LEGAL TRUTH: THE CONFLICT BETWEEN REAL JUSTICE AND LEGAL JUSTICE

By Patrick Mayer[*]

1 Introduction

The following article is a chapter taken from my dissertation, and as such needs to be situated for the reader. The dissertation is a philosophical discussion concerning the divergence between 'legal truth' and 'factual truth', practically illustrated by critically evaluating the effect that our law of evidence, criminal procedure as entrenched in the Criminal Procedure Act,[1] and the evidentiary exclusion clause entrenched in section 35(5) of the South African Constitution have on the ultimate decision of the court. It argues that often these rules and procedures obscure the truth rather than assist in finding it.

The crux of the discussion revolves around decisions of our criminal courts, where accused persons who are factually guilty are acquitted due to the operation of our evidence rules and procedures which call for the exclusion of evidence in specific instances or on technical grounds. The result of this exclusion is that relevant reliable evidence is deemed not to exist for the purposes of the trial, and evidence which might otherwise have lead to the conviction of the accused person is put beyond the reach of the courts.

This article then deals specifically with the debate surrounding 'what is justice?'; it looks at various concepts of justice and seeks to show that within the confines of our positivistic criminal justice system — a marriage between positive and natural law approaches — we might well be able to avoid decisions that are 'legally correct' yet offend one, as one cannot really say that justice was served.

Just as a last note, I only refer to relevant and reliable evidence throughout the article. I do so as I operate from the perspective that evidence obtained by torture, undue influence, the making of promises or any such means, by their very nature are never reliable pieces of evidence and should thus automatically be excluded.

* Final year LLB student (University of Pretoria).
1 Act 51 of 1977.

2 Justice versus legal truth

Rodger Berkowitz gives a succinct description of the 'justice versus legal truth' argument:

> The CEO of a Fortune 500 company who pays a fine so that his company can dump toxic waste into a reservoir, or move its corporate address to the Bahamas with the intention of avoiding taxes, does not say: 'I am acting legally if also unjustly.' On the contrary, the very legality of the act is seen as proof of its justness. The divorce of law from justice informs our modern condition. Lawfulness, in other words, has replaced justice as the measure of ethical action.
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> What does it mean that law — the institutional embodiment of mankind's highest ideals — has become a tool wielded by lawyers and their clients in the pursuit of strategic interests? How is it that law — the rational feeling, as Kant teaches, of man's connection with the ideal of justice — has come to stand for obedience to rules? And what does it mean that this debasement of law into an instrument of politics and economics no longer shocks us?
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> We are not shocked because we are in denial. We have not yet stared in the face of the hard truth that the pale word 'justice' has lost its fire. Judges, lawyers and law professors all speak vociferously of justice. When they speak of justice, however, they do not mean Antigone's burial of Polynices, or God's divine judgement that struck Ananias dead. Instead, they say that justice is fairness, an objective standard of playing by the rules; they say that justice is efficiency; or cold measure that equates economic gain with moral rectitude; or they say that justice is legitimacy thus reducing justice to whatever is believed to be just or is accepted by the people. *In all of its contemporary guises, justice today means something like a fair and efficient balancing of the interests in a way that produces legitimate legal outcomes.*[2]
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> To think about justice beyond the calculations of fairness, efficiency, and legitimacy is hard. Justice resists precisely what modern man most craves: the certainty of definition. Whereas rules and efficient norms offer the promise of legitimacy, the imperative to act justly requires us to think. Active thinking — what Emerson, in *The American Scholar,* calls the one thing of value in this world — is irreducible to rules or laws. Similarly, justice demands that man think and in thinking transcend the limits of his own unique self and enter into an ethical community with others. The dream of justice, in other words, is the dream of transcendence.[3]

Berkowitz goes on further to state:

> The distinction between transcendent justice on the one hand and modern conceptions of social justice on the other hand based upon rules on the other is clear to anyone who has seen the final minutes of a basketball game. Players on the trailing team foul their opponents to

