THE FACES OF JUSTICE AND STATE AUTHORITY

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A Comparative Approach to the Legal Process

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To My Parents

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Acknowledgments

The idea for this book stemmed from a felt need to reconcile my native and my adopted legal cultures. To bring this idea to fruition might have been too lonely an endeavor without my friend Bruce A. Ackerman: he constantly encouraged me to continue the project, prodded me to refine its basic organization, and unstintingly shared his ideas about how to integrate insights from my past and present professional lives. But since our frequent exchanges were also animated by a spirit of amicable disagreement, he is happily absolved of any complicity in specific lines of argument I follow.

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If the title of this book seems consciously to echo Sybille Bedford's *Faces of Justice*, it reflects my admiration for her vivid and colorful reportage from the courtrooms of Europe.

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Introduction

An immense and bewildering subject opens up before one who contemplates the diversity of arrangements and institutions through which justice is variously administered in modern states. The range of diversity is such that it eludes expression in terms of a common vocabulary and makes us uncertain about the adequacy of our basic points of reference. Does the legal process require, as is sometimes believed, an interaction of three independent sides—a claimant, a respondent, and a decision maker—or can it also take the form of an *affaire à deux* between an individual and a state official? For the process to retain its legal nature, is it necessary that it be controlled, directly or indirectly, by a state "judge"? What are the essential attributes and functions of this official? Is he primarily a conflict resolver, or an enforcer of state policy, an educator, and a *therapeuta?* Do individuals implicated in proceedings remain "parties" if they are turned into evidentiary sources, suppliers of information needed by the state to pursue its policies and programs? What are the minimal requirements of due process in modern states? These and many other questions cry out for explication because of the variety of answers given them in modern legal systems.

Not all differences in the institutional setting and in the forms of justice are visible at first sight. Some lurk behind superficial similarities and can be discerned only on close inspection. No wonder, then, that a consensus is sometimes proclaimed on points where agreement is mainly a rhetorical achievement. Virtually all states subscribe to the view that judges should be independent and that the accused should be presumed innocent until proven otherwise, but the unanimity begins to break down as soon as one considers the implications of these views and their operational meaning in the administration of justice of various countries.

It cannot be denied that on many such issues divergent arrangements and clashes of opinion about existing arrangements can be found within a single country. This is clearly illustrated by the crazy quilt of variant procedural and institutional patterns in American jurisdictions, and by the persistent debate over reform of the American administration of justice. Yet no matter how wide the

range of differences appears domestically, to an external vision such internal disunity often seems but a variation within a larger identity: notions of what is "fair" and "orderly," of how judicial institutions should be structured, and similar parameters for the choice of alternatives are frequently shared. Modes of categorizing issues are generally and unreflectively accepted: the idiom in which the debate proceeds is distinctively the same.

To get a sense of the much wider range of actual differences and of the limits on the community of discourse, one need not go outside the Western world. It suffices to consider some well-known—albeit ill-defined—contrasts between Anglo-American (common-law) and Continental (civil-law) systems of procedure. Proper ways of developing proof and argument are notoriously different in the two settings: direct and cross-examination by lawyers on one side, judicial interrogation on the other. That the criminal defendant can waive the right to trial by pleading guilty appears normal to Anglo-American lawyers, but strangely inappropriate to Continental lawyers in whose systems all cases—regardless of whether the accused confesses—must go to trial. That the civil party has the right not to testify is widely accepted in Europe, but almost shocking to Anglo-Americans. That most common-law systems place more severe restrictions on evidence gathering in criminal than in civil cases is almost beyond comprehension on the Continent. Less familiar, because more difficult to identify, are discrepant ideas on some basic issues such as the place of the trial in relation to the preliminary and the appellate process, or the precise nature of the judicial office. If unobserved, these subtle differences can cause serious misunderstandings between Anglo-American and Continental lawyers. Each group then suddenly discovers illusory bonds of commonality and a family resemblance on its side of the divide that separates the administration of justice in civil- and common-law countries.

Moving east, as our vision should at this late stage of Western affairs, the provincialism of our discourse surfaces in different ways. The administration of justice in the Soviet Union and its European followers exhibits many aspects that must strain conventional categories and offend legal sensibilities of Western lawyers, be they of common- or of civil-law variety. Common lawyers may find the role of the judiciary and of the bar too narrow in Western Europe, but this reduction seems only one of nuance when set against the diminished role of judges and lawyers in the Soviet Union. Traditional Western concepts are also offended by the relative ease with which judgments can be altered in communist systems. On the other hand, while there is increasing talk in the West about "symbolic functions" of the legal process, even relatively radical proposals for reform seem timid and modest compared with the strongly "edifying" overtones of Soviet procedural style. Farther east, in China one encounters systems of justice so different from ours that a discourse inscribed with the particularities of Western development fails us almost completely. Observed through conventional Western lenses, processes through which Chinese justice is administered hardly qualify as "legal": trials, lawyers—even courts or law as a semi-autonomous discipline—appear extrinsic and dispensable.

