A THEORY OF PROCEDURAL FAIRNESS

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Professor Macdonald argues that the concept of procedural fairness encompasses two complementary features of any decision-making process: the quality of participation afforded to persons affected by a decision, and the character of the reasons which properly may be offered in support of the decision which results. Taking Lon Fuller's works as his point of departure, Professor Macdonald argues that no one of the elements of procedural fairness such as the right to counsel, the right of cross-examination and the like is a sine qua non of due process in legal decision-making. The usual assumptions about what constitutes fair procedure in adjudication cannot be projected into all processes of decision in modern society. Procedural fairness is not merely a matter of conducting a legal proceeding according to the dictates of a finite set of pre-existing rules; consequently, a theory of due process based exclusively on the belief that just conduct is a matter of following rules will be incomplete.

As a corollary, the author argues that fairness requires the acquisition and application of tacit knowledge of the uses, limits and purposes of each process for achieving rational decisions. He concludes that a theory of procedural fairness will be incomplete if it does not provide a system for resolving problems of conflicting views about which process paradigm is appropriate. The optimal conflict resolving mechanism is seen to rest, not in an adjudicative framework, but on a consensual basis achieved in a mediational context. Consequently, the conception of procedural fairness here proposed ultimately would be grounded in political and ethical foundations which are essentially contractarian.

Une théorie de procédure équitable

Le professeur Macdonald affirme que le concept de procédure équitable comprend deux facteurs complémentaires pour tout processus de décision: la qualité de la participation accordée aux personnes affectées par une décision, et la nature des raisons que l'on peut convenablement apporter pour soutenir la décision à laquelle on est arrivé. Tout en prenant les oeuvres de Lon Fuller comme point de départ, le professeur Macdonald affirme que, pris séparément, aucun des éléments de procédure équitable tels le droit à un avocat, le droit de contre-interrogatoire etc. ne constitute de sine qua non à la légalité dans le processus de décision judiciaire. On ne peut projeter les critères habituels de juste procédure de jugement sur tous les processus de décision dans la société moderne. La procédure équitable ne tient pas seulement à la conduit d'une poursuite judiciaire selon les ordres d'un ensemble fini de règles préexistantes. Par conséquent, toute théorie de légalité qui se fonde uniquement sur la conviction que

la conduite juste n'est qu'une question de suivre des règlements sera incomplète.

En corollaire, l'auteur affirme que la justice exige l'acquisition et l'application de la connaissance tacite de l'emploi, des limites et des buts de chaque procédé pour parvenir à des décisions rationnelles. Il en conclue qu'une théorie de procédure équitable serait incomplète si elle ne fournissait pas de système pour résoudre les problèmes de conflits d'opinion quant au modèle de procédé convenable. Le système idéal permettant de résoudre les conflits semble reposer, d'après l'auteur, non pas sur une structure judiciaire, mais plutôt sur un principe consensuel réalisé dans un contexte de médiation. Par conséquent, la conception de procédure équitable proposée ici serait finalement ancrée dans un fondement politique et éthique essentiellement contractuel.

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1. Introduction

Procedural fairness or due process is a fundamental legal concept. Historically, both legislators and judges have sought to enshrine elements of procedural regularity in legal decision-making through such mechanisms as constitutional entrenchment, statutory enactment or implication of the common law. The legal community has been preoccupied with the characteristics of a fair judicial proceeding; yet, too little progress has been made toward elaborating a general concept of procedural fairness applicable to all legal activity.

Moreover, the distinction between substance and procedure has often been lost or confused, especially with the introduction of such barbarisms as "substantive due process" and "procedural due process" to legal discourse. In the following pages these two ideas will be kept separate as much as possible, although it is acknowledged that substance and procedure are often intimately related. Procedural fairness will be understood

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to encompass two complementary features of any decision-making process:

(i) the quality of the participation which should be afforded to persons affected by a decision; and

(ii) the kinds of reasons which properly may be offered in support of the decision which results.

The first feature approximates the notion *audi alteram partem* and directs our attention to the relation between enfranchisement and justice. The second, which comprehends, but is broader than the maxim *nemo judex in causa sua,* invites us to consider the connexion between justification and justice.

In a preliminary way, we might suggest at this point that a decision is tainted by procedural unfairness if either the quality of participation afforded to affected parties is inappropriate to the decision-making process undertaken or the kinds of reasons offered in support of the decision are inappropriate to the process followed.

Due process in the common law world generally conjures the notion of a trial, in which affected parties are entitled, as a minimum, to the following rights respecting their participation in the process:

—the right to advance notice of the issues of fact and law to be decided;

—the right to a remand or adjournment in order to prepare submissions fully;

—the right to counsel in the presentation of proofs and arguments;

—the right to examine witnesses and to submit documents;

—the right to cross-examine witnesses and to refute prejudicial written material; and

—the right to have the process take place in a public forum.

And these basic rights of participation imply that reasons for decision should satisfy the following standards:

—they be the product of an impartial decision-maker;

—they be based almost exclusively on the proofs and arguments presented; and

—they be published or at least made publicly available.

To these minimum requirements of procedural fairness might be added, in certain cases, other rights respecting participation such as:

—the right to pre-trial discovery or to a preliminary inquiry;

—the right to insist on formal pleadings;

—the right to invoke restrictive rules of evidence, including a protection against self-incrimination;

—the right to have a complete and accurate record of all proceedings.

—the right to negotiate a prejudgement or interlocutory settlement;

—the right to move for reargument and reconsideration after a tentative decision is announced;

—the right to appeal any decision upon its merits; and

—the right to seek clemency, pardon or remission.

It is usually agreed that the above features constitute the rudiments of a procedurally fair legal decision. Moreover, most people think that the fairness of any given legal process may be evaluated by considering how closely its particulars conform to the above catalogue.

In this understanding of procedural fairness are two assumptions that are often reflected in jurisprudential writing. The first, which has had a long history in North American legal literature, and which is particularly acute among "legal realists", is the belief that the reality of law can be seen in the behaviour of the courts. For example, one finds that many vexing problems of the law are analysed today from the perspective of the adjudicator who applies legal rules; again intense concentration on themes such as judicial discretion, hard cases and jurimetrics reflects this point of view. Modern legal theory seems preoccupied with questions such as "how do judges decide cases?", "what are the appropriate materials out of which a judicial decision is fashioned?" and "in what manner is a judge entitled to justify his decisions?" These concerns have led many writers to fix on courts as the only true decision-making institution of the law. They have also established judicial adjudication as the paradigm of due process in legal disputes.

The second assumption reflected in the above catalogue is that the fundamental elements of procedural fairness can be stated exhaustively and abstractly in advance as propositions about conduct. This assumption, like the first, has had a distinguished place in western legal thought; Kelsen, Pound, Hart, Dworkin, Raz and many other writers have attempted to explain law as a fabric of norms, rules, principles and other prescriptions. The conception of law as propositions about conduct has sustained the belief that procedural fairness in legal decisions can be guaranteed through the elaboration, interpretation, application and adherence to standards defining due process. With the elements of fair conduct so specified, a formal definition of procedural fairness then becomes possible: conduct that complies with the rules as stated is procedurally

fair; conduct that does not must be censured as procedurally unfair.

I argue in these pages that no one of the elements of procedural fairness listed above is a *sine qua non* of due process in legal decision-making. In doing so I also suggest that the two major assumptions just set out are not defensible. The concept of procedural fairness is not applicable only in adjudicative contexts; and so a notion of due process predicated uniquely on the elements of fair adjudication must be deficient. The concept of procedural fairness also involves not merely the governance of legal proceedings according to a finite set of rules; as a result, a theory of due process based exclusively on the belief that just conduct is a matter of following rules is incomplete. I argue as a corollary that questions of procedural fairness are not always appropriate for judicial determination. If a legal system is to establish an institution to resolve such questions, this institution must be mediational and not adjudicative. Consequently, a theory of procedural fairness will rest on political and ethical foundations which are essentially contractarian.