2 My emphasis.
3 R Berkowitz *The gift of science* (2005) ix.

> stop the clock. The foul is good strategy; it is also, however, a violation of the rules. As a wrongful act, it is punished according to the rules. Yet sports fans say it is fair to foul as long as the player accepts his penalty. *Fairness requires nothing more than playing the game according to the rules*.[4] The foul reflects a calculation: stopping the clock is worth the pain of the penalty. What is more, basketball players, coaches, and fans not only expect and condone the violation of the rules, but believe that such violation is justified.[5]

What Berkowitz is describing here is the conversion of the natural law concept of justice into the positive law concept of justice. So how did or does this conversion take place? Berkowitz answers this by studying the codification efforts of Gottfried Wilhelm Leibniz:

> Even for those aware that Leibniz was a jurist who pursued his work on a legal code throughout his life, the claim that Leibniz presided over the birth of positive law must sound strange. For, if nothing else, Leibniz is known as one of the canonical thinkers of natural law. Yet the claim that Leibniz is the first thinker of positive law is not necessarily inconsistent with his reputation as a natural lawyer. The distinctive aim of Leibniz's natural law thinking is the accurate knowledge of natural law through science. If law was traditionally understood as something authoritative, a claim of right that originated in what Clastres calls a 'time before men', the enlightenment faith in human reason had put the authority of such *ratio scripta* into question. Leibniz sought to revitalise law's power through a scientific approach to law that promised a true and certain knowing of natural law that would render its existence and authority beyond dispute. Against Leibniz's intentions, however, the turn to science and specifically legal code as a way of knowing law contributed to the very transformation of natural law into positive law that Leibniz sought to prevent.[6]

The importance of the conversion for this discussion is that it corresponds with the philosophical concept of criminal law and its actual practical implementation. The philosophical or natural law concept of criminal law is that mankind has universally distilled concepts of right and wrong, and although each society might have slight variations the basic principles remain universal, for example it is wrong to steal or to commit murder. Justice means seeking the truth about the wrongs and that the wrongdoer is punished for his or her wrongs in accordance with what is fair with regard to the wrongdoer, the person who was wronged and the community, while the actual practical implementation of criminal law is a set of positive rules, regulations and procedures which determine what is just. Thus we have the conversion of natural law concepts into positivist realities.

4 My emphasis.
5 Berkowitz (n 3 above) x.
6 Berkowitz (n 3 above) 10.

We can see that even though each and every one of these rules, regulations and procedures have their roots firmly planted in natural law soil, each one intending that justice be done at each phase of the criminal trial, the result of this collection of just rules, regulations and procedure are often at odds with that of the transcendent or universal ideal of justice.

John Bell discusses justice in great detail in his chapter 'Justice and the law', where he divides justice under two main categories, namely 'justice as abstract value' and 'justice as concrete value'. Within these categories, his discussions on positivism and justice, natural law approaches, justice according to the law, and procedural justice are in my opinion the most applicable to this discussion.

3 Justice as an abstract value

3.1 Positivism and justice

> Positivism dominates much of the legal philosophy at the present period. In a limited sense, positivism would simply deny any necessary connection between law and justice, since law is a human creation, identifiable from purely social sources of legislation, custom, case-law and doctrine. This would in no way deny that the positive law seeks to achieve the extra-legal ideal of justice. It would merely state that law need not necessarily do so and its validity does not depend on conformity to justice. There are, however, wider claims made by some positivists who seek to suggest that no values other than those which are socially determined can be demonstrated and that notions of 'justice' are merely empty categories within which individuals or collective preferences are expressed.[7]

Bell's description of the positivist concept of justice is echoed in Berkowitz's later work on the divorce of law and justice (as discussed above). A well-known caption often used with regard to positivist law is the application of the law as it is, not as it ought to be. This indicates that the positivist approach denies the existence of a higher ideal of justice which law and its institutions should strive to meet.

