NATURAL JUSTICE, FAIRNESS AND ADMINISTRATIVE FUNCTIONS

by

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When *Ridge* v. *Baldwin*[1] was decided, it was hoped that that decision would clear the mystery surrounding the rule *audi alteram partem* considerably and lead to logical developments in the law in the area. Instead, it would appear from decisions of the courts of England and other common law jurisdictions that an effect of that decision has been to cut the law loose from its earlier moorings and cast it adrift on an aimless course. The attempt to do away with the earlier law based on the dichotomy between administrative and judicial function and to construct a new concept of 'fairness' which would apply to all administrative functions initiated by the decision of *Ridge* v. *Baldwin* has floundered. A result of this unsuccessful effort is to leave many uncertainties in the law, so much so that despite the fact that the principle has been known to the English law for a long period of time[2] and has attracted a fair share of literature,[3] an English judge observed that 'the ambit of natural justice is indeed a subject worthy of further academic research'. In this paper an attempt would be made to study the scope of the right to a hearing in the context of developments in the common law jurisdictions.

One of the principal effects of *Ridge* v. *Baldwin* was to do away with the classification of executive functions into administrative and quasi-judicial.[4] The classification was accepted and used throughout the first half of this century which was the formative period of English administrative law and was approved by the Privy Council in *Nakkuda Ali* v. *Jayaratne*.[5] This dichotomy of functions[6] enabled courts to avoid im-

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1 [1964] A.C. 40.

2 E.g. see *R.* v. *University of Cambridge* (1723) 1 Str. 557.

3 E.g. see P. Jackson, *Natural Justice* (1973); D. Clark, 'Natural Justice: Substance and Shadow' [1975] *Public Law* 27; C. P. Seepersad, 'Fairness and Audi Alteram Partem' [1975] *Public Law* 242; G. D. S. Taylor, 'Natural Justice — The Modern Synthesis' (1974) 1 *Monash Law Review* 258.

4 Lord Denning in *R.* v. *Gaming Board, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417 at p. 430 said that 'that heresy [i.e. the classification of functions] was scotched in *Ridge* v. *Baldwin*.'

5 [1951] A.C. 66; *R.* v. *Glenelg Corporation, ex parte Pier House Pty. Ltd.* [1968] S.A.S.R. 246 at p. 256, Bray C.J. observed that *Nakkuda Ali* v. *Jayaratne* is binding authority in Australia.

peding administrative functions by frequent judicial intervention on the ground that principles of natural justice had not been followed in arriving at the administrative decision. A court could exclude its power of review by characterizing the function as purely administrative. Such judicial restraint is necessary for this area of the law represents a conflict between the individual's interest that decisions adverse to him should not be taken without giving him a proper hearing and the interest of good government that those carrying out administrative functions should not be subjected to the delay involved in the giving of such hearings. The reconciliation of these conflicting interests requires that the law should be stated with a degree of flexibility.

The 'liberalisation' of the law initiated by *Ridge* v. *Baldwin* left the English courts without a rational basis upon which refusal of judicial review could have been justified. Whereas previously such a refusal could be made by characterizing the function as administrative by referring to the need for speedy decisions and other such factors, in the post *Ridge* v. *Baldwin* era, the English courts have had to resort to inconsistent explanations for refusing judicial review.[7] The strategy adopted after *Ridge* v. *Baldwin* was to do away with the classification of functions and insist upon standards of 'fairness' in all administrative decisions. But that strategy has not been consistently followed and the cases decided so far shed little light on standards of 'fairness' that would be required. The inconsistency and uncertainty of adopting the new strategy may be illustrated by referring to the dicta of Lord Denning alone. In *Schmidt* v. *Secretary of State for Home Affairs* (1969)[8] in a burst of enthusiasm for the new trend, he said that 'the distinction [between administrative and quasi-judicial functions] is no longer valid' but in 1971 in *Re Godden*[9] he reverted to the classification of functions in holding that 'decisions leading to compulsory retirement are of a judicial character and must conform to the rules of natural justice'. More recently in *Selvarajan* v. *The Race Relations Board*[10] the Master of Rolls demonstrated that he had been completely reconverted to more conservative modes of thinking in this area.

There was little doubt that, in the interests of individuals affected by administrative power, the rules relating to judicial restraint which were formulated during the war years to permit untrammelled exercise of

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6 Professor Wade, ascribing the dichotomy to the fallacious assumption that natural justice applied only to judicial functions, referred to the use of the term 'judicial' to characterize essentially administrative functions as 'meaningless and dangerous shibboleth'. H. W. R. Wade, *Administrative Law* (3rd ed., 1971) p. 172. If the classification was in fact erroneous, it has become sufficiently entrenched by constant acceptance to be accepted as valid.

7 See on this, Clark, *op. cit.*

8 [1967] 2 Ch. 149, also see *Benaim and Khaida, supra.*

9 [1971] 3 All E.R. 20 at p. 25.

10 [1976] 1 All E.R. 12; for a comment, see N. P. Gravells, 'Fairness as a Basis of Procedure for Decision Making Bodies' (1976) 39 *M.L.R.* 342.

executive discretion should be curtailed.[11] But the effect of the trend initiated by *Ridge* v. *Baldwin* has been to throw overboard whatever principles that had emerged in this uncertain area of the law.[12] At least in Australia, the pre-*Ridge* v. *Baldwin* developments have not been totally thrown overboard[13] and it still remains a possibility to fit in the new English developments relating to fairness into the existing framework.[14]

In order to do this, certain factors must be kept in mind. Firstly, the right to be heard is not a single right but a bundle of rights like the right to present witnesses, the right of cross-examination, the right to lead evidence in rebuttal, etc.[15] Courts have sometimes held that natural justice would be satisfied where one of the subsidiary rights had been given.[16] It would be difficult to identify with precision the instances in which a full right to a hearing would be given and those in which only a partial right would be available. One would have to be satisfied with the formulations of general principles. Secondly in attempting a statement of the circumstances in which a right to a hearing would arise, it must be remembered that judges have cautioned against any effort at classification of these circumstances. This in *Durayappah* v. *Fernando*,[17] Lord Upjohn warned against a compilation of the circumstances on the ground that 'outside well known cases such as dismissal from office, deprivation of property and expulsion from clubs, there is a vast area where the principle can be applied upon most general considerations . . .' Likewise, Kitto J. in *Mobil Oil Australia Pty. Ltd.* v. *Commissioner of Taxation*[18] adverted to the impossibility of laying down 'a universally valid test . . . in the infinite variety of circumstances that may exist'. The cautious attitude of the judges is necessitated by the fact that in any situation, the policy considerations and statutory instruments involved may dictate a decision contrary to generally applicable principles. Thus even the categories stated by Lord Upjohn lack any certainty. As an illustration, one may point out that in the case of dismissals from office, a dismissed professor has been held not entitled to a right of hearing[19]

11 See on this, Barwick C.J. in *Banks* v. *Transport Regulation Board* (1968) 42 A.L.J.R. 64.

12 Further see A. G. Goodhart, '*Ridge* v. *Baldwin*: Administration and Natural Justice' (1964) 80 *L.Q.R.* 104 at p. 115.

