AN EXPANSION IN THE CONTENT OF THE RIGHT TO HEARING OVER THE YEARS LED BY A RIGHT-ORIENTED APPROACH OF THE COURTS

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The many rules of natural justice have grown in tandem with the development of civilisation and the content of its principles are often acknowledged as an accurate measure of the level of civilisation and *Rule of Law* prevalant in the community. As a shield against the excesses of organised, authoritative power, human beings are naturally inclined to appeal to a construct that extends beyond their own creation. Such a construct is often construed to be God and His law, which contitutes divine law or natural law, to which all temporal laws and actions must conform. This idea forms the origin or the conception of natural justice, and the principles of which innately operate along the lines of fairness, reasonableness, equity and equality; and any deviation from these tenets thereof may subvert the State apparatuses of law and destabilize the entire legal machinery.

The principles of natural justice and the various doctrines attributed to it that function as necessary integrants may be observed in the legal process quite persistently. The application and empolyment of techniques of natural justice, as derived from its various principles, tenets and doctrines, is not a stranger to the process of law and its implementation in the the legal praxis; and especially in the Justice delievery and reasoning system, the application of the rules of natural justice is not new; so much so, that its familiarity in the legal system has been greatly acknowledged, as it has driven home the assumption of being, so to say, it is assumed to be *"an essential inbuilt component"* of the judicial mechanism[1], that is imperative to the decision making process, and more specifically in those matters that pertain to the rights and liberties of the populous.

[1] Justice Brijesh Kumar on Principles of Natural Justice. Institute's Journal, July-September 1985.

Stemming from the weathered grounds of jurisprudence and legal philosophy, natural justice that originally began as a figment of esoteric philosophical debates resulting from scholarly, erudite discussions soon expanded its horizon to metamorph into an inherent legal component that became a procedural and administrative requirement; one that fortified a strong safeguard against any judicial or administrative order or action that threatened to adversely affect the substantive rights of individuals. The roots of 'Natural Justice' as a legal expression may be chronicled back to the exordium of English common law, as espoused in ***Local Government v. Alridge***[2], where Viscount Haldane observed, *"...those whose duty it Is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."* This case especially hints at the natural justice-derived right to fair hearing, which makes up the crux of this paper. The importance of this principle was further established and its ambit extended to include and apply to every tribunal endowed with the authority to adjudicate upon matters involving civil consequences by the Judicial committee in ***Lapointe v. L'Association***.[3]

The United States of America has not exactly doned the cloak of natural justice; at least, not in the strict sense that it was intended to be communicated, and instead takes on the likeness of the concept in the form of *due process* - a doctrine that espouses the fair treatment through the normal judicial system, especially a citizen's entitlement to notice of a charge and a hearing before an impartial judge.[4] This doctrine of due process is implemented and guaranteed by the protection conferred by the Constitution of the United States whenever an individual's life, liberty or property is affected by State action. The doctrine of *due process*, albeit a nebulous, indefinite and relatively undefined expression the implications of which still remain unsettled to this day, appropriately conveys that the principles of natural justice are well-observed in the wake of the phrase *"due process"* in the American context. The Supreme Court of United States, in ***Snyder v. Massachussets***[5], ruled that there occurred a breach of *"principle of Justice*

[2] *Local Government Body v Alridge* [1915] UK, 120 AC (UK).
[3] *Lapointe v L'association de Bienfaisance et Retraite de la Police de Montreal (Quebec)* [1906] Canada, 535 AC (Canada).

[4] 'Definition Of DUE PROCESS' (*Merriam-webster.com*, 2018) <https://www.merriam-webster.com/dictionary/due%20process> accessed 8 May 2018.
[5] *Snyder v Massachusetts* [1934] US, 291 (US).

so rooted In the traditions and conscience of our people as to be ranked as fundamental." Hearing before a decision was also construed in ***Hagar v. Reclamation District***[6] as belonging to one of such natural principles.

