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The right to be heard before administrative
tribunals and judges

History

1. That no man is to be judged unheard was a precept known to the Greeks, proclaimed in Seneca's 'Medea', to be found in the Year Books, and stated by Coke to be a principle of divine justice. It is a principle so fundamental to the administration of justice in a civilized community that one can only wonder that it has not at all times been recognised and acted on.

2. As early as 1850, in Bonaker v Evans, Baron Parke said:
"No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity for answering a case against him, unless indeed the legislature has expressly or impliedly given an authority without that necessary preliminary".

This was merely a restatement of an earlier rule. Many of the earliest cases where this principle was established were in the sphere of administrative law. Thus in 1615 James Bagg, a Burgess of Plymouth, was disfranchised without prior notice or hearing. This was held to be a breach of natural justice and the decision was quashed by the Queens Bench. In 1723 Mandamus was issued to restore Dr. Bentley to his academic degrees in the University of Cambridge of which he had been deprived without prior notice or hearing. It became established in the seventeenth and eighteenth centuries that removal from any office that was a freehold had to be preceded by notice and hearing.

3. In the early part of the nineteenth century it was recognised that the rule audi alteram partem applied to arbitrations, to the hearing of professional bodies and voluntary associations exercising disciplinary powers, and indeed to 'every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals'. One who was expelled from a club or trade union, or who was excluded from carrying on his calling by revocation of a licence or removal from a Register had the right to be heard, and if he was deprived of that right the Courts would quash the decision.

4. In view of the clearly defined attitude of the Courts in the early part of the century, it is surprising that the rule audi alteram partem tended to be lost sight of or to become blurred by decisions in the latter part of the same century and the first half of the twentieth century. This may well have been due to the vast increase in the functions of central and local authorities with wide powers of administration, with which the Courts were unwilling to interfere. In Board of Education v Rice (1911) AC 179 Lord Loreburn sought to re-establish the rule in English administrative law in a case which concerned the appellate functions of a Government Department. He said:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon Departments or Officers of State the determining or deciding of 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".

Nevertheless, the Courts still seemed hesitant about applying this rule in cases in which, according to modern thinking, they should have done. Thus, in Venicoff's case (1920) the Home Secretary had made an order deporting an alien. Under recent legislation he was empowered to make such an order if he deemed it to be 'conducive to the public good'. No hearing

had been afforded to the alien against whom an order of deportation had been made and on the order being challenged the Courts held that the Home Secretary was exercising purely executive functions, importing no duty to act judicially. As late as 1962 the Court of Appeal reaffirmed the rule that an alien deported had no implied right to a prior hearing. This rule has now been changed by Statute.

5. Behind this watering down of the audi alterem partem rule in administrative matters there can be discerned four lines of reasoning:

- (i) During the first and second world wars the Courts showed a reluctance to interfere with the wide powers conferred by Statute on the Government, lest it make the task of the latter more difficult. While this was understandable, this judicial attitude persisted long after hostilities had ceased.
- (ii) The wide policy discretion vested in Ministers responsible to Parliament was thought to preclude the Courts from questioning the exercise of such discretion.
- (iii) There appears to have been an assumption that the role of the Courts in administrative matters should be one of self-restraint, with the minimum interference. Thus, in the case of the Local Government Board v Arlidge (1915) AC 120, the House of Lords held that a government department determining a housing appeal was not obliged to divulge the contents of the report of one of its inspectors to the appellant, even though the report might contain information prejudicial to the appellant, which he would be unable to controvert. The withholding of what might be vital information from the appellant prevented him from knowing the case he would have to meet and so deprived him of a fair hearing.
- (iv) Where the Courts held that a Minister was acting in an executive, as opposed to a judicial, capacity, they held that in arriving at a decision he was not obliged to afford a hearing, even although it might materially affect the right of the individual.

6. Thus, up to 1963 the state of the law can be summarized generally as follows:

- (i) Judicial tribunals empowered to deprive persons of their liberty, or of their property, or to impose financial burdens on them had to obey the audi alteram partem rule.
- (ii) Arbitrators and government departments when called on to decide questions of law and fact in situations resembling lites inter partes must obey the rule.
- (iii) The rule also had to be observed in the removal of an individual from an office not held merely at pleasure, the exercise of disciplinary powers of professional bodies, administrative decisions affecting property rights, such as orders of demolition, compulsory purchase etc., disciplining of the clergy.
- (iv) But there was a marked reluctance on the part of the Courts to hold that there was an implied duty to give prior notice and afford an opportunity to be heard on persons or bodies empowered to make decisions in the general field of administrative law. This left a wide undefined area in the sphere of administrative law where authorities could act without paying any attention to the rule of audi alteram partem.

