However, in contrast to rules regulating the conduct of forensic actors in the hierarchical setting, such rules of practice and evidence are not unbending. The official presiding over proceedings can refuse to enforce them if he thinks it best under the circumstances. His refusal can be motivated by feelings of propriety or even by emotional factors such as compassion. For example, whereas the rule may require testimony from a witness who has validly waived his privilege against self-incrimination, the official can exercise discretion not to enforce the rule if he sympathizes with the motives that have led the witness to waive his privilege (e.g., by beginning to testify) and then to experience a change of heart.[29] Vigorous insistence on adherence to clear technical rules can easily backfire, especially if powerful and autonomous coordinate officials suspect that a party, although "technically correct," has pressed a point for ethically inferior reasons or has come to court with "unclean hands." Departure from technically mandated procedures is further facilitated by the absence of bureaucratic routine in the coordinate apparatus. As I have suggested, lay officials are willing to innovate and to experiment. In short, the filigree of technical rules does not prevent the impact on proceedings of standards of substantive justice.

As distinguished from rules governing the conduct of lawyers and parties, few rules bind the behavior of presiding officials. That they possess discretion to refuse to enforce the normative regime is only one aspect of their freedom. Those few rules which are addressed to them are vague and leave a substantial margin for additional, textually unexpressed authority. Nor should it be surprising if coordinate officials are authorized to enact their own rules concerning proceedings in "their" court.[30] But unlike the situation in a hierarchical judicial organization where rules regulating official behavior are applied more mechanically, the coordinate apparatus, while according vast powers to its officials, relies on their discriminating sense to decide when to exercise such powers. Even textually identical rules can thus have a vastly different impact in the coordinate and the hierarchical environments. If a judge in the coordinate apparatus is empowered to call witnesses on his own, for example, it would not be unusual if he actually did so only on the rarest of occasions. It is difficult to imagine that a judicial organization comprising such officials would support attempts to streamline procedural arrangements into an intellectual structure consistent with a few principles—a structure in which absence of logic and incoherence in procedural convention would cause great concern.[31]

In conclusion, as one would expect in an apparatus comprising powerful and independent officials, the progress of proceedings—no matter how minutely regulated at the surface—greatly depends on the manner in which these officials choose to exercise their vast "inherent" authority. Official discretion remains a keynote. As a turn-of-the-century German observer of English magistrates wondered from his perspective, can these officials be likened more appropriately to constitutional monarchs or to enlightened despots?[32]

Summary

Let us briefly pause and take stock. Proceedings adapted to the needs of coordinate officials center around the single echelon of authority: the trial is the focal point of the whole process, and it unfolds preferably without interruption. Its preparation is not the responsibility of a specialized branch of the judiciary or of other specialized state officials, but is relegated to the parties involved in the case. Decision makers thus necessarily come to the case unprepared and are unable to take charge of proof taking and similar activity—at least initially. As a result, those who prepare the trial—the parties or their forensic assistants—also present the evidence before the decision maker. Live testimony and oral communication are preferred over evidentiary records (documentary evidence) and written submissions.

Without regular mechanisms of review, parties dissatisfied with the decision must attempt to persuade the adjudicator to reconsider, or try to frustrate the enforcement of the decision in collateral proceedings. The easy blending of official and private action renders the outer boundaries of the process indistinct

29. From the perspective of a rigid hierarchical organization, there would be no point in having a regulation which can be so readily defeated. "All is lost if the judge wants to be smarter than the statute." See H. Drost, *Das Ermessen des Strafrichters*, 88 (Berlin, 1930). The phrase is attributed to Abbé de Mably.

30. American judges, even single judges in a multijudge court, are often accorded the power to adopt rules of decorum in their court. These rules can be fashioned ad hoc to fit a particular occasion. See *United States* v. *Barcella*, 432 F.2d 570, 572 (1st Cir. 1971).

31. For example, coordinate officials are singularly unimpressed by the "conceptualist" argument that it is inappropriate to let the defendant plead guilty and to delete the guilt-determining stage of the trial process because guilt is a matter for the adjudicator to decide in "creative" ways, by fine-tuning the law to the circumstances of the case. See *infra*, ch. 3, n. 43 and accompanying text.

32. See A. Mendelssohn-Bartholdy, *Das Imperium des Richters*, 120 (Strassburg, 1908).

and encompasses elements of private procedural enterprise. Moreover, although aspects of the trial may be subject to extensive technical regulation, this regulation can easily be displaced by norms invoked by coordinate officials in their own discretion.

iii. COMMENSURABILITY OF THE HIERARCHICAL AND COORDINATE PROCESSES

By playing out the procedural implications of the hierarchical and the coordinate ideals, elements of two distinctive procedural styles have now been obtained. But in showing how the character of authority impinges on procedural arrangements, I have also implicitly suggested the difficulty of comparing procedural problems across the divide that separates them. Otherwise similar forms of justice in the two institutional settings may differ in ways not easy to define, and forms of justice natural in one setting can elude description in terms of categories habitual in the other. Surely, Continental and Anglo-American lawyers find it more difficult to develop a common language in matters of procedure and evidence than in other areas of the law. Some problems of relating the divergent outlooks deserve a cursory review.

Single and Multiple Echelons of Authority

We saw that appeals, natural to hierarchical officialdom, are no longer the same when grafted upon a predominantly coordinate judicial organization, and that coordinate-style trials do not retain their identity when incorporated into a multistage process. While it seems normal in one system to enforce the trial court's judgment even before all legal remedies have been exhausted, this procedure appears "unnatural" and grotesque in the other.[33] Of course, where decisions are based on live testimony in one system and on the written record in the other, perceptions of a variety of problems must begin to diverge. We are all sufficiently McLuhanesque to suspect that form is likely to have an effect on the manner of viewing its content. Subtle but far-reaching differences in attitude arise from the absence in coordinate structures of a vision congenial to distant officials in tall pyramids of authority: where a more concrete and inclusive vision would locate a chance to attain "individualized" justice, a more abstract and selective vision would find dangers to consistent and predictable decision making. As a result, a large number of procedural problems is approached from different positions, and many procedural devices are assessed differently in the two official organizations. Like Don Quixote and his squire sensitized to different aspects of reality, so lawyers socialized in different settings of authority can look at the same object and see different things.

33. To the bewilderment of Continental lawyers, American courts are tempted to enforce foreign judgments before appellate remedies have been exhausted. See *Hearst* v. *Hearst*, 150 N.Y. 2d 764 (Sup. Ct. 1955). To make such a "mistake" seems almost unthinkable to Continental lawyers.

Unequal Degrees of Bureaucratization

One particularly troubling problem is that of relating a system that equates the legal process with steps taken by officials to a system that readily delegates procedural action to outsiders.

Consider an example. While to coordinate authority it is perfectly acceptable to allow private attorneys to take oral depositions in their private offices, the hierarchical process does not even have a categorical niche to classify this practice. At first, when viewed through the spectacles of hierarchical authority, the taking of oral depositions appears as a mere private interview aimed at developing the lawsuit. This is because depositions are taken without direct judicial superintendence, and because the results are not competent evidence to be incorporated in the official file of the case. But this categorization falters when it appears that deponents can be compelled to appear, can be impeached, and are obliged to respond truthfully to questions. In the end, the practice is neither fish nor fowl in the conceptual scheme of the hierarchical process. Yet because more than a private interview is involved, depositions tend to be viewed as an arrogation by private persons of action that must be reserved for governmental officials. Quite predictably, attempts by American attorneys to conduct depositions on the Continent are treated there as offensive to the prerogative of the state to administer justice and are now outlawed in several European countries.[34]

Forms of justice are not likely to be integrated similarly in a judicial apparatus that strives toward specialization and one that fuses functions. This gives a clue to the puzzlement of Continental lawyers looking at the branches of the American administration of justice and their mutual relation. The civil process, for example, seems to them to be much too diffuse, encompassing forms that seem more appropriately to belong to the administrative process, general administration, or even the legislative process. On the other hand, criminal prosecutions embrace many arrangements that seem "natural" only in the context of civil litigation.[35]

Substantive Justice and Technical Legalism

It is not easy to establish a community of discourse for those attached to substantive justice and those inspired by legalism. While one disposition strives to keep

34. France now prohibits pretrial discovery *à l'Americaine* even if it is part of an effort to obtain evidence for a lawsuit that has already begun in earnest, rather than (as often happens) solely for purposes of "fishing for information." See *Law* No. 80–538 of July 16, 1980. English authorities also disapprove of American pretrial discovery tactics, but they are not likely to regard such practices as violative of sovereignty, or even as reprehensible, provided the lawsuit has earnestly begun. For further examples of "privately" undertaken American litigation activity which Continentals find offensive, see H. Steiner and D. Vagts, *Transnational Legal Problems*, 669 (1968).

35. See chapter 6 passim. Even in England, Continentals find that the line between civil and administrative proceedings is drawn with insufficient clarity. See V. Varano, *Organizzazione e garanzie della giustizia civile nell'Inghilterra moderna*, 271 (Milano, 1973). From the Continental viewpoint, English criminal process also seems saturated with forms that "ontologically" belong to civil justice.

political, ethical, and legal issues distinct, the other finds this separation artificial and inappropriate. The problem can again be illustrated in the example of Continental and Anglo-American legal cultures. Continental judges are ideally still expected to anchor their decisions in a network of outcome-determinative rules; they are reluctant to "politicize" or "moralize" matters that come before them.[36] To the extent that they participate in decision making at all, laymen are pushed into relatively innocuous roles: vigorous advocacy of independent views on their part is readily branded as an arrogant display of dilettantism. By contrast, more potent forms of lay participation in the Anglo-American administration of justice (jurors, lay magistrates) continue vigorously to infuse precepts of substantive justice into the courtroom.[37] The American professional judiciary is notoriously politicized and expected to consider "the equities" of cases so that the door remains open to the consideration of various extralegal factors. Even in England, where professional judges are much more technically oriented than in America, Continental lawyers register their surprise at the apparent flexibility of the judiciary to respond to contours of individual cases in commonsensical ways.[38] Divergent attitudes surface also in the adjudication of constitutional issues—that is, in the area where law and politics inevitably merge. It is well known that several Continental countries have adopted mechanisms of judicial review, in some instances under the obvious influence of American constitutional law. Yet so deeply ingrained is the fear of unduly "politicizing" the administration of justice that it appeared undesirable to empower ordinary (real) judges to strike down unconstitutional statutes. Instead, this power has been vested in a highly placed and specialized tribunal, regarded not so much as a true court of law but as a superlegislative body.[39]

As this study proceeds, the difficulties of making hierarchical and coordinate proceedings truly comparable will persist. Like concepts of organic and geometrical beauty, the two procedural modes seem to elude a common Vitruvian measure. But because this study seeks to illuminate differences more than to

36. The tendency of the Continental career judiciary (and the legal culture as a whole) to separate legal and political questions more sharply than is usual in Anglo-American systems has often been noted. See M. Cappelletti, *supra*, n. 27, 865; K. Mannheim, *Ideology and Utopia*, 105 (1949); H. Spiro, *Government by Constitution*, 285 (1959).

37. Mendelssohn-Bartholdy has characterized decisions of English law magistrates as "Solomonic" (*supra*, n. 32, 161). Although the technical component of decision making has increased considerably in this century, lay magistrates, even if assisted by "technicians," should not be equated with the lower civil service judiciary on the Continent.

