

**Sir Anthony Mason Lecture**  
**The University of Melbourne Law School**  
**Law Students' Society**

**Procedural Fairness – Indispensable to Justice?**

Chief Justice Robert S French

7 October 2010

**Procedural Fairness – Rationale**

Procedural fairness is part of our cultural heritage. It is deeply rooted in our law. It lies at the heart of the judicial function and conditions the exercise of a large array of administrative powers affecting the rights, duties, privileges and immunities of individuals and organisations. As a normative marker for decision-making it predates by millennia the common law of England and its voyage to the Australian colonies. Its origins and application raise an old-fashioned question: Is it about justice or is it about wisdom? That question may be unpacked into a contemporary taxonomy<sup>1</sup> which posits a number of rationales.

1. That it is instrumental, that is to say, an aid to good decision-making.
2. That it supports the rule of law by promoting public confidence in official decision-making.
3. That it has a rhetorical or libertarian justification as a first principle of justice, a principle of constitutionalism.
4. That it gives due respect to the dignity of individuals – the dignitarian rationale.

---

<sup>1</sup> Proposed in I Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, Aldershot, 2002) at 286-294. See also Aronson, Dyer & Groves, *Judicial Review of Administrative Action* (4th ed, Thomson Reuters, Sydney, 2009) at 404-408.

5. By way of participatory or republican rationale – it is democracy's guarantee of the opportunity for all to play their part in the political process.

These rationales are plainly not mutually exclusive. Each has its place in a justification of procedural fairness. It is possible to say that procedural fairness is both just and wise.

That having been said, the existence of an instrumental justification has practical significance. There is a tendency in some quarters to regard procedural fairness as a species of ethical ornamentation, a moral luxury which is a drag on efficient decision-making. As Wade and Forsyth observe 'it is natural that administrators should be tempted to regard procedural restrictions, invented by lawyers, as an obstacle to efficiency'.<sup>2</sup> This view is reflected in statutory provisions expressly excluding procedural fairness from certain classes of decision-making. Such provisions can be found in widely disparate areas of legal regulation. Section 69(2) of the *Corrections Act 1986* (Vic) provides, in relation to the Parole Board:

In exercising its functions, the Board is not bound by the rules of natural justice.

In an entirely different field, the *Commonwealth Radioactive Waste Management Act 2005* (Cth) provides, in s 3D, in relation to nominations and approval of sites for radioactive waste management facilities:

No person is entitled to procedural fairness in relation to a nomination under section 3A or an approval under section 3C.

And in s 141(4) of the *Casino Control Act 1992* (NSW), relating to the New South Wales Casino Control Authority, it is provided that:

---

<sup>2</sup> Wade and Forsyth, *Administrative Law* (8<sup>th</sup> ed, Oxford University Press, Oxford, 2000) at 435-436.

### 3.

In the exercise of its functions under this Act, the Authority is not required to observe the rules of natural justice (except to the extent that it is specifically required to do so by this Act).

Such provisions raise the question: Does such legislation contemplate a tolerable level of bias or apparent bias or unfair refusal to hear from a person affected by a decision? That raises the related question: Is procedural fairness indispensable to justice? In decision-making by courts the answer to that question is plainly in the affirmative. In the field of administrative justice, there will be those who say: It depends on what you mean by justice. In speaking about procedural fairness in administrative decision-making, it is necessary to acknowledge, as the law does, that, as a practical matter, its content will vary according to context. Procedural fairness does not require the judicialisation of administrative processes. To that extent one can agree with what Lord Shaw said in the otherwise forgettable decision of *Local Government Board v Arlidge*<sup>3</sup> that 'the assumption that the methods of natural justice are ex necessitate those of Courts of justice is wholly unfounded'.<sup>4</sup> Given practical flexibility in their application, the rationales for procedural fairness are compatible with its universal application to official decisions affecting individual interests.

#### **The hearing rule – historical perspective**

The rules of procedural fairness, as rules of natural justice were derived from natural law as is demonstrated by English cases of the seventeenth and eighteenth centuries. The first limb to be considered in this connection is the so-called hearing rule.

---

<sup>3</sup> [1915] AC 120.

<sup>4</sup> [1915] AC 120 at 138.

The natural justice hearing rule appeared in many cases in the Year Books.<sup>5</sup> Chief Justice Coke, who played a leading role in its exposition and the development of the remedy of mandamus where it had been breached, inferred it from the provision of the *Magna Carta* that:

No free man shall be taken or imprisoned ruined or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.<sup>6</sup>

By this provision, he said, 'no man ought to be condemned without answer'.<sup>7</sup> It was something of a stretch, but Coke was nothing, if not creative.

