The Role of Natural Justice in Regulating the Exercise of Administrative Discretion: A Critical Reflection

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1. Introduction

[...] discretion is itself governed by rule, because it cannot exist unless it is permitted, expressly or implicitly, by a rule of law; and there are further rules of law which control its exercise, the principal of them being that discretion must be used after proper consideration of evidence and with reference to relevant considerations—in short, not at will or at whim, but in a 'judicial manner'; and there is a mass of law concerned with determining what is and what is not a 'judicial manner.'

----*SIR C K ALLEN*

The concept of natural justice is thought to be one of the most revealing features of the modern system of administrative law. In the domain of administrative decision-making, the term 'natural justice' is often explicated as a network of some procedural norms offering the standard of what Professor Allen calls 'judicial manner.'[1] To make administrative decision in a judicial manner is a precondition of exercising discretionary powers. And the principles of natural justice provide the mechanism of observing this precondition.[2] In fact, the major concern of these principles relates to the purpose of striking a suitable balance between the bestowing of wide discretionary power and the mechanism of controlling its exercise.

To many, the term 'natural justice' may however come as misleading in that there is nothing necessarily "natural" about justice, and often very little justice in nature.[3] To argue in this way, they usually wonder what useful purpose is actually served by subjecting a governmental decision to a ground of judicial review concerned not with the content or substance of a given decision, but with the way the decision was made. This prosaic concern can however be relaxed by a counter-argument that the doctrine of procedural fairness (or principles of natural justice as generically described) is essentially intended to maximize the possibility that the

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1 Sir Carleton Kemp Allen, *Law in the Making*, (Oxford, Clarendon Press, 1964) 347.

2 William F West, 'Structuring Administrative Discretion: The Pursuit of Rationality and Responsiveness' 28(2) *American Journal of Political Science* 340, 342.

3 Michael T Molan, *Administrative Law* (London: Old Balley Press, 2004) 134.

decision making process produces 'correct outcomes.'[4] Moreover, it is also arguable that this doctrine of procedural fairness comes to satisfy the standards of the rule of law which demands that wide discretionary power should not be eliminated, but there should be a mechanism to control its exercise.

To traditionalists, the phrase 'natural justice' encapsulates two ideas: that the individual be given adequate notice of the charge and an adequate hearing; and that the adjudicator be unbiased. Both of these ideas are suggestive of clear and immutable principles governing administrative procedures. Strictly applied, the content of these principles, however, signifies a core concern that the court will often take the view of nullifying the decision of any administrative body simply on the ground that it has not followed a fair procedure in arriving at its conclusion as to how it should exercise its discretion.[5] In other words, a decision that has been arrived at following the adoption of an unfair procedure will be *ultra vires* in theory as well as in practice.[6] It is thus clear that the principles of natural justice occupy a unique place in administrative law as an independent branch of the *ultra vires* doctrine.

Further, the principles of natural justice have in general been developed at common law by the courts as central to the idea of rule of law.[7] In English law, they perform a somewhat similar function as covered under the concept of procedural due process in the United States. There is, however, an essential difference between the legal and constitutional implication of the principles of natural justice in two major jurisdictions.[8] The Constitution of the United States contains the due process clause, thereby giving constitutional sanctity to the rules of natural justice.[9] Under English law, the principles of natural justice are thus grounded on moral and ethical foundation as embodied in 'the justice of the common law,' which simply supplies the omission of the legislature.[10] However, in the Indian subcontinent, the principles of natural justice stand on the same

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4 Ian Loveland, *Constitutional law, Administrative Law and Human Rights: A Critical Introduction* (New York: Oxford University Press, 2009) 484.

5 Robert E Scott 1972, 'The Reality of Procedural Due Process-A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker' (1972) 13(4) *William and Mary Law Review* 726.

6 Abdullah Al Faruque, *Natural Justice: From Principles to Practice*, (Dhaka: Palal Prokashoni, 2013) 19-28.

7 John Alder, *Constitutional and Administrative Law, (*New York: Palgrave, 2007) 406.

8 Thus, it is now hard in the United States to relieve the administration from their demands. In England, unlike the United States, the theory of parliamentary sovereignty precludes any such notion, and only the express provisions in a statute can dispense with the requirement of natural justice in a given case.

9 Frederick F Schauer, 'English Natural Justice and American Due Process: An Analytical Comparison' (1977) 18(47) *William and Mary Law Review* 52.

10 M A Fazal, *Judicial Control of Administrative Action in India, Pakistan and Bangladesh*, (India: The Law Book Company (Pvt.) Limited, 1990) 191-192.

footing as in English law. There is no constitutional sanctity attached to these principles as it is in the case of the United States. Thus, any express words in the statute can exclude their applications in particular cases. In such a situation, it is unlikely for the courts to ever add the injunction that the power must be exercised fairly. The courts, however, derive their jurisdiction in relation to natural justice by treating it as an 'implied precondition' to the exercise of statutory powers. Thus, difficulty may arise for the courts to apply the rules of natural justice, because the application of these rules itself is a matter of considerable discretion. This paper is an attempt to examine the experiences of how the court takes the challenge of using the rules of natural justice to diminish arbitrary exercise of administrative discretion. More importantly, it will focus on the development and application of some unavoidable or immutable rules which the courts have achieved over time to ensure the modicum of fairness in the sphere of administrative decision-making. And finally, this paper will examine as a case study the efficacy of such principles in striking the most suitable balance between administrative efficacy and legal protection of the citizen's rights in the context of Bangladesh.

2. The Concept of Natural Justice: From Formation to Judicialization

The formation of the concept of natural justice can be traced back to the philosophical stipulations of the Roman jurists of the Antonine age.[11] At the stage of its formation, the concept of natural justice was intended to denote a sense of justice based on the guidance of nature. In practice, natural justice was thought to consist in universal judgments which man himself elicits within the social frame to bring into the community the concept of fairness to be fused into the field of social activities.[12] Seen in this light, the rules of natural justice can be found to develop with the growth of civilization and social justice.

With the passes of time, the concept of natural justice plays a vital role in shaping the sphere of legal justice. In effect, the codification of various rules of natural justice in the legal instruments has blurred the distinction between the natural justice and legal justice.[13] At present, the domain of natural justice has thus been confined to the 'uncodified norms' of judicial conduct to which all tribunals and persons giving judicial and quasi-judicial decisions ought to confirm. In what follows, there is a brief description of how the concept of natural justice was confined to the breath of judicialization, and what this concept offers in the process of administrative adjudication.

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11 C K Thakker, *Administrative Law* (India: Eastern Book Company, 1996) 161.

12 D J Mullan 'Fairness: the New Natural Justice' (1975) 25(3) *University of Toronto Law Journal* 281-316, 290.

13 Hilaire Barnett, *Constitutional and Administrative Law,* (London and New York: Routledge Cavendish, 2009) 682.

2.1. Natural Justice and Administrative Justice: A Functional Dichotomy

The concept of natural justice is elastic and is not susceptible of any precise definition.[14] In the jurisprudential parlance, the term 'natural justice' is often used interchangeably with the concept of divine law, *Jus Gentium* or *Jus Nataurale*. In this sense, natural justice may mean simply 'the natural sense of what is right and wrong,' and even in its technical sense it is now equated with 'fairness.' However, the earliest usage of the term 'natural justice' appeared during the seventeenth and eighteenth centuries, when the principles of natural justice were found to be the corollary to the concept of natural law.[15] At that time, natural justice was more than the general jurisprudential concept the term now denotes.[16] Even at present, the term natural justice implies some higher laws of nature containing substantive universal values like fairness, reasonableness, equity or equality.