38. Flexible judicial supervision of every phase of trust administration as well as many "equitable" doctrines are telling illustrations. See R. Schlesinger, *supra*, n. 6, 736 (n. 3). The institutional merger of the judiciary and the legislature in the House of Lords is also surprising. As between the legal sensibility of professional judges in England and on the Continent, the main contrast is one between a more "pragmatic" and a more "logically ordered" brand of legalism. Many legal principles, dear to Continentals, appear across the Channel as airy generalizations linked, like so many captive balloons, by the most tenuous ties to the cases beneath.

39. On Continental constitutional courts as "superlegislatures," see J. Esser, *Vor-verständnis und Methodenwahl in der Rechtsfindung*, 201 (Frankfurt, 1970). For the special case of Greece, see F. Spiliotopoulos, "Judicial Review of Legislative Acts in Greece," 56 *Temple L.Q.* 463, 496 (1983).

identify common grounds, I shall not inquire here whether a scheme can yet be formulated in which procedural conventions in the two settings of authority can be made easily translatable.

IV. RELATIONSHIP TO CONVENTIONAL CATEGORIES

The core of the contrast between the Anglo-American and the Continental styles of administering justice is conventionally expressed by opposing the "inquisitorial" process of continental Europe to the "adversarial" process of countries whose systems derive from England. I have evoked this contrast, however, by juxtaposing the hierarchical and the coordinate styles. Clarification of the relationship among these categories requires that I revert to and expand upon certain themes sounded in the Introduction.

It should be clear that the hierarchical and the coordinate styles can each be employed either to adjudicate a bipolar adversarial dispute or to establish whether legal preconditions exist for the enforcement of some state policy or program. A controversy between two parties can be decided either by professional or by lay judges; the contest can unfold in written form (exchange of briefs) or orally; adversaries can be pitted against each other in a single "round" or in several, and argue before a single or several levels of authority. Conversely, an inquest with a view toward law enforcement can be conducted by professional or lay officials; it can rely on documents as well as on live testimony; it can implicate single or multiple echelons of judicial authority. The hierarchical and coordinate styles can thus be used across the lines of civil, criminal, and administrative proceedings—lines that are variously drawn in different legal cultures.

The possibility remains open that a particular organization of authority is better suited or more efficent to conduct an inquest, and another to conduct a contest, but there is no necessary relationship between the organization of procedural authority and the object of proceedings. Now if the adversarial system is understood to be a process designed as a bipolar dispute and the nonadversarial system is associated with a procedure of inquest (which seems to be the prevailing view), the two procedural styles I have described in this chapter are independent of the conventional dichotomy. The hierarchical style can be combined with *both* adversarial and nonadversarial forms, and the coordinate style possesses the same valences. To phrase the matter differently, the hierarchical and the coordinate authority can each develop its own adversarial and nonadversarial proceedings.

It is precisely because inquest and contest forms have actually been adapted to the indigenous organization of authority—coordination in Anglo-American lands and hierarchy on the Continent—that conceptions diverge in the two settings with respect to the constituent elements or necessary ingredients of adversarial and nonadversarial proceedings. As a result, there is presently no concept of the adversarial and nonadversarial modes that can be applied "neutrally" across the line that divides the two families of law shaped by different traditions of organizing judicial authority: forms of litigious and inquest procedure are desperately entangled in hierarchical and coordinate incrustations.

Can they be unraveled? If one is to begin to approach an answer to this question, the background of the contrast between contest and inquest forms of justice must be examined. Heretofore I have discussed connections between the administration of justice and the *structure* of authority. Controlling now for this variable, I shall examine in the following pages how different conceptions about the *function* of government can affect the shape of the legal process.

III Two Types of State and the Ends of the Legal Process

In search of a basic orientation, I shall explore how the legal process can be affected by two contrasting dispositions of government: the disposition to manage society and the disposition merely to provide a framework for social interaction. Some governments chose to be almost totally uninvolved in certain spheres of social life and to be quite managerial in others; they can embrace one disposition as a regulative ideal and temper it with the other; again, they may be profoundly torn between the inclination to stay at arm's length, and the duty to assume responsibility to steer society. They thus occupy a wide range on a continuum stretching from one theoretical end point—a state that fully penetrates social life—to the other theoretical terminus—a state that is truly laissez-faire.

It might be thought possible to obtain a double vision of an interventionist and of a laissez-faire administration of justice sufficiently polarized to cover existing systems, without including the end points of the continuum and thereby avoid considering extreme political doctrines. In short, to uncover the assumptions of these two visions it may be thought sufficient to analyze those proceedings in which *moderate* governments seek to implement programs, and those proceedings in which such governments provide a forum for the resolution of social problems. This approach can be restated in slightly different form: even if managerial and laissez-faire impulses lead to different ideas about the design of the legal process, such ideas are indifferent to the changing scope of government. As managerial concerns of the government expand, forms of the laissez-faire process remain unaltered; only the range of their applicability decreases. Conversely, as the agenda of government shrinks, forms of the interventionist process remain unaltered; only the domain of its applicability narrows.

On closer inspection, however, this argument has little to recommend it. The spheres in which moderate governments choose to assume managerial responsibilities and the spheres where they opt to be uninvolved are not hermetically sealed; rather, they interpenetrate and influence each other. The dominant conception of the role of the state—the idea of limited government, for

The readiness of an activist state to correct substantively faulty judgments is coupled with a great reluctance to disturb substantively accurate decisions, even if obtained through violation of procedural regulation. In describing the activist government's preference for flexible procedural instructions, I have already touched on this feature of the policy-implementing process. In technical legal jargon, the tendency prevails in activist justice to treat procedural error as "prejudicial" only insofar as such error casts doubt on the propriety of the decision on the merits; procedural error requiring automatic reversal is extremely limited, and the legitimacy of the concept itself hangs by a slender thread.[66] If official misconduct can be discouraged without reversing the right decision, this is the course of action that seems appropriate to activist government. It is immediately obvious, however, that a hierarchically organized machinery of justice can generate more mechanisms that permit deterrence without reversal than can coordinate officialdom. Consider only denials of promotion and similar disciplinary punishments, all readily available to a hierarchical organization. A coordinate activist official is thus somewhat more likely to deny recognition to a substantively accurate decision by parallel authority if the decision is rooted in a violation of procedural standards. Rendering useless the product of one's peer's efforts may be the only effective means to assure regularity of official action in the coordinate apparatus of justice.

66. This attitude bears on the problem of evidence obtained in violation of procedural law: such evidence should be rejected only if it appears unreliable. The idea that evidence improperly obtained should never be used (even if it is cogent) carries little weight in the policy-implementing process. Characteristically, Soviet commentators tend to justify rejection of illegally obtained evidence only by claims that it is unreliable; the problem of *reliable* but illegally obtained evidence receives scarcely any attention. A typical example of the failure to come to grips with this sensitive problem is J. N. Smirnov, ed., *Nauchnoprakticheskii Komentarii Ugolovnogo-Protssessualnogo Kodeksa RSFSR* 100, 107 (Moscow, 1970). Small wonder: the justice system is more easily persuaded to reject evidence secured in violation of standards of official decency if this evidence can also be made to appear necessarily unreliable.

VI Authority and Types of Justice

Now that two distinct types of proceedings have been derived from the objectives of justice in the reactive and the activist state, I shall reintroduce into this discussion themes developed in the first two chapters, where I examined some marks that hierarchical and coordinate authority leave on the legal process. Hierarchical officialdom has been associated with such procedural features as the succession of methodical stages, reliance on documentation, the tendency toward official exclusivity, and many other characteristics. Coordinate officialdom has been related to features such as temporal compression of proceedings, preference for oral testimony, readiness to delegate procedural action to nonauthoritative persons, and the like. In portraying the conflict-solving and the policy-implementing processes, I have alluded to transformations that these processes are likely to undergo in the differing settings of authority. The time has come to address this subject in systematic fashion. In short, the time has come to examine the ways in which procedural features attributable to different goals of justice interact with features rooted in the character of officialdom.

When the two types of procedure are conjoined with the two types of authority, the resulting combinations fall into the four boxes of the following two-by-two table:

	Policy-implementing	*Conflict-solving*
Hierarchical authority		
Coordinate authority		

This table provides a framework within which to examine the legal process as it is implicated in political ideology and as it is influenced by attitudes toward authority. In each box I shall first explore in an abstract way the interaction of features related to authority and features related to purposes of justice, and then

turn to examples of actual proceedings that fall into that particular taxonomic niche. But before this inquiry begins, two reservations are in order.

It is easily foreseen that the same procedural arrangement may sometimes be related both to an ideal of officialdom and to a particular conception of the objectives of justice. For example, in chapter 4 the dominant role of the parties in proof taking was found to suit the position of litigants in the conflict-solving process. But earlier, in chapter 2, it was observed that such dominance naturally follows from coordinate officials' propensity to delegate trial preparation to interested outsiders. Where such double attribution is possible, it will suffice to have offered two mutually reinforcing explanations for a particular procedural form, and I shall refrain from speculating as to which is the more fundamental, and therefore arguably independent, variable. I shall equally resist the temptation to conjecture whether the double attribution denotes an ideal match between the objectives of justice and the organization of the official apparatus.

Conversely, it must also be foreseen that, when combined, the two sets of models will sometimes lead to procedural arrangements with an inherent potential for strife and tension. For example, some arrangements typical of coordinate structures, where officials can block implementation of one another's decisions, can clearly be at odds with forms favored by the policy-implementing process in which deadlocks are undesirable. Confronted with this mix of arrangements, it will suffice that the double perspective has revealed a tension that arises when the justice machinery of a particular structure is used for particular purposes. However, the existence of such internal tensions is not necessarily perceived as undesirable; enemies of bureaucratic centralization can argue, for example, that where coordinate features of a judicial apparatus impede the efficiency of policy implementation, they also impede easy victories of a hurried government.[1] To talk seriously about mismatches of the structure of authority and function of justice is to enter into an ancient and controversial arena of political theory, whose complexity leads far beyond the limits of this book.

i. THE POLICY-IMPLEMENTING PROCESS OF HIERARCHICAL OFFICIALDOM

As defined in chapter 5, at its core the policy-implementing process is an officially controlled inquiry. How is this mode of proceeding adapted to the structure and work habits of hierarchical authority? The most obvious impact on the form of proceedings of this type of authority is that the "activist" inquiry is divided into stages according to the different ranks of officials in charge, and where officials of the same rank are functionally specialized, proceedings are also subdivided into stages according to specialized subtasks.

Observe that in this type of process there is no day-in-court trial as a culminating procedural event—at least not in the sense that the material for the decision is fully presented to the adjudicator as a whole, in one continuous block

1. See *infra*, Introduction, n. 19 and accompanying text.

of time and in a form unmediated by prior official action. Rather, the initial decision is made on the basis of material officially assembled over time and then regularly reviewed by higher authority, so that the initial decision is denied the significance it would possess if it were presumptively final. As befits the policy-implementing process, even decisions by the highest authority can be altered in light of subsequent knowledge; but pressures toward orderliness and certainty, treasured by bureaucratic hierarchies, limit the easy reopening of cases in which the highest echelon has spoken. Each discrete procedural stage and episode is integrated into a meaningful whole by documentation in the file of the case. The file thus serves as the repository of information gradually assembled and decisions made en route; it is the spinal cord of the entire proceeding.

