NATURAL JUSTICE—THE MODERN SYNTHESIS

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It is eleven years now since the House of Lords decided *Ridge* v. *Baldwin*[1] and transformed the law of natural justice. If the trend of cases is examined, *Ridge's* case is a watershed in the attitude of judges to the existence of the right to a hearing. Since then, the occasions where a hearing is required before an administrative body reaches a decision have widened dramatically. Courts are now finding a duty to give a hearing in situations where the argument would have been rejected out of hand in 1962. The last eleven years has also seen the birth and growth of the "duty to act fairly". This is clearly related to natural justice, but is it a part of the general rule or a separate but analogous principle? Finally, with the widening of a duty to hear, the issue in natural justice cases has changed. The crucial question today is the content of the hearing rather than the existence of the duty to hear.

For eight years after *Ridge* v. *Baldwin* the English courts handed down decisions which were strongly in favour of the individual and were characterized by the analysis and application of general principles. A fairly detailed structure of natural justice emerged. But then the temper of the courts appeared to change. Increasingly, judges looked to the individual statute and construed that—usually with the barest reference to the structure built in the preceding years. Natural justice appears to be disintegrating into a collection of individual cases of authority only on their very facts. Australian courts lagged behind this development in England and are now approaching natural justice cases in much the same way as English courts did a few years ago. This article seeks to analyse the new structure of natural justice and show, through synthesis, its policy values and over-all desirability. In this way, it is hoped, Australian courts will be led to retain this structure and not follow English courts into the limbo of individual construction of statutes, and English courts to reassert that structure so recently abandoned.

This article will not present an elaborate consideration of every natural justice case decided since 1963. It is much more concerned with the trends, principles, and movement of the law. There are obviously cases which do not fit into the pattern outlined in this article. Such exceptions

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[1] [1964] A.C. 40 (H.L.).

do not affect the general principles unless they are of such number and coherence as to challenge the trend and movement discussed here. It is submitted that up to 1971 the exceptional cases were not of such a nature as to challenge the modern synthesis of natural justice.

A DIGRESSION INTO HISTORY

The modern development of natural justice cannot be understood outside the history of natural justice over the last one hundred years. De Smith makes this point forcefully in the arrangement of his discussion of natural justice.[2] Although *Ridge* v. *Baldwin* changed the direction of the law, it did not make the new direction clear. However, the older cases fill this gap.

The key case, both in the opinion of Lord Reid in *Ridge* and in point of its relevance to the modern cases, is *Cooper* v. *Wandsworth Board of Works*.[3] There it was required by statute that notice be given to the Board of any proposed building. The sanction for non-compliance was demolition of the building erected. Cooper failed to give the required notice and the building was pulled down. There was no question of Cooper having been given any kind of hearing before action was taken, so the question was whether the Act implied that the Board had no power to demolish a building without first hearing the owner in his own defence.

Erle C.J. rejected the argument that only "judicial" discretions carry the duty to give a hearing. He inferred a duty to hear from the consequences of the Board's action and from the existence of an appeal provision in the Act which "would evidently indicate that many exercises of the power of the district board would be in the nature of judicial proceedings".[4] Willes J. found that a hearing must be given because the Board was a body "with power to affect the property of one of Her Majesty's subjects";[5] this was indicated by the nature of the discretion involved and the "analogy which exists between it and other recognized tribunals" in the form of the appeal section and other procedural provisions.[6] Since the Board had to "determine the offence, and . . . apportion the punishment as well as the remedy",[7] Byles J. required a hearing. Keating J. looked to the consequences of the action and the duty of the Board to find facts.[8] The four elements considered were:

(a) the subject-matter of the power (property);

(b) the consequences of the exercise of the power (demolition);

[2] S. A. de Smith, *Judicial Review of Administrative Action* (3rd edition, London: Stevens and Sons, 1973) ch. 4.
[3] (1863) 14 C.B.N.S. 180.
[4] Ibid. 190.
[5] Ibid.
[6] Ibid.
[7] Ibid. 194.
[8] Ibid. 196.

(c) the nature of the issue to be determined by the Board (factual and in the nature of an allegation of an offence); and

(d) the existence of what could be called 'express court analogy' (procedural provisions reminiscent of courts).

None of these four separate matters was relied upon by every Judge; they were seen as factors and not conditions *sine qua non* for the existence of a duty to hear.

The late 1920s ushered in an era of "revisionism"[9] through *R.* v. *Legislative Committee of the Church Assembly, ex parte Haynes-Smith.*[10] This case concerned the Prayer Book Measure 1927 which, it was claimed, had not been passed by the Church Assembly acting properly under the *Church of England Assembly (Powers) Act* 1919. Haynes-Smith sought certiorari and prohibition.

The threshold question was whether the Assembly was a body amenable to the prerogative writs claimed. Lord Hewart C.J. (Avory and Salter JJ. delivering substantially similar judgments) held that the writs would not run to the Assembly. Lord Hewart took as his basic text the so-called Atkin dictum

> "the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division [through certiorari and prohibition]."[11]

He then analysed the dictum carefully.[12] He noted the cumulative "and" and deduced from this that "the duty to act judicially" must be "superadded" to the power of "affecting the rights of subjects".

The Lord Chief Justice went on to consider whether this second requirement was satisfied, and concluded that it was not. In doing so he looked at the provisions of the Act and concluded that the Assembly was legislative in character and not judicial. He went no further and considered no other matters. Lord Hewart's decision is undoubtedly correct, but the way in which he arrived at it was defective. He converted the four elements in *Cooper's* case into a pair of conditions *sine qua non* for the duty to hear. This was the first defect in the reasoning. The second was in the superadded duty to act judicially. In *Electricity Commissioners* this appeared by express provision; in the *Haynes-Smith* case it was unsuccessfully sought in the wording of the statute. But this duty is not always found in the wording of the statute itself.

[9] Professor de Smith's phrase.
[10] [1928] 1 K.B. 411 (D.C.).
[11] *R.* v. *Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 K.B. 171, 205 (C.A.).
[12] [1928] 1 K.B. 411, 415.

Nakkuda Ali v. *Jayaratne*[13] was the apex of "revisionism". It states the law of the Atkin dictum/Hewart gloss definitively and illustrates it aptly, and so is the key to understanding the direction of the modern law. Jayaratne was the Controller of Textiles in Ceylon. The statute gave him power to revoke a dealer's licence where he "has reasonable grounds to believe that any dealer is unfit to continue as a dealer". He revoked Nakkuda Ali's licence. Lord Radcliffe first stated in general terms the effect of the common law of certiorari, finding that the law makes no distinction between regular courts and those bodies which "have to act analogously to a judge in respect of certain of their duties".[14] The essence is not the status of the decision-maker but the process of decision-making: it must be judicial or "analogous to the judicial".[15] Lord Radcliffe was unwilling to regard the instruction that the Controller had reasonable grounds as requiring him to hold a hearing. "Can one not act reasonably without acting judicially?" he asked.[16]

The great Judge had still to define what this judicial or analogous process might be. He returned to the Atkin/Hewart conditions. He found that neither condition had been made out in this case. Rights were not affected—there was merely the withdrawal of a privilege.[17] But, more importantly, there was no superadded duty. First, there was no express provision for notice to the applicant, or for an "inquiry". Nor was there an appeal. There was nothing in the Statute beyond the power itself, nothing in "the context or conditions of his jurisdiction" which suggested an analogy with judicial rules.[18] The duty to act judicially must be found by analogy with courts. The analogy is to be looked for in the express provisions of the statute or statutory instrument. There must be express court analogy.

THE LAW IN 1962

The four matters to which the Judges in *Cooper's* case looked had been reduced to two and radical alterations had been made in their content. The subject-matter must be a right and not a privilege in Hohfeldian terms.[19] There must be express court analogy. The oft-quoted dictum of Tucker L.J.[20] was very much an exception to this approach.