7. In the early 1960s there came about a change in the attitude of the Courts, and a return to earlier thinking.

In 1960 the Privy Council heard an appeal from Ceylon. It was held that before the university authorities could suspend a student for cheating at an examination he had to be given a hearing in accordance with natural justice, although there was no such requirement in the university-statutes. (Ceylon University v Fernando (1960) 1 WLR 223)

In the same year the Court of Appeal held that before the Registrar of Building Societies could make an order against a Society prohibiting further advertisements for capital, he was under a duty according to natural justice to notify the Society and hear their representations. (Regina v Registrar of Building Societies (1960) 1 WLR 669).

8. The leading modern case is Ridge v Baldwin (1964) AC 40 where the House of Lords held that a chief constable, dismissible for reasons laid down by Statute, had an implied right to have prior notice of the charges against him, adequate opportunity for preparing his case and a fair hearing. Lord Reid emphatically repudiated the view that the rules of natural justice applied only to those functions which were judicial or quasi judicial. He emphasised that the duty to act in conformity with natural justice could be inferred simply from a duty to decide 'what are the rights of individuals'. Ridge v Baldwin marked the beginning of a new era in the attitude of the Courts, and a return to the attitudes of the seventeenth and eighteenth centuries.

9. The present scope of the audi alteram partem rule

The law is still in a state of development, but the circumstances where there will be implied an obligation to observe the rule would appear to be as follows:

- (a) all administrative tribunals, with procedures and functions similar to those of the regular Courts must observe the rule:
- (b) administrative bodies, other than those in (a) supra will be required to observe the rule if (i) the sphere in which they operate indicates a duty to hold an enquiry before arriving at a decision; or (ii) they are required to decide matters analogous to lites inter partes; or (iii) they are required to determine disputable questions of fact or law and their decision may well adversely affect the rights of the individual.
- (c) It was stated in Ridge v Baldwin that the duty to observe the rules of natural justice may arise from the nature of the duty conferred on the authority. In deciding whether such duty exists there should be taken into consideration (i) the nature of the complainant's interest; (ii) the conditions under which the authority is entitled to make orders which may adversely affect such interests; and (iii) the severity of the sanctions it can inflict. Even when the Courts do not imply strictly the rule audi alteram partem, they may require decision makers to act 'fairly' so that the individual may be afforded a measure of protection against arbitrary acts of the administration.

10. The limits to the application of the rule audi alteram partem

There are however still numerous cases where the Courts will not imply the existence of the rule. Thus:

- (a) Parliament may expressly dispense with the need for notice or hearing, and may authorise enforcement against an individual ex-parte, in the interests of administrative efficiency .
- (b) Where the functions of the administration are entirely non-judicial.

In this latter class of case, however, English Courts no longer regard the application of the rules of natural justice as limited to those cases where the administration is acting in a judicial or quasi judicial capacity; and they are prepared to require authorities to act 'fairly' in what are purely administrative matters. Thus, where the administration has a discretion in a purely administrative sphere the Courts in appropriate circumstances will require it to act 'fairly', and to give the opportunity for an individual whose interests may be affected to make representations. In applying the rules of natural justice the Courts tend to operate a sliding scale of procedural rights, and the further removed from the judicial paradigm the administrative function is, the less likely are the Courts strictly to enforce the rules of natural justice.

- (c) Where legislation expressly requires notice and hearing for some purposes but imposes no procedural requirement for other purposes.

This, while supported by a number of authorities, is suspect. It is based on the maxim *expressio unius est exclusio alterius* and dates from a period ante 1960. It is submitted that Courts would hesitate before acting on this principle now.

- (d) Where to impose an obligation to disclose relevant information to the party affected would be prejudicial to the public interest.

This is dealt with more fully later in this paper. Under the increasing pressure of public opinion the law is continuously curtailing the claims of the administration to withhold information on the ostensible ground that to disclose it would be prejudicial to the public interest.

