The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civil community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him or entreating him, but not for compelling him, or visiting him with evil, in case he do otherwise.

JOHN STUART MILL
APPLICATION OF THE PRINCIPLES OF NATURAL JUSTICE

TO DOMESTIC TRIBUNALS

A Dissertation submitted in Partial Fulfillment of the Requirements for the Degree of Bachelor of Laws (LL.B.), University of Nairobi.

BY:

JUMA, AFWANDE PETER

NAIROBI

MAY 1984
ACKNOWLEDGEMENT

This work would be incomplete if I did not express my indebtedness to all those who contributed to its completion. To all I say thank you. However I would like to thank my supervisor, Mr. Kulundu Bitonye Wanyama, Lecturer, Faculty of Law, whose constant supervision and invaluable advice gave shape and direction to this paper. But any errors, be they of law or fact herein are in no way to be attributed to him as they are solely mine.

To Rosemary of Aga Khan Hospital, Nairobi, I am very greatful for the tedious job she had to do in typing this work to give it its present neatness.

I must not forget Sylvia who was always there to provide comfort, encouragement and inspiration whenever I felt blank and dejected.

Finally I thank all those who provided the material support, especially my Father Romano, and moral support that was necessary for the successful completion of this dissertation.
DEDICATION

This dissertation is dedicated to:

My Father; Romano
My Mother; Lucia
My Brothers; Godfrey, George, Patrick and David
My Sister; Imelda and Mary.
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INTRODUCTION

The rule of law, which is based on the values of a free society, is a combination on the one hand of certain fundamental ideals concerning the purposes of organised society and on the other, of practical experience in terms of legal institutions, procedures and traditions, by which those ideals may be given effect. In a free society the supreme value of human dignity and personality is recognised. All social institutions in such a society must be conceived of as servants, and not masters of the citizens.

Within this framework administrative and judicial procedures must be seen as an aspect of the much cherished rule of law; and that is precisely what they should confirm to. Fairness of administrative procedure is an essential criterion in determining the democratic nature of a government and other societal institutions. To be genuine and balanced an analysis of administrative institutions in any given society must at least be two dimensional. On the one plane one will concern himself with what is done by these institutions, while on the other the question how it is done must never be neglected. The issue of procedural fairness with which this paper is concerned falls squarely within the latter dimension - HOW. The constitution of Kenya recognises these two very fundamental aspects of administration.

Procedural fairness is thus clearly a very central element in any system of government/socio-political organisation that profess democracy as its cornerstone and central fabric. With this fact in their cognisance the courts have, over the centuries past, striven to develop the rules of natural justice as a kind of a code of fair administrative procedure. In this way the courts can control the manner in which administrative authorities exercise their powers or carry out their functions. In the common law system developed in England, which system is the basis of Kenya law, the rules
of natural justice perform a function, though within a limited sphere of administrative law, similar to the concept of procedural due process in the United States of America.  

This concept is by no means unknown to the Kenya legal system. Within the constitutional framework of Kenya, a constitution founded on the sound notion of human equality and dignity, procedural fairness is recognised as one of the fundamental rights of man which every free society must strive to protect. Naturally it follows that, to use Professor Wade's words, "procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable." This notion has received judicial pronouncement in the supreme court of the United States of America.

However to recognise the importance and ultimate indispensability of a principle is not quite the same thing as giving that very concept practical application whenever the circumstances so demand. It is manifest from a host of authorities (these will be critically examined in this paper) that the principles of natural justice are currently undergoing a very trying phase of development. Clearly discernible from some of the decided cases is the evergrowing tendency of the courts to initiate and facilitate a qualitative internal emasculation of the concept of natural justice. Rather ironically, one may observe, this degradation of natural justice is concurrent with a rain of platitudes to the vitality of procedural fairness from those very courts.

This phenomenon has not escaped the keen eyes of both academic writers and honourable judges of the bench. One such writer has expressed his concern on the present state of affairs in the following terms:

"The concept of natural justice has almost accidentally arrived at a critical point in its development. Invoked in recent years perhaps more frequently than at any other period, it stands in danger of undergoing a metamorphosis that would concert it into a mere ill-defined aspiration"
The bench on its part has not simply sat back and assumed an air of pretended ignorance about the whole situation. For instance, Lord Hailsham, L.C. has had this to say:

"The doctrine of natural justice has come in for increasing consideration in recent years, and the courts generally, and the House of Lords in particular, have ... advanced in frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases."

As a concept in the sphere of administrative law natural justice has been held applicable to two broad categories of administrative agencies. On the one hand there are the public administrative bodies set up by the government, normally by an Act of Parliament to deal with certain departmental issues in the day to day running of the government. In Kenya the best known of these are the numerous licencing boards (courts) in the multiferous fields of human economic activity. These are the administrative tribunals or agencies proper. On the other hand there are what are normally termed domestic tribunals. These are conceptually voluntary in nature. These are 'tribunals' of private organisations which do not necessarily owe their validity and efficacy to an Act of Parliament.

In both these categories the afore mentioned disconcerting trend in the development and application of natural justice has made its effect felt. With regard to public administrative agencies the major device that was used to disapply the rules of natural justice before 1964 was a classification of functions as purely administrative on the one hand and judicial or quasi judicial on the other. If the function was classified as administrative then natural justice would be inapplicable "That heresy," say Lord Denning, M.R., "was scotched in Ridge V Baldwin". However, the war against natural justice was not lost thereby. Another battle has been launched. This time the weapon is called "a duty to act fairly". In order to avoid the application of natural justice, whether to domestic or public tribunals the courts hold that all that is required of these agencies is to observe a general duty to act fairly. It will be argued ...
in this paper that seen on its own, different and distinct from the principles of natural justice, this notion of a duty to act fairly is malconceived, ill-defined, elusive and uncomfortably amorphous.

The problem in respect to domestic tribunals is not new either. At one time the courts totally refused to endorse procedural fairness in respect to domestic tribunals. The argument was that the courts had no jurisdiction to intervene in the affairs of private voluntary associations unless there was some property interest involved even where a member was improperly and unfairly subjected to disciplinary action such as expulsion or suspension. Thus in Rigby V Connell, JESSEL, M.R. had this to say:

"I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful (emphasis mine) expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property". 11

Although this kind of reasoning is now decisively obsolete no one can today confidently and reasonalby, stand up with his head high to say that the principles of natural justice have now been rehabilitated in respect of domestic tribunals. The nice entrappings of the duty to act fairly and certain notions of contract are too tempting!

The apparently inadvertent war against natural justice is not always disguised. One of the more direct offensive launched is to the effect that natural justice lacks in precise procedural content. Consequently it should not be upheld as a proper method of judicial review of administrative action or the actions of private organisations. 12 At the other end of the frontline in the offensive there is the contention that the rules of natural justice are so highly technical as to render their enforcement on domestic tribunals inappropriate. The argument runs that the standards set by natural justice are only suitable for formal courts of law. 13

In view of these defects (the present writer is skeptical about the use of the word "defects" here) it is only appropriate and fitting, they
argue, that instead of enforcing the concept of natural justice what the courts should infact enforce is the duty to act fairly. The irony here is clear. If anything at all, according to this author, it is this general duty to act fairly that lacks in procedural content. According to this concept administrative agencies and domestic tribunals are simply required to act fairly and in good faith. Whatever acting fairly precisely means is anybody's guess unless one has to employ the rules of natural justice yet again to give it some definite character. According to this author the duty to act fairly can only have some meaningful and practical application if it is to be seen as being an inherent ingredient of the concept of natural justice. Any attempts to divorce the two will be fatal to the development of natural justice or procedural fairness generally in administrative law.

It is hoped to be shown in this dissertation that the principles of natural justice, though lamentably, degenerating in their application in a very substantive manner. Exclusionary devices are being used to disapply natural justice. This is so although the spectrum of situations in which the rules are progressively being invoked continues to widen. It would appear, as will be seen in the second chapter, that the area which has been hit hardest by this trend is that of domestic tribunals. One submission in this paper is that this trend is unfortunate and uncalled for; everything possible should be employed to arrest it. This submission flows from the truism that natural justice is an integral and inseperably intertwined facet of the Rule of Law. This is more so when one considers the ever increasingly essential role played by private associations, such as football clubs, trade unions, social welfare groups and many others, in the daily lives of the citizenry.

It is perhaps appropriate at this stage to point out that by and large the Kenya courts apparently do not see the need of engaging in philosophical discussions about natural justice. What happens is that the courts simply decide
to state that natural justice applies and they are contented with citing a few English authorities in support of their holdings. Due to this fact most of the discussion in this paper will revolve around authorities from England. The presumption is that the law in England is basically the same as the law in Kenya. Developments in law in England are bound to affect Kenya as well. The Kenyan courts though not bound by English authorities nevertheless look to them as being of pursuasive value. Again it is easier to get English authorities than Kenyan ones! Be as it may though efforts will be made to show the law as it is in Kenya by reference to Kenyan authorities whenever possible.

In order to effectively deal with the problem at hand this paper will be sub-divided into three chapters.

In chapter one the author hopes to elucidate what he understands by "natural justice". This chapter will therefore be largely descriptive. It will be submitted that within the four corners of the two Latin maxims that are employed to express the concept of natural justice - 'nemo judex in causa sua' and 'audi alteram partem' - there are certain basic minimum requirements which must always be kept in mind. This irreducible minima is what makes the skeleton of natural justice. Any concept purporting to be natural justice which does not envisage these rudimentary requirements is simply not natural justice. But a skeleton is not the whole body.

Similarly there are numerous other possible requirements of natural justice. It is in reference to these other requirements that the courts do refer, or should refer, to whenever they say that the requirements of natural justice vary with the circumstances of the case. It is evident from decided cases that in most cases where natural justice has been eroded the courts have either deliberately or unknowingly failed to distinguish between the basic minimum requirements and the various other possible requirements.

The courts therefore end up excluding the minimum requirements while at the same time they claim to be applying natural justice. This is what the author
calls paying mere lip-service to natural justice while eroding it at the same time.

In order to ascertain the meaning of natural justice, and to support the afore mentioned distinction between the bare minimum and other possible requirements of natural justice, a historical perspective of the concept will be excursion. As this will be a general chapter on the meaning of natural justice the writer wishes to make it clear that what will be said of natural justice therein is true whether one is talking about public administrative bodies or private domestic tribunals.

In chapter Two the author proposes to deal with special problems of the application of natural justice to domestic tribunals. It will therefore be necessary to elaborate on the meaning of domestic tribunals in this dissertation. This is because domestic tribunals generally speaking do not owe their origin to statutes directly. But there are others which do. In explaining the meaning of domestic tribunals it will therefore be necessary to cite a few examples thereof.

It will be submitted that the major problem today is not whether domestic tribunals are bound by the principles of natural justice but to what extent they are, or they should be bound. It will also be contended that there are two major devices that have been used in the combat against natural justice in this sphere. First there is the question of jurisdiction. This was most acute in the last century but can still be seen in certain decisions of this century. The courts held that they had no jurisdiction over private voluntary associations unless some substantive rights, contractual, proprietary or tortious were involved. The stress was however on property and contractual rights. For instance a wrongful expulsion from a proprietary club could not be remedied. It is the opinion of the present author, and it will be submitted, that here the courts were confusing the "what" and the "how". The two issues
are equally important from the wronged citizen's perspective and to hold one more important than the other, or sacrifice one at the expense of the other altogether, is a gross misdirection.

Secondly there has emerged an apparently new concept of a duty to act fairly. This is another thorn in the flesh of natural justice and particularly in relation to domestic tribunals. The position of domestic tribunals is rather precarious in that in addition to the general problematic aspects of natural justice which will be discussed in the third chapter there are others that are peculiar to domestic tribunals. These latter will be discussed in the second chapter. This is the reason for the proposition that the woes of natural justice are most felt in the province of domestic tribunals of private associations.

The third and final chapter will be dedicated to what, in this paper, is called the eternal problem. The problem is duo-dimensional. The courts have first to decide whether in a particular case natural justice applies. Having determined this question they have to ascertain the specific requirements of natural justice in that case. The tools which have been so far utilised in this task have proved to be double edged. They fight both for and against natural justice. This has led to the core of this paper, namely the emasculation of natural justice in the face of the many platitudes poured on its name.

The proposal from some quarters that natural justice, due to its defects, be replaced by a general duty to act fairly will be dismissed forthwith. This will however be done after the merits of the proposal have been examined.

Then will follow a brief critique of natural justice as a legal concept. The argument will be that natural justice is being seen as a concept that offers too much protection for the individual against arbitrary actions of bureaucratic establishments. This is necessarily why it is plagued with ceaseless afflictions. This factor may however be operating only at a subconscious level in the minds of the judges.
On the question of reform it is the present author's opinion, humbly submitted, that it is not possible to have radical reforms in this area of the law as long as the socioeconomic substratum on which it rests still subsists. However reform within the system can still be carried out. In determining the 'eternal problem' the courts should look at the effects of the actions complained of by the citizen. The severer the effects the more appropriate and elaborate will the application and requirements of natural justice be appropriate. Thus an effect-oriented approach is the best. Above all it will be argued that the need to balance flexibility and predictability is needed more than ever before.

Finally there will follow a conclusion. It will be asserted that unless the current annihilation of the concept of natural justice is checked and brought to an end the concept may soon lose meaning altogether. The courts' errors lie in their failure to comprehend what natural justice actually means and the purpose(s) for which the concept was coined centuries ago, namely to offer procedural protection to the individual.
CHAPTER ONE

NATURAL JUSTICE: MEANING

A. CONSTITUTIONAL STATUS

The idea of procedural fairness forms the very core of administrative law theory. This theory revolves around the concept of the rule of law. According to the International Congress of Jurists, sitting in 1959 at New Delhi, India, the Rule of Law intergrally encompasses "practical experience in terms of legal institutions, procedures and traditions, by which ...... (certain fundamental ideals concerning the purposes of organised society) may be given effect. 1 Thus in every politically organised society professing the Rule of Law as herein above stated there will be formulated and enforced certain procedural rules upon all the formal law courts as well as any other bodies charged with adjudicating upon the rights and duties of the citizen. This is a consequence of the realisation that political power, which can be monstrous, must be checked in the mode it is to be exercised. "Procedural fairness and regularity are of indispensable essence of (sic.) liberty. Severe substantive laws can be endured if they are fairly and impartially applied," says an American judge 2. Within different contexts the notion of procedural fairness may go by varying names. For instance/the ordinary courts of law lawyers often talk of the "due process of law" 3 or a "fair hearing" 4, while in the sphere of administrative law the terminology which is normally employed is natural justice". Whatever the denomination used the underlying principle is the same; the exercise of political power must be controlled through the imposition of fair procedures lest the subject be nakedly exposed to severe hardship or tyrannical treatment. The object is to protect the powerless from the powerful within the same society or community.
Within the Kenyan constitutional framework the idea of procedural fairness or natural justice is to be found in section 77 of the Constitution. The term actually employed is "fair hearing" of special importance is section 77(9) which anticipates the application of the rules of a fair hearing to other adjudicating authority than the court. Entitlement to procedural fairness by the citizen is his fundamental right within this constitutional set up as section 77 squarely falls within Chapter Five of the Constitution which sets out or guarantees fundamental human rights of the individual. In this respect it can be argued that the rules of natural justice are not only procedural rules but they amount in fact to substantive rights. They must therefore be taken seriously by the courts.

