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# ON CIVIL PROCEDURAL LAW AND LIBERAL LEGALISM\*

by

*B D D Radipati\*\**

## Introduction

This article attempts to ascertain some of the general features regarding the unity between civil procedural law and liberal legalism. There is a fundamental idea that makes this attempt necessary. It is the critique of liberalism and its law which underlines much of the current thinking about civil procedure.

To avoid any misunderstanding of the content of this paper, it should be apposite to delimit its purview. As will soon be evident, the present study will deliberately omit a discussion of the actual rules of civil procedures, viz., the rules regarding what procedure to be followed; which pleadings to be filed and served; and what burdens of proof and of adducing evidence should apply in a given situation. Such an omission should, however, not be read as denying the importance of rules in the analysis of law and its successes or failures. It must be admitted though, that a theoretical analysis of civil procedure and the extent to which the former is moulded by ideology, merits the specific focus of this article.

## The Definitional Stage

The following discussion of the subject-matter of this paper should provide a convenient departure point. The rules of civil procedure (and those of the criminal process, for that matter) aim at the realisation of substantive law whenever judicial dispute arises. The application of substantive law is the end, the rules of civil process are the means to obtain it.<sup>1</sup> Thus, civil procedural law acts as an instrument for guaranteeing the observance of substantive law, or, in the common event that such substantive law is breached, as a device through which an injured party may seek judicial relief.

With regard to what constitutes liberal legalism, this paper adopts the following definition thereof — an idea that sees an immanent liberalism in law and its power to change social life for the better. In fact, as a derivative of the ideology of liberalism which favours some state intervention in the capitalistic economy, moderate re-distribution of income, state action to improve the lot of the disadvantaged, legal protection for the accused and mentally ill and legal bans on race and sex discrimination, liberal legalism tends to equate law with freedom and equality. Hence, its unabashed ability of promising the impossible — by assuring formal equality before the law. But of course, this equality is rendered meaningless by gross inequities in wealth, power and status, both between individuals and between individuals, corporate entities and the state.

Indeed, it is an exalted and distinctive feature of a liberal society that the purpose of the law is to simultaneously empower and protect the individual. Thus, liberal law must be such that it guarantees individuals' freedom to exercise the choices they make, subject to an identical freedom on the part of all others.<sup>2</sup> To assure that

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1 van Caenegem RC, "History of European Civil Procedure" in *International Encyclopedia of Comparative Law* (1973).

2 Hence the principle, one's rights end where those of the others begin.

freedom, liberal law confers powers on individuals and provides immunities from the deprivations of others.

According to Trubek; liberalism is not anarchy but rather a subject of ordered liberty. It requires a system of law in which some action chosen by individuals can be [permissible] or prohibited because one person's freedom [may] become another's domination.<sup>3</sup>

In order for law to protect the individual and to serve ordered liberty, it must be formal in its operation.<sup>4</sup> It must be able to delimit the spheres of freedom and regulation correctly; to define the scope of powers and immunities clearly; and to operate predictably.<sup>5</sup>

### The Union Of Civil Procedural Law And Liberal Legalism

Given the premise of formalism in liberal legalism,<sup>6</sup> there must be a correct rule for any set of facts. And granted the premise of liberalism,<sup>7</sup> it will from time to time be necessary to apply these rules to those who encroach upon protected spheres<sup>8</sup> without taking cognisance of their race, class, gender or motivation.

Those who accept these principles view civil procedural law not simply as a medium, but as a transparent one. Indeed, one that does not add or subtract anything from that which is promised by substantive law.<sup>9</sup> Put somewhat differently, civil procedural law should not make a difference in the outcome of a dispute. It should simply ensure that the process engenders the right answer — an answer which by hypothesis is already present in the determinant system of formal law.<sup>10</sup> Another feature of transparency is the idea that the civil process should not have an effect on the values, goals and desires of those who use the system.<sup>11</sup> In fact, the civil process will not equivocate in dismissing claims, which, even though they are socially valuable or politically progressive, do not fall within the matrix of promises made by substantive law.

Likewise, a peculiar trait of liberal law is its concern with procedures than with substance and goals. Indeed, it is common to encounter instances in which liberal legalism cares exclusively about whether the forms of legal procedure (such as proper court documentation, service and strict procedural time-frames), and due process have been followed, while ignoring the idea that law should be geared towards the maintenance or achievement of substantive goals in politics.<sup>12</sup> Lon L Fuller, whose thesis<sup>13</sup> represents conventional liberal legalism in its most advanced version, wants procedure over other principles. In fact, procedural justice in the form of an unqualified commitment to due process, before substantive justice, is the explicit thrust of his argument, just as with other traditional liberal legalists.<sup>14</sup> But as the pre-eminent 20th century exponent of natural law, he publicly admits that what he proposes amounts to a "procedural natural law".<sup>15</sup>

3 Trubek DM, "The handmaiden's revenge: on reading and using the newer sociology of civil procedure" (1988) 51 *Law and Contemporary Problems* 111 at 114.

