

Principles of Natural Justice: Revisiting History During the Time of Corona

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Abstract

The Principles of Natural Justice is a term widely in use in the legal field and in recent years even in popular dialogue. A phrase heard by every law student, academician, professional and ay other wit some legal acumen. It was popularized by the English Legal System which during the colonial times dispersed it throughout nearly all the commonwealth Nations. The two basic rules, that is, nemo iudex in causa sua (for the adjudging authority to be unbiased) and audi alteram partem (the right to ensure a fair hearing to each party) have come to be universally accepted as the basic requirements to be followed for ensuring that every accused person gets a fair trial and effectively ensures the practice of another widely accepted legal tenet – Innocent until proven Guilty. However, how exactly did these two famous rules come to be of such widespread use and acceptance in an environment where legal tenets are frequently muddled due to contrasting philosophical/jurisprudential opinions and socio-political trends. This paper attempts to trace a brief timeline of certain ancient and certain prominent statesmen, legal luminaries and their works which time and time again embellished the necessity of these Principles throughout human History.

Keywords: Principles of Natural Justice; Jurisprudence; Fair trail

During the lock down, when I had nothing to do, I was enjoying a book named “Gift of solitude”²-a collection of amazing photographs by a world-renowned photographer from Gujarat. The book is unique in the sense that for each photograph, an appropriate epigram - short poem - of Tagore (*Kobitika* as Tagore called it) is quoted. The photographs (all black and white) and the epigrams are food for the soul. One of the poems went straight in to my heart-

“Let my doing nothing when I have nothing to do become untroubled in its depth of peace like the evening in the sea shore when the water is silent”

To make my doing nothing peaceful and untroubled, I decided to go back to the days when I was a law student and revise my favourite subjects. In his book “*Less than One*”³, Brodsky, who was awarded the Nobel Prize for literature in 1987, had said- “*Attempting to recall the past is like trying to grasp the real meaning of existence.*” In Cricket, a dropped player often goes back to the basics in an attempt to sharpen his game. Taking a clue from that I decided to go back to the basics and revisit the Principles of Natural Justice, particularly the historical aspects with literary references. My efforts to remember the past and the experience of going back to the basics were pleasurable. There is a novel of the Nobel prize winning Colombian writer Gabriel Garcia Marquez by the name – ‘*Love in the time of Cholera*’. The idea of the title of this short article is borrowed from there.

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² Ashwin Mehta, “Gifts of Solitude”, 1st Ed., Grantha Corporation, 1999

³ Joseph Brodsky, “Less than One: Selected Essays”, Penguin UK, 2011

From the Internet I found a beautiful article by John M. Kelly of Notre Dame Law School titled "*Audi Alteram Partem: Note*"⁴ which has several Greco Roman references. While browsing also gave me an opportunity to look into historical references from Indian Scriptures.

Rules of Natural Justice which are defined as rules of "fundamental justice" are found even in Greco- Roman literature and legal writings and in the writings of our Scholars and thinkers like Kautilya-Chanakya, Brihaspati and Shukracharya. The original Latin term for natural law is Jus Naturale.

My tour started from Greece and from there I went to Rome and England and then came back to India. Here is the brief summary of my journey.

Coincidentally, my first stop had a reference to the writings of Demosthenes of Greece in "*De Corona*" - meaning "On the Crown". (That explained to me the shape of Corona Virus which we all see in TV Ads.) Demosthenes was a legal scholar in Greece during 4 Century BC. In his speeches collected in the work '*De Corona*', there is a mention of Athenian Judicial oath which contained a promise by the Judge to listen equally to the prosecutor and the defendant. It was felt that unless both the sides were granted equal opportunity of hearing, impartiality would be compromised. It is said that even in the plays performed in amphitheaters in Greece, this requirement would appear as a dialogue from the actor. For example, look at the following dialogue in the play *Heraclidae* of the Playwright Euripides –

"Who would judge a dispute or decide the matter before getting a clear statement from both sides?" Hearing both the sides before taking a decision was not only considered to be an act of wisdom but was also a moral need imbibed as a natural requirement in the society in general in ancient Greece.

Not very far from Greece, in Rome the first legal Philosopher and a great orator Cicero (106 B.C) emphasized the requirement of hearing both the sides in all his work. I was reminded of Prof. Niranjana Bhagat, the famous Gujarati Poet and a Scholar of Greco-Roman and European Literature who used to frequently quote dialogues of Cicero with great enthusiasm and passion. It was Cicero who wrote that justice is the crowning glory of all the virtues. Lockdown gave me an opportunity to watch "The Roman Empire" on Netflix. One Emperor Claudius was known for giving one sided and arbitrary justice. Suetonius, a famous historian, who is known for his writings on 12 Roman Emperors, is said to have noted an incident wherein a lawyer for the accused thanked Emperor Claudius for allowing an accused to make a defense. Suetonius has placed the following sentence in the mouth of that lawyer:

"Of course, it (hearing the accused before deciding on his guilt) is the custom."

