Liber Amicorum per Marco D'Alberti

Giappichelli

Comparazione e storia del diritto amministrativo

Natural Justice in UK Law: Continuity and Change from the 17th Century

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1. Introduction

This chapter is concerned with the historical development of natural justice from the early 17th century onwards. It is a rich and interesting story. It is also important for the overall thesis of a book that I am writing on the history of English Administrative law.[1] Contrary to popular belief, England developed a system of administrative law from the 17th century onwards, with origins that date back considerably earlier. Natural justice/due process was central to that system, as it is to any regime of administrative law. The reality is that the courts developed a sophisticated body of jurisprudence from first principles concerning both the right to be heard and the rule against bias. It was applied not only to public bodies broadly defined, but also to clubs, trade associations and mutual associations alike. The courts thus reasoned across the public/private divide. The structure of the ensuing argument is as follows.

[1] P. Craig, *English Administrative Law 1600-2020: Continuity and Change*.

The story begins with the foundational case law concerning the right to a hearing, which is followed by discussion of its applicability and content. The focus then shifts to analysis of bias, with discussion of the doctrinal foundations, followed by consideration of the breadth of its application. The analysis thereafter is on the 20th century case law prior to the 1960s, which exhibited elements of continuity with the earlier case law, but also change, in the sense of limitations engrafted on natural justice that were not present in the earlier case law. The final section of the chapter examines the seminal decision in *Ridge v Baldwin*,[2] which reconnected with the case law from the 17th-19th centuries and struck down a number of the limitations imposed in the earlier part of the 20th century. The remainder of this section charts the continuity and refinement of natural justice in the modern law when viewed in the light of the historic jurisprudence.

2. Hearing: Foundations

We begin with the foundational jurisprudence concerning the right to a hearing. The seminal decision was *James Bagg's* case, which was also central to the development of mandamus as will be seen below. It was the key early case on process rights, in this instance the right to a hearing and was decided in 1615. It is certainly one of the more colourful cases to create a legal precedent. It bears testimony to the fact that a claimant does not have to be beyond reproach in order to succeed.

James Bagg was a burgess of Plymouth, who was disenfranchised from office. He argued that this was unlawful and sought mandamus to restore him to his position. The writ stated that Bagg had always «carried and well-governed himself»; that the disenfranchisement was without reasonable cause; and that «speedy justice» should therefore be done by restoring him to his previous office.[3] This image of civility is, however, somewhat belied by the facts, which paint a rather different picture of Bagg's temperament. He seemed to have had a problem with the mayor, or to put the point more accurately, he had problems with successive holders of that office in Plymouth. The pleadings detail Bagg's insults to Robert Trelawny, John Battersby, John Clement and Thomas Fowens, all of whom held this august office. Matters came to a head in «discourse» with Thomas Fowens. Bagg continued his «evil disposition» towards Fowens, who responded «with mild words admonishing the aforesaid James Bagg that he would desist from uttering such contemptible words as aforesaid».[4] This admonishment did not have the desired effect.[5]

> «[I]n the presence and hearing of the aforesaid Thomas Fowens, then mayor of the borough aforesaid, and very many others of the burgesses and inhabitants of the borough aforesaid, and in contempt and disdain of the said Thomas Fowens, then mayor, turning the hinder part of his body in an inhuman and uncivil manner towards the afore-

[2] House of Lords, *Ridge v Baldwin*, AC 40, 1964.

[3] Court of the King's Bench, *Bagg's Case*, 11 Co. Rep., 1615, p. 93b.

[4] Ibidem, p. 95b.

[5] Ibidem, p. 95b.

> said Thomas Fowens, scoffingly, contemptuously, and uncivilly, with a loud voice, said to the aforesaid Thomas Fowens, these words following, that is to say, ("Come and kiss.") And further to the said lord the King we certify, that afterwards, that is to say, on the 20th day of August, in the 9th year of the reign of the lord the now King, at Plymouth aforesaid, the aforesaid James Bagg, with most insolent words, threatened the said Thomas Fowens, then being mayor of the borough aforesaid, without any reasonable cause; and then and there, to the said Fowens, threateningly and maliciously spoke these words following, that is to say, "I will make thy neck crack"».

Bagg was consistent. He treated all office holders with equal disrespect. Fowens' successor was John Scobb, who Bagg «publicly, falsely and scandalously» referred to as a «knave», notwithstanding the fact that Scobb «honestly and laudably carried and governed himself». [6] Nor did Bagg rest content with impugning the integrity of successive holders of mayoral office. He spread his critical net further to embrace other burgesses, accusing Thomas Shervill of being a «seditious fellow», even though he «honestly, discreetly, and with great integrity, carried and governed himself». [7] Bagg's behaviour extended beyond the personal insult, and included action whereby he told inhabitants of the borough that they did not need to comply with certain regulations and customary payments.

The court, nonetheless, found for Bagg. It held that disenfranchisement must be grounded on action that was against the duty of the burgess and against the public good of the borough; words of contempt, or *contra bonos mores,* did not suffice in this respect, nor did a mere attempt to do an act contrary to the duty. No freeman could be disfranchised by the corporation, unless it had authority to do so, by express words in the charter, or by prescription. If there was no such authority, the party ought to be convicted pursuant to the appropriate law before he could be removed. [8] The existence of such authority was, moreover, a necessary, but not sufficient condition for disenfranchisement. It had to be preceded by a hearing, which was absent in the instant case. Lord Coke CJ expressed the matter as follows. [9]

> «[Y]et 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, … and such removal is against justice and right».

