JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW

1975—1976

COVER:

Assizes in Hong Kong.
Photograph by courtesy
of South China Morning Post, Limited.

JUSTITIA

HONG KONG UNIVERSITY LAW ASSOCIATION REVIEW 1975—1976

CONTENTS

The views expressed by our contributors do not necessarily represent those of the Editorial Board.

EDITORIAL BOARD

©
Hong Kong University Law Association
H.K.U.S.U.
1977

FOREWORD

Once again Justitia makes its welcome appearance. A publication wholly organized by the students of the University's Law Department, it has justly become a source of pride and satisfaction to all those concerned with its production. It displays the application, thoroughness and enterprise which are now well-known qualities of Hong Kong law graduates.

Thoughtful and provocative legal literature, so important an aspect of mature legal systems, has generally been all too sparse in our jurisdiction. In a city which has been transformed with astonishing rapidity over the last thirty years, one can never safely assume that legal issues are quite like those elsewhere. However valuable foreign treatises may be, the demand for articles directed at specifically local matters and written with insight into local needs and conditions remains inescapable. Justitia represents an important contribution towards meeting that demand.

The editors have bestowed upon me the honour of being associated with this publication. I take the opportunity most warmly to wish Justitia well and to express the hope that readers will derive as much pleasure as I have from the articles contained in this issue.

R.A.V. Ribeiro

PREFACE

Like Assizes, session 1975-76 of the Hong Kong University Law Association marks the beginning of a new era. The University's Legal Aid & Advice Scheme operated by the staff, post-graduate students and certain legal practitioners has begun. At the inspiration of the Honourable Mr. Justice T.L. Yang, a Legal Education Project with the aim of arousing the awareness of secondary school students to law and the legal system was also undertaken. Justitia and these two projects represent a consciousness of a duty to the community. With Hong Kong's small legal profession and a legal system generally ill-perceived by the public, these are steps by the law students towards offering perspectives on the law to the man on the Shaukiwan bound tram.

In this review, the law on deportation from Hong Kong is examined with suggestions for reform. The principle of audi alteram partem, vigorously developing as a tool for challenging administrative decisions, is considered in the light of local decisions. The vague rules governing prison discipline are also discussed. The commentary on Lynch v. D.P.P. for Northern Ireland highlights the difficult questions of policy behind exculpating men acting under duress in criminal law. Some of the pitfalls that may confront a person dealing with unincorporated associations are also presented. This selection of articles represents some of the fruits of research undertaken by law undergraduates. The editors hope that the reader, finding this review inadequate, will go in search for more and ultimately contribute to the sparse resources of legal literature on Hong Kong.

The editors are greatly indebted to the Director of Legal Aid Mr. Desmond O'Reilly Mayne, Q.C., J.P. for an informative and inspiring interview on legal aid, the legal system and the legal profession.

The editors' thanks are further due to our patron, Professor D.M.E. Evans, and our advisers, the Honourable Mr. Justice T.L. Yang, Mr. Martin C.M. Lee and Mr. R.A.V. Ribeiro, for their un-failing assistance and encouragement during the preparation of this publication.

Editorial Board.

REMOVAL AND DEPORTATION FROM HONG KONG

Susan Kwan Shuk Hing

Commenting on the Immigration Act of 1971, S.A. de Smith says, "It is perhaps the most complex piece of legislation in the whole field of constitutionul law in this country . . . "[1] The Immigration Ordinance 1971, which bears substantial resemblance to the Immigration Act 1971, is perhaps no less complex. This dissertation seeks to examine Parts V, VI and VII of the Immigration Ordinance 1971, which relates to removal and deportation. This is followed by a discussion of the legal recourse open to persons against whom a removal or deportation order is in force. Before this is done, a brief scrutiny of the legislative history of removal and deportation is most appropriate.

BACKGROUND AND HISTORY

Removal and deportation orders have substantially the same effect. They require a person to leave Hong Kong and be removed to a specified country.[2] They invalidate any permission or authority to land or remain in Hong Kong given to that person before the orders are made or while they are in force.[3] However one difference may be drawn between removal and deportation orders at this early stage. A removal order cannot be made against a person who has the right to land in Hong Kong by virtue of section 8(1) Immigration Ordinance.[4] A deportation order, on the other hand, may be made against a person who has the right to land by virtue of section 8(1).[5] This is because the two kinds of orders are essentially different in nature. The classes of people subject to each order, and the grounds for making each order are different. To appreciate this point more fully, we will look at the origin of each.

---

[1] [1972A] C.L.J. 1

[2] Defined in Immigration Ordinance Cap. 115, L.H.K. 1971 ed. s. 2 as a country or territory –
a) of which a person who is to be removed from Hong Kong is a national or a citizen;
b) in which that person has obtained a travel document;
c) in which that person embarked for Hong Kong; or
d) to which an immigration officer has reason to believe that person will be admitted.

