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THE SOCIAL ASPECT OF PROCEDURE FROM A
EUROPEAN POINT OF VIEW

By H. MUNCH-PETERSEN*

PROCEDURE is a public institution. Possibly this sounds an obvious truism—a mere statement of fact,—and perhaps this is all it is. But at the same time there is a reason to emphasize the truth of this fact, in the face of the many mistaken beliefs upon this very point, which have so long prevailed.

In considering legal procedure from the standard of old Roman law—which considered the right to plead (*actio*) as merely one section of substantive law—some jurists are misled by the nature of the dispute in a civil case, and take it for granted that, as the parties concerned are usually at perfect liberty to settle this dispute themselves, the same liberty will naturally be accorded them in the resultant lawsuit.

The proof of the fallacy of this supposition is due mainly to modern German science of procedure and in particular to the efforts of O. Bülow, who urges the view that when legal proceedings are instituted, an entirely new situation arises, quite independent of the material circumstances forming the basis of the case. In the subsequent procedure the judge, as the representative of society, is an essential factor, and thus the case to be tried at once assumes a *public* character, however much it may in fact deal with legally *private* matters.

From a *theoretical* point of view this new assumption is of immense importance. At one stroke it does away entirely with the notion of a blind transference to legal procedure of the laws of private agreement which has hitherto prevailed. In numberless cases which come under the private law the autonomy of the parties holds good but this right is allowed only out of regard to general commerce and would not be applicable in legal procedure. Indeed if liberty of settlement were recognized here also, it might easily upset the whole legal machinery of the state and thus render her aims and objects quite illusory.

Here we find the *practical* importance of the modern assumption: that a law case is not merely a private but essentially a public matter. Hence it follows that its whole structure must be decided not by the private whims of the parties concerned, but

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by the public itself, in conformity with the practical end it serves and with the *social function* it fulfills.

As to the further character of these social purposes there cannot well be any doubt. It can only be: *as easily and surely as possible to assist members of society to their rights*. Everything that serves this purpose must be recognized, and on the contrary everything which is opposed to it must be banned. For instance, if the parties have the liberty voluntarily to postpone a case, experience shows that this only tends to produce endless and often needless delay, and consequently this liberty instead of assisting towards speedy settlement which is the aim of the legal procedure, acts merely as a drag, and must therefore be curtailed. Similarly if the liberty of debtors to waive legal proceeding tends too greatly to prevent citizens from obtaining legal satisfaction in a court of law this right must be limited as much as is necessary to circumvent this danger.

In considering the whole question of procedure it must not be forgotten that *its object is not in itself*, but that it serves another and higher end—*the consummation of perfect justice*. The more we emphasize the contrast between procedure and substantive law, the more important it becomes to remember that there is however this profound organic connection between them,—that procedure is and can never be anything more than the servant of justice, whose value and importance will depend solely upon how satisfactorily procedure can fulfill her duties in this humble rôle. When we reflect however that the object of law itself, as the famous German jurist Rudolf von Jhering once said, is to safeguard the interests of humanity, this rôle becomes by no means an insignificant one.

In order that this rôle be properly fulfilled it is not enough that the rights retained by litigants should not disturb the normal functions of procedure. It is also positively necessary that each individual link in the procedure adopted by the courts be so arranged that it becomes as perfect an instrument as possible for the true consummation of justice, individually as well as socially.

If we would briefly express what, from this point of view, might be called the epitome of procedure in our time it is, in a word, *simplification*. All superfluous technical precepts (and in truth most of them are superfluous) must be eliminated. The weak economic position in which most European countries find themselves after the war necessitates the greatest possible econ-

omy in every way—and legal procedure must likewise be subjected to the strictest supervision. But the kind of *procedural retrenchment* to which I refer would, if carried out, only be for its own good. Many formalities are truly not merely unnecessary but are often quite harmful in preparing pitfalls in the way of the establishment of true justice. Most of the written records which still encumber many legal cases even though they are called “oral” might easily be dispensed with. They tend more often to confuse the issue than to clarify it.

