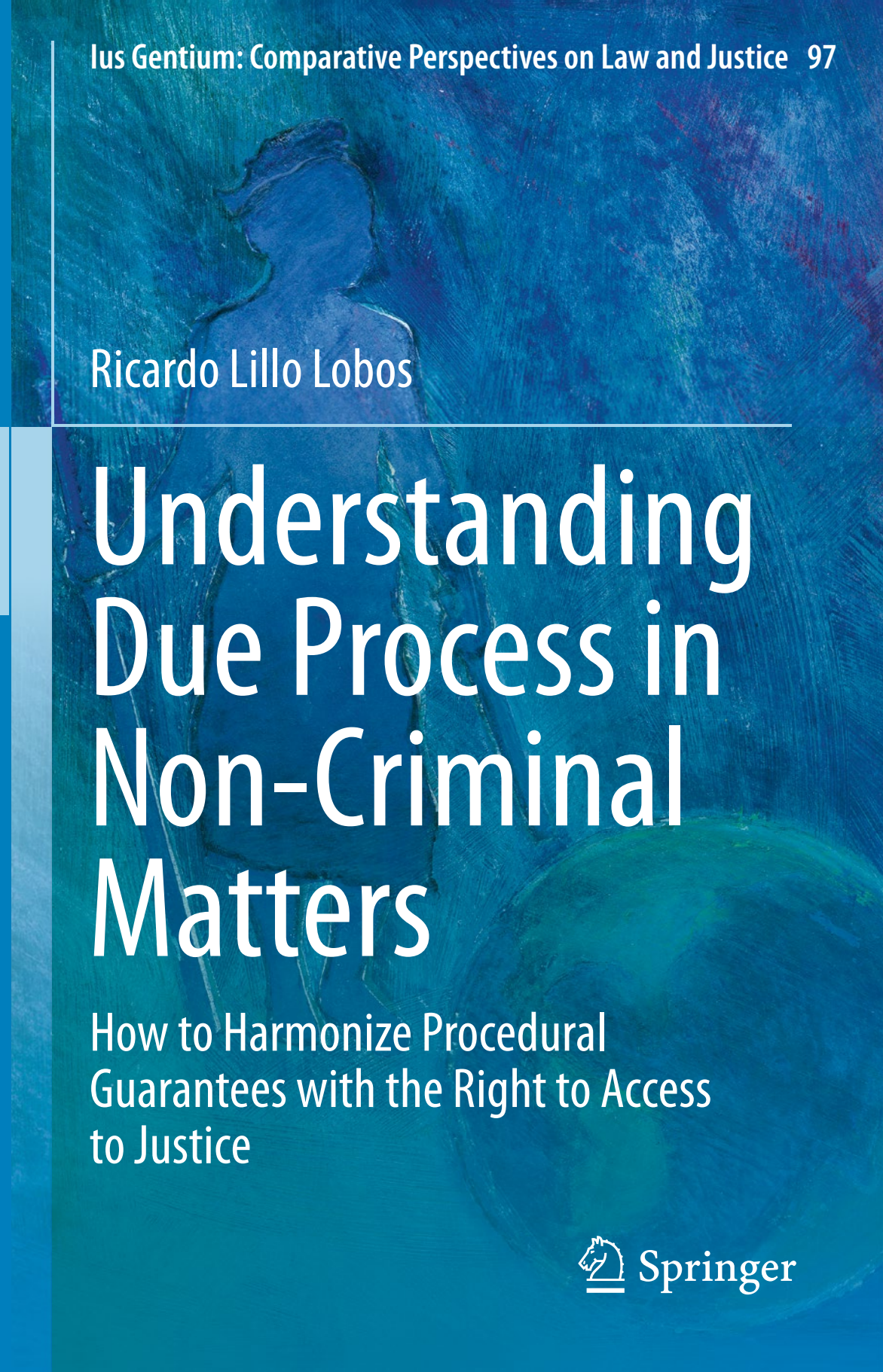
Ius Gentium: Comparative Perspectives on Law and Justice 97



Ricardo Lillo Lobos

# Understanding Due Process in Non-Criminal Matters

## How to Harmonize Procedural Guarantees with the Right to Access to Justice

Springer

# Ius Gentium: Comparative Perspectives on Law and Justice

Volume 97

*Ius Gentium* is a book series which discusses the central questions of law and justice from a comparative perspective. The books in this series collect the contrasting and overlapping perspectives of lawyers, judges, philosophers and scholars of law from the world's many different jurisdictions for the purposes of comparison, harmonisation, and the progressive development of law and legal institutions. Each volume makes a new comparative study of an important area of law. This book series continues the work of the well-known journal of the same name and provides the basis for a better understanding of all areas of legal science.

The *Ius Gentium* series provides a valuable resource for lawyers, judges, legislators, scholars, and both graduate students and researchers in globalisation, comparative law, legal theory and legal practice. The series has a special focus on the development of international legal standards and transnational legal cooperation.