NATURAL JUSTICE IN TIME PERSPECTIVE:

A BRIEF SURVEY

The modern concept of natural justice is traceable to the idea of "jus naturale" which idea has been described as

"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 rules requiring procedural fairness were not unknown to the ancient world or medieval precedents. In fact they were regarded as part of the immutable order of things. In adherence to the concept of jus naturale the courts required that parliament enact laws which would not violate the rules of procedural fairness: these rules were as old as man himself. This was the philosophy underlying such decisions as those in DR. BONHAM'S CASE and DR. BENTLEY'S CASE. In the latter case, decided in the early Eighteenth Century, Fortesque, J. observed "that even God Himself did not pass sentence upon Adam before he was called upon to make his defence."

Natural justice was therefore a term used to refer to principles which not only formed part of natural law but that part of natural law which relates to the administration of justice. These principles were treated as part of the English common law. As such until the Glorious Revolution of the 17th Century in...
England the courts could never allow parliament through its enactments to violate the rules of natural justice. After that Revolution however, parliamentary supremacy was established in England with parliament having absolute legislative powers. By and large one can safely observe that parliament in fact continued to respect the common law.

According to Marshall, it would appear that it was in the 19th century that the two procedural rules which now comprise the concept of natural justice came clearly and firmly to be associated together as parts of a single principle in any one reported case. This was the case of *Spackman v Plumstead District Board of Works* – hitherto it had been enough for the court in each particular case to say that this or that rule was an element of natural justice and to give an *ad hoc* decision as to the point in issue.

When in the 19th century parliament created numerous administrative authorities and boards whose functions would normally affect the rights and duties of the citizens of the realm the courts did not hesitate to assume supervisory jurisdiction over these authorities. The courts demanded that these bodies adhere to certain procedural requirements. The rules of natural justice were a ready handmaiden for this purpose. The rules of natural justice that were imposed are usually expressed in the two Latin Maxims namely "Nemo judex in causa sua" and "audi alteram partem" meaning "no man shall be judge in his own cause" and "no man shall be condemned unheard", respectively. These are the very rules which the constitution of Kenya sets out in elaborate details in § 77.

In the 19th century the concept of natural justice was applied in a somewhat flexible manner to administrative bodies. A classical example is provided by the decision in *COOPER V WANDSWORTH BOARD OF WORKS*. In holding that the decision making process of an administrative board must conform to the rules of natural justice, the court stated that the justice of the common law would supply the omission of the legislature. Thus where statute was silent or not elaborate as to the procedure to be followed by these administrative boards the courts would...
import the rules of natural justice from the common law to fill in the gaps so left. It was also in this same case where it was stated that the rules of natural justice applied to many exercises of power which in common understanding would not be called judicial. Here of course the courts were concerned that the ever increasing state intervention in the daily lives of the people would dismantle the subsisting laissez-faire philosophy.

It was at the beginning of the 20th Century that this approach began to change. It was implicitly recognised that, with the growing administrative power, administration could no longer be regarded as occupying a purely instrumental position within the classical tripartite division of powers between the executive, the legislature, and the judiciary under the traditional model. The courts withdrew from a fairly activist position where they had been imposing procedural requirements on these boards. Perhaps the first notable case in this trend is Board of Education V Rice. Despite admitting that boards, such as the Board of Education in the instant case, were charged with a duty of determining matters of fact as well as matters of law as the courts are Lord Loreburn in the House of Lords went ahead to state

"But I do not think they are bound to treat such a question as though it were a trial...... They can obtain information in anyway they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."16

The significance of this is that these authorities were free to determine their own procedures though within given limits. This means that the courts supervision on procedural safeguards would be less strict.

The epitome of this new trend is the House of Lords' decision in Local Government Board V Arlidge. Briefly the facts were as follows:

The Humpstead Borough Council had made a closing order in respect of a house in their district which appeared to the Local Government Board to be unfit for human habitation. Mr. Arlidge, the owner, had appeared before the Board in accordance with the procedure prescribed under the relevant English Statute.
The Minister, after holding a public local inquiry dismissed Mr. Arlidge's appeal. The latter then applied to the courts to declare the decision of the Minister to be invalid mainly on the grounds that the order in which it was embodied did not disclose which of the officials in the ministry actually decided the appeal; that the, the plaintiff, did not have the opportunity of being heard orally by that official, whosoever he may have been; and that he was not permitted to see the report of the inspector who had conducted the local public inquiry on behalf of the Minister.

The Court of Appeal held by a majority that it was contrary to natural justice for the Minister to dismiss the appeal without disclosure to the appellant the contents of the inspectors report, and without giving him a chance of being heard, and they therefore allowed the appeal. However the House of Lords on an appeal by the Board held that Arlidge had no right to object to the Minister's order on those grounds. This was so although the Law Lords had painstakingly stressed that administrative bodies of this nature must act judicially and in accordance with the principles of natural justice.

What emerged from this decision was that an authority entrusted by an Act of Parliament with the exercise of judicial functions need not follow the methods adopted by the courts but may employ any procedural rules which appear fair and convenient for the execution of its functions. It was conceded that "judicial methods may, in points of administration, be entirely unsuitable and produce delays, expense and public and private injury. To justify its retreat from an activist position the court invoked the theory of ministerial responsibility to parliament for departmental action. This is what essentially led to the formal classificatory approach in implying safeguards; if the function could be classified judicial then the courts would require that the exercise of such functions conform to the requirements of natural justice, and if not no procedural restrictions other than those set out in the enabling statute would be imposed.
The first unequivocal demonstration of this classificatory approach appeared in *Ex Parte Venico**f* 21 where the court held that in exercising his power to make a deportation order the Home Secretary was acting in an executive and not a judicial capacity. It would only be incumbent upon him to observe the rules of natural justice had he been acting in the latter capacity.

This trend in the downward dive of the concept of natural justice was to continue for several decades. The lowest ebb was reached during the Second World War and the years that followed. Administrative or ministerial powers became enormous. Checks on their exercise could not be strict because of security reasons as the nation was involved in the Imperialist wars of the time. But even after the war, in the 1950s the courts continued to follow war time authorities 22 which, in the submission of the current author, were anomalous having been decided under peculiar circumstances.

It was not until 1963 that procedural fairness in general, and natural justice in particular, was rescued from the danger of extinction as far as administrative law is concerned. In that year the House of Lords made the landmark decision in *Ridge V Baldwin* 23. This decision rescuscitated natural justice which could then have as well been considered comatose. Fresh blood was injected in administrative law theory.

In this case the chief constable of Brighton had been tried and acquitted on a criminal charge of conspiracy to obstruct the course of justice. The trial judge twice took opportunities to comment adversely on the chief constable’s leadership of the police force. The truth of the matter was that the chief constable himself, Mr. Ridge, was not convicted but two other officers under him were. Thereupon the Brighton Wartch Committee, without giving any notice or without offering any hearing to him, unanimously dismissed him from office. His solicitor then applied for a hearing and was allowed to appear before a later meeting. The committee confirmed their previous decision, but by a majority vote this time. Thereupon the chief constable exercised his right of appeal to the Home Secretary, but his appeal was dismissed.
It was not until the case reached the House of Lords that it was decided in his favour on the ground that there had been a breach of natural justice.

In their decision the House of Lords made it crystal clear that the narrow conceptualism of the formalist classificatory approach had been erroneous all along. To support this view Lord Reid reviewed numerous authorities of the 19th century and castigated the hitherto 20th century decisions that had brought about the crisis. Natural justice was not restrictively confined to judicial or quasi-judicial functions but had also a role to play in administrative decision-making process. The court suggested that in determining whether the rules of natural justice apply to administrative decision-making process one should examine the nature of the power and circumstances of the case. This decision marks a fresh starting point of the present era of judicial activism in administrative decision-making.

By and large it may be stated that in Kenya and East Africa as a whole natural justice was imported in the 20th century. As such it was the legal philosophy obtaining in England in this century that underlay the application of natural justice in this area. The usual approach in Kenya was the formal classificatory one. But the situation never actually got to be as bad as in Britain since the circumstances here in East Africa were not as bad as in England since the circumstances here in East Africa were not as bad as in

One would have thought that the woes of natural justice would end there. But alas! even before the turn of the decade the courts were coming up with an apparently new doctrine of a duty to act fairly. This doctrine was apparently intended to apply where the functionary was not exercising a judicial or quasi-judicial function but administrative. Thus the classificatory approach which
the House of Lords had thought they had scotched and buried in 1963 was bouncing back to life: though transfigured of course! Infact up to the present moment scholars are still engaged in the debate as to whether the general duty to act fairly should infract replace natural justice. 29

From this brief history it becomes clear that natural justice continues to weaken substantively although its name is being invoked more and more. Another point that has emerged is that the concept was nurtured in its early stages in the arena of domestic tribunals and it was from there that it moved via the justices of the peace to administrative authorities. Nevertheless its role has always been vital. It is now appropriate to answer the question what natural justice really is.

C. THE REQUIREMENTS OF NATURAL JUSTICE

The rules of natural justice are not hard-and-fast. The specific requirements of natural justice will vary from case to case depending on the circumstances of each case. Administrative tribunals or domestic ones will obviously not be expected to observe all those requirements set out in Section 77 of the constitution in all cases. For instance no one would expect that a domestic tribunal of a rural women's group or social welfare association in a remote part of Kenya should always allow a member coming before such a tribunal to have professional legal representation. Some of them have never even seen an advocate! It does not mean that if disciplinary action is taken against one of their members and in that event the member never had legal representation there was a breach of natural justice. In any case it would be a gross injustice to have an advocate represent someone before a tribunal whose members have never seen any law book!

It is clear however that natural justice imports basic rules namely, that every party must be afforded a reasonable and fair opportunity to present his case and that that case must be heard by an impartial and unbiased body. This are what basically constitute natural justice. What then are the several requirements of these basic rules?
I. "AUDI ALTERAM PARTEM"

It is around this limb of natural justice that a lot of cases in administrative law as well as the law of private voluntary associations revolve. The reason is that its possible requirements are indeed numerous. It would actually be demanding too much from these organs to expect them to apply all the individual requirements of natural justice in every case. Normally therefore the courts will hold that non-observance of certain rules is not fatal to natural justice in some instances.

Thus Tucker L.J. observed in Russell v The Duke of Norfolk that "whatever standard of natural justice adopted one essential requirement is that the person concerned should have a reasonable opportunity of presenting his case." His Lordship pronounced this dictum after having observed that the principle of audi alteram partem cannot have a fixed and immutable content given the width of the spectrum to which it applies. Thus it has numerous requirements.

(a) NOTICE

An opportunity to present one's case definitely imports the giving of notice to/affected party of the charge or indictment against him. In one of the earliest cases on the subject it was observed that "the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence" The University administration in that case had purported to strip one Dr. Bentley of his academic degrees but without having given him prior notice of their intention to so act. The court could not allow this. Today there are numerous cases both in England and here in Kenya which reiterate the importance of giving notice in these cases.

It therefore becomes clear that a fair hearing in conformity with natural justice cannot be so unless it is preceded by notice thereof. The notice must contain the charge accurately and particulars as to when and where the hearing is to be held. The rationale for the requirement that notice must be given, says De Smith (with whom the present author has no reason to differ),
is to enable those directly affected parties to make representation on their own behalf; or to appear at the inquiry or hearing (if one is to be held), and effectively prepare their own case and to answer the case (if any) they have to meet.

Thus in the famous case of Annamunthodo v The Oilfield Workers Trade Union, Annamunthodo, a member of the Union, was charged with breaking four of its rules for breach of which there was no power to expell under its constitution. He attended the hearing which was adjourned, but chose not to attend when the hearing resumed. At the resumed hearing he was proceeded against under another rule for breach of which a member could be expelled. The privy council held that the purported expulsion was void and could not be sustained. Said Lord Denning when reading their Lordships' judgement:

"When the General Council at the adjourned hearing desired to proceed under Rule 11(7) (which authorised expulsion) and found that he was not present they ought to have adjourned the hearing once again so as to give him notice of the charge: and they would have to do it in writing under rule 32(5). By failing to do so, they failed to observe the requirements of natural justice."

This case serves to illustrate how strict the requirement of notice is. A general notice without giving particulars of the charge will not suffice as it falls short of the rationale for the requirement that it be given. This requirement then presupposes some form of a hearing or at least an objective consideration of the case.

(b) HEARING

The hearing need not be oral. In Local Government Board v Alridge, a local authority had made a closing order in respect of an unfit house. The Board confirmed the order. This confirmation was objected to on the grounds, inter alia, that the objector was entitled to know which of the officials of the Board had actually decided the appeal and to be heard orally by that official. The House of Lords unanimously rejected this objection.
In R v Aston University Senate, Ex Parte, Roffey some students were required to withdraw from the University on the ground that they had failed their examinations. The court thought that it would have satisfied the requirements of natural justice had the students been allowed to put their case in writing. An oral hearing would not be necessary. A hearing can therefore be oral or written depending on the circumstances or the demands of justice of each case. If the hearing is oral then other considerations may arise.

(i) CROSS-EXAMINATION

The first question that arises when an oral hearing is held is whether the "accused" person should be afforded an opportunity to cross-examine witnesses with adverse evidence. In the University of Ceylon v Fernando, a student, Fernando, had been accused by a fellow student, Miss Balasingham, of cheating in examination. The allegation was investigated by a commission of inquiry before which Fernando appeared, Balasingham gave her evidence in the absence of Fernando. The commission found the allegation proved and consequently Fernando was rusticated indefinitely from all University examinations.

He argued that the decision was void as contrary to natural justice in that he was not given an opportunity to cross-examine Balasingham, the key witness against him. The Privy Council held that this did not amount to a breach of natural justice. However from that judgement it appears that had Fernando asked for an opportunity to cross-examine the chief witness against him, and had in that event the request been rejected, that would have amounted to a breach of natural justice. In his judgement Lord Jenkins, following Lord Loreburn's reasoning in Board of Education v Rice, said that the vice-chancellor in Fernando's case was not bound to treat the matter as a trial but could obtain information in any way he thought best. "It was open to him if he thought fit to question witnesses without inviting the plaintiff to be present" further on he added:
"But it remains to consider whether, in the course they took, the interviews must be held to have fallen short of the requirements of natural justice on the ground that the plaintiff was given no opportunity of questioning Miss Balasingham. She was the one essential witness against the plaintiff and the charge in the end resolved itself into a matter of her word against his. In their Lordships' view this might have been a more formidable objection if the plaintiff had asked to be allowed to question (her) and his request been refused."

The significance of this line of reasoning is that it recognises the right to cross-examine as an element or requirement of natural justice which must be satisfied under suitable circumstances.

(ii) LEGAL REPRESENTATION

From the authorities available on this subject it is possible to surmise that legal representation may also be considered as a requirement of natural justice in certain cases. Thus in De Souza v Tanga Town Council it was not objected to. There are however certain English authorities that have attempted to discuss situations which may warrant the permission of legal representation before a domestic tribunal.

In the famous Pett Cases the facts were: Pett was a greyhound trainer, holding a licence from the National Greyhound Racing Association. The defendants, the National Greyhound Racing Association, proposed to hold an inquiry into the withdrawal of Pett's dog from a race at the stadium on a suspicion of having been drugged. The rules of the club, which governed the inquiry, did not exclude legal representation. The normal procedure allowed the trainer to be present to hear evidence and to have an opportunity to cross-examine witnesses. The stewards rejected the plaintiff's request to have legal representation.