The law in 1962 restricted the duty to hear to a very narrow ambit—to bodies which looked like courts and had powers like courts. There was, naturally enough, a strong movement to widen the duty, and in the

[13] [1951] A.C. 66 (P.C.).
[14] Ibid. 75.
[15] Ibid.
[16] Ibid. 77.
[17] Ibid. 78.
[18] Ibid.
[19] See W. N. Hohfeld, *Fundamental Legal Conceptions* (edited by W. W. Cook, New Haven, Conn., 1964).
[20] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118 (C.A.).

Commonwealth some courts went to work with a will to break down *Nakkuda Ali's* case. In particular the New Zealand Court of Appeal issued two landmark judgments.

In *New Zealand Dairy Board* v. *Okitu Co-Operative Dairy Co. Ltd.*[21] it interpreted the right/privilege dichotomy in a curious fashion, holding to be permissions only those licences where the law prior to the statute or line of statutes in question had completely prohibited action in the field concerned. Further, it read the phrase "context and conditions" widely enough to make it no longer a question of express court analogy but to include the factual context of the decision. With regard to this second matter, the Court was without doubt acting unjustifiably, for the statement by Lord Radcliffe was clearly and expressly limited to express court analogy. As to the right/privilege dichotomy they were making a brave but essentially fruitless attempt to avoid the distinction and it remained for the High Court of Australia in *Banks* v. *Transport Regulation Board*[22] to lay the distinction to rest.

The second New Zealand decision was *New Zealand United Licensed Victuallers Association* v. *Price Tribunal*[23] where these lines of attack were developed and supported by the concept of a *lis inter partes* as a part of the context and conditions which would show a duty to act judicially. In this the Court brought in by a side door one forgotten element of *Cooper's* case: the nature of the issue.

RIDGE v. *BALDWIN*: THE NEW DIRECTION INDICATED

In *Ridge* v. *Baldwin*[24] the House of Lords held that the Brighton Watch Committee had a duty to act judicially (a duty to give a hearing) when deciding whether to dismiss the area's Chief Constable. The case was argued at two levels: breach of the detailed procedural regulations governing dismissal, and breach of the common law rules of natural justice apart from that. It is Lord Reid's speech which most clearly defines the reasons for a change in the direction of the law.

The indications of the new direction appear in several different parts of Lord Reid's speech. First, there is the way in which he deals with the dismissal situations. Where a person holds office at pleasure there is no hearing: "As the person having the power of dismissal need not have anything against the officer, he need not give any reason."[25] Where, however, the person possessing the dismissal power must possess a substantial reason of a fairly specific nature it is desirable that the existence of the reason should be tested.[26] This is related to justiciability. A

21 [1953] N.Z.L.R. 366.
22 (1968) 119 C.L.R. 222 (F.C.).
23 [1957] N.Z.L.R. 167.
24 [1964] A.C. 40 (H.L.).
25 Ibid. 65-66.
26 Ibid. 66-68.

hearing in the first case would not only be useless but could not exist as a hearing; there must be some issue or issues to guide adversary argument. In *Cooper* v. *Wandsworth Board of Works* Willes and Byles JJ. both adverted to this.[27] Justiciability is not capable of application as a condition *sine qua non*; the width of the issues raised and the extent of the factual elements is a question of degree. Lord Reid treated the dismissal cases as merely examples of the application of a general duty to give a hearing (albeit clearly established ones), but this has not always been recognized.[28]

The second area in which the new direction is indicated is that of natural justice in the reaching of decisions by Ministers of the Crown. This area, like the previous one, is connected with justiciability, though the connexion is more specific. When policy is in, law is out—that, at any rate, seems to be the message of the cases discussed by Lord Reid. In arriving at a policy decision, the Minister must consider "all manner of questions of public interest" and he may legitimately regard his policy as of overriding importance.[29] It would be wrong to read this as saying that the presence of any element of policy excludes the applicability of a hearing requirement. Total absence of a statutory restriction of the matters to be considered in reaching a decision makes the decision one so completely of policy that there is nothing for a hearing to bite upon.[30] There may, however, be stages in a total proceeding where policy appears in only a minor way. At such a stage there may be a sufficiently narrow issue of a suitable character to make a hearing worthwhile. United Kingdom planning legislation illustrates a process where there are hearings and policy decisions made at different stages of the same process.[31] The essence of Lord Reid's proposition is that the wider the discretion the less justiciable is the matter.

Lord Reid rejected the superadded duty to act judicially as a condition *sine qua non* of natural justice. He pointed out that in *Electricity Commissioners*[32] neither Bankes nor Atkin L.JJ. made express reference to this duty,[33] though in *Electricity Commissioners* the duty to act judicially appeared very clearly from the legislation so that there was little or no need for judicial discussion. Lord Reid rejected *Nakkuda Ali* as authoritative.[34] He deduced the duty to give a hearing from the "nature of the power" involved in *Ridge's* case.[35]

[27] (1863) 14 C.B.N.S. 180, 192, 194.
[28] See, for instance, *Vidyodaya University* v. *Silva* [1965] 1 W.L.R. 77 (P.C.).
[29] [1964] A.C. 40, 72.
[30] See *Attorney-General* v. *Cochrane* (1970) 72 S.R. (N.S.W.) 1 (C.A.); *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87 (H.L.) is consistent with this approach. *Durayappah* v. *Fernando* [1967] 2 A.C. 337, 351 (P.C.) also rejects the applicability of a hearing where discretion is very wide.
[31] *Town and Country Planning Act* 1971.
[32] [1924] 1 K.B. 171 (C.A.).
[33] [1964] A.C. 40, 75-76.
[34] Ibid. 78-79.
[35] Ibid. 76, 79.

Lord Devlin's advice discussed at length the vexed question of whether an order made in breach of the rules of natural justice is void or voidable, for this has distracted attention from his discussion of whether the rules of natural justice applied to the power.

Lord Devlin declared that outside certain matters, e.g. dismissal, no rule can be laid down, but, instead, consideration must be given to three things

> "First, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to enforce upon the other."[40]

Here, then, are three of the four matters relied upon in *Cooper's* case: subject matter, issue, and sanction. Later Lord Devlin adverted to the procedural elements involved in the power, thus completing the picture. None of these elements is capable of being answered in a "yes/no" fashion such as would be required if they constituted conditions *sine qua non* of the duty to give a hearing; each will more or less indicate the need for a hearing. Both *Cooper's* and *Durayappah's* cases deduce the duty to hear from a global appreciation of the relative strength of all four elements. The fact that there is no positive indication of a hearing in one element (a "nil" rating) will not necessarily mean that there is no duty to give a hearing. This is illustrated by *John* v. *Rees*[41] where both subject matter (honorary office in the local branch of a political party) and sanction (loss of office) were of little value or objective importance: "I refuse to hold that the right to natural justice depends upon the right to a few pieces of silver."[42] It goes almost without saying, that the approach in *Nakkuda Ali* is the antithesis of that of *Durayappah* and both cannot be authoritative; Lord Devlin's reserving of his opinion on the status of *Nakkuda Ali* can have been no more than politeness.[43]

Having stated the theory, the Board applied it to the facts. First, the Board looked at the subject matter of the power. It was felt that the statute governing local authorities emphasized the importance of their functions, and their independence of operation. It was inferred that powers which interfered with these functions and independence should be construed narrowly and that the local authorities should not be interfered with lightly. This was an indication, though not a strong one, that procedural safeguards should be implied in the operation of the dissolution section.

[40] [1967] 2 A.C. 337, 349.
[41] [1970] Ch. 345.
[42] Ibid. 398 per Megarry J.
[43] [1967] 2 A.C. 337, 349.