Ricardo Lillo Lobos

# Understanding Due Process in Non-Criminal Matters

## How to Harmonize Procedural Guarantees with the Right to Access to Justice

Springer

Ricardo Lillo Lobos
School of Law
Universidad Adolfo Ibañez
Santiago, Chile

ISSN 1534-6781 ISSN 2214-9902 (electronic)
Ius Gentium: Comparative Perspectives on Law and Justice
ISBN 978-3-030-95533-5 ISBN 978-3-030-95534-2 (eBook)
https://doi.org/10.1007/978-3-030-95534-2



This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

*To Shantal.*
*The love of my life.*
*For Domingo, Isidora, and Raimundo.*
*My whole life.*

# Foreword

Due process is one of the most fundamental and cherished legal concepts and values of our time. Yet, courts and commentators have underexplored and untheorized what due process requires in civil cases. This important and original book contributes to fill this vacuum.

The central argument of this book is that due process should be thought of not in parallel to, but in conjunction with, access to justice—another fundamental and cherished legal concept and value. Legal systems do not have unlimited resources and deal with various and very different types of legal cases—e.g., small-and-big-claim, low-and-high-complexity, and criminal-and-noncriminal cases. The argument of this book is that if wrongly conceptualized and defined, due process requirements may make impossible in many cases that people who need the courts or other mechanisms to protect their rights, interests, and well-being get access to these bodies and the justice they provide. This book then offers a framework within which both due process and access to justice can be properly integrated with each other and advanced. In this regard, this book speaks not only to academics, but also to policy makers who design, regulate, and administer the legal process—particularly, noncriminal proceedings.

To flesh out and substantiate this argument, this book uses a wide and sophisticated set of tools and makes various analytical, comparative, and empirical contributions, each of them insightful and important on their own right. Analytically, the book articulates two conceptions of due process. The first is the checklist model under which due process is a legal rule that requires a strict minimum specific set of conditions that are decided ex ante by a rule-making authority and that apply to broad categories of legal cases. The second conception is the flexible model under which due process is a legal principle whose content is defined on a case-by-case basis depending on the details of each case. The book conceives of these two models as ideal types that create a continuum that the book then uses to classify conceptions of due process in jurisdictions and adjudicative bodies in Europe, Latin America, and the USA. But these powerful analytical tools could be applied and shed light on other jurisdictions and due process regulations beyond the ones this book covers.

Using this combination of analytical, comparative, and empirical approaches, the book discusses noncriminal/nonpunitive conceptions of due process in Latin America, in Chile and California, in the European and the Inter-American systems of human rights, and in the USA. Each of these specific comparisons, empirical studies, and conceptual and legal analyses is enlightening not only to advance this book's central argument, but to understand these jurisdictions.

Regarding Latin America, one of the book's chapters describes the features of traditional Latin American civil procedure, how they have differed from civil procedure in Europe, recent civil procedure reforms and reform attempts in the region—including those prompted by the Iberian-American Model Code of Civil Procedure, and how they relate to what has been called the crisis of civil justice and to the access-to-justice movement around the world. In relation to its main argument, the book also explains that the Model Code has been criticized, among other reasons because it establishes a common procedural regulation for all noncriminal cases that include only three types of proceedings: ordinary, extraordinary, and the order for payment procedure, without leaving room for special courts or venues to deal with certain cases and to address certain problems of social justice.

Another chapter of the book also includes a fascinating and illuminating comparison between civil justice in California and Chile, showing how each of these jurisdictions would deal differently with a concrete hypothetical case. This comparative examination includes not only legal analysis but also two empirical studies that Ricardo Lillo made of the Small Claims Court of Los Angeles, California, and the Civil Courts of Santiago, Chile. His data show they are mostly corporations the ones that use civil procedure in Santiago against individual defendants. Through such a legal and empirical comparison, Ricardo Lillo shows how different conceptions of fair trial can have a substantial impact on civil procedure design and on to what extent human beings with actual legal needs may or may not access justice. The chapter in question is a model that future studies could follow on how the comparative legal analysis of a hypothetical case can be integrated with a comparative empirical analysis of two jurisdictions.

With an impressive analytical and empirical study, the book also examines and compares how the case law of the European Court of Human Rights and that of the Inter-American Court of Human Rights understand fair trial requirements in civil cases in their respective human rights systems. To that effect, Ricardo Lillo created a database from scratch for each of these courts, using his own operational definition of civil justice and of noncriminal and nonpunitive cases, and coded various variables on the characteristics of each case, the main legal issue under discussion, on many dimensions of the right to a fair trial—e.g., effective remedy, equality of arms, independent and impartial, and opportunity to be heard—and on the specific procedural elements analyzed by the court. Ricardo Lillo also originally created and coded various variables to operationalize the checklist and flexible due process models articulated earlier in the book. These variables included, among others, whether the court applies a procedural guarantee from the criminal prong of the clause over noncriminal cases versus whether the court considers the complexity of the case or

its particular circumstances as a factor to determine whether a procedural guarantee is required, whether the court interprets the procedural element or dimension as a clear-cut rule versus whether the court considers that a less formalistic approach is required, etc.

His analysis shows that despite the similarities in the texts of the American Convention of Human Rights and the European Convention of Human Rights in their regulation of the right to a fair trial, there are important differences in the case law of the two courts. The case law of the Inter-American Court of Human Rights is located somewhere in between the checklist and the flexible models, but with an important retention of the checklist model. In contrast, the case law of the European Court of Human Rights in civil cases has followed what the book calls a concrete analysis of effectiveness as its main approach, placing its case law closer to the flexible model. The book suggests as possible explanations for these differences the type of cases filed in each system—given that authoritarian governments have been more widespread and lasted longer in Latin America than in Europe after World War II; the larger influence of common law in the European system through the UK cases; and the *margin of appreciation* doctrine by the European Court of Human Rights.

