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THE EMERGENCE OF "FAIRNESS"

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C O N T E N T S

Introduction

This paper proposes to trace the 'concept of fairness', which has been adopted in a series of cases decided by the courts in the last seven years (1) as a basis for judicial intervention in administrative fields.

First, the demands of Society for justice will be viewed in its historic context as embracing fairness, both in a substantive and procedural context. Secondly, the course of natural justice will be examined to show how over time it acquired a restricted meaning describing just two rules of judicial procedure, so that despite its inherent flexibility its value as a basis for judicial review was considerably undermined. Finally the courts adoption of "fairness" will be discussed in an attempt to understand its role and identity today.

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(1) Regarding Re H.K. (an infant) 1967 2 Q.B. 617 as the beginning of the recent trend.

Justice and fairness

The law originated and exists to promote justice and fairness between peoples. These two terms are implicit in any discussion of a legal system and represent the general public's conception of what the law courts must achieve in daily life. In considering the court's role in society it is accepted that not only should the decision reached be fair and just but the procedure which is followed in reaching that decision should also be fair, as implied in the phrase 'the fair trial'. It thus seems that "fairness" is a suitable standard by which both substantive and procedural law should be judged and this paper seems to show that the law is, at present, evolving towards such a position.

Natural justice was in the past used interchangeably with Natural law. In the old but famous case of R. v Chancellor of Cambridge (2) the expression natural justice was used in the pleadings and the phrase 'law of nature' in the note of the judgement in relation to the same principle. Natural law was originally the Greek philosophical conception of a universal ideal of good conduct upon which all law should be founded. Many of the classical jurists refer to jus naturale in the sense of law based on natural reason. Alf Ross (3) explains that the idea of justice has always held a central place in the philosophy of natural law:-

> "Natural law insists that in our conscience lies a simple and evident idea, the idea of justice."

He points out that justice is a measure of the rightness of law:-

> "There appears to be everywhere an instinctive understanding of the demands of justice. Children do not have to be very old before they appeal to fairness or justice if one of them gets a bigger piece of apple than the other".

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(2) 1723 1 Str. 557

(3) On Law and Justice 1958 269

Lord Esher[4] has simply summed up natural justice as the "natural sense of what is right and wrong", whilst Lord Denning in his book 'The Road to Justice' attempts to formulate his own view of the nature of justice:

> "I ask the question, what is justice? The nearest we can get to defining justice is to say that it is what the right minded members of the community, those who have the right spirit within them believe to be fair"[5]

Marshall refers to a case where the law of nature was relied upon when there was no precedent or rule of law to follow:[6]

> "We shall do in this case as the canonists and civilians do where a new case comes up concerning which they have no existing law, then they resort to the law of nature which is the ground for all laws and according to which they consider to be most beneficial to the common weal"[7]

In effect it appears that what they were doing was to make up their own minds as to what was fair, just and beneficial to all concerned.

John Rawls has written a number of controversial articles and recently a book[8] propounding his theory that the fundamental idea of the concept of justice is fairness. He submits that the mutual acknowledgement of principles by free persons who have no authority over one another makes the concept of fairness fundamental to justice.

> "Acting fairly requires more than simply being able to follow rules; what is fair must often be felt or perceived, one wants to say"[9]

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(4) Vionet v Barrett 1885 55L.J.K.B. 39, 41
(5) The Road to Justice 1955 4
(6) Natural Justice 1959
(7) Yalverton C.J. 1470 Y.B. 8 Edw. IV 21
(8) A Theory of Justice 1972
(9) Justice as fairness 67 Philosophical Review 1958

A further illustration of the equation of natural justice with natural law which can be expressed as fairness can be seen from the statutory enactments of many of the legislatures of Her Majesty's Overseas Territories. A common provision in nearly all the court statutes is to the effect that an alleged rule of customary law in order to be enforceable in the courts must not be repugnant to natural justice and equity and good conscience. One sometimes comes across such other phrases as repugnant to justice and/or morlaity. T.O. Elias (10) comments that what is considered by the judges to be repugnant to natural justice and equity would appear to be whatever is deemed to offend against fairness and a sense of right.

This brief survey shows that natural justice was never confined to any restricted meaning in a procedural context, namely the two rules that a man shall not be judge in his own cause and that both sides must be heard in a dispute and there appears to be no authority available to show why such rules should have been singled out for special attention and described by the law through so many centuries. Justice was and still is regarded as fairness and 'natural justice' was just one of a number of phrases like substantial justice, fundamental justice and universal justice used to connote fairness.

I think it suitable to mention at this juncture how twentieth century thinking is dominated by the term 'fair' and what it represents. It seems to embrace the idea of proportionality in dealing with exchange in the retification of wrongs and in the allotment of rights and benefits. Thus it is common to speak of fair prices for goods, fair rents, fair compensation for services, fair exchange, fair competition, bargains and games etc.(11)

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(10) 'English Law and Africa' in Essays in Tribute to G.W. Keeton Law, Justice and Equity

(11) See John Rawls op. cit. and Edgar Bodenheimer Treatise on Justice

The Universal Ideal of the Fair Trial

In the procedural context the duty to act fairly must be considered in relation to the much hallowed "fair trial". Mr. Justice Frankfurter once said "The history of liberty has largely been the history of procedural safeguards" (12) and in similar terms Justice Robert Jackson has pointed out that "Procedural fairness and regularity are of the indispensable essence of liberty" (13) R.H. Graveson (14) defines justice in terms of here and now as the fair solution of conflicting claims:

> "Whatever the law maybe, whatever facts are proved or not proved the one essential quality of a trial which shall result in a fair decision is that the trial be fair."

Likewise Lord Denning (15) has stressed the paramount importance of the fair trial:

"When you set out on this road to justice you must remember that there are two great objects to be achieved; one is to see that the laws are just, the other that they are justly administered. Both are important but of the two the more important is that the law should be justly administered. It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers. A country can put up with laws that are harsh or unjust so long as they are administered by just judges but a country cannot long tolerate a legal system which does not give a fair trial. There is one thing to which every-one in this country is entitled and that is a fair trial at which he can put his case properly before a judge."

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(12) McNabb v U.S. 318 U.S. 332, 347 (1943)
(13) Shaughnessy v U.S. 345 U.S. 206, 224 (1953)
(14) The Scales of Justice in Essays op cit ft. 10
(15) The Road to Justice 1955 6

In a similar vein Goodhart (17) speaks of the importance of the fair trial:

"The golden thread of procedural law is the concept of the fair trial. In those three words 'the fair trial' we can sum up the outstanding contribution that the common law has made to civilisation. It depends on three things: an impartial judge, an independent and courageous bar and efficient and rational rules of practice and evidence."

He further asserts that the idea of a fair trial is of the greatest value not only in the field of law but also as the foundation of our democratic system of government. This concept of government he points out is not an easy one to attain because it requires a sense of law abidingness - a sense of fair play on the part of the people.

Accepting the tremendous value and necessity of the fair trial it must be considered what constitutes the same. There is no one definition but Lord Denning formulated some of the canons of a fair trial in the Road to Justice (18) He maintained that the principles which go to make a fair trial are:-

1. The judge should be absolutely independent of the government
2. The judge must have no interest himself in any matters that he has to try.
3. The judge before he comes to a decision against a party must hear and consider all that he has to say.
4. The judge must act only on the evidence and arguement properly before him and not on any information which he receives from outside.
5. The judge must give reasons for his decision.
6. A judge should in his own character be beyond reproach.
7. Each side should state its case as strongly as it can.

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(17) Cambridge Law Journal 1964 52 Legal Procedure and Democracy

(18) op cit pps. 1 - 44

The Rt. Hon. Lord Hewart of Bury [19] concurred with these principles but emphasised several others. These are that the parties are to be treated as equals before the court; that a case should be heard in public; that the judge should be identified and be personally responsible for his decision and finally that the parties should have a right of appeal to a higher judicial tribunal on questions of procedure.

It is true to say that the fair trial knows no boundaries - it is a world wide phenomena. In the United States the fifth and fourteenth Amendments of the Constitution provide that no person shall be deprived of life, liberty or property without due process of law and the constitutional guarantee has been consistently interpreted as meaning that the rights of citizens shall not be interfered with unless first there is a fair hearing. Mr. Justice Frankfurter believes that "Whether the scheme satisfies those strivings for justice which due process generates must be judged in the light of reason drawn from the considerations of fairness that reflect our tradition of legal and political thought." [20]

The right to a fair hearing is set down in Article 14(1) of the Covenant of Civil and Political Rights which reads:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." [21]

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(19) Lord Chief Justice Hewart The New Despotism 1929 Ch. 3

(20) Hannah v Larch 363 U.S. 420 (1960)

(21) This clause expands Article 10 of the 1948 Universal Declaration of Human Rights which states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.

Fairness is probably not susceptible to concise definition but at its 1962 meeting in Rio de Janeiro the International Commission of Jurists hammered out the following formula :

"In nearly every country one type of action of administrative agencies and executive officials is in the nature of adjudication and the decisions made are similar to judicial decisions. Whatever varieties in procedure may be appropriate to the kind of executive action there are certain fundamental principles that must be followed if the Rule of Law is to be preserved. These are:-

1. Adequate notice to the interested parties of the nature and purposes of the proceedings
2. Adequate opportunity for them to prepare the case including access to relevant data
3. The right to be heard and adequate opportunity for him to present arguement and evidence and to meet opposing arguement and evidence
4. The right to be represented by counsel or other qualified person
5. Adequate notice to parties of the decision and of the reasons therefore
6. The right of recourse to a higher administrative authority or to a court." (22)

At this point it may be of interest to briefly examine the recent Statutory Powers Procedure Act of Ontario (23) which creates a procedural code to govern the activities of a large number of tribunals in Ontario. Its preamble describes the Act as providing the minimum rules of procedure to govern the Exercise of Statutory Power granted to tribunals by the legislature wherein the rights, duties or priveleges of persons are to be decided at a hearing. The key phrase here is 'at a hearing' which shows that one of the rules of natural justice is the basis of the applicability of the new code. Part I sections 5 and 6 set out that 'reasonable' notice of the hearing is to be given and this shall include a statement of the time

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(22) Comparing this ideal of a fair trial with the generally recognised requirements of natural justice it would seem that the content of clauses 4 and 5 would probably not come within their scope but these aspects will be considered below.

(23) 1971 Ch. 47

place and purpose of the hearing, reference to the statutory uthority under which the hearing will be held and a statement that f the party notified does not attend at the hearing the tribunal ay proceed in his absence and he will not be entitled to any further otice of the proceeding. According to section 8, where the good haracter, propriety of conduct or competence of a party is in issue n any proceedings the party is entitled to be furnished prior to the earing with reasonable information of any allegations with respect hereto. The hearing is to be open except in stated circumstances (24) nd a party to the proceedings may be represented by counsel or agent all and examine witnesses and present his arguement and submissions nd conduct cross examinations of witnesses at a hearing when that s reasonably required for a full and fair disclosure of the facts in elation to which they have given evidence. (25) Notice of the ecision is to be sent to the parties who are entitled to request easons in writing for that decision. (26)

D.J. Mullan in his consideration of the statute points out that espite its forming a procedural code the development of a duty to ct fairly is not necessarily precluded by the Act but rather the Act ay encourage greater use of this concept. (27) He is of the opinion hat this is a desirable development as certain decision making funct-ons are not suited to the stringent requirements employed in the Act nd yet they call dor certain procedural safeguards. He suggests that he duty to act fairly may in this respect supply the flexibility that he courts could be looking for. (28)

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(24) ibid s 9

(25) ibid s9 & s 10

(26) ibid s 17 & 18

(27) Reform of Judicial Review of Administrative Action: The Ontario Way O.H.L.J. May 1974 Vol 12 No 1 125

(28) In this respect 'fairness' is being taken as demanding a lesser standard. See generally 'The Completeness of a Legislative Code' and the 'Content of Fairness'

In 1957 in England the Franks Committee (29) reported on administrative tribunals and inquiries and recommended that there are three closely linked characteristics, openness, fairness and impartiality which are fundamental and must be fulfilled before a determination is made.

"In the field of tribunals openness appears to us to require publicity of proceedings and knowledge of the essential reasons underlying the decision, fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet (if the objector was not allowed to state his case there would be nothing to stop oppression) and impartiality to require the freedom of tribunals from the influence, real or apparent of departments concerned with the subject matter of their decision."

Thus in England these three words were used to describe a fair trial and today these three requirements are widely acknowledged. It is of interest to note that Lord Parker in R. v Birmingham City Justices ex parte Chris Foreign Foods (30) used the exact words of the Franks Committee Report saying that the rules of natural justice "in their limited application to such a case as this, limited to openness, impartiality and fairness ...."

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(29) Cmnd 218 Report of the Committee on Administrative Tribunals and Inquiries 1957 Ch 3

(30) 1970 1 W.L.R. 1428, 1433

Judicial Review of Administrative Action

In matters of public law the role of the courts is of high constitutional importance. They play a dual role of upholding and affording protection of citizens' rights whilst, at the same time passing upon the validity of acts and decisions of the Executive. Natural justice and the "fairness concept" make up just one limb of judicial review of administrative action. A brief survey of the origins of judicial review may be helpful.

