Natural Justice in English Law: Continuity and Change from the 17th Century

Professor Paul Craig[*]

1 Introduction

This chapter is concerned with the historical development of natural justice from the early 17th century onwards. It is a rich and interesting story. It is also important for the overall thesis of a book that I am writing on *English Administrative Law 1600-2022: Continuity and Change*.[1] Contrary to popular belief, England developed a system of administrative law from the 17th century onwards, with origins that date back considerably earlier. Natural justice/due process was central to that system, as it is to any regime of administrative law. The reality is that the courts developed a sophisticated body of jurisprudence from first principles concerning both the right to be heard and the rule against bias. It was applied not only to public bodies broadly defined, but also to clubs, trade associations and mutual associations alike. The courts thus reasoned across the public/private divide. The structure of the ensuing argument is as follows.

The story begins with the foundational case law concerning the right to a hearing, which is followed by discussion of its applicability and content. The focus then shifts to analysis of bias, with discussion of the doctrinal foundations, followed by consideration of the breadth of its application. The analysis thereafter is on the 20th century case law prior to the 1960s, which exhibited elements of continuity with the earlier case law, but also change, in the sense of limitations engrafted on natural justice that were not present in the earlier case law. The final

[*] Emeritus Professor of English Law, St John's College, Oxford.

[1] P Craig, *English Administrative Law 1600-2020: Continuity and Change*.

section of the chapter examines the seminal decision in *Ridge v Baldwin*,[2] which reconnected with the case law from the 17th-19th centuries and struck down a number of the limitations imposed in the earlier part of the 20th century. The remainder of this section charts the continuity and refinement of natural justice in the modern law when viewed in the light of the historic jurisprudence.

2 Hearing: Foundations

We begin with the foundational jurisprudence concerning the right to a hearing. The seminal decision was *James Bagg's* case, which was also central to the development of mandamus as will be seen below. It was the key early case on process rights, in this instance the right to a hearing and was decided in 1615. It is certainly one of the more colourful cases to create a legal precedent. It bears testimony to the fact that a claimant does not have to be beyond reproach in order to succeed.

James Bagg was a burgess of Plymouth, who was disenfranchised from office. He argued that this was unlawful and sought mandamus to restore him to his position. The writ stated that Bagg had always 'carried and well-governed himself'; that the disenfranchisement was without reasonable cause; and that 'speedy justice' should therefore be done by restoring him to his previous office.[3] This image of civility is, however, somewhat belied by the facts, which paint a rather different picture of Bagg's temperament. He seemed to have had a problem with the mayor, or to put the point more accurately, he had problems with successive holders of that office in Plymouth. The pleadings detail Bagg's insults to Robert Trelawny, John Battersby, John Clement and Thomas Fowens, all of whom held this august office. Matters

[2] *Ridge v Baldwin* [1964] AC 40.

[3] (1615) 11 Co. Rep. 93b.

came to a head in ‘discourse’ with Thomas Fowens. Bagg continued his ‘evil disposition’ towards Fowens, who responded ‘with mild words admonishing the aforesaid James Bagg that he would desist from uttering such contemptible words as aforesaid’.[4] This admonishment did not have the desired effect.[5]

> [I]n the presence and hearing of the aforesaid Thomas Fowens, then mayor of the borough aforesaid, and very many others of the burgesses and inhabitants of the borough aforesaid, and in contempt and disdain of the said Thomas Fowens, then mayor, turning the hinder part of his body in an inhuman and uncivil manner towards the aforesaid Thomas Fowens, scoffingly, contemptuously, and uncivilly, with a loud voice, said to the aforesaid Thomas Fowens, these words following, that is to say, ("Come and kiss.") And further to the said lord the King we certify, that afterwards, that is to say, on the 20th day of August, in the 9th year of the reign of the lord the now King, at Plymouth aforesaid, the aforesaid James Bagg, with most insolent words, threatened the said Thomas Fowens, then being mayor of the borough aforesaid, without any reasonable cause; and then and there, to the said Fowens, threateningly and maliciously spoke these words following, that is to say, "I will make thy neck crack."

Bagg was consistent. He treated all office holders with equal disrespect. Fowens’ successor was John Scobb, who Bagg ‘publicly, falsely and scandalously’ referred to as a ‘knave’, notwithstanding the fact that Scobb ‘honestly and laudably carried and governed himself’.[6] Nor did Bagg rest content with impugning the integrity of successive holders of mayoral office. He spread his critical net further to embrace other burgesses, accusing Thomas Shervill of being a ‘seditious fellow’, even though he ‘honestly, discreetly, and with great integrity, carried and governed himself’.[7] Bagg’s behaviour extended beyond the personal insult, and included action whereby he told inhabitants of the borough that they did not need to comply with certain regulations and customary payments.

[4] Ibid 95b.

[5] Ibid 95b.

[6] Ibid 96b.

[7] Ibid 96b.

The court, nonetheless, found for Bagg. It held that disenfranchisement must be grounded on action that was against the duty of the burgess and against the public good of the borough; words of contempt, or *contra bonos mores,* did not suffice in this respect, nor did a mere attempt to do an act contrary to the duty. No freeman could be disfranchised by the corporation, unless it had authority to do so, by express words in the charter, or by prescription. If there was no such authority, the party ought to be convicted pursuant to the appropriate law before he could be removed.[8] The existence of such authority was, moreover, a necessary, but not sufficient condition for disenfranchisement. It had to be preceded by a hearing, which was absent in the instant case. Lord Coke CJ expressed the matter as follows.[9]

> [Y]et it appears by the return, that they have proceeded against him without … hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party, … and such removal is against justice and right.

Coke CJ thus reasoned from first principle. The existence of a substantive ground for removing Bagg as a burgess did not suffice. It had to be preceded by a hearing. The case was foundational for the existence of a right to a hearing and was much cited thereafter. The judgment speaks to the continuity and change in administrative law since its inception, which is a theme of this book. In this instance the dominant motif is continuity, both in relation to the general justification for such rights, and the more specific reason for requiring hearing rights in this instance.

The general justification for process rights in modern academic discourse is based on instrumental and non-instrumental argumentation.[10] These same rationales informed the

[8] Ibid 98a -99a.

[9] Ibid 99a.

[10] J Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985); D Galligan, *Due Process and Fair Procedures* (Oxford University Press, 1996).

foundational jurisprudence on hearing rights. This is unsurprising, given that the instrumental and non-instrumental justifications are not time dependent. To the contrary they are expressive of enduring values that would have been understood and accepted in the 17th as well as the 20th century.

The instrumental justification emphasizes the connection between procedural due process and the substantive justice of the final outcome. Substantive rules are designed to achieve a particular goal, in this instance specification of the valid grounds for disenfranchisement. Provision of a hearing before deciding to disenfranchise can help to ensure that this precept is correctly applied.[11] It enabled Bagg to 'answer what was objected', which was linked to the requirement of notice, as indicated by Coke CJ's statement that Bagg was not 'reasonably warned'. Compliance with these precepts would require the mayor to specify the reasons for the disenfranchisement, thus facilitating determination as to whether they fell within the legally permitted grounds. The non-instrumental justification for hearing rights is grounded on commitment to formal justice and the rule of law, helping to guarantee objectivity and impartiality, and protect human dignity.[12]

The preceding quotation is consistent with both rationales for affording hearing rights, more especially because the language speaks of Bagg being unable to address 'what was objected' and that 'he was not reasonably warned'. There is nothing to prevent a judgment from grounding its decision on the twin rationales for hearing rights. This is not a zero-sum

[11] J Resnick, 'Due Process and Procedural Justice', in J Pennock and J Chapman (eds), *Due Process* (Nomos, 1977) 217.

[12] HLA Hart, *Concept of Law* (Clarendon Press, 1961) 156, 202; J Rawls, *A Theory of Justice* (Oxford University Press, 1973) 235; F Michelman, 'Formal and Associational Aims in Procedural Due Process', in Pennock and Chapman (n 11) Ch 4.

game, and there is no a priori reason to conclude that Coke CJ would have preferred one to the other.

The continuity in patterns of thought is also apparent when we consider the justification for affording hearing rights in this particular instance. It is common in modern academic parlance to distinguish between the criteria that trigger hearing rights, and the content of such rights, assuming that a hearing has been triggered. Legal systems differ as to what constitutes the catalyst for hearing rights. In the UK, the modern test is framed in terms of a right, interest or legitimate expectation.[13] In the US, constitutional due process is conditional on the existence of a life, liberty or property interest.[14] The nature of the interest that can suffice in this respect may well differ over time. There is, nonetheless, much commonality, notwithstanding temporal difference. In *Bagg's Case*, the imperative for a hearing was intimately linked to the proprietary nature of the interest that a freeman had in a city or borough. This interest informed specification of the grounds that would suffice for disenfranchisement and the need for a hearing to determine whether they existed in the instant case. Thus, Lord Coke CJ stated that,[15]

> [H]e has a freehold in his freedom for his life, and with others, in their politic capacity, has an inheritance in the lands of the said corporation, and interest in their goods, and perhaps it concerns his trade and means of living, and his credit and estimation; and therefore the matter which shall be a cause of his disfranchisement, ought to be an act or deed, and not a conation, or all endeavour, which he may repent of before the execution of it, and from whence no prejudice ensues.

