FAIRNESS AND NATURAL JUSTICE IN ENGLISH AND SOUTH AFRICAN LAW*

PART I

1 INTRODUCTION

Since the landmark decision in Ridge v Baldwin, the notion of procedural fairness in administrative decision-making has received considerable attention in England, and similar developments have taken place in the United States. This is not surprising in view of the development of modern government and the transformation of the administration from being primarily regulatory in nature to the major dispensary of benefits and largess affecting every complexity of the society of today.

This trend is manifested in England, particularly in the Court of Appeal, by the recent development of a 'duty to act fairly' in administrative law. Many judges have expressed dissatisfaction with the traditional formulation of the principles of natural justice and have adopted instead the 'fairness' terminology.

At the same time, the approach of the judiciary in South Africa to the question of procedural safeguards and administrative law has, with notable exceptions, been mundane and sometimes quite sterile, while the notion of natural justice has been undervalued by prominent

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5 See below p 625f.
6 See, for instance, Motaung v Mathiba NO 1975 (1) SA 618 (O) at 629.
7 As an eminent commentator has pointed out, natural justice has enjoyed fluctuating and not very happy fortunes in South African case history: W H B Dean 'Whither the Constitution?' (1976) 39 THRHR 266 at 282ff.
writers. Yet to ignore the importance of procedural safeguards such as the principles of natural justice is to neglect the value placed upon process as a means of expressing the ideals inherent in the notion of fair administration and to evade the ‘very kernel of the problem of administrative justice: how far ought both judicial and administrative power to rest on common principles?’

It is my submission that a major factor contributing to the dissatisfaction presently expressed with South African administrative law by some commentators has been the failure of our courts to expand and develop the common-law principles of procedural fairness in accordance with the demands of modern society. And, in my view, this stagnation is the result of certain shibboleths that serve to obstruct the application of procedural safeguards in our administrative law.

In this article I shall discuss briefly the two major obstacles that I believe are to be found in our notion of natural justice: the doctrine of classification of functions, and the insistence by the courts that the administrative action complained of affect existing rights if the principles of natural justice are to be held to apply. I shall then proceed to review the development of the duty to act fairly in English law and to consider whether this development has any relevance to the South African situation and whether it would be of assistance in overcoming the obstacles inherent in the orthodox approach to natural justice.

In view of the historical development of our administrative law, reference to other common-law jurisdictions (and particularly the English law) is, I think, most productive; there are few of the structural differences that often obstruct comparative discussions in other areas of law.

2 Problems with Natural Justice in South African Law

The primary procedural safeguards in South African administrative law are expressed by the twin principles of natural justice: audi alteram partem and nemo iudex in causa sua: that is, that one should hear the other side, and that no one should be a judge in his own cause (or, in other words, that the decision-maker should be free of bias). As a general rule it may be said that the principles of natural justice apply whenever an administrative act is quasi-judicial, and an administrative

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8 For example, Professor Marinus Wiechers views natural justice as merely part of the broad principle that the administrative organ concerned should properly apply its mind to the case before it (see M Wiechers Administratiefreg (1973) 237. Cf Milne J in Durban City Council v Jailani Cafè 1978 (1) SA 151 (D) at 154.) With respect, this view fails to appreciate the wider objectives that procedural safeguards, such as natural justice, are designed to achieve (see further below).

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act may be said to be quasi-judicial if it affects the rights, liberties (and, perhaps, the 'privileges') of an individual. This formulation is open to attack: there are well-founded objections to the classification of administrative acts into categories such as quasi-judicial; and it is submitted that the requirement that the act complained of affect existing rights is quite irrelevant to the true purpose of natural justice.

(a) Classification of Functions and Quasi-judicial

The Classification Process

'The process of classification', says Professor Robson, '... is one of the principal elements in the "artificial" reason of the law.' The demand for reduction of material into easily manageable categories makes broad classification a necessity. Categories are here adopted for legal purposes alone, and are an aid to objectivity. Moreover, 'evidence can acquire its proper importance only if it comes before us marshalled by general ideas'.

Because the law is concerned with existing facts and circumstances, the categories that are created by the process of classification can at most be a synthesis of relevant material: the law, at least in practice, is not concerned with abstract concepts. Thus, for example, when proceedings are labelled 'judicial', the term is being used in a descriptive sense to describe proceedings that bear certain characteristics in whole or in part, which have relevance for the purpose at hand. They are "judicial" for that purpose alone.

But the danger with the classification process is that legal categories tend to become rigid and inflexible. So inherently flexible categories such as 'administrative' and 'quasi-judicial' may become rigidly distinguished from one another, as if there were really only one type of category into which any administrative act could fall. And, inevitably, classifications made for one purpose will be used inappropriately in other contexts: for example, an act classified as administrative because it is performed by a minister of state may later be thought not to be quasi-judicial for the purpose of observing natural justice.

This danger has led certain authors to distinguish between a conceptual and a functional approach to administrative law. According
to these authors, the chief difficulty with the traditional approach to administrative law is that lawyers and judges have adopted 'forced classification' techniques,\textsuperscript{20} forgetting that categories are fictions created for a particular purpose, and assuming that the relevant data may be easily categorized. This approach is called the conceptual approach. The better alternative, they urge, is a functional approach, which is concerned with the particular ends sought to be achieved, 'paying due regard to democratic safeguards and standards of fair play'.\textsuperscript{21}

Whether there is such a school of conceptualists or not, these comments do serve to remind us that in administrative law, at least, the purpose and function of actions or institutions is the correct basis of classification, not the labels of purpose and function.

Thus it is important that classification not be used arbitrarily, that the criteria for classification be rationally related to the purpose for which the classification is being employed, and that the categories of classification be recognized as no more than devices of convenience. Otherwise it could justly be claimed that rigid concepts 'put the cart before the horse'.\textsuperscript{22}

Unfortunately 'quasi-judicial' has seldom enjoyed such understanding at the hands of judges, here or in England.

The Abuse of 'Quasi-Judicial' in England and South Africa

South African courts traditionally follow the English law by classifying the functions of the administration into four broad categories: the legislative; the judicial; the quasi-judicial; and the purely administrative (including ministerial).\textsuperscript{23} Whilst even a 'purely administrative' function cannot be exercised \textit{ultra vires},\textsuperscript{24} it has generally been held that only judicial and quasi-judicial proceedings need follow the principles of natural justice.\textsuperscript{25}

Nevertheless, the classification of administrative action as quasi-judicial was intended only as a device of convenience, for although this category was thought to be 'very aptly expressed',\textsuperscript{26} in 1953 Schreiner JA perceptively warned that:

\begin{quote}
'The classification of discretions and functions under the headings of "administrative", "quasi-judicial" and "judicial" has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of the classification, and even some disagreement as to the usefulness of the classification when achieved. . . .'\end{quote}

\textsuperscript{20} Mironi op cit 748.
\textsuperscript{21} Griffith and Street op cit 144.
\textsuperscript{22} Mironi op cit 748.
\textsuperscript{23} \textit{LAWSA} I 35ff.
\textsuperscript{24} See, for example, G M Cockram \textit{Administrative Law} (1976) 59.
\textsuperscript{25} \textit{LAWSA} I 50 (para 82).
\textsuperscript{26} Per Hall JA in \textit{Laubscher v Native Commissioner, Piet Retief} 1958 (1) \textit{SA} 546 (A) at 553.
must be careful not to elevate what may be no more than a convenient classification into a source of legal rules.\textsuperscript{27}

Unfortunately, this warning has not been heeded\textsuperscript{28} and the quasi-judicial category has received much, if not always fair, criticism in South African journals.\textsuperscript{29} To understand the difficulties with the use of such a classification it is essential to consider the history of the quasi-judicial category in English law.

There are two contexts in which the term ‘quasi-judicial’ has been employed in English law: in the area of remedies and in the application of natural justice. Although analogous difficulties arose with the classification of functions in the English law of remedies,\textsuperscript{30} this area of English law bears no relevance to South African law and need not concern us.\textsuperscript{31} Important for present purposes, however, is the role of ‘quasi-judicial’ in English natural justice.

‘Quasi-judicial’ was used as a description of the sort of power that had to be exercised in accordance with the principles of natural justice. The term was used to differentiate between the judicial function of a court and acts of the administration which, although not ‘judicial’, were nevertheless required to be based upon, or take into account, certain existing circumstances. Natural justice had to be observed whenever a decision was to be made to take any action that could affect an individual’s interests. Thus, when a local authority proceeded to demolish a man’s building because he had not given the required notice that he was going to erect it (as the local authority was indeed empowered to do), the court awarded him damages on the ground that he had not been afforded a hearing; he should have been given an opportunity to explain his failure to give the notice before the decision to demolish was taken.\textsuperscript{32} The action may have been administrative, but by its very nature the power necessitated a hearing of the other side if it was to be exercised properly; it had to be exercised in a ‘judicial’ fashion.

This meant that every power which had to be exercised in accordance with natural justice would be labelled ‘judicial’. As a more convenient description of such powers (which were exercised by the administration, not the judiciary or judicial tribunals), ‘quasi-judicial’

\textsuperscript{27} Pretoria North Town Council v Al Electric Ice-cream Factory (Pty) Ltd 1953 (3) SA 1 (A) at 11. Other judges have more recently reminded us of these words (see Williamson JA (dissenting) in South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A) at 277ff; and Nestadt J in Carr v Jockey Club 1976 (2) SA (W) at 720).

\textsuperscript{28} See below.

\textsuperscript{29} See, for example, M Wiechers ‘Die Kwasie-judisiele Administratiewe Handeling’ (1966) 29 THRHR 201; H Street ‘Quasi-judicial and the Maxim Audi Alteram Partem’ (1967) 84 SALJ 385; Henning (1969) 2 CILSA 86 at 90ff.

\textsuperscript{30} See, for example, Wade Administrative Law 531ff.