The last case study of the book consists of an analysis of the evolution of procedural due process in noncriminal cases in the USA from its British origins until our day, using the checklist and the flexible models of due process as analytical tools. The analysis also explores why there has not been more case law by the US Supreme Court on what due process requires in noncriminal law cases other than in administrative law ones. The book suggests that the State action doctrine and the lack of a horizontal rights conception theory in the American legal system may help explain the relative paucity of such case law.

The book ends by articulating a theory of due process for noncriminal cases. The first step in this regard is that civil justice needs to escape the shadow of criminal justice regarding due process since these two fields of justice differ in important respects. The differences go beyond the different level of seriousness of the potential consequences of an adverse decision in each of these settings—e.g., deprivation of liberty in criminal justice versus economic consequences in civil justice. The book argues that in civil cases procedural fairness requires not only procedural rights that advance the accuracy of the verdict, but also a basic right to be able to use a legal procedure so that a legal need is satisfied, a dispute is solved, and a right is protected. In that regard, an accurate procedure would still be unfair if it were too costly or ineffective to be useful.

The book further distinguishes between legal processes based on two dimensions. The first is whether the goal of the legal process is dispute resolution or the imposition of a sanction. The second is whether there is high or low imbalance between the parties of the legal process. Using the two continuums created by these two opposing pairs, the book argues that in the criminal realm in which the goal is the imposition of a sanction and there is a high imbalance between public prosecution and defense, due process requires focusing on procedural protections for defendants. In contrast, in nonpunitive legal proceedings in which there is not such a high imbalance, due process requires the right to a court/to access justice as

its core requirement. The book argues that such an understanding of procedural due process is consistent with the conception of due process in the national and international jurisdictions discussed in the prior chapters.

Finally, the book argues that to make the right to a court/to access justice a central component of due process in noncriminal cases, the flexible conception of due process should be used to determine what due process requires in specific cases. However, the checklist approach should provide a "minimum floor" that would include, among others, the right to prior notice, to a hearing, and to an independent and impartial tribunal.

As the reader can tell from my short description of the book, this is an ambitious work at multiple levels. It uses various analytical, comparative, empirical, and normative methodologies and arguments in innovative and insightful ways. It covers a remarkable range of jurisdictions in at least three continents, thus providing a picture of how due process is understood in noncriminal matters in substantial portions of the world. The book also makes a crucial theoretical and policy contribution by articulating a theory on what due process requires in noncriminal cases. Like the best theories, the one from this book is consistent with many of the regulations and case law of many of the jurisdictions covered in it, but also enables a critique of them. Finally, the book is not only a crucial contribution to the academic literature, but also provides a framework and roadmap for policy makers.

This book is based on the dissertation that Ricardo Lillo completed as part of the requirements for his Doctor of Juridical Science (S.J.D.) degree at the School of Law of the University of California, Los Angeles, and his joint Ph.D. degree at the School of Law of University Diego Portales, Chile. I had the honor to supervise this dissertation. But the credit for it is Ricardo Lillo's. The book reflects the outstanding quality of his work, his exceptional work ethics and capacity to get things done, his maturity as a scholar despite his youth, and his strong commitment to improving the administration of justice, democracy, and rule of law in Chile, Latin America, and elsewhere.

David G. Price and Dallas P. Price Professor of Law, UCLA School of Law, Los Angeles, CA, USA

Máximo Langer

President of the American Society of Comparative Law, Los Angeles, CA, USA

# Preface

How to understand what procedure is due as a fundamental or constitutional right may have a critical impact on designing a civil procedure. Using comparative law and empirically oriented methodologies, I study how procedural due process is understood in national and international jurisdictions. Based on those findings, I argue that non-criminal matters in general, and civil adjudication in particular, require a theoretical basis on which to address the question: what are the basic requirements of due process, as distinct from conceptions that originate in criminal justice?

To propose a theoretical framework, I pursue two types of argument. First, I will use an ideal type approach to explain different conceptions of how due process is understood in different jurisdictions from a practical perspective. Based on my study of national and international notions of due process, I will construct an analytical framework to analyze the concept according to two basic models which I have called the checklist model and the flexible model. After constructing this analytical tool, I will move to a second level analysis, this time normative in character. I will advocate for a theory of procedural due process that is specially designed for legal procedures of a non-punitive nature. The main purpose of this framework is, on the one hand, to reconcile the requirements of procedural fairness with social demands for justice, as expressed by the access to justice movement, and, on the other hand, with the need to distribute the limited resources of the State.