3 Hearing: Applicability

It is common within legal orders to distinguish the applicability of a right to a hearing, from the content of the right, assuming that it is triggered. This duality was evident in the historic

[13] P Craig, *Administrative Law* (Sweet & Maxwell, 9th edn, 2021) Ch 12.

[14] *Goldberg v Kelly* 397 US 254 (1970); *Board of Regents of State College v Roth* 408 US 564 (1972).

[15] *Bagg's Case* (n 3) 98b.

case law. Issues concerning applicability will be considered here, followed by discussion of content in the section that follows.

(a) Scope of Application: Public Bodies, Clubs and Associations

James Bagg's Case was authoritative in later cases, and provided the foundation for the development and application of the rights to a hearing.[16] It was held applicable in a wide range of circumstances, where the interest of the claimant was deemed sufficient to trigger the right to a hearing. Particular types of case will be examined below.

It is, however, important at the outset to stress the breadth of application of natural justice, in terms of the right to a hearing. It was applicable to all public bodies, broadly conceived. By the mid-19th century it was commonplace for case law to be framed in terms of the right to a hearing being applicable in all instances where there was some judicial, or quasi-judicial form of decision-making, and these terms were broadly construed. This central principle was articulated and applied in *Capel*, and reiterated and applied in the *Hammersmith Rent-Charge* case, *Bonaker* and *Cheshire Lines Committee*.[17] This mid-19th century jurisprudence drew on earlier case law exemplifying application of these criteria. There was also some reference to invasion of property interests, which was also widely interpreted.

It is equally important to stress that hearing rights were not confined to public bodies. They were also applied to a wide array of private associations and clubs. The divide between the public and the private, which is so significant in many civil law regimes, did not occupy

[16] See, e.g., *Brownlow v Cox and Mitchell* (1615) 3 Bulstrode 32; *Campions Case* (1658) 2 Sid. 97; *R v Benn* (1795) 6 T.R. 198; *Harper v Carr* (1797) 7 T.R. 270; *R v The Company of Fishermen of Faversham* (1799) 8 T.R. 352.

[17] *Capel v Child* (1832) 2 C. & J. 558; *In re Hammersmith Rent-Charge* (1849) 4 Ex. 87; *Bonaker v Evans* (1850) 16 Q.B. 163; *R v Cheshire Lines Committee* (1872-73) L.R. 8 Q.B. 344. Compare *Ex p Death* (1852) 18 Q.B. 647.

centre stage in the common law tradition. It was standard practice for judges to borrow concepts developed in one domain and apply and/or adapt them to the other. This legal inclination was fuelled by uncertainty as to the factual boundaries between the public and the private, and by commonality of language between the two domains. This is exemplified by *Faversham*, which like *Bagg*, concerned disenfranchisement of a freeman.[18] However, in this instance the claimant was a freeman of a company of Kentish fishermen dealing, inter alia, with rules as to oyster fishing, which were enforced through a Water Court established by the company. Lord Kenyon CJ applied the precepts of the right to be heard, and the same is true for other cases concerning clubs and associations.

Innes[19] concerned the Caledonian Society of London, the objects of which were the extension of education in Scotland, and the preservation of the ancient Caledonian costume. The court acknowledged that it was open to such a society to make any rules concerning admission and expulsion to which members would have to conform. Lord Denman CJ held that any such expulsion must, however, be preceded by notice and an opportunity to respond to the reasons why the society sought to expel the claimant. Thus, notwithstanding that the claimant was alleged to have used menacing language to another member of the society, the expulsion was invalid and he was still a member. The court held that 'no proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so'.[20]

The same reasoning is evident in *Wood*.[21] In this instance the association was a mutual insurance society, which insured members against losses to ships and cargo. The committee of

[18] *Faversham* (n 16).

[19] *Innes v Wylie* (1844) 1 Car. & K. 257.

[20] Ibid 263.

[21] *Wood v Woad* (1873-74) L.R. 9 Ex. 190. See also, *Blisset v Daniel* (1853) 10 Hare 493.

the society had power to exclude a member if, inter alia, his conduct was deemed to be suspicious. The plaintiff, who had been a member of the society was then excluded by committee decision. He argued that the exclusion was wrongful, and motivated by desire to deprive him of the indemnity for losses to which he would have been otherwise entitled. His claim for damages failed, because the expulsion was held invalid for failure to accord him a hearing, with the consequence that he was still a member of the society and could claim thereunder. Kelly CB held that the mutual insurance society was bound to exercise its powers in accordance with the audi alteram partem principle, which was 'not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals'.[22]

The *Dawkins* case,[23] decided a few years later, applied the same legal precept. It concerned the expulsion of the plaintiff from the Travellers Club, who had sent a pamphlet complaining of the conduct of another member to his official address. The pamphlet was enclosed in an envelope on the outside of which was printed 'Dishonourable Conduct of *S*'. The committee of the Club sought an explanation from the plaintiff, which he refused to provide, after which he was expelled. The Court of Appeal held that the Travellers Club was bound to be observe the rules of natural justice, but that it had done so through the provision of ample notice to the plaintiff, who had refused to respond to their inquiries.[24]

The same principle was propounded in *Fisher*,[25] although the decision on the facts went against the Army and Navy Club. The court held that the committee of a club, being a quasi-judicial tribunal, was bound, in proceeding under their rules against a member of the club for

[22] Ibid 196.

[23] *Dawkins v Antrobus* (1881) 17 Ch. D. 615.

[24] Ibid 629-31.

[25] *Fisher v Keane* (1878) 11 Ch. D. 353. See also, *Labouchere v Earl of Wharncliffe* [1879] 13 Ch. D. 346.

alleged misconduct, to act according to the ordinary principles of justice, and should not expel a club member without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending his conduct. An expulsion that did not comply with such requirements would be null and void. In giving judgment against the Club, Jessel MR emphasized the instrumental value of providing a hearing, since the committee that expelled the plaintiff had failed to take account of evidence, including an apology by the member, which would have been evident if a hearing had been given.

The decision of the House of Lords in the *Saddlers* case[26] provides further evidence of the reach of the right to be heard. The case is interesting since it did not concern a club or mutual association, but a trade association in the form of a corporation set up pursuant to a Charter, and violation of a bye-law made by the Saddlers' Corporation. The case concerned dismissal from an office within the corporation. The House of Lords held that this was unlawful, inter alia, because of a failure to hear the affected person prior to dismissal.[27]

It is interesting to reflect on the rationale for the application of natural justice in such cases. There are some cases where it is arguable that the plaintiff had a proprietary interest as a result of club or association membership, which provided the normative foundation for the right to a hearing prior to expulsion. This was arguably the case in *Wood*,[28] given the nature of the mutual insurance society. This rationale is, however, not readily applicable in the other leading cases, nor in truth does it cohere with the reasoning in *Wood* and the other decisions. The principal reason given for the application of natural justice is the judicial or quasi-judicial nature of the proceeding, and these concepts were broadly interpreted. This reasoning

[26] *R v Saddlers Co* (1863) 10 H.L.C. 404.

[27] Ibid 459, 461, 471.

[28] *Wood* (n 21).

underpinned all decisions, including that in *Wood*. Kelly CB[29] drew on the judgment of Parke B in the *Hammersmith Rent-Charge* case, who held that it had 'long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding unless he has had an opportunity of being heard'.[30] There were, nonetheless, cases in which this rationale was combined the proprietary foundation for due process. This is exemplified by the reasoning of Bayley B in *Capel*, who held that he knew 'no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard'.[31]

(b) Scope of Application: Adjudication and Rulemaking

The paradigm situation for the right to be heard concerns adjudication, in some shape, manner or form. It is a single administrative decision addressed to a particular individual or individuals. This was as true in the 17th- 19th century as it is in the 20th and 21st. There is also debate as to how far the right to be heard should pertain to cases of a more legislative nature, where the challenged measure takes the form of a rule or something akin thereto. This is not the place to rehearse the arguments on this issue. Suffice it to say that modern UK administrative has not looked kindly on arguments that the right be heard should be applicable in the context of rulemaking.[32] Nor have other jurisdictions. The EU draws a sharp distinction between hearing

[29] Ibid 196-7.

[30] *In re Hammersmith Rent-Charge* (1849) 4 Ex. 87, 96.

[31] *Capel v Child* (1832) 2 C. & J. 558, 579.