The Indian context of law is as wide as the oceans and seas that surround the subcontinent, with relatively unparalleled systems prevalant from archaic times, imbibed with the quality of self-evolution to suit the times that they are implemented in. Apart from being firmly grounded in *Articles 14 and 21 of the Constitution of India*[7], the tenets and rules of natural justice may be found sprawled across the parchments of history. Right from the legal arsenal that explained the art of state craft explicated in the myriad pages of *Kautilya's Arthashastra*[8] and *Adi Shankaracharya's Advaitas*[9], to the neo-histoire of famous rulers and governmental bodies that were key actors in the state apparatuses, the principle of natural justice was prevalant in India since ancient times. Unsurprisingly then, in para 43 of the judgement passed by the Supreme Court of India in ***Mohinder Singh Gill v. Chief Election Commissioner***[10], the pressence of the principles of natural justice throughout the pages of Indian history was reflected as being *"...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 Kautllya'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."*

[6] *Hagar v Reclamation District* [1884] US, 111 (US).
[7] The Constitution of India 1949.
[8] Usha Mehta and Usha Thakkar, *Kautilya And His Arthashastra* (S Chand 1980).
[9] Śaṅkarācārya., *A Compendium Of The Raja Yoga Philosophy* (Published for the Bombay Theosophical Publication Fund by R Tookaram 1901).
[10] *Mohinder Singh Gill and Another v The Chief Election Commissioner and Others* [1978] Supreme Court of India, 851 AIR (Supreme Court of India).

Different jurists have described the principle in different ways. Some described it as the unwritten law *(jus non scriptum)* or the law of reason. The description and the labelling of the principles of natural justice have constituted a multitude of diversifications from Aristotle's description of natural justice as being principles of universal law before the era of Christ, to Justinian in the fifth and sixth Centuries A.D. labelling it "*jura naturalia"* i.e. natural law.[11] It has, however not been capable of being defined or narrowed down in meaning to suit a particular narrative because of the vastness it encompasses, but some jurists have described the principle as a great humanising principle intended to invest law with fairness to secure justice and to prevent miscarriage of justice. With the passage of time, some principles have metamorphed, evolved and crystallised into what are well recognized principles of natural justice.

The principle of natural justice that shall be extensively covered in this paper is one that stands out even within the ambit of natural justice, owing to the importance and necessity of it in the legal sphere, as it ensures hearing or consideration of a matter from both parties involved, thereby giving them a chance at an unbiased and impartial trial. The principle in question is ***audi alteram partem*** *(literally, "let the other side be heard as well"), or the right to fair hearing.* It ensures that no person should be unjustly condemned unheard and that both the sides must be fairly heard before the passing of any order. This principle is designed to prevent people from incurring losses of property and, or liberty for an offence that occurs due to not being given a fair opportunity of answering the case against them in an instituted judicial proceeding. The significance of this principle is such that it is substantial in the construction of many statutes and provisions that carry with them the substance of the principle and ensure that a notice is given to a person against whom an order is likely to be passed before a decision is made; and even in those instances where a provision for prior hearing may not provided by a statute, it still does not negate the applicability of the principles of natural justice since these principles – not being dependant on any statutory provision, has to be mandatorily put forth irrespective of whether there exists any such statutory provision for its application or not. This mandate for the application of the right of hearing is reflected in the *Judicial Review of Administrative Action (1980)*[12], where De Smith observed, *"Where a statute authorises*

[11] Justice Brijesh Kumar on Principles of Natural Justice. Institute's Journal, July-September 1985.

[12] S. A De Smith and John Maxwell Evans, *De Smith's Judicial Review Of Administrative Action*(Stevens 1980).

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." British academic lawyer William Wade also espoused that principles of natural justice are so inherently integral to the legal machinery, that they their mandatory requirement is implied and any instance of their non-appliance invalidates the exercise of power by an authoritative body.[13] Further, in ***Cooper v. Sandworth Board of Works***[14], it was held, *"...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."*.

In ***A.K. Kraipak***'s case[15], it was ruled by the Supreme Court of India that principles of natural justice are especially important owing to their supplementary nature with regard to the law of the land, since their operation mostly extends only to those areas not covered by any law validly made. It was further observed that since the aim and purpose of the rules of natural justice was to act as a safeguard against the miscarriage of justice, it is imperative that these rules be made available to administrative enquiries also.