There remains the question of how Lord Reid implied the duty to hear from the nature of the power. He looked to the effect of the dismissal, and the need for a factual allegation which was to the discredit of the Chief Constable. These are the second and third elements set out at the conclusion of the writer's discussion of *Cooper's* case.[36] There is nothing in Lord Reid's speech about the subject matter of the case having to involve a right, except in so far as he laid emphasis upon loss of pension rights as a consequence of dismissal.

Before leaving *Ridge* v. *Baldwin* two further points must be made. First, Lord Reid was the only Law Lord expressly to reject *Nakkuda Ali*, and Lord Evershed, on the contrary, maintained its correctness.[37] Secondly, Lord Hodson was the only other Law Lord to give extended consideration to the question whether there was a duty to give a hearing. He set out three matters in reaching his conclusion:

(a) a *lis inter partes* indicates a duty to give a hearing though its absence is not conclusive;

(b) categorization of function is no solution to the problem; and

(c) the necessity in the Regulations for an allegation which reflected upon the person charged indicated a need to give a hearing.

All three matters are related to the elements of *Cooper's* case. For Lord Hodson, the presence of a duty is gauged by the evaluation of factors and not the application of necessary and sufficient conditions. The validity of *Nakkuda Ali* and all the cases based on the Hewart gloss is inconsistent with this new direction.

THE DUTY TO HEAR: THREE LATER LEADING CASES

If *Ridge* v. *Baldwin* determines a new direction in the law, the precise content of that direction appears only in *Durayappah* v. *Fernando*.[38] The relevant legislation there provided that

> "If at any time, upon representation made or otherwise, it appears to the Minister that a municipal council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may . . . direct that the council shall be dissolved and superseded, and thereupon the council shall . . . be dissolved."[39]

An order was made under this section without any hearing or consideration of the arguments which the council may have been able to make. The Mayor, who automatically lost his office upon the dissolution of the

[36] Supra pp. 259-60.
[37] [1964] A.C. at 40, 94.
[38] [1967] 2 A.C. 337 (P.C.).
[39] *Municipal Councils Ordinance* s. 277(1).

council, challenged the dissolution order. It is perhaps unfortunate that Lord Devlin's advice discussed at length the vexed question of whether an order made in breach of the rules of natural justice is void or voidable, for this has distracted attention from his discussion of whether the rules of natural justice applied to the power.

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[40] [1967] 2 A.C. 337, 349.
[41] [1970] Ch. 345.
[42] Ibid. 398 per Megarry J.
[43] [1967] 2 A.C. 337, 349.

As to issue, there were three grounds upon which the Minister could act: incompetence, persistent default, and persistent refusal to follow instructions. Their Lordships made two fundamental points on this. In determining whether there is a duty to give a hearing, it is the statutory grounds which must be considered and not the ground or grounds which in fact actuated the decision-maker. This must be so, for the duty to hear attaches to the power and not to the given action. Secondly, an inquiry as to issue is an inquiry into justiciability. The first two grounds for ministerial action were precise and of such a nature as to require a hearing. This prevailed over the very general and vague ground of incompetence. Had incompetence been the only ground, "it might have been argued that as 'incompetence' is very vague and difficult to define Parliament did not intend the principle audi alteram partem to apply, . . ."[44] Such an approach takes into account the relative narrowness of the issues and the seriousness of the conclusion that the relevant reason exists.[45] This analysis is basically a matter of statutory interpretation, but behind it lies the necessary policy decision related to justiciability which provides the scale in weighing the statutory wording.

The third element to be considered is that of sanction. Here the Judicial Committee found a deprivation of property. It may be fairly noted that deprivation of personal liberty can hardly be rated lower, and that the dismissal cases indicate that deprivation of employment is to to be viewed in the same light.

Durayappah v. *Fernando* set the law squarely within that applicable in the nineteenth century. When reviewing a given body on the question of natural justice the court must look to the four factors mentioned above. It must weigh them and come to an over-all conclusion upon their total effect. The presence of major sanctions, for instance, may well overcome the absence of express court analogy and the relative vagueness of the issue to be determined by the body concerned. To state that the factors of subject matter, issue, sanction, and express court analogy are to be examined and an over-all evaluation made is not the same as saying that the existence of a duty to give a hearing must be extracted from the statute. All four elements are seen in the wording of the statute but the matter does not rest there; wording is not the be all and the end all. Evaluation of the factors is necessarily based upon other matters.

The second vital case since *Ridge* v. *Baldwin* is *Banks* v. *Transport Regulation Board.*[46] In that case the Board was entitled to revoke a taxi-driver's licence for breaking the conditions of the licence frequently,

[44] Ibid. 350-351.

[45] Cf. *Ex parte R., ex rel. Warringah Shire Council, re Barrett* [1967] N.S.W.R. 746 (C.A.), where a similar test was used to show that there was no duty to give a hearing. In that case the statute entitled the defendant to act "if in his opinion circumstances have arisen rendering it advisable so to do".

[46] (1968) 119 C.L.R. 222 (F.C.).

wilfully, or in a way dangerous to the public. The Chief Justice of the High Court looked to the Act itself in examining this subject matter, but he evaluated its provisions against the real commercial background. A taxi licence is a valuable possession, a right to work and an asset which can be disposed of for a large amount of money. The issues were stated in the Act. The allegations required were precise and factual. The consequences of revocation of a licence were that the driver necessarily lost his "meal ticket" and was deprived of the real money value of it which he could have realized by sale of the licence; the case raised the "right to work" and the commercial and personal use to which the proceeds of sale could be put. The Chief Justice's global assessment of these three matters stated with exceptional succinctness the post-*Ridge* law.

> "The nature of the power given to the Board and the consequences of its exercise combine, in my mind, to make it certain that the Board is bound to act judicially and that its proceedings are subject to the prerogative writs. Not merely has the Parliament not given any positive indication in the statute that the Board in deciding to revoke the licence, shall not be required to act judicially and be immune from supervision in the exercise of an absolute and unfettered administrative discretion but it has specified with some precision the specific matters of which the Board should be satisfied before exercising the granted power and has imposed upon the Board the obligation to give written reasons to the licensee for its decision to revoke his licence."[47]

Here are all the *Durayappah* elements. In addition, Barwick C.J. demonstrated the effect of eliminating a requirement that there be express court analogy when he, as it were, put the burden of proof upon those who would say that there is no duty to act judicially, to establish some express provision which supported that contention.[48] Kitto, Owen and Taylor JJ. delivered concurring judgments on this point and McTiernan J. dissented. *Banks'* case also represents the final rejection of the right/privilege distinction.[49] The Chief Justice's argument was simply this: there is no equation between a licence in the common law of real property and a licence in the statutory law of commercial regulation. The former is a "permission by a private person in respect of his own property" while the latter is not only a necessary ticket which enables a man to earn a living but also has a commercial value which is not only real but also substantial.[50] The analogy therefore failed. The essence of examining the subject-matter of the power is not its legal classification but its real importance. His solution was simple, but late in coming.

[47] Ibid. 234.
[48] Ibid. See also *Alliance des Professeurs Catholiques de Montreal* v. *Labor Relations Board* [1953] 2 S.C.R. 140 and Lord Wilberforce in *Wiseman* v. *Borneman* [1971] A.C. 297, 318 (H.L.).
[49] See Supra p. 261.
[50] 119 C.L.R. 222, 232.

