DONALD EDGAR PATERSON AND ADMINISTRATIVE LAW

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It is a privilege to be able to contribute to this issue of the Journal dedicated to the life and work of Professor Paterson.
The indulgence extended by the Editor to admit some personal recollections is taken advantage of in this piece. It has two Parts: I Reminiscences, and II Administrative Law in Niue's courts.

I REMINISCENCES

Don taught me Administrative Law and Conflict of Laws. He taught and I learned! The administrative law was in the undergraduate Constitutional and Administrative Law course at Victoria University of Wellington. Don had recently arrived at VUW from his doctoral studies in the US.[1]

One memory of that course was of an opinion for which I received a fail mark…45% or 49%. I read the comments and the marking guide and decided that I had written a passing opinion. I spoke with Don. A clear fail he said. But I had given the same reasons as in the marker's guide! "Well" said Don, "Did you substantiate your views by reference to *Ridge v Baldwin*?" I had used *RvB*, but not footnoted it.[2] Without the citation of authority, the opinion had no value. Lesson 1 learned.

In the LLM year I studied Conflict of Laws under Don. That was salutary also. We were a small class and I was the only student who was not working in a law firm. In true Don pattern the programme started at the beginning of the subject (jurisdiction) and moved relentlessly on to the end of the subject (recognition and enforcement). I was allocated responsibility for one of the first seminars which was on jurisdiction and service of process. This topic was new to me; the Code of Civil Procedure[3] was foreign territory. Undergraduate study in the subject had followed Don Inglis' book *Conflict of Laws*[4] which dealt primarily with connecting factors and choice of law rules. It was, to say the least, procedure lite.[5] The importance of jurisdictional rules in a conflicts case was Lesson 2. Subsequently the Conflicts field has been dominated by procedural disputes: The connecting factors and choice of law rules are mostly well settled; it is decisions on jurisdiction that typically decide the disputes.

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[1] Don joined Colin Aikman, Ken Keith and Roger Clark in the Faculty – a formidable team of constitutional and administrative law scholars.
[2] *Ridge v Baldwin* [1964] AC 40.
[3] The Code of Civil Procedure was effectively the High Court Rules and was published as the First Schedule to the Judicature Act 1908.
[4] *Conflict of Laws* (Sweet and Maxwell, Wellington, 1959).
[5] The later New Zealand text by Webb and Davis (*Casebook on the Conflict of Laws of New Zealand* (Butterworths, Wellington, 1970)) dealt extensively with procedural matters.

The years went by. Don was appointed to USP and history was made.

The first Vice-Chancellor of USP was Professor Colin Aikman who had been Don's Dean at VUW.[6] Don went on from Laucala to Port Vila to establish the law unit there for distance learning. In 1993 a conference was arranged in Vila, chaired by Neroni Slade, to consider the establishment of an LLB at USP and of the law school on the Emalus campus in Port Vila. Don was the inspiration and guiding spirit for the law school through its many ups and downs.

Don and I collaborated on several projects over the following years. My last contact with him was when I was in Port Vila doing Pacific Law research. He invited me to speak about French Law to his class of francophone students at the other institution where he was giving classes.

And now to some law….

II ADMINISTRATIVE LAW IN THE COURTS OF NIUE[7]

The recently published *Niue Law Reports* present cases of the Niue High Court and the Niue Court of Appeal from 1994 to 2021. There are several cases on administrative law matters including many which involve declarations and injunctions. The focus here is on the cases that invoke the notion of natural justice. They are *Talagi v Niue Public Service Commission*,[8] *Nelisi v Niue Public Service Commission*,[9] *Tohovaka v Niue Public Service Commission*,[10] *Andrew v Licensor of Business*,[11] and *Seu v Paka*.[12] All concerned due process and a fair hearing. None gave reasons for the principle of natural justice's being part of the law of Niue,[13] nor what is "natural" about it. Whether is it fair? That would be the justice aspect of it; suffering the result of a court decision of which there was no prior notice unreasonable.

"Natural justice" can mean different things to different people but has a focus on procedural fairness in decision-making and, in England and New Zealand at least, concerns the right of a person to a hearing that is fair in respect of decisions that affect them. The key principles are the right to be heard (*audi alteram partem*) and a lack of bias in the decision-maker (*nemo judex in causa sua*).