But in administrative law, only the precise or narrower meaning of the term 'natural justice' is accepted. According to its narrower aspect, natural justice is suggestive of some clear and fundamental principles governing fair procedure. This position has been clarified by Lord Shaw in the seminal case of *Local Government Board v Arlidge*.[17] In this case, he denies the possibility of accepting the term natural justice in its broader sense and observes that:

This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is harmless...In so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous.[18]

This observation of Lord Shaw clearly suggests that the concept of natural justice do have a very limited connotation for the purpose of administration of justice. In administrative law, the notion of natural justice is recognized only to the extent of crafting the domain of procedural fairness doctrine.[19] This doctrine does not concern about the standard of

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[14] M.P. Jain & S. N. Jain, *Principles of Administrative Law*, (India: Wadhwa and Company Law Publishers, 2003) 219.

[15] J. A.C. Grant, 'The Natural Law Background of Due Process' (1931) 31(56) *Columbia Law Review* 56-81, 67.

[16] Frederick F. Shauer 'English Natural Justice and American Due Process: An Analytical Comparison' (1976) 18(1) *William and Mary Law Review*, 18(1) 47- 72, 54.

[17] [1915 AC 120].

[18] Cited in A. K. Brohi, *Fundamental Laws of Pakistan*, (Karachi: Din Muhammad Press, 1958) 122.

[19] Lawrence B Solum, 'Natural Justice' (2006) 51(65) *American Journal of Jurisprudence* 70.

substantive justice; rather it propels the court to produce a paradigmatic code of procedural justice. As regards the function of the principles of natural justice, Sir William Wade thus comments that "[j]ust as they [courts] can control the substance of what public authorities do by means of the rules relating to reasonableness, improper purpose, and so forth so through the principles of natural justice they can control the procedure by which they do it."[20]

It is interesting, however, to note that the Rawlsian approach to justice may be found to bridge the understanding of the requirement of procedural justice with the realm of substantive justice. Rawlsian' idea of 'justice as fairness' denotes that justice has to be seen in the terms of the demands of fairness.[21] According to him, the notion of fairness must be taken as fundamental, and in some cases, as a 'priori' to the development of the principles of justice. This idea of fairness must fundamentally relate to the demand of avoiding bias in our evaluations.[22] In broader sense, fairness can be seen as a demand of impartiality. This Rawlsian approach seems to suggest that the procedural norms of natural justice may result in opening the door of substantive justice. Seen in this light, it is thus arguable that the narrower sense of natural justice, as used in the arena of administrative law, has an obvious resemblance with the broader sense of universal justice.

2.2. The Defining Features of Natural Justice: Justice in the Guise of Procedural Rights

In the sphere of administrative law, the courts constantly react against arbitrary exercise of discretionary powers by devising some means of preserving legal principles of control. In doing so, they have woven 'a network of restrictive principles' which require statutory powers to be exercised reasonably and in good faith, and for the proper purpose only. These stringent procedural requirements have been historically developed under the nomenclature of natural justice. In other words, the principles of natural justice are common law product, which have been mostly devised by the courts to prevent accidents in the exercise of outsourced power of adjudication to the administrative authorities. For convenience, it has also been discussed that the term procedural fairness is thought to be preferable when talking about administrative decision-making, because the term natural justice is mainly associated with procedures used by the courts of law.

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20 Sir William Wade and Christopher Forsyth, *Administrative Law*, (New York: Oxford University Press, 2008) 128.

21 John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly edited, (Cambridge, MA: Harvard University Press, 2001).

22 In particular, it means taking note of the interest and concerns of the other as well, and the need to avoid being influenced by our respective vested interest, or by our personal priorities, or prejudices.

Many a times, the statute under which an adjudicatory body functions may itself lay down an elaborate procedure which the administrative agency must follow while exercising decision-making powers. But usually the relevant statute may either be completely silent or may lay down some dubious procedural norms or may make the authority free to devise its own procedure. In many such cases, the court insisted that the administrative agency must follow a minimum of fair procedure. In the parlance of administrative law, this irreducible minimum procedure is often referred to as the principles of natural justice.

Seen from this perspective, many writers have attempted to define the kernel of natural justice. Professor William Wade defines the term natural justice as "the name given to certain fundamental rules which are so necessary to the proper exercise of power that they are projected from the judicial to the administrative sphere."[23] According to Professor Massey, "[t]he concept of Natural justice represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual."[24] In a similar way, Justice Amin Ahmed clarifies the defining feature of natural justice with reference to the court's practice. In his book, *Judicial Review of Administrative Action in Pakistan*, he comments that:

The principles of natural justice were considered to be those rights in Pakistan which were laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure adopted by a judicial, quasi-judicial or administrative authority while making an order affecting the rights of private citizens. These rules were intended to prevent decision making authorities from doing injustice.[25]

This position has been firmly established in the judicial sphere. In Indian jurisdiction, the famous case of *A. K. Kraipak v. Union of India*[26] portrayed the same image of the principles of natural justice by establishing that "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by the any law validly made. In other words they do not supplant the law of the land but supplement it."[27]Given this, the

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23 H W R Wade, 2011. *Administrative Law*, at, p. 154 cited in Dr. S. M. Hassan Talukder, *Development of Administrative Law in Bangladesh: Outcomes and Prospects* (Dhaka: Bangladesh Law Research Centre, 2011) 137.

24 I. P. Massey, *Administrative Law* (Lucknow: Eastern Book Company, 2008) 196.

25 Mr. Justice Amin Ahmed, *Judicial Review of Administrative Action in Pakistan* (East Pakistan: Dacca University) 1969, 11.

26 (1969) 2 SCC 262: AIR 1970 SC 150.

27 Cited in C. K. Takwani, *Lectures on Administrative Law* (Lucknow: Eastern Book Company, 2008) 173.

defining features of natural justice thus signify that the rules of natural justice are originated from the absence of legally prescribed procedure, being mostly the outcome of judicial achievement. In practice, they actually provide a paradigmatic code of fair procedure used by a decision-maker, requiring that the rules of procedure be used at the time of making an administrative decision.

2.3. The Appeal of Procedural Justice: Rationalizing the Exercise of Discretionary Power

There is no denying that natural justice has a wide general application in the numerous areas of discretionary administrative power. For however wide the powers of the state and however extensive the discretion they confer, it is always possible to require them to be exercised in a manner that is procedurally fair. A judge of the United States Supreme Court has said: "[p]rocedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."[28] Another judge has also said: "[t]he history of liberty has largely been the history of the observance of procedural safeguards".[29] Thus, procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable.

One may however wonder about the rationale of process rights in adjudication. In this respect, he/she may argue that if the outcome of the decision-making process neither illegal nor irrational, it would be entirely possible for the government body (whose decision may be unlawful because of procedural flow) to remake the decision, correcting its procedural error, and to produce precisely the same procedural result. Two forceful arguments may be asserted to rebut this proposition.[30]

The first argument speaks to the *instrumental role* of procedural rights which emphasizes on the connection between the substance of a decision and the way in which the decision is made.[31] Professor Ian Loveland describes as follows how procedural rights perform an instrumental role:

An insistence on a particular type of procedure may enhance the likelihood that the content of the decision is not just legal/rational in the narrower sense, but that it represents—if not best choice—then at least a good choice within the range of alternative open to the government body.