\textsuperscript{31} Wiechers ascribes the development of the use of ‘quasi-judicial’ to the peculiarities of the English system of remedies in administrative law (see Administratiefreg 131ff and (1966) 29 THRHR 201 at 204ff). But this is only part of the explanation; more important is the use of the term in the application of the principles of natural justice, as will appear in the ensuing text.

\textsuperscript{32} Cooper v Wandsworth Board of Works (1863) 14 CB (NS) 180 (143 ER 414).
was adopted.\textsuperscript{33} Professor Wade points out\textsuperscript{34} that in later cases, such as \textit{Urban Housing Co Ltd v Oxford City Council},\textsuperscript{35} where walls were also knocked down, the power was described as quasi-judicial rather than judicial, although without any change in meaning.

It was the \textit{preliminary stage} of determining these circumstances that was referred to by the term quasi-judicial.\textsuperscript{36} In other words, 'quasi-judicial' was simply a convenient label for the sort of administrative action that could be taken only after paying regard to existing circumstances.\textsuperscript{37}

However, the 'quasi-judicial' terminology fell into disrepute for two reasons. First, in 1932 the Report of the Committee on Ministers' Powers\textsuperscript{38} attempted to define a quasi-judicial decision by distinguishing it from a judicial one on the basis that the former need not necessarily involve the submission of legal argument by the parties if questions of law are involved (whereas this is essential to a judicial decision) and that whereas a judicial decision 'disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law',\textsuperscript{39} in a quasi-judicial decision this is replaced by 'administrative action, the character of which is determined by the Minister's free choice'.\textsuperscript{40} Unfortunately, this distinction is unsatisfactory, since it assumes that judicial decisions involve no discretion whereas quasi-judicial ones do;\textsuperscript{41} and it tends to imply that a minister is not bound to observe 'the law of the land',\textsuperscript{42} which, of course, he is. The Committee seemed to place too much emphasis upon procedural differences and seemed to view the quasi-judicial decision as a judicial decision from which some elements were missing.\textsuperscript{43}

But the main reason why the term has fallen into disrepute lies in the misinterpretation of the term 'judicial'\textsuperscript{44} by judges during the first half of this century.\textsuperscript{45} The misinterpretation stemmed from a statement by Atkin LJ in \textit{R v Electricity Commissioners, ex parte London Electricity Joint Committee Co.}\textsuperscript{46} The course of this misinterpretation is admirably
exposed and analysed by Lord Reid in a case which is one of the landmarks of English administrative law: Ridge v Baldwin.47 Lord Reid pointed out that there is something similar in what a committee, or the like, does when deciding what action to take against an individual, and what a judge does in a lawsuit. Although the committee may, in fact, be more concerned than a judge with the application of policy, it is nevertheless also deciding how someone should be treated. ‘So it was easy to say that such a body is performing a quasi-judicial task in considering and deciding such a matter, and to require it to observe the essentials of all proceedings of a judicial character—the principles of natural justice.’48 ‘Quasi-judicial’ was, as we have already seen, nothing more than a term used to describe the sort of action necessary when circumstances have to be considered before a decision is reached, and the type of power which necessarily involves that mode of procedure.

However, Atkin LJ had said (in relation to the prerogative writs of certiorari and prohibition):

‘Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King’s Bench Division exercised in these writs.’49

In a later case50 Lord Hewart CJ said that the phrase ‘and having the duty to act judicially’ was a superadded condition to the ‘authority to determine question affecting the rights of subjects’ and must be satisfied before the writs would issue. This view was followed in later cases,51 and involved the courts in an inhibited search for the indications of a ‘possible duty to act judicially’, such as the existence of a lis inter partes, or the provision for judicial procedure in the enabling statute.52 But Atkin LJ had used the additional phrase in a descriptive sense: to describe the sort of action that involved determining questions affecting individuals. He inferred a judicial element from the nature of the case.53 Lord Hewart’s interpretation was not only mistaken, but contrary to precedent.54

48 Idem at 72.
49 R v Electricity Commissioners [1924] 1 KB 171 (CA) at 205 (my emphasis).
50 R v Legislative Committee of the Church Assembly, ex parte Haynes-Smith [1928] 1 KB 411 at 415.
51 See Lord Reid’s judgment in Ridge at 75.
52 See generally, De Smith Judicial Review of Administrative Action 68ff. Indeed, in Canada, where Lord Hewart’s interpretation is still followed (see, for example, Mullan (1975) 25 Univ of Toronto LJ 281 at 288–96), this search for ‘clues’ of the presence of a duty to act judicially is still pursued (see, for example, Re Totrup and the Queen in Right of the Province of Alberta (Alta SC) (1978) 79 DLR (3d) 533). However, since this article was completed, the Canadian Supreme Court, splitting five to four, has approved the fairness doctrine for Canadian administrative law (see Re Nicholson and Haldimand–Norfolk Regional Board of Commissioners of Police (1979) 88 DLR 671 at 679–83). As will be shown later, this provides a means of avoiding the difficulty created by such reasoning (see below 625–6).
53 [1964] AC 40 at 76.
54 Idem at 75ff.
As a result of this misinterpretation, the term ‘quasi-judicial’ acquired the connotation of arid conceptualism, and although the record was set right in Ridge, the term has become disreputable in English law.65

But it is important to remember that although the term has fallen into disrepute, if it had been confined to its proper function, as described in Ridge, there would have been nothing inherently wrong with the category. What Ridge certainly did establish was that the ‘heresy’ that the principles of natural justice applied only to ‘judicial’ and not to ‘administrative’ proceedings had been well and truly ‘scotched’.56 Administrative proceedings very frequently involve the consideration of circumstances, and whenever they do, procedure in accordance with the principles of natural justice is generally appropriate. It was that aspect of the administrative function that was described as quasi-judicial, and the real danger was not the category itself, but its tendency to be misused. As a Scottish author put it:

‘The objection does not appear to lie so much in the creation of this tenebrous realm between the “administrative” and the “judicial”, or even by the ambiguity of the term “quasi-judicial”, formidable though these difficulties may be. It lies rather in the attitude of mind which a pseudocategorisation of this kind engenders; for the distinction suggests to us in the most persuasive way that there is in fact some ascertainable class of decisions which are quasi-judicial.’67

The convenience of ‘quasi-judicial’ as a description also led to its becoming associated with natural justice in South African law. But while the descriptive category may have proved to be of some use as a heuristic aid, certain cases have revealed the dangers inherent in the use of such a classification.

First, there has been a tendency to over-strain the descriptive classification by forcing entire proceedings into either an administrative or a quasi-judicial category. Thus, for example, in Van Wyk v Director of Education68 the court referred to a board as being a quasi-judicial body, whereas in fact it was only exercising quasi-judicial functions. Only in that sense was it a ‘quasi-judicial body’. This type of categorization may be frequently unrealistic where administrative bodies perform many different activities during the course of exercising their powers, and the danger is that a body which has been classified as administrative may, in fact, perform quasi-judicial functions at various stages during its activities. But the previous classification may lead courts to hold that it is therefore not obliged to observe the requirements of natural justice. A safer approach, it is submitted, is that of

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65 See, for example, De Smith, Judicial Review 64. Cf counsel in R v Gaming Board for Great Britain, ex parte Benaim and Khaida [1970] 2 QB 417 (CA) at 423.
68 1974 (1) SA 396 (N).
Rose Innes AJ in Helderberg Butcheries (Stellenbosch) (Pty) Ltd v Municipal Valuation Court, Somerset West,\(^{59}\) where he described a tribunal as acting 'in a judicial or quasi-judicial capacity'.\(^{60}\) This limits the description to that particular action alone (but even here it should be borne in mind that it is not the power or discretion itself that is quasi-judicial but the form of procedure which should be adopted; the form of procedure is inferred from the nature of the power).\(^{61}\)

Secondly, the danger of rigidity in the classification process has manifested itself in some decisions where natural justice has been held not to apply, simply because the relevant official was said to be exercising a so-called purely administrative function. So where natural justice would ordinarily have been applicable (because the relevant action had to be justified by the existence of certain circumstances, the ascertainment of which would have been assisted by the principles of natural justice), but is excluded by virtue of overriding factors such as national security,\(^{62}\) there is a temptation for the judge to justify this exclusion of natural justice, not on the basis that the special circumstances of the case constitute an exception but on the ground that the minister or official concerned was merely exercising an 'administrative' or 'purely administrative' function.\(^{63}\) The danger with this approach is that it tends to create the impression that other, equally 'administrative', acts are likewise not subject to the requirements of natural justice.

Another example of this approach is Pretoria City Council v Modimola,\(^{64}\) where property had been expropriated in terms of legislation that required this to be done if, as it seems was the case, the property was 'affected' by a proclamation in terms of the Group Areas Act 1957.\(^{65}\) The Appellate Division reversed a decision of the Transvaal Provincial Division. Botha JA, speaking for the unanimous court, said:

>'In the absence of a provision prescribing a quasi-judicial enquiry as a prerequisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act.'\(^{66}\)

Clearly, any expropriating authority must have a circumstantial basis upon which to exercise its powers, and the existence of such a

\(^{59}\) 1977 (4) SA 99 (C).

\(^{60}\) At 107H (my emphasis).

\(^{61}\) See Wade (1951) 67 LQR 103 at 106; Wiechers Administratiefreg 128.

\(^{62}\) See, for example, Winter v Administrator-in-Executive Committee 1973 (1) SA 873 (A) at 890-1; Minister of the Interior v Bechler 1948 (3) SA 409 (A) at 452. Cf R v Secretary of State for the Home Office, ex parte Hosenball [1977] 3 All ER 452 (CA) at 457.

\(^{63}\) For example Stanton v Minister of Justice 1960 (3) SA 353 (T) at 360.

\(^{64}\) 1966 (3) SA 250 (A).

\(^{65}\) Act 57 of 1957.

