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## The Right to be Heard in Rule Making Proceedings in England and in Israel: Judicial Policy Reconsidered

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# The Right to be Heard in Rule Making Proceedings in England and in Israel: Judicial Policy Reconsidered

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## **Abstract**

The purpose of this Article is to contribute to formulating a judicial policy that balances justice and fairness towards persons affected by the regulations, on the one hand, and administrative efficiency, on the other.

# THE RIGHT TO BE HEARD IN RULE MAKING PROCEEDINGS IN ENGLAND AND IN ISRAEL: JUDICIAL POLICY RECONSIDERED

*Baruch Bracha\**

## INTRODUCTION

In contrast to the United States, rule making proceedings<sup>1</sup> in England and Israel are not subject to a requirement of affording interested parties an opportunity to be heard. The two countries do not have a written constitution or a statutory scheme, like the United States Administrative Procedure Act<sup>2</sup> (APA), that might provide such a requirement. Furthermore, the courts have not supplemented judicially that which is lacking legislatively, since they have not applied the doctrine of procedural fairness<sup>3</sup> or the rules of natural justice<sup>4</sup> to rule making proceedings. Rather, considerations of administrative efficiency prevail in both English and Israeli judicial policy. Considerations of fairness towards those likely to be affected by regulations are largely ignored.

In England, the House of Lords held in *Ridge v. Baldwin*<sup>5</sup> that the individual's right to be heard by a government authority adversely affecting his or her rights is not limited only to judicial or quasi-judicial proceedings.<sup>6</sup> However, this

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1. Throughout this Article, "rule making proceedings" means the procedures for enacting rules by administrative agencies.

2. 5 U.S.C. §§ 551-59 (1982 & Supp. III 1985).

3. This doctrine implies some procedural safeguards that must be complied with by an administrative authority in the exercise of its powers.

4. These rules embody two basic principles of procedural fairness: (a) that the adjudicator be free from bias (*nemo iudex in causa sua*), and (b) that an interested party be given a right to a hearing before his interests are adversely affected (*audi alteram partem*). The fairness doctrine and the rules of natural justice roughly correspond to the American concept of procedural due process.

5. 1964 A.C. 40 (H.L. (E.) 1963).

6. In administrative law this term [quasi-judicial] may have any one of three meanings. It may describe a function that is partly judicial and partly

landmark decision that ended a long era of restrictive application of the *audi alteram partem* rule<sup>7</sup> has never been extended to rule making proceedings.

The situation in Israel is quite similar. In formulating its basic principles, Israeli administrative law initially adopted the corresponding principles of English law. More recently, however, Israeli courts have steered administrative law in directions and at a pace not always identical to those embraced by English courts.<sup>8</sup> The Supreme Court of Israel held, five years before *Ridge*, that although the *audi alteram partem* rule also applies to proceedings that are not judicial or quasi-judicial, it does not extend to rule making.<sup>9</sup> Though Israeli courts have often adopted aspects of United States law,<sup>10</sup> they did not accept the notion that rule making proceedings must be accessible to interested parties, a notion basic to the APA.<sup>11</sup>

As a result, the legislative acts of administrative authorities are accorded a "privileged" status within the general realm of governmental activity: they are freed from the requirements of procedural fairness that apply to non-legislative acts, and they are not subject to the principles of parliamentary legislative

administrative . . . . It may, alternatively, describe the "judicial" element in a composite function . . . . Or it may describe the nature of a discretionary act itself where the actor's discretion is not unfettered.

S.A. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 77 (J.M. Evans 4th ed. 1980).

7. See *supra* note 4.

8. Israeli law has departed from English law in some respects. Thus, for example, Israeli courts have demonstrated their independence from English law in all matters concerned with providing remedies for an individual in his disputes with public authorities. See *Yotavin Eng'rs & Contractors Ltd. v. State of Israel*, 34(2) *Piskei Din* (Reports of the Israel Supreme Court) [hereinafter P.D.] 344, 352 (1980). "How excellent is our lot and how pleasant is our fate that we are not bound by the precedents of the Court of Appeal in England, and [that] our [judicial] hands are free to add and to create new forms of remedies of our own . . . ." *Id.* (H. Cohn, J.); accord *Troodler v. Agricultural Councils Election Officials*, 17 P.D. 2503, 2513-14 (1963). See generally Friedmann, *Independent Development of Israeli Law*, 10 *ISRAEL L. REV.* 515, 525-36 (1975).

9. *Berman v. Minister of the Interior*, 12 P.D. 1943 (1958) (English trans. in 3 *Selected Judgments of the Supreme Court of Israel* [hereinafter S.J.] 29 (1958)).

10. See *Apelbom, Common Law à l'Americaine*, 1 *ISRAEL L. REV.* 562, 572-75 (1966). Sometimes such ideas are preferred to those prevailing in England. See, e.g., *Miller v. Minister of Transportation*, 15 P.D. 1989, 2005 (1961).

11. See 5 U.S.C. § 551-59 (1982 & Supp. III 1985). But the Israeli Supreme Court did cite American cases, in an opinion denying the right to be heard. *Israeli Consumer Council v. Chairman of the Commission of Enquiry for the Supply of Gas*, 23(1) P.D. 324, 335-37 (1969); see *infra* note 55.

procedure and its openness to public discussion. While this privileged status is first and foremost caused by the absence of a general statutory framework, the courts have also contributed to the creation of this state of affairs by their surprisingly passive stance in this area, as contrasted with the active concern for fairness toward the individual they manifest in other areas of administrative activity.

This passivity is not, however, a deeply entrenched or even a fully considered judicial position. For instance, some of the judicial statements that secondary legislation<sup>12</sup> is not subject to the *audi alteram partem* rule are only dicta or offered as an alternative ground for the court's holding. Moreover, the issue examined in this Article has not been addressed by England's highest tribunals, the House of Lords or the Court of Appeal.

The purpose of this Article is to contribute to formulating a judicial policy that balances justice and fairness towards persons affected by the regulations, on the one hand, and administrative efficiency, on the other. Both English and Israeli law are ripe for change, and they can achieve judicially that which has been obtained in the United States by statute. In so doing, they may find it helpful to be guided by the American experience.

## I. STATEMENTS IN THE CASE LAW REJECTING THE RIGHT TO A HEARING IN RULE MAKING PROCEEDINGS

### A. England

The principal English case is *Bates v. Lord Hailsham*,<sup>13</sup> which involved the authority of a committee under the Solicitors' Act to make general orders relating to the remuneration of solicitors. The plaintiff, a solicitor and member of the National Executive of the Committee of the British Legal Association, tried to prevent a committee acting by virtue of the Solicitors' Act from amending the Solicitors' Remuneration Order, 1883.<sup>14</sup> He argued that it would be unfair to make the amend-

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12. Also known as subordinate legislation, secondary legislation is delegated legislation, enacted by the exercise of power delegated by Parliament.

13. [1972] 1 W.L.R. 1373 (Ch.).

14. *Id.* at 1375.

ing order without affording his organization adequate time to present its views before the statutory committee.<sup>15</sup> About a month before the date on which it was to confirm the order, the committee published a draft of the amending order in *The Law Society's Gazette*.<sup>16</sup>

The plaintiff's organization was not mentioned in section 56(3). However, he claimed that because the matter in question was administrative in character, the organization had a right to be heard, by affording the organization a reasonable time in which to present its position. This right, according to the plaintiff, stems from the authority's obligation to act fairly.<sup>17</sup> As support for this, the plaintiff cited *Regina v. Liverpool Corp.*<sup>18</sup>

Justice Megarry distinguished *Liverpool Corp.* on the ground that it involved a public body exercising administrative power.<sup>19</sup> Hence, the holding merely supported the proposition that in exercising such statutory power, the authority is obligated to hear those likely to be adversely affected by a change in its policy.<sup>20</sup> In *Bates*, however, the situation was different:

In the present case, the committee in question has an entirely different function: it is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally; and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those af-

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15. *Id.* at 1376-77.

16. *Id.* at 1378. Section 56(3) of the Solicitors' Act, 1957, provides: "[A]nd the committee shall, before making the order, consider any observations in writing submitted to them by the council within one month of the sending to them of the draft, and may then make the order . . ."

17. *Bates*, [1972] 1 W.L.R. at 1377.

18. *Id.*; *Regina v. Liverpool Corp.*, [1972] 2 Q.B. 299.

19. [1972] 1 W.L.R. at 1377-78.

20. *Id.*

affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation, and yet they have no remedy.<sup>21</sup>

The court further distinguished *Liverpool Corp.* by noting that in *Bates*, Parliament had established an obligatory procedure, namely, sending the draft order to the Law Society with a one month period in which to submit comments.<sup>22</sup> Therefore, because Parliament had spoken with regard to the requirements of procedural fairness, the court should not expand them judicially.<sup>23</sup> The court stated: "It is easier to imply procedural safeguards when Parliament has provided none than where Parliament has laid down a procedure . . . ."<sup>24</sup>

Relying on this judgment, various commentators—some conclusively,<sup>25</sup> and some less so<sup>26</sup>—have stated that the rules of natural justice do not apply to rule making proceedings. Moreover, they have stated that the doctrine of fairness does not obligate a rule making authority to provide notice regarding proposed or impending secondary legislation to interested parties so as to enable them to make their position known to the authority.<sup>27</sup>

21. *Id.* at 1378.

22. *Id.*

23. *Id.* at 1378-79.

24. *Id.* at 1378.

25. *See, e.g.*, P. P. CRAIG, ADMINISTRATIVE LAW 206, 218, 260 (1983); J.F. GARNER, ADMINISTRATIVE LAW 147 n.19 (J.F. Garner & B.L. Jones 6th ed. 1985); P. JACKSON, NATURAL JUSTICE 169 (2d ed. 1979); E.C.S. WADE & A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 648 (A.W. Bradley 10th ed. 1985); H.W.R. WADE, ADMINISTRATIVE LAW 506-07, 755, 766 (5th ed. 1982).

26. *E.g.*, S.A. DE SMITH, *supra* note 6, at 185.

27. *See, e.g.*, Garner, *Rule Making in the United States*, 1976 PUB. L. 307, 311; Jergesen, *The Legal Requirement of Consultation*, 1978 PUB. L. 290, 294-96.

An additional judgment that is sometimes mentioned in this regard is *Essex County Council v. Ministry of Housing & Local Gov't*, 66 L.G.R. 23 (Ch. 1967). Here, the plaintiff attempted to prevent the defendant from issuing a development order under section 14 of the Country Planning Act, 1962 until such time as the plaintiff had an opportunity to present its objections, and the objections were *bona fide* considered by the authority in accordance with the *audi alteram partem* rule. The defendant filed a motion requesting that the statement of claim be struck out on the ground that it failed to state a cause of action. Justice Plowman granted the defendant's application, stating that "it is . . . true to say that whenever a Minister or other authority is held to be bound by the rules of natural justice, it is because he is at that point performing a judicial or quasi-judicial function." *Id.* at 29. In our case, "the Minister's power to make a development order under section 14 is a purely adminis-

B. *Israel*

In the *Berman* case,<sup>28</sup> the Supreme Court of Israel addressed the question of whether the investigatory proceeding that must be conducted whenever the Minister of the Interior considers changing by proclamation the territorial jurisdiction of a municipal corporation is subject to the rules of natural justice. The court held that the Minister's power was administrative rather than judicial or quasi-judicial.<sup>29</sup> After a comprehensive review of English law, the court concluded that the rules of natural justice also apply to acts of a purely administrative body.<sup>30</sup> In the words of Justice Silberg, "I think that we must not retreat from the ancient and deeply-rooted rule that an administrative body may not strike at the citizen by virtue of any given order unless he is first afforded a reasonable opportunity to be heard."<sup>31</sup>

Because the Minister's proclamation was classified as administrative, the court could have concluded its opinion at that point. However, it further stated that "[t]his duty clearly does not apply to legislative acts [or to acts] of a sovereign character in the true meaning of this term."<sup>32</sup>

*In Israeli Consumer Council v. Chairman of the Commission of*

trative or legislative power fully exercisable discretionarily," and thus this power is not subject to the rules of natural justice. *Id.* at 31.

28. 3 S.J. 29 (1958).

29. *Id.* at 41, 44.

30. *Id.* at 42-48. The judge rejected two English decisions from the 1950s—*Nakkuda Ali v. M.F. de S. Jayaratne*, 1951 A.C. 66 (P.C. 1950) and *Regina v. Metropolitan Police Comm'r*, [1953] 1 W.L.R. 1150 (Q.B.)—the results of which were not compatible with his conclusion, on the grounds that they were inconsistent with the English case law that preceded them, and that "[t]hese ideas are certainly foreign to the spirit of Israel case law." 3 S.J. at 47. Lord Reid reached a similar conclusion regarding the *Nakkuda* case in his opinion in *Ridge*, being "forced to the conclusion" that the rule of the judgment concerning the application of the rules of natural justice "was given under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative." 1964 A.C. 40, 79 (H.L. (E) 1963). In the same spirit, regarding the two English judgments from the 1950's cited above, see *id.* at 133 (opinion of Lord Hodson). See also J.F. GARNER, *supra* note 25, at 149 n.10. "The decisions in *R. v. Metropolitan Police Comr.*, [sic] *ex p. Parker* . . . and *Nakkuda Ali v. Jayaratne* . . . cannot stand in the light of the statements in the House of Lords in *Ridge v. Baldwin* . . ." *Id.* But see *Ridge*, 1964 A.C. at 94-95 (Lord Evershed, dissenting).

31. 3 S.J. at 48.

32. *Id.* The words in brackets are added to make the translation in S.J. comport with the Hebrew original.

*Enquiry for the Supply of Gas*,<sup>33</sup> the Minister of Commerce and Industry established a commission of enquiry under the Commissions of Enquiry Ordinance for the purpose of investigating the full range of problems associated with the supply of gas. The petitioner, at whose insistence the commission had been established, was a body that represented the consumer public. In this capacity, it petitioned for permission to be present during the hearings before the commission as well as for the right to take part in the examination of witnesses. The petition was accepted on the condition that the petitioner would not be permitted to inspect privileged material submitted to the commission in sessions announced previously as closed-door. In its petition to the Supreme Court of Israel sitting as a High Court of Justice, the petitioner sought, under the rules of natural justice, to require the commission to make available to it those materials designated as privileged.

Justice Sussman emphasized that the commission had been established in order to assist the Minister in exercising his legislative authority to prescribe the conditions under which gas would be supplied.<sup>34</sup> The commission acceded to the council's request, thereby enabling the council to make its position known, to produce its own witnesses, and to examine witnesses testifying in open session before the commission.<sup>35</sup> The council's right to be heard by the commission had thus been exhausted.

Even if the right does exist, its scope is not identical to

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33. 23(1) P.D. 324 (1969).

34. Commodities and Services (Control) Law, 1957.

35. "However, there are many varieties of the duty to hear that are ever-changing in light of the circumstances: this duty does not spawn the right as a self-evident proposition that one may become acquainted with material in the investigator's possession." 23(1) P.D. at 334. Justice Sussman went further:

The extent of a fair hearing necessary to dispense justice depends on what justice demands, and even where the authority is required to hear a person, it is not always obligated without exception to confer upon that person the entire bundle of rights conferred upon a litigant. The rules of natural justice as applied to a certain situation are not to be severed from the particular circumstances of that situation, and they should not be grafted onto a matter for which they are inappropriate. The proceeding that we are discussing here is neither judicial nor quasi-judicial but legislative, and the obligation to hear, even if it does exist—and it exists in the instant matter by virtue of the permission granted by the commission—depends upon the purpose of the proceeding.