- (e) Where the obligation to give notice and to have a hearing would prevent the taking of prompt action, particularly in cases where prompt action of a preventive or remedial nature is required in the public interest.
- (f) Where the matter in issue, or the financial interest involved is so trivial as to justify the implication that no prior notice or opportunity to be heard is to be inferred.
- (g) Older cases support the view that the rule *audi alterem partem* has no application where the matter in issue is a privilege as opposed to a right. But it is submitted that the cases supporting this view are now of doubtful authority, and today the Courts would be prepared to infer a duty to give notice and have a hearing before a decision was taken which would affect an individual's status or position.

1. The source of the right to be heard

- (a) (i) England has no fundamental constitution, unlike the United States, Ireland and most European Countries.
- (ii) In many cases in the sphere of administrative law Statutes have recognised the right of the individual to a hearing. The administration of the modern state could not work without an elaborate administrative judicial system of its own. For example, claims for benefit, applications for licences, disputes about controlled rents, planning appeals, compulsory purchase of land and a host of other matters have to be adjudicated on every day. They are for the most part unsuitable for adjudication by the ordinary Courts, and numerous specialised tribunals have been set up to deal with them.

By the early 1950s, there existed a mass of administrative tribunals deciding questions of great importance to the individual, with different procedures, in many cases differing one from the other, and many of the procedures drifting away from accepted rules.

This could not continue and the Government set up a committee under the chairmanship of Lord Franks to review the whole position. This committee approved the use of tribunals as an essential part of the administration of justice. Proceedings before all such tribunals should so far as possible conform to certain rules: proceedings should be in public, due notice should be given to all whose interests were affected, representation should be unrestricted, the case to be met should be disclosed in good time, questioning of parties and witnesses should be allowed, and reasoned decisions should be given. The committee also recommended the establishment of a permanent supervising body to supervise the future operation of tribunals. This was a great step forward.

The Government accepted the recommendations of the committee, and the Council on Tribunals was set up by the Tribunals & Inquiries Act 1958 (now the Tribunals & Enquiries Act 1971). As a result each tribunal is now equipped with its own set of procedural rules made by Statutory Instruments by the Minister concerned, after first consulting the Council on Tribunals.

Although the Rules differ from each other, necessarily, since they deal with many different kinds of subject matter, all tribunals are required to observe the principles of natural justice, and to afford to the individual a fair hearing when his representations can be heard.

(iii) The right to a fair hearing for a person whose interests may be affected was recognised in England as early as the Year Books, and was approved by Lord Coke in the seventeenth century. The rule audi alteram partem is deeply embedded in our law from the earliest times, and was recognised in the sphere of administrative law in the sixteenth and seventeenth centuries. It is based on the rules of natural justice and save for certain decisions in the latter part of the nineteenth century and in the first half of the twentieth century has been consistently observed by the Courts.

(b) In England there is no separate system of civil and administrative law with separate Courts. Although in England there are now very many specialised tribunals each dealing with separate and distinct areas of administrative law, each one is subject to the supervisory control of the High Court. Through the centuries first the Court of Kings Bench (later the Kings Bench Division of the High Court of Justice) controlled acts of the administration in an ever increasing degree by means of the Prerogative Writs of Mandamus, Certiorari and Prohibition, and in exercising such control they developed the rules of natural justice, and in particular the rule audi alteram partem.

2. The scope of the right to be heard

(a) (i) (ii) In England, as contrasted with the United States of America, there is no one fundamental law of the Constitution, which gives a right to a hearing to anyone who may be adversely affected by an administrative decision.

The law of adjudicatory procedure in the United States starts with the 'Due Process' clause which exists in all American Constitutions.

'Due Process' requires reasonable notice of hearing, the right to be heard and to present evidence in all cases where an administrative decision could adversely affect the personal or property rights of an individual.

There is no such corresponding fundamental right in England. With the increasing complexity of a modern state there exists a host of matters calling for day to day adjudication, such as claims for benefit, planning appeals, compulsory purchase orders, which were unsuitable for decision by the ordinary courts and are heard by tribunals. In the background are the ordinary courts with supervisory jurisdiction.

Since the Tribunals & Enquiries Act 1958 where tribunals are set up under particular Statutes to deal with specialised branches of administrative law, they are required to submit their rules of procedure to the Council on Tribunals, one of whose tasks will be to see that due provision is made for a hearing at which interested parties can be heard.

