

# Forms of Phenomena that Implement State-made Law

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\* The author is pleased to dedicate this essay to Professor Jes Bjarup on his retirement. The author wishes to thank his administrative assistant Mrs. Pamela Finnigan and his research assistants, Sarah Reigle, Robert Holcomb, and Steven Hall for valuable assistance.

## 1 Introduction

The state-made law within a society consists of the following forms of law: constitutions, the statutes adopted by legislatures, the regulations created by administrative agencies, the case law made by appellate courts, the adjudicative rulings of administrative bodies, and more. Such law has to be interpreted and implemented. By “implemented”, I mean applied to the factual circumstances to which it is addressed. Without implementation, there can be no rule of law or any of the values served that we associate with law.

Law, once created, is neither self-interpreting nor self-implementing. Institutional and other basic functional units are required for the application of law of all kinds, and especially for state-made law. Foremost here are the primary addressees of state-made law. For most state-made law, these primary addressees consist of (1) private individuals, (2) private corporate and other entities, and (3) various state agencies and officials. Though not the primary addressees of most state-made law, trial and appellate judges play major roles in its implementation when disputes arise between private entities over its validity or applicability. Trial and appellate judges also play special implementive roles when officials and agencies of the state seek to impose penalties or punishment on individuals and the basis for such penalties or punishment is contested. Indeed, in some systems this takes up half of the time of the courts.

## 2 Private Citizens as Implementive Entities

Private entities, including individual citizens and corporate and other bodies are the primary addressees of most law. Moreover, most law in a tolerably well ordered society is voluntarily applied by such entities and so implemented without further intervention by officials of any kind. Again, this is possible because (1) most law applies to classes of addressees in general types of circumstances, (2) these addressees are capable, alone or with the aid of lawyers, of classifying the relevant factual circumstances as instances to which general laws apply, duly interpreted, (3) these addressees generally learn of such laws, and (4) most such addressees are generally alert, legally sensitive, and co-operative.

What are the major types of private entities which function so significantly in the implementation of law? How does a form-oriented analysis apply to them? First, we must bear in mind that rarely does any rule or other form of law in developed Western systems name any particular individual, corporation or other body as addressee. Rather, rules and other forms of law are typically addressed to *classes* of addressees, e.g., “all citizens”, or “all drivers of motor cars”, or “all homeowners”, or “all registered voters”, etc. The most common class of general addressees consists of the very general class of ordinary individuals, most of whom are citizens. This class may, in a form-oriented analysis, be viewed as an entity – as one general type of institutional phenomenon. This entity – general citizenship – can be analyzed in terms of formal features and non-formal elements. First and foremost among the non-formal elements of each instance of such an entity, when functional, is a flesh and blood individual human being!

The formal compositional feature complementary to this specifies how a person becomes a citizen, and for how long. When an individual citizen dies, the institution of citizenship does not also die. Other individual citizens continue to occupy such status, each for his or her part, as entities. And even if all individual citizens of a given society were to die or vacate the territory, and entirely new individuals enter as entities, the status of general citizenship would, without more, remain the same.

A person with the status of general citizen has duties, rights, and powers. The appropriate authorizational form of citizenship confers these on all citizens *equally*. These rights and powers typically extend beyond the personal to various political rights and powers as well, including the right to vote. Appropriate form here tends to beget good content. A person occupying the status of citizen may, of course, add further duties, rights, and powers through such “acts in the law” as contracting, acquiring and owning property, entering into a marriage relation, and much more. The legal duties imposed on a person who instantiates the citizenship entity are of two basic kinds: (1) general duties imposed on all, such as the duties not to commit crimes and not to harm others negligently or intentionally, and (2) special duties incurred through contracts, ownership of particular property, and so on. Authorizational form thus confers powers and rights of citizenship on the occupant, and imposes duties as well. These powers, rights, and duties at the inception of citizenship may not all be specified in a single law but in a variety of laws adopted at different times which cumulatively define the status of general citizenship.

The content of the rights, powers, and duties of citizenship, personal and political, that authorizational form confers and imposes is not formal. Authorizational form merely organizes the conferral and imposition of such rights, powers, and duties subject (in some systems) to the formal yet fecund constraint of equality. The non-formal elements here also include important types of attitudes that individual citizens have toward the society and its legal system, attitudes of civic mindedness, patriotism, and social duty that may, in individual instances of citizenship, be present (though in varying degrees). There is, here, great potential for salutary influence of form on the non-formal.

Structural form defines relations between citizens and other persons in the society and between citizens and their government. Thus, the categories of authorizational and structural form overlap here, and along with procedural form, organize the general status of citizenship. The structure of an individual citizen's status can, of course, be substantially redefined as this citizen exercises rights and powers and incurs new duties over time.

