IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and
in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case No: CA/WRIT/112/2018

1. Pradeep Nilanga Dela Bandara
   Diyawadana Nilame of the Sri Dalada Maligawa
   Dalada Vidhiya, Sri Dalada Maligawa,
   Kandy

PETITIONER

Vs.

1. D. Nanayakkara,
   Secretary, Ministry of Sustainable Development and Wild life,
   9th Floor, Stage 1, "Sethsiripaya",
   Battaramulla.

1A. A.P.G. Kithsiri
   Secretary, Ministry of Sustainable Development and Wild life,
   9th Floor, Stage 1, "Sethsiripaya",
   Battaramulla.

1B. A.H.S. Wijesinghe

Secretary, Ministry of
Environment and Wildlife
Resources,
Sobadam Piyasa,
416/C/1, Robert Gunawardena
Mawatha,
Battaramulla.

Substituted 1B Respondent

2. J.A.K.N. Jayatunge
Additional Secretary of the
Ministry of Sustainable
Development and Wildlife,
9th Floor, Stage 1, "Sethsiripaya",
Battaramulla.

2A. P.H. Ananda
Additional Secretary of the
Ministry of Sustainable
Development and Wildlife,
9th Floor, Stage 1,
"Sethsiripaya",
Battaramulla.

3. Hon. Ravindra Samaraweera
Minister of Sustainable
Development and Wildlife,
Ministry of Sustainable
Development and Wildlife,
9th Floor, Stage 1, "Sethsiripaya",
Battaramulla.

3A. Hon. Sarath Fonseka
Minister of Sustainable
Development and Wildlife,
Ministry of Sustainable
Development and Wildlife,
9th Floor, Stage 1, "Sethsiripaya",

Battaramulla.

3B. Hon. S.M. Chandrasena
Minister of Environment and Wildlife Resources,
Ministry of Environment and Wildlife Resources,
Sobadam Piyasa,
416/C/1, Robert Gunawardena Mawatha,
Battaramulla.

Substituted 3B Respondent

4. Hon. Gamini Jayawickrama Perera
Former Minister of Sustainable Development and Wildlife and presently, The Ministwr of Buddha Sasana,
No. 135, Sreemath Anagarika Dharmapala Mawatha,
Colombo 07.

5. R.M.D.B. Meegasmulla
The Former Secretary, Ministry of Sustainable Development and Wildlife, and presently, the Secretary to the Ministry of Postal Services and Muslim Religious Affairs,
6th and 7th Floors,
Posts Head Office Building,
D.R. Wijewardena Mawatha,
Colombo 10.

6. K.V.R. Samantha Gunasekara
No.209/3,
Anagarika Dharmapala Mawatha,

Dehiwala.

7. R.S.P.B. Senanayake
   No.110-C, Quarry Road,
   Gadagandeniya,
   Peradeniya.

8. Justice Nimal E. Dissanayake
   No.392/3, Perera Mawatha,
   Kotuwegoda,
   Rajagiriya.

9. G.R. Bandara
   Director, International Affairs Division
   Sri Dalada Maligawa,
   Kandy

10. The Commissioner General of Buddhist Affairs,
    "Dahampaya", No.135,
    Srimath Anagarika Dharmapala Mawatha,
    Colombo 07.

11. Dr. R.H.S. Samarathunge
    Secretary to the Treasury,
    Ministry of Finance, The Secretariat, Lotus Road,
    Colombo 01.

11A. S.R. Attygalle,

Secretary to the Treasury,
Ministry of Finance, The Secretariat, Lotus Road,
Colombo 01.

Substituted 11A Respondent

RESPONDENTS

Before: Hon. D.N. Samarakoon, J.

Counsel: Sanjeewa Jayawardane P. C. with M. Mohamed for the Petitioner.

Chrishmal Warnasuriya with D. Ginigaddara for the 7th respondent

Sumedha Mahawanniarachchi with Binara Silva for the 8th respondent.

Kuvera de Zoysa P. C. with Pasindu Bandara for the 9th respondent.

Mohan Gopallawa, S. D. S. G. with Ishara Madarasinghe S. C. for 1st to 6th, 10th and 11th respondents.

Argued on: 21.07.2023, 03.08.2023, 04.10.2023, 08.11.2023, 27.11.2023 and 01.03.2024.

Written Submissions: tendered by all parties.

Decided on: 09th May 2024

D.N. Samarakoon, J

The petitioner seeks to quash P. 54.

It contains one and a half (1 ½) pages.

It says,

(i) Samantha Gunasekera in his evidence referred the attention of the Committee to the act of corruption committed in 2007 in the process of importing an elephant from Burma to Sri Dalada Maligawa

(ii) Usually the value of an elephant in the open market is 10 or 15 lackhs

(iii) But in importing an elephant for Sri Dalada Maligawa in 2007 it has been stated in invoices the value as Rs. 261,592,500/- and remitted that money overseas by Custom receipt No. 97382 according to his evidence

(iv) Hence those who were involved on behalf of the Dalada Maligawa having fraudulently shown the value of the elephant imported from Burma as Rs. 261,592,500/- has committed a fraud involving foreign currency

(v) It appears that thereby that person has committed an offence in terms of foreign currency regulations, custom regulations and the Penal Code of Sri Lanka

(vi) Although time has lapsed an investigation must be conducted by customs, central bank, the controller of exchange and the police

(vii) It is the responsibility of the department of wildlife which issued the permit to make complaints to the police, customs and to the treasury

(viii) To avoid liability there should have been a good coordination between wildlife conservation ministry, department of import and export (ministry of finance) which issues import permits and the department of customs and after investigating the loss caused to the country money should be recovered from him

(ix) Further if he has committed an offence involving fraudulent embezzlement of public funds he should be punished with imprisonment, either under exchange control laws or the penal code of Sri Lanka

The above is the English rendering of P. 54.

It is signed by the member of the one man committee.

It is dated 25.05.2016.

The report P. 54 is attached to a letter dated 23.11.2017 signed for the secretary of the ministry of sustainable development and wild life under the Right to Information Act No. 12 of 2016.

It is addressed to Pradeep Nilanga Dela.

He is the petitioner.

P. 51 is a letter written by the petitioner on 09.11.2017.

It is addressed to the Commissioner General of Buddhist Affairs.

The letter refers to a complaint made by one R. S. P. B. Senanayake of Peradeniya in respect of functions of Sri Dalada Maligawa.

It requests, to provide the petitioner with, the matters submitted by the complainant to the inquiry; and the determination of the Commissioner General thereof, if an inquiry has been held.

P. 51 refers to two tuskers donated to Sri Dalada Maligawa.

Sri Dalada Maligawa is the Temple of the Tooth, in Kandy. The petitioner is the Diyawadana Nilame or the lay custodian of the tooth relic.

P. 53, P.52 and P.51 shows, that, the petitioner was unaware of any proceedings or inquiry held in respect of an allegation against him or involving him the nature of which was referred to above.

The following is what the petition in this case dated 02nd March 2018 say,

> "64 The Petitioner states that notwithstanding all of the above most clear circumstances, more than 10 years after the said two tuskers arrived in Sri Lanka, he came to know, to his utter shock, surprise, dismay, pain of mind and embarrassment, , through newspaper articles published in the Sunday Times and the Ada e-paper on 22nd of October 2017 and the Lankadeepa, Lankadeepa online, the Lakbima and the Ada newspapers on 23rd of October 2017 that, a one man committee comprising of the 8th

Respondent abovenamed, appointed by the 4th Respondent, the then Minister of Sustainable Development and Wildlife Hon Gamini Jayawickrama Perera had most outrageously and recklessly, reported that the two elephants have been imported for the Dalala Maligawa claiming a higher value than the market price and that a fredulent invoice had been generated, to that amount and that money had been sent out of the country, illegally….

……

67. The Petitioner did not have intimation about the Inquiry or Proceedings. It was only after the Newspaper Articles of 22 10.2017 (the Sunday Times and the Ada e Paper) and 23.10.2017 (the Lankadeepa and the Lankadeepa online, the Lakbima, the Ada newspaper) were published, that he became aware of the purported Inquiry that was said to have been conducted by the one man committee comprising of the 8th Respondent. The said Inquiry was with regard to some other issue of mismanagement of the records, but in that process, this matter has also been contrived to have been inveigled into the same, based on utterly false evidence given by the 6th Respondent and most disturbingly, without any form of recourse to the petitioner, who is the aggrieved party by sucn an irresponsible and grievously illegal process.

68. Immediately upon seeing the said news reports, the petitioner sent a clarification to the media and this was carried on 24.10,2017 in the Ada Newspaper, the Daily News newspaper, the Rivira newspaper, the Lakbima newspaper, the Mawbima newspaper, the Island and on 26.10.2017, in the Daily Mirror Newspaper.

69. Thereafter, the 7th Respondent abovenamed, R.S.P.B. Senanayake, contrived to hold a press conference on or about 25.10.17 and stated that he has made a complaint to the 10th Respondent, the Commissioner General of Buddhist Affairs requesting him to suspend the Petitioner from

his office as the Diyawadana Nilame and to commence an inquiry and a purported contention portraying false information by the 6th respondent, was carried in the Divaina and the Dinamina newspapers on 26.10,17 and in the Lakbima, the Lankadeepa The Island, the Mawbima newspapers on 27.10.17.

70. The petitioner states that the 7th Respondent contested the Position of Diyawadana Nilame in 2005 and he secured only 5 votes and in 2015, he Couldn't even find any person to propose his name. Thus, he is a disaffected, mischief maker with a collateral personal agenda.

71. The Petitioner further states that the Divaina on 26.10.17 and the Lakbima, the Lankadeepa and the Mawbima newspapers on 27. 10.17 ("P42", "P44", P45" and "P47" annexed hereto) also carried a media release by the Petitioner that the Petitioner will be forced to take legal action against those who made false allegations against him.

72. The petitioner obtained a copy of the Letter dated 24.10.17 of the 7th Respondent, written to the 10th Respondent, Commissioner General of Buddhist Affairs, which was mentioned in the aforesaid newspaper articles, marked "P42", "P44", "P45" and "P47". The said letter of the 7th Respondent had evern most mischievously been copied, in a bid to do maximum damage, H.E. the President, H.E. the Prime Minister, the Hon Minister of Foreign Affairs and Justice and the Hon. Attorney General and had requested a suspension the Petitioner from the office of Diyawadana Nilame.

73. It had been contended most falsely and wrongfully and disgracefully, that the petitioner had utilized Dalada Magawa or Government funds for the aforesaid amount of Rs. 261,592,500/- stated in the said purported invoices mentioned in the Report of the 8th Respondent. There was also imputation of criminal liability made in respect of the same."

At this stage, it is pertinent to consider the submissions made by Mr. Mohan Gopallawa Senior Deputy Solicitor General on 04.10.2023 and the contents of the written submissions filed on behalf of the respondents he represented, 1st to 6th, 10th and 11th who are,

1. D. Nanayakkara, Secretary of the Ministry of Sustainable Development and Wildlife
   In his stead A. P. G. Kithsiri has been substituted.