2. A Taxonomy of Legal Decision-Making

It is not surprising that many legal philosophers adopt an adjudicative model of decision-making when seeking to explore some dimension of the law, for with few exceptions they have associated law with the political state. Moreover, at least since the time of Montesquieu, the state has been seen as comprised by three functional elements: a legislative branch which enacts law, an executive branch which carries out the law, and a judicial branch which interprets and applies the law. Legal decisions are thought to involve judicial adjudication of disputes according to established rules or standards. The traditional common law conception of "sources of law", which is usually stated to comprise legislation and precedent, reinforces this perspective. Under such a view legal decision-making may be characterized as involving only judicial interpretation of statutes or prior judicial decisions. Hence, the positivist concern with the pedigree of legal materials as determined by a supreme "law-apply organ" of the state is understandable. A preoccupation with fair procedures before that "law-applying organ" also is not surprising.

But some lawyers and legal theorists have insisted that the political state is not a necessary precondition of law. For them law is not an inflexible apparatus imposed upon people by the machinery of government, but a natural and creative phenomenon arising from human conduct. The legal enterprise contemplates the successful ordering of human affairs through the deployment of various institutional mechanisms. There are two obvious consequences of this latter perspective: first is the belief that law may be created by processes other than explicit

legislation (for example, custom and agreement), and second is the insistence that legal decisions might be reached through processes other than formal adjudication (for example, elections and mediation).

When considering processes for the creation and application of law one should not assume that each such process fulfills only one or the other function. A contract, for example, not only produces rules for the future conduct of the parties, but it also illustrates the uses of bargaining in the resolution of disputes; likewise, an election not only resolves contests, but it also demonstrates how voting may lead to the creation of norms. Of course, both the dispute-settling function of legislation and the law-creating function of adjudication have long been acknowledged.

It is obvious that legislation, adjudication, custom, contract, elections and mediation fulfill an important function in man's private affairs: in business, in voluntary organizations such as clubs or unions, in the family, or simply in the informal contacts of daily life. But a lawyer's concern with due process or procedural fairness normally arises when state institutions and office-holders, such as courts or the police, are involved. The U.S. Constitution states that no person shall be deprived of life, liberty or property without "due process of law"; and application of the common "rules of natural justice" supposes a governmental decision affecting an individual's rights. In both examples, the state or a state agency is implicated either as the legal decision-maker or as an interested party. Hence, it is necessary to consider whether the processes just identified are also present in official or public affairs.

The legal theorist and philosopher may interpret state activity solely by the legislative and adjudicative record, but the administrative lawyer has no such illusions. He regularly encounters various governmental functionaries who are required to legislate, adjudicate, investigate, mediate, negotiate, prosecute, settle, contract, manage land, advise, inquire, consult, research or defend a case at law, let alone simply act informally in innumerable ways. These officials are authorized to make decisions which may have a direct and substantial impact upon individual citizens, and the manner of their action may be either fair or unfair. Consequently, the concept of due process or procedural fairness should arise. Yet, it is by no means clear that the specific requirements usually thought essential to procedural fairness in judicial adjudication are appropriate. It makes little sense, for example, to engage in a full trial in order to determine whose census-return should be subjected to scrutiny; to decide who should be a bencher of the Bar; to conclude who should be permitted to acquire excess Crown assets; to choose a co-contractant in a governmental venture; to allocate a T.V. channel; to determine which passport applications should be processed first; to assist parties

in settling the terms of a collective agreement; or to finalize the choice of army uniforms. However, the inapplicability of adjudicative assumptions does not mean that the concept of procedural fairness is inappropriate to the above activities.

Despite the great variety of tasks undertaken by officials in the modern state, the fundamental mechanisms of government are not infinitely variable. It might seem difficult to conceive of decision-making processes which are as various and different as the criminal trial, the ordinary civil action, the labour arbitration, the disciplinary action of a professional body, the preliminary inquiry, the appeal to a superior court, the determination of a foul allegedly committed in a horse race, or the child custody hearing. But one should not be deceived by the apparent dissimilarity of these processes. Each is an example of adjudication and, subject to minor permutations, each is capable of being meaningfully carried on even if the entire inventory of procedural requirements listed earlier were rigorously followed. It follows, therefore, that a first task in the elaboration of the concept of procedural fairness is to develop a taxonomy of processes which will comprehend the entire range of state activity. This, of course, should be identical to that which relates to the structuring of man's private affairs.

Fuller and Eisenberg suggest such a taxonomy under the rubric "the ordering processes of society".[1] These processes are stated to be:

1. The coordination of expectations and actions that arises tacitly out of interaction; illustrated in "customary law" and "standard practice".

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[1] Lon L. Fuller & Melvin Aron Eisenberg, *Basic Contract Law,* 3rd ed. (St. Paul: West Publishing, 1972), 89-102. Throughout this essay, the influence of Professor Fuller will be apparent. I refer the reader to the following essays by Professor Fuller for elaboration of many of the points raised: "The Forms and Limits of Adjudication" (1978), 92 *Harv. L.R.* 353; "Collective Bargaining and the Arbitrator" [1963] *Wisc. L.R.* 3; "Adjudication and the Rule of Law", [1960] *Proceedings of the American Society of International Law* (54th Annual Meeting); "American Legal Philosophy at Mid-Century" (1954), 6 *J. of Legal Ed.* 457; "Governmental Secrecy and the Forms of Social Order" in J. Roland Pennock & John W. Chapman, eds., *Community: Nomos 2* (N.Y.: Atherton Press, 1959), 256 ff.; "Human Interaction and the Law" (1969), 14 *Am. J. of Juris.* 1; "Irrigation and Tyranny" (1965), 17 *Stan Law R.* 1021; "Mediation: Its Forms and Functions" (1971), 44 *So. Cal. Law R.* 305; "Two Principles of Human Association" in J. Roland Pennock & John W. Chapman, eds., *Voluntary Associations: Nomos 11* (N.Y.: Atherton, 1969), 3 ff. Most of these essays are now collected in Winston ed., *The Principles of Social Order: selected essays of Lon L. Fuller* (1981). See also Melvin Aron Eisenberg, "Participation, Responsiveness and the Consultative Process: an Essay for Lon Fuller" (1978), 92 *Harv. L.R.* 410.

2. Contract.
3. Property.
4. Officially declared law.
5. Adjudication.
6. Managerial direction.
7. Voting.
8. Mediation.
9. Deliberate resort to chance; "tossing for it".

In this grouping Fuller and Eisenberg attempt to highlight institutions by which social ordering may be achieved. Our present concern is slightly different, focussing specifically on divergent procedural models by which social decision-making is carried out. Consequently, in the paragraphs which follow, several modifications touching upon order, nomenclature and content are proposed. First, Fuller and Eisenberg note that their sequence for presenting these processes is neither intended to convey any logical neatness, nor the historical order of their development. Here, however, the processes will be grouped so as to emphasize similarities in the sources from which decisions emanate. Second, as to nomenclature, "election" has been substituted for "voting", and "management" for "managerial direction", in order to distinguish the process from the manner in which it is conducted. The term "politics" has also been substituted for "officially declared law" because the process by which legislation is made often finds application even when no general rules are contemplated. Finally, the content of some items has substantially been modified, notably those of "property" and "politics."