In Pett (No.1) he sought on interlocutory injunction to restrain the holding of the proposed inquiry unless he was allowed legal representation. The Court of Appeal held that as the case touched his reputation and livelihood the appellant was legally entitled to be represented. It appears from the Appellate Court's reasoning that representation
was seen as the appellant's right under the common law of agency; that is to say that every person has got a right to appoint an agent to act on his behalf. It is therefore possible to argue that legal representation here was not necessarily treated as a requirement of the concept of natural justice.

In Pett (No.2)\(^4\) the appellant sought a declaration that the defendants were acting *ultra vires* in refusing to allow him to be represented. Relying on the *University of Ceylon v Fernando*\(^6\), LYELL, J. held that Pett had no legal right to representation.

"I find it difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of natural justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs."\(^4\)

Naturally Pett was dissatisfied with this decision. However before his next case could be heard counsel for the defendants informed the court that the Association had changed their rules permitting legal representation and that Pett's case would be considered thereunder.

In Enderby Town Football Club Ltd. v Football Association Ltd.\(^4\), the Plaintiff club had been fined by the Football Association County Organisation. A rule of the Football Association excluded legal representation. Accordingly the club's request to have legal representation at the appeal was refused. The club sought an injunction to restrain the hearing of the appeal unless it was permitted legal representation. The court of Appeal Refused to grant an injunction.

Legal representation is only necessary where there are difficult issues of law involved. That being so the best way to proceed is for the points to be brought before the court itself for a decision in an action for a declaration, rather than before a domestic tribunal like the Football Association. If the plaintiffs decide to take their case before the domestic tribunal as they did here then they are bound by the rules of their Association.
On legal representation generally their Lordships had certain observations to make. Lord Denning thought that when the rules say nothing there is no absolute right to representation - it is a matter for the tribunal's discretion. However he went further to state that an absolute exclusionary rule is not permissible as it would be contrary to natural justice. But an exclusionary rule is valid if it leaves room for the tribunal to allow representation in exceptional cases where justice so demands. He did not elaborate on what those exceptional cases are. But one can safely assume that such cases are to be decided according to the effects of the action against the citizens.

On the other hand the Lord Justice Cairns thought that there is no rule against absolute exclusion of legal representation. Together with Lord Justice Fenton Atkinson they held that the rule of the Football Association against legal representation in the instant case was proper.

From the foregoing cases it can be surmised that legal representation has at least been recognised as an aspect of natural justice. What has not been settled is whether it is a sine qua non thereof in all cases.

(iii) ADDUCING OF EVIDENCE

It is obviously important to know what kind of evidence a tribunal may use against the "accused". Although it is generally accepted that a tribunal may obtain evidence in any way it thinks fit such a tribunal must nevertheless observe certain rules. Thus if the deciding body is possessed of evidence or information prejudicial to the interests of the party who is to be affected by the decision, it would appear that natural justice demands that such information be disclosed to the 'accused'. In Murgian and Sons Ltd. And Others v Transport Appeals Tribunal 49, the applicants contended that the Appeals Tribunal had acted contrary to natural justice in that they took into account certain observations contained in a circular addressed by the chairman of the Transport Licensing Board to the members of that Board without affording the applicants an opportunity of seeing that circular and advancing such arguments in relation thereto as they might think proper. It was conceded by
the applicants that in fact the circular in question was entirely favourable to them.

On the facts of this case it was held that the chairman's circular complained of was not "information prejudicial to the interests" of the applicants and therefore was not information upon which the Appeals Tribunal was not entitled to act unless and until the applicants had had an opportunity of being heard upon that information.

The deciding body is therefore required to disclose certain kind of evidence they decide to use against the 'accused'. Failure to so disclose in appropriate cases will amount to a breach of natural justice and hence vitiate their decision.

(C) GIVING REASONS

After the hearing a tribunal must obviously make a decision or a judgement. Then the question arises whether the tribunal must give reasons for its decision. Foulkes suggests that the giving of reasons is not an established requirement of natural justice. However there are judicial dicta which do not tally with this observation. In *Breen v Amalgamated Engineering Union* Lord Denning suggested that where there is a right to be heard there is a right also to be given reasons for the decision. He argued, "The giving of reasons is one of the fundamentals of good administration."

In *Padfield v The Minister of Agriculture, Fisheries and Food*, Lord Upjohn's words were much stronger. He said:

"If a man does not give any reason for his decision it may be if circumstances warrant it that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

In the instant case the Minister had in fact given reasons for his decision. But when the legality of his decision was questioned he had argued that he was under no duty to give reasons, that if he had not done so his decision could not have been questioned, and as he had given reasons he should not be put in any position worse than if he had not done so. The House of Lords rejected this argument.
It is clear from these judicial dicta that the giving of reason for a decision is an aspect of natural justice which may not be overlooked.

Having thus considered one limb of natural justice it is opportune to examine the twin rule thereof.

II. "NEMO JUDEX IN CAUSA SUA"

This rule of natural justice is just as important as the "audi alteram partem" rule. It is commonly referred to as the rule against bias. It revolves around the notion of interests. In fact the Latin word "causa" is sometimes substituted with another Latin word "Re" which latter word means "matters" or "interests." The essence of the rule is that no one should sit as a judge in matters in which he has an interest. Not all interests are however disqualifying. As such it becomes necessary for the court to determine whether a particular interest is disqualifying or not. It is here that most of the discussion, academic as well as judicial, is centered.

The first and by far the most important interest that will disqualify a judge or anybody sitting in that capacity is what is referred to as a pecuniary interest. Once it is established that the deciding body has a pecuniary interest in the matter before him (them) then he (they) will be disqualified from sitting as judge. A modern illustration of this principle is R V Hendon Rural District Council, Ex Parte, Chorley. A court quashed the decision of the defendant Rural District Council to allow some residential property in the district to be converted into a garage and restaurant. Under the enabling legislation the council had power to permit this development and as matters then stood the property owners would have compensation if their intentions were frustrated by the planning scheme.
One of the councillors was however the estate agent acting for the owners of the property and he was present at the meeting which approved the application. It was held that the agent's interest disqualified him from taking part in the council's consideration of it, even though the evidence was to the effect that he took no active part in the decision.

The special nature of the pecuniary interest is that once it is established then further discussion as to whether there should be a disqualification or not becomes unnecessary. In the case of other interests it is always necessary to apply certain tests to ascertain whether they (the interests) are disqualifying or not. Two tests compete for mastery in this respect, to wit, "real likelihood of bias" and "reasonable suspicion of bias". The initial step is normally to find out whether there are any circumstances that may disqualify a person from deciding the matter. If any such circumstances exist the next issue will be whether they constitute a real likelihood of bias or a reasonable suspicion thereof. In the great majority of the cases, contends Professor Wade, as indeed is the case, either test will lead to the same result. But this will depend on what meaning "likelihood" assumes, that is to say, possibility rather than probability. The authorities are not uniform as to the meaning likelihood should always portend.

Thus in Metropolitan Properties v Lannon the tenants of one residential block (A) of flats applied to the rent officer to fix a fair rent. The landlord appealed from him to the rent assessment committee. The chairman of that committee, Lannon, was a solicitor who lived with his father on another block of flats (B), the landlord of which was the associated company belonging to the same group of companies as the landlord of block A.
The chairman's firm had also acted for the tenants of block B, on similar matters, and he himself had assisted in writing a letter to the rent officer making representations on his father's behalf. The committee's decision was quashed. Actual bias was not alleged and Lannon's pecuniary interest was indirect and uncertain.

Reading through Lord Denning's judgement it becomes apparent that the Master of the Rolls not only equated likelihood with probability but also seems to have used both the above mentioned tests simultaneously. He said:

"There must be circumstances from which a reasonable man would think it likely or probable that the justice or the chairman would or did favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think that he did."

Elsewhere likelihood has been used to mean possibility and not probability. The two tests may thus give the same result depending on the meaning of "likelihood" in any one given case.

"Reasonable suspicion" has also been used as a test for bias. The best illustration is to be found in the decision in R v Sussex Justices, Ex Parte McCarthy. Hart, the Lord Chief Justice observed that justice must not only be done but must also manifestly and undoubtedly be seen to have been done. He added that nothing is to be done which might raise a suspicion that there has been interference with the proper course of justice. Bias must never be suspected to exist or to have tainted a decision.

With regard to these two tests the position is aptly summarised by Professor Wade in the following words:

"... the courts do not seem to have felt that the position was clear. Sometimes they have suggested that the two tests produce the same result; and sometimes that in the somewhat 'confusing welter of authority' it suffices to say that either test is satisfied on the facts. Apparently both tests are still operating concurrently"
A large number of circumstances have been subjected to these tests by the courts' endeavours to determine whether an interest is a disqualifying one. It will be sufficient just to mention some of them here, namely, personal convictions, subscribing to a group with particular beliefs, acting on tribunals of first and then appellate instances as a judge, having a pre-determined or prejudiced mind, or even family or business connections.

Considering the wide spectrum of possible interests it becomes very clear that not all such interests can be disqualifying. If that were so then the functioning of domestic tribunals especially would be grounded. As such the rule against bias, like its twin rule and alteram partem, has just as many possible aspects. Not all these requirements of natural justice can therefore be held to be applicable in all cases where natural justice must be observed. This then leaves the question what the essence of natural justice really is - the irreducible minima below which "natural justice" ceases in fact and in law to be natural justice.

MINIMUM CONTENT OF NATURAL JUSTICE:

THE BLIND SPOT.

The courts, in most cases where natural justice has been abused, have failed to appreciate that the concept of natural justice has a basic content. It would obviously be ludicrous to maintain that whenever natural justice is held applicable all its possible requirements must be adhered to. The effect of such a stance would be formalisation of procedural safeguards before tribunals to the standard of the same requirements before the law courts. Given the lack of legal training of the majority of those who man administrative or domestic tribunals one need not strain his brains...
to realise the quantum of hardships that would ensue. It is therefore mandatory to ascertain what basically constitutes natural justice.

The two Latin maxims commonly used to express the concept of natural justice are invaluable in this respect. Thus the "accused" must not only be given an opportunity to meet the case against him but that case must also be heard fairly, impartially and without bias. Before a man's rights are to be affected to his detriment, those charged with the duty of so dealing with his rights must serve him with a notice of their intention with a view to hearing what he has to say about the matter. Neither the notice nor his presentation of his case need be in writing; the format is not important for that matter. The reason for this requirement of notice and hearing is that although the case against a man may appear to be obvious, there may be in existence circumstances known only to the man that could influence the decision in his favour, and thus have his rights protected. The same would apply where extra liabilities are to be imposed upon him. If the "accused" fails to utilise the opportunity thus afforded him without any good reason, then in such a case there cannot be said to be a breach of natural justice.

As regards the rule against bias the minimum requirement appears to be that the deciding body must act in good faith and without prejudice. The only way to objectively determine whether a decision was reached in good faith is by considering whether there are any circumstances that may have militated against his so acting. If those circumstances do exist then the next question should be whether they actually operated on his mind to the prejudice of the affected party. The need to preserve the integrity of, and the people's confidence in, a body entrusted with determining their
rights and liabilities demands that justice must also be seen to be done. Caution must nevertheless be taken against over-emphasizing appearances at the expense of reality. It serves no purpose from the affected party’s perspective to merely make justice appear to have been done when in fact it was not done. Justice must first of all be done before it is made to be seen to have been done.

The skeleton of natural justice then amounts to this: that a citizen whose rights are to be affected by a tribunal must be given an opportunity of presenting his case and that his case must be considered fairly with an impartial and unbiased mind. Thus underlying the concept of natural justice is fairness to the citizen. This applies to any tribunal or body that sits in a deciding capacity, may it be public or domestic.
CHAPTER TWO

THE CONCEPT OF NATURAL JUSTICE AS APPLIED TO DOMESTIC TRIBUNALS

MEANING OF DOMESTIC TRIBUNALS

One of the most important facets of social development is the association and cooperation of human beings in voluntary groups. These voluntary social formations exist for varying purposes. As life becomes more highly organised and complex so do the associations so freely entered into by men and women increase in number, size, power and diversity. For the most part these societies exist with the object of furthering a purpose common to the members and for protection of the interests of those members and for protection of the interests of those members in the fulfilment of that purpose.

By his very nature man will never consciously or voluntarily strive to sustain institutions from which he derives no benefit. This is unecepttitionally true of voluntary associations. Their proliferation in modern societies is buttressed by the numerous advantages accruing therefrom to man. Suffice it to mention just a few of these advantages. First, when individuals become aware of a common interest they form an association for the purpose of mutually assisting one another over a period of time to promote that interest. They organise and distribute tasks amongst themselves which would otherwise be less easily attainable. The range of alternatives from which one may choose his social, intellectual, religious and political activities is thus increased by the ability to organise and participate in collective action. It is mainly for this reason that there are trade unions, women's organisations...
and students' unions for instance. In a University such as Nairobi University, for example, a student will belong to various associations each association catering for different interests but whose membership has a common interest. Thus one may belong to the Students Organisation of Nairobi University which caters for the general interests of all students, and at the same time be a member of an academic association such as the Kenya Law Students Society, catering for the interests, mainly academic, of Law Students exclusively. In addition the same student may be a member of one of the numerous "tribal" or District based students' associations such as the Busia University Students Association.

Secondly these associations serve as pressure groups. In this capacity they check on the excesses of the central government. Trade Union Organisations, if properly directed, provide the best example here. The Central Organisation of Trade Unions for instance has a very strong bargaining position against the central government. Voluntary associations of this kind cannot be compared to the statutory or public ones in that they enjoy a lot of flexibility in their approach to problems facing their members. They are freer to criticise the government and its policies since they are not part and parcel thereof. All in all voluntary or private organisations enjoy an amount of autonomy from the central political authority which public corporations cannot enjoy. Persistent deploration of unjust policies and laws or practices on the part of the government by these organisations may bring about a change in the government's approach to social, economic and political problems.

Thirdly, the individual is relieved of the tendency to feel isolated, a feeling which has become pervasive in modern society.
The individual's choice is not limited to either conforming with an unconcerned majority or being relegated into the realm of isolation. Numerous opportunities for creativity and responsibility are open to him as he can "indulge his idiosyncracies with others of similar inclination." It is normally within these private organisations that people discover leadership talents. A large number of politicians or parliamentarians in Kenya, both past and present, were at one time or other leaders in private organisations - Trade Unions, Football Administration or the now apparently (or is it officially) defunct tribal organisations.

Business executives who would otherwise be bored in the evenings form members' clubs where they meet to recreate and refresh themselves. It is astonishing how some of them feel more at ease in the company of each other when playing snooker at the club than they would with their families at home.

Finally, among professionals, these associations do a lot in perfection of skills. Professional guilds normally set standards, commonly called professional ethics, to which everyone of their members must conform. This is of obvious benefit not only to the profession but the society they serve at large. Doctors, Lawyers, Teachers or even Clerics, would like to maintain their dignity and the esteem they enjoy in society. This can only be attained if their services are of high quality. That is precisely what professional associations strive for.