(b) In the absence of specific provisions the law implies an obligation to grant a hearing to a person likely to be affected in the following cases -

(a) Where the tribunal has a procedure and function akin to that of the ordinary courts. The existence of a right of appeal to a higher administrative tribunal may also be taken as an indication that the original decision is to be made only after a hearing.

- (b) Where a body, for which no judicial or quasi judicial procedure is laid down, is empowered or required to decide matters analogous to lites inter partes, or the language by which its powers are conferred imply a duty to conduct an enquiry before coming to a decision, or it is empowered or required to determine disputable questions of fact and law and to exercise a judicial decision.
- (c) In Ridge v Baldwin (supra) it was said that the duty to observe the rules of natural justice should be inferred from the nature of the power conferred on the authority. In Durayappah .v Fernando (1967) 2 AC 337 it was suggested as a test of whether such duty should be inferred, that consideration should be given to (i) the nature of the complainant's interest that may be affected; (ii) the conditions under which the authority is entitled to encroach on the individual's interests; and (iii) the severity of the sanctions it can impose. Thus:
- (i) Nature of the interest affected.
Rights of property, personal liberty, status, immunity from penalties or other fiscal impositions are among the interests to which protection may be afforded, but this is far from being an exhaustive list. And since the Courts now, generally speaking, require decision makers to 'act fairly', it is impossible to define the interests, save in very general terms.
- (ii) The law will generally require fair procedural standards to be observed in cases where a finding of misconduct or incompetence would deprive a person of a legally recognised interest or where a person's reputation may be adversely affected.
- (iii) Sanction. The more severe may be sanction imposed as a result of a decision, the more inclined will be the Courts to imply the operation of the rule audi alteram partem.

Answering the 3 questions posed, the Courts will take into consideration

- (i) the nature of the organ of administration that takes the decision,
- (ii) the nature of the power exercised, and
- (iii) the fact that the decision may affect the personal liberty, the property, or the economic interest of the person to whom it is addressed.

(c) The right to a fair hearing

(i) Dismissal Cases

Before the case of Ridge v Baldwin (supra) there existed a labyrinthine mass of conflicting case law in which it was difficult to extract any settled principles. The problem was bedevilled by the older cases where the holder of a freehold office (which was equated with a property right) was entitled to a hearing before dismissal, as was the holder of an office only removable for cause shown, and those cases of pure master and servant where the master could dismiss his servant without cause and without a hearing, although in the latter case there might be a claim for damages for breach of contract by the servant.

In the case of Ridge v Baldwin (supra) Lord Reid reviewed the authorities and considered the question under three principles:

- (i) where the holder of an office was removable only for cause shown (whether misconduct, incompetence etc.), he was entitled to a prior hearing;
- (ii) where the office was held at pleasure, the holder had no right to a prior hearing;
- (iii) in a pure 'master and servant' case the servant had no right to a prior hearing, although he might have a claim in damages for wrongful dismissal.

Since 1961 the Courts have expanded the categories of persons entitled to a prior hearing, and in many cases the Courts have quashed or declared invalid dismissals which did not accord with natural justice. In Stevenson v United Road Transport Union (1977) 1 CR 893 the Court of Appeal granted a declaration against a Trade Union that the dismissal of a paid officer of that Union was invalid because he had not been granted a prior hearing to which he was entitled under the Union Rules. The Court held that the rules implied a right to a hearing because the official could only be dismissed for cause and that the charges brought against him were disciplinary by nature.

In many ways, by application of the 'fair play' rule the Courts are now prepared to hold invalid dismissals which have not complied with the rules of natural justice, and the older distinction between the office holder and the mere contractual servant has been eroded to vanishing point.

Statute has now overtaken Common Law. The Employment Protection (Consolidation) Act 1978 extends to every employee (with a few exceptions) of both public and private employees the right to be heard before he is dismissed, and in deciding whether his dismissal is unfair the industrial tribunals who hear such cases are required to have regard to the Code of Practice, issued by the Advisory, Conciliation and Arbitration Service, as approved by the Secretary of State for Employment

(ii) Disciplinary Cases

There are many cases, perhaps the majority, where Courts will set aside disciplinary decisions where there has been non-compliance with the rules of natural justice in that the complainant has not had a fair hearing.