Again we are faced with the unsettling reality that our faith in the law to protect us from the wrongs and uphold the rights has been misplaced. According to this approach of justice, when dealing with the criminal justice system, the best the community and the victim can hope for is that the police (which in many municipalities are under-funded, under-staffed, under-paid and under-trained) follow each and every procedure to the letter (these procedures are there to ensure admissibility of evidence, respect of the accused's fundamental rights, and to ensure a fair trial for the accused) and that

7 KR Scherer *Justice: Interdisciplinary perspectives* (1992) 116.

the prosecution follows suit and does not leave any loop holes open. Should this be the case, the victim and the community have a fair chance at expecting a just result to be the outcome of the criminal justice process.

However, should the police or the prosecution not have complied with all the procedures, the result is often that crucial evidence to the state's case is excluded, with the consequence that the accused, who would otherwise have been convicted, is set free because solid relevant and reliable evidence is deemed not to exist on technical grounds. With this very positivistic adherence to the rules of procedure and admissibility (with regard to evidence), we summarily kick the truth out the window. In the eye of the positivist lawyer, this is a completely just result to the case, as the law was followed to the letter. However the victim and the community (not to mention the natural law lawyer) are left feeling abandoned, if not betrayed by the law. Should this be an isolated incident that is rare in its occurrence, the community feels that on the whole justice is done and seen to be done.

However, in the South African context where crime rates are amongst the highest in the world, such legal but unjust, not to mention untruthful, decisions are not isolated or a rare occurrence. The growing sense in the community is that the police, and the law for that matter, are helpless to stop the waves of crime. This leads to even more disregard for the law, but this time by the law abiding citizen who feels it is time to take the law into their own hands, feeling that they have no other way to protect what is theirs as the recent spate of xenophobic attacks illustrates.

3.2 Natural law and justice

The natural law approach to justice is 'one which seeks to establish and justify principles of justice which have some independence from particular human communities'[8] or legal institutions for that matter, and these universal principles of justice or 'transcendent justice' (as Berkowitz puts it) is the justice to which all communities or legal institutions should aspire.

> A classic exposition of the natural law view point would suggest that the law ought to adhere to the demands of moral law. The precise content of this ideal is to be obtained from the rational reflection, even though it is recognised that statements of what is just may not be capable of full articulation. A provisional assessment is made in relation to a particular society and culture, even if no absolute standard can be claimed for such a method.[9]

8 Scherer (n 7 above) 118.
9 As above.

Bell adds that the reference to 'moral' is not an attempt to ground the ideal of justice solely in religion; I would say it is more a reference to the *boni mores* of each community, which in turn may be informed by the different religious views of each community, but not wholly based on such views.[10] He further points out here that each community or legal system has its own idea of justice, and that this idea is 'their attempt to understand and express the requirements of an ideal justice[11] to which the community aspires,'[12] and that 'such an ideal forms the basis for criticism of the achievements of particular communities.' This notion that each community or legal system has its own idea of justice is one of the criticisms against justice as an ideal put forward by some positivists, 'who seek to suggest that no values other than those which are socially determined can be demonstrated and that notions of justice are merely empty categories within which individuals or collective preferences are expressed'.[13]

I understand their argument to be that each community or legal system has its own idea of justice, and therefore mankind has no universal principles of justice — just individual communities' own construction of their socially determined justice. This is a narrow-minded and short-sighted argument, in that it fails to take into consideration that should one ask every community across the globe what they believe to be the fundamental rights and wrongs of a community, they will answer you with the following: it is *wrong* to steal, its *wrong* to murder, it is *wrong* to be dishonest, it is *wrong* to cheat; and it is *right* to act with integrity, it is *right* to act fairly, and so on. These are all universal to mankind, and the concomitant universal justice, as Ulpian defines 'giving to each his own', is that mankind universally agrees that the wrongs should be punished and the rights rewarded. The fact that each community may have a slight variation on how each right or wrong is defined and what the concomitant reward or punishment is cannot mean that there is no ideal of justice independent from the individual communities.