[3] Immigration Ordinance s. 19(4), s. 20(7)

[4] Immigration Ordinance s. 19(2) – "A removal order shall not be made under sub. s.(1)(b) against a person who has the right to land in Hong Kong by virtue of s. 8(1)." See also the case of *Chong Yee-Shuen* v. *A-G and The Director of Immigration* S.C.O.I. 521 of 1973.
s. 8(1) provides – "the following persons shall have the right to land in Hong Kong, that is to say –
a) Hong Kong belongers;
b) resident U.K. belongers but subject to s.20(6); and
c) Chinese residents but subject to s.20(6)"

[5] Immigration Ordinance s.20(6) – "If a deportation order is in force against a person who has the right to land in Hong Kong by virtue of s.8(1), such right shall cease while the deportation order is in force."

Deportation Orders[6]

The powers of deportation or banishment were probably exercised before 1857. It was only in that year, at "a time of apparent anxiety" that "an Ordinance for better securing the peace of the Colony" was passed, under which the Governor in Council was empowered to deport to China any Chinese arrested by a Justice of the Peace as a suspected emissary or abettor of enemies. No procedure was laid down and "no act done or attempted in pursuance of this Ordinance shall be questioned in any court."[7]

This was repealed in 1882 by the Banishment and Conditional Pardons Ordinance, which seeks "to make provision for the banishment and conditional pardon of certain persons." "Certain persons" include any persons "not being natural born or naturalized subjects of His Majesty," in other words, aliens.

It was in turn repealed by the Deportation Ordinance 1912-14 by which a new class of people, naturalized British subjects, could be deported in certain events.[8]

The Deportation Ordinance 1917, which repealed the Ordinance of 1912, introduced significant changes. Under section 4(14) (a), the power to deport was extended to "any person who in the opinion of the Governor in Council has been guilty before or after the commencement of this Ordinance of any criminal offence, or of any other misconduct, connected with the preparation, commencement, prosecution, defence or maintenance of any legal proceedings, or the sharing in the proceeds thereof, or in relation thereto." This section operates retrospectively and includes any person falling within the description, even a natural born British subject in the colony.[9]

Under the above statutes, deportation of British subjects and aliens are treated together in one Ordinance. This was changed by the Deportation of Aliens Ordinance 1935 (which repealed the Deportation Ordinance 1917) and the Deportation (British Subjects) Ordinance 1936. There was this formal division into British subjects[10] and aliens,[11] and different considerations and procedures were adopted in relation to each category.[12]

In 1971, the classes of people liable to deportation were re-shuffled. The emphasis is not so much on the division of British subjects and aliens. The term "British subjects" is broken up into "U.K. belongers," "resident U.K. belongers" and citizens of independent Commonwealth countries. From the term "aliens", a new category of "Chinese residents" emerged. These terms will be discussed in greater detail. For present purposes, it is enough to note that greater protection is given to people who have close connections with the Colony – an approach similar to the patrial and non-patrial approach in the Immigration Act 1971.

---

[6] For a detailed discussion, see the judgment of Sir William Rees-Davies C.J. in *Li Hong-mi* v. *A-G* (1918) 13 H.K.L.R.6

[7] This was first amended by a later Ordinance of the same year – by which the period of deportation was restricted to five years. In 1871, it was further amended – disobedience to an order of banishment was made a misdemeanor punishable with one year's imprisonment.

[8] By Ordinance 10 of 1913, the Governor could deport British subjects imprisoned here under sentence of His Majesty's court in China.
By Ordinance 20 of 1914 the power to deport was extended to "persons born in the Colony of parents neither of whom was a British subject."

[9] As in the case of *Li Hong-mi* v. *A-G.* (1918) 13 H.K.L.R. 6

[10] "British subjects" defined in Deportation of Aliens Ordinance 1935 as having the meaning attributed thereto by the British Nationality Act 1948.

[11] "Aliens" defined in Deportation of Aliens Ordinance 1935 as "a person who is not a British subject, a citizen of the Irish Republic or a British protected person but includes a British protected person who has been deported, banished or expelled from any territory which is not a foreign country."

[12] See s.3 Deportation of Aliens Ordinance 1935 and s.3 Deportation (British Subjects) Ordinance 1936. Briefly, an alien may be deported under the summary procedure or the long procedure (ss. 3,4 Deportation of Aliens Ordinance) and if the former procedure is adopted, no inquiry is necessary. A British subject can only be deported either on the recommendation of a court or where a report by a judge is approved by the Governor in Council (s.4 Deportation (British Subjects) Ordinance.) The grounds for deportation of British subjects and aliens are not entirely the same.