The Curia Regis of the eleventh and twelfth centuries was a court exercising the residuary justice of the King. The king was responsible for seeing that justice was done as well as that order was maintained. It was, therefore, his duty to see that no subject was denied a proper trial in any dispute. Henry II centralised justice to a considerable degree and the court of the king was recognised as the court to which his subjects should go in default of justice elsewhere. During the thirteenth century the Curia Regis split into three divisions: Common Pleas, Exchequer and King's Bench, the latter acquiring, through its close association with the king a supervisory jurisdiction over other courts and their officials and the authority to issue writs with which to exercise this control the chief of which being Quo Warranto, Certiorari, Habeas Corpus, Prohibition, & Mandamus. From the fourteenth century until the beginning of the nineteenth local government was in the control of the Justices of the Peace who discharged in a judicial form a number of 'administrative' functions including the government of the gaols, the control of the constable, the control of roads and bridges, the control of poor relief, the exercise of licensing powers and the fixing of prices. The Court of King's Bench supervised these activities. However, a series of enactments in the nineteenth century enlarged existing administrative authorities and created new authorities so that today very few administrative functions rest with the justices (except licensing). Yet just as the courts had supervisory control over the Justices so today by means of the same prerogative writs they perform the essential function of interpreting the limits of the powers of the administrative authorities

and issuing orders to prevent any authority from exceeding its powers. (31)

A public authority may exceed its powers by exercising them in an incorrect form or by adopting an improper procedure, to which the term procedural ultra vires is attached, or by going wrong upon a matter of law, fact or discretion where the vires of an administrative action are challenged. It is the task of the courts to interpret the relevant statutes according to a number of 'rules' that have evolved for this purpose. The classic rules for the construction of statutes were formulated in Heydon's case: (32)

> "That for the sure and true interpretation of all statutes in general ... four things are to be discussed and considered: First what was the Common Law before the making of the Act; Secondly what was the mischief and defect for which the Common Law did not provide; Thirdly what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth; Fourthly, the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy ... "

The courts generally try to ascertain the true meaning of the words used by Parliament by undertaking a literal linguistic and textual analysis of the Act. Occasionally the 'mischief' rule of interpretation may be employed to give effect to the policy of a statute and to the intentions of Parliament. As De Smith points out (33) in answering practical problems e.g. concerning the right to be heard it is usually necessary to consider both a textual analysis of the Act and an examination of judicial precedent to decide on the relevance of the particular ommission from the Act.

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(31) Sir Ivor Jennings The Law and the Constitution 5th ed. 208-220

(32) 1584 3 Co. Rep. at f 8a

(33) Judicial Review of Administrative Action 3rd ed. 86

In addition there are a number of Common Law presumptions which are acknowledged in this field of interpretation, the chief amongst which is that Parliament does not intend to deprive any subject of his Common Law rights except by express words or necessary implication.

The balance between Justice and Efficiency forms the heart of the matter in the exercise by the courts of their supervisory jurisdiction. This was clearly appreciated in England by the setting up in 1957 of the Franks Committee to consider the relationship between the individual and authority and to seek a new balance between private right and public advantage, between fair play for the individual and efficiency of administration. In its report (34) it is pointed out that administration must be not only efficient in the sense that the objectives of policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between the public interest which it promotes and the private interest which it disturbs. J.. Corry in his paper on the "Future of Public Law" (35) points out that in the past fifty years we have been moved by a powerful urge for social justice and that the community today accepts the welfare state and the extensive regulation of economic life but insists on standards of scrupulous fairness in administrative activities:

> "The courts must understand the broad policy and inherent complexities of administration but likewise the administration must recognise that in pressing public claims against private interests it is 'touching to the quick' deep and perennial moral issues" ...

and, therefore, must show a high degree of integrity and fairness. The Justice Report, Administration under the Law stressed the same point in the words:

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(34) Cmnd. 218 1957

(35) Essays entitled 'Changing Legal Objectives' 1969 16, 36

"The courts have always and rightly been conscious of the constitutional importance of not attempting to overrule or revise decisions taken on policy grounds but, nevertheless, they must also ensure that a just balance is achieved between citizen and government agencies" (36)

The whole area was also discussed in Canada by the McRuer Commission Report (37) which recommended increases in the scope of judicial review and procedural safeguards for the exercise of statutory power. D.J. Mullan (38) comments that in Canada legal writings have emphasised the basic tension which exists between the demands of the administrative process for efficiency and effectiveness through an absolute minimum of judicial interference on the one hand and the traditional role of the courts as the protectors of private interests from the ever extending reach of executive power on the other. The arguements are made that the courts do not really possess the kind of specialised knowledge necessary for them to be able to engage in any extensive supervision of the affairs of expert and specially appointed tribunals and officials and that long delays and increase in cost inevitably result. However, individual interests are dependent on the exercise of judicial review and the McRuer report expresses this philosophy in the following quotation:

"The lack in the law of Ontario of any comprehensive principle for review of conclusions of law or findings of fact within the powers conferred on a tribunal deprives the individual whose rights may be affected of an essential safeguard against unjustified encroachment on his civil rights." (39)

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(36) 1971 p. 1/2

(37) Vol. 1 - 3 Royal Commission Inquiry into Civil Rights Ontario Toronto: Queen's Printer 1968 which resulted in the Statutory Powers Procedure Act (S.O. 1971 c 47) and the Judicial Review Procedure Act (S.O. 1971 c 48)

(38) Reform of Judicial Review of Administrative Action - The Ontario Way 1974 O.H.L.J. May Vol 12 No 1

(39) op cit p 308/9

Jeffrey Jowell [40] examining the balancing task emphasises the need to recognise that the ends of the decision maker, direct participants and the public might not coincide and that what is perceived as a merit from the perspective of one actor might be perceived as a defect from that of another. In brief the adjucative decision concerns individual rights and may thus bear little or no relation to the primary administrative function which involves the performance of a particular task. P. Selznick [41] distinguishes adjudication and administration by the fact that the prime function of the former is to 'realise the ideals of legality' whereas administration attempts to manipulate a situation to achieve a desired outcome. Adjudication is deficient to achieve, for example, wide range planning since it is geared to the resolution of individual disputes rather than to the managerial task required to 'get the work of society done'. An illustration of this point can be taken from England where the procedure relating to Development Plans prepared by local authorities and introduced by the Town and Country Planning Act 1947 was criticised for its judicialisation. The gladiatorial nature of the inquiry was not considered conducive to deciding matters of policy to be contained in a flexible settlement of development proposals. In order to cure these defects the Town and Country Planning Act 1968 introduced Structure Plans which would deal with the broader strategic policies likely to have an important bearing on the structure of the town or on the general pattern of its growth. The 'Examination in Public' involving seminar like discussions conducted by a panel of three and allowing affected interests to be heard now replaced the previous public inquiry.

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(40) Legal Control of Administrative Discretion 1973 Public Law 178

(41) Law Society and Industrial Justice 1969

In both the natural justice and 'fairness' fields the need to strive towards both efficiency and justice has been well understood and expressed by the judges. It may be appropriate and helpful at this stage to quote from a few decisions to show the difficulties arising for the courts in their pursuit of a real balance.

In 1947 Lord Atkin said: "Convenience and justice are often not on speaking terms" (42) and earlier still Lord Shaw of Dunfermline in Local Government Board v Arlidge (43) remarks that "Judicial methods may in many points of administration be entirely unsuitable and produce delays, expense and public and private injury". "If administration is to be beneficial and effective it must be master of its own procedure". In the same case Viscount Haldane referring to the Board explains that such a body "has the duty of enforcing obligations on the individual which are imposed in the interests of the community. When, therefore, Parliament entrusts it with judicial duties Parliament must be taken in the absence of any declaration to the contrary to have intended it to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently." (44) This is clearly an example of the courts refusing to interfere with the administrative function and is often spoken of as the beginning of a period of 'judicial retreat'.

Another expression of the judiciary's approach to the problem is that of T.A. Gresson J in the New Zealand case of Low v Earthquake Commission (45) where it was said that "The court is not concerned with the question of administrative policy and it maybe conceded that in the opinion of the Governor General this provision

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(42) General Medical Council v Spackman 1943 A.C. 627, 638
(43) 1915 A.C. 120, 137
(44) ibid 132
(45) 1959 N.Z.L.R. 1198, 1206

(Reg. 2(2))of the Earthquake and War Damage Regulations) may have appeared expedient on practical and administrative grounds in this special field. Expedition and economy may have been taken into account."

In a similar vein and more recently McCarthy P. in Rich v Christchurch Girls High School Board of Governors (No. 1) [46] held that "the legislature in deciding to enact this section was faced with a clash between abstract justice and practical efficiency and it made a deliberate choice in favour of the latter. This court should not obstruct the legislation by placing glosses on what seems to be plain language." On the other side of the coin McCarthy P. in the Lower Hutt City case [47] asserted that "expedience cannot be promoted to the stage of denying citizens fundamental rights"

It seems that the 'concept of fairness' may now be being used to achieve a reasonable compromise between the two extremes as shown in Pearlberg v Varty.[48] Lord Pearson made a statement to the effect that "fairness does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administration or executive efficiency and economy should not be too readily sacrificed." The latest case of Maxwell v Department of Trade [49] also bears reference to this matter. Lord Denning M.R. was considering a view expressed by Forbes J. that "in order to do what was fair, after hearing the evidence and studying the documents the inspectors ought to come to a conclusion (which was necessarily tentative) and put the substance of that conclusion to the witness." Lord Denning reaches

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(46) 1974 1N.Z.L.R. 1, 9

(47) Lower Hutt City Council v Bank 1974 1 N.Z.L.R. 545 , 551

(48) 1972 2 W.L.R. 534, 547

(49) 1974 W.L.R. 338, 344

the conclusion that this is not necessary and that it is sufficient for the inspectors to put the points to the witness as and when they come to them. He seems to base this decision on practical grounds saying: "In short the inquiry will develop into a series of minor trials in which a witness will be accused of misconduct and seek to answer it. That would hold up the inquiry indefinitely." (50)

This theme has been considered in a valuable article by Dr. Mathieson (51) in which he criticises recent developments in the natural justice/fairness field. He feels that unless the courts exercise the jurisdiction which they have now claimed with great restraint and discernment it may be necessary for the legislature to curb the powers of the courts in order to redress the balance between state and the citizen on the ground that it has been struck too favourably on the citizen's side.

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50) These cases will be considered again in 'The Content of Fairness'

51) Executive Decisions and Audi Alteram Partem 12 N.Z.L.J. 1974 277

Natural Justice and its original flexibility

Prior to examining the possible causes and development of the 'fairness principle' it is necessary to consider briefly the well-recognised flexibility of natural justice which could be raised in arguement as militating against the need for a 'fairness' idea.

De Smith introduces his chapter on Natural Justice (52) by explaining that the rules are regarded as essential to justice and are the elements of judicial procedure which are now regarded as the hallmark of a civilised society. The principles are than an adjudicator be disinterested or unbiased and that the parties be given adequate notice and opportunity to be heard. (For the purposes of this paper the latter rule is of primary relevance) In the important case of Cooper v Wandsworth Board of Works (53) the audi alteram partem rule was said to be "of universal application and founded on the plainest principles of justice".

In the late nineteenth century and during the first half of the twentieth century there was a considerable upsurge in governmental activity and a considerable number of new adjudicatory functions were conferred upon existing Departments of State and local authorities and in addition special tribunals were established to deal with a wide range of matters. The courts, aware of their role in upholding citizens' rights were also aware that to demand these institutions to follow the procedure of courts of law would be negating the very reasons for which they were set up. However, the courts did insist that these bodies act judicially in the manner prescribed by the rules of natural justice. A much quote statement of Lord Loreburn from his judgement in Board of Education v Rice (54) is apt here:

"Comparatively recent statutes have extended if they have not originated the practice of imposing upon departments or officers of

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(52) Judicial Review of Administrative Action 3rd Ed. 134/5
(53) 1863 (14 C.B.N.S.) 180, 194 per Willes J.
(54) 1911 A.C. 179, 182

state the duty of deciding or determining questions of various kinds ... In such cases ... they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial... They can obtain information in any way they think best always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

The first question that needs to be asked is when does the obligation to comply with natural justice arise? In the important case of Durayappah v Fernando (55) the Privy Council considered this question. The Mayor of Jaffna took proceedings by way of Certiorari to quash the decision of the Minister of Local Government in Ceylon to dissolve the municipal council on the ground that the audi alteram partem principle had not been preserved. Lord Upjohn reading the advice of the Judicial Committee referred to Ridge v Baldwin (56) where the principle had been closely and carefully examined, remarking that in that case no attempt was made to give an exhaustive classification of the cases where the principle should be applied, for it would be wrong to do so. However, the judgement attempts to lay down three matters which must always be borne in mind when considering whether the principles should be brought into play. First, "what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice." Secondly, "in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene." Thirdly, "when a right to intervene is proved what sanctions in fact is the latter entitled to impose on the other." These tests may be briefly summarised as: (57)

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(55) 1967 2 A.C. 337, 349

(56) 1964 A.C. 40

(57) 32/33 New Zealand Journal of Public Administration 1969/71 70, G.D.S. Taylor & D.J. Mullan Recent Developments in Administrative Law

i. importance of the subject matter;
ii. prescence and nature of the allegation or charge;
iii. nature and severity of the sanction imposed.

It is of interest to note that these tests are all contained in the early leading case of Cooper v Wandsworth Board of Works (58)

The courts in New Zealand have also considered the question when the principles of natural justice apply. All of the judgements in the Okitu decision (59) concurred in regarding the question at point in the case as involving a matter of interpretation. Cooke J. and Finlay J. took the view that the consturction of the legislative provision involved required that regard should be given to the conditions and circumstances under which and in which the jurisdiction is exercised. In the recent 'fairness' decision of Lower Hutt City v Bank (60) McCarthy P. still found it necessary to consider whether the principles of natural justice should be applied to the function of the council. He also set down a three-fold test : a decision as to their applicability should be reached after a"realistic examination of the legislation, the circumstances of the case and the subject matter under consideration", but it is submitted that this scheme is less specific and helpful than that of Durayappah. The preference for the test set out in the latter can be appreciated after examination of the Nakkuda Ali case (61) where a very unsatisfactory decision was held despite a consideration of the three matters listed above.