For example, one will find discrepancies in the definition of murder, the ambit of the defence of private defence (which is a ground of justification for killing another human being, and absolves the person of the criminal liability for murder), and what is 'just' punishment for the crime of murder in different legal systems across the globe. But it is a universal belief (in that each community will agree) that justice is served when a wrongdoer is punished for their

10 As above.
11 The use of '*an* ideal of justice to which the community aspires' seems to indicate that the author also holds the belief that there are many different ideals of justice to pick from, instead of one universal ideal of justice of which each community attempts to understand and express the requirements thereof. This is a view with which I disagree, as is discussed below.
12 Scherer (n 7 above) 118.
13 Scherer (n 7 above) 116.

wrongdoing. The fact that the wrongdoer must be punished is universal, but each community will differ in what they believe is a just punishment.

Therefore, when a judge is presiding over a criminal case, the ever-present ideal that should be held in the back of their minds should be that we seek the truth about the wrong and wrongdoers who should be punished for their wrongdoing according to what is fair with regard to the wrongdoer, the person who was wronged, and the community. It should not be that as long as all the rules and procedures were followed that the result will be just. What this means in a pragmatic sense is that when it comes to the exclusion of evidence based on the fact that certain technical procedures were not followed, we are adhering to a positivistic approach to justice when a natural law approach which would include such evidence (to fully air the truth, so to speak) would result in a decision compatible with the above ideal.

You might ask why the natural law approach is more likely to yield more just results in our criminal justice system than the positive law approach.

The answer is quiet simple. The positive law approach is short-sighted and loses touch with the purpose of criminal law, this purpose being the collection of relevant and reliable evidence with regard to criminal activities; the placing of such evidence before a judge or magistrate, who in turn based on the strength of the evidence before him or her must evaluate whether or not the crime was in fact perpetrated by the accused person;[14] and in so doing find the truth. Instead the positive law approach gets bogged down with procedural and admissibility rules, which often result in the obscuring of the truth rather than the finding of it.

The natural law approach never loses sight of the purpose of criminal law. This approach ensures that by placing all the reliable evidence before the court, the court is placed in the best position to ascertain the truth about the wrong committed, with the result that the conviction or acquittal of the accused person will mirror the actual true state of affairs as closely as is humanly possible.

[14] PJ Schwikkard & SE van der Merwe *Principles of evidence* (2002) 534. The standard of proof for criminal cases in South Africa is beyond reasonable doubt. This is a very high standard of proof; it means that should the accused's innocent version be reasonably true then the proof against the accused is not beyond reasonable doubt, and the accused is acquitted. For an acquittal, it is not a prerequisite that the court believes that the innocent version of the accused version is true. It is sufficient that it might be substantially true. This high standard of proof that the state must adhere to before the court can making a finding of guilt, coupled with the exclusion of evidence on technical grounds is, in my opinion, the main cause for many of the unjust but legal decisions mentioned above.

3.3 Justice according to the law

Under this heading an important distinction is made; namely legal justice as an independent norm, and legal justice as dependant on social justice. Legal justice independent from the society in which it operates,

> is in a pragmatic sense what is done according to law. The idea of *giving to each his own*[15] expresses a relationship set up by law and the standard by which a situation is judged as 'just' or 'unjust' is that created by law. Thus 'justice' ... is equivalent to 'conformity to law' and, thus 'validity according to law' ... For example ... the common law which sees justice in terms of formal, procedural justice with the emphasis on the impartial application of law, and could apply to notions of equality before the law.[16]

From a practical perspective this makes perfect sense because before we can apply the ideal of giving each his own, we must first establish what belongs to whom. It is to the law that we look to establish this. The impartial application of law and equality before the law are vital parts of a just legal system. However the underlying concept of this view is that justice is what the law prescribes it to be, and it ignores the fact that some of these laws, which are equally applied, may have consequences that offend the greater society's sense of justice. The law is sketched as an ivory tower that dictates to society what is right and wrong, and that as long as things are done according to the legal rules justice is being served. In other words, justice as determined by the law is independent from the social justice of the society in which the law operates.

If we investigate our current criminal justice system, one of the first anomalies that you come across is that we have rules of evidence relating to admissibility, which are designed for a criminal system that makes use of a jury. This is strange since we do not make use of a jury, but instead have a legally trained judicial officer (judge or magistrate as the case may be) that decides the outcome of the criminal case.