Removal Orders

Removal orders relate primarily to immigration offences, e.g. entering or remaining without permission or valid travel documents[13] or in breach of a condition of stay. They do not have such a long history as deportation orders for immigration controls were being tightened with the influx of refugees from China during the last thirty years or so. As late as 1958, statutory provisions for removal and detention pending removal are brief and scant.[14]

THE LAW RELATING TO REMOVAL AND DEPORTATION

The Power To Remove: Who May Be Removed

Before the Immigration Ordinance 1971, the power to remove was exercisable only by the Governor.[15] Under section 18(1) of the said Ordinance, an immigration officer[16] may also exercise the power of removal in relation to two types of people:–

a) a person who is refused permission to land in Hong Kong[17]

b) a member of the crew who contravenes or is reasonably suspected by an immigration officer of intending to contravene certain conditions of stay.[18]

This power to remove is subject to section 18(2) – which provides that "a person who is refused permission to land in Hong Kong may not be removed from Hong Kong under subsection (1)(a) after the expiry of two months beginning with the date on which he was refused such permission." Presumably the two months' limit does not apply to a person who is to be removed under section 18(1)(b).[19]

Section 19 deals with the Governor's power to remove. The objects fall under three heads:–

a) a person who might have been removed from Hong Kong under section 18(1) if the time limited by section 18(2) had not passed.

b) a person who has committed or is committing an offence under section 38(1)[20] or 41,[21] whether or not he has been convicted of that offence.

c) an undesirable immigrant[22] who has been ordinarily resident[23] in Hong Kong for less than three years.

Under section 19(3), special consideration

---

[13] "Travel document" defined in s.2 Immigration Ordinance as "a passport furnished with a photograph of the holder or some other document establishing to the satisfaction of an immigration officer the identity and nationality of the holder."

[14] See Immigration (Control and Offences) Ordinance 1958. The Governor has power to order removal under s.11 (5) and s. 39(4). The two sections aim at people who enter in contravention of any provisions in the Ordinance or regulations or in breach of a condition of stay. Detention of such persons is laconically mentioned in s. 39(4). No detail provision is made with regard to detention for inquires, further warrants for detention, and detention pending removal. There is no classification of the people liable to be removed and no special consideration is given to any one class.

[15] "Governor" – defined in Interpretation and General Clauses Ordinance Cap. 1, L.H.K. 1975 ed. s. 3 – "the Governor of Hong Kong; the acting Governor; or to the extent to which a deputy to the Governor is authorised to perform on behalf of the Governor any functions of the Governor, the Deputy to the Governor."

[16] "Immigration officer" – defined in s.2 Immigration Ordinance – "any member of the Immigration Service of or above the rank of assistant immigration officer."

[17] A person who is refused permission to land is not necessarily guilty of an offence under s.38(1), for s.38(2) provides that a person may land without permission for the purpose of examination under s.4(1) (a), he shall be deemed for the purposes of s. 38(1) not to have landed unless and until permission to land is granted to him.

[18] Such conditions may be a condition of stay requiring him to leave Hong Kong (i) in a specified ship or (ii) within a specified period in accordance with arrangements for his repatriation – s.18(1) (b).

[19] Such a person may also be removed by the Governor under s.19(1) (b) as a person who has committed or is committing an offence under s.41.

[20] s.38(1) provides – "subject to sub. s.(2), a person who –
a) being a person who by virtue of s.7 may not land in Hong Kong without the permission of an immigration officer, lands in Hong Kong without such permission; or
b) having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director,
shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for three years.

[21] s.41 provides – "any person who contravenes a condition of stay in force in respect of him shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 dollars and to imprisonment for two years."

[22] Not defined in Immigration Ordinance, but cf. "undesirable person" in Deportation (British Subjects) Ordinance 1936 which is defined in s.2(1) (f) as "a person who is or has been conducting himself so as to be dangerous to peace, good order, good government, or public morals."

[23] To be defined later in connection with "Chinese residents" and "resident United Kingdom belongers."

is given to an immigrant who is a United Kingdom belonger[24] against whom a removal order has been made under section 19(1)(c). Such order shall not be made except after consideration by the Governor of a report by the Deportation Tribunal under section 23, and unless the Governor certifies that the immigrant's departure is necessary in the interest of the security of Hong Kong or for political reasons affecting the relations of Her Majesty's Government in the United Kingkom with another country.[25]

It is important to note that section 19(2) provides that a removal order shall not be made under section 19(1)(b) against a person who has the right to land in Hong Kong by virtue of section 8(1).[26]

The Power To Deport: Who May Be Deported

Every person is liable to be deported except a "Hong Kong belonger."[27] This term is defined in section 2 of the Ordinance and includes:–

a) a British subject[28] who was born in Hong Kong.[29]
b) a British subject by naturalization in Hong Kong;[30]
c) a British subject by registration in Hong Kong under section 7(2) of the British Nationality Act.[31]
d) a British subject who is or has been married[32] to or is the child of, a person mentioned in paragraph(a), (b) or (c).

Section 64 Immigration Ordinance provides that any person who claims to be a Hong Kong belonger shall have the burden of proving the same.[33]

1. Classes of People Liable to be Deported

Having eliminated the class of people known as "Hong Kong belongers", we now have a class of people liable to be deported. These people may be sub-divided into four categories.

A. "Chinese resident" is defined in section 2 Immigration Ordinance as

---

[24] Defined in s. 2 as "a person who is a citizen of the United Kingdom and Colonies by reason of his birth, adoption, naturalization or registration in the United Kingdom, and the wife and child of any such person."