It was a foray by Coke into a review of local government decision-making in 1615, which forcefully asserted the rule and at the same time dramatically extended the power of the Court of King's Bench in enforcing it by mandamus. The case concerned municipal misbehaviour. The Mayor and Chief Burgesses of the Borough of Plymouth had removed one of their number, James Bagg, from the office of Chief Burgess on the grounds of his misconduct. They made a number of allegations against him. They said that he had called the previous Mayor, Mr Trelawney, a 'cozening knave' and 'an insolent fellow'. They said that he had threatened to crack the neck of the current Mayor, Thomas Fowens. Worst of all they said that:

in the presence and hearing of ... Thomas Fowens, ... and very many others of the burgesses and inhabitants of the borough ... and in contempt and distain 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').<sup>8</sup>

<sup>5</sup> See HH Marshall, *Natural Justice* (Sweet and Maxwell Ltd, London, 1959) at 18-19, esp fn 58.

<sup>6</sup> JC Holt, *Magna Carta* (2<sup>nd</sup> ed, Cambridge University Press, 1992) at 461.

<sup>7</sup> Co Inst IV, 37 cited in Marshall, fn 5, at 18.

<sup>8</sup> *Bagg's Case* (1615) 11 Co Rep 95b [77 ER 1271 at 1275].

Mr Bagg commenced proceedings in the Court of Kings Bench challenging his removal from office by the Mayor and other Burgesses. The Court ordered the Mayor and the Burgesses to either restore Mr Bagg to office or to show cause why he was removed. An answer was given referring to Mr Bagg's very bad behaviour. However, the Court was not satisfied that the reasons given in the return to the writ justified his removal. On the question of how and by whom and in what manner a citizen or burgess should be disenfranchised, Coke CJ said:

... although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet 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 ... .<sup>9</sup>

For what may properly be called moral support, he quoted from Seneca's tragedy, the *Medea*, a passage which as translated in 1648, read:

Who ought decrees, nor heares both sides discust,  
Does but unjustly, though his Doome be just.<sup>10</sup>

The significant proposition embedded in those lines, was that even though a decision be right, it is not just if made without the decision-maker first hearing from the person to be affected by it. More significantly, it was not a statement of positive law.

It was not the first time that Coke had quoted Seneca.<sup>11</sup> Nor was it the last time that the *Medea* would be invoked in support of procedural fairness.<sup>12</sup>

<sup>9</sup> *Bagg's Case*, at 99a [77 ER 1271 at 1279-1280].

<sup>10</sup> *Medea: A Tragedie* Englished by ES Esq (1648).

<sup>11</sup> See also *Boswell's case* (1606) 6 Co Rep 48b, 52a [77 ER 326].

<sup>12</sup> Eg *R v Archbishop of Canterbury* (1859) 1 E & E 545; *Smith v The King* [1878] 3 AC 614 at 624.

Blackstone, writing about summary proceedings before Justices of the Peace, acknowledged their speedy efficiency but added a cautionary note which sounds a little sardonic to the modern ear:

The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is condemned. This is now held to be an indispensable requisite: though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca ...<sup>13</sup>

Seneca was quoted in this connection by the first Chief Justice of the High Court of Australia in 1907. The Court held in the case of *Utick v Utick* that, although a husband had failed to enter an appearance in a suit brought by his wife for dissolution of their marriage, the husband was entitled to be heard before an order for maintenance was made. Chief Justice Griffith said:

It may have been a perfectly just order. But, to quote the well-known epigram of Seneca, "*quicumque aliquid statuerit, parte inauditâ alterâ, æquum licet statuerit, haud æquus fuerit*".<sup>14</sup>

*Bagg's Case* was an early judicial expression of the hearing rule, although by no means the first. It was probably most notable as one of the first occasions on which mandamus was used as a tool for judicial review of administrative action. In justifying the issue of the writ, Coke asserted the jurisdiction of the Court of King's Bench in sweeping terms as:

not only to correct errors in judicial proceedings, but other errors, and misdemeanors [sic] extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public

<sup>13</sup> W Blackstone, *Commentaries on the Laws of England* (1<sup>st</sup> published 1765, 1<sup>st</sup> ed, 1966) vol 4 at 279.

