FAIRNESS AND NATURAL JUSTICE—DISTINCT CONCEPTS OR MERE SEMANTICS?

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The concept of administrative fairness has given rise to a number of periodical articles in the past two years. Some writers interpret the concept as meaning that discretions must not be abused (that is, must be exercised fairly), but often it is used as a label for procedural safeguards. In this article fairness is used in the latter sense—procedural fairness.

With the exception of an article by Mr D. J. Mullan,[1] writers have expressed disquiet at the growth of fairness. The major criticisms have been that the concept will lead to either a dilution of common law procedural protection[2] or the resuscitation of classification in determining what procedural protections will apply.[3] These have led writers variously to exorcise the doctrine of fairness[4] or to bring it within the discipline of natural justice.[5] In an earlier article,[6] this writer urged that the four factors set out by the Privy Council in *Durayappah* v. *Fernando*[7] provide an analysis for determining whether the rules of natural justice apply and also for ascertaining the content of those rules in a given case. The results of such an analysis, it was argued, accord both with policy and the trend of authority since 1963. The writer suggested that fairness was not an independent concept but was fully integrated into natural justice. Mullan, on the other hand, saw fairness as adding a useful and by no means incoherent procedural tool which may be applied according to the needs and facts of each statutory power.[8]

Discussion of fairness by writers has tended to be rather theoretical. Judges have continued to use the concept (and its appearance in the reports is now more frequent than that of natural justice) without careful consideration of the wider issues of a doctrine of fairness; fairness

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1 "Fairness: the New Natural Justice" (1975) 25 *U. Tor. L.J.* 281.
2 E.g. D. H. Clark, "Natural Justice: Substance and Shadow" [1975] *P.L.* 27.
3 E.g. G. D. S. Taylor, "Natural Justice—The Modern Synthesis" (1975) 1 *Mon. L.R.* 258, 279.
4 E.g. Clark, op. cit.
5 E.g. Taylor, op. cit.; C. P. Seepersad, "Fairness and Audi Alteram Partem" [1975] *P.L.* 242, 257.
6 Op. cit.
7 [1967] 2 A.C. 337, 350-351.
8 Op. cit. 300.

as a concept simply has suited the instant case. Jurisprudence lacked an appropriate test case whose facts might provide a measure for theoretical views and whose judgment made a major contribution to the theory of fairness. Such a test case has now appeared. It is *Dunlop* v. *Woollahra Municipal Council*[9] decided in the New South Wales Supreme Court by Wootten J.[10]

Although *Dunlop* deals with administrative law issues other than fairness and natural justice, it is a crucial case on the right to a hearing. It sits neatly at the conjunction of a number of problem areas. It shows the difficulties attached to theories of fairness. It demands discussion, not merely as a test of the theories, but also as possibly a major case in its own right. It is an ideal vehicle for evaluating the doctrine of fairness and its relation to natural justice.

THE FACTS OF *DUNLOP*

Dunlop and another owned properties in an exclusive area of Sydney. The properties were worth around $1.5 million and were situated in a small area which was zoned differently from the surrounding properties. All around this exceptional area there was a building height limit of two storeys, but the properties in question were zoned for residential buildings up to eight storeys. The plaintiff and the other owner filed a development application with the defendant Council for a residential complex consisting of two eight storey towers and six terrace houses, a total of thirty-four dwellings. The neighbours opposed the application, arguing that the zoning was anomalous and undesirable, that the development would destroy the character of the area, and that it would seriously affect the amenities of its immediate neighbours. The Council eventually rejected the application. This rejection was upheld by the appeal tribunal which also indicated guidelines for an appropriate development.

Negotiations between Dunlop and the Council continued after this rejection. A number of planning reports by the Council's officers were prepared suggesting that three storeys be the maximum development and that the buildings be fully screened from the street. Dunlop, however, pressed ahead with a further application for an eight storey construction of reduced size which fitted, though barely, within the appeal tribunal's guidelines. At one meeting between the parties, the Council's Town Clerk told Dunlop that three storeys was the maximum the Council would allow and that the Council might use its powers under the Local Government Act 1919 to impose a height limit on the properties in question irrespective of any planning conditions. Subsequent to this meeting, one of the Council's officers prepared a recommendation on the action to be

[9] [1975] 2 N.S.W.L.R. 446.
[10] A former Dean of the Faculty of Law, University of New South Wales.

taken by Council. This recommendation was before the Town Planning Committee when it met Dunlop later and adopted the recommendation as its own. Council accepted the recommendation. Dunlop never saw the report, nor was he told of its contents.

The Woollahra Municipal Council passed two resolutions: that no building higher than three storeys be erected and that a nominated and severe building line be applied to the land. The first resolution was pursuant to section 309(4) of the *Local Government Act* 1919 which provides:

"The Council may regulate the number of storeys which may be contained in a residential flat building: . . ."

The second resolution was taken under section 308(1) of the same Act which provides:

"The Council may, subject to any ordinances, fix building lines."

Both resolutions were passed as ordinary resolutions at a normal meeting of the Council. No extraordinary procedure was either adopted or required. There was no right of appeal.

Dunlop brought an action before the Supreme Court claiming declarations that the resolutions were invalid as, inter alia, contrary to the rules of natural justice. The plaintiff alleged that he had been given no notice of the Council's intention to use its power under the sections and had not been given an opportunity to present his case against the use of those powers. Other allegations involved repugnancy, the pursuit of an improper purpose, and the taking into account of irrelevant factors.

THE HOLDING IN *DUNLOP'S* CASE AND ITS PROBLEMS

The problems of natural justice arose because of the nature of the powers in issue. If, as Wootten J. decided after considering the question,[11] natural justice adheres to the power as a whole rather than to particular exercises of that power, a hearing must be granted on all occasions on which the power is exercised. Yet, sections 308(1) and 309(4) may be used for general regulation of all relevant property, to make determinations as to individual properties, or in any context between these extremes. If, as Wootten J. seems to have held,[12] any form of hearing may be alien to some exercises of the powers concerned, the consequence is that the rules of natural justice should not be implied in those powers. This Wootten J. decided.[13] Fairness, on the other hand, was held by the Judge to be capable of adhering to individual exercises of the power as distinct from the power as such.[14] Wootten J. held that fairness may include some, or even all, of the requirements of natural justice.[15] Dunlop was entitled

[11] [1975] 2 N.S.W.L.R. 477-478.
[12] Ibid. 476-477 and 478.
[13] Ibid. 478.
[14] Ibid. 478-479.
[15] Ibid. 479.

under the doctrine of fairness to an oral hearing. He was not given that hearing with respect to the building line restriction. The second resolution was, therefore, void.