2. J. A. K. N. Jayathunge, Additional Secretary of the above ministry
   P. H. Ananda substituted.

3. Ravindra Samaraweera, Minister of the above.
   Sarath Fonseka substituted.

3. Gamini Jayawikrema Perera, former Minister of above.
4. R. M. D. B. Meegasmulla, former secretary of the above ministry.
5. K. V. R. Samantha Gunasekera

10. Commissioner General of Buddhist Affairs
11. Dr. R. H. S. Samarathunge, Secretary to the Treasury.

The above respondent represented by the state for whom the learned S. D. S. G., appeared, have taken a stance of defending P.54, the findings of the one man committee report.

In fact the written submissions of the one man member of the committee, the former Judge of the Supreme Court, represented by Mr. Sumedha Mahawanniarachchi, who made oral submissions on 08.11.2023 has taken up the position in his written submissions that P. 54 is only the two pages of the report compiled by the 08th respondent and in it there is no reference to the

petitioner and the final recommendation in it is in reference to the Import Controller and not to the petitioner. (paragraphs 07 and 08).

The official respondents, except the 6th, represented by Mr. Gopallawa too agree that P.54 is not the whole report. Because their written submissions at paragraph 15 says that the report is not solely about the petitioner, that it is a report of 63 pages; and the only part relevant to the petitioner is pages 62 and 63 (which is marked as document P. 54 of the petition). So these official respondents, except for the unofficial one as 6th respondent accept, that, P. 54 represents the pages relevant to the petitioner. The rest not relevant to the petitioner. So the petitioner need not mark the rest. He can come to court marking only P.54. Hence the allegation that the petitioner attempted to mislead the court, at paragraph 07 of the written submissions for the 08th respondent (represented by Mr. Mahawannioarachchi) is unwarranted to say the least. The petitioner is not asking for "a writ in rem[1]," his concern, naturally, is about his rights and his reputation.

There is also a matter to be taken into account by this Court, which is revealed by the submissions made for the respondents represented by Mr. Gopallawa, S. D. S. G.; and Mr. Mahawanniarachchi. That is,

(i) The learned counsel for the 08th respondent argues, that, "although the petitioner was not personally noticed to appear" (so this is admitted for the 08th respondent) the public was made aware of the inquiry held by the 08th respondent by publishing in the newspapers that those who are interested concerned or affected had a right to come before the committee (paragraph 05)

(ii) The learned S. D. S. G., submits that the issue of permits with regard to domesticated elephants is an ongoing public question as there are discrepancies and irregularities in respect of the conditions to the issue of the permits and it is to investigate that a one man committee

[1] If there is one, that is

comprising of a former judge of the Supreme Court was appointed, to investigate into the malpractices in respect of granting of permits to import domesticated elephants (paragraph 08)

(iii) The learned S. D. S. G., further submits, that, hence the investigation was not confined to the activities of the petitioner but relates to a larger public question and hence upon a cabinet memorandum dated 04.12.2015 submitted by the minister of Sustainable Development and Wildlife that committee was appointed (paragraph 09)

The above (i) (ii) and (iii) must be considered together.

So the one man committee was appointed to investigate into malpractices committed in importing elephants to Sri Lanka.

If they had published, as they say, a newspaper advertisement, that was, then, about importation of these wild beasts into this country violating import regulations, etc.

So why should the petitioner be concerned? Why should he think that he is affected? Why should he be interested? (the words used in paragraph 05 in (i) above).

He does not represent the whole of Sri Lanka, or any part thereof for that matter, but, only the Dalada Maligawa (the temple of the tooth) in Kandy. And according to him, the two tuskers were not imported by him for the temple, but they were donated from a foreign country.

If the above respondents' position is accepted, there must be a proposition in administrative law, that, if the allegations are of general nature; and as they say a public question (issue) or a larger public question (issue), then having published an advertisement in newspapers that the matter is being investigated, any particular adverse finding could be reached, without notifying that party; and or giving him an opportunity of being heard in his defence. For example if importing narcotics to the country is a larger public question; and

on conducting a public inquiry on that, if a person comes before the committee and gives evidence against a specific person or an institution, then, without that person or the representative of that institution being heard, adverse findings could be arrived at, because the mandate of the committee is not to investigate about that person only, but about any person suspected of; and that person is also one of the suspects.

There is no such proposition in administrative law, as the examination of authorities would show.

4. The above respondents (both sets) also argue, that, P.54 was only a fact finding inquiry report, that it cannot be quashed; and it only leads to some sort of formal proceedings at which a hearing would be given (paragraph 09 of 08th respondent's written submission).

The 6th respondent (as per the report P.54) has provided evidence that the elephants imported by the Dalada Maligawa in 2007 have been effected pursuant to a payment of Rs. 261,592, 500?- which is twice the market value of an elephant which ranges (the written submissions of respondent represented by the Attorney General

So, there was evidence. The committee acted on that evidence. Must not the committee before recommending various actions, most of which are of drastic in nature, hear the relevant person?

The written submissions of the petitioner were received by this Court somewhat late, one reason that this judgment could not be given before this. It starts by saying, "Mr. Jayawardane made very comprehensive oral submissions before….Court".

Whereas his well expressed grace of language added beauty to the proceedings of this Court, it is the substance, or the elements of the principle on which his submission is based, not the form, or the vehicle that transported it, that becomes the subject of cognizance of this Court.

The Latin maxim audi alteram partem, translating to "listen to the other side" or "let the other side be heard as well," represents a foundational principle of natural justice and due process in legal systems worldwide. Its invocation ensures that all parties involved in a dispute receive an equitable opportunity to present their case before a decision is made. This part of the judgment will explore the historical and literary applications of this principle, coupled with an introduction to authoritative decided cases that have shaped its interpretation and application in the realms of law and society.

At the core of many legal systems is the belief in fair hearing. The maxim audi alteram partem embodies this belief, asserting that no person should be judged without a fair chance to present their side of the story. This principle is intrinsically linked to the notion of justice; it reflects a commitment to impartiality and fairness in adjudicating disputes. Since ancient times, societies have recognized the importance of this principle in various forms, ensuring that decisions are made only after all evidence and arguments have been considered.

Historical records are replete with examples of the audi alteram partem principle. In Ancient Greece, the Athenian democracy was renowned for its public courts, where litigants would have the opportunity to make their case to citizen juries—the dikasteria[2]. The Romans, too, incorporated this concept in their legal system, and it was during this period that the expression audi alteram partem originated.

Literary works often serve as a reflection of the values and principles of a society. The idea that every voice deserves to be heard is vividly encapsulated

[2] This system was comprised of three separate institutions: the ekklesia, a sovereign governing body that wrote laws and dictated foreign policy; the boule, a council of representatives from the ten Athenian tribes and the dikasteria, the popular courts in which citizens argued cases before a group of lottery-selected jurors. Although this Athenian democracy would survive for only two centuries, its invention by Cleisthenes, “The Father of Democracy,” was one of ancient Greece’s most enduring contributions to the modern world. The Greek system of direct democracy would pave the way for representative democracies across the globe. https://www.history.com/topics/ancient-greece/ancient-greece-democracy

in the Bard's play, "The Merchant of Venice". Shakespeare presents a dramatic courtroom scene where Shylock, though vilified, is given the platform to argue for his bond, embodying the audi alteram partem principle. Despite Shylock's ultimate defeat, the process underscores the significance of a fair hearing.

The maxim has been crystallized in the legal annals through its citation in numerous judicial decisions. One landmark case that reaffirmed its importance is Ridge v. Baldwin (1964). In this case, the House of Lords held that a police chief constable wrongfully dismissed without a proper hearing had his audi alteram partem rights infringed.

Another pivotal instance is provided by the European Court of Human Rights in the case of Al-Nashif v. Bulgaria (2002). Although the maxim audi alteram partem did not directly applied, in ECtHR - Al- Nashif v Bulgaria, Application no. 50963/99, 20 September 2002, "The Court found that a minimum requirement of an effective remedy (even where there is an allegation of a threat to national security) is that the competent independent appeals authority must be informed of the reasons grounding the deportation decisions even if those decisions are not publicly available. The authority must be allowed to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable[3]."

In the Commonwealth, the principle was further enforced in Osmond v. Public Service Board of New South Wales (1986), (Public Service Board of New South Wales v Osmond [1986] HCA 7; 159 CLR 656; 60 ALJR 209; 63 ALR 559) in which the High Court of Australia held that there is no general duty to provide reasons for administrative decisions[4], but this ruling has been subject to

[3] https://www.asylumlawdatabase.eu/en/content/ecthr-al-nashif-v-bulgaria-applciation-no-5096399-20-september-2002

[4] The High Court of Australia said, "With the greatest respect to the learned judges in the majority in the Court of Appeal, the conclusion which they have reached is opposed to overwhelming authority. There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons. That this is so has been recognized in the House of Lords (Sharp v Wakefield [1891] AC 173 at 183; Padfield v Minister of Agriculture, Fisheries and

criticism and has been greatly qualified by the introduction of statutory duties to give reasons in subsequent years[5]. Although Matthew Groves, the writer referred to in fn.4, attempts to imply that reasons are not absolute, there is, as this Court sees, a fundamental link between reasons and the maxim audi alteram partem.

The object of judicial process is arriving at the correct decision. The decision maker should have an objective mind. This is twofold. He or she must be open in mind so as to allow the free inflow of all facts and circumstances the presence of which is necessary to arrive at the right decision. He or she must also have an unfettered ability to discern good from evil. This is the ability to take independent and unbiased decisions. But it goes deeper. Ability to discern good from evil is not what anybody and everybody think good and evil, for it could be different from one person to another. This stands on a harder surface than

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Food [1968] AC 997 at 1032-33, 1049, 1050-54 and 1061-62) and the Privy Council (Minister of National Revenue v Wrights' Canadian Ropes, Ltd [1947] AC 109 at 123); in those cases, the proposition that the common law does not require reasons to be given for administrative decisions seems to have been regarded as so clear as hardly to warrant discussion. More recently, in considered judgments, the Court of Appeal in England has held that neither the common law nor the rules of natural justice require reasons to be given for decisions of that kind: R v Gaming Board; Ex parte Benaim [1970] 2 QB 417 at 430-31; Payne v Lord Harris [1981] 1 WLR 754 at 764 ; 2 All ER 842 at 850-51. It has similarly been held that domestic tribunals are not bound to give reasons for their decisions; see McInnes v Onslow-Fane [1978] 1 WLR 1520 ; 3 All ER 211 and earlier authorities collected in Pure Spring Co Ltd v Minister of National Revenue [1947] 1 DLR 501 at 534-5

The contrary view appears to have been expressed by Lord Denning MR in Breen v Amalgamated Engineering Union [1971] 2 QB 175, but that was a dissenting judgment and if it was intended to suggest that reasons must be given for the decision of a statutory or domestic body whenever the circumstances make it fair to do so it is inconsistent with R v Gaming Board; Ex parte Benaim, in which the judgment of the court was written by Lord Denning MR himself, and with Payne v Lord Harris, a decision to which Lord Denning MR was a party…." https://www.ato.gov.au/law/view/print?DocID=JUD%2F9ALNN85%2F00001

[5] "In Public Service Board of NSW v Osmond (1986) 159 CLR 656, the High Court held that there is no general duty to provide reasons for administrative decisions. The rule in Osmond has been criticised by scholars and greatly qualified by the introduction of statutory duties to give reasons. This 'Before the High Court' examines the rule established in Osmond, the case for and against a general common law duty to provide reasons, and the various statutory duties to provide reasons. It also considers the recent law of several other common law jurisdictions, by which the courts have recognised limited duties to provide reasons for administrative decisions. The pending case of Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA Trans 105 ('Kocak'), for which special leave was granted on 10 May 2013, provides an occasion for limited but important change to the law". Before the High Court Reviewing Reasons for Administrative Decisions: Wingfoot Australia Partners Pty Ltd v Kocak, Matthew Groves, Law Faculty, Monash University. https://classic.austlii.edu.au/au/journals/SydLawRw/2013/25.pdf

it may appear because it is so connected with the rationality of human mind. It may be called 'first principles' or 'fundamental principles' but whatever it may be called it is that which arises by cause following effect, reason.