Coke CJ thus reasoned from first principle. The existence of a substantive ground for removing Bagg as a burgess did not suffice. It had to be preceded by a hearing. The case was foundational for the existence of a right to a hearing and was much cited thereafter. The judgment speaks to the continuity and change in administrative law since its inception, which is a theme of this book. In this instance the dominant motif is continuity, both in relation to the general justification for such rights, and the more specific reason for requiring hearing rights in this instance.

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[6] Ibidem, p. 96b.

[7] Ibidem, p. 96b.

[8] Ibidem, pp. 98a-99a.

[9] Ibidem, p. 99a.

The general justification for process rights in modern academic discourse is based on instrumental and non-instrumental argumentation.[10] These same rationales informed the foundational jurisprudence on hearing rights. This is unsurprising, given that the instrumental and non-instrumental justifications are not time dependent. To the contrary they are expressive of enduring values that would have been understood and accepted in the 17th as well as the 20th century.

The instrumental justification emphasizes the connection between procedural due process and the substantive justice of the final outcome. Substantive rules are designed to achieve a particular goal, in this instance specification of the valid grounds for disenfranchisement. Provision of a hearing before deciding to disenfranchise can help to ensure that this precept is correctly applied.[11] It enabled Bagg to «answer what was objected», which was linked to the requirement of notice, as indicated by Coke CJ's statement that Bagg was not «reasonably warned». Compliance with these precepts would require the mayor to specify the reasons for the disenfranchisement, thus facilitating determination as to whether they fell within the legally permitted grounds. The non-instrumental justification for hearing rights is grounded on commitment to formal justice and the rule of law, helping to guarantee objectivity and impartiality, and protect human dignity.[12]

The preceding quotation is consistent with both rationales for affording hearing rights, more especially because the language speaks of Bagg being unable to address «what was objected» and that »he was not reasonably warned». There is nothing to prevent a judgment from grounding its decision on the twin rationales for hearing rights. This is not a zero-sum game, and there is no a priori reason to conclude that Coke CJ would have preferred one to the other.

The continuity in patterns of thought is also apparent when we consider the justification for affording hearing rights in this particular instance. It is common in modern academic parlance to distinguish between the criteria that trigger hearing rights, and the content of such rights, assuming that a hearing has been triggered. Legal systems differ as to what constitutes the catalyst for hearing rights. In the UK, the modern test is framed in terms of a right, interest or legitimate expectation.[13] In the US, constitutional due process is conditional on the existence of a life, liberty or property interest.[14] The nature of the interest that can suffice in this respect may well differ over time. There is, nonetheless, much commonality, notwithstanding temporal difference. In *Bagg's Case*, the imperative for a hearing was intimately linked to the proprietary nature of the interest that a freeman had in a city or borough. This interest informed specification of the grounds that would suffice for disenfranchisement and the need for a hearing to deter-

[10] J. Mashaw, *Due Process in the Administrative State*, London, Yale University Press, 1985; D. Galligan, *Due Process and Fair Procedures*, Oxford, Oxford University Press, 1996.

[11] J. Resnick, *Due Process and Procedural Justice*, in J. Pennock, J. Chapman (eds.), *Due Process*, *Nomos XVIII*, New York City, New York University Press, 1977, p. 217.

[12] H.L.A. Hart, *Concept of Law*, Oxford, Clarendon Press, 1961, pp. 156-202; J. Rawls, *A Theory of Justice*, Oxford, Oxford University Press, 1973, p. 235; F. Michelman, *Formal and Associational Aims in Procedural Due Process*, in J. Pennock, J. Chapman (eds.), *Due Process*, *Nomos XVIII*, cit.

[13] P. Craig, *Administrative* Law, IX ed., Mytholmroyd, Sweet & Maxwell, 2021.

[14] U.S. Supreme Court, *Goldberg v Kelly*, 397 US, 1970, p. 254; Id., *Board of Regents of State College v Roth*, 408 US, 1972, p. 564.

mine whether they existed in the instant case. Thus, Lord Coke CJ stated that, [15]

> «[H]e has a freehold in his freedom for his life, and with others, in their politic capacity, has an inheritance in the lands of the said corporation, and interest in their goods, and perhaps it concerns his trade and means of living, and his credit and estimation; and therefore the matter which shall be a cause of his disfranchisement, ought to be an act or deed, and not a conation, or all endeavour, which he may repent of before the execution of it, and from whence no prejudice ensues».

3. Hearing: Applicability

It is common within legal orders to distinguish the applicability of a right to a hearing, from the content of the right, assuming that it is triggered. This duality was evident in the historic case law. Issues concerning applicability will be considered here, followed by discussion of content in the section that follows.

3.1. *Scope of Application: Public Bodies, Clubs and Associations*

James Bagg's Case was authoritative in later cases, and provided the foundation for the development and application of the rights to a hearing. [16] It was held applicable in a wide range of circumstances, where the interest of the claimant was deemed sufficient to trigger the right to a hearing. Particular types of case will be examined below.