Four crucial questions are raised by this judgment. Are fairness and natural justice distinguished in that the former adheres to individual exercises of power while the latter adheres to the power itself? Where the concepts are held applicable in a case, do the criteria giving rise to this conclusion differ in one concept from the other? Is the content of the rules of natural justice different from that of the doctrine of fairness? What are the consequences of breach of these requirements and the remedies available therefor? If fairness and natural justice represent distinct concepts, then there must be a difference between them on at least one of these matters. Assuredly, *Dunlop's* case presented the Judge with a dilemma. Wootten J. took his premises from Professor Clark's article on fairness and natural justice[16] and, given his premises, reached a viable and, from some points of view, desirable conclusion. Nevertheless, each step of the Judge's road involved solution of a difficult question. The Clark thesis led Wootten J. in one direction. It is submitted in this article that the correct solution of each question leads in a different direction: that fairness and natural justice are, and should be, identical.

DO PROCEDURAL SAFEGUARDS ADHERE TO THE POWER OR TO INDIVIDUAL EXERCISES OF POWER?

This was a particularly urgent point in *Dunlop*. If the rules of natural justice could apply to some only of the exercises of power under sections 308(1) and 309(4), then the Judge could have required a hearing on the facts of the case without worrying about the legitimacy of a hearing where the powers are used legislatively. Wootten J., however, held that he could not do this with respect to natural justice.[17] He relied upon a passage in *Durayappah* v. *Fernando*[18] (which this writer had earlier cited as authoritative[19]) in which the Judicial Committee held that the clear applicability of natural justice to two of the three possible grounds of action by the decision-maker attacked extended to the third, and factually material, ground with respect to which, taken by itself, the Committee thought natural justice would not apply. This required that applicability of the rules of natural justice must be determined by looking at the power as a whole. The Canadian Federal Court of Appeal advanced an essentially similar analysis in *Howarth* v. *National Parole Board*.[20]

16 Op. cit. 28.
17 Supra.
18 [1967] 2 A.C. 337, 350-351.
19 Op. cit. 266.
20 [1973] F.C. 1018, 1024-1025. Reversed on appeal (1974) 50 D.L.R. (3d) 349 (S.C.C.).

Wootten J. referred to some contrary authority found in two major New Zealand decisions. In both, a majority of Judges cited *de Verteuil* v. *Knaggs*[21] as supporting the proposition that under a given power there may in some situations be a requirement of natural justice but not in others.[22] It must be noted that these New Zealand dicta were uttered as an essential step in escaping the shackles of *Nakkuda Ali* v. *Jayaratne*.[23] In *Nakkuda Ali* the Privy Council had held that the rules of natural justice apply only where the statute displays expressly a procedure analogous to the ordinary courts.[24] These indications were the "context and conditions" of the power conferred.[25] The New Zealand Court of Appeal linked this phrase with its reading of *de Verteuil* v. *Knaggs* so as to conclude that a court could look to the factual background of the power and its exercise as indications of a duty to hear. Unfortunately, the Court of Appeal misread both Privy Council decisions. The remarks in *de Verteuil* did no more than suggest two situations where failure to observe the duty to provide natural justice would be excusable. There are, however, five situations which could be argued to support the proposition made by the New Zealand Court of Appeal.

The late Professor de Smith collected a number of situations where the duty to provide natural justice, normally incident in a power, may be dispensed with on the facts. These are situations where prompt action is needed, where practicalities do not permit a hearing, and where the person charged knows the charges and has other means of protecting his interests. The common characteristic is that the power attracts the rules of natural justice, but that failure to act judicially will be excused. Thus, a power to condemn unwholesome food must be exercised in accordance with natural justice, but condemnation may take place without a prior hearing.[26] To require a prior hearing may often defeat the purpose of the power. Since a hearing after the order but before its execution by destruction,[27] or even after execution,[28] would not defeat the purpose of the power; the courts require an *ex post facto* hearing. These cases do not, therefore, suggest that natural justice adheres to exercises of the power rather than the power itself.

[21] [1918] A.C. 557, 560 (P.C.).
[22] *New Zealand Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd.* [1953] N.Z.L.R. 366, 404 (Finlay J.) and 418-419 (Cooke J. with Northcroft J. agreeing); *New Zealand Licensed Victuallers Association* v. *Price Tribunal* [1957] N.Z.L.R. 167, 198 (Finlay J.), 203 (Cooke J. with Northcroft J. agreeing) and 210 (Turner J.).
[23] [1951] A.C. 66 (P.C.).
[24] See Taylor, op. cit. 261 and 263.
[25] [1951] A.C. 75.
[26] *R.* v. *Cornwall Quarter Sessions, ex parte Kerley* [1956] 1 W.L.R. 906 (Q.B., D.C.).
[27] See *R.* v. *Randolph* [1966] S.C.R. 260.
[28] See Lord Evershed's gloss on *de Verteuil* v. *Knaggs*, supra, in *Ridge* v. *Baldwin* [1964] A.C. 40, 98 which was noted by Wootten J. in *Dunlop's* case [1975] 2 N.S.W.L.R. 446, 478.

Under English compulsory acquisition law,[29] a local authority may acquire an individual's property. On any understanding of the law, such acquisition attracts the rules of natural justice. Yet, it is only if the owner objects, that is, chooses to raise a *lis inter partes*, that a hearing is required.[30] Again, this does not indicate that natural justice adheres to exercises of power. The above situation may be seen either as a multi-stage procedure in which a hearing is required at only one stage, or as one where there is no dispute and so no occasion for a hearing until the owner objects. On both interpretations the duty to act judicially adheres to the power.