That voluntary associations are vital in society goes without saying. In a country like Kenya, which professes adherence to the rule of law, it is not a surprise that the constitution recognises the right to freely associate as a fundamental human right which must be guaranteed and protected. But this is not to say that the right has no limitations under the Laws of Kenya.
The Societies Act is very elaborate on how these associations should operate. They must be registered and their constitutions or rules must set out their objectives clearly. Any breach of the Societies Act may lead to penal consequences some of which are very severe indeed.

Acts of Parliament will not normally provide for the internal discipline of voluntary associations. Of course there are growing cases where professional associations operate almost entirely under Acts of Parliament. But for the majority of them internal discipline is governed by the association's own rules. These rules often provide for very extensive judicial powers within the association.

Some of the more common of these powers include powers of exclusion from membership; expulsion from the association; withdrawal of benefits to which a member would ordinarily be entitled; withdrawal of support, assistance or protection which the association is otherwise in the habit of affording members; imposition of fines for infringement of union's rules; and subjecting of a member to social ostracism while he still retains all the other vestiges of membership such as tangible or formal privileges and liabilities. These powers cannot be exercised just arbitrarily and by anyone. Often there will be some organ charged with the task of hearing complaints against a member, of arriving at a decision concerning the guilt or otherwise of a member, and of determining what rule or rules apply or what penalty, if any, should be imposed. In many cases it is the executive council that will deal with such matters pertaining to internal discipline.

"All these organs of authority, armed with power, essentially judicial in its nature, to hear and determine an immense number of questions closely affecting their rights and duties of individual members, may be designated domestic tribunals, in contradistinction to the courts of justice and administrative tribunals."
The essential distinction between domestic tribunals on the one hand and administrative or statutory tribunals on the other is that by and large the former are, unlike the latter, not established by an Act of Parliament but by the associations rules. The difference therefore lies not in functions or nature but rather in origin. One writer thus observes that domestic tribunals are "bodies or committees in whom authority is vested in professional or trade or sporting organisations, in various social groups or clubs or in various guilds or trade unions." He proceeds to reiterate that their powers and functions are not regulated by statute.

At this point the present author wishes to caution that what has been purported to be a definition of domestic tribunals is only a description. There are domestic tribunals which still owe their origin to statute. A distinguished Administrative law writer in England, Garner, says of domestic tribunals:

"......(these are) less formal tribunals set up voluntarily (usually contractual) and rarely by statute to regulate the affairs of a particular group of persons." He thus recognises that some domestic tribunals are in fact set up by statute. Here in Kenya professional associations for Lawyers, Doctors, Dentists and Pharmacists are established by statute. Their domestic tribunals are also provided for in the same statutes. The governments aim is to ensure that members of these professional associations are treated fairly within their own organisations. High procedural standards are imposed for the protection of these professional men. The statute will normally set out the broad outline, or the minimum procedural requirements, while leaving the domestic tribunals to fill in all the necessary details as the situation may command in each case.
In this paper "domestic tribunals" will include those set up voluntarily by private associations as well as the tribunals for professional associations which owe their origin to Acts of Parliament.

**Bases of Courts' Intervention in the Affairs of Domestic Tribunals**

One of the most fundamental aspects of voluntary associations is the notion that they should be autonomous. By this is meant that their powers of self-government should not be interfered with except in those very exceptional circumstances. The state should give maximum freedom to voluntary associations and should intervene to process their internal conflicts only where it can clearly be demonstrated that private resolution may be ineffective. According to a note appearing in the Harvard Law Review the State should only intervene where private resolution of conflicts may "harm interests which traditionally have been thought important enough to warrant legal protection."\(^{13}\)

This notion is pervasive in all judicial decisions arising out of actions of domestic tribunals. It is in fact safe to state that as a rule the courts will not interfere with the functions or actions of domestic tribunals. The courts only intervene in "exceptional" cases. This notion ascended to its best form during the hey-day of the *laissez-faire* philosophy in the 19th and early 20th centuries.\(^{14}\) Despite this phenomenon no court was bold enough to pronounce that the autonomy of domestic tribunals was absolute. Bases upon which the courts could interfere with their actions were maintained. The justification for this position was that no bodies or tribunals can be permitted to assert rivalry with the courts of justice as by the law established; that is to say rivalry as far as...
jurisdiction is concerned. "The law courts must be supreme in all matters affecting law and order" says one commentator. 15 Nothing short of an Act of Parliament can exclude the jurisdiction of the courts over all matters affecting the rights and duties of citizens. But this jurisdiction is not absolute either. In respect of domestic tribunals it can only be exercised upon certain bases.

THE PROPERTY THEORY.

It was fashionable in the 19th century to maintain that unless a complainant had some property interest in a dispute between him and his association there was no basis upon which the courts could intervene to help him. Thus in Rigby V Connol Jessel, M.R. said that there was no jurisdiction to decide upon the rights of persons who associate together when the association possesses no property. "I have no doubt whatever," he said,

"that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property." 16

In another case, Baird V Wells 17 the court denied the plaintiff relief (an injunction) against wrongful expulsion on the ground that the injury suffered by him was solely to his personality. As no property interest was involved the court could not intervene since the personality interest was not cognizable to equity.

Clearly the courts were in error on this point. In proprietary clubs the members normally have no tangible property interests. They pay some nominal fee to participate in the activities.
of the club. Infact associations such as those found in Nairobi University ask only a small membership fee of about Shs. 10/- and an annual contribution of the same amount or even less. Can it be said that such a wee property interest can form the basis for the courts jurisdiction? According to the present author the answer is clearly in the negative. There must have been some other interests which the courts sought to protect but did so under the pretext of protecting a nominal property interest. Today what may be compared to the so called property interest of the 19th century is the "right to work" in trade union cases. But the right to work is not a property interest in strictu sensu. No one can rely on cases of the line of Rigby V Connolly and Baird V Wells as authorities for excluding the courts' jurisdiction when there has been a wrongful expulsion today.

II. THE CONTRACT THEORY

According to this theory the relationship between a member and his association or other members is based on contract. The terms of the contract are the rules or the constitution of the association. The court intervenes incase of breach of these rules at the instance of the aggrieved party. Thus in Abbott V Sullivan Lord Denning L.J. (as he then was) observed that the jurisdiction of a domestic tribunal must be based on contract. The best expression of this theory is to be found in Maclean V The Workers' Union. A member of the respondent trade union, Mr. Maclean, had been expelled under its rules. The procedure followed in the expulsion exercise had been perfectly correct within the Union's rules. It was held that even though those procedural rules were unfair nevertheless the court could not interfere therewith as they formed a contract between the member and the Union. Both parties had been free and willing parties to the contract. At this point the dictum of Maugham, J. (as he then was) deserves to be quoted in extenso:
"In such a case as the present, where the tribunal is the result of rules adopted by persons who have formed the association known as a trade union, it seems to me reasonably clear that rights of the plaintiffs against the defendants depend simply on contract, and the terms of the contract must be found in the rules .... If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the courts would interfere with such a rule on the grounds of public policy. Moreover it is well settled by the decisions of the court of Appeal that, if the parties to a contract agree that a person who may be deciding in his own case shall be a judge in a dispute between the parties the courts will not interfere."

Similar reasoning was taken to in a relatively more recent trade union case. 23 The district committee of a trade union rule, unanimously decided not to approve the election of one Breen, the appellant, by his fellow members as a shop-steward. He protested against the decision for which no reason had been given and asked for it to be reconsidered.

The committee met again and unanimously resolved to stand by their previous resolution instructing their permanent paid secretary to inform the appellant of the reasons for their refusal to endorse his election. In his letter to the appellant the secretary included among the reasons an episode which had occurred eight years previously in which the appellant had been accused of misappropriating union funds, but of which accusation the appellant had come out clean after a full inquiry had been conducted.

In a subsequent committee meeting the chairman pointed out that that particular reason was wrong. Nevertheless the committee elected to stand by it and did not admit its falsity until the appellant started the court proceedings against the union. His action based on the ground that the committee had acted maliciously and contrary to natural justice was dismissed. It was categorically stated that the committee's decision had been made in exercise of their unfettered discretion under the union rules. This decision was upheld by the court of appeal.

In a dissenting judgement however Lord Denning severely castigated the purported supremacy of the contract theory over natural justice and public policy. He said:
"Their (association's) rules are said to be a contract between the members and the union. So be it. If they are a contract, then it is an implied term that the discretion should be exercised fairly...... If the rules set up a domestic tribunal and give it a discretion it is to be implied that that body exercise its discretion fairly"."24

This dissenting judgement appears more reasonable. It will be argued in the next chapter25 that a right to a fair hearing is a constitutional right to which every Kenyan is entitled. Whatever the position in England the Kenya Courts must bear in mind the provisions of the constitution.

There are two decisions of the High Court of Kenya expressing the two opposing views on contract theory. In Assa Karanja Solomon V The Presbyterian Church Of East Africa And Others26 Hancox, J stressing the autonomy of private associations and the supremacy of their rules as contractual terms held that an excommunicated member of the church whose excommunication had been effected properly in accordance with the rules of the church could not be heard to complain that he had been denied a fair hearing contrary to the rules of natural justice. he said:

"the church must regulate and decide matters affecting the conduct of its members. When the plaintiff became a member of the church he submitted, in my view, to the church's jurisdiction in that respect"."27

In concluding his judgement he observed that "The P.C.E.A. is a church set up and formed by its own governance. To my mind the church is the appropriate body to determine disputes such as this. I do not think it is a matter for the ordinary courts of law".28 Perhaps the judge here had the special position of a church as a private organisation where high standards of discipline are required. In addition the rules of churches have been handed down for centuries and interpreted by the churches time and time again. That is why the church is in the best position to interpret her own constitution.
In Mugaa M'Mpwii And Others V G.N. Kafiuki and Others, the high court refused to uphold the contract theory. The defendants were the officials of the Kenya Rugby football union (herein after called the K.R.F.U.) and the plaintiffs the officials of the Mwamba Rugby football club (to be called MRFC). Sometimes before June 1980 the club members of the KRFU invited the London Metropolitan Rugby football club (to be called the London club) to come to Kenya to play the game of Rugby football in Kenya with the club members of the KRFU. MRFC had been appointed to organise the matches with the visiting London club, and had accepted to do so. On discovering that the London Club had sporting links with South Africa, declined to organise the matches and so informed the chairman of the KRFU.

In accordance with its rules the KRFU decided to fine the MRFC a sum of KShs. 1,000 and to exclude them from the Rugby Football season, 1981. Consequently the plaintiffs took up the matter in the High Court. Finding that the the defendants' action had been contrary to the spirit of the Kenya constitution and that their rules (the contractual terms) were contrary to the principles of natural justice Masime, J. held that the "purported expulsion, or suspension and fining of the MRFC by the Executive Committee of the KRFU was wrongful and consequently null and void and of no effect." 30

This latter decision is the more acceptable one as the reasoning is founded on the Kenya constitution. Infact it puts natural justice in its proper place; as overriding the contract theory.
In any case one wonders between who and who the contract is. Obviously it cannot be between a member and the association since in most cases the association may have no legal personality. If it be said that it is a contract between a member and everyone of the other members the situation becomes illusionary. No one ever envisages entering such a multiplicity of contracts when he joins a trade union which may have membership running to tens of thousands. Finally on what ground may a citizen who is refused in a trade union found his action if it is necessary that he joins the Union before he works; or one of the professional organisations? Obviously such an applicant has entered into no contract with the professional association and as such he cannot found his action against wrongful exclusion on a non-existent or even an anticipatory contract. The contract theory is therefore quite unsatisfactory.

III. THE TORT THEORY

"The members relation to the association is the true subject matter of protection in most cases where relief is given against wrongful expulsion," says an article in the Harvard Law Review. The wrong against a member is a tort consisting in the destruction of the relation rather than in a deprivation of the remote and conjectural right to some kind of property. It is significant that no court has even expressly relied on this head, a tort, as a ground for intervention in the affairs of domestic tribunals. It is the legal scholars who have, after examining several authorities, come up with this theory. They claim that although courts may base their jurisdiction on either property or contract, what really operates on the mind of the courts is the need to protect the member's personality which may be, or may have been, blazed by the action of a domestic tribunal.
Thus in Fisher v. Keane the plaintiff, who had been a member of the Army and Navy club, was purportedly expelled from membership by a majority resolution for gross misconduct. It was stated against him that he had had an altercation with a guest of a fellow member while at a game in the club house. It was also said against him that he was intoxicated. From his subsequent letters to the committee and the offended party it was clear that he claimed that he had been expelled in an unfair manner. In his judgement JESSELL, M.R. commented that "the character and prospects of any member of this club may be irremediably blasted" by the decision of any members of the committee who do not act according to proper procedure, or according to sub-standard rules of the club.

In Baird v. Wells the club had no property whatever, and there was no possibility of resting relief to the plaintiff, who had been wrongfully expelled, upon any technical basis of injury to property rights. Accordingly the court denied an injunction on the ground that the injury was solely to personality and hence not cognizable to equity. However the court ingeniously undertook to secure the plaintiff's personality interest; despite having stated that they had no jurisdiction as there was no property interest at stake the court went ahead to say that the expulsion was improper and unfair, and by that cleared his name clean!

In Davis v. Crew-Pole the relief sought was damages for wrongful expulsion. The court stated that if, inter alia, a tort could be established then damages for a wrongful expulsion could be awarded.

According to Roscoe Pound the courts nominally interfere on the basis of protecting personality interests. The individual must be
protected from inhuman and undignifying treatment by any body. In conclusion he observes that "expulsion from a club may, indeed, be the highest form of injury without involving any interests of su substance in the least." 36

The tort theory comes very close to the truth. The only problem is that there seems to be problems similar to the contract theory. Who is the member to sue? It can only be those who participated in the decision to expel him. But assuming he establishes a tort then a problem arises as to who is to meet the damages awarded to the member. It may be the committee members personally or on behalf of the association. Either way unfairness may result. Perhaps a distinction should be made between substantive grounds of intervention such as tort, contract or property and the procedural ground upon natural justice. The substantive grounds must not be used to exclude intervention for failure of natural justice. Supervisory jurisdiction should be founded not on substantive but procedural grounds. The most important ground of intervention by the courts exercising supervisory jurisdiction should be for failure of natural justice.

IV. NATURAL JUSTICE

Generally speaking the principles of natural justice as examined in chapter one apply to domestic tribunals justi in the same manner mutatis mutandis. The courts will require that in the exercise of their judicial functions domestic tribunals must adhere to the principles of natural justice. What is meant by natural justice in respect of domestic tribunals was clearly explained in Byrne V Kinematograph Renters Society Ltd. 37

Following investigation into allegations against the plaintiff that he was defrauding the Kinematograph Renters Society, a
recommendation was made by a joint investigation committee that the plaintiff, who was in control of the two cinemas, be disqualified from receiving any supplies of films from members of the defendant society pending a full inquiry at his expense by accountants nominated by the society.