[32] *Bates v Lord Hailsham* [1972] 1 WLR 1373; *R v Devon CC, ex p. Baker* [1993] COD 138 QBD; *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, 1143−46, affirmed on different grounds [2008] 1 AC 1003. Compare *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

rights in relation to adjudication and rulemaking.[33] The US does have procedures that pertain to rulemaking, but these are grounded in statute in the form of the Administrative Procedure Act 1946, and constitutional due process does not, by way of contrast, apply to rulemaking.[34]

The common law did not historically furnish protection for the right to be heard in relation to rules of a legislative nature. In this respect, there is commonality between then and now. There is, however, an important difference. There was, and is, provision for a right to be heard in relation to private bills, and contentious cases are decided by the Court of Referees,[35] which has 12 members, with 3 constituting a quorum. The composition and jurisdiction of the Court of Referees is regulated through Standing Orders.[36] The Court of Referees considers the rights of a petitioner to argue against a private bill in cases where the promoters of the bill challenge that right.

The crucial difference between then and now is that in the modern day it rarely meets, the last occasion being in 2016. This is in stark contrast to the past, when it met frequently. Nor was this difference fortuitous. It reflects the difference in the prevalence of public and private bills in laying down the legislative regulatory framework. This was considered in detail in an earlier chapter,[37] which explained the balance between general and local measures. The numerical and substantive importance of local regulatory measures embodied in private bills in the 17th-19th century cannot be underestimated.

---

[33] P Craig, *EU Administrative Law* (Oxford University Press, 3rd edn, 2018) Ch 11.

[34] *Bi-Metallic Investment Co v State Board of Equalization of Colorado* 239 US 441 (1915).

[35] Court of Referees - MPs' Guide to Procedure - UK Parliament ; The Court of Referees - Erskine May - UK Parliament.

[36] House of Commons, Standing Orders 2019, Private Business, SO 89-102 (HC 6, 2019).

[37] See Ch 2.

The salient point from the perspective of the right to be heard is equally important. The cases decided by the Court of Referees were published in specialist law reports.[38] The formal focus of the case was on locus standi, which in this context connoted whether the particular person or company was sufficiently affected by the proposed measure to be able to petition about it. The substantive impact of the decisions was a right to be heard as to the terms of the proposed bill, and the language of hearing rights is a common feature in the reports. The reality is, therefore, that if the claimant was deemed to have locus standi, it would then have process rights to comment on the content of the proposed bill. It did not mean that its arguments would necessarily be successful, thus was it ever so. This should not mask the fact that the parliamentary procedure, policed by the Court of Referees, gave those who surmounted the locus standi hurdle some due process in the making of legislation. The precise focus of petitioners' arguments perforce varied. In some instances, they opposed the entire bill; in others, argument was focused on a particular clause; in yet other cases, they sought the addition of clauses protecting their interests. Parliament has always been able to grant consultation or participation rights in a particular statute if it wished to so, and courts have been good at enforcing such rights. However, the difference was that the procedure described above, grounded in parliamentary standing orders, was of generalized application to private bills.

(c) Imposition of Burdens: Dismissal

Many cases concerned dismissal from office, and in a number the facts were, as in *James Bagg's Case*, colourful.

[38] See, e.g., 1 Frederick Clifford and Pembroke S. Stephens, Practice of the Court of Referees on Private Bills in Parliament (1870); 2 Frederick Clifford and AG Rickards, Cases Decided during the Sessions, 1873, 8, 9, 80, by the Court of Referees on Private Bills in Parliament (1881).

Gaskin concerned the dismissal of a parish clerk, who sought mandamus and restoration to his position. The reason for the dismissal was that the clerk had been guilty of 'indecent and indecorous conduct' on several occasions; he was found on a 'certain day intoxicated during divine service, and incapable of performing his office'; and moreover 'he officiated in an improper part of the church'.[39] Counsel for the parish clerk argued that his client had been given no opportunity to provide a defence to these charges. Counsel for the parish authorities sought to rely on case law that was said to indicate that a hearing was not necessary in such circumstances.

Lord Kenyon CJ was unconvinced by the argument of counsel representing the parish. He did not accept that the cases relied on to deny the need for a hearing were authority for that proposition. His conclusion was informed by consideration of principle, stating that 'if we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, audi alteram partem'.[40] Lord Kenyon CJ 'trembled' at the consequences of compromising the principle, and while he had no doubt that Gaskin had acted from the best motives in dismissing the parish clerk, he held that this should be done in compliance with the right to be heard, which could establish whether the charges levied were true.

The House of Lords' decision in the *Saddlers'* case is a further example of the same principle, and is interesting because it was applied to a chartered corporation. The Saddlers' Company had a Charter dating back to the reign of Charles II. It provided, inter alia, for the appointment 'from among the freemen of the company practising the art or mystery of saddlers' of wardens and assistants of the company. They had various duties, including sitting on the company's Court of Assistants. Dinsdale was duly chosen as an assistant, but was then

[39] *R v Gaskin* (1799) 8 TR 209. See also, *R v Smith* (1844) 5 Q.B. 614; *Ex P Ramshay* (1852) 18 Q.B. 173; *Fisher v Jackson* (1891) 2 Ch. 84.

[40] Ibid 210.

dismissed without notice, for violation of a company bye-law, barring those who had been bankrupt from membership of the Court of Assistants. The House of Lords held this to be unlawful. Lord Cranworth held that it 'is impossible to contend that a person validly elected and admitted a member of the court, could behind his back, and without notice, be removed from his office',[41] and Lord Westbury and Lord Wensleydale reasoned to like effect.[42]

(d) Imposition of Punishment: Criminal Cases

The right to be heard was, not surprisingly, protected in criminal cases. In *Gaskin*, Lord Kenyon CJ stated that the right to be heard was at the 'head of our criminal law'.[43] This sentiment was repeated in *Ford*, where it was held that the requirement for notice and a hearing was a condition precedent for a lawful conviction for violation of the Statute of Deer Stealing.[44] The principle was reiterated in *Simpson*, where Parker CJ held that natural justice, always required the party charged with any offence to be heard before he was condemned, subject to an exception where the failure to be heard was a result of the accused's own default, since otherwise, every criminal might avoid conviction. The law therefore required the magistrate to give the accused some opportunity to appear, and if upon such notice he neither came nor sent sufficient excuse, the magistrate could proceed to judgment.[45]

Criminal punishment could occur in a plethora of ways, including pursuant to the poor law. In *Angell*,[46] Berkshire justices were acting pursuant to their statutory duty to find vagrants.

[41] Ibid 461.

[42] Ibid 449, 471. See also, *Osgood v Nelson* (1872) L.R. 5 H.L. 636.

[43] *Gaskin* (n 39) 210.

[44] *R v Ford* (1707) 12 Mod. 453.

[45] *R v Simpson* (1717) 1 Str. 44; *R v Aikin* (1765) 3 Burr. 1785.

[46] *R v Angell* (1735) Cas. T. Hard. 125.

They identified a person as a pauper, and ordered his removal to the parish where he was settled. He nonetheless returned to another parish, which led the defendant magistrate to commit him to a house of correction for three days. This was held to be unlawful, because the pauper was given no hearing before this commitment.

(e) Imposition of Burdens: Civil Actions

Natural justice also played a significant role in civil actions broadly conceived. Thus, in *Plews and Middleton*[47] Lord Denman held that an arbitral award should be set aside for failure to comply with natural justice, the infirmity being that the facts had been ascertained by one arbitrator separate from the other, that a witness had been examined in like manner and that the arbitration had been conducted separate from the parties. Similarly, in *Eastern Counties Railway*,[48] it was held that when an arbitrator relied on accountants, the report of the latter constituted evidence on which either party had a right to be hear, and that the final award was made in undue haste without affording this opportunity.

The decision in *Capel* is indicative of the importance of an adequate hearing.[49] Legislation empowered a bishop who believed that ecclesiastical duties were not being properly performed to impose a 'requisition', whereby the incumbent vicar would be charged with the cost of a curate, who would then ensure that such duties were adequately performed. The vicar denied that there was any reason for the requisition. The court found in his favour

[47] *In the Matter of an Arbitration between Henry Plews and Thomas Middleton* (1845) 6 Q.B. 846.

[48] *In the Matter of the Arbitration between the Eastern Counties Railway and the Eastern Union Railway Company* (1863) 3 De G.J. & S. 610.

[49] *Capel* (n 17).

and held the requisition invalid for failure to accord a proper hearing. Lord Lyndhurst CJ expressed the point in strident tones.[50]

> [A] party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defence. On consideration, then, it appears to me that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment.

The scope of ecclesiastical authority was in issue once again in *Bonaker*,[51] where a bishop had ordered the revenue due to a vicar from a parish, in terms of tithes and the like, to be sequestered by the Consistory Court because the vicar had not resided in the parish. Nothing daunted the vicar brought a restitutionary action for money had and received against the sequestrator. He succeeded on the ground that the sequestration had issued without notice given to the vicar as to why it should not issue, and the Court of Exchequer Chamber held that this was essential before the sequestration could proceed. Parke B held that,[52]

> [N]o proposition can be more clearly established than that a man cannot incur the loss of liberty or property for all offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.

(f) Deprivation of Rights and Benefits: Personal and Proprietary Rights and Interests

Natural justice was applicable not only in cases where a burden was imposed, but also in cases where the claimant was deprived of a right or benefit, as occurred in the *University of*

[50] Ibid 574.

[51] *Bonaker* (n 17).