It is commonplace that an employee dismissable at pleasure has no right to a hearing when dismissed.[31] However, there is some authority that if the decision-maker chooses to assign a reason and that reason involves a charge reflecting on the honesty or integrity of the employee, the latter is entitled to a hearing.[32] Recently, Megarry J. referred to this as a "possible exception" to the rule that there is no right to a hearing,[33] but Widgery L.J. has rejected the possibility that giving a reason may give rise to a hearing.[34] This may well represent a situation where natural justice adheres to the factual exercise of the power, but it is too slight a basis on which to build a theory.

Normally, the decision whether to admit an alien to citizenship is one to which the rules of natural justice are not attracted. However, in 1973 the Canadian Federal Court of Appeal held that a hearing must be given where the decision is based on "facts pertaining to the particular applicant" such as criminal activities.[35] This is another straw in the wind.

The most important authority that natural justice may depend on the factual exercise of power lies in an area close to that which arose in *Dunlop's* case. In *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*[36] the municipality altered the zoning of six pieces of land. The change was made at the request of the owners. No opportunity was given to neighbours to object. Such a zoning power may be used both generally and individually, and the Supreme Court of Canada, following earlier Ontario authority,[37] held that where the exercise of zoning power

[29] Cooke J. in the *Okitu* case, supra, 419 referred to these cases as additional support for his proposition that a power may have to be exercised judicially in some only of its possible applications.

[30] *B. Johnson and Co. (Builders) Ltd* v. *Minister of Health* [1947] 2 All E.R. 395 (C.A.).

[31] *Ridge* v. *Baldwin* [1964] A.C. 40, 65 (Lord Reid).

[32] *Dean* v. *Bennett* (1870) L.R. 6 Ch. App. 489.

[33] *Gaiman* v. *National Association for Mental Health* [1971] Ch. 317, 337.

[34] *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149, 172.

[35] *Lazarov* v. *Secretary of State for Canada* [1973] F.C. 927.

[36] [1965] S.C.R. 512.

[37] *Re Howard and City of Toronto* [1928] 1 D.L.R. 952 (C.A.). See also *Re Multi-malls Inc. and Attorney-General for Ontario* (1975) 5 O.R. (2d) 248 (D.C.). Cf. *Re Zadrevec and Town of Brampton* (1973) 37 D.L.R. (3d) 326 (Ont.; C.A.) where the principle was accepted but the legislative scheme distinguished. These

"involves a conflict of interests between private individuals who are affected" then a hearing must be held.[38] Where the power is exercised generally there need be no hearing. As it was put in the most recent Canadian case,[39] it is not the legislative (by-law) form of the action which is relevant, but the realities, "all that is really in issue is a specific decision by the Board respecting specific land".

It would appear, therefore, that it is not absolutely clear that natural justice cannot adhere to individual exercises of a power. Occasions where it is important to decide this question will be few as powers which may be used both generally and *ad hominem*, and for which there is no specified procedure, are uncommon. But, does the duty to act fairly adhere to individual exercises of power or to the power itself?

Mr P. Jackson, in his book, *Natural Justice*,[40] suggests that the fairness cases have brought the two consecutive issues in natural justice together into one question.[41] Instead of asking first whether there is a duty to hear and then what is the content of that duty, there is one question; "were the procedures used fair?" This was the approach of Wootten J. in *Dunlop*. The Judge contrasted the applicability of natural justice

> "to a particular class of function—the traditional class containing virtually all judicial functions and many administrative functions to which it is appropriate"[42]

with other situations where

> "the exercise of the function should . . . be treated as subject to an implied condition that it must be fairly exercised."[43]

It was in this way that Wootten J. was able to avoid the problem he saw in holding applicable the rules of natural justice. The minimum degree of hearing required by natural justice was, he thought, inappropriate to the legislative use of the sections in issue, yet, if the rules of natural justice applied, then all uses of the power would have required that hearing. By using the concept of fairness, he saw himself as able to vary the hearing content more widely and find a hearing inapplicable to some exercises of the power; the only question was whether the procedures used were fair in the circumstances. His analysis of the issue broke new ground in administrative law, for in earlier cases fairness was used *ad hoc*

and cases from other Provinces were considered carefully in the most recent case—*Re Lacewood Development Co. and City of Halifax* (1975) 58 D.L.R. (3d) 383 (N.S.; S.C., A.D.).

38 Supra, 522.
39 *Re Lacewood Development Co. and City of Halifax*, supra, 392.
40 London, 1973.
41 Ibid. 35-36.
42 [1975] 2 N.S.W.L.R. 446, 470-471.
43 Ibid. 471. The phrasing is reminiscent of Sachs L.J. in *Re Pergamon Press Ltd* [1971] Ch. 388, 402-403 where, however, the Lord Justice saw fairness as part of natural justice.

with little reasoning. But Wootten J.'s question is the same as that posed by the House of Lords in *Wiseman v. Borneman*[44] with respect to the content of the hearing. Does fairness really merge the two questions of natural justice into one? Or, does fairness proceed simply by ignoring the question whether a duty to act fairly does attach?

The proposition that natural justice adheres to the power derives from the former need to classify powers as judicial/quasi-judicial or administrative. In Canada this connexion has been emphasised recently by the Supreme Court of Canada in *Howarth* v. *National Parole Board*[45] where the majority held the recent common law cases on natural justice to be irrelevant to section 28 of the *Federal Court Act* which speaks of "administrative" powers which are to be exercised in a quasi-judicial manner.[46] Dickson J., for the minority, however, read the Act as restating the common law. He relied indiscriminately on fairness as well as natural justice cases.[47]

If classification is unnecessary, is there any value in insisting that natural justice adheres to the power? This question is answered brilliantly in the minority judgment of Laskin C.J. in the most recent case before the Supreme Court of Canada[48]

> "I do not think it follows that a denial of judicial or quasi-judicial status to a tribunal relieves it from observance of some at least of the requirements of natural justice. . . . Whether a hearing must be given, whether at least an opportunity must be given in some other way to meet an adverse decision or proposed decision, should not be determined merely by a classification of the tribunal so as to carry the result by the mere fact of classification. . . .
>
> In my opinion, it is the substantive issue which the tribunal is called upon to determine, and its consequences for the affected person . . . that ought to be considered as relevant to the application of the rules of natural justice."