Some powers and rights of citizenship require the citizen to follow certain steps for their valid exercise. Thus to exercise the right of a citizen to make a valid contract, for example, a given procedure may have to be followed. The contract, to be valid, may have to be the result of a bargaining process, and it may even have to be put in writing. Here a certain procedural form is specified. More fundamentally, a non-citizen who wishes to become a citizen will have to follow prescribed procedures.

I have already said that the non-formal elements of general citizenship include, most obviously, that of the private individual who instantiates this entity. Plainly, the better educated, nourished, and inspired, the more effective

and fully realized this individual, as citizen, is likely to be! The non-formal elements of such an entity do not, however, consist merely of the flesh and blood individual, and the content of the rights, powers, and duties of citizenship. Such a legal entity, as instantiated, also includes general knowledge, material resources, and more. The greatest social asset within a functioning legal system is an alert, legally sensitive, and co-operative citizenry. Not even a highly dutiful officialdom rivals such a citizenry.

The general status and attributes of the entity I call private citizenship is prescribed in numerous rules. As I have explained, the rule form is one major type of preceptive form.

Appropriate compositional, authoritative, structural, procedural, and preceptive varieties of form that figure in the institution of general citizenship contribute to its functions, ends and values, and in this way tend to beget good processes and outcomes, including general observance of state-made law. Indeed, all this has great implementive significance. First, in developed Western societies, these various formal features and their complementary content manifest a distinctive humanistic and liberal conception of the *individual as citizen*, and in turn symbolize and nurture that very conception. The forms, alone, as duly organized, do not project a simple top-to-bottom relation between state and citizen in which the citizen below is a mere object of official orders from above – a mere recipient of implementive commands. Rather, the formal status of general citizenship, however narrow, contemplates, to that extent, a relatively autonomous individual who, as bearer of known duties under state-made law, and as generally respectful of its demands, voluntarily applies the law, in the circumstances at hand, duly to implement its goals. The individual thus experiences the dignity of self-direction under law, and is not conceived as a mere object of the exercise of state power by officials. This, too, contributes to the legitimacy of the system in the eyes of the citizens. It also implements the ends of the law imposing such duties.

Second, and in the same vein, persons with equal rights and powers incident to the formal status of citizenship, are, depending on the content of those rights, thereby enabled to engage in further modes of autonomous self-direction through exercise of, for example, the rights of private contract, property ownership, democratic voting, and other participation in civic life generally. The citizen, as bearer not merely of duties incident to the formal status of citizenship but also as holder of rights and powers incident thereto in developed Western societies, thus has a dignified status that can itself inspire the fruitful exercise of those rights and powers, and thereby also implement the ends of the very state-made law conferring those rights and powers. Again, this contributes to the rule of law and to the legitimacy of the system in the eyes of the citizen.

Third, the individual as citizen, with equal and known rights of citizenship against others including the state, can be, and commonly is, a bulwark against interferences. The institution of citizenship creates a legally recognized entity with at least some rights to seek redress from, and, in some circumstances, even to secure prosecution of, those who interfere with this status, including officials of the state. A society so organized may also be said to be organized from the bottom upwards, rather than merely from the top down. Such a society is, as the great German jurist, Rudolf von Jhering saw, all the better equipped to succeed

in the struggle for law to prevail against lawlessness, arbitrariness, and illegitimate action.<sup>1</sup>

Fourth, any such general way of organizing and assigning equal rights, powers, and duties of general citizenship is at once both respectful of equality and highly efficient. Provision of the same general status of citizenship for all evinces for the state and the society an equality of respect valuable in itself. This, too, can also be highly efficient. Imagine having to fashion a new and specially tailored status for each particular new citizen on arrival!

### 3 Private Corporate and Cognate Entities as Implementors

I now concentrate on private corporate and other specially organized entities as basic legal phenomena with powers, rights, and duties, focusing on their role in implementing law. All these entities have responsibility for implementation of state-made law of many kinds. In developed Western societies, private corporate and other organized entities may even be classed as citizens, and so have powers, rights, and duties of general citizenship. But whether or not this is so, private corporations and other organized entities are also major addressees of the law, again not as entities named particularly in the law, but simply as falling within general legal classifications expressed in laws. Such corporate and other bodies, like individual citizens, most often apply such law to themselves voluntarily, rather than pursuant to official order or threat, frequently on the basis of legal advice. (Of course, the corporate form exists for a variety of reasons which need not be considered here.)

Private corporate and cognate entities demand special form-oriented analysis beyond what I have applied to the status of general citizenship in analyzing implementive roles. I will now focus on the form of corporations, rather than on their principal non-formal elements such as corporate personnel, materials of corporate decision-making, and various types of physical and other resources. The organizational form of a private corporate entity is far more complex than private citizenship with its status and attributes.