[25] Alternatively, such an immigrant may be deported under s. 20(2) subject to similar considerations and procedure.

[26] This is axiomatic and mere verbiage. Under s. 19(1) (b), a person who has committed an offence under s. 38(1) or s. 41 is to be removed. s. 38(1) relates to landing or removing without permission. A person who has the right to land in Hong Kong by virtue of s. 8(1) cannot be guilty of such an offence. s. 41 relates to breach of a condition of stay, and s. 8(2) provides that a condition of stay, whenever imposed, shall have no effect in respect of a person who has the right to land by virtue of s. 8(1). It is self-evident that such person cannot commit an offence under either section and is not subject to a removal order under s. 19(1) (b). However, such a mistake was made by the Deputy Colonial Secretary in *Chong Yee-Shuen.* Trainor J. dimissed it only as a "technical mistake."

[27] cf s. 2(2) Deportation (British Subjects) Ordinance 1936 which defines a person "deemed to belong to the Colony." The conditions are similar to those in the case of a "Hong Kong belonger" except for s. 2(2) (b) – a British subject who "has been ordinarily resident in the Colony continuously for a period of 7 years or more and since the completion of such period of residence has not been ordinarily resident in any other part of His Majesty's dominions or any territory under His Majesty's protection continuously for a period of seven years or more." – This bears some resemblance to the category of "resident United Kingdom belongers."

[28] "British subject" – defined in Interpretation and General Clauses Ordinance s. 3 as "a person who is a British subject by virtue of any provision of the British Nationality Act 1948."

[29] cf. s. 2(2) (i) Deportation (British Subjects) Ordinance –with an addition of words "or of parents who at the time of his or her birth were ordinarily resident in the Colony." Perhaps this is meant to provide for the case of a person born outside the Colony but whose parents were ordinarily resident in Hong Kong at the time.

[30] Defined in s. 2 Immigration Ordinance as –
a) in relation to a person naturalized after the commencement of the British Nationality Act 1948, a British subject to whom a certificate of naturalization has been granted by the Governor; and
b) in relation to a person naturalized before the commencement of that Act –
(i) a British subject to whom a certificate of naturalization was granted by the Government under s. 8 of the British Nationality and Status of Aliens Act 1914; and
(ii) a British subject who became such by reason of the fact that his name was included under s. 5 of the British Nationality and Status of Aliens Act 1914 in a – certificate of naturalization granted by the Government.

[31] It relates to the registration of minors.

[32] cf. "is or has been married to" with s. 2(2) (d) Deportation (British Subjects) Ordinance 1936 – "the wife of a person . . . not living apart from such person under a decree of a competent court or a deed of separation. "Thus if a woman is legally separated from her husband, she is not qualified under s. 2(2) (d) of Deportation (British Subjects) Ordinance 1936. However, she can become qualified as a "Hong Kong belonger" under (d) because she "has been married to" a person mentioned in paragraph (a), (b) or (c).

[33] See s. 64. The same applied to a person who claims that he – (ii) is not an alien; (iii) is a United Kingdom belonger; (iv) is a resident United Kingdom belonger; (v) is a Chinese resident; (vi) has been ordinarily resident in Hong Kong for three years or more than three years; (vii) is exempt from any provision of this Ordinance or belongs to a class or description of persons who are exempt from any provision of this Ordinance; (ix) is a person to whom s. 38(1) (a) does not apply by viture of an order under sub-s (3) of that section.

[34] "Immigrant" defined in s. 2 Immigration Ordinance as "a person who is not a Hong Kong belonger."

an immigrant[34] who –

a) is wholly or partly of Chinese race; and
b) has at any time been ordinarily resident in Hong Kong for a continuous period of not less than seven years."

In *Chong Yee-shuen* v. *A–G and Director of Immigration,* the term "Chinese resident" is discussed. Trainor J. indicated the difficulty of deciding whether a person is "wholly or partly of the Chinese race." How far back has one to go in tracing his ancestry? Trainor J. suggested that each case must be considered on its own facts "on the basis of parentage; what a person considers himself to be; with what ethnic group he is in association; what language or dialect he speaks; how he is considered by others; and should it exist, what travel document he possesses." This is certainly a helpful test.

Next, Trainor J. went on to discuss the phrase "ordinarily resident." He pointed out that the words "continuous period" connote an unbroken or uninterrupted period.[35] In *Levene* v. *I.R.C.,*[36] an income tax case, Viscount Cave L.J. held that the phrase "ordinarily resident," found in Income Tax Acts where it is contrasted with usual or occasional or temporary residence, connotes residence in a place with some degree of continuity apart from accidental or temporary absences. In *Re Abdul Manan,*[37] Lord Denning M.R. brings in an additional requirement. He said, "If this were an income tax case, he (the plaintiff) would, I expect, be held to be ordinarily resident here, but this an immigration case, so it means *'lawfully* ordinarily resident'." Section 2(4) Immigration Ordinance connotes a similar requirement.[38]

B. United Kingdom belonger is defined in section 2 Immigration Ordinances as "a person who is a citizen of the United Kingdom and Colonies by reason of his birth, adoption, naturalization or registration in the United Kingdom and the wife and child of any such person."[39]

C. Resident United Kingdom belonger is defined in section 2 Immigration Ordinance as "a United Kingdom belonger who has at any time[40] been ordinarily resident in Hong Kong for a continuous period of not less than seven years." Similar considerations apply to the phrase "ordinarily resident" as in the case of Chinese residents.