A final example of the flexibility of application of the rules of natural justice can be found in the decision of Gaiman v National Association for Mental Health.(62) Megarry J. had to consider whether the principles of natural justice applied to company law

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(58) 1863 14 C.B.N.S. 180
(59) New Zealand Dairy Board v Okitu Co-op Dairy Company Ltd. 1953 N.Z.L.R. 366 - 430
(60) 1974 1 N.Z.L.R. 545, 548
(61) 1951 A.C. 66
(62) 1971 1 Ch. 317, 333

and to a company limited by guarantee. He seemingly bewails the lack of a satisfactory test for determining their applicability and comes to the conclusion that there is a tendency for the court to apply them to all powers of decision unless the circumstances suffice to exclude them. "These circumstances may be found in the person or body making the decision, the nature of the decision to be made, the gravity of the matter in issue, the terms of any contract or other provision governing the power to decide and so on."

The second question to be posed in this area is what does natural justice, if found to be applicable, require? Time and again it has been emphasised that natural justice is not a rigid set of rules but is capable of adaptability to suit the exigencies of the situation. The most famous and much quoted dictum of Tucker L.J. in Russell v Duke of Norfolk represents the true position : (63)

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth."

Very similar language to that of Lord Tucker's was used in R. v Registrar of Building Societies (64) by Lord Parker C.J. :

> "There is no one code of natural justice which is automatically imputed into any procedure of a judicial nature. What is imputed by way of natural justice depends entirely on the tribunal or official in question, the nature of his functions and perhaps most important of all, the exact words of the statute."

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(63) 1949 1 A.E.R. 109, 118
(64) 1960 1 W.L.R. 669, 676

In University of Ceylon v Fernando (65) Lord Jenkins gave some thought to the requirements of natural justice and concluded "First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case and thirdly, of course, that the tribunal must act in good faith. I do not think that there really is anything more."

It appears that in both these aspects of natural justice, the cases and quotations speak for themselves. The principles of natural justice can always be appealed to and whether they will be upheld depends on the circumstances of each individual case and the interpretation of all the factors surrounding it. In the 'content' aspect the main areas of controversy are the right to counsel, cross-examination and the giving of reasons for a decision, and these will be considered below. The following pages will serve to show that the flexibility of natural justice was 'lost' in the 1940's and 1950's leaving the way open for fresh thinking in the years to follow this regression.

To conclude this section it seems suitable to quote Lord Morris of Borth-y-gest in Wiseman v Borneman (66) whose words seem to recapture the original conception of natural justice.

> "My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application."

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(65) 1960 1 W.L.R. 223, 233
(66) 1971 A.C. 297, 309

Unsatisfactory aspects of the operation of the rules of natural justice - the need for change

It is appropriate now to discuss those matters which have influenced the courts to a fairness way of thinking. These factors will be considered below under the headings: the analytical approach of the 1940's and 1950's; the review of discretionary powers and the completeness of a legislative code.

The analytical approach

The traditional division of the functions of government into three categories, legislative, executive and judicial has given rise to considerable difficulty in the administrative law field. The need in the past for distinguishing functions was mainly twofold. It was necessary to determine whether a body was required to act in a judicial capacity to ascertain whether its acts were reviewable by the orders of certiorari and prohibition, and secondly whether a body was under a duty to act judicially, thus being obliged to observe the rules of natural justice.(67) Today it is recognised that such a determination is not necessary on either counts.(63)

Problems arose at the beginning of the present century when Parliament, embarking on an extensive programme of legislation found it convenient to state only the general policy in statutes and to delegate to a minister the task of formulating detailed rules for its implementation. The court, appraising their role, felt that they could only review for procedural error those actions of the administration of a judicial character but by delegation

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(65) De Smith points out (p. 67) that "to say that a duty to observe natural justice is imposed on bodies that are obliged to act judicially is usually tautologous; for a duty to act judicially normally means nothing more than a duty to observe natural justice."

(67) Ridge v Baldwin 1964 A.C. 40
R. v Birmingham City Justices ex. parte Chris Foreign Foods (Wholesalers) Ltd. 1970 1 W.L.R. 1428

matters which had previously been considered legislative now belonged to the administration or to ministers. In order to bring matters of ad inistration within the scope of judicial review the use of the prefix 'quasi' was assumed meaning 'not exactly' or in context fulfilling some of the attributes of a judicial decision but not all. A similar movement had happened in America and a critical examination of the position was made by Mr. Justice Jackson of the United States Su reme Court:(68)

> "Administrative agencies have been called quasi-legislative, quasi-executive and quasi-judicial as the occasion requires in order to validate their functions. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognised classifications have broken down and quasi is a smooth cover which we draw over our confusion."

In Vine v National Dock Labour Board(69) Viscount Kilmuir points out that the "prescence of the qualifying word 'quasi' means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed.

Commentaries on the futility of the conceptual attitude of the courts are prolific and as De Smith and others point out any attempt to adopt a conceptual approach will almost inevitably be vitiated when practicability and expediency make it desirable that a particular function should be pushed into one category rather than another. De Smith goes so far as to say(70) that some of the differences in terminology have been deliberately contrived by judges seeking to impose on their decisions a veneer of superficially persuasive legal reasoning.

To understand the sterility of the analytical approach the failure of the courts to find satisfactory definitions of judicial proceedings and its antithesis administrative must be examined. Judicial functions may be identified by reference to

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(68) Federal Trade Company v Rubberoid Company 1952 343 U.S. 470, 487

(69) 1957 A.C. 488, 499

(70) op. cit. 66

to their formal, procedural or substantive characteristics or by an accumulation of any of them. The following guide lines are usually followed. The more closely a statutory body resembles a court of law the more likely it will be held to act in a judicial capacity, but even in this category there is an exception for discretion exercised by a court is considered judicial but when exercised by another body is usually considered administrative. Secondly, the conclusiveness of an order made by a body is an important factor as compared with orders that are merely advisory or conciliatory or deliberative etc. Thirdly, the conception of a judicial function is closely bound up with the idea of a suit between parties but this led to extreme conclusions as will be shown below. An act may be judicial because it declares and interprets pre-existing rights. A duty to act judicially may be inferred from the impact of an administrative decision on individual rights.

In 1929 Lord Sankey L.C. appointed a Committee on Ministers Powers (71) to consider the powers exercised by or under direction of Ministers of the Crown by way of delegated legislation and judicial or quasi-judicial decision and this resulted in the Donoughmore Report 1932. The Committee attempted the impossible and defined the judicial and quasi-judicial decision. In their opinion the essential distinctions between them is that in the former there is never an element of discretion - in fact a misapprehension - whilst there is invariably statutory permission to exercise discretion in the performance of a quasi-judicial function. Both these are to be distinguished from an administrative decision in that the exercise of judicial and quasi judicial functions presupposes the existence of a dispute, parties to the dispute and contains procedural elements.

The following cases serve to demonstrate how the conceptual approach could result in unjust or unsatisfactory decisions. In R. v Leman Street Police Station Inspector ex parte Venicoff (72)

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(71) Cmnd. 4060

(72) 1920 3 K.B. 72

the court refused to control the Home Secretary's deportation of an alien by holding that it was a purely executive function and there was no duty to act judicially. This classification was understood to exclude any implied obligation on the Secretary of State's part to act in accordance with natural justice despite the impact of the decision on the individual. The decision was justified on the grounds that there was a wide policy discretion which the courts felt restrained from subjecting to judicial review.(73) This attitude that the courts should not interfere with the administrative process was in accord with the earlier case of Local Government Board v Arlidge(74) which marked the beginning of the retreat from administrative spheres by the courts. In that case the legislature had provided an appeal to an administrative department of State - the local government board, and the House of Lords held that although this Board must act judicially this did not mean it was obliged to follow the procedure of a court of justice; it meant that the Board "must preserve a judicial temper and perform its duties conscientiously with a proper feeling of responsibility in view of the fact that its acts affect the property and rights of individuals."(75) Viscount Haldane considered that acting judicially meant that the deciders must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. "The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."(76) Having concluded that the Board was not bound to divulge the report of the Inspector even though this may have contained relevant statements prejudicial to the appellant's case which he might have wanted to controvert.

During the judicial retreat period a series of cases known as the Housing cases arose which illustrated the difficulty of

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(73) see 'The Review of Discretionary Powers'

(74) 1915 A.C. 120

(75) ibid per Lord Moulton 146

(76) ibid 132

distinguishing the judicial from the executive phases in the administrative process. Those cases involved a procedure for complaint against the validity of slum clearance or cumpulsory purchase orders made by local authorities. Objections made in accordance with the provisions of the relevant acts compelled the minister to institute an inquiry or arrange for a hearing. Those not given an express right of objection found it difficult to influence the court to give them the right to be heard. It was held that the minister's function was essentially administrative and therefore, not subject to judicial review but once one objection had been lodged the inquiry became quasi-judicial.(77)

An illustrative case is that of Miller v Minister of Health (78) where a letter from a regional planning officer received some time before the objection was lodged was held to be beyond the bounds of the hearing for the act was purely administrative before the objection was lodged. This case, the Housing cases in general and the Town Planning cases demonstrate the difficulties of requiring a body with administrative responsiblities and policies to act judicially. Thus in Franklin v Minister of Town and Country Planning (79) it was claimed that the Minister was biased to the government policy in favour of creating a new town. However, the House of Lords held that the criterion of bias had no relevance to the functions of the Minister which were "purely administrative" and that the only ground for challenge would be "that his mind was so foreclosed that he gave no genuine consideration to them".

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(77) See e.g. Johnson (B.) & Co. (Builders) Ltd. v Minister of Health 1947 2 A.E.R. 395 in which case Lord Greene was considering a compulsory purchase order. "But his (the Minister's) functions are administrative functions subject only to the qualification that at a particular stage and for a particular and limited purpose there is superimposed on his administrative character a character which is loosely described as quasi-judicial." In this case it was held that there was no duty upon the Minister to disclose material obtained prior to any objection being received despite its prejudicial nature for the plaintiff.

(78) 1946 K.B. 626

(79) 1948 A.C. 87, 102/3

The same problem arose in New Zealand in the case of Turner v Allison (80) where the judges found favour in the test for bias applied by seven judges of the High Court of Australia in ex parte Angliss Group. (81) A tribunal is to be regarded as biased if "a suspicion of bias reasonably and not fancifully is entertained by responsible minds. Turner v Allison recognised that the Town and Country Planning Appeal Board is in a different position from a judicial officer because its members must inevitably acquire opinions about the type of question with which they deal but held that this was not sufficient to amount to bias.

Referring back to the definition of the Committee on Ministers Powers (82) an essential element of the judicial or quasi-judicial decision involved a lis inter partes. This led to the conclusion that the withdrawal of a licence or permit which might be required for the carrying on of a trade or occupation was a proceeding which did not fit into this category for the dispute was not between two parties but between the deciding official and the holder of the licence only.

Two cases demonstrating this fundamental defect of the court's reasoning and reflecting an over compartmentalising of the law are Nakkuda Ali v Jayaratne (83) and R. v Metropolitan Police Commissioner ex parte Parker. (84) In the former case certiorari had been sought by a textile dealer whose licence had been revoked by the Controller of Textiles in Ceylon on the grounds that no inquiry had been conducted in accordance with natural justice.

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(80) 1971 N.Z.L.R. 833, 848
(81) 1969 A.L.R. 504, 506
(82) 1932 Cmnd. 4060
(83) 1951 A.C. 66
(84) 1953 1 W.L.R. 1150

The Privy Council considered the case in the light of Atkin L.J.'s statement of the circumstances in which the writ of certiorari would issue,(85) namely to "any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially." The Privy Council held that the withdrawal of the licence constituted only a withdrawal of a privelege and, therefore, no right had been violated and secondly that the controller was under no duty to act judicially but was merely executing an executive function, so that on both counts certiorari would not lie. The judgements implied that the bare power of the regulation was all that had to be considered; the presumption of the common law supplying the omission of the legislature was ignored (86) and none of the older authorities were referred to. The judgement read by Lord Radcliffe illustrates the narrow and unduly strict analysis used to arrive at the conclusion. "In brief the power conferred stands by itself on the bare words of the regulations and if the mere requirement that the controller must have reasonable grounds of belief is insufficient to oblige him to act judicially there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules." (87)

In Parker's case it was similarly held that the Commissioner of Police had an administrative function, that the licence of a taxi cab driver was a privelege and as the licence had been revoked for misconduct the power exercised was, in fact, disciplinary and that this in the words of Lord Goddard "should not be fettered by threats of certiorari and so forth because that interferes with the free and proper exercise of the disciplinary powers that he has." (88)

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(85) R. v Electricity Commissioners 1924 1 K.B. 171, 205

(86) See Byles J. in Cooper v Wandsworth Board of Works 1863 14 C.B.N.S. 180

(87) 1951 A.C. 66 78/9

(88) 1953 1 W.L.R. 1150, 1155

The Situation Rectified and 'fairness' developped

The courts were given the opportunity to review the situation in 1964 in Ridge v Baldwin [89] in which case Lord Reid examined the previous authorities exposing the fallacies underlying the previous decisions and reasserted the need for judicial activity to protect the rights of citizens. In his judgement Lord Reid closely considered the application of the audi alteram partem principle in a number of old cases and whose authority he believes has never been disapproved or doubted. He then discussed the difficulties which had been introduced by statements in a number of recent cases. First he pointed out that under modern legislation it is more difficult for the courts to control an exercise of discretionary power on a large scale where the treatment to be meted out to a particular individual is only one of many matters to be considered. Once again this is giving voice to the need for a balance between public policy decisions and individual rights. Secondly he mentioned the limited application of the principle to cases arising out of war time legislation and thirdly he stressed the misunderstanding concerning the dictum of Atkin L.J. This could be seen by reference to Lord Hewart C.J's judgement in R. v Legislative Committee of the Church Assembly ex parte Haynes-Smith [90] to the effect that before the prerogative writs shall apply not only must a body have legal authority to determine questions affecting the rights of subjects, there must be superadded the further requirement that the body has a duty to act judicially. Lord Reid holds that this interpretation impossible to reconcile with the earlier authorities and that the cases Atkin L.J. cited after the relevant passage did not seem to contain this superadded characteristic. Lord Atkin inferred the judicial element

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(89) 1964 A.C. 40

(90) 1924 1 K.B. 771

from the power itself. Finally and leading on from this Lord Reid distinguished Nakkuda Ali's case and it is now widely recognised that that decision and that of Parker's case are erroneous.