<sup>14</sup> *Utick v Utick* (1907) 5 CLR 400 at 403.

or private, can be done but that it shall be (here) reformed or punished by due course of law.<sup>15</sup>

There appeared to be little or no authority for this wide-ranging claim. Coke was the paradigm of what today would be called 'an activist judge'.

The procedural requirement for a hearing in *Bagg's Case* was seen as outweighing any consideration of the merits of the decision under review. In another frequently quoted decision to like effect in 1723, the Court of King's Bench issued mandamus to the University of Cambridge requiring the restoration to one Dr Bentley of the degrees of Bachelor of Arts and Bachelor and Doctor of Divinity of which he had been deprived by the University without a hearing. Dr Bentley had been served with a summons to appear before a University court in an action for debt. He said the process was illegal, that he would not obey it and that the Vice-Chancellor was not his judge. He was then accused of contempt and without further notice deprived of his degrees by the 'congregation' of the University. The judgment of Fortescue J in the case is often cited as an example of the way in which the idea of natural law informed the concept of natural justice. Fortescue J said:

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.<sup>16</sup>

The notion that God thought up procedural fairness supported its characterisation as a product of natural law. It was a notion which was extant a long time before *Dr Bentley's Case*. Writing in defence of St Athanasius in the fourth century, Bishop Lucifer of Cagliari invoked the example of a divinely convened hearing in the Garden of Eden:

<sup>15</sup> *Bagg's Case*, at 98a [77 ER 1271 at 1277-1278].

<sup>16</sup> *R v Chancellor of the University of Cambridge (Dr Bentley's Case)* (1723) 1 Str 557 at 567 [93 ER 698 at 704].

How do you believe it divinely permitted to punish a person unheard when you see that Adam and Eve, the origin of our race, were heard before they were struck by the sentence of God? 'Then God called Adam and said to him, Adam, where are you? And Adam said, I heard your voice, Lord, in paradise, and I was afraid, because I am naked, and I hid myself. And God said to him, Who showed you that you are naked, except that you have eaten from the tree from which alone I commanded not to eat? And Adam said, The woman that you gave me, she gave me from the tree, and I ate. And God said to the woman, Why did you do this? And the woman said, The serpent persuaded me, and I ate ...'.<sup>17</sup>

It does not appear that the serpent was asked to testify. Being omniscient, God had no need to hear from anybody. If His exchange with Adam and Eve reflected respect for the hearing rule, that respect did not depend upon its practical utility.

The Biblical record is not entirely consistent in relation to the application of procedural fairness. The Book of *Daniel* tells of a disastrous dinner hosted by King Belshazzar of the Chaldeans. During the meal a moving finger wrote on the wall these threatening words, '*mene, mene, tekel, upharsin*', which translated roughly as 'God has numbered the days of your kingdom and brought it to an end: you have been weighed in the balance and found wanting and your Kingdom is to be divided between the Medes and the Persians'.<sup>18</sup> As Professor RFV Heuston has pointed out, the prophet did not indicate that Belshazzar 'was given either summons, information of the nature of the complaint, or any opportunity to answer'.<sup>19</sup>

After *Dr Bentley's Case* the hearing rule was reinforced in 1799 by Lord Kenyon CJ in *R v Gaskin*.<sup>20</sup> It was Lord Kenyon who apparently coined the Latin term '*audi alteram partem*' to encapsulate the rule, of which he said:

<sup>17</sup> JM Kelly, 'Audi alteram partem' (1964) 9 *Natural Law Forum* 103 at 109, citing *Pro S Athan 1.1* (Migne Patrologia Latina, vol 13 col 817ff).

<sup>18</sup> *The Bible, Daniel*, 5:1-30.

<sup>19</sup> RFV Heuston, *Essays in Constitutional Law* (Stevens and Sons Ltd, London, 1961) at 172.

<sup>20</sup> (1799) 8 TR 209 [101 ER 1349].



It is to be found at the head of our criminal law, that every man ought to have an opportunity of being heard before he is condemned ...<sup>21</sup>

### **The rule against bias - an historical perspective**

The second aspect of procedural fairness, the rule against bias, surfaced in 1610 in *Dr Bonham's Case*.<sup>22</sup> The case is best known for another vaulting claim by Coke in his assertion of the superiority of judge-made law over the parliamentary variety thus:

when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void ...<sup>23</sup>

The Royal College of Physicians had fined Dr Bonham and secured his imprisonment when he had continued to practice in London after being refused permission to do so by the College. He brought a suit for false imprisonment in the Court of Common Pleas. In the course of the judgment, Coke said of the College, which was entitled to keep some of the fine which it imposed, that:

[t]he 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...<sup>24</sup>

He followed this with the observation in Latin, '*quia aliquis non debet esse Judex in propria causa*', foreshadowing the more familiar '*nemo Judex in causa sua*'.