*Id.* at 336.

that existing in the context of a judicial hearing. Rather, the right must be adapted to the type of proceeding in which it is being exercised. Because this is a well-accepted principle, the judge could have denied the petition on the ground that the proceeding—being legislative in character, or of some other character not requiring a judicial hearing—did not merit all the procedural rights claimed by the petitioner. Nevertheless, the judge chose to add that

the Knesset, and also various secondary legislators, enact legislation that imposes duties and burdens on the citizen; however, one cannot claim because of this that the citizen thereby has the vested right to come before the Legislator and argue . . . . An administrative authority is empowered to act without having to rely on the views of the citizen so long as in so doing, there is no lack of fairness towards him.<sup>36</sup>

After the judge clarified the legislative nature of the power of prescribing the conditions for supplying the commodity under consideration, he continued: “[T]he process for so prescribing is legislative and, as I have already stated, generally in a legislative proceeding the citizen does not have a vested right to articulate his position.”<sup>37</sup>

Finally, in *Consortium International Ltd. v. Director-General of the Ministry of Communication*,<sup>38</sup> the Minister of Communication enacted a regulation that adversely affected the petitioner’s business. The petitioner claimed that, because it was not given an opportunity to object to the regulation, the regulation was void. The court rejected the claim, finding “no basis at law” to support it.<sup>39</sup>

36. *Id.* at 334. The Knesset is Israel’s Parliament.

37. *Id.* at 335.

38. 31(3) P.D. 477 (1977).

39. *Id.* at 486. An additional decision in this regard is *Koori v. Minister of the Interior*, 19(2) P.D. 322 (1965). In this judgment, one can find the hint of a different approach to our subject. See *infra* text accompanying notes 181-85.

The view that the exercise of legislative power is exempted from the application of the *audi alteram partem* rule has also been accepted in Australia and Canada. On Australian law, see H. WHITMORE, *PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW* 96, 120 (5th ed. 1980). In *The Queen v. Wright*, 93 C.L.R. 528 (1955), the High Court of Australia clarified that the power of the Arbitration Court to issue orders under section 34 of the Stevedoring Industry Act, 1949 was legislative in character. *Id.* at 541. In treating the exercise of this power, the High Court added: “The Arbitration Court might competently make a regulation under s.34 of industrial matters

C. *The Weight of Judicial Statements Against the Right to a Hearing*

The opinions discussed above lead one to conclude that the judicial position in both England and Israel is that the *audi alteram partem* rule does not apply to rule making proceedings. So convinced are the judges who have commented on the issue of the correctness of this conclusion that in some instances they have not even found it necessary to state the reasons for their ruling. Moreover, some judges have found it appropriate to base their judgment on this conclusion even when the issue at hand did not require deciding that question. For example, in *Berman*,<sup>40</sup> Justice Silberg did not hesitate to state in a sweeping holding that the *audi alteram partem* rule "clearly does not apply to legislative acts."<sup>41</sup> This conclusion seemed so clear to the judge that he was prepared to offer it in dictum without any supporting reasoning.

In *Consortium International*,<sup>42</sup> the petitioner asserted that a regulation was invalid, because his right to a hearing in rule making proceedings had been denied. The court, however, did not take the petitioner's claim seriously, because it did not find "any basis at law" for it.<sup>43</sup> But the "basis at law" of the petitioner's claim is implicit in *Berman*.<sup>44</sup> According to "the rule adhered to by the common law for some hundreds of years, an administrative body—even one that is purely administrative (not quasi-judicial)—will not be permitted to [affect the citizen adversely] in his person, property, occupation, sta-

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without any parties before it. It might act of its own motion. There is no issue to decide. No existing right need be in question. All that is to be considered is what in point of policy ought to be done by way of regulative stevedoring operations." *Id.*; see also *infra* text accompanying note 191.

On Canadian law, see *Re Bright & City of Langley*, 131 D.L.R.3d 445, 453-54 (1982); D.J. MULLAN, *ADMINISTRATIVE LAW* 182-83 (2d ed. 1979); McDonald & Paskell-Mede, *Annual Survey of Canadian Law—Administrative Law*, 13 OTTAWA L. REV. 671, 803-04 (1981).

Still, it is also possible to discern in certain Canadian cases the foundation of a new judicial policy that would meet the requirements of fairness also in the context of rule making proceedings. We will deal more fully with the budding of this judicial policy later. See *infra* notes 177-79 and accompanying text.

40. 3 S.J. 29 (1958).

41. *Id.* at 48.

42. 31(3) P.D. 477 (1977).

43. *Id.* at 486.

44. 3 S.J. 29 (1958).

tus and the like, unless he is given a reasonable opportunity to be heard in defence against the contemplated act."<sup>45</sup> If the test for applying the rules of natural justice is whether a "right has been adversely affected," then a person should be entitled to present his case in every instance in which he might be adversely affected by an act of an authority, be the act judicial, administrative or legislative. This was the basis for the petitioner's claim in *Consortium International*.<sup>46</sup> Hence, if the court wishes to distinguish between legislative and other acts of administrative authorities, it bears the burden of finding the "basis at law" for asserting such a distinction.

Justice Silberg should have met this burden in *Berman*, when after having formulated the test of whether a person had been adversely affected, he found it appropriate to exclude legislative acts from its purview.<sup>47</sup> However, instead of meeting this burden and setting forth the grounds for the distinction, the judge was satisfied with merely stating that the distinction "clearly" exists.<sup>48</sup> The extent of this "reasoning" seems to have guided Justice Asher in *Consortium International* when he had to decide whether the petitioner had been entitled to be heard by the Minister prior to the enactment of the regulation adversely affecting him.

In *Israeli Consumer Council*<sup>49</sup> and *Bates*<sup>50</sup> the courts presented reasoning in support of the holding that the right to a hearing did not apply to rule making proceedings. I shall return to the reasoning of these judgments later.<sup>51</sup> Here, however, I wish to emphasize that in both cases, the appropriate authorities had satisfied the requirements of this right in regard to the interested parties involved. The holding that the right to a hearing does not apply to rule making proceedings was not essential to reaching a decision in either case.

In *Israeli Consumer Council*,<sup>52</sup> the material not disclosed to the petitioner dealt with profit and loss accounts of the gas

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45. *Id.* at 46. The words in brackets reflect more accurately the meaning of the Hebrew original than the text in S.J.

46. 31(3) P.D. 477 (1977).

47. 3 S.J. at 48.

48. *Id.*

49. 23(1) P.D. 324 (1969).

50. [1972] 1 W.L.R. 1373 (Ch.).

51. *See infra* Part II.

52. 23(1) P.D. 324 (1969).

companies, data at the focus of the investigation. The gas companies feared disclosure of the documents to competitors, and therefore requested that the documents be made available only to the members of the committee. Quite correctly, Justice Sussman pointed out that the petitioner had been given its full right to a hearing in light of the circumstances of the case. The commission of enquiry was not investigating the petitioner's activities; thus, the petitioner would not be adversely affected by the findings of the investigation. Hence, the petitioner was not entitled to the full bundle of rights—including inspection of all the evidence brought against him, an opportunity to examine all of the opponents' witnesses, etc.—that would be accorded a party in a full-fledged adversary proceeding.<sup>53</sup> There is also no reason to apply to the petitioners all the procedural rights granted to a party whose activities are subject to investigation by the commission and which therefore may be adversely affected by the findings of the commission.<sup>54</sup>

Thus, in order to reject the claim of the consumer council regarding the right to inspect material held privileged by the commission of enquiry, Justice Sussman did not have to hold that the right to a hearing does not extend to a legislative proceeding. Hence, even if the proceeding were subject to the right to a hearing, this right had been exhausted, and the council had no reason to complain.<sup>55</sup>

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53. *Id.* at 333; see also S.A. DE SMITH, *supra* note 6, at 203-04.

54. 23(1) P.D. at 333-34. Recall that the commission was established under the Commissions of Enquiry Ordinance. Section 6 of this Ordinance provides as follows: "Any person whose conduct is the subject of enquiry under this Ordinance or who is in any way implicated or concerned in the matter under enquiry shall be entitled to be represented at the whole of the enquiry, by an advocate or such other person as the Commission may, at its discretion, give leave to appear, and any other person who may consider it desirable that he should be represented in the manner aforesaid." A person who falls under one of the first two categories of the section is entitled to the full complement of procedural rights necessary for his defense. 23(1) P.D. at 333. The petition in this case did not fall under one of the aforementioned categories, but under a third category that is mentioned at the end of the section. *Id.* at 333-34. "Such a person, even if he is the accuser or a complainant, has no vested right to be heard before the commission . . . however, even if such a person is granted permission to appear, the investigatory proceeding does not thereby turn into a confrontational proceeding." *Id.* at 333; see also Bank Leumi le Israel Ltd. v. Commission of Enquiry Regarding the Regulation of Bank Shares, 39(4) P.D. 225, 244-46 (1985); S.A. DE SMITH, *supra* note 6, at 233-37.

55. To conclude that it is unnecessary for the authority to disclose all the material in its file to one who has the right to be heard—when this material is gathered

Similarly, in *Bates*,<sup>56</sup> a statutory committee was about to convene on July 19, 1972 to approve a remuneration order. A draft of the order was published in *The Law Society's Gazette* of June 21, 1972. The plaintiff did not contest that he had knowledge of the draft of the order. In fact, it was established that the association in whose name the action had been filed had knowledge of the draft order prior to that time, inasmuch as it addressed the contents of the order in a circular dated the end of May.<sup>57</sup> Because the draft order came to the attention of the plaintiff and his association, it was of no legal significance whether publication in *The Law Society's Gazette* constituted the formal way of bringing it to the attention of the interested parties.<sup>58</sup> Thus, plaintiff's challenge was not based on the absence of antecedent publication or on his lack of knowledge

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within the framework of investigatory proceedings that precede the issuance of a legislative act—Justice Sussman relied on two American opinions: *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294 (1933) and *Red Star Manufacturing Co. v. Grimes*, 221 F.2d 524 (1954). 23(1) P.D. at 335-37. These decisions involved enabling laws pursuant to which antecedent notice of the commencement of the rule making proceedings was given, and interested parties were accorded the right to appear before the investigatory committees in order to state their position. In both instances, it was held that there is no duty to show to interested parties all the material gathered within the framework of the investigatory proceeding so long as the refusal was not arbitrary. Therefore, these decisions do not constitute authority that there is no right to a hearing in legislative proceedings, but they merely circumscribe the scope of the right so that when it does apply, it will not necessarily be fully "judicial" in character, with all that it entails. This was precisely the legal authority necessary to resolve the particular matter before Justice Sussman.

To complete this picture, however, it must be pointed out that Justice Sussman relied, 23(1) P.D. at 335-36, on an additional United States case, *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915). This judgment was rendered prior to the enactment of the Administrative Procedure Act of 1946, which prescribes the obligations regarding participation of interested parties in rule making. 5 U.S.C. §§ 551-59 (1982 & Supp. III 1985). From this judgment it emerges that the constitutional requirement of due process does not require according the right to a hearing in rule making proceedings. The same principle also emerges from the comments of K.C. Davis in 1 *ADMINISTRATIVE LAW TREATISE* § 7.07, at 436 (1st ed. 1958) [hereinafter K.C. DAVIS]. "In rule making, when adjudicative facts are not in dispute, due process probably does not require a hearing." Justice Sussman cited this in his opinion, 23(1) P.D. at 335. Regarding the constitutional context of the aforementioned two American decisions—reliance on which, in light of what has been said in the text to this note, is superfluous—see *infra* note 225.

56. *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 (Ch.).

57. *Id.* at 1377.

58. See *Byrne v. Kinematograph Renters Soc'y Ltd.*, [1958] 1 W.L.R. 762, 785 (Ch.); *Russell v. Norfolk (Duke)*, [1949] 1 All E.R. 109, 117-18 (C.A.); *Mipromal, Jerusalem Ltd. v. Director of Customs & Excise*, 35(2) P.D. 169, 176 (1981); "*Hamegader-Iron*" Ltd. v. Customs Collector, 31(3) P.D. 281, 292 (1977).

concerning the intention of the committee to issue the order, but rather on the claim that insufficient time had been given to the association to present its position before the committee, and for the committee to hold additional consultations with professional organizations. Further, on July 11, the association had sent submissions to the committee, which included a request for an extension for the purpose of conducting further presentations and consultations.<sup>59</sup>

It is well known that:

[N]atural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position:

- (a) to make representations on their behalf; or
- (b) to appear at a hearing or inquiry (if one is to be held); and
- (c) effectively to prepare their own case and to answer the case (if any) they have to meet.<sup>60</sup>

Assuming that in *Bates*,<sup>61</sup> the proceeding for issuance of the remuneration order was subject to the rules of natural justice and that the plaintiff and his association had a right to be heard, was "adequate notice" given so as to enable them to exercise the right? The amount of time between notice and the holding of the hearing that satisfies the requirement of adequate notice obviously depends on the type of proceeding and on the particular circumstances.<sup>62</sup> With respect to *Bates*, Parliament had spoken: it accorded the designated body, the council of the Law Society, "one month of the sending to them of the draft to send observations in writing."<sup>63</sup> This was approximately the amount of time that plaintiff and his association had at their disposal following publication of the draft order in *The Law Society's Gazette*. In fact, more than one month had been at their disposal, inasmuch as they had knowledge of the draft even before the publication. Under such circum-

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59. [1972] 1 W.L.R. at 1377. The plaintiff did not claim that the association's right to a hearing had been impaired in the sense that the committee did not consider the comments of the association.

60. *Hamegader*, 31(3) P.D. at 291; S.A. DE SMITH, *supra* note 6, at 196.

61. [1972] 1 W.L.R. 1373 (Ch.).

62. P. JACKSON, *supra* note 25, at 63.

63. Solicitors' Act, 1957, § 56(3).

stances, the requirement of providing adequate notice to the plaintiff and his association had been met, and the right to a hearing was satisfied by virtue of sending the submissions to the committee, assuming that such a right did exist.

Hence, even if the plaintiff and his association enjoyed the right to a hearing, this right had not been impaired, and the court could have rejected the statement of claim on this ground without offering superfluous generalizations to the effect that the right to a hearing does not apply to rule making proceedings.

## II. *CRITICAL REVIEW OF THE GROUNDS FOR DENYING THE RIGHT TO A HEARING IN RULE MAKING PROCEEDINGS*

Although they may appear to be superfluous, generalizations to the effect that rule making proceedings are not subject to the rules of natural justice do appear in the case law. The question is whether such generalizations can be justified on the basis of sound policy considerations. Unfortunately, the judgments containing these generalizations do not greatly assist us in understanding the policy considerations that guided the judges in ruling as they did. Even when reasoning is given, it does not always clarify the basis for distinguishing between various categories of acts for purposes of applying the *audi alteram partem* rule.

Still, I shall attempt to identify possible considerations that may lead to the formulation of this judicial policy. Sometimes one or more of these considerations are expressed in the language of the judgments. At other times, however, while they may lie at the very heart of the judgments, they are not explicitly stated by the judges.

### A. *The Historic Ground: Labelling*

During the fifty years that preceded *Ridge*,<sup>64</sup> much judicial energy was wasted in England by classifying or labelling acts of administrative authorities for the purpose of determining whether these acts were or were not subject to the rules of nat-

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64. 1964 A.C. 40 (H.L. (E.) 1963).

ural justice.<sup>65</sup> Israeli courts followed a similar course during the early years after the founding of the state in 1948. In both countries, it was sufficient, however, that an act not be classified as "judicial" or "quasi-judicial" to exempt it from the application of these rules. The *Ridge* and *Berman*<sup>66</sup> opinions were meant to free the courts from this futile approach by attempting to anchor the application of the rules of natural justice on a rational-substantive test—namely the effect of the act on the rights of the person—as distinguished from a formalistic test based on the classification of the act.<sup>67</sup> To be consistent with this approach, the same substantive test should have been applied to legislative acts as well.

Although the courts professed to have freed themselves from empty tests based on the classification of the act, they once again shackled themselves with the same tests in providing that an act classified as legislative would be subject to neither the *audi alteram partem* rule nor the more flexible doctrine of fairness. It seems that the courts could not muster the strength to complete the task that they had begun. Perhaps they did not view administrative law as sufficiently mature to eliminate completely the historical distinction in this area.<sup>68</sup>

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65. See, e.g., S.A. DE SMITH, *supra* note 6, at 163-72; P. JACKSON, *supra* note 25, at 18-21; Loughlin, *Procedural Fairness: A Study of the Crisis in Administrative Law Theory*, 28 U. TORONTO L.J. 215, 219-23 (1978); Seepersad, *Fairness and Audi Alteram Partem*, 1975 PUB. L. 242, 242-43.

