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I. HART'S RULE-ORIENTED ACCOUNT[1]

It is a special privilege to have this opportunity to dedicate an article to Professor John Finnis, one of the leading philosophers of law in the world today. All of his colleagues in the subject continue to learn much from him, and will long be in his debt. Since it was as a fellow participant in a seminar taught by Professor H.L.A. Hart in 1964 that I first met John Finnis, the topic of my article here is all the more fitting for this Festschrift issue of the *Notre Dame Law Review.*

There is no separate chapter in Professor Hart's justly famous book, *The Concept of Law,*[2] on the basic institutions characteristic of a legal system. On legislatures, one finds a few subsections and other passages. On courts, one finds several paragraphs, and various isolated remarks, *en passant.* Hart does say that courts are among the "typical elements of a standard legal system."[3] Still, he does not treat the formal features and non-formal elements of courts or any basic legal institution frontally and systematically. He seems to have thought of a legal order as a system of rules and not also as a system of institutions.

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1 This is a revised version of a public lecture delivered on June 11, 1998, at the University of Oxford in a series of lectures on major Oxford philosophers of the Twentieth Century organized by Professors Peter Hacker and David Wiggins.

2 H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

3 *Id.* at 5.

Hart does say more about courts than any other type of institution. Here is a summary, with emphasis on trial courts. In his words, courts are "creatures of law."[4] Various types of legal rules "lie behind the operation of a law court."[5] These rules are constitutive of courts.[6] Rules "specify the manner of appointment, the qualifications for, and the tenure of judicial office."[7] Rules give the judge "power to try" certain types of cases, that is, grant jurisdiction.[8] Rules "lay down canons of correct judicial behavior."[9] Rules specify "the procedure to be followed."[10] Rules confer "special status on judicial declarations about the breach of obligations."[11] Rules define when "the judgments of courts become a source of law,"[12] and so specify one general criterion of valid law.[13]

Some of the work of courts is in the nature of self-policing to assure that the courts themselves follow what Hart calls the constitutive rules governing what a court is and how it operates. But the vast bulk of the work of courts is concerned not with such constitutive rules but with substantive rules addressed to extra-judicial activities of citizens and officials. The courts determine the validity of substantive rules,[14] interpret and apply them,[15] determine if they have been broken,[16] determine compensation or punishment for breach,[17] issue orders for enforcement,[18] and create new rules.[19]

In what little Hart does say about trial courts as a basic type of legal institution, his overwhelming emphasis is on rules. Here, I will explore the strengths and weaknesses of Hart's essentially "rule-oriented" approach to institutions, with focus on the nature, operations, and functions of courts, particularly trial courts. I will first identify several major strengths, and then turn to weaknesses. I will then ar-

4 *Id.*
5 *Id.* at 29.
6 *See id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* at 97.
12 *Id.*
13 *See id.*
14 *See id.*
15 *See id.* at 2.
16 *See id.* at 3.
17 *See id.*
18 *See id.* at 97–98.
19 *See id.* at 97.

gue that the primary approach to understanding an institution should be "form-oriented" rather than "rule-oriented."

I concede at the outset that with respect to what might be called the "preceptual" as distinguished from the "institutional" dimension of law, Hart is entirely right to stress the primacy of rules. He convincingly demonstrates the conceptual inadequacy of John Austin's notion that the preceptual form of law consists primarily of commands.[20] The preceptual form of law consists primarily of rules, and rules are quite different from commands, as Hart shows.[21] Moreover, I concede that courts are "creatures" of rules, at least insofar as rules prescribe features of adjudication.[22] Various types of rules, such as those conferring jurisdiction and those specifying procedures, prescribe features of the basic form of the institution of a court. Indeed, in an advanced system, such rules are required for the very existence of a duly authorized trial court.

Hart's emphasis on rules is also part of his more general project of refuting rule skepticism, one radical version of which is that there really are no legal rules at all, only "decisions" of courts.[23] Hart, to the contrary, argues that without rules we could not even know what institutions count as courts.[24] On another version of rule skepticism, the law consists merely of predictions of what courts will do.[25] Hart, to the contrary, stresses that courts themselves do not predict what they will do. They identify and apply law which consists largely of rules. Also, a legal rule does not function primarily as a basis of predictions. Rather, judges, other officials, and even many citizens generally look upon a binding rule primarily "as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticisms and demands made by others."[26] This Hart calls the "internal point of view" toward rules.[27]

Hart's emphasis on rules illuminates the self-regulating character of legal institutions, especially courts. A trial judge abides by what Hart calls "constitutive" rules of many different kinds. This occurs largely in virtue of the judge's own internal point of view toward the rules. That is, in taking such a point of view toward rules, the judge

20 *See, e.g., id.* at 6–8.
21 *See id.* at 19–20.
22 *See id.* at 5, 29, 97.
23 *See id.* at 136.
24 *See id.*
25 *See id.* at 137.
26 *Id.* at 138.
27 *Id.* at 89.

accepts them as binding standards and strives to abide by them.[28] At the same time, the litigants themselves also measure the judge's actions against the rules and insist that the judge follow them. Litigants even seek appellate review and reversal of the judge's actions, if necessary. Determinate rules thus secure basic features of trial court adjudication and its regularity of operation. These features and this regularity account for adjudicative capacity, itself one important kind of "social technology." In turn, the exercise of this special capacity accounts for the effectiveness of courts in resolving disputes in accord with law and fact.

