International Journal of Law and Global Policy | ISSN *1694-4364*
Published by AIR JOURNALS | https://airjournal.org/ijlgp
16/18 Avenue des Longaniers, Quatre Bornes, Mauritius
airjournals@gmail.com; editor@airjournal.org

Understanding Natural Law Principles of Audi Altarem Partem Doctrine from the Administrative Law Perspectives

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Citation: Onuorah, O. R., Nwodo, A. J., Onah, H. C. & Odoh S. C. (2024). Understanding Natural Law Principles of Audi Altarem Partem Doctrine from the Administrative Law Perspectives. *International Journal of Law and Global Policy, 5(1), 1-19. DOI: https://doi.org/10.5281/zenodo.11343478*

Indexing – *Advanced Science | Google Scholar | Researchbib.com | Publons | Director of Open Access Scholarly Resources | InfoBase Index*

DOI: 10.5281/zenodo.11343478

Abstract

Natural justice, rooted in English common law, requires procedural fairness in administrative law. Known also as substantial justice or fair play in action, these judge-made principles parallel the American procedural due process. Central to natural justice is "Audi Alteram Partem," meaning no one should be condemned unheard. This principle mandates a hearing before decisions affecting individuals' rights. Key components of fair hearing include notice, legal representation, and cross-examination. Failure to observe these principles can render decisions void, as in Ridge v. Baldwin (1964). Bagg's Case exemplifies early application of the fair hearing rule, using mandamus for judicial review. Natural justice comprises two doctrines: audi alteram partem and nemo judex in causa sua (no one should be a judge in their own case). While the former is indispensable, the latter has exceptions. The biblical account of God questioning Adam underscores this principle, reflected in constitutions like Nigeria's, which ensure fair hearings in civil disputes. Sir Matthew Hale, in 1676, emphasized hearing both parties before judgment. This was affirmed in Cooper v. Wandsworth Board of Works, where even God's fairness was cited. Justice Coke, in Bagg's Case (1615), asserted that proceedings without fair hearing are void, reinforcing the Court of King's Bench's role in correcting both judicial and extra-judicial errors. Despite the clear mandate for fair hearings, misapplications in administrative decisions persist. However, higher authorities often nullify such infractions. This work, based on secondary sources and legal citations, concludes that courts must vigilantly protect citizens' rights against arbitrary administrative decisions. Judges must remember that their own conduct is also under scrutiny during trials.

Keywords: Natural Justice; Audi Alterem Partem; Nemo Judex in Causa Sua; Rule of Law; Fair Hearing

Introduction

The principle of natural justice has its origin from Common Law in England and they are based on two Latin maxims:

1. Nemo Judex in causa sua or Nemo debet esse judex in propria causa or Rule against bias (No man shall be a judge in his own cause).
2. Audi Alteram partem or the rule of fair hearing (hear the other side) - which were hitherto drawn from jus natural).

There is no clear-cut definition of natural justice. However, the principles of natural justice speak to the same tenets in different jurisdiction and are being enforced different by judges and non-juridical personnel called to serve justice. Lord Esher M.R has defined it as "the natural sense of what is right and wrong" and "fundamental justice" in *Vionet v. Barrett*[1] and later in *Hopkins v. Smethwick Local Board of Health*[2] respectively.

Mr. Justice Bhagwati saw natural justice as "fair play in action".

Exclusion of natural justice (exceptions to the rule of natural justice)

1. Exclusion by statutory provisions.
2. Exclusion by the constitutional provisions.
3. Exclusion in case of legislative act.
4. Exclusion in case of confidentiality.
5. Exclusion in cases of academic adjudication.
6. Exclusion when no right of the person is infringed.
7. Exclusion in the cases of interim prevention action.
8. Exclusion in case of fraud.
9. Exclusion on the ground of the impracticability
10. Exclusion in public interest.
11. Exclusion in case of the need of prompt action or in emergency or necessity.

Audi alteram partem or the rule of fair hearing (hear the other side)

The second principle of natural justice is Audi Alteram Partem is from a latin phrase "*audiatur et altera pars*". The rule of fair hearing which means that no one shall be condemned unheard i.e. there must be fairness on the part of the deciding authority. Fundamental to this principle is that reasonable opportunity must be given to a person before taking any action against him. This rule maintains that the affected person must be availed an opportunity to produce evidence in support of his case. He should be disclosed the evidence to be utilized against him and should be given an opportunity to rebut the evidence produced by the other party. De Smith says[3];

[1] *Vionet v. Barrett* (1885) 55 LJ RB 39

[2] *Hopkins v. Smethwick Local Board of Health* (1890) 24 QB 713

[3] De Smith says; (1615) 11 Co. Rep 93 b: 8 Digest 218

> 'no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him'. A party is not to suffer in person or in purse without an opportunity of being heard'.

The Latin expression is well ingrained in the Common Law legal system and it requires that actions or decisions affecting the rights of individuals may not be taken until the persons affected have been given an opportunity of being heard. The opportunity to provide hearing before making any decision was considered to be a basic requirement in administrative and quasi judicial proceedings. This concept is recognized and significant even under our law as the Constitution of the Federal Republic of Nigeria enjoined that it be upheld in all circumstances where dispute arises between parties or between parties and government viz;

> *"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."*

Article 14[4] and 21[5] of the Indian Constitution has strengthened the concept of natural justice. In 1215, *Magna Carta* [6]recognized this principle in England under King John who was then facing a possible rebellion by powerful barons. Under duress, he agreed to a Charter of Liberties known as the *Magna Carta* (or Great Charter) that would place him and all of England's future sovereigns within a rule of law. The Magna Carta document was reissued (with alterations) in 1216, 1217 and 1225, and eventually served as the foundation for the English system of Common Law." when the historic document was made at Runnymede following discussions with the barons and clerics led by Archbishop Langton, King John granted the Charter of Liberties, subsequently known as Magna Carta. This document guarantees Barons their ancient rights: all free men have the right to justice and a fair trial with a jury. The Monarch doesn't have absolute power.

In 1863 during the celebrated case of *Cooper v. Wandsworth Board of Works*[7], the learned trial jurist resounded the first application of audi alteram partem by The Almighty God himself over Adam and Eve in the garden of Edem as recorded in the Holy book of Bible. When God called upon Adam to make his defence, God asked thus;

> "where art thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat".

The jurist posited thus:

> "Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou? hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat".

In Bagg's case supra (1615)[8] *audi alterm partem* was considered extensively in a suit concerning municipal misbehaviour. Here, the Mayor and Chief Burgesses of the Borough of Plymouth had removed one of their members, James Bagg, from the office of Chief Burgess on the grounds of his misconduct. Allegations were made against James Bagg, a Chief Burgess of Plymouth who had been disfranchised for unbecoming conduct. It was alleged that he had misconducted himself when he told the previous Mayor, Mr. Trelawney thus:

> "you are a cozening knave. I will make thy neck crack and by turning the hinder part of his body in an inhuman and uncivil manner towards the mayor, scoffingly, contemptuously and uncivilly, with a loud voice, said, ('Come and kiss')".

