
(2019) 02 P&H CK 0202

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 19265 Of 2016

Prof. C.S. Gautam And Another

APPELLANT

Vs

Union Territory Of Chandigarh And Others

RESPONDENT

Date of Decision : 22-02-2019

Acts Referred:

Medical Council Act, 1956 — Section 33

Constitution Of India, 1950 — Article 14, 16, 109, 126, 324, 329

Citation : (2019) 02 P&H CK 0202

Hon'ble Judges : Rajiv Sharma, J, J; Harinder Singh Sidhu, J

Bench : Division Bench

Advocate : Anupam Gupta, Talim Hussain, Karan Vir Singh, J.S. Toor, M.S. Longia, R.S. Bains

Final Decision : Allowed

Judgement

1. This petition is instituted against the order rendered by learned Central Administrative Tribunal, Chandigarh Bench (hereinafter referred to as 'Tribunal' for brevity, in O.A. No. 060/00157/2015 on 21.04.2015.

2. The brief facts necessary for adjudication of the petition are that petitioner No.1 obtained Degree of Master of Science (M.Sc.) (Pharmacology) from the Post Graduate Institute of Medical Education and Research (hereinafter referred to as "PGIMER"), Chandigarh, on 18. 04.1982. He was awarded Ph.D. by the PGIMER, Chandigarh, on 5. 04.1986. Petitioner No.2 obtained Degree of Master of Science (M.Sc.) (Anatomy in Medical Faculty) from the Government Medical College, Amritsar, on 28.06.1984. She was awarded Ph.D. by the PGIMER, Chandigarh, on 29.10.1991.

3. Petitioner No.1 was selected and appointed as Professor in the Department of Pharmacology through the Union Public Service Commission on 05.12.2007. He was designated as Head, Department of Pharmacology, Government Medical College & Hospital, Sector 32, Chandigarh, by the Chandigarh Administration, on 17/18.01.2008.

4. Petitioner No.2 was selected and appointed as Professor in the Department of Anatomy through the Union Public Service Commission on 23. 12.2010. She was designated as Head, Department of Anatomy, Government Medical College & Hospital, Sector 32, Chandigarh, by the Chandigarh Administration, on 10/14.09.2010.

5. Three successive inspections of the Government Medical College & Hospital, Sector 32, Chandigarh, were carried out by the Medical Council of India, in order to verify justification for increase in MBBS students from 50 to 100. No objection was raised by the Medical Council of India in all three successive inspections from 2011 to 2014, qua eligibility of petitioners No.1 and 2 to be Professor & Head of the Departments of Pharmacology and Anatomy, respectively. The petitioners were removed as Head of the Departments on 19.02.2015, and respondents No.4 and 5 were appointed as Head of the Departments of Pharmacology and Anatomy.

6. The petitioners, feeling aggrieved by the order dated 19. 02.2015, filed O.A before the Central Administrative Tribunal, Chandigarh Bench, assailing the order dated 19.02.2015.

7. The learned Central Administrative Tribunal dismissed the petitioners' O.A. on 21.04.2015.

8. It would be apt, at this stage, to refer to the minimum qualifications for Teachers in Medical Institutions Regulations, 1998 (hereafter referred to as "1998 Regulations") framed by the Medical Council of India, with the previous sanction of the Central Government under Section 33 of the Indian Medical Council Act, 1956. The object of these Regulations is to appoint medical teachers with minimum qualification and experience in various departments of medical colleges and institutions imparting graduate and post-graduate medical education, in order to maintain a standard of teaching. The minimum qualifications for appointment as a teacher in various departments of a medical college or institution imparting graduate and post-graduate education have been specified in Tables I and II, annexed with the 1998 Regulations.

9. It will be apt, at this stage, to re-produce clauses 1, 2, 4 and 5 of Schedule I of the 1998 Regulations, which read as under :-

"Every appointing authority before making an appointment to a teaching post in a medical college or institution shall observe the following norms :-

1. All Medical teachers must possess a basic University or equivalent qualification included in any one of the Schedules to the Indian Medical Council Act, 1956 (102 of 1956). They must also be registered in a State Medical Register or Indian Medical Register.

1A. x x x x x x x x

2. In the departments of Anatomy, Physiology, Biochemistry, Pharmacology and

Microbiology, non-medical teachers may be appointed to the extent of 30% of the total number of posts in the department. A non-medical approved medical M.Sc. qualification shall be a sufficient qualification for appointment as Lecturer in the subject concerned but for promotion to higher teaching post a candidate must possess the Ph.D. degree in the subject. Heads of departments of pre and para clinical subjects must possess recognized basic University degree qualification, i.e., MBBS or equivalent qualification. However, in the department of Biochemistry, non-medical teachers may be appointed to the extent of 50% of the total number of posts in the department. In case of the paucity of teachers in non-clinical departments relaxation upto the Head of the Department may be given by the appointing authority to the non-medical persons if suitable medical teacher in the particular non-clinical speciality is not available for the said appointment. However, such relaxations will be made only with the prior approval of the Medical Council of India. A non-medical person cannot be appointed as Director or Principal or Dean or Medical Superintendent. In the departments of Community Medicine, Lecturers in Statistics shall possess M.Sc. qualification from a recognized University.

3. x x x x x x x x

4. The appointing authority may consider the holders of equivalent postgraduate qualifications, which may be approved by the Medical Council of India from time to time, to have the requisite recognised qualification in the subject concerned.

5. The Medical Council of India shall determine equivalent qualification referred to in these regulations.

The minimum essential academic qualification for the post of Professor (Anatomy) as per the 1998 Regulations reads as under :-

M.S. (Anatomy)/M.D. (Anatomy)/MBBS with M.Sc. (Anatomy)/M.Sc. (Med. Anatomy) with Ph.D. (Med. Anatomy)/M.Sc. (Med. Anatomy)/ with D.Sc. (Med. Anatomy)

10. The Medical Council of India had sent letter dated 16.03.2005 (Annexure P-4) to the Director Principal, Government Medical College & Hospital, Sector 32-A, Chandigarh. The text of the letter reads as under :-

"Subject :- Teachers Eligibility Qualification - Appointment of person to the post of Professor in the Deptt. of Pharmacology.

Sir,

With reference to your letter No. GMC-TA-37-2003/029029, dated 27.09.2003, on the subject noted above, I am to inform you that the matter was considered by the T.E.Q. Sub-Committee of the Council at its meeting held on 04.08.2004. The Executive Committee at its meeting held on 31.1.2005 approved the decision of the TEQ Sub-Committee, which is as under :-

"The Sub-Committee considered the letter dated 27.9.2003 from the Director

Principal, Govt. Medical College, Chandigarh requesting for approval of MCI for appointment of Dr. C.S. Gautam to the post of Professor in the Deptt. of Pharmacology. The Committee noted that Dr. C.S. Gautam has obtained M.Sc. (Pharmacology) in 1982 and Ph.D.

(Pharmacology) in 1986, both from PGIMER, Chandigarh and thereafter has experience in various capacities and therefore decided to approve Dr. C.S. Gautam for the post of Professor in the department of Pharmacology." Kindly acknowledge."

11. Similarly, the Medical Council of India had sent communication to petitioner No.2 vide letter dated 06.10.2008 (Annexure P-5) qua eligibility for the post of Professor in Anatomy. The text of the letter is re-produced below :-

"Subject :- Teacher's Eligibility Qualification - Certificate of eligibility for the post of Professor in Anatomy.

Madam,

With reference to your letter dated 30.4.2008, on the subject noted above, I am directed to state that the matter was considered Teacher's Eligibility Qualifications Sub- Committee. The Executive Committee at its meeting held on 15.9.2008 has approved the decision of the Sub-Committee :-

"The TEQ Sub-Committee considered the request received from Dr. Kanchan Kapoor with regard to her Eligibility for the post of Professor in the Deptt. of Anatomy and noted that :-

Dr. Kanchan Kapoor has obtained M.Sc. (Anatomy in Medical Faculty) in the year 1983 from Govt. Medical College, Amritsar and Ph.D. in 1991 from Deptt. of Anatomy, Post Graduate Institute of Medical Sciences & Research, Chandigarh. Teaching experience as given in her application is as under :-

Post

Name of

From

To

Total

Institution

Experience

Demonstrator

Govt.

22.3.1992

29.12.1995

3 Years

&

6

Ad-hoc

Medical

Months

College

&

Hospital,

Chandigarh

Senior

Govt.

29.12.1995

22.01.1998

2 Years

Lecturer on

Medical

contract

College

&

Hospital,

Chandigarh

Senior

Govt.

22.1.1998

24.11.2003

5 Years & 10

Lecturer

Medical

Months
through
College
&
UPSC
Hospital,
Chandigarh
Reader
Govt.
25.11.2003

Till date
4 Years
&
5
through
Medical
Months
UPSC
College
&
Hospital,
Chandigarh

As per minimum qualifications for teachers in Medical Institutions Regulations, 1998, the academic qualification and experience for appointment as a Professor in the deptt. of Anatomy is prescribed as under :-

Anatomy

Post

Academic Qualification

Experience

(A) Professor

M.S. (Anatomy)/M.D. (Anatomy)/MBBS with M.Sc. (Anatomy)/M.Sc. (Med. Anatomy) with Ph.D. (Med. Anatomy)/ M.Sc. (Med. Anatomy)/ with D.Sc. (Med. Anatomy)

(i) As Reader/Associate Professor in Anatomy for four years in a recognised medical college. Desirable (ii) Minimum of four Research publications indexed in Index Medicus/ national journal and one research publication in international journal.

In view of above, the TEQ Sub-Committee decided that Dr. Kanchan Kapoor is eligible for the post of Professor in the Deptt. of Anatomy in a medical college."

12. It is evident from the combined reading of letters dated 16. 03.2005 and 06.10.2008 that the petitioners were found duly qualified by the Teachers Eligibility Qualification Sub-Committee for the posts of Professors in the Departments of Pharmacology and Anatomy, respectively. The petitioners were appointed Professors on the basis of recommendation made by the Union Public Service Commission. There is only one substantive post of Professor in the Departments of Pharmacology as well as Anatomy. The petitioners, as noticed above, were appointed as Head of the Departments. The charge of the posts of Heads of Department of Pharmacology and Anatomy was withdrawn from petitioners No.1 and 2, respectively, on 19.02.2015.

13. The case of the petitioners, in a nutshell, is that there was violation of principles of natural justice. The order dated 19.02.2015 is unreasonable and irrational. Clause 2 of Schedule I of the 1998 Regulations is unconstitutional. The petitioners had legitimate expectation to continue to discharge the duties of the office of the Head of Department. No reasons have been assigned while relieving the petitioners from the office of the Head of the Department.

14. The Chandigarh Administration in its reply has admitted that there was violation of principles of natural justice, but it has relied upon clause 2 of Schedule I of the 1998 Regulations to oppose the petition. The Medical Council of India has also admitted that there was violation of principles of natural justice. The private respondents have practically taken the same stand, which has been taken by the Chandigarh Administration as well as the Medical Council of India.

15. The learned Tribunal by referring to clause 2 of Schedule 1 has dismissed the writ petition. The learned Tribunal has also relied upon decision of a Constitution Bench of the Hon'ble Supreme Court in Dr. Preeti Srivastava Vs. State of M.P., 1999 (7) SCC 120.

16. Clause 2 of Schedule I of the 1998 Regulations lays down that in the departments of Anatomy, Physiology, Biochemistry, Pharmacology and Microbiology, non-medical teachers may be appointed to the extent of 30% of the total number of posts in the department. A non-medical approved medical M.Sc. qualification shall be sufficient qualification for appointment as Lecturer in the subject concerned but for promotion to higher teaching post, a candidate must possess the Ph.D. degree in the subject. Heads of departments of pre and

para clinical subjects must possess recognized basic University degree qualification, i.e., MBBS or equivalent qualification. This was incorporated vide Notification No. MCI-12(2)/2009-Med.-22654 dated 21.07.2009. Clause 2 of 1998 Regulations is required to be read in conjunction with clauses 4 and 5. Clause 4 provides that the appointing authority may consider the holders of equivalent postgraduate qualifications, which may be approved by the Medical Council of India from time to time, to have the requisite recognized qualification in the subject concerned. Clause 5 provides that the Medical Council of India shall determine equivalent qualification referred to in the 1998 Regulations. The requirements of academic qualifications, teaching and research experience have been prescribed in Table I and Table II of the 1998 Regulations. The minimum academic qualifications are prescribed for the post of Professor, Reader/Associate Professor, Assistant Professor/Lecturer, Tutor/ Demonstrator/Resident/Registrar in the subjects of Pharmacology and Anatomy. No separate academic qualification has been prescribed for appointment of Head of the Department in a particular subject in Table I and Table II. The qualification for appointment as Head of Department of pre and para clinical subjects for the first time has been brought in by way of amendment notified on 21.07.2009, whereby University degree qualification, i.e., MBBS or equivalent qualification, was prescribed to hold the office of the Head of Department.

17. The petitioners were found eligible and qualified to be appointed as Professors as per the letters dated 16.03.2005 (Annexure P-4) and 06.10.2008 (Annexure P-5), re-produced here-in-above. The Teachers Eligibility Qualification Sub-Committee found that the petitioners were possessing minimum essential qualifications, though they were not MBBS, but were having Ph.D. degrees in their respective subjects. The learned Tribunal has not taken into consideration the fact that the minimum qualification prescribed was MBBS or equivalent qualification. The Ph.D. degrees obtained by the petitioners were found equivalent to other qualifications required for filling up the posts of Professors in Pharmacology and Anatomy, including M.S. and M.D. at par with M.Sc. and Ph.D. The Head of Department is not an academic post. It is only an administrative post to deal with day to day administration in the department. The classification of pre and para clinical subjects is violative to Articles 14 and 16 of the Constitution of India. The classification must be based on intelligible differentia. All the Professors constitute homogeneous class, who fulfill the essential educational qualification prescribed in Tables I and II of the 1998 Regulations, and cannot be discriminated, only on the basis of clause 2 of Schedule I of the 1998 Regulations. Since the petitioners are qualified to be Professors, there is no reason why they are not qualified or eligible to discharge the duties of the office of HOD.

18. In *Subramanian Swamy v. Director, Central Bureau of Investigation and another*, (2014) 8 Supreme Court Cases 682, their Lordships of the Hon'ble Supreme Court have held that if the object of classification itself is discriminatory, then an explanation that the classification is reasonable having a

rational relation to the object sought to be achieved is immaterial. Their Lordships have held as under :-

"96. Various provisions under different statutes were referred to by Mr. L. Nageswara Rao where permission of the government is required before taking cognizance or for institution of an offence. Section 197 Cr.P.C. was also referred to, which provides for protection to Judges and public servants from prosecution except with the previous sanction by the competent authority. It may be immediately stated that there is no similarity between the impugned provision in Section 6-A of the DSPE Act and Section 197 Cr.P.C. Moreover, where challenge is laid to the constitutionality of a legislation on the bedrock or touchstone of classification, it has to be determined in each case by applying well-settled two tests: (i) that classification is founded on intelligible differentia, and (ii) that differentia has a rational relation with the object sought to be achieved by the legislation. Each case has to be examined independently in the context of Article 14 and not by applying any general rule."

19. In *Union of India and others v. N.S. Rathnam and sons*, (2015) 10 Supreme Court Cases 681, their Lordships of the Hon'ble Supreme Court have held that in order to pass the test of permissible classification, if the Government fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory.