The character of the rule against bias as a kind of natural or constitutional limit upon parliamentary power, was also asserted by Lord Chief Justice Hobart in

<sup>21</sup> (1799) 8 TR 209 at 210 [101 ER 1349 at 1350]; see also *Harper v Carr* (1797) 7 TR 271 at 275 [101 ER 970 at 972] discussed in Holloway, fn 1 at 16.

<sup>22</sup> (1610) 8 Co Rep 113b [77 ER 646].

<sup>23</sup> (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

<sup>24</sup> (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

1614 in *Day v Savadge* when he said that a statute 'made against natural equity, as to make a man Judge in his own case, is void in it self, for jura naturæ sunt immutabilia [the laws of nature are unchangeable], and they are leges legum [laws that apply to law]<sup>25</sup>. The passage demonstrates that the rule against bias, like the hearing rule, was treated as an expression of the natural law regarded by Roman legal scholars as 'that ideal body of right and reasonable principles which was common to all human beings'.<sup>26</sup> Those principles are said to have emerged from Cicero's Latin renderings of Greek Stoic philosophy, written in the first century BC.<sup>27</sup> They became the underpinnings of Thomas Aquinas's philosophy and were regarded as divine law informing creation and binding human beings. Despite this exalted status the constitutional force given to natural justice and natural law by Chief Justice Coke in *Dr Bonham's Case* and by Chief Justice Hobart in *Day v Savadge*, did not survive the rise of the doctrine of parliamentary supremacy. *Bonham's Case* did, however, receive what was probably one of its last hurrahs in a judgment given by Chief Justice Holt in 1702.

In *City of London v Wood*<sup>28</sup>, Chief Justice Holt reaffirmed the rule against bias as an expression of the natural law. By that time, the idea that a person could not be a judge in his own cause was well established. Natural law as an emanation of the divine had taken its place alongside the theories of Thomas Hobbes in which it was treated 'not as traditional right reason, but rather as a mode of reasoning about the liberty of individuals in the state of nature'.<sup>29</sup> At a level considerably lower than the lofty musings of Hobbes and the natural lawyers, the City of London sued

<sup>25</sup> (1614) Hob 85 at 87 [80 ER 235 at 237] and see B Toy-Cronin, 'Waiver of the Rule against Bias' (2000) 9 *Auckland University Law Review* 850 at 868.

<sup>26</sup> I Holdsworth, *A History of English Law* (4<sup>th</sup> ed, 1936) vol 2 at 6.

<sup>27</sup> Lloyd L Weinreb, *Natural Law and Justice* (Harvard University Press, 1987) at 1.

<sup>28</sup> (1702) 12 Mod 669 [88 ER 1592].

<sup>29</sup> PA Hamburger, 'Revolution and Judicial Review: Chief Justice Holt's Opinion in *City of London v Wood*' (1994) 94 *Columbia Law Review* 2091 at 2121.

Thomas Wood to recover a penalty imposed upon him for refusing to accept nomination as a sheriff. Anyone who refused to accept such a nomination could be punished by a fine. The fine was four hundred pounds. To nominate unwilling but wealthy individuals to the office of sheriff was used in the City of London as a way of raising revenue from those who were prepared to pay rather than to serve. The City brought its action of debt against Mr Wood in the name of the Mayor and Others and brought it in the Mayor's Court, which consisted formally of the Mayor and the Alderman. The judicial functions of the Court had for a long time been carried out by the Recorder. This did not save the proceedings from invalidity. The Mayor and the commonalty and the citizens could not sue in a court held before the Mayor and the Alderman.<sup>30</sup> In so holding, Chief Justice Holt expressed support for *Dr Bonham's Case* saying:

... it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, although it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature; but it cannot make one that lives under a Government Judge and party.<sup>31</sup>

One might ask in contemporary terms, and perhaps provocatively, how far distant from that proposition is the proposition that the rules of procedural fairness qualify the exercise of statutory powers as an implied limitation which requires clear words for its displacement. There would seem to be a small 'c' constitutional dimension to the common law rule of interpretation, which supports procedural fairness in the exercise of statutory powers. Less provocatively one might simply adopt Sir Owen Dixon's general remarks about the common law and the Constitution

---

<sup>30</sup> Hamburger, fn 29, at 2125.