The taxonomy elaborated by Fuller and Eisenberg also requires slight modification and elaboration because it is governmental initiative and not private ordering which is highlighted. In the illustrations presented below two facets of official activity are reflected wherever appropriate: examples preceded by (a) are those in which the state imposes an ordering process upon other parties (that is, where the state itself organizes the process), while examples preceded by (b) are those where the government or one of its agencies is merely a party to the process (that is, where the government or one of its agencies occupies the same institutional position as other parties). In both situations, however, one should be able to discern similar requirements of due process, for these requirements are tied to the nature of the process, not the status of the government.

A taxonomy of processes which may be used to elaborate the concept of procedural fairness in governmental activity can be illustrated by the following items:

(i) **Mediation:**
(a) A conciliation officer acting pursuant to a labour relations statute may convene before him the parties to a dispute and induce them to achieve a collective agreement.

(b) In determining the amount of compensation to be paid for an expropriation, the government and the party expropriated have recourse to the services of a mediator in their attempt to arrive at a settlement.

(ii) **Contract:**
(a) Not applicable. There is no institutional role performed by any person other than the contracting parties.

(b) Government departments may enter contracts for the supply of materials and services.

(iii) **Custom:**
(a) Not applicable. There is no institutional role performed by any person other than the parties whose interaction gives rise to the custom.

(b) In processing passport applications, the Department of Immigration disposes of files on a first-come/first-served basis.

(iv) **Election:**
(a) The affairs of the legal profession are conducted by a convocation of benchers who shall vote on any matter, including admissions, suspensions and disbarments, coming before it.

(b) As the producer of an agricultural commodity, a government farm has status to vote in the election of members to the appropriate marketing board.

(v) **Property:**
(a) The government proposes to dispose of excess assets by holding a public auction.

(b) The National Gallery purchases paintings at a private auction.

(vi) **Deliberate Resort to Chance:**
(a) In determining which citizens to subject to the long form of census filing, the government relies on computer selection from random number tables.

(b) Petro Can is awarded oil drilling leases on the basis of a lottery.

(vii) **Adjudication:**
(a) The Highway Transport Board may cancel or suspend any trucking license by reason of a breach of the provisions of selected statutes.

(b) The government sues a railway company to recover compensation for the cost of cleaning up a chemical spill.

(viii) **Politics:**
(a) In determining who should be awarded a pipeline license, the Minister of Communications may select the applicant which he thinks best fulfills the requirements of the relevant statute.

(b) The C.B.C., as a Crown Corporation is subject to C.R.T.C. regulations respecting the content of advertising which may be broadcast by television licensees.

(ix) **Management:**
(a) The Ministry of Defence decides that Army uniforms should be grey/green rather than olive/green.

(b) The hiring practices in certain Ministries are open to investigation by the Public Service Commission.

But just to advance a taxonomy of ordering processes and to illustrate how governmental activity may be characterized on the basis of such a taxonomy does not itself constitute a theory of procedural fairness. At least four other tasks are necessary: first, one must elucidate the features of each of these processes and justify its inclusion as a distinct item; second, one must delineate the specific procedural requirements appropriate to each; third, one must consider whether the concept of procedural fairness is exhausted in the elaboration of rules coherent with each process; and fourth, one must suggest a theory by which the particular strengths and limitations of each of these processes may be identified and the choice among them as an applicable paradigm may be made.

3. The Distinctive Characteristics of a Process of Social Ordering

Any taxonomy presupposes criteria of similarity and differentiation. In the present context development of such criteria involves several elements. First, it is necessary to suggest why, for the purposes of procedural fairness, the inventory of ordering processes should be limited to nine basic items. At the same time the meaning of the expression "ordering" as used here must be clarified. Finally, one would expect tests to be postulated for distinguishing the essential elements of each of these processes.

As Fuller and Eisenberg observe, the social theorist would

probably allege several omissions from the catalogue presented. No place seems accorded to force. The principle of kinship is absent. Superstition, religion or the charismatic leader are not mentioned. Neither money nor barter seems to be listed. However, it is suggested that each of the above may be subsumed under one or more of the nine listed processes. For what is being distinguished here is not the motivation for order (be it direct coercion as in the case of force, or be it indirect coercion as in the case of superstition); nor is it the particular medium through which order is effected (be it the device of money or the institution of kinship). We are concerned with distinctive processes of social ordering as these relate to the quality of participation afforded to affected parties and the kinds of reasons (if any) for decision which must be offered. From this perspective force and charisma can be seen as variants of management, while money and barter appear as aspects of property. Kinship, religion and superstition are types of customary processes.

These other sub-processes just reviewed illustrate that there will be nuances and combinations in the nine processes which have been listed. Each mutant or variant, however, is capable of being analysed independently as part of the larger process. This task will be undertaken later. What is important at this point is the meaning of "ordering". First, a principle for achieving social ordering should be understood as a rational institution for structuring, reconciling and also producing conflict. For example, a regime of rules may often appear as a mechanism for stimulating conflict. In doing so, it serves the important function of bringing to light previously obscured problems and channelling inarticulate aggravations into a conscious disagreement which can be resolved. The term "ordering" also is not intended to suggest merely negative constraints on freedom, but is employed so as to emphasize the need for restraint and discipline which is essential to creative human activity. A grammar and a syntax, for example, create the possibility of communication (that is, freedom to express ideas) by imposing limitations and structures upon the use of language. Finally, the phrase "social ordering" is used to emphasize that these processes are independent of government or the state: they are present wherever social organization is present, be this the family, the tribe, the community or the nation. That one also sees their impact in the relations between citizen and government is additional evidence of their pervasiveness.

If we accept that the inventory of nine processes can be adapted to cover the range of activity undertaken by government, it is important to isolate criteria for distinguishing these processes. In an important article Fuller rejects a differentiation based on the office of the decision-maker, and suggests that the distinctive element of each process is the

manner in which the affected party participates in the decision. In this vein, he offers the following correlations:

Process		**Participation**
contract	—	negotiation
elections	—	voting
adjudication	—	presenting proofs and reasoned argument

This approach certainly permits one to make important distinctions between bipartite processes (as in contract), multilateral processes (as in elections) and tripartite processes (as in adjudication); in a rudimentary form it would also permit one to make judgments as to specific rights of participation to be afforded to affected parties. But to my mind it is incomplete, and a more comprehensive set of criteria is required. These would involve elaboration of the principle upon which the decision rests, (including the kinds of reasons which properly may be offered in support of it), clarification of the relationship between the quality of participation afforded to affected parties and the kinds of reasons permitted, and identification of the locus of decision in the process.

Applied to Fuller's noted correlations, these additional criteria would produce the following results. In the regime of contract, we could say: the parties participate by bargaining; the principle upon which the decision rests is one of agreement; there need be no formal connexion between the mode of participation and the kinds of reasons given for decision; and the achievement of decision arises directly from the parties. As regards elections we could say: the parties participate by voting; the principle upon which the decision rests is the counting of ballots; the decision directly reflects the mode of participation; and the decision rests on an institutional rule determined in advance. In adjudication, we could conclude: the parties participate by litigating; the foundation of the decision is a pre-existing claim of right; there is a strong correlation between the mode of participation and the nature of the justification offered to support the decision; and the decision results from the judgment of a third party. While these additions do not at first appear to add much to Fuller's criteria, their usefulness will become apparent when all nine processes are contrasted.

A complete table of correlations, which comprises each of the processes found in governmental activity, should serve to direct attention to the rudiments of procedural fairness in the exercise of all state powers. Since this would be a basic table, there will be mutants and variants of each process which do not appear to be contemplated, but as noted, these will be examined briefly in a later section. The following taxonomy is suggested as a model from which the specific "due process" requirements of each process may be derived.