13 *Ridge* v. *Baldwin* was not accepted as binding in *R.* v. *Glenelg Corporation, supra*; also see *Banks* v. *Transport Regulation Board, supra*; for Canada, see *Howarth* v. *National Parole Board* (1974) 18 C.C.C. (2d) 385.

14 The most exhaustive Australian judgment considering the relevance of English decisions to Australian law is the judgment of Wootten J. in *Dunlop* v. *Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446.

15 Further see D. G. Benjafield and H. Whitmore, *Principles of Administrative Law* (4th ed., 1971) at p. 145 refer to the 'fluctuating content' of the right.

16 An extreme statement of the position is in the dicta of Donaldson J. in *R.* v. *Ashton University, ex parte Roffey* [1969] 2 Q.B. 538 at p. 552 who said that 'audi alteram partem will certainly not apply in every case in which there is a right to natural justice'.

17 [1967] 2 A.C. 337.

18 (1963) 113 C.L.R. 475 at p. 503.

19 *Vidyodaya University of Ceylon* v. *Silva*.

but an expelled undergraduate has been entitled to one.[20] But classification is an aid to eliciting general principles in a confused area of the law and must for that reason alone be attempted subject, of course, to the proviso that the mere fact that a set of circumstances domes within a particular category does not necessarily mean that a right to a hearing arises, for the statutory provisions and policy considerations involved may require that such a right not be an absolute one.

One of the contentions of this paper is that the dichotomy between administrative and quasi-judicial functions must be retained and that the rationalisation of the law be worked out in the context of that dichotomy. It would be argued that where an executive function falls within the categories of quasi-judicial functions, then the whole range of rights[21] included in the rule *audi alteram partem* become available to the party who would be affected by the exercise of that executive function. But in situations where the function could be characterized as purely administrative, there is still a duty to act fairly which may involve a limited right to a hearing, which would involve, at the minimum, the right to know the nature of the adverse evidence and to rebut such evidence.

At the cost of repetition, it may once more be pointed out that rigid classifications or absolute rules are out of place in this area of the law. Where a situation falls within one of the categories of quasi-judicial function, then an initial presumption arises that a right to a hearing exists. But policy considerations may displace that presumption. So too would the statutory scheme which confers the power of decision.[22] Bearing these observations in mind, one may proceed to examine the situations in which functions could be classified as quasi-judicial.

I. *QUASI-JUDICIAL FUNCTIONS:*

The distinction between quasi-judicial and administrative functions is usually traced to the dicta of Lord Atkin in *R.* v. *The Electricity Commissioners, Ex parte London Electricity Co.*[23] Lord Atkin defined a

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20 Lord Wilberforce in *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578 observed: 'A comparative list of situations in which persons have been held or not entitled to a hearing, or to observation of rules of natural justice . . . looks illogical and even bizarre.'

21 As suggested earlier, the right to a hearing is effectively a bundle of rights. Some of its constituent rights were adverted to by Lord Denning in *Kanda* v. *The Federation of Malaya* [1962] A.C. 322 at p. 327 where he said: 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them.'

22 Thus e.g. Lord Upjohn pointed out in *Durayappah* v. *Fernando* [1967] 2 A.C. 337 that 'the statute can make itself clear on this point and if it does, *caedit quaestio*'. Also compare that case with *Ex parte Queen; ex rel. Warringah Shire Council* [1967] W.N. 12 where on similar facts, a different result was arrived at because the statutes involved gave rise to different inferences as to the duty to act judicially. Further see G. Nettheim, 'The Right to be Heard: From Jaffna to Warringah' (1968) 42 *A.L.J.* 303.

23 [1924] 1 K.B. 171.

quasi-judicial function as involving a discretionary power conferred by statute on an executive officer, with the condition superadded that the power should be exercised only after a proper hearing. But the duty to give a proper hearing would have to be implied in the absence of a superadded duty and the mere failure of the legislature to specify the duty does not alter the situation. Problems then would arise as to the circumstances in which such a duty would arise.

The circumstances in which the duty arises have nowhere been stated but certain propositions may be drawn from the decided cases which would facilitate their identification. The best guidance towards such identification was given by Lord Upjohn in *Durayappah* v. *Fernando*[24] who, while warning that no exhaustive categorization of circumstances attracting the application of the *audi alteram partem* rule, yet indicated three factors that must be considered in determining when the rule becomes applicable. These factors included the nature of the interests affected by the exercise of the administrative power, the circumstances in which such a power becomes exercisable and the nature of the sanctions attaching to the exercise of such power. One may examine the case law after *Durayappah* v. *Fernando* to determine whether there is support for the factors indicated by Lord Upjohn and also whether other factors of a similar nature could be identified. It must be remembered, however, that the mere presence of one or more of these factors would not inflexibly lead to a valid claim for a right to a hearing, for a legislature could make the exercise of the power purely administrative or policy considerations involved in the situation may dictate that the function should be regarded as administrative rather than quasi-judicial, even where one or more of these factors are present.[25]

1. *Proprietary Interests*

In *Durayappah* v. *Fernando,* Lord Upjohn, after suggesting that an exercise of administrative power involving deprivation of property rights involves a right to a hearing, held that, in that case, since the dissolution of the municipal council by the Minister amounted to the confiscation of the property belonging to the council, the dissolution, without affording a hearing to the members of the council should be considered improper.