<sup>31</sup> 12 Mod 669 at 687-688 [88 ER 1592 at 1602] and see Hamburger, fn 29 at 2092.

in an address to Harvard Law School in 1955 in which he used a cosmological metaphor of some antiquity:

There is no difficulty in Australia, such is its history, in regarding the common law as antecedent to the Constitution. It supplies such principles in aid of its interpretation and operation. The common law is more real and certainly less rigid than the ether with which scientists were accustomed to fill interstellar space. But it serves all, and more than all, the purposes in surrounding and pervading the Australian system for which, in the cosmic system, that speculative medium was devised.<sup>32</sup>

The suggestion that the natural law could invalidate or avoid statutes which were contrary to its norms fell before the rising tide of parliamentary supremacy following the Glorious Revolution of 1688. Acknowledgement of that supremacy was emphatic in a number of decisions of the English Courts of the nineteenth century, including the Privy Council.<sup>33</sup> The rule against bias was no exception to it. In 1871, Willes J in the Court of Common Pleas, rejected the proposition in *Day v Savadge* that the Court might disregard a statute under which a person was made judge in his own cause. He said:

If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.<sup>34</sup>

Nevertheless, the rule against bias was well-established. It was rather dramatically deployed against the Lord Chancellor himself in *Dimes v Grand Junction Canal*<sup>35</sup> in 1852. The House of Lords in that case set aside a decision involving a canal company in which the Lord Chancellor, Lord Cottenham, who had

---

<sup>32</sup> Sir Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 ALJ 420 at 424-425.

<sup>33</sup> *Logan v Burslem* (1842) 4 Moore PC 284 at 296.

<sup>34</sup> *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576 at 582 and see generally Marshall, fn 5 at 14-15.

<sup>35</sup> [1852] 3 HLC 759.

presided, was a shareholder. There was no suggestion that he was influenced by his pecuniary interest in the case.<sup>36</sup> The appearance of bias sufficed. Lord Campbell, after stating that no-one could suppose that Lord Cottenham would be in the remotest degree influenced by his interest took the opportunity to deliver a stern warning to all lesser dispensers of justice:

This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.<sup>37</sup>

The House of Lords revisited the question with one of its own in 1999.<sup>38</sup> Their Lordships had held that Augusto Pinochet, the former dictator of Chile, was amenable to arrest and extradition for crimes committed when in office.<sup>39</sup> One of the intervenors in the case was Amnesty International. Lord Hoffman who sat on the case, was a director of a related organisation, Amnesty International Charity Ltd. That fact was not disclosed to the parties. The decision was set aside by a differently constituted panel of the Law Lords. The relevant principles were enunciated by Lord Browne-Wilkinson. A judge who was a party to an action or had a financial proprietary interest in its outcome was automatically disqualified from hearing it. If a judge's conduct or behaviour could give rise to a suspicion of partiality, for example because of friendship with a party, then the judge would be disqualified. Significantly, the automatic disqualification rule was extended to a judge involved 'whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit'.<sup>40</sup>

---

<sup>36</sup> [1852] 3 HLC 759 at 793.

<sup>37</sup> [1852] 3 HLC 759 at 793-794.

<sup>38</sup> *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

<sup>39</sup> *R v Bow Street Metropolitan Stipendiary Magistrate: Ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61.

<sup>40</sup> *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 135.

The principle so enunciated has been the subject of some debate referred to by Justice Grant Hammond of New Zealand in his interesting monograph, *Judicial Recusal*, which was published in 2009.<sup>41</sup> The criticism of the decision, as Justice Hammond explained it, was that the House of Lords had applied a formalistic per se rule to avoid any inquiry into whether Lord Hoffman could be said to have been likely to be biased. This approach was contrasted with that of the High Court in *Ebner v Official Trustee in Bankruptcy*.<sup>42</sup> There the focus of the Court was on reasonable apprehension of bias.

Consideration of the bias rule to this point once again leads to a reflection upon the operation of statutes excluding procedural fairness. In the context of bias, what is the effect of a statutory exclusion of procedural fairness? For even where a statute contains such a provision, a decision-maker actually biased against or in favour of, a particular person is likely to make a decision vitiated by bad faith or reference to irrelevant considerations or a failure to address the question which the statute requires be addressed. The same problem may not arise with respect to the rule against the appearance of bias. Indeed, it might be said that the rule against the appearance of bias lacks the same instrumental justification as that against actual bias. Nevertheless, the rule against the appearance of bias may be linked to the maintenance of confidence and the acceptance of official decisions by those affected by them and linked also to the more numinous concept of public confidence.