Can this stupendous diversity be made intelligible, or reduced to a manageable set of patterns? At a minimum, can a conceptual framework be developed to assist us in tracing similarities and differences in component parts? Such a framework is the principal theme of this book. Reflection on this topic has been quite extensive: diverse analogies have been explored, moving on different levels and in different segments of the legal process. Quite unsurprisingly, where some would locate unity within an apparent variety, others find variety within an ostensible unity. Reconciling these separate lines of inquiry has become so difficult that it is tempting to leave aside the punishingly copious literature the inquiry has spawned. But this temptation is to be resisted: it would seem flippant to suggest new approaches and add to the cacophony of voices without first indicating reasons for dissatisfaction with what has been thought and said before. Hence the fortunes and misfortunes of the most notable families of inquiry must be sketched in the following brief prolegomenon.

i. ADVERSARIAL AND INQUISITORIAL SYSTEMS

One well-trodden path that many have followed is to oppose adversarial against nonadversarial or inquisitorial systems. In the twelfth century the dichotomy was already in use to distinguish a process that required the impetus of a private complainant to get under way (*processus per accusationem*) from a process that could be launched in his absence (*processus per inquisitionem*). In later times this distinction was used by Continental jurists in a variety of contexts and acquired several technical meanings.[1] It is only more recently that it came to be used by comparativists on a broader scale, mainly to express the contrast between Continental and Anglo-American administration of justice. But having escaped from the relative exactness of internal legal usage, each label now denotes distinctive clusters of traits in shifting combinations, not infrequently conflicting with one another. Only the core meaning of the opposition remains reasonably certain. The adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The nonadversarial mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities.

Beyond this core meaning uncertainty begins. It is unclear how far the adversarial process yields to the wishes of the parties ("how passive the judge?") and how pervasive official control is in the inquisitorial mode ("how active the

1. The most important use was to distinguish and explore the relation between two types of the criminal process, one of which (the inquisitorial) prevailed in practice, whereas the other (the accusatorial) was a theoretically superior and preferable form. See A. L. Homberk zu Vack, "De diversa indole processus inquisitorii et accusatorii," in J. F. Plitt, ed., *Analecta iuris criminalis*, 369–72 (Francoforti-Lipsiae, 1791). Until recently, more pragmatic common lawyers have refused to theorize about the administration of justice: the utility of scholarship drifting across the Channel was, on the whole, quite suspect.

officials?"). Each concept is endowed with features of a different shape according to whether discussion focuses on criminal cases, civil procedure, or the administration of justice in general. Particularly confusing is the habit of incorporating into the two models of procedure various traits whose relation to the opposition of contest and inquest ideas is tenuous at best. For example, in the inquisitorial mode one finds features such as a career judiciary, preference for rigid rules, and reliance on official documentation, whereas the adversarial mode embraces jurors as decision makers, discretion in decision making, and an attachment to oral evidence.[2] The more each concept embraces such loosely knit collections of characteristics, the more obvious it becomes that the premises of the opposition are uncertain or ambiguous.

Another dimension is added to the complexity by the inclination of both Anglo-American and Continental lawyers to develop native variations on the theme of adversarial and inquisitorial proceedings. On the Continent, lawyers continue to attribute to the opposition a more technical and descriptive meaning, and they think about the allocation of control over the process—either to the officials or to the parties—within parameters that appear normal to Continentals in light of their historical experience. Matters such as the interrogation of witnesses seem "naturally" to be the responsibility of officials in charge of proceedings, so that alternative ways of proof taking are not included in the contrast of adversarial and nonadversarial forms.[3] To Anglo-Americans, on the other hand, the two concepts are suffused with value judgments: the adversary system provides tropes of a rhetoric extolling the virtues of liberal administration of justice in contrast to an antipodal authoritarian process—such as the system of criminal prosecutions on the Continent prior to its transformation in the wake of the French Revolution.[4] Furthermore, matters that can be allocated either to the parties or to the decision maker are imagined in light of Anglo-American experience, so that the adversarial style also includes, among other features, the partisan presentation of evidence.