D. A miscellaneous category consisting in an immigrant other than A, B and C above.

2. Grounds and Procedures

The power to deport is exercisable by

---

[35] "I do not think the legislature intended that a trip for a day to Macau, or a month to visit a parent in China to be a breach in the continuity it intended. To hold otherwise would be to deprive the word 'ordinarily' of all meaning" – per Trainor J. in *Chong Yee-Shuen.* See also *Stransky* v. *Stransky* [1954] 2 All E.R. 536 Karminski J., in construing the Matrimonial Causes Act of 1950, wherein the expression "ordinarily resident" appears, says, "Clearly, mere temporary absence from England, such as for holidays abroad, would not make a gap in the period of ordinary residence."

[36] [1928] A.C. 217

[37] [1971] 2 All E.R. 1016

[38] s. 2(4) Immigration Ordinance, provides that a person shall not be treated as ordinarily resident in Hong Kong –
a) during any period after the commencement of this Ordinance in which he remains in Hong Kong –
(i) without the authority of the Director, after landing unlawfully; or
(ii) in contravention of a limit of stay; or
b) during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court.

[39] see ss. 4, 5, 6, 7, 10, 11 of British Nationality Act 1948.

[40] cf. s. 2(2) (b) Deportation (British Subjects) Ordinance 1936 where a person shall be deemed to belong to the Colony if he or she is a British subject and has been ordinary resident in the Colony continuously for a period of seven years or more and since the completion of such period has not been ordinarily resident in any other part of His Majesty's dominions or any territory under His Majesty's protection continuously for a period of seven years or more. Under the Immigration Ordinance, the period of continuous residence may be "at any time".

the Governor in Council.[41] Different considerations apply to the objects who fall under three heads.

A Under section 20(1) Immigration Ordinance, the Governor in council may deport an immigrant other than a Chinese resident, a United Kingdom belonger or a resident United Kingdom-belonger on one of two alternative grounds:—

a) the immigrant has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than two years;[42] or
b) the Governor in Council deems it to be conducive to the public good.[43]

The phrase "conducive to public good" is not defined anywhere in the Immigration Ordinance. Perhaps the requirements as in "undesirable immigrants" under section 19(1)(c) apply.[44]

The above provision is similar to the summary procedure in the Deportation of Aliens Ordinance 1935. If an alien is deported on the ground that it is conducive to the public good, section 18 of Deportation of Aliens Ordinance required the Governor to make a report to the Secretary of State. No such requirement is imposed by the Immigration Ordinance.

B. Under section 20(2) Immigration Ordinance, the Governor in Council may deport a Chinese resident or a United Kingdom belonger on either of the two grounds mentioned in A above. However, there are additional safeguards. Under section 20(3), the Governor in Council shall not make a deportation order except —

a) on the recommendation of a court under section 21;[45]
b) after consideration of the report of a Deportation Tribunal under section 23;[46] or
c) where the Governor certifies that the case concerns the security of Hong Kong or the relations of Her Majesty's Government in the United Kingdom with another country.

C Under section 20(4) Immigration Ordinance, the Governor in Council may deport a resident United Kingdom belonger. However, this may only be done "if the Governor in Council deems it to be conducive to the public good on the ground that the departure of such person from Hong Kong is necessary in the interest of the security of Hong Kong or for political reasons affecting the relations of Her Majesty's Government in the United Kingdom with another country."

---

41 "Governor in Council" defined in Interpretation and General Clauses Ordinance s. 3 as "the Governor acting after consultation with the Executive Council in accordance with Royal Instructions but not necessarily in such Council assembled."

42 cf. s. 3(1) (b) Deportation of Aliens Ordinance 1935 – "any offence".
See also s. 20(8) Immigration Ordinance. "For the purposes of this section and section 21, the question whether an offence is one for which a person is punishable with imprisonment shall be determined without regard to any Ordinance restricting the imprisonment of young offenders."

43 cf. s. 3(1) (c) *ibid.*

44 s. 2(1) (f) Deportation (British Subjects) Ordinance 1936 which throws some light on these requirements. There an undesirable person is defined as "a person who is or has been conducting himself so as to be dangerous to peace, good order, good government or public mordls."

45 cf. s. 3(a) Deporatation (British Subjects) Ordinance 1936. This requirement, applicable to British subjects only, is now extended to Chinese residents by s. 20(3) Immigration Ordinance.