[4] Indian Constitution Article 14
[5] Indian Constitution Article 21
[6] Magna Carta originated as an unsuccessful attempt to achieve peace between royalist and rebel factions in 1215, as part of the events leading to the outbreak of the First Barons' War. England was ruled by King John, the third of the Angevin kings. First version issued in 1215 at Runnymede, an otherwise obscure field lying next to the Thames in Berkshire between Windsor and Staines. Charters granting rights and liberties to individuals and groups were issued by lords throughout society, including the king. Following further discussions with the barons and clerics led by Archbishop Langton, King John granted the Charter of Liberties, subsequently known as Magna Carta, at Runnymede on 15 June 1215. This document guarantees Barons their ancient rights: No new taxes unless a common counsel agrees. All free men have the right to justice and a fair trial with a jury. The Monarch doesn't have absolute power.
[7] *Cooper v. Wandsworth Board of Works, (1863) 143 ER 414)*
[8] Bagg's case *James Bagg's Case*: KBD 1572

Mr. Bagg dissatisfied with his removal commenced proceedings in the Court of Kings Bench challenging his removal from office by the mayor and other Burgesses. At judgment, the Court ordered the Mayor and the Burgesses to either restore Mr. Bagg to office or to show cause why he was removed. To this, an answer was given referring to Mr. Bagg's very bad behaviour and malversation. The Court was albeit not satisfied that the reasons adduced justified his removal. 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.

Bagg's Case represents one of the early judicial expressions of the fair hearing rule. It was perhaps most notable and one of the first occasions on which *mandamus* were used as a tool for judicial review of administrative action. In justifying the issue of the writ, 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 misdemeanours 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.

The Court of King's Bench issued another *mandamus* in 1723 against the University of Cambridge in *R. v Cambridge University-Ex parte Bentley*, for restoration to one Dr Bentley of the degrees of Bachelor of Arts and Doctor of Divinity of which he had been deprived by the University without a hearing. Facts of the case; Dr Bentley had been served with a summons to appear before a University court in an action for debt. He said the process was illegal, that he would not obey it and that the Vice-Chancellor was not his judge. He was then accused of contempt and without further notice deprived of his degrees by the 'congregation' of the University. The judgment of Fortescue J in the case is frequently cited as an epitome of the way in which the idea of natural law informed the concept of natural justice. Fortescue J said:

> The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.

After Dr Bentley's Case the fair hearing rule was reinforced in 1799 by Lord Kenyon CJ in *R v Gaskin.* Finally, Fortescue J's words in Bentley's case in *R v Chancellor of Cambridge University* in 1716 was re-echoed by Justice Kayode Esho, J. S, C in *Fawehinmi v LPD Committee*[9] in with both Justices saying that laws of God and man both give the party an opportunity to make his defence. It was Lord Kenyon who apparently coined the Latin term *'audi alteram partem'* to encapsulate the rule, of which he said: It 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. This is how principle of *Audi Alterm Partem* evolved in common law system. Later on, this principle was applied to other quasi-judicial and other tribunals and ultimately it is now clearly laid down that even in administrative actions, where the decisions of the authority may result in civil consequences, a hearing before a decision in necessary. In *Lapointe v. L'Association* it has been observed that 'the rule *(audi alteram partem)* is not confined to the conduct of strictly legal tribunals, but is applicable to everybody or body of persons invested with authority. Lord Wright also referred to the leading cases on the subject as he espoused in the *Board of Education v. Rice*[10] where Lord Loreburn, L.C. observed as follows:

> "Comparatively recent statutes have extended, if they have originated, the practice of imposing upon departments or offices of State the duty of deciding or determining questions of various kinds. It will, I suppose usually be of an administrative kind, but sometimes, it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. I need not and that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial...The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari".

[9] *Fawehinmi v LPD Committee* (1985), 2 NWLR Page 347
[10] *Board of Education v. Rice* (1911 AC 179:80 LJKB 796)

Lord Wright also reiterated from the same decision the observation of the Lord Chancellor that:

> "the Board can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view".

Akin to the same effect are the observations of Earl of Selbourne, in *Spackman v. Plumstead District Board of Works*[11] where the learned Noble Lord Chancellor observed as follows:

> "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice".

Lord Selbourne also added:

> that the essence of justice consisted in requiring that all parties should have an opportunity of submitting to the person by whose decision they are to be bound, such considerations as in their judgment ought to be brought before him.

All these cases lay down the very important rule of natural justice contained in the oft-quoted phrase 'justice should not only be done, but should be seen to be done'.

The concept of natural justice has morphed dramatically in recent years, consistent with the trite order that natural justice are not rules embodied always expressly in a statute, regulations or rule *strictu sensu*, instead natural justice may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must flow to a great extent on the fact and circumstances of that case in issue, the frame-work of the statute under which the enquiry is held. The old peculiarity connecting a judicial act and an administrative act has withered away dramatically. Distinctly, administrative orders which occasion civil consequences must be consistent with the rules of natural justice. The phrase 'civil consequences' cover contravention of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its broad sense, natural justice embodies the whole lot that affects a citizen in his civil life. Natural justice in administrative law must be in accordance with two principles as was held in *Board of Education v. Rice* that;

> "to act in good faith and fairly listen to both sides… as a duty lies upon anyone who decides anything"

Principle of Fair Hearing Explained

Audi alteram partem attributes of hear the other side, or no man should be condemned unheard or both the sides must be heard before passing any order is trite under both traditional and international jurisprudence. This is the first principle of civilized jurisprudence and is accepted by laws of men and God. Before an order or sentence is passed against any person, reasonable opportunity of being heard must be given to him. Commonly, this maxim includes two elements:

(i) Notice; and (ii) Hearing. Here we needed to be expatiated and import their fundamental values and how glossing over them can invalidate any judicial or quasi-judicial proceedings.

Notice

The first feature of *audi alteram partam* (hear the other side) is the question of Notice. The fundamental question here is what constitutes a notice in this sense. Prior to any action, the affected party must be adequately notified via a notice to show cause against the proposed action and seek his explanation. It is elemental, fundamental and a *sine qua non* to the entire hearing

[11] *Spackman v. Plumstead District Board of Works* (1985 (10) AC 229:54 LJMC 81)

process. Any decision passed without giving notice in its strictest sense is against the principles of natural justice and is void *ab initio*. Without knowing the facts of the case, no one can defend himself, either through self or through his attorney. The right to notice means the right of being known. The right to know the facts of the suit or case happens at the start of any hearing and must therefore precede any hearing. The ingredients of a valid notice must specify the time, place/date of hearing, jurisdiction under with the case is filed, the charges, and proposed action against the person. Any missing part goes to the root of the proceeding for the notice must be unambiguous to be adjudged proper and adequate. If it is ambiguous or vague, it will not be treated as a reasonable and proper notice. If the notice does not specify the action proposed to be taken, it is taken as vague and, therefore, not proper as was held in the case of *Abdul Latif v. Commr.* The notice will also be vague if it does not specify the property proposed to be acquired as was the issue in the case of *Tulsa Singh v. State of Haryana*[12]. If the person affected is aware of the case against him and not prejudiced in preparing his defence effectively, the requirement of notice will not be insisted upon as a mere technical formalities and proceeding will not be vitiated merely on the technical ground. Whenever a statute clearly specifies that a notice must be issued to the party, non-compliance makes the act void. However, non-issue of the notice or any defective service of the notice does not affect the jurisdiction of the authority but violates the principle of natural justice. In James Bagg's case[13], he was reinstated by mandamus as no notice or hearing was given to him before passing the impugned order. In the case of *Punjab National Bank v All India Bank Employees Federation*, the notice contained certain charges but the penalty was imposed on the charges other than those mentioned in the notice. Thus, the charges on which the penalty was imposed were not contained in the notice served on the person concerned. The notice was not proper and, therefore, imposition of penalty was invalid.