Although the principal speech was delivered by Lord Reid there is some problem of interpretation of his words and ambiguous sentences in relation to the analytical criterion for intervention as propounded in Dr. Mathieson's paper (91) and pointed out by Quilliam J. in Pagliari v A.G. (92) However, Lord Hodson seems to have disposed of the distinction between administr tive and judicial functions when he said:

"Secondly, the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice." (93)

By this stage it was finally realised that the development of public law was being impeded by the application of untenable distinctions (although this may not be strictly true of the New Zealand position for the Okitu case (94) decided after Nakkuda Ali was based on broad principles. The court held that although there were no words in the regulations under which the Dairy Board operated requiring it to act in accordance with natural justice and although the functions of the Board were primarily administrative nevertheless, there was a duty to act judicially since the zoning order it made involved a direct interference with the common law right of the Okitu Dairy Company to trade with whom it chose.

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(91) Executive decisions and audi alteram partem 12 N.Z.L.J. 1974 277

(92) 1974 1 N.Z.L.R. 86, 92

(93) Lord Denning in the Gaming Board case (1970 2Q.B. 417) holds without a doubt that the heresy that the principles of natural justice apply only to judicial functions and not administrative was scotched by Ridge v Baldwin.

(94) New Zealand Dairy Board v Okitu Co-op Dairy Co. Ltd. N.Z.L.R. 1953 366

Ridge v Baldwin must surely be regarded as a landmark case but three years later another important case was decided - a landmark case for its departure from the traditional and its adoption of an approach which may be more appropriate to the broader issues of administrative law.

The source of the 'fairness trend' can be found in the decision of Re H.K. (an infant).(95) Briefly the facts of that case concern the refusal of entry to the United Kingdom under s2(2) of the Commonwealth Immigrants Act 1962. The Immigration officer at London Airport felt that the child was not eligible for entry since he thought he was over fifteen years of age - an impression which was supported by medical evidence and by the fact that the date of birth upon the boy's passport did not exist. The boy was, therefore detained to be sent back to Pakistan. An action was brought for habeas corpus and certiorari on the ground that there was a duty to act in accordance with the rules of natural justice by giving the boy full opportunity for removing the suspicion in the officer's mind since he was acting in a judicial or quasi judicial capacity in deciding whether he was satisfied the boy was under sixteen. The action was dismissed, explained by the now well known words of Lord Parker:

> "I myself think that even if an immigration officer is not in a judicial or quasi judicial capacity he must at any rate give the immigrant an opportunity to satisfy him of the matters in the subsection and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. This is not as I see it a question of acting or being required to act judicially but of being required to act fairly."

A similar step to that taken in Re H.K. was taken by the Indian Supreme Court in the case of Kraipak v Union of India (96) India had previously followed the conceptual approach to natural justice but in this case Justice Hegde citing Re H.K. held that it made no

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(95) 1967 2 Q.B. 617, 630

(96) decided April 29 1969

difference whether the function being exercised by the Forest Board constituted for selecting candidates was quasi judicial or administrative. In a comment on this case K.B. Nambyar (97) notes that the concept of the rule of law would lose its vitality if the instrumentalities of the state are not charged with the duty of discharging their function in a fair and just manner.

Likewise in Canada there has been acceptance of the 'fairness' idea and the futility of catagories. In the case of ex parte Beauchamp (98) Pennel J. says :-

"The matters in question are within the jurisdiction of the Board and are administrative matters and are not in any way judicial determinations. However that may be, I am of the view that the person designate and the Board must act fairly in accordance with the principles of proper justice. I do not suggest that the National Parole Board is required to invoke the judicial process. But its decisions are of vital importance to the inmate since his whole future may be affected. In my judgement fairness demands a consideration of the inmates side of the story before revoking his parole."

In Schmidt v Secretary of State for Home Affairs (99) Lord Denning and the Court of Appeal took up the cause and having been cited the decisions of R. v Leman Street Police Station Inspector ex parte Venicoff (100) and R. v Governor of Brixton Prison ex parte Soblen (101) confidently declared that these were not applicable as the distinction between an administrative power and a judicial act upon which they were decided was no longer valid.

In 1970 Lord Parker was given the opportunity to develop his own theme in the case of R. v Birmingham City Justices ex parte Chris Foreign Foods (Wholesalers) Ltd. (102) Naturally following his

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(97) 86 L.Q.R. 1970 4 et.
(98) 1970 3 O.R. 607, 611
(99) 1969 2 Ch. 149
(100) 1920 3K.B. 72
(101) 1963 2 Q.B. 243
(102) 1970 1 W.L.R. 1428

reasoning in Re. H.K. (an infant) he finds it quite unnecessary to come to any decision in the matter of whether the inquiry or function was judicial or quasi-judicial or administrative for the qualities of openness, fairness and impartiality must always be fulfilled. (103) He further relied on the earlier decision of R. v Cornwall Quarter Sessions Appeal Committee ex parte Kerley and the judgement of Donovan J. (104) stating that a justice even though he was acting in an administrative or executive capacity, as an inspector of food must bring qualities of impartiality and fairness to bear on the problem.

The next important decision was R. v Gaming Board of Great Britain ex parte Benaim and Khaida (105) which consolidated the declassification trend. The applicants, managing directors of Crockfords wished to obtain a gaming licence under the Gaming Act 1968. The certificate of consent to entitle the applicants to apply was refused by the Board who based their decision on information already in their possession from outside sources. The applicants sought certiorari and mandamus on the ground that they had been given insufficient knowledge on which to base their case because the Board would not disclose which matter troubled them. The judgements of this case clearly demonstrate that the requirement of acting judicially was being erased from administrative law and that conceptualistic distinctions between different functions must be steered away from. Lord Denning reviews the application of the principles of natural justice:

> "At one time it was said that the principles only applied to judicial proceedings. That heresy was scotched in Ridge v Baldwin. At another time it was said that the principles do not apply to the grant or revocation of licences. That too is wrong." (106)

After quoting Lord Parker in Re. H.K. (an infant) he finds that the Gaming Board have a duty to act fairly and give the applicants an opportunity of satisfying them of the matters specified under the Act.

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(103) 1970 1 W.L.R. 1428, 1433
(104) 1956 1 W.L.R. 906
(105) 1970 2Q.B. 417

(106) ibid 430

The next case relevant to this study is Re. Pergammon Press Ltd.[107] which involved a statutory investigation by a board of inspectors into allegations against a company culminating in a report to the Board of Trade. The directors of the Company proved unwilling to co-operate with the inspectors claiming they were entitled to see any proposed findings before their inclusion in the report and that the proceedings should be conducted in a judicial manner. Lord Denning M.R. considered this claim and found that the inspectors were not a court of law and that their proceedings were not judicial; they were not even quasi-judicial for they decided nothing, they determined nothing. However, he pointed out that the report would have wide repurcussions for all involved and could lead to criminal prosecution or civil actions, thus demanding that the inspectors act fairly for "this is a duty which rests on them as on many other bodies even though they are not judicial or quasi judicial but only administrative."[108] Sachs L.J. similarly states that it is not necessary to "label the proceedings judicial, quasi judicial, administrative or investigatory it is the characteristics of the proceedings which matter, not the precise compartment or compartments into which it falls."[109]

Pearlberg v Varty[110] is another illustrative case of the judiciary's leaning towards the flexible standard of fairness and the departure from the restrictive labelling approach. In this case 'fairness' did not require a taxpayer to have a right of audience or a right to make written representations to a tax commissioner before he gave leave under s6(1) of the Income Tax Management Act 1964. Viscount Dilhorne is in point :

"Whether the commissioner's function in deciding to give leave is to be described as judicial or administrative he must

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(107) 1971 Ch. 388
(108) ibid 399
(109) ibid 402
(110) 1972 1 W.L.R. 534

obviously act fairly and be satisfied that there are reasonable grounds for believing that tax has or may have been lost owing in this case to neglect." (110)

It seems that in the case of non judicial activities the onus is on the applicant to show that his position is prejudiced by the existing procedural arrangements before the court will interfere.

A most interesting case is that of R. v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association (111) where once again Lord Denning delivered judgement emphasising the need to act fairly when exercising an administrative function. However it is Roskill L.J.'s words which have been most frequently quoted as clearly stating the position:

"This court is concerned to see that whatever policy the corporation adopts is adopted after due and fair regard to all the conflicting interests. The power of the court to intervene is not limited as once was thought to those cases where the function in question is judicial or quasi judicial. The modern cases show that this court will intervene more readily than in the past. Even where the function is said to be administrative the court will not hesitate to intervene in a suitable case if it is necessary in order to secure fairness." (112)

This passage seems to provide a very concise summary of the whole movement, acknowledging the mistaken, restrictive attitude of the courts in the past and affirming the need to secure fairness always.

Recent New Zealand cases are in line with these 'fairness' decisions in ending the futile attempt of classifying functions. In Smit v Egg Marketing Authority (113) White J simply states that the type of proceedings need no longer be defined. It may be suitable here to note that in this case White J. ordered the writs of certiorari and mandamus against the authority to allow the

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(110) ibid 542
(111) 1972 2 Q.B. 299
(112) ibid 310
(113) as yet unreported judgement delivered 21st March 1973

the plaintiffs further opportunity to have their applications considered. This seems to follow the decision in the Liverpool Taxi case where prohibition was issued having established that a duty to act fairly existed. Thus it seems that just as the requirement of acting judicially is no longer necessary to bring into play the rules of natural justice so the requirement of acting judicially is no longer a prerequisite to the prerogative remedies so that the more flexible approach will increase their availability and scope.

In Lower Hutt City v Bank (114) McCarthy P. makes a valuable summary of the present state of affairs:

"We believe that the clear cut distinctions once favoured by the courts between administrative functions on the one hand and judicial functions on the other as a result of which it was proper to require the observation of the rules of natural justice in the latter but not in the former is not in these days to be accepted as supplying the answers in a case such as we have before us. Former clear cut distinctions have been blurred of recent years by directions from highest authority to apply the requirements of fairness in administrative actions as well if the interests of justice make it apparent that the quality of fairness is required in these actions." (115)

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(114) 1974 1 N.Z.L.R. 545
(115) ibid 548

The Review of Discretionary Powers
'Fairness'applied in a substantive context

During the analytical period 'discretion' was used both by the Committee on Ministers Powers and by the courts as a distinguishing feature between the judicial and the administrative and, therefore, outside the scope of judicial review. However, this was a serious misapprehension for it has long been held that a discretion must be exercised fairly in accordance with the law.(116)

Jeffrey Jowell (117) has defined discretion as "the room for decisional manoeuvre possessed by a decision maker" and in similar vein K.C. Davis in Discretionary Justice 1969 says: "A public officer has discretion whenever the effective limit on his power leaves him free to make a choice among possible courses of action or inaction." Mr. D.M. Gordon (118) has explained that judicial tribunals and courts are concerned with legal rights and liabilities conferred or imposed by law whereas administrative tribunals base decisions on policy and expediency and further they create the rights and liabilities that they enforce; herein lies the exercise of a pure or absolute or unfettered discretion. Today it is realised that no such strict determinations can be made for law and policy are not always distinct and distinguishable and judicial discretions are also in existence e.g. in sentencing, awarding damages, equitable remedies etc. (although it is true these must conform to a norm and are liable to review on appeal). Sir Ivor Jennings (119) and Professor Robson (120) (inter alia) have both subscribed to this more realistic approach that judicial and administrative bodies have discretionary power to a lesser or greater degree. Professor Robson points out that if the work of the judges is regarded as a branch of the administration it follows that there is no inherent reason why the best features of the judicial technique should not be extended to other administrative

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(116) See e.g. Smith v Chorley U.D.C. 1897 1 Q.B. 678, 680
Roberts v Hopwood 1925 A.C. 578, 606

(117) Legal Control of Administrative Discretion 1973 Public Law 178

(118) Administrative Tribunals and the Courts 1933 49 L.Q.R.
Part I. 94, 106 Part II 419

(119) Law and the Constitution 3rd Ed.

activities which have features in common with the business of the courts. He feels that inspectors conducting Town and Country Planning Inquiries, Ministers making compulsory purchase orders, Income Tax Commissioners etc. are all concerned with the judicial side of administration and all should, therefore, cultivate the judicial mind or spirit, should be prepared to hear parties orally and ought to give reasons for their decisions. In his book Justice and Administrative Law he says :

"We are inclined to go so far as to suggest indeed that the whole modern conception of economic and social democracy involves the exercise of discretions which shall be 'judicial' in that they are not to depend on individual caprice and shall be free from personal favour and individual self-interest and this may imply an extension in certain respects of the judicial mind, an application of mental habits common among those who administer the judicial process." (121) Leading on from this he says that the sense of fairness which we associate with the judicial mind implies an ability on the part of the judge to exclude from his estimation in dealing with the case before him every tendency to bias arising from emotional disturbances.