46 cf. Emergency (Deportation and Detention) Regulations Cap. 241 I L.H.K. 1967 ed. reg. 16 – which provides for the suspension of the long procedure under the Deporation of Aliens Ordinance 1935; reg. 6 – a case shall be referred by the Commissioner of Police to the Deportation and Detention Advisory Tribunal. This will be discussed in greater detail under the heading "Deportation Tribunal."

Recommendation By A Court For Deportation

There are two classes of people whom a court may recommend to be deported.[47] They are an adult[48] United Kingdom belonger or an adult Chinese resident who is guilty of an offence punishable with imprisonment for not less than two years.

Section 21(1) Immigration Ordinance goes on to provide that "any court[49] having power to sentence him for that offence" may recommend deportation. Thus even a magistrate's court may recommend deportation since it has powers of punishment up to two years on trial of indictable offences.[50] It seems where an offender is committed to another court for trial or sentence, only the latter court can recommend deportation since it has the power to sentence the person for that offence.[51] It is irrelevant that the court technically has not convicted the offender, provided he is found to be guilty of an offence punishable with imprisonment for not less than two years.[52] In *R* v. *Edgehill*,[53] Lord Parker C.J. suggested the correct approach is that the courts should deal with the offence on its merits and sentence the prisoner to the penalty or the sentence he deserves. Having done that, the court should deal with the recommendation for deportation quite separately.

Seven days' notice in writing must be given by the court to the defendant so that he has the opportunity to make representations to the court.[54] The court may adjourn the proceedings to allow the seven days to elapse and if a person is not detained, the court may remand such person in custody.[55] Section 21(3) provides that the court shall have regard to any representations made by or on behalf of the defendant, in particular to any evidence which such person may adduce as to his character or circumstances.[56]

Leave to appeal is granted by section 21(5), which provides that a recommendation for deportation shall be treated as a sentence for the purpose of appeal. It goes on to provide that the validity of a court recommendation shall not be called in question except on appeal against recommendation or the finding of guilty. Zellick's view is that this "apparently seeks to exclude any collateral challenge, e.g. to a deportation order made on the ground that the court had no jurisdiction to make the original recommendation on which it is based."[57] Section 21(6) provides that a deportation order shall not be made on a court recommendation when an appeal is pending.

It is regrettable that no statistics could be obtained with regard to the number of recommendations made by the courts and the percentage that has been implemented by the

---

47 s. 21(1) Immigration Ordinance

48 s. 21(7) *ibid.* – "a person shall be treated as an adult for the purposes of this section if he is of or over the age of sixteen years." In *R* v. *Tarlochan Singh* [1963] Crim. L.R. 844, a recommendation for deportation was quashed on the ground that the appellant was under seventeen at the time of conviction and was thus ineligible for deportation.

49 "Court" – defined in Interpretation and General Clauses Ordinance s. 3 as "any court of the Colony of competent jurisdiction."

50 Three years consecutive in narcotic cases, Magistrates Ordinance Cap. 227, L.H.K. 1971 ed. s. 92. See also Dangerous Drugs Ordinance Cap. 134, L.H.K. 1974 ed.

51 cf Immigration Act 1971 s. 6(1) – which has an express provision to that effect.

52 This view was expressed by G.Zellick in "The Power of the Courts to Recommend Deportation" [1973] Crim. L.R. 612 at 614.

53 [1963] 1 All E.R. 181 at 183.

54 s. 21(2) *ibid.* cf s. 5(1) Deportation (British Subjects) Ordinance 1936, s. 6(2) Immigration Act 1971.

55 s. 21(2) *ibid.*

56 See Shyllon "Immigration and the Criminal Courts" (1971) 34 M.L.R. 135, 142-146. He discussed cases and outlined principles by which the courts act. Generally, the matters taken into account are: –previous good character, nature of the offence e.g. where the accused is engaged in smuggling and peddling of drugs, family connections with the United Kingdom.

57 Zellick *op. cit.* 614 at note 18.

Governor.[58] In England, during the period of January 1, 1966 to September 30, 1970, only 58.7% of the court recommendations for deportation was implemented by the Home Secretary.[59] It has been suggested by various writers that this power of the court ought to be restricted.[60] The Wilson Committee Report [61] recommends that this power should be withdrawn altogether from the courts.[62] Zellick, in his article,[63] sums up the reasons behind it:– a low percentage of the recommendations for deportation has been implemented by the Home Secretary; it is better to achieve uniformity of procedure by vesting the power in the Home Secretary alone. Moreover, the Home Secretary is more fully informed of all the circumstances than the courts and changes may take place between conviction and release which the trial court could never have anticipated.

Some of these considerations may well apply to Hong Kong. However, as the number of deportation orders made is rather low,[64] it is certain that the power of the courts to recommend deportation has not been abused to the extent as it has been done in England.

Deportation Tribunal

This is an *ad hoc* committee appointed under the following circumstances:– [65]

a) where it is proposed that a removal order be made under section 19(1)(c) against an immigrant who is a United Kingdom belonger, or

b) where it is proposed that a deportation order be made against a United Kingdom belonger or a Chinese resident,

and the Governor has not certified that the removal is necessary in the interest of the security of Hong Kong or for political reasons affecting the relations of Her Majesty's Government in the United Kingdom with another country.