In R. v. University of Cambridge (Dr Bentley's case) the University authorities without giving any notice cancelled the degree of Dr. Bentley on the ground of misconduct. The University's action was held violative of the principle of natural justice. In *R v New Market Assessment Committee,* the municipality issued a notice to the house owner stating that it was going to tax the house at the rate of 2, 5001 pounds per year and also stated that if the owner consented to it, he need not attend before Assessment Committee. The house owner did not attend. Later the municipal committee enhanced the tax to @ 4,500 pounds without giving any notice. The House of Lords quashed the municipal assessment order in the writ of certiorari.

Object of Notice

Considering the fact that the object of notice is to provide an opportunity to the person so that he can equip himself to defend his case, any order passed without giving a notice is considered violative of the principles of natural justice and is void ab initio. The case of *Board of High School v. Kumari Chitra*[14] provides a good illustration here. In this case, the petitioner appeared for the examination. But the board, without giving a notice cancelled the examination on the ground of the shortage of attendance. The petitioner was not given an opportunity of being heard. The board contended that giving show cause notice would not serve the purpose since the evidence (shortage of attendance) is borne on the record. Upon appeal, the Supreme Court rejected the contention of the board and held the action against the principle of natural justice.

The principle of natural justice must be observed irrespective of the reason, whether the purpose would be served or not. Maneka Gandhi v. Union of India. It is a leading case in personal liberty under Article 21 of Indian Constitution. The petitioner, Maneka Gandhi's passport was impounded without giving any opportunity (by the government of India) in public interest. The Supreme Court held that the order of the government was violative of the principles of natural justice and laid down the following propositions:

1. The adjudicating authority must be partial and without any interest or bias
2. The adjudicating authority, whether judicial or quasi-judicial cannot delegate or sub delegate its power (the power to decide the case should not be delegated)
3. The adjudicating authority must disclose all the material placed before it and must give reasonable opportunity to the affected interest to submit their case

Hearing

This is a basic requisition of rule of law and has been described as fundamental and a foundation concept. Hearing in its full sense means that a person against whom an order to his prejudice is passed should be fully and explicitly informed of the charges against him, have a right to know the evidence both oral and documentary, be given an opportunity to submit his

[12] *Tulsa Singh v. State of Haryana*. (1970) Lab I.C. 1448
[13] Bagg's case *James Bagg's Case*: KBD 1572
[14] *Board of High School v. Kumari Chitra* AIR 1970 SC 1039

explanation thereto, by which the matter is proposed to be decided, to have the witnesses examined in his presence and have the right to cross examine them and to lead his own evidence both oral and documentary in his defence. Hearing as a rule of procedure has no definite content, but varies with the facts and circumstances of each case. It is the first principle of the civilized jurisprudence.

Ingredients of Fair Hearing

Hearing will be considered as fair hearing if the following conditions are satisfied:

1. Adjudicating authority receives all the relevant material produced by the individual
2. The adjudicating authority discloses to the individual concerned evidence or material which it wishes to use against him.
3. The adjudicating authority providing the person concerned an opportunity to rebut the evidence or material which the said authority wants to use against him

The universality of application of the concept of *audi alteram partem* maxim and its flexibility in operation were brought out by Lord Loreburn L.C who stated;

> that the maxim applied to everyone who decides anything while recognizing also that the manner in which a person's case was heard did not necessarily have to be the same as an ordinary trial.

However, to claim fair hearing in any circumstance, an assumption is made that there must be:

1. Sufficient and valid notice to be given to allow for adequately preparation
2. That a person will be entitled to know what evidence has been produced against him or her. All evidence in form of arguments, allegations, documents, photos, etc presented by one party must be disclosed to the other party, who may then subject it to scrutiny as.
3. A reasonable chance to consider their position and prepare a response. What is reasonable can vary according to the complexity of the issue, whether an urgent decision is essential or any other relevant matter.
4. Proper opportunity to contest, correct or contradict any such evidence from the adversary and raise any relevant matters before the tribunal.
5. An opportunity to reply in a way that is appropriate in the circumstance.
6. Opportunity to receive all relevant information before preparing his/her reply as administrative decision must be based upon logical proof or evidence material.
7. Opportunity for his/her reply to be received and considered before the decision is made a
8. A genuine consideration of any submission. One needs to be fully aware of everything written or said, and proper and genuine consideration to his/her case. An investigator or decision maker should be able to visibly point to the evidence on which the inference or determination is based.

Fair hearing may also include being provided with legal representation, the right to cross examination of witness or reasons for a decision or order.

India, U.S.A. and England like some other Common Law countries do not consider the right to oral or personal hearing as part of the principle of *audi alteram Partem* unless the statue under which the action is taken by the authority specifically provides for the oral or personal hearing. Hearing order if passed by the authority without correspondingly providing the reasonable opportunity of being heard to the person affected by it adversely will be worthless and must be set aside. The case of *National Central Co-operative Bank v. Ajay Kumar*. This condition may be complied by the authority by providing written or oral hearing which is the discretion of the authority, unless the statue under which the action being taken by the authority provides otherwise. Personal or oral hearing is important when the context requires it as was held in the case of *A.K. Gopalan v. State of Madras*[15]. It is the duty of the authority to ensure that the affected party be given an opportunity of oral or personal hearing unless the context requires otherwise.

[15] *A.K. Gopalan v. State of Madras* (1950 AIR 27, 1950 SCR 88)

Legal Representation

A vital question is whether right to be heard includes right to legal representation? A fair hearing in administrative proceeding will not automatically include the right to legal representation as it is not considered as an indispensable part of the fair hearing. Representation will normally be permitted and sometimes demanded as a demonstration of transparency in the proceedings. In certain situations, if the right to legal representation is denied, it amounts to a violation of natural justice. Where the case involves question of law as in case of, *Jagmohandas Jagjivandas Mody v State of Bombay*[16] *(Now Gujarat)* and in *Krishna Chandra v. Union of India*, the courts ruled that denial of legal representation will amount to a violation of natural justice because in such conditions the party may not be able to understand the question of law effectively and, therefore, he should be given an opportunity of being heard fairly epitomized in legal representation.