Hence the reason or the basis for the existence of the maxim audi alteram partem is to allow the free inflow of all relevant information, on which; and on which only, a correct decision can be made.

In addition to these cases, the principle remains alive in literature, as evidenced in "To Kill a Mockingbird[6]," Harper Lee's seminal work set against the backdrop of racial injustice. The character of Atticus Finch, while defending Tom Robinson, exemplifies the essence of audi alteram partem, pleading for the jury to listen to both sides without prejudice, albeit in an atmosphere of deep-seated bias.

The significance of the maxim audi alteram partem cannot be overstated. Both historically and in modern jurisprudence, this principle safeguards individuals against the miscarriage of justice. It is not merely a procedural requirement but an ethical commandment that validates the essence of human dignity in the adjudicative process. While the examples from both history and literature reveal the challenges in realizing this ideal in practice, they also underline its perpetual relevance.

Across ages and cultures, the audi alteram partem rule has been an enduring beacon of justice, underscoring the belief that fairness cannot be achieved without lending an ear to all those affected by the law's reach. As depicted in

[6] "To Kill a Mockingbird" is a significant novel by Harper Lee that explores themes of racial injustice and moral growth. In the story, the jury plays a crucial role in the trial of Tom Robinson, a Black man falsely accused of raping a white woman, Mayella Ewell. Despite clear evidence of his innocence and a compelling defense by Atticus Finch, the all-white jury convicts Tom Robinson, reflecting the deep-seated racial prejudices of the time123.

The jury's decision is a pivotal moment in the book, highlighting the societal issues of the American South during the Great Depression and serving as a catalyst for the protagonist Scout's understanding of the complexities of human nature and justice. https://www.britannica.com/topic/To-Kill-a-Mockingbird; https://www.sparknotes.com/lit/mocking/section10/; https://www.sparknotes.com/lit/mocking/summary/

literature and realized in courtrooms, this maxim remains a cornerstone of fair play and equity, imperative for a society founded on principles of justice, equality and the Rule of Law.

Prior to coming to the reasons adduced for the petitioner, that, he was in no way involved in importing elephants violating import regulations and or committing an exchange fraud, for this Court considers, not only the application of the above maxim, but also the factual basis too; and further examine cases cited in respect of the maxim for the petitioner, a part of the final address by Mr. Jayawrdane, President's Counsel to the court on behalf of the petitioner (from the transcript of the proceedings) is reproduced, for this Court thinks, that it should be preserved.

"Mr. Sanjeewa Jayawardane P. C.

> I have collated important judgments– vigoures jurisprudence in the field of natural justice, a subliminally fundamental matter of natural law and rule of law. Certain contemporaneous judgments ad infinitum ad noseum[7] if I may use the phrase. Is it not further exacerbated retired supreme court judge sitting as one man committee to overlook such a basic fundamental requirement which resulted in a travesty of justice. It was a pure donation not only that donation from government to government….Hear the man. Ask him what do you have to say. It is required due to Rule of law, due process.

[cite meaning of the rule] [Reads]

> "burumayen aliyeku anayanaya kireemeedee ehi mila vishala lesa wedi kara…"
>
> The media will malice him because of this report….with this ammunition and fodder where he says "ehi mila vishala lesa wedi kara penwa". It is

[7] Ad infinitum ad nauseam is a phrase that means "to infinity until you become sick of it" https://www.skinscanapp.com/essay-writing-blog/what-is-the-difference-between-ad-infinitum-and-ad-nauseam/

character assassination so what more….so I can only come before this court which exercises the power of judicial review in view of article 140 to reverse this irreversible damage which only can be mitigated….it is 06 years and hanging over on my head like the sword of Damocles.

Because of a unilateral machination of a complainant who misled an inquiring officer into making a starkly bad order. This one man committee was appointed by the cabinet, so it becomes a cabinet appointed committee giving another string to the bow of my enemies or my detractors. I say with great responsibility, that it is perfunctory and reckless. [Reads from P.54]

"burumayen aliyeku anayanaya kireemeedee ehi mila vishala lesa wedi kara penwa videsha vinimaya vishala pramanayak pita ratakata neethyanukuula nowana paridi yeweemen kara ethi dushanaya".

Remitting of foreign exchange in an illegal manner. Then very solicitously and gratuitously examining the so called statement by one Samantha Gunasekera. [Reads]

"Samantha Gunasekera mahatha ohuge saakshiyeedee…"

So does not it strike that when X gives evidence against Y, that Y should be heard?

Rs. 261 million. [Here the learned President's Counsel made submissions "deconstructing" the report].

I want to deconstruct this report. First paragraph is apparently a narrative of what Samantha Gunasekera said. Second paragraph is the conclusion. He is no longer narrating what the witness says. Second paragraph is the conclusion he is not no longer narrating what Gunasekera said….

There are 07 charges in P.54 [Refer to it] after 08 lines of Samantha Gunasekera's evidence. The foreign exchange offence, reference to the

Penal Code, coopting the treasury, co opting wild life department. I did not know that a man can do so many offences in one go. [Reads] “danduwam deema…” Now recommends punishment. I do not want to allege mala fide because my regard and respect for the individual prevents me from saying so. But all without hearing me. Now just not fraud loss to the country [Reads]

“Vinimaya paalana neethiya yatahe ho lanka danda neethi sangrahaya yatathe sira danduwam lebiya yuthuya…”

There should be a decision by this court, so that similar issues do not transpire in future. I now take this court to the graphically illustrative example of the duty to give a hearing. It is quoted by the Supreme Court in Sarath Amunugama vs. Karu(narathne) Jayasuriya 2000 (1) SLR 172 at 180.

It is basically a rephrasing of what Professor Wade says in that chapter Right to a Fair Hearing I am citing the 12th edition page 389 Wade & Forsyth “An ancient rule of wide application” [Reads]

“According to one picturesque judicial dictum, the first hearing in human history was given in the Garden of Eden:

I remember to have heard it observed by a very learned man upon such an occasion, that even the God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam, says God, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also[8].”

[8] Court: The reply might have taken the longest time…]

[The above passage as Wade cites is from Rex[9] vs. University of Cambridge (1723) 1 Str 557 (Fortesque J)].

> Only Rhadamanthus[10] the cruel judge of hell it seems punish before he heard.

Here the learned President's Counsel, recommending to the court, the reading of the "Wasp" by Aristophanes cited the following cases.

> C. A. Writ 102 2017 01.11.2019
>
> Jayawardana vs. Dharani Wijethilake 2001 (1) SLR 132 at 149
>
> "The office of inquiry…."….The old distinction of judicial and quasi judicial now obliterated "…the power to decide on rights..:
>
> 2020 (1) SLR 212 at 218 219 and 220
>
> SLT asked for the quashing of the recommendation of the Human Rights Commission. The state took the objection that this is only a recommendation that it does not attract writ. Justice Sri Skandharajah upheld that objection. Supreme Court said the Court of Appeal was wrong and cited the 05 judge Bench case of G. P. A. de Silva vs. Sadiq of 09.10.1980, 44 years ago. It was enlightening at that relatively early stage as it adopted principles of fairness.

[9] The monarch of England in 1723 was George I1. He reigned from 1714 to 17272. During his reign, the power of the monarchy diminished and the modern system of government by a cabinet developed under the leadership of the first Prime Minister, Robert Walpole.

[10] Rhadamanthus is perhaps most famous for his role in the afterlife. After his death, he became one of the three judges of the dead, alongside Minos and Aeacus. https://www.theoi.com/Khthonios/Rhadamanthys.html His name has come to be associated with strict and inflexible judgment https://www.encyclopedia.com/literature-and-arts/classical-literature-mythology-and-folklore/folklore-and-mythology/rhadamanthus

G. P. A. de Silva vs. Sadique (1978,79,80) 1 SLR 166 is a Five Judges Bench[11] decision of the Supreme Court which said,

"Held :

(I) A Writ of Certiorari will lie to quash an order or decision which is of a binding effect and it either imposes an obligation or involves civil consequences to a person or alters his legal position to his disadvantage, or where such order or decision is a step in a statutory process which would have such effect. The order or decision must be of a body which had legal authority to determine. questions affecting rights. It is not essential that the body should be established by Statute (provided it is not merely a private or domestic tribunal) or that the rights must necessarily be rights which are enforceable by action.

.....

(iv) Before any lawfully constituted body arrives at a finding in respect of any person, it is necessary that such body should give a fair hearing to the person concerned. The principle audi alteram partem is one that is widely applicable...."

The learned President's Counsel also submitted, that, the writ court can quash a decision which is only a mere step in a process that "....alters his legal position into a disadvantage" (Judicial Remedies in Public Law Lewis at page 136) and referred to what he called the watershed case of Amaradasa vs. Land Reforms Commission 79 (1) NLR 505 at 529.

Further to the above matters adverted to in the final address of the learned President's Counsel to this Court, the factual situation in respect of two tuskers

[11] The court comprised of SAMARAWICKRAME J., THAMOTHERAM J., ISMAIL J., WEERARATNE J. AND SHARVANANDA J. HIS LORDSHIP G. T. SAMARAWICKREMA J. READ THE JUDGEMENT OF THE COURT.

arriving in Sri Lanka to be donated to the Dalada Maligawa is depicted in the following passages in the petitioner's written submissions.

15. In these circumstances, most irresistibly, Your Lordship would see the reliefs sought by the Petition dated 02/03/2018, should necessarily granted ex debito justitiae, with regard to that **PORTION OF THE 8TH RESPONDENT'S REPORT WHICH IS CONTAINED IN P-54, PER SE, WHICH RELATES TO THE PETITIONER.**

16. The Petitioner does not seek to do any violence to the rest of the report of the 8th respondent, which deals with matters not concerning the Petitioner and confined his reliefs only to P-54, which is the purported adverse and prejudicial findings of the Petitioner.

17. In fact, the Commissioner General of Buddhist Affairs in his Statement of Objections, duly and correctly admits the receipt of the communication from the Sri Dalada Maligawa, produced marked P-51, which shows the due interposition of the Commissioner General of Buddhist Affairs in this nationally important process on a Government to Government basis.