The view that any infringement of proprietary interests by an exercise of an administrative power must be preceded by a hearing given to the persons whose interests are to be affected by such exercise has been accepted in a long line of cases.[26] Any official whose decision may have the effect of diminishing the value of property belonging to a citizen has

24 *Supra.*

25 Thus e.g. in cases involving prison discipline where severe sanctions result, courts refuse to interfere; see e.g. *Frank* v. *Mudge* [1975] 1 W.L.R. 132; compare

26 In *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, Byles J. said: 'I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard.'

been held to exercise a quasi-judicial function.[27] In *Municipal Council of Sydney* v. *Harris*,[28] Griffith C.J. stated the rule as a general proposition in the following terms: 'the general rule of law is that a person so circumstanced — that is, who is liable to be called upon by some public authority to incur a heavy burden or loss — is entitled to be heard and to have the opportunity of giving reasons why such an order should not be made or enforced against him'.[29]

In *B.P. Australia Ltd.* v. *The County Council of the Gold Coast*,[30] the Queensland Supreme Court suggested that the fact that an interference with proprietary interests results is by itself insufficient to create a duty to grant a hearing. Thus, Hanger J. said that '. . . the basis of the principle that when a liability is imposed or rights are affected, a right to be heard should be afforded to the person upon whom the liability is imposed or whose rights are affected rests upon the fact that the tribunal is to proceed judicially'.[31] This is an untenable position. It is precisely because of an absence of a statement in the statute as to whether the function is to be exercised quasi-judicially or not that problems arise in this area. While it is true that a statute can expressly or impliedly dispense with a hearing in such situations, it is inconsistent with aim of protection of a citizen's rights against executive abuse to hold that if a statute is entirely silent on the question of a hearing, a hearing need not be provided. Where the statute is silent and the proprietary interests of a citizen are to be affected by the exercise of executive power, a heavy presumption that a hearing is a precondition to such an exercise must be made. Sherman J. in his dissenting judgment suggested that a duty to act judicially could be inferred, where the statute was neutral on the question but the rights of a citizen would have been affected by the exercise of the power.[32]

Testro Brothers v. *Tait*[33] also seems to be contrary to the view that a decision affecting proprietary interests should be presumed to be quasi-judicial. The High Court was concerned with the question whether the report of an inspector appointed to investigate a company's affairs could be regarded as affecting the company's interests sufficiently to require that the company and its directors be given a prior hearing which would have included the cross-examination of all the witnesses. The majority

27 *Errington* v. *The Minister of Health* [1935] 1 K.B. 249.

28 (1912) 14 C.L.R. 1.

29 At p. 7; he also said that 'whenever a public body is entrusted with power to decide whether a person shall suffer pecuniary loss, the principle [*audi alteram partem*] applies'. Also see *Delta Proprietary Limited* v. *Brisbane City Council* (1955) 95 C.L.R. 11.

30 [1967] Qd. R. 307.

31 At p. 325.

32 In a later Queensland decision, *Amstad* v. *Brisbane City* [1968] Qd. R. 343 it was held that where the statute made provision for payment of compensation, the courts would hold that there was no interference with proprietary interests. Compare *R.* v. *Glenelg Corporation; ex parte Pier House Pty. Ltd.* [1968] S.A.S.R. 246.

33 (1963) 109 C.L.R. 353.

of the Court preferred to leave undisturbed the ruling of the Full Bench of the Victorian Supreme Court in the *Viney Industries Case*[34] that there is no right to a hearing in such situations as the inspector's report does not prejudicially affect the rights of the company. The High Court followed this ruling despite the fact that the *Viney Industries Case* involved the Companies Act of 1958 and the High Court was concerned with a case involving the Companies Act of 1961 under which the inspector's report was made admissible in subsequent legal proceedings. Kitto J., who dissented, observed that[36] 'the general conclusion seems justified that the inquiry may be of the character that implies a necessity to allow a person affected, a fair opportunity to be heard, notwithstanding that an adverse report will do no more than expose him to a possibility not previously existing of a deprivation of rights by the exercise of discretionary powers by another authority.[37] The reason is that the report itself prejudices the rights by placing them in a new jeopardy; it involves 'civil consequences' to an individual, as Kelly C.B. expressed it in *Wood* v. *Wood*.'[38]

If Hanger J. in the *B.P. Australia Ltd. Case*[39] erred in holding that a right of hearing would not arise without a super-added duty to provide a hearing in the statute creating the power to affect proprietary and other interests, Kitto J., it is submitted with respect, erred at the other extreme in stating that there is a right to a hearing arising from the mere fact that the exercise of power would create prejudice to interests of citizens. That no such absolute and inflexible rules can be taken is made clear by the decision of the English Court of Appeal in *Re Pergamon Press Ltd.*[40] That case, like *Testro* v. *Tait*, concerned a director's right to be represented by a lawyer and the right to be provided with transcripts of evidence given before an inspector appointed to inquire into his company's affairs. Lord Denning held that the fact that such an inquiry was prejudicial to the company was not the only consideration that should be taken into account. The court should also have regard to the fact that the inquiry was in the public interest and that if witnesses were to be presented for cross-examination, they would be reluctant to supply information freely as they would not be protected by privilege in such

34 (1962) V.R. 630.

35 For criticisms of the case, see G. Nash, 'The Judicial Function and the Inspectors Appointed under the Companies Act, 1961' (1964) 38 A.L.J. 111.

36 (1963) 109 C.L.R. at p. 368. Only Kitto J. considered *Ridge* v. *Baldwin* which had been decided the same year.

37 In *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660 it was held that the preliminary nature of the inquiry excluded the operation of natural justice. Quaere whether the inspectors' inquiry could be regarded as preliminary.

38 (1874) L.R. 9 Ex. 190. Lord Chief Baron Kelly's dicta is considered the classic liberal statement of the principle *audi alteram partem*. He said: 'The rule is 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.'

39 [1967] Qd. 307.

40 [1971] 1 Ch. 388.

proceedings. These factors may indicate that the proceedings be not characterized as judicial and that a wide right to a hearing be afforded.