Process	Participation	Principle	Correlation	Locus
contract	direct bargaining	explicit agreement	no necessary connexion	affected parties
mediation	vicarious negotiation	externally induced and structured compromise	moderate	affected parties
custom	conduct	interactional expectancies	strong	affected parties
election	voting	counting of ballots	exact	institutional rule
property	bidding	market	exact	institutional rule
chance	enrollment	randomness	exact	institutional rule
adjudication	litigating — presenting proofs and argument	pre-existing claims of right	strong	third party
politics	lobbying — advancing data and opinion	consultation	diffuse	third party
management	no institutionally guaranteed participation	fiat	weak	third party

There are obvious similarities between many of the processes which are included in the table: the process of adjudication resembles mediation except that the locus of decision differs; it resembles politics except with respect to the correlation between participation and principle of decision.[2] Contract resembles property except as to the locus of decision; it resembles custom except in so far as the principle of decision is concerned. The process of elections resembles management but for the locus of decision; it resembles deliberate resort to chance except as to the principle of decision. Yet these similarities do not mean that each process is merely a variation on a theme. Rather, each process has its own integrity which is reflected in the organizing items: participation, principle, correlation and locus of decision.

[2] In later sections of this paper it will become clear that I regard the correlation between participation and principle as the single most important distinguishing criterion in all processes involving third party decision.

4. Deriving the Requirements of Procedural Fairness

If participation, principle, correlation and locus are the key defining elements of each process, then the manner of deriving the features of procedural fairness for each is easily discerned: any prescription, attitude or conduct which serves to guarantee the appropriate form of participation for each process, or which serves to enhance the ability of those engaged in the process to justify decisions on the principle inherent in each, is procedurally fair; any prescription, attitude or conduct which does not do so may be characterized as procedurally unfair.[3]

On this basis, one should be able to test the appropriateness of each item on the list of elements of a procedurally fair trial set out at the beginning of this paper by assessing the degree to which it corresponds with the "right to participation" and "principle" of adjudication — that is, whether it facilitates the orderly presentation of proofs and reasoned arguments, and enhances a decision-maker's ability to make determinations respecting pre-existing claims of right predominantly on the basis of such proofs and arguments. This evaluation will not be undertaken here because Fuller and others have already attempted it. But by distinguishing adjudication from three other processes with which it is sometimes combined and often confused, namely, mediation, politics and management, the extent to which the requirements of procedural fairness may be correlated with particular processes will be explored. Special attention will be given to isolating the distinctive characteristics of adjudication, politics and management since these three are by far the most common administrative processes of the state, and since they each involve third party responsibility for decision.

Adjudication, politics and management may be seen as lying along a spectrum. Management, at one extreme has been characterized as a process which does not guarantee any form of participation in the decision-making process to affected parties. Therefore, even should some participation be afforded, it would allow only a weak correlation between participation and reasons which may be given for decision. At the other extreme, adjudication guarantees a very precise form of of participation to affected parties and a strong correlation between proofs and arguments presented and justification of decision is imperative. For two reasons, the intermediate range of decisional processes has been labelled politics. First, the term politics implies a consultative process, and second, it signals that legislation generally will be enacted by means of a process falling within this category. What characterizes politics as a process? It differs from adjudication primarily in that political

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[3] I emphasize that I am not concerned at this point to identify when and why a given process (or paradigm) is appropriate. Here I am merely trying to show how specific requirements can be derived from operational paradigms.

decisions are seldom taken or justified solely on the basis of proofs and arguments adduced by affected parties; often they are grounded in evidence accumulated *proprio motu* by the decision-maker or arguments not raised or addressed by parties. The dynamic and informing principle of this process is not a pre-existing claim of right advanced by participants, but consultation: parties have no entitlement to a decision in their favour, but they can insist that decisions not be taken without their prior input.

Distinguishing management, politics and adjudication can become quite difficult, however, largely because notions of "judging" are frequently and colloquially misapplied. In one sense this occurs when the word "judge" is used to describe baseball umpires, music festival adjudicators, science fair evaluators and Nobel Prize committees and the like. The above are not, strictly speaking, judicial activities since such decision-makers are not formally obliged to hear representations, to justify a decision on the basis of proofs and arguments adduced, and to answer directly in reasons for judgment the representations and arguments made to them. A paradigm of the above informal decision-making may be exemplified in the habits of a business manager who takes decisions as he sees fit. Excepting bad faith (which is here distinguished from partiality), his action is governed by his own assessment of its probable success in achieving his goals. Of course, this judgment may well involve an assessment of the support his decision will win from those expected to obey rely upon, or follow it. Certain rights to participate may thus be thought desirable, though they are neither guaranteed institutionally nor intrinsically necessary.

Similarly, formal notions of judgement are conjured up in describing the award of a radio license or a government franchise or other process by which an investigatory or recommendatory report is prepared. Again, however, none of these is an adjudication, even though for other reasons we may wish to colour the process with the appearance of that particular kind of impartiality, rationality and integrity associated with judging. Here the decision-maker may take into account proofs and arguments not adduced by affected parties; here his justification for decision need not explicitly address arguments presented. In other words, one cannot distinguish politics and management from adjudication solely on the basis of linguistic usage. The realm of each must be determined upon its own principles.

Mediation has also been confused with adjudication, but here confusion arises for different reasons. While the participation afforded to affected parties may be similar in nature, the locus of decision and the correlation of participation to decision are quite distinct. These differences can be illustrated most easily by comparing contract and

mediation. Both processes ultimately result in decisions which the parties must agree to, and thus at first glance the distinction between them might appear to be tied to the presence in one of a third party (the mediator); whereas contract presupposes direct bargaining between affected parties, mediation implies formal assistance in achieving consensus. Nevertheless, this distinction is not crucial, for binding contracts may be negotiated by agents, and the physical presence of a mediator is not essential to the mediating process.

Mediation is distinctive because it involves compromise which is externally induced and structured. Whereas contract assumes that the parties themselves have the ability to consider all the various conceptions of their position and objectives, as well as the capacity to order these, successful mediation depends on the ability of the mediator to assist parties in rethinking their situation, redirecting their attitudes, and reordering their priorities by focussing their attention on alternative objectives or specific solutions. This reorientation may be achieved through the suggestion of rules and structures, (that is, by the transformation of an open-ended set of goals into a restricted set of objectives) or it may occur through the suggestion of solutions, (that is, the fractionation of an issue in a novel and uncontemplated manner). Mediation and contract may also be distinguished by the fact that the former usually presupposes that affected parties recognize the necessity of their coming to an agreement. Reciprocal gain is in most instances sufficiently evident to induce consensus in contract. Where it is not, agreement usually will not be achieved. In other words, neither party senses himself in a position where he must negotiate. By contrast, a mediator is most often employed to assist parties in realizing a gain in situations where such may not be immediately apparent to them, but where, for other reasons, they must achieve an agreement. In general, one might say that mediation has a predominance where the preservation of continuing relations within which contractual arrangements may flourish is a motivating feature in the quest for consensus. Paradoxically, this frequently occurs where parties have such intense relationships that contractual negotiation is impossible.

These comparisons elucidate differences between adjudication and mediation. Adjudication assumes the existence of impersonal act-oriented rules as the foundation for claims of right; mediation generally assumes that such rules do not exist. Adjudication rests on the ability of third parties to impose solutions upon themselves. In adjudication, proofs and whereas mediation rests on the capacity of affected parties to impose solutions upon themselves. In adjudication proofs and arguments adduced by parties sustain their position and are advanced in order to influence the decision; in mediation, parties often are induced to consider proofs and arguments they are themselves unable to formulate. Consequently, the

distinction between adjudication and mediation does not lie in differing correlations between participation and justification, as was the case with management, politics, and adjudication. Adjudication is distinguished from mediation by the fact that decision and justification in the former are imposed, while in the latter, are consensual.