The feature of compositional form specifies the qualifications and steps required for the creation of a valid corporate entity. These steps vary from system to system, but frequently include provision for perpetual existence, differentiation of status as between shareholders, officers, creditors, and other participants, allocation of duties and powers as between the above, procedures required for authoritative corporation action, and more.

A private corporate entity is therefore far from a mere aggregation of persons. Not even a corporation sole (one with one owner) is that. Such a conceptualization falsely reifies the organized corporate form in terms of its leading complementary non-formal element – i.e., personnel! Yet a corporate entity is organized partly through compositional and structural form differentiating such roles as those of officers, directors, employees, owners, and others, and specifying qualifications for these roles, the conditions for entering

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<sup>1</sup> Jhering, R. *The Struggle for Law* (Callaghan and Company, Chicago, 1915).

upon them, the length of terms, and the like. Structural form specifies the relations between roles. This dimension of form integrates and unifies the body as an entity capable of action on its own. The relevant compositional and structural forms here serve important functions, ends, and values. They bring advantages of a division of labor, provide accountability for corporate decisions, and more.

Authorizational form organizes the conferral of rights, powers, and duties on the corporate entity and certain role occupants within the entity such as officers, board of directors, and shareholders. The subject-matter of these rights, powers, and duties, however, is not itself formal.

Procedural form specifies and organizes the steps that a corporate entity must go through to take valid corporate action. Here, the relevant non-formal elements consist of the materials of corporate decision making including general policies, special business and other considerations, market and other studies, and various other materials heterogeneous in nature.

Preceptive form – charters, by laws, general rules, orders and the like – may figure in major ways in corporate organization and decision making. Many of the features of compositional, structural, authorizational and procedural form are specified in such preceptive forms as statutory rules, rules in corporate charters, rules in corporate bylaws, and rules adopted by corporate boards of directors.

A private corporation, then is a complex entity displaying in its existence and operation most of the major varieties of organizational form known to the law. Such a body, whether or not it qualifies for citizenship, is always a bearer of legal rights, duties and powers. As with the dimensions of organizational form figuring in the status of private citizenship, these dimensions here serve important functions, ends and values. These go beyond distinctively business activities to include the implementation of state-made law and so all of its various policies. Even when the language of state-made laws reads not in terms of corporate bodies but of citizens generally, or in terms of such designations as “makers of food and drugs”, “makers of automobiles”, or “the taxpayer”, such laws typically include corporations among their addressees.

Moreover, it is likely that corporate addressees are, in most developed systems, as likely to strive to fulfill the requirements of state-made law voluntarily as are most private individuals. Further, corporate charters and bylaws frequently include specific commitments requiring corporate officials to abide by the law.

#### **4 State Agencies and Officials as Implementors**

Officials and agencies of the state must, of course, themselves follow state-made law when it is addressed to them, directly or indirectly. Frequently, they are required to participate in securing compliance therewith on the part of private citizens and private corporate and other entities. Indeed, state officials and agencies of the state have specific duties to implement valid state-made law. For failing to do so, they are subject to discipline or even to removal from office. For dereliction of duty, elected officials risk the sanction of being turned out of office. Of course, there are many and diverse implementive roles for such

officials. These include (1) informing private citizens and corporate entities of the content of the law, (2) conducting investigations of, and securing compliance reports from, primary addressees of the law such as private citizens and corporations, (3) identifying departures and non-compliance, (4) seeking or imposing sanctions through courts or otherwise, and more.

Officials and agencies of the state in a developed Western system are highly varied and specialized. For example, in implementing the criminal law, we encounter police, prosecutors, magistrates, lay judges or jurors, professional judges, prison officials, parole officers, and others. (I will consider judges in Section Five of this chapter.) In the administration of legal programs for the regulation of private economic activity such as the provision of transportation to the public, or the programming of television, or the manufacture of drugs and foodstuffs, we encounter specialized agencies of the state with officials occupying various implementive roles. Likewise in the administration of programs for the conferral of public benefits pursuant to statute and regulations of state agencies, we also encounter specialized state officials, agencies of the state, and staffs of state employees of many kinds.

Many distinct offices within and without agencies of the state yield to an analysis in terms of an organized union of formal features and non-formal elements generally similar to the type of analysis I offered in earlier sections of this chapter. Features of compositional, authorizational, structural, procedural, and perceptual form organize and shape these offices. Moreover, governmental agencies regulating private business activity or conferring public benefits yield to an analysis in terms of an organized union of form and non-formal elements. There is, therefore, no necessity to recount the varieties of form that figure in distinct administrative offices or in agencies of the state. Nor is there need to reaffirm the, by now, amply supported propositions (1) that major varieties of form pervade such offices and agencies and define the roles involved, (2) that these offices and agencies have significant complementary non-formal elements, (3) that there are important inter-dependencies and relations between such formal features, and between them and non-formal elements, (4) that here, too, appropriate form begets or tends to beget good processes and outcomes, and (5) that appropriate form here serves various important values.