On application by the Attorney General, the Chief Justice shall appoint a Deportation Tribunal. It is to consist of a President (either a puisne judge or district judge) and two other members selected by the Chief Justice from a panel appointed by the Governor.[66]

Before an inquiry is held, a notice in writing is served to the person notifying him –

a) the date on which the inquiry is held and
b) the grounds on which it is proposed that a deportation or removal order shall be made.[67]

Every inquiry under section 23 shall be held in Chambers.[68] The procedures are laid down in regulation 9 Immigration Regulations. The practice and procedure of an inquiry shall be such as determined by the president.[69] A Deportation Tribunal may receive and consider any evidence which it considers relevant in carrying out its function under the Ordinance, notwithstanding that the evidence would not be admissible in a court in Hong Kong under the law relating to evidence.[70]

---

[58] Deportation figures for the following financial years are as follows:–
April 1, 1970 – March 31, 1971 – 31,
April 1, 1970 – March 30, 1972 – 46,
April 1, 1972 – March 30, 1973 – 47,
April 1, 1973 – March 30, 1974 – 21,

[59] H.C. Deb., November 11, 1970. A total of 3,089 recommendations were made and 1,812 deportation orders were issued.

[60] Rogerson in "Deportation" (1963) Public Law 305, 311 and Street in *Freedom, the Individual and the Law* (2nd ed. 1967), p.284. Both argued the power to recommend deportation ought not to be exercised by any court lower than the Crown Court, since the overwhelming majority of recommendations flow from magistrates' courts. Griffith in *Law Reform NOW* (1963) went further and suggested that the power should be confined to High Court judges.

[61] i.e. *Report of the Committee on Immigration Appeals,* (1967, Comn. 3387).

[62] This recommendation was not implemented in Immigration Act 1971.

[63] Zellick, *op. cit.,* 617.

[64] An average of thirty-six during the period April 1, 1970 to March 31, 1974.

[65] s. 22(1) Immigration Ordinance.

[66] s. 22(2) (3) *ibid.*

[67] s. 23(1) *ibid.*

[68] s. 23(2) *ibid.*

[69] Reg. 9(1) Immigration Regulations Cap. 115 A1 L.H.K. 1972 ed.

[70] Reg. 9(2) *ibid.*

After an inquiry is made, the Deportation Tribunal shall make a report to the Governor setting out its findings of fact and, if it sees fit, stating whether or not in its opinion a removal order or a deportation order should be made.[71]

The Deportation Tribunal bears close resemblance to the Deportation and Detention Advisory Tribunal set up under reg. 3(1) of Emergency (Deportation and Detention) Regulations. Both are advisory in nature. However, the latter tribunal is permanently set up whereas the former tribunal is *ad hoc* in nature. The latter tribunal deals only with cases of deportation of aliens; the former, as shown above, has greater powers.

An anomalous situation arises owing to the fact that the Emergency (Deportation and Detention) Regulations have not been repealed. The Deportation and Detention Advisory Tribunal is still found in the 1975 Civil and Miscellaneous List. It is almost a defunct body since no more cases are referred to it under reg. 6(1) of Emergency (Deportation and Detention) Regulations, which concerns the case of a person who has been arrested on a warrant issued under section 4(1) of Deportation of Aliens Ordinance 1935.[72] However it may still have some function under reg. 6(2), where a deportation order issued before the commencement of the Emergency (Deportation and Detention) Regulations [73] is in force after their commencement and the Commissioner of Police is of opinion that it would be contrary to public interest that this person (not being a person against whom a detention order made under Emergency (Deportation and Detention) Regulations or the Emergency (Detention Orders) Regulations 1956 is in force) should be at large in the Colony if his deportation is impracticable. Unless the case is certified by the Governor as being unsuitable to be dealt with under the Emergency (Deportation and Detention) Regulations, the Commissioner of Police may refer the case to the Deportation and Detention Advisory Tribunal.

Detention And Other Particulars Relating To Removal

It is convenient to discuss detention in three stages.

1. Initial Stage – Inquiry

A. Removal orders – under section 26(a) Immigration Ordinance, where any member of the Immigration Service of or above the rank of chief immigration officer or any police officer of or above the rank of assistant superintendent is satisfied that inquiry is necessary for the purposes of this Ordinance other than deportation, and that such person may abscond if not detained, may detain such person for not more than 48 hours.

This is subject to a five days' extension under section 26(b).

B. Deportation orders – the Governor may issue a warrant authorising detention for fourteen days if there are reasonable grounds for inquiry as to whether a person ought to be deported.[74] The Governor may issue further warrants authorising detention for periods of seven days,[75] if it appears to him further detention is necessary for purposes of (a) inquiry as to whether such person should be deported; (b) inquiry into activities of such person or another, that are prejudicial to the security of Hong Kong; or (c) while proceedings for his deportation are completed.[76]

2. Detention Pending Decision

A. Removal orders – under section

---

[71] s. 23(3) Immigration Ordinance.