Their Lordships have held as under :-

"14. What follows from the above is that in order to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and

(ii) that, that differential must have a rational relation to the object sought to be achieved by the statute in question. If the Government fails to support its action of classification on the touchstone of the principle whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held as arbitrary and discriminatory. In *Sube Singh v. State of Haryana*, (2001) 7 SCC 545, this aspect is highlighted by the Court in the following manner: (SCC p. 548, para 10)

"10. In the counter and the note of submission filed on behalf of the appellants it is averred, inter alia, that the Land Acquisition Collector on considering the objections filed by the appellants had recommended to the State Government for exclusion of the properties of Appellants 1 and 3 to 6 and the State Government had not accepted such recommendations only on the ground that the constructions made by the appellants were of 'B' or 'C' class and could not be easily amalgamated into the developed colony which was proposed to be built. There is no averment in the pleadings of the respondents stating the basis of

classification of structures as 'A' 'B' and 'C' class, nor is it stated how the amalgamation of all 'A' class structures was feasible and possible while those of 'B' and 'C' class structures was not possible. It is not the case of the State Government and also not argued before us that there is no policy decision of the Government for excluding the lands having structures thereon from acquisition under the Act. Indeed, as noted earlier, in these cases the State Government has accepted the request of some landowners for exclusion of their properties on this very ground. It remains to be seen whether the purported classification of existing structures into 'A', 'B' and 'C' class is a reasonable classification having an intelligible differentia and a rational basis germane to the purpose. If the State Government fails to support its action on the touchstone of the above principle, then this decision has to be held as arbitrary and discriminatory. It is relevant to note here that the acquisition of the lands is for the purpose of planned development of the area which includes both residential and commercial purposes. That being the purpose of acquisition, it is difficult to accept the case of the State Government that certain types of structures which according to its own classification are of 'A' class can be allowed to remain while other structures situated in close vicinity and being used for same purposes (residential or commercial) should be demolished. At the cost of repetition, it may be stated here that no material was placed before us to show the basis of classification of the existing structures on the lands proposed to be acquired. This assumes importance in view of the specific contention raised on behalf of the appellants that they have pucca structures with R.C. roofing, mosaic flooring, etc. No attempt was also made from the side of the State Government to place any architectural plan of different types of structures proposed to be constructed on the land notified for acquisition in support of its contention that the structures which exist on the lands of the appellants could not be amalgamated into the plan."

20. In *Director General, Central Reserve Police Force and others v. Janardan Singh and others*, (2018) 7 Supreme Court Cases 656, their

Lordships have held as under :-

"18. We have already noticed that by the Government Order dated 31.3.1987 special (duty) allowance was extended to CRPF personnel posted and serving in North-East region who had their headquarters also in that region. Obvious inference was that those personnel posted and serving in North-East region whose headquarters were not in that region were not entitled to the benefit. Whether such classification for extending the benefit to one class of personnel who were both posted and serving there and had their headquarter there and those personnel who were posted and serving there and having their headquarter outside the North-East region is valid or not and passes the test of equality before law under Article 14 is the question also needs to be considered.

19. to 21. x x x x x x x x

22. Further, the differentia has no relation to the object sought to be achieved. When the purpose is to encourage and retain the personnel in North-Eastern region to deny the benefit of special (duty) allowance to those who although posted and serving in North-Eastern region have their headquarter outside the North-East region does not have any rational nexus with the object sought to be achieved."

21. Their Lordships of the Hon'ble Supreme Court in *Navtej Singh Johar and others v. Union of India*, (2018) 10 Supreme Court Cases 1 have held that classification must be reasonable and have intelligible differentia and must have rational and casual connection between basis of classification and object sought to be achieved. Moreover, if the object of the classification is illogical, unfair and unjust, the classification will be unreasonable. Their Lordships have held as under :-

"408. A litany of our decisions - to refer to them individually would be a parade of the familiar - indicates that to be a reasonable classification under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation. There must, in other words, be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable.

409. Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra. What it ignores is that Article 14 contains a powerful statement of values - of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in State action. As our constitutional jurisprudence has evolved towards recognising the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence."

22. The petitioners were appointed as Professors in substantive capacity. Respondents No.4 and 5 were only upgraded as Professors to discharge the duties of HODs. All the appointments are to be made on the basis of

qualifications prescribed as per Tables I and II which constitute homogeneous clause. The petitioners cannot be discriminated on the basis of nomenclature i.e. pre and para clinical subjects. The petitioners had also specifically challenged clause 2 of Schedule I of the 1998 Regulations, but the learned Tribunal has not gone into this vital aspect. The learned Tribunal has not correctly considered the ratio of Preeti Srivastava's case (*supra*). This case pertains to admission to Medical Colleges and has nothing to do with the minimum educational qualification prescribed in the 1998 Regulations.

23. Petitioners No.1 and 2 were designated as HODs in the subjects of Pharmacology and Anatomy on 18.01.2008 and 14.09.2010, respectively. They were relieved of the charge of HODs of their respective subjects on 19. 02.2015 without hearing them. They were conferred with the status of HODs by the Chandigarh Administration by taking into consideration their educational qualifications, coupled with the fact that they were holding the post of Professor on substantive basis. The designation given to them could not be withdrawn unilaterally without hearing them.

24. It is settled law that any order which has civil consequences, including administration, must comply with the principles of natural justice. The petitioners had taken a specific stand that there was violation of principles of natural justice. This fact was admitted by the Chandigarh Administration as well as the Medical Council of India and despite that, the learned Tribunal has come to the conclusion that hearing them would be a "useless formality". The petitioners are still working as Professors in substantive capacity. The Tribunal has erred in law while coming to the conclusion that issuance of show cause notice would have been useless formality. The fact of the matter is that the petitioners could project their case, the manner in which they had been appointed as Professors on substantive basis and had been possessing essential qualification for the post of Professor. They were required to be served with notice before they were relieved of the office of HOD. They have entailed civil consequences.

25. Once the principle of natural justice has not been followed at the threshold, it will not be cured at the appellate stage.

26. According to clause 4 of Schedule I of the 1998 Regulations, the appointing authority may consider the holders of equivalent postgraduate qualifications, which may be approved by the Medical Council of India from time to time, to have the requisite recognised equivalent qualification referred to the Regulations.

27. Even the Director Principal of the Government Medical College & Hospital, Chandigarh, had sent a communication to the Medical Council of India on 06.02.2015 seeking permission to appoint non-medical teachers as Head of the Departments. The College had requested for permission to allow the petitioners to continue as Heads of their Departments due to non-availability of other eligible faculty members in their respective departments.

28. Their Lordships of the Hon'ble Supreme Court in Kumari Shrilekha Vidyarthi

and others v. State of U.P. and others, (1991) 1 Supreme Court Cases 212, have held that termination of DGC without any reason would attract Article 14 of the Constitution of India. Their Lordships held that every holder of public office is a trustee. All his actions must be in consonance with Article 14 of the Constitution of India and are subject to judicial review. Non-arbitrariness is a necessary concomitant of rule of law and is in substance fair play in action. Their Lordships have held as under :-

"18. The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Article 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.

19. x x x x x x x x x

20. Even apart from the premise that the 'office' or 'post' of DGCs has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Article 14, we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist.

21. to 27. x x x x x x x x x

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

29. to 32. x x x x x x x x

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in *Dwarkadas Marfatia's case*, (1989) 3 SCC 293, to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, L.J., in *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All ER 935, the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

34. x x x x x x x x

35. It is now too well-settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

36. x x x x x x x x

37. x x x x x x x x

38. After *Jaisinghani's case*, AIR 1967 SC 1427, long strides have been taken in several well-known decisions of this Court expanding the scope of judicial review in such matters. It has been emphasized time and again that arbitrariness is anathema to State action in every sphere and wherever the vice percolates, this Court would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India. It is, therefore, obvious that irrespective of the nature of appointment of the Government Counsel in the districts in the State of U.P. and the security of tenure being even minimal as claimed by the State, the impugned

circular, in order to survive, must withstand the attack of arbitrariness and be supported as an informed decision which is reasonable.

39. No doubt, it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repel the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, the State action must perish as arbitrary.

40. to 43. x x x x x x x x

44. Conferment of the power together with the discretion which goes with it to enable proper exercise of the power is coupled with the duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred, which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. All persons entrusted with any such power have to bear in mind its necessary concomitant which alone justifies conferment of power under the rule of law. This was apparently lost sight of in the present case while issuing the impugned circular."

29. The House of Lords in *Ridge v. Baldwin* and others, (1963) 2 All England Law Reports, 66, have explained the principles of natural justice. Their Lordships have held as under :-

"The appellant's case is that in proceeding under the Act of 1882 the Watch Committee were bound to observe what are commonly called the principles of natural justice, that before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and to give him a fair opportunity of being heard in his own defence. The authorities on the applicability of the principles of natural justice are in some confusion, and so I find it necessary to examine this matter in some detail. The principle *audi alteram partem* goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it had been interpreted in the Courts is much more definite than that. It appears to me that one reason why the authorities on natural

justice have been found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it has been sought to apply the principle.

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So I come to the third class, which includes the present case. There I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation. An early example is Bagg's case, though it is more properly deprivation of the privilege of being a burgess of Plymouth. *R. v. Gaskin* (1799), 8 Term Rep. 209, arose out of the dismissal of a Parish Clerk, and Lord Kenyon, C.J. referred to *audi alteram partem* as one of the first principles of justice. *R. v. Smith* (1844) 5 Q.B. 614 was another case of dismissal of a Parish Clerk, and Lord Denman, C.J. held that even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation, and in any event delaying to hear him would prevent yielding too hastily to first impressions. *Ex parte Ramshay* (1852) 18 Q.B. 173 is important. It dealt with the removal from office of a county court judge, and the form of the legislation which authorised the Lord Chancellor to act is hardly distinguishable from the form of section 191 which confers powers on the Watch Committee. The Lord Chancellor was empowered if he should think fit to remove on the ground of inability or misbehaviour, but Lord Campbell, C.J. said that this was "only on the implied condition prescribed by the principles of eternal justice". In *Osgood v. Nelson*, (1872), L.R. 5 H.L. 636, objection was taken to the way in which the Corporation of the City of London had removed the Clerk to the Sheriff's Court, and Lord Hatherley, L.C. said :

" I apprehend, my Lords, that, as has been stated by the learned Baron who has delivered, in the name of the Judges, their unanimous opinion, the Court of Queen's Bench has always considered that it has been open to that Court, as in this case it appears to have considered, to correct any Court, or tribunal, or body of men who may have a power of this description, a power of removing from office, if it should be found that such persons have disregarded any of the essentials of justice in the course of their inquiry, before making that removal, or if it should be found that in the place of reasonable cause those persons have acted obviously upon mere individual caprice".

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There were three possible courses open to the Watch Committee - reinstating the Appellant as Chief Constable, dismissing him, or requiring him to resign. The difference between the latter two is that dismissal involved forfeiture of pension rights, whereas requiring him to resign did not. Indeed, it is now clear that the Appellant's real interest in this appeal is to try to save his pension rights.

It may be convenient at this point to deal with an argument that, even if as a

general rule a Watch Committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But even if it could, the Watch Committee would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But as between the other two courses open to the Watch Committee the case is not so clear. Certainly on the facts as we know them the Watch Committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the exercise of their discretion decided to take a more lenient course.

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I shall now turn to a different class of case

- deprivation of membership of a professional or social body. In *Wood v. Woad*, (1874), L.R. 9 Exch. 190, the Committee purported to expel a member of a mutual insurance society without hearing him, and it was held that their action was void and so he was still a member. Kelly, C.B., said of *audi alteram partem*:

"this 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".

This was expressly approved by Lord Macnaghten giving the judgment of the Board in *Lapointe v. L'Association de Bienfaisance etc.* [1906] A.C. 535. In that case the board of directors of the association had to decide whether to give a pension to a dismissed constable - the very point the Watch Committee had to decide in this case - and it was held that they had to observe "the elementary principles of justice". Then there are the club cases, *Fisher v. Keane*, (1878) 11 Ch. D. 353, and *Dawkins v. Antrobus*, (1881) 17 Ch. D. 615. In the former Jessel, M.R., said of the Committee:

"They ought not, as I understand it according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever - perhaps to ruin his prospects for life without giving him an opportunity of either defending or palliating his conduct".

In the latter case it was held that nothing had been done contrary to natural justice. In *Weinberger v. Inglis (No.2)* [1919] A.C. 606 a member of enemy birth was excluded from the Stock Exchange, and it was held that the Committee had heard him before acting. Lord Birkenhead, L.C. said :

"If I took the view that the appellant was condemned upon grounds never brought to his notice, I should not assent to the legality of that course unless compelled by authority".

He said this although the rule under which the Committee acted was in the widest possible terms - that the Committee should each year re-elect such members as they should deem eligible as members of the stock exchange."

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We do not have a developed system of administrative law - perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedure are largely inapplicable to cases which they were never designed or intended to deal with. But I see nothing in that to justify our thinking that our old methods are any less applicable today than ever they were to the older types of case. And if there are any dicta in modern authorities which point in that direction, then in my judgment they should not be followed.

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Then there was considerable argument whether in the result the Watch Committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void, and that was expressly decided in *Wood v. Woad*. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.

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Accordingly, in my judgment this appeal must be allowed. There appears to have been no discussion in the courts below as to remedies which may now be open to the appellant, and I do not think that this House should do more than declare that the dismissal of the appellant is null and void and remit the case to the Queen's Bench Division for further procedure. But it is right to put on record that the appellant does not seek to be reinstated as Chief Constable: his whole concern is to avoid the serious financial consequences involved in dismissal as against being required or allowed to resign."

30. In *Durayappah v. Fernando and others*, (1967) 2 All England Law Reports, 152, the Privy Council has explained the rule of natural justice, i.e. *audi alteram partem*, as under :-

"On the question of *audi alteram partem* the Supreme Court followed and agreed with the earlier decision of *Sugathadasa v. Jayasinghe* (1958), 59 N.L.R. 457, a decision of three judges of the Supreme Court on the same section and on the same issue, namely, whether a council was not competent to perform its duties. That decision laid down

"as a general rule that words such as 'where it appears to' or 'if it appears to the satisfaction of' or 'if the ... considers it expedient that' or 'if the ... is satisfied that' standing by themselves without other words or circumstances of

qualification, exclude a duty to act judicially."

Their lordships disagree with this approach.

These various formulae are introductory of the matter to be considered and give little guidance on the question of *audi alteram partem*. The statute can make itself clear on this point and, if it does, *cedit quaestio*. If it does not then the principle stated by Byles, J., in *Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180 must be applied. He said this :

"... a long course of decisions, beginning with *R. v. Cambridge University, Bentley's case* (1723), Fortes Rep. 202, and ending with some very recent cases, establish that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

31. In *Mrs. Maneka Gandhi v. Union of India and another*, (1978) 1 Supreme Court Cases 248, their Lordships of the Hon'ble Supreme Court have held that the rules of natural justice apply as much to administrative action which entails civil consequences as to quasi-judicial and judicial functions. Their Lordships have further held that even if *audi alteram partem* is not specifically mentioned, it may be applicable by implication. Their Lordships have held as under :-

"9. We may commence the discussion of this question with a few general observations to emphasise the increasing importance of natural justice in the field of administrative law. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-y-Gest spoke of this rule in eloquent terms in his address before the Bentham Club :

"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception ? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance ? I believe that it is very much more. If it can be summarised as being fair play in action—who could wish that it would ever be out of action ? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled; it lacks more exalted inspiration." (Current Legal Problems, 1973, Vol. 26, p. 16).

And then again, in his speech in the House of Lords in *Wiseman v. Borneman*, 1971 AC 297, the learned Law Lord said in words of inspired felicity:

"... that the conception of natural justice should at all stages guide those who

discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action." Nor do we wait for directions from Parliament. The common law has abundant riches : there may we find what Byles, J., called "the justice of the common law".