66. *Berman v. Minister of the Interior*, 3 S.J. 29 (1958).

67. S.A. DE SMITH, *supra* note 6, at 184; P. JACKSON, *supra* note 25, at 102; Clark, *Natural Justice: Substance and Shadow*, 1975 PUB. L. 27.

68. It must be admitted that the abolition of the distinction between "judicial" (or "quasi-judicial") and "administrative" for the purpose of applying the rules of natural justice has not yet been fully accomplished, and that there are English decisions that continue to rely on the distinction, whereby the rules of natural justice are applied to acts of the first type, while regarding the other types, the duty "to act fairly" is applied. See, e.g., *Pearlberg v. Varty*, [1972] 1 W.L.R. 534, 547 (H.L.) (discussing the question of application of the rules of natural justice). "A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament is not to be presumed to act unfairly,' the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness." *Id.* (Lord Pearson, J.).

Criticism has been leveled against this judicial approach because it heralds the return to the pre-*Ridge* era. See, e.g., H. WHITMORE, *supra* note 39, at 120; Gravells, *Fairness as the Basis of Procedure for Decision-Making Bodies*, 39 MOD. L. REV. 342 (1976);

Without a doubt, it was more difficult to find in the time-honored rules of the common law a basis for applying the right to a hearing to rule making proceedings.

As indicated above, the "innovation" in the *Berman*<sup>69</sup> and *Ridge*<sup>70</sup> decisions lies mainly in their return to the well-rooted principles of the common law in which they found support for application of the *audi alteram partem* rule to judicial and quasi-judicial as well as administrative acts. The case law prior to the first World War reveals extremely broad statements regarding the scope of the rule's application, statements that could have served as the thread for granting the right to be heard in rule making proceedings.<sup>71</sup>

Equally, policy deliberations regarding procedural fairness that lie at the foundation of this case law could have been used for this purpose. However, in contrast to acts of an administrative type, regarding which there exists long-standing

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Seepersad, *supra* note 65, at 253-55. However, as indicated, *see supra* note 39, there is support for this in English, as well as Australian, *see id.*, and Canadian, McDonald & Paskell-Mede, *supra* note 39, at 747-48, case law. As pointed out by S.A. de Smith, the "duty to act fairly" in general "means a duty to observe the rudiments of natural justice for a limited purpose in the exercise of functions that are not analytically judicial but administrative." S.A. DE SMITH, *supra* note 6, at 238-39. In other words, both "administrative" and "judicial" acts are subject to the basic requirements of procedural fairness embodied in the rules of natural justice. The distinction may still be important, not, however, with respect to the *very existence* of the requirements, but rather regarding *their content and scope*. Concerning content and scope, additional considerations, beyond the mere classification of an act as "judicial" or "administrative," are also likely to be relevant. Therefore, it is doubtful whether expressions such as that of Lord Pearson are desirable, because they leave the impression that natural justice and fairness are different concepts that operate at different levels; the former at the level of judicial acts and the latter, at the level of administrative acts. Hence, many judgments—in England, Australia and Canada—do not rely on such a categorization and on the distinction between natural justice, on the one hand, and the duty of fairness, on the other. *See* P.P. CRAIG, *supra* note 25, at 259; H. WHITMORE, *supra* note 39; McDonald & Paskell-Mede, *supra* note 39, at 748-49.

In Israel, ever since the *Berman* case, the judges speak of the application of the *audi alteram partem* rule, almost without exception, to both judicial and administrative acts, *see, e.g.*, *Gingold v. National Labour Court*, 35(2) P.D. 649, 654 (1979), when, on occasion, the distinction between the two is significant in connection with the content of the rule, but not in connection with its very application. *Eshed v. Foreign Minister*, 13 P.D. 144, 152-53 (1959).

69. 3 S.J. 29 (1958).

70. 1964 A.C. 40 (H.L. (E.) 1963).

71. *E.g.*, *Board of Education v. Rice*, 1911 A.C. 179, 182 (H.L.); *Wood v. Wood*, L.R. 9 Ex. 190, 196 (1874); *see also infra* note 225.

concrete authority for the application of the right,<sup>72</sup> for legislative acts one cannot find specific authority to this effect. Hence, contemporary courts cannot justify application of the *audi alteram partem* rule to rule making proceedings on the ground that they are merely resurrecting neglected common law authority. To make these proceedings subject to the rule, a more creative judicial contribution was required. But the courts did not see fit to go so far, preferring instead to stop in mid-course.<sup>73</sup>

Because the courts stopped, they would have to return to the very task of classification from which they purported to have freed themselves.<sup>74</sup> If, in the past, the relevant distinction

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72. See, e.g., *Ridge*, 1964 A.C. at 66-72 (authorities surveyed); S.A. DE SMITH, *supra* note 6, at 159; P. JACKSON, *supra* note 25, at 15-16.

73. See *In re Gosling*, 43 S.R. (N.S.W.) 312, 318 (1943); *Bates*, [1972] 1 W.L.R. at 1378. *Essex County Council v. Ministry of Housing & Local Gov't*, 67 L.G.R. 23 (Ch. 1967), should be recalled in this regard. The reasoning of that case was based on the assumption, see *supra* note 27, that the rules of natural justice apply to the exercise of power classified as judicial or quasi-judicial; thus administrative and legislative functions are not subject to these rules. This reasoning, while consistent with the approach of the pre-*Ridge* era, is not compatible with the holding of *Ridge*. 1964 A.C. 40 (H.L. (E.) 1963). While *Ridge* was rendered several years before *Essex County Council*, it was not mentioned in the latter judgment.

In this context, it should be pointed out that during most of the period in which the case law shaped the basic concepts regarding the rules of natural justice—the 17th to 19th centuries—extensive use was not yet made of secondary legislation, which became widespread only during the second half of the 19th century. In 1893, the Rules Publication Act (RPA) was enacted, prescribing provisions concerning publication of notice of a proposed regulation and giving to any “public body” an opportunity to purchase the draft rules and to make comments thereon. Rules Publication Act, § 1. As a matter of practice, the rule making authority “provided notice” that the draft regulations were available for purchase in the Stationary Office; thus anyone, not just “public bodies,” was able to acquire them. See *Report of the Committee on Ministers' Powers* 45 (Cmd. 4060, 1932) [hereinafter *Report*].

Until its abrogation on January 1, 1948, by § 12(1) of the Statutory Instruments Act of 1946, effective by virtue of § 10 of this Act together with the Statutory Instruments Act of 1946 (Commencement) Order 1947, the provisions of this Act exhausted the requirements of procedural fairness with respect to secondary legislation. The 1893 Act was abrogated during the “twilight of natural justice,” see Wade, *The Twilight of Natural Justice*, 67 LAW Q. REV. 103 (1951), a period that came to an end only with the judgment in the *Ridge* case. 1964 A.C. 40 (H.L.(E) 1963). From then on, one could expect the case law to attend seriously to the problem of procedural fairness in rule making. The older case law could not serve as concrete authority for resolving this issue. The post-*Ridge* courts could draw from that case law only the basic concepts of fairness and justice towards the individual in the exercise of governmental power. The application of these concepts to rule making should have to be done by those courts on their own.

74. In fact, there is a more general trend by the courts to free themselves from

lay between judicial and quasi-judicial acts, on the one hand, and administrative acts, on the other, the judges would now be engaged in distinguishing between judicial, quasi-judicial, and administrative acts, on the one hand, and legislative acts, on the other. Again, the courts would waste considerable judicial energy on making distinctions not susceptible to analytical delimitations.<sup>75</sup>

Again, we may encounter fictitious conclusions regarding the nature of the act in accordance with the desire of the judges to subject or not to subject the act to the requirements of procedural fairness. In the past, judges found a way to label an act judicial or quasi-judicial, even if such a classification was not justified on the basis of "accepted" criteria,<sup>76</sup> when they found that considerations of justice required the application of the rules of natural justice.<sup>77</sup> Judges are now likely, by virtue of the same considerations of justice, to classify an act quasi-judicial or administrative, even if the act is in fact legislative.<sup>78</sup>

From the point of view of the person aggrieved by the act of the authority, it is irrelevant whether or not the harm re-

conditioning the application of various rules of administrative law on the basis of that classification. See *O'Reilly v. Mackmass*, [1983] 2 A.C. 237, 279; S.A. DE SMITH, *supra* note 6, at 69-70, 79-80, 89; E.C.S. WADE & A.W. BRADLEY, *supra* note 25, at 606-07.

75. S.A. DE SMITH, *supra* note 6, at 181; J.A.G. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* 48 (5th ed. 1973); E.C.S. WADE & A.W. BRADLEY, *supra* note 25, at 605.

The difficulty here is that of distinguishing between what is "general" and what is "specific." These words, although they have some extreme and easily recognisable forms, do not help to solve the doubtful cases. The matter is finally one for arbitrary decision. There is no answer, save one that is arbitrary, to the old and comparable riddle: "How many sheep make a flock?"

J.A.G. GRIFFITH & H. STREET, *supra*, at 48.

76. H.W.R. WADE, *supra* note 25, at 449-50.

77. The words of Justice Silberg in *Berman* are instructive in this context. In discussing the distinction between a quasi-judicial and an administrative act for the purpose of applying the rules of natural justice, he noted:

Indeed, one gets the impression that as the result of the lack of clear definition, the courts not infrequently behave like the marksman who draws the target rings round the point of impact *after* the shot has been fired. I mean that the adjective "quasi-judicial," which constitutes a condition precedent for setting aside an act for violating the principles of natural justice, is attached by the court after it has finally recognised that for reasons of *justice* the act should be set aside.

3 S.J. 29, 42 (1958).

78. See *infra* text accompanying note 178.

sulted from a legislative, administrative or judicial act. Casting a legislative imprint on an act of the authority does not lessen the potential harm to the person resulting from such an act. Being part of a group of aggrieved persons is not sufficient consolation to render superfluous the need to present one's views before the authority.<sup>79</sup>

Furthermore, the refusal of judges to apply the *audi alteram partem* rule or the principles of procedural fairness to legislative acts provides an opening through which administrative authorities can escape the application of these requirements by the artificial exercise of legislative power, when it would be more appropriate to exercise administrative or even quasi-judicial power. This is a realistic possibility when one considers that in a large number of instances, the authority empowered to take administrative action under the authorizing legislation is also empowered by that legislation to make regulations and, thereby, to reach the same result.<sup>80</sup> In extreme circumstances in which administrative or quasi-judicial power is exercised

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79. In the words of Justice Barak, written while still an academician: "When an individual citizen is adversely affected by an individual order he is given the right of redress. Why should such a right be withheld from him when he is affected not by an individual order but by a general one?" Barak, *Subordinate Legislation*, in 16 *SCRIPTA HIEROSOLYMITANA* 219, 232 (1966).

80. A clear example of this—not in the context of natural justice—is found in the Israeli decision *Lazarovitz v. Food Controller*, 10 P.D. 40, 48 (1956). There, Judge Berinson deals with the attempt to extirpate, in the early 1950s, the phenomenon of raising swine in Israel.

From the point of view of the citizen, an executive act is sometimes like the . . . enactment of a statute . . . and the situation before us is a salient example of the correctness of this statement. The authorities strongly wished to regulate the raising of swine in the State in a certain way, and they first took administrative measures by issuing orders separately against each of the persons raising swine requiring them to obtain a permit to maintain their swine, and afterwards they demanded that each of them, as a precondition for the issuance of a permit, transfer their folds to a certain area. When it subsequently became clear that this measure was not sufficiently effective, the authorities exercised their legislative power and issued an order concerning the raising of swine which imposed generally on all those who raised swine in the State the same duty to obtain a permit, and afterwards they presented each of them, by virtue of this order, with the same pre-conditions for receipt of a permit that had previously been presented by virtue of the individual orders.

*Id.* According to the distinctions that occupy us here, the individual orders are subject to the right to a hearing for those individuals who are aggrieved thereby; this right does not apply with respect to the general order, even though its effect on the *same individuals* is identical. Is there any logic in this result? Is there not a strong

under the pretext of legislative power, courts may disregard the formal label attached to the act and subject it to the rules of natural justice and the requirements of procedural fairness.<sup>81</sup> In other instances, it cannot be assumed that courts will interfere with "the freedom of choosing the power" by the authority, especially because it is difficult to prove that the public authority exercised its legislative power in order to circumvent the rules of natural justice or the requirements of procedural fairness.<sup>82</sup>

There are those who argue, by analogy to legislative acts of Parliament, that legislative acts of an administrative authority are not subject to the rules of natural justice: because the law making procedures of Parliament are not subject to these rules, rule making proceedings should not also be subject to them.<sup>83</sup> This analogy is not compelling.

First, in contrast to administrative rule making, parliamentary law making procedures express various principles embodied in the concept of due process. Bills are published, and thus the public at large receives prior warning about legislative arrangements that may affect it. Organizations and individuals may seek to influence their parliamentary representatives to enact or reject the bill. In Israel, it is common to allow various interest groups as well as interested individuals to appear before the particular Knesset committee preparing a bill for its

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incentive for the authority to operate by way of issuing a general order to evade the requirements of natural justice?

81. *Cf. infra* text accompanying notes 179, 186.

82. In the United States, this problem appeared in an acute form—but in the opposite direction—as administrative authorities tried to circumvent the rule making proceedings prescribed in the Administrative Procedure Act (APA) by fashioning a general policy through the issuing of a series of decisions in specific circumstances that, when taken together, later constituted a "general" policy. This problem is known as "rule making versus adjudication." See B. SCHWARTZ & H.W.R. WADE, *LEGAL CONTROL OF GOVERNMENT* 93 (1972); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 *HARV. L. REV.* 921, 942-44 (1965); Schwartz, *Administrative Law Cases During 1984*, 37 *ADMIN. L. REV.* 133, 136-37 (1985). The basic rule is not to intervene in the "freedom of choice" of the administrative authority. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *Arkansas Power & Light Co. v. I.C.C.*, 725 F.2d 716, 723 (1984); *cf. Maccabi Tel-Aviv Ass'n for Sport & Gymnastics v. Broadcasting Auth.*, 30(1) P.D. 772, 774-76 (1976).

83. See, e.g., *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915); *In re Gosling*, 43 S.R. (N.S.W.) 312, 318 (1943); *Regina v. Whalley*, 1972 V.R. 748, 755; *Israeli Consumer Council v. Chairman of the Commission of Enquiry for the Supply of Gas*, 23(1) P.D. 324, 334-35 (1969).

second reading.<sup>84</sup> This is not the case, however, with respect to administrative legislation, first and foremost, because there is no antecedent publication of the draft regulations. Moreover, in England there exists a special parliamentary procedure, of a quasi-judicial character, concerning the introduction of a private bill intended to regulate the affairs of a single person or of a defined group of persons, or matters in connection with a certain geographic area.<sup>85</sup> Even when speaking of hybrid bills, interested parties have a full opportunity to present their views before Parliament.<sup>86</sup> Thus, the mere fact that an act is labelled "legislative" does not bar considerations of fairness towards interested persons, entitling them to be heard before the decision making body.

Second, even if it is correct that the requirements of a fair hearing are not fully realized in parliamentary proceedings, one cannot analogize the procedures that should be imposed on *unelected* bodies with the procedures employed by an *elected* body. Parliament represents all the citizens of the State. By its very nature as a directly elected body in a democratic system, Parliament is to be trusted that the interests of the parties who

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84. Section 106 of the Knesset Procedural Code provides as follows:

A permanent committee may from time to time invite to its sittings -

- (1) an expert on the matter being considered by the committee, whether he is a Member of the Knesset or not;
- (2) the representative of any body or group, or any other person, who is interested in the matter being considered by the committee so that his view may be heard and so that he may be questioned by the committee

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*Id.*

According to A. RUBINSTEIN, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 261 n.18 (3d ed. 1980), "it appears that this discretionary power turns into a duty in every situation in which the committee considers a matter that might harm the rights or good name of a certain person. The principles of natural justice, even if they do not apply to Knesset committees, require that such a person be heard. However, in a number of situations, this rule has not been followed." *Id.* In any event, formulating a Bill in committee is done by affording a hearing to those parties that have an interest. *Id.* at 292; see also S. WEISS, HA'KNESSET (THE ISRAELI PARLIAMENT) 127, 169 (1977).