18. The 6th Respondent in his Objections makes a pathetic and most despicable attempt to mislead Your Lordships' Court and he annexes the Customs Declarations 6R1 and 6R-1 and attempts to portray an exorbitant amount has been paid for these elephants.

19. We invite Your Lordships' attention to the counter affidavit of the Petitioner 24/10/2021, where the Petitioner has clearly pointed out in paragraph 30(i) as follows:-

> **"in any event, I also state that both Customs Declarations produced marked 6R-1 and 6R-2, in cage No. 28, most categorically states as follows:-**
>
> **" No foreign exchange involved"**

20. We invite Your Lordships' Court attention to the said Customs Declaration 6R-1 and 6R-2 and to page 28 thereof (which was highlighted to Your Lordships' during oral submissions), which expressly states:-

> " No foreign exchange involved"

21. This is obviously so because the documents from P-1 onwards shows that this was a gift arranged from Government to Government basis from Myanmar in order to foster and strengthen Buddhist religion and to show good will to Sri Lanka and in reverence to the Sri Dalada Maligawa, which consecrates the Tooth Relic and is one of the chief places of veneration and worship in Sri Lanka and Internationally as well.

22. In any Customs Declaration there is a pro forma requirement of placing the value even whether its zero rated and even whether no payments have been made with regard to a gift. This is only purely for the purpose of the record.

23. We draw Your Lordships' Court attention to several sub-paragraphs (a) to (e) of paragraph 30, in pages 18 and 19 of the counter affidavit.

24. We respectfully submit that quite apart from the Petitioner not being noticed and not been duly offered an opportunity of being heard, in respect of this spurious complaint, the Petitioner was never made aware of any adverse material against him and if the Petitioner had been granted this opportunity, the Petitioner would have empathically refuted this complaint by demonstrating all the large number of documents which he had in his possession, which demonstrates that this was a gift to the country.

It is also pertinent to note, that, the petitioner's written submissions, in explaining documents P.01 to P.12 states, as follows,

1. "The following documents unequivocally prove this:-

A. In the 2nd paragraph of P-1, it is evident that the intervention of the Sri Lanka Ambassador for Myanmar had interposed himself as part of a meritorious deed through the donation of the tuskers by Myanmar and that he had stipulated that it should be facilitated through the ministry of foreign affairs of Sri Lanka. The title of the document is " request for donation of tuskers"

B. P-2 the official letter shows the intervention of Sri Lanka embassy in Myanmar with the foreign Ministry of the Government of Myanmar and to the Minister of foreign affairs of Myanmar.

C. P-3 is the official communication by Sri Lankan embassy in Myanmar, issued by none other than Mr. Arthur Samaraseke President's Counsel, then Ambassador to Myanmar, addressed to the Secretary, Foreign Affairs of Sri Lanka, referring to the Sri Lankan Embassy's communication of Yangon, of the Government of Myanmar.

D. Your Lordships' would see the notation at the bottom of P-3, vide at lines 5 and 6, where it clearly states from Sri Lanka's officials to his Excellency. The ambassador that "Myanmar has agreed to donate, one elephant to Sri Lanka."

E. P-5 is the official communication under the letter head of the "Government of the Union of Myanmar- Ministry of Foreign Affairs", addressed to SL embassy, which at 2nd paragraph states:-

" the Ministry accordingly has the honour to inform that the authorities concerned of the Union of Myanmar has agreed to the said request. The Embassy has advised to choose the two tuskers amongst the 5 tuskers which have been gathered at the Hlawga park.

F. P-5 is an official communication by Sri Lanka ambassador in Myanmar to Secretary, Ministry of Foreign affairs in Sri Lanka intimating that the Ministry of for affairs of Myanmar that the relevant authorities of Myanmar have agreed to grant the 2 tuskers to the Maligawa.

G. P-6 is the official communication where the Ministry of Foreign Affairs, Sri Lanka, officially invites the Petitioner as the Diyawadana Nilame of the Dalada Maligawa, to visit Myanmar to select the suitable tuskers.

H. P-7 is the follow- up letter in that connection under the letter head of the Maligawa to his Excellency, Mr. Arthur Samarasekere PC, his Excellency the Ambassador to Myanmar, referring to vide 3rd paragraph " it could be gifted to the temple officially, when the prime minister of Myanmar visits Sri Lanka in August of 2007."

I. P-8- press notice showing pictorially the minister of religious of Myanmar receiving the religious delegation led by the Petitioner at the religious affairs ministry of Myanmar and where Myanmar's deputy Minister and the DG of Religious affairs and DG of Promotion and propagation of Sasana were all officially present.

J. P-9 is an official letter addressed by the Ambassador of Sri Lanka, Mr. Excellency, Mr. Arthur Samarasekere PC, in his letter titled "donation of two tusker elephants to the temple of tooth Sri Lanka" and thanking Myanmar, its agreement to donate elephants to Sri Lanka and proposing that:-

"may I suggest that the actual making of the donation be timed to coincide with the visit of H.E the Prime Minister of Union of Myanmar to Sri Lanka. The Prime Minister of Sri Lanka has already extended the necessary invitation for such visit. If the visit is taking place, it may be possible to arrange the actual handing over of the two tusker elephants to be made at Kandy itself on that occasion"

In the very top of the 2nd page of P-9 refers to the very great meritorious act of not only of Sri Lanka of all the people of Sri Lanka and that one day these tuskers would " carry the golden Casket of the venerated Tooth Relic during the Annual Pageant held in Kandy."

K. P-10 is the official letter from the Sri Lankan Embassy to the Myanmar's Ministry of Foreign Affairs, arranging the logistics of the transport of the elephants from Myanmar to Sri Lanka.

L. P-11 is the official approval of the Commissioner of Buddhist Affairs of the expenditure of Rs. 150,000 for the relevant air fare.

M. P-12 is the official communication by the ministry of Forestry of the government of Myanmar addressed to Sri Lanka embassy stating inter alia :-

"at the request of the Government of Sri Lanka, the Government of the Union of Myanmar is now ready to donate the 2 full blown elephants …"

2. Surely, Your Lordships' Court would see most irresistibly that if the petitioner was noticed and afforded a hearing by this Cabinet appointed Committee this document and the other documents would have proved beyond doubt that this was a Government to Government donation and WAS NOT A PRIVATE PURCHASE OF THE MALIGAWA. It is nothing short of (pardon the colloquial phrase) " scary" that in this day and age, such decisions in the nature of P-54 can be grievously be made against a citizen, without noticing and hearing that citizen and then contriving to arrive at very perfunctory precipitous and regrettably naïve findings, unsustained by proper material.

A. P-13 shows all the logistical arrangements that were made;

B. P-15 expressly refers to the donation of the 2 tuskers;

C. P-17 which is the official clearance issued by the Department of Wildlife of Sri Lanka at cages 5 to "specimens to be imported as DONATION FOR RELIGIOUS PURPOSES TO THE MALIGAWA;

D. P-18 onwards are also several official communications between the two governments;

E. P-20(c) is the international animal certificates, which is the CITIES permit,

3. And number of several other documents , each of which were duly examined during the oral submissions".

Hence it is clear as clear can be, that,

(i) The petitioner did not import any elephant (tusker) or elephants as alleged in 2007

(ii) Thus the petitioner was not involved in any foreign exchange fraud or any other violation of any law, rule or regulation pertaining to the importation of flora and fauna

In respect of the proposition, that, there exists a right to know the opposing case, the petitioner refers to following cases, [among other things not quoted here]

Capital Trust Holdings Limited Vs Securities and Exchange Commission CA/WRIT/465/2022, CAM 12.12.2023,

> "I take the view that this Court should be guided with the following words of Lord Denning reflected in the Writ Remedies; Remediable Rights Under Public Law (by Justice B.P. Banerjee, 7th Edition, at page 1093) upon which the Petitioners have placed reliance:
>
> "One of the requirements of natural justice is that the objector should have the opportunity to know and meet if the case made against him. Lord Denning in Kanda v. Government of Malaya, (1962) AC 322 observed that if the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and the statement has been made affecting him and then he must have been given a fair opportunity to correct or contradict the same."

THE QURAN

"In Surah An-Nisa (4:135), it states: "O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives." This verse underscores the importance of upholding justice even when it may go against one's personal interests or relationships. Additionally, the concept of 'Adl' (justice) is central in Islamic

teachings, emphasizing the need to treat all individuals fairly and with dignity."

THE BIBLE

"You shall not be partial in judgment. You shall hear the small and the great alike. You shall not be intimidated by anyone, for the judgment is God's. And the case that is too hard for you, you shall bring to me, and I will hear it."

Sharvananda J(as he then was) in *Ittepana v. Hemawathie* [1981](1) S.L.R. at page 476] , observed that, " **The Principles of natural justice are the basis of our laws of procedure**..."

[This Court is of the view that the principles of natural justice go beyond mere procedure and it is the basis of the Rule of Law. Laws of procedure are only a reflection of the Rule of Law]

In *Amaradasa V. LRC*, 79 NLR 505, the Supreme Court has most emphatically upheld that a person's right to be heard is entrenched in the principles of natural justice as well as forms part and parcel of administrative law principles, failure to adhere to which, would render such decision, a **nullity.**

Sundakaran Vs. Bharathi [1989] 1 SLR 46, Justice A.R.B. Amarasinghe held that :-

" If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the essential principles of justice. The decision must be declared no decision. "

Sarath Amunugama and Others Vs Karu(narathne) Jayasuriya, Chairman, United National Party and others [2000] 1 SLR 172, the Supreme Court held that '.... whatever the uncertainty inherent in the phrase, "natural

justice" connotes, above all, the maxim audi alteram partem. What is the fuss about natural justice and the right to a fair hearing about? The right to a hearing has been accepted as a basic principle in many civilizations and over many years. In Greece, the requirement of hearing both sides before reaching a conclusion formed a part of the Athenian judicial oath and is referred to by Aristophanes, Euripedes and Demosthenes..... As might be expected, in Sri Lanka too matters were adjudicated after hearing both sides: 'ubhaya paksayen ma adyanta asa ganna dadek da' says the Saddharmarathnavaliya. .... **As far as the law is concerned, we have in Sri Lanka in this area closely followed the common law which, from very early times, recognized the right to a fair hearing.,"** prior to making a decision which affect rights of parties.

[3rd February, 2000 AMERASINGHE, ACTING C.J.]

Ranjith Flavian Wijeratne vs Asoka Sarath Amarasinghe, in SC Appeal 40/2013, SCM 12/11/2015, the Supreme Court held as follows:-

"In Russell v. Duke of Norfolk (1949) 1 All E.R. 109 Tucker L.J. observed that one essential requirement in regard to the exercise of judicial and quasi – judicial powers is that the person concerned should have a reasonable opportunity of presenting his case.

I am of the opinion that where the power is conferred in an administrative body or tribunal which exercises power in making decisions which affect the rights of persons, such body or tribunal should act according to the principles of natural justice except in cases where such right is excluded, either by express words or by necessary implication, by the legislature.