It is hardly surprising, then, that in the abbreviated treatment that Hart does give the institution known as a trial court, he emphasizes rules. There are major strengths in such an analysis. Are there any weaknesses? How might one try to improve on Hart here?[29]

II. An Attempt to Improve on Hart's Account

Even if one were to consider fully the contents of all the main types of what Hart calls "rules of adjudication" in various Anglo-American systems, this could not provide a satisfactory theoretical account of Anglo-American trial courts of general jurisdiction as a basic type of legal institution. This is because a satisfactory account requires that we focus frontally on the basic form of this type of institution, and only secondarily on the rules purporting to prescribe features of that form. The theorist should first attempt to identify and analyze the main features of organized form characteristic of an Anglo-American trial court, including those that figure in its makeup, in how it generally operates, and in its functions. The theorist should be especially concerned to explain why its makeup and mode of operation are suited to fulfill its characteristic functions. Hart's book includes little that is explicitly addressed to adjudicative form and its rationales. It is hardly surprising that in his Postscript to the second edition of *The*

28 *See id.* at 102–03.

29 Hart himself once acknowledged that there might be considerable scope for improvement. In 1964 when I was fortunate, as a junior academic, to be in Oxford to study under him for a year, I showed him a review I had written of the first edition of *The Concept of Law* in which I had suggested he was unduly reductionist in treating a legal institution such as a trial court mainly in terms of those "constitutive" rules that contribute to its makeup as an institution. *See* Robert S. Summers, *Professor H.L.A. Hart's Concept of Law*, 1963 Duke L.J. 629, 643–45. Hart then urged me to develop the point further. Having been diverted, however, by rules of commercial and contract law for some years, I only now return frontally to the point. The present Article is a much abbreviated version of a part of a book in process to be called *Form, Law, and Legal Theory*.

Concept of Law, published posthumously a few years ago, Hart acknowledged that he had said "far too little . . . about the topic of adjudication."[30]

All the institutional and other facts about adjudication I stress here will be familiar. Hart was aware of them all. In what follows, then, I offer no new facts but merely suggest how a form-oriented analysis can advance understanding of an institution well beyond where any merely rule-oriented account must leave matters. The basic form of trial court adjudication in Anglo-American systems can be analyzed in terms of several major features. These features of form are necessarily highly organized so that the trial court can have its special adjudicative capacity. A functioning trial court is a complex social entity consisting of formal features and non-formal elements organized in distinctive ways. In this entity, the formal features have organizational primacy. As a nineteenth-century American judge, who was himself then ruling on a specific issue of appropriate adjudicative form in the trial court, once said,

> Those who are impatient with the forms of law ought to reflect that it is through form that all organization is reached. Matter without form is chaos; power without form is anarchy. The state, were it to disregard forms, would not be a government but a mob. Its actions would not be administration but violence.[31]

I can now merely sketch a very general account of the main features constitutive of the basic form of civil trial courts of general jurisdiction in Anglo-American systems:

(1) There is the defined role of the presiding judge, duly qualified, who is to decide issues of law and issues of fact (with or without a jury) in an impartial, independent, and objective fashion.

(2) There are the defined roles in court proceedings of two opposed parties, each ordinarily represented by a lawyer, with one of the parties serving as claimant and "prime mover," and the other party as the respondent who defends.

(3) The claimant is to initiate the proceedings in the proper court by duly notifying the defending party, a party for whom the proceedings are compulsory so that if this party does not defend, an adverse judgment will be entered, assuming the parties do not themselves agree on some other resolution.

30 HART, *supra* note 2, at 259.

31 Cochran v. State, 62 Ga. 731, 732 (1879).

(4) There is an allocation of responsibilities within this overall tripartite arrangement in which the judge generally has a relatively passive role, with the claimant and the defendant, between them, having the active responsibility and fair opportunity, in accord with rules known in advance, to define the issues of law and/or fact over which they are in dispute, to identify applicable law, to gather evidence, and otherwise prepare to present law, argument, and evidence at an upcoming public trial. This process generally presupposes the existence of antecedent law in terms of which the issues of law and fact can be defined and the relevance of argument and evidence be determined.

(5) A solemn public trial is then to take place at which the opposed parties have the responsibility, and fair opportunity, to present their competing versions of law, legal argument, and evidence relevant to the issues in dispute, in the presence of each other, with fair opportunity to respond to each other, all before the judge sitting with or without a jury.

(6) There is then to be a decision by the judge, with or without aid of a jury, resolving the factual issues on the basis of the evidence introduced by the parties, and resolving the legal issues on the basis of the law and legal argument presented by the parties, with the judge rendering judgment accordingly.

(7) Machinery for enforcement of the court's orders during the proceedings, and for enforcement of the court's final judgment, is also provided.