Thus, the soul of natural justice is 'fair-play in action' and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an administrative hearing is regarded as essential requirement of fundamental fairness. And in England too it has been held that 'fair-play in action' demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. The rule was stated by Lord Denning, M.R. in these terms in *Schmidt v. Secretary of State for Home Affairs* (1969) 2 Ch D 149 - "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". The same rule also prevails in other Commonwealth countries like Canada, Australia and New Zealand. It has even gained access to the United Nations (vide *American Journal of International Law*, Vol. 67, page 479). Magarry, J., describes natural justice "as a distillate of due process of law" (vide *Fontaine v. Chastarton* (1968) 112 *Solicitor General* 690. It is the quintessence of the process of justice inspired and guided by 'fair-play in action'. If we look at the speeches of the various law Lords in *Wiseman's case*, it will be seen that each one of them asked the question "whether in the particular circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded", or, was the procedure adopted by the Tribunal 'in all the circumstances unfair'? The test adopted by every Law Lord was whether the procedure followed was fair in all the circumstances and 'fair-play in action' required that an opportunity should be given to the tax payer "to see and reply to the counter-statement of the Commissioners" before reaching the conclusion that "there is a prima facie case against him." The inquiry must, therefore, always be : does fairness in action demand that an opportunity to be heard should be given to the person affected ?

10. Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of

justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other ? Can it be said that the requirement of 'fair play in action' is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi-judicial character was spelt out from the following observation of Atkin, L.J. in *Rex v. Electricity Commissioners* (1924) 1 KB 171, "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division. . . .". Lord Hewart, C.J., in *Rex V. Legislative Committee of the Church Assembly*, (1928) 1 KB 411 read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine questions affecting the rights of subjects"-something super-added to it. This gloss placed by Lord Hewart, C.J., on the dictum of Lord Atkin, L.J., bedevilled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the services of the statute and this led to oversubtlety and over-refinement resulting in confusion and uncertainty in the law. But this was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in *Ridge v. Baldwin* (1963) 2 All ER 66, which marks a turning point in the history of the development of the doctrine of natural justice, Lord Reid pointed out how the gloss of Lord Hewart, C.J., was based on a misunderstanding of the observations of Atkin, L.J., and it went counter to the law laid down in the earlier decisions of the Court. Lord Reid observed : "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities". The learned Law Lord held that the duty to act judicially may arise from the very nature of the function intended to be performed and it need not be shown to be super-added. This decision broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clark in his article on 'Natural Justice, Substance and Shadow' in *Public Law Journal*, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This

development in the law had its parallel in India in the *Associated Cement Companies Ltd. v. P. N. Sharma*, AIR 1965 SC 1595 where this Court approvingly referred to the decision in *Ridge v. Baldwin* (supra) and, later in *State of Orissa v. Dr. Binapani Dei*, AIR 1967 SC 1269 observed that : "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also pointed out in *A.K. Kraipak v. Union of India*, (1969) 2 SCC 262, another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said:

"The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated, for determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised".

The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected and where it is found to exist, the rules of natural justice would be attracted.

11. This was the advance made by the law as a result of the decision in *Ridge v. Baldwin* (supra) in England and the decisions in *Associated Cement Companies's* case (supra) and other cases following upon it, in India. But that was not to be the end of the development of the law on this subject. The proliferation of administrative law provoked considerable fresh thinking on the subject and soon it came to be recognised that 'fair-play in action' required that in administrative proceeding also, the doctrine of natural justice must be held to be applicable. We have already discussed this aspect of the question on principal and shown why no distinction can be made between an administrative and a quasi-judicial proceeding for the purpose of applicability of the doctrine of natural justice. This position was judicially recognised and accepted and the dichotomy between administrative and quasi-judicial proceedings vis-a-vis the doctrine of natural justice was finally discarded as unsound by the decisions in *In re : H.K. (an Infant)* (1967) 1 All ER 226 and *Schmidt v. Secretary of State for Home Affairs* (supra) in England and, so far as India is concerned, by the memorable decisions rendered by this Court in *A.K. Kraipak's* case (supra). Lord Parker, C.J. pointed out in the course of his judgment in *In Re :H.K. (an Infant)* :

"But at the same time, I myself think that even if an Immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being

required to act judicially, but of being required to act fairly. Good administration and an honest or bonafide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly. I appreciate that in saying that it may be said that one is going further than is permitted on the decided cases because heretofore at any rate the decisions of the courts do seem to have drawn a strict line in these matters according to whether there is or is not a duty to act judicially or quasi-judicially."

12. This Court, speaking through Hegde, J., in A.K. Karipak's case quoted with approval the above passage from the judgment of Lord Parker, C.J., and proceeded to add :

"The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it... Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. The University of Kerala* [(1969)1 S.C.R. 317] the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principles of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case."

This view was reiterated and re-affirmed in a subsequent decision of this Court in *D.F.O., South Kheri v. Ram Sanahi Singh*, (1971) 3 SCC 864. The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable.

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14. Now, as already pointed out, the doctrine of natural justice consists principally of two rules, namely, *nemo debet esse iudex propriae causae* : no one shall be a judge in his own cause, and *audi alteram partem* : no decision shall be given against a party without affording him a reasonable hearing. We are concerned here with the second rule and hence we shall confine ourselves only to a discussion of that rule. The learned Attorney General, appearing on behalf of the Union of India, fairly conceded that the *audi alteram partem* rule is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it is calculated to act as a healthy check on abuse or misuse of power and hence its reach should not be narrowed and its applicability circumscribed. He rightly did not plead for reconsideration of the historic advances made in the law as a result of the decisions of this Court and did not suggest that the Court should retrace its steps. That would indeed have been a most startling argument coming from the Government of India and for the Court to accede to such an argument would have been so act of utter retrogression. But fortunately no such argument was advanced by the learned Attorney General. What he urged was a very limited contention, namely, that having regard to the nature of the action involved in the impounding of a passport, the *audi alteram partem* rule must be held to be excluded, because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded, he might immediately, on the strength of the passport, make good his exit from the country and the object of impounding the passport would be frustrated. The argument was that if the *audi alteram partem* rule were applied, its effect would be to stultify the power of impounding the passport and it would defeat and paralyse the administration of the law and hence the *audi alteram partem* rule cannot in fairness be applied while exercising the power to impound a passport. This argument was sought to be supported by reference to the statement of the law in S.A. de Smith's *Judicial Review of Administrative Action*, 2nd ed., where the learned author says at page 174 that "in administrative law a *prima facie* right to prior notice and opportunity to be heard may be held to be excluded by implication... where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature". Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair-play in action, it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion. There are certain well recognised exceptions to the *audi alteram partem* rule established by judicial decisions and they are summarised by S.A. de Smith in *Judicial Review of Administrative Action*, 2nd ed., at pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not

in any way militate against the principle which requires fair-play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the audi alteram partem rule is held inapplicable not by way of an exception to "fair-play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in *Russell v. Duke of Norfolk*, (1949) 1 All ER 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal : it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The audi alteram partem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise. This circumstantial flexibility of the audi alteram partem rule was emphasised by Lord Reid in *Wiseman v. Borneman* (supra) when he said that he would be "sorry to see this fundamental general principle degenerate into a series of hard and fast rules" and Lord Hailsham, L.C., also observed in *Pearlberg V. Varty*, (1971) 1 Weekly Law Reports 728 that the courts "have taken in increasingly sophisticated view of what is required in individual cases". It would not, therefore, be right to conclude that the audi

alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. the Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned to be heard, but as soon as the order impounding the passport is made, and opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports, Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure 'established' by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article."

32. Their Lordships of the Hon'ble Supreme Court in *Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others*, (1978) 1 Supreme Court Cases 405, have explained the principles of natural justice. Their Lordships have held as under :-

"43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of Authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam - and of Kautilya's Arthashastra - the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

44. The dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after *Kraipak* [A.K. *Krappak v. Union of India*, (1969) 2 SCC 262] in India and *Schmidt* [*Sachmidt v.*

Secretary of State for Home Affairs, (1969) 2 Ch 149] in England.

45. Kraipak marks the watershed, if we may say so, in the application of natural justice to administrative proceedings. Hegde, J., speaking for a Bench of five Judges observed, quoting for support Lord Parker in *In re : H.K. (an infant)* (1967) 1 All ER 226 :

"It is not necessary to examine these decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding." (p. 467) (SCC p.

271, para 17)"

* * * *

The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. (p. 468) (SCC p. 272, para 20)

* * * *

The validity of that limitation is not questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. The University of Kerala*, AIR 1969 SC 198, the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case." (p. 469) (SCC pp. 272-3, para 20).

46. It is an interesting sidelight that in America it has been held to be but fundamental fairness that the right to an administrative hearing is given. (See *Boston University Law Review* Vol. 53 p. 899). Natural justice is being given access to the United Nations (See *American Journal of International Law* Vol. 67 p. 479). It is notable that Mathew, J. observed in *Indira Gandhi* (supra) :

"If the amending body really exercised judicial power, that power was exercised in violation of the principles of natural justice of *audi alteram partem*. Even if a

power is given to a body without specifying that the rules of natural justice should be observed in exercising it, the nature of the power would call for its observance."

Lord Morris of Borth-y-Gest in his address before the Bentham club concluded :

"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying those principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance ? I believe that it is very much more. If it can be summarised as being fair play in action - who could wish that it would ever be out of action ? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled if it lacks more exalted inspiration."

47. It is fair to hold that subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play.

48. Once we understand the soul of the rule as fairplay in action - and it is so - We must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible: pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation : nothing more - but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation.

49. Let us look at the jurisprudential aspects of natural justice, limited to the needs of the present case, as the doctrine has developed in the Indo-Anglian systems. We may state that the question of nullity does not arise here because we are on the construction of a constitutional clause. Even otherwise, the rule of natural justice bears upon construction where a statute is silent save in that category where a legislation is charged with the vice of unreasonableness and consequential voidness.

50. Article 324, on the face of it, vests vast functions which may be powers or

duties, essentially administrative and marginally even judicative or legislative. [See All Party Hill Leaders' Conference, Shillong v. Capt. W. A. Sangma, (1977) 4 SCC 161]. We are not fascinated by the logo-machic exercise suggested by Sri P. P. Rao, reading 'functions' in contradistinction to 'powers' nor by the trichotomy of diversion of powers, fundamentally sound but flawsome in several situations if rigidly applied. These submissions merely serve to draw the red-herring across the trial. We will now zero-in on the crucial issue of natural justice vis-a-vis Article 324 where the function is so exercised that a candidate is substantially prejudiced even if he has not acquired a legal right nor suffered 'civil consequences', whatever that may mean.

51. We proceed on the assumption that even if the cancellation of the poll in this case were an administrative act, that per se does not repel the application of the natural justice principle. Kraipak (*supra*) nails the contrary argument. Nor did the learned Additional Solicitor General contend that way, taking his stand all through, not on technicalities, easy victories or pleas for reconsideration of the good and progressive rules gained through this Court's rulings in administrative law but on the foundational thesis that any construction that we may adopt must promote and be geared to the great goal of expeditious, unobstructed, despatch of free and fair elections and leaving grievances to be fully sorted out and solved later before the election tribunal set out by the Act. To use a telling word familiar in officialese : 'Election Immediate'.

52. So now we are face to face with the naked issue of natural justice and its pro tem exclusion on grounds of necessity and non-stultification of the on-going election. The Commission claims that a direction for re-poll is an 'emergency' exception. The rules of natural justice are rooted in all legal systems, not any 'new theology' and are manifested in the twin principles of *nemo iudex in causa sua* and *audi alteram partem*. We are not concerned here with the former since no case of bias has been urged. The grievance ventilated is that of being condemned unheard. Sporadic applications or catalogue of instances cannot make for a scientific statement of the law and so we have to weave consistent criteria for application and principles for carving out exceptions. If the rule is sound and not negated by statute, we should not devalue it nor hesitate to hold every functionary who effects others' right to it. The *audi alteram partem* rule has a few facets two of which are (a) notice of the case to be met; and (b) opportunity to explain. Let us study how far the situation on hand can co-exist with canons of natural justice. While natural justice is universally respected, the standards vary with situations, contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings.

53. *Ridge v. Baldwin* (1963) 2 All ER 66 is a leading case which restored light to an area 'benighted by the narrow conceptualism of the previous decade', to borrow Professor Clark's expression. (Natural Justice; Substance and Shadow-'Public Law' Journal - Spring 1975). Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. We

have already said that the classification of functions as 'judicial' or 'administrative' is a stultifying shibboleth, discarded in India as in England. Today, in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fairplay into its wheels.

54. The learned Additional Solicitor General welcomed the dramatic pace of enlargement in the application of natural justice. But he argued for inhibiting its spread into forbidden spaces lest the basic values of Article 329 be nullified. In short, his point is that where utmost promptitude is needed - and that is the *raison d'être* of exclusion of intermediate legal proceedings in election matters - natural justice may be impractical and may paralyse, thus balking the object of expeditious completion. He drew further inspiration from another factor to validate the exclusion of natural justice from the Commission's actions, except where specifically stipulated by statutes. He pointed out what we have earlier mentioned - that an election litigation is one in which the whole constituency of several lakhs of people is involved and, if the Election Commission were under an obligation to hear affected parties it may, logically, have to give notice to lakhs of people and not merely to candidates. This will make an ass of the law and, therefore, that is not the law. This *reductio ad absurdum* also has to be examined.

55. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experiential test, importing the right to be heard will paralyse the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and-death aspects of the supreme command by the then British Prime Minister 'to the distress of all our friends and to the delight of all our foes' - too historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social or haphazard solutions should be eschewed.

56. Normally, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very marrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the *nemo iudex* aspect) with expressiveness : "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'the judge was biased'." We may adapt it to the *audi alteram* situation by the altered statement : "Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that

man had no chance to defend his stance'." That is why Tuckor LJ in *Russol v. Duke of Norfolk* (11949) 1 All E.R. 109 emphasised that 'whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'. What is reasonable in given circumstances is in the domain of practicability; not formalised rigidity. Lord Upjohn in *Fernando [Durayappah v. Fernando]*, (1967) 2 All ER 152 (PC)] observed that 'while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable'. It is untenable heresy, in our view, to lock-jaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even in such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural pre-condition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoys far-reaching powers and the greater the power to affect others' right or liabilities the more necessary the need to hear.

57. We may not be taken to say that situational modifications to notice and hearing are altogether impermissible. They are, as the learned Additional Solicitor General rightly stressed. The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life's processes, if we may mix metaphors. Tucker L.J. drove home this point when he observed in the *Duke of Norfolk* case (*supra*) :

"There are no words which are of universal application to very kind of inquiry.....

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting the subject-matter that is being dealt with, and so forth".

This circumstantial flexibility of fair hearing has been underscored in *Wiseman v. Borneman* (1969) 3 All ER 275 by Lord Reid when he said he would be "sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules." Lord Denning, with lovely realism and principled pragmatism, set out the rule in *Selvaraian* (1976) 1 All ER 12, 19 :

"The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, when he should be told the case made against him and be afforded a fair opportunity of answering it. The investigation body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice

it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."

Courts must be tempered by the thought while compromise on principle is unprincipled, applied administrative law in modern complexities of government must be realistic, not academic. The myriad maybes and the diverse urgencies are live factors. Natural justice should not destroy administrative order by insisting on the impossible.

58. This general discussion takes us to four specific submissions made by the learned Additional Solicitor General. He argued that the Election Commission, a high constitutional functionary, was charged with conducting elections with celerity to bring the new House into being and the tardy process of notice and hearing would thwart this imperative. So no natural justice. Secondly, he submitted that there was no final determination to the prejudice of any party by directing a re-poll since the Election Court had the last word on every objectionable order and so the Commission's order was more or less provisional. So no natural justice. Thirdly, he took up the position that no candidate could claim anything more than an expectation or spes and no right having crystallised till official declaration of the result, there was no room for complaint of civil consequence. What was condemned was the poll, not any candidate. So no natural justice. Finally, he reminded us of the far-flung futility of giving a hearing to a numerous constituency which too was interested in proper elections like the candidates. So no natural justice.