The second anomaly that we find is that when the police do not follow the correct procedure in the collection of evidence, or violate any of the fundamental rights of the accused person during the pre-trial investigation, the appropriate punishment seems to be to exclude the evidence collected in such a manner. Whilst that might seem to be a very effective deterrent to prevent the same occurrence in the future, ask the question: Who is it that ultimately bears the burden of such a deterrent? The answer is the victims and society. Not only must they endure the initial detriment of the actual crime, but

15 My emphasis. This is Ulpian's concept of the ideal of justice.
16 Scherer (n 7 above) 123-124.

are then punished for the mistakes of the police when the accused person is acquitted on a technicality and placed back in the society who were initially harmed by the crime of the accused person. This is seen as justice, since every accused person is treated equally, all the procedures set in place to ensure an objectively fair trial are complied with, and should some of the procedures not be complied with evidence collected in contravention of such procedure is excluded to prevent prejudice to the accused person. This exclusion of reliable, relevant evidence is justified by sentiments such as rather setting ten guilty people free than convicting one innocent person. Theoretically speaking, this sentiment is beyond reproach, but if you evaluate the practical effect on our criminal justice system with specific reference to the exclusion of relevant reliable evidence, the result is that the accused's defence team is given a myriad of loopholes with which they can have proof of their client's guilt excluded.

The second concept shows legal justice as being fitted into a structure of social justice, and is necessarily parasitic on it. Legal justice would only be just if the social arrangements which the law enforces are themselves just according to the wider principles of social justice operative in society.[17] It is this second concept of legal justice that, in my view, is most appropriate for the South African criminal justice context. This approach allows legal justice in terms of criminal law to be informed by the various factors extraneous to the substantive and procedural criminal law. There are factors such as:

- the extremely high crime rate;
- the fact that a very large percentage of the crime rate is made up of violent crime;
- the fact that women and children, who are a socially vulnerable group, make up a large portion of the victims of violent crime and abuse;
- whether or not the current crime crisis calls for a crime prevention or control model to be applied;
- the general feeling of the greater society, as to whether the police and the judiciary are performing their constitutional duties towards the society and accused persons with equal balance.

This approach to legal justice allows the criminal justice system flexibility, ensuring that it can evolve and adapt to the demands of dealing with the ever-evolving criminal sphere. South Africa is a constitutional state, and we recognise the Constitution as the supreme law of our land. The preamble has two very important extracts for this discussion:

> Heal the divisions of the past and establish a society based on democratic values, *social justice*[18]and fundamental human rights; Lay

17 As above.
18 My emphasis.

> the foundations for a democratic and open society in which the government is based on the *will of the people and every citizen is equally protected by the law.*[19]

Our Constitution bases the creation of our society on, amongst other values, social justice. This indicates that our legal justice is not an independent norm, but a justice that must be informed by our society. The foundation of our society is that the government is based on the will of the people, and that the law equally protects every citizen.[20] However, the sentiment of the society as a whole, in the present crime crisis, is that our Constitution is being interpreted with a bias towards the accused person, with particular reference to accused persons being acquitted on technical grounds when they would have been convicted otherwise were it not for our overly-regulated evidence rules and related procedures. This results in valid, relevant and reliable evidence being declared as inadmissible in a court of law.

The present climate of distrust and lack of confidence in the judiciary and police is an emphatic indication that our criminal justice system is losing touch with the society in which it operates and the criminal sphere which it must control. It is time to call for review of our law of evidence rules with particular emphasis on rules relating to a jury, and whether or not the exclusionary rule is appropriate for South Africa.

4 Justice as a concrete value

4.1 Procedural justice

The South African criminal justice system has three main sources, namely the Constitution, statutes, and common law. As this discussion is focused on the rules and procedures with regard to evidence in a criminal trial, it is important to know what the sources of these rules and procedures and what their natures are. We find what evidence is and how to go about collecting it from two main sources, namely our common law and the Criminal Procedure Act.[21] Both of these sources are procedural in nature, they indicate what categories of evidence exist, which are admissible and which are not, and they detail the specific procedures that must be followed when collecting and processing such evidence. It is for these reasons that procedural justice is of vital importance, as our criminal justice system is one predominantly based on procedure.