4 *Ibid.* "A formal system of justice is simply a name for a legal system that can draw correct lines and adhere to them".

5 *Ibid.*

6 On what constitutes legalism see Trubek DM, "Back to the future: the short, happy life of the law and society movement" (1990) 18 *Florida State University Law Review* 1 at 9.

7 On what constitutes liberalism see *ibid* at 8.

8 Trubek *op cit* note 3.

9 *Ibid.*

10 *Ibid* at 115.

11 *Ibid.*

12 See Fowler RB and Grossman JB, "Liberalism, law and social change: a preface" (1974) 2 *American Politics Quarterly* 276.

13 Fuller LL, *The Morality of Law* (1965).

14 Fowler and Grossman *op cit* note 12 at 288.

15 Fuller *op cit* note 13 at 96.

## Legal Realism And The Civil Process<sup>16</sup>

A response to the aforesaid classical legal thinking came in the form of legal realism.

Realists altered some aspects of the classical account of law, while retaining others. For instance, they rejected the classical picture of legal knowledge as objective and determinant, while holding onto the classical notion of the autonomous self. This shift in theories about law had a direct impact on civil procedural thinking. The obvious one was that it was recognised that procedure and substance were inextricably intertwined.

One of the results of the realist thinking on civil procedural law was the development of empirical research on civil litigation and procedure.<sup>17</sup> Additionally, the emphasis on civil process was apparent in the proliferation of studies of access-to-justice.<sup>18</sup> Thus, the researches tended to evaluate the civil process in terms of the opportunities it provided for full participation of affected interests.<sup>19</sup> Their results were that public-oriented litigation, such as class actions and claims based on the promises of the welfare state, was difficult to initiate or continue, given the structural biases and vicissitudes of the civil process system, viz., costs, delay, technicalities and inappropriateness.

Notwithstanding this, the researches showed an implicit conviction in the viability and normative correctness of liberal legalism and its civil procedural law. Hence, it was commonly found that hindrances to a fair civil process could be overcome by formulating changes to civil procedural laws regarding *locus standi in judicio* and jurisdiction; building more court-rooms; availing the public defender and legal aid system to the mass of 'have-nots' and re-organising disputants by aggregating claims that are too small relative to the cost of remedies, or by reducing claims to manageable sizes by collective action to dispel or share unacceptable risks.<sup>20</sup> In other words, the intrinsic values of the liberal system were never doubted; justice was viewed as a determinate concept with fixed meaning, rather than as a symbolic assemblage that could be used by various groups, both to advance ideological programmes and to throttle calls for social change.<sup>21</sup> Expectedly, rumblings of discontent with this line of reasoning were soon heard in some quarters, and it is to this that the succeeding discussion will turn.

## Progressive Discursivity Of The Civil Process

A significant dissatisfaction with the liberal and realist notions of the civil process gave rise to the neo-Marxist and critical legal theory of law<sup>22</sup> and legal process.

Starting from the premise that law is ideological and that like other instruments of the state, it essentially expresses the will of the ruling or dominant class at different historical periods, progressive discourses questioned some very entrenched notions of liberal thinking.

Whereas liberalism equates law with equality and freedom, and treats civil procedural law as the handmaiden to substantive law,<sup>23</sup> i.e., as a process empowering the individual, progressive discourses show how this is

16 For a full account of legal realism and research on civil procedure see Trubek *op cit* note 3 at 116 *et seq.*

17 For example the 1981 Vol. 15 issue of *Law and Society Review* focused solely on dispute processing and civil litigation.

18 See for instance, Cappelletti M (ed), *Access to Justice AND The Welfare State* (1981) and Hutchinson AC (ed), *Access to Civil Justice* (1990).

19 Trubek, *op cit* note 3 at 118.

20 Galanter M, "Why the 'haves' come out ahead: speculations on the limits of legal change" (1974) 9 *Law and Society Review* 95 at 135-144.

21 Trubek *op cit* note 3 at 119 footnote 25.

22 On the literature on this see Hunt A, "The ideology of law: advances and problems in recent applications of the concept of ideology to the analysis of law" (1985) 19 *Law and Society Review* 11 at 20.

false. They assert categorically, how an individual's perception of the law and his or her expectations are fashioned by his or her contact with the legal system and its extensions.<sup>24</sup> So that an individual who has discerned the true nature of liberal law will generally be unconvinced about its ability to empower him or her through its civil process.