59. De Smit was relied on and Wiseman (1967) 3 All ER 1945 as well as Pearlberg v. Varty, (1971) 1 WLR 728 were cited in support of these propositions. We may add to these weighty rulings the decision of the House of Lords in Pearlberg. The decision of this Court in the ruling in Bihar School Examination Board v. Subhas Chandra Sinha (1970) 1 SCC 648, where a whole university examination was cancelled without hearing any of the candidates but was upheld against the alleged vice of non-hearing, was relied on.

60. We must admit that the law, in certain amber areas of natural justice, has been unclear. Vagueness haunts this zone but that is no argument to shut down. If it is twilit, we must delight. So we will play down the guidelines but guard ourselves against any decision on the facts of this case. That is left for the Election Court in the light of the law applicable.

61. Nobody will deny that the Election Commission in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden, wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP'

assumptions may boomerang. Natural justice is one such check on exercise of power. But the chemistry of natural justice is confused in certain aspects, especially in relation to the fourfold exceptions put forward by the respondents.

62. So let us examine them each. Speed in action versus soundness of judgment is the first dilemma. Ponnuswamy has emphasised what is implicit in Article 329 (b) that once the process of election has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick re-poll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of 'hearing' as condition for decision-making be martyred for the cause of administrative, immediacy? We think not. The full panoply may not be there but a manageable minimum may make-do.

63. In *Wiseman v. Borneman* (1967) 3 All ER 1945 there was a hint of the competitive claims of hurry and hearing. Lord Reid said: 'Even where the decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him (emphasis added). We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in *Wiseman* where all that was sought to be done was to see if there was a *prima facie* case to proceed with a tax case where, inevitably, a fuller bearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-y-Gest and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it *ex-parte* would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" [Lord Denning, M. R., in *Manward v. Borneman* (1974) 3 WLR 660 summarised the observations of the Law Lords in this form]. No doctrinaire approach is desirable but the Court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside

the action to the extent feasible. It is quite on the cards that the Election Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done, for a fair-play of fair hearing. This is a matter pre-eminently for the Election Tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty."

Their Lordships have also held that action is to be judged by the reasons stated while making the order and supplementary reasons in the shape of affidavits are to be excluded. Their Lordships have held as under :

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose,

J. in *Gordhandas Bhanji (Commr. of Police, Bombay v. Gordhandas Bhanji*, AIR 1952 SC 16)] :

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

33. In *S.L. Kapoor v. Jagmohan and others*, (1980) 4 Supreme Court Cases 379, their Lordships of the Hon'ble Supreme Court have explained the principles of natural justice as under :-

"4. Before the High Court, as before us, the principal submission of the learned counsel for the petitioner-appellant was that the order of supersession was passed in complete violation of the principles of natural justice and total disregard of fair play. It was pointed out that no notice to show cause against supersession was ever issued to the Committee, there was not the slightest hint until the order was made that there was any proposal to supersede the Committee and the Committee never had any opportunity either before or after the order of supersession was passed to offer their explanation against the allegations made in the order of supersession. The Full Bench upheld the claim of

the petitioners that it was necessary to hear the Committee before an order under Section 238 (1) of the Punjab Municipal Act was passed. But, held, the High Court, the Committee was made aware of the allegations and had been given opportunity to state its case or version in the case of at least three out of the four grounds and therefore, there was no failure to observe the principles of natural justice. Even otherwise, the High Court expressed the view that undisputed facts were there and they spoke for themselves and no purpose would have been served by giving formal notice to the Committee of the allegations and the proposal to take action to supersede the Committee since the result would have been the same. In the view of the High Court there was no prejudice to the Committee by the failure to observe natural justice. Shri Soli Sorabjee, learned counsel for the appellant, questioned the conclusion of the High Court that the Committee had the opportunity to offer their explanation in regard to the allegations on which the order of supersession was passed. He also canvassed the view that the failure to observe the principles of natural justice did not vitiate the order of supersession since the observance of natural justice would have, on the undisputed facts, led to the same result.

5. x x x x x x x x

6. x x x x x x x x

7. The old distinction between a judicial act and an administrative act has withered away and we have been liberated from the psittacine incantation of 'administrative action'. Now, from the time of the decision of this Court in *State of Orissa v. Dr. (Miss) Binapani Devi*, AIR 1967 SC 1269 "even an administrative order which involves civil consequences.... must be made consistently with the rules of natural justice". What are civil consequences? The question was posed and answered by this Court in *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi*, (1978) 2 SCR 272, Krishna Iyer J., speaking for the Constitution Bench said (at p. 308-309):

"But what is a civil consequence, let us ask ourselves, by passing verbal booby-traps? "Civil consequence" undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence".

The learned Judge then proceeded to quote from Black's Legal Dictionary and to consider the interest of a candidate at a Parliamentary election. He finally said:

"The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law locus standi and person aggrieved, right and interest have a broader import".

8. In *Schmidt v. Secretary of State for Home Affairs*, Lord Denning M.R., observed :

"The speeches in *Ridge v. Baldwin* [1964] AC 40, show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or, I would add, some legitimate expectation, of which it would not be fair to deprive him".

It was held in that case that a foreign alien had no right to enter the country except by leave, but, if he was given leave to come for a limited period and his permit was sought to be revoked before the expiry of the time limit, he ought to be given an opportunity of making representation, for he had a legitimate expectation of being allowed to stay for the permitted time.

19. Megarry, J., discussed the question in *John v. Rees*. He said (at p. 402):

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".

20. In *Annamunthodo v. Oilfields Workers' Trade Union*, (1961) 3 All ER 621, Lord Denning, in his speech said (at p. 625):

"Counsel for the respondent union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice".

21. In *Margarita Fuentes v. Tobert L. Shevin*, 32 L Ed 2d 556, it was said (at p. 574):

"But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses; that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protest against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no

adequate defense upon the merits".

22. x x x x x x x x x

23. x x x x x x x x x

24. The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. Jackson's *Natural Justice* (1980 Edn.) contains a very interesting discussion of the subject. He says:

"The distinction between justice being done and being seen to be done has been emphasised in many cases....

The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C.J.'s judgment in *R. V. Home Secretary, ex. p. Hosenball* (1977) 1 W.L.R. 766, 772, where after saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice".

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. In *Altco Ltd. v. Sutherland* (1971) 2 Lloyd's Rep. 515 Donaldson, J., said that the court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result. It was important that the parties should not only be given justice, but, as reasonable men, know that they had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In *R. v. Thames Magistrate's Court, ex.p. Polemis* (1974)1 W.L.R. 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the charge.

"It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing

that justice is done (per Lord Widgery C.J. at p. 1375)".

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

34. In *Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and others*, (2015) 8 Supreme Court Cases 519, their Lordships of the Hon'ble Supreme Court have explained the scope of applicability of principles of natural justice. Their Lordships have held as under :-

"19. What is the genesis behind this requirement? Why it is necessary that before an adverse action is taken against a person he is to be given notice about the proposed action and be heard in the matter? Why is it treated as inseparable and inextricable part of the doctrine of principles of natural justice?

20. Natural justice is an expression of English Common Law. Natural justice is not a single theory - it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called 'naturalist' approach to the phrase "natural justice" and is related to "moral naturalism". Moral naturalism captures the essence of commonsense morality - that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were: (i) rule against bias, i.e. *nemo debet esse iudex in propria sua causa*; and (ii) opportunity of being heard to the concerned party, i.e. *audi alteram partem*.

These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order'.

22. Though the aforesaid principles of natural justice are known to have their origin in Common Law, even in India the principle is prevalent from ancient times, which was even invoked in Kautilya's 'Arthashastra'. This Court in *Mohinder Singh Gill v. Chief Election Commr.* (1978) 1 SCC 405, explained the Indian origin of these principles in the following words:

"43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam - and of Kautilya's Arthashastra - the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these depths for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system".

23. Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it 'jura naturalia', i.e. natural law.

24. The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.

25. This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as 'hearing the other side'. Prof. D.J. Galligan attempts to provide what he calls 'a general theory of fair treatment' by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural fairness, by emphasizing that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions,

it would mean that the system is not working well and the social good is to that extent diminished. The rule of procedure is to see that the law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham, who wrote at length about the need to follow such principles of natural justice in civil and criminal trials and insisted that the said theory developed by Bentham can be transposed to other forms of decision making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:

"On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law makers of the society. Each case is an instance in achieving the general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved."

Galligan also takes the idea of fair treatment to a second level of understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject matter of fair treatment. However, that aspect need not be dilated upon.

26. Allan, on the other hand, justifies procedural fairness by following the aforesaid principles of natural justice as rooted in the rule of law leading to good governance. He supports Galligan in this respect and goes to the extent by saying that it is same as ensuring dignity of individuals, in respect of whom or against whom the decision is taken, in the following words:

"The instrumental value of procedures should not be underestimated; the accurate application of authoritative standards is, as Galligan clearly explains, an important aspect of treating someone with respect. But procedures also have intrinsic value in acknowledging a person's right to understand his treatment, and thereby to determine his response as a conscientious citizen, willing to make reasonable sacrifices for the public good. If obedience to law ideally entails a recognition of its morally obligatory character, there must be suitable opportunities to test its moral credentials.

Procedures may also be thought to have intrinsic value insofar as they constitute a fair balance between the demands of accuracy and other social needs; where the moral harm entailed by erroneous decisions is reasonably assessed and fairly distributed, procedures express society's commitment to equal concern and respect for all."

27. It, thus, cannot be denied that the principles of natural justice are grounded in procedural fairness which ensures taking of correct decisions and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be esigned to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms.

28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

29. De Smith captures the essence thus - "Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on plainest principles of natural justice"

(emphasis supplied)

30. Wade, Administrative Law (1977) 395 also emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

31. In Cooper v. Sandworth Board of Works, (1863) 14 CBNS 180, the Court laid down that: (ER p. 420) "...although there is no positive word in the statute requiring that the party shall be heard, yet justice of common law would supply the omission of legislature". (emphasis supplied)

32. Exhaustive commentary explaining the varied contours of this principle can be traced to the judgment of this Court in ECIL v. B. Karunakar, (1993) 4 SCC 727, wherein the Court discussed plenty of previous case law in restating the aforesaid principle, a glimpse whereof can be found in the following passages:

"20. The origins of the law can also be traced to the principles of natural justice, as developed in the following cases: in A. K. Kraipak v. Union of India, (1969) 2 SCC 262, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceedings also especially when

it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice.

21. In *Board of Mining Examination v. Ramjee*, (1977) 2 SCC 256, the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

22. In *Institute of Chartered Accountants of India v. L. K. Ratna*, (1986) 4 SCC 537, *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613 (Bhopal Gas Leak Disaster case) and *C. B. Gautam v. Union of India*, (1993) 1 SCC 78, the doctrine that the principles of natural justice must be applied in the unoccupied interstices of the statute unless there is a clear mandate to the contrary, is reiterated."

33. In his separate opinion, concurring on this fundamental issue, Justice K. Ramaswamy echoed the aforesaid sentiments in the following words:

"61. It is now settled law that the proceedings must be just, fair and reasonable and negation thereof offends Articles 14 and 21. It is well settled law that principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an opportunity or supplying the material which is the basis for the decision. The enquiry report constitutes fresh material which has great persuasive force or effect on the mind of the disciplinary authority. The supply of the report along with the final order is like a post mortem certificate with putrefying odour. The failure to supply copy thereof to the delinquent would be unfair procedure offending not only Articles 14, 21 and 311(2) of the Constitution, but also, the principles of natural justice."

34. Likewise, in *C.B. Gautam v. Union of India*, (1993) 1 SCC 78, this Court once again held that principle of natural justice was applicable even though it was not statutorily required. The Court took the view that even in the absence of statutory provision to this effect, the authority was liable to give notice to the affected parties while purchasing their properties under Section 269-UD of the Income Tax Act, 1961. It was further observed that

"30.... The very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an imputation casts a slur on the parties to the agreement to sell leads to the conclusion that before such an imputation can be made against the parties concerned they must be given an opportunity to show-cause that the under valuation in the agreement for sale was not with a view to evade tax."

It is, therefore, all the more necessary that an opportunity of hearing is provided.

35. From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the Court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed in *A.K. Kraipak's case* (supra) that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. In *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. In *Maharashtra State Financial Corporation v. Suvarna Board Mills*, (1994) 5 SCC 566, this aspect was explained in the following manner:

"3. It has been contended before us by the learned counsel for the appellant that principles of natural justice were satisfied before taking action under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straight-jacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take care of the lapse, because of which the action as made known is contemplated. No particular form of notice is the demand of law: All will depend on facts and circumstances of the case."

36. In *East India Commercial Company Ltd. v. Collector of Customs*, AIR 1962 SC 1893, this Court held that whether the statute provides for notice or not, it is incumbent upon the quasi-judicial authority to issue a notice to the persons concerned disclosing the circumstances under which proceedings are sought to

be initiated against them, failing which the conclusion would be that principle of natural justice are violated. To the same effect are the following judgments:

(a) Union of India v. Madhumilan Syntex

(P) Ltd. (1988) 3 SCC 348,

(b) Morarji Goculdas B&W Co. Ltd. v. Union of India, 1995 Supp (3) SCC 588,

(c) Metal Forgings v. Union of India, (2003) 2 SCC 36, and

(d) Union of India v. Tata Yodogawa Ltd., (2015) 9 SCC 102.

37. Therefore, we are inclined to hold that there was a requirement of issuance of show-cause notice by the Deputy Commissioner before passing the order of recovery, irrespective of the fact whether Section 11-A of the Act is attracted in the instant case or not.

38. But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that the principles of natural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason - perhaps because the evidence against the individual is thought to be utterly compelling - it is felt that a fair hearing 'would make no difference' - meaning that a hearing

would not change the ultimate conclusion reached by the decision-maker - then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch v. Aberdeen Corporation*, (1971) 2 All ER 1278 (HL), who said that :

"... A breach of procedure... cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

Relying on these comments, Brandon L.J. opined in *Cinnamond v. British Airports Authority*, (1980) 2 All ER 368 (CA), that :

"... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the Courts. Even if it is found by the Court that there is a violation of principles of natural justice, the Courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that order passed is always null and void. The validity of the order has to be decided on the touchstone of 'prejudice'. The ultimate test is always the same, viz., the test of prejudice or the test of fair hearing.

41. In *ECIL* (supra), the majority opinion, penned down by Sawant, J., while summing up the discussion and answering the various questions posed, had to say as under qua the prejudice principle:

"30. Hence the incidental questions raised above may be answered as follows:

xx xx xx

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to

assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

42. So far so good. However, an important question posed by Mr. Sorabjee is as to whether it is open to the authority, which has to take a decision, to dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by the English Court way back in the year 1943 in *General Medical Council v. Spackman*, (1943) 2 All ER 337 (HL). This Court also spoke in the same language in *Board of High School and Intermediate Education v. Chitra Srivastava*, (1970) 1 SCC 121, as is apparent from the following words:

"7. The learned counsel for the appellant, Mr. C.B. Agarwala, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show cause notice on the petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a show cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed."

35. In "Administrative Law" (Eighth Edition) by Shri H.W.R. Wade and Shri C.F. Forsyth, the learned authors have discussed the principle of *Audi Alteram Partem* as under :

Audi Alteram Partem

`Hear the other side'

It is fundamental to fair procedure that both sides should be heard : *audi alteram partem*, 'hear the other side'. This is the more far-reaching of the principles of

natural justice, since it can embrace almost every question of fair procedure, or due process, and its implications can be worked out in great detail. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing; but in deference to the traditional dichotomy, that rule has already been treated separately.