When the policy-implementing process is related to the hierarchical apparatus of authority, several variants can be distinguished. The simplest variant knows no specialization in the lowest echelon of authority; officials promiscuously perform analytically separable functions—they investigate, and they render decisions. But in contrast to coordinate all-purpose officials, they are not "autocrats" with broad discretionary powers: locked in chains of subordination, they exercise delegated authority. Ideally, their action is narrowly circumscribed by unconditional standards, and their decisions are subject to regular superior checks.

A historical example of this simple variant is the proceedings before the "investigating judge" in less serious criminal cases during the ancien régime on the Continent. While this judge-investigator was empowered both to gather evidence of crime and to make the original decision, he was expected to be guided by rules even in evaluating the evidence, and he was obliged to facilitate review by superior judicial authority; to prevent the defendant from taking an appeal was in certain cases a serious offense. Nor were appeals the only constraint on such generalist first-instance officials. A further constraint came from the propensity of bureaucratic organizations, especially those composed in tall pyramids, to create official units—panels of low-level officials—in order to permit mutual supervision in implementing centrally imposed policy. *Juge unique juge inique* is an old French adage expressing this idea, a view quite alien to coordinate structures. That some Continental constitutions still enshrine the "guarantee" of collective decision making at the *trial* level remains surprising to many a common lawyer.

As was pointed out in chapter 5, the fusion of functions in the person of the investigating judge is conventionally viewed as a distinguishing feature of the "pure" inquisitorial process. In the present analytical scheme, however, this fusion of functions is less than an ideal or full-fledged form of hierarchical policy implementation. A *division* of labor among officials on the first rung of the hierarchical ladder is closer to the ideal. One possibility for dividing the labor is to charge one official (or panel) with collecting information and another official (or panel) with rendering decisions. Again, the Continental criminal procedure of the ancien régime provides a good illustration: in serious cases the investigating judge was limited to conducting a documented inquiry. Once the inquiry was

completed, the file containing all the documents was then transmitted to the primary decision maker.[2]

Another possibility, already mentioned, is to introduce into the proceedings an official who specializes in bringing cases before the decision maker and moving them through the successive stages of the legal process. As observed before, in an activist state this official is regarded as a watchdog of state policy, engaged in the collaborative effort of state officialdom to discover and to implement the correct decision; he does not appear as a party on the same plane parallel with a citizen implicated in the legal process.[3] This "activist" reading of the situation is reinforced when hierarchical authority directs the policy-implementing process. Consider the example of a state prosecutor who is part of a hierarchical organization. Where he is incorporated into a pyramid of state authority, he clearly cannot be fitted with shoes of approximately the same size as those worn by the defendant: even the lowest prosecutor is linked to the center of state power. To place him, as a party, in a position parallel to that occupied by the criminal defendant would violate the hierarchical sense of proper order. It is equally obvious that notions of negotiation and bargaining between the state prosecutor and the defendant are out of place. Where an official close to the center of government begins to negotiate state interests with a private individual, in the perspective of hierarchical authority this practice approximates an abdication of state sovereignty. Indeed, as was claimed by Jean Bodin, one of the sixteenth-century founders of this concept, it is of the very essence of sovereign government that it has no equals with whom to negotiate.[4] *Justice n'est pas ployable.* Even if the state prosecutor were somehow imagined to be a party, the adjudicator's impartiality would not be credible in a hierarchical system of justice; his legitimacy as neutral resolver of the dispute between the parties is undercut by his association—as a professional civil servant—with the same authority that prosecutes the case: two against one. In conclusion, then, the division of labor between the court and a specialized official promoter introduces no conflict-solving forms into the hierarchical activist legal process. On the contrary, hierarchical authority, with its penchant for specialization, regards the division of tasks as a policy-implementing arrangement superior to the generalist version, which concentrates procedural control in the hands of officials who take charge of the case in the first instance.

Still another division of labor can be envisaged; as in the case of the promoter of the faith and the devil's advocate in the canonization proceedings of the Catholic church, two officials can be appointed to argue contrary points to the decision maker. But as was shown in chapter 5, the official contest is a mere surface ritual. That this ritual detracts from an ideal arrangement is again more

2. There were minor technical differences in implementing this idea, especially as between German lands and France. See M. Damaška, *supra*, ch. 2, n. 10.

3. See *supra*, ch. 5, n. 14.

4. On Bodin's views concerning the "true marks of sovereignty," see J. Bodin, *De Republica Libri Sex*, Liber I, Caput 10 (London, 1586). The relevant passages are translated in J. Bodin, *The Six Books of a Commonwealth*, Book 1, ch. 10 (London, 1606).

clearly visible with hierarchically organized procedural authority. Here, institutional controversy is treated as disruptive and aspirations strongly tend toward objective nonpartisan attitudes. Just as the Continental prosecutor must file an appeal *in favor* of the defendant if he thinks the attainment of the right result so requires,[5] so players of contrary official roles readily abandon the superficial ritual and jointly seek optimal solutions.

The interweaving of hierarchical authority and policy-implementing justice leads to great reluctance to delegate *autonomous* procedural action to private individuals. While bureaucracies tend to monopolize procedural control, radically activist states are reluctant to let voices competing with the government speak. The result of this synergetic effect of state function and state structure is that private enforcement of state policy is far from an ideal arrangement in the classificatory box now under consideration. I shall soon show how different the situation is in the ambience of activist coordinate officialdom, particularly in the early phases of the transition from an uninvolved to an interventionist government.

The combining of hierarchical organization with policy-implementing justice is in many other respects quite successful. Where the activist state strives toward utilitarian goals, this is scarcely surprising: hierarchical resolve and bureaucratic efficiency offer formidable instruments for the realization of state programs. Once higher authority has formulated a policy, the consistent application of that policy is relatively sure; impasses can be resolved relatively quickly and cleanly. But just as no marriages are truly made in heaven, this one is also not without its share of strife. As a prelude to the study of existing systems, two areas of potential tension and stress deserve particular attention.

It will be remembered that a hierarchical organization can espouse two different kinds of standards for making decisions: one possibility is posited goals, by which officials assess the consequences of alternative decisions; the other is normative standards for the guidance of officials. Because of the historical importance of the second variant, I have focused attention here on legalistic hierarchies. But let us now see what happens to this legalistic orientation in a state that begins to fulfill its activist potential: the tension increases between activist government's preference for instrumental decision making on the one hand and the judicial apparatus's attachment to unconditional standards on the other. It is true that these two dispositions can be balanced and somehow accommodated, so long as the propulsive programs of the state are not pressed with utmost seriousness. But as extremes of truly managerial government are approached, a gradual transformation of the hierarchical apparatus from its legalistic to its technocratic variant should be expected. A state that proposes to turn society into a giant corporation—at once to promote social welfare, cultural enrichment, environmental protection, and much else—must value efficient managers more highly than manipulators of normative programs.

5. For the prosecutor's "nonpartisan" right to take an appeal in favor of the defendant, see, e.g., *West German Code of Criminal Procedure*, §296, II. The tendencies of classic bureaucracies to avoid controversy are discussed in H. Jacoby, *The Bureaucratization of the World*, 154 (1973).

The other kind of friction arises from divergent attitudes to the participation of citizens in legal proceedings. It has been seen that a pronounced activist state dislikes autonomous associations and spontaneous social action, but nevertheless strives to involve citizens in its programs and align them with its policies. As a result, an activist process favors citizen participation in various accessory rituals—mainly as a chorus favorably inclined to and reinforcing governmental policy. But what about the attitude of hierarchically organized bureaucrats toward this citizen participation? They are likely to look askance even at such ceremonial and innocuous roles, regarding them as dilettante meddling, disruptive of orderly and efficient performance of technical tasks. In short, while activist orientation would draw the public in, hierarchical structures would keep them out. The resulting tension can surface even with issues of minor importance.

At this point, it is worth pausing for a moment to consider the relation of hierarchical policy-implementing arrangements to categories of conventional theory. In discussing the policy-implementing process apart from any particular structure of authority, I have repeatedly stated that in some of its aspects it resembles prevailing portrayals of inquisitorial procedure. This resemblance to traditional inquisitorial form has now been increased by the introduction of features associated with hierarchical authority, such as the role of the dossier or the impact of regular appellate review. Among the prominent differences between traditional inquisitorial process and the policy-implementing process before hierarchical officialdom are the greater stress, in our model, on broader aspects of the case, the open-endedness of state intervention, as well as on the educational role of the legal process. Both the proximity to conventional thinking and departures from it will be explicated as I take a fresh look at real-world systems that arguably fit into my first classificatory unit. In doing so, I shall first survey systems that are more removed from ideal forms and conclude by examining those that approximate such forms more closely. I shall begin with Continental criminal procedure of the ancien régime—a procedure long believed to epitomize the "pure" inquisitorial type of legal process.

Systems of Criminal Justice

ANCIEN RÉGIME. It is instructive to examine the genesis of what is regarded as the characteristically Continental style of processing criminal cases. As in the case of my synopsis of the rebirth of bureaucracy, I must again begin in the twilight of the Middle Ages. The function of the weak central government was, in the main, the prevention of clan warfare. Barely differentiated from civil wrong, crime was primarily treated as a matter between the miscreant and the victim, or between their respective clans. The legal process was aimed at absorbing conflicts by substituting forensic simulation for actual fighting. A form of adversarial proceedings prevailed in what would nowadays be classified as both civil and criminal matters. As the Continental hierarchical bureaucratic apparatus of justice began

to develop—pioneered in the late eleventh century by the Church of Rome—the image of the legal process as a contest of two adversaries before the court (a triadic relation) thus appeared quite normal. This disposition was reinforced by some texts of Roman antiquity, then venerated as part of the "rediscovered" codification of the Byzantine emperor Justinian.

The relentlessly expanding and more powerful central authorities, especially those of the church, soon began to covet powers much wider than those of conflict resolution: the ambit of governmental action expanded. In this new environment, crime ceased to be regarded as primarily a matter of concern to the victim and the miscreant; it was now seen as involved in what Aquinas was later to call *communitas politica*. To use a contemporary phrase, criminal "excesses" were now expected to be "corrected" even in the absence of a complaining victim or of a dispute to engage the forum. As a result of these changing ideas on both the agenda of government and the nature of crime, a spin-off occurred from the essentially conflict-absorbing justice of early medieval times; an officially controlled and propelled procedure of inquiry (*processus per inquisitionem*) emerged. Even if nobody came forward as an accuser, the judge was now obliged to begin a unilateral search for the truth about the possible incidence of a crime. Toward this end he was empowered to examine witnesses and to gather other types of evidence, either personally or through officials appointed by him. The suspect's interrogation became the centerpiece of this new procedural form ("he knows best whether he did it, and if he did, what were his intentions"), and the suspect's confession the most precious mode of proof (*regina probationum*). This orientation was almost natural in the innovative legal process of the church, where ordinary judges (bishops) were at the same time father-confessors, accustomed to interrogations and confessions in the "tribunal of conscience." But because the new procedure of inquiry was independent of a dispute between an accuser and a defendant, the confession was treated merely as a precious datum—not as a "dispositive" declaration of one contestant resolving the dispute and thus also dispensing with the reason for continuing the criminal case. The prominence of files on officially performed activities and pervasive appellate review make this new form easily classifiable as a policy-implementing process before hierarchical authority.