Much of the resulting confusion is due to the fact that criteria remain uncertain for the inclusion of specific features into the adversarial and the inquisitorial types. Promiscuously intertwined, two basic approaches to this problem can be discerned. One approach is to conceive the two types as portrayals of two distinctive groups, descendants of actual historical systems: one type embraces features common to procedures in the tradition deriving from England, while the other similarly relates to procedures in the Continental tradition. Now

2. See, e.g., A. Goldstein, "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure," 26 *Stanford L. Rev.*, 1009, 1017–19 (1974).

3. The interrogation of witnesses by the judge came to be viewed as an essential part of the judicial office as early as the twelfth century, so that it appeared "natural" that proof taking be in the hands of the judge in both inquisitorial and accusatorial versions of the legal process.

4. This usage is sometimes reflected in court decisions. See, e.g., *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966). Viewed against the background of their history, Continental lawyers place their contemporary systems of prosecution somewhere midway between "inquisitorial" (prerevolutionary) and "accusatorial" (reformed) forms. In contrast, common lawyers often refer even to contemporary Continental systems as "inquisitorial": from their standpoint both pre- and postrevolutionary Continental forms easily seem like branches of a common parent stem.

if this implies an attempt to set up models to which all Continental and Anglo-American systems would conform, the task becomes Sisyphean: the lowest common denominators of each system are unstable and constantly changing. As soon as a feature is rejected by a single country, it must be exorcised from its respective model; more trivial tricks of the style cannot be distinguished from its important components. It should scarcely be surprising, then, that those who subscribe to this understanding of the typology offer only "examples" of adversarial and inquisitorial systems and are unable to articulate the respective types as definite compositions of procedural and institutional patterns. To be sure, the first approach can also be understood to comprise only features that somehow "characterize" the Anglo-American and Continental traditions of administering justice.[5] Inevitably, however, the criteria for inclusion of features into the models become numerous and difficult to organize coherently: traditions embrace analytically separate matters pertaining to the structure of institutions, choice of procedural form, and similar characteristics that may coexist in unresolved tension. Doubtless, only some of these multiple characteristics can be related to the theme I have identified at the core of the opposition between inquisitorial and adversarial systems. In short, the typology becomes cumbersome and difficult to employ as an instrument of analysis. It is of very limited use in providing comparativist orientation beyond justice systems in the West.

The other approach to the typology goes a greater distance in detaching the two modes of the legal process from contingencies of history: it involves a search for and the articulation of ideas that are capable of molding forms of justice into recognizable patterns. Once obtained from observation of actual systems, these ideas assume, so to speak, a life of their own. Their implications for procedural form can be consistently traced over a wide range of procedural issues, whether or not any actual system goes so far as to embody all these implications. In their totality, the entailments of the ideas constitute the characteristics of the type. One such idea can be to entrust procedural action to the parties and another, to entrust it to a nonpartisan official: the implications of these two ideas can then be traced out to issues, such as who controls the initiation and the termination of proceedings, their subject matter, the taking of proof, and the like—even if existing systems, in varying combinations, entrust only some of these matters either to parties or to a nonpartisan official. Where this second method is applied, the adversarial and nonadversarial processes become fictitious creatures, seldom if ever found in reality, but under certain conditions useful for analyzing it and making it intelligible. Just as a particular building can be "recognized" in terms of an architectural style, so an existing process can be assigned to a type.[6] Thus conceived, the typology can be used as a neutral map across Continental and

5. See, e.g., A. Goldstein, *supra*, n. 2, 1017.

6. Comparison with styles in art can be carried further. To classify a work of art as belonging to a particular style, it is thought sufficient that the work encompass some, though not all, elements of the stylistic ideal. For example, although the Notre Dame Cathedral in Paris, lacking spires, does not fully express the vertiginous, sky-bound drive of other Gothic cathedrals, it is still unmistakably within the Gothic convention. It seldom occurs that a particular work of art fully embodies a style, as Boucher, perhaps, epitomizes the rococo.

Anglo-American countries: adversarial traits can be identified in continental Europe and can even be quite conspicuous in some branches of the administration of justice, while inquisitorial features, sometimes quite conspicuous, can be found in Anglo-American lands. Of course, the typology can also be applied to actual systems outside the Western legal tradition.