What specific conclusions can be drawn from this analysis? First, let us assume that each of the requirements for a procedurally fair trial set out in the introduction to this paper is justifiable in any adjudication. To what extent are any of these appropriate to non-adjudicative processes? Beginning with politics, we can suggest, as a minimum, several rights of participation which should be afforded to affected parties. Yet each is derived, not from the list thought necessary to adjudication, but rather from the governing principles of politics. They include:

- —the right to know in advance the subject matter of the point to be decided, as well as the authority under which the decision is to be taken;
- —the right to an adjournment in order to prepare submissions fully;
- —the right to engage counsel to assist in the presentation of fact and opinions;
- —the right to submit documents and other materials;
- —the right to have access to other submissions and to file supplementary comment thereupon; and
- —the right to have all official briefs treated as a matter of public record.

One would also expect the following constraints to be placed upon the decision:

- —that it be the product of a decision-maker who has genuinely and honestly attended to the facts and opinion advanced, either personally or by authorized delegate; and
- —that it be justified with published reasons which reveal the policy or other considerations influencing the decision.

Of course, additional rights of participation might be necessary requirements of procedural fairness in certain cases:

- —the right to know the general policy of the decision-maker in advance;
- —the right to know the exact identity of the decision-maker who will digest and summarize documentary material;
- —the right to move for reargument, reception of additional evidence and reconsideration; and
- —the right to appeal any decision upon its merits.

The above elements, it is suggested, are congruent with the nature of participation which ought to be afforded to affected parties, and with the constraints upon justification resulting from the underlying principle of the process called politics. It is not surprising, in view of the parallels drawn earlier, that they reveal several similarities to those elements associated with a procedually fair trial. Even though the requirements may seem similar, however, the motivation for their inclusion differs and their underlying justification is distinct. Such variances will be shown to produce substantial divergences in their interpretation and application.

A similar exercise may be undertaken with respect to management. Here a catalogue of basic requirements is more difficult because there is no institutionally guaranteed mode of participation afforded to affected parties and because decisions need not be justified on the basis of any proofs or argument. One might be tempted to conclude that no item on the list of due process requirements should ever be applicable. Yet, at some point, the line between politics and management is reached; as a result, even though a process may be characterized as management, in its limiting cases, certain prescriptions relating to politics could be invoked. Indeed, one should not assume the independence of the various processes we have discerned. Various mixed and combinational forms involving hybrid types of participation and justificatory constraints will be assessed below. Thus, both in its limiting cases, and whenever it is involved in a mixed or combinational form, the process of decision "management" may give rise to identifiable standards of procedural fairness.

An entirely different perspective is required where mediation is concerned. Rights of participation of affected parties would include:

—the right to a remand or adjournment for the proper presentation of one's position;

—the right to engage counsel to assist in the preparation of a negotiating strategy;

—the right to private access to the mediator; and

—the right to equal access to the mediator.

Justificatory constraints upon the decision are minimal because the decision rests ultimately on the consent of affected parties. Nevertheless, the process implies the one clear limitation on the office of mediator:

—the decision must be the product of consent not vitiated by a mediator who is partial to one party.

In appropriate cases, one might also suggest such rights of participation as:

—the right to a public mediation session; and

—the right to negotiate directly with the other party, in the absence of the mediator.

Additional justificatory constraints might also be contemplated:

—the decision must be the product of consent of the parties informed by a report from the mediator as to his intervention.

Thus, with respect to adjudication, politics, management and mediation, it is possible to derive specific procedural requirements to guarantee the integrity of the process undertaken. Occasionally, a requirement similar to an adjudicative norm is suggested. Often an entirely new standard may be required. Always, however, fair procedures must be derived from an assessment of the integrity and principle of the process itself.

These ordering processes, it has been noted, often appear in mixed or combinational forms. In many cases, these hybrids are successful and the requirements of due process can be elaborated by considering the procedural norms of each component process present in the hybrid. The most obvious mixed forms are those involving mediation and adjudication, politics and election, management and contract, and custom and chance. Common examples where adjudication and mediation are mixed involve tripartite labour arbitration, child custody proceedings and certain processes for liquidating matrimonial property. One finds in each an essentially adjudicative process tempered by proofs and argument not arising from the parties in a trial setting, or by the existence of person- oriented rules which cannot be abstractly applied, or by a factual indeterminacy which undermines determination on the basis of a claim of right. Politics and election are often combined in legislative enactments, or in proceedings before disciplinary committees of self-regulating professions. Decisions by any multi-member judicial body necessarily combine adjudication and election. One finds management and contract combined whenever standard form contracts are used or wherever collective agreements are negotiated. Finally, custom and chance are intermixed successfully in almost all instances. Though the meaning of due process in any of the above combinational forms cannot be traced out here, the possibility that the requirements of procedural fairness may be derived from a close analysis of the particular characteristics of each hybrid process considered is obvious.

It is not suggested that each of the processes identified is unique to a given decision-making structure, or that they do not mutually support each other. For example, a regime of contract may lead to a renegotiated contract, an adjudication or mediation if problems should arise; or an election might lead to a regime of rules implemented by a process of management or politics. More importantly, all of the above processes are constantly reshaped by the tacit accommodations of a customary regime. Regardless of how these processes shape and inform each other, the due process requirements of each may be independently determined.

A further point to be considered in connexion with mixed or combinational forms is that even where one process best describes a decision-making activity, elements of other processes may contribute to the whole in a subsidiary way. For example, during an adjudication, the trial judge may make management decisions as to evidence or permit parties to agree to expedited hearings. The management process rarely proceeds without informal canvassing of opinion of a customary nature. The form of an election is often contingent on contractual arrangements as to eligible voters and the counting of ballots. As long as each sub-process retains its essential integrity, there is no reason why such major and minor forms cannot coexist in a single process.

Before passing from the discussion of mixed and combinational forms, it is appropriate to note how the familiar distinction between vertically imposed order and horizontally generated order breaks down when applied to the processes we have elaborated. It might seem that management, politics and adjudication are examples of the former form of order. But it is axiomatic that no third-party decision can rest exclusively on its own weight and that no self-generated limitation is ever independent of external structuring. Consequently, it follows that fiat and consent are present in each of the processes identified; only when they fall out of the balance appropriate to a given process of ordering would that process be transformed into an alternative form. In such cases the specific requirements of procedural fairness then would have to take another shape, and be justified by an appeal to a different paradigm.

5. Procedural Fairness and a Regime of Rules

It is not uncommon for laywers and legal philosophers to adopt an ethical attitude which has been characterized as "legalism": the legally trained often strive to reduce the meaning of right conduct to a calculus based on a series of

specific propositions called legal rules.[4] These rules of duty and entitlement are thought to lie at the heart of a legal system, and much of modern jurisprudence has been devoted to explaining how such rules are elaborated and interpreted. Today however, some theorists have tempered their legalism, and have argued that true adjudication demands recourse by courts to second level principles, higher norms, policies, goals, or even to a fully developed political theory. (In other words, implicit in most writing is a belief that applicable dispositive standards will pre-exist any legal dispute.) It follows, if legalism is being called into question in so far as the justification for liability or exculpation is concerned in individual adjudications, that *a fortiori* it cannot be valid with respect to issues of procedural fairness, as that term is employed here.