The third natural justice issue in *Banks* concerned the fact that under the applicable legislation a decision by the Board did not result itself in the loss of Banks' licence. All decisions by the Board had to be passed on to the Governor of Victoria-in-Council who had power to approve or disapprove of the Board's decision and to make any order which the Board could have made. Barwick C.J. regarded this provision as obligating the Governor to make up his own mind independently on the question in issue.[51] Certiorari does not issue to the Governor-in-Council, but if the decision by the Board could be held to be void then there was nothing for the Governor-in-Council to examine. His would be a "non-decision". In terms of the Atkin dictum, it was doubtful whether the Board's decision *affected* the rights of subjects. Barwick C.J. found that it did affect the rights of subjects because, if the Board's decision was approved, the legislation provided that "the decision of the Board shall have force and effect".[52] The decision so put into effect was, in essence, not that of the Governor-in-Council, but of the Board. Hence, even after the Governor-in-Council had approved the decision it was still possible to challenge the Board's initial decision as void. McTiernan J. disagreed with this analysis and held that it was the Governor's decision which was essential.[53] Kitto J. referred to his own dissent in an earlier case of a non-final decision—*Testro Bros. Pty Ltd* v. *Tait*[54]—and stated that he agreed with Taylor and Owen JJ.[55] Taylor J. agreed in substance with the Chief Justice, noting, additionally, that it was not always the Board's decision to which effect was given.[56] Owen J.'s judgment does not add anything to those of the other Judges.

It is reasonably clear that if the *Durayappah* factors are taken at face value, the Atkin dictum is not only irrelevant but is positively misleading. The formula that a decision must affect rights is a good vehicle for appreciating this. On the *Durayappah* approach, affecting is not a necessary condition of the duty to hear but merely a factor for analysis since the degree to which a decision *affects* anything and the nature of what it affects is the analysis of sanction. It is implicit in the *Durayappah* approach that there may be a duty to give a hearing even though the decision-maker has only a screening task, and cannot make a final determination. *Banks* does not make this matter clear.

It is in the income tax case of *Wiseman* v. *Borneman*[57] that the correct analysis for non-final decisions was made. Under the Act a screening tribunal had to decide whether the Commissioners of Inland Revenue had

[51] Ibid. 240-241.
[52] Ibid. 241.
[53] Ibid. 243.
[54] (1963) 109 C.L.R. 353 (F.C.).
[55] 119 C.L.R. 222, 243.
[56] Ibid. 246-247.
[57] [1971] A.C. 297 (H.L.).

made out a sufficient case for reassessment of a taxpayer's liability. If the tribunal found that there was no sufficient case then the Commissioners could proceed no further, but if they held that there was a sufficient case then there had to be further proceedings before the taxpayer became liable to pay the additional assessment. The legislation set out what had to be proved by either side and the procedure was laid down in some detail including the documents (one from each side) which were to be before the tribunal. It was plain from the statute that there was strong express court analogy, and that the issue to be determined was precise and factual. Both of these factors therefore indicated a duty to give a hearing, but the other factors and the global appreciation of the situation were disputed.

It was common ground in the House of Lords that the tribunal was a "judicial" body,[58] but, as in *Ridge* v. *Baldwin*, it was necessary to decide whether the common law rules of natural justice were applicable in addition to the statutory procedure. Lord Guest was unable to see any distinction between a tribunal which reached final decisions and one which "has to decide a preliminary point which may affect parties' rights".[59] Lord Donovan, while he reserved his opinion on the question,[60] delivered a speech which seems to be inconsistent with denying the applicability of the rules of natural justice. However, the most important speech was that of the Law Lord who, with Lord Reid, has led in the development of administrative law into a coherent system. Lord Wilberforce's speech warrants extensive quotation.

> "I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a prima facie case for taking action. . . . Even if there were anything to be said in favour of treating one class of decision in a different manner from the other, this would be of little value, so great is the range of difference between prima facie decisions themselves. At one end, the decision may be merely that of an administrative authority that a prima facie case exists for taking some action or proceedings as to which the person concerned is to be able in due course to state his case; at the other end, a decision that a prima facie case has been made out may have substantive and serious effects as regards the person affected, as by removing from him an otherwise good defence . . . or by exposing him to a new hazard, or as when he is prevented, however temporarily, from taking action which he wishes to take. In the present case, the decision of the tribunal may have the effect of denying the taxpayer the opportunity of eliminating, in limine, a claim which may otherwise have to be fought expensively through a chain of courts."[61]

[58] Ibid. 311 per Lord Guest.
[59] Ibid.
[60] Ibid. 317.
[61] Ibid.

Lord Wilberforce set out the other two factors of *Durayappah's* case, discussed them in theory, and applied them to the facts. Lord Wilberforce's analysis directs attention to two things: the alleged effect which the preliminary decision has (the importance of the sanction) and the directness with which the decision produces that result. Indeed, this division is the natural and logical way of breaking up any investigation as to how far the sanction indicates the desirability of a duty to give a hearing. The tenor of all the speeches in the case is consistent with Lord Wilberforce's approach, although only two Law Lords actually discussed the point.

CONTENT OF THE HEARING: A COROLLARY OF THE NEW DIRECTION

The effect of the new direction in natural justice has clearly been to extend greatly the number and types of bodies having a duty to give a hearing. This very change precipitated a shift in the crucial issue of any given case. So long as the bodies having a duty to act judicially were relatively few and so long as they were essentially bodies which looked like courts in the narrow sense, the content of the hearing remained relatively fixed, certain, and judicial in the narrow sense. With the great increase in the bodies having a duty to give a hearing, many of the bodies which were obliged to give a hearing could not allow a court-like hearing with the confrontation of witnesses. Immigration cases aptly illustrate this.[62] Thus, the vital question in a given case became whether the procedure used breached the rules of natural justice. *Wiseman* v. *Borneman* shows the appropriate approach to this question.

It is helpful to start with Lord Wilberforce in *Wiseman's* case

> "I am not . . . satisfied with an approach which merely takes the relevant statutory provision . . ., subjects it to a literal analysis and cuts straight to the conclusion that Parliament has laid down a fixed procedure which has only to be literally followed to be immune from attack. It is necessary to look at the procedure in its setting and ask the question whether it operates unfairly to the taxpayer to a point where the courts must supply the legislative omission."[63]

He then set out the statutory requirement that the tribunal consider the Inland Revenue allegation, the taxpayer's reply, and the Revenue's counter-statement. The general principle stated above was then tied more closely to the factual situation

> "The question to be answered, in my opinion, is this: is it fair that the tribunal should decide on this material: or, in the interests of natural justice, or fairness, ought there to be read in a requirement either to allow the taxpayer an opportunity to see and answer the counter-statement, or, perhaps, to allow him some kind of hearing? Thus, this

[62] E.g. *Re H.K.* [1967] 2 Q.B. 617 (D.C.).
[63] [1971] A.C. 297, 317.

> is not a case where the court has to supply the requirement audi alteram partem. The requirement is, up to a point, already and expressly there. The question is, whether it is so imperfectly and inadequately imposed that the court should extend it."[64]

Although this represented the approach of all the Law Lords, Lord Reid's test that "it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation"[65] provides another useful formulation. In general, statutory procedural rules merely shorten the line of reasoning for common law natural justice and do not alter its results or techniques; breach of natural justice must be considered against all the factual background.

When the Law Lords in *Wiseman's* case came to apply these principles to the facts, the following elements were considered:

(a) the opportunity actually afforded to the taxpayer to present his case;

(b) the advantage he would have received by the added hearing claimed;

(c) the purpose of the tribunal and the needs of the legislative scheme; and

(d) the factors relevant to deciding whether there was a common law duty to act judicially (these factors being used a second time).

Lord Reid took the view that the more important the sanction, the greater would be the requirements of natural justice.[66] This factor was also considered by Lord Morris.[67] Lords Guest and Donovan applied sanction to positive effect by holding that since a decision that there was no prima facie case was "final" for the Revenue, the Commissioners should have the last comment.[68] Lord Wilberforce's view was that as a general principle the relative strength of the "*Durayappah* factors" in indicating a hearing should be borne in mind when considering the content of that hearing.[69] The instant case was one where, in his opinion, the judicial requirement was important and should be a reality in the procedure.

Possibly the crucial test applied in *Wiseman's* case was whether the added hearing demanded would achieve anything significant. All Law Lords took the view that in this case everything relevant would, or should, have emerged from the taxpayer's statutory declaration—one of the documents expressly required to be before the tribunal. The common law, therefore, did not require any further hearing to enable the taxpayer to be treated fairly.