[52] Ibid 171.

Cambridge case, also known as *Bentley's* case.[53] It arose when Cambridge University degraded the doctoral degree held by Dr Bentley, who had spoken 'contemptuously' of the University Court and the Vice-Chancellor. Bentley sought mandamus to restore the degree.

Fortescue J began his judgment by noting the nature of Dr Bentley's interest. He acknowledged that a University degree was only a civil honour, but reasoned that 'yet interest and property being the consequence of such degree, the Court considers it as such with all its attendances'.[54] He was doubtful whether the University Court had any power to degrade the doctoral degree, but held that in any event its action violated natural justice.[55]

> Neither does it appear that Dr. Bentley was ever summoned to answer this contempt; and it is against natural justice to deprive a man of his right before he is heard**;** therefore if there was a custom so to do, such custom would be absolutely void; and it is a thing of daily experience to grant prohibitions to Spiritual Courts, if they deny the defendants a copy of the libel, because such denial is against natural justice.

Fortescue J concluded with a biblical reference, noting that he had 'heard a learned civilian say, that God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence', opining that 'such proceeding is agreeable to justice'.[56]

The importance attached to natural justice in the protection of proprietary interests is apparent in the seminal decision in *Cooper*,[57] which drew on the reasoning in the *University of Cambridge* case. The plaintiff brought an action in trespass against the district board of works that had demolished his partially built house. The district board of works argued by way of defence that statute gave it power to order such demolition, inter alia, when the property had

[53] *R v University of Cambridge* (1723) 8 Mod. 148.

[54] Ibid 163.

[55] Ibid 163.

[56] Ibid 164.

[57] *Cooper v Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.

been built without giving seven days notification of intention to build, which the plaintiff had not done. The plaintiff counter-argued that the literal wording of the statute should be read subject to the precept that a person should not be deprived of his property without being afforded a hearing.

The court agreed. Erle J emphasized the breadth of the power claimed by the district board of works and the dramatic consequence of its exercise, since it could lead to demolition of a completed house of any value. His reasoning spoke to the instrumental justification for hearing rights, in that he proffered a number of situations where a person might have tried unsuccessfully to comply with the legislative requirement, which the provision of a hearing would have revealed.[58] It is also noteworthy, in the light of subsequent case law, that Erle J rejected an argument that the district board of works' act was not judicial, and therefore did not have to comply with natural justice. Erle J rightly held that natural justice had been deemed applicable to 'many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down'.[59] Willes J held that the any tribunal broadly conceived whose power impacted on property rights was 'bound to give such subject an opportunity of being heard before it proceeds'; this rule was 'of universal application, and founded upon the plainest principles of justice'.[60] Willes J was willing to characterize the action of the district board of works as being of a judicial nature, and, in common with Erle J, he noted the instrumental justification for granting hearing rights.[61] It was Byles J who pronounced the dictum for which the case is best known. He held that a hearing was required, irrespective of whether the act was classified as

[58] Ibid 188.

[59] Ibid 189.

[60] Ibid 190.

[61] Ibid 192.

judicial or ministerial, although he felt that it fell within the former category, and then continued as follows.[62]

> That being so, a long course of decisions, beginning with *Dr. Bentley's case,* and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be beard, yet the justice of the common law will supply the omission of the legislature.

4 Hearing: Content

(a) Content: Issue and Method

Modern courts commonly have to grapple with the content of natural justice. They have to decide how much due process is warranted in a particular case. The answer not surprisingly varies, given the heterogeneity of types of case that fall within the remit of administrative law. This will include matters such as the right to notice of the relevant decision; whether there is a right to an oral hearing or only a paper hearing; whether the hearing must precede the relevant decision or whether it can be given thereafter; whether there should be any right to discovery of documents or any right to cross-examination; whether the evidential rules applied in a normal trial should be modified or relaxed in their application to administrative decision-making; whether there can be any contact between the administration and one of the parties prior to the decision being made; whether causation should matter, in the sense that the reviewing court should consider if the hearing would have made a difference to the final outcome; whether there is a right to be represented by a lawyer; whether reasons should be given for the decision; and the meaning to be given to impartiality.

[62] Ibid 194. See also, *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 71.

A legal system will also have to decide how to go about deciding these issues. There are a number of options.[63] At one end of the spectrum is the all-embracing procedural code, which addresses such matters in detail. At the other end of the spectrum are *ad hoc* judicial decisions, with the courts deciding the issues on a case by case basis. There are various options in between. The courts may develop a general formula through which to determine the content of process rights.[64] Legislation may stipulate the content of process rights for hearings of a certain type, for example those that are more formal in nature.[65] The content of hearing rights can alternatively be determined by a mixture of *ad hoc* case law, combined with sector-specific legislation that applies the courts' precepts and fleshes them out.

(b) Central Core: Notice and Opportunity to Respond

UK courts have grappled with issues concerning the required content of natural justice ever since natural justice and hearings rights were recognized as part of the legal order. It is clear that notice of the hearing, and some opportunity to respond were regarded as integral to the very idea of natural justice. This was made clear in *James Bagg's Case*.[66]

[63] P Craig, 'Perspectives on Process: Common Law, Statutory and Political' (2010) PL 275; J-B Auby (ed), *Codification of Administrative Procedure* (Bruylant, 2014); G della Cananea, *Due Process of Law beyond the State: Requirements of Administrative Procedure* (Oxford University Press, 2016).

[64] See, e.g., USA, *Mathews v Eldridge* 424 US 319 (1976).

[65] This is the methodology for formal adjudication and formal rulemaking under the Administrative Procedure Act 1946 in the USA.

[66] *James Bagg's Case* (n 3); *R v Truebody* (1707) 2 Ld. Raym. 1275; *R v Venables* (1725) Fortescue 324; *R v Manning* (1757) 2 Keny. 561; *In the Matter of William Blues* (1855) 5 El. & Bl. 291; *Wayman v United Brethren Friendly Society* [1917] 1 KB 677.

Faversham further emphasized the significance of notice and proof.[67] Lord Kenyon CJ held that notice encompassed not merely notification prior to the hearing to the person affected, but also adequate notice to those who should take part in the decision-making process. He also held that there was a failure of natural justice where a person was disenfranchised from a company in circumstances where the charge on which this was based was not proven. There can nonetheless be instances where the right to notice is qualified by an agreement. This was so in *Vallee*,[68] where the defendant sought to resist enforcement of a judgment of a French court on the ground that he had not received notice of the action, nor was he resident in France. However, he was a shareholder in a French company, which required him to elect a domicile in France, and he was duly served there with notice of the French law suit. Alderson B duly held that it was 'not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them'.[69]

The hearing had to be adequate, but this did not always demand an oral hearing. A written hearing could suffice, as was the case for a hearing by a University Visitor in the *Bishop of Ely* case.[70] The courts were, nonetheless, generally assiduous in ensuring that the hearing was fit for purpose in the sense of addressing the issues raised by the claimant. This is exemplified by the *Archbishop of Canterbury* case.[71] Poole, an assistant curate had his licence revoked by the Bishop, and then appealed, as entitled, to the Archbishop. The latter heard the

[67] *Faversham* (n 16) 356.

[68] *Vallee v Dumergue* (1849) 4 Ex. 290.

[69] Ibid 303.

[70] *R v Bishop of Ely* (1794) 5 T.R. 475.

[71] *R v Archbishop of Canterbury* (1859) 1 El. & El. 545.

appeal, but only considered the grounds addressed by the Bishop and did not take further evidence. The court held that this did not suffice for a hearing. Wightman J reasoned as follows.[72]

> That is not a "hearing" of the appeal. It is said that the petitioner has, in effect, been heard. That, however, is not so. The very object of the appeal is to contest the validity of the grounds of condemnation; to contend, in fact, that the prima facie case made out against the appellant is not a good one. But all that the Archbishop looks at is this prima facie case.

The need to ensure the adequacy of the hearing is further evident in *Capel* considered above, where the court laid considerable stress on the fact that the hearing must enable the claimant to contest the claims made against him. The court also addressed an issue that is endemic in natural justice cases, as to whether an appeal can cure an infirmity in an earlier hearing. The court was adamant in this regard.[73]

> I apprehend the right to appeal to the Archbishop makes no difference in this case. Where there is an authority to pronounce a judgment, and an appeal is given from that judgment when it is pronounced, the party against whom the judgment is pronounced has a right to be heard on the original judgment: he has a right to be heard before the original judgment is pronounced, for the purpose of preventing that judgment from being pronounced; and the circumstance of its having been given makes in that respect, as I apprehend, no difference whatever.

(c) Hearing Rights: Sufficiency

The more particular demands of natural justice arose in many cases. In *Sheehy*, the court was concerned with the sufficiency of the hearing rights provided in Ireland for the purposes of the application of that judgment in the UK.[74] Erle J held that if he had been satisfied that the

[72] Ibid 560. See also, *R v Daly* (1749) 1 Ves. Sen. 269.

[73] *Capel* (n 17) 576.