In *Controversiae* Seneca the elder (54 BC to 39 AD) has shown the accused to be complaining that the Judge was not hearing him.

Shakespeare, who had perfected Latin, was influenced by the Playwright Seneca the younger (4 BC to 65AD). (In the second scene of the Second Act of *Hamlet*, Shakespeare has made Polonius say this-

"Seneca cannot be too heavy nor Plautus too light. For the law of writ and the liberty these are the only me.".)

Following dialogues from the younger Seneca's play *Medea* - the Roman tragedy with Greek subject- are worth mentioning-

(1) "Did you hear the person before he suffered punishment?"

⁴ University of Notre Dame - The Law School, https://scholarship.law.nd.edu/nd_naturallaw_forum/84, (last visited Dec 12, 2021)

(2) He who shall decide anything without hearing other side will not have done what is his right though he may have said what is right."

This requirement of hearing both the sides before coming to a conclusion was sought to be hammered on the people through literature and the dramatic performances.

Kindly see the Judgement of Supreme Court in the case of Union of India v. Tulsiram Patel, (1985) 3 SCC 398 for such historical references.

Our Professor of Administrative Law at Sir L.A.Shah Law College, Ahmedabad Justice C.K.Thakkar (Retired Judge of the Supreme Court of India and whose book on Administrative Law we all use as a reference book with great reverence) used to refer to an instance from the Holy Bible. When Adam and Eve ate the forbidden fruit of knowledge, God passed the sentence on Adam only after giving him an opportunity to defend himself. The same was repeated for Eve.

Magna Carta- The great charter -of 1215 also recognized the right to justice and right to fair trial. Then in 1670s, Sir Mathew Hale, the Chief Justice of the King's Bench gave 18 tenets for Judges. The 6th tenet was as under: -

"That I shall not myself to be possessed with any judgement at all till the whole business of both the parties be heard".

Coming back to India, in 4th Century B.C, Kautilya's Arthshastra had a chapter regarding administration of justice called Dandniti and one requirement for a Judge was

"impartiality". He said: *"It is the power of punishment alone when exercised impartially in proportion to the guilt, and irrespective of whether the person punished is the King's son or an enemy, that protects this world and the next"*.

Justice S.S. Dhawan of Allahabad High Court in his article "Indian Judicial System- a historical survey" has traced verses on the integrity of Judges from ancient smritis. According to him, in Brihaspati Smriti, the following is mentioned about quality of a good Judge-

"Judge who decides the case should be without any consideration of personal gain or any kind of personal bias and his decision should be in accordance with the procedure prescribed by text. A Judge who performs his judicial duties in this manner achieves the same spirituality as a person performing a yagna".

Section 5 of Chapter 4 of Shukranitisara is on Legal matters and procedure. The 7th verse thereof emphasizes impartiality of the Judge-

पक्षपाताधिरोपस्य कारणानि च पंच वै
रागलोभ भयद्वेषा वादिनोश्च रहः श्रुति ॥

(Five reasons that draw the judge towards partiality are attachment, greed, fear, enmity, and hearing a party in private.)

It can be seen therefore that while in ancient Greece and Rome, emphasis was on hearing both the sides as part of natural law, in India, the emphasis was on impartiality of the Judges. In Greece and Rome, hearing both the sides became interwoven in the society as part of its culture and when it was not followed, it was believed to result in partiality. In India also impartiality of the deciding authority was considered to be important and hearing a party in private was frowned upon.

Until two centuries ago, the words "Natural Law" and "Natural Justice" were used interchangeably. However, thereafter, the term "Natural Justice" became more prevalent. The two aspects of "Natural Law/Justice" became relevant from this- (1) No prejudging and (2) hearing both the sides (audi alterem partem).

Lord Denning in the case of *B.Surinder Kanda Vs. Federation of Malaya*⁵ gave one word for each of the two aspects (1) Impartiality and (2) Fairness.

I began with a poem “On doing nothing.” Let me also end with a poem by Catherine O’Marea of Wisconsin Madison, perhaps written during the lockdown, on doing many things staying home-

“And the people stayed home.

*And they read books, and listened, and rested, and exercised, and made art, and played games,
and learned new ways of being, and were still.*

And they listened more deeply. Some meditated, some prayed, some danced.

Some met their shadows.

And the people began to think differently.

And the people healed.”

In between “doing nothing when I had nothing to do” and “doing many things staying home”, I thoroughly enjoyed the historical and literary tour of the principles of natural justice.

⁵ B.Surinder Kanda Vs. Federation of Malaya (1962) 2 WLR 1153