

Contents

<i>Introduction</i>	xvii
<i>Table of Cases</i>	xxi
<i>Table of Legislation</i>	xxviii
<i>Table of Conventions and Treaties</i>	xxxi

Part I—Procedures and Fairness

Introduction	3
1. A map of procedures	5
1.1 Introduction	5
1.1.1 Legal procedures: a general outline	5
1.1.2 A note on terminology	8
1.1.3 Bentham on procedures	9
1.2 Procedures and purposes	13
1.2.1 The purposes of legal processes	13
1.2.2 The multiplicity of purposes	17
1.2.3 The shaping of procedures	20
1.2.4 Types of processes: an initial outline	24
1.3 Procedures and values	31
1.3.1 Procedures and the social good	31
1.3.2 Legal processes and the interests of persons	32
1.3.3 Tiers of values	33
1.3.4 The normative foundation of legal processes	38
1.4 A theoretical approach to procedures	48
1.4.1 Three procedural generalizations	48
1.4.2 Procedures and substance	49
2. Procedural fairness	52
2.1 The nature of procedural fairness	52
2.1.1 A general outline	52
2.1.2 Procedures as means to fair treatment	54
2.1.3 The idea of fair treatment	56

2.1.4	Normative expectations as the basis of fair treatment	58
2.1.5	Justice and fair treatment	60
2.2	Procedures and fair treatment	62
2.2.1	The contingent nature of procedures	62
2.2.2	A fuller account of the relationship	65
2.2.3	Justice seen to be done	72
2.2.4	Due process	73
2.2.5	The dignitarian challenge	75
2.2.6	Process values	78
2.2.7	Procedural fairness in other forms of process	82
2.3	Procedural fairness in social context	83
2.3.1	The social basis of procedural fairness	83
2.3.2	Perceptions of procedural fairness	89
3.	Rights, procedures, and costs	96
3.1	Procedural rights	96
3.1.1	Rights in general	96
3.1.2	Procedural rights	100
3.2	Procedural rights in the administrative process	102
3.2.1	Rights in the administrative process	102
3.2.2	Procedural rights in relation to discretion	104
3.2.3	Rights and values in relation to policy	107
3.2.4	The right to consideration	108
3.3	The problem of mistakes	112
3.3.1	The problem stated	112
3.3.2	Rights and mistakes	114
3.3.3	An alternative view of inadequate procedures	117
3.3.4	The principle of proportion	119
3.4	Devising procedures and calculating costs	122
4.	The virtues of participation	128
4.1	Introduction	128
4.2	A note on the forms of participation	130
4.3	Participation in legal and administrative processes	131
4.3.1	Participation and outcomes	131

Table of Contents

xi

4.3.2	Participation and respect: an indirect link	132
4.3.3	Participation and respect: a direct link	135
4.3.4	Participation and self-protection: a modified claim	140
4.4	Participation in the political process	144
4.4.1	Participation and political outcomes	144
4.4.2	Participation as political principle	147
4.4.3	Participation and the common good	150
4.4.4	Participation and other values	154
4.5	Participation in legal and political processes: a comparison	156
4.6	Participation in application	158
4.6.1	The social basis of participation	159
4.6.2	The effectiveness of participation	160

Part II—Three Traditions of Procedural Fairness

Introduction	165
5. Procedural fairness in the English common law	167
5.1 The procedural character of English common law	167
5.2 Due process at common law	170
5.2.1 The history of due process in English law	171
5.2.2 The dominance of the common law and the acceptance of due process	176
5.3 Due process and the modern constitution	178
5.3.1 Dicey, the rule of law, and due process	178
5.3.2 Due process in administration	179
5.3.3 The role of the courts	182
5.3.4 Procedural fairness in the twentieth century	185
6. The American doctrine of procedural due process	187
6.1 The doctrine of due process in general	188
6.2 Substantive due process	191
6.3 Life, liberty, or property	192
6.4 What process is due?	197
6.4.1 In the shadow of the trial	198
6.4.2 The balancing process	201

7.	Procedural fairness in Europe: the European Convention on Human Rights and the European Union	212
7.1	The new European order	212
7.2	The European Convention on Human Rights	214
7.2.1	Introduction and background	214
7.2.2	The threshold test	214
7.2.3	The procedural standards	218
7.2.4	Two contextual factors	221
7.3	Procedural fairness in European law	222
7.3.1	The sources of procedural principles	222
7.3.2	The rights of the defence	223

Part III—Forms of Process

	Introduction	227
8.	Forms of Process I	229
8.1	The problem of classification	229
8.2	Applying standards and exercising discretion	232
8.2.1	Criteria for the design of procedures	232
8.2.2	Two categories: individualized and collectivized	235
8.2.3	Three groupings: routine administration; basic adjudication; policy-based discretion	235
8.2.4	The middle ground of administration: bureaucratic administration and administrative justice	237
8.3	Adjudication and fair treatment	241
8.3.1	The adjudicative mode	241
8.3.2	Adversarial adjudication: the importance of participation	243
8.3.3	Adjudication and fair treatment: a synthesis	246
8.3.4	Variables in applying standards	247
8.4	Beyond adjudication	252
8.4.1	The shortcomings of adjudication	252
8.4.2	Alternatives to adjudication	256
9.	Forms of Process II	258
9.1	Discretion as professional judgment	258
9.2	Policy-based discretion	264