[74] *Sheehy v The Professional Life Assurance Co* (1857) 3 C.B. (N.S.) 597. See also, *Buchanan v Rucker* (1807) 1 Camp. 63; *Cavan v Stewart* (1816) 1 Stark 525; *Becquet v MacCarthy* (1831) 2 B. & Ad. 951; *Price v Dewhurst* (1837) 8 Sim 279; *Reynolds v Fenton* (1846) 3 C.B. 187; *Crawley v Isaacs* (1867) 16 LT 529.

defendants in the original suit never were in court so as to have an opportunity of being heard in their defence, 'it might have been necessary to consider whether a judgment pronounced against them was not so contrary to natural justice that it ought not to be held binding and conclusive against them in this country'.[75] However, having examined the relevant statutory provisions concerning service on corporations, he concluded that they had been properly complied with and that there was no failure in natural justice.

In *Story*,[76] the salient issue was the sufficiency of the hearing before a Consistorial Court, which heard an action by the claimant's wife for restitution of conjugal rights. The claimant sought prohibition to resist the resulting judgment, claiming a failure of natural justice. He had been heard, but argued that there had been a failure of natural justice because he had not been told the time and place when judgment would be given. The court rejected the claim, holding that natural justice did not demand such information.

In *Hayley*, the court was concerned with the right to be represented by counsel in circumstances where the barrister had fallen ill. It was argued that there was no instance of a trial being put off on account of the illness of the attorney for one of the parties. However, Lee CJ held that 'whether there be such an instance or not, it would be contrary to natural justice that a party should be compelled to have his cause tried, when the attorney, who has all along had the management thereof, is prevented by sickness from attending the trial'.[77]

The decision in *Osgood* emphasized the importance attached to the provision of a hearing prior to dismissal.[78] The case concerned dismissal of an officer who held a freehold post within the City of London corporation. The House of Lords, acting on the advice of judges

[75] Ibid 614.

[76] *Ex p Story* (1852) 12 C.B. 767.

[77] *Hayley v Grant* (1752) Sayer 53.

[78] *Osgood v Nelson* (1872) L.R. 5 H.L. 636.

from lower courts, held that it would not readily interfere with the substantive decision as to whether the office holder should be removed from his post, but that it would ensure that hearing rights were provided and these were interpreted broadly in the instant case. There had to be notice of the charge; the opportunity to cross-examine witnesses brought forward against him; the opportunity more generally to oppose the case set up against him; the ability to call his own witnesses; and more broadly the opportunity of defending himself.[79]

Hearing rights were not always defined this broadly, and the court was mindful of the nature of the person making the decision when deciding on the type of hearing that was required. This is exemplified by *Spackman*, which concerned who should determine the boundaries in which allowable building extension could take place. The House of Lords rightly decided that the architect attached to the Board of Works was properly assigned this power, not a magistrate.[80] The Lord Chancellor duly framed the required hearing rights cognizant of the fact that the architect was not a judge in the ordinary sense of that term, but that he should nonetheless give notice and some opportunity for response.

5 Bias: Foundations

Dr Bonham's case[81] decided in 1609 is most oft-cited for Lord Coke's dictum as to the court's power to declare void or disregard statutes that offended against common right or reason, or that were morally repugnant. This dictum did not fall on fertile judicial soil. It provoked a fierce response from Lord Ellesmere in his observations on Coke's Reports. He chastised Lord Coke

[79] Ibid 646, 650.

[80] *Spackman v Plumstead Board of Works* (1885) 10 App. Cas. 229, 240. See also, *De Verteuil v Knaggs* [1918] AC 557.

[81] (1609) 8 Co. Rep. 113b.

for making this claim, saying that there was no precedent for doing so, and Lord Ellesmere equally critical about the court's interpretation of the statute in the instant case.[82] The legal reality is that UK courts did not develop this aspect of the judgment and have not exercised the power of constitutional review.

Subsequent courts have, however, been receptive to that part of the judgment in which Coke CJ elaborated on the other central principle of natural justice, the rule against bias, which is contained in the nemo iudex principle. It was forcefully expressed in the instant case. Thus, in determining whether the College of Physicians had the power to fine and imprison Dr Bonham, Coke CJ made clear that a person could not be a judge in his or her own cause.[83]

> The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum et aliquem suae rei esse judicem;* and one cannot be Judge and attorney for any of the Parties.

This central principle was powerfully reaffirmed by Holt CJ in *City of London v Wood*, which concerned the enforcement of a debt for breach of a bye-law.[84] The defendant objected, inter alia, because the mayor was both prosecutor and judge. Holt CJ shared his misgivings.[85]

> But the true great point is, that the Court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and Judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the Judge, and the Judge is to hear the party; the party endeavours to have his will, the Judge- determines against the will of the party, and has authority to enforce him to obey his sentence: and can any man act against his own will, or enforce himself to obey? The Judge is agent, the party is patient, and the same person cannot be both agent and patient in the same thing; but it is the same thing to say that the same man may be patient and agent in the same thing, as to say that he may be Judge and party; and it is manifest contradiction.

[82] Ibid 118a, fn C.

[83] Ibid 118a.

[84] (1701) 12 Mod. 669.

[85] Ibid 687.

Interestingly Holt CJ shared Coke CJ's view as to the limits of parliamentary sovereignty. Holt CJ held that a court could set aside a statute that sought to make a person judge in his own cause.[86] He also voiced sentiments in rather modern sounding tones, stating that while an Act of Parliament can do no wrong, 'it may do several things that look pretty odd'.[87]

6 Bias: Application

Dr Bonham's case became the cornerstone for development of the rules against bias, in the same way that *James Bagg's* case was foundational for the right to a hearing. Later courts fleshed out the contours of the rule against bias. A central issue was the degree of interest that a person must have to be caught by the nemo iudex principle.

(a) Bias: Breadth of Application

The decision in *Hesketh* revealed the breadth of application of the nemo iudex principle.[88] The case took the form of an action in debt, allegedly incurred for breaking a bye-law, by keeping a shop within the City of Chester, not being a freeman. The bye-law was said to be based on a custom precluding any person who was not a freeman from keeping any shop within the City. The initial action for recovery of the debt was heard by the Portmote-Court, which was held before the mayor, and prosecuted by the plaintiffs, as treasurers of the city. The defendant denied that he owed the debt, which led to a trial before a jury composed of twelve freemen of

[86] Ibid 688.

[87] Ibid 688.

[88] *Hesketh v Braddock* (1779) 3 Burr. 1847.

the city. The defendant in turn challenged the composition of the jury, on the ground that they were interested in the outcome.

Lord Mansfield agreed. The custom and bye-law were designed to secure a monopoly to the freemen for selling within the City, with the consequence that every freeman had an interest in the outcome, irrespective of whether he had a share in the penalty. For Lord Mansfield, 'the incapacity arises from his bias in the particular facts he is to try: and whatever be the facts which that bias touches, he is incapable of trying those facts'.[89] This precept was not open to modification based on the extent of the interest. [90]

> There is no principle in the law more settled than this-that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned.
> The law has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If, therefore, the sheriff, a juror or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment; and therefore will not trust him.
> The minuteness of the interest will not relax the objection. For, the degrees of influence cannot be measured: no line can be drawn, but that of a total exclusion of all degrees whatsoever.
> In the present case, every member of the corporation was evidently interested in the very issue to be tried. For, the custom 'to exclude all strangers from trading in the city,' is the main foundation of the action: it is the only ground upon which such a bye-law could, in any case be valid. For, a bye-law 'to exclude', without a custom to support it, would be void, as an illegal restraint upon the common right of the subject.

(b) Bias: Pecuniary and Non-Pecuniary Interests

The courts continued to grapple with the degree of interest that would trigger the nemo iudex principle in subsequent cases. They tempered the force of *Hesketh* by drawing a distinction between cases where the interest was pecuniary, where any such interest would be regarded as

[89] Ibid 1857.

[90] Ibid 1856. See also, *The Company of Mercers and Ironmongers of Chester v Bowker* (1726) 1 Strange 640; *Ex p. Medwin* (1853) 1 El. & Bl. 610, 614.

a ground for disqualification; and other interests, where there would be inquiry as to the likelihood of bias.

The courts insisted that any pecuniary interest disqualified the decision-maker. Thus, in *Dimes*[91] the House of Lords reversed a decision made by the Lord Chancellor, Lord Cottenham, when the latter had affirmed decrees by the Vice-Chancellor in relation to a company in which the Lord Chancellor held shares. There was no imputation of actual bias against Lord Cottenham, but it was held that the principle that no man can be a judge in his own cause must be sacred.

The distinction between pecuniary and non-pecuniary interests was at the forefront in *Rand*.[92] The issue was whether justices who had heard an application for a certificate to enable a water company to take water from certain streams, should be disqualified because of a very remote and indirect connection with the outcome. There was no doubt, said Blackburn J, 'that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter'.[93] There was, however, no such interest in the present case, which at most involved a challenge to favour. The criterion for intervention in this latter instance was whether there was a real likelihood that the justice would be biased in favour of one of the parties.[94] The court held that there was no such likelihood in *Rand*, but such

[91] *Dimes v Grand Junction Canal Co Proprietors* (1852) 3 HLC 759, 793-4.