The effort to understand forms of justice in modern states is better served by this second approach. But if narrow and sterile constructs are to be avoided, the background against which lawyers oppose contest and inquest, official and party control, and similar structural principles of the legal process must be explored. Moreover, vain attempts to express the core of the contrast between Continental and Anglo-American administration of justice by juxtaposing such concepts must also be abandoned. Most features that constitute the essential contrast cannot be captured by them, especially if one's vision extends beyond the narrow area of criminal procedure.

ii. LEGAL PROCESS AND THE SOCIOECONOMIC ORGANIZATION OF THE STATE

A distinctive family of inquiries into the diversity of procedural forms has emerged from efforts to relate the legal process to the economic and social organization of modern states. Although many aspects of the administration of justice can profitably be studied from this perspective (e.g., how haves and have-nots fare in the courts), it has proved exceedingly difficult to relate the *design* of the legal process to any presently available classification of states according to socioeconomic variables.

This can be illustrated best by misfortunes that have befallen studies inspired by Marx's distinction between various "modes of production" (feudalism, capitalism, socialism, and the like) as ultimate determinants of social institutions, including the legal system. It was hoped that reliance on these categories would provide the Ariadne's thread by which to find one's way out of the labyrinth of procedural diversity: in theory, it should be possible to identify a basic feudal, capitalist, or socialist form of administering justice that, albeit permitting internal variation, provides the necessary orientation and possesses the greatest explanatory power.[7]

But the insights promised by this alignment of legal systems with Marxian categories turned out to be illusory. The immediate problem was how to account for strikingly similar procedural styles found in categorically different socioeconomic environments, and for strikingly dissimilar styles in categorically identical ones. Consider the obvious, if elusive, difference between common-law

7. Karl Marx himself never attempted to link his broad models of socioeconomic structure to formal aspects of the legal process. In the Soviet Union, however, especially during Stalin's rule, belief in the possibility of establishing this link became part of the canon, and all sorts of opportunists set out to discover it. The cogency of Vauvenargue's dictum was soon vindicated: "When the great minds have taught the lesser how to think, they put them on the road to error" (*Réflections et Maximes*, no. 221, Charbonnel, ed. [Paris, 1934]).

and civil-law systems: both sprang from the same socioeconomic subsoil of the waning Middle Ages (feudalism), and they continue to divide capitalist countries. Of course, arguably feudalism and capitalism differed on each side of the Channel; but if different feudal and capitalist settings produced different forms of the legal process, then this internal variation should be attributed to some other factor (or factors), rather than to feudalism or capitalism as such. Perhaps more important, it has proved insuperably difficult to articulate an overarching difference among forms of capitalist, socialist, or feudal justice in comparison to which contrasts such as those between common- and civil-law proceedings would pale into insignificance.[8] On the contrary, the conventional contrasts continue to loom large and to intrigue lawyers in European socialist systems: despite the fact that they could point to some novel "socialist" forms,[9] many important aspects of their legal process, when compared to puzzling common-law arrangements and institutions, appeared to exhibit a strong resemblance to conventional Continental systems. The essential structure of trials was similar, and so were the basic outlines of the preliminary and the appellate process, modes of proof, and a great number of more specific arrangements. There was clearly no way out but to acknowledge that such similarities bridge the divide that separates continental European states coordinated by plan from those dominated by capitalist markets.

The solution to this predicament has been to proclaim that the apparent similarities among procedural systems with different substructures in economic organization are merely superficial: similar formal arrangements, it has been said, are permeated with a different meaning or purpose and are recast into a new ensemble according to the economic substrate. Likewise, differences of procedural form among jurisdictions sharing the same socioeconomic organization have been explained away as merely shallow: here, variation in form is said to conceal important identities of purpose and of meaning. Justice—imagined as the instrument of a group dominating the socioeconomic formation—retains its identity, even as the shape of the instrument changes. Although this argument has been misused as an ideological elixir, it still deserves to be taken seriously. To consider forms of justice in monadic isolation from their social and economic context is—for many purposes—like playing *Hamlet* without the Prince. It is also true that an identical social policy can be realized, to a degree, through very different procedural arrangements and that very different policies can be imple-

8. For unsuccessful attempts in the Soviet literature and for some crudities of this enterprise, see, e.g., M. Cheltzov, ed., *Ugolovnyi Protsess*, 425–40 (on socialist procedure), and 440–56 (on capitalist systems) (Moscow, 1969). Differing views have been expressed by Soviet scholars on the relation between adversarial and nonadversarial forms and the opposition between capitalist and socialist procedure. Whereas some commentators, including the famous Pashukanis, thought that the adversarial idea was "bourgeois" and the nonadversarial "socialist," this identification was denied by others.