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28 *Shaughnessy v. United States* (1953) 345 US 206 (Jackson J).

29 *McNabb v. United States* (1943) 318 US 332 (Frankfurter J).

30 Ian Loveland, *Constitutional law, Administrative Law and Human Rights: A Critical Introduction.* (New York: Oxford University Press, 2009) 483.

31 P.P. Craig, *Administrative Law.* (London: Sweet & Maxwell, 2003) 408.

There is no cost-iron guarantee that this happy state of affair would be achieved, but there is a fair probability that this would occur.[32]

The second argument focuses on the *non-instrumental* justification for procedural rights, which concerns the intrinsic importance of fair procedure. This argument maintains that formal justice and the rule of law are enhanced, in the sense that the principles of natural justice help guarantee the objectivity and impartiality.[33] According to this view, the individuals intimately affected by a particular decision will be more likely to accept its legitimacy, if they are told to be treated with sufficient degree of seriousness and respect by the relevant decision-maker. More importantly, procedural rights are seen as uprising human dignity by ensuring that the individuals are protected from the arbitrary or capricious treatment of the administrative authority. [34]

2.4. Natural Justice and Doctrine of Implied Limitation: The Effect of Non-observance

The doctrine of implied limitation constitutes a rule of administrative law relating to jurisdiction, which points that every grant of power is limited both expressly and impliedly by the nature of the grant.[35] In other words, a discretionary power must be exercised in a manner that maintains the balance between executive efficacy and protection of individual rights by following those explicit and inherent limitations necessary to promote the scheme and design of the particular instrument. The principles of natural justice maintain a 'functional equivalence' with this doctrine of implied limitation. Thus, it can be found that there are both broader and narrower aspects to consider the effect of the non-observance of the rules of natural justice.

The narrower aspect is that the rules of natural justice are merely a branch of the principles of *ultra vires*,[36] and should really find their home within the mechanism of preventing the abuse of discretionary power. The violation of natural justice is then classified as one of the varieties of wrong procedure, or abuse of power, transgressing the implied conditions which the parliament is presumed to have indented. Just as a power to act 'as he thinks fit' does not allow a public authority to act unreasonably and in bad faith, so it does not allow disregard to the elementary doctrine of fair procedure.

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32 Loveland, above n 30, 483

33 Craig, above n 31, 408.

34 Ibid.

35 Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (India: Oxford University Press, 2009) 173.

36 O. Hood Philips, Paul Jackson *Constitutional and Administrative Law* (London: Sweet and Maxwell, 2001) 707.

In this respect, Lord Selborne once said: "[t]here would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."[37] Similarly, the Privy Council has also said that 'it has long been settled law' that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision making authority. The same view has been expressed by Lord Russel while he has observed in the case of *Fairmount Investment Ltd v Secretary of State for the Environment*[38] that "it is to be implied, unless the contrary appears, that Parliament does not authorize the powers in breach of the principles of natural justice, and that Parliament does by the Act require the particular procedure complying with those principles." Quoting these words, Professor William Wade thus comments that violation of natural justice makes the decision void, as in any other case of *ultra vires*.[39] He also says that the rules of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.[40]

In its wider aspect, the effect of non-observance of the rules of natural justice depends upon the determination of another vital question: how far is it right for the courts of law to try to impart their own standard of justice to the administration? The general view has been that since the special powers to decide dispute are vested in administrative bodies with the very object of avoiding the forms of legal process, there should also be a residuum of legal procedure which ought never to be shaken off from the process of administrative decision-making. In this respect, Professor William Wade gives the following observation:

The judges have long been conscious of this problem, and it prompted them to some of their more notable achievements. Rules of common law, which became in effect presumptions to be used in the interpretation of statutes, developed and refined the rules of natural justice over a period of centuries. Since the decisions to which the rules apply are various they have to be flexibly applied and their precise content depends on the circumstances. But their general applicability to governmental action is today never doubted.[41]

It seems that that the principles of natural justice can be attracted whenever a person suffers a civil consequence or a prejudice is caused to

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37 *Spackman v. Plumstead District Board of Works* (1885) 10 APP. Cas. 229, 240.

38 (1976) 1 WLR 1255, 1263.

39 Wade and Forsyth , above note 20. 437.

40 Ibid.

41 Ibid.

him by any administrative action.[42] Thus, the effect of the non-observance of the rules of natural justice depends upon the test on the touchstone of prejudice:[43] if breaches of natural justice result in prejudicing the rights or legitimate expectation of the citizen, it will have the effect of rendering the decision void in the absolute sense. And the infringement of natural justice in this sense would be a ground of challenge in both collateral and direct proceedings for review.[44]

3. Two Principles of Natural Justice: "the Shield and the Sword" against Abuse of Discretion

The principles of natural justice or fundamental rules of fair procedure governing administrative action are neither fixed nor static in nature. Thus, it was rightly stated in the famous English decision of *Abbott v Sullivan*[45] that "the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define." For centuries, the practice of the courts on the question of procedural fairness has however contributed to shape up the principles of natural law into a concrete form.[46] Thus, in the arena of administrative law, natural justice has turned to be a well-defined concept which comprises of two fundamental rules of fair procedure.

The first rule is often referred to under the Latin maxim as *audi alteram partem*; the literal translation is that 'the other side must be heard.' And it is generally taken to mean that a person affected by a governmental decision should be afforded some opportunity to present his cause to the decision-maker and should be given a reasonably clear indication of the case that may be made against him. The second rule—often referred to under the level *nemo iudex in causa sua* (literally, no one shall be judge in her own cause)—addresses the question of to what extent it is permissible for a decision-maker to have or to be suspected to have a personal bias in respect of a decision he has made. In history, these tow rules of natural justice are placed so high that the breach of them has always been recognized by the courts as a valid ground of challenging any action affecting individual rights. Some of the earliest reported case shows that

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42 Civil consequence means infraction of personal or property rights, violation of Civil liberties, material deprivation or sufferance of non-pecuniary damages.

43 M.B. Akehurst,'Void or Voidable- Natural Justice and Unnatural Meaning'1968 31(1) *The Modern Law Review*, 2-15, 9.

44 Fazal, above note 10, 232.

45 (1952) 1 K.B.189,195.

46 The rules requiring impartial adjudicators and fair hearing can be traced back to medieval precedents, and indeed they were not unknown in the ancient world. It is, however, believed that the principles of natural justice have been accepted as early as the time of Adam and Eve. According to the Holy Bible, when Adam and Eve were accused of disobeying God's command (not to take the forbidden fruit of knowledge), God passed sentence on them only after they were called upon to defend themselves.

the courts constantly applied these rules of procedural fairness that are still readily recognizable today. In the follows, some of these illustrative cases will shortly be discussed with a view to providing a brief outline of how these two rules of natural justice emerged with a historical need of regulating the exercise of administrative discretion.