An illustration of the aforementioned seems apposite. In a pioneering study<sup>25</sup> it has been shown how anti-discrimination law serves to reinforce the victimisation of its 'beneficiaries'. Two factors have been found to contribute to this: (a) anti-discrimination law demands the assumption of the label of 'victim' of a proscribed act, when a prospective litigant would rather not publicly declare his or her inability to cope with unjust situations;<sup>26</sup> and (b) the fear of the law and the power of the organisations against which a prospective litigant must assert his or her claim, in a civil process system heavily loaded against him or her.

This research thus delivers a devastating critique of the realist assumption that more effective procedural mechanisms, such as class actions, can by enhancing access-to-justice, effortlessly guarantee that rights will be made effective.<sup>27</sup>

In the tradition of post-realism or critical study of society, Law and Society scholars have recently articulated some criticisms of adjudication which reflected some discontent with liberal ideas about the relationship between law and society. They identified the following traits of adjudication that failed to enhance a long-term relationship between the litigants: (a) the winner-takes-all aspect of civil remedies, in which normally one party must win everything and the other lose all; (b) the structure of the adversarial system which encourages each side to push its case to the full without an eye on cost-efficacy; and (c) the backward looking feature of adjudication, which seeks to resolve issues in the past, rather than looking for ways to maintain future relations. Additionally given the inherent individualism of liberal law, critics of formal legal institutions thought that justice would be better served if the norms employed in dispute processing were drawn from the communities in which people lived. In this way, the argument went, communities would be strengthened and disputes handled more effectively. But progressive critiques have exposed the hidden agenda of this de-legalisation effort.<sup>28</sup> Some have not minced words in emphasising that a major function of the liberal state is to disorganise the masses through the legal form.<sup>29</sup> Drawing from this analysis, others have seen that

What is new in current informalisation and community programmes is that while up until now the oppressed classes had been disorganised at the individual level, that is, as citizens, voters, welfare recipients, in the future, they will be disorganised at the community level.<sup>30</sup>

Indeed, that de-legalisation reproduces the class distinctions in a liberal society is indubitable. For instance, it has been found that many disputes processed in informal settings possess two distinctive characteristics: (a) they show structural differences in social power between the parties and (b) they occur recurrently.<sup>31</sup> To

23 This is a term introduced by Trubek. It is submitted that it adequately encapsulates the role of civil procedural law *vis-à-vis* substantive law.

24 Trubek *op cit* note 3 at 122–123 footnotes 42–50 provides examples of such researches.

25 Bumiller K, *The Civil Rights Society* (1988).

26 *Ibid* at 93–95.

27 This is an adoption of Trubek's assessment of Bumiller's book, see Trubek *op cit* note 3 at 126.

28 Silbey S and Sarat A, "Dispute processing in law and legal scholarship: from institutional critique to the reconstruction of the juridical subject" (1989) 66 *Denver University Law Review* 437 at 452–454.

29 On a decidedly progressive and comparative critique of the de-legalisation movement see Radipati BDD, "Informal dispute resolution in South Africa: a comparative and jurisprudential study" (LLM dissertation, School of Law, University of the Witwatersrand, Johannesburg, 1993).

30 Poulantzas N, *Political Power and Social Classes* (1973).

31 de Sousa Santos, B, "Law and community: the changing nature of state power in late capitalism" (1980) 9 *International Journal of the Sociology of Law* 379 at 390.

the two types of disputes which are regarded as possessing the said distinguishing attributes, i.e., landlord/tenant disputes and consumer complaints,<sup>32</sup> might be added the following — environmental disputes, labour disputes and such like.

Thus, it is utopian to think of informalisation and community justice as representing participation, self government and real community. Rather, they represent an overall social control strategy of the liberal state<sup>33</sup> — of controlling disputes, disputants and dispute institutions.

### Conclusion

That doubts about liberalism and its legalism should abound, given the structural bias of the system, is a reasonable expectation.<sup>34</sup> That liberal law, its institutions and its processes are no longer seen as the embodiment of reason or as a powerful tool for the good,<sup>35</sup> is a remarkable discovery.

It is hoped that the foregoing discussion has succeeded in re-conceptualising law and its processes as ideological vehicles, with an intrinsic political agenda.<sup>36</sup> To deny this, is to defy reason.

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32 *Ibid.*

33 *Ibid.*

34 *Ibid* at 393.

35 Trubek *op cit* note 6 at 9.

36 *Ibid.*

37 On how a procedural system may be both ideological and outcome-oriented see Stein A, "A political analysis of law" (1988) 51 *Modern Law Review* 659.



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