\(^{66}\) Idem at 263. Cf Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A), a case involving an unsuccessful application for a residence permit in a restricted area: 'It would be a very difficult thing to set a formula which would satisfactorily distinguish in all cases "administrative" duties from "quasi-judicial" duties of a person like the commissioner. Fortunately it is not necessary to do this in this particular case, for . . . the duties of the commissioner in granting or refusing an application for the necessary permission, are clearly purely administrative duties': per Reynolds AJA at 550. Cf Hall AJA at 554.
basis (in this case, whether the property was indeed ‘affected’) is almost impossible to assess satisfactorily without enquiring into the facts and hearing representations.\textsuperscript{67} Natural justice was (on the court’s interpretation) excluded by statute, not by virtue of the fact that the act was administrative. Modimola has (correctly, it is submitted) received trenchant criticism from Wiechers.\textsuperscript{68}

So the words of Rumpff CJ in *Oberholzer v Padraad van Outjo*\textsuperscript{69} are to be welcomed. In this case a successful application for the closing of a private road had been made to the Road Board. The Board was empowered to grant the application, but if there were any objections it was to hold an inquiry before making a decision, which then had to be made with due regard for the interests of all concerned. The appellant had sent a written objection to the Board but was given incorrect notice of the inquiry and, as a result, did not attend it. Although it was admitted that the appellant had been misled, the court *a quo*\textsuperscript{70} held that the granting of permission for the closure was an administrative act and that natural justice did not apply. This decision was reversed by the Appellate Division (unanimously). In delivering the judgment of the court and criticizing the classification by the judge in the court *a quo* of ‘purely administrative acts’, Rumpff CJ said:

‘Lees mens die uitspraak van die hof *a quo*, dan tref dit mens dat ’n uiers tegniese benadering gevolg is en dat ’n oorweging van die aard van die belange van sowel die aansekerdoener as die beswaarmaker afwezig is. Die hof *a quo* het bevind dat die funksie van die Padraad “administratief” was en dat dit derhalwe nie nodig was om appellant ’n geleentheid te gee om op die beswerings te antwoord nie. Hierdie etikettering van ’n funksie, sonder meer, is m.i. gevaarlik en kan lei tot

\textsuperscript{67} At least where so-called adjudicative facts are in dispute (see K C Davis ‘The Requirement of a Trial-type Hearing’ (1956) 70 Harvard L.R. 193).

\textsuperscript{68} Wiechers *Administratiefreg* 141ff, 228ff and (1966) 29 THRHR 201 at 217ff.

\textsuperscript{69} A recent example of the same approach (although not here directly concerned with natural justice) is to be found in *Durban City Council v Jailani Cafi* 1978 (1) SA 151 (D), where Milne J followed Modimola, holding that expropriation by the Administrator under the authority of a Local Government Ordinance is a ‘purely administrative act’ (at 153). In his extempore judgment his lordship even went as far as suggesting that the exercise of a ‘purely administrative act’ does not entail a duty to take into account all relevant considerations (at 153f). The sole requirement is that the power be exercised ‘fairly and honestly’, which means ‘no more than that the Council shall have applied its mind to the question ... and shall have acted honestly’ (at 154). The view that the all-important criterion is whether the official or body applied his or its mind to the issue is one held by Wiechers as well, even where the principles of natural justice are concerned (see *Administratiefreg* 237: ‘In wese kom dit daarop neer dat die nakoming van die reëls van natuurlike geregtigheid versekker dat die administratiewe orgaan sy behoorlike aandag aan die saak skenke’). This view leads Wiechers to conclude that observance of natural justice is not an end in itself, but that if it can be shown that, notwithstanding failure to observe natural justice, the body or official concerned actually did apply its mind to the case, non-observance of natural justice will not affect the legality of the action. But here Wiechers seems to be overlooking the fact that the application of one’s mind is not in itself an end either: surely the requirements of natural justice and the application of one’s mind are both aimed at ensuring a fair assessment of the circumstances and a fair decision. They are not, however, the same requirements; the most partisan of officials can be said to have ‘applied his mind’ to a case before him, and all can ‘apply their minds’ to a situation without hearing the other side. In neither case will the requirement achieve any more than a serious attitude to the issue. The principles of natural justice, on the other hand, aim (at the very least) at encouraging a certain degree of objectivity and accuracy in the making of the decision (see further, below 635ff).

\textsuperscript{70} 1974 (4) SA 870 (A).

\textsuperscript{70} *Oberholzer v Padraad van Outjo* 1974 (2) SA 168 (SWA).
It is submitted, therefore, that the classification process and the quasi-judicial category, while perhaps of marginal analytic value, carry with them unnecessary dangers. For classification of functions in this area of law is not really necessary at all. In the words of two judges of appeal:

'What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context.'

'The purpose, wording and context of legislation under discussion and the nature of the interest of a person which is affected through an action under such legislation must be considered carefully.'

What is important is whether the power is to be exercised upon the assumption that certain circumstances exist and whether the course of action is likely to be influenced by external circumstances; for, if so, then it should be exercised in a fashion which ensures that the assessment of circumstances is accurate, or at least fair. The approach of the Appellate Division in *Turner v Jockey Club of South Africa* and the Rhodesian Appellate Division in *De Villiers v Sports Pools (Pty) Ltd*, where the classification process was ignored altogether, is an encouraging trend in this direction.

(b) Natural Justice and 'Rights'

'A function which is judicial or quasi-judicial as opposed to one which may be called purely administrative involves the exercise of powers affecting legal rights and enquiry into matters relating to such rights.'

This test for whether an action be quasi-judicial or, in effect, whether the principles of natural justice shall apply, was firmly established by the Appellate Division in *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* and has been repeatedly reaffirmed in subsequent cases.

Here I consider whether the requirement that the power exercised necessarily affects rights is a satisfactory criterion for applying the principles of natural justice. I submit that this approach is miscon-
ceived—while every administrative act which infringes upon an individual's rights should comply with natural justice, the reverse should not necessarily be true: the mere fact that action does not affect an individual's 'rights' should not allow administrative powers to be exercised without regard for the 'elementary principles' of fairness.

(i) *The Meaning of ‘Rights’*

Although in the cases quoted above the judges have merely referred to the 'rights' or 'legal rights' of the individual, many variants are to be found in other cases dealing with this point. The act complained of must ‘affect prejudicially the rights of person or property’; affect ‘rights of or involve legal consequences to persons’; involve ‘proprietary rights’ or ‘legal rights’; adversely affect such person’s interests. However, whatever the expression be, what is legally relevant is that the rights affected be *existing legal rights*. In *Laubscher v Native Commissioner, Piet Retief* trust land reserved for black Africans was placed under the trusteeship of the native commissioner. The plaintiff (who was not black and therefore was not entitled to reside on the land without a permit) had applied, unsuccessfully, for a permit of residence. This had been refused without any inquiry. The Appellate Division held that natural justice was not applicable. Schreiner JA insisted that the claimant to natural justice have an antecedent right which could be affected. And this was recently reaffirmed by the Appellate Division in *Administrateur van Suidwes-Afrika v Pieters*:

'It is egter algemeen gesprok duidelik dat waar 'n openbare liggaam of gesag statutr gemagtig word om 'n beslissing te gee wat die goed, vryhede of bestaande regte van 'n ander nadelig kan raak, of waar die beslissing bestaande regte kan aantas of regsgevolge vir andere mag inhou, daardie ander persoon of persone die reg het, tensy die teendeel uit die magtende bepaling blyk, om toegelaat te word om sy saak te stel voordat daar so 'n beslissing teen hom geneem word.'

It is important to note that the word 'privileges' adds nothing in this context: an ‘existing privilege’ which is protected by the law is

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80 *Dahner v South African Railways and Harbours* 1920 AD 583 at 598.
81 *Publications Control Board v Central News Agency* (supra) at 488. Cf *R v Ngwevela* 1954 (1) SA 123 (A) at 127; and *Surtees’ Silk Store (Pty) Ltd v Community Development Board* (supra) at 275.
82 *Minister of the Interior v Bechler* 1948 (3) SA 409 (A) at 451. Cf *Tabakain v District Commissioner, Salisbury* 1974 (1) SA 604 (R) at 606; and *Minister of the Interior v Mariam* 1961 (4) SA 740 (A) at 751.
83 *R v Nomveti* 1960 (2) SA 108 (E) at 116.
84 Idem at 120.
85 *Down v Malan NO* 1960 (2) SA 734 (A) at 741.
86 *Adjunk-Minister van Landbou v Heatherdale Farms (Pty) Ltd* 1970 (4) SA 184 (T) at 186.
87 See *Wiechers Administratiefreg 226ff* and *LAWSA I 38* (para 71).
88 1958 (1) SA 546 (A).
89 At 549. Cf *Reynolds AJA* at 550–1.
91 At 860, per Botha JA, delivering the judgment of the court. My emphasis.
nothing other than a species of legal right\textsuperscript{92} (or a liberty recognized by the law and, hence, protected by corresponding negative duties). In this context the term ‘existing privileges’ is legally irrelevant. It is important not to confuse ‘privilege’ in this context with the word ‘privilege’ in the so-called right-privilege distinction discussed below. The cases are therefore quite clear that only individuals whose existing rights (including property rights) and recognized liberties are being interfered with may claim the benefits of natural justice. Those who are merely attempting to obtain potential benefits have no enforceable claim that their applications be considered in accordance with natural justice.\textsuperscript{93}

A similar approach has been adopted in the past by courts in England and the United States. It is known as the right-privilege distinction.