In Trade Union cases the Courts have set aside disciplinary decisions made in breach of Union Rules and the rules of natural justice. Particularly is this so if the member has been expelled from the Union and his ability to earn his living has been affected (Taylor v National Union of Seamen (1967) J WIR 532). The right to a fair hearing will be enforced in those disciplinary proceedings before sporting bodies which have the right to fine and suspend for misconduct. Where a Transport Tribunal is considering the revocation or suspension of a carrier's goods vehicle licence, it is required to hold a public hearing. In the field of education, authorities are required to afford a student the right to be heard before taking disciplinary action, at least in the sphere of higher education. Thus, in Ceylon University v Fernando (1960) 1 WLR 223 the Privy Council, where a student had been expelled for cheating in an examination, proceeded on the assumption that the authorities were required to hold an enquiry and afford the student a right to be heard in accordance with the rules of natural justice. Quaere whether a headmaster must hold an enquiry before expelling a student from a school. There are authorities which state that he need not, but it is suggested that in accordance with the rule of fairness the Courts would hold that the student had a right to be heard.

It is submitted that at least in the field of higher education, the authorities have to comply with the rules of natural justice, provided that the sanction or penalty is so severe that it may affect the student's career, and the decision is based on other than academic attainments. Thus, if the university authorities have a discretion whether to refuse the re-admission of a student to a university they must afford the student the right to be heard. (Regina v Aston University Senate, ex parte Roffey, (1969) 2 QB 538).

(iii) The revocation or non-renewal of licences

The revocation of an existing license or the refusal to renew an existing licence is in a different category from the grant of a new licence because revocation or the refusal to renew may seriously affect the licence holder's future plans, cause him severe economic loss and even affect his reputation for integrity or honesty. Courts therefore will always be inclined to hold that the rules of natural justice apply and that an existing licence holder should be given the opportunity of a hearing before his licence is revoked or a renewal refused, and probably even if his licence is to be suspended for a period of time. There is a strong presumption that prior notice and the opportunity to be heard will always be implied, particularly if revocation or non-renewal may cause deprivation of livelihood or serious pecuniary loss. Variation of the terms of an existing licence will prime facie attract the rule of audi alteram partem, if the scope of the existing licence is to be cut down.

(iv) The grant of a licence

It is impossible to lay down a general all-embracing rule that all licensing authorities must obey the rules of natural justice.

If a licensing authority is constituted as a judicial or quasi judicial tribunal, or is required by the Statute constituting it to hear representations and objections before granting a licence, and a fortiori if there is a right of appeal to a higher administrative tribunal, the law readily infers that the rules of natural justice, together with the rule audi alteram partem apply.

On the other hand there are executive licensing authorities who are free from procedural duties and to whom the rules of natural justice do not apply. Thus, in awarding Government contracts, or in granting licences for television or commercial radio programme contracts, and financial grants to industry, the Government Department concerned do not have hearings, because policy (which is the sphere of politicians rather than judges) may govern their decision, and to have a hearing might unduly fetter the exercise of their discretion. Nevertheless, it is in accordance with modern outlook that such authorities in exercising their executive discretion should act 'fairly', but this is something imposed by public opinion rather than the Courts.

In between these two ends of this spectrum, there exists a large number of decision making bodies exercising licensing powers. Local Authorities regulate a wide range of trades and occupations under powers conferred by Statute, under which no duty to conduct a hearing or to bear representations by applicant or objectors is laid down. In what circumstances then will the Courts imply that the rules of natural justice apply? There is very little authority on this point. In Regina v Barnsley M.B.C. ex parte Hook (1976) 1 WLR 1052 the Local Authority acting under a Private Act revoked a stall-holder's market licence without a hearing, and it was held that their action offended against the rules of natural justice and the revocation was quashed. In New Zealand in Stininato v Auckland Boxing Association (Inc.) (1978) 1 NZ. LR 1, the Boxing Association refused to grant a discretionary licence without affording an opportunity to be heard and this was held to be a denial of natural justice.

(v) The expulsion of aliens

The Common Law took the harsh view that, in considering whether an alien should be deported the Secretary of State was under no implied duty to afford a hearing. In the Venicoff's case mentioned above the Secretary of State was empowered to make a deportation order if he deemed it to be 'conducive to the public good'. It was held that he was exercising purely executive functions, that his discretion was not fettered by considerations of natural justice. This decision was perhaps influenced by immediate post-war attitudes prevailing in 1920. But as late as 1962 the Court of Appeal reaffirmed the view that an alien deported has no implied legal right to a hearing. Both decisions were given at a time when the Courts were loath to apply the audi alteram partem rule in the sphere of administrative decision making.