It is, however, important at the outset to stress the breadth of application of natural justice, in terms of the right to a hearing. It was applicable to all public bodies, broadly conceived. By the mid-19th century it was commonplace for case law to be framed in terms of the right to a hearing being applicable in all instances where there was some judicial, or quasi-judicial form of decision-making, and these terms were broadly construed. This central principle was articulated and applied in *Capel*, and reiterated and applied in the *Hammersmith Rent-Charge* case, *Bonaker* and *Cheshire Lines Committee*. [17] This mid-19th century jurisprudence drew on earlier case law exemplifying application of these criteria. There was also some reference to invasion of property interests, which was also widely interpreted.

It is equally important to stress that hearing rights were not confined to public bodies. They were also applied to a wide array of private associations and clubs. The divide between the public and the private, which is so significant in many civil law re-

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[15] Court of the King's Bench, *Bagg's Case*, cit., p. 98b.

[16] See, e.g., *Brownlow v Cox and Mitchell*, 3 Bulstrode 1615, p. 32; *Campions Case,* 2 Sid, 1658, p. 97; *R v Benn*, 6 T.R., 1795, p. 198; *Harper v Carr*, 7 T.R. 1797, p. 270; *R. v The Company of Fishermen of Faversham*, 8 T.R. 1799, p. 352.

[17] *Capel v Child*, 2 C. & J., 1832, p. 558; *In re Hammersmith Rent-Charge*, 4 Ex., 1849, p. 87; *Bonaker v Evans*, 16 Q.B., 1850, p. 163; *R. v Cheshire Lines Committee*, L.R. 8 Q.B., 1872-73, p. 344. Compare *Ex p Death*, 18 Q.B., 1852, p. 647.

gimes, did not occupy centre stage in the common law tradition. It was standard practice for judges to borrow concepts developed in one domain and apply and/or adapt them to the other. This legal inclination was fuelled by uncertainty as to the factual boundaries between the public and the private, and by commonality of language between the two domains. This is exemplified by *Faversham*, which like *Bagg*, concerned disenfranchisement of a freeman.[18] However, in this instance the claimant was a freeman of a company of Kentish fishermen dealing, *inter alia*, with rules as to oyster fishing, which were enforced through a Water Court established by the company. Lord Kenyon CJ applied the precepts of the right to be heard, and the same is true for other cases concerning clubs and associations.

Innes[19] concerned the Caledonian Society of London, the objects of which were the extension of education in Scotland, and the preservation of the ancient Caledonian costume. The court acknowledged that it was open to such a society to make any rules concerning admission and expulsion to which members would have to conform. Lord Denman CJ held that any such expulsion must, however, be preceded by notice and an opportunity to respond to the reasons why the society sought to expel the claimant. Thus, notwithstanding that the claimant was alleged to have used menacing language to another member of the society, the expulsion was invalid and he was still a member. The court held that «no proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so».[20]

The same reasoning is evident in *Wood*.[21] In this instance the association was a mutual insurance society, which insured members against losses to ships and cargo. The committee of the society had power to exclude a member if, *inter alia*, his conduct was deemed to be suspicious. The plaintiff, who had been a member of the society was then excluded by committee decision. He argued that the exclusion was wrongful, and motivated by desire to deprive him of the indemnity for losses to which he would have been otherwise entitled. His claim for damages failed, because the expulsion was held invalid for failure to accord him a hearing, with the consequence that he was still a member of the society and could claim thereunder. Kelly CB held that the mutual insurance society was bound to exercise its powers in accordance with the *audi alteram partem* principle, which was «not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals».[22]

The *Dawkins* case,[23] decided a few years later, applied the same legal precept. It concerned the expulsion of the plaintiff from the Travellers Club, who had sent a pamphlet complaining of the conduct of another member to his official address. The pam-

[18] *R. v The Company of Fishermen of Faversham*, cit., 16.

[19] UK High Court, *Innes v Wylie*, 1 Car. & K., 1844, p. 257.

[20] Ibidem, p. 263.

[21] Exchequer Division, *Wood v Woad*, L.R. 9 Ex., 1873-74, p. 190. See also, *Blisset v Daniel*, 10 Hare, 1853, p. 493.

[22] Ibidem, p. 196.

[23] UK Court of Appeal, *Dawkins v Antrobus*, 17 Ch. D., Court of Appeal, p. 615.

phlet was enclosed in an envelope on the outside of which was printed «Dishonourable Conduct of *S*». The committee of the Club sought an explanation from the plaintiff, which he refused to provide, after which he was expelled. The Court of Appeal held that the Travellers Club was bound to observe the rules of natural justice, but that it had done so through the provision of ample notice to the plaintiff, who had refused to respond to their inquiries. [24]

The same principle was propounded in *Fisher*, [25] although the decision on the facts went against the Army and Navy Club. The court held that the committee of a club, being a quasi-judicial tribunal, was bound, in proceeding under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and should not expel a club member without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending his conduct. An expulsion that did not comply with such requirements would be null and void. In giving judgment against the Club, Jessel MR emphasized the instrumental value of providing a hearing, since the committee that expelled the plaintiff had failed to take account of evidence, including an apology by the member, which would have been evident if a hearing had been given.