Lord Diplock in the case of O'Reilly v. Mackman (1983) 2 AC 237 at 276 held that the right of a man to be given a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament

intended that a failure to observe it should render null and void any decision reached in breach of this requirement.

A tribunal exercising quasi judicial functions is not bound to adopt a particular procedure in the absence of statutory provision. In some situations the tribunals have to act within certain limits. However, it needs to observe certain minimum standards of natural justice and fairness when discharging its functions.

In the said case, it was further held as follows:"

"…….. The failure of the Commissioner to afford the 1st Respondent an opportunity of showing cause as to why the house should not be vested in the Commissioner violates the principles of natural justice. Further, the inquiry before the Commissioner is inquisitorial proceedings and, as such, the burden is on the Commissioner to conduct the inquiry. Further, in the absence of laid down procedure in the said Law the inquiry should be conducted according to the principles of natural justice. Thus, the Commissioner"s order is in violation of the principles of Natural Justice which require that a party such as the 1st Respondent should have been afforded an opportunity of being heard before any decision affecting his rights was made by the Commissioner. Any decision given in breach of the rules of natural justice is null and void and has no force in law."

Jayawardena V. Dharani Wijayatilake, Secretary, Ministry of Justice and Constitutional Affairs And Others, ([2001]1 Sri L.R. 132), the Supreme Court, held as follows:-

The legal principles are clear. In Cooper v. Wandsworth Board of Works it was, laid down that "although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." In a passage which has repeatedly

been cited with approval, Lord Loreburn, LC, referred to the duty of public bodies and officers when called upon to decide questions, even involving discretion:

"In the present instance, as in many others, what comes for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend on matter of law alone. In such cases [they] will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view." Board of Education v Rice, [1911] AC 179.

[Then that judgment quoted, at that time, from the 5th Edition of Wade the reference to God, Adam and Eve]

Splendour Media (Pvt.) Limited vs Commissioner of Labour, CA (Writ) Application No: 102/2017, CAM 1st November 2019, it was observed as follows:-

"The importance of natural justice and why Courts insist upon it are captured by the following paragraphs in 'Administrative Law' by Wade:

"Just as the courts can control the substance of what public authorities do by means of the rules relating to reasonableness, improper purposes, and so forth, so through the principles of natural justice they can control the procedure by which they do it. In so doing they have imposed a particular procedural technique on government departments and statutory authorities

generally. The courts have, in effect, devised a code of fair administrative procedure based on doctrines which are an essential part of any system of administrative justice.

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. A judge of the United States Supreme Court has said: 'Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. One of his colleagues said: 'The history of liberty has largely been the history of the observance of procedural safeguards.

It is true that the rules of natural justice restrict the freedom of administrative action and that their observance costs a certain amount of time and money. But time and money are likely to be well spent if they reduce friction in the machinery of government; and it is because they are essentially rules for upholding fairness and so reducing grievances that the rules of natural justice can be said to promote efficiency rather than impede it. Provided that the courts do not let them run riot, and keep them in touch with the standards which good administration demands in any case, they should be regarded as a protection not only to citizens but also to officials. Moreover, a decision which is made without bias, and with proper consideration of the views of those affected by it, will not only be more acceptable; it will also be of better quality. Justice and efficiency go hand in hand, so long at least as the law does not impose excessive refinements…."

Lalith Oeshapriya vs. Captain Weerakoon and Others, Marsoof, J/President of the Court of Appeal (as he then was) held as follows :

"Even more serious is the violation of the two cardinal principles of natural justice embodied in the maxims 'audi alteram partem' and 'nemo judex in causa sua potest'. The first of these principles postulates a fair hearing before the rights of a citizen are affected by a quasi judicial or administrative decision. In this context, it is now recognised that 'qui aliquid statuerit parte in audita altera acquum licet discerit, haud acquum fecerit' - which means that he who determines any matter without hearing both sides, though he may have decided right, has not done justice. According to the jurisprudence built around the 'audi alteram partem' principal, there should not only be a hearing of both sides, but the hearing should be more than a pretence. The procedure followed should be fair and conducive to the achievement of justice. In Board of Education v Ricell Lord Loreburn, L. C. in his famo us dictum laid down that a tribunal was under duty to "act in good faith, and fairly listen to bath sides for that is a duty lying upon everyone who decides anything." In De Verteuil v Knaqqs it was laid down as follows: "In general, the requirements of natural justice are first, 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, that the tribunal should act in good faith"

In regard to the maxim audi alteram partem, this Court wishes to state further, as follows,

In FALEEL v. SUSIL MOONESINGHE AND OTHERS 1994 (2) SLR 303, Justice Ismail referred to the case of John vs. Rees. The latter, which is a decision by Megarry J., in 1968 referred to Fortescue J., in his reference to the God and Adam [and Eve]. In a series of Tea Board cases, where the question was, whether the factory owners must be heard prior to suspending the operations of the factory on allegations of the tea adulterated by excess amounts of glucose [in these cases the Tea Board effected the suspension by informing the brokers not to accept tea from the particular factory; and

informed the factory owner after 2 or more days] in which the Attorney General cited Faleel's case, in my judgments C. A. Writ 195 2020 dated 22.09.2022, C. A. Writ 196 2022 dated 03.05.2024 and C. A. Writ 198 2020 which incidentally will be given today, 10th May 2024, I have been referring to the statement of Fortescue J.; and presently consider delving more on the factual basis of John's case.

Firstly, this is what Ismail J., said,

"The submission on behalf of the petitioner is that there was no situation of emergency, a critical situation, a destablising factor or a compelling reason to resort to a holding operation by way of a suspension. Learned Counsel referred to the judgment of Lord Denning M. R. in Lewis v. Hefer (3) in which he used the term holding operation after quoting Megarry J. in John v. Pees (4). It arose in this manner. In the course of the submissions in John v. Rees it was the contention of the counsel for the plaintiff that the rules of natural justice apply not only to expulsion or dismissal, but also to suspension from office, and among the cases cited by him were Burn v. National Amalgamated Labourers' Union of Great Britain and Ireland (5),…."

Having examined a case decided by Denning L. J., too, which will be referred to in due course, Ismail J., decided that as per the facts in that case a hearing prior to the decision was not necessary.

But in John vs. Rees itself, [of which I have the original law report from the Judges' Library] Megarry J., decided, that, the rule audi alteram partem should have been followed.

The facts were as follows,

"On March 27, 1968, the Member of Parliament for Pembrokeshire, Mr. Desmond Donnelly, was expelled from the Labour Party. Ten days later, on April 6, the annual meeting of the Pembrokeshire Divisional Labour Party (referred to as P.D.L.P.), took place. At the start of the meeting, Mr. James

Cecil Gough John, as president of P.D.L.P., took the chair. The meeting was attended by about 100 people, mostly delegates from various local Labour Parties within the constituency. After Mr. John had welcomed the delegates, the assistant national agent of the Labour Party addressed the meeting on loyalty to the party. He reminded members of their obligations, referred to Mr. Donnelly's expulsion, and ended by suggesting that a resolution be passed to the effect that P. D. L. P. should continue to act in strict conformity with its constitution, and the rules and constitution of the Labour Party. No such resolution appeared on the agenda and when Mr. John sought to put such a resolution, which had been moved and seconded by delegates from the floor, to the vote disturbances broke out, since the majority of those present were supporters of Mr. Donnelly, and favoured disaffiliation from the Labour Party. There was a certain amount of noise, disorder and, in a few cases, bodily contact, but nothing that could really be called violence, and no one appeared to have been put in fear. After some attempt to restore order, Mr. John purported, as chairman, to adjourn the meeting sine die, and left the meeting accompanied by a number of other delegates. Those who remained proceeded with the business of the meeting, which included the election of officers. Mr. Bartholomew Cleare was elected president, in place of Mr. John, and Mr. Haydn J. Lewis was elected treasurer. Mr. Glyn Rees, the secretary, remained secretary since his office was not amongst those to be filled, In addition to other business, the meeting then passed, by 69 votes to 1, a resolution to disaffliliate from the Labour Party. The validity of the continuation of the meeting, after the purported adjournment, was challenged by Mr. John, as plaintiff, in a writ issued on May 6, 1968 [1968 J. No. 2692],: and a notice of motion was issued on the same date, claiming an injunction to restrain Mr. Rees, Mr. Cleare and Mr. Lewis (the first, second and third defendants, respectively), from dealing in any way with the moneys or other property of the P.D.L.P. Mr. John, the plaintiff, claimed to represent all members of the P.D.L.P. other than the three defendants and also, to be

acting personally". [page 351 of John vs. Rees and others [1968 J. No. 2692]; Martin and another vs. Davis and others [1968 M No. 2390] and Rees and another vs. John [1968 R. No. 2276] 1970 Chancery Division 345].

.....

"Meanwhile, on April 24, 1968, the National Executive Committee of the Labour Party, hereinafter referred to as N.E.C., passed two resolutions, one suspending the activities of the P.D.L.P., and the right of its officers to handle the funds of the party, and the other authorising the national agent "to take such steps as are necessary to complete the reorganization" of the P.D.L.P. In pursuance of these resolutions the national agent resolved, inter alia, to convene a meeting of the Haverfordwest Local Labour Party, but before doing so he sent a letter by registered post to leading members of the dissident faction who supported Mr. Donnelly, informing them of the proposed reorganisation and requesting from them an undertaking that they accepted, and would conform to, the constitution, programme, principles and policy of the Labour Party, that they neither belonged to nor were actively associated with any proscribed organization and that they would co-operate in re-establishing the P.D.LP. in accordance with the rules and constitution of the Labour Party". [page 352].

Among other things, one question for decision was, whether the National Executive Committee should have heard the purportedly elected members of the P. D. L. P., [after Mr. James Cecil Gough John, who was known as "Counsellor John" since he was having 40 years of experience as an active member adjourned the disorderly meeting sine die and left it] prior to making the decision to suspend them.

Megarry J., said,

" "**However that may be, what matters here is, in my judgment, not the terminology but the substance and the reality: and looking at**

that, it seems plain that the principles of natural justice prima facie apply. Mr. Sparrow sought to avoid this conclusion by urging that what was done bore generally on P.D.L.P. and was not directed against individuals. He further contended that the principles of natural justice did not apply because the acts were administrative, because there had been no dismissal of any disaffiliates, and because these principles did not apply to unpaid offices".

"**I do not find any of these contentions persuasive**…A "party" or a "club" if unincorporated is not an entity separate from its members; and action against the collective unit takes direct effect against the individuals comprising that unit. This seems to me to be quite different from the indirect effect that a proposal for a new road may have on the individual landowners, to which Lord Reid referred in Ridge vs. Baldwin [1964] A. C. 40 at page 72. On these submissions, as throughout, **I look to the realities and not to the labels.** Further, without authority to support it, I can see no warrant for the view that the application of the principles of natural justice to dismissal or suspension should be withheld from honorary office and yet accorded to ordinary membership. My reference to the office of Treasurer of an Inn of Court was later to move Mr. Sparrow to protest on the ground that the Inns were peculiar bodies. Indeed, they may be; but there are many other offices, both honourable and honorary, in other bodies; and unless constrained by authority (and none has been cited) I refuse to hold that the right to natural justice depends upon the right to a few pieces of silver.

