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## Calamandrei: Procedure and Democracy

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PROCEDURE AND DEMOCRACY. By *Piero Calamandrei*. Translated by *John Clarke Adams* and *Helen Adams*. New York: New York University Press. 1956. Pp. xv, 104. \$4.50.

One of the most noteworthy characteristics of civil procedure in the United States, and of the great movement for procedural reform which has recently had so much success, has been its isolation and inbreeding. The American procedural scholar has been necessarily expert as to the varying procedures in American jurisdictions—though he tends to avoid Louisiana with a shudder—and he is familiar also with English experience, at common law, in chancery, and more lately, under the Judicature Act. But this enumeration virtually exhausts the sources to which he is accustomed to resort. With a few notable exceptions, students in this field have made little effort to enrich civil procedure by a comparative analysis of other domestic systems of procedure which might well be suggestive, such as the procedures used in criminal courts, administrative agencies, admiralty and arbitration.<sup>1</sup> Nor have most of our reformers shown much awareness of or interest in procedural developments in countries which do not enjoy the common law.<sup>2</sup>

In part this insularity may result from the same factors which limit comparative law study generally in the United States—language barriers, and the imagined difficulty of understanding an entirely different legal tradition, have long deterred all but the most stout-hearted in fields other than procedure. But I believe there is a special factor applicable only to procedure. Too often civil procedure is approached in a technical, vocational manner rather than as a subject of deep theoretical interest. The practitioner is generally content to know only the code of his own state, and his limited interest has been reflected in much—but by no means all—of the teaching and research about this subject.

Dr. Calamandrei's little book, now made available in an extremely felicitous translation, demonstrates very forcefully how much we have been

<sup>1</sup> One conspicuous exception is *VANDERBILT, CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* (1952), which combines civil procedure with criminal procedure in a single set of teaching materials.

<sup>2</sup> The handful of books and articles on procedures in other than common-law jurisdictions are cited in *CLARK, CODE PLEADING*, 2d ed., §3 (1947). Judge Clark has been one of the few Americans to treat procedure jurisprudentially rather than vocationally.

missing by these limitations on American procedural research. The author is professor of civil procedure at the University of Florence, a successful practitioner, a sometime member of the Italian Parliament, and, according to Edmond Cahn's foreword, "enjoys an illustrious international reputation in the law and philosophy of civil procedure." (p. v)

The author demonstrates in these few pages how well-merited that illustrious reputation is as, with keen insight and no little charm, he analyzes the central problems of procedure. Though his examples are taken usually from the civil law systems with which he is most familiar, the problems discussed are universal. The issues Dr. Calamandrei considers are well-known in American procedural reform and his thoughtful and provocative comments are fully applicable here.

He begins with an examination of the relation between legal procedure and judicial custom: a code takes form as a rationalization of existing practices, but the code, in turn, has meaning and application only as it is interpreted and used by lawyers and judges who vary the code in the light of their particular needs and habits. ". . . The judicial process as it is written in the Code is only an empty mold, which produces different results according to the particular substance poured into it. . . . In this way procedures duly written in the law may become atrophied and disappear in practice, while, conversely, methods of procedure can spring up in practice that are unknown to the written law." (pp. 10-12) The American reader thinks immediately of the "cold, not to say inhuman, treatment of the infant code" attributed to New York judges<sup>3</sup> as compared with the liberal interpretation of the same code in, for example, Minnesota, and he notes how the pre-trial conference has become a useless, time-wasting procedure in state courts in Chicago, while splendid results are being achieved under a virtually identical rule in the federal courts in the same city.

The next three lectures examine the role of the judge. The first of these considers the notion that the judge is a mere automaton applying an impersonal "rule of law." Dr. Calamandrei's answer is unequivocal: ". . . in every interpretation of the law there is a re-creation, and individual inspiration is the decisive factor." (p. 31) There follows a discussion of the "independence" of the judge, which the author rightly praises as the ultimate goal toward which all reform must aspire. "Independence" is defined as meaning both freedom from selfish motives and freedom from hierarchic control, and it is shown how difficult the latter element is to achieve so long as the government has administrative responsibility for the courts and judges are motivated by desires for promotion. Dr. Calamandrei makes the original and imaginative suggestion that the traditional secrecy of the judges' chambers does a disservice to justice, and may tend to diminish the

<sup>3</sup> The famous phrase is that of Chief Justice Winslow in *McArthur v. Moffet*, 143 Wis. 564 at 567, 128 N.W. 445 (1910).

independence and sense of responsibility of the judge; without committing himself, he notes the interesting practice of the Mexican Supreme Court, where the judges hold their conference in open court.