Cross Examination

The adjudicating authority in a fair hearing is not required only to disclose the person concerned the evidence or material to be taken against him, but he should be provided an opportunity to rebut the evidence or material. The important question before the authority is that the witness should be cross-examined or not. Courts do not insist on cross examination in administrative adjudication, unless the circumstances are such that in the absence of it a person cannot put up an effective defense. In *Kanungo & Co. v. Collector of Customs,* the business premises of a person were searched and certain watches were seized by the authority under the Sea Customs Act of India. He was not allowed to cross-examine the persons who gave information to the authority: Held: No violation of the natural justice hence the principles of natural justice do not require the authority to accord the respondent/defendant the right to cross examine the witnesses in the matters of seizure of goods under the Sea Customs Act.

Failure to Give Reason

The law requires that in deciding all matters that may prejudice an individual, the reason for arriving at such order must be given. Where the reason for the decision is not given to the person concerned or reasons are not given to the court, the order is quashed and the authority is directed by the court to examine the matter de novo or afresh. Where the reasons are not communicated to the person concerned but that they are on record, in some cases, the court has upheld the action but in some other cases, the court has not upheld it.

In *Ajantha Industries v. Central Board of Direct Taxes*[17]*,* the court has held that recordings of reasons on the file are not sufficient. It is necessary to give reasons to the person concerned. In this case, the order was quashed on the ground that the reasons were not communicated to the person concerned. The view expressed in the Ajantha Industries case appears to be the better view. Reasons are for the benefit of the party concerned and, therefore, they should be communicated to the person concerned and they should not be confined to the record or file.

Exceptions to the Rule of Natural Justice (*Audi Alteram Partem)*

Contempt of Court

Contempt of court will receive elaborate discussion here as an exception to the principle of *Audi Alteram Partem* because of the peculiar nature of itself and the circumstances of how and where it operates to protect the integrity of our courts, its decisions, procedures and the judges in our judicial system. The subject of contempt of court is complicated since several different conceptions are brought under the same heading. The word "contempt" connotes an attitude or feeling of a person towards a person or thing that he considers worthless, despicable or scorn; wilful disregard of, or disrespect for the authority of a court of law or legislative body. By definition, it is difficult to define what a court may regard as contempt of contempt as it is not every act of discourtesy to the court by counsel or anyone that may amount to contempt. But language or behaviour which is loathsome, contemptible or scandalous or which deliberately insults or denigrates the court, comments whether oral or written scandalizing the court is contemptuous. Print, electronic or social media publications or article containing scurrilous, slanderous, libelous personal abuse of a judge with reference to his conduct as a judge in a judicial proceeding which has terminated or is ongoing, private communication to a judge for the purpose of influencing his decision upon a pending matter - whether or not accompanied by the offer of a bribe or by personal abuse is contemptuous as it tends to interfere with the cause of justice. Per the provision of Section 133(4) of the criminal code, every publication in a newspaper misrepresenting

[16] *Jagmohandas Jagjivandas Mody v State of Bombay (Now Gujarat)* AIR 1962 Guj 197, (1962) IILLJ 507 Guj.
[17] *Ajantha Industries v. Central Board of Direct Taxes* AIR 1976 SC 437

proceedings of a court is contempt and therefore punishable. It is therefore case to case dependent. In the case of Franklin *O Atake V Attorney General of the Federation & Anor*, Idigbe JSC[18] noted;

> *"it is indeed difficult to give an exact definition of contempt of court, because it is so manifold in aspects. But generally, it may be ascribed as any conduct which tends to bring into disrespect, scorn, or disrepute to the authority and administration of the law or which tends to interfere with and or prejudice litigants and/or their witnesses in the course of litigation."*

Nevertheless, in *Theophilus Adetola Awobokun & anor v Toun Adeyemi*[19], the court defined contempt of court as

> "action or inaction amounting to an interference with or obstruction or having a tendency to interfere with or obstruct due administration of justice.

Section 133 of the criminal code says that Contempt of Court occurs when and where;

> *"Any person who within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespects, in speech or manner, to or with references to such proceeding, or any person before whom such proceeding is being heard or take, is guilty of an offense known as contempt of court".*

"Contempt of Court" is the act of putting into disrepute, disdain or denigrating the integrity of the court either directly or constructively which may be civil or criminal. Contempt occurs both in as civil or criminal trial and it can be competently captured under two heads of (a) direct (*in facie curiae*) and (b) indirect (constructive) (*ex facie curiae*) contempt respectively. One may be cited in court for civil contempt when you wilfully disregard orders made by a court and also for civil contempt when you disobey the court's judgment. In our jurisdiction, the procedure for disregard to court decision is to be served with Form 48, which is notice of the consequence of disobedience to court orders. If you still persist in the disregard, form 49 will be subsequently served, which requires you to show cause why you shouldn't be committed to prison and so it goes until committal.

The Punishment for Contempt of Court is not so Severe

The punishment for contempt does not attract so severe a punishment as would that of capital offences like rape, armed robbery, treason, or murder. Per section 133 of the criminal code**,** the judge may sentence a contemnor to imprisonment for a maximum of 3 months, and for contempt under the Halsbury laws, a maximum of 6 months for civil contempt**.** Okoma v Udoh. Every act of neglect or disdainful treatment, disobedience to the order of court, or malicious words spoken against the person in judicial capacity by anyone is deemed as contempt and treated as same and no one is immune from contempt of court. A lawyer may be cited for contempt and same for litigants too and may be tried for contempt accordingly but his conduct but be a clear-cut contempt and not mere discourtesy. Per Lord Tucker in Izuora v. The Queen[20], the two phrases were distinctively delineated thus;

> "It is not every act of discourtesy to the Court by Counsel that amounts to contempt, nor any conduct which involve a breach by Counsel of his duty to his client. In the present case the appellant's conduct was clearly discourteous, it may have been a breach of the rules and it may perhaps have been a dereliction of his duty to his client but in their Lordship's opinion it cannot properly be placed over the line that divides mere discourtesy from contempt."

However, judges must wield the contempt stick with dignity and respect for himself and the integrity of the courts generally. Per Hon. Justice M. I. Edokpayi, Chief Judge of Edo State (as he then was) in a paper he presented in honour of a distinguished jurist and titan, Hon. Justice S.M.A. Belgore, G.C.O.N., Chief Justice of the Federal Republic of Nigeria (as he then was) opined that.

Where a Judge insulted, summarily tries and summarily convicts and imprisons, he may be legally within his rights but such summary proceedings do create an embarrassing situation and a cause for concern.