Situations, such as in *Dunlop*, where the relevant power may be used on clearly legislative occasions as well as *ad hominem*, are few. The only policy reasons against seeing natural justice as adhering to exercises of power, rather than the power itself, are two. First, it may lead to the dilution of the content of a hearing required by natural justice. This was Wootten J.'s objection,[49] but it is invalid, for the content of the hearing has long extended all the way down to written submissions in answer to a general indication of the case to be met.[50] The dilution problem has

[44] [1971] A.C. 297, 308 (Lord Reid), 309 (Lord Morris), 311 (Lord Guest), 315 (Lord Donovan), 320 (Lord Wilberforce).
[45] (1974) 50 D.L.R. (3d) 349.
[46] Ibid. 352.
[47] Ibid. 357-359.
[48] *Mitchell* v. *R.* (1975) 61 D.L.R. (3d) 77, 83-84 (S.C.C.).
[49] [1975] 2 N.S.W.L.R. 446, 470.
[50] See infra, pp. 204-206.

been with us always. Secondly, it may lead to the content of a required hearing being ascertained only *ex post facto* for individual cases. Lord Guest has expressed this fear,[51] but it too is submitted to be invalid. The hearing varies only with classes of case and not with individual cases. There will be a particular type of hearing where, for instance, a building line is used for individual properties; the hearing will not depend on the individual situation of the individual property-owner.

Conclusion

At first glance, Wootten J.'s view is viable and attractive. There would be the rules of natural justice. They would apply where a review of the "*Durayappah* factors"[52] suggest that they should, rather than where the function is classified as judicial or quasi-judicial. Apart from them, procedural safeguards would be required where the procedure used was unfair on the facts. But it is submitted that the twin concepts of fairness and natural justice are co-extensive in content,[53] arise in the light of the same criteria,[54] and give rise to the same remedies and consequences.[55] If this is so, then the only distinction between them would be that one adheres to the power and the other to exercises of the power. Yet, the objections to seeing natural justice as adhering to exercises of power are unconvincing. If so, to distinguish fairness and natural justice on this basis alone is to make a cross for the back of administrative law. It would be best to recognize that the proposition in issue stems from the old and discredited need to classify powers and to discard it along with the process of classification.

WHEN DO THE DUTIES OF NATURAL JUSTICE AND FAIRNESS ARISE?

Do either the indices or the tests which determine whether there is a duty to act fairly differ from those for natural justice? This question is related to that of the content of the duties once established to apply. It must be noted that in many cases the judges have not articulated the reasons for holding applicable a duty to act fairly; they have simply stated that there is or is not a duty.[56] One could examine the facts and

[51] *Wiseman* v. *Borneman* [1971] A.C. 297, 310 (H.L.).

[52] These are the four elements set out by Lord Upjohn in *Durayappah* v. *Fernando* [1967] 2 A.C. 337, 349—subject matter, issue, sanction, and express court analogy. These were examined by the writer, op. cit. 264-270 and that analysis was adopted by Wootten J. in *Dunlop* [1975] 2 N.S.W.L.R. 446, 473.

[53] See infra, pp. 202-207.

[54] Ibid., pp. 199-202.

[55] Ibid., pp. 207-208.

[56] *R.* v. *Gaming Board of Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417, 429; *Re H.K.* [1967] 2 Q.B. 617, 630 (Lord Parker C.J.), 636 (Blain J.); *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175, 200 (Megaw L.J.); *Bates* v. *Hailsham* [1972] 1 W.L.R. 1373, 1378 (Megarry J.). This tendency is especially apparent in Canadian cases.

infer criteria, but that would involve an assumption that the judge was following views expressed in other cases or the imposition of the writer's own preferred hypothesis.[57] It should also be noted that in some areas it has become accepted that there is or is not a duty with the consequence that judges simply refer to the leading case.[58]

It may be expected that judges who distinguish the duty to act fairly from that of observing the rules of natural justice will adopt differing criteria for inferring that duty. In testing this, it will be assumed that the criteria indicated in *Durayappah* v. *Fernando*[59] are those of natural justice. Judges affirming a distinction between fairness and natural justice are Lord Parker C.J.,[60] Lord Pearson,[61] Lawton L.J.,[62] de Grandpre,[63] Megarry,[64] Pennell,[65] and Wootten JJ.[66] Lawton L.J. stated the full basis for his views. He distinguished an inquiry into a factual situation from one into specific charges. In the case in hand he saw the situation (of *Companies Act* inspectors) as being of the first type. This, a minority view in the case,[67] harks back to the pre-*Ridge* v. *Baldwin* cases on the subject.[68] Also, it does not sit well alongside the approach of the House of Lords in *Wiseman* v. *Borneman* where the rules of natural justice were inferred.[69] Lord Pearson makes his distinction on the view that natural justice would require "a plurality of hearings or representations and counter-representations".[70] Lord Parker C.J. distinguished the two duties only in conceptual terms, making particular reference to the relevant immigration officer being an administrative officer and to the inappropriateness of "judicial processes" to his duties. The conceptual argument is not a satisfactory one today. The reference to "judicial processes" implies that a trial-like procedure is necessary for natural justice; this is not so.[71] De Grandpre and Pennell JJ. also made their distinction on those two grounds.[72] When Megarry J. distinguished fairness from natural justice,

57 See Taylor, op. cit. 272-278.
58 E.g. immigration in *R.* v. *Secretary of State for the Home Department, ex p. Mughal* [1974] Q.B. 313, 325 (Lord Denning M.R.) and many other cases.
59 [1967] 2 A.C. 337, 349.
60 *Re H.K.* [1967] 2 Q.B. 617, 630-631 (D.C.).
61 *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534, 547 (H.L.).
62 *Maxwell* v. *Department of Trade and Industry* [1974] Q.B. 523, 539-541 (C.A.).
63 *Roper* v. *Executive Committee of the Medical Board of the Royal Victoria Hospital* (1974) 50 D.L.R. (3d) 725, 728 (S.C.C.) per curiam.
64 *Bates* v. *Hailsham*, supra, 1378.
65 *Ex p. Beauchamp* [1970] 3 O.R. 607.
66 *Dunlop* v. *Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446, 470-471 and 472.
67 The other judges saw fairness as part of natural justice and the duty to act judicially.
68 Cf. *St. John* v. *Fraser* [1935] S.C.R. 441 and *Testro Bros Pty Ltd* v. *Tait* (1963) 109 C.L.R. 353.
69 [1971] A.C. 297.
70 [1972] 1 W.L.R. 534, 547.
71 De Smith saw this fallacy as an origin of a separate and inferior duty to act judicially—*Judicial Review of Administrative Action* (3rd ed., London, Stevens & Sons, 1973) 208.
72 Supra, 730 and 611 respectively.