In the paragraphs which follow, three limitations to a rule-oriented view of due process will be briefly elaborated and analyzed. However, as a preliminary, it is necessary to clarify the sense in which rule, rule-oriented and rule-bound are being used. A distinction is being drawn between rules as finite propositions (and thus totally specifiable) and right or justice as infinite ideals (as reflected in concepts such as Polanyi's "tacit knowledge", or Hegel's "spirit as dialectic"). While all legal decisions ultimately must be justified by an appeal to the latter, traditional views of law and legal rules tend to restrict the scope of legal rights (including procedural rights) to those which have been enumerated in propositions of the former kind. My intention is to demonstrate that controversies about the requirements of procedural fairness are capable of resolution only if the latter conception of law is adopted. A first limitation of the traditional legalistic view arises because a legitimate complaint of procedural unfairness can arise even in circumstances where the claim is not founded on a pre-existing rule. Second, although many elements of a fair procedure may be derived *a priori* by working out the ramifications of a given decision-making process, several specific requirements of due process in individual cases may be brought to consciousness only in the actual operation of that process. Third, even if a process of decision which rested completely upon a structure of rules could be created, the fact that legal meaning comprises

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[4] See Judith N. Shkar, *Legalism* (Cambridge, Mass.: Harvard U. Press, 1964). The influence of Michael Polanyi, *Personal Knowledge; Towards a Post-Critical Philosophy* (Chicago: Univ. of Chicago, 1958); Susanne Katherina (Knauth) Langer, *Philosophy in a New Key; A Study in the Symbolism of Reason, Rite and Art*, 3rd ed. (Cambridge, Mass.: Harvard U. Press, 1957); and Georg W. F. Hegel, *The Philosophy of Right*, trans. T.M. Knox (London: Oxford U. Press, 1967) will be obvious in this section of the essay. I also acknowledge Owen Barfield, Ernst Cassirer and Arthur Koestler. On a more mundane level see the analysis in Phillipe Nonet and Philip Selznick *Law and Society in Transition* (N.Y.: Octagon Books, 1978).

both immediate, short-term signification and mediate, long-term symbolism compels knowledge and insight on the part of decision-makers which transcends the rules themselves.

How can a claim of procedural unfairness be justified if it is not founded on the invocation of a rule? Two distinct ideas must be addressed. We might isolate decision-making processes where the decision-maker is not obliged to support his decision by reference to any rules: the decision of a party to a negotiation to advance a given argument, or even to conclude a contract, is not founded on any pre-existing rule; nor is the decision of a mediator to convey the position of one party to the other in a particular fashion; nor is the decision of a manager to restructure a company. In this sense, only adjudicative processes habitually involve the invocation of rules of justification.

Yet this is not the sense intended by the claim that problems of procedural fairness may arise in the absence of rules, for in the above cases, affected parties have no grounds for demanding participation in the determination of criteria for decision. What we mean is rather that detailed finite rules as to the nature of participation by affected parties are not present. For example, it is impossible to formulate in advance, with the precision required for a self-contained system of duties and entitlements, what the rights respecting participation of contracting parties might be. Should one co-contractant be able to insist that the other make full disclosure of information, that each term of an agreement actually be negotiated, that he have the right to the assistance of counsel, that competitors be allowed to intervene in a negotiating session, that negotiations be conducted in public, that agreements be formalized in writing, or that agreements not become executory until a certain delay has passed? No doubt, it would be argued that *a priori* formulation of such rights does not belong in a regime of contract. Yet, in certain contractual settings, each has found express legislative or judicial sanction.

The requirement in certain labour relations statutes that parties bargain in good faith, or the duty of *uberrime fidei* in insurance contracts can be seen as a crude requirement for disclosure and real negotiation. Hostility to standard forms and incorporation of oral representations in certain consumer contracts also relates to the theme of negotiation. In certain jurisdictions, the requirement of notarized marriage contracts, hypothec agreements, and registration in land title matters, or the necessity of personal attendance for marriage or personal signature in certain trust agreements, may be tied to beliefs about the need for expert advice or the publicity of negotiations. Again, the phenomenon of "negotiating through the press" or public tendering reflects a concern with openness and the rights of competitors. The latter concern is also implicit in tax relief agreements and multi-lateral trade arrangements

under international treaties. Finally, "cooling-off periods" to consumers, or the requirement of ratification or writing can be seen as the contractual correlations of the transcript and appeal (or reconsideraton) in adjudication. In commercial contracts, the requirement of a writing also operates like restrictive rules of evidence, as well as serving to guarantee the production of a transcript which institutionalizes a certain manner of participation. Of course, partly because of rule-bound conceptions of due process, the law of contract usually converts these procedural issues into ones of substance through doctrines of consent, form and consideration; yet finding the absence of an agreement on one of these bases is akin to finding an adjudication improper for a breach of the requirements of due process.[5]

The analysis of how due process requirements are often camouflaged by substantive doctrine can be undertaken with respect to other processes as well. In a customary regime, for example, cases of procedural unfairness are often resolved simply by the denial that a custom exists or that an interactional expectation has arisen. Does this often not mean that the participation by affected parties required for such a customary regime to arise has not been demonstrated? Yet can it be said that a comprehensive inventory of pre-existing rules — of the sort envisioned for an adjudication — is possible in contractual or customary processes? By contrast, the fact that the law has already given inchoate recognition to general substantive principles reflecting procedural concerns, illustrates the impact that claims of unfairness may have even in regimes characterized by an absence of pre-existing rules of due process.

In addition to situations where the elements of fair procedure cannot be derived for individual cases without difficulty, or even transformation, there are also situations where rudimentary and universally applicable procedural standards can be implied or applied. The process of mediation is one such regime where what has been described as "the *a priori* derivation of rules of fair procedure" must be supplemented by specific requirements which become articulate only when triggered by individual instances. This, Polanyi has characterized as "knowing more than one can tell". Knowledge in specialized areas arises consciously and unconsciously, from direct analysis of the particular problem and indirect speculation about general problems. Yet the sum of our

[5] Let me make this point more explicit. In determining issues which are fundamentally those of procedural fairness (participation; reasons for decisions) common law courts often hide behind well-established substantive rules. This not only conceals the true nature of the problem being addressed, but also protects the adjudicative due process paradigm by implicitly denying a normative procedural content to other ordering processes.

articulate expression on general or specific issues is not the sum of our knowledge. Hence, no matter how comprehensive our understanding of the general theory of a decisional process, no matter how detailed our knowledge of specific procedural requirements of a given regime, there lurks subliminally an inarticulate acquired knowledge which permits us to recognize and solve new and unknown problems as they arise. A notion of procedural fairness must recognize and account for the importance of knowledge of this deeper sort.

If we are able to deduce a general theory of mediation and derive from it certain specific requirements of fair procedure, it nevertheless remains that an experienced mediator will be compelled to adopt certain non-specified procedures in individual cases in order to ensure the overall fairness of the process. For example, if a mediator feels that one party is abusing the other by direct confrontation, he may schedule separate meetings, or he may "leak" information, or he may privately tell him that he is "in the wrong". What constitutes abuse or procedural unfairness is difficult to determine in advance. Yet the experienced mediator will quickly recognize it and instigate procedures consistent with the theory of mediation which overcome it.

This point may also be made with respect to adjudication even though here fair procedures are most susceptible to formalization by rules — the nature of participation being highly structured and rigourously limited or defined. An experienced adjudicator will always be able to find instances of procedural unfairness which have not been and cannot be identified and codified in an *a priori* fashion. Inequality of financial resources may need to be balanced; prevention of subtle intimidation of witnesses, excessive delay, outrageous dilatory procedures and the like are all encompassed by the general idea that control of the process ultimately rests with the judge. Yet no one would suggest that a complete inventory of such abuses has been produced. Moreover, experienced adjudicators can detect unfairness on the part of the judge which is incapable of prior identification more sophisticated than "that is no way for a judge to act". Inarticulate appreciation of the integrity of a process arises not only from a structure of pre-existing rules but also from experimental knowledge of its functioning. Procedural fairness implies the application of this tacit knowledge to individual cases which are not specifically governed by a pre-existing rule of due process.