The new type of proceeding could consist of a "bipolar" relation between the judge and the defendant, but it could also be an engagement of three persons—the judge, the defendant, and an official promoting the larger interest in suppression of crime before the court.[6] It would be anachronistic to imagine that contemporaries viewed the official promoter and the defendant as adverse parties battling each other before a passive umpire of their disputation: the promoter was instead seen as an official assistant to the judge.

This ecclesiastical procedure was soon taken up with enthusiasm by secular Continental rulers, so that it continually gained ground at the expense of the old adversarial form of criminal prosecution. The office of promoter, variously la-

6. See *supra*, ch. 1, n. 17 and accompanying text.

beled in different countries, was also received into secular systems and organized into a hierarchical institution whose responsibility frequently exceeded the bounds of criminal law enforcement. French royal *procureurs* and *avocats*, for example, acquired important powers in civil cases affected by larger interests, and in absolutist Prussia, the royal *Fiskalat* was expected to be a general "guardian" of the ruler's regulations—his *Auge und Ohr* (eye and ear). Because the latter institution, by way of Sweden, came to czarist Russia and was later adapted to the needs of the Soviet government, it is a historian's *bonne bouche* that the mighty Soviet *Prokurator* has a relatively embarrassing pedigree going back to the *promotor fidei* of the Roman Catholic church.[7]

It is important to emphasize, however, that even in its most extreme variants—such as the special proceedings of the Holy Inquisition—the historical inquisitorial process always retained some features and much terminology of the conflict-solving mode of proceeding. Thus, for example, some issues were termed "defensive," although there was often no other party with whom the criminal defendant could share the raising of issues or the burden of proving them; the official investigator was actually duty-bound to build a single "case" by probing on his own, irrespective of the defendant's allegations.[8] More interestingly, the inquisitorial process, although in practice dominant, was regarded as an anomaly or an aberration from regular forms. In its infancy, it required protection by extensive justification, even apologies: as a departure from revered tradition, it was to be used only exceptionally—a necessary evil if the war against crime were to be successfully fought (*ne crimina maneat impunita*).[9] Even later, and until the downfall of the old order, the ancient "accusatorial" process remained to many the theoretical ideal of criminal justice. Scholarly discussion of the inquisitorial procedure was regularly interspersed with ceremonial genuflection before an alternative design of criminal prosecution that always required a complainant, and readily evoked the idea of a dispute.[10] As the apparatus of justice grew increasingly bureaucratic, medieval popular participation was swept away, so that only sporadically were some of its vestiges in evidence. Although educational impulses would surface in the ecclesiastical administration of justice, at-

7. For details on how the *promotor* of canon law procedure was adopted in France and elsewhere, see Lefebre, *supra*, ch. 1, n. 17. The Prussian *Fiskalat* is discussed in E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, 3d ed., 180 (Göttingen, 1965). On the circuitous transplantation route of Prussian "guardians of legality" to Sweden, czarist Russia, and eventually the Soviet Union, see M. Kovalevsky, *Russian Political Institutions* (1902); J. Hazard, Settling Disputes in Soviet Society, 217–43 (1960).

8. For vestiges of "accusatorial" forms, see B. Carpzov, *Practica nova Imperialis Saxonica rerum criminalium*, Pars III, Quest. 115 (Frankfurt, 1678).

9. Primary sources on initial apologies for the new process of inquiry are collected in F. A. Biener, *Beitrage zur Geschichte des Inquisitionsprozesses*, 45–46 (Leipzig, 1827). Initially, capital punishment could not be pronounced in the new procedural form.

10. In the seventeenth century, Carpzov still treated the *processus per accusationem* as superior to the inquisitorial form. See Carpzov, *supra*, n. 8, Qu. 106. Echoes of this position can be detected even in the eighteenth century, as evidenced by sources cited in Homberk zu Vack, *supra*, ch. 5, n. 17.

tempts to use the secular legal process for the purpose of transforming people were few and far between.[11]

If it takes a radically interventionist government to generate pure policy-implementing forms, then such deviations of historical inquisitorial systems from the model of hierarchical policy-implementing process can readily be understood. In the period of the dominance of the *processus per inquisitionem*, the character of Continental government was far from managerial excess. Well into the sixteenth century, European rulers were imagined primarily as judges or conflict resolvers: that the sovereign power is regulatory or legislative is a comparatively modern idea.[12] So too is the notion of a government whose mission is to manage people. It is true that some popes early made claims to all-encompassing powers of governance, but they were never able to unite *spiritualia* and *temporalia* under their singular authority.[13] Their successors, the absolutist secular rulers, would sometimes display tutorial and managerial urges, but even the most radical among them never attempted a comprehensive transformation of society. To find a political landscape capable of supporting a decisive break with justice conceived of as conflict-resolution, one must seek much more activist government than that of European absolutist princes. It is not surprising that theorists who have tried to construct a type of proceeding by abstraction from the actual criminal law enforcement systems of the old order have always been unable to describe an extreme or "pure" inquisitorial procedure.

Before examining forms of justice in truly interventionist states, I shall review developments in Continental criminal process after the upheavals caused in large part by the widening ripples of the French Revolution.

THE POSTREVOLUTIONARY AMALGAM. I have already touched on postrevolutionary reforms of the Continental administration of justice, focusing upon attempts—more successful in proclamation than actual practice—to relax the inherited bureaucratic centralization of judicial institutions. I shall focus now on postrevolutionary efforts to inject more conflict-solving forms into the inherited Continental procedure of inquiry. Therefore I shall say little here about those characteristics of reformed procedure traceable to the continuing dominance of hierarchical authority: the methodical succession of stages culminating in appeals, the crucial role of the file, weak forms of lay participation in decision making, and many similar features remain on the periphery of the present discussion.

11. The secular arm was unfavorably inclined toward *poenae medicinales* (medical penalties) of ecclesiastical criminal law. Yet, traces of an educational and tutorial conception of criminal justice radiating from the church were not altogether absent, even from prosecutions for witchcraft (*crimen magiae*). For an interesting fourteenth-century example, see Bartolus de Sassoferrato, in J. Hansen, *Quellen und Untersuchungen zur Geschichte des Hexenwahns*, 64–66 (Bonn, 1901).

12. See Q. Skinner, *The Foundations of Modern Political Thought*, vol. 2, 289 (1978).

13. For a cursory review of papal aspirations to *plenitudo potestatis*, see M. Oakeshott, *On Human Conduct*, 220–22 (1975). See also *supra*, ch. 5, n. 9. Harold Berman has recently shown how crucial was the late eleventh-century split between ecclesiastical and secular orders for both the specifically Western polity and the law as a whole. This split is the permeating theme of Berman's *Law and Revolution* (1983).

Efforts to weave more conflict-solving patterns into the fabric of Continental criminal procedure were inspired by the tenets of liberal ideology. I have noted that this ideology developed the image of the criminal process as a contest between the accused and the state held before adjudicators independent of the executive branch of government. In an environment accustomed to centralized judicial and prosecutorial bureaucracies dominating the administration of criminal justice, the applicability of this image seemed too limited to be taken literally. Not even liberal reformers thought that any stage of the criminal process should be linked to the existence of an actual disagreement between the prosecution and the defense. That the purpose of criminal prosecution is to apply state policy toward crime independent of the defendant's attitude toward the charges was a deeply ingrained intellectual habit.[14] What seemed attractive to liberal reformers, however, was to structure criminal proceedings, whenever feasible, *as if* there were a clash of opinions between the state prosecutor and the defendant. Contest forms, or *simulation* of a dispute, seemed to indicate at least some recognition that the interest of an individual can legitimately be opposed to the interest of the state: no small achievement in the liberal view. The offshoot of this train of thought was to advocate an amalgam of policy-implementing and conflict-solving forms in criminal cases: the strength of one's liberalism was measured by the degree to which conflict-solving arrangements were thought capable of expansion at the expense of those related to the policy-implementing purpose of proceedings.

Sooner or later, liberal reforms were inaugurated in all Continental countries. In assessing the flavor of the resulting amalgam, however, it is crucial to distinguish between the aspirations of reform legislation and the reality—by no means an easy task. It is bedeviled by the natural inclination of many Continental commentators—committed agents of change in their domestic systems—to exaggerate the extent to which their liberal aspirations have become reality. Perhaps they hope that an Heisenbergian effect will occur, so that the observer will induce a desired change in the observed. Fortunately, the broader comparative perspective helps identify such exaggerated claims.

First, then, what of aspirations? The amalgam of contest and inquest forms was conceived as follows. The old investigation, preceding the decision-making stage, was to be retained because a basically unilateral gathering of evidence was thought necessary to elucidate the truth. But the importance of this initial stage was to be downplayed, and at least some contest forms were to be introduced into it. The role of the investigation was to be reduced by no longer insisting that the investigator gather all the material needed for the decision: his inquiry was to be recast as a mere vehicle for orientation, on the basis of which the state prosecutor would decide whether formally to accuse a citizen of crime. Thereafter, the full

14. This habit continues to prevail, although in a few countries, under the influence of American sociology, a small number of academics now argue that conflict solving is the objective of *all* adjudication. For more recent thinking on the goals of criminal process in the influential German literature, see P. Riess, "Gesamtreform des Strafverfahrensrechts," in *Festschrift für Karl Schafer*, 168–72 (Berlin and New York, 1980).

factual basis for the decision would be ascertained in stages more richly laced with contest forms. Which forms should be allowed in the initial phases? For example, the investigator could decide to examine a witness in the presence of both the defendant and the state prosecutor, provided that a more secretive examination were not mandated by the interest in finding out the truth. Defense counsel was to be admitted from the early stages of the investigation and familiarized, whenever feasible, with the progress of fact-finding; investigative findings could then be challenged and counterarguments presented.

With the investigation complete, the documented file would be transmitted to the state prosecutor for decision as to whether or not the process should continue. If in the affirmative, the prosecutor would file a formal charge with the criminal court, just as a civil plaintiff would lodge a complaint. The factual parameters of the charge would present a limit on subsequent fact-finding. Although proceedings were to culminate in a public trial patterned upon the image of contest, a rigorous contest structure was never even contemplated. For example, although the accused could be asked at the very outset to state his "attitude" toward prosecutorial allegations, even if he failed to contest them and fully confessed—so that there was no contest between him and the state—the judge still would be required to go on with guilt determination. Moreover, issues at trial were not to be separated into a "case" for the prosecution and a "case" for the defense. Instead, the court was to build a single integrated case through unilateral action, limited only by the parameters of the charge. While it was never lost on the reformers that the division of issues into two cases—even if rigorously implemented—permits the state prosecutor to represent larger interests, the reformers regarded it as unacceptable to accord the accused a parallel position and thus a corresponding control over "defensive" issues. Whether all necessary preconditions existed for the criminal sanction was thought to be a decision for the court, not the defendant.

Accordingly, the trial was only meekly to simulate a contest: there were to be opening and closing statements by the prosecution and the defense, and after the presiding judge completed the interrogation of witnesses, prosecution and defense could address questions to them in turn. To mute the significance of the pretrial stages, the reach of the documentary file was shortened: the original decisions were to be based solely on evidence examined directly in court. In contrast to prior law, the court could no longer refuse to decide the case until it was "more amply informed." If the judgment favored the defendant, its reconsideration was to be limited by comparison with the prerevolutionary process.[15] This, in a nutshell, was the prevailing theory of the amalgam.