The idea of fairness is implicit in the concept of judicial discretion. In the old case of R. v Askew (122) the concept of judicial discretion was stated by Lord Mansfield to import a duty to be"fair, candid and unprejudiced; not arbitrary, capricious or biased, much less warped by resentment or personal dislike." This sort of reasoning was applied in Osgood v Nelson (123) where objection was taken to the way in which the corporation of the City of London had removed the clerk of the Sheriff's court and

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(120) Justice and Administrative Law 1951
(121) op cit 39
(122) 1768 4 Burr 2186, 2189
(123) 1872 L.R. 5H.L. 636 649

Lord Hatherley L.C. said :

"I apprehend my Lords that as has been stated by the Learned Baron who has delivered in the name of the judges their unanimous opinion the court of Queens Bench has always considered that it has been open to that court, as in this case it appears to have considered, to correct any court or tribunal or body of men who may have a power of this description, a power of removal from office if it should be found that such persons have disregarded any of the essentials of justice in the course of their inquiry before making that removal or if it should be found that in the place of reasonable cause those persons have acted obviously upon mere individual caprice."

In 1891 Lord Halsbury spoke of the nature of discretion in the case of Sharp v Wakefield (124):-

"Discretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice not according to private opinion ..." He continues on : "The legislature has given credit to the magistrates for exercising a judicial discretion - that they will fairly decide the questions submitted to them ..."

The idea of discretion which is to be exercised in a fair, disciplined and responsible manner represents a compromise between the idea that people who possess power should be trusted with a free hand and not tied down by narrow formulae and the competing notion that some contingent control must be retained over them in case they act in an unreasonable way. The courts recognise their incapactiy to substitute their own discretion for that of an authority on which the discretion has been conferred, yet few discretionary powers are found to be absolutely unreviewable when they have a direct impact on private rights. Thus in the old case of ex parte Ramshay (125) the Lord Chancellor was empowered 'if he should think fit' to remove a county court judge from

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(124) 1891 A.C. 173, 181

(125) 1852 18 E.R. 173, 190

office on the ground of inability or misbehaviour. However, despite the wide terms of the power Lord Campbell C.J. held that its exercise was "only on the implied condition prescribed by the principles of eternal justice." More recently in the case of Roberts v Hopwood (126) where the Poplar council was empowered to pay their employees such wages 'as they think fit' the House of Lords by holding first that the Council stood in a fiduciary position towards its ratepayers, held that the discretion of the local authority had been exercised unlawfully. Yet again in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation (127) it was held that a local authority empowered to attach such conditions 'as it thinks fit' to the grant of licences or permits must have regard to relevant considerations and disregard the irrelevant (even though the factors which were to be taken into account were not mentioned in the Act.) This case was of particular note for its holding that the courts would only interfere on the grounds of unreasonableness if there was something 'overwhelming' (usually interpreted to mean oppressive or palpably absurd). Subsequent cases, however, have been decided on the unreasonableness ground so that the case has not placed too tight a rein on judicial activity in this area, contrary to first beliefs that it would. In the case of Pyx Granite Company v Ministry of Housing and Local Government (128) Lord Denning said that although the planning authorities are given very wide powers to impose such conditions 'as they think fit' nevertheless, the law says that those conditions, to be valid must fairly and reasonably relate to the permitted development.

Finally the case of Padfield v Minister of Agriculture, Fisheries and Food (129) must be considered. Under the statutory milk marketing scheme the Minister was empowered to appoint a committee of investigation if he 'in any case so directs'. In the course of his judgement Lord Denning quotes Lord Esher in R. v Vestry of St. Pancreas (130) who said

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(126) 1925 A.C. 578, 606
(127) 1948 1 K.B. 223, 233
(128) 1958 1 Q.B. 554, 572
(129) 1968 A.C. 997
(130) 1890 2 Q.B.D. 371, 375/6

of a body who were entrusted with a discretion:

"They must fairly consider the application and exercise their discretion on it fairly and not take into account any reason for their decision which is not a legal one."

In discussing discretion the problem arises of a body or person being committed to a stated policy. This was considered in Schmidt v Secretary of State for Home Affairs (131) where the Home Secretary had laid down a general policy to exclude all alien students of scientology so that it might be said that he had fettered his discretion. However, his claim was not upheld, relying on the dicta of Bankes L.J. in the case of R. v Port of London Authority ex parte Kynoch Ltd. (132) in which the relevant principles were well stated:

"There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy and without refusing to hear an applicant intimates to him what its policy is and that after hearing him it will act in accordance with its policy and decide against him unless there is something exceptional in his case ... if the policy has been adopted for reasons which the tribunal may legitimately entertain no objection would be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

It is clearly desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion. One example of where this has been carried out is in the publication of instructions to immigration officers concerning the exercise of their powers and duties under Immigration legislation. These instructions were considered in Re H.K. (an infant) (133) and Re Mohamed Arif (134) where it was held that the powers conferred on the officers must be exercised fairly, humanely and honestly.

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(131) 1969 2 Ch. 149
(132) 1919 1 K.B. 176, 184
(133) 1967 2 Q.B. 617
(134) 1968 Ch. 643

The Court of Appeal in Breen v Amalgamated Engineering Union (135) delivered some broad pronouncements upon the scope of discretionary decisions. Edmund Davies L.J. said that "it was entirely a matter of discretion whether the plaintiff was approved or not." This was referring to the decision of a trade union district committee refusing to approve the plaintiff's election as shop steward. However, he continues on : "Discretion up to a point was certainly theirs but though wide it was not untrammelled, it had to be fairly exercised." (136) Lord Denning in the same case summarised the position in clear terms: (137)

> "It is now well settled that a statutory body which is entrusted by statute with a discretion must act fairly. It must in a proper case give a party a chance to be heard ... the discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. ... If the rules set up a domestic body and give it a discretion it is implied that that body must exercise its discretion fairly." This decision raises a strong presumption that unless Parliament legislates to the contrary nobody with a power to affect individual interests has an unfettered discretion.

In the Liverpool Taxi case (138) one of the main issues concerned the effect of an undertaking which had been made and subsequently contravened by the makers. The Liverpool corporation, which was entrusted with the statutory function of licensing taxi-cabs within the city, had given a written undertaking to the taxi owners association that the corporation would not increase the number of licences within the city until proposed legislation to control private hire cars had come into force. The ratio of Birkdale District Electric Supply Co.

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(135) 1971 2 W.L.R. 742

(136) ibid 749

(137) ibid 749

(138) R. v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators Association 1972 2Q.B. 299

Ltd. v Southport Corporation (139) which stated that a public body may not fetter a statutory discretion by agreement was cited to the court. However, Lord Denning, without hesitation held that the corporation should not give an undertaking and break it as they pleased unless it conflicted with their statutory duty and that under the circumstances it did not do so. Fairness demanded that the corporation be bound by its undertaking until such time as it was properly terminated. Roskill L.J rested his decision on the basis that

"to allow the council to resile from that undertaking without notice to and representations from the applicants is to condone unfairness in a case where the duty was to act fairly." (140) It should perhaps be pointed out that this case may be looked at in a different light, namely that natural justice requires that a change of policy on the part of the deciders should be disclosed to the parties involved.

In Smit v Egg Marketing Authority (141) Miss Van der Brink complained that she was lulled into a false sense of security by a letter inferring that she would be granted an entitlement licence for a specific number of birds. White J. agreed that this letter was misleading and considered there was unfairness in the dealings that had taken place between the authority and the lady. It is suggested that the language used in both this case and that of the Liverpool Taxi case is very reminiscent of that employed to describe equitable estoppel and that 'fairness' here is being used in a substantive context. (142)

The principle that a public authority cannot bind itself not to exercise a discretion was recently considered in Lower Hutt City v Bank (143) The matter at issue was whether the council had precluded itself from inquiring 'fairly' into the objections to the stopping of a street by its action in agreeing at an earlier date to take steps to stop the street in question. It was submitted that when they came to consider the

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(139) 1926 A.C. 355, 364

(140) ibid 311

(141) as yet unreported decision; judgement delivered 21 March 1973

(142) However, consider Smith v A.G. 1973 2 NZLR 393 which holds that estoppel cannot be raised to hinder the exercise of a statutory duty or discretion

(143) 1974 1 N.Z.L.R. 545

objections to the exercise of their statutory power to stop the street here was a real likelihood that they would feel inclined to disallow he objections. Thus McCarthy P. delivering the judgement of the Court f Appeal had to consider the effect of the agreement made between the ouncil and a certain Challenge Properties Ltd. and reached the onclusion that indeed the public authority was not able to discharge ts statutory duty with fairness in the circumstances. McCarthy P mphasising once again the maxim that justice must not only be done but ust be seen to be done said:

"... when a public authority by contract purports to bind itself in uch a way that it appears to right thinking people that the authority s no longer able to discharge its statutory duty with fairness the courts ill intervene to prevent it purporting to perform that duty. In the pplication of that principle it seems to us not to matter whether the ontractual obligation is enforceable or not so long as it can fairly be aid that the obligation appears to be exercising in fact a restraint n the freedom of the council to discharge its duty in the way the egislature intended." (144)

One further case needs to be mentioned, namely Pagliara v A.G.(145) here the applicant challenged the validity of a deportation order made gainst him pursuant to s14(1)(b) of the Aliens Act 1948. Quilliam J. efers to the speech of Lord Reid in Wiseman v Borneman (146) to the ffect that courts will only supplement a statutory procedure where it s insufficient to achieve justice and where to do so will not frustrate he apparent purpose of the legislation. Quilliam J. considers that the urpose of s14 of the Aliens Act is to enable the Minister to have emoved from the country someone who has no right in any event to remain. e continues :"I think it must be accepted that the intention of the egislation is to confer on the Minister a wide discretion and it would e contrary to the nature of that legislation to fetter the Minister's iscretion by importing into it the additional procedural requirements

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(144) ibid 551
(145) 1974 1 N.Z.L.R. 86
(146) 1971 A.C. 297, 308

which would be necessary if the audi alteram partem principle is to apply" (147)

However, it may be noted that some weight was placed on the fact that the Minister had heard representations from the applicant's solicitor so that it might be said that no unfairness had taken place. It is of interest to note that the discretion here is wide yet the courts refused to intervene whereas logically it would seem that this should be the kind of case where some supervisory jurisdiction is required.

To summarise this section it has been seen that fairness is implicit in the exercise of discretionary powers and it embraces a duty to act in good faith, to be impartial, to consider only relevant considerations and not resile from undertakings upon which reliance has been placed. Sankey J. summarises this in the following quotation from the 1916 case of R. v Brighton Corp. ex p. Thomas Tilling Ltd.(148)

"It is their duty to hear and determine according to law and they must bring to that task a fair and unbiased mind. They are not entitled to decline a hearing and in coming to a determination they must put aside preconcieved opinions and act without prejudice or partiality considering both the interests of the public and the rights of the applicants. Finally they must treat all applicants fairly."

The several forms of abuse of discretion are recognised as overlapping to a very great extent and that the task of separating them analytically may be almost impossible. It is boldly suggested that by applying a fairness approach to the review of discretion the problems raised in this area will be overcome and again (as in the procedural field) the need for classification will be lost. If this were the case the courts would be following the lead of the United States where little attempt is made to classify the various forms of abuse of discretion. Lord Greene M.R. in Associated Provincial Picture Houses Limited v Wednesbury Corporation (149)

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(147) ibid 95
(148) 1916 85 L.J.K.B. 552, 555
(149) 1948 1 K.B. 223, 229

seems inclined to this idea:

"I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty, unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to according to the facts of individual cases as being matters which are relevant to the question. If they cannot all be contained under one head they at any rate I think overlap to a very great extent."

The completeness of a legislative code

For many years now the idea that relevant legislation constitutes a 'code' has been held to be a further limiting factor to judicial review. In the past the courts had applied the common law principles of natural justice to supplement, where necessary, statutory procedures. Byles J. summarises this approach in his judgement in Cooper v Wandsworth Board of Works:(150)

" .... a long course of decisions beginning with R. v Cambridge University, Bentley's case and ending with some very recent cases establish that although there are no positive words in a statute requiring that the party shall be heard yet the justice of the common law will supply the omission of the legislature."

D.J. Mullan in an article 'Procedural Codes, a Second Opinion' (151) comments on this case pointing out that "if the draftsmen of the legislation have specifically directed their minds to the problem of procedural fairness then there is no basis for the courts interfering and supplying omissions. Nothing has, in fact been omitted. The matter has been considered and a conscious decision about procedure has been taken." If that is apparent to the adjudicating court it has no further role to play. Whether this is, in fact possible in practice is an open question.