This conclusion leads to a final observation, and a third reason for claiming that issues a procedural fairness may arise even in the absence of rules. The meaning of legal language (as all language) is both significative and symbolic. Even were we to elaborate a decision-making process, the due process elements of which had been completely reduced to *a priori* rules, it would be wrong to assert that procedural fairness

required only adherence to those rules. Together, and individually each requirement has symbolic value which controls the interrelation and application of specific prescriptions. When decision-makers who perform management or political functions arrogate to themselves the title or quality of "judge", they do so precisely because they wish to trade on the symbolism of adjudication. When one party is faced with "non-negotiable" terms of an agreement, it is obvious that the stipulating party is characterizing the process as contract in order to profit from the force of its consensual symbolism. When the majority shareholder of a company submits proposals to a shareholders' meeting, or when a dictatorship stuffs ballot boxes, one sees attempts to exploit the symbolic value of elections. It is primarily because most adjudications, contractual arrangements, or elections are conducted in a procedurally appropriate manner that the symbolism of each is or is made efficacious. It is primarily because participants know and expect more than a literal adherence to procedural rules that these processes are thought, in any given case, to be fair.[6]

Yet it is not only ordering processes which are possessed of symbolic meaning. As Langer observes, all human situations may be symbolized. The motive for reciprocity in relationships of economic exchange lends itself poorly to a system of centralized management. Conversely, the need for decision in times of crisis encourages the deployment of management regimes. The intimacy of the family and its insulation within another and superior envelope of symbolic motives, makes explicit contract unsuitable as an ordering process and induces a regime of customary practice. (I distinguish custom arising reciprocally in shared experience from custom as an appeal to traditional practice, which masks arbitrariness; only the former is contemplated in this analysis.) We associate the selection of delegates as representatives with an electoral process, but decisions as to merit or demerit evoke the symbolism of an adjudicative model.

Of course, it is often possible to transform a problem that is symbolically associated with one particular process into one that is associated with another by changing its structure. A political decision may be made acceptable for adjudication by eliminating (for example, through contract or management) factors extraneous to an adjudicative solution; again, mediational or contractual processes may be transformed into a

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[6] An obvious corollary of the above paragraph is that overworking any one process tends to weaken its own symbolic integrity. I suggest that much public distrust of the courts stems precisely from the inability of the legal profession to appreciate the extent to which they are encouraging overuse of the adjudicative ordering process. To a lesser degree, recent backlashes against legislative initiatives also reflect a similar overuse.

regime of adjudication through devices such as final-offer selection. Apportioning a testamentary estate may be accomplished by changing a management or contractual situation into one that can be resolved by deliberate resort to chance (for example, where shares are distributed according to the drawing of lots). In each of the above transformations, what ultimately occurs is the adjustment of the symbolism of a problem so that it coincides with the symbolism of an ordering process.

These brief observations show the limitations of a strictly rule-oriented view of procedural fairness. While fair procedural rules can often be declaimed, as such they can never be exhaustive of the requirements of due process in its fullest dimensions: a theory of due process must comprehend a concept of tacit or deep knowledge. The achievement of procedural fairness not only requires the deduction of paradigms of decision-making and the delineation of specific rules of due process therefor; it also demands an understanding of legal and social symbolism.

6. Determining Which Process Paradigm Should Apply

The elaboration of a theory for determining the application of paradigms is also a necessary component of procedural fairness; for, as argued earlier, any particular procedural requirement finds its justification and meaning primarily in the paradigm from which it is derived.[7] In the normal range of legal decision-making, parties are not, of course, permitted any choice as to the appropriate decisional regime. For example, most suits and actions at common law or under statute are brought before a court which is performing a formal adjudicative function; whenever this is not the case, a statute will specifically establish the procedures which a decision-maker is expected to follow (for example, an inquiry, royal commission, or an inquisitorial process); usually, the process for selection of public officials is elaborately set out in constitutions or statutes as some variant of electoral process.

In the above cases, which are the rule in most democratic states, the choice as to the appropriate paradigm process is made in advance. But the paradigm selected may be inappropriate: can highway transport licenses really be awarded by means of an adjudicative determination?

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[7] The reader will note parallels between the paragraphs which follow and the contractarian theory developed in John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971). Here I am obviously articulating a theory about paradigms in which the only determinant is the consent of affected parties. Unlike Fuller, I assert that no problem is always unsuitable for resolution by a given process. Certain problems may, however, require substantial transformation in order to make them soluble by specified processes.

Additionally, although the paradigm selected may not be unsuitable, it may also not be the best or most appropriate in a given context: would it be better to nominate judges by an electoral rather than a political process? Hence, even when a *prima facie* selection of a decisional process has been made, a theory of choice in ordering processes can provide important censorial and evaluative guidance.

But it is primarily in situations where the law does not stipulate the process to be followed that a theory of choice is most important. These arise most frequently in administrative law, where a statute expressly or implicitly grants a power of decision to an official, without setting out any criteria as to how that power is to be exercised, and without providing any indication of the rights of participation to be afforded affected parties. Similar situations arise in voluntary and semi-voluntary organizations such as corporations, clubs, professional associations and unions. How should one determine the appropriate paradigm to guide the exercise of decision-making power? In other words, are there any inherent limitations to these social-ordering devices which dictate that certain kinds of problems are not amenable to solution by one or the other process?

Earlier a taxonomy of social ordering processes was developed by reference to the participation afforded to affected parties, the principle upon which decision rests, the correlation between participation and justification of decision, and the locus of decision-making power. These elements, it is suggested, may also provide a framework within which the limits of each ordering process may be established. Once again, discussion may profitably commence with the predominant legal form, adjudication. Fuller suggested that polycentric problems (defined as those involving situations "of interacting points of influence") are inappropriate for adjudication. As examples in support of this thesis, he offers the unsuitability of adjudication to solve problems such as the division of a valuable, but miscellaneous, collection of paintings between two museums, the determination of industrial wages within a plant, and the assignment of players on a football team to various positions. Yet, as Eisenberg has argued, a distinctive limiting element of adjudication is also the notion of multiple criteria of decision. Adjudication is not appropriate where multiple criteria for decision, even though mutually independent, (and therefore non-polycentric) cannot be ranked in any fashion which permits of proof and argument as to their primacy. The allocation of television channels requires manipulation of multiple criteria incapable of lexical ordering.

Although these two ideas reflect certain limitations to adjudication, I believe that the parameters of this decision-making process can best be appreciated by extrapolation from the dynamic principle upon which it rests, namely pre-existing

claims of right. No such claims are possible either in polycentric situations or those involving multiple criteria. But, more importantly, they are also not possible where the applicable standards are so general that they do not admit of specific proof and demonstration. In this essay, I do not pretend to elaborate fully a theory of the limits of adjudication or any other process; I do suggest, however, that it is the governing principle of each which carries with it inherent criteria for delimiting the scope of that process. Voting, for example, is usually appropriate only where a decision involves discrete alternatives, and is independent of other decisions; contract cannot function effectively to resolve problems which have no stable factual pattern; the law of the market breaks down when it is necessary to establish a regime of rules to regulate production. A complete analysis of the limits of various processes should permit the elaboration of kinds of problems which are unsuited to resolution by a given process, capable of imperfect resolution by a given process, and optimally resolved by a given process. Once this analytical task is complete, a theory of fairness would demand, in principle, that the third alternative dominate in the deployment of various social ordering processes.

The claim that each process is circumscribed by natural limits, does not imply that there are certain problems which *cannot* be resolved by reference to it. Rather, it implies that certain problems arise in a particular fashion and that, if resolved in a fashion which respects the nature and quality of their own origin, several processes are incapable of successful deployment. Of course, it is often possible to convert problems to a form in which they can be resolved by a pre-selected ordering process. Such conversions habitually occur in one of two ways: either the government mandates such conversion by stipulating the applicability of a given process, or affected parties (regardless of legislative direction) agree on an appropriate paradigm. Both of these hypotheses require further explanation.