### **The common law and the statute law**

Returning briefly to the nineteenth century and to the hearing rule, we arrive at the important case of *Cooper v Wandsworth Board of Works*<sup>43</sup>, decided in 1863. It extended natural justice to decisions interfering with property rights. The Board of

---

<sup>41</sup> Hammond, *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Oxford, 2009).

<sup>42</sup> (2000) 205 CLR 337.

<sup>43</sup> (1863) 14 CB (NS) 180 [143 ER 414].

Works demolished a building where the builder had not complied with a statutory requirement of seven days notice before commencing construction. The demolition was begun without the builder being given the opportunity of explaining his failure. The decision of the Board was held void because of its failure to provide a hearing and its demolition a trespass. In the course of his judgment Byles J, in a frequently quoted passage, said:

... 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 heard, yet the justice of the common law will supply the omission of the legislature.<sup>44</sup>

That passage and the other judgments in *Cooper v Wandsworth Board of Works* anticipated the question – Just how does the justice of the common law supply the omission of the legislature? The English approach was to treat the problem as one of statutory interpretation. In *Wiseman v Borneman* Lord Guest said:

... the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest.<sup>45</sup>

Chief Justice Barwick in *Salemi v MacKellar (No 2)*<sup>46</sup> also treated the matter as one of statutory interpretation by way of implication. Whether or not the statutory power was qualified by the rules of procedural fairness was a matter for the parliament:

... it is fundamental that what the courts do in qualifying the powers is no more than to construe the statute.<sup>47</sup>

---

<sup>44</sup> (1863) 14 CB (NS) 180 at 193 [143 ER 414 at 420].

<sup>45</sup> [1971] AC 297 at 310.

<sup>46</sup> (1977) 137 CLR 396.

<sup>47</sup> (1977) 137 CLR 396 at 401.

That was also the approach supported by Sir Gerard Brennan.<sup>48</sup> Sir Anthony Mason on the other hand gave greater emphasis to the common law rule.<sup>49</sup> The emphasis on the common law in Sir Anthony's approach was reflected in his statement in *Kioa v West*:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.<sup>50</sup>

It may be that the distinction between the common law and a common law rule of statutory implication approaches a distinction without a real difference. Hayne J in *Re Refugee Tribunal; Ex parte Aala* said:

... it may be that for many purposes the competing views lead to no different result, the ultimate question being whether the obligation asserted is compatible with the terms of the relevant legislation. On either view, the obligation to accord procedural fairness is an obligation affecting how the decision maker is to go about the task of decision making. It is a limitation on the power to decide.<sup>51</sup>

Gaudron J referred to that passage in her judgment in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*<sup>52</sup> when she observed that the difference between the two views may not be as great as might first appear. Her Honour noted that in *Annetts v McCann* Brennan J had explained that the implication arises because

<sup>48</sup> Holloway, fn 1 at 256 traces Sir Gerard's approach through such cases as *Walton v Gardiner* (1992) 177 CLR 378, *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 at 407-408, *Kioa v West* (1985) 159 CLR 550 at 611 ff, *Annetts v McCann* (1991) 170 CLR 596 at 604, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 584-585.

<sup>49</sup> Holloway refers to Sir Anthony's judgments in *Twist v Randwick Municipal Council* (1976) 136 CLR 106, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, *Kioa v West* (1985) 159 CLR 550, *Annetts v McCann* (1991) 170 CLR 596.

<sup>50</sup> (1985) 159 CLR 550 at 584.

<sup>51</sup> (2000) 204 CLR 82 at 143 [168].

<sup>52</sup> (2001) 206 CLR 57 at 83 [89].



'the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of the power.'<sup>53</sup>

The implication of a condition upon a statutory power that it be exercised in accordance with the rules of procedural fairness is an implication effected by a common law rule of interpretation. The alternative characterisation of the operation of the rules of procedural fairness is that there is a freestanding common law rule only to be displaced by clear statutory words. It is arguable that these two expositions collapse conceptually into one. In *Saeed v Minister for Immigration and Citizenship*<sup>54</sup>, in which judgment was delivered on 23 June 2010, the plurality judgment<sup>55</sup> quoted what Sir Gerard had said in *Kioa v West*, namely that 'all statutes are construed against a background of common law notions of justice and fairness'. The judgment continued:

12. The implication of the principles of natural justice in a statute is therefore arrived at by a process of construction. It proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that they apply to the exercise of a power of the kind referred to in *Annetts*.
13. Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise, as Brennan J further explained in *Kioa*. A failure to fulfil that condition means that the exercise of the power is inefficacious. A decision arrived at without fulfilling the condition cannot be said to be authorised by the statute and for that reason is invalid.<sup>56</sup> (footnotes omitted)

---

<sup>53</sup> (1990) 170 CLR 596 at 604.