In reality, however, and although now ideologically in a sort of demi-

15. Nevertheless, in all Continental systems the prosecutor can appeal the judgment of acquittal rendered by the trial court; the original "jeopardy" simply continues. Moreover, in most countries even a *final* judgment can be reversed if the finally acquitted defendant subsequently confesses the crime. It would thus be unwise for a criminal to publish a book depicting the crime of which he was acquitted or to promise the acquitting court that he will not do it again—all practices far from unknown in Anglo-American systems.

monde, inquest forms fared better than liberal reformers contemplated. To begin with, pretrial investigation remained exhaustive, at least in cases of serious crime, and investigators typically found the defendant's presence at witness interrogations or other evidentiary activity potentially dangerous to the elucidation of truth, so that this presence was usually denied. Beyond this, if occasional legislation made the defendant's presence during some investigative activities mandatory, crucial detective work tended to be shifted from traditional investigative judges to police officers, to whose inquiry the defendant's right to participate did not apply. Readers of Simenon's or, more recently, of San Antonio's detective stories are familiar with the ensuing dilatory games, in a low visibility area of police inquiries, between the *inspecteur* and the judge in charge of "formal" investigation. To put an end to these wasteful games, some Continental countries—West Germany, for example—have now abolished the office of the investigating judge.

At trial, information from the investigation continued to exert a strong influence on decision making, notwithstanding protests of academic commentators. There were many reasons for this, but the most widespread was the requirement that the presiding judge prepare himself for proof taking by meticulously studying the file. In the end, preliminary investigation remained the crucial procedural phase of the entire process. To a great extent, the trial became a review of work already done with its original inquiry limited to search for the most appropriate sentence.[16]

To emphasize the gap between aspiration and reality is not to deny that the postrevolutionary reforms moved Continental criminal justice much further away from pure policy-implementing forms than was the case with the criminal process of the ancien régime. Nor could it have been different, in view of changing conceptions of the relation between the individual and the state in light of liberal tenets. Yet if the final flavor of the Continental amalgam is to be evaluated properly, the discrepancy between aspiration and reality assumes a decisive significance.

Continental commentators often claim that the postrevolutionary "mixture" should be located somewhere midway between inquest and contest forms, or at a midpoint between policy-implementing and conflict-solving justice. If this claim were justified, the Continental amalgam would pose serious taxonomic problems; its inclusion into the first classificatory box would be questionable. But regardless of how matters appear in the parochial Continental perspective—to the eye examining itself—a broader comparative vision reveals a different picture. Especially revealing is the vantage of Anglo-American observers, in whose system trials are more genuinely independent of earlier proceedings and more rigorously patterned on the contest idea. Symptomatically, these observers find Continental trials similar to procedures for reviewing results of work done at predominantly inquisitorial stages of criminal prosecution. From their stand-

16. For a rare realistic appraisal of actual practice, see J. Stepan, "Possible Lessons from Continental Criminal Procedure," in S. Hottenberg, ed., *The Economics of Crime and Punishment*, 181, 187 (Washington, 1973).

point, then, even those Continental systems incorporating the largest number of contest forms fit squarely within the "nonadversarial" or policy-implementing engagements.

There is some disagreement among comparativists on whether Continental countries use devices that can meaningfully be associated with bargaining between procedural parties, the process so intimately linked to the conflict-solving style. Much of this disagreement is due to the conflation of unilateral official concessions to the cooperating defendant with explicit bargaining between the prosecution and the defense concerning the exchange of benefits. The first practice is as ubiquitous as the ordinary impulse to accept the norms of reciprocity or to return a favor. Such practices are not offensive to the policy-implementing process, or violative of the hierarchical sense of propriety. They are widespread in all Continental systems of criminal justice. A prominent illustration is sentencing concessions, often routinely accorded to confessing defendants. In contrast, explicit negotiations between the prosecution and the defense leading to deals or bargains are alien to Continental legal sensibilities. There is, of course, no room for charging and sentencing concessions in exchange for the defendant's waiver of trial, because all offenses of some gravity must be processed at trial, regardless of the will of the procedural parties. More important, to grant the defendant a standing to negotiate with state officials over charges or the sentence to be imposed, as well as to allow the court to sanction such deals, is truly offensive to Continental ideas on the proper administration of criminal justice. Only for minor crimes, and in response to the overcrowding of dockets, have some Western European countries recently developed summary procedures that resemble bargained guilty pleas. Most of these procedures, however, involve nonnegotiable prosecutorial offers that the defendant pay a determined fine or face the possibility of a more serious sentence if he chooses to go to trial. The very nonnegotiability of the offer bespeaks the uneasiness with which Continentals approach consensual party transactions in criminal prosecutions: if, for the sake of saving resources, the prosecuting official is sometimes forced to offer bargains to the defendant, the image of a store with fixed prices is much less repugnant than the haggling reminiscent of an Oriental bazaar. In the sphere of petty offenses, a few Continental jurisdictions go even further and allow devices which necessitate negotiations between the prosecution and the defense: if the defendant promises to take certain actions, the prosecution is permitted to drop charges.[17] A few countries that have adopted such procedural devices to cope with the mass of petty crime (predominantly traffic offenses) have taken a significant

17. For a legislative example of such conditional dismissals of charges, see *West German Code of Criminal Procedure*, § 153(a). One must not project onto Europe American expectations that such powers of dismissal lead to a great deal of wheeling and dealing, in which the defendant holds chips of great significance to the authorities. It is sobering to note in this connection that conditional dismissal of charges is known even in the Soviet Union, limited, of course, to minor offenses involving offenders who display contrition. See *RSFSR Code of Crim. Proc.*, art. 51. On the West German example, an American scholar has shown how Continental systems can get along without extensive plea bargaining (J. Langbein, "Land without Plea Bargaining: How the Germans Do It," 78 *Mich. L. Rev.* 204 [1979]).

step away from conventional forms of Continental criminal justice: procedural forms may have gained a foothold on the Continent that are truly in the conflict-solving mode.

THE SOVIET MODEL. Because czarist Russia had adopted a variant of the hybrid procedure just described, it was normal for the architects of the Soviet criminal process to build upon Continental foundations. Elements of the contest style in the mixture lost their ideological support, however, and came under a cloud. The image of criminal process as a dispute between the state and the individual lay beyond any recognizable Marxian contours and contradicted the intensely activist nature of Soviet rule. The criminal process was to be made an effective instrument for the government to repress conduct dangerous to the state and to educate the masses.[18]

This orientation contributed to the strengthening of policy-implementing forms. Relatively meager testimonial privileges inherited from prerevolutionary days were not expanded but were instead curtailed. Family members, doctors, and priests could not refuse to testify against the defendant, as they can in most liberal Continental systems;[19] refusal or evasion of a duty to testify was viewed as a criminal offense rather than a minor infraction.[20] Because admission of counsel at an early stage was thought to increase unduly the opportunity for guilty defendants to obfuscate the truth, lawyers were excluded from preliminary investigations until after the investigator had completed his work and the cat was, presumably, out of the bag.[21] This exclusion was in sharp contrast with regulations supported by liberal Continental reformers to provide for counsel's contacts with the defendant as early as possible in the process. In consequence, the attenuation of the unilaterally probing character of prosecutions—an attenuation that accompanies counsel's participation in procedural activities—was postponed. In addition, the impact of such a streamlined inquiry was significantly enhanced by insistence that it be as thorough and exhaustive as possible. Investigators were required to explore every facet of the case and to persuade themselves of the defendant's guilt before concluding that a case deserved to go to trial.[22]

18. The image of criminal process as a contest with the state was diagnosed as originating *ex partibus infidelium*, from "bourgeois" ideology. See, e.g., T. Szabo, *The Unification and Differentiation in Socialist Criminal Justice*, 13 (Budapest, 1978). Nor was distrust of government—a potent source of procedural form in liberal thought—a consideration in devising Soviet forms of criminal justice: if the state is to transform society, it must be powerful and it must be trusted. Where a benevolent government is in power, it was felt, social ills may be less the consequence of oppressive governmental control than of oppressive lack of control; the party and citizenry should exercise whatever supervision against abuse is necessary. See M. A. Chelzov, ed., *Ugolovnyi Protsess*, 428–29 (Moscow, 1969).

19. However, as noted before, counsel was exempt from testifying against his client.

20. See *RSFSR Criminal Code*, art. 182.

21. See *RSFSR Code of Crim. Proc.*, arts. 199–207. Compare also *supra*, ch. 5, n. 58.

22. As previously noted, Continental systems are more reluctant than many common-law jurisdictions to take the defendant to trial on the basis of merely "orientative" investigations. Yet, on this point, Soviet process is much more demanding than traditional Continental mixed procedures: taking the defendant to trial on the mere "probable cause" that he committed a crime is branded by Soviet commentators as a "bourgeois" attitude. See, e.g., N. S. Alekseev and V. Z. Lukashevics, *Leninskie Idei v Sovetskom Ugolovnom Sudoproizvodstve*, 72 (Leningrad, 1970).

The strongest reason for the weakening of the contest admixtures in the design of Soviet pretrial stages was the increased stature and prestige of the office of state prosecutor (the Procuracy). No longer may the defendant's complaints against investigative action reach the court, as they can in non-Soviet Continental systems. Instead, these complaints must now be addressed to the procurator in his capacity as "guardian of legality."[23] He was made undisputed master of the pretrial process, supervising the work of investigators (his employees), and he, not the court, independently decided on such sensitive matters as the preliminary detention of the defendant. To view this towering official, linked to the very center of governmental power, as a mere "party" in dispute with the defendant made no sense at all. Rules devised by Continental liberal reformers to preclude the substantive use at trial of information obtained at earlier stages of the process—including police inquiries—were rejected as formalistic. As a result, the audit character of trials was strengthened, even in comparison with the conventional Continental amalgam. In harmony with the policy-implementing mode, even those judgments accorded legal effect could be revised if they were wrong on the merits; indeed, the grounds on which a "finally" decided case could be reopened became identical with grounds on which judgments not yet "final" could be appealed.[24] With relative ease, the stability of decisions could thus be traded off for accurate results mirroring the "objective truth."

It is instructive to look at these features of Soviet criminal prosecution through conventional Continental lenses: the investigative phases of the process seem orphaned of contest forms and too relentless in their probing; trials appear overly influenced by work done beforehand, too much of a foregone conclusion; the format seems too limited for effective action by defense counsel; stability of judgments seems too shaky and decisions too easily modified to the detriment of the defendant. In their totality, the features of the Soviet system outlined so far appear to Western European lawyers as a partial throwback to Continental inquisitorial procedure after the abolition of judicial torture but before liberals began to leaven it with elements of the contest style. Observe the subtle irony, however: such assessments reproduce almost exactly the impressions which common lawyers regularly express about the conventional Continental amalgam—impressions dismissed as caricatures by classical Continental lawyers, much as the similar impressions just registered are dismissed by officials in the Soviet judicial apparatus.

23. See *RSFSR Code of Crim. Proc.*, ch. 10. It must be realized that there is nothing sacrosanct to Soviets about court (as opposed to the Procuracy's) protection of the criminal defendant: the idea of the judiciary as an independent branch of government is rejected as a mystification of actual power relationships.