[92] *R v Rand* (1866) L.R. 1 Q.B. 230.

[93] Ibid 232.

[94] Ibid 232-3.

challenges succeeded in later cases, where the court concluded that the requisite likelihood existed.[95]

The distinction articulated in *Rand* was developed and applied in later cases. In *Huggins*, a statute prohibited an unqualified pilot from taking charge of a ship where a qualified pilot had offered to do so. In a subsequent action for a penalty, one of the justices hearing the case was a qualified pilot. Wills J emphasized the importance of distinguishing between cases where there was a pecuniary interest; cases where there was no such interest, but there was nonetheless bias; and cases where a person acted as prosecutor and judge. It was, he said, also important to distinguish cases where the decision impugned was made by a judicial tribunal, from that made by an administrative rather than of a judicial body.[96] In the instant case, there was no pecuniary interest, nor was there any actual bias, but there was the possibility of a reasonable apprehension of bias, because one of the justices was a qualified pilot.

(c) Bias: Prosecutor and Judge

Bias could also be manifest when the prosecutor of an offence was also the judge. This occurred directly as in *Shaw*,[97] where the sanitary committee of a town council instructed the town clerk to prosecute a person and one of the justices before whom he was prosecuted was a member of that committee. The court held that the decision could not stand. The matter can also arise indirectly where the decision-maker belongs to an organisation that initiated the proceeding,

[95] See, e.g., *R v Cheltenham Commissioners* (1841) 1 Q.B. 467; *R v Justices of Hertfordshire* (1845) 6 QB 753; *R v Aberdare Canal Company* (1850) 14 Q.B. 854; *R v Meyer* (1875) 1 Q.B.D. 173; *R v Cumberland JJ* 4 TLR 294; *R v Hain* 12 TLR 323; *R v Justices of Sunderland* [1901] 2 KB 357, 366-8.

[96] *R v Huggins* (1895) 1 QB 563, 565.

[97] *R v Lee, ex p. Shaw* [1882] 9 QBD 394; *R v Gaisford* [1892] 1 QB 381.

but where he himself has taken no part in the decision to prosecute. In *Leeson*,[98] the General Medical Council had disqualified a doctor for infamous misconduct in a prosecution brought by the Medical Defence Union, an organisation designed to uphold the character of doctors and to suppress unauthorised practitioners. Two of the 29 who held the inquiry were members of the Medical Defence Union, but not of its managing body. The court found that, looked at in substance and fact, the two Medical Defence Union members on the General Council were not accusers as well as judges and that they could not reasonably be suspected of bias.

7 Hearing and Bias: 20th Century Continuity and Change

(a) Continuity: Central Values

There is then no doubt that there was a developed body of administrative law dating from the 17th century, which enshrined the right to a hearing and the duty of impartiality. They constituted the twin pillars of natural justice. The case law attests to the enduring values and concerns that underpin due process. The courts were mindful of the instrumental and non-instrumental rationales for natural justice. They did not use this precise language, but nor do modern courts.

It is, nonetheless, clear that these rationales informed the foundational case law and its development thereafter. It is clear also that the courts took a broad view of the type of bodies that should be subject to due process, eschewing a rigid public/private divide, and applying natural justice to clubs, mutual associations and trade associations. They were, in addition,

[98] *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366; *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

cognizant of the need to tailor due process to the nature of the decision-maker, thus speaking to an issue that features prominently in modern case law.

It is then unsurprising that this case law provided a firm foundation for jurisprudence in the 20th century. The remainder of this chapter considers the contours of this case law. The object is not to provide detailed textbook treatment of all aspects of natural justice. It is, as with other chapters, to paint a picture of the continuity and change that informed 20th century developments in this area.

(b) Continuity: Breadth of Application

The courts continued to emphasize the breadth of application of natural justice, and flexibility as to its content depending, inter alia, on the nature of the decision-maker.[99] This is evident from *Rice*, where the Board of Education was challenged on the ground that it had paid differential salaries to teachers in 'provided' and 'non-provided' schools. Lord Loreburn LC noted that the Board of Education would commonly make decisions of an administrative nature, albeit they could, on occasion, involve issues of law and fact.[100]

> I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

The courts also affirmed the broad reach of natural justice, in terms of the types of bodies to which it was applicable. This is readily apparent from *Lapointe*, decided by the Privy

[99] See, e.g., *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118.

[100] *Board of Education v Rice* [1911] AC 179, 182.

Council shortly after the turn of the new century.[101] A police pension society declined to give a pension to the claimant, and thereby broke its rules specifying that each such application should be considered by the board of the society. Lord Macnaghten was scathing about the board's conduct, labelling it as 'most extraordinary', since it listened to 'all sorts of stories about Lapointe's past history'; raked up 'everything that was against him during his connection with the force'; and then refused the pension without telling him the charges, or giving him any opportunity of defending himself.[102] Lord Macnaghten drew explicitly on the earlier case law that applied natural justice to clubs and associations and struck down the board's decision.[103]

Analogous reasoning was applied in the context of trade unions, as evidenced by *Abbott*,[104] which concerned a hearing by the Cornporters' Committee. The Court of Appeal held that the Committee lacked jurisdiction to determine the particular dispute, but that even were this not so, the hearing was inconsistent with natural justice. The jurisdiction of the Cornporters' Committee was said to be based on contract, express or implied,[105] since, in the words of Denning LJ, 'outside the regular courts of this country no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it'.[106] Grounding the jurisdiction of such bodies on contract did not in itself suffice to secure application of the principles of natural justice. This required a further conceptual step, which

[101] *Lapointe v L'Association de Bienfaisance et de Retraite de la Police de Montreal* [1906] AC 535; *Weinberger v Inglis* [1919] AC 606.

[102] Ibid 538-9.

[103] Ibid 539-40.

[104] *Abbott v Sullivan* [1952] 1 KB 189. See also, *Burn v National Amalgamated Labourers' Union of Great Britain and Ireland* [1920] 2 Ch 364; *Maclean v The Workers' Union* [1929] 1 Ch 602; *Lawlor v Union of Post Office Workers* [1965] Ch 712, 727-9.

[105] Ibid 194, 197.

[106] Ibid 197.

was to treat compliance with such principles as an implied contractual term, where there was no express provision. Denning LJ, drawing on *James Bagg's* case, furnished the clearest rationale for this conclusion, stating that,[107]

> These bodies, however, which exercise a monopoly in an important sphere of human activity, -with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid.

(c) Change: Limitation of Application -- Inquiries

The application of natural justice was also limited in the context of inquiries. In *Arlidge*,[108] the House of Lords considered whether an individual should have an oral hearing before the Local Government Board, and whether the person should be entitled to see the report of the hearing inspector in the context of a statutory scheme to determine whether a closing order on a house should be rescinded. Lord Haldane LC upheld the general principles in the *Rice* case, but refused access to the housing inspector's report or to the Board itself: when a matter was entrusted to a department of state or similar body, Parliament should be taken, subject to contrary intent, to have meant that it could follow its own procedure. When, therefore, the Board was entrusted with appeals this did not mean that any particular official should undertake the task, nor was the Board bound to disclose the report.[109] Some of this reasoning can be accepted, but the failure to disclose the report was a severe set-back in the evolution of inquiry procedures, which took long to heal.

[107] Ibid 198. See also, 195, 210.

[108] *Local Government Board v Arlidge* [1915] AC 120.

[109] Ibid 132−4.

(d) Change: Limitation of Application – Judicial, Quasi-Judicial and Administrative

All legal orders have, as noted earlier, to demarcate the types of case where natural justice is required. Whether a particular consideration should inform the applicability of natural justice or its content can, however, be contentious. The difficulties in this regard are exacerbated by the fact that the same language can sometimes be used to determine the scope of natural justice, and on other occasions it can refer to content variation. This ambiguity is evident in the courts' usage of the language of 'judicial', 'quasi-judicial' and 'administrative'.

In the 19th century and earlier the right to a hearing was applied in a number of areas that were administrative. In so far as the terms 'judicial' or 'quasi-judicial' were used, they were automatically implied when a decision affected a person's rights in a broad sense, and/or where there was some element of adjudication.[110] The House of Lords had, moreover, acknowledged that natural justice could be applicable where the decision was 'administrative' in nature, although this could then affect the content of the hearing rights provided.[111] There were, however, 20th century cases where the courts drew a dichotomy between administrative and judicial decisions, took a relatively narrow view of what constituted a 'judicial' or 'quasi-judicial' decision and required this as a condition precedent for a right to a hearing.

In *Errington*,[112] the relevant legislation gave the local authority power to declare an unhealthy area to be a clearance area, but the order was not binding until confirmed by the minister. The Court of Appeal found that there had been a breach of natural justice, because the minister conferred with the local authority and received further evidence after the close of a public inquiry, but the phrasing of the judgment was nonetheless restrictive. The objection

[110] See, e.g., *Cooper* (n 57); *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 713.