9. I do not here suggest that peculiar traits of Soviet justice could always be attributed to the economic dimension of Soviet life with any degree of plausibility. While a historical link to economic organization is in some instances quite obvious (e.g., with respect to ways of settling disputes between nationalized firms), more often than not a relation to ideology and politics appeared more direct and plausible.

mented in similar proceedings. Here, where the subject of inquiry is diversity of procedural form *tout court*, this argument misses its mark—except, perhaps, insofar as it suggests that interest in procedural form is a preoccupation with surfaces.[10] What is tacitly conceded is that no new leaves are turned in the strange album of procedural form as society moves from one "mode of production" to the next. Because most questions relevant to the study of procedural diversity lie beyond the opposition of capitalism, socialism and similar vague socioeconomic concepts, inspiration for a scheme useful for our purposes must be sought elsewhere.[11]

iii. LEGAL PROCESS AND THE CHARACTER OF GOVERNMENT

If socioeconomic criteria are of little help, can political factors provide more illumination? This approach is hardly novel and has been explored on a great variety of topics. The study of affinities between the legal process and dominant currents of political ideology appeared particularly promising: after all, it was thought, political regimes legitimate themselves through the administration of justice that they establish. Mining this vein, numerous writers have contended that the design of proceedings is sensitive to particular shifts in prevailing ideology, especially to oscillations between individualistic and collectivistic, liberal and authoritarian, or similarly labeled positions. In the civil process, it has been argued, these shifts have a direct impact on the question of how much power private individuals should have to direct the course of lawsuits—undoubtedly an important question in the choice of procedural form.[12] In the criminal process, it was similarly argued that ideological shifts affect the degree of protection accorded the defendant from the state: the comparatively peculiar position of the

10. This is probably what Marx and Engels actually thought: the form of law—even the forms of political regimes—were far from the center of their interest. Law was seen as an instrument for the attainment of specific substantive ends, in particular, class domination. The shape of this instrument, the contour of legal form, was of minor importance and largely disregarded. Yet the concept of ties between substance and form lingered in the background. In an interesting letter to Mehring, the aging Engels acknowledged this narrow focus and tried to justify it. See K. Marx and F. Engels, *Selected Correspondence*, 459 (letter of July 1893) (Moscow, 1955).

11. Even in countries where Marxism is the official state ideology, some sophisticated thinkers now acknowledge that links between the legal process and economics are "mediated" by political variables, so that the latter have a greater explanatory force. The economic sphere determines procedural form only "ultimately" or "in the last instance." See, e.g., I. Szabó, *Les fondements de la théorie du droit*, 66 (Budapest, 1973). The causal primacy of economics remains undiscussable, like Helen beckoning to her bed.

12. A long tradition of Continental legal scholarship maintains that ideologies penetrate the civil process by changing ideas on the applicability of "private" as opposed to "public law" style. See, e.g., F. Klein and F. Engel, *Der Zivilprozessrecht Oesterreichs*, 162 (Mannheim, 1927). The theme is developed in a comparative context by M. Cappelletti, *Processo e Ideologie*, 11–20 (Bologna, 1969). However, many writers have discerned "ideologically determined" variations within both public and private law styles. See G. Foschini, *Sistema del diritto processuale penale*, 226–30 (Milan, 1965); M. Taruffo, *Il Processo civile "Adversary" nell' esperienza Americana* (Padua, 1979).

accused in the Anglo-American criminal prosecution has time and again been linked to tenets of classical liberalism.[13]

In the writings of others, relationships of political power received more emphasis than the role of pure political ideology. Thus, for example, important changes in the design of the legal process were traced to differing degrees of centralization, to the participation of laymen in the administration of justice, and to similar factors.[14] Many insights generated by such studies, mostly of historical nature, were used by social theorists—most notably by Max Weber—to suggest an apparatus for more systematic understanding of procedural change. Weber developed "ideal types" of authority and suggested that the diversity of power relationships can explain important differences among legal systems, including their administration of justice.[15]

In this volume, proposals about linkages between politics and justice will be taken seriously: hence, factors from the political sphere will be recruited in the search for a scheme capable of making the striking variations in modern forms of justice more intelligible. Much of the discussion about politics and justice circles around two themes that command our attention. The first concerns the structure of government—more specifically, the character of procedural authority; the second concerns the legitimate function of government—more specifically, views on the purpose to be served by the administration of justice. In much of what has been said thus far, these two themes have been interlaced and confounded: certain engagements of government were invariably associated with certain kinds of governmental organization. I shall attempt hereafter to develop each theme separately, seeking in each a distinct coherence that can link procedural arrangements into identifiable associations. A context will thus emerge within which to associate a great deal of procedural diversity—and its puzzles—with the changing structure and function of contemporary states.