In England, the heart of the effort regarding an attempt to influence legislation is directed towards the appropriate government body responsible for the Bill. S.A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 284-92 (H. Street & R. Brazier 5th ed. 1985); K. WHEARE, LEGISLATURES 57-58 (2d ed. 1968).

85. E.C.S. WADE & A.W. BRADLEY, *supra* note 25, at 189-90. There is no parallel procedure in Israel.

86. *Id.* at 190.

may be aggrieved by its acts will be taken into account. This is not necessarily so with respect to secondary legislators, most of whom<sup>87</sup> are unelected.<sup>88</sup> The latter cannot be assumed to be directly responsive to the public at large. In such circumstances, the need to afford interested parties an opportunity to present their views before the decision making body is much greater.<sup>89</sup>

Finally, in contrast to the proceedings of administrative bodies, parliamentary proceedings are not subject to judicial review.<sup>90</sup> Even if the courts believe that the proceedings of Parliament are unfair and should be changed, they are not empowered to interfere and to fashion the proceedings differently.<sup>91</sup>

87. Excluding, for example, local authorities (empowered to make by-laws) whose members are elected by the local electorate.

88. See *Southern Ry. Co. v. Virginia*, 290 U.S. 190 (1933).

But if we assume that a state legislature may determine what public welfare demands . . . it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public.

*Id.* at 197 (McReynolds, J.).

89. R.S. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 99-100 (1969).

It is necessary in a democracy for lawmakers (including rulemakers) to be responsive to the public . . . . The problem of administrative responsiveness is particularly serious because administrators are not ordinarily elected. They are appointed. . . . *Democratic administration* . . . is a method of carrying on the administrative process in such a way as to encourage participation or at least the sense of participation in the decision-making process by those affected by the decision.

*Id.* (emphasis in original).

90. *Pickin v. British Rys. Board*, 1974 A.C. 765, 782 (H.L. (E) 1973) (opinion of Lord Reid).

In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

*Id.*; see also Loughlin, *supra* note 65, at 217.

91. 44 HALSBURY'S *LAWS OF ENGLAND* 505 (Lord Hailsham 4th ed. 1983). "If a Bill has been agreed to by both Houses of Parliament, and has received the royal assent, it cannot be impeached in the courts on the ground that its introduction, or passage through Parliament, was attended by any irregularity, or even on the ground that it was procured by fraud." *Id.*

The contents of a bill, like the proceedings for its adoption, are subject to parliamentary sovereignty.<sup>92</sup> This is not so, however, with respect to administrative authorities. In performing their duties, these authorities are subject to the principles of administrative law, shaped largely by the case law. Here, the courts are not constrained: the act of an administrative authority must meet tests of validity that are not applied, in the absence of a constitution, to acts of the legislature. For example, while courts may review the reasonableness of secondary legislation in order to rule on its validity, they are not authorized to review the reasonableness of primary legislation.

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92. See *Pickin*, 1974 A.C. 765 (H.L. (E) 1973); P. JACKSON, *supra* note 25. In this regard, there is no difference between a public and a private Bill. *Pickin*, 1974 A.C. at 782-83. Even in a situation in which a defect occurred in the adoption proceedings of a private Act, in the sense that the notice required by Standing Orders was not delivered to an interested party, the House of Lords refused to find in this defect a ground for holding that the Act did not apply. *Edinburgh & Dalkeith Ry. Co. v. Wauchope*, 8 Cl. & F. 710, 8 Eng. Rep. 279 (1842).

Also in Israel, in light of the Knesset's sovereignty, the courts, as a rule, do not intervene in its legislative proceedings. *Central Yeshiva of the Supporters of Honesty v. State of Israel*, 38(2) P.D. 273, 276 (1984). "However, when an organ of the Knesset unlawfully prevents the ordinary course of legislative proceedings, and this obstacle is not an insignificant matter but fundamentally impairs parliamentary life, or the very foundations of the structure of the constitutional system, then there is no escape from intervention." *Kahane v. Chairman of the Knesset*, 39(4) P.D. 85, 95 (1985) (Barak, J.). In the *Kahane* case, the respondents refused to lay before the Knesset two Member Bills of the petitioner on the alleged ground that they were racist. In taking this position, the respondents relied upon section 134 of the Knesset Procedural Code, which provides as follows:

- (a) Any member of the Knesset may propose a bill.
- (b) A Member proposing a bill shall submit it to the Chairman of the Knesset, and the Chairman and the Vice-Chairmen, after they have approved the bill, shall lay it on the table of the Knesset.

The Supreme Court voided the decision of the respondents:

This decision fundamentally harms the fabric of parliamentary life, and it harms in a substantial way the foundation of the structure of our constitutional system . . . . It fundamentally negates the ability of a Member of the Knesset to function fully in one of the principal ways that the Procedural Code (in its present version) places at his disposal. In these unusual circumstances, the court cannot avoid exercising its authority.

39(4) P.D. at 95-96 (Barak, J.). One should note that although this was an exceptional instance of judicial intervention in the law making proceedings of the Knesset, the court did not "dictate" to the legislator the proceedings that it deemed "desired" or "just." The court examined the legality of the decision made by the Chairman of the Knesset in accordance with the Knesset Procedural Code. As a parenthetical aside, it is noted that it is extremely doubtful whether an English court would have found it appropriate, under similar circumstances, to intervene in the proceedings of Parliament.

Courts may also review secondary legislation on the basis of additional criteria concerning the exercise of discretion by the secondary legislator. Can it be argued that just as the propriety of the deliberations of the primary legislator cannot be reviewed, such should also be the case concerning the review of the deliberations of the secondary legislator? If this argument cannot be made, why can the claim of analogy be made regarding legislative proceedings? That the courts lack the authority to intervene in the proceedings of parliamentary legislation need not stand in the way of their intervening in the proceedings of administrative legislation when such proceedings do not satisfy the fundamental requirements of procedural fairness.

The conclusion that follows from this is that the mere fact that an act of administrative authority is classified "legislative" does not, in and of itself, justify exempting that act from the fundamental requirements of procedural fairness as embodied in the rule prescribing the right to a hearing. Hence, other considerations that lie at the foundation of the exemption from the requirement of fairness need be examined.

#### B. *The Pragmatic Ground: Efficiency*

One of the principal reasons for the delegation by the legislature of legislative powers to administrative authorities is that the latter are capable of dealing efficiently by way of a quick and flexible response with matters to be regulated. Requiring the rule making authority to provide antecedent notice to interested parties regarding its legislative plans, affording an opportunity to these parties to present their views before the authority and obligating the authority to consider these views carefully will severely undercut the very reasons why legislative powers have been conferred upon the authority. It should be remembered that by the very definition of a power as legislative, it follows that this power is intended to apply to the public at large or to a substantial portion thereof. Can one imagine that every interested person should receive antecedent notice of the intention to enact regulations? How, indeed, could the authority hope to contact each such person? How could the authority shoulder the burden of reviewing each and every comment that it would receive? Moreover,

even if the authority could satisfy all of this, would not the sheer cumbersomeness of such a procedure void the very reason for enlisting the help of the secondary legislator?<sup>93</sup>

This cumbersomeness takes on a special dimension in view of the vast quantity of regulations that are issued both collectively and individually by the secondary legislators.<sup>94</sup> A large portion of these regulations deal with subsidiary matters, "filling in the details" of a scheme whose parameters have already been prescribed by primary legislation. The question arises whether the interested public should be afforded a right to be heard also in regard to such regulations. Furthermore, secondary legislation sometimes prescribes an arrangement that requires, for the public good, that it become effective without prior warning.<sup>95</sup> Can one realistically expect, for instance, antecedent publication of draft orders that change the exchange rate or increase customs rates?

It appears that considerations of efficiency occupy a major place in the judicial policy of non-recognition of the right to a hearing with respect to legislative acts.<sup>96</sup> These considerations are weighty, and no serious examination of the question of procedural fairness in the area of rule making can ignore them. If, indeed, opening up rule making proceedings to the comments of interested parties will frustrate the ability of the secondary legislator to fulfill his legislative responsibilities, then there will be no alternative but to conduct these proceedings in closed session.<sup>97</sup>

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93. See generally S.A. DE SMITH, *supra* note 6, at 191-92.

94. J.F. GARNER, *supra* note 25, at 48.

95. J.A.G. GRIFFITH & H. STREET, *supra* note 75, at 138-39.

96. See, e.g., N.Z. Licsd. Victuallers v. Price Tribunal, 1957 N.Z.L.R. 167, 200 (Finlay, J., dissenting); Gardner v. Dairy Indus. Auth., [1977] 1 N.S.W.L.R. 505, 518-19; see also *id.* at 533-34, 552.

97. This is because

[i]n an era such as ours in which the powers of government are ever-expanding, the rights of the citizen surely deserve the utmost protection, yet administrative activities should not be converted into judicial proceedings, and thus fetter the public authorities by imposing judicial principles when they may frustrate the work of an administrative authority. Imposing judicial principles—in order to do justice—on administrative proceedings, when it is neither necessary nor appropriate, will not bring about justice, but rather will paralyze the working of the administrative authority and lead to chaos . . . ."

Anonymous v. Minister of Health, 19(1) P.D. 122, 127-28 (1965) (Sussman, J.).

However, one should guard against over-haste in completely rejecting considerations of fairness on grounds of administrative efficiency. *So long as it is possible to achieve a balance between considerations of efficiency and considerations of justice to the individual, one should not be rejected in favor of an exclusive preference for the other.*<sup>98</sup>

In situations not involving legislation, a principle exists, as mentioned above, that the right to a hearing will not be accorded to a person if its exercise would completely frustrate the work of the administrative authority.<sup>99</sup> This principle can be relied upon in order to justify, for example, taking urgent, essential action without affording an opportunity to be heard, if delay in taking the action would cause irreparable damage in an area that lies within the care of the administrative authority.<sup>100</sup> The right to a hearing may also be denied if there is reason to protect the secrecy of a certain action,<sup>101</sup> or if emer-

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98. In the words of Justice Barak, in dealing with the right to a hearing in the context of a tender, where the authorized body considered disqualifying a bid on the basis of information regarding defective work allegedly performed by the bidder in the past:

I am aware of the fact that in affording the right to a hearing regarding "past failures," there is a certain burden on the governmental authority; however, considerations of efficiency cannot be permitted to adversely affect a fundamental right of the citizen. As for myself, I would seek a solution in the establishment of an appropriate administrative framework that will ease truth-finding by the public authority, such as "a hearing in writing" or the appointment of a qualified examiner to review the facts and to bring the findings before the appropriate authority. It seems to me that the right to a hearing is too important a right in our legal system to be relinquished or to be circumscribed solely on the basis of considerations of efficiency.

Mahmood v. Minister of Educ. & Culture, 33(1) P.D. 767, 775-76 (1979).

99. See *supra* text accompanying note 97; S.A. DE SMITH, *supra* note 6, at 190-91; H.W.R. WADE, *supra* note 25, at 473.

100. See *Regina v. Davey*, [1899] 1 Q.B. 301; *White v. Redfern*, 5 Q.B.D. 15 (1870); *Yoosrah Kawasmeh v. Minister of Defense*, 35(3) P.D. 113, 134-35 (1980); *Noah Films Co. Ltd. v. Council for Review of Motion Pictures & Plays*, 30(1) P.D. 757, 760 (1976). In such a situation, it is likely that a hearing at a later stage will be necessary, if, of course, it will be effective. See P. JACKSON, *supra* note 25, at 136.

The necessity for speed may justify immediate action; it will, however, normally allow for a hearing at a later stage. The possibility of such a hearing—and the adequacy of any later remedy should the initial action prove to have been unjustified—are considerations to be borne in mind when deciding whether the need for urgent action excludes a right to rely on natural justice.

101. See S.A. DE SMITH, *supra* note 6, at 189-90; J.F. GARNER, *supra* note 25, at 156-57 (cases discussed by each). Thus, it would be possible, for instance, to increase customs duties without antecedent publication of draft regulations.

gency power is exercised in other extremely urgent circumstances.<sup>102</sup> If another essential interest exists, the protection of which requires the absolute denial of the right to a hearing, the courts may not grant the hearing at all.<sup>103</sup> However, since a "fundamental right" is involved, denying that right in order to protect interests such as the need for administrative efficiency will occur only in exceptional situations in which there is no other way of achieving a balance between the conflicting interests.<sup>104</sup>

These principles can also be applied in connection with rule making proceedings. It cannot be said that *in every instance*, conferring the right to a hearing will severely impair the authority's ability to enact regulations: every situation must be examined in light of its particular facts. Clearly, however, because legislative proceedings implicate a potentially large number of interested persons, the scope of the requirements may be circumscribed. For example, in most cases the authority will be justifiably exempted from providing personal notice to interested parties, and publication that enables the parties to examine the draft regulations in full or in summary will be sufficient.<sup>105</sup> The exercise of the right to a hearing does not necessarily require oral argument, as written comments generally suffice.<sup>106</sup> The time available to submit such comments

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102. *Dunlop v. Woollahra Mun. Council*, [1975] 2 N.S.W.L.R. 446, 478; *De Verteuil v. Knaggs*, 1918 A.C. 557, 560-61; N.Z. Licisd. *Victuallers v. Price Tribunal*, 1957 N.Z.L.R. 167, 206; *Yoosrah Kawasmeh*, 35(3) P.D. at 134-35. *But see Durayappah v. Fernando*, [1967] 2 A.C. 337, 346 (P.C.). As to national security considerations that point to circumstances when the authority may reject the requirements of procedural fairness (in this specific case, the request for consultation, which is anchored in practice), see *C.C.S.U. v. Minister for the Civil Service*, [1984] 3 All E.R. 935 (H.L.).

103. *S. Shapiro & Assocs. Contracting Co. of Netanya Ltd. v. State of Israel*, 36(1) P.D. 337, 365-66 (1981) (opinion of Barak, J.).

It happens that an administrative authority takes a decision without hearing the interested party, and the decision stands unaltered. This occurs when the interest that the decision defends in a specific situation is weighted more heavily among all the general interests than the right to a hearing. Despite the importance of the rule regarding the right to a hearing, it should not be forgotten that it is only one among all the interests that must be honoured.

*Id.*; see also *Dunlop*, [1975] 2 N.S.W.L.R. at 469 and cases cited therein.

104. H.W.R. WADE, *supra* note 25, at 473.

105. See *Gardner v. Dairy Indus. Auth.*, [1977] 1 N.S.W.L.R. 505, 520; *Dunlop*, [1975] 2 N.S.W.L.R. at 479-80; S.A. DE SMITH, *supra* note 6, at 192-93.

106. See *Dunlop*, [1975] 2 N.S.W.L.R. at 479; Barak, *supra* note 79.

may also be limited.<sup>107</sup> In certain circumstances, a public hearing, held for the purpose of enabling interested persons to exercise their right to be heard, may be sufficient.<sup>108</sup>

Moreover, one may definitely take into consideration the burden that the proceedings discussed herein will place on the authority, and exempt it from conducting such proceedings when the anticipated harm from the regulation is minimal. In this way, the authority may be freed from the duty of antecedent publication of regulations when they are merely "filling in the details" of statutory arrangements that have already been prescribed in the authorizing law.