The decision of the House of Lords in the *Saddlers* case [26] provides further evidence of the reach of the right to be heard. The case is interesting since it did not concern a club or mutual association, but a trade association in the form of a corporation set up pursuant to a Charter, and violation of a bye-law made by the Saddlers' Corporation. The case concerned dismissal from an office within the corporation. The House of Lords held that this was unlawful, *inter alia*, because of a failure to hear the affected person prior to dismissal. [27]

It is interesting to reflect on the rationale for the application of natural justice in such cases. There are some cases where it is arguable that the plaintiff had a proprietary interest as a result of club or association membership, which provided the normative foundation for the right to a hearing prior to expulsion. This was arguably the case in *Wood*, [28] given the nature of the mutual insurance society. This rationale is, however, not readily applicable in the other leading cases, nor in truth does it cohere with the reasoning in *Wood* and the other decisions. The principal reason given for the application of natural justice is the judicial or quasi-judicial nature of the proceeding, and these concepts were broadly interpreted. This reasoning underpinned all decisions, including that in *Wood*. Kelly CB [29] drew on the judgment of Parke B in the *Hammersmith Rent-Charge* case, who held that it had «long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding unless he

[24] Ibidem, pp. 629-631.

[25] Id., *Fisher v Keane*, 11 Ch. D., 1878, p. 353. See also, Id., *Labouchere v Earl of Wharncliffe*, 13 Ch. D., 1879, p. 346.

[26] House of Lords, *R. v Saddlers Co*, 10 H.L.C., 1863, p. 404.

[27] Ibidem, pp. 459, 461, 471.

[28] Exchequer Division, *Wood v Woad*, cit.

[29] Ibidem, pp. 196-197.

has had an opportunity of being heard». [30] There were, nonetheless, cases in which this rationale was combined with the proprietary foundation for due process. This is exemplified by the reasoning of Bayley B in *Capel*, who held that he knew «no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard». [31]

3.2. *Scope of Application: Adjudication and Rulemaking*

The paradigm situation for the right to be heard concerns adjudication, in some shape, manner or form. It is a single administrative decision addressed to a particular individual or individuals. This was as true in the 17th-19th century as it is in the 20th and 21st. There is also debate as to how far the right to be heard should pertain to cases of a more legislative nature, where the challenged measure takes the form of a rule or something akin thereto. This is not the place to rehearse the arguments on this issue. Suffice it to say that modern UK administrative has not looked kindly on arguments that the right be heard should be applicable in the context of rulemaking. [32] Nor have other jurisdictions. The EU draws a sharp distinction between hearing rights in relation to adjudication and rulemaking. [33] The US does have procedures that pertain to rulemaking, but these are grounded in statute in the form of the Administrative Procedure Act 1946, and constitutional due process does not, by way of contrast, apply to rulemaking. [34]

The common law did not historically furnish protection for the right to be heard in relation to rules of a legislative nature. In this respect, there is commonality between then and now. There is, however, an important difference. There was, and is, provision for a right to be heard in relation to private bills, and contentious cases are decided by the Court of Referees, [35] which has 12 members, with 3 constituting a quorum. The composition and jurisdiction of the Court of Referees is regulated through Standing Orders. [36] The Court of Referees considers the rights of a petitioner to argue against a private bill in cases where the promoters of the bill challenge that right.

The crucial difference between then and now is that in the modern day it rarely meets, the last occasion being in 2016. This is in stark contrast to the past, when it met frequently. Nor was this difference fortuitous. It reflects the difference in the prevalence of public and private bills in laying down the legislative regulatory framework. This was consid-

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[30] *In re Hammersmith Rent-Charge*, 4 Ex., 1849, pp. 87, 96.

[31] *Capel v Child*, 2 C. & J., 1849, pp. 558, 579.

[32] *Bates v Lord Hailsham*, 1 WLR, 1972, p. 1373; *R. v Devon CC, ex p. Baker*, COD 138 QBD, 1993; *R. (BAPIO Action Ltd) v Secretary of State for the Home Department*, EWCA Civ, 1993, pp. 1139, 1143-1146, affirmed on different grounds, 1 AC, 2008, p. 1003. Compare *R. v Liverpool Corporation, ex p Liverpool Taxi Fleet Operators' Association*, 2 QB, 1972, p. 299.

[33] P. Craig, *EU Administrative Law,* Oxford, Oxford University Press, III ed., 2018, ch. 11.

[34] U.S. Supreme Court, *Bi-Metallic Investment Co v State Board of Equalization of Colorado*, 239 US, 1915, p. 441.

[35] *Court of Referees*, in UK Parliament, MPs' Guide to Procedure; *The Court of Referees*, in UK Parliament, *Erskine May*.

[36] House of Commons, Standing Orders 2019, Private Business, SO 89-102 (HC 6, 2019).

ered in detail in an earlier chapter,[37] which explained the balance between general and local measures. The numerical and substantive importance of local regulatory measures embodied in private bills in the 17th-19th century cannot be underestimated.

The salient point from the perspective of the right to be heard is equally important. The cases decided by the Court of Referees were published in specialist law reports.[38] The formal focus of the case was on locus standi, which in this context connoted whether the particular person or company was sufficiently affected by the proposed measure to be able to petition about it. The substantive impact of the decisions was a right to be heard as to the terms of the proposed bill, and the language of hearing rights is a common feature in the reports. The reality is, therefore, that if the claimant was deemed to have locus standi, it would then have process rights to comment on the content of the proposed bill. It did not mean that its arguments would necessarily be successful, thus was it ever so. This should not mask the fact that the parliamentary procedure, policed by the Court of Referees, gave those who surmounted the locus standi hurdle some due process in the making of legislation. The precise focus of petitioners' arguments perforce varied. In some instances, they opposed the entire bill; in others, argument was focused on a particular clause; in yet other cases, they sought the addition of clauses protecting their interests. Parliament has always been able to grant consultation or participation rights in a particular statute if it wished to so, and courts have been good at enforcing such rights. However, the difference was that the procedure described above, grounded in parliamentary standing orders, was of generalized application to private bills.