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[6] On appointment Colin was asked by colleagues at VUW whether there would be a law school at USP. The answer was an emphatic "no" – the focus would be on building technical skills.

[7] A passing note on the Conflict of Laws in Niue is warranted. In the *Niue Law Reports* there is only one judgment of a conflicts nature (*Maesua v Saweri* (2015) Niue LR 771) - a foreign adoption. The court dismissed the application presented because its granting would serve no useful purpose. The basic Conflicts rules for Niue continue as stated in the "South Pacific" monograph published in 2010 in the Kluwer International Private International Law Series.

[8] (1997) Niue LR 101.

[9] (2004) Niue LR 153.

[10] (2009) Niue LR 197.

[11] (2020) Niue LR 1521.

[12] (2021) Niue LR 1593.

[13] There is no necessary reason that Niue should follow the English system. For instance, an ombudsman-like system (remedy for an act or omission on a matter of administration by a government agency which affects a person in their personal capacity) might be more appropriate to the Niue circumstances than the English based system of judicial review.

These are English Common Law principles developed by the English courts over many centuries.[14] The rules of natural justice are a procedural development of the English courts since at least the 17th century. A failure to follow these procedural rules invalidates any decision made. New Zealand received those principles and has since been substantially influenced by English precedents.

From 1916 to 1974 the sources of Niue law included:[15]

> 672. Law of England as in the year 1840 to be in force in Niue –
> The law of England as existing on the 14th day of January in the year 1840 (being the year in which the Colony of New Zealand was established) shall be in force in Niue, save so far as inconsistent with this Act or inapplicable to the circumstances of Niue:
> Provided that no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before the said 14th day of January in the year 1840 shall be in force in Niue, unless and except so far as it is in force in Niue at the commencement of this Act.

So Niue acquired the administrative law of England of 14 January 1840, whatever that may have been. It was probably not inconsistent with the Niue [Cook Islands] Act eg s 71 of the Niue Act 1966 speaks of natural justice in the context of High Court's making procedural rules…subject to "convenience":

> 71. Procedure so far as not governed by rules of Court –
> Subject to the provisions of this Act and of rules of Court, the practice and procedure of the High Court in the exercise of its civil and criminal jurisdiction shall be such as the Court thinks in each case to be most consistent with natural justice and convenience.

"[I]napplicable to the circumstances of Niue" is a separate enquiry.[16] How applicable to the circumstances of Niue in 1916, or later, were the natural law principles of England of 1840? Given that at that time Niue had executive government by New Zealand, no regular court system, and legislation that discriminated between white people and Niueans, the answer may be in the negative.[17]

In 1974 Niue became a self-governing state in free association with New Zealand in the Realm of New Zealand.[18] The sources of law were affected accordingly. The Constitution is the supreme law[19] in a heavily entrenched[20] written constitution. The invalidity of laws contrary to the Constitution is established by art 28(4). The existing law was continued by art 71; the

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[14] See *Bagg's Case* (1615) 11 Co Rep 93b, and the extensive discussion of the historical development of natural justice in De Smith SA *Judicial Review of Administrative Action* (Stevens and Sons, London, 1959) Ch 5.
[15] When originally applied to Niue it was s 615 of the Cook Islands Act 1915.
[16] This is an ambiguous phrase and has the capacity to create a great deal of uncertainty. Sir Kenneth Roberts-Wray suggested at least four possible meanings for the phrase. See Roberts-Wray, K *Commonwealth and Colonial Law* (Stevens, London, 1966) 545-547.
[17] Margaret Pointer *Niue 1774-1974 200 years of contact and change* (Otago University Press, Dunedin, 2015) 165.
[18] Niue Constitution Act 1974 (19 October 1974).
[19] Niue Constitution Act 1974, s 3.
[20] See art 35 of the Constitution.

terms "law", "existing law" and "enactment" were all clearly defined in art 81. Section 672 continued in force. In 2004 amendments were made to patriate the law of Niue. Part of that endeavour was the repeal of s 672 of the Niue Act 1966[21] and the enactment of a sources of law provision in the Interpretation Act 2004:

> 4. Sources of law
> The sources of Niuean law are, in order of priority –
> a) The Constitution;
> b) Acts of the Assembly;
> c) Regulations;
> d) Niuean custom;
> e) The common law of Niue.