Santiago, Chile
December 2021

Ricardo Lillo Lobos

# Acknowledgments

I would like to thank Maximo Langer, who has truly been a mentor since 2013 for his continuous support and for encouraging me into the world of academia. I am very glad that today I can also call him a friend. I would like to express my gratitude to Javier Couso for accepting to be my co-advisor during the long journey that has been my doctorate. I am thankful as well to Joanna Schwartz and Bryant Garth, for their kind and useful comments on my work. I am very thankful to the Office of Graduate Studies and International Programs and the Hugh & Hazel Darling Law Library at UCLA School of Law, and also to the Doctoral Program of Universidad Diego Portales (UDP) Law School staff. I would as well like to thank Carlos Peña and Judith Schönsteiner for serving as committee members at my presentation of research proposals, whose comments were really appreciated for this book. To my mentors and friends at the Procedural Reform and Litigation Program at UDP School of Law: Eduardo Alcaíno, Mauricio Duce, Claudio Fuentes, Alejandra Mera, Cristian Riego, Juan Enrique Vargas, and Macarena Vargas. I would as well like to thank Lidia Casas, Juan Ignacio Contardo, Jaime Couso, Matías Güilloff, Héctor Hernández, Fernando Londoño, Domingo Lovera, Judith Schönsteiner, and all my friends and colleagues who had an opportunity to comment on previous versions or chapters. I would like to express my gratitude to the Dean's Fellowship at UCLA School of Law, to the Doctoral Scholarship provided by UDP, and to Becas Chile for their financial support. Last but not least, to my parents and family for all their support during the years.

# Contents

# Chapter 1
# Introduction


The right to a due process of law is a complex concept for jurisprudence theory. Today, as a legal institution that crosses national boundaries it is considered an element that is inherent in our Western legal tradition. Legally binding in many national constitutions and international instruments, called by different names or shaped by normative provisions when applied to legal procedures, it might be characterized as an attribute of the rule of law, rooted in basic conceptions of justice and fairness.[1] Its complexity comes from the profound philosophical ideas from which it is derived, which in turn originate in different historical and political traditions concerning the relationship between individuals and the State, and specifically the protection of individuals against arbitrary actions by State authorities.[2]

Due process is a complex concept also because it addresses different types of public authority that are mandated to follow its requirements in their relationships with citizens. As such, it applies to legal institutions of adjudicative and legislative capabilities. In this regard, due process and its requirement of a fair legal procedure—two concepts that I will use as synonyms in this book—applies to courts as to other legal institutions. While courts decide cases following a legally established procedure, fair trial standards are mandates directed as much to judges as to legislators. Nevertheless, courts in their adjudicative capacities are important to analyze,[3] and this book might be useful in that regard, its main application is intended to be in the field of legal procedure design.

For this purpose, as an underlying assumption of my work is that during the design of legal proceedings, those in charge of enacting such regulation are mandated to establish and provide safeguards for the requirements of fairness. Such

[1] See, e.g.: Raz (1995), pp. 373–374; Waldron (2011), pp. 3–31, p. 6; Sampford (2005), p. 11.

[2] Miller (1977), p. 3. See also: Galligan (1996), p. 166.

[3] For example, because they are supposed to be impartial and independent third parties that are empowered to review whether another public authority's decision against an individual was arbitrary from a procedural or a substantive perspective. See: Scanlon (1977), pp. 94–106.



R. Lillo Lobos, *Understanding Due Process in Non-Criminal Matters*, Ius Gentium: Comparative Perspectives on Law and Justice 97,
https://doi.org/10.1007/978-3-030-95534-2_1

requirements, as a normative demand on how the State must treat individuals, are expressed not just in the question of which procedural guarantees should be afforded them, but also on the question of the access they should have. This is the key idea that it is intended to be further developed with this book.

Civil justice should be accessible to solve different types of legal needs or disputes, big and small claims, of high or low complexity. And in this regard, how to understand due process and its requirements in civil matters has a critical impact on the design of a civil procedure that provides access to civil justice. The point is that no matter how many procedural guarantees are legally provided, people would use other non-judicial mechanisms or no mechanisms at all to satisfy their legal needs if they believe the proceeding would take too much time or money, or in general if a procedure is perceived to be ineffective.

The contribution intended in this book is to provide a normative theory based on empirical considerations. As such, I provide a theoretical framework that allows procedural fairness requirements to be reconciled with social demands for justice and the need to distribute limited resources, without detracting from the goal of accuracy inherent to any legal procedure. This framework is relevant because in the literature that calls for an improvement of access to civil justice it is not clear what might be sacrificed to successfully meet this goal without compromising the right to a fair legal procedure. In other words, to provide an answer to the question of which procedural guarantees should be afforded as a matter of basic protection, and how this should be decided.

Suggesting answers to this question may be useful for judicial reform and policy decisions. At the very least, it may clarify our thinking about what we may be sacrificing by fulfilling the goal of providing a more flexible, speedy, and in general accessible, civil procedure. As a former researcher at an international organization working on judicial reform and access to justice, I have found that while the literature on this subject calls for simpler legal proceedings, there is a common resistance in terms that this type of mechanisms would be against the right to a fair trial. For many former or current practitioners working on academia or government I met along the way, due process would serve as a wall against this type of arguments. As such, while access to justice problems might be caused by several factors, from a legal theory perspective, my argument is that understanding the requirements of due process in civil proceedings is a critical one. That is why, as said, the main expected contribution of this book is in the field of legal procedure design and it is targeted to those in charge of such responsibility.

To construct this theoretical framework, I use different empirically oriented methodologies. First, however, I describe due process as a complex jurisprudential concept and provide a preliminary version of the two models I will use. The idea is to acknowledge the challenging task ahead while testing the lens through which I will study how due process is applied in practice.