3.3. *Imposition of Burdens: Dismissal*

Many cases concerned dismissal from office, and in a number the facts were, as in *James Bagg's Case*, colourful.

Gaskin concerned the dismissal of a parish clerk, who sought mandamus and restoration to his position. The reason for the dismissal was that the clerk had been guilty of «indecent and indecorous conduct» on several occasions; he was found on a «certain day intoxicated during divine service, and incapable of performing his office'; and moreover 'he officiated in an improper part of the church».[39] Counsel for the parish clerk argued that his client had been given no opportunity to provide a defence to these charges. Counsel for the parish authorities sought to rely on case law that was said to indicate that a hearing was not necessary in such circumstances.

Lord Kenyon CJ was unconvinced by the argument of counsel representing the parish. He did not accept that the cases relied on to deny the need for a hearing were authority for that proposition. His conclusion was informed by consideration of principle,

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[37] See Ch 2.

[38] See, e.g., F. Clifford, P.S. Stephens, *Practice of the Court of Referees on Private Bills in Parliament*, London, Butterworths, 1870; F. Clifford, A.G. Rickards, *Cases Decided during the Sessions 1873-[1884] by the Court of Referees on Private Bills in Parliament*, London, Butterworths, 1885.

[39] *R. v Gaskin*, 8 TR, 1799, p. 209. See also, *R. v Smith*, 5 Q.B., 1844, p. 614; *Ex P Ramshay* 18 Q.B., 1852, p. 173; *Fisher v Jackson*, 2 Ch. 1891, p. 84.

stating that «if we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, *audi alteram partem*».[40] Lord Kenyon CJ 'trembled' at the consequences of compromising the principle, and while he had no doubt that Gaskin had acted from the best motives in dismissing the parish clerk, he held that this should be done in compliance with the right to be heard, which could establish whether the charges levied were true.

The House of Lords' decision in the *Saddlers'* case is a further example of the same principle, and is interesting because it was applied to a chartered corporation. The Saddlers' Company had a Charter dating back to the reign of Charles II. It provided, *inter alia*, for the appointment 'from among the freemen of the company practising the art or mystery of saddlers' of wardens and assistants of the company. They had various duties, including sitting on the company's Court of Assistants. Dinsdale was duly chosen as an assistant, but was then dismissed without notice, for violation of a company bye-law, barring those who had been bankrupt from membership of the Court of Assistants. The House of Lords held this to be unlawful. Lord Cranworth held that it «is impossible to contend that a person validly elected and admitted a member of the court, could behind his back, and without notice, be removed from his office»,[41] and Lord Westbury and Lord Wensleydale reasoned to like effect.[42]

3.4. *Imposition of Punishment: Criminal Cases*

The right to be heard was, not surprisingly, protected in criminal cases. In *Gaskin*, Lord Kenyon CJ stated that the right to be heard was at the 'head of our criminal law'.[43] This sentiment was repeated in *Ford*, where it was held that the requirement for notice and a hearing was a condition precedent for a lawful conviction for violation of the Statute of Deer Stealing.[44] The principle was reiterated in *Simpson*, where Parker CJ held that natural justice always required the party charged with any offence to be heard before he was condemned, subject to an exception where the failure to be heard was a result of the accused's own default, since otherwise, every criminal might avoid conviction. The law therefore required the magistrate to give the accused some opportunity to appear, and if upon such notice he neither came nor sent sufficient excuse, the magistrate could proceed to judgment.[45]

Criminal punishment could occur in a plethora of ways, including pursuant to the poor law. In *Angell*,[46] Berkshire justices were acting pursuant to their statutory duty to find vagrants. They identified a person as a pauper, and ordered his removal to the parish where he was settled. He nonetheless returned to another parish, which led the de-

[40] Ibidem, p. 210.

[41] House of Lords, *R. v Saddlers Co*, cit., p. 461.

[42] Ibidem, pp. 449, 471. See also, *Osgood v Nelson*, L.R. 5 H.L., 1872, p. 636.

[43] *R. v Gaskin*, cit., p. 210.

[44] *R. v Ford*, 12 Mod., 1707, p. 453.

[45] *R. v Simpson*, 1 Str. 1717, p. 44; *R v Aikin*, 3 Burr., 1765, p. 1785.

[46] *R. v Angell*, Cas. T. Hard., 1735, p. 125.

fendant magistrate to commit him to a house of correction for three days. This was held to be unlawful, because the pauper was given no hearing before this commitment.

3.5. *Imposition of Burdens: Civil Actions*

Natural justice also played a significant role in civil actions broadly conceived. Thus, in *Plews and Middleton*[47] Lord Denman held that an arbitral award should be set aside for failure to comply with natural justice, the infirmity being that the facts had been ascertained by one arbitrator separate from the other, that a witness had been examined in like manner and that the arbitration had been conducted separate from the parties. Similarly, in *Eastern Counties Railway*,[48] it was held that when an arbitrator relied on accountants, the report of the latter constituted evidence on which either party had a right to be heard, and that the final award was made in undue haste without affording this opportunity.

