

Legal Process, Professionalism and Ethics:  
Legal and Ethical Issues in the Making and Application of Law  
University of Toronto, Fall 2014  
Markus Dubber

Annotated Outline & Syllabus  
[subject to change]

1. [Legal Process: An Overview](#)
  - A. [Legal Process \(Hart & Sacks\)](#)
  - B. [Legal Process, Professionalism and Ethics](#)
  - C. [Types of Process](#)
  - D. [Principles](#)
  - E. [Mode\(l\)s of process](#)
  - F. [Focus areas](#)
  - G. [Legal process](#)
2. [Legislation: Making Law](#)
  - A. [Law](#)
  - B. [Ethics](#)
  - C. [Who?](#)
3. [Adjudication & Administration: Applying Law](#)
  - A. [Law](#)
    - (i) [Basic Features: General Part](#)
    - (ii) [Selected Issues: Special Part](#)
  - B. [Ethics](#)
  - C. [Who?](#)

\*\*\*\*\*

1. Legal Process: An Overview

- A. Legal Process (Hart & Sacks) [Rubin](#) (pp. 1394-96); [Roach](#) review (pp. 363-66)
  - institutional design & institutional competence
    - making and application of law
      - making vs. (“mere” interpretation vs.) application; “common law” vs. “civil law” vs. “statutory law”; legislators vs. judges vs. administrators
    - functional, purpose-based approach re: design and implementation
      - MPC as Legal Process document/project
        - see purpose section in MPC (§ [1.02](#)) (crim)
        - [Willis](#) (p. 59, § IV) (admin)
      - discretion: acknowledge and guide
        - interpretation maxims (see MPC §§ [1.02](#)(3), [2.02](#)(3), (4), [2.05](#))
        - [Interpretation Act](#) (see § 3)
  - systemic, comprehensive, comparative
    - = see civil law materials, e.g., on codification (Hart & Sacks [772-77](#); [787-91](#))

## B. Legal Process, Professionalism and Ethics

- = systemic
  - process unmodified
  - norms
    - actions
    - actors (incl. qualification)
- = comprehensive (less so)
- = comparative
  - internal
    - civil, criminal, administrative
  - external
- = contextual
  - law
  - ethics
- = historical (e.g., jury)

## C. Types of Process

- = functions, rationales, purposes
- private law
  - “civil”
    - “alternative” (mediation, arbitration, etc.)
- public law
  - administrative
    - public
    - “private”
      - disciplinary ([Wigglesworth](#), paras. 16-28)
      - labor ([Dunsmuir](#) para. 74)
  - criminal

## D. Principles

- = nature & sources of norms?
  - common law
    - principles
    - caselaw
  - constitution
- admin
  - procedural fairness/natural justice
    - audi alteram partem
    - nemo iudex (but see [Vermeule](#) pp. 386-90) ([Ocean Port](#) paras. 39-43)
  - = arbitration (§§ [19, 20](#) Ont. Arb. Act)
- US: con law: due process
  - [Goldberg](#) (pts. I & II) vs. [Nicholson](#) (paras. 18-26)
- crim
  - due process
    - post-“natural justice”
  - “general principles of criminal procedure” ([LRCC](#) pp. 23-28)

- civ (values, principles, objectives)
  - fairness, order, efficiency, justice (to all parties), comity, predictability, security, stability ([Van Breda](#) paras. 25-27, 34, 38, 66, 73, 79 (jurisdiction) (also: balance, reconcile (paras. 66, 73)); see [Dutton](#) below (balance efficiency & fairness)
    - = [Rules of Civil Procedure](#) (Ont.) (1990) (§ 1.04)
      - “the just, most expeditious, and least expensive determination of every civil proceeding on its merits”; proportionality
    - = [Federal Rules of Civil Procedure](#) (U.S.) (1938)
      - “the just, speedy, and inexpensive determination of every action and proceeding”
  - due process
    - US vs. Canada (jurisdiction)
      - [Int’l Shoe](#) (319: “relation to the fair and orderly administration of the law which it was the purpose of the due process clause to insure”) vs. [Morguard](#) (“demands of order and fairness”; “proper,” “appropriate”)