The right to a hearing and the concept of "administrative fairness" are both flexible enough to be adapted to the considerations of efficiency in rule making proceedings. Hence, one should not accept claims that the work of the secondary legislator will be paralyzed if it is made subject to the general requirement of procedural fairness and to the particular requirement of the right to a hearing.<sup>109</sup>

The English experience with the Rules Publication Act (RPA) proves that it is possible to balance considerations of efficiency with considerations of fairness in the area of rule making.<sup>110</sup> Until its abolition in 1948, the RPA applied to a substantial portion of all regulations,<sup>111</sup> subject to the discretion accorded the subordinate legislators to make "provisional rules" in those circumstances which, in their opinion, require urgent legislation.<sup>112</sup> For over fifty years in which the RPA was in effect, it did not paralyze the working of public authorities.<sup>113</sup> In fact, the Committee on Ministers' Powers recommended broadening the RPA's application by deleting

107. Barak, *supra* note 79, at 233.

108. Cf. S.A. DE SMITH, *supra* note 6, at 193.

109. Cf. *Re Anzil Const. Ltd. & West Gwillimbury Twp.*, 19 D.L.R.3d 37, 45 (1971).

110. In this connection, it is unimportant that the source for this balancing is in the statute itself and not in the case law. Regarding the problems that derive from the judicial balancing between conflicting considerations, see S.A. DE SMITH, *supra* note 6, at 182; *infra* text accompanying note 227.

111. See Rules Publication Act, §§ 1, 4 and *supra* note 73.

112. Rules Publication Act, § 2.

113. Although, prior to its enactment, a number of governmental authorities "warned" of the harm to administrative efficiency that lurked within these arrangements. See C.K. ALLEN, *LAW AND ORDERS* 98 (3d ed. 1965).

“anomalous” exceptions to section 1 of the RPA and by making it applicable to any regulation that had to be presented before Parliament.<sup>114</sup> Moreover, the Committee recommended circumscribing the “provisional rules” exception, and prescribed that secondary legislation would not be exempt from the duty of antecedent publication of draft regulations “except in a very special case.”<sup>115</sup> The principal defect of the RPA, therefore, was not the excessive burden that it placed on public authorities but the loopholes that permitted circumvention of its provisions concerning participation of the public in rule making proceedings.<sup>116</sup>

Similarly, in the United States, public authorities have not been paralyzed, although secondary legislation is subject to the general arrangement in the APA concerning the right of interested parties to be heard.<sup>117</sup> Section 4 of the APA requires antecedent publication in the Federal Register of “[g]eneral notice of proposed rule making.”<sup>118</sup> The notice must include: “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or sub-

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114. *Report, supra* note 73, at 66.

115. *Id.*

116. C.T. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW 55 (1941).

117. The rule making procedures of the APA are based in large measure on the 1893 RPA. See Schwartz, *Administrative Procedure and the A.P.A.*, 24 N.Y.U. L. REV. 514, 516 (1949). Still, the American legislature tried to avoid a return to the errors of the English statute. Regarding the comparison between the two arrangements, see B. SCHWARTZ, *LAW AND THE EXECUTIVE IN BRITAIN* 139-41 (1949).

The United States Act was enacted notwithstanding the fierce opposition of representatives of certain administrative authorities, who resisted the establishment of rule making proceedings that would impair, so they claimed, the efficiency and flexibility of their work. See Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 370 (1946).

Over the years, as models were developed for use by state legislatures, similar laws at the state level have been adopted, beginning with the Model State Administrative Procedure Act, 1946, continuing with the Revised Model State Administrative Procedure Act, 1961, and extending to the Model State Administrative Procedure Act, 1981. For the history of state laws, see UNIF. LAW COMM'RS MODEL STATE ADMINISTRATIVE PROCEDURE ACT prefatory note (1981), in 14 U.L.A. 73 (1985 Supp.); Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I*, 34 ADMIN. L. REV. 1, 1-4 (1982).

118. 5 U.S.C. § 553(b) (1982 & Supp. III 1985). This section provides: “General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law . . . .”

stance of the proposed rule or a description of the subjects and issues involved."<sup>119</sup>

After antecedent publication, interested parties have the opportunity to present arguments before the rule making authority. The APA does not require that the authority actually "hear" the parties. Rather, it merely requires that after antecedent publication of draft rules, interested parties be given an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.<sup>120</sup>

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119. 5 U.S.C. § 553(b)(1)-(3) (1982 & Supp. III 1985). The duty of antecedent publication pursuant to section 553 is subject to a number of exceptions, which collectively bare a broad scope of application. Thus, the section does not apply to rules that involve "a military or foreign affairs function of the United States." *Id.* § 553(a)(1). Further, it does not apply to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." *Id.* § 553(a)(2). In addition to these two broad exceptions that apply to section 553 generally, there are two additional exceptions that relate specifically to antecedent publication and that exempt the rule making agency from fulfilling this obligation. The first exception set forth in section 553(b)(A) provides that the authority is exempt from the aforementioned obligation in connection with "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." The second exception is contained in section 553(b)(B), which confers upon the agency discretion to forego the duty of antecedent publication "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest." The broad scope of this latter exception enables the rule making agency to meet the need for urgent legislation, to forego antecedent publication of draft rules of only marginal importance, and not to bring rules which require the the element of surprise to the prior attention of the public.

Regarding the obligation of antecedent publication pursuant to section 553, see, e.g., B. SCHWARTZ, *ADMINISTRATIVE LAW* 172-73 (2d ed. 1984); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 234-37 (1974); 73 C.J.S. §§ 640-46 (1983).

120. 5 U.S.C. § 553(c) (1982 & Supp. III 1985). As interpreted by American case law, the APA does not require the rule making agency to hear oral testimony under this section. *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 50, *cert. denied*, 389 U.S. 844 (1967). Here, the court held that the aforementioned section requires only that the authority make it possible to submit written materials, and that it consider them. Further proceedings are necessary only if they are required by the enabling law. *Id.* at 54.

In addition to the informal proceedings prescribed in section 553, the APA also recognizes other proceedings similar to those commonly employed by agencies in exercising judicial powers. These proceedings are regulated by sections 556-557, and are to be used "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c) (1982 & Supp. III 1985).

Regarding rule making, the focus of which in the American system is on the participatory proceedings discussed hereinabove, see I K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 447-634 (2d ed. 1979), 107-59 (1982 Supp.); B. SCHWARTZ, *supra* note 119, at 166-79.

The American model proves that one need not be alarmed by the prospect of opening up rule making proceedings to the participation of interested parties. All in all, participatory proceedings in the United States have not so burdened rule making authorities as to prevent them from fulfilling their legislative responsibilities.<sup>121</sup>

In this context, I should mention a recently-issued directive of the Attorney General of Israel.<sup>122</sup> It calls for "broadening antecedent publication of draft regulations in a way that will strike the desired balance between the need to function efficiently and economically within the limits of available resources, and the need to improve the democratic process in the area of rule making." According to the Attorney General, "draft regulations need not be published except in situations in which special importance is attached to publication, and there are no substantial considerations to the contrary."<sup>123</sup>

Thus, it is "desirable to provide antecedent publication of draft regulations that prescribe a basic, comprehensive scheme of significant novelty, or which substantially influence a considerable public."<sup>124</sup> On the other hand, the ground supporting antecedent publication will be less compelling, even nullified, if the regulations are of only marginal importance, if enactment of the regulations is urgent, or if the regulations are enacted after consultation with a body representing in large measure the public likely to be affected.<sup>125</sup> The directive of the Attorney General is important because it expresses the viewpoint of the highest echelon of Israeli public administration that open rule making proceedings not only will leave unimpaired the ability of the rule making authorities to function but that such proceedings are often highly desirable.<sup>126</sup>

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121. "The procedure prescribed by [section 553] does not impose any undue burdens upon agencies exercising the rule making power." B. SCHWARTZ, *supra* note 117, at 517.

122. Directives of the Attorney General, No. 60.012, November 1985 [hereinafter AG Directive].

123. *Id.* § 21.1.

124. *Id.* § 21.2(a). "Certain subjects have special significance in connection with antecedent publication, including fundamental freedoms such as freedom of expression, association, occupation, etc.; consumer protection; matters involving the quality of the environment; transportation and safety." *Id.*

125. *Id.* § 21.2(c).

126. Attention should be drawn to the fact that we are here speaking of an "internal directive," which has no formal legal status; moreover, the Attorney General

Hence, also in rule making, it is possible to balance considerations of efficiency and fairness. Accordingly, one set of considerations should not be favored at the total expense of the other.<sup>127</sup>

Finally, administrative efficiency is not measured only by one's ability to act quickly and flexibly in enacting the final version of the regulations. From a wider perspective, administrative efficiency requires that all the relevant information and considerations be presented before the rule making authorities. The position of interested parties is, without a doubt, a relevant factor in the exercise of rule making power. Further, the true test of efficiency lies in the ability of the secondary legislator to *enforce* its regulations and in the willingness of the public, for which the regulations were intended, to act in accordance with them. Opening up rule making proceedings, affording the public an opportunity to participate in the proceedings, and obligating the authority to consider the position of interested parties may all enhance a willingness to act in accordance with the regulations. Hence, such measures may in fact reinforce administrative efficiency.<sup>128</sup> In the words of Justice Leventhal:

This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rule making procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for pub-

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has no statutory standing in rule making proceedings. Still, inasmuch as he is the chief legal counsel for the executive branch, the Attorney General enjoys special legal position with respect to legislation, including secondary legislation. The internal proceedings of rule making authorities regarding the preparation of regulations are based on the aforementioned directive of the Attorney General. See Barak, *supra* note 79, at 230-31.

127. See generally *Homex Realty v. Village of Wyoming*, 116 D.L.R.3d 1, 9 (1980).

It is true that the proceedings discussed herein may delay to some degree the work of rule making, and they involve a certain monetary cost. "The point must however be kept in perspective. Any controls over rule making, and this includes existing legislative controls, cost time and money. It would indubitably be cheaper never to lay any instrument before Parliament, let alone scrutinise it. If we desire control and accountability then this must be paid for." P.P. CRAIG, *supra* note 25, at 208.

128. Jowell, *The Legal Control of Administrative Discretion*, 1973 PUB. L. 178, 191, 219; Nathanson, *supra* note 117, at 385-86.

lic participation tends to promote acquiescence in the result even when objections remain as to substance.<sup>129</sup>

C. *The Ground Based on Statutory Construction: Expressio Unius Est Exclusio Alterius*

English and Israeli legislators are aware of the need for procedural fairness in secondary legislation, and they have sometimes provided a statutory solution in the authorizing legislation. For example, some statutes require the rule making authorities to consult with interested parties before enactment. Other statutes require antecedent publication of draft regulations or some other way of bringing them to the attention of interested parties, and afford an opportunity to those who may be aggrieved by such regulations to present their position before the authority.<sup>130</sup> In those situations in which no such statutory proceedings are prescribed, one can infer the "negative" intent of the legislator regarding the obligation of procedural fairness, under the maxim *expressio unius est exclusio alterius*.<sup>131</sup> Certainly, one can infer such an intent from a statute that deals with procedural fairness. Here the argument is stronger against broadening the scope of the legislator's language, either by adding further proceedings or by conferring standing on parties other than those prescribed in the statute to participate in the rule making.

In English law, the repeal of the RPA reinforces this conclusion. The Act, which prescribed procedures ensuring fairness in rule making, was abrogated by Parliament without re-enacting similar procedures in the Statutory Instruments Act. Should we not infer from this that Parliament is disinterested in a general scheme for rule making proceedings, as opposed to specific statutory arrangements to be prescribed as Parliament finds it necessary? Should proceedings rejected by the legislator be reimposed judicially?

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129. *Guardian Fed. Sav. & Loan v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (1978).

130. See generally Barak, *supra* note 79, at 231-32; Garner, *Consultation in Subordinate Legislation*, 1964 PUB. L. 105.

131. Regarding this maxim, see W.F. CRAIGES, *ON STATUTE LAW* 259-60 (S.G.G. Edgar 7th ed. 1971). Concerning the care that should be exercised in relying on the maxim, see P.B. MAXWELL, *ON INTERPRETATION OF THE STATUTES* 293-97 (P. St. J. Langan 12th ed. 1969).

The silence of the legislature regarding the requirement of participation by interested parties still does not imply rejection of procedural fairness. Rather, it leaves the matter to be addressed by application of the common law. The starting point of English courts in addressing the question of natural justice is "that, although there are no positive words in a statute requiring that the part[ies] shall be heard, yet the justice of the common law will supply the omission of the legislature."<sup>132</sup> Various statutes deal with one aspect or another of the rules of natural justice in connection with proceedings prescribed thereby. One cannot infer from this that the silence of the legislator in other statutes indicates a rejection of these rules in the exercise of power.

The same is true in rule making proceedings. One should not infer from the fact that the legislature has prescribed proceedings with respect to certain statutes that it has rejected such proceedings with respect to other statutes that are silent in this regard. In the latter situation, the silence of the legislator may be supplemented by the common law principles of natural justice and procedural fairness. Therefore, the silence of the legislator does not bar the application of these principles in rule making proceedings.

The repeal of the RPA does not detract from the correctness of the above conclusion regarding English law. The Act while in force provided a general framework for antecedent publication of draft regulations and accorded interested parties the right to present their position regarding these regulations. Every regulation lying within the scope of the RPA was subject to its requirements for procedural fairness. The abolition of the RPA caused the abolition of the proceedings which derived their validity *from the RPA itself*. In the absence of a statutory provision in this regard, the common law governs, and every regulation will be examined individually concerning the right of interested parties to participate in the enactment process and the proper scope of procedural requirements required. It is difficult to accept the position that by abrogating the RPA, Parliament also intended to effect a restrictive appli-

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132. *Cooper v. Wandsworth Bd. of Works*, 14 C.B. (N.S.) 180, 194, 143 Eng. Rep. 414 (1863) (Byles, J.).

cation of the common law or to block forever subsequent judicial development in this area.

However, when the authorizing statute does address aspects of procedural fairness, it is more difficult to justify imposing additional procedural requirements upon the rule making proceedings. In such circumstances, reliance on *expressio unius est exclusio alterius* seems more compelling. Thus, in *Bates*,<sup>133</sup> the court emphasized that the enabling statute did address the issue of procedural safeguards by compelling the rule making authority to allow the council of the Law Society to present its position to the authority prior to enactment. Hence, the obligation would not apply to bodies not mentioned in the statute.<sup>134</sup> Support for this position may be found in the well-known United States decision *Vermont Yankee Nuclear Power Corp. v. NRDC*.<sup>135</sup>

*Vermont Yankee* held that in the absence of an explicit statutory provision, a rule making authority is not obligated to satisfy any procedural requirements beyond those set forth in the APA. Thus, for example, if the regulations fall within the scope of one of the exceptions contained in the APA,<sup>136</sup> they are completely exempt from the requirements of procedural fairness, and the legislative exemption cannot be circumvented by imposing an additional judicial obligation.<sup>137</sup>

Here too, the issue under consideration is not characteristic only of rule making proceedings. Courts often encounter it in connection with other types of acts of administrative authorities that are also subject in principle to the rules of natural justice. Does statutory treatment of certain aspects of these rules prevent supplementing them with common law principles?

The case law does not afford us a unanimous judicial response to this question.<sup>138</sup> However, even when a statute addresses only some of the aspects of natural justice, it should

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133. [1972] 1 W.L.R. 1373.

134. *Id.* at 1378-79; see also *supra* text accompanying notes 23-24; cf. *Essex County Council v. Ministry of Housing & Local Gov't*, 67 L.G.R. 23, 31 (1967).

135. 435 U.S. 519 (1978).

136. See *supra* text accompanying note 119.

137. *Vermont Yankee*, 435 U.S. at 548.

138. See S.A. DE SMITH, *supra* note 6, at 166, 182, 187-88; P. JACKSON, *supra* note 25, at 140-42.

still be presumed that the statutory provisions do not “in general exclude the rules of natural justice but [are] supplemental to them.”<sup>139</sup> Still, attention should also be paid to the more

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139. *Nicholson v. Secretary of State for Energy & Nat'l Coal Bd.*, 1978 J.P.L. 39, 40 (Sir Douglas Frank).

A far-reaching expression of this approach was given in *The “Likud” Faction of the Municipality of Petach Tikvah v. The Municipal Council of Petach Tikvah*, 34(2) P.D. 566 (1980), relying upon the judgment in *Nicholson*. The question before the Court in that case—the same question which we are now addressing—was defined by Justice Barak as follows:

[w]hat is the law in the intermediate situation in which the legislator has defined the authority and conferred power and even has prescribed a number of arrangements concerning either the right to a hearing, bias or conflict of interests, which do not cover all the situations and circumstances to which the rules of natural justice apply. Can it be said that when a statutory arrangement is prescribed, it supersedes the rules of natural justice, or should it be said that alongside the statutory arrangement, and to the extent the contrary is not explicitly stated, the rules of natural justice will continue to apply?