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[18] *Franklin O Atake V Attorney General of the Federation & Anor* (1982)11 S.C At Page 175
[19] *Theophilus Adetola Awobokun & anor v Toun Adeyemi* (1968) NMLR. @ Page 286
[20] Izuora v The Queen, (1953)13 WACA 313 at page 346

According to him, he finds solution to all that - citing Oputa C. A. (JSC) in his Paper delivered at the Faculty of Law UNN 21st of March 1981 titled the "Ten Commandments for the Judge; His Lordship said inter alia as follows:

> The test whether or not a judge takes himself, too seriously or thinks too much of himself is in his attitude towards contempt of his court. Undoubtedly, one of the most important power of a Judge is his power to make orders. If these orders are disobeyed, the Judge has one weapon in his armor, which he can always use. He can punish the defaulting and disobedient party for contempt of court either by fine or imprisonment. All contempt of court has one thing in common- they obstruct one or other of the streams of justice. If the contempt is in the face of the court (in facie curiae) it is tried summarily by the Judge who may be the very Judge who had been injured by the contempt. How he deals with the contempt shows and proves his maturity.

Generally, the contemnor is not made to enter the witness box for the reason that doing so would violate section 36(11)[21] of the constitution which forbids an accused person from being compelled to give evidence. However, the judge may also order the arrest and detention of the contemnor and if that is the circumstance, a charge will be drafted against the contemnor, consequent upon which the contemnor will be arraigned and charged.

Learned Justice Agbaje JSC (as he then was) succinctly captured the concept into two and posits thus:

> "Contempt is of two kinds, direct or constructive. When the contempt are direct i.e. committed in the immediate view And presence of the court or so near the presence of the court as to obstruct or interrupt the due and orderly course of proceedings they are said to be contempt committed in curiae facie i.e. contempt in the face of the court. On the other hand, those contempt which arise from matters not occurring in or near the presence of the court, said to be constructive or indirect contempt, are referred to as contempt committed ex facie curiae."

Generally, not all types of contempt operate as an exception to the *nemo judex rule* except: direct or in facie curiae contempt, committed in the presence of the court. This constitutes an exception for various purposes and reasons, for instance, an accused person scandalizing the court can be swiftly punished for denigrating the integrity of the temple of justice. This is based on the policy of law that: '*the honesty and integrity of a judge cannot be questioned but his decision may be impugned for error of law or fact'* but this is not to conclude that a judge cannot be justifiably be required to disqualify himself on valid and reasonable ground(s).

There is a retinue of provisions under our law which empowers the judge to maintain the high standing and the integrity of our courts so as to shield it from denigration. Criminal Code Act CAP. (C38 LFN 2004) 6 and 133(1-9)[22] and Section 72[23] of the Sheriff and Civil Process Act, LFN 2004, and Order 9 Rule 13 of the Judgment Enforcement Rule. The provisions of these legal instruments categorically protect and empower the courts to commit for contempt, particularly where it stated under Criminal Code Act CAP. (C38 LFN 2004) that:

> *"Nothing in this Act or in the code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as contempt of court; but so that a person cannot be so punished and also punished under the provisions of the code for the same act or omission."*

Section 72[24], The Sheriff and Civil Process Act, LFN 2004, (Committal for refusal to comply with order)

> If any person refuses or neglects to comply with an order made against him, other than for payment of money, the court, instead of dealing with him as a judgment debtor guilty of the misconduct defined in paragraph if of section 66 of this Act, may order that he be committed to prison and detained in custody until he has obeyed the order in all things that are to be immediately performed and given such security as the court thinks fit to obey the other parts of the order, if any, at the future times thereby appointed, or in case of his

[21] Constitution of the Federal Republic of Nigeria 1999 (as amended Section 36(11)
[22] Criminal Code Act CAP. (C38 LFN 2004) 6 and 133(1-9)
[23] Section 72, The Sheriff and Civil Process Act, LFN 2004
[24] ibid

> no longer having the power to obey the order then until he has been imprisoned for such time or until he has paid such fine as the court directs.

Order 9 Rule 13 of the Judgment Enforcement Rule[25]

> When an order enforceable by committal under section 72[26] of the Act has been made the registrar shall, if the order was made in the absence of the judgment debtor and is for the delivery of goods without the option of paying their value or is in the nature of an injunction, at the time when the order is drawn up, and in any other case, on the application of the judgment creditor, issue a copy of the order endorsed with a notice in Form 48, and the copy so endorsed shall be served on the judgment debtor in like manner as a judgment summons.

The court can punish by committal to prison instantly of any person (including Lawyers appearing before it) without the process of formal trial because the punishment is meant to preserve and protect the integrity and utmost authority of the court. Note that the emphasis is on the court but not on the Judge in person. Lord Widgery CJ submitted in *A.G. v. Times Newspaper Ltd*[27] that the punishment in the index case clearly violates the *nemo judex rule* because the judge is 'the complainant', 'the witness', 'the prosecutor' and at the same time, 'the judge'.

> The Supreme Court in *Atake v. A.G Federation*[28] the court held that: *"In proceedings instanter or trial brevi manu (i.e. punishment instantly for contempt in the face of the court), the judge before who is the contemnor, is the prosecutor, witness and judge".*

A brief fact of the case in Senator Atake was as follows; Senator Franklin Oritsemueyiwa Atake rose from his seat and told the court that he had "a preliminary point to raise before the Ruling should be read"; although hardly an appropriate time to raise "a preliminary point" in a suit or matter in court, he was allowed to raise his point. From what followed, it turned out that the "preliminary point" was in fact an oral application for the learned Chief Judge to transfer the entire proceedings (including the matter upon which the Ruling was about to be made and on which arguments had been taken without prior objection whatsoever) before him to another judge for hearing and determination on the ground that in the opinion of the applicant he, (the Chief Judge) was unlikely to do justice in the proceedings. One thing led to another and Atake was committed to prison for contempt. Note the submission of the trial Justices at the Supreme Court at paragraph 6 of grounds for appeal. Held:

> ….The Learned Justices of the Court of Appeal erred in law in finding the Appellant in contempt on the ground that the word "Gratification" mean a reward, recommence, gratuity, bribe when (a) The word gratification also means delight, pleasure, satisfaction.(b) The learned trial Judge did not so inform the Appellant……*(in apparent reference to the altercation which ensued between the Judge and the Contemnor which later snowballed into comital)*(italics mine).

The general norm has remained that at the end of it all, it must serve the essence of justice and justice must be served. Judges have however cautioned against careless invocation of punishments in contempt cases Per: Stephen L.J in *Bologh v. St. Albans Crown Court*[29] that the punishment:

> *"must never be invoked unless the ends of justice really require such drastic means;*

In *R.C Cooper v. Union of India,* The Supreme Court of India as an orbiter remarked that if another judge can try the contempt (*in facie curiae)* committed before a brother judge, it is a *desideratum* (something desired as essential or something that is needed or wanted).

Legislative Function:
A ground on which hearing may be excluded is that the action in question is legislative and not administrative in character. Typically, an order of a general nature, and not applying to one or a few specified persons, is regarded as legislative in nature.