(8) The entire process is "self-regulated" in the sense that the judge and the opposed parties are to abide by various rules throughout, with the parties through their lawyers measuring the judge's actions against these rules and seeking to hold the judge to them, even through appeal to a higher court when necessary.

These, then, are the main features of the standard case of trial court adjudication in civil matters in Anglo-American systems. All of these features are entirely familiar. I will now continue with a more intensive form-oriented analysis of several of these features. I will consider, among other things, in what sense these features are formal. I will introduce several concepts of form, and so of the formal. These will enable me to portray these features of trial court adjudication in ways that I think improve upon Hart's highly abbreviated rule-oriented account. The concepts of form and the accompanying termi-

nology I introduce here are, I believe, more adequate, conceptually, to portray features of the standard case of trial court adjudication than is Hart's analysis solely in terms of "rules of adjudication." As I have indicated, Hart himself showed in his book how the concept of a rule is more adequate, conceptually, to represent or portray what might be called the "preceptual" element in a legal system than is Austin's concept of a command.[32] Here, in somewhat parallel fashion, I try to show that relevant concepts of compositional, structural, authorizational, and procedural form are more adequate to represent or portray constituents of the basic form of a trial court than Hart's account merely in terms of the content of "rules of adjudication." In the course of this, I will also consider how these formal features and their essential implementation, as duly organized within the basic form of a trial court, are appropriately formal given the functions that civil adjudication must serve. Thus, to understand appropriate form, we must also go into the rationales for formal features. In short, my emphasis is primarily "form-oriented" rather than "rule-oriented." Without a prior understanding of form, it would not even be possible to draft rules of adjudication in the first place.

A. The Qualified Occupant of a Judicial Role

A necessary feature of the standard case of adjudication is that the presiding officer of a trial court of general jurisdiction be duly qualified. This is one facet of what I call "compositional" form, and it requires special organization. At minimum, the occupant of this judicial role must have legal training, will preferably have significant experience as a trial lawyer, and will preferably also be of an objective disposition or frame of mind. Compositional form—here of the office of judge, just is one variety of "form" recognized in our language.[33]

The rationales for the foregoing desiderata of compositional form derive from the judicial role itself, which is concerned with technical matters legal and factual, and with the exercise of objective judgment. It is true that, on Hart's rule-oriented approach to the analysis of trial courts, we might simply read off the particular contents of specific rules of composition specifying that the judge be a lawyer, have had trial experience,[34] and be of objective disposition. But we need to understand more than this. We need to understand the nature of the

32 *See supra* notes 20–21 and accompanying text.

33 For this narrow point, I rely mainly on 6 OXFORD ENGLISH DICTIONARY 78, def. I.5.a (2d ed. 1989) (defining "form").

34 *See* HART, *supra* note 2, at 97.

role to be filled, and so the rationales for the content of the rules. The content of such rules is typically devoid of rationales. Yet a prior understanding of these rationales is required for an understanding of the very content of any rules purporting to prescribe compositional form. Thus, only someone already conversant with the basic form of adjudication—with the nature of the judicial role to be filled, and so with the rationales for the content of the rules of composition—could fully understand what this content calls for, and what adherence to such rules contributes to adjudication itself—to its form and its non-formal elements. The mere content of these so called "constitutive" rules does not carry us very far. Indeed, this content may even be entirely silent with regard to the desideratum of judicial objectivity, yet this is a fundamental feature of appropriate adjudicative form. A form-oriented approach, then, is more illuminating, for it includes, via the concept of appropriate adjudicative form, an account of the relevant relations between form and value, and so of the rationales for judicial qualifications, whether or not these qualifications are specified in the rules. A form-oriented approach thus advances understanding beyond where a mere rule-oriented account must leave matters.

B. An Impartial and Independent Judicial Role

As usually constituted, the judicial role is also to be an impartial and independent one. This is not merely one of the usual features of the basic form of adjudication in Anglo-American systems. It is also a necessary one. Without impartiality and independence of the judge, what we consider to be adjudication could not exist. This feature, too, requires formal organization. It cannot be effectively implemented merely as an agreed and solemnly declared desideratum. Impartiality and independence are complex, and so require formal organization in several dimensions. For one thing, the judge's role must be organized so that it is relatively passive, as Lon L. Fuller stressed.[35] Thus, the judge's role must be organized so that, prior to trial, the judge does not engage in the search for evidence relevant to the issues of fact. Rather, the opposing parties must do this. Why so? If the judge, prior to trial, were to participate in gathering evidence for one side, and then, in turn, to participate in gathering evidence for the other side, this would likely compromise the judge's impartiality, if not in every case, then in some significant proportion of cases. A judge is only human. Once immersed in the preparation of one party's case,

35 *See* Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 30 (Harold Berman ed., 1961).

and then in that of the other, a judge would frequently be strongly tempted to prejudge which side has the better of it, in advance of the public trial. A relatively passive role for the judge, duly organized, is a major safeguard against this and is thus appropriate. This passive role institutionalizes judicial suspension of judgment until the public trial takes place, which is supposed to be the real time and place of decision. (That the judge has no responsibility to help build the case for each side also enhances the incentives of the opposed parties to prepare fully.)