The lamentable result of the many intricate unnecessary procedural steps, and of the equally superfluous written matter, is that many cases are prolonged to an unconscionable time. This alone, if nothing else, should deal a death blow to any attempt to justify such procedure. It was perhaps an exaggeration when a wit once remarked that “it was much more important that a trial be quick than that it be just,” but it is certainly true that in many cases it may be equally important that it be quick as well as just.

If a man goes to law for the recovery of an animal, there is not much satisfaction in winning the case if the action is settled only long after the animal is dead. Or if a man is injured in a motor accident, his right to damages will be of little more than theoretical importance if he has to wait years before being awarded them. In the hustling business life of our times enormous damages may be done—both to individuals concerned and, economically to the nation—by sluggish procedure. Litigation may often mean the tying up of large sums—assets which the litigating firms are unable to touch. They do not know whether they are entitled to them or not, and cannot count on them in their business transactions. The burden of the many economic difficulties with which business men, or at any rate European business men, have to struggle after the war cannot but be increased by delays of this sort.

The artificiality and slowness of legal proceedings, as experience shows, simply invites misuse. Debtors for example are able to obtain a moratorium from fulfilling their engagements, which they do not deserve.

The new Danish procedure is based on these points of view. In Denmark the whole disposal of a case from its first beginning to its end generally does not take more than one or two months.

The spoken word is an extremely useful ally in accelerating the speed of procedure, and, with its twin sister, *immediacy*, which possesses the added advantage that all evidence is given straight to

the judges who are to decide the case, it serves to convey to the court a true and unbiased account of the case, and all the details necessary to give a decision, which even a most studious perusal of the written evidence would hardly obtain.

There is also a certain *social-political* element, as it is often called, about this need to simplify and accelerate legal procedure in that it is only when these reforms have taken place that the law will become a fitting instrument to protect the interests of our poorer classes. It is especially difficult for the poor to surmount the artificial barriers fixed by law around all legal proceedings, and that they are the ones to suffer most in being debarred too long from recovery of their rights is only too obvious. Take the case of an artisan who has been robbed of his tools, and with no prospect of recovering them for a year or possibly two, is therefore prevented from continuing his work. Here it is certainly evident that slow justice is equivalent to no justice at all.

This idea of social justice, first advanced by Anton Menger, the Austrian, and later so ably carried out by Franz Klein, has become the keystone of Austrian civil procedure, and this again, in many respects, has served as the model of the Danish and Norwegian laws of procedure.

It also exercises some influence upon the judge's position in civil procedure. In principle, a judge, in conformity with what in Germany is called *Verhandlungsmaxime*, which Professor Millar of the Northwestern University in his highly interesting pamphlet¹ translates, the "principle of party-presentation," contrasted with the principle of "judicial investigation," ought to interfere as little as possible with the pleading of the case, and should in the main leave the evidence and its production to the litigants themselves. Otherwise he might form a biased opinion beforehand, and thus be unable to make the final decision with the necessary acumen and impartiality. But this view may easily be carried to excess, and, as was the case in the written methods of procedure formerly in use on the European continent, a judge may remain a mere passive spectator during a trial without the power to lift a finger to help towards the elucidation of a case.

This method of procedure does at least presuppose fully capable litigants, usually assisted by lawyers. If the parties are unable to afford the expense of such legal assistance themselves, as much as possible ought to be done to allow them legal aid and

¹The Formative Principles of Civil Procedure, 1923.

free costs. In the Danish law every person who does not possess the means to carry on a lawsuit that is esteemed reasonable can be dispensed from paying the court fees, and all other necessary expenses, including the fee to the counsel, will be paid by public means. But should the amounts thus involved be considered to overstrain the public purse, it is necessary that the judge be instructed to assist and guide the parties in such cases, and this he will naturally be in a better position to do, the more simply and less artificially legal procedure is arranged.

A certain social political tendency is also evident in the rules applying in Danish procedure, where it is laid down that a lawyer is prevented from demanding larger fees than can honestly be considered reasonable remuneration for the legal services he renders, and in case where there has been a definite agreement as to payment, which is obviously unfair to the litigant in question, the agreement may even be declared null and void.