## **5 Trial Courts and the Court System as Implementors**

We now turn to the role of form in the institutional phenomenon of the trial court. As I will explain, trial courts are called upon to implement state-made law, not on the front lines of human interaction, but usually only as a last resort in exceptional cases in the event that a dispute arises. Indeed, trial courts are so called upon to implement all varieties of law, state-made and privately created. From the fact that trial courts actually come into play only exceptionally it does not follow that they have no significance for the implementation of law except in such unusual cases. Their very existence and availability influences private citizens, officials, and other entities on the front lines to follow law. Thus the very credibility of such law depends partly on standing availability of trial courts. Moreover, when disputes over law or fact do arise, the standing

availability of such courts greatly facilitates out-of-court resolution of the overwhelming majority of such disputes by the parties themselves. Once constitutional law is in force, or statutory law is made by a legislature, or regulations are made by a state agency to whom the legislature has delegated law-making power, or case law by an appellate court, it is inevitable that disputes will arise over the meaning of the law, or over the facts to which law is to be applied or both, at least in some proportion of cases. Disputes over the validity of a law may arise as well. Many disputes arise between officials or agencies of the state and private parties. Others arise merely between private parties. The overwhelming proportion of disputes are resolved by the opposing parties themselves through negotiation. But even when negotiating in good faith, they will not always succeed in resolving their disputes. Here, trial courts (and appellate courts) are a necessity if law, justice, and order are to prevail.

In a well designed system, judicial resolution of such disputes in accord with applicable law and the true facts serves the rule of law, legitimacy, rationality, democratic will, implementation of policy content of the law, processual fairness, finality of resolution, facilitation of out-of-court dispute settlement by the parties themselves, and much more. If trial courts could not, in disputed cases, generally be counted on to apply the true law to the actual facts, the system would likely disintegrate. Given that trial courts can be counted on generally to apply the true law to the actual facts, almost all disputes will be settled by the disputants themselves in the shadow of the law and the trial courts.

By what characteristic activities do trial courts carry out their functions? Much here is familiar. In civil cases, courts are repositories of summonses, pleadings, and other documents by which one disputing party takes initiative to assert a claim to a judicial remedy as against the other disputing party, and by which the other party may assert factual denials, demurrers, defenses, counter-claims and more. Trial courts hold hearings and other proceedings to determine the validity in law and fact of claims, defenses and the like, to determine the proper interpretation or application of law, to find facts, and to resolve procedural issues. In such hearings and other proceedings, the disputants present law, arguments, and evidence to the court. Major activities of a trial judge in most developed systems also include legal research, study of applicable law, weighing of the evidence, the analysis and evaluation of legal arguments, final resolution of disputes, and the conduct of any post trial review. (Criminal cases pose some variations here.)

What is the make up of a functioning institution organized as a trial court to find facts and apply law and how does form figure here? In any particular trial court dispute, the non-formal elements are extensive and heterogeneous. In civil matters, these include the policy content of any relevant substantive law; the evidence presented in the dispute; decision-making personnel, that is, the judge or judges, any lay participants such as jurors, court clerks, marshalls, librarians, and other personnel assisting the court; material resources required to house and support the court and its personnel, and to finance their activities; a library of relevant law, or ready access thereto; court files of documents prepared by litigants, orders and rulings issued by the court, and more. It is worth emphasizing that a trial court could not function at all well if there were no relevant antecedent substantive law, for the parties would not have sufficient



basis on which to define determinate issues for judicial resolution. The parties would also have no criteria by which to determine what evidence would be relevant. Thus, the content of antecedent substantive law is a major non-formal element in a functioning trial court. It not merely facilitates dispute resolution, it embodies policy to be duly administered as well.

Moreover, the proper functioning of a trial court is dependent on other governmental phenomena, especially executive agencies that may be ordered to enforce the court's judgments and orders.

The foregoing non-formal elements are themselves duly integrated into several major formal dimensions of the institution as a whole. No institution can operate without such elements. Yet, as we have seen, it is mainly the form of the institution that provides for its make-up, its unity, its mode of operation and its instrumental efficacy. Form also, in effect, specifies its criteria of identity – an identity it retains through time even as new non-formal elements replace prior ones. Form enables us to understand the distinctiveness of the institution, given that how it is organized is what differentiates it most essentially from other types of institutions. Legal institutions all function with many of the same or similar non-formal elements.