3.1.1. The Rule against Bias: The Shield for Objectivity and Impartiality

The first principle of natural justice consists of the rule against bias. The main premise of this principle is that decisions should be made free from bias or interest. This principle indicates that an adjudicatory authority is required to be unbiased and neutral so that he may be in a position to apply his mind objectively in deciding the dispute before him.[47] According to this principle, a judge must be in a position to act judicially and to decide the matter objectively. Thus, if the judge is subject to bias in favour of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a judge, and the proceedings will be vitiated.[48]

Literally, the term 'bias' means an operative prejudice, whether conscious or unconscious, in relation to a party or issue. Such operative prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open.[49] According to I.P. Massey:

Bias may be generally defined as partiality or preference which is not founded on reason and is actuated by self-interest—weather pecuniary or personal....the requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record.[50]

It is therefore clear that the rule against bias strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. This rule is founded upon the propositions that: 'no man be a judge in his own cause', and also that 'justice should not only be done but should manifestly and undoubtedly be seen to be done'. Thus, this rule against disqualification is applied not only to avoid the possibility of a partial decision but also to ensure public confidence in the impartiality of administrative adjudicatory process.

The minimal requirement of the rule against bias is that the authority must be composed of impartial persons acting fairly, without prejudice and bias. This rule against bias speaks of a fair foundation of exercising

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47 Jain and Jain, above n 14 p. 220.

48 Takwani, C. K. 2008. *Lectures on Administrative Law.* Lucknow: Eastern Book Company, at p. 178.

49 Massey, above n 24, 201.

50 Idid.

administrative power. In this manner, the rule provides a guarantee of objectivity and impartiality. By ensuring impartiality, objectivity and public confidence in the process of administrative decision making, the rule against bias thus works as a shield against the arbitrary exercise of discretionary powers.

Historically, this first limb of procedural fairness—the rule against bias——was first surfaced in 1610 in *Dr Bonham's Case.*[51] The fact of this case was that Dr Bonham was convicted to fine and imprisonment by the Royal College of Physicians on the ground that he had continued to practice in London after being refused permission to do so by the College. In the suit brought by Dr. Bonham challenging the legality of the decision of the College, Justice Coke relied on the Latin maxim *quia aliquis non debet esse Iudex in propria causa* (which is more familiar in the form of *nemo Iudex in causa sua*), and said that "[t]he censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture..."[52]

In the case of *Day v Savadge,*[53] the rule against bias was characterized as a kind of natural or constitutional limit upon discretionary power of the parliament in 1814. In this case, Lord Chief Justice Hobart asserted the rule, when he said that a statute made against equity so as to make a man Judge in his own case is void in itself. In observing so, Justice Hobart had, however, articulated the ideal (that a person could not be a judge in his own cause) under the guise of natural law. The case of *City of London v Wood*[54] is also an example, where Chief Justice Holt reaffirmed the rule against bias as an expression of the natural law. In this case, Chief Justice Holt expressed support for *Dr Bonham's Case* saying:

... it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party.[55]

The rule against bias was dramatically deployed against the Lord Chancellor himself in *Dimes v Grand Junction Canal*[56] in 1852, where the House of Lords set aside a decision involving a canal company in which the Lord Chancellor, who had presided, was a shareholder. By the middle of the 19th century, the rule of unbiased tribunal was thus established beyond controversy. Recently, the House of Lords has come to revisit the question relating to this rule in 1999.[57] The case concerns the trial of

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51 (1610) 8 Co Rep 113b [77 ER 646].

52 (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

53 (1614) Hob 85 at 87 [80 ER 235 at 237].

54 (1702) 12 Mod 669 [88 ER 1592].

55 12 Mod 669 at 687-688 [88 ER 1592 at 1602] and see, Hamburger, fn 29 at 2092.

56 [1852] 3 HLC 759.

57 *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

Augusto Pinochet, the former dictator of Chile.[58] One of the intervenors in the case was Amnesty International. And Lord Hoffman, who sat on the case, was a director of a related organization, Amnesty International Charity Ltd. Thus, the decision of this case was finally set aside on the principle that a judge who was a party to an action or had a financial proprietary interest in its outcome was automatically disqualified from hearing it.

3.1.2. The Rule of Fair Hearing: The Sword that Cuts Off the Shade

The second limb of natural justice is that both sides should be heard: *audi alteram partem.* This rule ensures that no man should be condemned unheard. This is the far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing. But in deference to the traditional dichotomy, that rule has already been treated separately. The right to a fair hearing requires that individuals are not penalized by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the cases against them, a fair opportunity to answer, and the opportunity to present their own cases.[59]

This rule of natural justice intends to prevent the authority from acting arbitrarily and thereby adversely affecting the rights, interest and legitimate expectations of the concerned persons.[60] Towards this end, this rule requires various procedural norms to be observed at the various stages, spanning from serving notice to the final determination of an administrative issue.[61] The right to fair hearing thus includes, right to notice, right to present case and evidence, right to rebut adverse evidence, and right to reasoned decisions or speaking orders.

The rule of fair hearing constitutes the core of the procedural fairness doctrine.[62] As this rule speaks for a network of procedural norms to be observed in the decision-making process, it virtually works like a sword to cut off all the shadows surrounding the source and sanctity of a particular administrative action. In this manner, this rule of fair hearing helps uprising human dignity by ensuring that the individuals are protected from the arbitrary or capricious exercise of the administrative discretion. It is for this reason that the right to a fair hearing is now considered as a

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58 *R v Bow Street Metropolitan Stipendiary Magistrate: Ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61.

59 Hlophe, John. 1987. "Legitimate Expectation and Natural Justice: English, Australian and South African Law", 104 *S. African L. J.* 165.

60 Dr. Kailash Rai, *Principles of Administrative Law* (Faridabad: Allahabad Law Agency, 2004) 181.

61 Talukder, above n 13, 139.

62 Hlophe John, 'Legitimate Expectation and Natural Justice: English, Australian and South African Law' (1987) 104(165) *African Law Journal,* at p. 167.

rule of universal application[63] to be followed in the case of administrative acts or decisions affecting individuals' rights.

Historically, the rule of fair hearing was lingered into the seventeenth century and faintly even into the eighteenth century. It has, however, reached its high water-mark during these centuries as is demonstrated by some seminal cases of Common law.[64] In the Common Law jurisdiction, the hearing rule was basically inferred from the provisions of the Magna Carta that "[n]o free man shall be taken or imprisoned, ruined or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[65]

In a famous case concerning municipal misbehavior, Chief Justice Coke is found to play a leading role in stretching this provision of the Magna Carta to include the application of the rule of fair hearing. This case is popularly known as Begg's Case,[66] where disfranchisement of a freeman of Plymouth was declared void because he was not given a hearing prior to this privilege being revoked. On the question of how and by whom and in what manner a citizen or burgess should be disenfranchised, Coke CJ said:

...although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without ... hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party ... [67]

In asserting the hearing rule in this case, Justice Coke has actually observed that 'no man ought to be condemned without answer.'[68] In fact, it was a foray by Coke into a review of local government decision-making in 1615, which forcefully asserted the rule.[69] Apart from the provision of Magna Carta, Justice Coke has, however, found the moral basis of inferring the rule from the message of Seneca's tragedy, the Medea, which read: "[w]ho ought decrees, nor heares both sides discust, [d]oes but unjustly, though his [d]oome be just."[70] The major promise of this message lies on the proposition that that even though a decision be right, it is not just if made without the decision-maker first hearing from the person to be affected by it.

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63 See, article 10, *Universal Declaration of Human Rights*, 1948.

64 HH Marshall, *Natural Justice* (London: Sweet and Maxwell Ltd, 1959) 18-19.

65 JC Holt, *Magna Carta*. (London: Cambridge University Press, 1992) 461.

66 *Bagg's Case* (1615) 11 Co Rep 95b [77 ER 1271 at 1275]

67 *Bagg's Case*, at 99a [77 ER 1271 at 1279-1280].