In the second part I justify the research ahead by describing and exemplifying the problem which will serve as a working hypothesis. I begin by providing an account of the sense of crisis in comparative civil procedure literature that is due to the concerns expressed by the access to justice movement. As I will argue, while this

literature demanding a more accessible civil justice is not new at all, it is still quite applicable to many countries around the world where the current situation of civil justice is described as "in crisis". On this point, besides describing the literature that claims for a generalized dissemination of this perception of crisis, I focus later on Latin America to introduce the civil justice reform movement and its challenges. Finally, in this part, I use a comparative law methodology to show how due process as a constitutional requirement differs between Chile and California and how this produces different outcomes in terms of legal procedures as barriers of access to justice. My purpose is to introduce the problem and to explain why facing this crisis requires an understanding of due process requirements in civil procedure.

In the third part, I describe and compare the answers provided in the field of International Human Rights Law, which is critical for today's understanding of fair trial requirements, especially in this age of the convergence of legal systems.[4] With this purpose, I analyze the answers provided by two regional systems of human rights protection, using an empirical mixed method approach to study the case law of their two main tribunals, the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR). I will analyze each system's response to the question of how due process applies to non-criminal matters in general, and to civil justice in particular. I will show that there are subtle but important differences in the answers they provide by identifying the application of the checklist and flexible models. Based on the case law of both regional systems I will describe and compare two different approaches: the expansive doctrine of the Inter-American system, and the concrete analysis of effectiveness of its European counterpart.

In the fourth part, I will analyze how the checklist and fairness ideal types of due process are at the origin of due process as a legal institution and how they have been followed until the present day in American jurisprudence. On this topic, I will explore how conceptions of justice and fairness were crystallized for the first time in the Magna Carta and later incorporated into the United States Constitution in its due process clause. This historical perspective and a comparison between criminal and non-criminal matters will exemplify the different conceptions of fair trial expressions of procedural due process. It also provides an opportunity to identify several factors that might explain how the two analytical models of due process have been in continuous interplay in different moments and contexts.

With these objectives in mind, I explore first the origins of the due process clause in the Magna Carta until its incorporation in the 14th Amendment. Particularly relevant in this point will be to explain why much of the development on procedural due process has been in the criminal justice arena. Second, I will develop the approaches followed by the Supreme Court of the United States (SCOTUS or simply the Supreme Court) in deciding on the procedure that is due. Particularly relevant in this regard is the conception of the adversarial mode of trial required by due process. For this purpose, I relied in a review of the specialized literature which was crucial to identify the relevant case law that I analyze in these chapters. I will describe the

[4] Merryman (1981), pp. 357–388.

different approaches, from early case law more focused on tradition and history to a more flexible approach based on the idea of a fundamental fairness test. I explore also from this point of view some modern debates on the application of the clause in non-criminal matters. Finally, I will explore on the relation of the due process clause and access to justice in the American legal system.

In the fourth part, based on the findings of the previous chapters, I will develop a theoretical framework on how fair trial should be understood and applied in civil matters. With this in mind, first I will argue that civil justice needs to escape the shadow of criminal justice. Procedural fairness, in this regard, not only requires procedural rights in order to ensure accurate determination of fact as a proxy for a quality outcome, but also to ensure a legal need has been satisfied, a dispute solved, a right protected. With the right to a court at the center of due process, the social cost of providing a legal procedure, far from being an exogenous element of a theory of procedural fairness it must be an inherent part of it.[5] Then I will describe the features of this understanding of procedural fairness using the categories of the flexible and the checklist models and explain how this theory fits with the common use of due process both in the international and national jurisdictions studied in the previous chapters. Finally, I will provide a basic exercise by using this analytical tool on the main legislative product of the Chilean civil justice reform, as an example of how the proposed theoretical framework can be applied in particular contexts.

## References

Bone R (2003) Agreeing to fair process: the problem with contractarian theories of procedural fairness. Boston Univ Law Rev. 83:485–552

Galligan D (1996) Due process and fair procedures. A study of administrative procedures. Clarendon Press, Oxford

Merryman J (1981) On the convergence (and divergence) of the Civil Law and the common law. Stan J Int Law 17:357–388

Miller C (1977) The forest of due process of law. In: Pennock R, Chapman J (eds) Due process, Nomos, vol XVIII. New York University Press, New York, pp 3–68

Raz J (1995) Ethics in the public domain. Essays in the morality of law and politics, revised edn. Oxford University Press, Oxford

Sampford C (2005) Reconceiving the rule of law for a globalizing world. In: Zifcak S (ed) Globalisation and the rule of law. Routledge, Great Britain, pp 9–31

Scanlon T (1977) Due process. In: Pennock R, Chapman J (eds) Due process, Nomos, vol XVIII. New York University Press, New York, pp 94–106

Waldron J (2011) The rule of law and the importance of procedure. Nomos 50:3–31

[5] Bone (2003), p. 515.

# Part I
# An Introduction of Two Ideal Types. The Checklist and Flexible Models of Procedural Due Process

# Chapter 2
# Due Process as a Subject of Special Jurisprudence. The Checklist and Flexible Models of Procedural Due Process


The answer to the question of which procedure is provided by the right to due process may have a critical impact on the design of a civil procedure. In terms of access to justice, to provide a simple, flexible, fast, and low-cost mechanism to solve civil disputes—in a way that does not sacrifice other goals of a fair procedure—requires, first, a conception of what due process elements may and may not be sacrificed in order to fulfill such a goal. The main purpose of this book is to provide an understanding of the right to a fair trial for civil matters which allows these competing goals to be reconciled.