When a legislature enacts a statute giving a cause of action to certain persons in certain circumstances, it is at the same time directing that the problems be resolved in an adjudicative setting. This direction asks the decision-maker to ignore or disregard many factors which normally might be thought to bear on the dispute. Similarly, in most situations involving adjudication of common law rights there are elements to the problem litigated which the judge must ignore. One need only consider the extent to which concepts such as duty in tort, consideration in contract, and intention in the criminal law cancel or transform aspects of legal problems involving polycentricity, multiple criteria or indeterminate standards. When a legislature directs a decision-maker to resolve a problem in a judicial manner, or when a court decides that a

matter can be litigated, these decisions must be taken as judgments that the cost of translating the problem into a form which can be handled successfully by adjudication is less than the cost of permitting a problem to go unresolved, or to be resolved through contract, mediation, or some other non-adjudicative process.

In contrast to situations of external direction, are cases where affected parties themselves consent to the translation of a problem into a different form. This may occur even where an express legislative direction has been given (for example, when the parties agree to pre-trial settlement [contract] of a pending lawsuit), or it may occur where the legislature is silent (for example, a member of a union faced with a disciplinary proceeding may agree to [contract] the process by which the complaint against him is heard). In the former case, if changes in form are frequent, one has strong evidence that an inappropriate paradigm of dispute settlement was selected by the legislature. This, of course, demonstrates why it is important to permit the waiver of procedural formalities by affected parties. The latter case is an example of parties recognizing the symbolic nature of their problem and finding the appropriate mechanism for its resolution. It is important to appreciate that, when we accept that there are limits to ordering processes which can be overcome by transformation, we are facilitating the achievement of the optimal process for the resolution of disputes, in the form in which they arise. The parties' choice to override legislative direction, or to create their own paradigm, can be seen as based on a principle of consent. Consequently, procedural fairness is not absolute in its specific requirements, and its underlying paradigms cannot be attached *a priori* to given social problems.[8]

There is one other issue which must be considered in this analysis of paradigm selection. How ought disagreements over applicable paradigms to be resolved? Two situations of conflict may be envisaged: first in governmental matters, where a power is granted to an official, with no procedural guidelines as to its exercise, and parties (including the titulary of the power) cannot agree on the appropriate paradigm against which to evaluate claims of fairness; secondly, in non-governmental matters, where neither direction nor agreement is present. One might be tempted to acknowlege the limits to a theory of fairness and simply permit the power-holder to exercise the power following whatever procedural paradigms he thinks appropriate.

However, I believe that all problems of paradigm selection

[8] In this light one should note two related phenomena in North American legal practice: (i) the attempt to transform all decision-making into variants of adjudication, and (ii) the concomitant attempt to introduce inappropriate elements (polycentricity, multiple criteria, indeterminate standards) into the transformed process.

can and should be resolved by a theory of procedural fairness. Two approaches are possible. First, we might consider a legislatively imposed mechanism for paradigm selection involving third-party direction management, (that is, either politics or adjudication). Alternatively, the choice of a process by which the appropriate paradigm is selected could be left to affected parties (that is, custom, contract or mediation, and possibly deliberate resort to chance.) In other words, just as one often finds a legislative direction to adjudicate certain substantive legal problems, there is no reason why such a direction to adjudicate could not be given with respect to paradigm selection. It may be argued parenthetically that this is precisely what a "due process" clause in a constitution, or the common law rules of natural justice achieve; under current practice adjudicative bodies ultimately decide all matters of procedural fairness.

But I believe that the problem here to be resolved is not grounded sufficiently in pre-existing rules that it can be adjudicated without substantial transformation; decisions as to paradigm selection do not naturally flow exclusively from antecedent claims of right. A contractual regime is obviously excluded since, by definition, the parties have not been able to agree on a paradigm. A managerial regime ought to be excluded, since its characteristic feature is the absence of any rights to participation by affected parties (the very concern which leads to the problem of paradigm selection in the first place).

Within the taxonomy of processes suggested earlier, only two seem at all suited to resolution of the problems of selecting the appropriate paradigm for evaluating questions of procedural fairness: politics and mediation. The advantage of mediation over politics in the present context lies in its consensual basis. Throughout this essay, a theory of procedural fairness whose fundamental elements rest on the consent of affected parties has been elaborated. This consensual theme is continued in the suggestion that decisions as to the appropriate process be mediated by a two-man panel, one member of which is selected by each party to a dispute. This panel would presumably be well-suited to assist the parties in reaching consensus on the applicability of a given paradigm; moreover, it could aid in the elucidation of procedural requirements coherent with that paradigm and suited to the particular case.[9]

Because the precise requirements of procedural fairness are tied to the most appropriate process of decision-making in a given context, the selection of paradigms is of fundamental importance. Whether or not the choice is made *a priori* in

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[9] For a further elaboration of this institutional model see R.A. Macdonald, "Judicial Review and Procedural Fairness in Adminstrative Law: II" (1980), 26 *McGill L.J.* 1.

legislative instruments, ultimately parties themselves must be permitted to resolve paradigm disputes on a consensual basis. If a transformation of the problem is involved, one must assume a desire by the parties to assume the cost of such transformation. In cases where direction or consent is absent, the choice of process itself becomes the first question of procedural fairness to be resolved. For reasons already given, this decision should not be achieved by an adjudicative process, but rather should be undertaken in a mediational setting. Once the appropriate paradigm is agreed upon, questions of the due process requirements in particular situations can then be addressed and resolved in the manner suggested in earlier sections of this essay.

7. Conclusion

In this essay I have not attempted to canvass in a comprehensive fashion all the necessary constituent elements of a theory of procedural fairness. It is argued that the concept of procedural fairness comprises two complementary features of any decision-making process, the quality of participation afforded to persons affected by a decision and the kinds of reasons which may be offered to justify the decision itself. Moreover, it is suggested that the usual assumptions about fair procedure in adjudication cannot be projected into all processes of decision; indeed, it is asserted that the specific requirements of procedural fairness must be tied to particular decisional processes, and may be derived from the inherent principle of each. Further, the conclusion is reached that procedural fairness requires more than positivistic adherence to a finite set of pre-existing rules; procedural fairness also requires the acquisition and application of tacit knowledge relating to the uses, limits and purposes of each social ordering process. It follows that a theory of procedural fairness is incomplete if it does not provide a mechanism for resolving problems of conflicting views as to the appropriate process paradigm. The best conflict-resolving mechanism at this level rests, not on an adjudicative framework, but on agreement achieved in a mediational context. Consequently, the concept of procedural fairness here proposed will ultimately be grounded in a contractarian political and ethical meta-theory.

While I have not explicitly addressed the theory of society and state which supports the view of procedural fairness here advanced, the reader will immediately discern its major elements. I believe that a variation of the contractarian conception of the state is justified and that from it may be deduced a theory of procedural fairness which is congruent with the theses induced in this study. For I claim that the theory of procedural fairness is a powerful means of access to major problems in legal and political philosophy: in other words, an understanding of the relationship between enfranchisement and

justice, and between justification and justice (both fundamental to a theory of procedural fairness), supposes an understanding of concepts such as society, state, law and community.[10]

[10] I should like to conclude on a metaphorical note. When I mentioned to a colleague in the Department of English with whom I serve on the University Tenure Procedures Committee that lawyers have a tendency to want to resolve all problems by means of an adjudicative process, he responded: "Although I am a Shakespearian scholar, I certainly don't expect speakers on the floor of the University Senate to address us in iambic pentameter." Good literature takes many forms; plays, poetry and prose are judged on their own terms, not exclusively by reference to the criteria relevant to judging good novels. It is no different in the law.