The author concludes his discussion of the role of the judge by considering the practice of written opinions, which he regards as important and useful even though recognizing that the opinion is a rationalization of a decision already intuitively made. Consideration of the role of reason in procedure naturally leads the author to the question of the jury. The jury system, abolished under the Fascist regime in Italy for political reasons, has not been re-established, and Dr. Calamandrei suggests that this is wise: ". . . the traditional jury system, in which the jurors were called on to judge without giving the reasons for their verdict, seems to have been fashioned—as experience has borne out—for the very purpose of encouraging the jurors to judge unreasonably; and so, rather than the faithful expression of the social conscience, their verdict often appeared to be the triumph of pure irrationality, an irrationality that was all the more dangerous in that it was not susceptible to appeal." (pp. 56-57) The argument is an interesting one, and it will surely appeal to many Americans at the present time when the desirability of retaining the civil jury is being much discussed. But it may be suggested that Dr. Calamandrei, on this point has discounted unduly the presence of important values in the democratic process other than reasonableness. The author makes frequent and suggestive use of an analogy between civil procedure and parliamentary procedure. If that analogy can be used here against him, it may be argued that, subject to minimal constitutional bounds, a legislature is not required always to act rationally nor must it give a reasoned opinion to support its every action. The jury, which like the legislature is representative of community sentiment, should be similarly free to express the collective conscience of the community regardless of the dictates of pure logic.

A chapter on the dialectical aspects of judicial process centers attention on the relationship of the parties to each other and to the court. The author considers this relationship to be the "most precious and typical characteristic" of modern civil procedure. (p. 74) He makes a strong argument for preservation of the adversary system, and he is concerned for the freedom and independence of the parties. A dominant theme in current American reform is to centralize power over the course of the proceedings in the hands of the judge, and correspondingly to diminish the role of the parties and their lawyers. Already procedures have been widely—and, I think, wisely—adopted which give the judge virtually uncontrolled power over the form and method of trial<sup>4</sup> and of pre-trial proceedings,<sup>5</sup> and a

<sup>4</sup> See, e.g., Rules 42 (b) and 49 of the Federal Rules of Civil Procedure.

<sup>5</sup> Under the federal rules and similar state systems, the judge is given almost complete freedom to determine such vital matters as: whether to hold a preliminary hearing on various important defenses or postpone them until the trial, F.R. 12 (d); whether to have a pre-trial conference, F.R. 16; and the scope of discovery, F.R. 30 (b), (d).

similar power over the admission of evidence and the use of expert witnesses looms on the immediate horizon.<sup>6</sup> Dr. Calamandrei probably would deplore this movement. He discusses proposals during the final years of the Nazi domination of Germany by which it was planned to abolish the freedom of the parties and to provide a procedure where all initiative would emanate from the judge. It is apparent that the author regards such proposals as typical of the totalitarian regime in which they were made, and that he considers them unsuitable for a democracy.

The final chapter is concerned with the respect for the individual in the judicial process. It considers such topics as the practical meaning of the equality of citizens before the law, the manner in which financial inequality between the parties may prevent them from obtaining equal treatment in the courts, and the great problem of the right to counsel, which the author considers "the most important indication of respect for the individual in the judicial process." (p. 93)

If there is one fundamental theme which emerges from these lectures, it is that judicial procedure has its roots in, and is a miniature of, the kind of government which a nation enjoys. I have already noted the fruitful use Dr. Calamandrei makes of the analogy between the judicial and parliamentary processes. The desirability of mutual confidence among the three parties to the judicial debate, the importance of respect for the individual, the requirement that judges be independent, the role of custom in relation to the codes—all of these are elements of civil procedure as western nations have known it, but they are also essentials in our broader commitment to the ideals of parliamentary democracy.

To the American student of procedure, fresh from bitter debates on such earth-shaking topics as whether a defendant should be given twenty days or thirty to file an answer in an action, such a grand conception as this is both startling and illuminating. But this is the level on which we must think if we are ever to achieve a real procedural jurisprudence and make our codes something more than an unrelated collection of arbitrary rules.

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<sup>6</sup> See, for example, the proposed Uniform Rules of Evidence, endorsed by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the American Bar Association. Rule 45 of these rules would permit the judge to exclude otherwise competent evidence if he believed its probative value was outweighed by its tendency to confuse the jury. And rules 59 to 61 would authorize the judge to appoint his own "impartial expert."