(ii) The Right-Privilege Distinction in English and American Law

(1) During the ‘twilight years’\textsuperscript{94} of natural justice in England the courts drew a distinction between action that involved deprivation of a right and action that merely had the effect of depriving or refusing at most a ‘privilege’ (ie something the administration could grant, such as a licence, but to which the applicant or holder had no legal claim). The most notorious case was \textit{Nakkuda Ali v Jayaratne}.\textsuperscript{95} Here a textile dealer’s licence had been cancelled, allegedly in breach of natural justice. The Judicial Committee of the Privy Council was of the opinion that no breach had in fact occurred. But it held, \textit{inter alia}, that even if there had been a breach, the Controller of Textiles was not acting judicially but ‘taking executive action to withdraw a privilege’.\textsuperscript{96}

However, \textit{Nakkuda Ali} was frowned upon by Lord Reid in \textit{Ridge v Baldwin},\textsuperscript{97} and the distinction has been criticized by commentators,\textsuperscript{98} although it seems still to be recognized by Lord Denning MR: in \textit{R v Gaming Board for Great Britain, ex parte Benaim and Khaida},\textsuperscript{99} where the applicants had sought a permit to run a gaming house, he said:

'It is an error to regard Crockford’s as having any right of which they are being deprived. . . . What they are really seeking is a privilege—almost, I might say, a franchise—to carry on gaming for a profit. . . .'

Although his remark was obiter and, in any event, he still held that the Gaming Board had a duty to act fairly (and that they had fulfilled

\textsuperscript{92} That is not to say that all privileges are rights or that a privilege which is a right is nothing else as well (see A R White ‘Privilege’ (1978) 41 Modern LR 229).

\textsuperscript{93} At least in theory: see below pp 622–3.

\textsuperscript{94} [1951] AC 67 LQR 103.


\textsuperscript{96} [1951] AC 66 at 78.

\textsuperscript{97} [1964] AC 40 at 77–9. Cf Lord Hodson at 133.

\textsuperscript{98} For instance, De Smith Judicial Review 165–6; P Jackson Natural Justice (1973) 43f; and \textit{Wade Administrative Law} 440.

\textsuperscript{99} [1970] 2 QB 417 (CA).

\textsuperscript{100} At 429.
it), the Master of the Rolls (and Megarry V-C) have expressed similar views in other judgments.\textsuperscript{101}

(2) In the United States the distinction has played a major role in determining the applicability of procedural due process to state or federal action.

The origins of this distinction have been traced to \textit{McAuliffe v Mayor of New Bedford},\textsuperscript{102} in which Justice Holmes made his celebrated statement:

\begin{quote}
"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."\textsuperscript{103}
\end{quote}

Holmes held, \textit{inter alia}, that a 'due hearing' had not been required when a police officer had been dismissed for violating a regulation forbidding participation in political activity.

Since then the doctrine of privilege has played an important part in determining whether one who seeks, or has been deprived of, discretionary benefits is (or was) entitled to a fair hearing and the protection of the due process clauses of the United States Constitution.\textsuperscript{104}

The requirement that administrative action affect legal rights was reinforced by the doctrine of 'entitlement triggers'; the constitutional guarantee of due process in the event of deprivations of 'life, liberty or property' was triggered if the claimant could establish some legal entitlement.\textsuperscript{105}

In recent years, however, the right-privilege distinction appeared to fall into disfavour,\textsuperscript{106} and it was expressly rejected as inappropriate by the United States Supreme Court in a number of recent cases.\textsuperscript{107} But it has been suggested\textsuperscript{108} that the distinction has been revived by a recent decision, \textit{Bishop v Wood}\textsuperscript{109} in which a policeman had been dismissed without a hearing.

(3) South African courts, therefore, are not alone in drawing a

\textsuperscript{101} Cf dicta of Lord Denning MR in \textit{Schmidt v Secretary of State for Home Affairs} [1969] 2 Ch 149 (CA) at 171A; \textit{Breen v Amalgamated Engineering Union} [1971] 2 QB 175 (CA) at 191 (dissenting); and \textit{R v Governor of Pentonville Prison, ex parte Azam} [1973] 2 All ER 741 (CA) at 750G. See also Megarry V-C in \textit{McInnes v Onslow Fane} [1978] 3 All ER 211 at 217.

\textsuperscript{102} 29 NE 517 (1892).

\textsuperscript{103} At 517 (due process being claimed, of course, under the United States Constitution).


\textsuperscript{106} See W W van Alstyne 'The Demise of the Right–Privilege Distinction in Constitutional Law' (1968) 81 Harvard LR 1439; Gellhorn and Byse op cit 600ff; and Schwartz and Wade op cit 115ff.

\textsuperscript{107} For two of the most recent examples, see \textit{Meachum v Fano} 427 US 215 at 231 (1976) and \textit{Elrod v Burns} 427 US 347 at 361–2 (1976).


distinction between benefits to which a person has a legal right and those which the administration may, but has no duty to, provide. I have suggested that such an approach is misconceived, and it certainly does not appear to have enjoyed stable tenure in England or the United States. I shall now consider what I believe to be the principal objections to the right-privilege distinction and try to explain why it may have been adopted in the first place and why it still carries support. Although the distinction is not normally referred to as being between rights and privileges in South African law, for the sake of convenience I shall continue to use this terminology.

(iii) Objections to the Right-Privilege Distinction

There seems to be two major objections to the use of the right-privilege distinction in determining whether the administration has a duty to observe standards of procedural justice. First, the distinction can be question-begging; and, secondly, it is surely irrelevant to the question whether one is entitled to a fair hearing (even if it is relevant to the question whether one is entitled to succeed in one’s claim).

(1) The first criticism is empirical. It suggests that the right-privilege distinction is not consistent with how courts, at least under common-law systems, develop rights in actual practice. Whether the claimant has a right which is affected often depends upon whether the court chooses to recognize that right by granting him a remedy. By the very process of striking down administrative action, the court may have created a new right at common law. If it really were the case that courts recognize only existing rights, then this would not be true. But since not only statutorily created rights but also common-law rights are afforded recognition, the courts are bound (at some stage) to create new rights:

‘The notion of a “right” is an evolving concept which has permitted courts to recognise as legal rights individual interests which had never before been understood as such.’

Thus to argue that a person has no claim to a benefit because he has no right to it is circular and begs the question; he has no right to it because the court will not grant him one. By this I mean to say no more than that in some cases rights are recognized for the first time and that to talk in terms of ‘existing rights’ in some contexts adds nothing to the question in issue: namely, should the body or official concerned act fairly or in accordance with the principles of natural justice?

Although not specifically concerned with natural justice as such, an interesting example of the recognition by judges of a new right where none had previously existed is Nagle v Fielden. Here, a woman

110 Note ‘Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing’ (1975) 88 Harvard L.R. 1510 at 1528.

111 Cf Van Alstyne (note 106 above) at 1458ff; and Note 1977 Duke L.J 453 at 472-5.

trainer was refused a trainer’s licence by the stewards of the Jockey Club, who had the monopoly of control over flat racing. Her claim for a declaration that their act of refusal was void as being contrary to public policy was struck out by the Master and by John Stephenson J as disclosing no cause of action. However, this decision was reversed by the Court of Appeal. In holding that she had an arguable case, the lords justices of appeal referred to the changed conditions of society and the importance of the licence to livelihood.

And in another, more recent, English case, Central Council for Education and Training in Social Work v Edwards, where a student had been refused admission to a polytechnic without being afforded a hearing or being given reasons for the refusal, Slade J held that although the applicant could not expect the polytechnic to act judicially (since he was only applying for a place, not being deprived of one), he was nevertheless entitled to a fair hearing, as the polytechnic was under a duty to act fairly because, inter alia, it was publicly funded, and the refusal could seriously affect the applicant’s career.

In Nagle the court recognized a possible right to a licence; and in Edwards the court recognized that an applicant had a right to be treated fairly. In neither case were these rights based upon any previously established entitlement.

Nowhere is an evolution of rights more likely to occur than under modern conditions, where the dispensary of benefits is monopolized by government. In a seminal article in 1964 Professor Reich drew attention to the magnitude and importance of governmentally distributed largess in the modern world, which he termed the ‘new property’. When individuals are entirely dependent upon the government for the distribution of commercial or social necessities, such as trading licences or social welfare benefits, it is facile to label these dispositions as ‘privileges’. As Beck J put it recently in Tabakain v District Commissioner, Salisbury:

'The complexities of modern society have enormously multiplied the controls to which people are subjected in the exercise of their legal rights, and there is an increasingly insidious tendency to regard permits of all kinds as a form of privilege. I would resist the notion of regarding a permit... as a sort of delectable crumb that might or might not be dropped from the bureaucratic dinner table.'

113 At 647: 'The right to work has become far better recognised since that time [seventeen years ago]' (per Lord Denning MR); 651: 'That [her application is not considered simply because she is a woman] is arbitrary and entirely out of touch with the present state of society in Great Britain... and no longer justified by present conditions' (per Danckwerts LJ). Cf idem at 650.

114 At 654-5. Cf Edwards v SOGAT [1971] Ch 354 (CA); McInnes v Onslow Fane [1978] 3 All ER 211 at 217.

115 The Times 5 May 1978.


117 1974 (1) SA 604 (R).

118 At 606. It is true that Beck J justified his view on the ground that the permit was a control of an existing right (to trade). Similarly Wiechers (Administratiefreg 136ff) explains that whereas one has the right to be heard on an application for a trading licence (since licences are a restriction of a common-law right), and whereas one should have a right to be heard pending threatened
Government, one assumes, should act in accordance with law and not arbitrarily. The largess or benefits it distributes are not baubles but should be distributed in accordance with law, whether common or statute law. This is not to say that the administration has no discretion, but merely that it is not (unlike individuals and private organizations in this respect) a free agent to act as it pleases.\(^{119}\)

The distinction between rights and privileges begs the question whether the administration should act fairly.