<sup>54</sup> (2010) 267 ALR 204.

<sup>55</sup> French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

<sup>56</sup> (2010) 267 ALR 204 at 208-209.

Reference was then made to the joint judgment of Mason CJ, Deane and McHugh JJ in *Annetts* where they said that the principles of natural justice could be excluded only by 'plain words of necessary intendment'. These observations were linked, in *Saeed*, to the principle of legality:

The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australia Workers' Union*, 'governs the relations between Parliament, the executive and the courts'.<sup>57</sup> (footnotes omitted)

### **Procedural fairness – Australia and the United Kingdom**

The evolution of procedural fairness under the rubric of natural justice in England was largely paralleled, at least up until the mid-twentieth century, in Australia. The principles of natural justice were recognised from the very earliest colonial times. The *audi alteram partem* rule was referred to by the first Chief Justice of New South Wales, Sir Francis Forbes, in 1827 as a maxim that the Commissioner of the Court of Requests was not 'at liberty peremptorily to set aside'.<sup>58</sup> In his advisory opinion on the validity of legislation relating to the licensing of newspaper operators the Chief Justice tied the hearing rule directly to natural law when he wrote:

By the laws of England, founded in the law of nature, every man enjoys the right of being heard before he can be condemned either in his person or property.<sup>59</sup>

On the other hand, he contrasted the decision-making powers of the Governor and the Executive Council where they could be both complainants and judges at the same

<sup>57</sup> (2010) 267 ALR 204 at 209 [15].

<sup>58</sup> *Ex parte Mathews* (1827) Supreme Court of New South Wales reported *Sydney Gazette* 16 May 1827.

<sup>59</sup> *Newspaper Acts Opinion* [1827] NSWKR 3 [294].

time and in their own cause, that cause being one of political opposition to their own measures and consequently their own interests. He said:

In the course of my professional experience I cannot find a precedent for any proceeding like this; in no instance within my recollection are the accuser and the Judge associated in the same person. On the contrary, for a Judge to determine in his own cause is, by the laws of England, held to be corruption and punished as a misdemeanour.<sup>60</sup>

Natural justice languished a little in the United Kingdom in the first half of the twentieth century with the assistance of such decisions as *Local Government Board v Arlidge*<sup>61</sup> in which Lord Shaw uttered the following damning words of faint praise:

In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous.<sup>62</sup>

It was in the 1960s in the United Kingdom that natural justice, as procedural fairness, was brought out into the full sunlight initially by the Privy Council in *University of Ceylon v Fernando*<sup>63</sup> and thereafter by the House of Lords in 1963 in *Ridge v Baldwin*.<sup>64</sup> The House of Lords in the later case repudiated the confining requirement that decision-makers had to be characterised as acting judicially before attracting the application of the rules of natural justice. It reinstated the approach to the requirements of natural justice taken in *Cooper v Wandsworth Board of Works*. From that time onwards, the language of 'fairness' in decision-making gained

---

<sup>60</sup> *Newspaper Acts Opinion* [1827] NSWKR 3 [294].

<sup>61</sup> [1915] AC 120.

<sup>62</sup> [1915] AC 120 at 138 and see *Holloway* fn 1 at 91-120.

<sup>63</sup> [1960] 1 WLR 223.