This is not an easy task. Fair trial, as an expression of procedural due process, is a complex concept from the point of view of jurisprudence. It draws on profound philosophical ideas of procedural and substantive justice that have changed over time. These ideas derive from different historical and political traditions concerning the relationship between individuals and the State, and specifically the protection of individuals against arbitrary actions by State authorities.[1]

Of course, whether an individual is being treated fairly or not may be analyzed from different perspectives, ranging from essentialism,[2] individual psychological perception or "party satisfaction,"[3] dignitary theories,[4] etc. From a normative point of view, particularly relevant is the distinction between process-based and outcome-based theories, depending on whether the analysis of fairness considers the outcomes of the legal procedure or is completely independent of them.[5]

Due process is a complex concept, also, because it addresses different types of public authorities that are mandated to follow its requirements in their relationships

[1] Miller (1977), p. 3. See also: Galligan (1996), p. 166.

[2] See: Fuller and Winston (1978).

[3] See: Tyler (1994).

[4] See: Mashaw (1981).

[5] Bone (2003), pp. 508–516.



R. Lillo Lobos, *Understanding Due Process in Non-Criminal Matters*, Ius Gentium: Comparative Perspectives on Law and Justice 97,
https://doi.org/10.1007/978-3-030-95534-2_2

with citizens. As such, due process is a mandate that applies to courts but also to legislatures. Regarding courts, due process presents specific issues that are important to analyze for at least two reasons. First, courts are supposed to be impartial and independent third parties that are empowered to determine whether another public authority's decision against a citizen was arbitrary from a procedural or a substantive perspective.[6] Evidently, it would be hardly considered fair if the same public authority that decides on people's rights were also in charge of resolving disputes about its own decisions. But the judiciary and judges themselves are equally bound by due process requirements in the way they treat individuals. Consequently, the legal process by which the judiciary decides or determines people's rights must be conducted in accordance with basic minimum conditions. This second dimension has its particularities and a complex structure consisting of different procedural guarantees, which in turn must be applied as standards depending on various factors. But, as courts decide cases following a legally established procedure, fair trial standards are mandates directed as much to judges as to legislators. During the design of legal proceedings, those in charge of enacting this regulation would be constitutionally mandated to establish and provide safeguards for the required fair trial standards.

According to an outcome-based conception of fairness, Dworkin characterizes the legislative dimension of procedural due process as a right to have the institution acting in such capacity (which might be a court or a parliament) to fix civil procedures that correctly assess the risk and importance of moral harm.[7] Moral harm, the "injustice factor" as he calls it—the risk that either might suffer from an erroneous assessment and application of law to a given factual situation—must be equally distributed between the parties.[8] From this point of view, procedural fairness relates to the reliability of the outcome. I will come back to this definition in the last part of this book. I see it as critical in answering my research question.

In the chapters that follow, I will pursue an approach that is somewhat different from the traditional one. My idea is to construct a theoretical framework to understand fair trial as an expression of procedural due process based on inductive reasoning. I will explore how this concept evolved into what it is known to be in central countries, such as in the modern American conception of the due process clause and in the field of international human rights law, which has been an important source for standards now shared among nations. By studying how procedural due process evolved in time and in particular how it has been understood in different jurisdictions I will propose a conception of procedural due process, especially concerning its application in civil justice.

---

[6] Regarding courts role against public authorities' arbitrariness, see: Scanlon (1977), pp. 94–106.

[7] Dworkin (1985), p. 93.

[8] According to Dworkin, to determine the procedural rights to which parties are entitled is relevant the moral harm beyond the bare harm, which are related to gains and losses which emerges from utilitarian calculations. That is why its determination would be a matter of principle not policy, because it is a question of an entitlement to a right to win a lawsuit if the law is on the party's side, even if the society overall loses thereby. See: Dworkin (1985), pp. 89, 92–96.

As I will show, beyond the philosophical roots of due process as a demand of procedural justice or as a dimension of morality, and specifically as a legal institution, there are two ways of applying procedural due process. One way is to understand due process as a strict minimum set of conditions that must be met for a legal procedure to be considered as the one that is due as a right. According to this model, due process requirements are applied without any reference to the underlying values or conceptions of justice that someone may have, even though it is perfectly possible that its requirements were designed to protect such values. The other way is to conceive due process as a general principle whose content will vary in each case, taking the necessary form required for its legal procedure to be considered "fair." Such a decision will be taken according to the values of the right to a fair trial inherent to each specific legal system, or even according to the discretion of the decision maker. I conceive these two models as two ideal types in the Weberian sense and as opposed versions that exist in tension with one another.[9] I have found that this conception is similar—and as such appealing for my purposes—to the work done by Cass Sunstein in "Two Conceptions of Procedural Fairness," where he distinguishes between a conception of fairness based on rule-bound decisions as compared to individualized treatment decisions.[10]