What basic form and constituent formal dimensions characterize a trial court? How is it organized? In developed Western societies, its basic form – its minimal unifying organization – includes in some degree all the following formal dimensions:

- composition of adjudicative personnel, including qualifications, mode of selection, term of office of judges, i.e. organized compositional form,
- conferral of power on judges to conduct proceedings, decide issues on the basis of the trial record and applicable law, and order enforcement (even when the defendant does not respond), all subject to conditions and limits, i.e. organized authorizational form,
- some specification of respective responsibilities of, and relations between judge and litigants, all with respect to preparation and presentation of evidence, law, and argument, i.e. organized structural form,
- some specification of procedures and methodologies for the commencement and conduct of court proceedings, including the taking of evidence and hearing of argument at public trial, and for the rendering of decisions, i.e., organized procedural form
- due preceptive form, i.e., incorporation of foregoing in required rules, and in other species of law

The foregoing formal dimensions comprise the basic form sufficient for a trial court to decide legal disputes, and thus the minimum sufficient to count as the standard version of the basic form of a trial court – a definition of what just such an institution is.

It is not surprising that in developed systems, the foregoing dimensions are typically elaborated well beyond this minimum, which merely incorporates those features without which we would not have a trial court at all, or which would not even be marginally suited to function as a court. Of course, even the minimal basic form of a court, as accepted in developed western societies, is not identical in all those societies. For example, in some systems, in eliciting testimony and other evidence, the adjudicative body plays an active role, in other systems, a more passive role. There is also some variation, even within the minima, on whether adjudicators must base their decisions solely on whatever evidence and legal argument has been put before them by disputing parties.

The minimal basic form of a trial court is not a value free or value neutral conception. It is a means to such ends and values as legitimacy, procedural fairness, procedural rationality, the rule of law, and more. If this form failed significantly as a means in these ways, we should say it is not really a trial court, or at least that it is so deficient that we may well doubt whether it should be considered a trial court. Here, too, what “ought to be” in order for a court to exist necessarily influences what “is” – what counts in fact as such a court. There can be no sharp cleavage in the existence conditions for a trial court between what “ought to be”, and what “is”.

The institution of a trial court, then, is also highly organized and therefore highly formal. It is organizationally complex, for it consists of several major dimensions of organizational form, which are variegated, overlapping and inter-related. Without this complexity, state-made and other law simply could not be duly implemented.

Methodologies for interpretation and application of different types of law, and for fact-finding, are typically involved in the adjudication of disputes, but such methodologies also have major “legal lives” of their own outside of court, as when citizens, often with the aid of lawyers, must, in effect, apply statutes or official rules and regulations, or case law to their daily activities even though no dispute of any kind has arisen, and so there is no occasion for adjudication.

Here I will concentrate on fact-finding methodology. How then is the form of the fact-finding methodology in trial court adjudication organized? There are major complexities here, but its rudiments are implicit in the minimal basic form of trial court adjudication whereby disputes of fact are resolved in accord with evidence. The truth of a conclusion of fact reached in a trial court is generally a truth reached by rational consideration of the evidence presented, e.g., “The evidence shows that the defendant driver of the car caused the accident by falling asleep and crossing over into the wrong lane.” The truth of such conclusions may be shown by invoking the basic principle of appeal to direct observational evidence whereby one or more witnesses so testifies. Or this truth may be shown by appeal to the principle of circumstantial evidence of physical or other facts, e.g., skid marks on the highway in our example. Or it may be shown by appeal to the principle that the conclusion reached is simply the best explanation of all the credible evidence, including direct and circumstantial.

Appeal to the foregoing minimal and rudimentary principles of proof and their elaborations represents the core of the fact-finding methodology in trial courts in all developed systems. This is hardly surprising. This is the core methodology that we utilize when determining the truth of assertions of disputed

assertions of fact in all that we ordinarily do in daily life and in human affairs generally. The law has no monopoly on the rudimentary principles of the essentially empiricist methodology. Indeed, trial court adjudication presupposes at least these rudimentary principles of proof for resolution of disputed issues of fact, principles already generally in place in the society at large in the sense that they are widely accepted principles of empiricist rationality. This core fact-finding methodology therefore differs fundamentally from legislative drafting methodology. It also differs fundamentally from interpretive methodologies. It is, however, generally similar to the legislative methodology for finding “legislative facts”.

