PROCEDURE AS AN INSTRUMENT OF SOCIAL JUSTICE

(Address delivered to students, reading for the LL.B. degree at the Faculty of Law, UWI)

By Sir Jack Jacobs

Procedure itself is a very generalized operation which exists in all sorts of different fields. It applies wherever there is a gathering of people who have a common aim and they have to decide on how they should proceed. Procedure is merely the orderly process of conducting any gathering with a view to making a decision of any kind. You have it at clubs, at Directors' Meetings of companies you have it at all levels, you have it at the United Nations: for example anybody who wishes to present his credentials has to go through a procedural requirement. So that procedure is the basis for lots of activities, social, administrative, any kind of activity you can think of and I suppose it applies in the family as well as its operation is to provide the orderly machinery for decision making.

In legal procedure we come down a level because we are limited to the orderly process of decision making on legal problems. In the field of law, the judicial process and the nature of litigation itself, shows really what the basis of procedure is. Litigation means going to law. Resorting to a court or to a tribunal or to any other body which is legally constituted or legally recognised for the determination or solution or adjudication of the issue or controversy between the parties. Litigation requires that there should be three elements in it. First, that there should be a dispute or controversy or conflict between two or

more people about some matter, or it could be in relation to the status of one of them, then that dispute must have a legal character about it to determine the legal rights or legal duties of one or more parties, and finally it must be committed to a court of law as part of the judicial process, or as I said earlier to a tribunal or other body which has recognition of the law as having authority to make legal decisions.

In a sense this definition of litigation covers all kinds of legal proceedings including criminal proceedings, but of course the criminal process is entirely different and separate from the civil process, and in the common law we make a very sharp distinction between the civil process and the criminal process. Whether it is necessary to do so or not is really quite a different matter. Some states do not, some states even in America for example say that judges will be trying criminal cases as well as civil cases, but whereas the criminal process is a monopoly of the state on the whole, you cannot, as it were, set up a criminal court or you cannot set up a criminal tribunal or anything of that kind.

In the civil process there is a much greater flexibility and you can have courts, tribunals, you can have arbitration, you can have conciliation, and these are new methods of dispute dissolving processes which are becoming more and more popular and much more used in different states in different countries of the world. They find that conciliation is necessary for many types of disputes, disputes concerning discrimination matters, disputes concerning environmental matters, disputes concerning sexual equality in pay and other matters. The conciliation process is used on

quite a big scale, it is used in family affairs, it is used in industrial disputes and so forth very largely because conciliation is itself a healing process. It is not similar to the adjudicative process. The adjudicative process determines something to be right or something to be wrong, a sense of compounded social dispute insisting that someone was right or someone was wrong.. The conciliation or the mediation process, which ever way you go about it, has the capacity, has the inherent feature about it that it brings people together or at any rate does not put blame on each other. It enables them to resolve their disputes within the framework of the law, but according to a kind of uncontentiousness. So that the need for civil litigation is very wide spread. The need for it is that it produces harmony and peace and orderliness among social relations.

The opposite to civil litigation is self-help and it produces arbitrariness where might is right, where power takes effect in every form and I do not think in a society, not even perhaps in Barbados can you exclude the possibility of arbitrariness and the exercise of power of one kind or another taking place outside the litigation process. So that the main stress, the main aim of procedure is to provide for the resolution of civil disputes through the process of civil litigation and that is a function of government. That is why the judiciary is regarded as the third arm of government. There is the legislature, the executive and there is the judiciary. The legislature makes the laws, the executive carries out the laws and the judiciary applies the laws, and in so far as the judiciary applies the laws, which ever judiciary it is or what ever

other method you use in so far as it does so, civil litigation then becomes an instrument of social justice. It is a process employed by the state to secure justice between its citizens or between the citizens and the state. It provides access to justice, it enables people to resort to the courts in order to obtain a satisfactory solution, that is to say in accordance with the laws to the dispute between them, hopefully in a sense that the dispute will be finalised and both parties can start off afresh from the point which they have reached.

Lord Bowen in his great speech on Law Enforcement in February of 1828 in the House of Commons, he later became Lord Chancellor, described the civil litigation process as one of the highest and most important functions of government and described it in a very telling phrase: as having "the objective of securing justice between man and man."