<sup>64</sup> [1964] AC 40.

prominence.<sup>65</sup> Indeed, Wade and Forsyth identify *Cooper v Wandsworth Board of Works* as noteworthy for the role it played in the 1960s revival of the right to be heard.<sup>66</sup>

It was not long after *Ridge v Baldwin* that the High Court in *Banks v Transport Regulation Board (Vic)*<sup>67</sup> issued certiorari to quash the revocation of a taxi licence. And although there was reference to the obligation of the Transport Regulation Board to 'act judicially'<sup>68</sup>, Garfield Barwick CJ denounced the reasoning of the Privy Council in *Nakkuda Ali v Jayaratne* as 'erroneous' in a radical respect.<sup>69</sup> Since that time there have been major developments in administrative law and in the application of procedural fairness in the Australian courts. The enactment in Australia of the *Administrative Decisions (Judicial Review) Act* (Cth) in 1977, coupled with an increasing volume of litigation raising questions of procedural fairness and particularly decisions under the *Migration Act 1958* (Cth), generated a tide in the development of administrative law that seems still to be running. It was in the judgment of Mason J in *Kioa v West* that the notion of natural justice as procedural fairness was discussed:

It has been said on many occasions that natural justice and fairness are to be equated ... And it has been recognized that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness. This is because the expression "natural justice" has been associated, perhaps too closely associated, with procedures followed by courts of law. The developing application of the doctrine of natural justice in the field of administrative decision-making has been very largely achieved by reference to the presence of characteristics which have

<sup>65</sup> DJ Mullen, 'Fairness: The New Natural Justice' (1975) 25 *University of Toronto Law Journal* 281 at 283-288; M Allars, 'Fairness, writ large or small', (1987) 11 *Sydney Law Review* 306.

<sup>66</sup> Wade and Forsyth, *Administrative Law* (9<sup>th</sup> ed, Oxford University Press, Oxford, 2004) at 405-418.

<sup>67</sup> (1968) 119 CLR 222.

<sup>68</sup> (1968) 119 CLR 222 at 233.

<sup>69</sup> (1968) 119 CLR 222 at 234.

been thought to reflect important characteristics of judicial decision-making.<sup>70</sup>

What Mason J said in *Kioa v West* was adopted by the majority of which he was a member in *Annetts v McCann*.<sup>71</sup> In that case the application of the rules of natural justice to the exercise of statutory powers was stated concisely in the joint judgment:

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.<sup>72</sup> (footnotes omitted)

Procedural fairness has also found a place in Ch III of the Constitution of the Commonwealth. That Chapter provides remedies for its breach by Commonwealth officers. It also protects the essential characteristics of federal courts and State courts in which federal jurisdiction may be exercised. One of those essential characteristics is procedural fairness.

In 2000, in *Re Refugee Tribunal; Ex parte Aala*<sup>73</sup> the Court held that denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will issue under s 75(v) of the Constitution. Gaudron and Gummow JJ, with whom Gleeson CJ relevantly agreed, set out the following general propositions:

- (i) the denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will go under s 75(v);

---

<sup>70</sup> (1985) 159 CLR 550 at 583.

<sup>71</sup> (1990) 170 CLR 596.

<sup>72</sup> (1990) 170 CLR 596 at 598.

<sup>73</sup> (2000) 204 CLR 82.

- (ii) if there has been a breach of the obligation to accord procedural fairness, the consequences of the breach were not gainsaid by classifying the breach as "trivial" or non-determinative of the ultimate result – the issue is whether there has or has not been a breach of the obligation;  
That proposition takes us back to Seneca's *Medea* and the judgment of Coke CJ in *Bagg's Case*;
- (iii) the practical content of the obligation, and thus the issue of breach, may turn upon the circumstances of the particular case; and
- (iv) the remedy of prohibition under s 75(v) does not lie as a right, but is discretionary.<sup>74</sup>

More recently, in *International Finance Trust Pty Ltd v New South Wales Crime Commission*<sup>75</sup> the High Court held a provision of a New South Wales statute requiring a State court to hear and determine, on an ex parte basis, an application for an interim freezing order under the *Criminal Assets Recovery Act 1990* (NSW) was invalid. In so doing it applied what has broadly been described as the *Kable* principle.

### **Conclusion**

The concept of procedural fairness has its origins in the natural law which informed the development of the rules of natural justice as part of the common law of England. Its scope has broadened, then narrowed, then broadened again, through its history. Despite incidents of legislative exclusion, procedural fairness is alive and well today in Australia. There is little doubt that the norms of procedural fairness reach well beyond the confines of the courtroom in judicial proceedings or judicial review of administrative decisions. They are important societal values applicable to any form of official decision-making which can affect individual interests. I do not think it too bold to say that the notion of procedural fairness would be widely regarded within the Australian community as indispensable to

<sup>74</sup> (2000) 204 CLR 82 at 91-92 [17].

<sup>75</sup> (2009) 240 CLR 319.

23.

justice. If the notion of a 'fair go' means anything in this context, it must mean that before a decision is made affecting a person's interests, they should have a right to be heard by an impartial decision-maker.