Again, developed legal systems modify and add to the foregoing core empiricist methodology in many ways. These elaborations and variations pose many important choices of methodological form, and modern systems differ in these choices. Though all these systems must make such choices, there are several that the very nature of adjudicative fact-finding requires, if the process is to yield, as it must, definite outcomes. These include (1) the imposition of a burden of proof (i.e. the risk of not persuading the trial court) upon the shoulders of one or the other of the litigants, so that the court may determine who prevails if there is insufficient evidence on a point in issue or if the evidence is in equipoise, and (2) the adoption of some standard of proof that the party with the burden of proof must meet through introduction of evidence, such as “by preponderance of the evidence” in civil cases, and “beyond a reasonable doubt” in criminal cases”. Legal systems vary both in allocations of burden of proof and in prescription of standards of proof. But they vary even more in how they modify the rudimentary principles of evidentiary proof themselves. This is so even though the primary overall objective is to adjudicate disputed issues of fact in accord with the actual facts, i.e., in accord with what really happened, or what really was the truth of the matter.

The rudimentary principles of proof, modifications thereof, and so elaborations, that occur in all systems are usually set forth in so called “rules of evidence” and in certain procedures. The overall methodology of adjudicative fact-finding can therefore be said to be made up not only of the rudimentary principles of proof that comprise the core, but also of rules of evidence and relevant rules of procedure that pertain specifically to fact-finding. Not all of these rules are truth-oriented. For example, it is familiar that some rules of evidence are essentially truth defeating, as with a rule that prevents a husband from testifying in court against a wife, the policy being that of preserving marital harmony. Other rules that are not truth-oriented include the rule in some systems that a prosecutor may not use evidence against an accused that has been unlawfully obtained by search of a private home. Here, one policy served is that of privacy against state intrusion.

Sometimes the rudimentary principles of proof are modified in ways that may be truth defeating in a particular case, but not generally so. For example, the rule in a criminal case that an attorney for the accused may not be forced to testify against the accused may defeat the truth in a particular case, as where the accused has confessed to the attorney, but in the general run of cases, this rule facilitates a free flow of information from accused to attorney, and this makes it more likely that the true facts will be found.

Different systems make still other major types of modifications and other elaborations with respect to the rudimentary core of principles of proof. Assuming the system is well designed, the facts found by the adjudicative body will generally accord with the actual truth of the matter. That is, the methodologically formal truth and the actual truth of the matter will coincide in the general run of cases.

It can be seen, however, from the foregoing examples, that in some particular cases the facts found by the trial court in accord with the rudimentary principles, as modified, and so legally binding on the parties, may diverge from the actual truth. When this occurs, and becomes known, the legal system in question will still usually adhere to the facts as found. This is so even though the actual truth has become indisputable and known to all parties, as where an adjudicative body refuses, on ground of the policy of finality of dispute settlement, to re-open an earlier judgment to hear new evidence, e.g., that a defendant auto driver who earlier had to pay damages for allegedly causing, through an accident, a plaintiff's inability to bear children, can now prove that the plaintiff has in fact, three years later, had a baby. In such cases, it may be said that the truth of the matter binding on the parties is merely a methodologically formal legal truth. In the usual case, however, methodologically formal legal truth coincides with actual truth.

The non-formal elements complimentary to a formal methodology of fact-finding include all of the familiar types of evidentiary materials that litigants may seek to introduce at trials to prove their contentions. These include direct witness testimony, physical and other "real" evidence of a circumstantial kind, records, and more. Such complimentary non-formal elements may be shaped or modified by the legal methodology of fact-finding in all the ways identified here. Indeed, this methodology may even preclude the introduction of some such evidentiary material. Thus methodological form affects the non-formal, and this, in turn, affects outcomes. In general, appropriate methodological form begets outcomes that accord with the truth.

What, then, are the ends and values implemented through methodological form in adjudicative fact-finding? First and foremost are the ends served through the finding of the actual truth of the matter in accord with rational principles of proof, as modified and elaborated. These ends and values include legitimacy, rationality, and the rule of law. There can be no rule of law in disputed cases *if there is no rule over fact*. An adjudicative process that fails to find the truth of the matter in a significant proportion of disputed cases is itself methodologically irrational. It affords no reliable foundation for the application of law and so cannot serve the policies and principles embedded in the law. It cannot treat factually similar cases similarly under the law or otherwise serve the rule of law. It cannot, though its existence and operation, sufficiently induce disputants to settle out of court, and cannot secure overall legitimacy of adjudication.

An adjudicative process that is appropriately organized in its formal fact-finding methodology distinctively implements the rule of law. It also, through truth finding, in the general run of cases, serves the underlying policy goals embodied in the content of the law to be applied to the dispute. For example, when a court correctly finds an accused guilty of speeding and punishes him or her accordingly, this deters others and serves the policy of highway safety.

Furthermore, an appropriately designed formal methodology of adjudicative fact-finding generates confidence that adjudicative processes are, in this respect, a reliable, predictable, and fair means of dispute resolution. This also serves the end of legitimacy.