Accordingly, I must consider what are the principles of natural justice which prima facie are applicable, and whether or not there is anything to oust their application. In doing this, it is convenient to refer to a case concerning an avowed expulsion from a political party which came before me some three weeks after the conclusion of the argument in this case,

namely, **Fountaine v. Chesterton.** It may be that there is other authority on the point that I have in mind: but none was cited to me in that case or in this. The decision was briefly reported in "The Times" of August 20, 1968 and 112 S. J. 690: but I gather from the asterisk attached to the latter report that no full report is likely to appear, at any rate in the Weekly Law Reports. Accordingly, it may be convenient if I set out as best I can from my notes the passage in that judgment which I have in mind.

In that case I said: [Megarry J.,]

"**The expression 'the principles of natural justice' is, I think, now a technical term. As Maugham J. pointed out in Maclean v. Workers' Union [1929] 1 Ch. 602, 624, among most savages there is no such thing as justice in the modern sense. In a state of nature, self-interest prevails over any type of justice known to civilisation; the law of the jungle is power, not justice. Nor am I clear what the word 'natural' adds to the word 'justice.' It cannot be intended to indicate the antithesis of 'unnatural justice,' which would indeed be an odd concept; I imagine that it is intended to suggest justice that is simple or elementary, as distinct from justice that is complex, sophisticated and technical**.

"The term 'natural justice' has often been used by eminent judges, and although Maugham J. said (at p. 624) that it 'is, of course, used only in a popular sense,' **I would prefer to regard it as having become something of a term of art. To extract the quintessence of the process of justice is, indeed, notoriously difficult. 'The ideas of natural justice,' said Iredell J., 'are regulated by no fixed standard; the ablest and the purest men have differed on the subject': Calder v. Bull (1798) 3 U.S. 386, 399. In Ridge v. Baldwin [1964] A.C. 40, 132, Lord Hodson referred to a 'certain vagueness' in the term, but rejected the view that because the requirements of natural justice depended upon the**

circumstances of the case, this made natural justice so vague as to be inapplicable. He added: 'No one, I think, disputes that three features of natural justice stand out - (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges.' I do not think that I shall go far wrong if I regard these three features as constituting in all ordinary circumstances an irreducible minimum of the requirements of natural justice. I need only add that all these requirements are essentially procedural in nature; I regard natural justice as a distillate of due process of law."

"I then turned to consider a submission based on the judgment of Denning L.J. in **Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 342** to the effect **that public policy would invalidate any stipulation excluding the application of the rules of natural justice to a domestic tribunal**, and said that although I respectfully inclined to the same view, **it seemed to have been expressed obiter and was not mentioned by the other members of the court**, **so that I would hesitate to decide the case on that ground**. I went on to refer to the rule which was said to justify the expulsion, and then said:

> "It is trite law that the rules of an unincorporated association form a contract between all the members of that association. It is, indeed, a somewhat special form of contract; but subject to that, what I am required to do is to construe the terms of a contract. Where the terms in issue deal with the exercise of a power of peremptory suspension or termination of the rights of one of the parties to such a contract, **then I think that the common expectation of mankind would be that the power would be exercised only in accordance with the principles of natural justice unless the contrary is made plain**. This expectation rests upon high and

ancient authority. When a member of a university was deprived of his degrees without being given an opportunity to defend himself, Fortescue J. said: 'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also': Rex v. Cambridge University (1723) 1 Stra. 557, 567. **Even if the law permits the principles of natural justice to be effectually excluded by suitable drafting, I would not readily construe the rules as having achieved this result unless they left me in no doubt that this was the plain and manifest intention**. **Put a little differently, I would say that if there is any doubt, the applicability of the principles of natural justice will be given the benefit of that doubt**. The cry 'That isn't fair' is to be found from earliest days, in nursery, street and school alike; and those who wish to confer upon the committee or other governing body of a club or association a power to act unfairly or arbitrarily in derogation of common and universal expectation must make it plain beyond a per adventure that this has been done. This view is, I think, at least consistent with the approach of Romer L.J. in **Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 349, C.A.** on a not dissimilar point, where he said that it would require 'the use of clear language' before he was satisfied that the members of any body such as the trade union in question had agreed to leave the construction of the trade union's rules to the committee, to the exclusion of the courts."

"Having now had the opportunity of reconsidering the language that I used in that case, I must say that I can see no reason for resiling from it. **Before resorting to public policy, let the rules of the club or other body be construed: and in the process of construction, the court will be slow to conclude that natural justice has been excluded**. Only if the rules make it plain that natural justice was intended to be disregarded will it be necessary for the courts to resolve the issue of public policy. In this case, accordingly, I approach both clause 8 (2) of the Labour Party constitution and the resolution of the N.E.C. dated April 24, 1968, as provisions requiring to be construed strictly, and as not excluding the processes of natural justice except in so far as this is made plain. Nothing that I can see in clause 8 (2) even begins to exclude the process of natural justice. **The phrase "to take any action it deems necessary" cannot, in my judgment, be read as if it continued "however contrary to natural justice it may be"; nor, in my judgment, are the words "disaffiliation," "expulsion" or even "or otherwise" to be qualified in any such way. These things may be done: but they must be done fairly and justly, and not unfairly or unjustly**……."

not unfairly or unjustly. Accordingly, the first resolution, spending the activities of the Pembroke Constituency Labour Party and depriving the officers of the right for the time being to handle the funds of the party, falls to be tested by the standard of whether it was made in accordance with the rules of natural justice. Whatever may be said about the right to an unbiased tribunal, the process of giving notice of the charges and giving those concerned the right to be heard in answer to the charges was plainly not followed. Accordingly, in my judgment the resolution was a nullity. It was effective neither to suspend the activities of the Pembroke Constituency Labour Party nor to deprive the officers of that party of their right to handle the funds.

The two limbs of the second resolution, though directed to the same end, are markedly different in function. The first is an operative decision that the Pembroke Constituency Labour Party be re-organised." The second provides that the national agent be “given authority" to take such steps as are necessary to “complete the re-organisation" and so confers authority on another to take certain steps. Both are very wide and indefinite in their terms, depending on the protean word "re onganise.” Plainly there is considerable scope for argument about what that word means. But whatever it means, I do not think it can be said to include a process which excludes from the benefits of membership, without making a charge and without affording a hearing, anyone who fails to sign return within a reasonable time the form put forward in this case.

Mr. Sparrow did contend that sending out the form amounted to affording the members an opportunity of being heard: but not even his considerable powers of advocacy sufficed to give any life to as barren a contention as I have heard. I cannot believe that the concept of "Write a letter in the form I dictate, or you are out" would seriously be regarded by any of the great judges who have spoken on the subject as making even an approach to conformity with the requirements of natural justice; and the prospects of this are not increased by the words "or you are out” not being there but being represented only by the hint to be derived from the reference to “making any recommendation to the National Executive Committee about your continued membership of the party”.

These are not days of linguistic accuracy. Euphemisms abound: and as I said on a completely different subject in Pet Library (London) Ltd., vs. Walter Ellson & Son Ltd., [1968] F.S.R. 359, 361, today

> “many words of precision are being weakened by misapplication, sometimes for convenience but more often by ignorance: words such as “alibi” and “disinterested” spring readily

to mind. There are also words which are persistently misused; thus even in circles of high respectability (and I look with sorrow at Vol. 29 of Halsbury's Laws of England (3rd ed.) (1960), p. 646), the word 'escapees' is sometimes applied to the fugitive prisoners rather than the governor and prison officers that they left behind them."

Nevertheless, after making all due allowances for an age of semantic laxity I do not think the word "re organize" can be held to comprehend a process which in substance amounts to expulsion without a charge and without an opportunity to meet it. The more indefinite the language, the less apt it is to exclude the members' reasonable expectation of being accorded natural justice."

I also bear in mind the rule that, in general, a failure to give due notice of a meeting to even one member of a body who is entitled to attend invalidates the decisions of that body: see, for example, Smyth v. Darley (I849) 2 H.L. Cas, 789, concerning the election of an officer, and Young v. Ladies Imperial Club Ld. [1920] 2 K.B. S23 where an expulsion was in issue. Here, no notice of the second meeting was given to a number of the members of the local Labour Party: and it is clear that this was due not to inadvertence or accident but to deliberation. It follows that the meeting was not validly constituted, and so its proceedings were void. In the words of Lord Campbell L.C. in Smyth v, Darley, at p. 803, "even a unanimous election by those who did attend would be void,"

The next two passages which I will quote from the judgment of Megarry J., the Vice Chancellor of Her Majesty the Queen, who among other great sayings of him said, that, the most important person in a court is the litigant who is about to lose; and the judgment must show why he lost, are extremely crucial and out of the two, the first one, in addition, is monumental.

"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When

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

Let me add this. What was done was, in my judgment, wrong; but there is nothing before me to suggest that it was consciously wrong. I do not for one moment say that the N.E.C. deliberately or knowingly resolved to ignore the rules of natural justice. There is no evidence before me on the point, but it may very well be that the thought never entered the minds of the members of that committee. I am content to assume that the process of “getting round all problems relating to expulsion" was not the object of the committee, but merely the contention of the advocate seeking, quite properly, to make the best that he could of what had been done. Nevertheless, however innocent the committee, what was done was wrong. It follows that, subject to any argument that there may be about the precise terms of the order, the plaintiffs are entitled to the injunctions sought by the notice of motion.”

In re Pergamon Press Ltd., Denning L. J., in the Court of Appeal while applying Ridge vs. Baldwin [1964] A. C. 40, said that although the function of the

inspectors' was investigatory and not judicial, they must, in view of the consequences which may follow from their report act fairly.

This directly applies in the present case. There cannot be "fair" action without adhering to audi alteram partem.