All that can then be said is that, while there is no inflexible rule that a power of taking a decision affecting the proprietary interests of a citizen is a quasi-judicial power the exercise of which must be preceded by a proper hearing, yet there arises a *prima facie* inference from the nature of the power that it must be exercised quasi-judicially. Such a rule, for which there is much support, protects a citizen from executive abuse of power and is a good starting point for balancing the individual's interests protected by the right to a hearing and the public interest in effective administration which requires a minimum of judicial intervention.

2. *The Right to a Livelihood*

The exercise of a power which involves a denial of an opportunity for employment to a citizen has been held to involve a quasi-judicial function. Thus exclusion from membership of trade unions, membership of which are necessary to carry on a trade, expulsion from an office involving a status protected by statute and denials of licences which are prerequisite to the carrying on of a profession or trade have been held to involve judicial functions.

The law on this developed largely after the decision in *Lee* v. *Showman's Guild of Great Britain,*[42] where Lord Denning distinguished between expulsion from social clubs and expulsion from membership of a trade union, and held that courts would interfere readily with the latter type of cases. He observed: 'It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They can deprive a man of his livelihood... Is such a tribunal to be treated by these courts on the same footing as a social club? I say no. A man's right to work is just as important to him as, if not more important than, his rights of property. These courts intervene every day to protect the rights of property. They must also intervene to protect the right to work.'[43]

Lord Denning has developed this view in many subsequent cases.[44] In *Pelt* v. *Greyhound Racing Association*[45] he held that an owner of a dog found drugged with barbiturates before a greyhound race had a right to

42 [1952] 2 Q.B. 329; Further see on the question of exclusion from trade unions, C. Grunfeld, *Modern Trade Union Law* (1966) at p. 180 *et. seq.*

43 At p. 343; compare Harman J. in *Byrne* v. *Kinematograph Rentals Society* who said that '... a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property'.

44 In *Nagle* v. *Fielden* [1966] 2 Q.B. 633 he disagreed with his own dicta in *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 and held that since that case, the right to work has become better recognised.

45 [1969] 1 Q.B. 125.

a hearing and a right to be represented by counsel at an inquiry held by the association which controlled greyhound racing as the charge involved the man's 'livelihood and reputation'.[46] In *Re Godden*,[47] he ruled that a medical officer who is given power to make a decision which may lead to the compulsory retirement of an employee performs a judicial function and must conform to rules of natural justice as such decisions affect the person's standing, ability to get other work and his pension rights.[48] In *Edwards* v. *Sogat*[49] he ruled an expulsion from a trade union without a hearing improper as an absolute power of dismissal is inconsistent with the right to work. Other judges have followed this view and used the *audi alteram partem* rule to protect the right to livelihood.[50]

This view has been accepted in Australia as well. In *Fagan* v. *National Coursing Association of South Australia*[51] where a trainer of racing dogs was disqualified, Bright J. ruled that failure to conform to rules of natural justice rendered the disqualification invalid as the inquiry affected the plaintiff's livelihood. A recent decision of the Tasmanian Supreme Court[52] seems, at first glance, to be inconsistent with this view. The Racing and Gaming Commission of Tasmania had, without a hearing and without giving reasons, prohibited the plaintiff from entering any racecourse in Tasmania. The plaintiff asked for certiorari, averring that his principle source of income was derived from betting at the races. Chambers J. refused to issue the writ on the ground that the Commission was not performing a judicial function. He pointed out that the decision did not deprive the plaintiff of his livelihood as he could place bets off the course. The mere fact that the plaintiff would be denied his entertainment as a result of the decision did not make the decision judicial. He was careful to point out that the position would have been different if the Commission had disqualified an owner or a trainer without a hearing as in such a case, as the right to livelihood was affected, a judicial function was involved. Though the judge's distinction is supportable, his decision may be criticised on the basis that though the Commission was not acting judicially, yet it was under a duty to act fairly by giving the plaintiff information as to the nature of misconduct alleged and an opportunity to answer them.[53]

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46 He rejected the contrary view in *McLean* v. *Workers Union* [1929] 1 Ch. D. on the ground that "much water has passed under the bridge since 1929".

47 [1971] 3 All E.R. 20.

48 At p. 25, he said: 'I am clearly of the opinion that decisions leading to compulsory retirement are of a judicial character and must conform to the rules of natural justice.'

49 [1971] 1 Ch. 354.

50 Further see on this, G. Ganz, 'Public Law Principles Applicable to Dismissals from Employment' (1967) 30 M.L.R. 288; K. W. Wedderburn, *The Worker and the Law* Grunfeld, *Modern Trade Union Law.*

51 Unreported (No. 1534 of 1973); 1974 A.C.L.D. 192. Compare *McNab* v. *Auburn Soccer Club* [1975] A.C.L.D. 44.

52 *R.* v. *The Tasmanian Racing and Gaming Commission, Ex parte Heatley,* unreported (No. 57/1975).

53 *Ex p. Benaim and Khaida, supra.*

There is then overwhelming authority[54] to support the view that any exercise of a power to interfere with the right to livelihood involves, at least prima facie, a quasi-judicial function and that a proper hearing must be had before the function is exercised. However, this presumption may be displaced where policy reasons require that an exhaustive hearing not be given.

3. *Right to a License:*

Since certain trades cannot be carried out without a license, the right to a license is as important as the right to a livelihood and must be protected with the same vigour. In *R.* v. *Metropolitan Police Commissioner, ex parte Parker*[55] the view was taken that a license was a privilege and therefore the person conferring it is not restricted by the rules of natural justice. Such a view, of course, would be inconsistent with the cases which have held that a proper hearing is a precondition for any interference with the right to a livelihood, unless, of course, public interests require otherwise.[56]

In Australia, this is a well settled proposition since *Banks* v. *Transport Regulation Board*[57] where a license to drive a taxi was held to be a property right and that a Board given the power to revoke such a license must act judicially. A Tasmanian court has accepted this position.[58]

4. *Imposition of a sanction or other harm:*

Where the exercise of an executive function involves an imposition of a sanction or where some substantial harm would result from such imposition courts have characterised such a function as judicial. Since punitive sanctions are usually imposed by courts, judicial procedure would be adhered to. But problems arise in case of imposition of harm which resembles punitive sanctions. In *Durayappah* v. *Fernando*,[59] Lord Upjohn suggested that expulsion from clubs must be preceded by a hearing. In *John* v. *Rees*,[60] expulsion from a political party was held to give rise to a prior right to a hearing. The question whether the expulsion of an undergraduate must be preceded by a hearing has given rise to many inconsistencies.[61] This situation presents the classic conflict

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54 Further see R. R. S. Tracey, 'Section 141 of the Conciliation and Arbitration Act and Natural Justice' (1976) 18 *Journal of Industrial Relations* 58.

