

Procedural Justice: The Thread that Weaves the Fabric of Justice in Society

“Not only must justice be done, it must also be seen to be done.”



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This article focuses primarily on procedural justice with particular reference to the Constitution of the Republic of South Africa of 1996 and the justice system in South Africa. The object, scope and functionality of procedural justice regarding its implementation and impact on just outcomes are discussed. Some examples where the judicial process has impacted on just and fair outcomes are highlighted with an aim to understand the role and current state of procedural justice in South Africa. This analysis does not aim to level criticism at any authority or stakeholder but, rather to stimulate debate and dialogue in this area.

The ambit of justice extends from substantive justice to questions of distributive, restorative and retributive justice. The thread however that holds the various aspects of justice together is in fact procedural justice. The notion that fair procedures are the best guarantee for fair outcomes is a popular one. Many scholars believe that procedural justice is not enough, and reaching fair outcomes is far more important than implementing fair processes. Others maintain that insofar as fair procedures are likely to “translate” into fair outcomes, they are of central importance.¹ Procedural justice is concerned with making and implementing decisions according to fair processes.² Whether designated processes are always fair, and whether they are always available and applied, are however different issues entirely.

John Rawls is widely regarded as one of the most important, if not the most important political philosopher of the 20th century.³ His primary work *A Theory of Justice* and his later work *Political Liberalism* received high scholastic acclaim and demonstrated a shift from the metaphysical to the political realm of the principle of “justice as fairness”. For Rawls the process used is pivotal to the outcome reached. He argues that if fair processes are utilised, principles of justice based on fairness and equality will be an inevitable result. Rawls believes that because the conception of justice he advocates results from an extravagantly dressed family of ideas involved in a particular procedure of construction, all reasonable people in society will unquestioningly accept and honour it. The problem with Rawls’ portrayal of justice as fairness is that both the political constructivist process and the resulting outcome he proposes are highly idealistic, albeit in a society with modern liberal democratic values.

Prescribed processes involved in meting out justice is the tool which allows persons

to access justice. The Bill of Rights in Chapter 2 of the South African Constitution grants individuals certain enshrined rights. These rights must be upheld and have vertical and horizontal application. It follows that where persons are given rights, there must be workable and legitimate processes in place to enable them to enforce these rights. Similarly, the civil and criminal justice system consists of a body of legislative and common law principles. For these principles to be binding on persons there must be processes in place to allow substantive justice to be translated from theory into practice.

There is often however a mismatch between what is in the content of the law and how justice materialises once legal processes are attempted or applied. There is little correlation between what should in fact occur and the length of time in which it should occur, and what actually happens in the justice system. This dismal situation is not specific to South Africa, but is also a feature of other – both ‘first’ and ‘third’ world – countries. Examples like the number of years it takes for deceased estates to be wound up, the number of criminals who go unpunished and slip through the justice net, the millions of children who do not receive child support from parents, and the high number of inexperienced and untrained judicial officers, are but only a few.

Where processes of law are not adhered to by persons requesting decisions and decision makers, a fair outcome with regard to justice is unlikely. It is difficult always to monitor and to ensure that designated processes are followed to secure just outcomes. It is also unfortunately the case that very often legal processes are abused by both the State and its citizens resulting in what only appear to be ‘fair’ and ‘just’ outcomes. Although impressive vehicles are designed to ensure that fair outcomes are achieved to give effect to substantive justice, these vehicles are not adequately structured, equipped and maintained on an ongoing basis. The phrase “the wheels of justice turn very slowly” has become a well known cliché in both developed and developing countries, with South Africa being no exception. Further, it is not uncommon for participants to breach rules on how the vehicle should be driven and thereby prevent its smooth and uninterrupted operation.

What makes processes fair involves numerous factors including: consistency, transparency, legitimacy, and impartial and neutral decision makers.⁴ The problem however is that in most instances what are deemed to be fair and legitimate processes often result in a miscarriage of justice. In several developing countries – including South Africa – it is immensely difficult for citizens to follow prescribed processes. The unwieldy bureaucracies responsible for the administration and enforcement of justice are often inaccessible and their personnel inadequately trained. Most people just don’t know where to go, what they need to do, and how to do it to enable them to achieve a just outcome. This may be attributed to numerous factors including, but not limited to the high illiteracy rate, the urban-rural divide, limited resources and the over-burdened justice system. The cost of employing legal practitioners and lengthy time delays are key factors that frustrate procedural justice and consequently substantive criminal and civil justice as well.