#### E. Mode(l)s of process

- = parameters
  - aims
  - functions
  - “meaning”
  - significance
- = truth
  - wrongful convictions (China)
- = legitimacy
- = civility
  - order, “repute”
- = protectionism/elitism ([CBA Futures](#) p. 18)
  - lawyers’ interest
- = types of model
  - systemic/general
    - adversarial vs. inquisitorial
    - justice vs. efficiency
  - by area
    - = criminal
    - = civil
    - = administrative

#### F. Focus areas

- = habeas corpus
  - history ([Halliday thesis](#) 943-46) ([Halliday & White](#) 6-7, 16-31)
    - jurisdictional, hierarchical
    - beacon of liberty
  - values
    - justice
    - royal authority

- prerogative writ
- civil vs. criminal procedure
- collateral
- flexible (standard vs. norm)
- = jury
  - history ([Brunner thesis](#))
    - peer judgment vs. tax collection
    - local self-government vs. central authority
    - royal (common law) courts vs. manorial courts
    - English vs. French
  - values
    - justice
    - royal authority
- = wrongful convictions
  - process vs. substance; process vs. truth
  - wrongful conviction vs. mistaken identity vs. false positive
  - finality/accuracy/resources
  - collateral
    - habeas corpus
  - legal vs. political; judicial vs. executive
  - adversarial vs. inquisitorial

#### G. *Legal process*

- rule of *law*?
  - the “legal” in legal process
    - Legal Process?
      - intro. H & S (ch. I, § 1, A. (pp. [1-9](#)))
      - Hart, Aims of the Criminal Law ([401-06](#))
      - [Fuller on Law](#)
      - ego: law = autonomy ([vs. police](#))
- law vs. police; legality vs. “managerial direction”
  - why process?
    - discretion
    - police process? vs. legal process?
  - process vs. substance
    - John Hart Ely ([representation-reinforcement](#)); Kent Roach ([dialogic judicial review](#) pp. 49-55)
    - procedural vs. substantive review (Can. admin law)
    - process as substance
      - e.g., federal habeas in state cases (U.S.): statute of limitations (1 year), exhaustion (state remedies), successive petitions, retroactivity (“new” rules)
    - process vs. substance?
      - process = neutral?
      - principles = neutral? ([Wechsler](#) pp. 15, 19-20)
  - autonomy

- self-judgment: legitimacy?
  - representativeness
    - jury
      - M (Fritz Lang 1931) ([jury of M's peers](#))
  - participation (audi alteram)
  - self-designed process
    - = *omnis iudex in sua causa*
- "rule of law"/principle of legality? ([Fuller](#))
  - generality/equality
    - formality of process
      - standards vs. rules
    - objectivity (neutrality)
      - *nemo iudex in sua causa*
      - *but see* self-designed process
  - certainty/predictability (prospectivity)
    - predetermined process vs. ad hoc
  - specificity/clarity
  - consistency (internal, temporal)
    - "legitimate expectations" ([Agraira](#) paras. 93-97); executive estoppel/officially induced error (see below)
  - publicity
  - congruence
  - speed/efficiency
  - accuracy
  - finality
- process vs. procedure?

\* \* \* \* \*

## 2. Legislation: Making Law

### A. Law

- = legislativity
  - = delegation ([Willis](#)) (admin); [Mistretta](#) (pts. I-III & Scalia dissent)
  - = common law crimes, [Frey](#)
- = codification
  - = criminal code ([Friedland](#) 145-55, [Linden](#) 1-8, 12-20) [Alberta Nurses](#)
  - = civil code vs. criminal code ([Kasirer](#) pt. II)
  - = admin code (StVollZG)
    - BVerfGE 33, 1 (1972): substantiality; non-delegation
    - statute vs. code
- = "rules of procedure"
  - making law about applying law
  - rules vs. code vs. act
    - [Fed. R. Crim. P.](#) vs. Can. Crim. Code pts. [XIV-XXVIII](#) vs. [StPO](#)
  - = [Rules of Civil Procedure](#) (Ont.) ([Civil Rules Committee](#); [Process](#))