On the other hand of course one ought to remember that civil litigation and the whole process of civil procedure is not the sole province of lawyers, it is not a self-contained priesthood engaged in exercising a mystery. It is really a concern of all citizens at all levels of their activities and as part, as I believe you may have in your first year here, treating it as part of the Social Sciences. You look at economics, you look at sociology, you look at administration, you look at perhaps medicine, psychiatry, psychology. All these different disciplines intermesh with the legal process just as much as the legal process intermeshes with the different areas of the Social Sciences. I think we are inclined in the field of Social Sciences to be a little sectarian. As I understand it here in the University of the West

Indies, you are less sectarian because in your first year you have a certain passing aquaintance with things like economics, sociology and so forth, but at least the seed is sown and it is for you to develop it and see how it relates to the legal process.

Civil procedure can be regarded as fulfilling three functions and it is a way of emphasising its importance and its operation. First, there is the complementary function. This is how it is normally regarded by the books on Jurisprudence, it is said that procedure assists the substantive law. It is complementary to the substantive law. Procedure is not the master of the law but is the servant of the law and the theory is that the substance of law is the law at rest. Law which consists of rules which govern relationships between people. You have as you sit there as it were a whole body of rules of law belonging to you, you have a right not to be defamed, or hit, or injured, or to have your property stolen or damaged, or any thing of that kind. These are all rules of substantive law. You will learn them in your legal studies as part of your hard core subjects of Contract, Tort or Constitutional law, Property law or whatever it may be. Procedure brings the law to life, it is law in action as compared with the law at rest, and it is necessary that we should have procedural rules and machinery in order that these rights, which you enjoy should be brought to life, should be given effect. If there were no machinery of law to give effect to your substance of rights, why then your substance of rights would be basically non-existant or at any rate diminished in value and importance. The whole point of procedure is to make the law, the substance of the law effective and enforceable. Sir Morris Amos said about procedure "that procedure lies at the

heart of the law" and by that he meant that it is the machinery of justice, the process of justice which gives effect to the substance of law and brings heart to it. So that procedure lies at the heart of the law and that is its first approach the complementary function of procedure.

The second function is protective. Procedure as a kind of protection, it ensures that no man can be deprived of his rights or his entitlements or whatever it may be except through the due process of law, through proper procedural machinery. The American phrase "Due Process of Law" which is written in the American Constitution is really derived from the old common law. It is implicit in Magna Carta and was explicitly stated in a statute in England at the time of Edward I, so that due process of law acts as a protection against being tried or losing any of your substantive rights except through the machinery of the courts. Again, you have the contrast between the machinery of the courts and arbitrariness through the exercise of power, and this concept of protection of the function of procedure has many manifestations. It provides the basis for the rules of natural justice for example you are entitled to know the charge made against you, and that you have the proper opportunity of meeting the charge, that the judge should not be biased or should not appear to be biased, the requirement that not only justice should be done, but ultimately seen to be done and so forth. These are all part of the features of natural justice which themselves are part of the protective character, the protective function of procedural law, and so of course is access to justice.

One of the biggest problems which all the countries in the world are very much concerned

about is the question of access to justice. To provide access to justice to all citizens for all purposes both plaintiffs and defendants, both claiments and respondents, and this ties up with the notion that equality before the law means not merely equality in terms of basic substance of rights, but equality in procedural matters, and this means a great variety of things which effect the procedure of the law, including the provision of legal services: proper, adequate, effective legal services as a means of making access to justice itself effective.

The third function of procedure may be called practical. The practice of the law is one of the objectives which the law has in its approach to providing the traditional process and the practice of the law is where you come in. You, ultimately as lawyers now starting on your careers, will have to practice the law and you will have to get involved with nuts and bolts meaning you will have to look, as was suggested, at the Supreme Court Practice. Of course you have in your states in the Caribbean your own procedures which dominate because they provide you with the basic machinery for dealing with it. The practice of the law itself has two objectives. One may be described as positive, and that is, that the practice of the law should so operate as to produce a just result. But whatever you may mean by a just result, because this is obviously a personal kind of approach, I think on the whole that people recognise a just result compared with a result which is not just. That is the first objective on the practical side of the law to produce a just result. In other words the machinery of the court should be so operated, so geared, so framed that it should aim at producing a just result for the parties.