Later in this book, using the opposition between these two different understandings of due process and the requirements of fairness, I shall explain how I plan to tackle what Robert Bone calls the puzzle of a rights-based theory of procedural fairness. According to Bone, and following Ronald Dworkin, the puzzle is "how to make room for arguments of social cost without stripping the right of its force as a right."[11] My answer, which I will develop in the last chapter, is that an inherent element of procedural due process is the requirement of access to the legal procedure and the capacity to pursue it to its conclusion. In this sense, a procedure would also be unfair if, no matter how accurate it might be or how protective of procedural guarantees, it is too costly or ineffective to be useful. In this regard, the social cost of providing a legal procedure is not an exogenous element of a theory of procedural fairness but it must be an inherent part of it.[12]

For example, one way to frame this debate is to consider that fairness trumps or constrains aggregative metrics such as economic efficiency. A right to due process as an expression of the fairness of legal procedures, under this view, is concerned with how individuals are treated. As such, it provides reasons to trump or constrain the pursuit of aggregate social goals if they will be promoted at the expense of treating some individuals unfairly.[13] From the other side, the access to justice movement calls for simple civil procedures since in that way judicial resources would become available for more individuals. If the claim for a more accessible civil justice is taken

[9] See: Weber (1949), pp. 91–92.

[10] Sunstein (2006).

[11] Bone (2010), p. 1015.

[12] Bone (2003), p. 515.

[13] Bone (2003), p. 487.

as an efficiency argument, and as such based on purely utilitarian grounds, it is easy to see the problem.

In what follows I will describe this analytical framework I have constructed as the lens that I will use to analyze different conceptions on how procedural due process is conceived and applied in the following chapters. I shall call them the *checklist* and the *flexible* models. I conceive these as two ideal types in the Weberian sense and as opposed versions that exist in tension with one another. They will aid and guide me during the rest of the book and, finally, in proposing an answer to my main question: how to harmonize the requirements of due process with demands for access to civil justice.

## 2.1 The Checklist Model

In the checklist model, procedural due process is reduced to a set of procedural guarantees considered to be the minimum requirement for any legal proceedings that might affect an individual's legal rights to be regarded as a due procedure. Of course, the specific guarantees to be considered part of due process might vary between legal systems, and within them in terms of their application to different types of legal procedures. Nevertheless, under this conception, what seems to be more important is that its content is fixed by legislation. Whether statutory, constitutional, customary, or of any other source, what is considered "fair treatment" is decided ex ante by a rule-making authority.

The right to a fair trial, under such a conception, is equal to the sum of procedural guarantees that are recognized for all legal procedures, as well as specific ones. That is why I call this version of procedural due process the "checklist" model, since to assess whether a procedure is due the analysis would consist of "checking" that each protection on the list is guaranteed.

Under this conception, the content of due process is whatever law says, no more but no less. Since this content is decided ex ante, a great deal of work in "legal design" is required. The rule-maker in this regard will tend to rely more on rules that are abstract, general, and as clear as possible.[14] This will mean that procedural safeguards will take the form of legal directives construed more as legal rules, that is, as a mandate that is applicable in all-or-nothing fashion.[15]

In terms of its interpretation and subsequent application, the official in charge of its application must respond to the directive by assessing the presence of a list of easily distinguishable factual aspects of a situation and then intervene accordingly. This is what Ihering calls "formal realizability."[16] Clear-cut legal rules of this type, it

[14] Sunstein (2006), p. 620.

[15] Following Ronald Dworkin account for the differences between legal principles and rules. See: Dworkin (1967), pp. 22–29; Dworkin (1977), pp. 22–31.

[16] Kennedy (1976), p. 1687.

is said, provide better restraint over official arbitrariness[17] and allow less room for judicial discretion.[18]

This does not mean that every type of legal procedure will have the same procedural guarantees. In the checklist model, there is room for flexibility but only if the legislator has provided ex ante for broad categories of cases. The maxim in this regard is that similar situations demands similar treatment.[19] Therefore, it is perfectly possible under the checklist approach for a procedural regulation—let us say a code of civil procedure—to provide for different procedures, affording different procedural guarantees based on factors such as monetary value or the complexity of evidence. Moreover, it would be possible to find a specific legal procedure full of exceptions where one or more guarantees will not apply. Notwithstanding such regulation, the conception will still be characterized by clear, abstract, and general legal rules.

For this model to work, the interpretive choices[20] will tend to be based on textualism and originalism, that is, centered on the primacy of the text and or legislative intention.[21] Text will be as clear as possible so the decision-maker will have less room to deploy his own conceptions of the rule but, on the contrary, as far as possible rules will be applied strictly to a set of facts. The idea is for the decision-maker to apply such a rule even though the rationale behind it does not apply.[22] The decision-maker will resemble an officer inspector, checking that every procedural guarantee afforded in a specific legal procedure has been observed.

Thus, if the text is not as clear as desired, the role of the decision maker will be to ponder whatever notion of "fairness" the rule-maker entertained. In this regard, the checklist approach is neutral in terms of any underlying values or notions of justice. The legislator may have a purely utilitarian conception in establishing a simplified procedure or a consideration for human dignity when requiring that before depriving anyone of a social right there must be "some kind" of hearing.

A model like this might have advantages in deciding what procedural guarantees must be afforded by the right to a fair trial. The most obvious is the legal certainty it provides for private actors. If this model is followed, citizens are able to know in advance what to expect in a legal procedure and act and plan their activities accordingly.[23] This, in turn, might reduce decision costs for those potential litigants,[24] but also at the end it might impact on the duration, accuracy, and economic costs of the legal procedure and therefore be attractive for both private and public budgets.