68 Co Inst IV, 37 cited in Marshall , above note 64, fn 5, at p 18.

69 Robert S French. 2010. "Procedural Fairness – Indispensable to Justice?" *Sir Anthony Mason Lecture* the University of Melbourne Law School, Law Students' Society, 7 October 2010.

70 ES Esq, *Medea: A Tragedie* Englished (1648).

This procedural requirement for a hearing in *Bagg's Case* paves the way of outweighing any consideration of the merits of the decision under review. Thus, the rationale of this case continues to be reflected in the cases relating to the review of administrative decisions. *R v Chancellor of the University of Cambridge (Dr Bentley's Case)*[71] is a frequently cited case that exemplifies the application of this rule in the decision under review. In this case, Dr Bentley was summoned to appear before a University court in an action for debt. But Dr Bentley said the process was illegal, and that he would not obey it. He was then accused of contempt and without further notice deprived of his degrees by the congregation of the University. The Court of King's Bench issued mandamus to the University of Cambridge requiring the restoration to one Dr Bentley of the degrees of Bachelor of Arts and Bachelor and Doctor of Divinity on the ground that he had been deprived by the University without a hearing.

In 1799, the hearing rule was, however, reinforced in a more concrete form in the case of *R v Gaskin*.[72] In this case, Lord Kenyon coined the Latin term '*audi alteram partem*' to encapsulate the rule, of which he said: "[i]t is to be found at the head of our criminal law that every man ought to have an opportunity of being heard before he is condemned..."[73] Since then the court began almost subconsciously to apply these principles to cases involving dispute between citizen and the administration to ensure that those with executive power it with a modicum of fairness. This position was reflected in the important case of *Cooper v Wandsworth Board of Works*,[74] decided in 1863. It exemplified the extension of the application of the rules of natural justice to decisions interfering with property rights. The Board of Works demolished a building where the builder had not complied with a statutory requirement of seven days notice before commencing construction. The demolition was begun without the builder being given the opportunity of explaining his failure.

The decision of the Board was held void because of its failure to provide a hearing and its demolition a trespass. In the course of his judgment Byles J, in a frequently quoted passage, said: "... a long course of decisions, beginning with Dr Bentley's case, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."[75]

At the beginning of the twentieth century, as the scale and power of the executive agencies began to increase, the court started to develop a more

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

72 (1799) 8 TR 209 [101 ER 1349].

73 (1799) 8 TR 209 at 210 [101 ER 1349 at 1350]; see also *Harper v Carr* (1797) 7 TR 271 at 275.

74 (1863) 14 CB (NS) 180 [143 ER 414].

75 (1863) 14 CB (NS) 180 at 193 [143 ER 414 at 420].

generalized concept of natural justice, reflecting a requirement of fairness as a part of those welding power.[76] In *Board of Education v Rice*[77] Lord Loreburn observed that administrative agencies such as the Board were required to entertain the law and facts in good faith and listen fairly to both sides. In his view, it was "a duty laying upon everyone who decides anything."

From these promising beginning, the courts somewhat lost their way during the ensuing fifty years, effectively abdicating the role of controlling the arbitrary exercise of administrative discretion by invoking the common law concept of fairness. This retreat from natural justice was reflected in a number of subsequent decisions, of which the case of *Local Government Board v Arlidge*[78] is a notable one. However, the tide in favor of the procedural justice turned once again in the classic case of *Ridge v Baldwin*[79] which effectively reinstated the breach of natural justice as a ground for challenging the arbitrary exercise of executive power.

The leading speech of Lord Reid in *Ridge v Baldwin* is of the great significance because of extensive discussion on the importance of observing the principles of natural justice, which inevitably exposed the fallacies of the decisions of 1950s.[80] The main outcome of this case has been that a power which affects rights must be exercised 'judicially' e.g. fairly and the fact that the power is administrative does not make it any the less 'judicial' for this purpose. According to the observation of this case, every person acting in a capacity even of executive or administrative authority should always be the subject to the principles of natural justice.

3.2. The Requirements of the Principles of Natural Justice: The Flexibility of Contents

For convenience, the content of the principles of natural justice is thought to be flexible and elastic enough to cover almost all the modes of administrative action affecting individuals' rights. The law's basic approach is that the requirement of natural justice should be applied flexibly and with sensitivity to circumstances.[81] In order to preserve flexibility, the courts frequently quote general statements such as: "the requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."[82]

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76 Michael T Molan, *Administrative Law* (London: Old Balley Press, 2004) 135.

77 (1911) AC 179.

78 [1915] AC 120

79 (1964) AC 40.

80 Wade and Forsyth, above note 20, 484.

81 Peter Cane, *Administrative Law* (New York: Oxford University Press, 2011) 74.

82 *Russell v. Duke of Norfolk* (1949) 1 All ER 109 at 108.

However, the flexibility of natural justice does not imply a variable standard of procedural justice.[83] It simply means that the application of the principles of natural justice is necessarily as various as the situations in which they are invoked.[84] The courts have thus always tried to concretize the contents of the principles into a modicum of procedures. By quoting a passage from *Byrne v Kinematograph Renters Society Ltd*, Lord Harman observes:

What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, the tribunal should act in good faith.[85]

To the same effect, Ramachandaran describes the requirements of natural justice by clarifying the position that where the statute is silent, or did not provide adequate procedure to get the remedy, the courts become inclined to see how best to help the citizen under the law and how best to give him a good hearing in the interest of justice.[86] To him, the fundamental criteria in respect of principles of natural justice are: a) to hear both the contesting parties; b) the hearing to be before an impartial judge; c) the judge should decide in good faith with no biasness; d) the parties affected should have an opportunity to meet and refute the evidence; and d) the decision must be supported by reasons.

To regulate the exercise of discretionary powers, these modicums of procedural norms play a vital role by ensuring fairness and reasonableness of a particular administrative decision.[87] Indeed, the observance of these norms provides the person affected by such decision with objectivity and reasonableness. However, reduction of the rules of natural justice into a concrete residuum of procedure does not amount to disregard the flexibility of the content of natural justice. In the absence of any statutorily prescribed procedure, the courts are always free to maintain procedural propriety by taking recourse to any novel or conventional norms.

3.3. Rules of Natural Justice vis-à-vis Governmental Agencies: The Expanding Horizon of Applicability

Almost all the governmental agencies are coupled with certain powers to be exercised. These powers may be judicial, quasi-judicial or administrative in nature. It is a settled law and now there is no dispute

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83 Roderick A. Macdonald, 'Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice' (1987) 39(2) *Florida Law Review*, pp. 218-242, at p. 219.

84 Wade and Forsyth, above note 20, 493.

85 [1958] 1 WLR 762.

86 Ramachandaran, *Administrative Law* (New Delhi, 2008) 257.

87 Faruque, above note 6, 146-147.

that the principles of natural justice are binding on all the courts, judicial bodies or quasi-judicial authorities.[88] But there was a long-standing controversy as to the applicability of the rules of natural justice to administrative authorities. Formerly, the courts have taken the view that the principles of natural justice were not applicable to administrative orders.