*Id.* at 574. Justice Barak answered: “It seems to me that the answer to this question lies in the construction of the statute that created the authority and conferred the power, and which prescribed arrangements regarding natural justice . . . . The statute must be construed against the background of the legislative purpose and the substantive material.” *Id.* at 574-75. Therefore, the judge did not believe that it was appropriate to rely on the “simplistic rule”—*expressio unius est exclusio alterius*:

Therefore, the question that must be answered is whether, in light of the legislator’s purpose and the background of the issue, the provisions of the statute should be construed as exhaustive, thereby rejecting the principles of natural justice that lie outside them, or should the statutory provisions be construed as consolidating the principles of natural justice contained therein, but leaving the application of the rules not included in the provisions in co-existence, one alongside the other, statutory arrangements together with common law arrangements.

*Id.* When no conclusion can be drawn concerning the construction of the statute in this regard, the continuing application of the rules of natural justice should be given the benefit of the doubt, viz., that the statutory provisions dealing with the rules of natural justice are neither comprehensive nor exhaustive, but are only complementary and intended for emphasis.

In that case, Justice Barak employed his approach towards the application of the rules of natural justice to the question whether, on the basis of the general principles regarding bias and conflict of interests, to disqualify a member of the city’s management committee from serving on its control committee, when the relevant statute (section 149C of the Municipalities Ordinance [New Version]), while proscribing certain conflicts of interest (e.g., the mayor and the vice-mayors shall not be members of the control committee, or the committee chairman shall not be from the fraction of the mayor) does not specifically address the alleged conflict of interests raised in the petition. Justice Barak refused to accept the argument that the legislator had exhausted application of the rule against bias in the context of conflicts of interest:

In referring to the mayor and his vice-mayors, the legislator merely expressed the view that the holders of these offices, which are the central executive figures in the administration of a city, are ipso facto disqualified from

guarded words of Lord Reid:

For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.<sup>140</sup>

Returning to *Bates*,<sup>141</sup> no inference could be drawn that the statutory procedural safeguards concerning the participation of the Law Society in rule making proceedings were exhaustive. Not all solicitors are members of that body.<sup>142</sup> Thus, from the point of view of those solicitors who are not members, the consultation proceeding is "insufficient to achieve justice." In equal measure, the "additional steps" required here—namely, enabling solicitors who are not members of the Law Society, or their organization, to participate in rule making proceedings (for example, by publication of the draft order so as to bring it to their attention and by establishing a one-month period in which to make comments<sup>143</sup>)—"would not frustrate the apparent purpose of the legislation." On the contrary, the democratization of the process would strengthen the purpose of the authorizing statute because it would lead to greater willingness on the part of the community of solicitors to act in accordance with the provisions of the order.

Courts should be wary of drawing the conclusion that procedural provisions prescribed by the authorizing statute in

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serving as members of the control committee, without need to resort to the general law. But this explicit reference is not sufficient to support the inference that the other members of the municipal council are qualified to serve as members of the committee even if there exists, in their regard, a real likelihood of a conflict of interests.

*Id.* at 580.

Justice H. Cohn joined Justice Barak's judgment, *id.* at 584-87, while Justice Bechor took issue in his minority opinion. *Id.* at 582-84.

140. *Wiseman v. Borneman*, 1971 A.C. 297, 308 (1969).

141. [1972] 1 W.L.R. 1373 (Ch.).

142. *Id.* at 1375-76.

143. Recall that in the *Bates* case, the plaintiff had knowledge of the draft order, and had more than one month to offer comments thereon. Hence, as I suggested above, the court did not have to address the inapplicability of the requirement of fairness to rule making proceedings. *Id.* at 1376; *see supra* text accompanying notes 56-61.

connection with rule making proceedings are exhaustive, if such provisions do not prescribe participation by interested parties in the proceedings,<sup>144</sup> or when participation is afforded only to some parties. Again, there is no reason to apply different principles to rule making proceedings than to those applied to the procedures of other types of acts of administrative authorities.<sup>145</sup>

With respect to the *Vermont Yankee* case,<sup>146</sup> it should be noted that it was decided within the context of a legal framework that fundamentally differs from those existing in England and in Israel. In the United States, as discussed,<sup>147</sup> the APA can be said to have exhausted the requirements of procedural fairness in rule making.<sup>148</sup> This Act "was not only 'a new, basic and comprehensive regulation of procedures in many agencies,' . . . but was also a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" <sup>149</sup>

Against this background, *Vermont Yankee* held with respect to the APA that

[G]enerally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.<sup>150</sup>

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144. *Homex Realty v. Village of Wyoming*, 116 D.L.R.3d 1, 7-8 (1980).

145. *Creednz Inc. v. Governor General*, [1981] 1 N.Z.L.R. 172; *Homex Realty*, 116 D.L.R.3d at 7-8.

146. 435 U.S. 519 (1978).

147. See *supra* text accompanying notes 117-21.

148. But see 2 K.C. DAVIS, *supra* note 120, at 78-79 (2d ed. 1979), 127-42 (1982 Supp.); Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3.

149. 435 U.S. at 523 (Rehnquist, J.) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

150. 435 U.S. at 524 (citations omitted).

Even if we ignore the severe criticism that has been leveled against *Vermont Yankee*<sup>151</sup> and we take the judgment as reflecting current United States law,<sup>152</sup> the rule it articulates has no place in a legal system like that of England or Israel where the legislator has not concerned himself with providing a comprehensive scheme for procedural fairness in rule making. In these legal systems, the existing statutory provisions can be supplemented by applying case law principles in accordance with the previously discussed judicial guidelines developed by the English and Israeli courts.<sup>153</sup>

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151. In this regard, see specifically 2 K.C. DAVIS, *supra* note 120, § 7:19, at 78, 91-94 (2d ed. 1979), at 127-42 (1982 Supp.); see also Davis, *supra* note 148. Davis' basic approach is that the APA does not exhaust the requirements of procedural fairness in the area of rule making, and that the courts are permitted to add requirements to those prescribed by that section:

Enactment of the APA deprives courts of power to uphold procedure that is below the minimum required by the APA, but nothing in the APA deprives courts of power to require more than the minimum specified by APA. If Congress imposes a requirement of specified procedure from A to F and provides that the requirement does not apply to procedure from G to Z, the courts are still free to impose their own requirements for procedure from G to Z.

*Sometimes justice requires notice and comment procedure when the APA does not require it, and nothing in the APA is inconsistent with a judicial requirement of such procedure.*

2 K.C. DAVIS, *supra* note 120, § 6:31, at 597 (2d ed. 1979) (emphasis in original).

For a detailed discussion of the *Vermont Yankee* case, see Note, *The Substantial Impact Test: Victim of the Fallout from Vermont Yankee?*, 53 GEO. WASH. L. REV. 118 (1985). See also Beatson, *A British View of Vermont Yankee*, 55 TUL. L. REV. 435 (1981).

152. The United States Supreme Court has reaffirmed these words in subsequent opinions. See, e.g., *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). However, in the lower courts, a certain degree of confusion reigns concerning the precise interpretation of the decision. See Note, *supra* note 151, at 128-39. In Davis' opinion, *supra* note 120, at 143-47 (1982 Supp.), the language quoted from the opinion in the text accompanying note 150, *supra*, does not reflect the law, and courts have, and will continue, to deviate from it. But see R.J. PIERCE, S.A. SHAPIRO & P.R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 333 (1985); Note, *supra* note 151, at 146.

153. See *supra* text accompanying notes 138-40.

Returning to the *Bates* case, [1972] 1 W.L.R. 1373, it should be noted that there, the need to supplement the statutory provision regarding rule making proceedings by means of common law rules relates to the *very right* of participation in such proceedings. In this regard, the explicit statutory reference to participation by the Law Society is not meant to deny other parties the opportunity to participate in the proceedings. Regarding *the contents of the right*—in the circumstances of the *Bates* case, the amount of time given to interested parties to comment on the draft order—there is, as we have seen, room for much flexibility according to the circumstances of each case. In this regard, when the legislature allotted a period of one month, it thereby

D. *The Substantive Ground: Rule Making Proceedings Satisfy the Requirements of Fairness Even Without Judicial Intervention*

This ground adds a substantive dimension to the maxim *expressio unius est exclusio alterius*. As indicated, English and Israeli law have provided a developed system of public participation in rule making through consultation with interested organizations.<sup>154</sup> Furthermore, it is also customary in England to consult with interested bodies even in the absence of a statutory duty to do so.<sup>155</sup> This practice is so deeply rooted that it is considered to be a constitutional convention<sup>156</sup> in connection with the exercise of rule making powers.<sup>157</sup> Not infrequently, the subordinate legislator consults with scores of bodies and organizations prior to publication of the final version of the regulations,<sup>158</sup> and in many instances, there is on-going, almost daily contact between officials of the rule making authority and interested bodies.<sup>159</sup> A rule making authority that chooses to ignore such an interested body may later encounter vociferous protest by the body, because the authority has neglected to consult it, and it may even be subject to criticism on the floor of Parliament.<sup>160</sup> Even in Israel, where voluntary consultation is not so well developed as in England, such consultation is still common.<sup>161</sup> Presumably, the new directive issued by the Attorney General will prod the rule making authorities to make use of this procedure to an even greater ex-

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provided a statutory solution, in light of the particular circumstances, to the requirement of "adequate notice," and there is no reason to view this solution as "insufficient to do justice." Hence, there was no reason, as requested by the plaintiff, to extend judicially the period of time established by statute. *See also supra* text accompanying notes 56-63.

154. *See supra* text accompanying note 130.

155. *See Report, supra* note 73, at 48.

156. Constitutional conventions are "rules of political practice which are regarded as binding by those to whom they apply, but which are not laws as they are not enforced by the courts or by the Houses of Parliament." O. HOOD PHILLIPS & P. JACKSON, *O. HOOD PHILLIPS' CONSTITUTIONAL AND ADMINISTRATIVE LAW* 104-05 (6th ed. 1978) (emphasis omitted).

157. *See* S.A. DE SMITH, *supra* note 84, at 356; S. WALKLAND, *THE LEGISLATIVE PROCESS IN GREAT BRITAIN* 51 (1968).

158. *See* Garner, *supra* note 130, at 115 (data concerning voluntary consultations among various governmental offices); *see also* H.W.R. WADE, *supra* note 25, at 768.

159. J. GARNER, *supra* note 25, at 64.

160. *See* J.A.G. GRIFFITH & H. STREET, *supra* note 75, at 126.

161. Barak, *supra* note 79, at 233.

tent.<sup>162</sup>

It might be argued, in light of this developed system of consultation, that there is no need for additional prescriptions. In other words, the requirement of procedural fairness that interested parties be afforded an opportunity to present their position before rule making authorities is satisfied and indeed exhausted by this system of consultation.<sup>163</sup> In these circumstances, the maxim *expressio unius est exclusio alterius* transcends its simplistic framework and takes on a substantive dimension, thereby reinforcing the conclusion that there is no place for judicial intervention, based on the principle of "fairness," in an area where the requirements of fairness are well satisfied.

This argument is unacceptable. Consultation proceedings cannot be considered a suitable solution to the problem of participation of the unorganized public in rule making activities. This is especially true when the regulations affect either the public at large, or a large portion thereof that is not organized with respect to the subject addressed by the regulations. For example, the public at large belongs to an unorganized group of "consumers." Is this group consulted in connection with regulations that affect each of us daily?<sup>164</sup>

In certain situations, the regulations affect a certain group, not necessarily organized, in a direct, immediate and personal fashion. The members of this group have an interest in presenting their personal position before the authority prior to final enactment of the regulations. Moreover, it is possible that prior to enactment, facts in dispute need to be determined, and conflicting, unorganized interests need to be re-

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162. See AG Directive, *supra* note 122, § 13.2. "[I]t is advisable to conduct such a consultation in situations in which the regulations are likely to significantly affect the legal situation, or an economic or social interest of a certain public or of certain bodies. Special importance is attached to the consultation in cases where the regulations are said to prescribe primary arrangements."

163. According to the Lord Chancellor, this is the principal ground for the omission of the requirement of antecedent publication of regulations in the Statutory Instruments Act. See 139 PARL. DEB. (H.L.) col. 330 (1945); see also 415 PARL. DEB. (H.C.) cols. 1101, 1111-1113 (1945-46) (reasoning of the Solicitor General); J.A.G. GRIFFITH & H. STREET, *supra* note 75, at 126; O. HOOD PHILLIPS & P. JACKSON, *supra* note 156, at 572; D.C.M. YARDLEY, A SOURCE BOOK OF ENGLISH ADMINISTRATIVE LAW 53-54 (2d ed. 1970).

164. See B. SCHWARTZ, ADMINISTRATIVE LAW 266-68 (1st ed. 1976); Suzman, *Administrative Law in England: A Study of the Report of the Committee on Ministers' Powers*, 18 IOWA L. REV. 160, 167 (1933).

solved.<sup>165</sup> Such matters should not be settled without first affording interested parties an opportunity to be heard before the rule making authority.

Further, in the absence of a general rule concerning the duty to hear the comments of interested parties, the system of consulting only with certain bodies, as specified in the authorizing statute, is likely to accord excessive weight to the views of these bodies, often designated by virtue of their political power. This is also the situation concerning voluntary consultation: the subordinate legislator is likely to accord excessive weight to powerful organizations that might otherwise, absent their involvement in the process of enactment, significantly interfere with the implementation of the regulations. The resulting concern is that the interests of the less powerful and less organized bodies will not be taken into account. The same subordinate legislator is also likely to hear the comments of only those bodies that tend to support his ideas and positions. Hence, inasmuch as he consulted with such bodies and willingly heard their comments, consultation in such circumstances may provide him with a "defense" to the charge that he did not take into account the position of bodies outside the realm of public administration.<sup>166</sup> By conducting consultations, a working partnership regarding rule making is achieved.<sup>167</sup> Not infrequently, the situation arises in which a single authority, in enacting a large number of regulations pursuant to various laws, consults with the same pressure groups, either by statutory obligation or by its own choice. This reality reinforces the above concern that the rule making authority will reach an accommodation with these bodies at the expense of the concerns of other less powerful organizations as well as to the detriment of unorganized interests.<sup>168</sup>

The existing arrangements, concerning public participation in rule making proceedings, inasmuch as they provide only a partial solution to the requirements of procedural fair-

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165. See J.A.G. GRIFFITH & H. STREET, *supra* note 75, at 137-38.

166. Craig, *The Working of the Statutory Instruments Act, 1946*, 39 *PUB. ADMIN.* 181, 189 (1961).

167. Garner, *supra* note 130, at 117.

168. Asimow, *Delegated Legislation: United States and United Kingdom*, 3 *OXFORD J. LEGAL STUD.* 253, 267 (1983).

ness, need to be supplemented. This should be done by the courts.

### III. THE BUDDING OF A NEW JUDICIAL APPROACH

In a number of judgments in England, Israel, and other common law jurisdictions, a different judicial approach from that expressed in *Bates*<sup>169</sup> and *Berman*<sup>170</sup> can be discerned. I will now examine a number of avenues, emerging from these judgments, that point to a new possible direction.

#### A. The "Legislative" Label is No Barrier to the Rules of Natural Justice

In the *Creednz* case, Justice Richardson tries to remove from legislative acts the almost mythical mantle that has shielded them from the application of the rules of natural justice.<sup>171</sup> Justice Richardson asserts in fact that legislative acts, like other acts of administrative authorities, are subject to the rules of natural justice. Parties that may be aggrieved by these acts are entitled to a hearing, unless the statutory arrangement is exhaustive with respect to the requirements of fairness, in which case reliance on the common law may be regarded as superfluous, or there is a fear that additional procedures "would be inconsistent with the scheme of the legislation and frustrate the purpose of the statute."<sup>172</sup> Such is the case re-

169. [1972] 1 W.L.R. 1373 (Ch.).

170. 3 S.J. 29 (1958).