55 [1953] 2 All E.R. 717.

56 *Ex parte Benaim and Khaida, supra, Tehrani* v. *Rostron* [1971] 3 All E.R. 790; *R.* v. *Lewis Justices, ex parte The Gaming Board* [1971] 2 W.L.R. 1466.

57 [1968-69] 42 A.L.J.R. 64.

58 *Hunsey* v. *Massey*, (Unreported, no. 34 of 1974).

59 *Supra.*

60 [1970] 1 Ch. 345.

61 In *University of Ceylon* v. *Fernando* [1960] 1 W.L.R. 223 the Privy Council held that the Vice Chancellor in such situations exercised a quasi-judicial function but that natural justice would be satisfied if a fair opportunity to contradict any prejudicial statement is given. In *Glynn* v. *Keele University* [1971] 1 W.L.R. 487 at 494 Pennycuick V.C. thought that the disciplinary body acts in a 'magisterial capacity' and not in a quasi-judicial one. *R.* v. *Aston University, ex parte Roffey* [1969] 2 W.L.R. 1418

which characterizes this field of the law, for the maintenance of an academic atmosphere within the university requires absence of interference in discipline by outside bodies like the courts, but yet the expelled students' rights to an education and career have to be protected. Courts have expressed different views on the question but the more recent views tend to suggest that university disciplinary boards exercise a judicial function. In this area again, this would be a tentative view, which could be displaced by policy considerations.

5. *The Existence of a Lis Pendens:*

In *Hoggard* v. *Worsbrough Urban District Council*,[62] Winn J. observed that 'where two parties are in dispute and it is the obligation of some person or body to decide equitably between the competing claims, each claim must receive consideration and each claimant must be invited — not merely left to take the initiative if he chooses — to put forward materials in the form of documents or accounts which he desires to have considered . . .' Where a *lis pendens* is absent, a judicial duty will not normally be inferred.[63] Implied in this development is the idea that where a decision has to be made on merits between two competing claims, each of the claimants would have a right to a proper hearing. Where a statute imposes a procedure which bears a resemblance to a *lis inter partes*, an inference that a hearing is a condition to the exercise of an executive discretion may be inferred.[64]

II. *ADMINISTRATIVE FUNCTIONS AND FAIRNESS:*

There is no dearth of English authority that where a function can be characterized as judicial, there arises a duty to grant a hearing.[65] How-

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was the only case in which natural justice was considered applicable. Courts in India have been more liberal to the student. In *Gajadhar Prasad* v. *The University of Allahabad* A.I.R. 1966 All 477 it was held that 'considering the serious consequences to the student and the serious consequences to the student and the serious nature of misconduct which the Vice Chancellor may find in some cases it must be held that the Vice Chancellor is required to act judicially.' However the Privy Council in a Malaysian case, *Mahadevan* v. *Anandarajan* [1974] 1 M.L.J. 1 has held that there was only a duty to act fairly owed to the expelled student. See also note in [1974] J1. of *Malaysian and Comparative Law* 114. See also *Re University of Sydney, Ex parte Forster* [1963] S.R. (N.S.W.) 723; *King* v. *The University of Saskatchewan* [1969] 6 D.L.R. 120. Further see B. Hepple 'Natural Justice for Rusticated Students' [1967] C.L.J. p. 169.

62 [1962] 2 Q.B. 93.

63 *R.* v. *Deputy Industrial Injuries Commissioner, ex parte* Moore [1965] 1 Q.B. 456; *R.* v. *Manchester Legal Aid Committee, ex parte Brand* [1952] 2 Q.B. 413; but in New Zealand, it has been held that the mere absence of a *lis pendens* does not necessarily make the function non-judicial. *New Zealand United Victuallers Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 167.

64 S. A. DeSmith, *The Judicial Control of Administrative Action* (3rd ed., 1973) p. 72.

65 E.g. *Johnson Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395; *Aristides* v. *Minister of Housing and Local Government* [1970] 1 All E.R. 195; In *Hounslow* v. *Twickenham* [1970] 3 All E.R. 326, Megarry J. said that "for the rules of natural justice to apply there must be something in the nature of a judicial situation".

ever courts were avoiding review of executive functions by merely characterizing them as administrative and not quasi-judicial, particularly during the war years. Hence the attempt made by Lord Reid in *Ridge* v. *Baldwin*[66] to break down the idea of categorization of functions as administrative or quasi-judicial and the formulation of the concept of fairness by Lord Parker in *Re H.K. (An Infant)*[67] were welcomed. An effort was made to develop fairness as a substitute for natural justice applicable to all executive functions.

The duty to act fairly is not a new concept. It was recognized in 1911 by the House of Lords in *Board of Education* v. *Rice*[68] for in that case Lord Loveburn said that the duty to 'act in good faith and fairly listen to both sides' is one 'which lies upon everyone who decides anything'. Though in *University of Ceylon* v. *Fernando*,[69] the Privy Council characterized the disciplinary function of the Vice Chancellor as quasi-judicial, it adverted to the concept of fairness. It could be inferred that the concept of fairness existed independently of natural justice and that it applied to all executive functions but that in the case of executive functions which could be characterized as quasi-judicial, a higher standard of procedure was required by the principles of natural justice before the executive power was exercised.[70]

The post *Ridge* v. *Baldwin* rediscovery of fairness, on the other hand, was intended to supplant the concept of natural justice. By 1974, Lawton L.J. in *Maxwell* v. *Department of Trade and Industry*[71] was in a position to show contempt for natural justice in worship of the new concept of fairness. He said in that case:

> From time to time lawyers and judges have tried to define what constitutes 'fairness'. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise. As a result of these efforts, a word in common usage has acquired the trapping of legalism: 'acting fairly' has become 'acting in accordance with the rules of natural justice', and has on occasion been dressed up with Latin tags. This phrase in my opinion serves no useful purpose and in recent years it has encouraged lawyers to try to put those who hold inquiries into legal straitjackets[72]. . . . For the purposes of my judgment I

66 [1964] A.C. 40.