- as is/are just = 79 (31/48) times: “justice,” discretion
- = “liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits”
- = [Federal Rules of Civil Procedure \(Process\)](#)
- = “construed and administered to secure the just, speedy, and inexpensive” determination of every action and proceeding”

## B. Ethics

- = legislators
  - Ont. Members’ [Integrity Act](#) (preamble & §§ 2-9); Ont. Integrity Commissioner ([2013-14 Report](#) pp. 1-12)
  - = [legislative drafters](#) (pp. 125-26, pt. IV)
- = lobbyists (Can. [Code of Conduct](#); [Lobbying Act](#) § 5(1))
  - [Democracy Watch](#) (paras. 1-9, 27-54)

## C. Who?

- = right to vote
  - = felons ([Sauvé](#) paras. 1-62)
  - = Fair Elections Act ([UofT](#) profs)
  - = citizenship ([Toronto PR voting](#) proposal)
- = right to be voted for
  - = s. [750](#) Criminal Code, citizenship

\* \* \* \* \*

## 3. Adjudication & Administration: Applying Law

### A. Law

#### (i) Basic Features: General Part

- = models
  - areas
    - criminal (Packer, [Roach](#) I-III)
    - civil ([Scott](#))
    - admin ([Willis](#)) (p. 59, §§ III-IV)
  - systems
    - adversarial vs. inquisitorial
      - criminal (Roach: [wrongful conviction](#) (causes) pts. I & II); ([Langer](#) pts. II & III)
      - civil ([Jolowicz](#)) [Langbein vs. Allen]
      - = [10th District Court](#) (France) (trailer)
- = interpretation
  - [Willis](#) (pp. 4-16); [Llewellyn](#)
  - [Schreiber](#) paras. 52-80 (bijural/bilingual)
  - [Rizzo](#) (civil), [Régie](#) (paras. 147-48, 158-60) (admin), [Canadian Foundation](#) (paras. 28-43) (con), [Paré/McIntosh/Sharpe/L.B.](#) (crim),
- = discretion

- = crim
  - judges ([Summers](#)) (paras. 20-69) [[Nur](#) (supplemental)]
    - U.S. Sentencing Guidelines ([intro](#) § 1A1(1)-(3))
  - prosecutors ([Krieger](#)) (paras 1-15, 24-32, 40-end)
    - = discretion not to prosecute (plea bargaining)
      - criticism ([Canada](#)) ([US](#) pp. 115-17, 122-23, 125-26, 130-33)
  - “prohibition”
    - Germany: Legalitätsprinzip (StPO § [152](#)), Opportunitätsprinzip §§ [153-154](#)); [fact vs. fiction](#) (pp. 547-553; 558-60); “legalization” (StPO §§ [257b](#) & [257c](#); [in practice](#) pp. 72-79); [Fed. R. Crim. Pro. 11](#)
  - police ([Ladouceur](#) (Cory judgment))
    - = discretion not to investigate ([Beaudry](#) (Charron judgment)) (obstruction of justice)
- = admin: [Suresh](#) (paras. 29, 33-38)