The rule *audi alteram partem* will be breached where the procedure

[64] Ibid. 320.
[65] Ibid. 308.
[66] Ibid.
[67] Ibid. 309.
[68] Ibid. 312, 315.
[69] Ibid. 318.

actually followed resulted in unfairness to the plaintiff before the tribunal. What degree of hearing will be required to be fair will depend on all of the four matters relied upon above, but the yardstick will be the fourth matter: the strength of the elements which lead to the conclusion that a duty to give a hearing arises. These common law elements, therefore, both indicate the existence of the duty and its extent. Of those elements, the most important would appear to be the seriousness of the subject-matter and the sanction attached to the power. The purpose of requiring a body to act according to the rules of natural justice is to protect the individual's interests and to ensure that justice is done. Just as greater care is taken and more weighty evidence required where a person is accused of murder than where the offence is shop-lifting, so too, as a matter of policy, the requirements of natural justice become more rigorous as the subject-matter and sanction become more serious. A more court-like procedure is required.

The content of the rule *audi alteram partem* changes not only with the particular decision-maker, but also with the facts of the matter before him. In *Wiseman* Lord Reid opposed the adoption of hard and fast rules governing the content of the hearing,[70] Lord Morris expressly stated that the content of a hearing depended on the facts of the actual case,[71] and Lord Wilberforce laid great stress on the individual facts in this part of his speech. Lords Guest and Donovan, however, looked only at the tribunal in general. While the majority approach may answer the needs of justice, it does so at the expense of certainty. Lord Guest regretted that if by this approach each case was to be "decided *ex post facto* upon some uncertain basis".[72] However, it may be said that the theory of relating the degree of hearing to the seriousness of the matter is to be applied only broadly. Thus, the degree of hearing does not vary from case to case but from category to category of subject-matter. An immigration officer must provide a different hearing for Commonwealth immigrants from that for aliens and university disciplinary authorities must give a greater hearing to students likely to be expelled than for limited suspension. Uncertainty is not, therefore, as great as may appear at first sight.

THE CONTENT OF THE HEARING: BROAD LEVELS OF FAIRNESS

The cases appear to differentiate between a number of broad types of hearing. These range from the opportunity to make submissions, through evidence and cross-examination, to formal and legal representation. Within each band there are some variations. There does, however, seem to be a

[70] Ibid. 308.
[71] Ibid. 309.
[72] Ibid. 310.

hierarchy in the rule *audi alteram partem* which is fairly closely related to the seriousness of subject-matter and sanction. The cases used to illustrate these levels of hearing are all ones subsequent to *Ridge* v. *Baldwin*. Earlier cases could be used as illustrations, but it is conceived that the later trends in the cases are a more apt illustration.

The Opportunity for Submissions

The cases within this band are those where an analysis of the *Durayappah* factors does not show strongly that a hearing is required.

In general, an alien has no right of entry into a country and may be deported at will. The effect of *Ridge* v. *Baldwin* was not such as to lead the English Court of Appeal in *Schmidt* v. *Secretary of State for Home Affairs*[73] to depart from its earlier decision in *R.* v. *Brixton Prison Governor, ex parte Soblen*[74] that an alien was not entitled to a hearing on the question of whether he should be admitted to the United Kingdom. This is not because immigration is *sui generis*. Rather, none of the "*Durayappah* factors" show any implication of a hearing. The subject-matter involves something which the applicant does not have and has no special claim to (residence), the sanction of loss is illusory because there is nothing to lose, there need be no reasons for the Crown to refuse entry so there is no justiciable issue, and there is no express court analogy. Statutory rights of entry or residence for aliens change this picture and will, it is submitted, give a right to a hearing of the type discussed in this section.

In *Schmidt's* case, however, Lord Denning M.R. expressed the view that there would be a common law right for a resident alien if his permit was revoked before the nominated time had expired, "for he would have a legitimate expectation of being allowed to stay for the permitted time".[75] This situation differs only marginally from an alien's rights in other situations. There is a possession, or right in the widest sense, of some value; deportation will cause disruption and genuine loss. But there is still no justiciable issue or court analogy. Hence, any hearing which goes further than the right to make representations will be anomalous: because no reason need be given there is no point in any form of rebuttal.

The Right to be Informed of the Case to be Met

A stage further up the scale is *R.* v. *Gaming Board, ex parte Benaim and Khaida*.[76] There the Board was a "filtering" body. It had to examine the character and connexions of applicants for gambling licences to ensure that they were of good character. The Board had no power to grant a licence,

[73] [1969] 2 Ch. 149 (C.A.).
[74] [1963] 2 Q.B. 243 (C.A.).
[75] [1969] 2 Ch. at 171.
[76] [1970] 2 Q.B. 417 (C.A.).

but its consent was a necessary prerequisite for a licence. The subject-matter involved the right to work in a broad sense, but the question was one of an application and not of a revocation, so neither sanction nor subject-matter was of real significance. The proceedings were preliminary, but they were conclusive if against the applicant.[77] The issue to be determined by the Board was open-textured and vague: is the applicant "likely to be capable of, and diligent in, securing that the provisions of the Act . . . are complied with, that gaming on those premises will be fairly and properly conducted, and that the premises will be conducted without disorder or disturbance".[78] There was, therefore, no strong indication of a hearing, although it may be noted that a decision against the applicant would cast a slur on his character. The only element of express court analogy was that the Board must inform the applicant of its objections to the fullest possible extent consistent with the public interest.

These elements were stronger than those in the preceding cases so that a greater degree of hearing was appropriate. The applicants sought a right to cross-examine the persons who had given the Board information which suggested that they were not of the appropriate character. This was rejected by the Court of Appeal. The Court referred to the need for confidentiality of sources,[79] to the nature of the subject-matter, and to the sanction. Lord Denning M.R. found that the Board must "act fairly"[80] and said

> "They must give the applicant an opportunity of satisfying them of the matters specified in the subsection. They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office, . . . or depriving him of his property."[81]

This statement relied heavily upon *Re H.K.*[82] Two points should be noted. It is apparent that the degree of hearing was related directly to the seriousness of the matter. Also, there is no indication that the "duty to act fairly" is anything other than an abbreviation to describe a particular degree of hearing required by the rules of natural justice.

A further case in this band of hearing is *Re Pergamon Press Ltd.*[83] involving an investigation by Board of Trade inspectors into the running of the company. This subject-matter was important but was clearly of less seriousness in the eyes of the legislature than the statutorily protected independence of the local authority in *Durayappah*. The issues were factual, though broad, but involved charges which reflected upon the character of the directors. There was no express court analogy. An adverse report by

77 Cf. *Wiseman* v. *Borneman* [1971] A.C. 297 (H.L.).
78 *Gaming Act* 1968 Sch. 2 para. 4(5) and (6).
79 Cf. *Rogers* v. *Home Secretary* [1973] A.C. 388 (H.L.)—a Crown privilege case.
80 The duty to act fairly is considered infra, pp. 278-9.
81 [1970] 2 Q.B. 417, 430.
82 [1967] 2 Q.B. 617 (D.C.).
83 [1971] Ch. 388 (C.A.).

the inspectors would not result in legal sanctions, but could form the basis of legal proceedings. These consequences and the fact that the investigation could result in a charge against the directors suggested that a significant hearing was appropriate. On the other hand, the question of confidentiality of sources was relevant in this context also.