Another link in this social political tendency are the exemption statutes, which are continually being amplified—a movement which seems to be spreading over the whole world. Since the amendment, in the act of 1925, it is now strictly forbidden, by Danish Law, to take a lien either on the necessary wearing apparel, linen, bed and bedclothes of a debtor and his family, or even on "other effects," provided that such effects are necessary to the upkeep of a simple dwelling for the debtor and his family and are not valued at more than 150 Danish Kroner (about \$40) in the case of a single person and 500 Kroner where the debtor has to support a family.

Indigent debtors are thus effectively protected, but there is of course a reverse side to the medal, in that it is now becoming increasingly difficult for the poor people to obtain any credit.

My remarks up to now have applied mainly to civil procedure. If we turn to criminal law no one nowadays can be in any doubt as to its public character and social function. But it seems to me that we have not always followed the consequences of this view to their utmost length.

The aim of criminal procedure—and in the light of modern ideas the aim also of criminal law itself—is to protect society from crime. But the need for protection is not equally urgent in the case of all offenders. It is the professional or habitual criminal who constitutes the real menace to society and whom

society must therefore combat with the most powerful means at its disposal. Occasional criminals, on the contrary, do not present the same danger, and in their case, society may well be somewhat more lenient.

If we are briefly to define our modern criminalistic viewpoint as contrasted with that formerly held under "classical" criminal law, we might well say that punishment awarded nowadays is a link in conscious and efficient social hygiene, whilst formerly it was merely an example of abstract justice. Under what we call "classical" law, punishment was dealt out blindly, and with neither purpose nor feeling, without regard to the harm that might be done through the individual to society itself. One cannot help thinking of a dog biting its own tail, as no heed was taken as to whether any real protection to society was secured by this means.

But a modern social hygienist—as a criminalist ought to be—reflect more than once before he use a weapon as doubtful in its beneficial effects upon society and upon the individual concerned as he well knows punishment to be. He therefore lays most weight upon the "prophylactic" method, that is to say he gives especial attention to everything that will serve to check and destroy the reasons for crime itself. But even when an individual has passed beyond the criminal boundary, a criminalist of the modern school will not despair of him. As long as there is hope he will avoid punishing him and will try by other means to save him for society. When everything else fails, and only as a last resort, will punishment be employed, but then it must be so effective that it affords society secure protection from those individuals who in spite of all that is done for them will not be assisted or driven away from their criminal habits.

However, if it may be said that *to avoid punishment as long as possible* is one of the main objects of modern criminalism, it is obvious that this view also must influence the rules of criminal procedure. Even in the case of persons who really have committed a crime we are averse to using punishment. But how much greater does not our aversion become—how awful is not the thought—that punishment may be awarded to an innocent person? The case is not much better when we jail a suspected person for an indefinite period—or employ other equally evil legal expedients. Even though the prisoner be liberated finally, for want of sufficient evidence, in many cases he will suffer the same injury to his whole social position as if he had really been

guilty and sentenced. Hence, our criminalistic efforts must be directed rather towards obtaining the greatest possible security from sentencing the innocent and from misuse of legal process.

In weighing the pros and cons of public security on the one hand, and individual liberty of citizenship on the other, it is obvious that the rules to apply in the various cases will depend greatly upon whether an accused belongs to one or another of the above mentioned criminal categories.

If it is not a case of an habitual criminal but possibly of a person who is accused for the first time, the legal precaution can hardly be made strong enough. Here in truth the old sentence holds good: "Rather that ten guilty should go free than one innocent person should be punished."

The accused should therefore always be assisted by a legal adviser and if he cannot afford the fees himself, counsel should be appointed and fully paid for by the Crown—otherwise it is not to be expected that his services would be very effective. And this appointment of counsel for the defence by the Crown is especially necessary immediately a suspect is arrested, since the very fact that a person is detained will usually prevent him from securing the services of anyone himself. Nothing would be more likely to cause bad feeling and to incite class hatred than, in cases dealing often with matters of vital importance, to differentiate between rich and poor.