He brought an action for a declaration that the recommendation of the joint investigation committee was null and void on the ground that it was a result of the proceedings conducted contrary to the tenets of natural justice. As a matter of fact the court found that there was nothing contrary to natural justice in the way the investigation was carried out. Having cited Tucker, L.J.'s dictum to the effect that proceedings before a domestic tribunal need not be similar to those of a court of law in the earlier case of Russell V. Duke of Norfolk,38 Harman, J. Said:

"What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith."39

This statement lays down the minimum requirements of natural justice whenever the term is used in the province of domestic tribunals Acting in good faith here means properly addressing one's mind to all relevant issues and ignoring the irrelevant ones. To use the words of one scholar:

"The minds of adjudicators, no matters how little acquainted they may be with legal ideas or the spirit of justice, are supposed to be unlike those of party politicians: that is, they must not be made up before the debate, but must remain liable to be shaken by cogent reasoning or persuasive oratory."40

In fact these words sum up the rationale for the concept of natural justice. An impartial mind open to arguments from all corners is the most likely to come up with the most sound pronouncement on any given set of contended facts and ideas. This is especially important where one has to determine matters affecting the
citizens' rights and liabilities.

However it would be grossly erroneous to assume that the application of natural justice to domestic tribunals is a smooth sailing exercise. There are various obstacles which the courts have to tackle. In fact in quite a few cases the courts have totally failed to surmount these hurdles. In others they have done exceptionally well.

II. SOME PROBLEMATIC ASPECTS OF THE CONCEPT OF NATURAL JUSTICE IN RELATION TO ITS APPLICATION TO DOMESTIC TRIBUNALS:

Central to the problems which are hereunder to be dealt with is the issue of policy conflict. Whereas the courts value the autonomy of domestic tribunals they cannot at the same time be seen or heard to abdicate their function in society as the final arbiters in matters of conflicting interests in society. Where statute empowers a particular body to act as an adjudicator on matters affecting people's rights the courts will retain a supervisory role in that function. The same applies where parties agree to set up a body with similar adjudicatory powers. The courts' role is to ensure that the adjudication process is carried out in a fair manner. The question that is being raised in each of these problems is how far the courts should exercise their supervision in view of the notion of autonomy so highly cherished within private associations.

I. PROBLEM OF DEFINING NATURAL JUSTICE

The first problem, as is to be expected, is definitional. What exactly is meant by natural justice? Failure to determine this question leads to the progressive erosion of the concept of natural justice. Two judgements are very instructive at this juncture. The first one is *Maclean v The Workers' Union*.41
Maugham, J. took time to explain that the term natural justice is only used in a popular sense and that there is no justice natural among men. The justice that exists in the civilised world did not exist among the most savages. It is quite different from the crude and ready justice that existed in England in the 13th century when there were trials by compurgation or ordeal or by water. He further stressed that justice is in fact a very elaborate conception which has evolved over many centuries of civilisation; and even today it will differ from one country to another even in its essential aspects. In conclusion he said:

"The phrase 'principles of natural justice' can only mean in this connection the principles of fair play so deeply rooted in the minds of modern (men) that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation."

In Russell v Duke of Norfolk, a race-horse trainer was disqualified and warned off the turf for gross negligence. Consequently his licence to train turf horses was withdrawn under the rules of the Jockey Club. It was a condition of his licence that he might be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and that withdrawal or suspension could be published in the 'Racing Calender', the official magazine for horse-racing news. The trainer, Mr. Russell, contended that the procedure which had been adopted by the stewards in his case was contrary to natural justice. In the course of his judgement the Lord Justice Tucker spoke his mind on what he understood by natural justice. He said:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. 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 under consideration and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used."
In both these cases the learned judges were in essence expressing the difficulty of ascertaining the precise meaning of natural justice in any given situation. In the latter case however both Tucker and Denning, L.JJ. (as he then was) recognised the essential elements of the 'audi' principle as indispensable to the concept of natural justice. Lord Denning alone mentioned 'malice' which is an element of the rule against bias.

Be as it may the issue was not whether natural justice was applicable but what entails that application. In both cases it was held that since the tribunals had adhered to the minimum requirements of natural justice the complainants could not complain of failure of natural justice or procedural fairness. The aim is not to lay down elaborate fixed rules which domestic tribunals must slavishly adhere to whenever they are called upon to exercise their functions. Rather it is to give a broad framework within which to work. In fact Lord Reid once observed that he would be "sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules." However there is a danger of diluting the concept of natural justice by exploiting its "general character" to the extent of failing to appreciate its minimum content. To recognise that the judicial approach to the determination of what in specific terms a fair hearing entails in a particular context is primarily a pragmatic one is not to concede that the issue should be entirely at large and that the demands of natural justice are inherently incapable of prediction. To think otherwise would be disastrous and, to use the words of one writer,

"the doctrine of natural justice ceases on this view to be a small clear light which shines steadily in darkness. It becomes a series of guttering candles which flicker uncertainly here and thereover the confused welter of domestic tribunals."
It is the view of the present writer that if the courts only addressed themselves seriously to the definitional problem of natural justice, keeping in mind the "irreducible minima," then half the problems of natural justice would be got over. The courts however do not appear to be keen enough on this issue. As a result the problem continues to loom large.

1. THE CONTRACT THEORY.

One line of authorities hold that natural justice can only be held to apply to domestic tribunals if and only if the rules or the relevant statute expressly or by necessary implication so say. This will conveniently be called the supremacy of contract school. Extremist adherents to this school even go further to maintain that by its rules the domestic tribunal may expressly and absolutely exclude the application of natural justice or any form of procedural fairness for that matter. On the other hand there are those who maintain that there must be implied rules of natural justice in all rules of procedure governing domestic tribunals. At the extreme end of this school it is contended that any rules of a private association which are contrary to natural justice or public policy must be held to be null and void.

Once again the real issue is the extent of the private associations' autonomy. Always the courts have in mind their duty as final arbiters in disputes among members of society. At the same time they would like to respect and infact defend private bargains. As such the courts will ordinarily permit people to make bargains as to how certain issues will be determined and the courts will support and assist such bargains by ensuring that they are honoured but also by ensuring that all is done fairly and regularly. That is the crux of the matter: the need to strike a balance between two equally important policies that appear to be
polarised. Of course there are arguments either way.

In the first place it may be contended that greater control over private organisations may be made necessary by the considerable power which such organisations, or rather their governing councils, may wield, and the weakening of traditional methods of control by members. Labour unions and trade associations, especially under the "closed shop" policy, control access to jobs and other economic opportunities. Social organisations and schools can possess in their disciplinary powers awesome authority over the economic and social lives of their members. The general hypothesis is that as private associations grow larger and more bureaucratized the magnitude of the injury they can inflict grows larger and their internal structure also tends to change. Leaders possessed of bureaucratic acumen become more likely to succeed those who are more committed to ideals and original purposes of the association though lacking in administrative skill. Oligarchies tend to develop. Sheer numbers make it more difficult for members to control their leaders as the individual disappears into the multitude and therewith disappear personality and sense of responsibility.

It is this phenomenon that has led the judiciary at times to pronounce that domestic tribunals are not quite different from administrative ones in their functions and tendencies. The grounds of courts' intervention should therefore not be differentiated merely on grounds of pedigree. A contract which stipulates further- ence of oligarchies cannot be enforced on grounds of public policy. Infact it has been observed by the eminent Lord Denning that the so called contract is in fact a code of legislation similar to an Act of Parliament. Such rules can only be termed "contract" in the framework of Rousseau's "social contract." This theory is
quite misleading as it assumes that at one stage of socio-political development all members of a given political society come together at a common "baraza" and agree on how they should be governed. This has never happened anywhere. Even in the small closely-knit societies or associations it is very rare to that all members in fact participate actively or are even given the opportunity to participate in the drafting of their constitution. That is why the courts must step in to protect the individual who may find himself subjected to harsh regulations.

Conversely it is contended that judicial supervision of internal affairs of associations might be so burdensome as to hamper a group's functioning. The argument runs that great injustice may be done by attempts to judicialise the functions of domestic tribunals which are, in most cases, manned by people who have no legal training. Infact it could even be argued constitutionally that to reinstate an expelled member who is not wanted by the association is an infringement on the freedom of association enshrined in the constitution. But this argument can run either way since by expelling him the association is also violating that very right of the expelled member. But since it is a fundamental right, it is here submitted, it should only be curtailed by use of reasonable, just and fair means.

The other argument in favour of supremacy of contract is that it is only the association which understands best its aims and goals. Since the rules were made in reference to those aims and goals it is only their domestic tribunals which are in the best position to interpret those rules. As long as those goals are legitimate and not contrary to public policy then the courts have no legitimate reason for interfering with the furthering of the
purposes of the association. This is especially so in ecclesiastical societies which know best what their faiths are. The courts should not supervise the mode of excommunicating a member who appears to have lost his sense of direction in respect to the particular faith." 58

Further it is contended that the members are more likely to accept standards they have set for themselves rather than those imposed from the outside. Such an argument assumes that all members participated in the formulation of the rules. How can one explain why members resort to courts if this argument is allowed to stand? Certainly the common law system which forms the Kenyan legal system is such that a court never takes the initiative in dispute settling. It has to be approached by an aggrieved party. The fact that the court has been called upon to intervene means that either the party complaining has something against the way his case was conducted by the domestic tribunal, that is to say, in disregard of their rules, or that even if those rules were followed they ought not to have been followed on the grounds that they are unfair. That surely it is the courts' prerogative to decide.

Finally there is the point of convenience. Private dispute settlement must be encouraged to reduce litigation in the already overburdened courts. The courts should therefore desist as much as possible from intervening in private dispute settlement. Again the justification behind any kind of tribunals is that they are quick, convenient, expedient and cheap. In specialised matters such as those of private associations it is the domestic tribunals which are best qualified to deal therewith.

In his analysis the present writer is of the opinion, and strongly so, that although all these arguments are valid and convincing it must not be forgotten that every individual is constitutionally entitled to fair treatment. 59 The courts being
the custodian of the constitution, it would be most unfortunate on constitutional grounds to exclude them from having a say in how an individual may enjoy his rights. If that enjoyment is curtailed or hampered in any way the courts must intervene. Rules militating against the spirit of the constitution must never be allowed to stand.

II. WHEN IS NATURAL JUSTICE TO APPLY

The contention is that natural justice cannot be applied to all functions of domestic tribunals. There are certain functions where it is inappropriate. As a result there have been attempts to demarcate a fixed line, as it were, between those functions which call for the application of natural justice and those which do not.

The most illustrative case of this attempt is McInnes v Onslow Fane And Another. The plaintiff had had a chequered career in professional boxing. At various times he held trainer's, promoter's and master of ceremonies' licences. In 1973 the British Boxing Board of control withdrew all his licences because of his conduct as the master of ceremonies at a boxing tournament in one English city. Between 1972 and 1975 he made five futile applications for a boxers' managers' licence. In 1976 he applied to the Board, through an area council, for a manager's licence and asked for an oral hearing and prior notification of anything that may prevent the council from making a favourable recommendation to the board.

The board replied that they had considered the application and had decided not to grant it. The plaintiff thereupon sought a declaration that the board had acted in breach of natural justice and, or, unfairly in rejecting his request to be informed of any circumstances that could operate against his application, or to grant him a hearing.
It was held that the plaintiff's application for a manager's licence affected his liberty to work and as such the court was entitled to intervene if necessary to enforce the observance of the requirements of natural justice or fairness by the board.

From this it emerges that the preserve of the right or liberty to work entitles a court to intervene for the plaintiff. This however is not a conclusive justification for intervention. What the court was saying at this stage was that it had jurisdiction; that already there was a *prima facie* case for application of natural justice. But this did not mean that natural justice automatically would be applied. Other circumstances had to be considered so in determining whether natural justice should apply one must first of all establish an interest of substance in the matter such as the liberty to work. From there he must consider certain other circumstances.

In the instant case the court held that in view of the fact that the plaintiff had already made five unsuccessful applications for a manager's licence and had already had all his other licences withdrawn, he could only hope, and was not entitled to expect, to be granted the licence. In those circumstances the board's only duty was to decide the application fairly and in good faith. He was not entitled to a hearing.

In his judgement Megarry, V-C. stated that there were three types of cases to be distinguished, namely, forfeiture cases, application cases and expectation cases. In forfeiture cases the decision takes away some existing right or position. This is where for instance a member is expelled, excluded, suspended or his licence revoked. In such cases, said His Lordship the Vice-Chancellor,
"there is a threat to take away something for some reason, and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges... are mainly apt

He observed that Lord Hodson had said these were the three features of natural justice that stood out in Ridge v Baldwin.

In application cases the situation is different. He said that the distinction is well recognised since in general the courts will demand that natural justice be observed before one is expelled from a club, but not when he applies for admission. In such cases he has no legitimate expectation of anything and all that is required of a domestic tribunal is to act in good faith, and not necessarily in accordance with the precepts of natural justice.

Sandwiched between these two types of cases lies the expectation cases. These are more akin to application cases. At one end they veer off into application cases while at the other they are infact closely linked to revocation cases. Thus if a man having satisfied or the necessary qualifications to become a doctor applies to the body regulating the profession of physicians for membership he expects to be admitted unless there is some good reason why he should not. In such a case if the body is to decide to exclude him on any reason they must afford him a reasonable opportunity to disabuse their impressions. By refusing him membership they may be depriving him of the opportunity to exercise his skills for the benefit of society. Society may not enjoy his services consequently.

On the other hand a man who applies to join a football club in Kenya where football is not professional is not entitled to any hearing. If he is refused membership in one club he can try another. Unlike in professional associations there is no monopoly. One can join any of the many clubs, AFC Leopards, Scarlet, Gor Mahia,
for instance, to play soccer. To become an advocate, on the other hand, one has to secure admittance into the Bar by having his name on the Roll of Advocates or else a qualified man may otherwise not practice law at all.

One will appreciate such a classification as being useful only in so far as it gives some guidelines. It does not however provide absolute criteria when and when not natural justice will be applicable. The expectation cases are evidence of this assertion.

Two other distinctions should be mentioned. In Lewis V Heffer and Others it was held that in cases of suspension it was only where a suspension is to be effected by way of punishment that natural justice demanded that the person concerned be afforded an opportunity of being heard before such suspension is effected.

Where the suspension was made as a holding operation pending enquiries, the rules of natural justice did not apply, because the suspension was only done as a matter of good administration. Again this is a good general principle but it cannot be said to be absolute. It has been observed that some suspensions may just be as devastating to the personality and economic interests of the individual as expulsion.

Finally it was contended elsewhere that the courts ought not to intervene where the functions of a domestic tribunal are purely disciplinary. Such intervention could hamper the enforcement of internal discipline of private associations. But the present author would have thought that this is exactly where the courts must be very keen. Disciplinary powers especially in academic institutions are often awesome.
HIERARCHY OF TRIBUNALS

Often there will be a tribunal with jurisdiction of first instance and another with appellate jurisdiction. In such a case it has been stated, and correctly so according to this writer, that where an appellate tribunal affords the appellant a fair hearing in accordance with natural justice, that gesture in itself vitiates the failure of the original tribunal to observe the rules of natural justice. In most cases what happens is that at the appellate level the case is heard de novo, both on its merits and questions of law. To hold otherwise would render appellate domestic tribunals useless.

THE END JUSTIFIES THE MEANS

It was urged that one should not complain of failure of natural justice unless he has been harmed by that failure. This contention was vehemently rejected in Annamunthodo v Oilfield Workers' Trade Union. To allow such a contention is tantamount to sanctioning arbitrariness in this very crucial field of human activity. The means or machinery for achieving an end doubtlessly furthers society's faith in that machinery as well as the end. This faith must be sustained and maintained if judicial functions of domestic tribunals are to be respected.