67 [1967] 2 Q.B. 617. Lord Evershed in *Ridge* v. *Baldwin* [1964] A.C. 40 at 87 had suggested that natural justice should be extended to 'cases where the body concerned can properly be described as administrative'.

68 *Supra.*

69 *Supra.*

70 Support for this could be found in the dicta of Lord Wilberforce in *Wiseman* v. *Bornerman* [1971] A.C. 297 and in *R.* v. *Liverpool Corporation* [1972] 2 Q.B. 299 where fairness and natural justice were regarded as distinct concepts. Also see Wootten J. in *Dunlop* v. *Woollahra Municipal Council* [1975] 2 N.S.W.L.R. at p. 469.

71 [1974] Q.B. 523 at p. 539; for the development of 'fairness' in Canada and its use by Canadian courts, see D. J. Mullan, 'Fairness: The New Natural Justice' (1975) 25 *University of Toronto Law Journal* 281.

72 At this point, there is a quotation from *Local Government Board* v. *Arlidge* [1915] A.C. 120.

> intend to ask myself this simple question: did the inspector act fairly towards the plaintiff.

The adulation for the concept of fairness to supplant natural justice was taken over by academic writers on the subject as well.[73] However, as other academic writers have pointed out, in some areas at least, courts have demonstrated that the concept of fairness does not afford much protection to a citizen as it could be narrowed down considerably on grounds of policy.[74] The criticism is reflected in the dicta of Wootten J. in *Dunlop* v. *Woolahra Municipal Council* when he said:[75]

> The temptation in the period of rapidly expanding administrative law, is to abandon, not only the traditional categorization, but any categorization of functions as a basis for invoking the rules of natural justice, and to resort to a largely subjective assessment of whether 'fairness' or 'fair play in action' requires observance of certain procedures. This course is welcomed by some of the commentators but it is related to another development in the law which has been justly criticized as emasculating natural justice from within and as nullifying, at least to a large extent, the effect of the applicability of natural justice.

English cases show that the enthusiasm for the 'fairness' concept and the breaking down of categorization of functions is now waning. The same judges who once hailed 'fairness' as having broken down the narrow conceptualization of earlier law, increasingly resort to the earlier categorization of functions. The earlier law, at least ensured that in situations where the function could be regarded as quasi-judicial, a citizen's interests were protected by the right to a hearing. The return to the old terminology is evident in the recent decision of *Selvarajan* v. *Race Relations Board*.[76] Lord Denning in that case examined the position of the Board and held that 'the duty of the Board . . . is only to make such enquiries as they bona fide consider necessary and not to act judicially and/or fairly'.[77] Likewise Scarman L.J. observed that:[78]

> The Race Relations Board does not exercise judicial functions. Part II of the Act is absolutely clear. The board was created so that in the sensitive field of race relations compliance with the law and the resolution of differences could be first sought without recourse to the courts with their necessarily open and formalised judicial process. The board is an administrative agency charged with a number of critically important functions in the administration of the law; — but it is not a judicial institution — nor is it the apex of a hierarchy of judicial institutions.

The dicta indicate that once again the courts would examine the nature of the function in determining whether the principles of natural justice had been adhered to. But the restoration of the older scheme

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73 E.g. see Jackson, *op. cit.* p. 36.

74 See e.g. W. Birtles, 'Natural Justice Yet Again' (1970) 33 *M.L.R.* 559.

75 [1975] 2 N.S.W.L.R. 446 at p. 467.

76 [1976] 1 All E.R. 12; for a comment, see N. P. Gravells, 'Fairness as the Basis of Procedure for Decision Making Bodies' (1976) 39 *M.L.R.* 342.

77 At p. 19.

78 At p. 24.

must not be taken to mean that the flirtation with the concept of fairness has not achieved anything. Fairness still remains the standard by which the validity of decisions arrived at in pursuance of functions which could be characterized as administrative is assessed. In this field, it certainly achieves the aim of promoting judicial review of purely administrative functions[79] but at the same time permit sufficient flexibility for non-intervention by courts, for standards of fairness which would normally involve a right to a hearing could vary with the nature of and the public policy served by the different administrative functions. Courts have already worked out rules relating to procedural functions in certain areas. These may be identified as those involving public policy, discipline and speedy administration. These areas require further consideration.

(1) *Public Policy:*

The right to a hearing may be curtailed in the interests of public policy. In *ex parte Benaim and Khaida,*[80] it was held that the Gaming Board need not disclose its source of information as its main function was 'to protect the public interest, to see that persons running the gaming clubs are fit to be trusted'. It was held that giving an indication of the nature of the adverse evidence and an opportunity to disabuse impressions created by such evidence satisfied the standards of fairness necessary in the circumstances. Likewise in *R.* v. *Lewes Justices, ex parte The Gaming Board*[81] it was held that overriding public interest was for non-disclosure of the sources of adverse evidence. In both instances, public policy required that the function of licensing, which involved a right to livelihood, should not be characterized as quasi-judicial, because public policy considerations[82] were involved.

(2) *Speedy Administration:*

An unrestricted right to a hearing would obviously hinder speedy administration which could be in the public interest. Where a speedy decision is required, courts would not insist on a full hearing. Thus in *Gaiman* v. *National Association for Mental Health*[83] Megarry J. observed:[84] 'Where, as in the present case, their duty may impel the council to exercise the power with great speed, whereas natural justice would require delay, I think that this indicates that the council is intended to be able to exercise its powers unfettered by natural justice.' Likewise the majority opinion of the Canadian Supreme Court in *Howarth* v. *National*

79 Standards of fairness have to be observed in administrative functions too under the 'new approach'. As Lord Denning put it in *Re Liverpool Taxi Owners' Association* [1972] 2 All E.R. 589 '[The Corporation] may be said to be exercising an administrative function. But even so, in our modern approach, they must act fairly and the courts will see that they do.'

80 [1970] 2 Q.B. 417.

81 [1971] 2 W.L.R. 1466.

82 In *Ex parte Soblern* [1963] 2 Q.B. 243 state security reasons were advanced for denying a hearing; also see *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149.

83 [1971] 1 Ch. 317.

