

EDITORIAL

The exercise of power

Any exercise of power should to be undertaken in good faith; impartially and without bias; reasonably and for the purpose for which the powers are conferred. Failure to adhere to any of these principles can lead to significant unfairness to one of the parties to a complaint or the accused in criminal proceedings, and is contrary to the underlying moral purpose of the law.

Procedural fairness

It is essential that the procedure is fair. This is because it is necessary for the purpose of moral integrity and the legitimacy of the decision. The moral integrity of the process is significant, because if the process is impartial, then the justification for the infliction of damages and public censure is readily apparent. It is a practical requirement that the process of investigation and adjudication should exhibit moral integrity, because individuals have a right to feel secure under the protection of the state, and to go about their business without being harmed. Any unfairness in the process of determining the rights of the parties in civil proceedings or the guilt of the accused in criminal proceedings may result in unfair findings of fault. The standards of moral propriety should be palpable. It is a contradiction to practice justice by means of unfairness.

Reliability of the evidence

The process of adjudication should include the obtaining of all relevant witnesses, and for the evidence to be provided in advance of a hearing. The evidence must be reliable to have any efficacy. This means that the evidence and the testimony of witnesses should be open to being tested for reliability by examination and cross examination.

The investigation

The adjudication of a complaint, including the fairness of any investigation, must be fair to both sides. The investigator should be independent, impartial, and be held accountable for their actions. In this respect, it is important for the investigator to obtain relevant evidence and provide for its factual accuracy. This is especially germane, because the finder of fact acts as a moral agent, and central to this is that the findings by an adjudicator must be justifiable, and meet the demands of rationality and ethics.

In turn, in criminal proceedings, the accused should be informed clearly and lucidly of the complaint against them, and be given adequate time to prepare their defence. In addition, the accused has a right to defend themselves appropriately, either by representing themselves, or by way of a legal representative. The right to representation by a legal representative is an essential component of any adjudication process where the gravity of any allegation is serious, and the ramifications for the accused are momentous.

The adjudicator must not only be independent, but seen to be independent and free of any taint of bias. The adjudicator must be impartial.

Observations

Historically, many judicial processes have been considered to be unfair in the light of our contemporary understanding of justice. There is usually a great deal of legend that surrounds commentaries by the ill informed, and there can be a level of ignorance and partiality of historians when writing about events on which they have a personal view. On 30 January 1649, Charles I was beheaded on the scaffolding erected outside Banqueting House in Whitehall, London. Historians and politicians that have royalist sympathies have relentlessly criticised those that were responsible for his trial and

execution. However, the republicans had good reason for indicting the king. The indictment was the first modern legal argument against tyranny (for which see Geoffrey Robertson, *The Tyrannicide Brief The Story of the Many who sent Charles I to the Scaffold* (London: Chatto & Windus, 2005)). In addition, the trial was a model of propriety – so much so, that the king was given far more time to prepare his defence and conduct the trial than was permitted under the rules of procedure at the time. When Charles II was invited to take the throne in 1660, he took revenge on those directly responsible for the death of his father. The process that was observed by the officers of the law was far from the fairness afforded to Charles I. Samuel Pepys recorded in his diary entry for 10 October 1660, that those arraigned for treason ‘... all seemed dismayed and will be condemned without Question.’ That no attempt at fairness was extended to such men illustrates that those in power at the time exacted revenge, regardless of the niceties of morality and justice.

There is no room for such manifest unfairness in the twenty-first century, yet evidence in digital format seems to continue to cause problems relating to the entire legal process in the same way as knowledge of statistics causes similar problems, as indicated by Lord Neuberger, President of the Supreme Court when giving a speech at the annual Bond Solon Expert Witness Conference Expert Witnesses on 7 November 2014 at the Church House Conference Centre, Westminster, London, where he said, at [28] ‘Practitioners and judges have to understand the relevant technicalities and statistics better than they currently do.’ Lay people are not aware of the ignorance of this topic amongst the legal profession. It is time that the legal profession took digital evidence seriously. Practitioners need to educate themselves in the topic, and universities should be teaching the subject to aspiring lawyers.

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