24. See *supra*, ch. 5, n. 64. Compare also *RSFSR Code of Crim. Proc.*, arts. 342, 379. It is true that in noncommunist Continental systems *ordinary* appellate remedies can be directed both against legal and factual errors, and that they operate both in favor and to the detriment of the defendant. But, after these remedies are exhausted, the stability of decisions is quite rigid: final judgments can never be reversed or altered on the ground of *legal* error favorable to the former defendant (such as a mistaken interpretation of a criminal statute beneficial to him); on factual grounds, final judgment can be changed to the detriment of a former defendant only in a very restrictive class of cases. See, e.g., *West German Code of Crim. Proc.* §362.

an ideology whose ambitions exceed its effective reach. While governmental ideologues insist that any dispute absorbed into the justice system provides an opportunity to implement some conflict-transcending policy, or at least to exert an educational influence on participants, the larger implications of cases are in practice often difficult to divine and their didactic potential may be dubious. Igor and Olga bring cases of such disappointing nature to Soviet courts every day that, confronted with them, the Soviet judge necessarily assumes the posture of a conflict resolver while other guardians of larger interests remain on the sidelines. The civil process now unfolds in ways that a common lawyer would hardly distinguish from civil actions in some Western Continental countries.[47]

This is not to say that the Soviet system fails to offer striking and original examples of the displacement of judicial conflict solving by administrative and managerial procedures. Where the economy is organized by an encompassing plan and the firms are owned by the state, disputes among economic agents cannot be considered in isolation from the overall functioning of the state economy. If problems arise in the preparation and execution of contracts among state firms, an administrative perspective on these problems necessarily prevails. Clearly, conflicts generated by the interaction of these firms are not the stuff conventional litigation is made of: they fall within the jurisdiction of a special tribunal, the Arbitrazh, obligated to institute a case on its own initiative if the firms involved have no wish to sue and the state interest calls for action.[48] In essence, Arbitrazh is an administrative agency and proceedings before it are at bottom administrative in nature.

Another area in which Soviet administrative processes swallow up conflict-solving forms is that encompassing reaction to complaints of illegal action taken by ubiquitous state officialdom. Citizens cannot sue the administration or other agencies of the state in court; the aggrieved or concerned citizen must try to enlist the help of the mighty Procuracy. In the exercise of its general powers of supervision, the Procuracy can investigate state agencies; it possesses broad "discovery" powers and can force officials to surrender documents or otherwise provide necessary information. But if in such circumstances an instance of "illegality" or a pattern of such behavior is detected, no court proceedings ensue: instead, the matter is brought to the attention of the appropriate hierarchical superior and is framed as a problem for internal resolution.[49]

47. This is especially the case with relatively informal civil proceedings patterned on the Austrian model. For a good sketch of this model, see A. A. Ehrenzweig, *Psychoanalytic Jurisprudence*, 266–69 (1971). Observe that the Soviet government officially disapproves of many market transactions that actually take place in Soviet society: if such transactions lead to disputes, they are settled in ways that avoid official scrutiny. In consequence, many matters never reach the civil court that would immediately raise larger policy issues. For conjectures on this point, see D. M. O'Connor, *supra*, n. 46, 60.

48. On the peculiar nature of proceedings before the Arbitrazh, see O. S. Ioffe, and P. B. Maggs, *Soviet Law in Theory and Practice*, 201–03, 306 (1983); R. F. Kallistratova, *Razresheniye sporov v gosudarstvennom arbitrazhe*, 12–20 (Moscow, 1961).

49. See *1955 Statute on Prokuratorial Supervision*, art. 23, ch. 2. Compare also G. Morgan, *Soviet Administrative Legality* (1962).

ii. THE CONFLICT-SOLVING PROCESS BEFORE HIERARCHICAL OFFICIALDOM

There are many ways in which proceedings structured as a two-party contest are affected by a multilayered judicial apparatus staffed with civil service bureaucrats. But it will suffice for comparativist purposes to examine the impact of this type of authority on the confrontational aspects of proceedings and on the requisite passive stance of the decision maker.

Several factors associated with hierarchical authority combine to reduce the lawsuit's potential for turning into a fierce disputation. Litigation chopped up in discrete installments and unfolding before several echelons of authority lacks a focal point for the unleashing of the partisan agon; the loser of one round may prevail in the next; and "punches can be pulled." Another factor relates to the ubiquitous reliance on documentation of activity performed at earlier procedural episodes: in preparation for a subsequent session, officials are expected to draw on the file of the case so that at least part of what they learn is no longer the direct product of party contest. The further the litigation progresses, the greater the concentration of such mediated information in the total pool. Remember also the tendency toward official exclusivity of hierarchical structures: at least some activities which an ideal conflict-solving process would entrust to the litigants become the monopoly of officials in charge of proceedings. But the greater the official share of procedural action, the more reduced is the scope for direct, unmediated interaction of the parties in dispute. Of course, no phase of the proceedings can be performed by the litigants alone in the total absence of the moderating effect of official presence. Quite naturally, then, the parties' contest before hierarchically organized bureaucrats tends to be low-keyed: confrontational aspects of the lawsuit are thus reduced or diluted.

How does the environment of hierarchical authority affect the passive role of the decision maker required by the conflict-solving mode of proceeding? As I have observed, notions of bureaucratic prerogative demand that he personally take charge of some procedural steps which authority of a different type would delegate or share with litigants and their counsel. In this sense, the hierarchical official as a conflict resolver may appear as a relatively active protagonist of the legal process. But in striking contrast to his stance in policy-implementing proceedings, he is not self-propelling: because initiation and termination of lawsuits, as well as the definition of issues, are all matters in which conflict resolution implies party sovereignty, he must be moved by the litigants. Once moved, he is far from a relentlessly probing investigator with the concièrge curiosity he evinces in the policy-implementing mode. Nor should he be expected to probe zealously on his own if his efforts can at any moment be rendered useless by the inviolable admissions and stipulations of the parties. Thus, springing from notions of bureaucratic prerogative, his primary responsibility for some procedural steps (e.g., interrogation of witnesses) tends to be treated loosely—he lacks drive and tends to be inert. In this deeper sense he is actually passive, in a reactive stance, and in need of prodding by the parties. But the absence of his investigative

zeal cannot be replaced by vigorous action of the litigants, given that the hierarchical apparatus of authority frowns upon private procedural enterprise.

Yet hierarchical authority does not necessarily stifle the litigants' control over the lawsuit. It has been noted that rationalist bureaucracies shape proceedings to their animating purposes, so that at least those aspects of party control that seem implicit in the conflict-solving purpose become more sacrosanct and untouchable than in a setting of procedural authority less committed to placing procedural forms into a consistent purposive scheme. Important reasons can no doubt be imagined that tempt the adjudicator to encroach on party control for the sake of larger interests. However, much better than their counterparts in a coordinate organization, hierarchical officials are prepared to live by the rigidities of a narrow conflict-solving role mandated by laissez-faire ideology: they are case-hardened professionals. Nor can they escape their narrow role—when this seems desirable to them—by exercising "inherent" discretionary powers. What they can and cannot do in the hierarchical apparatus is determined by relatively unyielding rules. In brief, 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.

It follows from what has been said so far that the conflict-solving process before hierarchical authority tends to be deprived of potent instruments of truth discovery. Parties themselves are not permitted to "privatize" fact-finding, and officials lack their usual drive in searching for the truth. But one should not fail to realize that in a reactive polity intensive and probing factual inquiries are much less acceptable with a hierarchical than with a coordinate judicial apparatus. In the former, factual inquiries are part of official prerogative, and even if initiated and their contours defined by private parties, the probing still comes from civil servants who bring the powers of government to bear on the administration of justice. Beyond this, the results of fact-finding are recorded in official documents of evidentiary significance, documents which travel as part of the dossier to the very center of the state government. In coordinate organizations, in contrast, fact-finding is readily delegated to private litigants, so that one member of civil society investigates another, and the products of the litigants' efforts are not readily available to ultimate power holders. All other things remaining equal, then, the independent inquisitiveness of hierarchically organized officials is more threatening to the vision of self-governing society than is the search for the truth in the legal process before coordinate officials. The former must be kept on a shorter leash.

Having thus outlined those characteristics of the hierarchical reactive process that are most important for comparative purposes, I shall leave abstract discussion to one side and now examine some real-world procedures that qualify as examples of the hierarchical reactive style.

Continental Forms of Civil Procedure

THE ROMAN-CANONICAL PROCESS. This prototype of Continental civil procedure was primarily the product of purposive efforts, dating from the twelfth

century, to adapt the dispute-settling mechanisms of the Middle Ages to the evolving structure of the Roman Catholic judicial authority. Where this authority was not faced with instances of "infamy" or "excesses", as in criminal matters, the initiation of lawsuits naturally remained an exclusive prerogative of the parties. After some initial hesitation, the definition of facts in dispute was also thought to lie in the hands of the litigants. But developing notions of bureaucratic propriety and order were deemed to require that the judge or some other court official personally take charge of a variety of procedural activities. To administer justice came to be regarded as an eminently technical, professional pursuit. Most important for comparative purposes was the demand that professional officials, *ex officii debito*, take over the examination of evidence offered by the parties. This examination proceeded methodically and could be stretched over several separate sessions. The very presence of the litigants at these sessions was deemed undesirable; it was feared that witnesses could be intimidated and confused, that disorder and disruptions could obstruct the calm and methodical ventilation of the truth. So while the parties were asked to suggest what questions were to be addressed to witnesses, their interrogation became part of exclusive official prerogative. It was regarded inappropriate for litigants directly to exchange documents of evidentiary significance: where a party was obliged to disclose a document, he was to bring it to the judge (*editio*). All procedural steps officially taken had to be recorded, not only for the inspection by the parties, but also to preserve the informational basis for the original decision maker and reviewing authority.[50] Under conditions then prevailing, the voyage of the file through all the levels of the appellate process sometimes took decades.

Yet it must be noted that the Roman-canonical process did not permit total domination of lawsuits by the litigants, even in areas where party control was in principle recognized; only private control over the beginning of a lawsuit was truly sacrosanct. Once proceedings got under way, court officials exercised important powers to intervene in proceedings for the sake of preserving justice (*aequitas*), so weighty in ecclesiastical courts. Issues and facts not presented by the parties themselves would sometimes be elicited. This may be doubted by those familiar with many legal maxims developed by scholars of the period—maxims that seem to assume a passive and inert civil judge. In practice, however, the principles expressed by these widely quoted sayings were laced with exceptions permitting the judge to turn activist.[51] It must also be realized that Roman-canonical authorities insisted—although with less rigor than in criminal mat-

50. For an excellent nutshell portrayal of the Roman-canon civil process, see R. C. Van-Caenagem, "History of European Civil Procedure," in *International Encyclopedia of Comparative Law*, vol. 16, 17–19.

51. While tags such as *ne procedet judex ex officio* (i.e., the judge should not act of his own motion) are regularly invoked, it will suffice to consider encompassing obligations of the ecclesiastical judge "moved by equity" to supplement the parties' action as enumerated by one of the greatest fourteenth-century authorities on Roman-canonical process. See Baldus de Ubaldis, *In Decretalium Commentaria X 1.5.3.*, nos. 6–10 (Taurinum, 1578). The latent activism of the judge in secular proceedings has recently been illustrated with the example of German lands by F. Bomsdorf, *Prozessmaximen und Rechtswirklichkeit*, 62–65 (Berlin, 1971).

ters—that the judge be the seeker of truth.[52] Testimonial privileges that emerged early on were based mainly on fear that certain witnesses might lie rather than on the acknowledgment of values that compete with the desire to establish the truth.[53] These departures from what a pure hierarchical reactive style may demand can easily be explained: the ideology of uninvolved government had yet to be born, and even had it been alive, it would have clashed with aspirations of authority, both imperial and sacerdotal. Besides, as was pointed out in chapter 1, the influential ecclesiastical government never fully developed characteristics associated with the hierarchical ideal—characteristics that support rigidity in preserving party autonomy, where this autonomy is recognized.