Without an extensive set of procedures organizing who is to do what, when and how, in the process of resolving issues of fact, the parties to an adjudication could not implement the fact-finding methodology heretofore described. It is mainly through appropriate procedural form that such accepted methodological form is implemented at trial. Thus methodological form depends essentially on procedural form. Indeed, it is through, by means of, and in, specified procedural steps and stages that evidence is introduced before the adjudicator. Earlier I alluded to other methodologies (in the narrow sense) besides the fact-finding methodology. These other methodologies include the methodology for interpreting statutes, for applying common law, and more. The same analysis applies to these. It is through, by means of, and in, specified procedural steps and stages in an overall adjudicative process that these law-applying methodologies are brought to bear in adjudicated disputes as well.

Appropriate procedural form also distinctively contributes to ends and values that go beyond what the relevant methodologies themselves can serve. For example, no matter how rationally designed the methodology of factual proof, it alone cannot be implemented except through some formal procedural set up. As indicated, it is vital to design this overall set up – this sequence of steps and stages – not merely to maximize the likelihood that the truth of the matter will emerge. It is also important to design the procedure to serve such ends and values as conduciveness to deliberation, orderliness, timeliness, public confidence, procedural fairness, and more.

The adjudicative process must also operate in a reasonably tight and regular fashion. This distinctively serves what might be called procedural predictability, and thus can profoundly affect how well the opposing parties can prepare and present their cases at each stage in the process. The more regularized an adjudicative process is, the more definitive is its procedural form. The main factors that affect the definitiveness of an institution such as a court are the precision of its institutional design (which implicates not merely procedural but the other varieties of form as well), the faithful prescription of that design in rules, the provision of sanctions for failure to follow these rules, and the readiness of judges, officials and affected parties to criticize departures from those rules, and general readiness to take action to remedy, sanction, or otherwise counter departures. In all this, definitiveness is not so much itself a variety of form as a feature of compositional, authorizational, structural, procedural, methodological, and preceptive form. Yet it is worthy of special emphasis.

A trial court, overall, may also be characterized in terms of the generality of its scope of applicability or operation. If it applies to disputes having highly varied subject-matter, we may say that its degree of “accommodational form” is high, and if it applies only to a single basic type of dispute, as with a process for adjudicating social security or state pension rights, then its accommodational form is low. Accommodational form overlaps with authorizational form, but the concept of authorizational form defines what valid judicial action is, and so

includes more than what is encompassed within jurisdiction as such. Authorizational form includes the following of prescribed procedure for the exercise of jurisdiction as well.

Appropriate degrees of accommodational form -- applicability to variable content -- serves important values of its own including efficiency, treatment of like cases in like fashion, and co-ordination of similar or related policies as expressed in laws that become the subject of disputes.

## **6 Appropriate Preceptual Form and the Limits of Rule-Oriented Analysis**

It is not cause for surprise that the overall form of, for example, a trial court institution is usually the object of a considerable body of quite specific rules. This form must be prescribed, so far as possible, in rules if it is to operate in a sufficiently regular, definitive, and determinate fashion. This extends the rule of law and such associated values as predictability and uniformity into the very constitution of the institution (which might be left merely a matter of conventional rather than legal form). It follows that a further major formal facet of a legal institution such as a trial court just is the set of diverse types of rules that prescribe some of the features of its various formal dimensions. Other legal theorists, most notably H.L.A. Hart, have emphasized the importance of rules in providing an account of a legal institution such as a trial court.<sup>2</sup> While I concur that rules should be included in the overall account, I do not accord them the central place that Hart did. I favor, instead, a form-oriented account, rather than a rule-oriented one. I now turn to some of the limitations of Hart's emphasis on rules.

Historically, we first had dispute settling institutions before we had formal rules about them. It follows at least that some form of adjudication is possible without formal rules. Further, if we apply a genetic analysis, we can see at once that form must come first and rules second. If we imagine ourselves drafting a set of rules to set up a trial court, we would first have to know what form the court is to take before we could know what features to prescribe in the rules. Indeed, we would need to know more. We would need to know what the non-formal elements are to be, how they are to be shaped by form and integrated into form, what the interplay is to be between form and the non-formal elements, and how relevant ends and values are to influence the form of the institution. Indeed, a comprehending account of the institution requires that we understand, above all, the relations here between form and value.