It should perhaps be made clear that 'code' in this paper is being used in a procedural context as compared to a statute which embraces all the law on a particular subject and which must, therefore be considered conclusive. In this respect see Bank of England v Vagliano Brothers (152)

A useful example of a procedural code is found in the New Zealand case of Waitemata County v Local Government Commission (153) The facts of this case are somewhat complicated but for present

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(150) 1863 14 C.B.N.S. 184, 194

(151) 1973 N.Z.L.J. 41 replying to article by Dr. Northey; 1972 N.Z.L.J. 307

(152) 1891 A.C. 107

(153) 1964 N.Z.L.R. 689

purposes it is sufficient to know that after the modification of a provisional scheme for the reorganisation of Local Government a certain class of persons including property owners and interested parties found themselves outside the scope of s19(1) of the Local Government Commission Act 1961 governing the rights of objectors. It was, therefore, submitted either that s19 of the act should be given a construction that accorded with the principles of natural justice or that the court should supplement the provisions of the statute. The learned jduge, after a careful examination of the legislation and at the conditions and circumstances of the exercise of the jurisdiction in accordance with the test laid down in the Okitu case (154) held that the statute could not be interpreted or supplemented in the manner suggested. In arriving at this conclusion he holds the opinion that the statute itself is comprehensive in relation to procedural requirements for the activity in question and left no room for the implication of any further steps. In the words of Richmond J:

> "In my opinion the statute has expressly provided an opportunity to all classes of persons to be heard in the event of the Commission deciding to hold a public inquiry for the purpose of considering objections. To this extent, therefore, the express provisions of the statute leave no room for the court to imply some additional right of hearing. The right conferred by the statute is indeed wider in scope than any equivalent right which could be implied by the court ...." (155)

A decision to the same effect is that of Re Mohamed Arif (an infant).(156) Lord Denning said:

> "It seems to me that in the Commonwealth Immigrants Act 1962 Parliament laid down a full and complete code to govern the entry or removal of immigrants from the Commonwealth and has entrusted the administration of it to the immigration officers. So much so that the courts ought not to interfere with their decisions save in the most exceptional circumstances. The policy of the statute is to place immigration control in the hands of the immigration officers trusting

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(154) 1953 N.Z.L.R. 366
(155) ibid 698
(156) 1968 Ch. 662

that they will exercise their powers fairly and as I believe they do, humanely also. So long as they exercise it honestly and fairly the courts cannot and should not interfere." (157)

Lord Denning is clearly following the lead of Lord Parker in Re. H.K. (an infant) (158) but seems to be considering rather the manner in which the legislative procedure is carried out than the adequacy of the procedure itself.

The question of a statutory 'code' has been discussed in a number of recent decisions. In Wiseman v Borneman (159) we find Lord Reid explaining the general position:

"For a long time the courts have without objection from Parliament supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that the required additional steps would not frustrate the apparent purpose of the legislation." (160)

In the same case Lord Morris explains that:

"while I have expressed the view that the statutory provisions must not be read as in any way absolving the tribunals from doing at all times what in all the circumstances is fair, even at a stage when no decision finally adverse to the taxpayer is being made it is I think a positive consideration that Parliament has indicated what it is that the tribunal must do and has set out that the tribunal must take into consideration three documents ... if the tribunal follows the course that Parliament has defined and decides not to extend that course I do not think that by reason of that circumstance alone it should be held that they have acted unfairly." (161)

This provides another instance of the courts deferring to the completeness of the statutory provisions concerning procedure, assuming that what Parliament has done is fair until the contrary is shown (162) and refusing to intervene until fairness demands it.

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157) ibid 661 See R. v Sec. of State for the Home Dept. ex p. Mughal 1973 3 All E.R. 796

158) 1967 2 Q.B. 617

159) 1971 A.C. 297

160) ibid 308

161) ibid 310

162) see Viscount Dilhorne in Pearlberg v Varty 1972 1W.L.R. 534

It should be briefly noted here that according to the decision in een's case [163] it is also possible for the rules of a domestic body be equated with a statutory code so that the courts can, perhaps, terfere to secure fairness.

The Privy Council considering the New Zealand Court of Appeal's cision in Furnell v Whangarei High Schools Board [164] were concerned th the scope of the relevant statutory regulations and their relation- ip to the audi alteram partem rules which could entitle the teacher an opportunity to be heard at the outset. In the Court of Appeal ld C.J. observed that in any particular case a statute can make itself lear on procedural matters so that the question whether the principle plied did not arise. He considered the case in the light of the sts set out in Durayappah v Fernando [165] and had no trouble in lding after a detailed examination of the regulations that natural stice could not be employed in the circumstances. On appeal to the ivy Council it was held 3 - 2 that this decision was correct; the gislature had addressed itself to the very question and enacted a ultitiered and elaborate' code and that it was not the function of the urt to amend the statute by engrafting upon it some provision which it nsiders more consonant with a complete opportunity for an aggrieved rson to present his case. It is however, submitted that the judgements the Court of Appeal are more persuasive and that in the Privy Council e dissenting views of Viscount Dilhorne and Lord Reid are to be eferred at least in the manner of their reasoning rather than in their nclusion.

The effect of the existence of a procedural 'code' is further nfused by the judgement of the House of Lords in Malloch v Aberdeen rporation [166] when a right of a school teacher to be heard before being

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63) 1971 2 W.L.R. 742 per Lord Denning
64) 1973 2 W.L.R. 92
65) 1967 2 A.C. 337
66) 1971 2 A.E.R. 1278

dismissed was implied by the court despite the prescence of detailed regulations. Lord Reid after an examination of the legislation involved reaches the conclusion that there is nothing "which can reasonably be interpreted as taking away that elementary right (to be heard)" (167) Lord Wilberforce considers the principle of 'dismissal at pleasure' and the public policy reasons behind it but proceeds to say that these should not prevent the courts "from examining the framework and context of the employment to see whether elementary rights are conferred on him (the employee) expressly or by necessary implication and how far these extend." (168) He concluded that a right to be heard should not be denied. The differences in approach in the two last discussed cases may perhaps be explained on the grounds that the legislation was different and that in Furnell it was a case of suspension whilst in Malloch it was one of dismissal but neither are wholly satisfactory.

Dr. J.F. Northey (169) brings to light another New Zealand case where this notion of a statutory code has been discussed: Forbes v Johnston & others (170) Woodhouse J. held:

"In my judgement the statutory procedures laid down and followed on this occasion in fact have resulted in 'fair play in action' and I think those statutory procedures were intended as a code in themselves to achieve the effect."

This decision seems to infer that in evaluating the conclusiveness of the statutory provisions a test of 'fairness' must be applied. Thus Forbes case seems to be more in line with Wiseman v Borneman by suggesting that where a statutory 'code' is found to be present the courts will not intervene except to secure fairness.

The main problem which now seems to assert itself in this area is what constitutes a 'code'. As Dr. Northey points out (171) the

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(167) ibid 1283
(168) ibid 1296
(169) 1972 N.Z.L.J. 307 The exclusion of natural justice by a code
(170) 1st June 1971
(171) op cit 310

legislation in the Furnell case was quite detailed but in the Forbes case the provisions were less comprehensive yet still sufficed. Differences in judicial opinion as seen in Furnell only serve to make the picture more uncertain.

Finally the case of Bates v Lord Hailsham of St. Marleybone[172] is of interest. This case decided that a legislative function did not attract compliance with the rules of natural justice. Megarry J. held that since the act expressly laid down a consultation procedure to be followed this implied exclusion of the other forms of consultation. "It is easier to imply procedural safeguards where Parliament has provided none than where Parliament has laid down a procedure ..."[173]

D.J. Mullan suggests[174] that it seems that at a time when procedural fairness has been given considerable attention by the courts legislative draftsmen are more and more likely to take steps to provide procedural codes in legislation setting up decision making powers necessitating a hearing. Dr. Northey suggests[175] it would be preferable if the empowering legislation made it clear whether any procedural provisions were intended to be comprehensive. To try to summarise the position it may be said that where there are no procedural safeguards the courts can require them;[176] where there is a statutory code the court is unlikely to consider itself able to add anything more and where some procedural requirements are provided the court will hold natural justice applicable and apply further safeguards if necessary. An illustrative case of this latter approach is Denton v Auckland City[177]

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(172) 1972 1 W.L.R. 1373

(173) ibid 1378

(174) op cit 42

(175) op cit 312

(176) see Smit v Egg Marketing Authority in which case White J. pointed out that counsel for the plaintiffs accepted that the rules of natural justice are only to be implied when the statute is silent.

(177) 1969 N.Z.L.R. 256

in which an examination of s 28c of the Town Planning Act makes it apparent that an objection to a conditional use application must be 'heard' and 'considered' and the methods of procedure set out in the regulations indicate that a judicial inquiry is to be undertaken. (178) Thus it was held that the principles of natural justice were applicable.

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(178) ibid 259 per Speight J.

"Fairness"

The following sections try to come to the heart of the matter by asking whether 'fairness' differs from natural justice, what the content of 'fairness' is and when may 'fairness' be applied. Although De Smith (179) warns that close analysis of relevant judgements is apt to generate its own confusion it seems essential that some scrutiny be made to try to reach some conclusions.

Before these matters are considered and to understand the treatment of them the writer must submit that she considers 'fairness' to be a great step forward in administrative law. It seems to the writer to be a return to the long standing principle that justice is fairness, both in a procedural and a substantive context and as such to be the correct principle on which to base the supervisory jurisdiction of the courts. Natural justice originally arose out of an idea of fairness but became too defined within the two maxims of audi alteram partem and the nemo judex in causa sua rules to be applied in the very general and flexible way that a progressing society needs. It is inevitable that in many instances natural justice as it is popularly understood and fairness will coincide and so partially explain the numerous dicta which equate the two but it is by no means necessary or desirable that this should always be so. In particular circumstances fairness may demand something different from the two procedural rules and the courts should not be limited to these. It is finally suggested that the term natural justice is really superfluous and should be dropped so that the all embracing standard for review will be "fairness". To support this submission the writer quotes Lawton L.J. in Maxwell v Department of Trade (180) who seems to be of similar mind:-

"From time to time during that period (the last sixty years)

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(179) Judicial Review of Administrative Action Page 209
(180) 1974 2 W.L.R. 338, 349

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 trappings 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 try to put those who hold inquiries into legal strait jackets."

he use of the word 'fair' prior to 1967

It is helpful to make a brief resume of the judicial use of the ord 'fair' prior to 1967 and the decision in Re H.K. (an infant) (181) or it cannot be denied that 'fair', 'fairly' and other derivatives ave appeared with more than accidental frequency in 'natural justice' udgements throughout the century. Thus it is hoped to show that fairness' has long been the underlying feature of natural justice.

Probably one of the most important statements and surely the most requently quoted is that of Lord Loreburn in Board of Education v Rice (182) where he said that the Board must "act in good faith and fairly isten to both sides for that is a duty lying upon everyone who decides nything..... They can obtain information in any way they think best lways giving a fair opportunity to those who are parties in the ontroversy for correcting or contradicting any relevant statement rejudicial to their view."

Just a few years later Lord Parmoor made a similar statement in e Verteuil v Knaggs:(183)

"Their Lordships are of the opinion that in making such an inquiry by the Governor of Trinidad concerning the transfer of indentures of

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181) 1967 2 Q.B. 617
182) 1911 A.C. 179, 182
183) 1918 A.C. 557, 560

of immigrants from one employer to another) there is apart from special circumstances a duty of giving to any person against whom a complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."

In 1936 Swift J. (184) relates the dictates of natural justice to the obligation to carry out an inquiry which is fair to all parties interested. This is a clear equation of the two principles and a further example is provided by the judgement of Lord Jenkins in University of Ceylon v Fernando.(185) He says:

"In the absence of any express requirement the plaintiff is thrown back upon the necessary implication that the Vice Chancellor's procedure will be such as to satisfy the requirements indicated ... and thus to comply with those elementary and essential principles of "fairness" which must as a matter of necessary implication be treated as applicable in the discharge of the Vice Chancellor's admittedly quasi judicial functions under clause 8 or in other words with the principles of natural justice."

Lord Denning in the 1962 case of Kanda v Government of Malaya (186) makes an interesting summary of this area of the law as understood at that time.

"The rule against bias is one thing, the right to be heard another. These two rules are the essential characteristics of what is often called natural justice. They are the firm pillars supporting it. The Romans put them in two maxims, nemo judex in causa sua and audi alteram partem. They have recently been put into the words impartiality and fairness."

This dicta limits 'fairness' to the audi alteram partem rule but recent developments in case law show that this may no longer be accurate.

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(184) William Denby & Sons Ltd. v Minister of Health 1936 1 K.B. 337, 342/343

(185) 1960 1 W.L.R. 223, 233

(186) 1962 A.C. 322, 337

Finally before considering the present position it can be noted that atural justice has often been identified with the catch phrase 'fair lay in action'. One of the earlier cases in which it was used was aclean v The Workers Union (187) when Maugham J. said:

"The phrase the principles of natural justice can only mean (in this connection) the principles of fair play so clearly rooted in the minds of modern Englishmen."

n like manner Professor Wigmore has lightheartedly commented that the porting theory of justice is the instinct of giving the game fair play! arman J. acknowledged this tendency in Ridge v Baldwin (188) when he tated that "natural justice in this connection has been defined as air play in action."

he Content of 'Fairness'

Re H.K. (an infant) (189) must be considered as the starting point or any discussion of the content of fairness. Lord Parker expresses he view that the duty to act fairly is essential to good administration nd an honest and bona fide decision and that it requires "not merely mpartiality", "not merely bringing one's mind to bear on the problem" ut giving a person an opportunity to know what the decider's impression s so that the person can disabuse him. Lord Salmon L.J. tries to be ore precise by saying that acting fairly does not mean that a ecider has to ado t judicial procedures or hold a formal inquiry or ven less hold anything of the nature of a trial. Finally Blain J. onsiders that acting fairly consists of the decider applying his mind ispassionately to a fair analysis of the particular problem and the nformation avail ble to him in analysing it. This case has formed he foundation on which the fairness duty has been constructed and the ords of Lord Parker in particular have been quoted with approval in a umber of cases. (190) It can be seen from the judgements in Re. H.K. that

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187) 1929 1 Ch. 602, 623

188) 1963 ? Q.B. 539, 578

189) 1967 2 Q.B. 617

190) see e.g. R. v Gaming Board for Great Britain ex parte Benaim and Khaida 1970 2 Q.B. 417 and Smit v Egg Marketing Authority as yet unreported decision, judgement delivered 21 March 1973

what is required under the duty to act fairly is something more than what was outlined by Lord Loreburn in Board of Education v Rice (191) by Lord Parmoor in De Verteuil v Knaggs (192) and generally by the audi alteram partem rule. According to the 'fairness' decision it is not sufficient merely to give a party an opportunity to be heard but the decider must let that party know his impression so that the party has an opportunity to disabuse him. However, two points may be noted at this stage. First, although the words of Lord Parker seem reasonably clear on the duty to act fairly his colleagues in that case seem rather confused with the 'new' language so that both Lord Salmon and Blain J. relate fairness to natural justice and so detract from Lord Parker's dicta. Secondly the application of a duty to act fairly in this case seems to be justifiable basically on the administrative function being exercised. Apart, and bearing in mind Ridge v Baldwin (193) it is hard to understand why the rules of natural justice requiring adequate notice to be given to a person to be affected by a decision could not be called upon. Such a principle states that a party must have an adequate opportunity of knowing the case he has to meet and of answering it and for this purpose particulars of allegations prejudicial to him should be disclosed. The fact that the person exercising the function in this case was an immigration officer and not a minister may have had relevance.

