FAIRNESS PROBABILITY AS A RATIONALE FOR THE USE OF PRINCIPLES OF NATURAL JUSTICE

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"... the phrase '...principles of natural justice'... in a popular sense ... must not be taken to mean that there is any justice natural among men... 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... has little to do with modern ideas of justice... The truth is that ... (natural justice) is a very elaborate conception, the growth of many centuries of civilization..."[1]

INTRODUCTION

History reflects that human beings do not want arbitrary governments or whimsical administration. The same can be ensured by means of entrenchment of 'rule of law' and practices of good governance in our societies. Good governance has been emphasised by the United Nations system and it includes in it the component of fairness in administration.[2] The concept of 'principles of natural justice' (PNJ) and its application in Justice delivery system is ancient as it is believed to be as old as the system of dispensation of justice itself.[3] PNJ assure fairness in government actions as well as fairness in the process of administration of justice. The 'principles of natural justice' have become visible from the need of man to get protected from the excesses of organized power and in fact they act as the essential component of decision making by ensuring a strong safeguard against any Judicial or administrative order or action

[1] As Per Maugham, J., in Maclean v. Workers Union [LR (1929) I CH 602, 624
[2] See https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx
[3] Justice Brijesh Kumar, *Principles of Natural Justice*, available at http://ijtr.nic.in/articles/art36.pdf, last visited on 07/03/2019

which adversely affects the substantive rights of the individuals.[4] The expression 'natural' in 'principles of natural justice' represents universally accepted principles that are to be followed everywhere. This would mean that the PNJ are an aspect of human rights, social control and social integration. Therefore, these principles must be respected by both the substantive and procedural normative standards existing at the national and international levels. Importantly, it must be remembered that in a welfare State like India, the competence, contributory role and jurisdiction of administrative authorities is getting proliferated. In circumstances like these, the concept of 'rule of law' and justice would fail its respect and purpose if the administrative authorities as well as instrumentalities and agencies of the government are not obligated to act in a fair and just manner. In view of this, it becomes important to inquire into the rationale for the universalness or need and application of the PNJ. Accordingly, this article aims to identify probability as the rationale for the use of PNJ.

PROBABILITY OF FAIRNESS AND THE PRINCIPLES OF NATURAL JUSTICE

The PNJ trace their origin to ancient civilizations while constituting the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice that is not to preserve of any particular race or country but is shared in common by all human beings.[5] The expression 'natural' in 'principles of natural justice' signifies commonly accepted principles that are to be followed ubiquitously. Traditionally, 'natural justice' was used to imply the existence of moral principles of self-evident and unarguable truth.[6] It is said, until about two centuries ago, the term 'natural justice' was often used interchangeably with "natural law" and it is said that at times, it is still so used.[7] Jean-Jacques Rousseau while introducing inequality had pointed out that *"O man, of whatever country you are, and whatever your opinions may be, behold your history, such as I have thought to read it, not in the books written by your fellow-creatures, who are liars, but in nature, which never lies. All that comes from her will be*

[4] *Ibid.*
[5] Union of India v. Tulsiram Patel, (1985) 3 SCC 398
[6] Paul Jackson, *Natural Justice*, 2nd Edn., (Sweet & Maxwell, 1979) p 1.
[7] *Supra* n 5.

true…"[8] From this statement, it would be clear that one has to consider the history to understand what has been the man's state in the original state of nature,[9] as well as what has brought on inequality among men[10] while considering what has civilisation and progress made of man?[11] In a state of nature, individuals are seen to be weak and insecure as they are prone to abuses by few mightier fellow beings or despotic rulers who translated to be one-sided and oppressive while benefitting some of the armed, might and rich, jeopardizing the poor. In order to overcome this situation and avoid despotic rulers people created an entity called 'State' which will protect individuals from perils (internal and external) as they could not effectively protect themselves or their dependents' rights in the aforementioned circumstances. In this scenario, it may be argued that it is only law based justice and reason that can prevent oppressive and arbitrary practices of the mightier persons (juristic and natural persons). Nevertheless, men throughout the ages cherishes some basic values, and justice is one such value.[12] However, the perception and importance given to justice depended on civilisation and moral levels of society, ideologies of the people as well as factors like time and principles of governance.