## (ii) Selected Issues: Special Part

- = jurisdiction
  - = “jurisdiction” (vs. jurisgeneration; vs. law “enforcement”)
    - senses: activity, power, scope ([Dubber](#) 256-63)
  - civil (international & interprovincial)
    - ([Morguard](#)) ([1990] 3 S.C.R. 1077, 1082-83, 1095-end); ([Saldanha](#) (paras. 1-11, 24-77)); ([Van Breda](#))
  - criminal
    - legislative competence: power to make law ([Firearms Reference](#)) (paras. 15-16, 24-25, 31-35, 41-42, 54-55)
    - adjudicatory/applicatory competence: power to apply law ([Stucky](#)) ([Libman](#) paras. 1-11, 43-44, 55-78) ([Morgan](#) on Libman, pp. 246-47, 269-77)
      - territoriality et al. ([Dubber](#) 263-65); [Code of Service Discipline](#); Comp Crim L [144-46](#)
  - administrative
    - “true” jurisdiction ([Alberta Teachers](#) paras. 30-42)
    - vs. civil ([Weber](#) (McLachlin judgment paras. 32-58))
- = justiciability/standing/”statute of limitations”/mootness
  - = justiciability (issue)
    - ([Black](#))([Guergis](#)) paras. 1-22, 50)
  - = standing (person)
    - civil
      - private interest standing ([animals](#)) ([Nakhuda](#) paras. 1-4); environment ([Sierra Club](#) (majority and dissents))
      - public interest standing ([Downtown](#)) (paras. 1-8, 18-end)
    - criminal
      - search ([Edwards](#)) (paras. 1-57); competence ([Whittle](#): paras. 28-33, 48); [pro se](#)
    - administrative (initial determination, not judicial review)
      - public interest standing ([Finlay](#)) (paras. 1, 17, 22, 23, 27, 31-36)

- = intervention
  - civil ([Pictou Landing First Nations](#)) ([Choc](#))
- = statute of limitations/delay
  - civil: [Bond](#) (paras. 34-end)
  - crim: [LRCC](#) p. 34; summary convictions ([Dudley](#) paras. 1-46); speedy trial ([Morin](#) (Sopinka judgment)); [Minnesota](#)
  - admin: [Bagambiire](#) (LSUC; summarizing [Blencoe](#))
- = mootness
  - [G.\(J.\)](#) (paras. 1-2, 41-48)
- = procedural rights/due process
  - = “natural justice”/“procedural fairness”/nemo iudex & audi alteram partem
    - admin (vs. due process): [Schauer](#) 47-58, 71-72 ([Consolidated Bathurst](#) paras. 2-3, 22-23, 42-51)
    - civil: [Ariston Realty Corp](#); [Kallaba](#) (para. 31); [Beidas](#) (paras. 36, 79)
    - criminal: [Villota](#) (paras. 47, 77-78, 90-119, 123, 131-33) (certiorari)
  - = independence & participation
    - jury ([Spence](#) (paras. 1-25, 77-78): race); [Kokopenace](#) (paras. 1-12, 137-39, 144-51, 205-12, 227-28: underrepresentation)
    - administrative tribunal ([NF Telephone](#))
      - = ([Ocean Port](#) paras. 39-43); ([Vermeule](#) pp. 386-90)
    - judge ([NF Telephone](#)) ([Provincial Judges](#)) (paras. 94-95, 105-07, 109)) ([R v S \(RD\)](#) (paras. 31-49, 52-53 (L’Heureux-Dubé), 118-20, 158-59 (Cory)) (crim))
  - = discovery/notice & privilege
    - crim [Stinchcombe](#) ([1991] 3 S.C.R. 326, 329-41 (paras. 1-24))
    - civil [Grossman](#)
    - admin [May](#) (paras. 89-120)
  - = privilege
    - [Blank](#) (paras. 1-65) (solicitor-client, litigation privilege)
      - [- paralegals [Chancey](#) (paras. 1-3, 26-57) (supplemental)]
- = right to (paid) counsel
  - criminal: [Bartle](#) (pts. I-III, IV(a), (b), (e), (g)(ii))
  - admin: [G.\(J.\)](#) (paras. 1-2, 41-48 (mootness), 56-61, 68-75, 81, 91)
  - civil: [P.D.](#) (paras. 1-14, 148-58)
  - = pro se ([advice to lawyers](#))
- = burden of proof
  - = crim vs. civil [Starr](#) (paras. 91-101, 136, 139, 150-51, 230-43)
  - = civil & admin [McDougall](#) (paras. 1-50)
- = over- and abuse of process
  - res judicata/double jeopardy; abuse of process; estoppel & (“the rule against”) collateral attack
    - [CUPE 79](#) (admin/crim) (paras. 1-59); [Penner](#) (civil/admin) (paras. 1-72); [Mahalingan](#) (crim: estoppel/double jeopardy) (paras. 1-59); [\\$787,940](#) (crim/admin); [Berkowitz](#) (crim/crim); [Rasouli](#) (admin/civil; + privilege)
      - admin [flip-flop](#)