Several recent cases which throw light on the content of 'fairness' have occurred in the realm of investigatory and recommendatory functions. Before considering 'fairness' in these areas it should be realised that it has always been uncertain whether natural justice is applicable to such cases and even if it does what it demands. A recent article on the Canadian situation in this area highlights the difficulties (194) and it may be helpful to mention a few of the cases

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(191) 1911 A.C. 179

(192) 1918 A.C. 557

(193) 1964 A.C. 40

(194) Robert D. Howe The applicability of the rules of natural justice to investigatory and recommendatory functions 1974 O.H.L.J. May, Vol. 12 No. 1 179

to see how the courts have approached the problems. In the early case of Re. Godson & the Corporation of the City of Toronto (195) the Supreme Court of Canada held that the rules of natural justice did not apply to an inquiry into dealings between the city and persons who had been contractors for civic contractors. The decision of St. John v Fraser(196) which held that no right to cross examination existed was followed in Guay v Lafleur (197) where the majority based their decision on the ground that no rights and obligations were determined by the persons appointed to conduct the investigation since the taxpayers rights remained unaffected until an actual assessment had been made. The conflicting interests in this area are well illustrated by a more recent Canadian case, Re Ontario Crime Commission ex parte Feeley & McDermott. (198) The majority acknowledged that the Royal Commission set up to inquire into the possible corruption of law enforcement officials was not conducting a trial but they also recognised that the reputation of the petitioners could be severely impaired by the inquiry and subsequently held that cross examination would be in order. In a dissenting opinion Laidlaw J. emphasised the need for efficiency pointing out that if every person affected by some evidence given by witnesses was given the full rights of a trial the inquiry would be rendered less productive and inoperative and the purpose and intention of the Legislature would be defeated.

Thus it has been shown that this is an area where once again there is an inherent conflict between the need for governmental efficiency and the desire to safeguard the rights of individuals.(199) It seems that in this sphere 'fairness' is now being developed to achieve a reasonable compromise between the two extremes.

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195) 1890 18 S.C.R. 36
196) 1935 D.L.R. Vol 3 465
197) 1965 S.C.R. 12
198) 1962 O.R. 872
199) see pages 13 - 18 supra

The first case to be considered is Re Pergamon Press Ltd. (200) which involved an inquiry by inspectors under s164 of the Companies Act 1948 leading to a report to the Board of Trade. Lord Denning gave the leading judgement holding that the proceedings were not judicial nor even quasi-judicial for they decide or determine nothing. They only investigate and report. However, this report he emphasised might have wide and serious repercussions for the persons involved. Therefore he concluded that the inspectors must act fairly.

"They can obtain information in any way they think best but before they condemn or criticise a man they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice." (201)

Analysis of this and subsequent cases seems to suggest that the content of fairness is closely bound up with the question of disclosure of relevant material and evidence. The matter was further discussed in Herring v Templeman (202) which involved a recommendatory function. In this case a student at teacher training college sought to show that his dismissal was in breach of natural justice. He claimed entitlement to have disclosed to him and to challenge at a hearing before the academic board all the material on which the academic board's assessment was based. It was argued that the governing body was in error in refusing to reveal to the plaintiff all the evidence, opinions and reports on which the assessment of the plaintiff's fitness to be a teacher had been reached by the academic board. Russell L.J. holding that such disclosure was not required said:

" The purpose of the hearing before the governing body is not, as we think that there should be a detailed review of the reasons for or against the evidence on which the recommendation had been arrived at.

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(200) 1971 Ch. 388
(201) ibid 399/400
(202) 1973 3 A.E.R. 569

The purpose is to give the student a fair chance to show why the recommendations should not be accepted. It is said that without all the evidence, opinions and reports the student could not fairly present his case. But the reasons for the recommednations are set out with fullness and fairness in the report. The plaintiff was told ... why the recommendations were made and what the relevant facts were. He was not told the details of the reports nor (for reasons of confidentiality which in our view both the governing body and the academic body were entitled to respect) his final grading ..." (203) The court held that the governing body was not a court of law but was the master of its own procedure. "Its duty was to be fair. It was fair ... we see no reason that there was any vestige of unfairness." (204)

Yet another case to be considered under this investigatory and recommendatory head is R. v Gaming Board for Great Britain ex parte Benaim and Khaida (205) which concerned the situation of the Gaming Board who had to make inquiries about an intending applicant for a licence and who received information from various sources. A certificate of consent from the Gaming Board was necessary before there could be an application to magistrates for a licence. The Board had received information from outside sources concerning which they asked the applicants a number of questions and invited written representations from them. The applicants sought an order of certiotari to quosh the Board's decision to withold their certificate of consent on the ground that the Board's failure to disclose the source of its information was a denial of natural justice. They also asked for an order of mandamus requiring the Board to give sufficient information to enable them to answer the case against them, According to sch. 1 para. 7 of the Gaming Act 1968 the Board have power to regulate its own procedure.

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(203) ibid 587
(204) ibid 588
(205) 1970 2 Q.B. 417

The outline procedure set before the court contained the following:

"In cases where the source or content of this information is confidential the Board accept that they are obliged to withold particulars the disclosure of which would be a breach of confidence inconsistent with their statutory duty and the public interest ... In the course of the interview the applicant will be made aware to the greatest extent to which this is consistent with the Board's statutory duty and the public interest of the matters that are troubling the Board."

Lord Denning considered first the rules of natural justice before turning for guidance to the decision of Re H.K. (an infant) and concludes that the Board have a duty to act fairly. They must give the applicant an opportunity to satisfy them of the matters specified in the Act. They must let him know what their impressions are so that he can disabuse them although this does not require them to quote chapter and verse. Lord Denning discusses the fact that much of the information received will be confidential but considers that that does not mean that the applicants are not to be given a chance of answering it subject to the qualification that they need not be told the source of the information if that would put the informant in peril or otherwise be contrary to the public interest.

"Without disclosing every detail I should have thought that the Board ought in every case to be able to give to the applicant sufficient indication of the objections raised against him such as to enable him to answer them. That is only fair. And the Board must at all costs be fair." (206)

This case was quoted at some length in the Canadian case of Lazarov v Secretary of State for Canada (207) where Thurlow J. held that an applicant for citizenship must be afforded a fair opportunity to state his position to the Minister before he makes his decision.

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(206) ibid 429

(207) 1974 39 D.L.R. 3rd. 738

"That is not to say that a confidential report or its contents need be disclosed to him but the pertinent allegations which if undenied or unresolved would lead to the rejection of his application must as I see it be made known to him to an extent sufficient to enable him to respond to them and he must have a fair opportunity to dispute or disabuse them" (208)

An examination of all these decisions shows that 'fairness' requires a lesser standard of disclosure than natural justice would demand in that the gist of the prejudicial material is all that is required.(209)

The most recent decision, Maxwell v Department of Trade (210) (a continuation of the Pergamon Press saga) is one of great value and may be considered in some detail. It concerned the extent of the obligations which natural justice imposes on inspectors conducting an investigation under the Companies Act 1948. Forbes J. who heard the application for an interim injunction considered there were three stages to be fulfilled.

"First the hearing of evidence (including Mr. Maxwell's) and the study of documents. Secondly the inspectors coming to a conclusion (necessarily tentative in the circumstnaces) and thirdly putting the substance of that conclusion to the witness."

On the other hand Wien J. who tried the action considered that all that was required was that the inspectors should give Mr. Maxwell :-

" a fair opportunity of correcting what is said against him. An outline of the case is enough."

The court held that at this latter view was the correct one. It was further submitted that relevant statements made by witnesses prejudicial to Mr. Maxwell should be put to him to give him an opportunity of answering them. The court had little difficulty in demolishing this arguement. Lord Denning explains:-

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(208) ibid 750
(209) see below page 68
(210) 1974 2 W.L.R. 338

"It must be remembered that the inspectors are doing a public duty in the public interest. They must do what is fair to the best of their ability. They will, of course, put to a witness the points of substance which occur to them so as to give them the chance to explain or correct any relevant statement which is prejudicial to him." (211)

"The public interest demands that so long as he (the inspector) acts honestly and does what is fair to the best of his ability his report is not to be impugned in the courts of law."

"To my mind the inspectors did their work with conspicuous fairness. They investigated all the matters with the greatest care. They went meticulously into all the details of these complicated transactions. They put to Mr. Maxwell all the points which appeared to call for an explanation or an answer. They gave him every opportunity of dealing with them ... " (212)

Lawton J. also declares that for the purpose of his judgement he intends to ask himself the "simple question" whether the inspector acted fairly towards the plaintiff and after reviewing the conduct of this inquiry he has no hesitation in finding that it was conducted fairly. Once again this case seems to hold that 'fairness' demands only an outline of the case or the gist to be disclosed to the person affected by the decision; and the language used by Lord Denning quoted above that the inspectors must act honestly and fairly to the best of their ability is almost identical to the sentiments expressed in Re Mohamed Arif (an infant).(213)

Closely related to the previous decisions are two further 'fairness' decisions where 'fairness' is being used in relation to proceedings deciding whether a prima facie case exists.

In Wiseman v Borneman (214) in the House of Lords it was held that there was no need for a hearing before a tribunal as this was not

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(211) ibid 346
(212) ibid 346
(213) 1968 Ch. 662 see page 50/1 supra
(214) 1971 A.C. 297

entitled to pronounce a final judgement against the tax payer - it could only find if there was a prima facie case and the person concerned would be given a hearing at a later point in time. The tax payer is authorised to submit to the Commission of Inland Revenue a statutory declaration setting out all the facts and circumstances supporting his case. The Commissioners consider this declaration and send this with any counter statement they make to the tribunal. It was claimed that the taxpayer should be given the opportunity to see the counter statement before the tribunal makes up its mind whether there is a prima facie case. In holding that 'fairness' did not such disclosure Lord Donovan said:

> "I do not believe that Parliament intended that the additional safeguard given to the taxpayer by this preliminary procedure should develop into something like a round by round contest conducted on paper." (215)

Lord Morris of Borth y Gest approached the case by considering whether in all the circumstances the tribunal acted unfairly. (216) He reached the conclusion that if the tribunal follows the course that Parliament has defined and decides not to extend that course it cannot be held by reason of that circumstance alone that they have acted unfairly.

Likewise in Pearlberg v Varty (Inspector of Taxes) (217) a taxpayer was claiming a right of audience or a right to make written representations to the single commissioner before he gave leave under s6(1) of the Income Tax Management Act. The House of Lords held that there was nothing unfair in giving leave for an assessment to be made without the taxpayer having had an opportunity to object. Viscount Dilhorne after reference to Wiseman v Borneman concludes:

> "where the person affected can be heard at a later stage and can then put forward all the objections he would have preferred if he had been heard on the making of the application it by no means

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(215) ibid 315
(216) ibid 309
(217) 1972 1 W.L.R. 534

follows that he suffers an injustice in not being heard on that application." (218)

A negative statement as to the content of fairness is applied in this case by Lord Pearson when he says that:

"Fairness does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothin could be done simply or quickly and cheaply. Administrative or executive efficiency should not be too readily sacrificed." (219)

In the New Zealand case of Smit v Egg Marketing Authority (220) 'fairness' is considered in the light of a final decision (as compared with the preliminary actions above considered.) Once again it is necessary to mention what natural justice demands in order to understand the relevance of the 'fairness' application. The natural justice position requiring full disclosure of materials as decided in Board Of Education v Rice (221) is well summarised in the words of Lord Denning delivering the advice of the Privy Council in Kanda v Government of Malaya: (222)

"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused one to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."

In the Smit decision White J follows the previously quoted decisions of Re H.K. (an infant) and the Gaming Board case in holding that 'fairness' demands that the gist of the material must be communicated to the applicants. The Authority should disclose at least the tenor of the reports from its own investigators to the plaintiff:

"I do not consider that there was any duty to forward to the plaintiffs copies of reports made by officers of the authority but

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(218) ibid 546
(219) ibid 547
(220) as yet unreported decision; judgement delivered 21st March 1973
(221) 1911 A.C. 179
(222) 1962 A.C. 322, 337

that the issues and matters of criticism should have been brought to their attention."

hite J. reached the conclusion that the plaintiffs had been inadequately nformed of their rights under the regulations to enable them to present heir cases. In considering fairness he stressed that the time factor nd the difference between the regulations and the information contained n the circular letter were likely to lead to misunderstandings so that he applicants should have been informed of the variations and given the pportunity to make representations.