An example of inexcusable delays in justice being served due to procedure was reported in the Cape Times on 18 August 2009. ‘Daniel Hoffman lodged his appeal 11 days after he was sentenced to 10 years’ imprisonment for theft of goods valued at about R1 000, but it was to take six years for his appeal to be heard. When the now 50-year-old’s appeal was finally heard in the Western Cape High Court

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and his sentence lowered to five years, Acting Judge Hansie Botha and Judge Lee Bozalek expressed shock over how long Hoffman had to wait. He is due to be released immediately, having already served a year too much. Quoting from case law, Judge Botha said it was “outrageous in a constitutional democracy” that someone who may have been acquitted had to spend years in prison waiting for the finalisation of his case. This made a “mockery of the constitutional rights of accused and detained persons”.⁵ This is but one of the thousands of cases that plague the criminal justice system in South Africa.

Section 35 of the Constitution states that an accused must be given a fair trial. Where a trial is procedurally unfair, due to an entrenched right not being protected or a procedural step not being adhered to, the accused person, the victim, or society at large has to pay the price. This sort of situation often occurs where police officers fail to follow correct procedures when taking confessions from accused persons, or fail to obtain necessary warrants to conduct searches and seizures and the like. Where criminals are able to escape the clutches of justice due to erroneous actions of law enforcement personnel, it is inevitable that fair and just outcomes will not result despite the fact that procedural justice has at least notionally, been done.

An example of how processes of law frustrate substantive law and where the judiciary displayed its dissatisfaction towards this non-adherence to fair legal/administrative processes can be seen in the case of *Treatment Action Campaign v Minister of Correctional Services and Another* (case no. 18379/2008). Southwood J in the North Gauteng High Court held: “The papers in this case demonstrate a complete disregard by the Minister and his (sic) department of the provisions of the Constitution and PAIA which require that records be made available. There is no indication in the first respondent’s papers

that the Department complied with its obligations under PAIA at any stage. ...only after proceedings were instituted did the Minister and the Department attempt to justify failure to hand over the report and then on spurious grounds. It is disturbing that the first respondent has relied on technical points which have no merit and instead of complying with its constitutional obligations has waged a war of attrition in the court. This is not what is expected of a government Minister and a state department. In my view their conduct is not only inconsistent with the Constitution and PAIA but is reprehensible. It forces the applicant to litigate at considerable expense and is a waste of public funds.”⁶

Glaring gaps, especially within the criminal justice system cannot be ignored. The process involved with utilising interpreters in criminal courts is an example where although the accepted process appears to be fair and legitimate, it does not give the accused, the legal representatives and the Court, the opportunity to grasp an exact account of the various communications. The negative impact that time delays between questions and answers, legal jargon, the loss of tone and inflections and rephrasing has on proceedings and on the final outcome is highly undesirable.

It cannot be a foregone conclusion that what is prescribed as a just process will result in a just outcome. Like the highly idealistic process of Rawls’ political constructivism which would have ideally resulted in an overlapping consensus, processes involved in meting out justice do not necessarily unfold in a just and fair manner. It is clear that the undeniable and often inescapable challenges faced by law enforcement officials, the judiciary, officers of the Court and citizens cannot be left unresolved. The task before us is how best to address these challenges pragmatically.

NOTES

- ¹ Nelson W, "The Very Idea of Pure Procedural Justice," *Ethics*, vol. 90, no. 4 (July 1980): 506
- ² Deutsch M, "Justice and Conflict," in *The Handbook of Conflict Resolution: Theory and Practice*, ed. M. Deutsch and P.T. Coleman (San Francisco: Jossey-Bass Inc. Publishers, 2000), 45
- ³ Sukhraj-Ely P, 'John Rawls, From the Metaphysical "A Theory of Justice" to the Quasi-Political "Political Liberalism"', Masters Thesis, 2002, University of KwaZulu Natal, Durban, 4
- ⁴ Maiese M, "Procedural Justice: Beyond Intractability". Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: January 2004 <http://www.beyondintractability.org/essay/procedural_justice/>
- ⁵ Breytjenbach K, "Cape Man's Prison Ordeal", *The Cape Times*, 18 August 2009 page 1 at: http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn_20090818031759436C862678
- ⁶ *Treatment Action Campaign v Minister of Correctional Services and Another* (18379/2008) [2009] ZAGPHC 10 (30 January 2009) paragraph 36) at: <http://www.saflii.org/za/cases/ZAGPHC/2009/10.html>