The Apparatus of Government

The organization of procedural authority leaves some marks on the legal process which are fairly obvious and often noted. For example, many distinctive traits of the Anglo-American style have been related quite persuasively to the division of the tribunal into judge and jury. While other marks are more remote and speculative, it can scarcely be disputed that even such intangibles as the more or less personal tone of proceedings, or divergent attitudes toward documents and deadlines, may be influenced by a particular character of authority (e.g., by degrees of

13. See, e.g., J. Griffiths, "Ideology and Criminal Procedure," 79 *Yale L.J.* 359 (1970); M. Taruffo, *supra*, n. 12, 259–301; S. Kadish, ed., *Encyclopedia of Crime and Justice*, vol. 1, *The Adversary System* (1983).

14. See, e.g., J. P. Dawson, *A History of Lay Judges* (1960); F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 183–89, 243–48 (Göttingen, 1967).

15. M. Weber, *Economy and Society*, vol. 1, p. 215, vol. 3, p. 1059 (1968). See also Max Rheinstein, ed., *Max Weber on Law in Economy and Society*, 349–56 (1966).

bureaucratization). In the first chapter I shall suggest a framework within which to study these linkages between authority and the legal process in a more systematic way. To facilitate this task I shall assemble into models or "ideals" those characteristics of procedural officialdom that seem relevant for the forms of justice. To keep the problematic within manageable proportions, I shall construct only two such ideals of officialdom, building the two models from major features that seem to distinguish the machinery of justice on the Continent and in lands of the Anglo-American tradition. But because these two ideals will exaggerate certain tendencies (e.g., hierarchical ordering of courts in Europe, less rigid hierarchization in Anglo-American countries), their use as instruments of analysis or as sources of empirical hypotheses will not be limited to the contrast of civil- and common-law systems. Indeed, as will be seen, aspects of the Soviet system and technocratic tendencies in the West will also be reflected in some aspects of the two ideals.

The implications of these two ideals will largely concern important aspects of procedural design, such as the varying structure of the trial, its relation to the process as a whole, preferences for alternative proof-taking techniques, and the like. Other implications will concern more general subjects in regard to which existing systems have been observed to differ: for example, how the way in which the apparatus of justice is organized affects the prevailing perspective on issues (more or less abstract viewpoints), or how the relative attractiveness of discretion in decision making contrasts with preference for rules.

Before the second chapter comes to a close, two distinctive styles of administering justice will thus emerge, capturing much of the observed difference between common- and civil-law systems apart from the customary contrast of contest/inquest forms or the adversarial/inquisitorial modes. To be sure, the two styles will include some traits found in one or another version of these conventional concepts, but while these traits are only loosely attached to conventional categories they will have firmer moorings in this scheme.

It is important not to misconceive the relation of the two styles to Continental and Anglo-American systems of procedure. As I have pointed out, the two styles will be constructed against the background of models of authority which exaggerate or stylize contrasts among judicial organizations in Continental and Anglo-American states (such as attitudes toward hierarchization or toward lay decision makers). In consequence, the two styles will also intensify or magnify trends and features of existing procedures. Actual Anglo-American and Continental procedures will be seen to belong to one or another mode, as buildings can be said to belong to one or another architectural style.

Functions of Government

My second theme demands that connections be established between the design of legal proceedings and dominant views on the role of government in society. Such connections can be established in several ways, but I shall mainly trace them as mediated by changing ideas about the purpose to be served by the administration

of justice: dominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements. Because only some forms of justice fit specific purposes, only certain forms can be justified in terms of prevailing ideology.

If this path is to be followed, the great wealth of ideas on the mission of the state in society must somehow be absorbed and arranged for the needs of this study. One solution is to see these views as embodying two contrary inclinations, each rarely strong enough totally to displace the other: the one is to have government manage the lives of people and steer society; the other is to have government maintain the social equilibrium and merely provide a framework for social self-management and individual self-definition. In the third chapter I shall approach the preserves of political theory to inquire into the ideological background of these contrary inclinations. Where government is conceived as a manager, the administration of justice appears to be devoted to fulfillment of state programs and implementation of state policies. In contrast, where government merely maintains the social equilibrium, the administration of justice tends to be associated with conflict resolution. In chapters 4 and 5 I shall use these two contrasting purposes of justice—refracted, as it were, in the lenses of the ideological tenets that support them—to articulate two archetypes of the legal process: one devoted to conflict resolution, the other to policy implementation. This undertaking involves a search for arrangements that are either implicit in the animating purposes or suitable to their realization, while compatible with ideologies that lie at their base.