There are other, more obvious threats to impartiality and independence. On motion of the parties, or on the judge's own motion, the judge should be excused from sitting on a case if, for example, the judge would be financially or otherwise personally interested in which of the two parties prevails. A judge is also supposed to be free of external political or other influence. Administrators, legislators, and political party officials are not to try to influence the judge. Formally organized safeguards are necessary here, too. Thus, in an ongoing adjudicative process that is appropriately designed and organized, the judge is to function free of temptations to prejudge the case and independently of any improper influences.

The independence and impartiality of the judge, including its essential implementation, then, is one of the features that figures in the basic form of adjudication. This feature is structurally formal. In our language, one recognized variety of the formal is, "[o]f or pertaining to structure,"[36] and structure itself pertains to how parts in a whole are ordered. In the organized structure of a court, there are at least two sets of resulting functional relations between parts. There is the relation between the role of judge and the roles of the two opposed parties. Here, the judge is to remain relatively passive, with the parties actively preparing and presenting their own sides of the case. In this relation, the parties, too, are not to exercise improper influence. There is also the further relation of independence as between the judge and third parties, including administrative officials, legislators, political parties, and the like who might take an interest in the case. Such third parties are not to exercise influence, either. Each of the foregoing basic relations is an ordered relation between parts within a whole, and so contributes to a structure which is formal.

I will expand briefly on the connections between form and value here, and on the rationales for the formal structure. The appropriately formal feature of judicial impartiality and independence, and its

36 See 6 OXFORD ENGLISH DICTIONARY, *supra* note 33, at 82, def. A.1 (defining "formal"); *see also* 6 *id.* at 78, def. I.5.a (defining "form").

due implementation partly through structural means, contribute to the rule of law. This feature enhances adjudication as a substitute for lawless private conflict. This feature also makes it much more likely that, in an actual adjudicated dispute, the judge will not be deflected from determining the truth in light of the evidence or from applying the applicable law. The overall importance of this to the rule of law transcends the resolution of particular disputes. The resolution of disputes in accord with fact and law lends credibility to the law in its general bearing on conduct outside of court. Many citizens on the front lines of human interaction accord credence to the law when they know it can be backed up by resort to impartial and independent courts. At the least, citizens are more likely to follow the law voluntarily, in light of any needed legal advice. This, in turn, not merely implements policies and principles of the law, but contributes to dispute avoidance generally. Moreover, impartiality and independence contribute to treatment of like cases in like fashion (as marked out by the law) and constrain judicial and other official arbitrariness. In these respects, the appropriate structural feature of judicial independence and impartiality is a major means to the realization of ends and values *external* to, and separate from, the workings of particular adjudicative processes in particular cases. Here appropriate form tends to beget good content in adjudicative outcomes.

Appropriate structural form securing judicial impartiality and independence also serves ends and values *internal* to adjudicative processes—ends and values realizable in the course of the very workings of those processes. Impartiality and independence contribute to the fairness, rationality, objectivity, and legitimacy of the process itself, as a process. We might call these "process values."[37] Here it could be said that appropriate structural form securing impartiality and independence defines and so begets good processes as such, quite apart from, and in addition to, "good outcome" efficacy. This, in turn, also influences losers to accept outcomes more readily and thereby serves finality of resolution, as well.

As I have said, Hart does not attempt to provide an extended and systematic account of the features of the standard case of any type of legal institution, let alone trial courts. Insofar as he does analyze the basic form of legal institutions, he purports to analyze them almost entirely in terms of rules—in terms of what he calls "secondary rules which confer . . . power[s]."[38] In the case of courts, he invokes mainly

37 *See generally* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

38 HART, *supra* note 2, at 97.

those rules qualifying persons to be judges, rules conferring jurisdiction to adjudicate, and rules of procedure.[39] In *The Concept of Law*, Hart says little about the basic feature of trial court form I am now considering, namely judicial impartiality and independence, a feature that, for its adequate elucidation, requires the concept of appropriate structural form, and requires an understanding of the rationales for this form.

We might try to imagine what further Hart might have said here by way of elaboration on his rule-oriented approach. He might, for example, have called our attention to rules requiring that the parties conduct trial preparation and presentation, rules forbidding a judge from hearing a case where he or she has a personal financial interest in the outcome, rules forbidding bribery of judges, rules forbidding politicians to contact judges, and the like. Hart might then have stressed that we not only have such rules, we also have judges who adopt an "internal point of view" to these rules, and thus strive to conform to them voluntarily. He might then have emphasized that it is this self-regulating internal point of view that largely secures the independence and impartiality of the judge. Hart might then have gone on to say that such rules "define" an important feature of what a court is,[40] and that a court in this and similar respects is a "creature" of such rules.[41] Here, though, I believe he would have stopped. (As I have noted, according to his Postscript to *The Concept of Law*, written in the 1980s, he says he wished he had gone much farther.)[42]

Yet, as I have indicated, there is far more to the structurally formal feature of independence and impartiality of the trial judge, and to its rationales, than what even Hart could glean from the content of such rules as those that, in effect, deny the judge an active role in preparing the case for each side or, for example, require the judge to excuse himself if personally interested in the outcome. There is much more, even if the relevant rules are themselves quite comprehensive in addressing internal and external threats to judicial impartiality and independence. For one thing, these rules merely purport to exclude or negate such threats. They do not purport to provide concepts that may be used to represent or portray adequately the general character of the organized institutional reality they are to regulate.