9.3	Investigation and inquiry	267
9.3.1	A classification of investigative bodies	268
9.3.2	Investigation, inquiry, and fair treatment	270
9.4	Negotiation, mediation, and agreement	273
9.4.1	Classification of processes based on agreement	275
9.4.2	The use of direct negotiation and mediation	275
9.4.3	Procedures in mediation: a note	280
9.4.4	Bargaining in administrative contexts	281

Part IV—Individualized Processes: Principles, Doctrines, and Practices

Introduction	291
10. The sources of procedures	293
10.1 Sources in general	293
10.2 Parliament and the Administration as sources of procedure	296
10.2.1 Parliament and procedures	296
10.2.2 Procedural rule-making by administrative bodies	298
10.3 The Council on Tribunals and its model procedures	299
10.3.1 The role of the Council on Tribunals	299
10.3.2 The Council's model rules of procedure	300
10.4 Ombudsmen and their influence on procedures	302
10.4.1 The role of ombudsmen	302
10.4.2 The influence of ombudsmen on procedures	304
10.5 Other bodies creating and influencing procedures	306
10.6 A code of administrative procedures?	308
10.6.1 Current trends	308
10.6.2 The case for a code	309
11. The legal approach to procedural fairness	314
11.1 The general legal approach	315
11.1.1 Who is entitled to fair procedures?	316
11.1.2 The threshold test of English law	318
11.1.3 Legitimate expectations	320
11.1.4 What are the standards of fair treatment?	322
11.1.5 Developing procedural principles	323

11.2	Procedural fairness in the courts	327
11.2.1	The general judicial approach	328
11.2.2	The relationship between fair treatment and fair procedures	330
11.2.3	Rules, principles, or discretion?	334
11.2.4	The judicial construction of procedural fairness	337
11.2.5	Judicial review and the costs of procedures	340
11.2.6	The courts and statutory procedures	342
11.2.7	The impact of judicial review	345
12.	The hearing principle	348
12.1	General considerations	348
12.1.1	The notion of a hearing	348
12.1.2	The hearing and procedural fairness	349
12.1.3	The right to be heard: the general judicial approach	353
12.1.4	Notice and disclosure	356
12.1.5	What kind of hearing?	357
12.1.6	The effect of a hearing	359
12.2	Legal representation	361
12.2.1	Legal representation and fair treatment	361
12.2.2	The practical effects of legal representation	366
12.2.3	Legal representation in English law	367
12.3	The hearing principle in different contexts	370
12.3.1	Routine administration	370
12.3.2	Standard adjudication	371
12.3.3	Three-party adjudication	373
12.3.4	Policy-based discretion	375
12.3.5	Informal negotiation	379
12.3.6	Professional judgments	381
12.3.7	The effectiveness of hearings in professional judgments	384
12.3.8	Investigation and inquiry	386
13.	Recourse: appeals, reviews, and other forms	392
13.1	Recourse and procedural fairness	393
13.1.1	Forms of recourse	393
13.1.2	Recourse as a part of procedural fairness	395
13.2	Practical issues for recourse	398
13.2.1	The effectiveness of recourse	398
13.2.2	Kinds of recourse	402

13.3	The special case of judicial review	406
13.3.1	Judicial review as fair procedure	406
13.3.2	The effectiveness of judicial review	408
13.4	Appeal and review in legal doctrine	411
13.4.1	The legal basis of recourse	411
13.4.2	Curing procedural defects on appeal or review	413
14.	Principles and doctrines: standards, reasons, and bias	418
14.1	Setting standards	418
14.1.1	Standards and fair treatment	419
14.1.2	The level of standards	422
14.1.3	Standards in context	423
14.1.4	Doctrines in relation to setting standards	426
14.2	The giving of reasons	429
14.2.1	The general background to reasons	429
14.2.2	Reasons, fair treatment and procedural fairness	431
14.2.3	The law relating to reasons	434
14.3	Impartiality in administrative processes	437
14.3.1	The nature of bias and loss of independence	437
14.3.2	Impartiality and fair treatment	441
14.3.3	The problems of proof	442
14.3.4	Impartiality in legal doctrine	444

Part V—Policy Formation and Rule-Making

Introduction	451
15. Procedural fairness in the policy process	453
15.1 The policy process	454
15.1.1 General nature of the policy process	454
15.1.2 The context of policy-making	457
15.1.3 The role of interest groups	461
15.2 The normative foundation of policy-making	465
15.2.1 Three normative models	465
15.2.2 The respective merits of the three models	468
15.3 Fair treatment in policy-making	470
15.3.1 Standards of fair treatment	470

15.3.2	Fair treatment in context	473
15.3.3	Designing procedures	476
15.3.4	Overcoming the obstacles to procedural fairness	478
16.	Legal approaches to the policy process	483
16.1	Formal rule-making in the United Kingdom	483
16.1.1	Formal and informal rules: a note on the distinction	483
16.1.2	Rule-making procedures	484
16.1.3	The role of the courts	487
16.1.4	Procedural fairness on the British model	491
16.2	Rule-making in the United States	493
16.2.1	The general approach	493
16.2.2	Procedural fairness on the American approach	496
16.3	Innovation in Australia	501
16.3.1	Statutory schemes for rule-making	501
16.3.2	Procedural fairness on the Australian approach	503
16.4	Informal rules	505
16.4.1	The nature of informal rules	505
16.4.2	Procedures for making informal rules	507
16.4.3	Procedural fairness	508
16.4.4	The role of the courts	511
	Bibliography	515
	Index	531