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FIRST SESSION

Thursday, April 28, 1960, at 2:30 p.m.

PEACE THROUGH LAW: THE RÔLE AND LIMITS OF ADJUDICATION

The session convened at 2:30 o'clock p.m. in the Chinese Room of the Mayflower Hotel, Professor Hardy C. Dillard, of the University of Virginia Law School, presiding.

ADJUDICATION AND THE RULE OF LAW

By Lon L. Fuller

Harvard Law School

I

The analysis that underlies this essay originated partly in a concern with the conventional problems of legal philosophy, including the perennial favorite: "What is law?" This analysis also had another source that lay in a concern with the practical problems of labor relations and administrative law. These two areas share with international law the characteristic that in them if law exists at all, it exists imperfectly—it is still in process of being born. The reflections prompted by these concerns ran along two converging lines, the first having to do with what I have called "the limits of adjudication," the second with clarifying what is meant by "the rule of law."

By speaking of "the limits of adjudication" I mean to indicate the very simple and familiar idea that there are certain kinds of social tasks that are not suitable raw material for the adjudicative process. We cannot solve all of our problems and disputes by referring them to judges or arbitrators. Anyone who discharges a judicial function works within a particular institutional framework. That framework is like a specialized tool; the very qualities which make it apt and efficient for one purpose make it useless for another. A sledge-hammer is a fine thing for driving stakes. It is a cumbersome device for cracking nuts, though it can be used for that purpose in a pinch. It is hopeless as a substitute for a can-opener. So it is with adjudication. Some social tasks confront it with an opportunity to display its fullest powers. For others it can be at best a *pis aller*. For still others it is completely useless.

When the question is thus stated, one is faced with the problem of clarifying the concept of adjudication itself. This is no easy task, for adjudication presents itself in many mixed forms. Sometimes, for example, it verges on mediation directed toward compromise. In this form it tends to merge with the concept of contract. At other times, when the

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members of a tribunal are selected in such a way as to make them representative of the various interests affected by the tribunal's decisions, adjudication verges on representative government.

One line of my thought was, then, directed toward some definition of adjudication in what might be called its unmixed manifestations; when it presents itself *simpliciter* and does not borrow its forms and methods from some other process of social decision.

The other line of thought was, as I have said, directed toward clarifying the meaning of "the rule of law." In the literature we find the rule of law identified with ideas that not only seem quite different from one another but actually opposed in meaning. It can be said—and it has been said with varying degrees of explicitness—that the rule of law exists, *first,* where there is respect for justice and human dignity; *second,* where there is constituted a law-making authority whose decrees will be obeyed even when they are unjust; *third,* where the rules established by authority are faithfully enforced by judicial processes; *fourth,* where there is an independent judiciary ready to protect the affected party against the arbitrary acts of established power, *et cetera.*

I suggest that one way of bringing coherence into this confused area is to emphasize one aspect of the process by which a state of anarchy or despotism is converted into something we can call "the rule of law." The aspect I have in mind is the process by which the party affected by a decision is granted a formally defined participation in that decision. Thus we may oppose against anarchy and naked power a society in which there are recognized voting procedures, for voting is an ancient and cherished device by which the individual is accorded a participation in decisions which affect his interests. Again, we may oppose against anarchy and untrammeled power a society organized by the principle of contract, for negotiation (directly or through representatives) is a procedure by which the affected party is granted a participation in the settlement which governs his future conduct.

Continuing along the same line of thought, we may arrive at the conclusion that the fundamental characteristic of adjudication also lies in the particular form of participation it accords to the affected party. That participation consists in the institutionally protected opportunity to present proofs and arguments for a decision in his favor. This is, in effect, nothing more than an unfamiliar formulation of a very familiar conception, that of giving the affected party "his day in court." The formulation I am offering has the advantage, I believe, of clarifying what is necessary to make the party's day in court meaningful. For one thing, he must have some conception of the issues toward which his proofs and arguments are to be directed, if his opportunity to present proofs and arguments is to be meaningful. This is a truth that has been recognized in writings as far apart as Kafka's *The Trial* and Lewis Carroll's account of the Mad Hatter's attempt to testify before the King of Hearts. It is a truth that is, however, often forgotten, I am afraid, by uncritical enthusiasts for "judicializing" every kind of social decision.