(2) More important, perhaps, even if the above point is incorrect, there seems to be a logical objection: the distinction is surely irrelevant and misleading. Perhaps one of Holmes's most misleading statements was the one quoted above:

'The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'

This is beside the point: for a claimant to a fair hearing does not demand that he succeed in his application; he merely claims that his application should be considered in accordance with common-law standards of fair procedure. As Justice Jackson put it in the important case of *Joint Anti-Fascist Refugee Committee v McGrath*:\(^{120}\)

'The fact that one may not have a legal right to get or keep a government post does not mean that he can be judged ineligible illegally.'\(^{121}\)

When looked at this way, the question of rights or privileges becomes no more than a question of *locus standi*: for natural justice is a requirement of the common law that binds the administration as much as anybody else, and observance of natural justice 'is a duty lying upon everyone who decides anything'.\(^{122}\)

(iv) *The Right-Privilege Fallacy*

If the above criticisms are correct, there must surely be other factors encouraging judges to maintain this artificial distinction. It seems to me that the persistence of the right-privilege analysis is prompted by, and disguises, two related considerations: the first involves the policy question of the reach of the law, and the second is the recognition that a certain degree of freedom of action must be accorded to all bodies, public or private, by the law.

expropriation (since expropriation affects an existing right in property), an individual who seeks a permit to live in a certain area has no claim to a hearing, since he seeks a favour ('begunstigende beskikking' (157)). But this reasoning seems to me to be strained: it is arbitrary to claim that there is a general right to trade but no general right to live where one pleases. Both are really liberties and it is only present-day political realities that create the impression that the former is any less capable of restriction by statute than the latter. The point is that the 'existing rights' argument is circular.

\(^{119}\) See further below pp 624–5.

\(^{120}\) 341 US 123 (1961).

\(^{121}\) At 185. Cf Van Alstyne (note 106 above) at 1451–2.

\(^{122}\) Per Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179 at 182. Cf *Fernandez v South African Railways* 1926 AD 60 at 68.
(1) The extent to which the law should attempt to regulate conduct is dependent upon the relative importance of that conduct to the public interest—a phenomenon that is continuously varying in ambit and emphasis. Whether, for example, a court will hold the requirements of natural justice to be capable of exclusion by a contract between parties will ultimately depend upon public policy and the importance the law attaches to regulating that aspect of inter-personal relationships.\textsuperscript{123} If the prevailing mood of public policy is that the law should not concern itself with that area of private activity, then the court is unlikely to require that the parties observe the common-law requirements of natural justice, even if there may be a moral duty to do so.

So in this sense it could be said that a claimant may have no ‘right’ to a hearing. What is meant is that the law is not prepared to grant legal protection to what may or may not be a moral right.

(2) But it seems almost trite that there is an overwhelming public interest in fair administration in government and public authorities. However, this does not automatically imply that in no case can the government act without observing the requirements of natural justice. For there would seem to be a further, more important, reason for not always enforcing the requirements of natural justice or the standards of fair procedure. This is the recognition that in some activities the administration, like private organizations, should, as a matter of necessity, enjoy a degree of freedom of action. Where the administration is acting like a private body the addition of procedural safeguards would not seem to be very important and could be unduly restrictive. Thus in hiring employees for the type of employment that any private institution may offer, the administration would not be required by any court to observe the requirements of natural justice.

Where, however, the similarities between the administration and the private sector end—where the administration exercises a monopoly, where participation in state-controlled activities is non-voluntary,\textsuperscript{124} or where administrative action is authorized by legislation and financed by the taxpayer\textsuperscript{125}—it seems that government should have no claim to freedom of action.\textsuperscript{126} This does not mean that the receipt of largess is an automatic right of individuals; but it suggests that the administration should comply with the essentials of procedural fairness in reaching its decisions.

It is this aspect of administrative action that seems to have been ignored by proponents of the right–privilege distinction. While the administration may be no different from individuals when conducting some activities, in the disposition of benefits or largess it is acting as the public servant and there is an important public interest that it act

\textsuperscript{123} Cf Jackson \textit{Natural Justice} 47ff.


\textsuperscript{125} Cf Central Council for Education v Edwards (note 115 above).

\textsuperscript{126} Cf Gellhorn and Byse op cit 603; and, generally, Reich (1964) 73 \textit{Yale LJ} 733.
in accordance with the common-law principles of fairness. Whereas an individual has freedom of action and may act arbitrarily, say, in deciding whether or not to be fair in the allocation of his contracts, the administration can claim no such freedom if it dispenses benefits to which individuals have no other access and which are funded by public money: it must surely be in the public interest that the administra-
tion does not have the freedom arbitrarily to decide to entertain an application from one individual (and that means hearing his case) but not from another.127

In my opinion the right-privilege distinction is a method of analysis which was adopted because it seemed to express the limits to which courts would be prepared to enforce procedural safeguards and to recognize the fact that the administration must be accorded a certain degree of freedom of action where it is acting in the same fashion as private individuals in the open market. But my submission is that to extend this analysis to actions of the administration where the adminis-
tration is acting as a public institution is an unjustified development of the right-privilege distinction.

Indeed, the distinction itself is misleading in two important respects: it creates the impression that there is a fixed group of rights which are protected by procedural safeguards; and it is irrelevant to the question whether, in deciding whether or not to grant an applicant some benefit (or deprive a holder of a benefit already granted), the adminis-
tration should be able to ignore common-law notions of fair procedure.

Despite the criticisms that have been levelled at both forms of analysis above—the classification of functions and the right-privilege dichotomy—these formulations are deeply associated with natural justice, especially in South African law. A new form of approach is, it is submitted, desirable, and for this reason the current development in English law of the duty to act fairly seems a particularly attractive advance for administrative law.

PART II

3 FAIRNESS AND ENGLISH ADMINISTRATIVE LAW

In recent years the courts in England have developed a so-called duty to act fairly which has generally been thought to have two main advantages over the traditional ‘natural justice’ analysis:

(a) the new approach avoids the temptation to classify functions, thereby avoiding the dangers of conceptualism which had to be exposed in Ridge v Baldwin;128

(b) the duty to act fairly enables the courts to give effect to the inherent flexibility of natural justice (which is based upon under-
lying principles of fairness).129

127 Cf Gellhorn and Byse op cit 602.
128 See above pp 613ff.
129 See below p 626-7.
130 Cf De Smith Judicial Review of Administrative Action 208.
(a) It was for the first reason that Lord Parker CJ initiated the development of the duty to act fairly in 1967 in *In re HK (An Infant)*,\(^{131}\) where, dealing with the action of an immigration official who had refused to allow a boy entry into England, he said that it was not, as he saw it, ‘a question of being required to act judicially but of being required to act fairly. . . . [T]o that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.’\(^{132}\)

Lord Parker reaffirmed this approach in *R v Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd*,\(^{133}\) noting\(^{134}\) that his approach had been approved by the Court of Appeal (as indeed it had in *Schmidt v Secretary of State for Home Affairs*).\(^{135}\) The development has been enthusiastically taken up by members of the Court of Appeal\(^{136}\) and has, perhaps, received implied approval from the House of Lords in *Wiseman v Borneman*\(^{137}\) and *Pearlberg v Varty*,\(^{138}\) as well as by the Privy Council in *Furnell v Whangerei High Schools Board*.\(^{139}\)

The advantage of this approach is that it avoids the labyrinth of classifications; the simple question to be asked is whether the organ or official concerned acted fairly. For as Lord Justice Ormrod has recently said:

‘Natural justice is but fairness, writ large and juridically. It has been described as “fair play in action”. Nor is it leaven to be associated with judicial or quasi-judicial occasions.’\(^{140}\)

(b) The other reason for the apparent success of the doctrine of fairness is that it emphasizes and expresses the flexibility inherent in procedural fairness and natural justice,\(^{141}\) and avoids the ‘trap of

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\(^{131}\) [1967] 2 QB 617.

\(^{132}\) At 630. Cf Salmon LJ: ‘. . . but he must act . . . fairly in accordance with the ordinary principles of natural justice. . . . Of course . . . [he] is acting in an administrative rather than in a judicial capacity’ (at 633). Cf Blain J at 636.

\(^{133}\) [1970] 1 WLR 1428.

\(^{134}\) At 1433.

\(^{135}\) [1969] 2 Ch 149 (CA) at 170–1, per Lord Denning MR. For subsequent express approval by Lord Denning MR, see *R v Gaming Board for Great Britain, ex parte Benaim and Khalda* [1970] 2 QB 417 (CA) at 430; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) at 190 (dissenting); *Re Pergamon Press* [1971] Ch 388 (CA) at 389; and *R v Secretary of State for the Home Office, ex parte Hosenball* [1977] 3 All ER 452 (CA) at 459f.

\(^{136}\) See note 135 above, and below.

\(^{137}\) [1971] AC 297, especially at 309 (‘I approach the present case by considering whether in all the circumstances the tribunal acted unfairly’—Lord Morris of Borth-y-Gest); cf at 310 and 320 (‘. . . in the interests of natural justice, or fairness . . .’—Lord Wilberforce).

\(^{138}\) [1972] 2 All ER 6 (HL) at 17 and 19 (Lords Pearson and Salmon).

\(^{139}\) [1973] AC 660 (PC) at 679 (Lord Morris of Borth-y-Gest for the majority).


\(^{141}\) There is no doubt that the actual requirements of natural justice are flexible (see *Board of Education v Rice* [1911] AC 179 at 182; *Local Government Board v Arlidge* [1915] AC 120 at 130, 140; *Maclean v Workers’ Union* [1929] 1 Ch 602 at 620; *General Medical Council v Spackman* [1943] AC 627 at 638; and cf the Report of the Committee on Administrative Tribunals and Enquiries (the ‘Franks Committee’) (HMSO Cmd 218, July 1957) para 25). The celebrated dictum of Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118 emphasizing this aspect of natural justice has been ‘repeatedly cited with approval’ by the House of Lords (see Lord Hailsham of St Marylebone LC in *Pearlberg v Varty* [1972] 2 All ER 6 (HL) at 11) and has ‘found special favour in the Commonwealth’ (see D G T Williams 1973 *Annual Survey of Common-
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legalism provoked by the phraseology attached to natural justice. As a second justification, flexibility has gained acknowledgment in a number of decisions in the Court of Appeal. In Maxwell v Department of Trade and Industry Lawton LJ explained why he preferred the fairness terminology:

'From time to time during [the past sixty years] lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise. As a result of these efforts a word in common usage has acquired the trapping of legalism: “acting fairly” has become “acting in accordance with the rules of natural justice”, and on occasion has been dressed up with Latin tags. This phrase in my opinion serves no useful purpose and in recent years it has encouraged lawyers to put those who hold enquiries into legal straitjackets. . . . For the purposes of my judgment I intend to ask myself this simple question: did the inspector act fairly towards the plaintiff?