THE RULE AGAINST BIAS

Virtually all members of a private organisation have an interest of some kind or other in the matters before a domestic tribunal. In domestic tribunals of professional associations which are established by statute, the law is clear. The courts cannot overrule statutory provisions in accordance with the doctrines of separation of powers and supremacy of parliament. How about
"contractual" domestic tribunals? At times the courts have gone so far as to say that even personal differences arising from a long time dispute are not sufficient to disqualify one from sitting as a member of the tribunal which "tries" his foe. This is just an expression of the difficulty. Naturally the ordinary tests of bias may not be very helpful here. Perhaps the standard used should be what members of the society, or club, or association would think. If real bias is established then the biased party must not be permitted to sit on the tribunal. The problem is more acute in small closely knit associations where there are personal relationships amongst all members. In Kenya as few as ten people can form an association and register it under the Societies Act. In such an association member is likely to be involved in all matters of the association - with his fellow members. If a dispute then does arise who can be said to be a disinterested party? In large associations expulsions sometimes result from frictions with the leadership who also form the domestic tribunals. Is the entire tribunal disqualified from entertaining the dispute?

In cases of this nature a manifestly strong case of bias must be made out. The circumstances of the dispute must be closely observed. Perhaps a member whose conduct is to be inquired into should be given the additional opportunity of objecting to a particular person's or persons' sitting on the tribunal. If he does not object then he should not be heard to complain later that the tribunal was biased. This however is not a justification for domestic tribunals to be partial. They must act fairly, in good faith and without malice. In order to ensure this it should be mandatory that they give reasons for their decisions. Where there is a bias the reasons given will obviously be bad.
Throughout this chapter it has been demonstrated that there is a tug of war between maintaining the private associations' autonomy and the need to control their activities. In this struggle natural justice has yet to assume its rightful position as a very important concept in the functioning of domestic tribunals. The proponents of autonomy use that notion to scale down the vitality of natural justice. All the problems dealt with above are in fact dealing with the issue of the extent to which natural justice can be held out on its own as a ground for judicial review of the action of domestic tribunals. Most of the arguments submitted in support of the notion of autonomy do in fact have a corrosive effect on the concept of natural justice substantially. While it would be undesired to blindly and indiscriminately apply the concept of natural justice to domestic tribunals, it would just be as unfair to dilute the concept to the extent that it loses its essential meaning.

That natural justice has a crucial role to play in the sphere of domestic tribunals is therefore not in question. Problems only arise when that general notion of its importance is to be given practical effect. These hurdles have yet to be surmounted. In Kenya the direction which the law is taking in its development in this area is not easy to discern due to the dearth of authorities. One can assume, however, from the few available cases, that the same problems encountered in this area in England will have to be tackled in Kenya as well.

The present author's view is that whatever direction the development takes, the law must strive to protect the interests of the members of private associations both as individuals and groups. It would be tragic if the end of the struggle referred to in this chapter ended in total annihilation
of natural justice. Natural justice must be maintained despite the many afflictions it is being subjected to from time to time.
CHAPTER THREE

THE ETERNAL PROBLEM: A CRITIQUE AND A SUGGESTED APPROACH

THE ETERNAL PROBLEM

A citizen who feels that an administrative or a domestic tribunal has failed to observe the rules of natural justice in dealing with his case may lodge a complaint with the High Court in that respect. This passes two issues for the High Court to deal with. First it has to decide whether in the particular case the rules of natural justice had any relevance, that is to say, whether the body in question was bound to observe the rules of natural justice when dealing with the plaintiff's case. If the court decided that the answer to this question is negative then the plaintiff loses his petition automatically for failure to disclose a cause of action. However if the answer turns out to be positive the court has to move to the second question; to try to ascertain what constitutes natural justice, or what the requirements of natural justice, are in that particular case.

All academic as well as judicial discussions of the concept of natural justice virtually revolve around these two issues. In their endeavours to determine these issues the courts have come up with certain criteria. Unfortunately these criteria have proved to operate as a double-edged sword. At their inception they enhance the rule of law by promoting the area in which natural justice applies. However with the passage of time they begin to back-cut deep into the flesh and muscle of natural justice. In the last chapter there was occasion to review certain principles which the courts take into consideration in determining these questions in relation to domestic tribunals. In this chapter
these questions are going to be considered further with a view to showing that failure to deal with them properly leads to emasculation of the concept of natural justice.

CLASSIFICATION OF FUNCTIONS

The first criterion devised by the courts to determine the first question was to ask whether the powers or functions, or even the character of the decision making body or tribunal are judicial or administrative. If the court formed the opinion that the body was acting judicially then it would hold that such a body was bound by the principles of natural justice. Otherwise if the tribunal's powers were held to be administrative it would not be bound to observe natural justice. Initially there were no acute problems in deciding this matter since most of the administrative functions were carried out by the justices of the peace whose character was clearly judicial. The acuteness of the problem was however felt when numerous administrative authorities came into being in England in the 19th and 20th centuries. According to the courts procedural fairness had to be observed by these new mushrooming administrative authorities no less than had the justices of the peace. What mattered was the functions or powers and not the character of these authorities.

This kind of approach meant that the court had to decide what constituted a judicial character function or power as opposed to an administrative one. In dealing with this question the courts were initially very much in favour of enlarging the territory in which natural justice would apply. The meaning of "judicial" was expanded to cover almost the entire "administrative" sphere. In the mid-nineteenth century the law was enunciated with
great clarity in the famous case of Cooper v. Wandsworth Board
Of Works.² By an Act of Parliament in 1855 in Britain it was
provided that before anyone put up a building in London he had to
give a seven days' notice to the local board of works. Failure
to give such notice would entitle the local board to have the
building demolished. Cooper began to erect a house in the
Wandsworth locality of London without giving notice as required
by statute.

One late evening when the building had reached its second
storey the Wandsworth local board of works caused it to be
demolished. The board's action was precisely within the provisions
of the relevant Act. Their action, as any one can see was purely
administrative in the ordinary and natural sense of the term.
Nevertheless the builder successfully brought an action for
damages for the injury to his building on the ground that the
board had no power to act as they did without first affording him
a hearing.

The local board was characteristically an administrative
body the court saw it fit to classify its powers as judicial.
The judges reasoned that since those powers were to inflict
heavy loss upon the citizen in terms of property rights they could
not be otherwise but judicial. Again the board were said to act
judicially since they had to determine the offence, and they had
to apportion the punishment as well as the remedy.

The mechanisms established in this case were later applied
to numerous cases. In Hall v. Manchester Corporation³ the house
was condemned as unfit for human habitation. It was held that
in as much as the order of the corporation acting under an
Act of Parliament entailed a penalty on the citizen the corporation
would be held to have been required to act judicially and therefore
subject to the rules of natural justice. Thus as long as an act entailed a penalty or adversely affected a person's rights, more so property rights, it was designated "judicial".

This approach to the question whether natural justice applies in any particular case developed its own defects to the detriment of the application of the concept of natural justice. The position, to use the words of Professor Wade, became thus:

"When in time the courts came to forget the paradoxical sense which they had invented for 'judicial' they found themselves in difficulty. There seemed to be nothing but a circular argument: natural justice must be observed when the function is judicial; and the function is judicial when natural justice ought to be observed".

As the position then stood in England the term "administrative" powers lost all meaning. Realising the quagmire in which they were the English courts coined the term "quasi-judicial" as an epithet for characteristically administrative powers which were required to be exercised judicially, and hence in conformity with the principles of natural justice. The term "quasi-judicial" began to be used precisely in the same situations where "judicial" had been used. The classical epitomisation of the general principle of law is to be found in Lord Loreburn's judgement in Board of Education v. Rice. A local education authority was exercising discrimination in maintaining different salary scales for teachers in church schools and those of its own schools. A body of school managers complained that the local authority were failing to keep schools efficient as required by the Education Act of England. A public inquiry held before a barrister made a report in the managers' favour but the board decided in favour of the local authority. Speaking about the board's duties in general the Lord chancellor, Lord Loreburn said that as long as the matter which comes for determination involves determination
of matters of law and fact the board must fairly listen to both sides and act in good faith. That, he added, is a duty lying upon every person who decides anything.

The classificatory approach did not fail to find its way to East Africa. This is very much evidenced in the language of the courts dealing with cases arising out of licensing disputes. But only to this extent did the East African Courts ape the English law. The next development in English law apparently did not touch East Africa. That is the doctrine of the "lis"

In England ministers were given general powers as appellate bodies. Where an authority had been set up to carry out certain functions, if in the course of that exercise their powers exacted a penalty upon a citizen then he could appeal to minister. This method had its own problems. A minister was supposed to perform administrative or ministerial duties but in a judicial way. Administrative convenience began to take the upper hand over natural justice. The struggle was now between procedural fairness or natural justice and administrative convenience. As natural justice began to lose battle after battle the doctrine of the lis was devised as its weapon of defence.

The courts used this new doctrine to infuse natural justice into statutory procedure. The artificial nature of the lis was not to last long before it was discovered. It had been assumed that the dispute or lis existed between the local authority and the objecting citizen. The minister was to be the impartial arbiter in this tripartite set up. But it was also clear that more than not local authorities sought advice from the minister before acting. In some cases indeed the minister would advise on his own initiative. The minister was supposed
to act hand in glove with the local authority but only upto a certain stage: When an objection was raised. As soon as it was lodged he had to become an independent arbiter. The obvious difficulties were that the work of the minister and the local authority would be paralysed as long as the objection remained unsettled or unprocessed. On this rather unhealthy situation the Master of the Rolls Lord Greene said, "it is manifest that, in the operation of hybrid functions of this kind, no perfectly logical result is to be expected." 9

The notion of the lis therefore provided no key to the problem of distinguishing judicial from administrative acts. It merely related to time: When an objection was raised. The real problem which lay in a substantive distinction was not solved. At any rate it would have been most erroneous even to assume that the powers or functions were only judicial if a lis was found to exist. In most licence application cases no one can say that there is a lis even in the remotest sense of the term. A man applying to join the Railway Club, or the United Kenya Club, or the Law Society of Kenya, or the Dock Workers' Union cannot be said to have a dispute in the sense of a lis. The notion operates in a triangular manner - two disputants and an arbiter. Surely natural justice cannot be confined to such a situation only.

In East Africa even before Ridge v. Baldwin 10 the lis doctrine was eschewed in favour of the wider notion of the effect of a decision upon the individual's interest. Thus in Ndegwa v. Nairobi Liquor Licensing Court 11 it was held that natural justice certainly applied to the cancellation of a liquor licence, since this was a decision confiscating a substantial interest of the appellants in their own property. Said Rudd, Ag. C.J.J:

"If therefore the licensing body makes a decision the consequence and direct effect of which is to deprive the owner of the shop of the privilege of carrying out a business of a certain kind, then the decision involves a diminution of the value of the subjects' property. That should be done, if at all, properly in due form of law"12

It is clear from this case that the focus was not so much on the classification or characterisation of functions and powers as judicial or administrative but rather on the effects the act of a functionary would have on the citizen.
If the property rights, or any substantial rights for that matter, would be adversely affected then natural justice would be called into play. In a case from Tanzania decided ten years before *Ridge v Baldwin*[^13], Edmonds, Ag.J. stated:

"The function of the committee was administrative and not judicial although in discharging its duty it was bound to apply a judicial mind, that is to say a mind to determine what is fair and just in respect of matters under consideration"[^14]

It is this author's view that the East African approach is the more acceptable one as it does not seek to hide in dubious and elusive terminology. It is the erratic and artificial nature of the classification as done in England that has led to so many of the afflictions which the concept of natural justice has been subjected to. It would have been more realistic in England to pronounce that natural justice as a concept is applicable to all functions irrespective of whether they are judicial, administrative or quasi-judicial. But then what would be the justification for such a bold statement whose effects would be very far reaching? This would certainly amount to over-judicialisation of administrative work, domestic or public. This difficulty was envisaged and that is why the courts stuck to the traditional classificatory approach inspite of itself.

**PARLIAMENTARY SUPERIOUCY.**

It was urged that since a minister is directly responsible to parliament he need not observe the rules of natural justice.[^15] The rationale behind this kind of argument is apparent. There is no need to duplicate or unce unnecessarily multiply. Systems of control over ministerial or administrative functions. Judicial control would be worthwhile if parliamentary control were not there. Again this kind of approach minimises the amount of litigation and makes the work of both the judiciary and the ministers easier.

Whereas this reasoning appears sound it is the contentions in this paper that it is also dangerous. Dangerous because of its adverse effects on natural justice. Taking the Kenyan circumstances one notes that parliamentary
control is far from satisfactory. Ministers are not bound to answer any questions. If they choose to answer, which they almost always do, there are no effective sanctions in case their answers are unsatisfactory except where the president decides to exercise his constitutional powers to relieve them of their duties. This is not often done. There is also every possibility that the doctrine of ministerial responsibility to parliament may be over-stretched. For instance it could easily be decided that all administrative authorities or tribunals under any one ministry be defended by the minister responsible in parliament. The result would be that these bodies would carry out their functions in disregard of all rules of procedural fairness knowing that they would be defended in parliament. What the position of domestic tribunals would be remains anybody's guess.

It is contended here that this device is a potentially destructive one against the concept of natural justice. In any case it proved very unsuccessful in its hey-day that it seems to have disappeared.

In the same vein legislation was paradoxically used to dwarf the application of natural justice. By using the doctrine of parliamentary supremacy it was said in England that where the legislature by its omission had intended to exclude the rules of natural justice and accordingly they had to be excluded. This may be true and fair in relation to the rule against bias. There are cases when out of necessity parliament has to authorise an interested party as a judge in his own cause. This is true both in East Africa and in England. Such statutory interpretation would be very misleading in respect of the "audi" principle. It overlooks the rule that the common law will supply the omission of the legislature. As natural justice is part and parcel of the common law it is only logical, and it does not offend against good reason, that unless the reading of natural justice into statute would be in direct conflict with the express provisions of that statute, there is no harm in so doing. The same argument can be advanced in respect of Kenya by virtue of the reception clause in the Judicature Act, 1967.
The Kenyan position is further strengthened by the fact of its written constitution. Section 77 (9) of the Kenya Constitution provides that:

"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation .... shall be independent and impartial, and when proceedings for such a determination are instituted by any person before such a court or other adjudicating authority the case shall be given a fair hearing within a reasonable time."

It is unfortunate that this section has never been relied upon in administrative law, at least to the knowledge of this writer. This provision anticipates that the legislature and the common law will make the necessary variations to suit the varying circumstances. The rest of Section 77 of the constitution provides what constitutes a fair hearing before a court of law. The "other adjudicating authorities" are required to conduct their affairs in accordance with fair procedures or natural justice.

By virtue of section 3 of the constitution, which gives it its supremacy over any other law, Section 77(9) cannot be violated by any law which sets out procedure for administrative or domestic tribunals. Any statute which purports to make procedures contrary thereto will be hled null and void to the extent of its inconsistency therewith. The same argument may be advanced in respect of domestic tribunals. Voluntary associations are formed under the Societies Act. This Act is silent upon procedural safeguards before domestic tribunals. This cannot mean that domestic tribunals can adopt any rules of procedure even if such rules are contrary to natural justice. Such an interpretation of the Societies Act would be per incuriam and ultra vires the constitution.