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To recapitulate, the analysis presented here regards adjudication as a process of social decision characterized by the peculiar form of participation it accords to the affected party, that of presenting proofs and arguments for a decision in his favor. This conception is, I believe, capable of bringing into some kind of order notions about the proper rôle of adjudication that otherwise remain merely enumerative and disjunctive. I do not have time here to trace, or even to suggest, all the implications that seem to me to flow from this conception. I shall have to content myself with two.

II

The first of these has to do with the concept of the polycentric task. This is a term I have borrowed from Michael Polanyi's profound and much neglected work, *The Logic of Liberty* (1951). To anticipate my conclusion I shall assert that adjudication is a process of decision badly suited to the solution of polycentric problems.

What is a polycentric problem? Fortunately I am in a position to borrow a recent illustration from the newspapers. Some months ago a wealthy lady by the name of Timken died in New York leaving a valuable, but somewhat miscellaneous, collection of paintings to the Metropolitan Museum and the National Gallery "in equal shares," her will indicating no particular apportionment. When the will was probated the judge remarked something to the effect that the parties seemed to be confronted with a real problem. The attorney for one of the museums spoke up and said, "We are good friends. We will work it out somehow or other." What makes this problem of effecting an equal division of the paintings a polycentric task? It lies in the fact that the disposition of any single painting has implications for the proper disposition of every other painting. If it gets the Renoir, the Gallery may be less eager for the Cezanne, but all the more eager for the Bellows, *et cetera.* If the proper apportionment were set for argument, there would be no clear issue to which either side could direct its proofs and contentions. Any judge assigned to hear such an argument would be tempted to assume the rôle of mediator, or to adopt the classical solution: Let the older brother (here the Metropolitan) divide the estate into what he regards as equal shares, let the younger brother (the National Gallery) take his pick.

Let me now give a series of illustrations of polycentric problems, some of which have been assigned, with poor success, to adjudicative treatment, some of which have been proposed for adjudicative treatment, and some of which are so obviously unsuited for adjudicative decision that no one has dreamed of subjecting them to it: setting prices and wages within a managed economy to produce a proper flow of goods; redrawing the boundaries of election districts to make them correspond to shifts in population; assigning the players of a football team to their respective positions; designing a system of throughways into a metropolitan area; allocating scarce funds for projects of scientific research; allocating air routes among our various cities; drawing an international boundary

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across terrain that is complicated in terms of geography, natural resources, and ethnology; allocating radio and television channels to make balanced programs as accessible to the population as possible.

For problems like these it is clear that adjudication can at best be an unsatisfactory mode of decision. There is and can be no single solution or issue toward which the affected party may direct his proofs and arguments. The mode of participation in the decision accorded to him, that is, the opportunity to present proofs and arguments for a decision in his favor, therefore loses most of its meaning. If he is nevertheless "given his day in court," this concession cannot have the meaning it does for the ordinary litigant, since the deciding agency must direct its mind toward considerations much more important than those contained in the fragmentary presentation open to any single party.

To avoid misunderstanding, let me present briefly a series of clarifications and qualifications.

First, polycentricity is not merely a matter of the complexity of the issues presented to the deciding tribunal. A suit by *A* against *B* on a promissory note for $100 may present extremely complex issues, where, for example, the note was given as part of some complicated deal between the parties. It is not complexity of issues but of patterns of decision that characterizes the polycentric problem. In the case of the promissory note the court can decide that *A* wins over *B,* without having to move *C*'s position, or to exchange *C*'s position for that of *D*. Contrast this with the football coach who, when he put A in as quarterback, has to move B from halfback to end, to retain C as a center, *et cetera.*

Second, polycentricity is not a matter merely of a multiplicity of affected parties. Indeed, as I have indicated, a polycentric problem can arise between two parties, as in the case of Mrs. Timken's will. On the other hand, if an award were offered for information leading to the capture of a particular criminal, the fact that ten claimants might appear would make for a cumbersome hearing; it would not make the problem polycentric.

Third, I am not asserting that polycentric problems are problems without rational solution. There are rational principles for building bridges of structural steel. But there is no rational principle which states, for example, that the angle between girder *A* and girder *B* must always be 45 degrees. This depends on the bridge as a whole. One cannot construct a bridge by conducting successive arguments on the angle of every pair of intersecting girders. One must deal with the whole structure at once.

Fourth, the fact that an adjunctive decision affects and enters into a polycentric relationship does not of itself mean that the adjudicative tribunal is moving out of its proper sphere. On the contrary, there is no better illustration of a polycentric relationship than an economic market, and yet the laying down of rules that will make a market function properly is one for which adjudication is generally well suited. The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that

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they should promote the free exchange of goods on a polycentric market. The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.