Strict regulations should also be enacted with regard to arrest in the case of persons of hitherto blameless character—and should arrest have been ordered in the case of an innocent person wrongfully accused, he ought, in the most comprehensive way possible, to receive full and complete compensation and rehabilitation. Finally, in countries where juries are employed, the accused should be given full liberty to avail himself of their services and especially so in cases of a more serious nature.

These views have also been fully realised in the new Danish Procedure Act of 1916, which came into force in 1919. This act has been modelled largely upon similar arrangements in foreign countries especially England—the arrangement of our institution of counsel still having been borrowed from French law. What may, however, to a certain degree be described as an original new departure in our legislation, is the difference in conformity with the basic criminalistic idea mentioned before, which it makes between persons previously punished and first offenders. Those who have been punished for certain criminal offenses will not

enjoy the same unlimited right to demand the assistance of a legal adviser the moment they are arrested, as may persons who have a clean criminal record. In the rather many cases where according to our law the use of a jury or otherwise depends upon the prisoner's own wishes, they have, when the former offense was of a serious nature, not the right to demand trial by jury, nor have they generally the right to claim damages or redress for wrong arrest. In my opinion the Danish legislative regulations in this respect almost overshoot the mark, but it seems to me that they are at least based upon an idea that is just and well founded—that in dealing with the large army of professional criminals it is impossible without running too many risks to employ the same methods as with ordinary citizens. In dealing with these declared enemies of society it is necessary to a certain degree to employ a sort of martial law, entailing, as does martial law, a curtailment of the ordinary rights of citizenship. Only when we thus recognize the possibility of establishing special laws to apply in exceptional cases can we, without being faced by too many counter arguments, be able to direct all our efforts to drawing up our common criminal laws in the way most beneficial to free citizenship.

That legal procedure may properly fulfil its social function does not, of course depend only upon its outward form, but possibly even more upon the inner abilities of the persons to whom the execution of these aims of justice have been entrusted. It is necessary that these persons be imbued with a sense of the real and social spirit of present day justice.

And here we at once find that certain provisions must be made for the education of the future jurists. It might be thought that in order to conform to the spirit of our times this education ought to be purely practical, the young jurists being simply attached to the office of some legal practitioner and there learning under his supervision the ins and outs of legal procedure.

Something of this sort was once attempted in England and also here in America, but the results obtained in this way were disappointing, to say the least of it. In the intricate life of a court or office an inexperienced legal mind can never discover the real point at issue, and it would be something of a happy accident if the practitioner with whom the student was placed had the will or the ability to teach him what he really needed, for the true pedagogic ability, taking things as they are, is an extremely rare quality. This kind of instruction must therefore be left to those

who have made a special study of their subject for it will usually take up so much time, that it will be difficult for a practising lawyer to carry out these duties as a sort of side line in addition to his main occupation. Looking at this matter from the other side, it would certainly be all to the good if teachers of the science of law would keep in constant touch with practical legal life, and it is of quite especial importance that their own education beforehand should not have been entirely and solely theoretical, but that they should also have had the opportunity of learning at first hand the practical value of the theory of law as it is actually used in commercial and social life itself.

Therefore the main object in law studies should not be merely the practice alone. To learn this thoroughly the majority of jurists, at the conclusion of their university career, will usually have more than enough time on their hands, during the many years they have to spend before they are able to obtain an independent position.

The comparatively limited time which young jurists spend upon their university studies is too valuable for them to waste any of it on the same practical work that they will usually have to repeat the rest of their lives. They ought to direct all their energies towards obtaining as solid a general foundation for their future work as they possibly can.

This foundation ought to consist mainly of theoretical knowledge, and especially a good basis of social knowledge would be a decided advantage in arming a young man for his work in the service of society which so characterises a lawyer's position today. In my opinion the study of law must be thoroughly based on the notion of the law as being a side of the social life only.