The right to a fair hearing has been used by the courts as a base on which to build a kind of code of fair administrative procedure, comparable to 'due process of law' under the Constitution of the United States. As already mentioned, there has been an outburst of such activity since 1963, when the landmark decision of the House of Lords in *Ridge v. Baldwin* put an end to a period of judicial backsliding. Parliament also has made many provisions for tribunals and inquiries, and, particularly since 1957, for improving these statutory procedures. These, though dealt with in separate chapters, should be viewed together with the principles of natural justice as parts of a comprehensive design for ensuring that power is exercised considerably and fairly.

The courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. Even where an order or determination is unchallengeable as regards its substance, the court can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Thus the law makes its contribution to good administration.

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An ancient rule of wide application

According to one picturesque judicial dictum, the first hearing in human history was given in the Garden of Eden [*R. v. University of Cambridge* (1723) 1 Str. 557 (Fortescue J)] :

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. 'Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also.

This was in *Bentley's case*, in which the University of Cambridge had deprived that recalcitrant scholar of his degrees on account of his misconduct in insulting the Vice-Chancellor's court; but he was reinstated on a mandamus from the Court of the King's Bench, on the ground that deprivation was unjustifiable and that, in any case, he should have received notice so that he could make his defence, as required by 'the laws of God and man'. This is a nice example of the old conception of natural justice as divine and eternal law.

A century previously the same doctrine had made an appearance in an equally notorious case of contumacy, where a freeman of the borough of Plymouth had threatened and scandalised the mayor and was disfranchised. It was similarly held that the penalty was unjustified, in the absence of any special power of disfranchisement; and that even if there had been such a power, the removal would be void because it was not shown that a hearing had first been given. In this case also the remedy was a mandamus for restoration. Coke's report quotes from Seneca :

quicunque aliquid statuerit parte inaudita altera, aequum licet statuerit, haud aequus fuerit.

This contains the same message as does the law about bias, that where natural justice is violated it is no justification that the decision was in fact correct.

36. The concept of natural justice has been discussed by DE Smith,

Woolf and Jowell in "Judicial Review of Administrative Action" (Fifth Edition) as under :-

The concept of natural justice

The expression "natural justice", which is the source from which procedural fairness now flows, has been described as one "sadly lacking in precision". It has been consigned more than once to the lumber room. Thus, it has been said that in so far as it "means that a result or process should be just, it is harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale, it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous. No one who has the slightest acquaintance with the medieval English legal system or with legal systems in other parts of the world will suggest that those elements of judicial procedure which are now regarded as the hallmark of a civilised society have been generally enforced or even generally regarded as proper. But courts and commentators who decline to accept any form of justice as natural may take their choice from among "substantial justice", "the essence of justice", "fundamental justice", "universal justice", "rational justice", "the principles of British justice", or simply "justice without any epithet", "fair play in action", or "fairness writ large and juridically" as phrases which express the same idea. And in any event "natural justice" was written into the statute book in 1969. Moreover, "natural justice" is said to express the close relationship between the common law and moral principles, and in addition it has an impressive ancestry. That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden. The historical and

philosophical foundations of the English concept of "natural" justice may be insecure; but it is not therefore the less worthy of preservation. If it is vulnerable to rational criticism, so too are the "unalienable rights" of the Founding Fathers of the American Constitution or the notion of "due process". And the view that "natural justice is so vague as to be practically meaningless" is tainted by "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist."

Certainly it did exist in English law. It became identified with the two constituents of a fair hearing ; (a) that the parties should be given a proper opportunity to be heard and to this end should be given due notice of the hearing and (b) that a person adjudicating should be disinterested and unbiased.

Natural Justice and the Duty to Act Fairly Today Procedural fairness, as we have seen, is no longer restricted by distinctions between

"judicial" and "administrative" functions or between "rights" and "privileges". This "heresy was scotched" in *Ridge v. Baldwin*. The term "natural justice" is being increasingly replaced by a general duty to act fairly, which is a key element of procedural propriety.

Whichever term is used, the time has come to make a break with the artificial constraints surrounding the situations in which natural justice or the duty to act fairly are required. The previous distinctions were already comatose and should be formally declared moribund. The entitlement to fair procedures no longer depends upon the adjudicative analogy, nor whether the authority is required or empowered to decide matters analogous to *lites inter partes*. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well-established exceptions.

Procedural fairness is therefore not these days rationed at its source - blocked at the outset on the ground of a decision being administrative rather than judicial, or governing a privilege rather than a right. It may, in exceptional situations, be diverted during the course of its flow - where special circumstances, such as national security, excuse a right to a fair hearing. And the breadth of the flow will depend upon the circumstances surrounding the decision. Some decisions require full adjudicative-type hearings, others only narrowly permit the mere right to make representations.

Increasing resort to the open-textured standard of fairness is not, though, without its drawbacks. There is a point at which the benefits of its flexible application may be outweighed by the costs of uncertainty. Determining at what point the scales tip in a particular direction is, of course, a familiar enough task for the courts. Yet by widening the scope of their scrutiny well beyond the exercise of powers that could be characterised relatively readily as judicial in

nature, the courts have potentially expanded their functions. Guided only by the inevitably vague standard of the duty to be fair, and an intuitive sense of the calculus of costs and benefits involved in the completing procedural claims, courts may produce a series of cases from which it will be very different for those engaged in the administrative process, whether as officials, affected individuals or legal advisors, to derive any clear principles for future guidance. In expanding from the protection of rights to interests, and thence to legitimate expectations, the courts are perhaps creating "a surrogate political process to ensure the fair representation of a wide range of affected interests in the administrative process". Doubts have been expressed whether the courts are institutionally equipped for such tasks, and whether the unconstrained expansion of participation might paralyse effective administration.

In response to these doubts, various attempts have been made to devise categories or criteria of relative precision to determine the bounds of procedural fairness in the modern era. In *Ridge v. Baldwin* it was stated that the duty to observe the rules of natural justice should be inferred from the nature of the power conferred upon the authority. It has been suggested that whether the nature of the power requires such an inference to be drawn may be determined by considering the following three factors : first, the nature of the complainant's interest; secondly, the conditions under which the administrative authority is entitled to encroach on those interests; and thirdly, the severity of the sanction that can be imposed. These factors offer some guidance as to which interests should be protected by fair procedures, but leave a great deal open to speculation.

A more precise classification was provided in *McInnes v. Onslow Fane* (1978) 1 W.L.R, 1520, where the following three situations were distinguished :

- (1) "forfeiture" or "deprivation" cases, where a vested interest (such as a licence to trade) has been withdrawn;
- (2) "application" cases, where no interest yet exists, but is merely being sought (such as an application for a licence, passport or a council house); and
- (3) "expectation" cases, where there is a reasonable expectation of a continuation of an existing benefit which falls short of a right.

A fair hearing, it was suggested, should be granted in cases involving "forfeiture" and (normally) "expectation", but not in those involving a mere "application".

This analysis would, if strictly applied, result in anomalies and injustice for there are situations where the refusal of an application could adversely affect an interest deserving of protection by means of a fair hearing. For example, the refusal of an application for a passport not only prevents the exercise of a basic liberty to travel, but may also cast aspersions on a person's character. It would seem unfair to deny an applicant for planning permission procedural protection (as is provided by statute) so that he may argue in favour of his interest in

developing his land. It would also seem unfair to deny an applicant for a licence to export goods the opportunity to make representation in support of his application (such an opportunity not presently provided by statute).

In addition, some decisions deserving of a fair hearing do not fall into any of the three categories set out in *McInnes*. For example, it has been held that in some circumstances an interested person such as a neighbour is entitled to object to a proposed development of land despite the absence of a statutory right to make representations and the absence of any legitimate expectation of so doing. That kind of situation fits none of the categories in *McInnes*, as the interested person is neither in the position of an applicant, nor someone deprived of an existing right, interest or legitimate expectation.

In general there are practical reasons why a hearing cannot be given to every applicant for a licence, for the same reason that the hearing cannot be given to all applicants for scarce resources (such as hospital beds, or university places). The task of allocation in these circumstances requires despatch, and the class of applicant may be entirely open-ended. However, one can imagine situations where the unfairness of the summary refusal of a licence or the summary award of a licence to a competitor will be so manifest (e.g. because the worthiness of the applicant rather than the availability of resources is the dominant factor shaping a decision), that it will be right for a court to hold that the deciding body is under a duty to give the applicant an opportunity to make representations (whether in writing or orally) and of being apprised of all information on which the decision may be founded.

Other situations where applicants may be accorded the benefits of a fair hearing include those where the licensing authority is constituted as a distinct tribunal, or is expressly required to entertain representations or objections or appeals, or to conduct hearings or inquiries, when deciding whether or not to grant a licence. A duty to act fairly may also be imposed even upon "application" cases when policy guidelines have been established (especially if published) within which discretion will normally be exercised. They may raise an expectation of benefit in those who believe that they fall within the guidelines. In addition, an opportunity to be heard, both on the application and the merits of the policy, may be required in order to prevent a fettering of discretion.

There are, therefore, situations which are not covered by the *McInnes* approach which, like other attempts at classification, has its shortcomings. Would it, therefore, not be preferable to adopt a more comprehensive approach? Surely the time has come to recognise that the duty of fairness cannot and should not be restricted by artificial barriers or confined by inflexible categories. The duty is a general one, governed by the following propositions :

(1) Whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is required to be performed fairly.

(2) The inference will be more compelling in the case of any decision which may adversely affect a person's rights or interests or when a person has a legitimate expectation of being fairly treated.

(3) The requirement of a fair hearing will not apply to all situations of perceived or actual detriment. There are clearly some situations where the interest affected will be too insignificant, or too speculative, or too remote to qualify for a fair hearing. Whether this is so will depend on all the circumstances but a fair hearing ought no longer to be rejected out of hand, for example, simply because the decision-maker is acting in a "legislative" capacity.

(4) Special circumstances may create an exception which negatives the inference of a duty to act fairly. The inference can be rebutted by the needs of national security, or because of other characteristics of the particular function. For example, a decision to allocate scarce resources amongst a large number of contenders which needs to be made with despatch may be inconsistent with an obligation to hold a fair hearing. The inference may also not be drawn if the protection is to be achieved another way. For example, in the case of a "legislative" decision, at least where participation is built into the decision-making process elsewhere, the safeguard which would be provided by a fair hearing can be achieved by other means; as in cases where the decision is taken by democratically elected representatives accountable to Parliament or to the electorate for the exercise of the relevant power.

(5) What fairness requires will vary according to the circumstances. The question of the content of the fair hearing is considered in Chapter 9 below. We shall see that some decisions, while attracting the duty to be fair, will permit no more to the affected person than a bare right to submit representations. In other cases however there will be a right to an oral hearing with the essential elements of a trial. In between these extremes come a large variety of decisions which, because of the nature of the issues to be determined or the seriousness of their impact upon important interests, require some kind of a hearing (which may not even involve oral representations), but not anything that has all the characteristics of a full trial.

(6) Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in relation to procedural propriety.

The significance of this approach is that it *prima facie* imposes on all administrators an obligation to act fairly. Without acknowledging this expressly, the majority of the recent decisions of the courts are in practice no more than conscious or unconscious illustrations of the approach. They can be conveniently examined under the following three headings :

A. Where the terms of a statute confirm the inference of a fair hearing;

B. Where the inference of a fair hearing is confirmed by the need to safeguard a right or interest;

C. Where the inference of a fair hearing is confirmed by the need to safeguard an expectation induced by the decision-maker."

37. In "Administrative Law" (Fifth Edition) by Shri P.P. Craig, natural justice and fairness, including categorisation of rights and privileges as well as nature of the individuals' interest and right including legitimate expectations have been explained as under :-

Categorisation : Rights and Privileges

Resurrected legal doctrine does not always assume the same form that it possessed before. This should not, however, blind us to its reappearance. The dichotomy between rights and privileges provides a clear example of this. We have already seen how that distinction was used prior to *Ridge v. Baldwin*. Lord Denning M.R. subsequently held that licences are subject to natural justice, and that *Nakkuda Ali* (1951) A.C. 66 and *Parker* (1953) 1 W.L.R. 1150 are no longer authority to the contrary. It was, however, Lord Denning M.R. himself in *Schmidt v. Secretary of State for Home Affairs* (1969) 2 Ch. 149, who stated that while natural justice could apply to an administrative act, it would depend upon whether the individual had some right, interest or legitimate expectation, such that it would not be fair to deprive him of it without a hearing. While in *Cinnamond v. British Airports Authority* (1980) 1 W.L.R. 582 his Lordship invoked the same type of reasoning, stating that operators of cabs at an airport had no legitimate expectation which would warrant granting them a hearing.

It seems clear on principle that the technical distinction between rights and privileges should not be determinative of the applicability of procedural protection. Many interests may be extremely important to an individual even though they would not warrant the label "right" or "Hohfeldian right". The absence of a substantive right to a particular benefit should not lead to the conclusion that procedural rights are inapplicable, and the term legitimate expectation should not be manipulated to reach this end.

It is, however, also clear that the concept of legitimate expectation, like many legal concepts, can be used in more than one way. It does not have to be given a restrictive interpretation. Thus, a number of later cases have given a broader meaning to that term, utilising it as the foundation for procedural rights for immigrants, workers and local authorities, and thereby expanding the reach of natural justice in a beneficial manner. A more detailed examination of the role played by legitimate expectation will be provided below.

Natural Justice and Fairness

The years since *Ridge v. Baldwin* have not, however, been wholly marked by atavistic reasoning. They have also seen the development of new terminology. The case law is replete with mention of "fairness", or a "duty to act fairly". These

terms made their initial appearance in the judgment of Lord Parker C.J. in *Re HK* (1967) 2 Q.B. 617. Since then their use has varied. Some courts treat these terms in an omnibus fashion : natural justice is said to be but a manifestation of fairness. In other cases the courts will apply natural justice to judicial decisions and reserve a duty to act fairly for administrative or executive determinations. It is not uncommon for different members of the same court to be in agreement as to the contents of the procedural duty, but to differ as to whether they describe this as resulting from natural justice or fairness. There are differing views as to the significance of the development of fairness.

One view sees the development of fairness as a corollary of the expansion of procedural rights post *Ridge v. Baldwin*. The judgment of Megarry V.C. in *McInnes* is illuminating in this respect. He stated that natural justice was a flexible term, which imposed distinct requirements in different cases. It was capable of applying to the whole range of situations encapsulated by the terms "judicial", "quasi-judicial", "administrative", or "executive". However, the further that one moved away from any thing resembling a "judicial" or "quasi-judicial" situation, the more appropriate it became to use the terms fairness rather than natural justice. On this view the distinction between the terms natural justice and fairness is linguistic rather than substantive. The former can cover all cases, but it is felt to be more appropriate to use the term fairness in the context of, for example, company inspectors or immigration officers. The significant point about this view is that whichever label is used, the expansion in procedural rights is not regarded as involving any fundamental change in the nature of natural justice. As discredited limitations have been discarded, and natural justice has expanded to new fields, fairness is seen by some as a more appropriate label.

Some commentators take a different view, seeing a broader significance in the shift from natural justice to fairness. It is argued that the basis of natural justice was the desire of the ordinary courts to maintain control over adjudication and to impose their own procedures on those subject to judicial control. The necessity for the function to be characterised as "judicial" before procedural constraints were imposed was said to be integral to this approach, because only bodies exercising such functions were suited to adjudicative procedures. A corollary of this view was that the content of the rules of natural justice could be relatively fixed and certain. The shift to a broader notion of fairness is said to alter fundamentally the basis of procedural intervention : it can no longer be restricted to adjudicative settings, and there can no longer be fixed standards for determining whether there has been a breach of procedural fairness. The courts are forced to engage in a difficult balancing operation, taking into account the nature of the individuals' interest and the effect of increased procedural protection upon the administration.