However, one of the leading advocates of the fairness approach Professor David Mullan has argued that the courts should move towards a more flexible standard in assessing the reviewability of administrative procedures. According to him, in general the traditional jurisprudence on the issue of 'natural justice' which restricted the ambit of judicial supervision of procedures to situations where the functions performed by a public authority could be classified as 'judicial' or 'quasi-judicial' is not well-founded. Thus, he thinks that the courts should enlarge their procedural review power in order to encompass 'purely administrative' decisional processes.[89]

This approach to (and justification for) judicial review of administrative procedures was expressly reflected in the seminal case of *Ridge v. Baldwin*.[90] However, *Bagg's Case* was an early judicial expression of the realization that the application of the principles of natural justice should not be limited only to the judicial proceedings. In justifying the reviewability of administrative action, Coke asserted the jurisdiction of the Court of King's Bench in sweeping terms as:

...not only to correct errors in judicial proceedings, but other errors, and misdemeanors [sic] extra judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law.[91]

By considering the root of this realization in *Bagg's case* as well as its revival in *Ridge v. Baldwin*, Professor Wade thus argues that the principles of natural justice are applicable to 'almost the whole range of administrative powers'. The truth of this argument is also found in *Breen v. Amalgamated Engg. Union*, where Lord Denning observed: "[i]t is now well-settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or administrative

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88 Mark Ryan, Jacqueline Martin, Chris Turner, *Unlocking Constitutional and Administrative Law* (Hodder Education, 2012) 609.

89 R. A. Macdonald, 'Judicial Review and Procedural Fairness in Administrative Law'(1980) 25(1) *McGill Law Journal* 1-44.

90 [1964] AC 40.

91 *Bagg's Case*, at 98a [77 ER 1271 at 1277-1278].

on the other hand."[92] Thus, it has now become a widely accepted view that except where the application is excluded by statute, the rules of procedural fairness are applicable to every sphere of administrative decision-making affecting the rights, interests or legitimate expectations of a person.

4. Applications of the rules of natural justice in averting the abuse of discretion: the role of specific procedural norms

The application of natural justice in administrative decision-making has tended to produce a number of procedural safeguards for the individual whose rights or interests are likely to be affected by any such decision. In fact, the content of these procedural safeguards depends upon a range of factors: the proximity between the initial investigation and final decision; the importance of the subject matter for the individual; and the need for administrative efficacy in balancing different types of factor.

In more general terms, the content of procedural protection includes the right to notice, right to know the evidence against him, right to present the case and evidence, and right to reasoned decision, etc. This part is designed to present a picture of how some of these specific procedural norms of natural justice work to bring the supposedly positive effect in protecting citizen's rights in the process of administrative decision-making.

4.1 The Requirement of Prior Notice

The requirement of prior notice of hearing allows a person to claim the right to adequate notification of the date, time, and place of the hearing as well as detailed notification of the case to be met. This information allows the person adequate time to effectively prepare his own case and to answer the case against him. The rationale of this right, as explained by Lord Mustill, is that "[s]ince the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."[93]

It seems that the right to prior notice serves three important purposes: *firstly*, it increases the value of the proceedings as it is only when the interested person knows the issues and the relevant information that he or she can make a useful contribution; *secondly*, it provides the affected person with the right to know what is at stake, and also with the sense that it is not enough to simply inform him or her that there will be a hearing; and *thirdly*, it opens up the operations of the public authority to public scrutiny. By way of serving such purpose, the requirement of prior notice thus works to diminish the possibilities of abusing discretionary power. Indeed, the right to prior notice at the initial stage of hearing paves the way of providing the reasoned decision, and thereby provides a fundamental protection to the citizen's rights. It is for this reason that Lord Denning has observed: "if the right to be heard is to be a real right

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92 (1971) 1 All ER 1148.

93 *R. v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531.

which is worth anything, it must carry with it a right of the accused man to know the case which is made against him."[94]

4.2 The Requirement of Hearing

Two of the most important aspects of the hearing are 'the right of the hearing itself' and 'the conducts of hearing'. The first aspect requires that every person has the right to have a hearing and be allowed to present his own case. As such, if a person is not afforded with the opportunity of being heard, even with adequate notice given, the very purpose of fair trial is supposed to be frustrated.[95] On the other hand, the second aspect requires that when deciding how the hearing should be conducted, the adjudicator has to ask whether the person charged has a proper opportunity to consider, challenge or contradict any evidence. It also encompasses the question of whether the person is also fully aware of the nature of the allegations against him or her so as to have a proper opportunity to present his or her own case. This position has been properly explained in *Secretary of State for the Home Department v. AF (2009)*, where it was observed that:

The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed.

It is evident from such claim that the right to be heard in answer to charges before an unbiased tribunal is indispensable in respect of reaching a fair and reasonable decision. Since the requirements of hearing offers the opportunity of knowing the evidence against the individual, of presenting his own case and evidence, and above all, of rebutting the adverse evidence, the right of hearing possesses the potentials of influencing the reasoning of the decision. In this way, it results in protecting the rights of the individual from the capricious exercise of administrative powers.

4.3 The Requirement of Reasoned Decision

The requirement of reaching in the 'reasoned decision' in the process of exercising administrative powers plays a vital role in protecting the citizen's rights.[96] This requirement offers a number of advantages that

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94 *Kanda v. Government of Malaya* (1962) A. C. 322, at 337.

95 In *Chief Constable of the North Wales Police v. Evans* (1982), a chief constable required a police probationer to resign on account of allegations about his private life which he was given no fair opportunity to rebut. The House of Lords found the dismissal to be unlawful. Likewise in *Surinder Singh Kanda v. Government of the Federation of Malaya* (1962), a public servant facing disciplinary proceedings was not supplied with a copy of a prejudicial report by a board of inquiry which the adjudicating officer had access to before the hearing. The Privy Council held that the proceedings had failed to provide him a reasonable opportunity of being heard.

96 In fact, the requirement of reasoned decision relates to the general feature of diagnosing justice and injustice. Thus, Amartya Sen argues against the avoidance of reasoned justification by public authority and says that "it is no way of

help avert the abuse of discretionary powers by the administrative authority. The first of such advantages is that the reasons for decision can insist the courts in performing their supervisory function. If the reasons for decision are made evident, it will result in making the substantive review much easier to apply. The second advantage is that an obligation to provide reasons will often help ensure that the decision has been thought and based on relevancy, propriety of purpose or proportionality. Finally, a duty to give reasons can also perform a more general function. Professor Craig has rightly described the function in the following sense:

It is arbitrary to have one's status redefined without adequate explanation of the reason for the action. The provisions for reasons can, by way of contrast, increase public confidence in the administrative process and enhance its legitimacy. A duty to provide reasons can, therefore, help to attain both instrumental and non-instrumental objectives that underlie process rights.[97]

It is of importance to note that there is no common law duty to give reasons, but there are nonetheless a number of ways in which the common law has imposed a duty to deliver a reasoned decision. The court has indirectly imposed such duty to provide reasons more directly by linking the provisions of reasons to the procedural fairness itself. As such, it is now well-established that the court is now supposed to satisfy the standard of procedural fairness by taking recourse to the requirement of reasoned decision in order to diminish the arbitrary exercise of discretionary power.