It is not the actual visible amount of reading, however, which is so important. It is my impression, on the contrary, that on the European continent at any rate, we are inclined to exaggerate our demands in this direction, although it is of course impossible to exhaust the endless kaleidoscopic phases of legal life. But what is required above all is that the knowledge acquired be thoroughly grasped so that it really becomes part and parcel of oneself. In this respect attention given to the concrete cases in legal life will be of great use. That this is so, is fully proved by the records of the famous American law schools, first I think in Harvard, where by means of the "Langdell" or "case" method quite exceptionally good results have been obtained, also as regards pure theory. Only along this path will a young jurist ob-

tain the right schooling, and develop that practical judgment, which is the chief asset of the servants of Law, for they will as a result be better able to master also the new intricates of law which they come across in their subsequent careers.

Though I fully recognise the value of this case method and therefore have been anxious to introduce it in Denmark, I am still in doubt whether it ought to be the only one, or there might be domains of the science of law where more theoretical lectures must be presumed to give a better result. At least in the Scandinavian countries we use the case method only as supplementary to our University lectures.

In order that true human justice may be attainable, it will however be of importance that other people *besides jurists* should assist at legal proceedings.

In Denmark trials by purely lay members are hardly known, and the experience gained in a certain field,—that of disputes arising from the sale of domestic animals, where lay judges are employed,—cannot be said to be exactly an encouragement to continue any further in this direction. Possibly they have obtained a certain popularity among the peasants themselves (who are as you know a powerful factor in Denmark), since they feel a sort of class satisfaction in having their own courts, but regarded from a higher standpoint of justice the decisions given by these “arbitration courts,” as they are called, leave much to be desired.

In Denmark no attempts have otherwise been made to oust our jurists from their work in administering justice. Their expert knowledge of the common laws of justice which they represent is of recognised importance. A court consisting solely of lay judges would be considered in Denmark a retrograde step in legal culture, and the possibility of using lay judges to do more than assist our legal judges is out of the question.

The question of such assistance by lay judges arises primarily in criminal procedure. Whether the services of lay judges are to be secured in the same way as in American and British courts,—I refer to juries, who decide independently the question of a prisoner’s guilt,—or as assistant or “associate” judges, (in German called “Schöffen”) to settle both the question of guilt and punishment in coöperation with the legal judges—that is on the continent still the question. But nearly everyone who has had any opportunity of seeing these popular courts at work—in Denmark we know them only in the larger cases, as juries,—agrees that they are certainly of great advantage to legal procedure. As the basic

reason for this it is in Denmark considered that a jury stands as the personal representative of common human justice in criminal procedure and thus forms a counter-balancing influence to a purely legal view, which declares a certain act illegal and punishable without its illegality having any root in the public conscience, or without the prisoner himself really having been aware of the fact.

In civil procedure a lay judge's principal importance is considered that of bringing forward special expert knowledge which the court is more easily able to understand from him than from any complicated statement made by expert witnesses. There will thus also be a better prospect of neutralising a too extensive use of arbitration courts—which are used rather much in Denmark but are open to so much criticism from a fundamental point of view.

In Denmark we never have known juries in civil cases and would, I think, consider them a little superfluous there. But in maritime and commercial cases we know and use lay experts as assistant judges, and at the Maritime and Commercial Court in Copenhagen they have amply proved their worth.

In conformity with this idea, their institution might also be extended to various cases of technical nature, for in such cases with the help of expert assistant lay judges the court would be supplied with knowledge which would be of inestimable advantage in arriving at a just decision in each individual case. This arrangement we also find, for instance in the Norwegian Code of Procedure of 1915, which has however not yet come into force.

Indeed coöperation of this kind with practical men in every walk of life would in many ways—as I know myself from my work as one of the presidents of the Copenhagen Maritime and Commercial Court—serve greatly to assist in the enrichment and development of the jurists themselves. It may with certainty be asserted that what jurists might lose in outward power by such coöperation with non-legal assistant judges, would be easily balanced by what they would gain of inner strength, and also here we thus find a corroboration of the immense importance of a close connection between the law and the lawyers and the practical life and its men.