For example, on a Hartian analysis, we might recite the content of those rules that, as he would say, "lie behind" the functioning struc-

39 *See id.*

40 *See id.*

41 *See id.*

42 *See supra* text accompanying note 30.

tural relation between the judge and the parties and the functioning structural relation between the judge and certain types of third parties—relations which go far to secure impartiality and independence. But any mere recital of the prescriptive content of such rules could not itself adequately convey the social reality of the contemplated structural relations. Admittedly, a set of rules prescribing, for example, that the parties must prepare their own cases and that the judge is not to participate in this, could be construed to prescribe a formal structure—a special ordered relation here between parts within a whole. But to go this far is already to go beyond the usual content of such rules. It is already to introduce and use the very concept of an appropriate structural relation in such an analysis to portray, and so further, our understanding of the relevant institutional reality. Without concepts of, and rationales for, appropriate structural features of the basic form of adjudication, we simply could not have courts. Such structural form figures in the very nature of a court. A court just is an organized social entity having formal features appropriate to serving the ends and values of adjudication. Rules are not, contrary to Hart, constitutive of courts. The varieties of organized form such as compositional and structural form, and the corresponding varieties of nonformal elements (personnel, material resources, etc.), are constitutive of courts. Rules merely prescribe certain of the particulars of adjudicative organization.

A solely rule-oriented approach is limited here in a further way. The rules have what might be called exclusionary and negational content that does tend to secure judicial impartiality and independence. Impartiality rules out various types of partiality. Independence rules out various types of dependence. There is, however, a more affirmative and more fundamental side to the overall feature of adjudicative form that I have here denominated "impartiality and independence." This more affirmative side is simply that the judge is to find facts (with or without a jury) and to apply law to the facts, all in an *objective spirit.* Some rules specifically purport to direct and constrain the judge here, but these rules can go only so far. Moreover, an affirmative spirit of objectivity can more fully inform the judgment of the judge than can the effects of any rule or set of rules excluding or ruling out particular types of partiality or irrelevant influences. Objective judgment requires more than that the judge not be partial, and it requires more than that the judge be free of irrelevant influences. The judge must identify and formulate the law applicable to the particular facts in an affirmatively objective spirit, and the judge must weigh and balance conflicting argument and evidence in an affirmatively objective spirit. The content of the relevant rules is typically silent, or not very inform-

ative here. There simply are limits to what rules can prescribe here as means to such ends. True, a rule might simply say that the judge shall bring a spirit of objectivity to bear. But it is not surprising that we have no, or very few, such rules. They would simply restate an obvious end without prescribing means.

Thus, we should understand that the overall feature of adjudicative form here, a structurally formal feature usually denominated in terms of impartiality and independence, has a more affirmative and aspirational side that in large measure cannot be prescribed in rules, let alone adequately characterized in terms of rules. More fully articulated, the overall feature of adjudicative form here should be formulated in terms of objectivity, as well as in terms of impartiality and independence. Explicit introduction of the further concept of objectivity enables us to offer a more perspicuous and comprehensive account of what adjudication is and aspires to. The concept of formal structure also facilitates our understanding of objectivity as the affirmative side of this institutional reality, and enables us to represent its character more felicitously. In the typical trial process, duly designed, there just is a formal tripartite structure of interacting roles, with an objective spirit animating the role of judge, and yet a quite different and partisan adversarial spirit animating the roles of each of the opposed parties. It may also be that this facet of the structural relations of roles—the interaction of an objective spirit of inquiry with the partisan spirit of advocacy—explains more fully than any other single factor the efficacy of adjudication in generally securing the correct application of law to true fact (in light of the evidence). Here we see that much credit should be given to appropriate form, a matter that lies beyond what a mere rule-oriented analysis typically addresses.

Even if we confine ourselves to the exclusionary and negational side of the overall feature of trial courts at hand, namely, impartiality and independence, I hope to have suggested that there is still more to this side, too, than can be grasped merely from a Hartian study of specific rules securing the judge against various internal and external threats to impartiality and independence. We saw reason to introduce the concept of *appropriate* structural form, which takes us into the rationales for form. We came to understand judicial passivity as an aspect of a tripartite structural relation in which preparatory roles are allocated to the parties to safeguard judicial impartiality. We came to see judicial independence in terms of structural relations between judge and parties, and between judge and possible external influences. In turn, we came to see how these structural relations, when duly organized, enable judges to determine law and fact more accurately, and how in turn these appropriately formal structures serve the

rule of law, the policies and principles embedded in substantive law, and various "process values" such as fairness, rationality, and legitimacy.