It is pertinent, at this stage, to further consider the case of Rex vs. The University of Cambridge or The King against The University of Cambridge from the original law report. It is as follows,

> "CASE 94. THE KING against THE UNIVERSITY OF CAMBRIDGE. [Referred to, Bonaker v. Evans, 1850, 16 Q. B. 171 ; Marquis of Abergavenny v. Bishop of Llandaff, 1888, 20 Q. B. D. 472.]
>
> Time allowed to shew cause to a mandamus. A mandamus lies to restore a member of a university to doctor's degrees, from which he had been degraded by the University Court for speaking contemptuous words of the vice-chancellor, and of the process of the Court.-S. C. 2 Ld. Ray. 1334. S. C. Stra. 557. S. C. Fort. 202.
>
> Mandamus to the vice-chancellor, masters, and scholars of Cambridge, to restore Dr. Bentley to the degrees to which he had been admitted by the university, and had been surreptiously degraded (as was suggested), or that they should shew cause why he should not be restored.
>
> The counsel for the university desired time to shew cause why a mandamus should not go, for that there were several old books and charters which were necessary to be inspected before they could shew cause.
>
> And thereupon the time was enlarged for that purpose.
>
> And upon another day.
>
> It was argued for the university, that by virtue of a charter given to them by Queen Elizabeth, they had a Court of Judicature to try and determine all matters arising within their jurisdiction, in which Court a plaint was levied by Dr. Middleton against Dr. Bentley, and thereupon a summons was sent by the beadle to the doctor, which he received, and spoke contemptuous words of the court, for which he was degraded, and from which no appeal would lie; no more than a writ of error would lie for imposing a fine by a Temporal Court for a contempt, because every Court of Record is entrusted with the final judgment of what shall be a contempt to their anthority; therefore if an appeal or a writ of error would lie in such case, it would put the trial of what is a contempt [149] to the discretion and judgment of a Superior Court, and to strip an Inferior Court of that power which they have by law to judge what is a contempt to them; whereas contempts of the authority of Courts are undoubtedly to be judged by the same Courts to whom the contempt is offered which is the reason that a writ of error will not lie on a sentence for a contempt to this Court ; but then it must be plainly proved. Now the same thing is done by a mandamus after an indirect manner as would have been done by an appeal or writ of error, if that would lie ; but as an appeal will not lie for a contempt, so neither will a mandamus ; for admitting this degradation

had been ad libitum, yet a Temporal Court could not grant a mandamus. It is like the case of a recorder of a corporation who was removeable at will, and being displaced moved for a mandamus, but it was denied. Besides, the constant course and custom of this university warrants a dis cretionary power amongst them to confer degrees on some, and to degrade others for any contempt; and in this case they have done all they could to bring Dr. Bentley to an easy agreement; for after the first summons they sent another in writing by their beadle, but the doctor's doors were then shut, and he would not be seen ; then they adjourned from day to day, on purpose to give him leave to appear, before they would suspend him ; but when he contemptuously declined, they first suspended and afterwards degraded him. Now as a mandamus was never yet granted to admit a man to a degree in the university, after he had performed all his exercises, so there ought to be none to restore one after a degradation, because degrees are arbitrarily given by the universities, and so are degradations arbitrarily made; for if they should by any means rashly admit an unlearned man to a degree, they may upon better information degrade him, without taking a traverse to the return of a mandamus, which must be tried by a jury of lay freeholders. Besides, these degrees are but titles of honour and precedency, and give no temporal right, and for that reason a mandamus ought not to go ; for if a knight should be degraded in a Court of Honour, no mandamus would lie to restore him (a), which is a case in point ; therefore if it should lie in this case, it would introduce a new method to evade [150] the privileges given by this charter, which was afterwards confirmed by Parliament; and as it hath been formerly adjudged in the case of Castle v. Litchfield (b), that a certiorari or writ of error will not lie to correct a judgment given for a contempt, so no mandamus ought to go, which is in effect the same. If it should be objected, that his degree qualifies him for some temporal employment, of which he would be incapable without it; now admitting that to be true, yet such employments are only consequential, and not directly incident to his degree, and therefore ought not to be regarded. And is another objection should be made, viz. that the doctor would have appeared by a proctor, but was not allowed so to do; though this may be true, yet it is no objection of weight, because it might not be the course of their court to admit such appearances, and the universities have a privilege to proceed according to their own laws, as an encouragement to learning; and if they have proceeded accordingly, this Court will not interpose. Now take the case as it stands upon Dr. Bentley's affidavit, there will be no reason to grant a mandamus; for he makes oath, that he has appealed from the sentence of the University Court; which if true, then there is another remedy for him to be restored, viz. by an appeal ; and where there is another remedy, a mandamus is never granted. Moreover the doctor made oath, that the university had no power to degrade him ; if so, then he is not degraded for want of a sufficient power so to do, and consequently a mandamus ought not to go, for it is impossible that a man should be restored to his degree who was never degraded.

But on the other side it was said, that the merits of this cause ought not to be argued upon a motion, but upon the return of the mandamus; and for that reason it ought to be granted.

The Court. All care shall be taken that justice shall be duly administered in the universities ; but if they assume an arbitrary power exempt from the jurisdiction of any other Court of Judicature, then they may do what they please without cotitroul , and where people are under such a government, they are in a very bad condition. But this Court hath a greater regard to the learning of the universities than to admit the arbitrary sentence of a vice-chancellor to be final. [151] As

to what has been said, that the degrees in the universities are only honorary ; this is a mistake, for they are blended with a temporal right so far as to deserve a mandamus to restore a mal degraded. It is true, this might have been a proper objection before the statutes of 21 Hen. 8, c. 13, and 13 & 14 Car. 2, c. 4, were made, which render a man incapable of a benefice if he had not taken his degrees in some university ; for before those statutes, such degrees were only titles of precedency, and the allowing them, or a degradation, was no temporal advantage or loss ; therefore in such case the Temporal Courts had no reason to interpose ; and this may be the reason why the universities degraded ad libitim, and of their constant course so to do. But this is no objection since the making those statutes. Neither shall it be said, that where a corporation has admitted a mal willingly to his freedom, that they shall have power to disfranchise him, because they do not like him ; neither can the universities give degrees to whom they please, and take them away ad libitum. AinI though their counsel have objected against this mandamus, for that they have an exempt and absolute jurisdiction amongst them selves, this seems to be a good reason why it should be granted, though it might have been otherwise if they had shewed that they had a visitor, to whom an appeal would lie ; for probably that might have excluded the superintendency of this Court; but to deny a degree to him who had performed all his exercises to qualify him for a degree, would be a great discouragement to learning; and in such case this Court would grant a mandamus to admit him, especially since it is accompanied with a temporal interest. Now admitting it should be enacted by some statute, that a mail should be incapable of such an office if he was not a knight, should not a knight degraded have a mandamus? Certainly he should ; and so had Dr. Bentley in this case.

The mandamus was granted, and the university made this return:

[The report of the case, then records, what appears to be the appeal by the university].

[Then it gives the judgments of the Chief Justice and two other judges, which includes that of Fortescue J.].

Pratt, Chief Justice. This is a case of great consequence, both as to the property, the honour, and the learning, of this university, and concerns every graduate there, to law. though at present it is the case only of one learned man, and the head of a college. The question is, whether the university can suspend and degrade, and by what rules they may proceed in either or both of these cases ? And to this matter, it is allowed they may suspend or degrade for a reasonable cause; but then the cause must be specially set forth, that the Court may judge whether it is reasonable, and accordingi And upon this ground it is, that a return of a suspension for contumacy generally will not be good, for the particulars of the contumacy ought to be specified. 5 Rep. 57. [162] It is agreeable to law, that a man shall not be deprived of his property without being heard, unless it be by his own default ; but it is hard that it should be in the power of one man to suspend or degrade another without any appeal for if he should err, as all men are subject to error, then the person suspelded or degraded has no remedy. It is allowed, that this university has a jurisdiction in several cases ; and this Court will support them in the exercise of such jurisdiction, if they do not exceed their proper bounds and limits. Now as to the return, there are several causes set forth both for the suspension and degradation, viz. in saying, " that he would not obey

the summons ; that it was illegal ; that the Vice-Chancellor stltd egit; and that he was not his judge ;" aiid all this spoken to a beadle who served the process of their court, and in a very indecent manner, in diminution of the authority thereof, and to make it ridiculous, which is consequently a contempt thereof ; and if the like had been done to an officer of this Court, it would have been accounted a great indignity, and the person should be punished ; but then the matter must be brought before the Court in a proper manner: and whether that was done in this case is now to be determined. Now by this return it appears, that depositions for a con tempt were exhibited by the beadle, but it does not shew that those depositions were taken before a proper judge ; and this being the foundation of the degradation, it does not appear to this Court that they had any power to degrade the doctor. But admitting they had such a power, then the next thing to be considered oil this return is, whether the cause returned is sufficient to justify this degradation : and if it was, then whether [163] They return, that they had power to degrade for a con it was well returned. tempt, and this was given to them by a charter of Queen Elizabeth, and for any other reasonable cause : now the cause returned was neither, for it was not a contempt to the university, but to the Vice-Chancellor's Court; it is like a contempt to a mayor, which can never be said to be a contempt to the whole corporation ; therefore, though they might degrade for a contempt to the university, it cannot be inferred from thence, that they may degrade for a contempt to a private court of that university.

Fortescue, Justice. The words are "a contempt to the court," for which he ought to have been committed if he had been present in court; and if not, he ought to have been bound to his good behaviour. I do not see how a deprivation for this cause is agreeable to reason or justice: many customs of the university have been adjudged void. It is a rule, that all customs shall be certain. Now this custom to deprive _po connacit is uncertain as to the meaning of the word "contmnacy," whether it means contumacy to the congregation, to the vice chancellor to this court, or to the university ; whether to Dr. Gooch as head of the college, or as Judge of the Iiferior Court.

Pratt, Chief Justice (as to this matter). The words are improper and indecent we should punish all persons who should speak so disrespectfully of our process, and might bind them to their good behaviour ; but the authorities seem too strong to allow a power to remove a person from his freehold for such words.

Eyre, Justice, said, that lie was not satisfied that the university can deprive for a contempt to the vice-chancellor; for a contempt to the vice-chancellor is no con tempt to the university ; they cannot deprive for all contumacies, ior have they returned a power to deprive for a contumacy to the vice-chancellor. It must be university. Suppose, in any other corporation a member should offer a contempt to an Inferior Court, can the corporation deprive- him ? No: they can only punish him as other inhabitants. A proper punishment for a contempt is fine and imprisonment, but not loss of freehold ; an officer of this Court ought not to lose his office for con temptuous words to the Court. A tenant to the lord of a manor or district cannot lose his estate for non-attendance at any court.

Fortescue, Justice. Though a degree in the university is only a civil honour, yet interest and property being the consequence of such degree, the Court considers it as such with all its attendances. It is like the case of an alderman, which of itself is no profit, only by consequence. All degrees were originally given by the Crown ; and though the present right of conferring them

is prescribed for by the university, yet that prescription must be presumed to be founded upon a right derived by authority from the Crown; so that a person advanced to the degree of a doctor, &c. may be esteemed to be advanced by the King. There were no degrees among the Grecians or Romans, nor among the first Christians ; they began about the twelfth or thirteenth century, and have been since attended with great privileges and profits, universitatis is the proper Latin word for corporation. A learned man of this university told me, that there were no degrees ever granted there until the university was a corporation. The seminaries for education of youth were antiently held in the cathedrals of the churches of the first Christians. Besides, where any person is degraded for a contumacy, it ought to be by that court to whom the contempt was offered; but it is not pretended by this return, that the vice-chancellor's court had any power to degrade. Neither does it appear that Dr. Bentley was ever summoned to answer this contempt ; and it is against natural justice to deprive a man of his right before he is heard ; therefore if there was a custom so to do, such custom would be absolutely void ; and it is a thing of daily experience to grant prohibitions to Spiritual Courts, if they deny the defendants a copy of the libel, because such denial is against natural justice. And now to offer a common instance, viz. suppose an officer of this Court should show any contempt thereof, could he be deprived of his office for such contempt? Certainly he could not. It is true, they who have argued for the university insisted, that the proceedings there are according to the civil law, and this they have done to justify the suspension, without being summoned to answer the contempt; but it does not appear upon the return (upon which this Court is (164] to judge), that they proceed there by the civil law ; and if so, then the Court must intend that they proceed by the common law, which they have not done, for there is no manner of proof that the doctor was surnmoned to appear to answer the contempt; and it can never be said, that a court which proceeds according to the common (a) law, shall suspend or degrade a person without being heard or summoned. It is said likewise, that this was not a proceeding by virtue of a charter alone, but by a charter-confirmed by Act of Parliament. Now admitting that to be true, it must be granted that convictions, even upon Acts of Parliament, are frequently quashed, for not summoning the persons convicted, though not required by the statute, because it is still against natural justice to convict without hearing, The want of a summons is an objection that can never be got over. Had the custom been returned to deprive without summons, it had been void, as against natural justice. If a justice of peace convict any man without a summons, such conviction is void. I heard a learned civilian say, that God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence. Gen. iii. 9. Such proceeding is agreeable to justice. Admitting the university has a jurisdiction, yet this Court will inquire what they have done, and how they have used that jurisdiction, as it was done in * Bushel's case, where it was insisted, that the merits of the cause could not be inquired into upon the return of a habeas corpes, but it was over-ruled ; and this Cou-t.cannot affirm the proceedings in this case without over-ruling Bushel's case, and several other authorities of the like nature.