The law has now been drastically altered by the Immigration Act 1971. If a deportation order is made against a non-patrial person (otherwise than on the recommendation of a Court), or if the Home Secretary refuses to revoke a deportation order already made, the alien may appeal to an adjudicator or to the Immigration Appeal Tribunal. The right is subject to certain exceptions i.e. that the deportation order is made on the ground that it is conducive to the public good, for security, diplomatic or political reasons (see 15 (3)) in which cases the alien is entitled to a non-statutory reference to a panel of 'Three Advisors'. Under the Prevention of Terrorism (Temporary Provisions) Act 1976 if an exclusion order is made, there is a right to make written objection to the Home Secretary, and to be given a personal interview by persons nominated by the Minister who must take their report into account when reconsidering the case.

- (d) Does the right exist in cases where the administrative decision is a discretionary one?

This is a subject on which the boundaries of the law have not yet been drawn with precision.

An authority may have a discretion whether to exercise a power, or a duty to exercise a power. If a discretionary power is not absolute, the authority exercising such discretion is under a legal duty to observe certain requirements that condition the manner in which the discretion is exercised. Thus, all statutory powers affecting private rights must be exercised reasonably, and if an authority acts unreasonably a Court may hold that it acts improperly. In many recent cases Courts have implied that there is a duty to act reasonably, and this implies a duty to adopt a fair procedure. It is implicit in a judicial discretion that the authority shall act impartially, give due notice to the person whose rights may be affected, and to hear any representation he may wish to make.

- (e) There are a number of exceptions to the rule of audi alteram partem. Thus:

- (i) It has been held by the Courts that an authority is not obliged to disclose relevant information to the party affected if it would be prejudicial to the public interest

In the past this has been carried to extremes. Courts have refused to compel Ministers to disclose to interested parties information obtained in the course of their duty which might interfere with the administrative process by destroying the anonymity of civil servants, discouraging frank comment, or their responsibility to Parliament. Thus, in planning cases Courts in the past have refused to compel the Minister to disclose reports of Inspectors on enquiries. This refusal do disclose prejudices the operation of the rule audi alteram partem.

The climate of judicial opinion has now changed, administration has become more open but Courts will still protect from disclosure information which would adversely affect national security, certain aspects of national policy, or information leading to the detection of crime.

- (ii) Where the obligation to afford a hearing would prevent prompt action, in circumstances where such action was necessary in the public interest.

Thus, if it is decided to prohibit the holding of a public procession or demonstration which might lead to violence or disorder, it is (probably) unnecessary to hear prior representations for the promoters.

- (iii) In the interests of public health an Inspector from the Ministry of Agriculture may destroy infected crops (Plant Health Act 1967). A dangerous nuisance may be abated. Contaminated food may be destroyed (White v Redfern (1979)). The boundaries of the law are ill defined, but in cases of urgency where prompt action is necessary to protect the public welfare it is thought that the authorities may disregard the audi alteram partem rule.

- (iv) Where the matter in issue or the monetary value of the interest is too trivial to justify an implication that there must be a hearing before the administrative authority takes action.

(3) The nature of the right to be heard

- (a) Failure to give adequate notice of a hearing to the person who may be affected by an administrative decision, or to give that person sufficient information so that he can prepare his case is tantamount to a denial of the opportunity to be heard.

A notice should therefore be given in good time, so that the person (a) should know the nature of the proposed administrative action; and (b) should have adequate time to prepare his case, and to answer the case made against him.

If there is to be an oral hearing the notice should also give the date, place and time of the hearing.

In those codes where rules of procedure are laid down, then the length of notice and the information required are specified. In those cases where the right to a hearing is implied by law, that requires that the person who may be affected by the decision should have reasonable notice.

- (b) So that a person may protect his interests he must have the opportunity of knowing the case that is to be presented against him. He must be enabled to controvert, correct or explain facts alleged, and an outline of the case against him should be given in the notice.

In disciplinary cases, particulars of the allegation against him should be furnished. If this information is not given him, then he may have the right to have the hearing adjourned. If relevant essential facts are not disclosed in the notice, so that person affected does not know the case against him, there is a prima facie breach of the rule of natural justice.

If the administrative tribunal holds an ex parte hearing, or holds ex parte inspections before, during or after the hearing, then there could be a strong case for setting aside the decision.