That the development of procedural fairness does involve the court in a balancing function is undeniable. How significant are the changes brought about by the introduction of this concept is more contentious. The starkness of the contrast

between traditional natural justice and fairness is difficult to sustain.

First, the premise is that natural justice stemmed from a judicial desire to maintain control over adjudication and to impose its own procedures on those subject to its control. While this may have formed part of the rationale for natural justice, the major reason for the development of the doctrine was the protection of property rights and interests akin thereto.

Secondly, the argument that the term 'judicial' was used to ensure that only those bodies suited to adjudicative procedures should be subject to natural justice is not sound. That term was automatically held to be satisfied when the effects on the interests of the individual were felt to be serious enough to warrant procedural protection, and this was so whether the context was deprivation of an office, expulsion from a trade association, the destruction of one's property, or the loss of something which would juridically be termed a privilege. In deed, in cases where the remedy sought was not certiorari there was often no mention of the "judicial" requirement at all. It is, moreover, mistaken to view the twentieth century cases that limited natural justice through the judicial-administrative dichotomy as doing so primarily because of a feeling that those categorised as administrative would be unsuited to adjudicative procedure. This may have been a factor, but the authorities dealing with aliens, licensing and discipline reflect much more a judicial conclusion that the substantive interests at stake were not worthy of judicial protection.

Thirdly, the application of natural justice, prior to the introduction of fairness, was never uniform. Courts often explicitly or implicitly balanced the interests of the individual with the effects on the administration in deciding where the line should be drawn on many issues concerning the content of natural justice.

What is undoubtedly true is that natural justice has resulted in adjudicative types of procedural constraints. Process rights are modelled on those of the ordinary courts and any balancing is undertaken within this context. Whether the introduction of the term fairness causes any modification in this stance depends upon which of the two following meanings is accorded to that term.

One interpretation would see fairness as simply fitting into an adjudicative framework and not necessitating the development of non-adjudicative procedures. On this view the courts would determine what adjudicative procedures are required in particular areas. In some it may approximate to the full panoply of procedural safeguards, including notice, oral hearing, representation, discovery, cross-examination and reasoned decisions. In others it may connote considerably less. There will be a broad spectrum in between. This is indeed how the system generally works at present. The term fairness can be used to cover all such instances or differing labels can be used in differing circumstances. If one prefers the latter option then the term natural justice can be used for that part of the spectrum that requires a relatively wide range of procedural checks. Fairness can be used in those areas where either the nature

of the decision maker renders the term natural justice inappropriate or the set of safeguards tends towards the lower end of the spectrum. In so far as fairness is used within the traditional adjudicative framework the balancing involved therein may be different in degree, but not in kind from that which has always been undertaken within natural justice itself. Lord Loreburn L.C. might well question whether there is really a difference in degree.

The other interpretation would see the emergence of fairness as having a broader implication. Adjudication is only one form of decision making with its own distinctive procedure. Mediation, arbitration, contract and managerial direction are other forms of decision making and each possesses its own procedural norms. A general concept of procedural fairness could, therefore, lead the courts into developing procedural forms other than classical adjudication. If this transpires then fairness will have a substantial effect on the procedural due process. Whether this should take place, and the implications of any such development, will be considered below.

The following sections will be concerned with these two ways in which natural justice and fairness could operate. We will consider how the term fairness is presently used in an adjudicative context. This will be followed at the end of the chapter by a look at some of the broader possible implications of fairness, and the way in which that term might aid in the development of procedural forms other than classical adjudication.

Section 5. Applicability of Procedural Protection : Rights, Interests and Legitimate Expectations We have already seen that the courts will regard procedural rights as applicable if the applicant has some right, interest or legitimate expectation affected by the decision being challenged. The common law meaning of these terms will be explained, followed by an examination of the jurisprudence under Art. 6 of the ECHR.

1. The Nature of the Individuals' Interest : Rights The term right in this context will clearly cover instances in which the challenged action affects a recognised proprietary or personal right of the applicant. Thus, if, for example, the public body's action threatens to impinge upon a person's real property, it will require some form of process rights before the action is deemed legal. This has been equally the case in respect of personal property, and process rights will be applicable where a job is regarded as an office and a species of personal property. Some form of hearing right will also be demanded if the action affects the personal liberty of the individual, more particularly if that action entails some actual loss of liberty.

2. The Nature of the Individuals' Interest : The Meaning of "Interest"

The term "interest" is looser than that of right, and has been used as the basis for some type of hearing even where the individual would not be regarded in law as having any actual substantive entitlement or right in the particular case. Many of the cases concerning the application of natural justice in the context of

clubs, unions and trade associations provide examples of the courts demanding that process rights be accorded in circumstances where the applicant has an interest as such, rather than any substantive entitlement. The application of natural justice or fairness in the context of, for example, licensing and aliens is also based upon the individual possessing an interest as opposed to a right *stricto sensu*.

3. The Nature of the Individuals' Interest : Legitimate Expectation Legitimate expectations adds to the concepts of right and interest in three different ways. These must be distinguished in order to avoid confusion.

First, the court may decide that the interest, although not presently held, is important enough that an applicant should not be refused it without having some procedural rights. In this sense the courts are protecting future interests. In such instances the courts are making a normative judgment to the effect that one consequence of applying for a substantive interest is that some of the requisites of procedural protection are warranted. Thus, in *McInnes Megarry V.C.* held that there was a class of case in which the applicant could be said to have a legitimate expectation that an interest would be granted. This was where the applicant was a licence holder who was seeking the renewal of a licence, or where a person was already elected to a position and was seeking confirmation of the appointment from a different body. Precisely which future interests should be deserving of this procedural protection will obviously be contestable, as will the level of procedural rights thereby afforded.

A second way in which the concept of legitimate expectation adds to the ideas of right and interest is where there is a representation. There will be detailed discussion of the problems concerning representations later. For the present we will consider their importance as the foundation of procedural rights. The representation must be clear and unequivocal in order to generate a procedural legitimate expectation. Where this condition is satisfied a representation generating a legitimate expectation can be of importance in two types of case.

On the one hand, there may be cases in which the representation provides the foundation for the procedural rights, even though in the absence of the representation it is unlikely that the substantive interest would, in itself, entitle the applicant to natural justice or fairness. In this type of case the interest of the applicant, by itself, would not warrant procedural protection. It is the conduct of the public body, through its representation, which provides the foundation for the procedural protection. In *A.G. of Hong Kong v. Ng Yuen Shiu* (1983) 2 A.C. 629 it was held that although the rules of natural justice or fairness might not generally be applicable to an alien who had entered the territory illegally, a person could claim some elements of a fair hearing if there was a legitimate expectation of being accorded such a hearing. Such an expectation could arise if, as was the case, the government had announced that illegal immigrants would be interviewed with each case being treated on its merits, albeit there being no guarantee that such immigrants would be allowed to remain in the territory. The

point is well captured by Elias, who states that :

"It was only the legitimate expectation arising from the assurance given by the Government that enabled the court to intervene on behalf of the illegal immigrant: his status as an illegal immigrant would not of itself have created any entitlement to a hearing."

On the other hand, the representation that gives rise to the legitimate expectation may augment the applicant's procedural rights, as exemplified by the Liverpool Taxi case. In that case the council had pursued a policy of limiting the number of licensed taxis to 300. The applicants were repeatedly assured that the figure would not be increased without their being consulted. This position was reinforced by an undertaking given by the relevant committee chairman that the figure of 300 would not be exceeded until certain relevant legislation had been passed. Notwithstanding this sequence of events, the committee resolved to increase the number of taxis without any further opportunity for consultation by the applicants. It is unclear whether the court believed that the applicants would have had any procedural rights in the absence of the initial assurances given on behalf of the council. It is, however, clear that the scope or content of the applicants' procedural rights were enhanced by the fact that the representations had been made. Thus, Lord Denning M.R. stated that the council ought not to depart from the undertaking "except after the most serious consideration and hearing what the other party has to say and then only if they are satisfied that the overriding public interest requires it." Roskill L.J. formulated the applicants' rights in somewhat different terms, but he too held that the council could not resile from their undertaking "without notice to and representations from the applicants", and only after "due and proper consideration of the representations of all those interested."

The third way in which legitimate expectations can arise is closely related to, but distinct from, the second. This is where the defendant institution has established criteria for the application of policy in a certain area, an applicant has relied on these criteria and the defendant then seeks to apply different criteria. In Khan the applicant sought to adopt his brother's child from Pakistan. The Home Office, while stating that there was no formal provision for this in the immigration rules, provided a circular stating the criteria which the Home Secretary would use in such cases. The applicant sought entry clearance for the child on the basis of these criteria, but was refused, and the Home Office indicated that different tests had in fact been used. The court found for the applicant. Parker L.J. drew on the Liverpool Taxi case and reasoned as follows. While it was true that there was no specific undertaking in this case, the principle from Liverpool Taxi was nonetheless applicable. Thus if the Home Secretary stipulated certain general entry conditions he should not be allowed to depart from them "without affording interested persons a hearing and then only if the overriding public interest demands it." Reliance is required to sustain an action of this nature. A new policy could be implemented, but the recipient of the letter which set out the previous

policy must be given the opportunity to argue that the "old" policy be applied to the particular case. More recently, in the *Guardians ad Litem* case the court held that self-employed guardians had a legitimate expectation, based on the defendant's conduct and statements, that they would be consulted before changes in their terms of engagement."

38. The principles of natural justice have been discussed by H.H. Marshal in "Natural Justice" Sixth Indian Reprint 2011 as under :-

"The principles of natural justice are easy to proclaim, but their precise extent is far less easy to define." Evershed M.R. in *Abbot v. Sullivan*.

Statement of the problem There is no single definition of natural justice that is both authoritative and comprehensive though, as will appear below, it is possible to enumerate with some certainty the main principles of which it is, in modern times, said to consist. The qualification as to modern times is made because our problem is complicated by the fact that the expression "natural justice" was until the eighteenth century often used interchangeably with the expression "natural law" and other synonymous phrases, but has in recent years acquired a restricted meaning and has come to be used as a compendious phrase to describe certain rules of judicial procedure. Let us not, however, anticipate the solution of our problem but proceed to its detailed exposition.

Hamilton L.J. has described the phrase as an expression sadly lacking in precision, Channel J. gave it as his opinion that "there really is very little authority indeed as to what it does mean"; while Lord Shaw of Dunfermline in the following mordant words appears to criticise the principle out of existence :

"In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and in so far as it is restored to for other purposes it is vacuous."

Fortunately, however, these dicta do not stand alone. Other more positive and definite pronouncements have been made by other judges concerning the elements whereof natural justice is composed. For instance the Earl of Selborne L.C. said in *Spackman v. Plumstead District Board of Works* :

"No doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirement 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 Wright, in quoting these words in *General Medical Council v. Spackman*, remarks that he has italicised the two phrases which the Earl of Selborne seems to him to use as meaning what is generally meant by "natural justice." Again Bowen L.J. said in *Lesson v. General Council of Medical Education* :

"The statute imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard and the decision must be honestly arrived at after he has had a full opportunity of being heard."

Lord Wright goes on to say :

"... the statements which I have quoted may at least be taken to emphasise the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard."

Statement of the principles

There are numerous other dicta in many other reported cases, some of which will be referred to in their proper place later on, but the above extracts from judgments of the highest authority are sufficient to summarise and explain the two essential elements of natural justice which are in modern times usually expressed in the following form :

- (a) no man shall be judge in his own cause: and
- (b) both sides shall be heard, or *audi alteram partem*.

Other principles which have been stated to constitute elements of natural justice, are, e.g., that the parties must have due notice of when the judge or tribunal will proceed, that the tribunal should not act under the dictation of other persons who have no authority and that if the tribunal consists of several members all must sit together all the time. It is, however, hoped to show that these and many other rules are merely extensions or refinements of the two main principles stated above.

Whence comes the name ?

Having arrived at a statement of the essential elements of natural justice it may be permitted, before proceeding to a fuller discussion of the subject, to consider why these two elementary principles should have been designated by the name of natural justice. This is especially necessary in view of Lord Shaw's allusion to *jus naturale* in *Arlidge's case* mentioned above and of the remarks of Maugham J. (as he then was) in *Maclean v. The Workers' Union* as follows :

"The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is

no such thing as justice in the modern sense. In ancient days a person wronged executed his own justice. Amongst our own ancestors, down to the thirteenth century, manifest felony, such as that of a manslayer taken with his weapon, or a thief with the stolen goods, might be punished by summary execution without any form of trial. Again, every student has heard of compurgation and of ordeal; and it is hardly necessary to observe that (for example) a system of ordeal by water in which sinking was the sign of innocence and floating the sign of guilt, a system which lasted in this country for hundreds of years, has little to do with modern ideas of justice. It is unnecessary to give further illustrations. The truth is that justice is a very elaborate conception, the growth of many centuries of civilisation; and even now the conception differs widely in countries usually described as civilised." Here clearly is a problem that merits further investigation. It is proposed to carry out such an investigation in the next chapter in the form of an historical survey of the available authorities.

HISTORICAL SURVEY OF NATURAL JUSTICE

Section 1 - Natural Justice in relation to Natural Law

"Natural justice - that is ... the natural sense of what is right and wrong." Lord Esher M.R. in *Voinet v. Barrett*. From an investigation of the authorities it is clear that the practice of confining the expression "natural justice" to the two procedural principles mentioned above is of comparatively recent origin. The expression was in the past used interchangeably with the expressions "natural law", "natural equity", "eternal law", "the laws of God", "summum jus" and other similar expressions. In one case, *R. v. Chancellor of Cambridge*, the expression "natural justice" was used in the pleadings and the expression "law of nature" in the note of the judgment, in relation to the same principle. It is still occasionally used as a synonym for "natural law."

At the outset, therefore, it is desirable to examine the relationship of natural justice to that other concept of great antiquity, namely natural law by whatever name it has from time to time been called.

Jus naturale or natural law was originally the Stoic philosophical conception of a universal ideal of good conduct upon which all law should be founded and which, as some asserted, ought not to be overridden by any other laws however made. The classical jurists were indistinct in their conceptions about the matter but many of them frequently refer to jus naturale in the sense of law based on natural reason. Gaius indeed definitely makes it synonymous with the jus gentium which was originally a collection made by the Romans of principles found to be common to all the ancient Italian tribes. Sir Henry Maine says :

"Seen in the light of Stoical doctrine the Law of Nations came to be identified with the Law of Nature; that is to say, with a number of supposed principles of conduct which man in society obeys simply because he is a man. Thus the Law of Nature is simply the Law of Nations seen in the light of a peculiar theory. A passage in the Roman Institutes shows that the expressions were practically

convertible," and again :

"The Law of Nations so far as it is founded on the principles of Natural Law is equally binding in every age and upon all mankind."

The medieval civil and canon lawyers also relied on a conception of natural law and, when confronted with a case for which there was no precedent or upon which their law was silent, purported to resort to the Law of Nature which they deemed to be fundamental to all law. Yelverton C.J. said in 1470 :

"We shall do in this case as the canonists and civilians do where a new case comes up concerning which they have no existing law; then they resort to the law of nature which is the ground of all laws, and according to what they consider to be most beneficial to the common weal they do, and so also we shall do. If we are to make a positive law on this point we ought to see what is most necessary for the common weal and to make our law accordingly."

In effect it appears that what they were doing was to make up their own minds as to what was fair, just and beneficial to all concerned.