[17] Kennedy (1976), p. 1688.

[18] Kennedy (1976), p. 1690.

[19] Sunstein (2006), p. 619.

[20] On interpretive choices, see: Vermeule (2000), p. 82.

[21] Between the relation among the two in its modern conceptions, see: Eskridge (2013).

[22] Sunstein (2006), p. 629.

[23] Kennedy (1976), p. 1688.

[24] Sunstein (2006), p. 629.

For private individuals, it might also protect against arbitrariness or bias of those officers in charge of deciding that procedural guarantees are afforded or of enforcing the law. According to Sunstein, an example in this regard are the Miranda rules, which through a clear prophylactic protocol avoid police arbitrariness.[25] At the same time, a clear checklist of what rights are to be afforded might simplify the accountability of such officers and enforceability by individuals, since such rules turn individuals into right-holders.[26]

## 2.2 The Flexible Model

In the flexible model the content of due process is not fixed but is flexible, less restrained by the ties of history and in its application more dependent on the circumstances. In this regard, to decide on what is the procedure that is due, there is a case-by-case approach in which details matter.

In this regard, procedural due process will be construed in a broad language, avoiding rigid rules. Using the conception developed by Ronald Dworkin,[27] due process and its content will be interpreted more as a legal principle or, as Robert Alexy would call it, as a mandate of optimization.[28] A legal principle in this regard is a type of norm which states a reason that argues in one direction but does not prescribe a particular decision.[29] As a matter of degree, Raz conceives of principles as norms that prescribe unspecific types of behavior, that is, types of acts that can be performed on different occasions by the performance of a great many heterogeneous generic acts on each occasion.[30]

Beyond the type of behavior prescribed, and especially according to authors such as Dworkin or Alexy, legal principles are distinguished from rules in the way of solving conflicts between norms. While legal principles are subject to a dimension of weight and the conflict between them may be solved by an exercise of "weighing" their merits, conflicts between rules are subject to a criterion of validity.[31] Also, like any norm but particularly as a legal principle, the use of due process in practical settings involves a critical interpretation of its meaning, instead of a mechanical binary answer as in the case of legal rules.

---

[25] Sunstein (2006), p. 631.

[26] Sunstein (2006), p. 632.

[27] Dworkin (1967), pp. 23–29.

[28] See: Alexy (2014), p. 68.

[29] Braithwaite (2002), p. 50.

[30] Raz (1972), p. 838. Notwithstanding, the main difference between rules and principles according to Raz is about the roles each type of norm serve in a legal system. See Raz (1972), pp. 839–843.

[31] Dworkin (1967), p. 27; Alexy (2014), pp. 70–79. Raz points out that this conflict solving criteria proposed by Dworkin as defining character of principles. See: Raz (1972), p. 833. Notwithstanding is not my purpose to solve this issue here, and I will use this character to try to define my analytical models, I believe it is important to acknowledge its limitations.

Interpretive choice weighs heavily on the decision-maker, who is required to decide what will be considered as due in a specific legal procedure. The labor would be not to "check" all of the elements on the laundry list but will be closer to what Dworkin calls *creative interpretation*, that is providing purpose in order to make it the best possible example of the form or genre to which is taken to belong. Interpretation, in his account, is a matter of interaction between purpose and object.[32] In this sense, the flexible model is a value-oriented approach.[33] Nevertheless, the flexible approach does not necessarily specify which values or notion of justice are those which the interpreter must use. From utilitarian conceptions of justice, natural law-based theories, even process-based and dignitary conceptions, all would be open to inclusion.[34]

This is not to say necessarily that the decision-maker will have full discretion in deciding which procedure is due. The admissible values might be those inherent to a specific legal system. In this regard, history, and especially legislative history, will have only a limited value since what will be considered "fair" might not be considered as such for times to come and especially for the case at hand. On the contrary, history might have a value in determining which values are inherent to the system, reflected in the settled practices.[35]

There are many reasons why a flexible approach would be desirable. Even though the decision-maker may or not have full discretion, what is certain is that he or she will be the one weighing up the specific circumstances and factors in order to specify which procedural guarantees are afforded. The idea, is that unlike legal rules, often criticized for being under or over-inclusive and therefore producing unfairness when applied to unanticipated circumstances, here particularities must be taken into account. Here the maxim is that those in different situations must be treated differently to be equal.[36]

While sometimes the use of legal rules to make decisions on what is a due procedure might reduce cost, sometimes it might increase it. For example, if it is established that for a legal procedure all parties must have legal representation, this might be more expensive than providing it under a specific circumstances approach only to those that really require it. In this regard, the flexible approach might imply greater decision cost but less transactional cost.

In many situations, a good design of clear-cut rules might be a challenge to achieve. For example, it might be quite complex to determine how long a legal procedure should take to be considered acceptable, especially taking into consideration that factors such as human resources or dockets change over time. In such cases, a flexible approach may even diminish decision cost.

---

[32] Dworkin (1986), p. 52.

[33] Regarding, value oriented theories of procedural due process, see: Saphire (1978).

[34] See: Mashaw (1981).

[35] Redish and Marshals (1986), pp. 474–475. See also: Dworkin (1985), p. 90.

[36] Sunstein (2006), p. 633.