Whether the person who may be affected by the decision is entitled to see the whole or part only of an official file is dealt with in (5) infra.

- (c) The right to a 'hearing' generally means an oral hearing, but it also includes the right to make written representations. But where a Statute gives

a right to a 'hearing' this nearly always denotes an oral hearing, at which the person may conduct his own case, or be represented legally or by some person nominated by him. And, in the absence of a statutory right, where the rule audi alteram partem applies, the Courts will imply the right to an oral hearing. But there are a number of exceptions to this general rule, where the Courts have held that natural justice is satisfied if the person has had the opportunity to present his case by way of written representation.

- (d) It is only possible to answer this question at a high level of generality. Where a Minister is empowered to make a decision after the holding of a local enquiry at which all parties affected have been given the right to be heard, then those parties will not be heard again before the Minister makes his decision.

(4) The remedies for a denial of the right to be heard

Depending on the circumstances of the case, a decision reached in which the rule audi alteram partem has not been observed can be judicially reviewed by a Divisional Court of the Queens Bench and relief given by means of certiorari, prohibition, mandamus, an injunction or a declaration.

- (a) Whether a decision taken in breach of the rule is void or merely voidable has been the subject of endless academic discussion. In the case of Durayappah v Fernando (1957) it was held that the decision was voidable, that is to say it is valid until set aside or until quashed on judicial review. But there is a substantial body of authority to the effect that a breach of the rule goes to jurisdiction (or is akin to a jurisdictional defect) and renders a decision void. In the present state of the law

it is impossible to give a firm answer to the question, but the better opinion appears to be that the decision would be void ab iritio.

The remedies which may be granted when the right to a hearing has been established

(b) (i) (ii)

On an application for judicial review under R.S.C. Order 53 it is now possible for a Court to award in the proceedings any one or more of the prerogative orders of Certiorari, Mandamus, Prohibition, a Declaration or an Injunction. In addition the Court may award damages, but it seems only when the application includes one or more of the other forms of relief that may be granted on an application for judicial review.

Order 53 r.1 (2) provides that declaratory or injunctive relief may be granted on an application for judicial review if the Court considers that it is just and convenient so to do, having regard to the nature of the matters in respect of which Certiorari, Prohibition and Mandamus may be granted and of the bodies or persons against whom these prerogative orders may be obtained and all the circumstances of the case.

(c) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

The discretionary nature of the relief when a denial of the right to a hearing has been established

(d) As a general rule, on an application for judicial review the Court has a wide discretion whether or not to grant relief.

(1) Certiorari and Prohibition

The Courts have a discretion to refuse relief if circumstances justify the refusal. Thus, the Courts will not issue Orders that cannot possibly be implemented. Relief may be with-held for minor procedural irregularities that were unlikely to have affected the ultimate decision. On the other hand where there has been a major irregularity, such as a denial of the right to a hearing where the individual had a right to be heard, the Courts would usually exercise their discretion and quash the proceedings.

(ii) Mandamus

This has always been regarded as an extraordinary, residuary remedy to be granted only when there is no other way of obtaining justice. Even though all the other requirements for securing the remedy have been satisfied by the applicant, the Court will decline to exercise its discretion if there is available a specific alternative remedy which is "equally, convenient, beneficial and effectual". Re. Barlow (1861) 30 LJ QB 270.

Since the remedy is entirely discretionary, it may be refused in a wide variety of circumstances. For example it has been refused where it would be impossible in law or in fact for the respondent to comply with the order, or where there is no practical possibility of enforcing obedience, or where the Court is of the opinion that no con-

ceivable benefit would accrue to the applicant. In the context of the present paper it is unlikely that the relief of Mardamus would be sought to remedy the evil that an individual has suffered by being denied a hearing. The correct remedy would be Certiorari to quash the proceedings.

(iii) Declaration & Injunction

In deciding whether a case is one in which Declaratory or Injunctive relief ought to be granted the Courts exercise the widest discretion. There is no exhaustive catalogue of the factors to which the Courts should have regard when exercising their discretion, but if a declaration or injunction were the appropriate remedies it would be unlikely that the Courts would exercise their discretion to refuse relief to an applicant who had been denied a hearing.

(e) (i)

In theory, if the Court was of opinion that although the right to a hearing had been denied, the tribunal must have arrived at the same decision, it could refuse the relief which is discretionary. However it is very difficult to envisage any case in which the applicant had a right to a hearing and this had been denied him, where the Courts would refuse relief.