The concept of natural justice cannot be put into a straightjacket of a cast-iron formula.[13] Similarly, it is opined "The principles of natural justice are vague and difficult to ascertain".[14] Therefore, it is pointless, to look for definitions or standards of natural justice from various sources and then apply that meaning to the facts of any given case.[15] The only essential point that has to be kept in mind in all cases is that the person concerned have to have a reasonable opportunity of presenting his case and that the authority concerned (administrative, quasi-judicial or judicial) should act fairly, impartially and reasonably.[16] Certainly, PNJ are not embodied rules as they continue to serve as means to an end and not an end in themselves.[17]

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[8] Jean-Jacques Rousseau, *Discourses on the Origin and Foundations of Inequality Among Men*, (Translated by Ian Johnston) available at https://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/inequality/preface1.html
[9] Nature nurtures man as it does nurture animals
[10] State, social structure and savage or inflict of pain or suffering by the powerful few
[11] Made men weak and dependent on social stratification based on certain parameters
[12] Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664
[13] *Ibid* at p. 683
[14] As per Maugham, J., was in Errington v. Minister of Health [LR (1935) 1 KB 249
[15] As per Reid L..J. in Ridge v. Baldwin [LR 1964 AC 40, on appeal from LR (1963) 1 QB 539
[16] Keshav Mills Co. Ltd. v. Union of India, (1973) 1 SCC 380 at p. 387
[17] *Supra* n.12 at p. 683

Post-World War II, the civilization has been witnessing profound developments in legal systems of all independent nations. In India too, norms are developed concerning environment, trade and commerce, food standards, companies, Intellectual Property Rights, and some of which have paved way for establishing tribunals and boards that act with few attributes of judiciary.

It is said, over the years, by judicial process, two principles of natural justice have evolved which now represents the principles in judicial process, including therein quasi-judicial and administrative processes.[18] The first rule is "*nemo judex in causa sua*" or "*nemo debet esse judex in propria causa.*"[19] The second rule is "*audi alteram partem"*,[20] which means, "Hear the other side". It is said that this rule is deduced from other rule, that is, "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."[21] The same is now expressed as "justice should not only be done but should manifestly be seen to be done."[22] The two rules "*nemo judex in causa sua"* and *"audi alteram partem"* and their corollary that justice should not only be done but should manifestly be seen to be done came to be firmly established over the course of centuries[23] and

[18] *Supra* n. 5

[19] "no man shall be a judge in his own cause" stated in Earl of Derby's case (1613) 12 Co Rep 114. Alternatively, "*aliquis non debet esse judex in propria causa*, *quia non potest esse judex*, that is, "no man ought to be a judge in his own cause, because he cannot act as a judge and at the same time be a party" or *"nemo potest esse simul actor et judex*", that is, "no one can be at once suitor and judge" is used. This rule may include (i) Right to know adverse evidence; (ii) Right to present case; (iii) Right to rebut evidence; (iv) Right to cross-examination and legal re presentation; and (v) Right to reasoned decision.

[20] Alternatively known as "*audietur et altera pars*"

[21] "*qui aliquid statuerit, parte inaudita altera aequum licet dixerit, hand aequum fecerit*"

[22] *Supra* n. 5

[23] For instance, the "Roman law recognized the need for a judge to be impartial and not to have a personal interest in the case before him (Digest V.I. 17) and Tacitus in his "Dialogus" referred to this principle. Under Roman law a judge who heard a cause in which he had an interest was liable as on a quasi-delict to the party prejudiced thereby (Justinian's Institutes IV, 5 pr.; as also Justinian's Codex III, 5, 1). Even the Kiganda tribesmen of Buganda have an old proverb which literally translated means "a monkey does not decide an affair of the forest" (see Law and Justice in Buganda by E.S. Haydon, p. 333). The requirement of hearing both sides before arriving at a decision was part of the judicial oath in Athens. It also formed the subject-matter of a proverb which was often referred to or quoted by Greek playwrights, as for instance, by Aritophanes in his comedy The Wasps and Euripides in his tragedies Heracleidae and Andromache, and by Greek orators, for instance, Demosthenes in his speech De Corona. Among the Romans, Seneca in his tragedy Medea referred to the injustice of coming to a decision without a full hearing. In fact, the corollary drawn in Boswell case [(1606) 6 Co Rep 48-b, 52-a.] is taken from a line in Seneca's Medea. In The Gospel according to St. John (vii, 51), Nicodemus asked the chief priests and the Pharisees, "Doth our law judge any man, before it hear him, and know what he doeth?" Even the proverbs and songs of African tribesmen, for instance, of the Lozi tribe in Barotseland refer to this rule (see The Judicial Process Among the Barotse of Northern Rhodesia by Max Gluckman, p. 102)" as cited in Union of India v. Tulsiram Patel, (1985) 3 SCC 398

have become a part of the law of the land. Both in England and in India they apply to civil as well as to criminal cases and to the exercise of judicial, quasi-judicial and administrative powers.[24] The third rule is rule against bias.[25]