84 At p. 336.

Parole Board[85] and Roskill L.J. in *Fraser* v. *Mudge*[86] held that since prison administration required speedy decisions, this was a factor which made it unnecessary for tribunals concerned with prison administration to strictly adhere to natural justice. In this area too policy reasons oust natural justice, though some standard of fairness would have to be adhered to.

(3) *Discipline:*

Courts have been reluctant to review decisions of disciplinary tribunals within the armed forces, the police,[87] the prisons and similar services.[88] Here again the public interest that efficient discipline must be maintained within these services outweighs the individual's concern that his interests should not be affected without a proper hearing.[89]

However, cases involving university discipline indicate the acuteness of the conflict. In this field, the interest that academic conditions cannot be maintained without good discipline conflicts with the interest of the individual that he be not denied education and a passport to a career without a right to a hearing. The courts have wavered when confronted with this situation, earlier recognising the student's right to a hearing but later moving away to the view that the disciplinary boards exercise a 'magisterial' function which should not be reviewed unless the board had been unfair by e.g. not giving notice of its sittings to consider the case or not communicating the charge to the student concerned.[90]

The content of the right to hearing varies in situations where the function is characterised as administrative. Here the courts would weigh policy considerations where a function is characterized as administrative. Where a function is characterized as quasi-judicial, it is submitted that the right to a hearing does not have such a fluctuating content.[91]

CONCLUSION

In this paper, an effort was made to sort out the confusion created in the field of natural justice by the attempts to replace natural justice with the concept of fairness. The new concept could be used to erode the meagre protections that have been devised against abuse of administrative power. To prevent this, there is every need to retain the existing

85 *Supra*; for a comment, see (1975) 53 Can. Bar Rev. 92; earlier cases dealing with parole boards are *Ex parte Beauchamp* [1970] 3 O.R. 607; *Ex parte McCaud* [1965] 1 C.C.C. 168.

86 [1975] 1 W.L.R. 132; compare the Victorian decision in *R.* v. *The Pentonville Prison.*

87 *R.* v. *Commissioner of Police for Northern Territory; ex parte Holroyd* [1966] A.L.R. 243.

88 E.g. see *Ex parte Fry* [1954] 2 All E.R. 118.

89 *Frank* v. *Mudge, supra.*

90 See footnote 61.

91 Compare Megarry J. who in *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373 at p. 1378 said: 'Let me accept that in the sphere of the so-called quasi-judicial functions the rules of natural justice run.'

law which does seek to give effective protection to a citizen's right to property, right to livelihood etc. In this sphere natural justice operates with full vigour. But the new concept of fairness could be used to afford further protection by requiring certain minimum standards of procedure. In this manner, a flexible system affording protection to the individual but at the same time taking policy considerations into account could be built up.

POSTSCRIPT

Since the above paper was written, the Australian High Court has handed down its decision in *Heatley* v. *Tasmanian Racing Gaming Commission* (unreported). The judgment of Chambers J. which was approved by the Full Bench (Green C.J. dissenting) has been commented on in the text. The High Court has now overruled the decision (Barwick C.J. dissenting). The question from the point of view of this writer is whether the decision supports the view advanced in the paper that there is a hierarchy of rights and that where the more important of these rights are affected by the exercise of a discretionary power, a hearing is a precondition to the exercise of that power unless, of course, the statute creating the power had expressly or by implication excluded the need for such a hearing. It was also contended that where the more important rights are affected (these rights were identified in the text on the basis of decided cases) then the function is categorized as purely administrative, a duty still existed to act fairly. The categorization of the functions would depend on many factors, a primary consideration being the nature of the right of the citizen affected but it was suggested that what may *prima facie* appear to be a judicial function may be characterized as administrative where considerations of public policy require that there should not be judicial intervention. It now remains to be examined whether the judgment in *Heatley's* case supports the above analysis.

Barwick C.J.'s judgment does not require analysis as he had concluded by interpreting the statute involved that the statute did not create a duty to give a hearing before exercising the power (see further Barwick C.J.'s views in *Twist* v. *Randwick Municipal Council* (1977) 12 A.L.R. 379). As the need for inquiry into whether the function is judicial or administrative arises only where the statute is silent and as Barwick C.J. was able to construe the statute as not involving an administrative function, having arrived at such a conclusion, he held that *certiorari* would not be. But he should yet have considered whether the Racing Commission had acted fairly for under the common law, as developed in the recent cases, there is a duty to act fairly even in exercising a purely administrative power (*In re H.R.*). But as the Tasmanian statute (S. 75 of the Supreme Court Civil Procedure Act, 1932) clearly lays down that *certiorari* could be issued only to a person or tribunal charged by law

with a duty to determine judicially and not merely ministerially any question or matter, the English innovations accepted in other Australian states (see *Dunlop* v. *Woollahra Municipal Council* [1975] 2 N.S.W.L.R. at 969). But this was not the reason why the Chief Justice did not consider whether the duty to act fairly had been satisfied and hence it is submitted with great respect that his decision lacks completeness.

The majority judgments held that the power exercised was judicial in nature. If the contentions advanced in the above paper be correct, the judges should have come to the conclusion that the statutory power exercised was judicial because it affected a major right of a citizen — a right which was protected by the rule *audi allevam partem.* The possible rights of the plaintiff that could have been affected must then be examined and the extent to which the judgments support such an approach be analysed. The possible rights that could have been affected are:

(1) *The Right to a Livelihood*: It is well established that a statutory power affecting the right to a livelihood, unless the statute excludes the requirement of a hearing, must be exercised in a judicial manner (see list above and *R.* v. *Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 1 W.L.R. 1052). Murphy J. was influenced by the argument that the plaintiff's right to earn a livelihood would have been affected if he was warned off the course as he was a professional punter. Murphy J. was prepared to compare the situation of the plaintiff with the situation in which a stockbroker had been warned off a stock exchange. The Tasmanian courts had countered this argument effectively by pointing out that the plaintiff could still have placed bets off-course. It may still be argued that a professional punter would not have the opportunity of making a decision on the spot after discussions with fellow punters etc. at the race-course. Still one is left with the impression that a punter's position is not similar to that of a trainer of greyhounds (as in *Fagan* v. *National Coursing Association of South Australia*) or an owner of greyhounds (as in *Pett* v. *Greyhound Racing Association*) who had been entitled to hearings before disciplinary boards.