(ii) If a tribunal or administrative body arrived at a decision without hearing the applicant, the applicant would claim relief from the ordinary courts or, if the appeal to a higher administrative tribunal was by way of rehearing, he could appeal to that tribunal. If he were again refused a hearing, he could then claim relief from the ordinary courts.

(f) Before an application for judicial review can be heard, leave must first be obtained, and this will only be granted if the applicant has 'a sufficient interest'. What is 'a sufficient interest' must be decided on the facts of each particular case, but it is almost impossible to envisage a situation where the applicant would be refused leave if he had been denied a right to a hearing.

(5) The right to be heard in the context of an application to review an administrative decision

(a) The right to obtain disclosure of official documents

In recent years there has been complaint about the difficulty of access to information in the possession of the Government, and although the position has been substantially improved, it is still not completely satisfactory. Much might be learned from the American Freedom of Information Act. The pressure of public opinion in addition to recent decisions of the Courts has done much to remedy what was formerly an unsatisfactory state of affairs.

Until the second world war the Courts recognised that the Crown's power to forbid the disclosure of information was not absolute. The Crown was entitled to claim that certain matters could not be investigated in Court because it would be contrary to the public interest. But in the last resort the Courts could always disallow such claim if it appeared unjustified. But in Duncan v Cammell Laird & Company Limited (1942) AC 624 the House of Lords held that a Ministerial claim of privilege was absolute and could not be questioned. This decision, on its particular facts, was fully justified, since the claim related to the plans of naval submarine and was given in war time. But this ruling, which

was of general application, proved a serious handicap to the administration of justice, and Government departments sought to justify their refusal to make disclosure over a wide range of subjects. As Lord Radcliffe said in Glasgow Corporation v Central Land Board. 1956, SCL, privilege from disclosure was being extended to cover 'everything however commonplace that passed between one civil servant and another'.

The position became untenable, and under the increasing pressure of public opinion the Government made administrative concessions, undertaking not to claim privilege in a wide class of case. These were merely administrative concessions, and it was not until 1968 that the House of Lords went back on its earlier decision and restored the position to what it had been prior to the second world war. In Conway v Rimmer (1968) AC 910, a junior police officer had brought an action for malicious prosecution against a superior officer, and in the course of preparation of the case his legal advisors required to see the reports made on him in the Police Service. The Home Secretary claimed the right of privilege from disclosure. The house of Lords disallowed the claim of privilege, inspected the documents and said they could not see any possible ground for privilege. In this case the law was comprehensively reviewed, and where a claim or privilege is made by a government Department, either central or local, the Courts will inspect the documents, and then decide whether the claim made in the interests of secrecy outweighs the public interest in doing justice to the litigant.

Although Conway v Rimmer destroyed the legally unreviewable power of a Minister of the Crown to object in the public interest to the admission of evidence, it is clear that the Courts may exclude evidence, not

merely on the ground that to admit such evidence would impair the effectiveness of authorities other than departments of central government or hinder the performance of public functions by non-governmental bodies. (R v National Society for the Prevention of Cruelty to Children (1978) AC 171).

In particular discovery will normally be refused for documents supplying confidential information by private individuals to the Revenue Authorities, or confidential information supplied by informers to the Police authorities. To grant discovery might well dry up the sources of such information in the future.

(5) (b)

If an applicant for judicial review is a person with 'a sufficient interest', and leave has been granted, no difficulty arises. But there may be case where the person wishing to bring the action relies upon injury not to himself as an individual, but to a larger group or collectivity of which he is a member. There is evasive but useful device known as 'a relator action', in which the Attorney General sues in his own name but at the relation (i.e. at the instance of) some private person or body of person. Over the centuries a practice has grown up whereby the Attorney General will lend his name to the proceedings brought in fact by a private person or a body of person. The relator action has been a standard procedure whereby rate payers can challenge the lawfulness of public expenditure. A typical case was where the London County Council attempted to open a bus service where they were only entitled to operate a tramway, and their decision was successfully challenged by a rural bus company who were also rate payers. (London County Council v Attorney General (1902) AC 165.

Where a person has been denied a hearing, he would have sufficient interest to apply for judicial review, and it is difficult to see the necessity for a relator action. Third parties who wished either to support or challenge the administrative action could not be heard, unless they were expressly made parties to the action.