As this study progresses, it will more clearly appear that the policy-implementing mode is partial to inquest, while its antipode is similarly biased in favor of contest forms. That is to say, a kinship will thus surface between the archetypes on the one hand and adversarial and inquisitorial systems on the other. Three main points of difference from conventional thought should be noticed at this early point. First, as such, inquest and contest arrangements are conventionally thought of as structural alternatives to achieving the same end.[16] In America, for example, they are usually imagined as alternative designs for conflict resolution. But where the opposition is imagined as two alternative routes leading to the same destination, the two sets of arrangements to which the opposition relates cannot properly be distinguished without ambiguity. Second, our two modes of legal proceedings, each predicated on a different purpose of justice, embrace only characteristics that can be related to a particular procedural goal, and exclude others that reflect a particular structure of authority. For example, whether judicial, prosecutorial, or other authority is more or less centralized will be irrelevant for the purpose of opposing our two archetypes. A price

16. As suggested *supra*, n. 12, an ancient line of Continental thought suggests in an implicit and oblique way that the two forms serve different purposes: one form is said to fit civil cases (or private law matters), while the other fits criminal cases (or public law matters). This view was already current in the fourteenth century. See, e.g., A. de Butrio, *Super Prima Secundi Decretalium Commentaria*, Tomus 3, *Rubrica de Judiciis*, 2 (Venice, 1628). For differences between this line of thought and the approach proposed in the text, see *infra*, ch. 3, n. 42.

must be paid for this self-imposed abstention, but as I shall suggest in the next section, it will prove illuminating in the end.

Finally, the policy-implementing and the conflict-solving processes arise against the background of two extreme views about the role of government—views in which the roots of the conventional opposition of inquest and contest forms are perceived. This link to political ideology provides the context in which I shall address the issue of how far the twin themes of party dispute and official inquiry can be pressed in modern states. Further, a perspective will be obtained that will reveal—and in revealing, expand—the limits of conventional analysis. For example, sharply divergent ideas on judicial independence, and on the sacrifice of accurate judgments for the sake of preserving the integrity of the legal process, can both be related to the opposition of policy-implementing and conflict-solving procedures.[17]

This brief synopsis of the proposed archetypes discloses that they embrace legal arrangements in pure or ideal form, but that these terms are meant to denote not a perfect or wished-for procedural design but rather a design detached from historical contingency by an urge to analyze and to identify. The relation of the archetypes to actual proceedings parallels the relation of governmental functions they each presuppose to the function of existing or historic governments. As the function of government includes both the maintenance of social equilibrium and programs of social transformation, rather than only one or only the other, so actual legal proceedings exhibit both conflict-solving and policy-implementing forms, often in complex and ambiguous combinations. Of course, in pronouncedly managerial states such as China or the Soviet Union, one should expect a heavy layer of policy-implementing characteristics in all spheres of the administration of justice. But in classical Western systems—be they of common- or civil-law variety—more equivocal compounds are likely, with the flavor of the blend depending on the particular proceeding. Anglo-American systems have no monopoly on conflict-solving (thus also adversarial) features; Continental systems have none on policy-implementing (thus also inquisitorial) characteristics.

So, the analytical scheme opens the possibility for finding some conflict-solving features in Europe that are missing from Anglo-American jurisdictions, and some policy-implementing features in the latter that are absent from European law. In brief, characteristics of the two archetypes should not be understood as repositories of essential facets of *existing* procedures in civil- and common-law countries. They are meant to be used in seeking to understand the complex mixtures of arrangements, as means to analyze them in terms of their components, as one would study compounds in analytical chemistry.

17. The "inquest-contest" dichotomy, so habitual with lawyers, is sometimes linked to ideological tenets. See *supra*, n. 12. However, on the whole, ideological positions relevant to the dichotomy have not been sufficiently purged of inconsistencies and obfuscations that characterize many prominent political doctrines. Inquiries into the political assumptions of the inquisitorial form have been particularly deficient. However, seeds of a polarization of ideologies useful for our purposes can be found in C. Lindblom, *Politics and Markets*, 248 (1977).

Proposal for a Unitary Scheme

Having developed two different perspectives on the administration of justice in modern states—one focusing on its relation to the structure of state authority, the other centering on its relation to the function of government—I shall then attempt to bring the two perspectives together, in order to observe the panorama, so to speak, bifocally. It will be doubted, however, whether the policy-implementing and the conflict-solving processes can freely be combined with arrangements adapted to structures of authority. Are not *some* functions of the state invariably associated with certain structures of government? Is it not true, for example, that states bent on effecting a far-reaching transformation of society require a centralized and professional government, so that their programs—in Lenin's phrase—are not applied differently in Kaluga and Kazan? And does it not therefore follow from this that policy-implementing forms of justice should be associated only with forms adapted to a centralized bureaucratic machinery of government?