Lord Denning M.R. looked at all these elements and had no hesitation in concluding, first, that there was a duty to give a hearing, and, secondly, that the inspectors' obligation was that enunciated in *Benaim and Khaida*.[84] Sachs L.J. agreed, and suggested that the precision with which the charges should be outlined would vary with the facts.[85] Buckley L.J. (a company law expert) detailed the hearing requirement with greater precision

> "If inspectors are disposed to report on the conduct of anyone in such a way that he may in consequence be proceeded against, either in criminal or civil proceedings, the inspectors should give him, if he has not already had it, such information of the complaint or criticism which they may make of him in their report and of their reasons for doing so, including such information as to the nature and effect of the evidence which disposes them so to report, as is necessary to give the person concerned a fair opportunity of dealing with the matter, and they should give him such an opportunity."[86]

Because of his expertise, the opinion of Buckley L.J. should, perhaps, be given greater emphasis. He laid considerable stress upon the possibility of further legal action. In this respect he, and his fellow Judges, make clear that the dissenting judgment of Kitto J. in *Testro Bros. Pty Ltd* v. *Tait*[87] was correct.

Oral Hearing and Cross-Examination

Two university cases illustrate this degree of hearing. The first case is *Glynn* v. *Keele University*[88] where the applicant was fined and suspended for one year under the Vice-Chancellor's power to maintain and promote the "efficiency and good of the university".[89] The applicant was found to have sun-bathed naked in the University grounds. Admission to the university and completion of a degree is an important subject-matter for it has considerable repercussions on the career of the student concerned. In this case, the sanction was only loss of membership of the university for one year, which was not a complete and irrevocable loss of the subject-matter. The issue was factual and precise: whether the student had done that act which was alleged. Finally, there was extensive express court analogy in an appeal provision which included detailed rules of procedure

[84] Ibid. 400.
[85] Ibid. 405.
[86] Ibid. 407.
[87] (1963) 109 C.L.R. 353 (F.C.).
[88] [1971] 1 W.L.R. 487 (Ch.D.).
[89] *University Statutes* s. 6(3).

and evidence. Thus, all elements were in favour of a hearing, but those of subject-matter and sanction were perhaps not so strong as the other two.

Pennycuick V.C. relied expressly upon the "*Durayappah* factors" in deciding whether there was a duty to give a hearing.[90] He did not, however, spell out the content of the hearing, saying only that the Vice-Chancellor "ought . . . to have sent for him before he left Keele, and given him an opportunity to present his own case".[91] There is an element of a formal hearing here, with the applicant being entitled to the oral presentation of his case. There is, however, no indication that cross-examination will be permitted or that anything akin to a trial was necessary.

The case of *R.* v. *Aston University Senate, ex parte Roffey*[92] is more specific. Here the subject-matter was the same as in *Glynn's* case but the sanction was exclusion both under the rules on failure of examinations and pursuant to a general power.[93] Roffey and others had dismally failed their examinations. Donaldson J. delivered the main judgment, and neither Lord Parker C.J. nor Blain J. differed from his view in any significant way. He laid considerable stress upon the detailed examination regulations which constituted strong express court analogy,[94] and finally concluded that

> "In such circumstances and with so much at stake, common fairness to the students, which is all that natural justice is, and the desire of the examiners to exercise their discretion upon the most solid basis, alike demanded that before a final decision was reached the students should be given an opportunity to be heard either orally or in writing, in person or by their representatives as might be most appropriate."[95]

In this case, the far-reaching sanction resulted in a greater degree of hearing than was required in *Glynn's* case.

In the recent case of *Herring* v. *Templeman*[96] the Court of Appeal cast doubts upon the principle stated by Donaldson J. in *Roffey's* case. The Court held that the appropriate hearing on questions of whether a student should be expelled for failure in examinations was one "to give the student a fair chance to show why the recommendations [for exclusion] should not be accepted".[97] In particular, the Court held that the student was not entitled to all the information before the decision-maker. On its face this confines the content of the hearing in such cases to no more than the level found in *Glynn's* case. This decision is capable of being confined to the facts of the hearing demanded by the student, and so set within the thesis of this article. Also, some of the grounds for differing from *Roffey* are incorrect. However, the case must be regarded as casting doubt upon

90 [1971] 1 W.L.R. 487, 493-494.
91 Ibid. 495.
92 [1969] 2 Q.B. 538 (D.C.).
93 *University Statutes* s. 19.
94 [1969] 2 Q.B. 538, 552-553.
95 Ibid. 554.
96 [1973] 3 All E.R. 569.
97 Ibid. 587.

the placing of these two university cases at this stage of the structure developed here. Earlier cases such as *University of Ceylon* v. *Fernando*[98] may, however, be analysed in the above manner and be seen to represent this level of hearing.

Cross-examination involves another step up the scale. It is possible only where *evidence* is produced orally. In this way the situation differs from that in either of the preceding cases in which the material which opposed the applicant's interests may be in the hands of the decision-maker from another source or proceeding. By the time the stage of cross-examination is reached there is a formal trial procedure, and it will only be in the strongest cases that this will be required. However, if the oral hearing involves witnesses, the old law which implies the right of cross-examination would presumably still hold good.[99]

The Right to a Full Trial

In this context the twin cases of *Pett* v. *Greyhound Racing Authority (No. 1)*[100] and *(No. 2)*[101] well illustrate the situation. The case concerned an inquiry into allegations that Pett had been drugging greyhounds under his control. The penalty, should he be found to have done so, was disqualification as a greyhound trainer. This was a deprivation of employment. Beyond the use of such words as "inquiry" in the Rules of Racing, there was no express court analogy. However, the issue was precise, factual, and in the nature of a charge against the applicant. Hence, three of the four "*Durayappah* factors" very strongly supported a hearing.

The question before the court was whether the Authority's refusal to allow Pett legal representation breached the rule *audi alteram partem.* In *Pett (No. 1)*, Lord Denning M.R. said obiter that it did infringe the rule and the Court of Appeal granted an interlocutory injunction. Lord Denning held that, because of the seriousness of the charge and the consequence of being found guilty, an accused person should be entitled to a "friend"—"And who better than a lawyer who has been trained for the task".[102] Lyell J. refused to follow this dictum when the case came to trial. He distinguished "domestic tribunals" from statutory bodies and held that they are subject "only to the duty of observing what are called the rules of natural justice and any procedure laid down or necessarily to be implied from the instrument. . . ."[103] Apparently, then, Lyell J. took the view that the rules of natural justice could never require representation; he accepted the pre-1963 law stated in *University of Ceylon* v. *Fernando*[104]

98 [1960] 1 W.L.R. 223 (P.C.).
99 *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636; *R.* v. *Edmonton JJ. ex parte Brooks* [1960] 1 W.L.R. 697 (D.C.).
100 [1969] 1 Q.B. 125 (C.A.).
101 [1970] 1 Q.B. 46.
102 [1969] 1 Q.B. 125, 131-132.
103 [1970] 1 Q.B. 46, 63.
104 [1960] 1 W.L.R. 223, 232-233 (P.C.).

and the cases there cited. Only a change of the Greyhound Racing Rules, which rendered the issue moot, saved Lyell J.'s judgment from its probable rejection in the Court of Appeal.

With respect, it is submitted that Lyell J.'s opinion cannot be sustained. The whole thrust of the cases since *Ridge* v. *Baldwin* has been to eliminate the hard and fast construction of statutes, and to broaden the scope of *audi alteram partem*. Several of the cases discussed in this article have gone further than Lyell J. was prepared to go in detailing the content of *audi alteram partem*. One aspect of natural justice is that the applicant should be "given an opportunity to state his case",[105] but what that opportunity means will vary with the facts of the case. The opportunity may on occasions include legal representation. Lord Denning M.R.'s statement may be too wide, but it indicates with clarity the considerations which move a court to raise the content of the hearing.

However, it seems that there is never a *right* to legal representation. Its granting is always discretionary, though a body cannot exclude the possibility of legal representation. This, at any rate, is the opinion of Lord Denning M.R.,[106] and if he has rejected the right to legal representation then it may be taken that natural justice will not go that far in modern conditions.