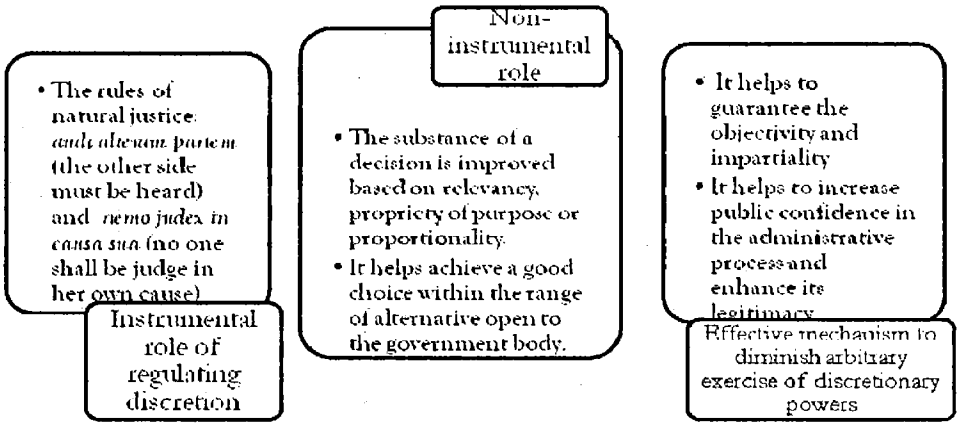

Figure: How the application of the rules of natural Justice works to diminish arbitrary exercise of discretionary power

guaranteeing that the right things are done." See, for details, Amartya Sen, *The Idea of Justice* (Allen Lane, 2009) 4-5.

97 Craig, above n 31, 436.

5. The Concept of Natural Justice in Bangladesh: Legal and Constitutional Implications

5.1 Legal Status of the Principles of Natural Justice in Bangladesh

As mentioned earlier, there is a bit disagreement among the scholars as to the precise legal effect of violating the principles of natural justice. Professor Wade argues that any decision rendered in violation of the rules of natural justice is void. On the other hand, according to D M Gordon, procedural errors can never render a decision void as jurisdictional error. In the judicial sphere, the courts are also divided on the issue of legal effect. However, in Bangladesh the issue concerning the legal status of the rules of natural justice has been settled beyond controversy. Various legal enactments of Bangladesh have necessarily embodied some procedural rights, thereby recognizing the legal effect of the principles of natural justice into the entire fabric of legal system.[98] For example, the Code of Civil Procedure of 1908 and the Code of Criminal Procedure of 1898 have substantially contained various procedural norms which are recognized as the rules of natural justice.[99] In the case of *Abdur Rahman and Others v Sultan and Others*,[100] the court held that the Civil Procedure Code deals with procedural matters and not substantive rights, and these procedural laws are governed on the rules of natural justice.[101]

Apart from this, legal status of the principles of natural justice has been categorically established in the case of *Abdul Latif Mirza v Bangladesh*.[102] In this case, the Appellate Division of the Supreme Court has observed that "the principle of natural justice is a part of the law of the country." However, it is of importance to note that the application of the principles of natural justice is confined only to the cases, where there is no express provision of procedural law. This position has been clarified by Justice Badrul Haider Chawdhry in the case of *Abdur Rahman and Others v Sultan and Others*[103], where he observed that "[w]hen the matter is regulated by express provisions of procedural rules there is no scope for introducing a supposed rule grounded on vague principles of natural justice. To do so is to introduce fancied notions in a procedural law which the legislature did

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98 Faruque, above n 6, 35-44.

99 For example, if summons are nor duly served on the defendant , that is a good ground for setting aside an *exparte* decree under order 9, Rule 13 of the Code of Civil Procedure, 1908.

100 (1983) 35 DLR (AD) 51.

101 *Abdur Rahman and Others v. Sultan and Others*, (1983) 35DLR (AD) 51, 53

102 31 DLR (AD) 33.

103 35 DLR (AD) 51, 53.

not provide."[104] This observation of the case can be found to reduce the domain of the principles of natural justice. Thus, the implications of such approach of the court on the way of diminishing the arbitrary exercise of administrative discretion should however be assessed as a matter of further inquiry.

5.2 Natural Justice and Fundamental Rights: Constitutional Implications

The Constitution of Bangladesh does not directly recognize the enforcement of the principles of natural justice. However, there are several provisions of the Constitution of Bangladesh which seem to be founded on the principles of natural justice. For example, Article 135(2) of the Constitution provides that "[n]o person who holds any civil post in the service of Republic shall be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause why action should not be taken." Thus, it can be inferred by implication that this article is reflective of the constitutional recognition of the enforcement of the principles of natural justice.

In the context of Bangladesh, the court usually takes the requirements of natural justice to be observed under the guise of 'equal protection clause' which is a fundamental right guaranteed by the Constitution. Article 27 of the Constitution of Bangladesh states: "[a]ll citizens are equal before law and are entitled to equal protection of law." This article can be considered to provide the courts with a strong ground of judicial review of administrative action. In this respect, the apex Court of our country has held that to treat a person in violation of the principles of natural justice would amount to arbitrariness and discriminatory treatment in violation of the rights guaranteed by article 27 of the Constitution.[105]

Apart from this, the court also recognizes the principles of natural justice with reference to the fundamental constitutional promise that animates the Constitution of Bangladesh. The case of *Abdul Latif Mirza v. Bangladesh*[106] exemplifies this claim, where the Supreme Court of Bangladesh held that the principles of natural justice are inherent in every society in which the rule of law, the fundamental human rights and freedom, equality and justice, political, economic and social shall be secured.

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[105] *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 33.

[106] (1979) 31 DLR (AD) 33.

5.3 Application of the Rules of Natural Justice in Bangladesh: Some Illustrative Cases

The recognition of the enforcement of rules of natural justice has been reflected in many judicial decisions in Bangladesh. The court has actually used these rules as the tools to diminish the arbitrary exercise of administrative powers, thereby protecting the rights and interests of the individuals. Thus, in the case of *B. S. Agents v. Bangladesh*,[107] the court observed:

The rules of natural justice require an adjudicator to act fairly, in good faith and without bias or conflict of interest. They also require an adjudicator to allow each party adequate opportunity to present its case and respond to its opposition's case. The essential feature of the principles of natural justice is that no person should be deprived of his right without a hearing before an independent authority – its purpose is to prevent miscarriage of justice.

In *AKM Mazharul Haq Chowdhury v. Bangladesh*,[108] the court has stood against the arbitrary exercise of administrative power by observing that section 9(2) of the Public Servants (Retirement) Act, 1974 has no guidelines for its appreciation and violates the principles of Natural Justice. As the authority has issued the impugned order compulsorily retiring the petitioner by exercising their power under the said statute in a capricious and discriminatory manner, it amounts to a clear case of 'fraud on power'. Again, in the case of *Saint Martin Commodities Limited v. Chairman and Joint Commissioner, Licensing Authority Customs House*,[109] the court found that without initiating any proceeding or even without issuing any notice the action impugned against was taken which is certainly in violation of principle of natural justice and also flouts the provision of article 40 of the Constitution. [110] In this case, the court goes to observe that while dealing with the offences and penalty for trial of Customs offences the principle of natural justice must be observed in the departmental or judicial procedure.

The more recent example of the application of the rules of natural justice can be found in the case of *Jesmin Anwar v. State and Another's (2012).* In

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107 (1979) 31 DLR (AD) 272.

108 (2010) 57 DLR 100.

109 39 CLC 2010 (HCD).