This expansion of the ambit of the rules of natural justice, and more specifically the right to hearing, to circumscribe the realm of administrative action, was cemented by the landmark judgement in ***Smt. Maneka Gandhi v. Union of India And Another***[16], where the Supreme Court of India observed that *"…there is no specific provision for showing cause, yet in a proposed action which affects the rights of an individual it is the duty of the authority to give reasonable opportunity to be heard. This duty is said to be implied by nature of function to be performed by the authority having power to take punitive or damaging action."* The same principle of right to hearing was invoked by the Supreme Court of India in ***C.B. Gautam v. Union of India And Others***[17], where it was observed that albeit the right to a fair hearing does not comprise of an explicit statutory requirement, it is however fundamental for the authoritative body to provide a notice to the parties affected while purchasing their properties under the provisions of the *Income Tax Act*, that deals with the compulsory purchase of the property. It was also observed that despite the fact that a relatively tight time frame within

[13] William Wade, *Administrative Law* (Clarendon Press 1977).
[14] *Cooper v Sandworth Board of Works* [1863] UK, 180 NS (UK).
[15] *A K Kraipak & Ors Etc vs Union Of India & Ors* [1970] Supreme Court of India, 150 SC (Supreme Court of India).
[16] *Smt Maneka Gandhi v Union of India and Another* [1978] Supreme Court of India, 597 SC (Supreme Court of India).
[17] *CB Gautam v Union of India and Others* [1993] Supreme Court of India, 1 SCC (Supreme Court of India).

which an order for compulsory purchase has to be made is provided by the act, the urgency of such a requisite cannot, in any way, trump and prelude a reasonable opportunity of being heard. A presumption of an attempt to evade tax may be raised in case of significant under valuation of the property but it would be rebuttable presumption, which necessarily implies that a party must have an opportunity to show cause and rebut the presumption. Further, it was also observed that the very fact that an imputation of tax evasion arises where an order for compulsary purchase is made, an opportunity to show cause that the under valuation in the sale agreement was made without the intent to evade tax is owed to the parties concerned before such an imputation can be made to ensure the prevention of an unjust slur being cast on the parties; therefore all the more necessatating the need for the right to a hearing with regard to the administrative action of the State and its authorities.

The opportunity to provide a fair hearing prior to the making of any decision hence constituted a basic requirement that was not just limited to court proceedings, but evolved to include other quasi-judicial bodies, inclusive of but not exclusive to tribunals, as established in an important case mentioned earlier – *Lapointe v. L'Association*, where it was conclusively observed, *"The rule (Audl alteram partem) 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."*[18], leading ultimately to the right to hearing to take the form of a penultimate element of administrative actions where any authoritative decision may result in civil consequences, since these very adminsitartive actions are as much, if not more, under the strains of rules of natural justice as are judicial or quasi-judicial decisions, as they represent higher procedural principles developed by judges which every administrative agency must follow in making decisions that adversely affect the rights of a private individual.

The principles of natural justice, including the right to hearing however, carry with them a significtant degree of flexibility in that they cannot be applied in any straitjacket formula. The application of these principles is directly proportional to the kind of functions performed and the extent to which the rights of an individual is likely to be affected. For instance, a full-fledged oral hearing may not be obligatory in every case though it may be necessary in certain

[18] *Lapointe v L'association de Bienfaisance et Retraite de la Police de Montreal (Quebec)* [1906] Canada, 535 AC (Canada).

other matters that require its application. The provisions that are listed in procedural statutes providing a right to hearing operate only in compliance with the rules of natural justice, in so far as, in certain matters, it may suffice to allow a person to make a mere representation without necessitating a full oral hearing, but the same may differ in another matter where a full oral hearing, including cross-examintaion of the witness etc., is fundamnetal to the passing of a judgement. Another influential element in the consistency and necessaity of applying the principle of right to hearing are the facts of a case, wherein the application of natural justice varies in each case depending upon the factual aspect of the matter. For instance, in those matters pertaining to major punishment, it is only fair that a very stringent procedure that involves a full-fledged application of the right to hearing is envisaged under statutory rules before a verdict is passed against the person concerned, but where the factual aspect of a case revolves around one involving a minor punishment, a mere explanation submitted by the person concerned will suffice in meeting the requirement of principles of natural justice. Case in point, ***Union of India v. J.P. Mittar***[19] - a matter relating to the correction of date of birth, where the provision of a personal hearing was not considered necessary; and a mere representation was held to be sufficient to conform to the application of the principles of natural justice. A similar contention was observed in ***MP Industries v. Union of India And Others***[20] where a personal hearing was not considered necessary, and a mere written representation as provided under the Rules sufficiently complied with the principles of natural justice.