The decision in *Capel* is indicative of the importance of an adequate hearing.[49] Legislation empowered a bishop who believed that ecclesiastical duties were not being properly performed to impose a 'requisition', whereby the incumbent vicar would be charged with the cost of a curate, who would then ensure that such duties were adequately performed. The vicar denied that there was any reason for the requisition. The court found in his favour and held the requisition invalid for failure to accord a proper hearing. Lord Lyndhurst CJ expressed the point in strident tones.[50]

> «[A] party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defence. On consideration, then, it appears to me that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment».

The scope of ecclesiastical authority was in issue once again in *Bonaker*,[51] where a bishop had ordered the revenue due to a vicar from a parish, in terms of tithes and the like, to be sequestered by the Consistory Court because the vicar had not resided in the parish. Nothing daunted the vicar brought a restitutionary action for money had and received against the sequestrator. He succeeded on the ground that the sequestration had issued without notice given to the vicar as to why it should not issue, and the Court of Exchequer Chamber held that this was essential before the sequestration could proceed. Parke B held that,[52]

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[47] *In the Matter of an Arbitration between Henry Plews and Thomas Middleton*, 6 Q.B., 1845, p. 846.

[48] *In the Matter of the Arbitration between the Eastern Counties Railway and the Eastern Union Railway Company*, 3 De G.J. & S., 1863, p. 610.

[49] *Capel v Child*, cit.

[50] Ibidem, p. 574.

[51] *Bonaker v Evans*, cit.

[52] Ibidem, p. 171.

> «[N]o proposition can be more clearly established than that a man cannot incur the loss of liberty or property for all offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary».

3.6. *Deprivation of Rights and Benefits: Personal and Proprietary Rights and Interests*

Natural justice was applicable not only in cases where a burden was imposed, but also in cases where the claimant was deprived of a right or benefit, as occurred in the *University of Cambridge* case, also known as *Bentley's* case.[53] It arose when Cambridge University degraded the doctoral degree held by Dr Bentley, who had spoken 'contemptuously' of the University Court and the Vice-Chancellor. Bentley sought mandamus to restore the degree.

Fortescue J began his judgment by noting the nature of Dr Bentley's interest. He acknowledged that a University degree was only a civil honour, but reasoned that «yet interest and property being the consequence of such degree, the Court considers it as such with all its attendances».[54] He was doubtful whether the University Court had any power to degrade the doctoral degree, but held that in any event its action violated natural justice.[55]

> «Neither does it appear that Dr. Bentley was ever summoned to answer this contempt; and it is against natural justice to deprive a man of his right before he is heard**;** therefore if there was a custom so to do, such custom would be absolutely void; and it is a thing of daily experience to grant prohibitions to Spiritual Courts, if they deny the defendants a copy of the libel, because such denial is against natural justice».

Fortescue J concluded with a biblical reference, noting that he had «heard a learned civilian say, that God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence», opining that «such proceeding is agreeable to justice».[56]

The importance attached to natural justice in the protection of proprietary interests is apparent in the seminal decision in *Cooper*,[57] which drew on the reasoning in the *University of Cambridge* case. The plaintiff brought an action in trespass against the district board of works that had demolished his partially built house. The district board of works argued by way of defence that statute gave it power to order such demolition, *inter alia*, when the property had been built without giving seven days notification of intention to build, which the plaintiff had not done. The plaintiff counter-argued that

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[53] *R. v University of Cambridge*, 8 Mod., 1723, p. 148.

[54] Ibidem, p. 163.

[55] Ibidem, p. 163.

[56] Ibidem, p. 164.

[57] *Cooper v Wandsworth Board of Works*, 14 C.B. (N.S.), 1863, p. 180.

the literal wording of the statute should be read subject to the precept that a person should not be deprived of his property without being afforded a hearing.

The court agreed. Erle J emphasized the breadth of the power claimed by the district board of works and the dramatic consequence of its exercise, since it could lead to demolition of a completed house of any value. His reasoning spoke to the instrumental justification for hearing rights, in that he proffered a number of situations where a person might have tried unsuccessfully to comply with the legislative requirement, which the provision of a hearing would have revealed.[58] It is also noteworthy, in the light of subsequent case law, that Erle J rejected an argument that the district board of works' act was not judicial, and therefore did not have to comply with natural justice. Erle J rightly held that natural justice had been deemed applicable to «many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down».[59] Willes J held that the any tribunal broadly conceived whose power impacted on property rights was «bound to give such subject an opportunity of being heard before it proceeds»; this rule was «of universal application, and founded upon the plainest principles of justice».[60] Willes J was willing to characterize the action of the district board of works as being of a judicial nature, and, in common with Erle J, he noted the instrumental justification for granting hearing rights.[61] It was Byles J who pronounced the dictum for which the case is best known. He held that a hearing was required, irrespective of whether the act was classified as judicial or ministerial, although he felt that it fell within the former category, and then continued as follows.[62]

> «That being so, 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».

4. Hearing: Content

4.1. *Content: Issue and Method*

Modern courts commonly have to grapple with the content of natural justice. They have to decide how much due process is warranted in a particular case. The answer not surprisingly varies, given the heterogeneity of types of case that fall within the remit of administrative law. This will include matters such as the right to notice of the relevant decision; whether there is a right to an oral hearing or only a paper hearing; whether the

[58] Ibidem, p. 188.
[59] Ibidem, p. 189.
[60] Ibidem, p. 190.
[61] Ibidem, p. 192.
[62] Ibidem, p. 194. See also, *Hopkins v Smethwick Local Board of Health*, 24 QBD, 1890, p. 71.

hearing must precede the relevant decision or whether it can be given thereafter; whether there should be any right to discovery of documents or any right to cross-examination; whether the evidential rules applied in a normal trial should be modified or relaxed in their application to administrative decision-making; whether there can be any contact between the administration and one of the parties prior to the decision being made; whether causation should matter, in the sense that the reviewing court should consider if the hearing would have made a difference to the final outcome; whether there is a right to be represented by a lawyer; whether reasons should be given for the decision; and the meaning to be given to impartiality.