171. [1981] 1 N.Z.L.R. at 188-89. While dealing with an Order in Council of the Governor-General acting with the consent of the Executive Council for New Zealand, Justice Richardson states:

The mere fact that the decision is embodied in an instrument, an Order in Council, that is legislative in form does not necessarily preclude the imposition by implication of an opportunity to be heard. Again, it is well-settled in this country that a body which is exercising functions that are legislative in form and substance may be subject to an implied duty to observe the requirements of natural justice . . . . Furthermore, the dividing line between "adjudication" (or "administration") on the one hand and "legislation" on the other, is not always easy to draw and the attempt may be an arid exercise for in the twilight area the conceptual foundations for a distinction are not self-evident. It is more profitable to focus on the nature and effect of the decision under the statutory scheme than to search for labels to characterise the Executive Council's function . . . .

*Id.*

172. *See supra* text accompanying notes 138-45.

garding other acts of administrative authorities,<sup>173</sup> and this should also be true for legislative acts.<sup>174</sup>

A similar approach was expressed by Justice Dickson in his dissenting opinion in *Homex Realty*,<sup>175</sup> in which he refused to condition the right to a hearing on classifying the by-law as quasi-judicial: "it is not particularly important whether the function of the municipality be classified as 'legislative' or as 'quasi-judicial.' Such an approach would only return us to the conundrums of an earlier era. One must look to the nature of the function and to the facts of each case."<sup>176</sup>

B. *Regulations Affecting a Limited, Specific Public:*  
*"Quasi-Judicial Legislation"?*

In recent years, Canadian courts have shown a marked tendency to subject the enactment of regulations, particularly by-laws, to the rules of natural justice in those circumstances where, despite the regulations' legislative character, they are intended for a defined, limited public whose interests—particularly property interests—are adversely affected.<sup>177</sup>

In some of these Canadian cases, the judges emphasize that despite the instrument's legislative form, it should be treated as quasi-judicial because of its nature and effect. In this way, it may be made subject to the rules of natural justice<sup>178</sup> without explicitly holding that these rules generally ap-

173. [1981] 1 N.Z.L.R. at 191.

174. In the specific situation—through reliance on the general principles regarding the supplementing of procedural provisions in a statute by means of common law requirements—the court reached the conclusion that the detailed statutory provisions regarding the participation of interested parties in the rule making proceedings are exhaustive.

175. 116 D.L.R.3d 1, 10-11 (1980).

176. *Id.* at 3 (Ritchie J. joined Dickson J.). The majority did not take issue with the minority regarding application of the right to a hearing in the present circumstances, although its reasoning differed. *See infra* note 178.

177. The signal for this development was given by the Canadian Supreme Court in 1965 in the case of *Wiswell v. Metropolitan Corp. of Greater Winnipeg*, 51 D.L.R. 2d 754 (1965). Since then, numerous courts, provincial as well as federal, have reiterated its holding. *See* D.J. MULLAN, *supra* note 39, at 182-83.

178. Thus, the *Homex Realty* case, 116 D.L.R.3d 1 (1980), involved two by-laws, the adoption of which limited the liability of landowners to engage in transactions involving their land, as a result of which the value of their land declined. Most of the lots with which the by-laws dealt belonged to the appellant, which had not, however, received antecedent notice of the contemplated by-laws. Justice Estey, on behalf of the majority, concluded "that the action taken by the council was not in substance

ply to legislative acts. In other judgments, the court's reasoning is not based on the quasi-judicial nature of the regulation. The fact that the regulation is intended to apply to a limited, defined public whose interests will be affected by its provisions is sufficient for the court to recognize the right of that public to a hearing.<sup>179</sup>

Expressions of this approach may be found outside Canada as well,<sup>180</sup> and is also manifested in the Israeli judgment *Koori*.<sup>181</sup> In this case, the Minister of the Interior issued an order pursuant to which the name of a certain local council was struck from one local order and added to another, thereby conferring upon the Minister authority to intervene in the council's composition. The petitioners sought to rescind the order, alleging a violation of the rules of natural justice, as the local council was denied the right to a hearing. Justice H. Cohn did not discuss this question, invalidating the order on other grounds.<sup>182</sup> Justice Halevi emphasized that the Minister's act was "legislative"<sup>183</sup> and improper in light of the circumstances. He continued:<sup>184</sup>

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legislative but rather *quasi-judicial* in character so as to attract the principle of notice and the consequential doctrine of *audi alteram partem*, as laid down by the Courts." *Id.* at 25. Nevertheless, the judge did not find appropriate the granting of relief to the appellant in accordance with the court's discretion "to deny *certiorari* to an applicant otherwise in law entitled." *Id.* at 24. Hence, the operative result of the majority differed from that reached by the minority judge—Justice Dickson—who was of the opinion that relief should be granted. As mentioned above, *see supra* text accompanying note 176, Justice Dickson did not base the right to a hearing on the quasi-judicial nature of the by-laws. *See also* *Atkinson v. Municipality of Metro. Toronto*, (1976) 69 D.L.R.3d 193; *Re Hershoran & City of Windsor*, 40 D.L.R.3d 171 (1973), *aff'd*, 45 D.L.R.3d 533 (1974); *Raes v. Township of Plympton*, 20 D.L.R.3d 645 (1971); *Wiswell*, 51 D.L.R.2d 754 (1965).

179. *See, e.g.*, *Re Anzil Const. Ltd.*, 19 D.L.R.3d 37 (1971), which involved a by-law that imposed limitations on the use of certain real property and which "was aimed undoubtedly at the applicants." *Id.* at 44. The court invalidated the by-law due to the local council's failure to give notice to the applicants concerning its intention to enact it; this, without entering "into a discussion of whether or not the Council was performing a *quasi-judicial* function." *Id.* at 43. In concluding that the right to a hearing exists, it was sufficient for the judge that the by-law was especially directed towards the applicants and that it adversely affected their property rights.

180. *See, e.g.*, *Dunlop v. Woollahra Mun. Council*, [1975] 2 N.S.W.L.R. 446, 479-80 (relying on the doctrine of fairness).

181. 19(2) P.D. 322 (1965).

182. *Id.* at 333-34.

183. *Id.* at 335.

184. *Id.* at 337.

Needless to add that the legislative act under consideration was done in haste, without any thorough exercise of discretion, without any proper warning to the local council affected by it, and without any attempt to ascertain the council's position (as distinguished from consultation with the chairman of the council who had resigned). The Minister of the Interior is not permitted to strike out of hand the local council from the Local Councils Order (A) and to transfer it against its will to the Local Council's Order (B).<sup>185</sup>

Can it not be inferred from this that Justice Halevi was prepared to void the Minister's legislative act on the ground that the council was given neither antecedent warning nor an opportunity to be heard before the Minister?

When one speaks of regulations intended for a limited public, it is easier for the courts to afford that public the right to a hearing. Such regulations lack one of the principal ingredients of a legislative act: generality. Even if regulations apply to a potentially undefined public, if in actuality they affect a limited, defined public, they become functionally similar to an administrative or judicial act. This makes it easier for judges to overcome their reluctance towards extending the application of the rules of natural justice and procedural fairness to legislative acts as well. At the same time, this may prevent an authority from adopting a legislative proceeding solely to avoid the application of these rules.<sup>186</sup> Even more importantly, because in actuality only a small number of interested parties are likely to exercise their right to a hearing, there is no genuine fear of significant harm to considerations of efficiency. However, on the assumption that a way can be found to prevent such harm even in connection with regulations that apply to a large public of interested parties,<sup>187</sup> is it not appropriate to broaden this approach so as to make such regulations subject to the right to a hearing? Can judicial reluctance towards broadening the application of the rules of natural justice be justified solely on the ground that the regulations are really legislative in character?

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185. The third judge, Justice Mani, agreed with his two colleagues, that is to say, also with the reasoning of Justice Halevi. *Id.*

186. "One cannot label an act 'legislative' for the purpose of dispensing with fairness." *Homex Realty*, 116 D.L.R.3d at 9 (Dickson, J., dissenting).

187. See *supra* text accompanying notes 105-09.

C. *Construing the Authorizing Statute in Favor of Applying the Rules of Natural Justice*

The courts may, by means of statutory construction, infer the intent of the legislature to confer the right to a hearing in rule making proceedings, even when such an intent is not explicitly stated. In *New Zealand Licd. Victuallers*,<sup>188</sup> for example, the court addressed the question of whether the Price Tribunal, in fixing the maximum price of goods, under sections 10(a) and 16 of the Control Prices Act of 1947, had to accord interested parties the right to a hearing. Although the issue involved a legislative act, the Court of Appeal answered this question affirmatively, principally on the basis of the language in the statute containing "judicial trappings" relating to the work of the Tribunal.<sup>189</sup>

Against the background of the era in which this judgment was rendered, the judicial approach manifested in it is of great importance. English case law at that time reached its zenith in restrictively applying the rules of natural justice only to judicial or quasi-judicial proceedings.<sup>190</sup> Further, Australian case law that had addressed the same subject reached an opposite result.<sup>191</sup> Nevertheless,<sup>192</sup> the New Zealand court concluded that

188. 1957 N.Z.L.R. 167.

189. *Id.* at 204.

It is convenient . . . to examine the material statutory provisions . . . Matters that appear to me to be of importance are: (i) the language of s. 3 by which the Tribunal is constituted; (ii) the use of the word "case" on several occasions in subs. (6) of s. 5; (iii) the use in that subsection of the word "heard" which shows that the Legislature intended there should be a hearing; (iv) the fact the provisions of subss. (5) and (6) of s. 5 indicate, as I think, that the normal form of hearing is to be in public and thus point more strongly to an obligation of the Tribunal to act judicially . . . (v) the provisions of s. 11(2) conferring [sic] power to summons [sic] witnesses and administer oaths; and (vi) the provisions contained in s. 39 of the Act which I think show that on appeals under that section the Tribunal is to act judicially, and which therefore point to its being under a duty to so act on other occasions upon which the rights of subjects are affected. The foregoing matters appear to me to point generally to a duty on the part of the Tribunal to act judicially in or before performing the function assigned to it by para. (a) of s. 10 "to fix prices for goods and services."

*Id.*

190. *See supra* notes 30 and 73.

191. *In re Gosling*, 43 S.R. (N.S.W.) 312, 317-20; *Ex parte Waterside Workers' Fed'n of Austl.*, 93 C.L.R. 528.

192. The judges were aware of these Australian judgments, as well as, obviously, the relevant English case law of that period. However, they could draw support from

the Tribunal, in exercising legislative power, had a duty to accord all interested parties the right to a hearing.<sup>193</sup> It comes as no surprise, therefore, that this judgment provided suitable support for the Court of Appeal of New Zealand to state broadly, years later, that "it is well settled in this country that a body which is exercising functions that are legislative in form and substance may be subject to an implied duty to observe the requirements of natural justice."<sup>194</sup>

One should not view the *New Zealand Licd. Victuallers* judgment<sup>195</sup> as having been based solely on the literal-technical construction of a single statute. The construction of the statute reflects a judicial policy of expanding the rules of natural justice in the direction of legislative proceedings in an era in which it was the norm to assume that these rules applied only to judicial or quasi-judicial acts. In the contemporary jurisprudential climate, when there can be no doubt that these rules or the requirements of procedural fairness also apply to non-judicial or quasi-judicial proceedings, the ground is fertile for applying this same judicial policy to a wider array of statutes that confer rule making powers. Construction of these statutes on the basis of this judicial policy derives from the supposition that the legislator did not intend to empower an authority to affect a person's right adversely without first affording him an opportunity to present his position before that authority. This supposition is not foreign to the courts in dealing with non-legislative acts of administrative authorities. If judges show

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an earlier judgment rendered by a New Zealand lower court, the Supreme Court of New Zealand, *Jackson & Co. v. Price Tribunal* (no.2), 1950 N.Z.L.R. 433. This judgment paved the way for the judicial approach that reached expression in the *N.Z. Licd. Victuallers* judgment. 1957 N.Z.L.R. 167; see also *id.* at 185-200 (minority opinion of Finley, J., refusing to join this approach).

Interestingly, in *Charlton v. M'bers of Teachers Tribunal*, 1981 V.R. 831, 847, the Supreme Court of Victoria, while cognizant of the Australian cases mentioned in note 191, *supra*, chose to follow the 1957 New Zealand Court of Appeal case, referring to "the principle actually applied by the Court of Appeal as good in law." 1981 V.R. at 849 (per McGarvie, J.).

193. However, the judgment did not clarify the scope of interested parties that would benefit from the right to a hearing. 1957 N.Z.L.R. at 214; see also D.E. PATERSON, *AN INTRODUCTION TO ADMINISTRATIVE LAW IN NEW ZEALAND* 127-28 (1967).

194. *Creednz Inc.*, 1981 N.Z.L.R. at 189 (Richardson, J.). On *N.Z. Licd. Victuallers*, see Northey, *The Rights of Subjects*, 31 *AUSTL. L.J.* 2 (1957/58); Wade, *Constitution of Australia—Separation of Powers—Judicial Function—Administrative Law—Price Fixing—Right to Hearing*, 1957 *CAMBRIDGE L.J.* 117, 119-20.

195. 1957 N.Z.L.R. 167.

the necessary initiative, they will be able to apply this same supposition equally to legislative acts.

D. *The Right to a Hearing Pursuant to the Principles Concerning the Exercise of Discretion*

An administrative authority that is granted discretion regarding the regulation of a certain field is required constantly to weigh the need to exercise its power. The same is also true of subordinate legislators: the power conferred upon them to enact regulations obligates them to consider whether the enactment is necessary. It is well known that even discretionary power is subject to the duty to exercise discretion and to decide whether, in a given situation, it is necessary to exercise the power in one fashion or another.<sup>196</sup>

When an interested party applies to a rule making authority requesting it to exercise its power, is the authority permitted to ignore the request, on the ground that the applicant has no statutory standing to make such a request with respect to rule making,<sup>197</sup> or is the authority required to consider the request and decide on the merits? The Supreme Court of Israel addressed this question in Justice Shamgar's minority opinion in *Berger v. Minister of the Interior*.<sup>198</sup>

In this case, petitioner challenged the refusal by the Minister of the Interior to grant a request to institute daylight savings time by means of legislative order, pursuant to the Time Determination Ordinance that conferred discretion in this regard upon the Minister. Justice Shamgar emphasized that when the Minister received the request, he was under an obligation to consider it "*with a receptive mind*," i.e. "*fairly and without prejudice*. If the Minister's mind was made up in advance to deny the request, then the description's 'a fair consideration' would not be appropriate . . . ." <sup>199</sup> He then continued:

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196. S.A. DE SMITH, *supra* note 6, at 283, 285.

197. A few statutes confer upon interested parties the right to apply to the authority and to initiate rule making. See O. HOOD PHILLIPS & P. JACKSON, *supra* note 156, at 574. Concerning such parties, the question does not arise, because it is clear that the authority is required to consider their application. In the United States, there is a general statutory provision that confers upon an "interested person" the right to apply to the authority "and to petition the authority for issuance, amendment or repeal of a rule." 5 U.S.C. § 553(e) (1982 & Supp. III 1985); see also *id.* § 555(e).

198. 37(3) P.D. 29 (1983).

199. *Id.* at 47.

In all circumstances, the decision must be the result of a *fair and systematic* observation on the *merits*, and if, in light of the nature of the matter or the grounds for the application, repeated examination, review and consideration are required, the new request should not be rejected out of hand and without proper examination by exclusively relying on the fact that the authority was granted *discretion* to decide the matter, or by adhering to a long past decision which may require a fresh review.<sup>200</sup>

In Justice Shamgar's opinion, the Minister of the Interior, upon receipt of the petitioners' request to exercise his power under the statute, did not fulfill his obligation, insofar as the process of taking the decision is concerned. Hence, the petition should have been granted so as to obligate the Minister to reconsider his position "in accordance with the manner prescribed by law."<sup>201</sup> The majority, however, took issue with Shamgar here, reasoning that the Minister had taken into account the relevant considerations, without finding any flaw in his decision-making process. Justice Barak, on behalf of the majority, did not address the principles laid down by Justice Shamgar regarding the process for reviewing initiatives for rule making arising outside the authority: he neither expressed any reservations towards nor any approval for these principles. Therefore, Justice Shamgar's opinion in this regard does not necessarily reflect a minority view.