Only slightly modified, this process of ecclesiastical origin was adopted by secular courts, and its forms prevailed on the continent of Europe throughout the ancien régime. The habit thus became deeply ingrained to view the civil judge as responsible for proof taking. Equally ingrained became the habit of associating litigation with a series of discrete sessions without a clear focal point. Documentation, hierarchical appeals, and similar features also came to be associated with the forensic resolution of disputes.

THE CIVIL PROCESS OF LAISSEZ-FAIRE. Somewhat miraculously, old forms of civil procedure survived the upheavals of the French Revolution with fewer changes than the administration of criminal justice. While revolutionary reforms introduced the lay jury into segments of the criminal process, decision making in civil cases remained—even in the postrevolutionary period—the exclusive province of professional judges. Until the more recent advent of mass litigation, few pressures were felt to induce the temporal compression of civil litigation.

Yet within this ancient framework important changes began to take place at the turn of the nineteenth century. It was then that Continental scholars constructed a rigorous model of the lawsuit as a dispute of two autonomous parties before a passive court. Self-consciously derived from the conflict-solving objective of justice, this model was recommended as an ideal in the sphere of "mine and thine,"—property—where rights were regarded as waivable and social relationships were treated as amenable to independent ordering by civil society. The civil process, now imagined as a mere continuation of private transactions by other means, was to be governed by very broad notions of party autonomy.[54]

52. See W. Ulmann, "Medieval Principles of Evidence," 62 Law Quarterly Review, 77 (1946).

53. Concerns about perjury also led to the testimonial incapacity of the parties. To be sure, the litigants could be interrogated by the judge, but only for the purpose of formulating issues in dispute, not for the purpose of proving them. Because different officials often presided over pleadings and over proof taking, the separation of testimonial and nontestimonial roles of the parties was a technical refinement not without practical significance.

54. For references, see K. W. Nörr, *Naturrecht und Zivilprozess*, 25, 48 (Tübingen, 1976). The model in question was mainly the work of German scholars, following the seminal efforts of Nikolaus Gönner in the beginning of the nineteenth century. For the original version of the model, see N. T. von Gönner, *Handbuch des deutschen gemeinen Prozesses*, vol. 1, 268 ff. (Erlangen, 1801). A refined version of Gönnerian theory comprises two organizing principles for civil process: one postulates mastery of the parties over the rights in dispute (*Dispositionsmaxime*), the other, party

The scholarly model affected the administration of justice and deserves to be briefly outlined.

In some respects, party dominance over lawsuits was now indisputable and more rigorously maintained than in the old Roman-canonical practice. For example, not only were parties to be sovereign in determining the facts to be ascertained, but they were also to supply the legal theories applicable to the controversy. The earlier emphasis of Roman-canonical authorities on the discovery of truth was greatly weakened. The judge was resolutely denied any power to call witnesses on his own. The old maxim, "no one is expected to supply weapons to his adversary," now found strict applications: only minimal obligations were to be imposed on litigants to surrender to the court documents of evidentiary significance. Testimonial privileges, heretofore based on cognitive considerations, were now to be anchored in values independent of or in conflict with the search for the truth—privacy, family loyalty, even fear of financial ruin.[55] While the old rule that parties are incompetent to testify was rejected, so too was the idea that they could be compelled to offer testimony: a duty to make declarations against self-interest seemed inhumane. As I have remarked in chapter 4, if allowed to take the stand at all, the party was to have a sweeping right to refuse to answer questions. Some extremists even advocated the position that no prosecution for perjury should lie if a party decided to testify (to avoid harmful inferences from refusal to speak) and was caught lying.[56]

Although impelled by desire to allocate as much procedural control as possible to the parties, the architects of the new civil process were still constrained by deeply ingrained notions of judicial prerogatives. Self-executing party action, akin to American pretrial discovery, was not even contemplated; traditional judicial powers of interrogation appeared natural and were retained. Of course, judicial questioning did not appear overly disturbing, since Continentals were accustomed to the practice of the civil judge asking only questions suggested by the litigants.[57]

Upon examination, this model of civil procedure will be seen to reflect many features of the pure conflict-solving procedure defined in chapter 4, adapt-

initiative for procedural action (*Verhandlungsmaxime*). The implications of these organizing principles were widely followed in the legislation of Continental countries. For a comparative survey, see M. Cappelletti, La Testimonianza della Parte nel Sistema dell' Oralita, vol. 1, 353, 375 (Milano, 1962). This distinction was domesticated for American use in the 1930s. See R. W. Millar, "The Formative Principles of Civil Procedure," 18 *Ill. L. Rev.* 1–36 (1923). French lawyers followed their own paths, but reached essentially similar results as those following German theory. See E. Glason and A. Tissier, *Traité theorique et pratique de procédure civile*, 656–61 (Paris, 1926).

55. See *supra*, ch. 4, n. 53. For illustrations of the (to common lawyers amazing) right of Continental witnesses to refuse to answer if "faced with an immediate financial loss," see *Code of Civil Proc. of the Swiss Canton Zürich*, §159. Suprisingly, a similar provision appears in *Yugoslav Federal Law on Civil Procedure*, art. 227.

56. This view was sporadically reflected in legislation. For example, under Austrian influence, it found its way into the law of the Kingdom of Yugoslavia and was for a while retained by the communist government. See S. Triva, *Gradjansko Procesno Pravo*, vol. 1, 439–43 (Zagreb, 1965).

57. See *supra*, ch. 4, n. 50 and accompanying text.

ed to an environment of hierarchical bureaucratic judiciary. This model was adopted by legislation in several Continental Countries during the course of the nineteenth century, and in several others, it was viewed as a desirable blueprint for reform. As a result, the prevailing Continental forms of civil procedure were in important aspects then more rigorously attuned to narrow conflict resolution than coeval forms of civil justice in Anglo-American lands. Classical civil proceedings in common-law countries were a much more potent vehicle for the discovery of truth, and adjudicators were much less litigant-dependent or "reactive," than their counterparts on the Continent. This springs clearly into focus even if one's vision does not include—as it should—the equity side of Anglo-American civil process. Mainly because common-law observers of the European scene tended to be overly impressed by the highly visible judicial powers of interrogation, penetrating in criminal but harmless in civil cases, it became customary for common lawyers to label the Continental civil process as "inquisitorial."[58] At the same time, to Continental observers imbued with liberal ideology, many aspects of Anglo-American civil justice appeared insufficiently respectful of individual self-interest and overly probing—too committed to ascertaining the real state of the world.[59]

Civil Justice in the Welfare State. The apotheosis of party autonomy was to be of short duration. Before the nineteenth century was out, many Continental countries passed legislation curbing party control and "activating" the judge. If it were necessary for the "right" solution, he was now supposed to intervene in the framing of issues; he could demand from the litigants clarification as to what they allege and what they want to be proved; he could even correct some consequences of litigants' faulty advocacy. To the extent that he actually chose to inject himself into proceedings, he would introduce—to a degree—new factual and legal issues.[60] Moreover, broader duties were imposed on the parties to surrender evidence in their possession or to cooperate with the court in other ways so that "the truth may prevail."[61] From their inception, these legislative reforms were justified by rejection of the individualism associated with the tenets of classical liberalism.[62] But—especially in more recent times—some reforms can also be attributed to the crowding of dockets in industrial states. To be efficient, caseflow management necessitates the weakening of litigants' control over the progress of cases.

Yet, after all is said and done, the resulting departures from classical forms

58. For examples, see C. T. McCormack, *Handbook of the Law of Evidence*, 12, 503 (1954); E. M. Morgan, *Basic Problems of Evidence*, vol. 1, 60 (1957).

59. See the perceptive observations of M. Cappelletti, *Processo e Ideologie*, 332–33 (Bologna, 1969).

60. See R. Schlesinger, *Comparative Law*, 4th ed., 393 (1980). Practice varied from country to country regarding the extent to which judges actually abandoned their posture of noninvolvement.

61. In most countries these reforms were linked to the rise of consumer protection and similar phenomena of the welfare state. While Continental codes of civil procedure seldom provide broader discovery, new duties are usually imposed by special legislation. See *supra*, ch. 4, n. 66.

62. See F. Klein, *Der Zivilprozess Oesterreichs*, 186–87 (Mannheim, Leipzig, and Berlin, 1927).

of hierarchical conflict resolution are not as significant as might be expected. The characteristic piecemeal style continues to the present day, notwithstanding legislatively expressed preference for "concentrated" trials in the name of greater efficiency;[63] the file remains the backbone of proceedings, even as virtues of the viva voce are often extolled; judges still depend on the parties in important ways. Judges are denied powers to call witnesses freely or to exceed the contours of the controversy; to disregard the prayer for relief or to accord the plaintiff more than he has asked for is still forbidden. Generally speaking, the truth-finding potential of civil proceedings is rather limited, especially when compared to Continental criminal justice. The use of the party as a source of information is modest, even where mechanisms exist for extensive interrogation. Broad testimonial privileges remain largely intact.[64] In the still prevailing view, civil justice—as opposed to criminal—should be relatively unconcerned with accurate fact-finding.[65]

It will not have escaped the reader's attention that I have focused on suits brought in the litigant's self-interest. In welfare states, however, civil litigation is increasingly used for the protection, and sometimes also for the definition, of larger or "public" interests. The protectors of these interests can be either governmental officials or individuals and nongovernmental associations.[66] For comparative purposes it is important to emphasize the special difficulties facing nonofficial enforcement of public interests in traditional Continental systems. Predictably, the mainspring of the opposition originates in the hierarchical bureaucratic apparatus of authority: the fusion of public and self-interested action is viewed here with greater suspicion than in a setting of authority accustomed to rely on outsiders. Proper incentives for vigorous private enforcement of the public interest may easily appear corruptive. Hierarchical officialdom values a consistent, uniform approach and systematic action that citizens' suits in the public interest are not likely to supply. Some fear that the administration of justice itself might become unduly politicized.[67] It therefore appears preferable to entrust enforcement of regulatory policies and the protection of larger in-

63. See *supra*, ch. 2, n. 9.

64. Specialists in transnational litigation know that it is much easier to obtain information from witnesses in common law than in Continental civil proceedings. Thus, where financially acceptable, they use mechanisms of international judicial assistance to obtain testimony from common-law courts for use in Continental civil litigation or arbitration proceedings.

65. More effective fact-finding devices in civil than in criminal cases would be a "mismatch" of the two branches of justice. Compare H. Baade, "Illegally Obtained Evidence in Civil and Criminal Cases: A Comparative Study of a Classic Mismatch," 51 *Tex. L. Rev.* 1325–62 (1973).

66. A comprehensive survey of possible enforcers of the public interest can be found in M. Cappelletti, "Governmental and Private Advocates for the Public Interest in Civil Litigation," 73 *Mich. L. Rev.* 794–881 (1975). In pluralist countries, citizens' associations can and often do invoke the judicial process in opposition to the government.