It is one thing to know and understand enough to be able to draft the rules that are to "constitute" a newly founded institution. It is quite another to provide a satisfactory overall account of what an existing institution is merely by studying the set of rules that, so to speak, constitute it. The rules, if drafted as such rules typically are, simply cannot capture what there is to understand about an institution that is most central, namely its form and the way ends and values

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<sup>2</sup> Hart, H. L. A. *The Concept of Law* 29-30 (Oxford U. Press, 1961).

shape that form. Here ends and values reveal themselves in appropriate form. Rules that purport to specify this form are typically silent as to rationales, and therefore silent as to ends and values at stake.

Similarly, there are major varieties of form than can only be very imperfectly represented through the study of the content of relevant rules. This is true, for example, of procedural form displaying the various stages and steps in a linear projection of trial court action dealing with a case from beginning to end. No single rule or set of rules can depict such a projection as felicitously as well as a general narrative account frontally addressed to the form of these stages and steps. (Similarly, structural form displaying the relations between parts within a whole – a trial court's tripartite structure – cannot be captured in the contents of several rules nearly so aptly as in a frontal overall description in terms of form.)

In still further ways, a comprehending account of an institution requires more than a study of rules “constituting” it. The truly serious student of a trial court needs to understand how the form of the institution shapes its non-formal elements, and how the institution as a whole – its form, and its complementary non-formal elements, operate and with what effects. The rules “constituting” the institution do not go very far here.

Moreover, major activities of institutional actors reflecting dimensions of the form of, say, a trial court are only quite imperfectly depicted in the terminology and concepts of rules. The “weighing and balancing of evidence” is one of these methodological activities. A rule merely using these words could not itself capture this type of exercise understandingly, yet the exercise is central to adjudication. A descriptive form-oriented account would provide an account of the type of activity, where it fits within overall procedural (and methodological) form, of how and why it is appropriate, what its rationales are, and more.

It is plain, then, that major varieties of form pervade trial court adjudication. These varieties figure centrally in organizing who is to do what, how and when, all with an eye to various ends and values to be realized not only in the outcomes of adjudication but also in the course of the very workings of the process itself.

Various pairs (or more) of these varieties of form are also interdependent, and congruent, in a well designed trial court. For example, procedural form must itself be authoritative. Authoritativeness of adjudicative outcomes, however, is itself partly dependent on adherence to procedure. Further the interplay between formal fact-finding methodology and procedural form is conspicuous. A fact-finding methodology must be embedded in a procedural context. On the other hand, the appropriateness of much procedural form depends on the fact-finding methodology. A fact-finding methodology that affords each side a fair and rational opportunity to present proof and to challenge proof requires procedural form that is, overall, dialogic in character. In addition, there are interdependencies between structural form and other varieties of form. A tripartite adversarial structure presupposes composition of role participants, and a procedure in which this role allocation plays out.

Again, as we have seen, there are significant relations and interactions between formal dimensions of composition, authorization, structure, procedure, methodology and more, on the one hand, and various complementary non-formal elements on the other. Thus, a formal tripartite structure in which the judge is to occupy an impartial, independent, and relatively passive role tends to

infuse judicial personnel who occupy that role with a spirit of objectivity and even-handedness in dealing with the contentions of opposing parties. Here, appropriate formal structure not merely exacts compliance with the minimal dictates of role. It tends to affect, in salutary ways, the general frame of mind of the personnel occupying the role. For example, a judge conscious of the role may take on a general spirit of objectivity that goes beyond mere impartiality. Though this spirit is not itself formal, it may be viewed as an effect of formal role on the frame of mind of the judge, and thus be partially credited to form. In addition, a dialogic procedure in which one side is to answer the other, tends to focus the issues of fact and substantive law, and tends to motivate preparation for presentation of points and counterpoints. The relatively passive role assigned to the judge in preparation of cases of the two sides minimizes the risk that the judge will identify with the evidence and law favoring one side and maximizes the likelihood that the judge will not prejudge the case but instead suspend judgment until both sides are heard. At the same time, the opposing sides will have all the more incentive to prepare. Thus, major types of interdependent form organize the whole of this complex social institution, and these varieties of form matter in major ways.

Developed Western systems not merely provide for trial courts. They provide for appeals from trial court determinations of fact and applications of law. Again, the same major varieties of form organize and shape the workings of appellate courts, though with important variations and modifications, as we saw in the last chapter. For example, appellate procedure is dialogic, but it is not oriented to the finding of disputed facts in the way a trial court procedure is.

The relation between trial courts and higher courts in a court system itself comprises a structure – an ordered relationship of parts within a whole. The principle of centralization of appeals into one highest court is a structural principle that not merely provides for correction of error but also secures system-wide uniformity in the interpretation and application of law.

## **7 Conclusion**

Many basic varieties of entities and other phenomena are required for the effective implementation of law, and thus the realization of ends and values. All these take their own distinctive forms without which they could not exist at all. Also, through study of these forms such implementive phenomena can be more fully understood.