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[25] Judgment Enforcement Rule; Order 9 Rule 13
[26] **Section 72,** The Sheriff and Civil Process Act, LFN 2004
[27] *A.G. v. Times Newspaper Ltd*. (1972) 3 All E.R.
[28] *Atake v. A.G Federation* (1982) 11 SC 153; (1982) LPELR-SC 5
[29] *Bologh v. St. Albans Crown Court* (1975) 1 QBD 73 at page 90

Legislative action, plenary or subordinate, is not subject to the rules of natural justice because these rules lay down a policy without reference to a particular individual. Nevertheless, if the legislative exclusion is arbitrary, unreasonable and unfair, courts may quash such a provision. Cases of extreme urgency has been generally acknowledged as excusable of hearing, where interest of the public would be jeopardized by the delay or publicity involved in a hearing. Also, in extraordinary cases of emergency where time bound action which may be preventive or remedial, is required, the obligation of notice and hearing may be obviated in tandem with the aphorism that, if the right to be heard will paralyze the process, law will exclude it. In such a circumstance, the system may choose other law making provisions to carry on the business of the state, such as issuing executive order as was applied during the 2019/2020 Covid 19 pandemic where executive orders were issued towards the containment of the pandemic.

Contractual Arrangement

Termination of an arrangement/agreement is neither a quasi-judicial act, so the duty to act judicially is not attracted.

Delegated Legislation

However, in matters of Delegated Legislation, it has been held that failure to comply with the rules of natural justice in course of making delegated legislation does not invalidate the decision made thereto. *Bates v. Lord Haislam*[30]. The rationale being that delegated legislation tends to affect large number of people and if all had a right to be heard system is upheld, it would grind to halt for lack of time and money. Furthermore, the process of delegated legislation is seen as part of political rather than judicial system. In relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived[31].

Preliminary Hearing

In a matter requiring preliminary hearing, a decision will not generally be invalidated for failure to give hearing if merely preliminary to a later decision for which the hearing must be given; 'preliminary' in the sense here amounts that no issue will be conclusively settled by earlier hearing in such a way as to prevent it being raised at later hearing.

Interim Disciplinary Action

In Interim- Disciplinary action like suspension etc. particularly where the suspension has an interim term, there is no obligation to follow the principle of natural justice. In *S.A Khan vs. State of Haryana*[32], Mr. Khan an IPS Officer holding the post of Deputy Inspector General of Haryana; Haryana Govt., was suspended by the Haryana Government due to various complaints against him. Thus, he approached the Supreme Court on the ground of violation of Principles of Natural Justice (PNJ) as he was not given an opportunity to be heard. His lawyer has vehemently contended that the suspension order was a mala fide exercise of the discretionary power for improper purpose, for the simple reason that the petitioner has been in charge of the investigation of the case of corruption registered against Bhajan Lal. He further contended that the order of suspension was patently unconstitutional and illegal besides being vitiated by malice both in law and facts and that it is in gross violation of Indian Constitution as it has been passed by misuse of power in a very arbitrary and capricious manner. The SC held albeit that the suspension being an interim-disciplinary action, there was no requirement to afford hearing. It was not violative of the principles of an opportunity of hearing.

Master and Servant Relationship

In Master and Servant relationship, the rule of hearing does not apply to a large extent as it falls into the category of simple contract. A servant can be dismissed without hearing. *Ridge v. Baldwin*. One reasoning therein appears that a servant owe duty only to his master, not to the public at large. There is no relevant public interest underpinning which would justify an application of requirements of natural justice which is seen as a part of public law in broad sense but where officials and others have power to make decisions affecting the rights of individuals the rule of natural justice must be observed.

Academic Evaluation

Where nature of authority is purely administrative such as evaluation of academic performance and associated decisions therein, no right of hearing can be claimed. This was the case in *Jawaharlal Nehru University v. B.S. Narwa*. B.S Narwal[33], a student of Jawaharlal Nehru University was removed from the rolls for unsatisfactory academic performances without notice or hearing. The Supreme Court held that the very nature of academic adjudication appears to negative any right of an opportunity to be heard. The Supreme Court contended that if the competent academic authorities saddled with the

[30] *Bates v. Lord Haislam* (1972) 1 WLR 298, 308
[31] *State Bank of Patiala v. S.K. Sharma* (1996 (3) SCC 364)
[32] *S.A Khan vs. State of Haryana* (1992) INSC 0790
[33] *Jawaharlal Nehru University v. B.S. Narwa* (1981) SCR (1) 618 *l*

responsibility of examining and assessment of the work of a student over a period of time it worthy and appropriate to declare his work unsatisfactory, the rules of natural justice may be excluded.

Statutory Exclusion

Natural justice is implied by the Courts when the parent statute under which an action is being taken by the Administration is silent as to its application. Omission to mention the right of hearing in the statutory provision does not *ipso facto* exclude a hearing to the affected *Karnataka Public Service Commission v. B.M. Vijay Shankar,*. Nevertheless, a statute can exclude natural justice either expressly or by necessary implication. The Indian case of *Charan Lal Sahu v UOI* (Bhopal Gas Disaster case)[34] epitomizes the application of this exception. In this case the constitutional validity of the Bhopal Gas Disaster (Processing of Claims) Act, 1985, which had authorized the Central Government to represent all the victims in matters of compensation award, was interrogated. The applicant had challenged it on the ground that because the Central Government owned 22 % of the share in the Union Carbide Company and as such it was a joint *tortfeasor*, a situation which created enough conflict between the interests of the government and the victims. The court negative the contention and rightly observed that even if the argument was correct on its own, the doctrine of necessity would be applicable to the situation because if the government did not represent the whole class of gas victims no other sovereign body could so represent and thus the principles of natural justice were not tenable.

Impractibility

Natural justice can be followed and applied when it is practicable to do so but in a situation when it is impracticable to apply the principle of natural justice then it can be excluded. In *Bihar School Examination Board vs. Subhash Chandra*[35] the Board conducted final tenth standard examination. Students of a particular centre numbering more than one thousand were accused of mass cheating. Prima-facie evidence corroborated the allegation of mass copying as most of the answers were same and they received same marks. On this ground, the Board cancelled the exam without giving any opportunity of hearing from the applicants in the extant case and ordered for fresh examination, requiring all students to appear for the same. Many of the students approached the Patna High Court challenging it on the ground that before cancellation of exam, no opportunity of hearing was given to the students to defend their complicity or otherwise. The High Court struck down the decision of the Board in violation of *Audi Alteram Partem*. The Board dissatisfied appealed the decision of the Supreme Court. The Supreme Court rejected the High Court on grounds of impractibility and held that in this situation, conducting hearing is impracticable as thousands of notices have to be issued and served to everyone and all ordinarily requiring to be given an opportunity of hearing, cross-examination, rebuttal, presenting evidences etc would not be practicable at all. Administrative agencies are not bound by the technical rules of procedure of law courts; substantial aspects of the law must be copiously adhered to. This brings out the need to pursue the minimum procedure of fair hearing.