The approach of Aickin J. was that the plaintiff had a certain status to be protected. This idea has also been developed in cases involving the right to a livelihood in that a certain legal status resulting from an association with a body may be essential to earn a livelihood and therefore the termination of that status must be preceded by a hearing. These cases have involved three types of situations:

(a) membership of a professional body.
(b) trade union membership (the most recent and lucid explanation of the law on this is in the judgment of Judge Dillon in *Stevenson* v. *United Road Transport Union* [1976] 3 All E.R. 29).
(c) students of universities (e.g. *R.* v. *Aston University, ex parte Roffey*).

In these three situations, a definite status, quite different from that of the other members of the public, was enjoyed by the persons who were affected by the decisions of disciplinary bodies. Thus, for example, as was pointed out in *Roffey's* case, the situation of an applicant for admission to a university, whose application had been refused, was different from that of an expelled undergraduate. The latter had a status within the university set-up, the former was no different from the ordinary member of the public. The cases all concern specific types of status created by law or by virtue of some association (e.g. *John* v. *Rees*) and not a generic right everyone was entitled to. It is for this reason that the sophisticated reasoning of Aickin J. that the plaintiff's status was affected by the warning off lacks merit, as the legal context does not credit a status needing protection in the accused or in all other members of the community.

(2) *The Right to a Reputation*: Murphy J. gave as a reason for holding that the power was judicial the fact that 'the exercise of the power will probably have an adverse effect on the person and his reputation . . .' Likewise Aickin J. seemed to agree with the contention of the plaintiff that the 'warning-off notice casts a serious aspersion on his character', i.e., like Neasey J. in the Supreme Court referred to *Cookson* v. *Harwood* [1932] 2 K.B. 978 where it had been held that to say of a person that he had been warned-off a racecourse is defamatory. Since the right to a reputation is akin to the right of property, there is no reason why where discretionary power is permitted to affect it, it should not be regarded as protected by the rules of natural justice. There are few incidental references in English judgments to the idea that the exercise of statutory power affecting reputation must be preceded by a hearing. In *Pett* v. *Greyhound Racing Associates*, Lord Denning said that, '. . . when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth, he also has the right to speak by counsel or solicitor'. In *Gaiman* v. *National Association for Mental Health*, Megarry J. suggested (at p. 336) that where power to exclude from an association for misconduct was exercised, natural justice ought to apply as '. . . reputation might well be at stake'. It is submitted that the strongest reason for holding that the power exercised was judicial lay in the fact that the exercise of the power had the tendency to affect the reputation of the plaintiff.

(3) *The Right to have an Expectation affected only after a Hearing*: Another reason for holding that the power was judicial suggested in the judgment of Aickin J. was that the law now recognises that since an expectation has been created, an administrative interference with the fulfilment of that expectation must be preceded by a hearing. The rule, he said, 'is a relatively recent development' and cited four English decisions in support of the rule. It is submitted with respect that the English decisions cited do not support so wide a proposition advanced by Aickin J.

Schmidt v. *Secretary of State* was a decision in which Lord Denning, following the then fashionable view that the dichotomy between judicial and administrative functions was no longer valid and that there was only a general duty to act fairly, went on to make a weak reference to a 'legitimate expectation' in holding that a hearing need not be given an alien refused a visa. (To quote the sentence: 'It all depends on whether he has a right or interest, *or I would add, some legitimate expectation*, of which it is not fair to deprive him without hearing what he has to say'). That immigration officials perform an administrative function has been recognised in a series of decision, the only limitations being that they should act fairly. (*Ex p. Venicoff*; in *re H.R.*). Lord Denning was not departing from this view in *Schmidt*.

Similar explanations could be given of *Breen* v. *Amalgamated Engineering Union* and *Re Liverpool Taxi Owners Association*. In both cases, the functions had been characterized as administrative but the requirement to act fairly existed. To quote Lord Denning in the *Liverpool Taxi Owners* case: 'It is perhaps putting it a little high to say they are exercising judicial functions. They may be said to be exercising an administrative function. But even so, they must act fairly; and the court will see that they do so'. These cases then cannot support Aickin J.'s view as they involved functions which had been characterized as administrative.

The fourth case Aickin J. used in support of his wide view was *R.* v. *Barnsley Metropolitan Borough Council; ex parte Hook* [1976] 1 W.L.R. 1052. This case involved the revocation of a license to run a stall at a market, due to misconduct by the market manager. There were weighty reasons to hold that the power exercised was judicial. The power exercised involved a punitive sanction and a violation of the common law right of a man to earn his living in the ancient market. There was hardly any need to resort to so wide a doctrine as formulated by Aickin J. to decide *Hook*.

It is submitted that the wide proposition formulated by Aickin J. lacks authority. There is only authority for the view that where an expectation is created and is not fulfilled due to some administrative intervention, there is a duty on the part of the administrative official to act fairly. The standard of fairness would of course vary according to the circumstances. If the rule that Aickin J. formulated were to be accepted administration in a welfare state, which creates so many expectations, would be difficult indeed. An academic lawyer would shudder at the prospect that a hearing should be given to every applicant for admission to the university because he has an expectation that he would be admitted and a refusal would interfere with these expectations. Can the student who fails in administrative law at the end of the year argue that he should be given a hearing because his legitimate expectations had been so brutally interfered with?

In conclusion, the decision of the High Court is supportable on the basis that the power exercised affected the right to reputation of the plaintiff and therefore should have been preceded by a hearing. The plaintiff would not have been entitled to *certiorari*, unless he could show that the power exercised was judicial in nature for under s. 75 of the Civil Procedure Act 1932 *certiorari* will be only in respect of judicial functions.

The question now arises whether s. 75 should not be amended in the light of the English extensions of the law. As has been indicated, English courts have intervened by way of *certiorari* in functions categorized as administrative on the ground of non-adherence to standards of fairness. There is a greater readiness to intervene and review administrative functions in the interests of speedy administration during the period between the wars. Now that there is no need to favour speedy administration over the interest of the citizen affected, the repeal of s. 75 of the 1932 Act would facilitate the introduction of the English trend in Tasmania. A way of indirectly achieving the same result is to ask for a declaration that the administrative act was a nullity for want of adherence to the standard of fairness.