During the long period of time when the common law of England was being developed, a similar process was invoked by the common law courts, and a divine origin was frequently ascribed to natural law. One outstanding example of this may here be quoted. Calvin's Case, the case of the Postnati, heard in 1608, was to a great extent decided on the basis of natural law. The following extracts are taken from the judgment.

"Now followeth the Second Part, De Legibus wherein these parts were considered: first that the ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England: thirdly, that the law of nature was before any judicial or municipal law: fourthly that the law of nature is immutable. The law of nature is that which God at the time of the creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God along time governed, before the law was written by Moses, who was the first reporter or writer of law in the world. The Apostle in the second chapter to the Romans saith *Cum enim gentes quae legum non habent naturaliter ea quae legissuant faciunt*."

The judgment goes on to quote further from the Scriptures, the Classics and from Bracton and Fortescue, and then proceeds :

"And certain it is that before judicial or municipal laws were made, kings did decide causes according to natural equity and were not tied to any rule or formality of law, but did dare jura."

In this connection it is interesting to turn again to Maine. He has this to say :

"The habit of identifying the Roman law with the Law of Nature, for the purpose

of giving it dignity, was of old date in Europe. When a clergyman or a lawyer of an early age wishes to quote the Roman law in a country in which its authority was not recognised, or in a case to which Roman Law was not allowed to apply, he calls it 'Natural Law'." And again :

"The *jus gentium* of the imperial juriconsults is identical with the law of nature, or natural law, of many modern ethical and juridical writers; and both are, in fact, the law of God, made known somewhat dimly to the whole human race at all times.... This is, in truth, the highest law by which mortal beings can be governed; highest in its Lawgiver, who is omnipotent over each individual man, as well as over societies and states.... "

Pre-eminent among those who infused new principles into the common law in this way was, of course, Lord Mansfield C.J. One of Lord Mansfield's aims was to embody the law merchant in the common law and in this he was to a great extent successful. In this process he was prone to adopt the course, referred to by Maine, of identifying the law merchant with natural law which, as we have seen above, was known by a variety of names in those days. In 1760 in the famous case of *Moses v. Macferlan* which was described by Lord Mansfield as "an equitable action to recover back money which ought not in justice to be kept" (an action to enforce a right which in modern times we should class under the heading of quasi-contract) the Chief Justice said :

"In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

The words "natural justice" were here clearly not used in their restricted modern sense but were synonymous with natural law; in the same way as the word "equity" did not refer to technical equity, i.e., the equity of the Chancery Court, but to *jus naturale* : In other words "natural justice" and "equity" in this passage meant the same thing, i.e., natural law.

In 1824 in *Forbes v. Cochrane* Best J. said : "The proceedings in our courts are founded upon the law of England and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these the English municipal courts cannot recognise it."

The principle of "*Audi alteram partem*", has been discussed by the learned author as under :

"The origin of this principle is alleged to be traceable to the dawn of time. Fortescue J. in *R. v. Chancellor of Cambridge* in 1723 quotes a perhaps fanciful view which holds that the principle was invoked in the investigation of the first offence on record - that committed in the Garden of Eden. He says :

"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. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

At all events it was a principle that existed in the remote days of antiquity. It is stated by Seneca in one of his tragedies, the *Medea* in the following terms : "Quia quicumque aliquid statuerit parte inaudita altera, aequum licet statuerit haud aequus fuerit." This passage has often been quoted in judgments delivered in the English courts and in the later reports is sometimes referred to as a "maxim" without reference to its origin.

It is surely no coincidence that a principle of natural justice and of natural law should have been thus stated by the one who was the most prominent leader in the direction which Roman Stoicism took.

It has been said by some that the principle of *audi alteram partem* was upheld in *Magna Charta*, and Lord Coke appears to have subscribed to that view when he said : "... by the statutes of Mag. Cart. ca. 29, 5 E 3 Cap. 9 and 28 E 3 Cap. 5 no man ought to be condemned without answer, etc." This is, however, a paraphrase of the actual words of ca. 29 of *Magna Charta*, which reads as follows :

"The body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished, nor destroyed in any way and the King shall not go or send against him by force except by the judgment of his peers and by the law of the land."

Numerous cases supporting the principle appear in the *Year Books* and are cited in authorities later in date. Two of these are quoted in a note to Dr. Bentley's Case in *Fortescue* at p. 206 as follows :

"As to the not summoning the party I will mention some few among very many cases. The 39 H. 6.32, the Duke of Norfolk, Marshal of the King's Bench absented himself, tho' a place concerning the administration of justice yet there can be no forfeiture until he be summoned; for he may excuse himself. 9 Edw. 4 held by the Chancellor and Judges that it is required by the law of nature that every person before he can be punished ought to be present; and if absent by contumacy he ought to be summoned and make default." Coke regarded it as a rule not only fundamental but divine. He said :

"And the poet (Virgil, *Aeneid*, vi, 566), in describing the iniquity of Radamanthus, that cruell judge of Hell, saith, 'Castigatque, auditque dolos subigitque fateri.' First he punished before he heard; and when he had heard his deniall, he compelled the party accused by torture to confess it. But far otherwise doth Almighty God proceed, postquam reus diffamatus est - 1 vocat, 2 interrogat, 3 judicat."

We now pass to *Boswel's Case*, decided in 1605, where it was resolved that no incumbent should be removed by the statute of Westminster the Second by *quare impedit* or *assise of darrein presentment* purchased within the six months,

unless the incumbent be named in the writ quia res inter alios acta alteri nocere non debet, although the incumbent be in by defeasible title.

This was followed by James Bagg's Case, decided in 1615, in which it was said :

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

39. The petitioners had legitimate expectation that once they have been designated as HODs, they would be permitted to continue. However, the fact of the matter is that without hearing them, they were directed to hand over the charge to their juniors. In *Navjyoti Coop. Group Housing Society and others v. Union of India and others*, (1992) 4 Supreme Court Cases 477, their Lordships of the Hon'ble Supreme Court have held that within the conspectus of fair dealing in case of 'legitimate expectation', the reasonable opportunities to make representations by the parties likely to be affected by any change of consistent past policy, come in. In a case of 'legitimate expectation' if the authority proposes to defeat a person's 'legitimate expectation' it should afford him an opportunity to make representations in the matter. Their Lordships have held as under :-

"15. It also appears to us that in any event the new policy decision as contained in the impugned memorandum of January 20, 1990 should not have been implemented without making such change in the existing criterion for allotment known to the Group Housing Societies if necessary by way of a public notice so that they might make proper representation to the concerned authorities for consideration of their viewpoints. Even assuming that in the absence of any explanation of the expression "first come first served" in Rule 6 (vi) of Nazul Rules there was no statutory requirement to make allotment with reference to date of registration, it has been rightly held, as a matter of fact, by the High Court that prior to the new guideline contained in the memo of January 20, 1990 the principle for allotment had always been on the basis of date of registration and not the date of approval of the list of members. In the brochure issued in 1982 by the DDA even after Gazette notification of Nazul Rules on September 26, 1981 the policy of allotment on the basis of seniority in registration was clearly indicated. In the aforesaid facts, the Group Housing Societies were entitled to 'legitimate expectation' of following consistent past practice in the matter of allotment, even though they may not have any legal right in private law to receive such treatment. The existence of 'legitimate expectation' may have a number of different consequences and one of such consequences is that the authority ought not to act to defeat the 'legitimate expectation' without some overriding reason of public policy to justify its doing so. In a case of 'legitimate expectation' if the authority proposes to defeat a person's 'legitimate

expectation' it should afford him an opportunity to make representations in the matter. In this connection reference may be made to the discussions on 'legitimate expectation' at page 151 of Volume 1 (1) of Halsbury's Laws of England, 4th edn. (re-issue). We may also refer to a decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*. It has been held in the said decision that an aggrieved person was entitled to judicial review if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment on such reasons.

16. It may be indicated here that the doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in case of 'legitimate expectation', the reasonable opportunities to make representation by the parties likely to be affected by any change of consistent past policy, come in. We, have not been shown any compelling reasons taken into consideration by the Central Government to make a departure from the existing policy of allotment with reference to seniority in registration by introducing a new guideline. On the contrary, Mr. Jaitley the learned counsel has submitted that the DDA and/or Central Government do not intend to challenge the decision of the High Court and the impugned memorandum of January 20, 1990 has since been withdrawn. We therefore feel that in the facts of the case it was only desirable that before introducing or implementing any change in the guideline for allotment, an opportunity to make representations against the proposed change in the guideline should have been given to the registered Group Housing Societies, if necessary, by way of a public notice."

40. In *M.P. Oil Extraction and another v. State of M.P. and others*, (1997) 7 Supreme Court Cases 592, their Lordships of the Hon'ble Supreme Court have held that in an appropriate case, 'legitimate expectation' constitutes a substantive and enforceable right. Their Lordships have held as under :

"44. The renewal clause in the impugned agreements executed in favour of the respondents does not also appear to be unjust or improper. Whether protection by way of supply of sal seeds under the terms of agreement requires to be continued for a further period, is a matter for decision by the State Government and unless such decision is patently arbitrary, interference by the Court is not called for. In the facts of the case, the decision of the State Government to extend the protection for further period cannot be held to be per se irrational, arbitrary or capricious warranting judicial review of such policy decision. Therefore, the High Court has rightly rejected the appellant's contention about the invalidity of the renewal clause. The appellants failed in earlier attempts to challenge the validity of the agreement including the renewal clause. The subsequent challenge of the renewal clause, therefore, should not be entertained

unless it can be clearly demonstrated that the fact situation has undergone such changes that the discretion in the matter of renewal of agreement should not be exercised by the State. It has been rightly contended by Dr. Singhvi that the respondents legitimately expect that the renewal clause should be given effect to in usual manner and according to past practice unless there is any special reason not to adhere to such practice. The doctrine of "legitimate expectation" has been judicially recognised by this Court in a number of decisions. The doctrine of "legitimate expectation" operates in the domain of public law and in an appropriate case, constitutes a substantive and enforceable right."

41. The Medical Council of India's stand was that the petitioners were not possessing MBBS degree. It is true that they obtained their M.Sc. qualification, thereafter, they acquired Ph.D. They were appointed as Professors on the basis of their qualifications, which was prescribed in Table I of the 1998 Regulations. What has been specifically provided to them, could not be taken back by clause 2 of Schedule I of the 1998 Regulations. Since the petitioners have been found to be eligible and qualified for the post of Professor in respective discipline of Pharmacology and Anatomy, they could not be declared ineligible to be HODs. They were declared eligible to be appointed as Professors as per the letters dated 16.03.2005 (Annexure P-4) and 06.10.2008 (Annexure P-5). The prescription of academic qualification for Head of Department is irrational, arbitrary and discriminatory. Clause 2 of Schedule I of the 1998 Regulations and the qualifications prescribed in Table I are required to be harmonised.

42. We have also gone through the order dated 19.02.2015. No reasons have been assigned why the charge has been taken back from the petitioners and handed over to their juniors. It was necessary for the administration to assign reasons while taking away charge of the post of HODs from the petitioners.

43. Their Lordships of the Hon'ble Supreme Court in *Kranti Associates Pvt. Ltd. & Anr. vs. Masood Ahmed Khan & Others*, 2010 (9) SCC 496, have held that order of Authority whether administrative or quasi judicial must be a speaking order. Their Lordships have held that the necessity of giving reasons by a body or authority in support of its decision has come up for consideration before the Supreme Court in several cases. The Supreme Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. Their Lordships have held as under:-

"12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognized a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in *A.K. Kraipak and others vs. Union of India and others* reported in AIR 1970 SC 150.

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14. The expression 'speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See 1878-97 Vol. 4 Appeal Cases 30 at 40 of the report).

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the 'inscrutable face of a sphinx'.

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44. But, however, the present trend of the law has been towards an increasing recognition of the duty of Court to give reasons (See *North Range Shipping Limited vs. Seatrans Shipping Corporation*, (2002) 1 WLR 2397). It has been acknowledged that this trend is consistent with the development towards openness in Government and judicial administration."

Their Lordships have summarised the principle as under :-

"47. Summarising the above discussion, this Court holds:

- (a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- (b) A quasi-judicial authority must record reasons in support of its conclusions.
- (c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- (d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- (e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- (f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- (g) Reasons facilitate the process of judicial review by superior courts.
- (h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.
- (i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been

objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. [See David Shapiro in Defence of Judicial Candor (1987) 100 Harvard Law Review 731-737].

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain, (1994) 19 EHRR 553, at 562 para 29 and Anya v. University of Oxford, 2001 EWCA Civ 405 (CA), wherein the Court referred to Article 6 of the European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

44. In normal circumstances, we would have struck down clause 2 of Schedule I of the 1998 Regulations, whereby qualification of MBBS/equivalent has been prescribed for being designated as HOD. However, clause 2 of Schedule I of the 1998 Regulations is required to be read down to avoid it being declared unconstitutional by holding that the qualifications, which the petitioners possess, i.e. M.Sc. and Ph.D., are valid qualifications to be designated as HODs of Pharmacology and Anatomy.

45. In B.R. Enterprises v. State of U.P. and others, (1999) 9 Supreme Court Cases 700, their Lordships of the Hon'ble Supreme Court have discussed the principle of reading down as under :-

"81. The legal principle which emerges, as submitted, is that delegation of essential legislative power of the principle to the delegatee would amount to abdication of its legislature power and if it is bereft of any guidelines then it is unsustainable in the eyes of law. The authorities cited by various learned counsel

and the law on the subject, cannot be doubted. But this principle is to be tested by scanning the impugned legislation which may differ one from the other in its nature, setting up or other circumstances which may have bearing to conclude. It is also well settled, first attempt should be made by the Courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the another upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old gold rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within its track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts, shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingeniously interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the constitution. For doing this, the courts have taken help from Preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief if any which existed, which is sought to be eliminated. The Kingdom of interpretation is enriched by the Rule as laid down in Heydon's case as far back in the 16th century. According to this, courts must see what was the law before the impugned provision, what was the mischief for which the then law did not provide, what is the reason to remedy that mischief and what remedy the impugned provision has provided. This rule has been accepted by this Court in *Bengal Immunity Co. Ltd. V State of Bihar*, AIR 1955 S.C. 661 and *K.P. Varghese v. ITO*, AIR 1981 SC 1922 at p. 1929. In *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554, this Court held:

"Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; *Bengal immunity Co. Ltd. v. State of Bihar*, *RMD Chamarbaughwalla v. Unions of India*, AIR 1957 SC 628, *Mahant Moti*

Das v. S.P. Sahi, AIR 1959 SC 942.

Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. Charanjit Lal Chowdhury v. Union of India, AIR 1951 SC 41, State of Bombay v. F.N. Balsara, AIR 1951 SC 318, Mahant Moti Das v, S.P. Sahi."

The following passage in Seervai's Constitutional Law of India (3rd Edn.) has stated at p. 119 found approval in Delhi Transport Corpn. v. D.T.C. Mazdoor Congress, (1991) Supp. (1) SCC 600. The Court held : (SCC p. 711, paras 217-18)

"217. Seervai in his book Constitutional Law of India (3rd Edn.) has stated at p. 119 that :

";.... the courts are guided by the following rules in discharging their solemn duty to declare laws passed by a legislature unconstitutional:

(1) There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity."

x x x x x x x

(6) A statute cannot be declared unconstitutional merely because in the opinion of the court it violates one or more of the principles of liberty of the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution."

218. On a proper consideration of the cases cited herein before as well as the observations of Seervai in his book Constitutional Law of India and also the meaning that has been given in the Australian Federal Constitutional Law by Colin Howard, it is clear and apparent that where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act (sic)".

This principle of reading down, however, will not be available where the plain and literal meaning from bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised on unbridled power. The Delhi Transport Corporation case (supra) was with reference to the challenge to the provisions relating to termination of service of a permanent employee. In Registrar of Coop.