Rights Inherent in Fair Hearing

(i) Right to Notice

Valid notice is the starting point of any hearing exercise. Except a person knows the formulation of subjects and issues involved in the case, he cannot defend himself. Notice therefore embodies rule of fairness, and must herald an adverse order. The adverse party must have adequate time within which to respond to the points raised. If requirement of notice is a statutory requirement, then notice must be given in a mode provided by law. Notice must also be adequate, which usually means it must state: (i) time, (ii) place (iii) nature of the hearing, (iv) legal authority under which the hearing is to be held, and (v) specific charges which the person has to meet. In *Gajendra Bahadur* v. *District Land Reform Office Kathmandu*[36], it was held that merely publishing notice in a newspaper, without duly serving notice pursuant to the law was valid as decision cannot be taken in the absence of the concerned party.

(ii) Right to Know Evidence against Him

In an Administrative proceeding and as well as other processes of adjudication, it is trite that nothing should be used against the person, which has not been brought to his notice. Every person before an administrative authority exercising adjudicatory powers has the right to know the evidence to be used against him.

[34] *Charan Lal Sahu v UOI* (Bhopal Gas Disaster case) (1989) INSC 395
[35] *Bihar School Examination Board vs. Subhash*
[36] *Gajendra Bahadur* v. *District Land Reform Office Kathmandu* (NKP 2050, p. 671)

(iii) Right to present case and evidence

The adjudicatory authority should afford reasonable opportunity to the party to present his case and such presentation can be done orally or through writing. Statutes or any other legal instrument providing in the contrary will be voided for inconsistency with the rule of natural justice. This was the basis of the decision in *Nyuchhemaya Tuladhar* v. *Rupandehi Dist. Court* where proceedings required inclusion of registered persons other than the borrower, and the auction notice which was published did not include such registered persons, therefore, the proceeding requiring such registered persons to make payment without the opportunity to be heard is against the principle of natural justice.

(iv) Right to rebut adverse evidence

Usually, people get confused between right to hearing and right to fair hearing. For fair hearing, it is not enough that the party should know the adverse material on file but it is further necessary that he must have an opportunity to rebut the evidence. Rebuttal can be done either orally or in writing as the party concerned may elect. In *Pett v. Greyhound Racing Assn (I),* Lord Denning observed that:

> "when a man's reputation or livelihood is at stake, he not only has a right to speak by his mouth. He also has a right to speak by counsel or solicitor"

The right of hearing will be of little value if the concerned party is kept in dark as to the evidence against him and he is not given an opportunity to deal with it. The adjudicating authority must disclose all material placed before it in course of proceedings. The authority cannot base its decision on any material unless the person against whom it is sought be utilized has been given an opportunity to rebut or explain the same.

For making the opportunity to rebut evidence meaningful, it is necessary to consider the following two factors:

(i). **Legal Representation or Right of Counsel**

A fair hearing in administrative proceeding will not necessarily include the right to legal representation. Representation will, however, normally be permitted. In *MH Hoskot v. State of Maharashtra*, the Indian Supreme Court ruled that the right to personal liberty implies provision by the state of free legal service who is indigent or disabled from securing legal assistance where the end of justice so demands. (Nigerian Constitution)

(ii) **Cross- Examination**:

Cross examination is one of the effective modes of establishing truth and establishing false-hood. Courts do not insist on cross examination in administrative adjudication, unless the circumstances are such that in the absence of it a person cannot put up an effective defence. However, the right of cross- examination of witnesses is regarded as an essential content of natural justice and fairness (Nigerian Constitution).

(viii) One who must hear must Decide, or Institutional Decision.

In contrast to law courts, administrative proceeding is not often the decision of one man from start to finish. Frequently one person hears and another decides. This shared task may work contrary to the concept of fair hearing. Whatever may be the merit of this rule, the fact remains that in view of the complexity of modern administration, a literal application of this rule will bring the wheels of administration to a grinding halt. Therefore, the person or authority charged with the responsibility of taking a decision may take help from subordinates, but he must personally consider and appraise the evidence and independently come to a decision. American legal jurisprudence popularized this concept of institutional decision.

(v) No Evidence Should Be Taken At The Back of the Other Party

For fair hearing it is necessary that the concerned party must be given right to present his case and evidence. Whatever information, sometimes described as evidence obtained by the administrative authority must be disclosed to the other part, and an opportunity to rebut it must be provided. The adjudicating authority must give full opportunity to the affected person to produce all relevant evidence in support of his case.

(vi) Report of Enquiry to Be Shown to the Other Party

A copy of the report of the inquiry officer should be made available to the affected party before the deciding authority takes a stand on the guilt or otherwise, including meting out the consequential punishment on the basis of the report of the inquiry officer. Often, especially in disciplinary matters, it happens that the inquiry is entrusted to someone else and on the report being submitted; action is taken by the competent authority.

(x) Decision post-Haste

Fundamentals of 'fair hearing' require that the administrative authority must not haste in making decisions. It may compromise procedures related to fair hearing. In *S.P. Kapoor v. State of H.P*[37] the SC quashed the action of the government taken in haste. The SC held that the way that the whole thing was completed in haste gives rise to the suspicion that some high-up was interested in pushing through the matter hastily, hence the matter requires to be considered afresh.

(vii) Reasoned Decision or Speaking Orders

The Supreme Court of Nepal often times uses the term 'judicial conscience', an analogous in meaning to reasoned decision. Reasoned decision speak to the fact that an official with authority to take a judicial or quasi-judicial decision, while deciding, must consider evidence and decide by giving reasons for the decision. In *Kalar Thakur Hajam* v. *District Land Reform Office Saptari* -the Indian court could not agree less that reason must accompany decision in a judicial or quasi – judicial decision, further reiterating use of judicial conscience.

(ix) Rule against Dictation

The rule against delegation is related to the rule against acting under dictation. Dictation occurs where an inferior authority having a discretion in a matter allow some unauthorized superior authority to dictate to it by declining to act without the superior authority's consent or by submitting to the wishes or instructions of that superior authority in its decision-making. This is to ensure that when a specific person or body is given a statutory discretion, the discretion is exercised by that person or body and not by someone else. Where there are fixed laws there is certainty, there is certainly impartiality and consistency – all things being equal. A person may stand upon his legal rights without fear or favour. Discretion, on the other hand, undermines justice. Of all discretions, Executive discretion is the most dangerous of all forms of all, because its impact upon the citizen is immediate and uncertain. Legislative discretion has the attribute of uncertainty but not immediacy. Judicial discretion on the other hand is immediate but not uncertain. The combined effect of immediacy and uncertainty in favour of executive discretion throws it open to the greatest possible abuse. The administrator has direct unfettered power over the individual who stands at his mercy. The opportunities for arbitrary, insolent, discriminatory, intrusive and corrupt activity as well as totalitarian social engineering are maximized at this point. Generally, non - exercise of discretionary powers by a public authority can be said to be insupportable or intolerable. A private person has an unfettered power to allow whom he pleases to use his land, to release a debtor, regardless of his motives. This is the extent to which he can use his unfettered discretion. However, a public authority may do none of these things save it acts reasonably in good faith and upon lawful and relevant grounds of public interest. The underpinning of the government of laws is legal control over human discretion. The existence of widespread discretion is therefore directly inimical to the existence of a liberal order. To that extent, discretions need to be exercised on the basis of justice or some real justification or even of mere reason. An unfettered discretion is an opportunity for temptation and for arbitrary, insolent, discriminatory, intrusive, socially engineering and corrupt, government. Any administrative authority invested with the power of decision-making must exercise this power in exercise of its own judgment. If a decision is taken at the direction of any outside agency, there is violation of fair hearing. Courts intervene when discretionary power is not exercised properly such as in non – application of mind, acting under dictation and unauthorized delegation of power.