Although, as Professor De Smith pointed out, in view of the flexibility inherent in natural justice it is not strictly necessary to resort to a simple doctrine of fairness at all, the latter approach is useful in removing the dead wood of conceptual verbiage that accompanies the traditional approach, and it facilitates a fresh examination of the fairness of each particular situation.

However, although the new approach appears to have found general acceptance, it is not altogether clear whether the duty to act fairly has subsumed the principles of natural justice or is merely a parallel

wealth Law 198f). It has been expressly approved in South Africa (see, for example, Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 646).

Indeed, not only are the requirements necessarily flexible, but it is desirable that this be so (cf Spackman [1943] AC 627 at 644; Maxwell v Department of Trade and Industry [1974] 2 WLR 338 at 349; Stevenson v United Road Transport Union [1977] 2 All ER 941 (CA) at 951; and Lord Morris of Borth-y-Gest ‘Natural Justice’ (1973) 26 Current Legal Problems 1 at 15: ‘Their lack of rigidity is their virtue’.)"
procedural safeguard, nor is it at all certain exactly what is meant by 'fair'.

In the first place, there is support to be found for the view that the duty to act fairly has merely replaced the traditional natural-justice formulation; that it is in fact a sort of 'mini natural justice', providing the barest minimum of procedural fairness even where natural justice does not apply; or that it is really a much wider standard, embracing substantive issues of fairness as well as procedural fairness.

It is submitted that in view of the dicta of a number of judges in the Court of Appeal, in which natural justice and the duty to act fairly have either been expressly equated or have been used interchangeably, and in view of the silence on this point of the House of Lords, it may safely be assumed that the fairness doctrine is intended to be a substitute for the orthodox formulation of natural justice.

On the other hand, the new approach presents considerable difficulties of meaning. For uncertainty is inevitable with the use of an ethical concept such as 'fair', and the judges themselves have been far from consistent in their use of the term, frequently failing to distinguish

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148 Cf De Smith Constitutional and Administrative Law 573: 'Sometimes different judges use the same term to convey different ideas, or different terms to convey the same idea.' And see further below p 633.

149 In a number of judgments the judges have used the terms interchangeably, as if there were no difference (see, for example, Parker LJ and Salmon LJ in In re H K (An Infant) [1967] 2 QB 617 at 633, 636; Sachs LJ in Re Pergamon Press [1971] Ch 388 (CA) at 402F; Lawton LJ in Maxwell v Department of Trade [1974] 2 All ER 122 (CA) at 131 and Selvarajan v Race Relations Board [1976] 1 All ER 12 (CA) at 22; Roskill LJ in Ex parte Hanson [1978] QB 823 (CA) at 837; Geoffrey Lane LJ in Ex parte Rosenball [1977] 3 All ER 452 (CA) at 463 and Norwest Holst Ltd v Department of Trade [1978] 3 All ER 280 (CA) at 296; and Ormrod LJ in Lewis v Hefter [1978] 3 All ER 354 (CA) at 367. Recently in Stevenson v United Road Transport Union [1977] 2 All ER 941 (CA) Buckley LJ specifically rejected counsel's contention to the effect that cases could be classified into those where natural justice applied and those where only fairness applied (at 950F).


151 This interpretation may perhaps be justified by the tenor of certain of the cases dealing with fairness, where the judges have seemed to indicate that fairness is some sort of lesser standard (see, for instance, Lord Pearson in Pearlberg v Varty [1972] 2 All ER 6 (HL) at 17 and Viscount Dilhorne at 15F; and Megarry J in Bates v Lord Hailsham of St Marylebone [1972] 1 WLR 1371 at 1378). Certainly this is the interpretation that has been placed on these words by Garner (note 150 above). Cf R E Wraith and P G Hutchinson Administrative Tribunals (1973) 344F; Bailey, Cross and Garner Cases and Materials in Administrative Law 346; J F Northey 'Pedantic or Semantic' 1974 NZLJ 133 at 137, 'The Aftermath of the Furnell Decision' (1974-6) 6 NZULR 59 passim, and his case note in 1979 NZLJ 146. See also W Birtles 'Natural Justice Yet Again' (1970) 33 Modern LR 559 at 561, where, discussing the developments since In re HK (An Infant), he says '[s]ubsequent decisions on the admission of Commonwealth immigrants have shown how easy it is for the courts to narrow the meaning of 'acting with fairness' to the point of extinction'. And it is submitted that this would be a fair interpretation of the judgment of Megarry V-C in the recent case of Mclnnes v Onslow Fane [1978] 3 All ER 211, where the Vice-Chancellor held that fairness went no further than ensuring that the body concerned acted honestly and without bias or caprice.

152 See see the criticisms by Garner Administrative Law 128 and D G T Williams 1974 Annual Survey of Commonwealth Law 120 of Machin v Football Association The Times 21 July 1973, where Lord Denning MR had included in the requirement that the Association act fairly the duty to 'come to a fair decision' (my emphasis). In HTV Ltd v Price Commission [1976] ICR 170, Lord Denning MR equated a misuse of power with unfairness, which it surely is, but at the same time referred to precedents concerning abuse of discretion (at 186). And Scarman LJ quite clearly regarded the duty to act fairly, as developed in recent cases, as embracing substantive aspects of judicial review (at 189). (Cf Wade Administrative Law 447n2.)


154 See note 149 above.
between the substantive connotations of fairness and its procedural connotations. As Lawton LJ said: '... there are, in my judgment, two facets of fairness: what is done and how it is done.'

When natural justice was described as being based upon fairness, fairness was being used in the procedural sense. Examples of the phrases that were used are: fair play; 'listen fairly'; 'fair crack of the whip'; and 'elementary rules of fairness'. But recent phrases, such as 'act fairly' and 'fairness writ large', can apply as equally to the substantive result of the case as to the mode of procedure. Nor is this merely loose verbiage, since recently some judges have suggested that they will employ the term 'duty to act fairly' to include the result of the decision as well as the procedure. In any event, fairness has long been recognized as a ground for review of abuse of discretion.

But it is submitted that it is preferable that the substantive and procedural aspects of fairness be strictly separated, for there are dangers associated with any attempt to combine the two grounds of review, which may be illustrated by the following discussion of the relationship between procedural and substantive fairness.

Procedural and Substantive Fairness: The Relationship

The most obvious justification for good procedure is its efficiency in achieving just results. 'The emphasis is thus on a process which is deemed to make fair and reasonable decisions more likely.' And the rationale underlying a procedural maxim such as audi alteram partem is, partly at least, to ensure that certain facts have been found

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155 Maxwell [1974] 2 All ER 122 (CA) at 132.
157 Board of Education v Rice [1911] AC 179 at 182.
158 Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865 (HL) at 874, [1976] 1 WLR 1255 at 1265.
159 Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 (CA & HL), per Lord Denning MR in the Court of Appeal.
160 In re HK (An Infant) (supra) and the subsequent cases discussed above.
161 Furnell v Whangarei High Schools Board [1973] AC 660 at 679; Lewis v Heffer [1978] 3 All ER 354 (CA) at 367.
162 See especially the Machin and HTV cases discussed above note 152. In the latter case the Court of Appeal quite clearly regarded fairness as embracing substantive issues—in this instance, inconsistency—and exercised powers of review on that ground. And in Maxwell [1974] 2 All ER 122 (CA) at 132 Lawton LJ, after declaring that he adopted the duty to act fairly in preference to that of natural justice, declared that '... in all these cases there are, in my judgment, two facets of fairness: what is done and how it is done. Doing what is right may still result in unfairness if it is done in the wrong way.' And Lord Morris of Borth-y-Gest even suggests that natural justice (which he summarized as 'fair play in action') is not only invoked 'when procedural failures are shown' (see (1973) 26 Current Legal Problems 1 at 16).
163 In England, that is (see De Smith Judicial Review of Administrative Action 303; Wade Administrative Law 359-61).
164 Cf ... a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed; otherwise it would become the master instead of the servant of justice': per Lord Devlin in In re K (Infants) [1963] 3 WLR 408 (HL) at 434.
166 See below.
to exist before a power is exercised.

Thus procedure and substance are intimately intertwined; procedures are adopted to ensure substantive justice. But although substantive and procedural justice may tend to go together, this is not necessarily so, since unjust laws may be administered by impeccable legal process.

Equally, it is sometimes impossible to measure the 'correctness' of a decision by means of any fixed, objective standard, because the standards involved in the decision-making process are subjective in nature. It is where the outcome of an administrative decision is not measurable by any fixed, objective standard that procedure plays its most important role in ensuring 'justice'. This might be clarified by considering three types of procedural justice delineated by Professor Rawls: perfect procedural justice; imperfect procedural justice; and pure procedural justice.

**Perfect procedural justice** may be devised where (a) there is an independent criterion for measuring the correctness of the result, and (b) it is possible to devise a procedure that will ensure the desired outcome. As Rawls says, 'perfect procedural justice is rare, if not impossible, in cases of much practical interest'.

**Imperfect procedural justice** is exemplified by trials. The procedure is framed to ascertain the facts, but 'it seems impossible to design the legal rules so that they always lead to the correct result'.