These rules of natural justice have been recognized and given effect to in many countries and different systems of legal systems. Nonetheless, the PNJ are now made integral part of higher moral norms, i.e. human rights on being enshrined in the UDHR,[26] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953[27] and ICCPR 1966,[28] to name a few international human rights instruments. So respecting PNJ is now an element of State's discharge of human rights obligations. Even so practically, it is the sensitivity of the officials concerned, who are to apply PNJ, and their know-hows or choice of manner of application or notch of observance or on the contrary, the circumstances construed as exceptions[29] to the PNJ that determine the whole 'PNJ-Experience' and its outcome. This apart, the apex court has contextually considered equality as antithetic to arbitrariness.[30] This interpretation has helped to check official arbitrariness as well.[31] Bhagwati, J., in Maneka Gandhi's case[32] pointed out that concerning the applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function as 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 then it is difficult to see

[24] *Supra* n.5
[25] Bias may include :(i) Personal Bias; (ii) Pecuniary Bias ; (iii) Subject-matter Bias; (iv) Departmental Bias; and (v) Preconceived notion bias.
[26] The Universal Declaration of Human Rights 1948,Article 10
[27] The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953, Article 6
[28]The International Covenant on Civil and Political Rights 1966, Article 14
[29] The principles of natural justice can operate only in areas not covered by any law validly made or until law prescribes some exceptions for those. In this way, the principles of natural justice can supplement the law but cannot supplant it. See A.K. Kraipak v. UOI (1975) 1 SCC 421
[30] "…In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 (of the Constitution of India) like a brooding omnipresence ...." See E.P. Royappa v. State of Tamil Nadu1974) 4 SCC 3
[31] As per Subba Rao, C.J., "Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately." See State of A.P. v. Nalla Raja Reddy AIR 1967 SC 1458
[32] Maneka Gandhi v. UOI 1978) 1 SCC 248

why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

CONCLUSION

It follows from the above discussions that the PNJ are devised by the courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. Accordingly, what practically matters is a given case or its facts and circumstances, the framework of law under any statutory authorities like tribunals or authorised officers' conduct inquiry and the power to decide.[33] In this sense, the aim of rules of natural justice is to prevent injustice. These principles operate only in areas not covered by any law validly made. In other words, they do not supplant the law. It is true that if a statutory provision can be read consistently with the PNJ, the courts should do so because it must be presumed that the Legislatures and the statutory authorities intend to act in accordance with the PNJ.[34]

Though the two rules of natural justice, namely, *nemo judex in causa sua* and *audi alteram partem*, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould, as they are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed. There is no difference in this respect between the law in England and in India.

The present author in this paper submits that the PNJ are capable of providing us the probability that the concerned authority by following certain principles like providing reasoned decisions, opportunity of being heard and by not deciding one's own cause acts in a just, fair and reasonable manner. Indeed, A. C. Lloyd has pointed out that the principles of natural justice make it probable that, whatever the matter to be decided, the discretion, action or decision will

[33] A.K. Kraipak v. Union of India [(1969) 2 SCC 262
[34] See Union of India v. Col. J.N. Sinha (1969) 2 All ER 1207

be right or the PNJ are those whose non-compliance makes it less probable that, whatever the matter to be decided, the discretion, action or decision will be right.[35] In this sense, the principles specify a verge of procedures representing the utmost irreducible basis of law's integrity. In addition, the PNJ provide an empirical and rational content to the natural justice by avoiding subjective references.[36] The PNJ acts as a great humanising principle intended to invest law with fairness to secure justice and to prevent miscarriage of justice.[37] Thus, it is said, the *raison d'etre* of natural justice is not the probability that justice will be done, that is the right decision be reached, but the probability that it will also seem to have been done.[38]

[35] A. C. Lloyd, *Natural Justice*, The Philosophical Quarterly (1950), Vol. 12, No. 48 (Jul., 1962), 221, pp. 218-227
[36] *Ibid*
[37] *Supra* n. 2
[38] A. C. Lloyd, *supra*