The interpretation which was adopted in England in the 1950s was thus clearly in ignorance of the common law. In Kenya it cannot stand. It is the submission here that the interpretation was simply another device aimed at annihilating the concept of natural justice. It was used to exclude the application of anatural justice in cases where it clearly should have been applied.
NATURAL JUSTICE

Natural justice, it has been said, only applies when the person demanding that it be observed has some right and not merely a privilege. In jurisprudence rights and privileges are concepts sui genus and a right seems to be much stronger than a privilege. The difference between the two is therefore a matter of degree. As such there are bound to be those twilight cases when one may not clearly distinguish the two. This approach is therefore just as dangerous and artificial as the attempted dichotomisation of administrative and judicial functions. Its destructive potential is overwhelming. All it needs to exclude natural justice is the court's forming the opinion that what the citizen has is a privilege and not a right.

As regards the second issue - what the requirements of natural justice are in a particular case - the courts have simply stated that it depends on the circumstances of each case. This general statement has had its toll of adverse effects on natural justice. Realising its potential dangers the courts have not hesitated to add that there are however certain basic requirements of natural justice which cannot be got over. Left on its own the general statement could be used to cut into the very fabric of natural justice and destroy the whole concept.

THE DUTY TO ACT FAIRLY

"Fairness as a concept has always been accepted as having some role to play in statutory decision making. ... It has generally been demanded that statutory decision makers act fairly and in good faith in the sense of not pursuing their own advantage and in the sense of giving bona fide consideration to all relevant issues."

Having realised that the answers they sought to give to the problems of natural justice were far from satisfactory the courts have relatively recently come up with an apparently new concept of a "duty to act fairly". The reasoning is of course simple and naive. Since natural justice has proved to be a difficult concept to apply a new concept must be coined to replace it. As indicated in the quotation above the concept of a duty to
act in good faith and without malice or bias. All he had to do was to apply his mind reasonably on the situation before him and decide.

Since 1967 however there seems to have occurred a change in the conception of fairness. The duty to act fairly is now seen as having some procedural content. The best exposition of this new concept first appeared in In Re H.K. (An Infant)\(^{27}\). H.K. had been refused admission to the United Kingdom by an immigration officer at London Airport. His father sought an order of certiorari to quash the immigration officer's decision, and a writ of habeas corpus to secure H.K.'s release who was being held in custody pending repatriation to his own country. He was denied both remedies.

But in his judgement the Chief Justice, Lord Parker, said, and he is here quoted in extenso:

"I doubt whether it can be said that the immigration authorities are acting in a judicial or quasi-judicial capacity as those terms are generally understood. 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 subsection, 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 and bona fide 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"\(^{28}\)

On the facts of this case the court held that those requirements had been met. In the same case the Lord Justice Salmon saw the duty to act fairly as part and parcel of natural justice. He said that natural justice demanded that the immigration officer act fairly even if a formal inquiry was not necessary. Blain, J. on the other hand talked of fairness in its traditional sense. He felt that fairness was necessary irrespective of classification but then defined it as meaning, "applying his mind dispassionately to a fair analysis of the particular problem and the information available to him in analysing it"\(^{29}\)
Subsequent cases have increasingly adopted Lord Parker's approach. The duty to act fairly is now recognised as some form of procedural fairness. Read in the light of subsequent developments, In Re H.K. may be seen as the starting point of a blamant attempt to absolutely destroy the concept of natural justice. In fact one commentator has had no problem in designating this new concept "the New Natural Justice." Seeking to replace the concept of natural justice is not abominable per se. The replacement must convincingly hold itself out as a better alternative. It is submitted in this paper that this new concept of fairness is not a better alternative to natural justice. It lacks the qualities or mechanisms necessary to solve the problems which the courts face in respect of natural justice. All that it is good to do is to dilute the role of procedural fairness in administrative decision-making process. Such a dilution is antithetical to the concept of the rule of law as understood in a free democratic society.

To illustrate the negative aspect of this new development in administrative law theory it is pertinent to highlight some problematic aspects of the duty to act fairly vis à vis natural justice.

**UNCERTAINTY**

No one has indicated the basic minimum requirements of this new concept. However going by Lord Parker's dictum in Re H.K., it would appear that not only is an administrative authority or a domestic tribunal required to be free from bias but also to give the citizen an opportunity of satisfying it on the matters in consideration. But these are part and parcel of the requirements of natural justice. Surely for it to be said that a citizen has been given that opportunity he must have been given a reasonable notice under the circumstances and an opportunity to make some kind of representations on his own behalf. What is unsatisfactory is that these appear to be the maximum procedural requirements rather than the minimum. Inevitably there will be cases when the courts will decide to use "fairness" in its traditional sense without any...
reference to procedural requirements whatsoever. This is what must be avoided at all costs.

It may be argued in favour of this concept of fairness that what appears to be uncertainty of its requirements is in fact the desirable flexibility. Thus it cannot jeopardise administrative decision-making process since it does not impose stiff procedural requirements. This argument may go further: it is natural justice which lacks in certainty.

The current author's view is that such an argument is naturally and realistically inverse and grossly misdirected. In this paper it was clearly shown in the first chapter that natural justice does not lack in certainty. It has certain minimum procedural requirements which must be kept in mind whenever one talks of it. In addition there are other several requirements which vary with the circumstances of the case. In most cases the minimum requirements do suffice. Natural justice is therefore far much better off as regards certainty than the dubious, ill-founded and mediocre concept of a general duty to act fairly. In defence of natural justice it has been observed that "there is reasonable certainty as to what the principles of natural justice contain and what a tribunal must do to satisfy them". About the duty to act fairly it has been stated categorically that "the uncertainty produced by the modern approach is compounded by the substitution of an obligation to act fairly for the more concrete, concrete though still flexible, requirements of natural justice, in 1960-style". This writer entirely concurs with these views which are reflective of the true natures of the two concepts, going by judicial dicta and authorities.

It borders on tautology to observe that certainty of legal principles is conducive for predictability. In advising their clients lawyers continually rely on certain assumptions. As of necessity advocates have to hazard certain predictions before they accept to represent their clients. They can only do so where there is some certainty about the legal principles and rules they hope to rely on for their cases. Certainty is a product of the reasonable
exercise of judicial discretion by the courts. It goes without saying that too much discretion is so tempting to the courts that in their endeavours to exercise it reasonably they may end up or degenerate into the realm of arbitrariness. The duty to act fairly as opposed to natural justice provides just that kind of discretion. From here uncertainty and unpredictability take their cue. Incidentally D.J. Mullan, a proponent of this new concept quite frankly concedes, rather paradoxically it may be noted, that of the eighteen reported cases in the United Kingdom with regard to this new concept as of 1975, it is only in three that judicial review for procedural unfairness succeeded. He further admits that the way the new concept was applied in those three cases was incoherent!

Incoherence

A dilemma apparently surrounds the courts. One of the English judges who have played a big role in promoting this new concept is none other than the then Master of the Rolls, Lord Denning. Throughout his judgements on the subject he has continually and tenaciously treated the duty to act fairly as a general principle applicable to all statutory decision makers under which the rules of natural justice or procedural fairness play a varying role. In this sense the concept of fairness is seen as ingrained in natural justice - it forms part of the minimum requirements of natural justice.

But in Bates V Lord Hailsham it was suggested that the concept of fairness and that of natural justice are different standards, one lesser and applying to administrative decision making and the other higher and applying to judicial and quasi-judicial processeses. Megarry, J. (as he then was) said: "Let me accept that in the sphere of the so called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness." This is once again reflective of the cheap conceptualism connected with the futile classification exercise.
One of the major attributes of the decision in Ridge v Baldwin is that it did away with the elusive classification of functions the courts had so much cherished previously in their attempts to decide whether or not procedural fairness was required. In that case the classification exercise was termed a heresy and scorned accordingly. In subsequent cases the Court of Appeal was at pains to reject the classificatory approach as archaic and irrelevant to the application of the doctrine of fairness. To resuscitate the same is tantamount to accepting that the new concept of fairness provides no remedy against the maladies that have hitherto persistently plagued natural justice. In any case it appears that classification will now be more entrenched and intricate. In the first place the court will have to decide whether the functions in question were administrative or judicial. If judicial then the court has to determine the particular elements of natural justice that apply. If administrative the choice will again be between the concept of fairness in its traditional sense and the new concept with a procedural content. To choose the new concept with a procedural content calls for a determination of that content. Surely such a cumbersome exercise that has never before been encountered is uncalled for. Problems are duplicated. This could never have been the intention of introducing this new concept in administrative law theory and yet it looks like the logical conclusion of that introduction.

NATURAL JUSTICE AND FAIRNESS

It is the contention in this dissertation that it would be unfortunate if natural justice and fairness were to be viewed as separate and distinct standards that do not apply concurrently. The object of the doctrine of natural justice is to instil into the administrative process some procedural fairness. Thus to separate the two could pose a serious danger to the development of the law in this area as it could turn into a jungle of confusion with little or no rational basis. The idea of fairness is the very foundation of natural justice. Natural justice embodies a translation of a theoretical and largely
subjective notion of fairness into certain objective principles with a practical application.

In England today it is evident that fairness and natural justice are being treated as one broad concept with regard to domestic tribunals. In one case Megarry, V-C. had this to say:

"If one accepts that natural justice is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as 'judicial', 'quasi-judicial' and 'administrative'. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question if removed from what may reasonably be called a justiciable question, the appropriate it is to reject an expression which includes the word 'justice' and to use instead terms such as 'fairness' or the duty to 'act fairly'." 42

The Lord Vice-Chancellor was here emphasising that there is only a difference in terminology. Where the use of the term natural justice would raise eyebrows then the same principles may be applied under a different terminology namely, "fairness" or the "duty to act fairly".

In this particular case however His Lordship somewhat confusingly chose to use the term "fairness" in its traditional sense and held that the only duty which the domestic tribunal had was to reach an honest conclusion without bias and not in pursuance of any capricious policy. Maintaining that the case before the court was an application one and therefore that it did not import a right to a hearing he said, "The case is not an application case where natural justice confers the right to know the charge and have an opportunity of meeting it at a hearing." 43

The application of fairness in this manner is an abuse to natural justice especially where the latter term is used as is the case here. It fails to appreciate the minimum requirements of natural justice. It would have been better to use the term "fairness" but not in apparent contradistinction to natural justice as it was here done. There cannot be natural justice without some form of opportunity to present one's own case. It would therefore appear that natural justice is bound to suffer a setback what or not fairness is seen as an integral part of it.

.../77
It is however a submission in this paper that to treat them as one is
the better view but only in so far as one remembers that natural justice
embodies two cardinal principles which must always be kept in mind. The
main reason for referring to the above cited case and others decided in the
1970s and early 1980s with regard to domestic tribunals is to show that the courts
have at least professed to see natural justice as being founded on the idea
of fairness. 44 That the courts continue to act contrary to natural justice
underscores the thesis of this paper that there is a concerted war vigorously
waged against natural justice. This was is direct when it is stated that
fairness is different from natural justice as in Bates v Lord Hailsham
where it was said that natural justice has no relevance but only the duty
to act fairly did. It is indirect when it is said that the two concepts are
in fact the same but under that guise exclude natural justice by saying that
it applies but only to a limited extent as in McInnes v Onslow Fane. 46

In Kenya given the absence of any reported cases on this development of
the law one can safely assume that so far this new threat to natural justice
has not yet arrived. One hopes that if the problem ever crops up here in
Kenya the courts will be steadfast in their enhancement of the course of
fairness by properly adhering to the concept of natural justice within the
spirit of the Kenya Constitution.

**A SHORT CRITIQUE OF NATURAL JUSTICE**

Like all legal doctrines natural justice must be seen as a part of a
legal system. A legal system on its part is an intergral part of the superstruc-
ture founded on a given socio-economic basis. The superstructure having arisen
from the economic basis tit now operates to maintain that same base. This is
what is appropriately referred to as the dialectical relationship between the
base and the superstructure. 47 It is only in this framework that the tribulations
of natural justice can be understood. The years between 1500 AD, and 1700 AD
are a transitional period from feudalism and mercantilism to industrial
capitalism. A transitional period normally sees great activism in the legal
process. It is during such periods that the instrumental nature of law is felt most.

It is no surprise then that in the 16th and 17th centuries when the concept of natural justice took its modern shape it was seen as part of the immutable world. Parliament which was then not under absolute control of the rising industrial bourgeoisie had not assume supremacy over the other organs of state. It would appear that at that time the supremacy of the organs of state ran from the judiciary at the top, the executive and then parliament at the bottom. The judiciary normally tends to be conservative and stick to the values of a dying regime. Natural justice was seen as part of the natural law. Perhaps the coining of the term natural justice was intended to give those tenets some kind of divine elements so that they could be used to overrule acts of Parliament in favour of the individual. The individual had to be liberated from feudalism so that he could "freely" to the emerging industrialists of the time. The mushrooming factories needed their labour. Parliament which was still dominated by feudalists could not be entrusted with this task. The courts on the other hand, though tendeciously conservative, are more flexible and ready adoptive to new situations. Hence once the industrial bourgeoisie brought parliament under their control they had to ensure its supremacy since it could now be trusted more than the courts. The courts had no alternative but succumb to the doctrine of parliamentary supremacy.

It was not until the 19th century that natural justice definitely meant the two twin rules by which it is known today. It must be remembered that private property was highly cherished in England at that time. The courts would not sit to watch any body, governmental or private, indiscriminately interfere with such property. So such interference would only be justifiable subject to certain procedural requirements. Natural justice was the ready tool as is exemplified in Cooper V. Wandsworth Board of Works. The right to work became recognised as deserving of procedural protection when the strength of trade Unions and the Labour Party in Britain were felt in this century.
Today the state views natural justice with suspicion. If left to operate
liberally it could be a very strong shield for the citizen curtailing state
control of the individual's activities. It is at this point that the Marxist
view of law becomes very instructive.

Law is nothing more or less than an instrument of oppression possessed
by the dominant class in society. The economically powerful class will dictate
the course of legal development through their proteges or surrogates in
parliament. Of course parliament is not a homogenous body those representing
the interests of the dominant class. But the dominant element in parliament
indeed is. The same applies to the courts. In England as well as in Kenya
appointments to high judicial offices are political. The courts can therefore
not be expected, under these circumstances, to be the foolproof bastion of
individual rights especially where and when those rights are in direct conflict
with those of the ruling class. That is why the courts have made lots of
attempts, and to a large extent succeeded, to invent devices (problems) to
mitigate or even obliterate the otherwise progressive role of natural justice.
The connotation of the epithet "natural justice" for procedural fairness is
very threatening to the ruling class. It is a danger to their status quo
as it imports the revolutionary elements of the natural law theories.50

But one may ask how the application of natural justice to domestic tribunals
threaten the state. Well the reason is simple. It would be strange and
infact raise suspicion if the state were to blatantly prohibit the application
of natural justice to its own agencies while it enforces the application of
the same on the affairs of private voluntary organisations. Its intention would
be too clear - suppression of the individual. It attempts to hide this intention,
and infact practice, under uniformity of law.