he did so only as an hypothesis for the sake of argument. He did not distinguish them on the facts nor has he made the distinction in other cases.[73] Wootten J. did not spell out the matters he considered in deciding that there was a duty to act fairly. However, looking at his judgment as a whole and the purpose of his distinguishing fairness from natural justice, it would seem that he would regard all administrative actions as having to be performed fairly. The difficulty with such a proposition is that it simply delays the decision. When the second question of whether the decision-maker has acted unfairly is posed one must ask whether fairness in the circumstances requires, for instance, notice of the decision-maker's preliminary views. This question, it is submitted, can only be answered by reference to the "*Durayappah* factors". Thus it is unhelpful and positively misleading to say that all administrative actions must be performed fairly.

The preponderance of judicial opinion does not distinguish fairness from natural justice. It may, therefore, be positted that the same indicia are applied whether the judge uses fairness or natural justice phraseology. This seems to be borne out in so far as the indicia are in fact articulated. Judges seeing the concepts as identical are: Lords Denning,[74] Widgery,[75] and Salmon,[76] Edmund Davies,[77] Orr,[78] Buckley,[79] and Scarman L.JJ.,[80] Mason J.A.,[81] and Blain,[82] Connor,[83] Holland,[84] McCarthy,[85] and Wells JJ.[86] In addition, the Judges of the Federal Court of Appeal of Canada have referred to natural justice and fairness cases indiscriminately in determining whether a power must be exercised in a judicial or quasi-judicial manner.[87] They see no distinction between the concepts.[88] Where the reasons for adducing a duty to act fairly or observe the rules of

[73] See *John* v. *Rees* [1970] Ch. 345.
[74] Notably in *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149, 170, *Re Pergamon Press Ltd* [1971] Ch. 388, 399-400, and *R.* v. *Gaming Board of Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417, 430-431.
[75] *Schmidt*, supra, 172 where he agreed with Lord Denning's exposition.
[76] *Re H.K.* [1967] 2 Q.B. 617, 633 (D.C.). But see *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534, 550 (H.L.) where he speaks of "neither natural justice nor any other concept of fairness".
[77] *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175, 195 (C.A.).
[78] *Maxwell* v. *Department of Trade and Industry* [1974] Q.B. 523, 537-538 (C.A.).
[79] *Re Pergamon Press Ltd*, supra, 407.
[80] *R.* v. *Secretary of State for the Home Department, ex p. Mughal* [1974] Q.B. 313, 330-331 (C.A.).
[81] *Attorney-General* v. *Cochrane* (1970) 72 S.R. (N.S.W.) 1, 11 (C.A.) (Holmes J.A. agreeing).
[82] *Re H.K.*, supra, 636.
[83] *R.* v. *Commissioner of Police, ex p. Ivusic* (1973) 20 F.L.R. 412, 436 (A.C.T.; S.C.).
[84] *Re Cardinal and Board of Commissioners of Police of the City of Cornwall* (1973) 42 D.L.R. (3d) 323, 327-328 (Ont.; H.C., D.C.).
[85] *Lower Hutt City Council* v. *Bank* [1974] 1 N.Z.L.R. 545, 548 (C.A.) per curiam.
[86] *Perre Bros* v. *Citrus Organisation Committee* (1975) 10 S.A.S.R. 555, 561.
[87] E.g. *Lazarov* v. *Secretary of State for Canada* [1973] F.C. 927, 932-940.
[88] This must now be seen subject to the recent Supreme Court of Canada cases discussed, supra, p. 198.

natural justice are stated, three constant threads appear. They are the dismissal of classification as an instrument,[89] the citation of fairness and natural justice cases indiscriminately,[90] and the use of the "*Durayappah* factors" as supplying the indicia relevant.[91]

Conclusion

Where judges have distinguished the duty to act fairly from that to observe the rules of natural justice, only four matters other than those relevant to natural justice have been raised. They are classification, the belief that the minimum content of natural justice is an oral hearing and that that is inappropriate in the situation, the distinction between a charge and an inquiry (which is, on one view, an aspect of the first of the "*Durayappah* factors"), and the adherence of fairness to individual instances of action. Classification is dismissed nowadays, and with it may be dismissed the proposition that natural justice adheres to the power and is thus distinguishable from fairness. It will be seen in the following section that the content of the hearing in natural justice varies over the full range of fairness. Finally, Lord Justice Lawton's point of distinction is debatable. The great majority of judges do not distinguish fairness from natural justice and infer the duty to hear from the same indicia. There is little, therefore, to support the suggestion that the incidence of fairness and natural justice differs.

DOES THE CONTENT OF THE CONCEPTS DIFFER?

The rules of natural justice are two: *audi alteram partem* and *nemo debet esse judex in sua causa.* The former rule requires that a person affected by a decision be given notice of the timing of the hearing early enough to prepare his case, be informed of the matters to be inquired into, be heard by the person making the decision, and be given an adequate opportunity to present his case. The latter rule requires that the decision-maker be financially and mentally impartial in his decision. Despite some suggestions to the contrary, there can be no doubt that both rules are essential and integral parts of natural justice.[92] However, neither rule has precisely the same content on all occasions.[93] Some

[89] Lord Denning M.R. in *Benaim and Khaida,* supra; Scarman L.J. in *Mughal,* supra; Blain J. in *H.K.,* supra; Mason J.A. in *Cochrane,* supra; Connor J. in *Ivusic,* supra; Holland J. in *Cardinal,* supra; McCarthy J. in *Bank,* supra; Quilliam J. in *Pagliara* v. *Attorney-General* [1974] 1 N.Z.L.R. 86, 93.