A legal system will also have to decide how to go about deciding these issues. There are a number of options.[63] At one end of the spectrum is the all-embracing procedural code, which addresses such matters in detail. At the other end of the spectrum are *ad hoc* judicial decisions, with the courts deciding the issues on a case by case basis. There are various options in between. The courts may develop a general formula through which to determine the content of process rights.[64] Legislation may stipulate the content of process rights for hearings of a certain type, for example those that are more formal in nature.[65] The content of hearing rights can alternatively be determined by a mixture of *ad hoc* case law, combined with sector-specific legislation that applies the courts' precepts and fleshes them out.

4.2. *Central Core: Notice and Opportunity to Respond*

UK courts have grappled with issues concerning the required content of natural justice ever since natural justice and hearings rights were recognized as part of the legal order. It is clear that notice of the hearing, and some opportunity to respond were regarded as integral to the very idea of natural justice. This was made clear in *James Bagg's Case*.[66]

Faversham further emphasized the significance of notice and proof.[67] Lord Kenyon CJ held that notice encompassed not merely notification prior to the hearing to the person affected, but also adequate notice to those who should take part in the decision-making process. He also held that there was a failure of natural justice where a person was disenfranchised from a company in circumstances where the charge on which this was based was not proven. There can nonetheless be instances where the right to notice is qualified

[63] P. Craig, *Perspectives on Process: Common Law, Statutory and Political*, in *Public Law*, 2, 2010; J.-B. Auby (ed.), *Codification of Administrative Procedure,* Bruxelles, Bruylant, 2014; G. Della Cananea, *Due Process of Law beyond the State: Requirements of Administrative Procedure*, Oxford, Oxford University Press, 2016.

[64] See, e.g., U.S. Supreme Court, *Mathews v Eldridge*, 424 US, 1976, 319.

[65] This is the methodology for formal adjudication and formal rulemaking under the Administrative Procedure Act 1946 in the USA.

[66] Court of the King's Bench, *Bagg's Case*, cit.; *R. v Truebody*, 2 Ld. Raym., 1707, p. 1275; *R. v Venables*, Fortescue, 1725, p. 324; *R. v Manning*, 2 Keny, 1757, p. 561; *In the Matter of William Blues*, 5 El. & Bl., 1855, p. 291; *Wayman v United Brethren Friendly Society*, 1 KB, 1917, p. 677.

[67] *R. v The Company of Fishermen of* Faversham, cit., p. 356.

by an agreement. This was so in *Vallee*,[68] where the defendant sought to resist enforcement of a judgment of a French court on the ground that he had not received notice of the action, nor was he resident in France. However, he was a shareholder in a French company, which required him to elect a domicile in France, and he was duly served there with notice of the French law suit. Alderson B duly held that it was «not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them».[69]

The hearing had to be adequate, but this did not always demand an oral hearing. A written hearing could suffice, as was the case for a hearing by a University Visitor in the *Bishop of Ely* case.[70] The courts were, nonetheless, generally assiduous in ensuring that the hearing was fit for purpose, in the sense of addressing the issues raised by the claimant. This is exemplified by the *Archbishop of Canterbury* case.[71] Poole, an assistant curate had his licence revoked by the Bishop, and then appealed, as entitled, to the Archbishop. The latter heard the appeal, but only considered the grounds addressed by the Bishop and did not take further evidence. The court held that this did not suffice for a hearing. Wightman J reasoned as follows.[72]

> «That is not a "hearing" of the appeal. It is said that the petitioner has, in effect, been heard. That, however, is not so. The very object of the appeal is to contest the validity of the grounds of condemnation; to contend, in fact, that the prima facie case made out against the appellant is not a good one. But all that the Archbishop looks at is this prima facie case».

The need to ensure the adequacy of the hearing is further evident in *Capel* considered above, where the court laid considerable stress on the fact that the hearing must enable the claimant to contest the claims made against him. The court also addressed an issue that is endemic in natural justice cases, as to whether an appeal can cure an infirmity in an earlier hearing. The court was adamant in this regard.[73]

> «I apprehend the right to appeal to the Archbishop makes no difference in this case. Where there is an authority to pronounce a judgment, and an appeal is given from that judgment when it is pronounced, the party against whom the judgment is pronounced has a right to be heard on the original judgment: he has a right to be heard before the original judgment is pronounced, for the purpose of preventing that judgment from being pronounced; and the circumstance of its having been given makes in that respect, as I apprehend, no difference whatever».

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[68] *Vallee v Dumergue*, 4 Ex., 1849, p. 290.
[69] Ibidem, p. 303.
[70] *R. v Bishop of Ely*, 5 T.R., 1794, p. 475.
[71] *R. v Archbishop of Canterbury*, 1 El. & El., 1859, p. 545.
[72] Ibidem, p. 560. See also, *R. v Daly*, 1 Ves. Sen., 1749, 269.
[73] *Capel v Child*, cit., p. 576.