On the negative side, the machinery of the law should so operate as to prevent delay, prevent costs, or reduce costs, prevent vexation, which is another word that Bentham used, by which he meant technicalities in procedure, where a case is decided not on the merits of the case but on a procedural point. A matter which is really part of the machinery and not the merits of the case and anything which obstructs the ultimate result of producing a just result. In other words on the negative side it is where justice is being denied. Justice can be denied by many factors, most important are those which were identified by Jeremy Bentha who was a great legal philosopher, but he was much more than that. In London over 200 years ago or about 200 years ago he called it "delay, costs and vexations," which as I said to you is procedural technicality. Delay in the procedural process everyone knows is a serious defect in the legal process. Delay is a denial of justice. Delay was condemned in Magna Carta - " to none should be denied to none should be delayed." I think Magna Carta has been repealed in England, but I do not think they are going to repeal that provision because it is still a very important provision and delay applies not only in England but throughout the whole world. Delay can operate as to bring about a considerable denial in justice. People who need to have their rights decided right away, people who need cash flow, people who are injured in accidents, people who have matrimonial problems, people who have industrial problems, what they want is a fairly quick decision of the kind which they can regard as acceptable in the society in which they live, which meets with the cultural acceptance of society.

Then the next one is costs, and costs can be very prohibitive; in fact costs are really an inhibitive

feature of the legal process. The idea that we have to pay so much money to lawyers in order to have access to justice is a serious blemish on the machinery of justice. That is why people talk of one law for the rich and another law for the poor. Of course lawyers have to live, nobody is suggesting that they do not, nobody is even suggesting that they should not be paid proper fees, but they reach a state, at any rate some lawyers hold society up to ransom with the fees that they charge, but I am not of course saying you would do that but talking as a general feature of the procedural process in all countries. In many countries the costs of litigation have to some extent been mitigated by legal aid and legal advice and there has been a greater provision of legal services. Query whether this is enough, query whether you do not have to go beyond that and provide community law service, that you do not have to provide duty lawyers even in the criminal field as well as in the civil field, where a solicitor will provide these services free on a rota basis say for one day, and any litigant can ask or can approach him or he can approach the litigant who is left on his own to fight his own case in court, present his own case and does not have the articulation or the knowledge of procedure of what the judge really wants and so forth. We may reach the stage where we may have to provide free legal advice, at any rate to some citizens, like we do in England where there is legal aid and a person who has not got sufficient means gets a Nill Certificate, he does not pay anything at all and is not liable for the other costs.

So that the problem of costs is a contractable problem and all nations are very concerned about the ways in which they ought to try and meet this problem. One of the ways is the establishing of

what are called Small Claims Courts under which there would be no costs, because if you had a small claim the amount of the claim would not justify employing a lawyer or even going to court, so people are simply denied their rights. For example if you buy a pair of shoes and they go bust the next day you go to the shop and try and replace it. They say well it is the manufacturers fault and you ask who the maufacturer is and they give you the address, and by that time your sense of outrage is somewhat subdued and inertia comes in to play and people shrug their shoulders and say ok I will buy another pair of shoes. Well Small Claims Courts are designed to meet that kind of problem where people have claims which are perfectly justifiable, perfectly proper but are too small to be pursued because of the question of costs.

Then there is the great sense of fear that people have of lawyers and the law and the whole mystery of law. They think they are getting involved in a great sort of unknown machine and wonder what is going to happen next, as Cathgar indicated in his book called "The Trial". That book frightens you if you have anything to do with law and lawyers except of course if you know about the law. I hope that it does not frighten you. Procedural technicalities are a feature of this fear of the law, language of the law is different, you are learning a language now which is necessary for your understanding of legal problems and legal issues and legal solutions but it is strange to your friends outside the law who may wonder what you are talking about. There is a great deal of mystification of the law and Jeremy Bentham called a long time ago for the demystification of the law and the law process.

Then there is the question of the administration of the law in public, and people may think why should their little problem which is really a private problem be discussed in public. The answer is that the administration of public justice is a very necessary part of the procedural system, because otherwise there may be a danger of arbitrariness. If you do not know what is happening you may start guessing and you may start guessing wrong. The judge may have been perfectly proper but no one will know what happened. Again, Jeremy Bentham put it in a very sharp form "the need for public justice is the requirement where the judges themselves need to be judged."

Then of course there are other features of the legal system which I think one has not so much to take for granted, but to ensure that it continues to operate, by independence of the judiciary. What do we mean by the independence of the judiciary? We mean that they should be independent of the executive. That they should not be mouthpieces of the executive. That they should be alert to ensure the rights of the ordinary citizen are maintained and strengthened.