Fifth, the polycentricity of any given problem is a matter of degree, though we need to recall Holmes' remark that a distinction may be a matter of degree and none the worse for that. For example, in the evolution of the rules of contract law, our courts often had to backtrack when they discovered that a rule that seemed proper in *Situation X* worked an injustice when applied to *Situation Y*. The problem of the unexpected side effects of a precedent is one that plagues all systems of law, including those which interpret contracts as well as those which lay down the rules for contracting. But the difficulties of this problem furnish no argument for abandoning any concern for the limits of adjudication. On the contrary, they warn us eloquently where adjudication will land if it decides it might as well quit the frying pan for the fire.

To recapitulate: When we move from a condition of anarchy to despotism toward something deserving the name of "the rule of law," one of the most important aspects of that transition lies in the fact that formal institutions are established guaranteeing to the members of the community some participation in the decisions by which their interests are affected. Adjudication is a form of social decision which is characterized by a peculiar mode of participation accorded to the affected party, this participation consisting in the opportunity to present proofs and arguments for a decision in his favor. Whatever impairs the meaning and force of that participation impairs the integrity of adjudication itself. This participation is seriously impaired where an attempt is made to deal with problems where the polycentric element, as here defined, is important and significant. Adjudication is a mode of decision badly suited for the solution of polycentric problems. When it is seriously misused in this direction the rule of law is itself impaired.

What measures, then, are open for the solution of polycentric problems? I can see only two: *contract* and *managerial authority.* The first is illustrated by an economic market; the second by a football coach who assigns his players to their appropriate positions.

The majority principle is itself incompetent to deal with polycentric tasks; at least it would be incompetent if it were not so commonly supplemented by contract in the form of the political deal. Perhaps studies in voting forms (such as those of Kenneth Arrow, Duncan Black and Gordon Tullock) may yield methods of voting that will accommodate the machinery of elections to the solution of polycentric tasks.

III

The second main implication of my analysis is one that I have already mentioned, and that is that adjudication must take place within a framework of accepted or imposed standards of decision before the litigant's participation in the decision can be meaningful. If the litigant has no idea

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on what basis the tribunal will decide the case, his day in court—his opportunity to present proofs and arguments—becomes useless. Just as the judge cannot be impartial in a vacuum, so the litigant cannot join issue with his opponent in a vacuum. Communication and persuasion presuppose some shared context of principle.

Those who regard the judge's task as essentially deductive have considered that adjudication can function meaningfully only when rules have been formally laid down in advance for the decision of controversies. According to this view, in any situation where the rule of law is in process of being born, we must first establish rules of decision, and then set up tribunals to administer and apply those rules in particular cases. If the established rules are insufficient to cover the area of possible controversy, then to that extent adjudication must also default as an ordering principle.

Against this view stand those who contend that rules are a kind of by-product of the adjudicative process, who indeed often seem to regard rules as an unwelcome by-product of adjudication, born of the perverse human impulse toward rationality, often manifesting itself at the cost of good sense.

With considerable simplification we can divide the opponents in this dispute into those whose slogan is: "First rules, then courts," and those who adopt the opposite slogan: "First courts, then rules." Those who take the second position—that is, those who say, "First courts, then rules" —often support their argument by references to history. It is pointed out that the two great systems of law that dominate the world today—the common law and the Roman law—took their origins in a case-by-case evolution of doctrine. Even today, when developments occur in the common law, it is often only at the end of a series of cases that the governing principle becomes clear. In the civil-law countries the codes from which courts purport to derive their principles often provide little beyond a vocabulary for stating legal results. They are filled with clauses referring to "good faith," "equity," "fair practice," and the like—standards that any court could apply without the aid of a code. One of the best of modern codes, the Swiss Code of Obligations, lays down very few rules and contents itself largely with charting the range of judicial discretion and with setting forth what might be called check-lists for the judge to consult to make certain that he has overlooked no factor properly bearing on the exercise of his discretion.

Those on the opposite side of this argument reject this historical argument. To their minds it only confirms the truth of their own slogan, "First law, then courts." In the instances mentioned there were already rules which the courts could apply. These were not, to be sure, rules of law, but they were established moral principles that were generally accepted by the litigants who came before the courts. What happens in such cases has no bearing on situations where a court attempts to project its functions into a moral and legal vacuum. Here the court will fail unless it can enter this wilderness armed with rules authoritatively laid down in advance.