Structural analysis lays bare the foregoing complexities and thus furthers our understanding of judicial impartiality and independence—of what these and objectivity require, and of the ends and values at stake. A Hartian cluster of relevant "rule contents" cannot adequately represent the formal structural *relations* here between relevant parts, relations that are appropriate given the relevant rationales, such as the functions of the institution and the ends and values these serve. Moreover, in a further analysis, we could deepen our understanding of the relevant means-end relations still further by systematically considering such questions of appropriate structural form as: What is the relevant whole? What are the relevant parts of that whole? What are the parts at hand between which there are possible relations? What are the alternative possible relations? How are they now ordered in the structure? What is relevant to determining the appropriateness of this relation? How appropriate is it? All this must take us far beyond any particular rule contents, for such contents are typically silent with respect to ends and values, and with respect to alternative means—silent with respect to rationales, and can only prescribe piecemeal part of what, in the functioning institutional process, constitutes the actual structure.

It is also possible to conceptualize and describe each basic feature of the standard case of trial court adjudication faithfully without reference to any rules prescribing those features. (The self-regulating feature may be an exception to this.) Thus, for example, and in highly summary terms, we may conceptualize the basic feature of impartial, independent, and objective judging as consisting essentially of activity in which (1) the judge only considers what is relevant to the issues, and so, (2) when deciding a case, excludes all irrelevancies including, for example, any favorable or unfavorable disposition toward one party and any attempts of outsiders to influence the process, and (3) brings to these tasks an all-pervasive spirit of objectivity.

C. The Duly Authorized Role of a Judge

A further basic feature of the standard case of trial court adjudication is that the judge is only to exercise lawful authority in presiding over the proceeding, keeping order, ruling on any procedural and evidentiary matters, and after public trial, deciding the issues of law and issues of fact (with or without a jury). Authority of this nature is not merely a feature of the standard case of adjudication. It, too, is a

necessary feature. Without it, nothing we now call adjudication could exist. Considerable organization is required to specify the nature and extent of the authority of a judge. This authority presupposes due composition. Thus, as already noted, the occupant of the judicial role must satisfy certain qualifications and be duly appointed or otherwise installed in office. The powers of the judge to conduct trials and decide issues of law and fact must also be authoritatively spelled out. Required procedures must be spelled out—so, too, the remedial and enforcement powers of the judge. All these must be duly organized if effective judicial authority is to exist. The existence of authority duly conferred and duly limited is one indispensable source of the legitimacy of adjudication. Such authority, in turn, furthers the rule of law, for one function of the rule of law is to control and limit official power, including judicial power.

As Hart argues, rules are required to organize the conferral of authority on judges to adjudicate. Still, the resulting organizational realities—the social phenomenon of operational authority to adjudicate—cannot be adequately understood solely in terms of judges following rules that confer such authority. This is true even where judges follow these rules closely and the rules themselves are precise, specific, and relatively comprehensive. The actual operational authority of the judge is itself an organized social phenomenon in which the judge invokes authority to act and the litigants recognize and abide by this authority. The existence, recognition, and exercise of authority has a reality as a social phenomenon quite apart from the rules that, as Hart himself says, "lie behind" it.[43] Moreover, not all of the authority of a judge in presiding over a trial is itself specifically covered by rules. The judge cannot always look up a rule and know whether there is authority to act. Even when there is an applicable rule, a judge may still have to exercise judgment that in a sense goes beyond the rule. Here, the forms of adjudicative authority operating apart from or beyond the rules must be taken into account.

Functioning adjudicative authority is formal in several major senses of the word. First, according to our standard lexicons, one meaning of the word formal is simply "done or made with the forms recognized as ensuring validity."[44] The organized authority of trial judges to adjudicate is a type of form that ensures validity. When not authorized, the rulings of a trial court judge can not be upheld as valid. Form that determines validity is "authorizational" form. The

43 Hart, *supra* note 2, at 29.

44 6 OXFORD ENGLISH DICTIONARY, *supra* note 33, at 82, def. A.5 (defining "formal").

general conditions for valid exercise of adjudicative authority are also formal in a second, more negative, sense. These general conditions are independent of various particulars of content, though this, too, varies somewhat from system to system. Adjudicative authority depends on matters such as the judge's (1) compliance with general qualifications for presiding over a case, qualifications which typically exclude inquiry into the particular judge's own political or other social views, (2) compliance with statutes granting jurisdiction in general terms to preside over cases of the type at hand, without reference to the particulars of any case within this type, (3) compliance with general procedures which are not "case specific" and so apply regardless of the particular content of the general type of dispute involved, and (4) compliance with valid substantive law, law that is itself generally authoritative in virtue of its source rather than its particular content.[45] Authority to adjudicate, then, is also formal in this second, "content-independent" sense, and this is of major significance. Adjudicative authority generally exists independently of the social and political views of the judge. It generally exists independently of the particulars of the subject-matter of the dispute to be adjudicated. It is generally exercised through procedures that apply independently of the substantive law in dispute. And such authority is exercised in accord with substantive law that is itself generally authoritative in virtue of its source in legislation, common law, or the like, rather than in virtue of its particular content. Adjudicative authority, including its content-independence, is a major formal feature of civil adjudication in trial courts. This feature can be and is to some extent prescribed in rules, too, but the functioning realities of judicial authority transcend rule content and cannot be represented perspicuously merely by reference to the content of rules.