[111] See, e.g., *Spackman* (n 80); *Rice* (n 100); *Arlidge* (n 108).

[112] *Errington v Minister of Health* [1935] 1 KB 249.

by homeowners to the clearance order was held to have transformed what would have been an administrative determination into one that was quasi-judicial, thereby triggering the prohibition on *ex parte* contacts as part of natural justice.[113]

Maugham J had but a few years earlier framed the application of natural justice in terms of contestation between two parties, presided over by a third party.[114] He developed this theme on elevation to the Court of Appeal in *Errington*, where he juxtaposed ministerial acts that were 'merely acts of administration', for which the only remedy was 'application' to Parliament; with 'quasi-judicial acts' that were subject to natural justice.[115] Maughan LJ decided that the case fell within the latter category because 'there was a true contest as between the owners of the property and the local authority', 'as between whom the Minister has to come to a determination after consideration'.[116]

The linkage between an act being deemed quasi-judicial and a dispute or 'lis' being joined between the parties was emphasized in other cases, and where the dispute had not yet been joined the applicant was less successful. Thus in *Frost*, Swift J made it clear that he felt that the ministerial powers under the slum clearance legislation should be regarded as purely administrative, with the consequence that natural justice would not apply. However, he acknowledged that he was bound by *Errington*, but distinguished the case on the ground that in *Frost* there had not yet been anything akin to a joinder of a dispute between two parties presided over by the minister, and therefore natural justice did not apply.[117]

---

[113] Ibid 259, 264, 270.

[114] *MacLean* (n 104).

[115] *Errington* (n 112) 270-1.

[116] Ibid 271.

[117] *Frost v Minister of Health* [1935] 1 KB 286, 290-2. See also, *Offer v Minister of Health* [1936] 1 KB 40, 48.

(e) Change: Limitation of Application – Rights and Privileges

There are some legal issues that transcend legal borders. They are evident in judicial reasoning in different legal regimes. This is as true for erroneous legal reasoning as it is for that which exhibits greater verisimilitude. The advent of the 20th century welfare state posed challenges for the applicability of natural justice. This was more especially so because the welfare state involved an increase in what Charles Reich memorably depicted as the 'New Property'. In a series of articles, he charted how individuals in the US were increasingly reliant on government largesse broadly conceived, in the form of social welfare, licences, government contracts, grants and the like.[118]

The very title of the articles was informed by the argument that such interests should be regarded as 'property', thereby satisfying the requirement of 'life, liberty or property' so as to trigger constitutional due process pursuant to the 5th and 14th Amendment. This argument was predicated on the fact that US courts at that time had delimited the reach of constitutional due process to cases where the claimant had a substantive right to the subject matter, whatsoever that might be. The existence of substantive rights was viewed as a necessary condition precedent to procedural rights. The Supreme Court finally scotched this fallacious causality,[119] albeit a few years after the same intellectual infirmity had been laid to rest in the UK.[120] The salient point for present purposes was that UK law was afflicted by the same infirmity.

[118] CA Reich, 'The New Property' 73Yale LJ 733 (1964); 'Individual Rights and Social Welfare: The Emerging Legal Issues' 74 Yale LJ 1245 (1965); 'Beyond the New Property: An Ecological View of Due Process' 56 Brook. LR 731 (1990-91).

[119] *Goldberg v Kelly* 397 US 254 (1970).

[120] *Ridge v Baldwin* [1964] AC 40.

In *Parker*,[121] the issue was as to whether the applicant was a fit person to continue to hold a cab-driver's licence. His licence was revoked, after a hearing had been held, but he contended that he had no opportunity to call a witness, who could have rebutted the police's allegation. Lord Goddard CJ was not impressed. The applicant's claim for natural justice was denied in part because the proceeding was regarded as disciplinary, to which due process did not attach.[122] It was also denied because the applicant had no substantive right to the licence, which was conceptualized as a mere permission that could be withdrawn at will. It was, said Lord Goddard CJ, impossible to maintain that the applicant was entitled to any hearing at all.[123]

> Indeed, leaving out of account such very exceptional things as irrevocable licences granted under seal and possibly licences coupled with an interest, the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. The licence is nothing but a permission, and if one gives a man permission to do something it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission. Unless he has given a licence for a definite period, thereby giving some contractual right, he can withdraw it.

The same reasoning is evident in *Nakkuda Ali*, where the Controller of Textiles in Ceylon removed the applicant's licence, having concluded that he was, in the words of the relevant legislation, unfit to be allowed to continue as a dealer. Lord Radcliffe, giving judgment for the Privy Council, denied that natural justice was applicable, in part because there was no ground for concluding that the Controller was acting judicially or quasi-judicially when enforcing the legislation. Lord Radcliffe also placed considerable emphasis on the fact that cancellation of a licence was characterised as withdrawal of a privilege, not the determination of a right.[124]

---

[121] *R v Metropolitan Police Commissioner, ex p Parker* [1953] 1 WLR 1150, 1153.

[122] Ibid 1155.

[123] Ibid 1154.

[124] *Nakkuda Ali v Jayaratne* [1951] AC 66, 77−8.

> In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred on the Controller by reg. 62 stands by itself on the bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules

This does not reflect prior law. The general position was that revocation of licences were subject to natural justice. This is exemplified by the *Archbishop of Canterbury* case, where the court held that natural justice was applicable when a curate's licence was withdrawn, and the court also ensured that the hearing was fit for purpose.[125] In *Rogers*, the court held that an employer who retained the licence of his employee could not be a judge in his own cause as to whether the employee had committed a wrong, nor could he render the licence useless by penning such a conclusion on the licence.[126] In *Fuller*, a conviction for selling brandy without a licence was quashed because of a litany of errors relating to the notice of the hearing, the sufficiency of the hearing and the evidentiary foundation for the conviction.[127] The same conclusion is evident in the context of revocation of transport licences, where notice and hearing had to precede the revocation.[128]

The principles underlying the case law were reinforced by legislation. It was standard legislative practice, in fields as diverse as transport, liquor, gaming, theatres explosives and mining, for the grant and modification of licences to be subject to rules concerning notice,

[125] *Archbishop of Canterbury* (n 71).

[126] *Rogers v Macnamara* (1853) 14 C.B. 27.

[127] *R v Russell* (1733) Sess. Cas. 66.

[128] 2 GT Whitfield Hayes, Mews' Digest of English Case Law: Supplement Containing the Cases Reported in the Years 1936 to 1945 (2nd edn, 1949) 2211-13.

hearings and the like.[129] The hearing served the public interest, in ensuring that the applicant was a fit and proper person to hold the relevant licence; it also served the interest of the individual, by ensuring that if the applicant was denied a licence, or if the licence was to be revoked for non-compliance with conditions on which it had been granted, the individual would be able to contest the reasons for such a conclusion.

(f) Change: Limitation of Application – Hearing Rights and Remedies

We shall consider the law relating to certiorari as it developed historically in a later chapter.[130] It is nonetheless apposite here for the following reason. It was held in *Haynes-Smith* that for certiorari to be available there would have to be not just a determination affecting the rights of individuals, but also a superadded duty to act judicially.[131] This view has now been overturned.[132] However, while it held sway it was sometimes interpreted to mean not just that there had been a breach of natural justice with no remedy available. The courts went further and said that natural justice itself was not applicable.

In *Nakkuda Ali*,[133] the reasoning concerning rights and privileges was reinforced by explicit reference to *Haynes-Smith* and the requirement of the superadded duty to act judicially, Lord Radcliffe stating that 'it is that characteristic that the Controller lacks in acting under reg. 62', which was the governing legislation in that case. The linkage between applicability of natural justice and certiorari was also apparent in *Parker*. Lord Goddard CJ reasoned that the

[129] See, e.g., Excise Licences Act 1825; Explosives Act 1875; Licensing (Consolidation) Act 1910;

[130] See below, Ch 15.

[131] *R v Legislative Committee of the Church Assembly, ex p. Haynes-Smith* [1928] 1 KB 411, 415 (mis)interpreting *R. v Electricity Commissioners, ex p. London Electricity Joint Committees Co (1920) Ltd* [1924] 1 KB 171, 205.

[132] *Ridge v Baldwin* [1964] AC 40, 72−6.

[133] *Nakkuda Ali* (n 124) 78.

Commissioner could not be regarded as a judge or quasi-judge who was subject to natural justice, because he did not make anything akin to an order, with the consequence that 'there is nothing to be brought up to be quashed in this court'.[134]

8 Hearing and Bias: 20th Century Post-Ridge

(a) Reconnecting with the Historic Jurisprudence: Ridge v Baldwin

Ridge v Baldwin[135] is justly regarded as a seminal decision on natural justice in the 20th century, and more generally in the revival of administrative law. It is then all the more important to recognize that the reasoning was informed by case law from earlier centuries, and the values in their Lordships' judgments echo those from the formative jurisprudence.