**SUGGESTED APPROACH**

In view of the foregoing analysis which has shown law as a tool of class
oppression in the hands of the dominant class, it is becomes quite difficult
to suggest any changes without advocating for a total social revolution.
But such a revolution cannot be envisaged in the near future. Any suggested approach will therefore presume that the government is a benevolent organ selflessly interested in the welfare of the governed. This of course is contrary to the reality as Engels has ably and convincingly shown. However as it is the chorus of the day this paper will be contented to go by the presumption.

In the first place the courts must be ready to accept those requirements sine qua non of natural justice. Having accepted these irreducible minima which were established in the first chapter of this paper and have been stressed throughout the courts must not forget those other various requirements of natural justice falling within the spirit and intendment of section 77 of the constitution which should only apply as the situation may demand. This approach eschews the initial confusion that surrounds the meaning of natural justice - what the concept really stands for. The duty to act fairly thus falls squarely within the parameters of natural justice.

Secondly the courts should address themselves to the question as to when natural justice should apply. In this respect the 19th century case law in England and the East African cases together with S.77(9) of the constitution of Kenya should provide the necessary guidelines.

The law should be directed towards protecting the individual's property as well as personal rights. The words of Professor Keeton writing in 1949 aptly describe the present position of the law with regard to private rights. He says:

"A private right may, without exaggeration, be defined as an area of personal freedom which exists only so long as it does not impede the development of a social policy by a public organ. When it does, compulsory powers of acquisition or of personal direction, coupled with departmental legislation, and adjudication will effectively compass its destruction. It is only very exceptionally today that the citizen can escape from the comprehensive meshes of this spider's web into the somewhat Olympian calm of the ordinary courts - and when he does it frequently to be told that, however regrettable it may be, the court has no power to interfere with the inexorable advance of departmental policy."

Similarly Robson observes, "I do not suggest that the individual has no rights with regard to these matters at present, but rather that those he possesses are..."
totally inadequate to enable him to confront the great Leviathan without being reduced to the status of an impotent pigmy.53

What these two scholars are calling for is a recognition of the individual's rights in the modern complex society. Rights to personality as well as property must be protected. The law and the courts in particular must first of all recognise rights and then strive to protect them. Today the citizen is entitled to a multitude of rights which never existed or could never have been recognised in the 18th and 19th centuries. If it can be accepted that the government has certain duties in respect of such areas as health, education, labour, town planning and industrial development, public corporations and parastatals, and the general social welfare of the citizens towards those citizens then, in ordinary jurisprudential analysis the citizen has correlative rights. There has been an attempt to classify these rights as privileges and therefore to exclude their protection against government excesses.54 This is unfortunate. Before the government, or its agencies or domestic tribunals, can touch on these rights with an adverse effect on the citizen certain procedural requirements must be satisfied.

Ideally the citizen must have a say on how he should be governed. No less so when his rights as a member of a political society are to be adversely affected. The same should apply if any organised body seeks to impose upon him extra obligations. These procedural safeguards are readily found in the concept of natural justice. Consequently the courts must take an effect-oriented approach to the question of natural justice. If the rights of the citizen are to be adversely affected natural justice should be employed as a shield for him. He must be given an opportunity to express his views on the matter.

In determining the details of the specific requirements of natural justice the court should have regard to the severity of the effects of the action of a tribunal on the citizen. The greater the severity of the effects the greater the procedural requirements that should be employed. In most cases however the citizen...
citizen should be able to request that he be afforded some of those rights like representation or the right to cross-examination. If he so asks then he should be afforded these rights.

There may arise an argument that this could lead to over-judicialisation of the administrative process. The answer to this fear lies in the justification for requiring the courts to observe those same rules. It is because traditionally the courts monopolised the determination of matters that concern the individual's rights and duties. Now that some other bodies, domestic and public, have assumed a similar role and do share with the courts in that onerous task they also must be controlled by certain procedural rules. These are readily to be found in the concept of natural justice.
CONCLUSION

The concept of natural justice is very central in administrative law theory and practice. Doubtlessly it has its origin in the medieval notion of *jus naturale*. Under that notion law was conceived of as an immutable component of the universe, a standard set out to which men must conform in their conduct. That being so no man or legislator could enact laws that were contrary to natural law or *jus naturale*: It was the law of nature or the law of God.

Today however the concept of natural justice has acquired a very technical meaning. It is normally expressed in two Latin maxims: *Audi alteram partem* and *nemo judex in causa sua*. Under the principle of natural justice it is required that before an action is taken against a man, which action may have the effect of depriving him of his rights or adding to his duties in a substantial way, he must be given an opportunity of presenting his case or influencing the adjudicators. This demands that a sufficient notice be given to him with the view to enabling him to make his presentations. In addition the adjudicating body must act impartially in good faith and without bias.

Within the Kenyan context this doctrine is elaborately embodied in section 77 of the Constitution. Although term used therein is "fair hearing" and not natural justice, the underlying principle are the same, founded on the notion of
procedural fairness. Of special importance is section 77(9) thereof which applies the notion procedural fairness to "other adjudicating bodies" in addition to the courts of law must adhere strictly to the provisions of s.77 but these other adjudicating bodies can apply the rules of fair hearing in a more flexible manner. However they are not allowed to sink below the basic standards required by natural justice that, is they must give sufficient notice of their intention to take action with a view to hearing the affected party and they must listen to him in an impartial manner. No man can be judge in his own cause unless he be permitted by the law.

It is clear that both at common law and within the Kenyan Constitution the principles of natural justice are just as much applicable to domestic tribunals as to public or administrative ones. The underlying philosophy is that in reality the two kinds of tribunals perform the same or similar functions and that the difference only lies in their origins. Whereas public or administrative tribunals are born of Statute, domestic tribunals originate from contract or quasi-contract. But the enabling contract cannot be allowed to disapply the rules of natural justice. Thus the 19th Century cases, and those of this century which sought to exclude the court's supervisory jurisdiction over domestic tribunals unless some kind of property rights had been violated or contractual terms flouted, or some tort committed, are no longer good authority within the Kenyan setting. The position today must be that as long as the domestic tribunals carries out its functions in
disregard of the principles of natural justice the court must intervene at the instance of the aggrieved party in accordance with the spirit of section 77 of the Constitution.

A question which the courts have had to grapple with for many decades is in relation to when natural justice should apply. In the Mid-Nineteenth Century, the approach was effect oriented as evidenced in Cooper-v. Wandsworth Board of Works. If the effects of the actions of a tribunal were going to be more than trivial on the citizen then it imported that the principles of natural justice must be adhered to. However early in this century the courts came up with a classificatory approach. This approach has done more harm than good to the concept of natural justice. The first classification was that between administrative and judicial functions, natural justice was only to apply in the latter. Another classification was between rights and privileges. Again natural justice was to be confined to the former, only. It is clear that such distinctions are fine and can only be useful in obvious cases. But in the twilight are a between administrative and judicial in quasi-judicial functions, gross injustice can be meted out if the classification is strictly adhered to.

In addition to these devices the doctrine of the lis or dispute was devised. Together all these did quite a great deal of harm to the development of natural justice.

It was in the Land mark case of Ridge v. Baldwin that the spirit of natural justice that had been alive in Cooper's case was rescusitated once again, The classification heresy was scotched.
However today in England a new concept of a duty to act fairly has been coined. The arguments so far run that this new notion should replace the principles of natural justice which are considered inflexible and uncertain. This argument is however not supported by any empirical facts. Natural justice is a concept full of flexibility and certainty unlike the amorphous and grossly misdirected notion of a duty to act fairly. This new notion can only be useful in administrative law theory if it is seen as a supplement to and not a substitution for the principles of natural justice. Central to the concept of natural justice is the notion of fairness. It is through the principles of natural justice that the somewhat theoretical idea of fairness is given practical translation.

Finally it must be observed that domestic tribunals stand in precarious position as far as the afflictions against natural justice are concerned. In addition to the general problems connected with the application of natural justice there is the notion of autonomy by which it is sought to exclude the courts' supervisory jurisdiction over the functions of domestic tribunals. Autonomy is appreciated but it must also be remembered that the individual's right to a fair hearing cannot be sacrificed for the sake of autonomy. Autonomy will only be useful if procedural fairness is adhered to in accordance with the principles of natural justice.
It is therefore time that whatever the situation may be in England the Kenya courts must take the constitutional principles seriously. If this is done then the emasculation of the concept of natural justice will be anested, at least as far as Kenya is concerned. It would be useless to invoke natural justice in a wide spectrum of situations but only in name whereas in actual fact the central fabric of the concept is being eroded by non-application or dis-application for some dubious reasons such as those based on the classification of functions approach. An effect oriented approach to the question of natural justice, and especially in the sphere of private voluntary associations is the best.
FOOTNOTES

INTRODUCTION:

1. The constitution of Kenya, Act No. 5 of 1969, Chapter V.


3. The Constitution of the United States of America, the fifth and Fourteenth Amendments.


9. These are committees or councils of private voluntary Associations that are formed under the societies Act, Cap.108, Laws of Kenya.


11. (1880) 14 Ch.D. 482 at p.487

12. Infra pp.70-76.

13. See Wade, Supra note 5, at p.398

14. A full discussion of these is in Chapter One and Two. Infra

15. Infra chapter Two.

16. Rigby v. Connol (1880) 14 Ch.D. 482

17. MacClean v. The Worker's Union [1929] 1 Ch. 602

18. Baird v. Wells (1890) 44 Ch.D. 661

19. Supra p.1

CHAPTER ONE:


3. It is the term used in the U.S.A.

4. It is the common term in Kenya. see s.77(1) of the Constitution.

5. S.77(1).


7. Ibid. Ch.2.


9. 1 Str. 557 at 567.

10. Ibid

11. Marshall, *Supra* note 6, Chapters 2 and 3.


13. 

14. (1863) 14 C.B. (N.S.) 180

15. [1911] A.C. 179

16. Ibid, at p.182

17. [1915] A.C. 120


19. [1915] A.C. 120 at 137

20. Per Lord Shaw, Ibid at p.137

21. [1920] 3 K.B. 72


23. [1964] A.C. 40


25. *Supra* note 23
26. Supra note 17

27. Supra note 23


30. [1949] 1 All E.R. 109 at 118

31. Supra, note p.


33. [1961] 3 W.L.R. 650

34. Ibid at p.656

35. [1915] A.C. 120

36. [1969] 2 All E.R. 964


38. [1960] 1 All E.R. 631

39. [1911] A.C. 179

40. Ibid 183

41. Ibid

42. Supra note 37


44. [1969] 1 Q.B. 125

45. [1970] 1 Q.B. 46

46. Supra note 38

47. [1970] 1 Q.B. 46 at 66

48. [1971] Ch. 591

49. [1959] E.A. 1

51. [1971] 1 All E.R. 1148 at 1154
52. [1968] A.C. 997
53. Wade, Supra note 22 at p.400
54. [1933] 2 K.B. 696
55. [1968] 3 All E.R. 304
56. [1969] 1 Q.B. 577 at 599
57. Dimes v. Grand Junction Canal 1933 2 K.B. 696
58. [1924] 1 K.B. 256
59. Wade, Supra note 22 at pp.411-412
63. R. v. Haín 91396) 12 T.L.R. 323
64. R. v. Rand (1866) L.R. 1 Q.B. 230 at 232-233

CHAPTER TWO:

1. See "Judicial Control of Actions of Private Associations" (1962-63) 76 H.L.R. 983, where these are extensively discussed.
2. Ibid at p.998
3. The Constitution of Kenya s.80(1)
4. Ibid s. 80(2)
5. Laws of Kenya Cap. 108
6. Ibid Sections 8 - 15
7. Ibid s.19(1), see also Rule 2 in the Schedule to the Act
8. Ibid s. 42
9. E.g. The Law Society of Kenya Act, Cap. 15
10. Robson, W.A. Justice and Administrative Law (stevens and Sons Ltd., 1951 London, 3rd Ed.)
13. Supra note 1 at p. 986
14. See Dworkin v. Antrobus (1881) 17 Ch.D. 615, and Maclean v. The Workers' Union 1929 1 Ch. 602
15. Morris, W.J., Supra note 11 at p. 318
16. (1880) 14 Ch.D. 482 at 487
17. (1890) 44 Ch.D. 661
18. Supra note 16
19. Supra note 17
20. [1952] 1 K.B. 189
21. [1929] 1 Ch. 602
22. Ibid at pp. 623-624
23. [1971] 2 W.L.R. 742, Breen v. A.E.U.
24. Ibid at 750
25. Chapter 3 infra
26. Unreported, High Court of Kenya at Nairobi Civil Suit No. 2859 of 1977
27. Ibid at p. 11
28. Ibid at p. 12
29. 
32. (1879) 11 Ch.D. 353
33. Ibid. at p.359
34. Supra note 17
35. [1956] 1 W.L.R. 833
36. Roscoe Pound, "Equitable Relief Against Defamation and Injuries to personality" 1913 29 H.L.R 640 at p.677
37. [1958] 1 W.L.R. 762
38. [1949] 1 All E.R. 109
39. [1958] 1 W.L.R. 762
40. Robson, Supra note 10 at p.328
41. [1929] 1 Ch. 602
42. Ibid at p.625
43. [1949] 1 All E.R. 109
44. 65 T.L.R. 225 at p.231
45. Ibid
46. Ibid
48. Robson, Supra note 10, p.33
49. Supra note 21
50. Ibid
54. Ibid
57. Section 80
58. Supra note 24
59. Chapter V of the Constitutiono of Kenya, Especially s.77.
60. [1978] 3 All E.R. 211
61. Ibid at p.218
62. [1964] A.C. 40 at p.132
63. [1978] 3 All E.R. 354
64. Ibid per Lord Denning, M.R.
65. Ex parte, Fry [1952] 2 All E.R. 118
67. Ibid
68. [1961] 3 W.L.R. 650
70. MaClean v. The Workers Union [1929] 1 Ch. 602
71. Cap. 108, S.2(1)

CHAPTER THREE:

2. (1863) 14 C.B. K.S. 180
3. (1915) 84 K L.J. Ch. 732
4. Supra note 1 at p.430
5. Ibid at p.431
6. [1911] A.C. 179
8. Wade, supra note 1 at pp. 432-441.
10. [1964] A.C. 40
12. Ibid at p. 712
13. Supra note 10
15. See Generally Re Trunk Roads Act 1936 [1939] 2 K.B. 515
19. Cap. 8, Laws of Kenya S.3
21. Supra note 15
27. [1967] 2 Q.B. 617
28. Ibid at p. 630
29. Ibid at p. 636
30. Schmidt v. Secretary of Home Affairs [1967] 2 Ch. 149
31. Supra note 27
32. Supra note 26
33. Supra note 27
36. Mullan, Supra note 26 at p. 305-306
37. Ibid., especially at pp.285-286
38. [1972] 1 W.L.R. 1373
39. Ibid at p.1378
40. [1964] A.C. 40
41. E.g. [1970] 2 Q.B. 417
42. McInnes v. Onslow Fane [1978] 3 All E.R. 211 at p.219
43. Ibid at p.224
44. Calvin v. Carr [1979] 2 All E.R. 440
45. [1972] 1 W.L.R. 1373
46. Supra note 42
49. (1863) 14 C.B. (N.S.) 180
50. Mihyo, P.B. The Development of Legal Philosophy (Kenya Literature Bureau, Nairobi, 1977) pp42-54

CONCLUSION:
1. (1863) 14 C.B. N.S. 180
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