It cannot be denied that certain enterprises of government will not be contemplated at all, or will remain pipe dreams, in the absence of a minimally capable apparatus of rule. But short of such extremes, there seems to be no necessity that a particular conception of the mission of government must be accompanied by a particular structure of implementation. An intensely managerial state can be ruled by decentralized amateurs—a situation, for example, like Iran governed by the Shiite clergy[18]—and a state with a proclivity for laissez-faire can have a centralized bureaucratic government—a situation reminiscent of many Continental states in the nineteenth century. It can be argued, of course, that realization of certain objectives of the state is better served by particular organizations of authority, or that certain types of governmental organization impede the smooth realization of particular objectives. A state with many independent power centers and a powerful desire to transform society can be likened to a man with ardent appetites and a poor instrument for their satisfaction. But this argument does not deny the reality of such combinations; it implies only the observation that some combinations are harmonious while others create dissonance, stress, and tension.[19] Similarly, policy-implementing and conflict-solving forms of justice can be combined with forms adapted to various structures of

18. In a lay illustration, the Yugoslav model of socialism combines pervasive social programs with the ideals of decentralization and of Jacksonian rotation of citizens in office.

19. In the presence of such mismatches, structuralists tend to diagnose a dismantling (*décalage*) of the structure and functions of government (N. Poulantzas, *Pouvoir politique et classes sociales de l'état capitaliste*, 303, 388 [Paris, 1968]). The presence of a décalage does not inevitably indicate an undesirable state of affairs: for example, the dilatory effect of decentralized lay officialdom on the realization of some programs can be assessed, on balance, as a salutary check on hasty realization of ill-conceived projects, or as justified by the observance of some "expressive" value (e.g., maintaining the judgment of one's peers despite cost and delay in the administration of justice). Automatic condemnation of "dysfunctions" and "inefficiencies" may in fact tacitly recognize bureaucratic inclinations, themselves objectionable in certain types of governmental organization.

authority, but while some combinations can be viewed as stressful mismatches, others can be assessed to successfully dovetail procedural functions and procedural authority.

The remainder of this volume will then attempt to interlace the two sets of models in a unitary scheme and suggest ways in which the resulting ensemble can be used to analyze the diverse arrangements and institutions that characterize the administration of justice in some prominent modern systems. The enhanced perspective will enable us to identify some heretofore obscured differences of degree—such as discrepant conceptions of the judicial office in common- and civil-law countries—and to perceive divergent ideas on the relation between civil and criminal processes. But most of my effort will be not so much to identify new things as to show how my proposed perspective differs from the conventional gloss on them, and how it suggests new meaning for the previously incomprehensible.[20]

The more puzzling forms of American public interest litigation will now appear as complex and equivocal blends of policy-implementing and conflict-solving modes, interacting with arrangements and institutions adapted to an apparatus of authority that still "in principle" rejects bureaucratization and hierarchization of judicial authority. Genuinely "Soviet" arrangements will be seen as combinations of features attractive to an intensely managerial state and features associated with centralized and bureaucratized procedural authority. I shall pay particular attention to those aspects of traditional Anglo-American authority that create stresses and tensions with contest forms, and those aspects of Continental authority that facilitate their implementation. Thus, certain adversarial arrangements unknown to Anglo-American procedure have flourished in some spheres of the Continental administration of justice: this paradox—to conventional theory—can in turn be explained as an interaction of procedural authority with certain objectives of proceedings.

Although the foregoing sufficiently marks the route to be traveled in this volume, a word of caution remains to be addressed to the reader. Adjusted to the broad comparative scale, my scheme must always suggest how things appear

20. My main purpose will be to show how certain ideas on the mission and shape of government justify or support particular clusters of procedural forms, thus providing means whereby recognizable patterns of procedural arrangements can be composed. By and large I shall refrain from making stronger claims that these ideas actually caused certain procedures to be what they are. However, such stronger claims will occasionally be made: some forms seem inextricably linked with specific purposes of justice, or with specific structures of procedural authority. Some procedures have also had demiurges who showed little respect for preexisting form, and who tried—whenever possible—to shape it in accordance with ideological preconceptions. I shall make some methodological observations, but attempt no full account of the precise nature of links or connections between politics and justice. Greater precision would risk delay on the barbed edge of complicated philosophical issues: whenever human purposes and perceptions constitute links among phenomena, staggering methodological problems arise. Even if they could be resolved, the lever would be weightier than the load, and I would never get on with my story.