67. See N. Luhmann, *Legitimation durch Verfahren*, 2d ed., 122 (Darmstadt, 1975). For special problems of "popular" actions in West Germany, see I. Markovits, "Socialist vs. Bourgeois Rights," 45 *U. Chi. L. Rev.* 612, 618 (1978). Compare also insightful remarks by H. Kötz, "Public Interest Litigation: A Comparative Survey," in M. Cappelletti, ed., *Access to Justice and the Welfare State*, 112–16 (1981).

terests to traditional official "promoters"; if they lack the requisite specialized knowledge, then new "specialized" officials should be appointed to avoid reliance on the haphazard action of people outside the official apparatus.

Conflict-Solving Forms in Continental Criminal Justice

THE OLD ACCUSATORIAL PROCESS. Earlier in this chapter I noted that a form of prosecution by the victim survived the rise of the inquisitorial process on the Continent and that, for a long time, this form was treated as the ideal design of criminal proceedings. Shorn of its early medieval features, it was adapted to the hierarchical organization of the judiciary and made quite similar to the Roman-canonical civil process from which it was for some time imperfectly distinguished. In this mode of proceedings, the victim of a crime controlled the initiation and termination of prosecution; albeit under pain of forfeiting a sum of money, he could withdraw charges at any time. The criminal defendant retained many attributes of a party, and although he could be subjected to questioning by the judge, coercion to extract answers from him was forbidden.[68]

In terms of practical importance, however, the ancient process *per accusationem* was almost totally eclipsed by the officially controlled inquisitorial procedure. The old form continued to play a part only in the area of minor crime, where authorities found little if any independent interest to enforce criminal law policy. Sporadically, defendants of the noble classes would lay claim to be treated according to this theoretically superior procedure, mainly because—even where contaminated with inquest forms—it was far less ruthless than the dominant process *per inquisitionem*.[69] Only in a small number of jurisdictions were absolutist bureaucracies strong and ambitious enough to wholly displace this form of private prosecution. The victim usually retained only "secondary" or "subsidiary" rights to set the wheels of justice in motion where responsible officials remained inactive; rulers found the mechanism useful as a check on their burgeoning judicial bureaucracy.

MODERN PRIVATE PROSECUTION. Pockets of such prosecution survive in several Continental countries, where a limited number of misdemeanors can be prosecuted only if the victim presses a criminal charge. Typical examples are minor offenses against dignitary interests, some forms of petty larceny, or the infliction of minor bodily injury. Where the public prosecutor is not entitled to take over the prosecution of these misdemeanors without the victim's consent, the private prosecutor retains exclusive control over the continued existence of proceedings and over the scope of factual inquiry.[70] But the resulting criminal case does not

68. For the old Italian forms of this process, see H. Kantorowicz, *Albertus Gandinus und das Strafrecht des Skolastik*, vol. 1, 87–120 (Berlin, 1907). For the variant in Carpzov's Saxony, see B. Carpzov, *supra*, n. 8, Quest. 106.

69. See E. Schmidt, *supra*, n. 7, 100. In some countries the importance of the accusatorial process was eroded by permitting the judge, confronted with serious proof difficulties, to "switch" into the inquisitorial mode. Compare Carpzov, *supra*, n. 8, Quest. 107, no. 59.

70. This is the case in Austria. See *Austrian Code of Criminal Procedure*, §46. By contrast, the West German prosecutor can always replace the private party, who recedes into the role of an intervenor with a watching brief. Compare J. Langbein, *supra*, n. 38, 101.

unfold exactly as does a Continental civil lawsuit. For example, the failure of the defendant to contest the charges does not provide a dispensation from judicial guilt determination.[71] Because trials in private prosecution cases are not preceded by extensive official investigations, much of their "audit" character is lost.

Why are such citizen actions included in the category of hierarchical conflict resolution? Are they not engaged in implementation of state policies toward crime and aimed at attaining the usual goals of punishment? The answer emerges from analysis of the motives that impel the victim to press criminal charges. In some cases, he pursues his financial interest in order to obtain a favorable settlement of the damage claim arising from the misdemeanor; private criminal prosecution gives the victim leverage in the ongoing bargaining process with the defendant—the tortfeasor. However, where the privately prosecuted misdemeanor does not give rise to a separate tort claim or can lead only to "symbolic" damages, the victim is driven by desire to obtain vindication: the fines sought in private prosecution (imprisonment is hardly ever imposed) can be regarded by a comparativist as rough substitutes for the nonexistent punitive damages that could otherwise be sought in a tort action. Phrased differently, the fines sought provide an outlet for feelings that could otherwise be satisfied by hefty damage awards.[72] Observe, parenthetically, that most conduct subject to private prosecution on the Continent usually constitutes an intentional tort—but not a criminal offense—in Anglo-American systems.[73] What the state actually tries to achieve in offering its forum to a private prosecutor is to provide a safety valve for private outrage, a valve whose absence could lead to disturbances—possibly to the private exaction of vengeance. It cannot seriously be maintained that what the state tries to achieve is to implement its usual punishment goals—moral suasion, deterrence, rehabilitation, or similar ends. In short, proceedings upon a private charge serve no policy goals independent of the resolution of an interpersonal conflict; the existence of these proceedings is conditioned by the existence of such a private conflict. Hence cases of private prosecution for misdemeanors on the Continent may justifiably be treated as instances of disguised conflict resolution or as a peripheral aberration in the context of policy-implementing justice. It should not be surprising that the Continental apparatus of justice tries to discourage such private action or is most reluctant to convict on private charges.[74]

Outside of the area of minor crime, private control over law enforcement may be found only in a limited number of Continental countries as a check against the inactivity of officials primarily responsible for criminal prosecutions. The French public prosecutor, for example, does not completely monopolize

71. However, the defendant can persuade the private prosecutor to withdraw the charges and settle out of court.

72. The difference remains, of course, that whereas punitive damages go to the victim, the fine accrues to the state.

73. This is the case with some injuries to personal reputation and privacy. Only very recently have a few Western European countries made these injuries actionable torts. In this connection see the famous *Soraya* case as reported in R. Schlesinger, *supra*, n. 60, 580–81.

74. For West Germany, see Kunert, in Löwe-Rosenberg, *Strafprozessordnung*, 22d ed., comments to §374, comment no. 1 (1972); H. J. Hirsch, "Gegenwart und Zukunft des Privatklageverfahrens," in *Festschrift für Richard Lange*, 815–17 (Berlin, 1976).

criminal law enforcement; the victim who shows that he is entitled to claim tort damages can request that the investigating judge institute criminal proceedings if the *procureur* has failed to do so.[75] While the prosecutor technically remains responsible for the conduct of such victim-initiated proceedings, he usually leaves the victim to do the prosecuting. Similarly, in Austria, the victim has a right to take over the prosecution from inactive state officials, who nevertheless can take charge at any stage of the criminal process.[76] Undoubtedly, even if only secondary, such private powers detract from rigid hierarchical arrangements as I have defined them. The private individual can overrule the agenda of state officials; his grievance against the accused takes precedence over the official appraisal of the best course of action. But it would be wrong to assume that such secondary prosecutors seriously detract from or threaten the usual tone of Continental proceedings dominated by the civil service judiciary. Once under way, proceedings are firmly under official control, and so is the decision whether punishment should be imposed. Private settlements are not dispositive because, as has been noted, the public prosecutor can decide to continue the prosecution even where the defendant and the subsidiary prosecutor have made an out-of-court settlement and the subsidiary charges have been withdrawn. In short, proceedings still serve the implementation of state policy and the private voice remains muted.[77]

iii. THE CONFLICT-SOLVING PROCESS BEFORE COORDINATE OFFICIALDOM

Now to be canvassed is the realm of judicial apparatus dominated by amateurs who take turns in administering justice, who are free from hierarchical supervision, and who are receptive to considerations of substantive justice. How do such coordinate officials act as conflict resolvers, presumptively imbued by the ideology of laissez-faire? In other words, what imprint does coordinate organization leave on the conflict-solving process?

At the outset, it is important to recall the pressures toward temporal concentration of proceedings generated by the coordinate organization. Because of these pressures, it is unlikely that the parties' dispute will be orchestrated staccato, or as a sequence of discrete installments: the contest of the parties is

75. It is not necessary for the victim actually to file a civil complaint; it suffices to show that damages could be sought *in principe*. See R. Merle and A. Vitu, *Traité de Droit Criminel*, 2d ed., vol. 2, 67–68 (Paris, 1973). For a good overview of the French *partie civile* action, see A. V. Sheehan, *Criminal Prosecution in Scotland and in France*, 21–22 (1975). Recall that the French judiciary has a long tradition of being empowered to investigate independently of the views of state prosecutors: *toute juge procureur general*.

76. See *Austrian Code of Crim. Proc.*, §48. In practice, subsidiary action independent of a parasitic civil suit for damages is of little importance. Observe that in Austria the public prosecutor does not participate in the subsidiary prosecution, but can take it over.

77. Strong movements are underfoot that would curtail the rights of private individuals to interfere in state prosecutions. For France, see A. V. Sheehan, *supra*, n. 75, 23.

preferably waged during a single, continuous forensic episode. Further concentration of the lawsuit derives from the absence of a reprise of the contest before higher levels of authority: proceedings in the first instance are normally final in nature.

Of course, if the single procedural episode—the trial—is to flow continuously, it must be prepared. But because there are no low-level officials to perform necessarily discontinuous detective work, trial preparation is left to the parties in dispute: each assembles evidence in support of his contentions. In an official apparatus whose ranks are fluid, there can be no strong objection against this delegation of activity to outsiders; as I have repeatedly stated, where officials are themselves amateurs, they can assert few compelling reasons for excluding other amateurs. Special devices, unknown to hierarchical authority, appear to enforce compliance with private investigative demands. As parties are driven be self-interest, these private investigations can become powerful vehicles for the discovery of information. Ideally, the preparatory activity of the parties does not involve officials at all; authorities must be brought in only to resolve possible subsidiary disputes regarding the proper reach of private preparatory activity. No longer is a lawsuit identified with action presided over by officials, as in proceedings before hierarchical officials.

The adjudicator characteristically comes to the case unfamiliar with the controversy. He cannot study an official dossier concerning preparatory activities where there is no such document. Inevitably, a great deal of procedural action—and at trial, too—is performed by the litigants. At least initially, they are the only ones who can interrogate witnesses effectively and present other evidence. Accordingly, information is conveyed in an intensely disputational form that permits each litigant to challenge immediately what the other has elicited or presented. Of course, trials may easily become noisy squabbles, but this spectacle can better be tolerated by coordinate officials—used to this sort of thing—than by methodical bureaucrats. Nor is the weak mediating role of officialdom the only source of the fierce confrontational character of proceedings; the intensity of forensic contest is further enhanced by the possible finality of the verdict. Since there is no regular "next stage" before higher authority to which the loser can appeal, the party cannot afford to temporize but must say to himself "my time is now." Briefly, then, coordinate authority reinforces the morphology of contest which is demanded by the conflict-solving process.

Is this also true of the adjudicator's passive posture? In an important sense, the answer is affirmative. With so much trial action conducted by the litigants, the adjudicator easily recedes into passivity: he listens to the arguments and proof advanced by the parties, he monitors their compliance with the ground rules of a fair contest, and at the conclusion of the trial, he reaches a decision, announcing which side has prevailed. His detachment is supported by the belief—generated by the ideology of the reactive state—that the forensic dispute presents no larger issues exceeding the desirability of its resolution, and that letting the parties fight it out is the best means to absorb a conflict.

The conception of legal proceedings as conflict can realistically be extended