**Pure procedural justice**, on the other hand, 'obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed'.

Plainly, natural justice as procedure qualifies as pure procedural justice (at the least), and imperfect procedural justice (at most). And only where it falls into the latter category—where fixed and ascertainable standards are to be applied on the ascertainment of certain facts—would the substantive justice of the result override the means whereby the result was obtained. In such cases provision for an appeal is usually made.

But when the courts are exercising their powers of review and they are confronted with the question whether procedural standards have been observed, they will regard any act that failed to observe the standards of fair procedure required as void.

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167 Wade (1948-50) 10 Cambridge LJ 216.
169 Cf Rawls op cit 59ff; P Stein and J Shand Legal Values in Western Society (1974) 84.
171 That is not to say that they are unfettered (see Wade Administrative Law 340ff and R Dworkin Taking Rights Seriously (1977) 31ff).
173 A Theory of Justice 85.
174 Ibid.
175 Idem 86.
The Duty to Act Fairly and Procedural Justice

In *General Medical Council v Spackman* Lord Wright said:

'If the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.'\(^{177}\)

This principle was categorically repeated in *Ridge v Baldwin* by Lord Hodson:

'I do not find that the answer put by counsel for the watch committee to your Lordships that the case was as plain as a pikestaff is an answer to the demand for natural justice.'\(^{178}\)

It was affirmed by the Judicial Committee of the Privy Council in *Annamunthodo v Oilfields Workers' Trade Union*.\(^{179}\) The rule is, if anything, even stricter in cases where bias is alleged, for actual bias need not be proved: it is the appearance which is important.\(^{180}\)

Yet since 1958 three English cases have cast doubt upon the invariability of this rule.\(^{181}\) For instance, in *Malloch* Lord Wilberforce declared that although a complainant could show that he had a right to a hearing,

'... to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of the procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.'\(^{182}\)

This statement has been described as 'ominous',\(^{183}\) and all three cases have been trenchantly criticized by Clark in a recent article.\(^{184}\) Not only have we learnt from experience that 'the path of the law is strewn with examples of open and shut cases which, somehow, were not',\(^{185}\) but from the discussion above it is clear that important considerations are ignored when the courts embark on enforcing any form of 'discretionary natural justice'.\(^{186}\)

Yet the modern duty to act fairly, if it expresses a general duty of fairness, conceals this danger and carries within it an inherent contradiction.

\(^{176}\) [1943] AC 627.

\(^{177}\) At 644–5.

\(^{178}\) [1964] AC 40 at 128.

\(^{179}\) [1961] AC 945 (PC) at 956.

\(^{180}\) *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259.

\(^{181}\) *Byrne v Kinematograph Renters Society Ltd* [1958] 2 All ER 579, [1958] 1 WLR 762; *Glynn v Keele University* [1971] 2 All ER 89, [1971] 1 WLR 487; and *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 (HL), [1971] 1 WLR 1578. For South Africa, cf *Durban City Council v Jailani Caff* 1978 (1) SA 151 (D) and note 68 above.

\(^{182}\) [1971] 2 All ER 1278 (HL) at 1294, [1971] WLR 1 1578 at 1595.

\(^{183}\) *Wade Administrative Law* 455.

\(^{184}\) D H Clark 'Natural Justice: Substance and Shadow' 1975 *Public Law* 27 at 43ff.

\(^{185}\) Per Megarry J in *John v Rees* [1970] Ch 345 at 402.

\(^{186}\) Cf Clark op cit and *Wade* (1968) 84 LQR 95 at 110ff.
(a) In the first place, the ambiguity of the term 'fair', which fails to distinguish between procedural and substantive fairness, may encourage judges to ignore procedural faults if the outcome of the decision was 'substantially fair'. There is already an element of this form of thinking in Lord Devlin's dicta concerning natural justice in In re K (Infants), and the temptation will be greater with the flexible and ambiguous terminology of fairness. This fear may prove to be unjustified, but a clear statement distinguishing between a procedural duty to act fairly and a substantive duty to act fairly is needed if my previous comments are correct.

(b) Secondly, in view of the relationship of procedure to substance, there is something inherently contradictory about the general duty to act fairly. If an unfair procedure has produced (by chance or otherwise) a fair result, how can the court review for unfairness? For if it declares the decision void for failure to observe procedural fairness, it does violence to the 'fairness' of the result. The truth is that a duty to act fairly which incorporates substantive issues creates a review of the merits, not just the boundaries of the administrative action. This in itself is not unusual (since decisions must be reasonable), but it is unobjectionable provided only that review of procedural fairness and review of substantive fairness are clearly distinguished.

None the less, provided that the duty to act fairly is kept within the bounds of procedural fairness, this new approach to the control of administrative procedure is, in my opinion, an attractive development for reasons best summed up by the following statements:

'I do not think that much help is to be obtained from discussing whether "natural justice" or "fairness" is the more appropriate term. If one accepts that "natural justice" is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as "judicial", "quasi-judicial" and "administrative". Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word "justice" and to use instead terms such as "fairness", or "the duty to act fairly"... The suitability of the term "fairness" in such cases is increased by the curiosities of the expression "natural justice". Justice is far from

187 [1965] AC 201 at 238: 'But a principle of judicial enquiry, whether fundamental or not, is only a means to an end. If it can be shown... that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed...'.

188 Or, as Clark puts it: a 'trial within a review' (op cit 50).

189 In English law (see, for example, Wade Administrative Law 338ff) although not, it would seem, in South African law (see, for example, Union Government v Union Steel Corporation (SA) Ltd 1928 AD 220 at 226; but cf discussion of the important case of Theron v Ring van Wellington voo die NG Sendingkerk in SA 1976 (2) SA 1 (A) by J A v S d'Oliveira 'Diskresie, Regdwaling en die Hersieningshof: Redelikheid in die Administratiefreg' (1976) 39 THRHR 211 and N E Franklin 'Two Days in the Appellate Division: Reasonableness, Review and Discretionary Administrative Acts' (1977) 2 Natal University LR 76.)

190 Even then, review of substantive fairness should be kept within strict limits where administrative action is concerned, otherwise the courts lay themselves open to the charge of unwarranted interference: '... the role of the judiciary should be to police the limits of governmental power against the individual, rather than to review the quality of governmental policies' (Note (1975) 88 Harvard LR 1510 at 1538).
being a "natural" concept. The closer one goes to a state of nature the less justice does one find.  

More important:

'... the degree and quality of adherence to natural justice principles is carefully tailored to the type of discretion and manner in which it is exercised.'  

And there seems to be no reason why the duty to act fairly is not appropriate to South African administrative law as well.  

What Does 'Fairness' Mean?

Of course, the immediate problem raised by adoption of the 'duty to act fairly' is the question what 'fair' actually means. This is the most difficult question of all, for fairness is like 'justice' and 'happiness', a contested concept: it is a concept that admits of different conceptions. As a bare concept, fairness has no meaning, but the meaning accorded to fairness in any given situation will be a conception of fairness. But one person's conception of fairness in any given situation will frequently differ from another's, and this demonstrates that fairness is a contested concept. Not only will conceptions of fairness differ because of differences or errors of judgment between individuals, but also because different individuals may hold different ideas of fairness. While one individual may consider that the idea of fairness is equality, another may believe that fairness is the embodiment of consent. To the former, it would be unfair for A to receive more than half of the proceeds realized from a treasure-hunting expedition with B, all things being equal, even if A and B had agreed to this in advance. But the person who believes in fairness as consent would consider the agreement to be perfectly fair, provided both parties had freely consented.  

So while all may agree that fairness should be upheld, each of us is able (and likely) to find himself arguing over what fairness dictates in any set of circumstances. As an abstract concept, fairness is meaningless, and it is not surprising to find a dictionary defining 'fair', 'just' and 'equitable' in terms of each other.  

191 Per Megarry V-C in Mclnnes v Onslow Fane [1978] 3 All ER 211 at 219.  
192 S Silverstone (1975) 53 Canadian Bar Review 92 at 94.  
193 Our courts recognize that natural justice is nothing other than an expression of the ideal of fundamental fairness (see, for example, Minister of the Interior v Bechler 1948 (3) SA 409 (A) at 452; and, more recently, Motaung v Mothiba NO 1975 (1) SA 618 (O) at 629; Durban City Council v Jailani Cafet 1978 (1) SA 151 (D) at 154. Cf De Villiers v Sports Pools (Pvt) Ltd 1977 (1) SA 832 (RAD) at 839). Note also the extensive use of 'fairness' by Botha JA in Turner v Jockey Club of South Africa 1974 (3) SA 633 (A).  
195 That is not to say that the two ideals are mutually exclusive or that only one ideal may be accommodated at once.  
197 'So just means lawful and fair; and unjust means unlawful and unfair' (Aristotle Nichomachean Ethics Book 5 (Thompson translation, rev ed (1976)) 172).  
198 Rawls (A Theory of Justice) says that he views 'justice as fairness', but that 'justice as fairness' 'does not mean that the concepts of justice and fairness are the same, any more than the phrase
Thus, if fairness is a contested concept, it is clear why references to the term by judges are both pleasing and frustratingly vague. We all uphold the formal notion of fairness, but on its own the word is not very helpful. Nevertheless, in the legal context it is possible to find some consensus on the ideal of fairness, since the law is confined to geographic and cultural localities and usually expresses a conventional morality by which it has been influenced.

But the task of ascertaining fairness is a little easier in administrative law, where philosophical considerations must give way to the practical purpose and function of the institution to which one is applying the procedural standards.

'We cannot answer important questions about the satisfactoriness of our administrative agencies and their procedures unless we understand just what those agencies are expected to do.'

Even where the courts were accused of adopting a sterile, conceptual approach to judicial review, there was always, implicit in their decisions, a functional justification for imposing standards of procedure on administrative bodies. The term 'judicial' was descriptive of the sort of function that a decision-maker was performing.