The highly "content-independent" character of the conditions for exercise of lawful adjudicative authority is not merely formal, but appropriately formal. That is, it is grounded in sound rationales. A judge should not be subjected to specific political, religious, or other such tests of content as qualifications for the exercise of judicial authority in any particular case. Also, trial courts of general jurisdiction are, by and large, preferable to courts with jurisdiction confined to special content, for judicial experience with a range of cases informs and matures general judicial wisdom. Further, a generalized procedure that accommodates a wide range of cases, regardless of content, is highly efficient and also affords genuine scope for the development of the kind of judgment that treats like cases alike and different cases

45 *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 266–81 (1980).

differently. In addition, the criteria of validity for substantive law must generally be highly source-oriented and so formal, rather than content-oriented, if there is to be wide scope for democratic legislation. Thus, in light of these rationales, the characteristic content-independence of the conditions for the exercise of judicial authority is, in general, not merely formal, but appropriately formal.

The concept of appropriate authorizational form, which, as I have explained, pertains to validity and is content-independent in major ways, portrays authoritativeness as a basic feature of the standard case of trial court adjudication more felicitously than can any general concept derived *merely* from a Hartian analysis of the particular contents of various legal rules that together confer powers on a judge. One might, so to speak, inductively derive general content-independence from all the various rules that together, in effect, prescribe it. But, again, legal rules of this nature rarely also set forth the rationales for appropriate form. It therefore becomes necessary to construct those rationales. This is done better in light not only of what the rules say, but also in light of how authority is actually taken to exist and is exercised in practice, and in light of our understanding of the origins of, and the reasons for, such conferral of authority. The articulation of such rationales not merely enables us to introduce concepts that felicitously represent or portray the reality of authorizational form, but it deepens our understanding of the appropriateness of that formal feature and of its essential implementation, as well.

The concept of appropriate authorizational form in adjudication, then, adds dimension to, and so more fully portrays, the reality of adjudicative authority, than can an analysis merely in terms of the content of rules conferring powers. The concept also lays bare the varied complexity of the relevant institutional reality—of the varied formal conditions for exercise of judicial authority. In so doing, the concept sharpens awareness of the nature of those conditions, too.

D. Roles of Opposed Parties in the Process

As we have seen, the parties, not the judge, are to define the issues, prepare for trial, and at trial, present law, legal argument, and evidence. All this is to be done in front of the judge and in front of each other, and on an officially kept record of these very proceedings. All this is also to be done in orderly and dialogic fashion in accord with known rules of procedure that afford fair opportunity of each adversary to be heard. The judge and the parties ordinarily follow these rules quite voluntarily, but the adversaries may enforce them through objections and arguments to the judge who will often resolve

the issues then and there. These basic procedural features, too, are present in the standard case of civil adjudication in Anglo-American systems. Are they necessary or are they merely salient features of the standard case of adjudication in such systems? Some defined mode of presentation to the judge is, of course, a necessity, but it may be that presentation by the actual parties to be affected is not. In criminal cases, for example, it is familiar that in some systems a state functionary—a prosecutor—assumes the role of presenting the side of the complaining witness or victim of an alleged crime. In civil matters, something similar could be done. Party preparation and party presentation, however, remain characteristic of modern civil adjudication in Anglo-American systems.

Also, evidence could be presented to the fact-finder out of the hearing of one party, but again this is not generally done. Rather, the process is dialogic. So, too, major parts of the process could be allowed to evolve ad hoc in each case rather than occur in accord with definite rules of procedure known in advance. Yet this, too, is not characteristic.

All these related procedural features—party preparation and presentation in accord with openly dialogic and known procedures prescribed in advance—also require deliberate, and indeed elaborate, organization in which the various stages in the overall process are spelled out and ordered in an appropriate overall sequence. An adjudicative process could not otherwise operate effectively. Mere resolution, solemnly acknowledged by all participants at the outset, to proceed in an orderly and rational fashion could not be effective.

The appropriateness of some fairly elaborate overall form of process has long been acknowledged. The complexity of what is involved demands as much. This is demonstrable at every stage of the process, beginning with the initial stage at which the issues of law and fact as between the parties are to be isolated and defined, a discrete stage that is highly complex. The intrinsic needs of adequate party preparation also require an organized process in which each party knows what is to come next in the sequence and so can have sufficient opportunity to plan and prepare for what is to occur at that next stage. This is a necessity if there is to be fair notice and fair opportunity for each side to present its case. Further, only within an ordered sequence of stages can the process be a duly dialogic one in which the parties present their cases in the presence of each other, with each side having a chance to respond to the other accordingly. Such a process not only tends to serve participatory fairness; it also serves the rationality of the process, for it tends to assure thorough consideration of each issue so that the truly applicable law is identified and applied to findings of

fact that most accord with the evidence. Such a process also contributes to the legitimacy of judicial action. These matters are not mere technicalities—they go to the very aims and purport of civil adjudication—to an appropriate and fundamental feature of its basic form.