Therefore the common law of Niue is the default source of law (after Niue custom). This invites the courts of Niue to develop a distinct body of principle for Niue informed by the circumstances of Niue. Naturally the case law and legislative experience of other countries will inform the development of the Niue common law but New Zealand case law has no necessary pre-eminence in this enquiry.[22]

***Talagi v Niue Public Service Commission* [1997] NUHC 1:**

This case involved a petition for judicial review in respect of actions taken against the plaintiff employee by the employer, the Niue Public Service Commission. It was stated (at [40]):

> … the plaintiff must be accorded the same elementary principles of natural justice and a fair hearing just as every other civil servant in Niue is entitled. This must be especially the case when the issue has been categorised by the Commission as serious misconduct. I do not believe that those principles of substantive fairness and natural justice have been accorded the plaintiff in this instance.

And in para [43], "the procedure adopted by the Commission…contravened the principles of natural justice and substantive fairness…". Two cases were cited in the judgment in the context of principles of judicial review. Both were New Zealand cases. [23]

Talagi was followed in the Niue High Court in the case of *Nelisi v Niue Public Service Commission*. It too referred to the main case and legislation mentioned in *Talagi*.[24] The concern in *Nelisi* was with the validity of an administrative transfer under reg 45 of the Niue Public

[21] Interpretation Act 2004, s 37(4).
[22] As the Court of Appeal observed in *Vaha – Disputed Election of Dion Taufitu* (2014) Niue LR 715, some legislative provisions bring a culture with them eg art 24 of the Constitution is clearly a statutory restatement of s 9 of the Bill of Rights 1688. Alex Frame writing in 1992 ("Fundamental Rights in the Realm of New Zealand" (1992) 22 VUWLR, monograph 3, p 85 at 89-90) stated that "the provisions of Magna Carta (1215) and the Bill of Rights (1688) apply as part of the law of Niue…the significance of this…is that…clause 39 of Magna Carta…will apply as part of the law of Niue". In the same paper he noted that Niue is bound by the ICCPR, but also that in 1991 Niue decided against legislating for fundamental human rights. The ordinary legislation of Niue does however protect many basic rights such as the right to a fair trial.
[23] *Poananga v State Services Commission* [1985] 2 NZLR 385; *Lindsley v Public Service Commission* (unreported), Supreme Court, Auckland A 61/62 9 August 1962.
[24] Above n 23. The legislation was the State Services Act 1962 (NZ).

Service Regulations 1979.[25] There was no reference to natural justice; simply reliance on the judgment in *Talagi*. In technical terms that was not a very satisfactory approach given that the Constitution, which has art 69 relating to the Niue Public Service as one of the 10 heavily entrenched provisions, was not mentioned, that Niue courts are not bound by the decisions of the New Zealand Court of Appeal, and further because the New Zealand Court of Appeal decision in *Poananga v State Services Commission* was based on an Act which was not part of the law of Niue.

The next case was *Tohovaka v Niue Public Service Commission*. In para [4] it was stated, "[s]o this statutory body [the Niue Public Service Commission] has particularly wide powers. It is implicit within those powers that there is a general duty to act fairly as the term is understood in administrative law". In para [17] it was stated, "[c]ounsel for the applicants rightly focused on the principles of natural justice". No cases were cited in this judgment. The judgment is interesting also in that it queried the right of the Niue Public Service Commission to make regulations. The Judge said, "I can find no authority in art 68 or any other part of the Constitution for the [Niue Public Service Commission] to make regulations…".[26] This ignored the provision in art 68(2) which states that "the Commission may prescribe and determine the terms and conditions of employment of members of the Niue Public Service, and may issue such instructions or exercise such other powers as may be necessary". 'Prescribed' was defined in the Acts Interpretation Act 1924 of NZ (also which was at that time law for Niue) as "prescribed by the Act in which that term is used, or by regulations made under the authority of that Act"; that definition has been continued in s 4 of the Interpretation Act 2004 (Niue). The Judge also doubted the vires of reg 56(6) of the Niue Public Service Regulations insofar as it said that a decision by the Commission is "not subject to appeal or judicial review". It was stated to be "completely invalid" as "an attempt to amend the Constitution by Regulation. It is quite outside the powers that could be given to any Regulation making body".[27]