Justice Shamgar's opinion is potentially of great significance. By virtue of the very obligation to exercise appropriate discretion in reaching a decision, it follows that the authority is required to consider seriously all requests filed in connection therewith. Thus, if an interested party, relying on such a requirement, applies to the administrative authority, setting forth his position, the authority is not permitted to ignore the application. Rather, it is required to consider the application with a receptive mind. The authority must take into account the position of that interested party, among other considerations, especially as it is possible that the party will present facts that are essential for reaching its decision. In prescribing that the authority is obligated to consider the position of an inter-

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200. *Id.* at 48.

201. *Id.* at 45.

ested party, it is obvious that that party also has the right to be heard before the authority. Hence, Justice Shamgar's opinion represents a large step forward in recognizing the right to a hearing in rule making proceedings.<sup>202</sup>

The question remains, however, how an interested party can exercise his right to a hearing with respect to contemplated regulations if that party knows nothing about them. Justice Shamgar's opinion addresses the authority's obligation to consider an interested party's application *after* it has been received by the authority. The opinion does not deal with the right of that party to receive information from the authority concerning its legislative intent in order to enable him to apply to the authority and to submit his comments to it. Still, in holding that the authority is obligated to consider an application, it seems that a further step should be taken so as to obligate the authority to make potential applicants aware of the contemplated rule making in order to enable them to respond and thereby to enable the authority to exercise appropriate discretion when all the relevant considerations are before it.

E. *Applying the Right to a Hearing to Policy Decisions Having Broad Effect: "Quasi-Legislative Decisions"?*

In *British Oxygen Co. v. Board of Trade*,<sup>203</sup> the Minister of Technology issued an "internal rule" regarding the exercise of his powers in connection with the awarding of grants under the Industrial Development Act, 1966. Appellants challenged the rule. The judgment in large part turned on the question of an administrative authority's fettering its own discretion. Viscount Dilhorne stated that before adopting the policy, "[i]t was both reasonable and right that the Board should make known to those interested the policy it was going to follow."<sup>204</sup>

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202. It should be noted that the obligation imposed by Justice Shamgar upon the rule making authority to consider the application submitted to it "with receptive mind" is the same obligation imposed upon it regarding the position taken by a body with which the authority is obligated to consult under a statute. The quoted language is that of Justice Morris in *Rollo v. Minister of Town Planning*, [1947] 2 All E.R. 488, 496 (K.B.) and it was adopted by Lord Justice Bucknill on appeal. [1948] 1 All E.R. 13, 17 (C.A.). See also *Agricultural Bd. v. Aylesbury Mushrooms*, [1972] 1 W.L.R. 190, 194-95 (Q.B.). This language has also been adopted in the Israeli case law in connection with the statutory duty of consultation.

203. 1971 A.C. 610 (H.L. (E.) 1970).

204. *Id.* at 631.

Viscount Dilhorne intended his words to be a recommendation to the authority involved.<sup>205</sup> However, in *Regina v. Liverpool Corp.*,<sup>206</sup> this view received an operative dimension concerning an authority that did not act in accordance therewith. Applicants, taxi owners' and taxi operators' associations, challenged the decision of the Liverpool Corporation to increase the number of licensed taxi cabs in Liverpool. Long before the decision was taken, authorized persons, on behalf of the corporation, had promised the applicants that the number of licenses would not be increased before it consulted interested parties. Later, they further promised that the number of licenses would not be increased until proposed legislation in this regard were enacted. Nevertheless, the decision was made without providing antecedent notice to the applicants.

Lord Denning invalidated the decision on two grounds.

First I would like to say this: when the corporation consider [sic] applications for licences under the Town Police Clauses Act 1847 they are under a duty to act fairly. This means that they should be ready to hear not only the particular applicant but also any other . . . persons or bodies whose interests are affected. . . . To apply that principle here: suppose the corporation proposed to reduce the number of taxicabs from 300 to 200, it would be their duty to hear the taxicab owners' association: because their members would be greatly affected. They would certainly be persons aggrieved. Likewise suppose the corporation propose [sic] to increase the number of taxicabs from 300 to 350 or 400 or more: it is the duty of the corporation to hear those affected before coming to a decision adverse to their interests.<sup>207</sup>

The second ground was that "the corporation were [sic] not at liberty to disregard their undertaking."<sup>208</sup>

It is important to emphasize that Lord Denning considered each of these grounds to be independent. Hence, even without the breached promise, the court would have reached the same result.

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205. Lord Reid, who also gave an opinion in this judgment, did not address this point. The three other judges joined in Lord Reid's opinion.

206. [1972] 2 Q.B. 299.

207. *Id.* at 307-08.

208. *Id.* at 308.

Lord Justice Roskill based his decision on a breach of promise, and thus pointed out that he saw no reason to decide the question of whether, in the absence of such a promise, the right to a hearing existed.<sup>209</sup> The third judge—Sir Gordon Willmer—also ruled on this basis.<sup>210</sup>

Lord Denning's opinion and Viscount Dilhorne's words provide an opening through which the requirements of procedural fairness may be applied to proceedings in which general policy decisions prescribing the criteria and principles for the exercise of power towards a sizeable public are adopted. In this sense, the "rules" that were considered in the two cases are very similar to legislative acts.<sup>211</sup> Hence, this judicial approach may lead to applying the right to a hearing to rule making proceedings.<sup>212</sup>

But even before the ink was dry on Lord Denning's judgment, Justice Megarry distinguished it in *Bates v. Lord Hailsham*,<sup>213</sup> by emphasizing that the principle established in Lord Denning's opinion addressed only "administrative functions" and did not apply to legislative functions.<sup>214</sup> This distinction is not persuasive. To the extent that it is based on the "label" that is attached to the particular power, it is unacceptable,<sup>215</sup> and if "what is important is not its form but its nature,"<sup>216</sup> then the distinction between the two cases

breaks down. In either situation, the authority was making a policy decision to lift certain restrictions on an occupation. Each determination was in general terms and would have to be applied to particular cases in the future. Each would almost certainly have an adverse effect on the incomes of members of the organisations seeking to make representations.<sup>217</sup>

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209. *Id.* at 311.

210. *Id.* at 312-13.

211. See S.A. DE SMITH, *supra* note 6, at 181. Hence, the term "quasi-legislative" is sometimes used in order to describe decisions such as these. See, e.g., C.K. ALLEN, *supra* note 113, at 192-93; J.A.G. GRIFFITH & H. STREET, *supra* note 75, at 42; Megarry, *Administrative Quasi-Legislation*, 60 LAW Q. REV. 125, 218 (1944).

212. S.A. DE SMITH, *supra* note 6, at 181-82 & n.92. *But cf.* Regina v. Herrod, 1976 Q.B. 540, 560.

213. [1972] 1 W.L.R. 1373.

214. *Id.* at 1378.

215. See *supra* text accompanying notes 64-82.

216. *Bates*, [1972] 1 W.L.R. at 1378.

217. Jergesen, *supra* note 27, at 295-96; see also G. GANZ, ADMINISTRATIVE PROCE-

Further, considerations of fairness should apply more strongly to a legislative act than to an internal rule of policy, inasmuch as the former has a binding effect and affects those parties to which it applies. This is not true of the latter, because by virtue of the principle that an authority cannot fetter its own discretion, such an internal rule has no binding effect. At most, it serves to guide the authority in exercising its discretion. In a given situation, the authority may deviate from that rule if the particular circumstances so warrant.<sup>218</sup> As indicated, such is not the case with a legislative act.<sup>219</sup>

In any case, the opening provided by *British Oxygen*<sup>220</sup> and *Liverpool Corp.*<sup>221</sup> with respect to applying the right to a hearing to legislative acts remains largely unexploited. Still, Justice Megarry's opinion in *Bates*<sup>222</sup> has not sealed this opening. A judicial policy that recognizes the necessity of subjecting rule making proceedings to the requirements of procedural fairness will be able to find in the words of Viscount Dilhorne and Lord Denning a basis for applying them to future decisions.

### CONCLUSION

The policy proposed in this Article is based on the assumption that the need for fairness does not disappear when a legislative label is affixed to an act of an administrative authority. The same considerations that justify according this right in judicial and administrative proceedings also exist with regard to legislative proceedings. To the same degree, the considerations of efficiency that affect the ability of the authority to fulfill the tasks entrusted to it by the legislator are not unique to leg-

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DURES 101-02 (1974). "This distinction seems to be very technical. The Liverpool Corporation were dealing not with an application for an individual licence but were making a policy decision about the number of licences to be granted in the city. This is clearly laying down a rule and is therefore a legislative act . . ." Hence, Ganz concluded that *Bates* and *Essex County Council*, 66 L.G.R. 23 (Ch. 1967), "are in marked contrast to *R. v. Liverpool Corporation* . . ." G. GANZ, *supra*, at 101.

218. *British Oxygen Co. v. Board of Trade*, 1971 A.C. 610, 616; H.W.R. WADE, *supra* note 25, at 330-32.

219. See also Evans, *The Duty to Act Fairly*, 36 MOD. L. REV. 93, 97 (1973). The author points out that under the American Administrative Procedure Act (5 U.S.C. § 553(b)(A)), the hearing requirements do not apply to the making of general statements of policy.

220. 1971 A.C. 610 (H.L. (E.) 1970).

221. [1972] 2 Q.B. 299.

222. [1972] 1 W.L.R. 1373.

islative acts. Just as during the fifty years preceding the *Ridge* decision<sup>223</sup> there was no justification for excluding those powers not classified as either judicial or quasi-judicial from the application of the rules of natural justice, so too the current exclusion of acts classified as legislative lacks all justification. The *Ridge* and *Berman*<sup>224</sup> decisions return us to a basic concept of the common law: that a person should not be adversely affected by governmental power without first being afforded the opportunity "to defend himself" before the appropriate governmental authority. This time-honored concept can provide the courts with the starting point for applying the requirements of procedural fairness to legislative powers as well.<sup>225</sup>

The idea that this Article has attempted to develop is that in order to open up rule making proceedings to the comments of interested parties, there is no need for special legal theories. On the contrary, those artificial legal theories that have imbued rule making proceedings with a certain divine status, such that any attempt to interfere with these proceedings is viewed as legal desecration, ought to be abandoned. The rules of natural justice and the doctrine of procedural fairness, if applied to secondary legislation, are sufficiently flexible to give way—in part, or in extreme circumstances, even in whole—to other basic considerations, such as efficiency and urgency, that

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223. 1964 A.C. 40 (H.L. (E.) 1963).

224. 3 S.J. 29 (1958).

225. This is the basic approach taken by the American commentator, Davis, who advocates using the vast reservoir of the common law in shaping the principles of administrative law. According to Davis, courts may make use of this common law reservoir as a supplement to the provisions of the legislature, including the rule making procedures provided by the APA. See Davis, *supra* note 151; see also Davis, *English Administrative Law—An American View*, 1962 PUB. L. 139, 151-55.

It is noteworthy that in the American case law that preceded the enactment of the APA, there was ambivalence regarding whether the rule making authority had a duty to hear interested parties under the constitutional requirement of due process of law. The case law did not take a single position on this subject, but it seems that the predominant view was that one could not rely on the aforementioned constitutional requirement for that purpose (unless there was a statutory provision that ensured the right to participate in the proceedings). Compare L. JAFFE & M. NATHANSON, *ADMINISTRATIVE LAW—CASES AND MATERIALS* 482 (4th ed. 1976) with Bell, *Administrative Law: Rule Making and a "Hearing": A Tale of Two Cases (Three Rules) or What the Dickens!*, 8. GA. L. REV. 19, 51-55 (1973-74). The words of Davis quoted in note 55, *supra*, should be understood in this constitutional context although, in his opinion, in the absence of a statute prescribing the obligation to allow participation this obligation derives from common law principles.

are also relevant to the work of secondary legislators. This flexible framework is adequate to enable the formulation of special proceedings for the participation of interested parties that will address and surmount the difficulties occasioned by the exercise of the right to a hearing by a potentially large number of persons.

The obvious difficulty is in striking a balance between the various considerations that operate in this area and especially between considerations of fairness and efficiency. This difficulty can be overcome.<sup>226</sup> The question is whether the courts can be entrusted with this task of balancing. The "danger inherent in such judicial innovation should not be minimised; judges may not be equipped to develop appropriate procedural forms for types of decision-making with which their professional experience has not equipped them; nor is the development of procedure on a piecemeal, case-by-case basis ideal."<sup>227</sup> As J.M. Evans pointed out:

The principal argument for reserving for legislation procedural regulation in a context far removed from the model of litigation in the courts is that statutory rules provide a more suitable instrument for striking a proper balance between administrative efficiency and the provision of opportunities to be heard. The difficult and diverse problems of administrative policy involved should not be under emphasised. There is a limit upon the extent to which the courts can successfully tailor the rules of natural justice to the wide range of statutory bodies and power.<sup>228</sup>

Further, because we speak of a flexible balancing of the above considerations whose relative weights vary in accordance with different rule making powers, an element of uncertainty will be added to rule making proceedings. This element may well adversely affect the work of the secondary legislators and may also encourage litigation, or may leave a degree of doubt regarding the validity of the regulations.<sup>229</sup>

One may agree that because of its sensitivity and complexity, parliamentary treatment of this area, by way of establishing a framework, as in the United States, for affording interested

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226. See *supra* text accompanying notes 105-29.

227. S.A. DE SMITH, *supra* note 6, at 182.

228. Evans, *supra* note 219, at 97-98.

229. Cf. Loughlin, *supra* note 65, at 236-38.

parties an opportunity to participate in rule making proceedings, is more appropriate. The question is, however, whether in the absence of such a statutory arrangement, it is proper for the courts to view rule making proceedings as outside spectators, and thereby to refrain from utilizing the reservoir of judicial resources at their disposal in order to supplement the omissions of the legislature. In other governmental areas, the courts have not hesitated to supplement what the legislature has omitted. In this way, the courts formulated the rules of natural justice. The same holds true with respect to the doctrine of procedural fairness and other principles of administrative law, both procedural and substantive. The vast majority of these principles are judge-made, and they accompany and complement the various statutory schemes. Fairness in rule making can also be achieved through such judicial activity.

The danger that lurks in entrusting care of this matter to the courts should not be exaggerated. Courts are not expected to prescribe in exacting detail the proceedings that the authority must follow. They must only ascertain that the authority has satisfied the minimum requirement of affording an adequate opportunity for interested parties to present their position in accordance with the particular circumstances of each case and in light of considerations such as administrative efficiency and the urgency of the matter. This task does not differ from that which falls upon the court in reviewing other proceedings of administrative authorities—judicial, quasi-judicial, or administrative—pursuant to the aforementioned minimum requirement.<sup>230</sup> Furthermore, because of the potentially large number of persons who may seek to be heard by the authority, it is assumed that in most situations, “informal” proceedings, focusing on publication of draft regulations or a summary of them as well as affording an opportunity to comment, even if only in writing, will be sufficient. These are the requirements prescribed by the APA in the United States,<sup>231</sup> and presumably in the majority of instances, the courts will not impose upon

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230. S.A. DE SMITH, *supra* note 6, at 240.

231. Thus, according to this law, 5 U.S.C. § 553 (1982 & Supp. III 1985), rule making proceedings are recognized as “informal rule making” or as “notice and comment rule making.” This is to be distinguished from “formal rule making” or “rule making on the record,” characterized by formal judicial proceedings. See Verkuil, *supra* note 119, at 186-87; *supra* note 120.

the authority more stringent procedural obligations such as an oral hearing and cross examination.

To a certain degree, the task of "balancing" that is imposed on the courts with respect to rule making proceedings may even be less burdensome than that imposed in connection with non-legislative activities, because the latter frequently demands more detailed procedural requirements. The experience in the United States with the Administrative Procedure Act can assist both the administrative authorities and the courts in finding the proper balance.<sup>232</sup>

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232. See S.A. DE SMITH, *supra* note 6, at 181-82.