19 My emphasis.
20 This equal protection will be discussed with reference to the *audi alterem partem* rule under the next heading.
21 Act 51 of 1977.

> It is a central theme in much writing that justice involves the impartial application of legal rules without bias and in a way which treats all subjects of the law equally and entitles them to state their point of view ... Procedure concerns the process or steps taken in arriving at a decision; substance concerns the content of the decision. The two are conceptually distinct, for one can use different procedures for the same substantive issues and the same procedures for different substantive issues. A number of values can be discerned in this area, principal among which Bayles identifies as impartiality, an opportunity for each party to be heard, the requirement of reasons to be given for a decision, and the formal justice of consistent adherence to rules ... If, as many think, the central issue of justice is the proper arbitration between mine and thine, then impartial decision-making is the service which the law has to provide either in the distribution or in the correction of holdings of social resources.[22]

The above quote can be summarised by two Latin maxims, which are '*nemo iudex in sua causa*' (*nemo iudex* rule) and '*audi alterem partem*' (*audi* rule). The first maxim, simply put, means that you cannot be a judge in your own case. This is the impartiality requirement to which the above quote refers. The second maxim means that each party to the dispute must be given the opportunity to state their case. These maxims are the equal treatment and equal application of the law requirements also referred to in the abovementioned quote. They form the basis of procedural justice.

It is interesting to note that in our criminal justice system the *nemo iudex* rule is applied without any alteration or adaptation. The same cannot be said for the *audi* rule, as this rule only applies to the accused person in a criminal trial. The classic illustration of the one-sided application of this rule is the workings of our evidentiary procedures and the concomitant inadmissibility rules. The result of these procedures and rules is the exclusion of relevant and reliable evidence that was collected in contravention of either such procedures or rules. If we analyse the effect this has on the two parties to the dispute, we find a situation that benefits one party to the detriment of the other.

Let me explain this further. In a criminal trial we have two parties, namely the accused person and the state. The state however represents the victim and the greater community. The accused person is allowed to present their side of the story; this story is often assisted by the evidentiary procedures and rules, as well as in that evidence can be excluded in terms of these rules. This evidence is usually prejudicial to the establishment of the innocence of the accused person, and the exclusion thereof creates a false credibility or truthfulness with regard to the version of events as told by the accused person which is obviously to their benefit. On the other hand,

22 Scherer (n 7 above) 127.

by excluding this evidence, the state's case – and by extension the case of the victim and community — is severely prejudiced, as critical evidence needed to establish the truth of the state's — and by necessity the victim's — version of the events is no longer available to the state.

Therefore if we accept that procedural justice is based on the *nemo iudex* and the a*udi* rules, we can see that our criminal justice system does not fully comply with the concept of procedural fairness as only one party is afforded the opportunity to fully state their case. Our Constitution guarantees equal treatment before the law for all persons in South Africa; however there seems to be a highly unequal treatment of persons when we deal with the criminal justice system.

The immediate counter-argument to such a statement will be that all accused persons are treated equally before the law, all accused persons are given the same opportunity to state their case and the evidentiary rules and procedures are equally applied; therefore procedural justice is served.

This argument merely serves to illustrate the point that the criminal justice system has become polarised towards the accused person. Pre-1994, our criminal justice system was abused to achieve political goals. The consequences of that past is that in the present, we have a criminal justice system that has over-emphasised the rights of the accused person to such an extent that the purpose which criminal law serves (which is to protect the rights of the community and individuals, to establish law and order, ascertain the truth about criminal activities and punish the offenders accordingly) has been severely undermined. What is required for our current crime crisis is the rebalancing of interest that our criminal justice system seeks to protect, prevention of the abuses of the past on the one hand and dealing effectively with the crime crisis on the other.