Therefore it is possible to deduce the meaning of fairness in each particular case if we are aware of both the particular function of the administrative organ in question and the purpose of the requirement of procedural safeguards—more especially, the requirement of procedural fairness.

The imposition of procedural fairness has, therefore, been justified from time to time by the assumption that it enables certain desired objectives to be reached: accuracy of decision-making; objectivity; and efficiency. Underlying these assumptions are value judgments that those objectives are desirable—one could imagine an administrative state where the sole objective was efficiency in administration,
in which case accuracy may take only second place and objectivity none at all.

So even the purely utilitarian approach to procedural standards is based upon moral notions of fairness.

In addition to this intuitive functionalism, another objective seems to have been protected by the courts in decisions involving procedural fairness. This objective has probably been best expressed as 'process value' by Professor Summers, and is implicit in the maxim: 'the ends don't justify the means.'

Here I propose to examine the broad rationale underlying procedural fairness and shall try to show that the cases and writings on natural justice manifest a concern for two basic objectives in the administrative decision-making process: that is, that the process will be accurate (and, related to this, that even if not accurate, the process will be the most likely to ensure accuracy), and that the process will pay due regard to decency and individual dignity.

(a) Accuracy. Liberal Western society assumes that state interference with an individual requires a justification and that its action be authorized by law—the principle of legality—and that this interference be not arbitrary. For the power of interference to be exercised certain circumstances must exist (jurisdiction), and we probably expect the agent of the state to make as full and objective an assessment of the relevant circumstances as possible before deciding upon a course of action.

Perhaps the central motive for applying the principles of natural justice or fair procedure, therefore, is to ensure that jurisdictional facts and relevant circumstances have been accurately assessed. This has been labelled as 'fairness as accuracy' by one American writer, and is acknowledged as the purpose of procedural due process in the United States. Thus requirements of fair procedure are thought likely to 'minimise substantively unfair deprivation of property'. 'The rules and principles of procedural fairness (in the narrow sense) all are designed to promote the correct decision of disputes.'

That this is the prime justification for the application of procedural standards in England is clear from judicial statements in old and modern cases. In Cooper v Wandsworth Board of Works Erle CJ could 'conceive a great many advantages' for the Board to hear a party

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204 Cf Wade Administrative Law 23.
206 See, for example, Note (1975) 88 Harvard LR 1510 at 1516ff; R L Rabin 'Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement' (1976) 44 Univ of Chicago LR 60 at 76.
208 T C Grey 'Procedural Fairness and Substantive Rights' in Due Process: Nomos XVIII 182 at 184.
209 (1863) 14 CB (NS) 180 (143 ER 414).
before acting, including enabling the party to demonstrate that, despite appearances, he might in fact have complied with the correct procedures, in which event the Board would not have had authority to act as it did.

And, of course, Lord Reid’s third class of employee, who could be dismissed only if there was ‘something against’ him (ie a cause for dismissing him), is entitled to a hearing, since his explanation might, for example, ‘disprove criminal motive or intent and bring forward other facts in mitigation’. In a more recent case, John v Rees, Megarry J explained that although circumstances may appear to speak for themselves,

‘... the path of the law is strewn with examples of open and shut cases which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change’.213

Most recently, Buckley LJ suggested that a useful test to determine whether or not natural justice applies is to ask whether there is a condition which must first be satisfied before a power can be exercised. If this was so, the determination of the existence of such a condition could be facilitated by natural justice.

If hearing the other side enables the holder of the power to have all the relevant circumstances placed before him, absence of bias enables him to assess these circumstances objectively, for only an objective assessment will ensure that the power is exercised in circumstances which really exist. Objectivity is another aim of natural justice.

The goal of accuracy is so important that the requirements of fair procedure are enforced by the courts as a policy, which ‘far transcends the significance of any particular case’. Observance of natural justice is a ‘canon of good administration’, a ‘long range principle of action’ and the ‘best insurance against accidents’. The importance of such procedures is ‘overwhelming’, and for this reason the tendency to overlook procedural irregularities where they may not, in fact, have affected the substance of the case has been roundly condemned.

Nowhere is the enforcement of procedural standards as a policy clearer than in cases involving possible bias. For it is politic that

211 At 66. Cf Geoffrey Lane LJ in Ex parte Hosenball [1977] 3 All ER 452 (CA) at 463f.
213 At 402.
214 Stevenson v United Road Transportation Union [1977] 2 All ER 941 (CA) at 949.
216 Ridge v Baldwin (supra) at 114, per Lord Morris of Borth-y-Gest.
218 G Sawyer Law and Society (1965) 106.
221 See above, and especially Clark op cit 43ff and Wade Administrative Law 454f.
'[j]ustice be rooted in confidence and confidence is destroyed when right-minded people go away thinking: “the judge was biased”.222 Even though the House of Lords was convinced that their Lord Chancellor was not 'in the remotest degree' influenced by personal interest, as 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' the House set aside his decrees.223

(b) Process Values. Perhaps closely allied to the purpose of enforcing procedural standards as a policy is the enforcement of these standards because they are valued for their own sake. This rationale is a 'neglected topic',224 because it is so much assumed as to be commonly understood and also because we tend to assume that procedures are valued for their efficacy in producing a good result225 alone. But even if it were true that procedures are valued solely for the results they achieve, there is still an underlying value judgment that, among the results to be achieved, the dignity of the individual should be observed.226 Efficiency must give way to individual dignity where the ends do not justify the means.

Thus procedures must conform to 'those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses'.227 This Kantian notion of fairness is expressed by the exhortations of various writers to observance of procedures on the basis that we 'attach value to the individual's being told why the agent is treating him unfavourably and to his having a part in the decision'.228

The value in the enforcement of procedural standards is perhaps recognized in Lord Hewart CJ's famous dictum that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'.229 In Western civilization we have 'come to expect minimum procedural standards',230 and even if failure to observe these standards leads only to a 'feeling of grievance'231 the courts place great importance upon their symbolic function,232 holding, for example, that a

222 Metropolitan Properties (FGC) Ltd v Lannon [1969] 1 QB 577 (CA) at 599, per Lord Denning MR.
223 Dimes v Grand Junction Canal (1852) 3 HLC 759, especially at 793 (10 ER 301, especially at 315).
224 Summers (note 23 above) 1. 225 Idem 2.
226 Per Frankfurter J in Rochin v California 342 US 165 at 169 (1952) and Malinsky v New York 324 US 401 at 416f (1945).
228 R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 at 259.
229 De Smith Constitutional and Administrative Law 206.
230 E C S Wade in his introduction to A V Dicey The Law of the Constitution at cxxxc. Contra Summer op cit 34ff, who contends that process values are much more fundamental than this.
231 T M Scanlon 'Due Process' in Due Process: Nomos XVIII 93 at 99. An opportunity 'to blow off steam'? (Sir Hartley Shawcross QC, arguing in the Court of Appeal in Franklin v Minister of Town and Country Planning [1947] 1 All ER 612 (CA)).
breach of natural justice is itself a miscarriage of justice. In *John v Rees* Megarry J said that natural justice would ensure accurate results, and that ‘those with any knowledge of human nature who pause to think for a moment’ would not be ‘likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events’.

Where administrative powers are subjectively phrased, perhaps greater value is placed upon procedures than ever before, because procedure becomes more and more simply a method of ensuring ‘pure procedural justice’.

It seems, therefore, that procedural standards are enforced for a variety of reasons. These objectives probably bear a close inter-relationship to each other, but a procedure is perhaps only *fair* if it serves the objectives of accuracy whilst at the same time being consistent with respect for individual integrity and participatory democracy. Sophisticated standards of procedure are not only more efficient but represent the conventional morality of modern Western society. Although these two main objectives are interrelated, it is essential that they be recognized as separate ends in their own right, particularly in the face of administrators’ objection that ‘fair’ procedures hinder efficient administration. A proper assessment of all the functions that procedures serve will facilitate a more accurate determination of what constitutes a fair procedure in each individual case.

## 4 Conclusion

Natural justice is entirely a creation of the common law. In its vigour and especially in its new-found vitality, as clothed in the duty to act fairly, it is little short of a miracle of judicial creativity. Provided the temptation to resort to a form of ‘bush justice’—a temptation which it is conceded becomes more real when the fairness approach is employed—is resisted, my view is that the duty to act fairly affords scope for the development of urgently required procedural safeguards against arbitrary administrative action such as has not been available under the orthodox approach to natural justice; natural justice unfortunately accumulated a mass of dead wood which held up any development.

For when the fairness approach is combined with the spirit of the statement by M T Steyn J, with which I conclude, I do believe that our administrative law will enjoy major advancement at the hands of our judiciary in at least one important area.

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234 See above p 630.
235 Cf Gelhorn and Bye op cit 579-81, who list three considerations: accuracy; efficiency; and acceptability.
FAIRNESS AND NATURAL JUSTICE IN ENGLISH AND SA LAW

Being rules of the common law, this much can safely be said of the principles of natural justice, viz: that they have been a part of our system of law for a very long time and that they are capable of further formulation, growth and practical application to meet the needs of a rapidly developing and expanding society which is continually being subjected to an increasing degree of administrative and bureaucratic regulation and control.  

L G BAXTER*

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*Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth . . . and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved': per Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547 at 569.

LAW AND SOCIETY

'... [T]hough a society to be viable must offer *some* of its members a system of mutual forbearances, it need not, unfortunately, offer them to all. It is true . . . that if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established. But coercive power, thus established on its basis of authority, may be used in two principal ways. It may be exerted only against malefactors who, though they are afforded the protection of the rules, yet selfishly break them. On the other hand, it may be used to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large or small, depending on the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize of the former. For those thus oppressed there may be nothing in the system to command their loyalty but only things to fear. They are its victims, not its beneficiaries': H L A Hart *The Concept of Law* (1961) 196–7.

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237 *Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 629.
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