Therefore they have to be skilled, they have to be wise, they have to be penetrative. I thought myself that three main requirements of the judiciary are: first, they must have patience to hear everything that is being said to them; secondly, they must have wisdom to weigh up what is being said; and thirdly, they must have courage to do what is right, and of course they have to be absolutely impartial and have integrity and command the confidence and respect of the community. There is also the independence of the lawyer. This applies especially to the independence of the advocate, the Barrister. You of course have fusion here in Barbados so that in effect it applies to the independence of the

Attorney. You have to remember that you are in the procedural context the mouthpiece of the litigant. He is the raw material as it were on which the procedural system is based. You will have to represent him to the best of your ability, not to overreach your opponent, but to use the machinery of the court, the armory of the rules of the court to the best advantage and moreover the independence of the attorney requires him to take on perhaps unpopular cases. You do not have to be merely concerned with cases which your colleagues regard as popular or which are regarded as ones that are fee producing. It may be an unpopular case in the sense that the man charged may have differing political complexions or differing political convictions or a different religious faith or whatever, but you have to stand up for him, because he has no other way of having access to the courts except through the attorney, except through the independence of the attorney, and it may mean that you may have to fight the government, you may have to be against the government.

I mentioned in passing access to justice. I just want to stress the importance of that. I think that procedural rules and the procedural framework of rules should be so devised that the Halls of Justice are open to all and the inhibitive factors which I have mentioned, should as far as possible be reduced. The process of procedure is in a sense much like a healing process. The disputes, controversies and conflicts that I mentioned are the pathology of social life and they are things that have gone wrong. You do not go to a court of law when things are right, it is when things have gone wrong and the duty of the court is to produce some kind of solution. That solution is a kind of healing process and justice should not be made to appear blindfolded holding the

scales in one hand and the sword in the other as though she were being impartial in that way. Justice should have her eyes open and should be welcoming to the litigants who resort to it. Certainly in the civil field. There is of course a great deal of need to modernise the law. Part of the procedural problem which we have is because of the complexities of the law which are basically unnecessary and which ought to be put right, and for that purpose I think in many countries, I am not sure what the position is in Barbados, but certainly in Trinidad they have a Law Commission which has the continued duty to review the law and bring it up-to-date, and it seems to me that one of the great needs of procedure is that it needs to be brought up-to-date all the time, and one of the most important features of procedural law which most lawyers do not really pay much attention to, or have a great deal of learning about, is the enforcement of judgments. Here a great deal of distress takes place. You have two conflicting principles, you have a judgment and you are entitled to enjoy the fruits of your judgment. You are entitled to secure the fruits of your judgment but it may be that the debtor has not got the means to pay, and the machinery of the court should be such that if he has the means you should get it from him, but if he has not got the means then the law should recognise that to some extent the exercise has been as it were a theoretical exercise. I do not know what the answer is to the question of enforement of judgments. How can you make a man pay when he has not got the means. Of course there are hard core people who can escape being caught up in the grip of law, but I am talking of the honest man, the man who wants to do his best but cannot do it and debtors on the whole do not enjoy the sympathy of people in society. They regard them as carriers,

people who have gone wrong and they are left as it were to their own devices. In the report, of which I was a member, when we talked about the enforcement of judgments, I was able to get the committee to accept the statement that there was not a debtors' union. Of course the concept of a debtors' union is itself a bit laughable, but behind it was the feeling that there was no one there to protect the individual debtor from the rigours of the law.

Let me finish by citing to you the derivation of Lord Bowen in the speech he gave in the House of Commons. He took six hours to make that speech. In those days they were able to take refreshment while addressing the House, he had a basket of oranges and he would peel an orange as he went along and they say when his basket was empty so he came to an end. This is how he finished. "For most of Augustus (that is Augustus Caesar) from part of the glimmer in which Euripides in his earlier years was lost, that he found Rome of brick and left it of marble, a phrase not unworthy of the great prince, and to which the present sovereign (George IV) also has it claims, but how much nobler could be the sovereign's boast if he should have it to say that he found law dear and left it cheap, found it a sealed book and left it a living letter, found it the patrimony of the rich and left it the inheritance of the poor,found it a two-edged sword of craft and oppression and left it a staff of honesty and shield of innocence."

I think the pursuit of justice is one of the highest aspirations of the human spirit and I think we should all be concerned with the pursuit of justice.