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It seems to me that what is needed in this dispute is some analysis of the circumstances under which rules or standards of decision can develop out of the adjudicative process without being laid down in advance; where, in other words, adjudication may reasonably be expected to produce such rules or standards as a by-product of its functioning. For we cannot assume that this will under all conditions occur. Some of our most important domestic regulative agencies were initiated in the hope that, as knowledge was gained case by case, a body of principle would emerge that would be understandable by all concerned and that would bring their decisions within the rule of law. Sometimes this has happened; sometimes our hopes that it would happen have been completely disappointed. Here is a pool of experience which ought to be tapped.

As I see it, there are two major conditions that must exist before principles of decision may be expected to emerge as a by-product of adjudication. The first is that there must be an extra-legal community, existent or in process of coming into existence, from which principles of decision may be derived. The common law of contracts developed concomitantly with the development of the economic institution of exchange. In the course of the long evolution of legal doctrine about contracts, litigants had to put up with many unpleasant manifestations of the adjudicative process—with wooden literalness, with confused analysis, with class bias, with imperfect insight and foresight. But they put up with these inconveniences because they saw that adjudication was necessary to maintain something that existed outside the courtroom that they wanted to preserve and develop. They saw also, by and large, that the principles of law laid down by the courts were themselves derived from the intrinsic demands of this extra-legal community of interest. This was just as true, I think it should be emphasized, whether the courts were laying down rules for the making of contracts, or were developing principles for the interpretation of contracts already concluded, for I believe that it is in the sphere of interpretation that the law's dependence upon extra-legal community is most direct and complete.

The first condition for the emergence of legal doctrine as a by-product of adjudication is, then, the actual or potential existence of extra-legal community. The second condition is that the adjudicative process must not, in attempting to maintain and develop extra-legal community, assume tasks for which it is radically unsuited. I hope I shall not appear to be overworking the concept of polycentricity if I say that all community is polycentric in nature, as indeed are all living relationships. Adjudication may profitably nurture extra-legal community and help it into being; it cannot create it.

It is notable that the greatest failure in American administrative law has been with respect to those agencies that were assigned, or assumed for themselves, polycentric tasks which they attempted to discharge through adjudicative forms. This has been the case with the Civil Aeronautics Board and the Federal Communications Commission. Both of these agencies have attempted to operate as adjudicative tribunals with

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only the guidance of very general legislative mandates. Both have failed to build up any coherent body of doctrine that can be called a system of law. Both have failed, not because there was nothing in the way of extra-legal community they could help to develop, but because they were compelled, or thought they were compelled, to create and shape that community through adjudicative procedures. The inadequacies of the community thus built, as well as the too frequent lapses from the judicial proprieties that have characterized both agencies, are alike attributable to an attempt to use adjudicative forms for the accomplishment of tasks for which they are not suited. It is as if the courts of common law, instead of laying down rules governing the making and interpretation of contracts, had from the beginning felt compelled to write contracts for the parties, and had attempted to hold a separate hearing for each clause as the contract was being written.

My final conclusion is that, like many other precious human goals, the rule of law may best be achieved by not aiming at it directly. What is perhaps most needed is not an immediate expansion of international law, but an expansion of international community, multiplying and strengthening the bonds of reciprocity among nations. When this has occurred—or rather *as* this occurs—the law can act as a kind of midwife—or, to change the figure—the law can act as a gardener who prunes an imperfectly growing tree in order to help the tree realize its own capacity for perfection. This can occur only when all concerned genuinely want the tree to grow and to grow properly. Our task is to make them want this.

PEACE THROUGH LAW: THE RÔLE AND LIMITS OF ADJUDICATION—SOME CONTEMPORARY APPLICATIONS

By Arthur Larson

Director, World Rule of Law Center, Duke University

Before taking up my main task, which is to test the rôle of adjudication on a sampling of actual current disputes, I should like to point out one special reason that makes this discussion timely—its relation to the Connally amendment. It has recently struck me that most of the "scare" arguments we have been hearing from the opponents of repeal are based, not just on a misconception of the scope of domestic jurisdiction, but even more on a misconception of the scope of the adjudication function.

Let me read you a typical example of the kind of circular that helped produce the flood of letters that helped delay action on this issue in the Senate. If the Connally amendment were repealed, according to this circular from the Patriotic Letter Writers, Inc.,

> This Court, loaded with members of the Communist Party and their dupes, would have jurisdiction over all areas of our lives, for Congress

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