In *Andrew v Licensor of Business* the plaintiffs were declined a business licence by the Licensor of Business under the Business Licence Act 1997. The plaintiffs appealed that decision on the basis of s 24 of the Business Licence Act 1997. No cases were cited but the decision was made on the application of a basic principle of natural justice: Fair decision-making follows from the opportunity to answer objections. The matter was ordered to be reheard by the Licensor. In para [23] the Chief Justice stated:

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[25] That regulation was introduced in 1979 during the time when New Zealand officers were in the Niue Public Service Commission. It reflected the small size of the Niue Public Service and the need for flexibility in the placing of officers in the service of Niue. The regulations are supported by the instructions in the *Niue Public Service Manual* which at D27-D29 provide detail of the circumstances in which the Secretary to the Government may direct an employee 'up to salary step 27' to transfer from one department to another, and "the employee shall transfer and perform the duties assigned in that other department". Presumptively, the conditions in the *Manual* are conditions of the employment contract of every public servant (reg 20(2) of the Public Service Regulations 2004). Salary step 27 or lower was not the step of most senior appointments. It appears that the Commission did not follow the *Manual* in its dealing with *Nelisi*.

[26] At [5].

[27] At [7]. It is unclear which Article of the Constitution is being referred to. It is clear that regulations cannot amend the Constitution (see art 35(1)).

In political terms, an important issue in Niue has been whether regulations made by the Niue Public Service Commission under art 68 reach the Legislative Assembly via Cabinet or whether they go directly to the Assembly in accordance with the Interpretation Act 2004, s 22(2) and Standing Orders (SO 44).

> It is one of the basic tenets of natural justice that parties should know the information against them that is being put before a decision maker, unless there are very clear reasons why that information cannot be disclosed. This is necessary to ensure a transparent and fair process of decision making.

Finally, in the case of *Seu v Paka* a breach of the rules of natural justice was listed as one of several standard criteria for the grant of a rehearing. [28] This is well set out in this case and is consistent with the reasoning in a long line of Niue judgments.[29]

III CONCLUSION

There is clearly now a body of Niue common law incorporating principles of the English natural justice law. No judgment has stated why that should be so though clearly the colonial links, the closeness of Niue to New Zealand in the Realm, and the fact that the Judges of Niue superior courts are New Zealand Judges also, will have influenced the decision-making.

Judges and lawyers, whether expatriate or local, depend in the exercise of their profession on the attitudes and rules instilled during their legal training. There is a degree of inevitability in that: A New Zealand trained judge will look to New Zealand principles when deciding a case in a foreign country; a judge from East Africa will refer to the cases of the home jurisdiction when sitting in Seychelles despite Seychelles' not being a common law jurisdiction.

Desirably counsel and judges should take careful stock of the law they are advocating or applying to ensure that it is the law of the forum, fit for the forum and that it is not in fact the law of the place with which they are most familiar. This the judges of Niue have been doing increasingly in recent years.[30]

A striving to develop the local laws of Pacific countries and the improving of access to those laws were key to the work of Don Paterson as the many texts, the law reports' work and the law and culture conferences attest. These aspirations are the legacy of Donald Edgar Paterson.

[28] The basis for the criteria was found in an English case, a New Zealand case, and a Privy Council decision from the Cayman Islands: *Ladd v Marshall* [1954] 3 All ER 745 (EWCA); *Dragicevich v Martinovich* [1969] NZLR 306 (CA); *Almeida v Opportunity Equity Partners Ltd* [2006] UKPC 44.

[29] The leading one of which is *Tahega v Kapaga* (2016) Niue LR 915.

[30] Eg *Tuhipa v Hipa* (2020) Niue LR 1561; *Asemaga v Suamili* (2020) Niue LR 1363; *Koligi v Iakopo* (2017) Niue LR 1003; *Tongahai v Tafatu* (2014) Niue LR 757.