Further, the requirement of notice will not be insisted upon as a mere technical formality, when the concerned party clearly knows the case is against them, and is not thereby prejudiced in any manner in putting up an effective defence as we find in ***Keshav Mills Co. v. Union of India***[21], where the court did not quash the order of the government taking over the mill for a period of five years on the technical ground that the appellants were not issued notice before this action was taken, because, at an earlier stage, a full-scale hearing had already been given and there was nothing more which the appellant wanted to know. Similarly, in ***Maharashtra State Financial Corpn. V. Suvarna Board Mill***[22], the court held that a notice calling upon the party to repay dues within fifteen days failing which the factory would be taken over is

[19] *Union of India v JP Mittar* [1971] SC, 1093 AIR (SC).
[20] *MP Industries Ltd v Union of India and Others* [1966] SC, 671 AIR (SC).
[21] *The Keshav Mills Company Ltd & Anr V Union Of India & Ors* [1972] Supreme Court of India, 1 SCC (Supreme Court of India).
[22] *The Maharashtra State Financial Corporation Vs M/s Suvarna Board Mills & Anr* [1994] Supreme Court of India, 2567 AIR (Supreme Court of India).

sufficient for taking over the factory and no fresh notice is required for pulling down an unauthorised structure when notice for removing such structure has already been given. Also, in ***Srikirishna v. State of Madhya Pradesh***[23], it was again established that the rules of natural justice were flexible and the test laid down was that the adjudicating authority must be impartial and fair hearing must be given to the person concerned. Similarly, the facts and circumstances of the case also surmise whether a delinquent may be allowed to be represented through counsel; as such a demand cannot be made as of right. There may, however, arise certain circumstances where a counsel may be permitted where, for example, the person concerned may not be in a position to express or to place before the authority complicated nature of facts and law. In ***Hiranath Misra v. Principal***[24], the request for opportunity to cross-examine the witnesses was refused, which was upheld by the Supreme Court. The boy students of the Medical College in question had misbehaved with the girl students residing in Hostels. A committee of three independent members of the staff was appointed by the Principal who enquired into the complaints of the inmates and recorded their statements. Charges were framed and the boy students were made known of the charges and their explanation was called. This was held to be sufficient to comply with the principles of natural justice and in the facts and circumstances of the case it was not necessary to allow them cross-examination etc., as it would have exposed the individual girl students to harassment by the male students. The arrangement made by the Principal to enquire into the matter was approved by the High Court.

It must be underscored, however, that the expansion of the content of the right to hearing has occurred so broadly, that where a statute expressly provides that a notice must be given, failure to give notice makes the act void. *Article 22 of Constitution of India*[25] requires that detenu must be furnished with the grounds of detention and if the grounds are vague, the detention order may be quashed by the court. This furthers the content of the right to hearing in being applied as a right-oriented approach by the courts, and largely substanitates and backs up its position as part of a procedural aspect of law.

In conclusion, to answer the question of whether there is an expansion in the content of right to hearing over the years led by a right oriented approach of the courts, it may be observed that what was initially a right that was exclusive to the courts of law alone, soon expanded past the

[23] *Srikrishna v State of MP* [1977] Supreme Court of India, 1691 AIR (Supreme Court of India).
[24] *Hiranath Misra v Principal* [1973] Supreme Court of India, 1260 AIR (Supreme Court of India).
[25] The Constitution of India 1949.

judicial sphere to the tribunals in their exercise of quasi-judicial functions and subequently to statutory and administrative authorities who bear the responsibility of determining civil rights and obligations. It may *prima facie* be observed that, all conditions normal, any action or decision – judicial or administrative, that affect the rights of an individual and bear adverse effects resulting in civil consequence is unconscionable. Following this line of thought, the modern day law making process cannot function in any capacity whatsoever without affording hearing by an unbiased and impartial authority who must act objectively and must also give out their mind, as to what weighed in the decision making process, by incorporating reasons to support the decision or, to say so, by giving a speaking order, as is paramount in a society governed largely by the *Rule of Law*. The principles of natural justice, and all of its contents, hence have definitely expanded over the years led by a right-oriented approach by the courts, and rightfully so since, to say it again, the rules of natural justice are great humanising principles intended to invest law with the upstanding quality of fairness to secure justice and prevent its miscarriage.