[90] Lord Denning M.R. in *Schmidt,* supra; Mason J.A. in *Cochrane,* supra; Holland J. in *Re Robertson and Niagara South Board of Education* (1973) 41 D.L.R. (3d) 57, 63; McCarthy J. in *Bank,* supra; Quilliam J. in *Pagliara,* supra; Thurlow J. in *Lazarov,* supra.

[91] Lord Denning M.R. in *Pergamon Press,* supra; Salmon L.J. in *H.K.,* supra; Mason J.A. in *Cochrane,* supra; Holland J. in *Cardinal,* supra; Sachs L.J. in *Pergamon Press,* supra; Thurlow J. in *Lazarov,* supra.

[92] See Wootten J. in *Dunlop* [1975] N.S.W.L.R. 446, 469 and Clark, op. cit. 28 ff.

[93] Lord Reid's stricture in *Wiseman* v. *Borneman* [1971] A.C. 297, 308 (H.L.).

Canadian judges have taken the view that natural justice requires an oral hearing in all cases.[94] Is this so? Each aspect of the two rules of natural justice must be examined and compared with the concept of fairness.

Notice of the Timing of a Hearing

This is a servicing requirement. Without it, the person affected could not adequately present his case. Hence, the length of notice required will vary with the type of matter involved and the time needed to assemble an appropriate case.[95]

Although none of the fairness cases discuss notice in this sense, such a requirement must be essential and is likely to vary in the same way as natural justice and for the same reasons. Thus, the very notion of fairness would seem to require in a situation such as the *Gaming Board* case[96] that the authority allow an adequate gap between informing the applicants of its suspicions and requiring them to show that those suspicions are unfounded.

Notice of the Case to be Met

In natural justice cases the extent to which a person is entitled to be informed of the case to be met is not constant. Where it is alleged that a person has done specific acts, these must be disclosed to him and no further "charge" may be preferred without separate notice.[97] But even in this case the degree of specificity with which the charge is to be disclosed may vary. The test is whether a given notice adequately informs the person concerned and enables him to prepare his opposing case.[98] It would be a mistake to think that the specificity of a criminal indictment is always required.

The trend in fairness cases, on the other hand, has been to require only general notice of the case to be met; "the gist of the case to be met"[99] is probably the best expression. As with natural justice, the test of adequacy is whether the notice gives "the party affected sufficient information to enable him to deal with it".[100] *Dunlop's* case illustrates the test neatly. Wootten J. first stated the notice required by the rules of natural

[94] See *Roper* v. *Executive Committee of the Medical Board of the Royal Victoria Hospital* (1974) 50 D.L.R. (3d) 725, 730 (S.C.C.).
[95] See *R.* v. *Thames Magistrates' Court, ex p. Polemis* [1974] 1 W.L.R. 1371 (Q.B., D.C.).
[96] [1970] 2 Q.B. 417 (C.A.).
[97] *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945.
[98] See *Lazarov* v. *Secretary of State for Canada* [1973] F.C. 927, 941 (C.A.); *Howarth* v. *National Parole Board* [1973] F.C. 1018, 1024 (C.A.) (reversed on appeal on other grounds); *R.* v. *British Columbia Pollution Control Board, ex p. Greater Campbell River Water District* (1967) 61 D.L.R. (2d) 221, 223 (B.C.; C.A.).
[99] Clark, op. cit. 42.
[100] *Re Pergamon Press Ltd* [1971] Ch. 388, 400 (Lord Denning M.R.) re disclosure of evidence and *Lazarov* v. *Secretary of State for Canada*, supra, 941.

justice: "notice of the specific action contemplated, as distinct from a general hearing on the relevant facts".[101] Under the duty to be fair, he said, "it may sometimes be possible to take a less stringent view".[102] On the facts, however, he concluded that fairness required specific notice of the action contemplated under sections 308(1) and 309(4):[103]

> "It is all very well to say that he knew the council was considering what development should be approved on his land, including the height and bulk of buildings, but it is one thing to address a body formulating a general policy which can later be challenged on appeal from refusal of a development application. It is quite another to be faced with a final action by the council on specific matters which may drastically alter one's rights and curtail the powers of the appellate tribunal."

Notice in fairness may, then, on occasions be as stringent as in natural justice.

May the requirements of natural justice be as easy to satisfy on occasions as they may sometimes be in fairness cases? There is no authority on this point. However, since the test is the same in fairness as in natural justice cases, it is probable that the requirements vary in much the same way.

Hearing by the Decision-Maker

"He who decides must hear" is one of the maxims of *audi alteram partem*. The act of listening to the person affected may be delegated, but either a full transcript or an accurate and adequate summary must be provided for the decision-maker.[104] In *Dunlop's* case the applicant was heard orally only by the Town Planning Committee and not by the full Council which made the decision. Wootten J. commented that, had the rules of natural justice been applicable, this "might well have been fatal", but since the Council need only act fairly the procedure was permissible.[105] The Judge then laid considerable emphasis on the fact that the members of the Committee formed a majority of Council and concluded that the procedure was not unfair. No previous judge has addressed himself to this aspect of the duty to act fairly. Wootten J. appears to suggest that the requirements of fairness are less than those of natural justice in this respect and are flexible in contrast to the rigid natural justice principle. But the requirements of natural justice in this respect are not rigid but flexible and, according to the House of Lords in *Wiseman* v. *Borneman*,[106]

101 [1975] 2 N.S.W.L.R. 446, 479.
102 Ibid.
103 Ibid. 480.
104 *Jeffs* v. *New Zealand Dairy Production and Marketing Board* [1967] 1 A.C. 551 (P.C.).
105 [1975] 2 N.S.W.L.R. 446, 479.
106 [1971] A.C. 297, 308, 310, 311, 317.

are assessed by the very test adopted by Wootten J., namely, "whether it [the procedure] operates unfairly" to the applicant.[107] In *Dunlop* there does not appear to have been a formal summary of submissions by the Committee to the Council, but the presence of so many committee members on the Council no doubt ensured that sufficient information of the submissions was available so as to enable the Council independently to turn its mind to the question. And that is the essence and purpose of this requirement. Wootten J. would appear wrongly to have viewed the requirements of natural justice as rigid.