For which reasons the Court was unanimous in granting a peremptory mandamus; and in Easter term, in the tenth year of George the First, the doctor was restored to his degree.

George the First ascended throne on 01st August 1714. His tenth year was 1724. The law report says the judgment is dated 1723.

There are examples to the principle that the decision is a nullity if a material party is not heard in popular culture too[12].

The 08th respondent in his written submissions attempts to distinguish the following cases relied upon for the petitioner,

(i) *Sri Lanka Telecom Ltd., vs Human Rights Commission of Sri Lanka, 2020(1) SLR 212*

The Human Rights Commission directed parties to do certain things, whereas P.54 is only a fact finding report.

As Lord Megarry V. C. said in John vs. Rees,

> "These are not days of linguistic accuracy. Euphemisms[13] abound: and as I said on a completely different subject in Pet Library (London) Ltd., vs. Walter Ellson & Son Ltd., [1968] F.S.R. 359, 361, today

[12] In the English version of the play "The Caucasian Chalk Circle" of Bertolt Brecht, Azdak [before he was appointed the Judge by Ironshirts] in interviewing Bizergen Kazbeki, the nephew of Prince Ahzen Kazbeki, for the vacant post of a judge stages a mock trial; Azdak coming as the Grand Duke, who is accused of losing the war. Azdak maintains that he declared war only on the advise of patriots like Uncle Kazbeki, who wanted the war to steal money from the treasury. Bizergen, the candidate in his judgment finds the Grand Duke (Azdak) guilty of losing the war and sentence him to be hung by neck; and says Azdak, demanding to annul the sentence

"….war lost, but not for princes. Princes won their war. Collected three million eight hundred sixty three piasters for horses not delivered…..Therefore victorious. War only lost by Gruzinia, not present in this court."

What Azdak means is that since a necessary party is not before court, the decision is a nullity.

In the German original it is said,

"….Krieg verloren, aber nicht fur Fursten. Fursten haben ihren Krieg gewonnen. Haben sich 3863000 Piaster fur Pferde bezahlen lassen, die nicht geliefert….

Krieg nur verloren fur Grusibien, als welches nicht anwesend vor diesem Gericht".

Which translates into

"War only lost for Grusinia, as which is not present before this court".

But to the credit of Mr. Henry Jayasena who translated it into Sinhala, he adds, something that is not in the original version too, for he says,

"yudde peradune Grusiniawe mahajanathawa. Egollo methana ne…ee nisa me naduwath weradyi, theenduwath weradyi!!"

[Caucasian chalk circle]

[13] a mild or indirect word or expression substituted for one considered to be too harsh or blunt when referring to something unpleasant or embarrassing.

> "many words of precision are being weakened by misapplication, sometimes for convenience but more often by ignorance: words such as "alibi" and "disinterested" spring readily to mind. There are also words which are persistently misused; thus even in circles of high respectability (and I look with sorrow at Vol. 29 of Halsbury's Laws of England (3rd ed.) (1960), p. 646), the word 'escapees' is sometimes applied to the fugitive prisoners rather than the governor and prison officers that they left behind them."

Nevertheless, after making all due allowances for an age of semantic laxity I do not think the word "re organize" can be held to comprehend a process which in substance amounts to expulsion without a charge and without an opportunity to meet it. **The more indefinite the language, the less apt it is to exclude the members' reasonable expectation of being accorded natural justice**."

Although the 08th respondent says "fact finding", it has come to conclusions without the affected party, the petitioner being heard; and in a way similar to what the 08th respondent says the Human Rights Commission did in Sri Lanka Telecom case, by way of recommendations or otherwise it directs taking of certain action against the petitioner.

(ii) Dias vs. Abeywardene 68 NLR 409

A writ of prohibition does not lie against a Commissioner appointed under the Commissions of Inquiry Act.

H. N. G. Fernando S. P. J., (later Chief Justice) considered the case of King v. Electricity Commissioner [1 (1924)1 K. B. 171.].

However, his lordship said,

"Let me suppose that the Commissioner in the instant case makes a report in which is contained a determination that X intercepted certain

telephone messages at the instigation of Y and divulged the contents of the messages to Z. There is literally nothing in the Commissions of Inquiry Act by reason of which such a determination can create, affect or prejudice the rights or obligations of X, or Y or Z. Even though the finding which the Commissioner is required to reach according to his terms of reference is that a person unlawfully intercepted a telephone message, the finding would not be one made in terms of the Telecommunication Ordinance, under which the function of determining whether there has been such unlawful interception is committed solely to the ordinary Courts. Even if the report of the Commissioner in this case were to be published, it would not, in the absence of any supplementary legislation, be proof for any purpose that X or Y or Z had (in the example I have taken) done any act found by the Commissioner to have been done by him."

The above case was decided in 1966 some 58 years ago. The distinction between "judicial" and "quasi judicial" or "administrative" has thinned. In Balmoral Tanks Limited and Balmoral Group Holdings Limited v Competition and Markets Authority, [2019] EWCA Civ 162, Balmoral Tanks faced legal consequences for its actions related to information sharing, even though it was not directly involved in the initial cartel arrangements.

(iii) Fernando vs. Jayaratne 78 NLR 123

Sharvananda J., (later Chief Justice) said, that,

"The only power that the Commissioner has is to inquire and make a report and embody therein his recommendations. He has no power of adjudication in the sense of passing an order which can be enforced proprio vigore, nor does he make a judicial decision. The report of the respondent has no binding force ; it is not a step in consequence of which legally enforceable rights may be created or extinguished."

Obiter-" **I am constrained to add that while there may be no duty to act judicially, it does not follow that there is no duly to act fairly by observing the principles of natural justice. Reason and justice require that the person concerned against whom the Commissioner may feel inclined to make an adverse report should be heard before a finding is reached against him**."

Hence even if the decision is not "judicial" audi alteram partem must be followed. The authority 08th respondent relies itself operates to nullify his position.

(iv) Ratnagopal vs. The Attorney General 72 NLR 145

This case did not say anything about quasi judicial as the 08th respondent's learned counsel claims. The Privy Council decided, that,

"….inasmuch as the scope of the inquiry was not limited by the Governor-General and was to be decided by the Commissioner, the appointment of the Commissioner in terms of the warrant was ultra vires and invalid having regard to the powers of the Governor-General under section 2 of the Commissions of Inquiry Act. It followed that the conviction of the appellant for contempt of Court should be set aside."

The appeal was allowed.

(v) Silva and others vs. Sadique and others [1978,79,80] (1) SLR 166

Here 05 judges of the Supreme Court, among other things, said,

"**Before any lawfully constituted body arrives at a finding in respect of any person, it is necessary that such body should give a fair**

hearing to the person concerned. The principle audi alteram partem is one that is widely applicable…."

Hence whatever the characteristics of the commission of inquiry, etc., audi alteram partem must be followed.

The petitioner submits, on the question, that, "THE PURPORTED CONCLUSIONS AND FINDINGS ARE JUSTICIABLE IN LAW", as follows,

"In the case of *Sri Lanka Telecom Ltd., vs Human Rights Commission of Sri Lanka,* SC. Appeal No. 215/12, SCM 01/03/2017, the Honourable Supreme Court held as follows:-

If a decision of a Public Body affects the rights of an individual, can such a decision be quashed by issuing a writ of certiorari? In this connection, I would like to consider a passage of the judgment of Lord Justice Atkin in Rex Vs Electricity Commissioner (1924) 1 KB 171 at 205 which reads as follows:

"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs."

In B Sirisena Cooray Vs Tissa Dias Bandaranayake and Two others [1999] 1SLR 1 this court issuing a writ of certiorari quashed the determination of the Presidential Commission. His Lordship Justice Dheeraratne in the said judgment observed as follows:

"The determinations and recommendations of the Commission are flawed firstly as being unreasonable in that the Commissioners did not call their own attention to the relevant matters; secondly as they are not based on

evidence of any probative value; and thirdly because those determinations and recommendations have been reached without giving the petitioner a right of hearing in breach of the principles of natural justice."

HWR Wade & Forsyth in the book titled „Administrative Law" 10th Edition page 518 discussing the question of issue of writ of certiorari states as follows: "They will lie where there is some preliminary decision as opposed to a mere recommendation which is a prescribed step in a statutory process which leads to a decision affecting rights even though the preliminary decision does not immediately affect rights itself."

In GPA DE Silva Vs Sadique [1978-79-80] page166 at page 171-172 this court observed thus: "The circumstances in which a Writ of Certiorari will issue have been the subject of judicial pronouncements. Brett L.J. in R. v. Local Government Board [1982] Vol: 10 QBD 309,321 said. "Wherever the Legislature entrusts to anybody of persons other than to the superior Courts the power of imposing an obligation upon individuals the Courts ought to exercise as widely as they can the power of controlling those bodies if they attempted to exceed their statutory powers." That this principle applies not merely to statutory bodies is clear. In Wood v. Wood, [1874] LR Vol: 9 Ex 170 it was said - 12 "this rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." It appears to be clear that certiorari will also lie where there is some decision, as opposed to a recommendation, which is a prescribed step in a statutory process and leads to an ultimate decision affecting rights even though that decision itself does not immediately affect rights."

Considering the above legal literature, I hold that if a recommendation of a Public Body affects the right of an individual, Superior Courts, in the

exercise of their writ jurisdiction, have the power to quash such a recommendation by issuing a writ of certiorari."

Hence there is no doubt whatsoever, that, the petitioner is entitled to what he asks.

Reliefs under paragraphs (c), (d) and (e) of the petition are granted without the part which prays for the calling of the report, as the case is over. Writs of certiorari are granted as per paragraphs (c) and (d) and a writ of prohibition is granted under paragraph (e).

The petitioner is entitled for the costs of this application.

Judge of the Court of Appeal