Ridge, who was the Chief Constable of a police force, was charged twice with serious criminal offences, and acquitted twice, on the latter occasion no evidence being proffered by the prosecution. The trial judge, nonetheless, twice impugned his integrity and bemoaned the lack of leadership. Ridge then sought reinstatement in office, in order primarily to secure his pension. The reinstatement was refused by the police watch committee, who alleged that he had been guilty of neglect of duty, albeit without offering further particulars of the offence. He was found guilty by the watch committee, and sought to have the decision struck down as being ultra vires.

The House of Lords found in his favour, in large part because of breach of natural justice. Lord Reid gave the leading judgment. He noted at the outset the longevity of the audi alteram partem principle, and noted also that in modern times some had expressed the view

[134] *Parker* (n 121) 1155; *R v St. Lawrence's Hospital Statutory Visitors, ex p. Pritchard* [1953] 1 WLR 1158.

[135] *Ridge* (n 2).

that natural justice was 'so vague as to be practically meaningless', to which he responded that such ideas were 'tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist'.[136] Lord Reid drew on the historic case law concerning natural justice, dismissal from office, deprivation of property rights and interests akin thereto, and clubs and associations.[137] His Lordship noted that this case law had never been doubted, but gave three reasons why the law had become confused in the 40 years prior to the ruling.

The first was that natural justice could have only a limited application in the context of the wider duties or discretion imposed upon a minister, but the courts had applied these limits to areas where the constraints were unnecessary.[138] The second reason was that the principle had received only limited application during the war, but this should not affect the ambit of natural justice now. The third was the confusion between rights and remedies in the requirement of a superadded duty to act judicially for certiorari, and the way that this had stilted the development of natural justice. Lord Reid expressly disapproved the ruling in *Haynes-Smith*, and that in *Nakkuda Ali*, insofar as it supported that reasoning.[139] It was, said Lord Reid, impossible to accept that there had to be something superadded in addition to the impact on rights/interests, before natural justice could be applicable. This did not withstand scrutiny in the light of the historic case law on natural justice. For Lord Reid, the judicial element in natural justice should be inferred from the nature of the duty/power and its effect on the individual.[140]

[136] Ibid 64-5.

[137] Ibid 66-71.

[138] Ibid 71−2.

[139] Ibid 75.

[140] Ibid 75-6, 77-8.

His Lordship concluded that the watch committee could not dismiss the Chief Constable until they informed him of the charges and gave an opportunity to respond.[141] Lord Morris of Borth-y-Gest also based his judgment on the 19th-century jurisprudence.[142] For Lord Hodson[143] the absence of a legal action between the parties was not decisive, nor was the characterisation of the act as judicial, administrative or executive.[144]

Their Lordships therefore revived the principles of natural justice. They rediscovered the older jurisprudence, which had applied the principle to a broad spectrum of interests and a wide variety of decision-makers. They disapproved 20th-century impediments: the requirements of a formal action between parties, and a superadded duty to act judicially were said to be false constraints.

(b) Developing the Historic Jurisprudence: Post-Ridge v Baldwin

This is not the place for detailed exegesis on the modern law of natural justice post-*Ridge*. The object is rather to focus on the elements of continuity and change in current law when viewed from an historical perspective. These have already been considered with respect to 20th century case law prior to *Ridge*, with the case law revealing both continuity and change in the manner adumbrated above. The period post-*Ridge* is principally characterized by continuity with the past, and further refinement of precepts and values in the older case law. This is apparent if we focus on issues relating to the applicability and content of natural justice.

[141] Ibid 79.

[142] Ibid 120−1.

[143] Ibid 127−32.

[144] Lord Devlin based his judgment primarily upon the police regulations, ibid 137−41; Lord Evershed dissented, 82−100.

In terms of applicability, *Ridge* cleared the ground by removing impediments in some earlier 20th century case law. However, there was little positive guidance as to when natural justice should apply. The closest to any general formulation was that the applicability of natural justice was dependent on the nature of the power and its effect upon the individual. It was, therefore, unsurprising that in the years following *Ridge* the courts were faced with many cases concerned not just with the content of natural justice, but with the criterion for its applicability. They largely eschewed distinctions between the judicial and the administrative insofar as the application of natural justice is concerned, although norms of a legislative nature are still generally regarded as not covered by common law due process. The distinction between rights and privileges has also been side-lined, as far as the applicability of natural justice is concerned. The criteria that have been developed are fairly broad and flexible, such that the applicant must show some right, interest or legitimate expectation to render natural justice applicable.[145] This is reflected in the increased use of the term 'fairness', which was felt by some judges to be more apt than natural justice where the case was further removed from the judicial end of the spectrum. The focus on rights and interests resonates with the considerations that shaped the applicability of audi alteram partem from the 17th century onwards. So too does the idea that the applicability of natural justice/fairness would be determined by the nature of the power/duty and its impact on the individual. The concept of legitimate expectation is, by way of contrast, novel. So too were the problems posed by application, and indeed content, of natural justice in the context of legislation designed to combat terrorism.[146]

In terms of the content of natural justice, the courts post-*Ridge* have refined techniques evident in the foundational case law for determining the content of natural justice, where the courts repeatedly emphasized the need to tailor the particular process rights accorded to the

[145] Craig (n 13) 12-012—12-015.

[146] Ibid Ch 13.

nature of the decision being made. This same approach informs the modern jurisprudence. The courts take account of a wide variety of factors within the balancing test. These include the nature of the individual's interest; the type of decision challenged; whether it was final or preliminary; the type of subject-matter; how far it was necessary to supplement statutory procedures; and the cost of imposing further procedural requirements. In more general terms, the result is arrived at after balancing three types of factor: the individual's interest; the benefits to be derived from added procedural safeguards; and the costs to the administration, both direct and indirect, of complying with these procedural safeguards.[147] The courts have further developed these principles in an important way through recognition of the concept of systemic/structural unfairness.[148]

The same combination of continuity with the past and further refinement is evident in relation to the other limb of natural justice, the rule against bias. The courts continued to apply the principles developed in the formative case law, explicated above. They also continued to grapple with the precise test for bias that should be applied in cases where the interest was non-pecuniary, and with the difficult issue as to how far the test for bias could be applied in institutional settings where the decision-maker could not be expected to have the impartiality characteristic of a person deciding a case in a judicial setting.[149]

(c) Novel Influences: EU Law and the ECHR

The application and content of natural justice have also been affected by novel external influences, which self-evidently did not exist in earlier centuries. UK membership of the EU

[147] Ibid 12-020—12-025.

[148] Ibid 12-026.

[149] Ibid 14-002—14-008.

rendered general principles of EU law applicable within the UK legal order. This included the rights of the defence, which were applicable whenever the UK, including any agency or local authority, acted within the scope of EU law. UK membership of the ECHR also had implications for the application and content of process rights, more especially after the Human Rights Act 1998 rendered Convention rights directly enforceable in UK courts. Article 6 ECHR specified the need for hearing rights for cases involving civil rights and obligations, the meaning of which was not entirely clear from the Strasbourg jurisprudence.[150] Article 6 also required that the hearing should be before a tribunal that was independent, as well as unbiased, and this too generated complex case law in Strasbourg and domestic courts.[151]

(d) Novel Problems: AI and Algorithmic Decision-making

The judges who fashioned the central precepts of natural justice demonstrated pretty good understanding of the decision-making mechanisms to which they were applied. There were nonetheless limits to their prescience, and indeed to that of their modern counterparts. The judges in the 1970s would have had no greater foresight of the challenges posed by new technology in terms of automated decision-making than would their brethren in the 1670s. For all the changes that have occurred over 400 years, the constant has been that decisions have been made by individuals operating singly, or within the context of public bodies. Developments in the last few years have undermined that assumption. The reality is that in many instances it is not possible to trace a decision back to a discrete individual. The operative decision may be made by an algorithm, or some other form of automated decision-making. This poses a plethora of problems for all areas of law, including administrative law. It creates

[150] Ibid 12-016—12-018.

[151] Ibid 14-012—14-018.

challenges for due process, and what it means for a person to be heard when the operative decision is made largely or exclusively by an algorithm. The doctrinal response to these challenges will occupy courts in the coming years.[152]

9 Conclusion

There are in law, as in life, certain issues that are enduring, others that are ephemeral. The former include, inter alia, issues where the normative values are relatively constant, notwithstanding that there may be room for doctrinal contestation as to how they are best met. It is exemplified by the terrain covered by natural justice. The instrumental and non-instrumental values that underpin modern discourse shaped the foundational case law concerning the applicability of natural justice and its development thereafter. The enduring importance of certain issues, and the normative values that underpin them, is evident once again in the recognition that the precepts of due process should also be applicable to certain private settings, more especially where those that entailed aggregations of power that could impact on individuals. The heterogeneity in the forms of decision-making has always been an endemic feature of the administrative state, and this was reflected in variation as to the content of natural justice in the formative jurisprudence, in much the same way as in the modern case law. The courts from the 17th century onwards were fully cognizant of the normative values that underpinned natural justice. They responded by creating the doctrine that we continue to use. It constituted a central part of administrative law that emerged 400 years ago.

[152] Ibid Ch 10.