110 Article-40 of the Constitution of the People's Republic of Bangladesh states that Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.

this case, the petitioner has claimed that the High Court Division itself has made adverse remark against her without affording her any opportunity to explain her position. By accepting the petitioner's claim, the Appellate Division of the Supreme Court has held that such adverse remarks are required to be expunged for ends of justice. In deciding so, the court relies on the view that by making adverse remarks before making observations and giving directions, High Court Division acted illegally in not giving any notice to the appellants which is a gross violation of the principle of natural justice and consequently, the remarks should be expunged.[111]

However, in applying the principles of natural justice, the court has always been aware of the necessity of excluding the rules of natural justice in the appropriate cases. Where the application of the rules of natural justice is not desirable, the court has avoided taking recourse to the observance to these rules. Thus, in the case of *Prof. Dr. Yusuf Ali v. Chancellor of Rajshahi University,*[112] where the former President Justice Shahabuddin Ahmed removed the then Vice-Chancellor of Rajshahi University without any notice and hearing to defend him, the court treated the case as an exception to the requirement of natural justice. In this case, the Chancellor being satisfied with the overall disturbing condition in the university and considering the fact that the petitioner being Vice-Chancellor was unable to run the administration peacefully and properly had exercised his power under section 16 of the General Clauses Act. In a case like this, if show cause notice was issued, it would aggravate the situation more and more.[113] It is for this reason that that the Chancellor had rightly exercised his power, without issuing any show cause notice, for relieving the petitioner from the post of Vice-Chancellor.

Recently in *Re Muhammad Yunus*[114], the court has looked upon the limitation of applying the rules of natural justice and held that the rules of natural justice cannot have universal application; the rules of natural justice necessarily vary with the nature of the right and the attendant circumstances. In this case, it is submitted that the Bangladesh Bank issued the impugned orders without affording Professor Muhammad

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111 *Rajib Kamrul Hasan v. State* 30 CLC AD (2001) 866.

112 (1997) 26 CLC (HCD).

113 On the point of natural justice the learned Attorney-General submits that at the relevant time the academic atmosphere of the Rajshahi University was worst and circumstances were beyond control. There were disturbances in the university in between different sections of students as well as different groups of teachers of the Chancellor had no alternative to remove the Vice-Chancellor immediately in the greater interest the institution. The court in this case found substance in the aforesaid contention of the learned Attorney General, and thus upheld the removal order issued by the Chancellor of the University.

114 (2012) 64 DLR (AD) 152.

Yunus an opportunity of being heard and thus there is procedural impropriety in the impugned orders. This principle of natural justice has been laid down by Courts as being minimum protection of rights of the individual against the arbitrary decision taken by the quasi-judicial and administrative authority when making an order affecting ones rights. There is no dispute that whenever justice fails to achieve solemn purpose, natural justice is called in aid of legal justice. In respond to such contention, the court has reaffirmed the importance of the principles of natural justice by observing that:

Natural justice relieves legal justice from unnecessary technicality. There is also no denial of the fact that the adherence to principle of natural justice is recognized by all civilized States which is of supreme importance when quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving penal consequence is in issue. It is now well recognized that no one should be condemned unheard and a notice has to be served before any action is taken.[115]

But in determining whether Professor Yunus was entitled to a notice when he ceased to hold office on attaining the age of retirement, on the operation of law, the court found that he was not terminated from service or retired compulsorily or removed from service for which he was entitled to a show cause notice. He was informed that as he had surpassed the age of superannuation, he had no right to hold the office. This principle would apply only when the action was attended with penal consequences, which constituted punishment. Thus, the court held that in the facts of the given case it would not attract the principles of natural justice

6. Conclusion

The persistent practice of conferring wide discretionary powers upon the public authorities has been an essential feature of the modern democratic state. In practice, the bestowing of such discretionary power does, however, animate the risk of exercising it in the way of impinging the citizen's rights. Historically, the court has thus developed a devise that puts a disguised negation to unfettered discretion affecting adversely the rights or interests of the individuals. This devise of regulating unfettered discretion is known as the rules of natural justice. In the context of administrative law, the term natural justice is equated with the concept of procedural fairness, as distinct from the discourse of natural law. [116] The essence of natural justice or procedural fairness is that it should be observed generally in the exercise of discretionary powers. In fact, the

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[115] Ibid.

[116] R. A. Macdonald. 'Judicial Review and Procedural Fairness in Administrative Law' (1980) 25(1) *McGill Law Journal,* 1-44.

major promise of this concept is founded upon the proposition that all discretionary powers have limits of some kind, and as such, the discretion ought to be exercised fairly and reasonably.[117]

Typically, the term natural justice is found to encapsulate two principles. The first principle of natural justice consists of the rule against bias (*nemo iudex in causa sua*). This principle indicates that an adjudicatory authority is required to be unbiased and neutral so that he may be in a position to apply his mind objectively in deciding the dispute before him. By ensuring impartiality, objectivity and public confidence in the process of administrative decision making, the principle thus works as a shield against the arbitrary exercise of discretionary powers. The second principle of natural justice is that the individual be given adequate notice of the charge and an adequate hearing (*audi alteram partem*). This principle speaks for a network of procedural norms (such as right to notice, right to present case and evidence and right to reasoned decision etc) to be observed in the decision-making process. By working like a sword to cut off all the shadows surrounding the source and sanctity of a particular administrative action, this rule virtually ensures that the individuals are protected from the arbitrary or capricious exercise of the administrative discretion.

Being suggestive of clear and immutable principles governing administrative procedure, these principles of natural justice thus put a modicum of procedural limits on the exercise of discretionary power. And the judiciary has always been able to impose upon every official the duty to conform to these procedural formalities with a view to averting the arbitrary exercise of administrative discretion. More importantly, the gravity of the importance of the principles of natural justice has been addressed within the fabric of fundamental human right, for the observance of these norms provides the person affected by such decision with objectivity and reasonableness.[118] At this moment, it is thus believed that the development of these principles by the judiciary has led to the

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117 Wade and Forsyth, above n 20, 525.

118 It is of importance to note that the concept of natural justice has acquired recognition under international human rights law. Article 10 of the Universal Declaration of Human Rights declares: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him." Article 6 of the European Convention on Human Rights and Fundamental Freedoms, 1950 makes provisions for a 'fair hearing' in similar terms. Although the words 'civil rights and obligation' appearing in Article 6 (to which the 'fair hearing' provisions apply) is thought to apply to private law rights rather than administrative law, the European Court of Human Rights has held that article 6 is applicable to decisions of public authorities taken under statutory powers so long as the rights in questions of private law content. See, Fazal, above n 10, 231.

'highly desirable simplifying of the theoretical underpinnings of the law [of procedural review]'.[119]

To regulate the exercise of discretionary powers, the application of the principles of natural justice is now thought to be indispensable in almost all the jurisdictions of the world. Notably, the form and content of these principles have overcome the jurisdictional diversities, being found to be reduced into a concrete residuum of procedure. However, such reduction into specific procedural requirements to be observed in administrative decision-making does not amount to the denial of the flexibility of the content of natural justice. In fact, the courts are virtually free, in the absence of any statutorily prescribed procedure, to maintain procedural propriety by taking recourse to any novel or conventional norms. And this is, perhaps, the emerging point that we need to recognize these days in order to meet the major promise of the principles of natural justice relating to the effective regulation of administrative discretion.

[119] This view was expressed by Mullan. See, Macdonald, above n 116 'Judicial Review and Procedural Fairness in Administrative Law' 25(1) *McGill Law Journal* 1-44.