THE DUTY TO ACT FAIRLY

The use of this phrase to indicate a degree of administrative hearing first appeared in *Re H.K.*[107] and has appeared frequently since then. It is debatable whether it is merely a description of a certain content of hearing due under the rule *audi alteram partem*, or is a separate though analogous concept which is binding on every administrative decision-maker, and is not to be confused with the duty to act judicially and obey rules of natural justice.

Re H.K. involved a Commonwealth immigrant to the United Kingdom who claimed to be a child under sixteen of a U.K. resident. If he was under sixteen then he was entitled to entry automatically, otherwise he would almost certainly be excluded. In terms of the scheme used in this article, H.K. would be entitled to a hearing which would at least include the right to make representations. In fact, the Divisional Court gave H.K. a right to a hearing equal to that in the *Gaming Board* case,[108] though the duty was phrased differently[109]

"*That is not, as I see it, a question of acting or being required to act*

[105] Byrne J., quoted by Lyell J. [1970] 1 Q.B. 46, 65.
[106] *Enderby Town Football Club* v. *Football Association* [1971] Ch. 591, 605 (C.A.).
[107] [1967] 2 Q.B. 617 (D.C.).
[108] *R.* v. *Gaming Board, ex parte Benaim and Khaida* [1970] 2 Q.B. 417 (C.A.). See, supra pp. 273-4.
[109] [1967] 2 Q.B. 617, 630.

> *judicially, but of being required to act fairly.* Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, *only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.*"[110]

Lord Parker's exegesis is contradictory, but the context in which it was spoken makes it clear that while the duty is an application of the rules of natural justice, it is a duty lying on bodies not obliged to act judicially.

Salmon L.J. took the opposite tack. First, he found that there was a duty on the immigration officer to act quasi-judicially,[111] and then held that this did not require a court-like hearing but only that the officer must act "fairly in accordance with the ordinary principles of natural justice".[112] Fairness, in his view, was part of natural justice applicable to quasi-judicial bodies, but whether a body can be classified as administrative or quasi-judicial is irrelevant to whether it is under a duty to give a hearing. The separation of fairness from natural justice has been often reiterated by judges, e.g. by Lords Pearson and Salmon in *Pearlberg* v. *Varty*.[113] It is significant, however, that judges who separate fairness and natural justice do so in situations where they have felt obliged to speak conceptually: fairness is for administrative bodies, natural justice for judicial. If there is one thing that the recent history of administrative law illustrates, it is that to define rights and duties in terms of concepts is unproductive. Concepts such as "judicial discretion" are incapable of definition. They describe a set of phenomena. The definition, so far as it can be called that, *is* the phenomena. In the context of natural justice a discretion is "judicial" where there are requirements which are of the nature of a "hearing". These are determined not by concept but by evaluation of the "*Durayappah* factors". In this sense, the distinction between fairness and natural justice may be explicable: it may provide shorthand expression for cases where representations must be allowed (with or without information as to the issue to be met in the representations) on the one hand, and cases where an oral hearing is necessary on the other—administrative fairness and quasi-judicial thesis of this article, and some of the grounds for differing from *Roffey* natural justice. But if the distinction is being used in this way it is dangerous. Both of the concepts to which these duties are attached have a long history. Their use invites a return to the approaches seen before 1963. Already there is an indication that this is exactly what has happened.

[110] Ibid. Emphasis added.
[111] Ibid. 633.
[112] Ibid.
[113] [1972] 1 W.L.R. 534, 547, 550.

THE NEW REVISIONISM

It is trite law that the duty to obey the rules of natural justice appears primarily from the statute concerned. But the process of determining a duty to give a hearing is not simply one of statutory interpretation. By dwelling upon statutory interpretation, one is directed to the procedural rules contained in the statute, with the implication that express court analogy is necessary for a duty to hear. It is this very requirement that *Ridge* v. *Baldwin* scotched. Many of the recent cases where breach of natural justice has been alleged have concerned bodies whose powers and procedures have been set out in detailed and codified form. Three cases in the House of Lords and Privy Council fall into this class.[114] They show the nature and extent of this new revisionism.

The presence of a code does not exempt the courts from examining the powers of the body by the common law rules. *Ridge* v. *Baldwin* itself dealt with a detailed procedural code. The procedure will, undoubtedly, show strong express court analogy, but the other three elements set out in *Durayappah* v. *Fernando* will remain for broad common law analysis. Where there is a code it will be the exceptional case which holds that there is no duty to give a hearing. However, the approach of most of the Law Lords participating in the decisions referred to in this section has been distorted into a question of looking for each element of hearing in the statute and going no further than the express provisions in reaching their conclusions as to content. Clearly, the decisions in *Pearlberg* v. *Varty*[115] and on one of the parts of *Furnell* v. *Whangarei High Schools Board*[116] are correct. What is more important (perhaps crucial to the future of natural justice) is the way the Law Lords went about their task.

Four propositions run through these recent cases.[117] First, since Parliament went to the trouble of providing a detailed procedural code any omission from it must have been deliberate.[118] Secondly, where the decision-making takes the form of a multi-stage process, any legislative failure to provide for a hearing at an early stage is compensated for by a hearing at a later stage.[119] Thirdly, decisions must be based on a meticulous analysis

114 *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578 (H.L.); *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534 (H.L.); *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 (P.C.).

115 [1972] 1 W.L.R. 534 (H.L.).

116 [1973] A.C. 660 (P.C.).

117 *Furnell's* case has been analysed in detail by the author in "The Unsystematic Approach to Natural Justice" (1973) 5 N.Z.U.L.R. 373. See also Professor Northey's reply, "The Aftermath of the Furnell Decision" (1974) 6 N.Z.U.L.R. 59.

118 [1971] 1 W.L.R. 1578 at 1587 per Lord Morris with Lord Guest agreeing: [1972] 1 W.L.R. 534 per Lords Hailsham L.C. at 537, Dilhorne at 543-544, Pearson at 547-548, and Salmon at 551; [1973] A.C. 660 at 679-687.

119 [1972] 1 W.L.R. 534 per Lords Hailsham L.C. at 540, Dilhorne at 545, and Salmon at 551; [1973] A.C. 660 at 681.

of what the statute says and the context in which it was passed.[120] Fourthly, there is no duty to give any form of hearing unless the body has power to decide something.[121]

Some brief comments may be made on these four propositions. As to the first, this is based on a fiction which is obviously inaccurate. Where the code is in a statutory instrument it is all too likely that it will almost certainly not have been subjected to careful and thoughtful scrutiny as to the justice and social desirability of its procedural provisions. Even as a statute, the vast quantity of subsequent amendments to detail of legislation demonstrates that not every implication and problem is sorted out before a Bill becomes an Act. In any case, "Parliament" generally means the political governing party and perhaps (often in this area of procedure) members of a government department. The history of natural justice is punctuated with additional implications of procedural rules in detailed legislative provisions.

The second proposition is directly contrary to *Wiseman* v. *Borneman* where the House of Lords considered the relevant stage of proceedings quite separately from any subsequent ones. If an analysis of natural justice in preliminary proceedings is to have any role, this must be the approach. It is basic to the principles upon which a duty to hear is now implied that if the situation is such that the common law would imply a hearing, it is for those opposing a hearing to establish an express provision in their favour.[122] The second proposition reverses this basic approach.

The third can be true only if natural justice is a statutory implication. It is not. It is a common law implication which brings the statutory provisions into line with the common law requirements of justice. The process for the courts is that adopted by the House of Lords in *Wiseman* v. *Borneman*; the issue is whether the extra element of hearing that the applicant seeks is necessary in order that he might have justice done to him. If it is necessary then it will be implied, whether or not it can be worked into the statutory wording. Certainly the Courts will not make such an implication gratuitously; this simply represents the constitutional balance of power. But if the implication is not to be made this decision must be based on valid reasons and presumptions.