4.3. *Hearing Rights: Sufficiency*

The more particular demands of natural justice arose in many cases. In *Sheehy*, the court was concerned with the sufficiency of the hearing rights provided in Ireland for the purposes of the application of that judgment in the UK.[74] Erle J held that if he had been satisfied that the defendants in the original suit never were in court so as to have an opportunity of being heard in their defence, «it might have been necessary to consider whether a judgment pronounced against them was not so contrary to natural justice that it ought not to be held binding and conclusive against them in this country».[75] However, having examined the relevant statutory provisions concerning service on corporations, he concluded that they had been properly complied with and that there was no failure in natural justice.

In *Story*,[76] the salient issue was the sufficiency of the hearing before a Consistorial Court, which heard an action by the claimant's wife for restitution of conjugal rights. The claimant sought prohibition to resist the resulting judgment, claiming a failure of natural justice. He had been heard, but argued that there had been a failure of natural justice because he had not been told the time and place when judgment would be given. The court rejected the claim, holding that natural justice did not demand such information.

In *Hayley*, the court was concerned with the right to be represented by counsel in circumstances where the barrister had fallen ill. It was argued that there was no instance of a trial being put off on account of the illness of the attorney for one of the parties. However, Lee CJ held that «whether there be such an instance or not, it would be contrary to natural justice that a party should be compelled to have his cause tried, when the attorney, who has all along had the management thereof, is prevented by sickness from attending the trial».[77]

The decision in *Osgood* emphasized the importance attached to the provision of a hearing prior to dismissal.[78] The case concerned dismissal of an officer who held a freehold post within the City of London corporation. The House of Lords, acting on the advice of judges from lower courts, held that it would not readily interfere with the substantive decision as to whether the office holder should be removed from his post, but that it would ensure that hearing rights were provided and these were interpreted broadly in the instant case. There had to be notice of the charge; the opportunity to cross-examine witnesses brought forward against him; the opportunity more generally to oppose the case set up against him; the ability to call his own witnesses; and more broadly the opportunity of defending himself.[79]

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[74] *Sheehy v The Professional Life Assurance Co*, 3 C.B. (N.S.), 1857, p. 597. See also, *Buchanan v Rucker*, 1 Camp., 1807, p. 63; *Cavan v Stewart*, 1 Stark, 1816, p. 525; *Becquet v MacCarthy*, 2 B. & Ad., 1831, p. 951; *Price v Dewhurst*, 8 Sim, 1837, p. 279; *Reynolds v Fenton*, 3 C.B., 1846, p. 187; *Crawley v Isaacs*, 16 LT, 1867, p. 529.

[75] Ibidem, p. 614.

[76] *Ex p Story*, 12 C.B., 1852, p. 767.

[77] *Hayley v Grant*, Sayer, 1752, p. 53.

[78] *Osgood v Nelson*, L.R. 5 H.L., 1872, p. 636.

[79] Ibidem, pp. 646, 650.

Hearing rights were not always defined this broadly, and the court was mindful of the nature of the person making the decision when deciding on the type of hearing that was required. This is exemplified by *Spackman*, which concerned who should determine the boundaries in which allowable building extension could take place. The House of Lords rightly decided that the architect attached to the Board of Works was properly assigned this power, not a magistrate.[80] The Lord Chancellor duly framed the required hearing rights cognizant of the fact that the architect was not a judge in the ordinary sense of that term, but that he should nonetheless give notice and some opportunity for response.

5. Bias: Foundations

Dr Bonham's case[81] decided in 1609 is most oft-cited for Lord Coke's dictum as to the court's power to declare void or disregard statutes that offended against common right or reason, or that were morally repugnant. This dictum did not fall on fertile judicial soil. It provoked a fierce response from Lord Ellesmere in his observations on Coke's Reports. He chastised Lord Coke for making this claim, saying that there was no precedent for doing so, and Lord Ellesmere was equally critical about the court's interpretation of the statute in the instant case.[82] The legal reality is that UK courts did not develop this aspect of the judgment and have not exercised the power of constitutional review.

Subsequent courts have, however, been receptive to that part of the judgment in which Coke CJ elaborated on the other central principle of natural justice, the rule against bias, which is contained in the *nemo iudex* principle. It was forcefully expressed in the instant case. Thus, in determining whether the College of Physicians had the power to fine and imprison Dr Bonham, Coke CJ made clear that a person could not be a judge in his or her own cause.[83]

> «The 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, *quia aliquis non debet esse Judex in propria causa, imo iniquum et aliquem suae rei esse judicem;* and one cannot be Judge and attorney for any of the Parties».

This central principle was powerfully reaffirmed by Holt CJ in *City of London v Wood*, which concerned the enforcement of a debt for breach of a bye-law.[84] The defendant objected, *inter alia*, because the mayor was both prosecutor and judge. Holt CJ shared his misgivings.[85]

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[80] *Spackman v Plumstead Board of Works*, 10 App. Cas., 1885, pp. 229, 240. See also, *De Verteuil v Knaggs*, AC, 1918, p. 557.

[81] Court of King's Bench, *Dr Bonham's Case*, 8 Co. Rep., 1609, p. 113b.

[82] Ibidem, p. 118a, fn C.

[83] Ibidem, p. 118a.

[84] *City of London v Wood*, 12 Mod., 1701, p. 669.

[85] Ibidem, p. 687.