Non-Application of Mind

An authority conferred with powers has to apply its mind to the facts and circumstances of the case before taking action. Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand and come to its own decision. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad and then the action or decision taken by it will be bad because it has not exercised its discretion. Non- Application of mind on part of the administrative authority and acting mechanically is recognized as another ground of control of administrative discretion. In *Jaganath v State of Orissa*[38], in the order of detention, six grounds were verbatim reproduced from the relevant section and it was proved in the Court that the Minister was "personally satisfied" only of two out of the six grounds mentioned in the statute. The Supreme Court ruled that the Minister had acted mechanically and quashed the order of detention. In *Sukumaran s/o Sundaram v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia*[39] the High Court quashed a detention order made under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The order in question was signed by the Timbalan Menteri without applying his mind. According to the wording of the order, it was the Minister, and not the Timbalan Menteri, who was satisfied that the concerned person be detained but he did not sign the order. The Timbalan Menteri who signs was not personally satisfied. These rules deter the person or body which has

[37] *S.P. Kapoor v. State of H.P1981 AIR 2181*

[38] *Jaganath v State of* Orissa Judgment date; 17/12/1965

[39] *Sukumaran s/o Sundaram v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* (1995) 2 MLJ 247

discretionary power to act mechanically, merely as a "rubber stamp" or a "postman", and will compel him to apply his minds on each and every facts of the case that is put before him, and consider its merits.

Acting under Dictation

This is a Common Law Principle against acting under dictation. An authority or agency entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. It must be exercised by him without being influenced by the will of the superior authority. Thus, discretionary power shall not be exercised under dictation. It is immaterial that the external authority had not sought to impose its policy on the inferior authority. Traditionally, the courts have taken the same view and held that a decision-maker must personally exercise a discretion conferred on him by statute unless the statute expressly or by implication authorizes delegation of that discretion or confers power on another to give. The principle abhors an inferior authority having discretion in a matter to allow some unauthorized superior authority to dictate to it by declining to act without the superior authority's consent or by submitting to the wishes or instructions of that superior authority in its decision-making. Where a discretionary power is vested in a decision-maker personally, the decision-maker must turn his or her mind to the exercise, and cannot act at the discretion or behest of another person. A repository of a personal discretionary power will act invalidly if he or she makes a decision without exercising his or her own independent discretion but instead merely carries out instruction given by his or her superiors. A public body (X) upon which a discretion has been granted may not exercise that discretion in accordance with the dictation (whether real or imagined) of another body (Y), unless that other body has a power to give directions. Body (X) will have fettered its discretion; if body (Y) has actually sought to exercise a power to give directions that it does not have, it will too have acted unlawfully. Acting under dictation is known by other terms such as acting under the bidding of others, acting at "the direction or behest of another person" *Bread Manufacturers v Evans*[40], acting under "the undue influence" of another. In *Indian Railways Construction Co v Ajay Kumar*[41] the court laid down that in general discretion must be exercised only by the authority to whom it is committed and the authority must itself genuinely attend to the matter, not attending to the dictates of a senior officer. There is a duty on the official to make their own investigation and decision and not rely on what others say.

In *Patto v CPO* [42], a Malaysian case; Under section 27(2) of the Police Act 1967, the licensing authority to issue permits for holding meetings in public places is the OCPD (Officer in Charge of Police District) of the district where the meetings are to be held. The CPO (Chief Police Officer) has no jurisdiction in this matter save that he is the appellate authority after the OCPD has decided the matter at first instance. Through a departmental arrangement, the OCPD did not apply his mind at all to applications for such permits. He acted as a mere conduit pipe to transmit such applications to his superior authority, the CPO, for decision. The Supreme Court in no uncertain terms ruled that the OCPD, as the licensing authority under the act, had abdicated his functions by transmitting the applications for consideration and determination by the CPO. He has acted under dictation and in consequence fettering the discretion legislatively vested in him which must be exercised by him and him alone and the court so declared accordingly.

Unauthorized Delegation of Power

The rule against delegation is related to the rule against acting under dictation. The principle is derived from the Latin maxim *Delegates Non Potest Delegare* which means that a delegate cannot further delegate the power to someone else. This is to ensure that when a specific person or body is given a statutory discretion, the discretion is exercised by that person or body and not by someone else. The interpretations of the maxim *delegates non potest delegare* principle is that where a function has been entrusted by statute to body "X", the function should be performed by "X" and not delegated by "X" for performance by body "Y". However, the rule does not entail an unconditional prohibition on delegation. It usually operates as a principle of interpretation that a statute will only be interpreted as permitting delegation of discretion powers if express words to that effect are used or power to delegate is very clearly implied in the statute. Enabling provisions in the UK commonly require the authority making delegated legislation to consult. Sometimes the requirement is to consult a specified body, and any delegated legislation made under such an enabling provision will declare in its preamble that there has been consultation with the body specified. This principle, when taken to an extreme, could operate as a severe restraint on administrative decision-making. Therefore, there are certain exceptions to this rule.

I. The principle does not prevent the exercise by civil servants of powers entrusted by legislature to the ministerial head of department or entrusted to the Department itself.

[40] *Bread Manufacturers v Evans* (1981) 180 CLR 404 at 411
[41] *Indian Railways Construction Co v Ajay Kumar* Case NO.: Appeal (Civil) 3299 of 2000
[42] (1986) 2 MLJ 204 Perak,

II. Parliament may provide express authority to a body, whom it has conferred powers, to delegate, and even for that delegate to sub delegate, those powers. The maxim *delegates non potest delegare* is a presumption of interpretation which must give way to clear contrary legislative intention. Where a power of delegation does exist, the courts may still interrogate whether the delegate has acted within or beyond the scope of the powers delegated.

III. The rule against delegation has been interpreted as requiring that the ultimate power of decision as to the whether and how a discretionary power is to be exercised should be retained by the designated statutory body. It does not stop that body from delegating to another body some preliminary task leading up to that final decision. In so doing the appointed body is adopting a procedure by which it seeks assistance in reaching what can still be regarded as its own decision on the matter. Thus, a body may delegate certain fact-finding tasks to, and even seek recommendations from, another body (or its own sub-committee). It must, however, retain to itself the power of final decision – it must not allow itself to be dictated to by the delegate, nor can it confer power to make any binding decision (as distinct from non-binding recommendation) on the delegate.

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