Finally, the fourth proposition represents a return to the pre-1963 law and the Atkin dictum. It threatens to say that a decision "affecting the rights of subjects" is an essential condition for the duty to give a hearing. It will be on rare occasions only that there will be a duty to hear where

[120] [1971] 1 W.L.R. 1578 per Lord Morris throughout his speech with Lord Guest agreeing; [1972] 1 W.L.R. 534 per Lords Hailsham L.C. at 540, Dilhorne passim, and Pearson at 547.

[121] [1972] 1 W.L.R. 534 per Lord Hailsham at 539; [1973] A.C. 660 at 680.

[122] See the cases cited in fn. 48 supra.

the body concerned reaches no decision at all. However, even a recommendation which may be acted upon by some other body is a sufficient "decision" to attract the rules of natural justice.[123]

CONCLUSION

Natural justice, like so many other areas of administrative law, depends upon the systematic application of a theoretical structure. Too often judges have relied upon the facts of the case to the exclusion of concrete general principles. This structure is provided by the four elements found in *Cooper* v. *Wandsworth Board of Works* and elaborated in the modern law in *Durayappah* v. *Fernando*. These elements provide the foundation for a decision whether a given tribunal or other body has a duty to give a hearing. The thrust of this modern structure is towards extending the duty to give a hearing. But with an extension of the duty to hear, the content of the hearing becomes widely variable. It ranges upward from the duty to allow the individual to make representations. The degree of hearing appropriate to a particular case is that which will ensure that justice is done. It will depend largely upon the seriousness of the proceedings, but also upon the practical needs of the administration—confidentiality, quick decision, and the object of the legislation.

There is no need for a judge to determine the nature of the body making the decision. The whole process outlined in this article and which is best shown by *Durayappah* v. *Fernando* and *Wiseman* v. *Borneman* is characterized by an evaluation of factual elements. Not every decision-maker will have an obligation to provide a hearing, but those which do have that obligation must provide a hearing in keeping with the justice of the situation.

To a large extent this process will involve statutory interpretation, but the statute is not the only, or even the ultimate, piece of material from which the duty and content are derived. To look at the statute with an intense and minutely analytical gaze serves only to continue the present fragmentation of judicial review of administrative action. It will result in loss of the essential sense of direction without which statutory analysis is pointless. Lord Wilberforce in *Malloch* v. *Aberdeen Corporation*[124] may be left with the last word. The issue falls to be "treated broadly on arguments of public policy and not to be resolved on narrow verbal distinctions".[125] Characterization is to be avoided.[126] Judges' first step is to look at the Act, but "this should not . . . prevent them from examining the

[123] See *Re Pergamon Press Ltd.* [1971] Ch. 388 (C.A.).
[124] [1971] 1 W.L.R. 1578 (H.L.).
[125] Ibid. 1594.
[126] Ibid. 1595-1596.

framework and context of the [subject-matter] . . . to see whether elementary rights are conferred upon him expressly or by necessary implication, and how far these extend".[127]

[127] Ibid. 1597.

CASE COMMENTARY

BRADLEY v. THE COMMONWEALTH[1] AND SECTION 57(1) OF THE POST AND TELEGRAPH ACT

Section 57(1) of the Post and Telegraph Act 1901-1971 (Com.) provides as follows:

> If the Postmaster-General has reasonable ground to suppose any person to be engaged either in the Commonwealth or elsewhere in receiving money or any valuable thing—
>
> (a) as consideration (1) for an assurance or agreement express or implied to pay or give or (2) for securing that some other person shall pay or give any money or valuable thing on an event or contingency of or relating to any horserace or other race or any fight game sport or exercise; or
>
> (b) for promoting or carrying out a scheme connected with any such assurance agreement or security or a lottery or scheme of chance or an unlawful game; or
>
> (c) as contributions or subscriptions towards any lottery or scheme of chance; or
>
> (d) under pretence of foretelling future events; or
>
> (e) in connexion with a fraudulent obscene indecent or immoral business or undertaking;
>
> he may by order under his hand published in the *Gazette* direct that any postal article received at a post office addressed to such person either by his own or fictitious or assumed name or to any agent or representative of his or to an address without a name shall not be registered or transmitted or delivered to such person.

I believe that an implied requirement that the Postmaster-General hold hearings prior to action under this subsection ought to be and would be found by the High Court were the issue to be raised before it today. In elaborating on my position I will refer particularly to two High Court decisions which have concerned themselves with s. 57(1), the most recent being *Bradley's* case.

The first of these decisions, *R.* v. *Arndel*,[2] decided in 1906, provides a convenient point of departure. In that case one Freeman, whose firm had been the subject of an order made under s. 57(1) without prior hearing, sought a writ of mandamus to compel the Postmaster-General to deliver mail to him. The basis of his application was his contention that the order under s. 57(1) had been a nullity because the Postmaster-General had wrongly come to the conclusion that he had reasonable ground to suppose

[1] (1973) 1 A.L.R. 241.
[2] (1906) 3 C.L.R. 557.

Freeman's firm to be engaged in a fraudulent and immoral business. The Court held, however, that it was incapable of reviewing the Postmaster-General's findings of fact that persons were engaged in any of the activities proscribed by s. 57(1).[3] Apparently sensing this outcome during argument, Freeman had also argued that certiorari would lie to quash the order because it had been made without giving him a hearing beforehand. The reason for this shift in the remedy sought must have been the view that failure to hold a hearing when one was impliedly required merely rendered the order voidable and not void,[4] so that certiorari was the only remedy available. In any event, Freeman was unsuccessful with this argument too, the Court holding that the Postmaster-General was under no implied duty to hold hearings prior to action under s. 57(1). Various reasons for this conclusion were advanced, some by more than one of the learned Justices.

Griffith C.J. doubted whether the courts ought ever to infer a duty to hold hearings before action when the power in question was one exercisable by a Minister.[5] Such doubts have since been laid to rest, although not in the way the learned Chief Justice would have expected. The fact that a power is exercisable by a Minister does not preclude the inference of a duty on him to hold hearings.[6]

The learned Chief Justice also believed that no duty to hold hearings prior to action under s. 57(1) ought to be inferred because the power was one to be exercised in emergencies[7]—if time were lost as a result of the need to hold hearings, great public harm would ensue.

The harm sought to be suppressed by s. 57(1) is the doing of the activities listed therein. The exercise of the power conferred in that subsection, however, is not particularly effective in achieving that result, since it only prevents a person from receiving mail, not from sending it as well, as do some other provisions in the Act.[8] Even if it did both, it would still not be a complete deterrent to the doing of those activities—only the criminal process could achieve that result. In view of the relative ineffectiveness of the power conferred in s. 57(1) in achieving its aim, it can hardly be said that it must be exercised without hearings' being held so as to overcome any emergency that would otherwise arise. It could not do so even if it were exercised without hearings.[9]

Barton J. suggested that no hearing requirement ought to be inferred in respect of s. 57(1) because of the wording of other provisions in the Act.[10] Other provisions conferring powers not to transmit or deliver mail in

[3] Ibid., 571, per Griffith C.J.; 577-8, per Barton J.
[4] This view has since been superseded. See S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed., London, Stevens & Sons, 1973), 1973, 209ff.
[5] Op. cit., 571-2.
[6] See *Durayappah* v. *Fernando*, [1967] 2 A.C. 337 (P.C.) and *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 A.C. 13 C.P.C.
[7] Op. cit., 572.
[8] See ss. 29(3) and 44. Cf. the Post Office Act, R.S.C. 1970, c. P-14, s. 7(1), the Canadian provision similar to s. 57(1).
[9] Cf. *Walker* v. *Popenoe*, 149 F. 2d 511 (D.C.C.A., 1945), an American case rejecting the "emergency" argument on the then-current legislation allowing the Postmaster-General to bar materials from the mails.
[10] Op. cit., 574-5.