A further recent case illustrating this point is R v An Immigration fficer at Heathrow Airport ex parte Thakar (222A) where counsel for the pplicant claimed that the Secretary of State had not acted fairly when e decided that the applicant was not a British protected person, arguing hat this involved listening openly and without prejudice to the applicant nd placing before him particulars of matters which would tend to nfluence the immigration officer's mind. The court concluded that here were no grounds for interfering with the Secretary of State's ecision; the obligation to be fair in the sense of disclosing matters in he immigration officer's mind which might not have been in the applicant's id not go beyond indicating the broad areas in which the immigration fficer would be interested to hear the applicant's case.

Finally in considering the content of fairness a statement by Lord enning in the Liverpool Taxi case. (223) He considers the question of locu tandi and holds that the 'deciders' must be ready to hear not only the rticular applicant but also any other persons or bodies whose interests re affected, if fairness is to be fulfilled. However, this dicta failed o gain favour with the court in the case of Bates v Lord Hailsham of t. Marleybone (224) (although this may be explained by the rather xceptional nature of the case) The plaintiff was a member of the British ssociation who sought a declaration that any order made affecting olicitors' renumeration would be void unless the plaintiff and other epresentatives of solicitors were consulted. The Council of the Law ociety had been consulted but the plaintiffs claimed that 'fairness'

222A) 1974 1 A.E.R. 415
223) 1972 2 Q.B. 299, 308/9
224) 1972 1 W.L.R. 1373

required that other affected bodies be given an opportunity to be heard. McGarry J. held that the function of the Lord Chancellor's Committee was legislative rather than administrative or executive in that it applied to solicitors generally and this attracted no obligation to comply with natural justice. Thus it was held that the Common Law does not require preliminary consultation for legislative instruments although many statutes do. It may further be criticised as falling back into the realm of classifying functions but the real impracticality or maybe impossibility of consulting all persons affected by a general provision probably dictated the need to do so.

One case that should be briefly mentioned is Wislang v Medical Practitioners Disciplinary Committee (225) One of the points at issue was the role played by the Secretary, a Mr. Lee at a disciplinary hearing. Speight J. held that mr. Lee played no part in the deliberations (relying on affidavit evidence) and concluded that he was merely 'an experienced and doubtless efficient executive assistant on whom the committee was glad to rely for assistance on the mechanics of running the inquiry.'

"I cannot see that this irregularity is of a gravity that would require me to exercise my discretion in favour of the plaintiff claiming breach of natural justice. Certiorari in this area is a powerful weapon but not one to be taken up too readily in respect of such comparatively minor irregularities where a court feels that there has been no breach of the basic requirements of a fair and just hearing." (226) It is submitted that this really is a very unsatisfactory decision; it seems to ignore the maxim that justice must not only be done but must be seen to be done as upheld in R. v Birmingham City Justices ex parte Chris Foreign Foods (Wholesalers) Ltd. (227)

To sum up this examination of the content of a duty to act fairly the words of Lawton J. in Maxwell v Department of Trade (228) seem appropriate:

"That which fairness calls for in one kind of inquiry may not be called upon in another."

In other words, fairness is a truly flexible standard and what it connotes all depends on the circumstances of each and every individual case and any attempt to define it will only serve to defeat its purpose and merits.

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(225) 1974 1 N.Z.L.R. 29
(226) ibid 33
(227) 1970 1 W.L.R. 1428
(228) 1974 2 W.L.R. 338, 349

The application of the duty to act fairly

The course of this paper has already involved some discussion of the application of a duty to act fairly. Thus it has been seen that in the realm of investigatory, advisory and preliminary proceedings a standard of fairness has been applied in a number of cases and it seems likely that this trend will continue. In these areas and others 'fairness' is being employed as a compromise between the demands of justice and efficiency. Similarly the development of the 'fairness' idea has been described in relation to the trend to discard the analytical approach to functions. Thus, in this respect, the answer to the question 'when does the duty to act fairly arise?' seems, at first sight to be 'when the function being exercised is neither judicial nor quasi-judicial but of an administrative or executive nature'. A passage supporting such an interpretation is found in the case of Bates v Lord Hailsham of St. Marleybone.(229) In the course of his judgement Megarry J. said:

"Let me accept that in the sphere of the so called quasi-judicial the rules of natural justice run and that in the administrative or executive field there is a general duty of fairness."

Dr. Northey in his paper on this area of the law (230) seems to follow such a reasoning but it is the writer's submission that it does not represent the true position and is defective in several respects. First the futility of classifying functions has, at long last, been recognised as demonstrated in the judgements of Ridge v Baldwin and (231) subsequent cases and such a summary as this can only serve to preserve the need for categorisation instead of consolidating the trend of abandoning distinctions. Surely the more correct way to look at it is that 'fairness' is an all-embracing basis and a minimum standard for judicial review and is applicable to every type of proceeding and at some stage those procedures which natural justice has traditionally demanded will be required to fulfill the 'fairness' test in that particular case.

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(229) 1972 1 W.L.R. 1373, 1378

(230) Pedantic or Semantic N.Z.L.J. 1974 133

(231) 1964 A.C. 40

Secondly, although Re. H.K. (an infant) (232) introduced new terminology in the words of 'a duty to act fairly' the idea of 'fairness' itself has always been related to the ideal of justice in the minds of people. The whole 'fairness concept' has been criticised (233) on the basis that the only answer to the question 'when must one legally act fairly' is 'whenever in the interests of fairness that is required'. McCarthy P. seemed to express this in the following extract from his judgement in the recent case of Lower Hutt City v Bank : (234)

> "The former clear cut distinctions have been blurred of recent years by directions from highest authority to apply the requirement of fairness in administrative actions as well if the interests of justice make it apparent that the quality of fairness is required in those actions."

As mentioned previously (235) 'fairness' is something that is almost inbred, that is recognisable and which forms an eminently sensible basis on which the courts should base their supervisory jurisdiction. Perhaps these ideas are capable of being translated into a passage which is expressing similar sentiments. It maybe remembered that in Ridge v Baldwin (236) Lord Reid opened his judgement with the following words:

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore, it does not exist. The idea of negligence is equally insusceptible of exact definition but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable as serving as tests in law..."

The word 'fairness' can easily be substituted for natural justice in

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(232) 1967 2 Q.B. 617

(233) Dr. Mathieson Executive decisions and audi alteram partem 1974 12 N.Z.L.J. 277

(234) 1974 1 N.Z.L.R. 545, 548

(235) see page 2 above

(236) 1964 A.C. 40, 65

the opening line and the passage is clear on the point that the value of a 'concept's' flexibility must be preserved. Natural justice is inherently flexible [237] and capable of achieving what 'fairness' has done but because in the minds of lawyers and the judiciary it has become stereotyped and too defined its powers were diminished.

Thirdly, the passage is unsatisfactory as it automatically creates a distinction or comparison between 'fairness' and natural justice. According to the writer's submission it is inevitable that these two concepts will overlap at a certain point. 'Fairness' will always be demanded and in some circumstances will demand those principles which natural justice has come to imply but there is no need for such a phrase to be applied. 'Fairness' is capable of covering all situations. Confusion arises over the relationship between the two concpets because precedent could not suddenly be ignored and the judges felt themselves bound when talking of a duty to act fairly to relate it to natural justice. This can be shown from an examination of the judgements of Re H.K. (an infant) [238] where the judges showed a marked lack of consistency in their language whilst in agreement on what was demanded according to the facts. Lord Salmon's judgement is interesting in that it seems to reach the conclusion that the immigration officer is acting in an administrative capacity and a quasi judicial capacity and it is the latter role that attracts the duty to act fairly. This seems strange and unsatisfactory considering that previous decisions held quasi-judicial functions to attract the application of natural justice. Further, in R. v Kent Police ex parte Godden [239] Lord Salmon follows his irregular reasoning holding that the medical practitioner was exercising a quasi judicial function in reaching his decision and, therefore, must act fairly. It should perhaps be pointed out that the statements, according to the writer's submission, are not strictly wrong for 'fairness' applies to all functions regardless of their category.

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(237) see pages 19 - 23 above
(238) 1967 2 Q.B. 617, 633
(239) 1971 2 Q.B. 662, 671

In the same judgement Lord Salmon does provide a useful test of application :

> "The law imposes a duty to act fairly upon a person who is called upon to exercise a statutory power and make a decision affecting basic rights of others ..."

Two points must be made, however on this test. First, a clear distinction must be made between basic rights and legal rights for in Re H.K. (an infant) the immigrant had no 'right' to enter the country but was entitled to be treated fairly. (240) Secondly, this can ot be considered an all embracing or truly accurate test of application as it has been shown that 'fairness' is applied as the basis for judicial review of investigatory and recommendatory functions when no conclusive decisions are made.

It seems to the writer that 'fairness' should be applied as the basis for judicial review of administrative actions and Lord Pearson hints at this state of affairs in Pearlberg v Varty when he says that "... as Parliament is not to be presumed to act unfairly the court may be able in suitable cases (perhaps always) to imply an obligation to act with fairness." (241)

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(240) as pointed out by Lord Denning in the Gaming Board of Great Britain case 1970 2 Q.B. 417

(241) 1972 1 W.L.R. 534, 543

CONCLUSION

Universally, justice has always been associated with fairness, and the courts' role in society is to secure justice in accordance with law. The underlying assumption according to which the courts exercise judicial review of administrative action is that all power should be exercised fairly both in appearance and in reality.

Natural justice was, in the beginning representative of fairness but, unfortunately it came to connote just two, albeit important principles that both sides must be heard in a dispute and no person shall be a judge in his own cause. Despite the often declared flexibility and adaptability of natural justice the changes that took place in the first half of this century, in particular the increase in administrative activity caused the courts to resort to the fiction of the quasi function to justify their powers of review. As a result of these developments it may be said that the rules of natural justice lost a great deal of their stature and relevance during the 1940's and 1950's.

Thus, in recent years we find the judiciary departing from the traditional and engineering their judgements to ensure that justice, meaning fairness is done. Precedent could not permit of a complete rebuttal of previous rationes but case by case change took place so that today we have almost reached the stage where a general standard of fairness is applied. Fairness can be evaluated by consideration of the circumstances and facts of every case and in itself is sufficient to achieve justice in any and every situation. (242A) It can be used by the courts to achieve the necessary balance between justice to the individual and efficiency of administration. Further, it is suggested that a broad base of fairness, flexible in the extreme can be used to consider those perennial areas of uncertainty which arise under the natural justice doctrine. One of these doubtful areas is that of legal representation. The right to such representation before statutory tribunals is generally acknowledged (242B) but the authorities in the ...

(242A) Compare e.g. Schmidt v Sec. of State for Home Affairs 1969 2 Ch. 149 where fairness did not require a hearing to be given to alien scientology students whose visas had expired and e.g. Re H.K. (an infant) 1967 2 Q.B. 617 see page 59 above.

(242B) R. v Board of Appeal ex parte Kay 1916 22 C.L.R. 183

context of domestic bodies are unclear. In Pett v Greyhound Racing Association (No 2) (243) Lyall J. disagreeing with the opinion of the Court of Appeal in the interlocutory proceedings (244) held that natural justice did not entail representation before a domestic tribunal unless, possibly, the proceedings are sophisticated and complex. The issue was discussed again by the Court of Appeal in Enderby Town Football Club v Football Association (245) where one of the Football Association's regulations excluded legal representation. It was held unanimously that there was no need for representation at the informal proceedings provided they were sufficiently fair. However, Lord Denning, M.R. thought that although there is no general right to representation, nevertheless the court would, as a matter of public policy declare invalid a rule which purported to exclude representation if in an exceptional case such representation was necessary for a fair hearing. Thus it seems that this dissenting judgement encourages the standard of a fair trial to be the deciding factor as to whether or not representation is required.

A second area of uncertainty is the question whether a deciding body is bound to give reasons. According to the decision in R. v Gaming Board of Great Britain ex parte Benaim and Khaida (246) neither natural justice nor fairness requires this but in Breen v Amalgamated Engineering Union (247) Lord Denning speaks at some length on the matter.

"It all depends on what is fair in the circumstances. If a man seeks a privelege to which he has no particular claim such as an appointment to some post or other then he can be turned away without a word... but if he is a man whose property is at stake or who is being deprived of his livelihood then reasons should be given why he is being turned down and he should be given a chance to be heard. I go further: If he is a man who has some right or

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(243) 1970 1 Q.B. 46
(244) Pett v Greyhound Racing Association No. 1 1969 1 Q.B. 125
(245) 1970 3 W.L.R. 1021
(246) 1970 2 Q.B. 417
(247) 1971 2.W.L.R. 742

interest or some legitimate expectation of which it would to deprive him without a hearing or reasons given then these be afforded him according as the case may demand. The giving reasons is one of the fundamentals of good administration." (248)

Finally, the writer suggests that the continuing use of the phrase natural justice' is sterile in the light of the all embracing standard f fundamental 'fairness'. In Furnell's case (249) Lord Morris xpressed the view that natural justice is but fairness writ large and uridically and I have already quoted the statement of Lawton L.J. in axwell v Department of Trade (250) with which I concur.

In conclusion the writer wishes to refer to Lord Shaw in Local overnment Board v Arlidge (251) who explains:

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

'Fairness' must be acknowledged as the flexible, sensible basis for judicial review of administrative action; let 'natural justice' die a natural death.

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(248) ibid 750
(249) Furnell v Whangarei High Schools Board 1973 2 N.Z.L.R. 92, 105
(250) see page 56 supra
(251) 1915 A.C. 120, 138

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