- crim: executive estoppel/mistake of law ([Studifin](#)); officially induced error ([Tétreault](#) paras. 20-28); cf. legitimate expectation
- double jeopardy: [Wigglesworth](#) (paras. 1-31) (admin/crim); [Shubley](#) (majority opinion) (same)
- habeas corpus: [May](#) (paras. 1-54, 64-86) (also see above: discovery)
  - procedure as substance; process v. merits ([Teague](#) pp. 1-6)
  - wrongful conviction (Roach: [More Procedure, Less Justice](#) pp. 283-86)
- = alternative procedures
  - = crim: plea bargaining ([Nixon](#)) (abuse of process) (paras. 1-17, 33-end)
    - plea bargaining as “alternative” process?
  - = admin: [environmental ADR](#) (model legislation pp. 106-21)
  - = civil: mediation ([Sable Offshore](#)); class action ([Dutton](#)) (paras. 1-10, 19-end) (“balance efficiency & fairness”)
- = “motions”
  - = injunctions
    - = civil: [RJR](#) (pts. VI & VII); [Morland-Jones](#)
    - = admin: [Tomko](#) (pp. 116-25) (“cease and desist”)
      - contempt: [Alberta Nurses](#)
    - = crim: sureties (Crim. Code §§ [810-811](#))
  - = motion to strike
    - = civ: [Hunt](#) (pts. 1-3 & 4(1)(b)) [Joly](#) (“person”)
    - = admin: [Majesty](#) (Human Rights Tribunal)
  - = summary judgment
    - = civil: [Hryniak](#) (paras. 1-68, 85-end) (“access to justice”; roadmap)
    - = crim: summary conviction (Crim Code [Pt. XXVII](#))

## B. Ethics

- = judge’s ethics
  - [code of conduct](#) (pp. 3-7, 13, 17, 23, 27-29)
  - Judges Act §§ [63-66](#)
    - Cosgrove ([report 2](#)) [[report 1](#)] (paras. 121-64, 182-90) (supplemental)]
- = adjudicator
  - LSUC tribunal adjudicator [code of conduct](#)
- = lawyer
  - LSUC [Rules of Professional Conduct](#)
    - = e.g., § 1.02 (“conduct unbecoming a barrister or solicitor”; [UCMJ](#)); 1.03; 2.01; 2.02(1), (5); 2.03; 2.03(1)-(4); 3.01(1); 4.01; 4.06(1); 5.02(3); 6.01(1), (3); 6.03(1); 6.11
    - civility (Woolley [uncivil I](#); [uncivil II](#) (intro, pts. III-V))
    - ungovernability: [Shifman](#)
    - fraud: [Nguyen](#)
    - conflict of interest/duty of loyalty: [Neil](#)
    - crim: defense ([Martin](#)) ([Simon](#) 1703-06); prosecution ([Krieger](#)) (see above)
- = administrator’s ethics
  - = police (Code of Conduct [ON](#); [RMCP](#))
    - [- [Bridgman](#) ([penalty](#)) (supplemental)]

- [Wigglesworth](#) (RCMP)

C. Who?

= judge

= judicial qualifications ([Superior Ct](#)) [Supreme Court ([Nadon](#)) (supplemental)]

= jury

= right ([eligibility](#)) to sit on jury

= civil

= Can: [Guardian of Civil Rights](#) (pts. I & II, IV)

= crim

= Can: [overview](#) (pts. I-III)

= admin

= lay participation (e.g., [Competition Tribunal Act](#)) ([NF Telephone](#) (above))

= lawyer

= [Nat'l Admission Standards Project](#); LSUC (e.g., pt. IV ([good character](#)))

= law schools/LPP ([Pathways](#) (executive summary))

= students ([Moran](#) (paras. 1-3, 24-52)) (see also competence (above))