The organizational realities here are procedural and so formal. It just is in one of the familiar varieties of "formal" in our lexicon that we mean "of or pertaining to procedure."[46] So once again we see that a basic feature of the social reality of adjudication is significantly formal in a further major way. We also see in general ways how appropriate processual form serves fairness, rationality, and legitimacy. Indeed, the concept of appropriate processual form, dialogic in character, represents or portrays facets of the realities of adjudication that go to its very nature as a major type of social institution. Adjudication is authorized, independent, impartial, and objective. It is also intrinsically processual. It just is a *process* extended in time. What adjudication *is*, overall, can in large measure be understood in terms of *how* it does what it does—its procedural reality. The concept of the appropriate procedural form of adjudication goes far to represent the very heart of adjudication—adversarial party preparation and presentation pursuant to dialogic procedure known in advance, with the judge deciding the issues objectively on the basis of the presentations.

On a Hartian analysis, the procedural feature of the standard case of trial court adjudication, and its essential implementation, are presumably to be gleaned merely from a study of the content of the relevant procedural rules. Here, too, this cannot be a sufficient avenue of understanding, and I would propose to substitute, as the primary focus, the conception of appropriate procedural form, duly instantiated, with its various facets and general rationales. This highly complex conception can be deployed to represent or portray more felicitously the typical institutional realities themselves, including the rationales served by means of formal procedure. Again, it would be possible to study all the relevant procedural rules and not emerge with a clear grasp of these rationales, which are seldom stated in the rules themselves. Moreover, the rules in developed systems typically include much technicality that may even obscure these rationales.

There are still other formal features of the standard case of trial court adjudication in Anglo-American systems worthy of special focus. For each of these, there are corresponding (albeit overlapping) concepts of appropriate form. It is not necessary to consider these now, but a comprehensive study would treat them.

46 *See* 6 OXFORD ENGLISH DICTIONARY, *supra* note 33, at 82, def. A.1 (defining "formal"); *see also* 6 *id.* at 77, def. I.11.a (defining "form").

E. Non-Formal Elements of Trial Court Adjudication

In my analysis so far, I have presupposed numerous non-formal elements that must figure in any actual instantiation of trial court adjudication. These are necessarily heterogeneous and include,

(1) trained personnel, including judges and lawyers,

(2) various material resources on which these personnel depend when fulfilling their roles, including a courthouse, law libraries, and devices for communication between personnel,

(3) the content of any substantive law relevant to particular disputes of law, and

(4) testimonial and other evidence relevant to particular factual disputes.

A comprehensive treatment of trial court adjudication would take account of these elements, too. Each of these elements figures in the operation of an actual trial court. Formal features affect the non-formal elements and vice versa. A trial court just is an entity, the organization of which integrates and coordinates both formal features and non-formal elements into a unified whole having adjudicative capacity. It is plain that while rules may prescribe some of the organization of non-formal elements, those elements cannot themselves be reduced to rules. Instead, their general character, and how they are organized into a functional whole in a functioning adjudicative institution, must be treated frontally on their own terms.

CONCLUSION

Basic types of legal institutions such as courts and legislatures are characteristic of developed legal systems. A satisfactory account of courts must treat their main formal features and non-formal elements. Professor Hart, in *The Concept of Law*, observed that trial courts are among the typical institutional units of a standard legal system. But he did not frontally treat their formal features and non-formal elements. To the extent he did treat courts, he sought to analyze them mainly in terms of certain types of rules which he said are constitutive of the makeup of courts. While there are strengths in Hart's rule-oriented approach to legal institutions, I have tried to show that such an approach cannot be adequate, and that a more fruitful approach would be one that focuses directly on the social reality of each type of institution, with primary emphasis on form. On this approach, concepts of appropriate compositional, structural, authorizational, procedural, and other form in adjudication must be introduced. So, too,

must the rationales that explain this appropriateness. These concepts and rationales can represent more adequately the nature of this type of institution than can an analysis merely in terms of the contents of rules that, as Hart himself put it, merely "lie behind" the institution.[47] These concepts and rationales illuminate the varieties of organized form that are constituents of the basic form of the institution in the foreground. They lay bare and do justice to the organizational complexity. Even so, it is not my claim that there is anything new in the general idea that a given type of legal institution such as a court has a special compositional form, or a special structural form, or a special authorizational form, or a special procedural form. But just what these special formal features *are* may not be so widely understood, even among theorists. And *how* they are appropriately formal, when they are such, may not be so widely understood. And Hart certainly, one of the great theorists of his day, failed to see just why a typical legal institution such as a court cannot be adequately understood solely in terms of the content of rules that contribute to its makeup.

Once the basic institutions of a legal system are properly accounted for, an analysis of their own structural relations with each other would be in order. Contrary to the central thrust of Hart's analysis, a legal order is much more than a system of rules. It is, at the least, also a system of institutions. These institutions have distinct realities of their own that are beyond the rules. These institutions are also duly integrated and coordinated with each other and thus have a unity of their own distinct from the unity that the rules of the system have. A system of law is not merely as Hart put it, "a union of primary and secondary rules."[48] A system of law is, in complex ways, a union of basic institutions, too. But this must await another day.

47 HART, *supra* note 2, at 29.

48 *Id.* at 99.