What is a Hearing?

Do the rules of natural justice require that every hearing be oral? Do they require that the decision-maker disclose all the material advanced by other parties? That there be cross-examination? That there be a right to counsel? De Smith suggested that, prima facie, a hearing is to be oral,[108] but there are enough situations where written representations have been held adequate to cast doubt on this presumption.[109] The particular facts in issue may also justify a refusal to disclose all information or allow cross-examination of witnesses. National security cases are an obvious example,[110] but there are many others.[111] However, these are exceptions and the general rule is that full disclosure is necessary[112] and, where the hearing is oral, parties are entitled to cross-examine witnesses.[113] The right to counsel is a much debated issue. Despite some authorities suggesting a right to counsel,[114] the vast majority of cases have rejected this.[115] At the most, courts have held that where there is a statutory right to personal appearance there is a right to counsel. In a recent Australian case[116] it was held that the right to an oral hearing implied a right to counsel, but this is the only recent authority to that effect.[117]

The fairness cases present a different picture. Several writers have deduced from them that in this respect the requirements of fairness are

[107] Ibid. 317.
[108] Op. cit. 177.
[109] See the comments of Clark, op. cit. 28 n. 6. See also *R.* v. *British Columbia Pollution Control Board, ex p. Greater Campbell River Water District* (1967) 61 D.L.R. (2d) 221, 223 (B.C; C.A.).
[110] E.g. *Hutton* v. *Attorney-General* [1927] 1 Ch. 427.
[111] E.g. *Re K.* [1965] A.C. 201 (H.L.) and *Local Government Board* v. *Arlidge* [1915] A.C. 120 (H.L.).
[112] *Kanda* v. *Government of Malaya* [1962] A.C. 322 (P.C.).
[113] *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636.
[114] *R.* v. *Assessment Committee of St. Mary Abbotts* [1891] 1 Q.B. 378 and *R.* v. *Public Service Board of Appeal, ex p. Kay* (1916) 22 C.L.R. 183.
[115] See de Smith, op. cit. 187-188.
[116] *R.* v. *Visiting Justice at Pentridge Prison, ex p. Walker* [1975] V.R. 883.
[117] Cf. *Enderby Town Football Club* v. *Football Association* [1971] Ch. 591, 605-606 (Lord Denning M.R.).

less than those of natural justice.[118] But, as de Smith pointed out,[119] this deduction is based on the mistake of thinking that natural justice always requires an oral hearing and most of the trappings of a court. Certain Canadian courts have equated quasi-judicial duties with the need for a full trial.[120] Plausibility is given the writers' deduction by the finding in most fairness cases that only limited information need be given the person affected, that contrary evidence need not be disclosed and that an oral hearing is not required. Yet those fairness cases involved factual situations where any greater rights were inappropriate—had natural justice been held applicable, the content of the hearing would have been the same. It is inevitable that a *Companies Act* inspector or the Gaming Board should not be required to reveal more than he or it did reveal, and, in the case of an immigration officer, there is little that can possibly be revealed.[121] Since the requirements of natural justice may on the facts be fulfilled merely by allowing written representations,[122] the suggestion that fairness represents a lower content of procedural safeguard than natural justice cannot be sustained. It must be noted further that the requirements of fairness are not always satisfied by written representations. Although the passages are ambiguous, *Dunlop's* case can be read as supporting the proposition that fairness may require an oral hearing.[123] Lord Parker C.J. in *R.* v. *Birmingham Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd*[124] not only regarded the oral hearing as a necessary part of fairness, but also imposed a significant requirement that the justices disclose information taken behind the applicant's back.[125] It is exceedingly difficult to discern the difference between fairness and natural justice in matters of the content of a hearing.

The Rule against Bias

The second rule of natural justice is *nemo debet esse judex in sua causa.* This rule appears also in the duty to act fairly. In *Re H.K.*[126] itself, Lord Parker C.J. named "impartiality" as a necessary characteristic of fairness.[127] Later, in the *Chris Foods* case,[128] the Lord Chief Justice

118 See de Smith, op. cit. 208-209; Mullan, op. cit. 288; Seepersad, op. cit. 254.
119 Ibid.
120 See *Roper* v. *Executive Committee of the Medical Board of the Royal Victoria Hospital* (1974) 50 D.L.R. (3d) 725, 730 (S.C.C.).
121 *Re Pergamon Press Ltd* [1971] Ch. 388 (C.A.), *R.* v. *Gaming Board of Great Britain, ex p. Benaim and Khaida* [1970] 2 Q.B. 417 (C.A.), and *Re H.K.* [1967] 2 Q.B. 617 (D.C.) respectively.
122 See especially *Local Government Board* v. *Arlidge* [1915] A.C. 120, 133 (Lord Haldane L.C.), 143-144 (Lord Parmoor) (H.L.) and *University of Ceylon* v. *Fernando* [1960] 1 W.L.R. 223 (P.C.).
123 [1975] 2 N.S.W.L.R. 446, 479.
124 [1970] 1 W.L.R. 1428 (Q.B., D.C.).
125 Ibid. 1433.
126 [1967] 2 Q.B. 617 (D.C.).
127 Ibid. 630.
128 Supra.

repeated this and found on the facts that the magistrate was partial in that he conferred with the prosecutor prior to judgment.[129] Although he did not advert to the leading natural justice case on bias, *Metropolitan Properties (F.G.C.) Ltd* v. *Lannon*,[130] his approach was on all fours with it. Bias under the duty to act fairly has been adverted to in only one other case. In *Re Dick and Attorney-General for Ontario*[131] the test of "obvious and real bias such as personal animosity or direct monetary interest" was raised.[132] This is much the same as the requirement of natural justice.

Conclusion

Both natural justice and fairness contain the two basic rules of *audi alteram partem* and *nemo debet esse judex in sua causa*. The individual aspects of these rules vary according to the same tests and within much the same parameters in both cases. There is not enough authority to say that the parameters are the same, but the fact that the tests are the same and the authority that does exist both indicate that they are. In fact, the very way in which judges use fairness and natural justice interchangeably indicates that nothing hangs upon the use of one concept rather than the other in this context.