Societies v. K. Kunjabmu, [1980] 1 SCC 340, this Court held :

"The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication. Delegation unlimited may invite despotism uninhibited. So the theory has been evolved that the legislature cannot delegate its essential legislative function. Legislate it must, by laying down policy and principle and delegate it may to fill in detail and carry out policy. The legislature may guide the delegate by speaking through the express provision empowering delegation or the other provisions of the statute such as the preamble, the scheme or even the very subject-matter of statute. If guidance there is, where it may be found, the delegation is valid. A good deal of latitude has been held to be permissible in the case of taxing statutes and on the same principle generous degree of latitude must be permissible in the case of welfare legislation, particularly those statutes which are designed to further the Directive Principles of State Policy."

This case holds that guidelines can be gathered from the subject-matter of the Act."

46. In Calcutta Gujarati Education Society and another v. Calcutta Municipal Corpn. and others, (2003) 10 Supreme Court Cases 533, their Lordships of the Hon'ble Supreme Court have held that rule of reading down a provision of law is a rule of harmonious construction in a different name. It is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. Their Lordships have held as under :-

"35. The rule of "reading down" a provision of law is now well recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing the creases found in a statute to make it workable. In the garb of 'reading down', however, it is not open to read words and expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfil its purposes."

47. Their Lordships of the Hon'ble Supreme Court in Union of India and others v. Ind-Swift Laboratories Limited, (2011) 4 Supreme Court Cases 635, have held that the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilised to straighten the crudities or ironing out the creases to make a statute workable. Their Lordships further held that it has been repeatedly held that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. Their Lordships have held as under :-

"18. We do not feel that any other harmonious construction is required to be given to the aforesaid expression/provision which is clear and unambiguous as it exists all by itself. So far as Section 11AB is concerned, the same becomes relevant and applicable for the purpose of making recovery of the amount due and payable. Therefore, the High Court erroneously held that interest cannot be claimed from the date of wrong availment of CENVAT credit and that it should only be payable from the date when CENVAT credit is wrongly utilized. Besides, the rule of reading down is in itself a rule of harmonious construction in a different name. It is generally utilized to straighten the crudities or ironing out the creases to make a statute workable.

19. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the Rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute."

48. Their Lordships of the Hon'ble Supreme Court in *Afjal Imam v. State of Bihar and others*, (2011) 5 Supreme Court Cases 729, have held that in order to reconcile two apparently inconsistent provisions, one can be read as "subject to" the other. Their Lordships have held as under :-

"Making cross-reference to sections to read them harmoniously

55. One of the methods adopted in such situations is to make cross-reference to the relevant sections to read them harmoniously. Thus, way back in *Ramkissendas Dhanuka Vs. Satya Charan Lal*, reported in [AIR 1950 PC 81], the Privy Council was faced with such a situation in a case arising under the Companies Act, 1913. One of the Articles of Association i.e. Article 109 of the Company concerned prescribed a maximum of four and a minimum of three directors without any qualifying words. Another Article i.e. 126 authorised the company in a general meeting from time to time to increase or reduce the 35 number of Directors subject to the provisions of section 83-A(1) and to alter their qualification and change the order of rotation of the increased or reduced number. The question was whether the power of the company by ordinary resolution to "increase or reduce" the number of directors conferred by Article 126 was only exercisable within the limits set by the maximum and the minimum prescribed by Article 109, and whether a special resolution altering Art. 109 was required to increase the number of Directors beyond the prescribed maximum. After considering the relevant Articles, the Privy Council held that Articles 126 and 109 were two textually inconsistent provisions.

56. The proposition that emerges from the judgment is that it is permissible to read words such as "subject to" etc. in order to reconcile two apparently inconsistent provisions. To reconcile Article 109 with Article 126 and to give effective content to them, it was necessary to imply words such as "subject to".

The Court therefore, observed in paragraph 5 as follows:- (Ram Kissendas case)

"The omission to make such cross-references as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. There is thus no insuperable difficulty in reconciling Article 109 with Article 126 either by implying in the former some such opening words as "subject to Article 126" or implying in the latter some such opening words as "notwithstanding anything containing in Article 109."

57. to 59. x x x x x x x x

60. Considering the powers which are available to the Empowered Standing Committee, if the newly elected Mayor is not read as having the power to nominate his nominees on the Empowered Standing Committee, he will be treated dissimilarly and such an interpretation will make section 27 violative of Article 14 of the Constitution and contrary to the powers of the Mayor under section 21(3) of the Act. The only way, therefore, to save section 27 is to read it down by implication, and to make it subject to sections 25 (4), 23 (3) and 21 (3) of the Act, thereby, holding that the nominated members shall also automatically vacate their office when the Mayor nominating them is no longer in the office. Thus, the newly elected Mayor will also have the authority to nominate seven members of his choice on the Empowered Standing Committee."

49. In *Hiral P. Harsora and others v. Kusum Narottamdas Harsora and others*, (2016) 10 Supreme Court Cases 165, their Lordships of the Hon'ble Supreme Court have explained the doctrine of reading down.

Their Lordships have observed as under :-

"48. However, it still remains to deal with the impugned judgment. We have set out the manner in which the impugned judgment has purported to read down Section 2(q) of the impugned Act. The doctrine of reading down in constitutional adjudication is well settled and has been reiterated from time to time in several judgments, the most recent of which is contained in *Cellular Operators Association of India v. TRAI*, (2016) 7 SCC 703. Dealing with the doctrine of reading down, this Court held:-

"50. But it was said that the aforesaid Regulation should be read down to mean that it would apply only when the fault is that of the service provider. We are afraid that such a course is not open to us in law, for it is well settled that the doctrine of reading down would apply only when general words used in a statute or regulation can be confined in a particular manner so as not to infringe a constitutional right. This was best exemplified in one of the earliest judgments dealing with the doctrine of reading down, namely, the judgment of the Federal Court in *Hindu Women's Rights to Property Act, 1937*, *In re* [AIR 1941 FC 72] . In that judgment, the word "property" in Section 3 of the Hindu Women's Rights to Property Act was read down so as not to include agricultural land, which would be outside the Central Legislature's powers under the Government of India Act,

1935. This is done because it is presumed that the legislature did not intend to transgress constitutional limitations. While so reading down the word "property", the Federal Court held: (SCC OnLine FC)

"... If the restriction of the general words to purposes within the power of the legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the legislature intended the general words which it has used to be construed only in the narrower sense: Owners of SS Kalibia v. Wilson [(1910) 11 CLR 689 (Aust)], Vacuum Oil Co. Pty. Ltd. v. Queensland [(1934) 51 CLR 677 (Aust)] , R. v. Commonwealth Court of Conciliation and Arbitration, ex p Whybrow & Co. [(1910) 11 CLR 1 (Aust)] and British Imperial Oil Co. Ltd. v. Federal Commr. of Taxation [(1925) 35 CLR 422 (Aust)].

51. This judgment was followed by a Constitution Bench of this Court in DTC v. Mazdoor Congress [1991 Supp (1) SCC 600] . In that case, a question arose as to whether a particular regulation which conferred power on an authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services, or by making payment in lieu of such notice without assigning any reasons and without any opportunity of hearing to the employee, could be said to be violative of the appellants' fundamental rights. Four of the learned Judges who heard the case, the Chief Justice alone dissenting on this aspect, decided that the regulation cannot be read down, and must, therefore, be held to be unconstitutional. In the lead judgment on this aspect by Sawant, J., this Court stated: (SCC pp. 728-29, para 255)

"255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible- one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can

never be called into play is where the statute requires extensive additions and deletions. Not only it is no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so.

(emphasis in original)"

49. We may add that apart from not being able to mend or bend a provision, this Court has earlier held that "reading up" a statutory provision is equally not permissible. In *B.R. Kapur v. State of T.N.*, (2001) 7 SCC 231, this Court held:

"39. Section 8(4) opens with the words "notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3)", and it applies only to sitting members of Legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be "reading up" the provision, not "reading down", and that is not known to the law."

50. In *Southern Motors v. State of Karnataka and others*, (2017) 3 Supreme Court Cases 467, their Lordships have held that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. Their Lordships have held as under :-

"31. It was proclaimed thus: [*K.P. Varghese case*, (1981) 4 SCC 173]

"5. Now on these provisions the question arises what is the true interpretation of Section 52, Sub-section (2)? The argument of the Revenue was - and this argument found favour with the majority Judges of the Full Bench - that on a plain natural construction of the language of Section 52, Sub-section (2), the only condition for attracting the applicability of that provision is that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared. Once the Income-tax Officer is satisfied that this condition exists, he can proceed to invoke the provision in Section 52 Sub-section (2) and take the fair market value of the capital asset transferred by the assessee as on the date of the transfer as representing the full value of the consideration for the transfer of the capital asset and compute the capital gains on that basis. No more is necessary to be proved, contended the Revenue. To introduce any further condition such as understatement of consideration in respect of the transfer would be to read into the statutory provision something which is not there:

indeed it would amount to rewriting the section. This argument was based on a strictly literal reading of Section 52 Sub-section (2) but we do not think such a construction can be accepted. It ignores several vital considerations which must always be borne in mind when we are interpreting a statutory provision. The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he laid:

"....it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else.

But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

We must not adopt a strictly literal interpretation of Section 52 Sub-section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which Section 52 Sub-section (2) appears, because, as pointed out by Judge Learned Hand in most felicitous language:-

'....the meaning of a sentence may be more than that of the separate words as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.'

Keeping these observations in mind we may now approach the construction of Section 52 Sub-section (2).

6. The primary objection against the literal construction of Section 52 Sub-section (2) is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but they can certainly help to fix its meaning. It is a well recognised rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided. There are many situations where the construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. Take, for example, a case where A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement - and it is quite well-known that sometimes the competition of the sale may take place even a couple of years after the date of the agreement - the

market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price at which the property is sold by more than 15% of such agreed price. This is not at all an uncommon case in an economy of rising prices and in fact we would find in a large number of cases where the sale is completed more than a year or two after the date of the agreement that the market price prevailing on the date of the sale is very much more than the price at which the property is sold under the agreement. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no understatement of consideration in respect of the transfer and the transaction is perfectly honest and bonafide and, in fact, in fulfillment of a contractual obligation, the assessee who has sold the property should be liable to pay tax on capital gains which have not accrued or arisen to him. It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation under-taken by him. It is difficult to conceive of any rational reason why the legislature should have thought it fit to impose liability to tax on an assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on income which has neither arisen to the assessee nor has been received by him. If we may take another illustration, let us consider a case where A sells his property to B with a stipulation that after some-time which may be a couple of years or more, he shall resell the property to A for the same price could it be contended in such a case that when B transfers the property to A for the same price at which he originally purchased it, he should be liable to pay tax on the basis as if he has received the market value of the property as on the date of resale, if, in the meanwhile, the market price has shot up and exceeds the agreed price by more than 15%? Many other similar situations can be contemplated where it would be absurd and unreasonable to apply Section 52 Sub-section (2) according to its strict literal construction. We must therefore eschew literalness in the interpretation of Section 52 Sub-section (2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and we cannot find any escape from the tyranny of the literal interpretation. It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction (vide: *Luke v. IRC*, 1963 AC 557). The Court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision. We think that, having regard to this well recognised rule of interpretation, a fair and reasonable construction of Section 52 Sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is

under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bonafide transaction where the full value of the consideration for the transfer is correctly declared by the assessee. There are several important considerations which incline us to accept this construction of Section 52 Sub-section (2)."

51. The principles of reading down have been discussed by their Lordships of the Hon'ble Supreme Court in *Binoy Viswam v. Union of India and others*, (2017) 7 Supreme Court Cases 59, as under :-

"83. It is, thus, clear that in exercise of power of judicial review, Indian Courts are invested with powers to strike down primary legislation enacted by the Parliament or the State legislatures. However, while undertaking this exercise of judicial review, the same is to be done at three levels. In the first stage, the Court would examine as to whether impugned provision in a legislation is compatible with the fundamental rights or the Constitutional provisions (substantive judicial review) or it falls foul of the federal distribution of powers (procedural judicial review). If it is not found to be so, no further exercise is needed as challenge would fail. On the other hand, if it is found that Legislature lacks competence as the subject legislated was not within the powers assigned in the list in VII Schedule, no further enquiry is needed and such a law is to be declared as *ultravires* the Constitution. However, while undertaking substantive judicial review, if it is found that the impugned provision appears to be violative of fundamental rights or other Constitutional rights, the Court reaches the second stage of review. At this second phase of enquiry, the Court is supposed to undertake the exercise as to whether the impugned provision can still be saved by reading it down so as to bring it in conformity with the Constitutional provisions. If that is not achievable then the enquiry enters the third stage. If the offending portion of the statute is severable, it is severed and the Court strikes down the impugned provision declaring the same as unconstitutional."

52. In *Independent Thought v. Union of India and another*, (2017) 10 Supreme Court Cases 800, their Lordships of the Hon'ble Supreme Court have held that by reading down a statute/provision, court does not create a new provision.

53. Their Lordships of the Hon'ble Supreme Court in *Krishna Mohan Medical College and Hospital & anr. v. Union of India & anr.*,

(2017) 15 SCC 719, have held that reasonable opportunity of hearing is synonymous to "fair hearing". The rule of "fair hearing" requires that the affected party should be given an opportunity to meet the case against him effectively and the right to fair hearing takes within its fold a just decision supplemented by reasons and rationale. Their Lordships have held as under :

"20. In the predominant factual setting, noted hereinabove, the approach of the respondents is markedly incompatible with the essence and import of the proviso to Section 10-A(4) mandating against disapproval by the Central Government of

any scheme for establishment of a college except after giving the person or the college concerned a reasonable opportunity of being heard. Reasonable opportunity of hearing which is synonymous to "fair hearing", it is no longer *res integra*, is an important ingredient of *audi alteram partem* rule and embraces almost every facet of fair procedure. The rule of "fair hearing" requires that the affected party should be given an opportunity to meet the case against him effectively and the right to fair hearing takes within its fold a just decision supplemented by reasons and rationale. Reasonable opportunity of hearing or right to "fair hearing" casts a steadfast and sacrosanct obligation on the adjudicator to ensure fairness in procedure and action, so much so that any remiss or dereliction in connection therewith would be at the pain of invalidation of the decision eventually taken.

Every executive authority empowered to take an administrative action having the potential of visiting any person with civil consequences must take care to ensure that justice is not only done but also manifestly appears to have been done."

54. The impugned orders dated 19.02.2015 have been passed in compliance with the objection raised by the Medical Council of India. A letter has been issued by the Medical Council of India on 27.01.2015 to the Secretary, Government of India, Ministry of Health & Family Welfare. The Executive Committee of the Council considered the Council Assessors report (9th and 10th December, 2014) and noted that the Heads of Departments of pre and para clinical departments could not be non-medical degree holders. Copy of this letter has not been annexed with the orders dated 19.2.2015, though it is categorically mentioned that the decision dated 19. 02.2015 has been taken in compliance with the letter dated 27.1.2015.

55. There is violation of principles of natural justice. No reasons have been assigned in the impugned order. Clause 2 of Schedule I of the 1998 Regulations is required to be read down to save it from unconstitutionality. The order is also unreasonable and irrational. The petitioners had legitimate expectation to continue to discharge the duties of HOD in their respective departments.

56. Accordingly, the writ petition is allowed. The order dated 21. 04.2015 rendered by the learned Central Administrative Tribunal, Chandigarh Bench, and the orders dated 19.02.2015, passed by the Chandigarh Administration are set aside. Clause 2 of Schedule I of the Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998, whereby Heads of Departments of pre and para clinical subjects are required to possess recognised basic University degree qualification, i.e. MBBS or equivalent qualification, is read down being in conflict with Table I of the 1998 Regulations.