DO THE REMEDIES OR SUBSEQUENT NULLITY DIFFER?

Breach of the duty to act fairly makes the action void and not voidable.[133] Had breach made the action merely voidable, then the remedies of mandamus, prohibition, and declaration would have been unavailable. In *R.* v. *Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd*[134] prohibition was granted for lack of fairness, and in another case it was stated positively that prohibition was an appropriate remedy.[135] In other cases prohibition was sought but no comment on its availability was made.[136] Mandamus was issued for breach of the duty to act fairly in *R.* v. *Chief Immigration Officer, Lympne Airport, ex parte Amrik Singh*[137] and *R.* v. *Kent Police Authority, ex parte Godden*,[138] and in two

129 Ibid. 1433.
130 [1969] 1 Q.B. 577 (C.A.).
131 (1973) 42 D.L.R. (3d) 657 (Ont.; H.C., D.C.).
132 Ibid. 665.
133 It is assumed that *Durayappah* v. *Fernando* [1967] 2 A.C. 337 (P.C.) is either wrong on this point or uses "voidable" as a label for situations of limited standing only.
134 [1970] 1 W.L.R. 1428 (Q.B., D.C.).
135 *R.* v. *Liverpool Corp., ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299, 308-309 (Lord Denning M.R.) (C.A.).
136 See Mullan, op. cit. 287. Mullan's citation of *R.* v. *Hillingdon London Borough Council, ex p. Royco Homes Ltd* [1974] Q.B. 720, 728 (D.C.) is not helpful on this point.
137 [1969] 1 Q.B. 333 (D.C.).
138 [1971] 2 Q.B. 662 (C.A.).

other cases mandamus has been stated to be an appropriate remedy.[139] Finally, a declaration was issued in *Dunlop's* case and there are a number of other cases where a declaration was sought, though not ordered, without the Judges indicating that the remedy was unavailable.

A body subject to the duty to act fairly falls within the dictum of Atkin L.J. in *R.* v. *Electricity Commissioners.*[140] The above instances of prohibition show this as do *Amrik Singh* and *Godden* where certiorari was granted. In two further cases there have been judicial statements on the availability of certiorari[141] and there are other instances of certiorari being sought without adverse judicial comment.

It is clear beyond doubt, therefore, that there is no distinction between fairness and natural justice in terms of remedy or consequent nullity.

CONCLUSION

The picture which emerges from analysis of the fairness cases is that there are few and arguably no differences between the operation and consequences of the duties to act fairly and to provide natural justice. The criteria which define the applicability of both are the same, the content of the duties involves the same elements applied to the facts by the same tests and within the same parameters, both are subject to the same remedies and both render action void.

Some gaps and possible inconsistencies appear. First, there is no authority whether fairness may require legal representation and the right to counsel in natural justice is far from clear. No useful conclusion may be drawn from this, but the close resemblance of the way in which the content of the hearing varies under each principle suggests that there is no inconsistency here. Secondly, it may be that fairness adheres to individual exercises of power while natural justice adheres to the power itself. As shown above,[142] there are situations where natural justice has been held to depend on the factual exercise of power. In the past, natural justice has been held to adhere to the power largely because of the felt need to classify the power as either judicial/quasi-judicial or administrative. Classification has proved to be a wayward and difficult instrument and administrative law now has, through the "*Durayappah* factors", a much more efficient means of determining when the rules of natural justice apply. There would appear to be no other convincing policy reason why natural justice should not be held applicable where a power is used *ad hominem* even though that power may also be used as a

[139] *Re H.K.* [1967] 2 Q.B. 617, 632 (Lord Parker C.J.), 636 (Blain J.) (D.C.); *R.* v. *Secretary of State for the Home Department, ex p. Thakrar* [1974] Q.B. 684, 704 (Lord Denning M.R.).

[140] [1924] 1 K.B. 171, 204-205 (C.A.).

[141] *Thakrar*, supra, 704 (Lord Denning M.R.); *Re Mohammed Arif* [1968] Ch. 643, 648.

[142] Supra, pp. 195-197.

general regulation. The "*Durayappah* factors" will indicate when the power is being used sufficiently individually to attract the rules of natural justice. To maintain two concepts with identical content and consequences in order to keep intact a principle which derives from an outmoded view of natural justice law is nonsensical.

The foundations for a principle of procedural fairness were laid long ago. To state that the requirements of natural justice are those necessary "to be fair in the circumstances" is to do no more than affirm that the content of the principle varies with the facts. This we have always known. This phraseology was used long before the "duty to act fairly" appeared. But the classification of functions into judicial, quasi-judicial, and administrative became the dominating factor in natural justice. Judicial and quasi-judicial were felt by judges earlier this century to be an epithet appropriate only for persons and bodies very similar to judges and courts. It is natural that judges should find it difficult to describe immigration officers as "judicial" or even "quasi-judicial". The great majority of judges felt this difficulty and seized upon the "doctrine of fairness" as a means to bring natural justice into play without analogising civil servants to judges. Those judges who have distinguished fairness from natural justice have always spoken in the context of a need to classify the decision-maker.

If we reject classification finally and accept that natural justice need not adhere to the power, we have no need for separate duties of fairness and natural justice. The "*Durayappah* factors" provide a workable test for the applicability of natural justice/fairness. They provide results in accordance with common sense and policy. They also provide an approach to determining the content of the rules of natural justice/fairness which accords with common sense and policy.[143] Finally, they avoid the dangers inherent in the classification of functions and in the approach to natural justice based simply on strict statutory construction.[144]

The division of fairness and natural justice into two adjacent concepts raises needless problems. *Dunlop* v. *Woollahra Municipal Council* is evidence of that. It is submitted that the path of future development lies (a) in restoring fairness to its former place as a formula for deploying argument on the content of the rules of natural justice, and (b) in the "*Durayappah* factors" as indices for determining both the applicability of the rules of natural justice and their content.

[143] See Taylor, op. cit. 272-278.
[144] G. D. S. Taylor, "The Unsystematic Approach to Natural Justice" (1973) 5 *N.Z.U.L.R.* 373.