[72] Repealed by the Immigration Ordinance 1971.

[73] July 27, 1962.

[74] Immigration Ordinance s. 29(1). Form No. 4 in the First Schedule to Immigration Regulations is used.

[75] s. 29(2) *ibid.*, Form No. 5 is used.

[76] In Form No. 5 all three reasons are listed and inappropriate ones are to be deleted.

32(2) a person may be detained under the authority of the Colonial Secretary for not more than fourteen days pending the making of an application for a removal order. This is subject to extension of another fourteen days.

B. Deportation orders – in the case where a recommendation for deportation has been made by a court, and such person is not detained, the court may detain him for not more than twenty-eight days pending the decision of the Governor in Council.[77]

Alternatively, a person may be detained under section 29 for the purposes of further inquiry or while proceedings for his deportation are completed.

3. Detention Pending Removal

A. Removal orders – a person who is to be removed under section 18 may be detained until he is removed for not more than forty-eight hours under the authority of an immigration officer and thereafter under the authority of the Director of Immigration.[78] He may also be detained under the authority of the Chief Secretary pending his removal from Hong Kong.[79] [80]

The Director of Immigration may give directions to the captain, agent or owner of any ship or aircraft requiring a person to be removed in a particular ship and to a specified country.[81] [82]A person may be removed by land to a specified country.[83]

B. Deportation orders – a deportee may be detained under the authority of the Chief Secretary pending his removal from Hong Kong.[84]

Similar procedures follow as in the case of removal orders.[85] A deportee may be detained by the Governor for the purposes of further inquiries into activities prejudicial to the security of Hong Kong.[86]

Under section 36 Immigration Ordinance, a person detained under section 27, 28, 30, 32 or 34 may be required to enter into a recognizance in such amount

---

[77] s. 30 Immigration Ordinance.

[78] s. 32(1) (a) *ibid.*

[79] s. 32(3) *ibid.*

[80] cf. Deportation (British Subjects) Ordinance 1936 s. 9(2) (3) which provide that a person against whom a deportation order is in force shall not be detained pending his removal for a period exceeding twenty-eight days, at the end of which the deportation order shall cease to have effect.
Deportation of Aliens Ordinance 1935 – s. 11(1) (c) specifically provides that the time within which such person shall depart from the Colony may be extended from time to time. s. 32(3) Immigration Ordinance is silent as to whether such period of detention could be extended.

[81] "Specified country" – explained in s. 2 Immigration Ordinance.

[82] s. 25(1) (2) Immigration Ordinance. In the case of a person to be removed under s. 18 in a ship or aircraft, an immigration officer is to give such directions – s. 24(1) *ibid.*

[83] s. 24(4), s. 25(4) *ibid.*

[84] s. 32(3) *ibid.*

[85] cf. Deportation of Aliens Ordinance 1935 – the proviso to s. 11(1) states that where extradition proceedings have been previously taken against any person resulting in his discharge on *habeas corpus*, the Governor's power to order a person to leave by a particular route shall not be construed as empowering the Governor to send such person to a place in the territory of the state by which the surrender of such person was demanded. This avoids conflict with the laws of extradition. There is no equivalent provision in the Immigration Ordinance.

[86] Immigration Ordinance s. 31(1) (2).

and with such sureties as the Director of Immigration or a police officer may require.[87] He may be released on entering into such a recognizance.[88] In *Chong Yee-shuen* v. *A-G and Director of Immigration,*[89] conditions of stay were imposed on the plaintiff upon his entering into a recognizance under section 36[90]. There was no reference in section 36 to the imposition of conditions. The plaintiff claimed to be a Chinese resident and sought, *inter alia,* a declaration that the Director of Immigration had no power to impose conditions on him upon his entering into a recognizance. This was turned down by Trainor J. as a "far too sweeping demand," since there is a possible situation where the Director could impose a condition of stay contemporaneously with the taking of a recognizance against a person who has the right to land under section 8(1) (a Chinese resident in this case) – if a deportation order is in force against such a person.[91]

Section 35(4) grants the power to an immigration officer, immigration assistant[92] and police officer to arrest without warrant any person required to be detained by or under this Ordinance. Furthermore, any person who is (a) detained by virtue of Immigration Ordinance (b) being removed from one place in which he is detained to another or (c) being taken to any place in the custody of an immigration officer, immigration assistant in accordance with immigration Ordinance, shall be deemed to be in lawful custody.

A detention order may be rendered invalid if it is shown that procedures in the Ordinance have not been complied with. *Chiu Chung-keng* v. *Commissioner of Prisons and Commissioner of Police*[93] was decided on the ground that section 51(1) of Police Force Ordinance 1948[94] was not complied with, thus the applicant was unlawfully detained when a warrant was executed after the 72-hour limit had expired. The Immigration Ordinance 1971 has not changed this position. Though section 35(4) provides that a person shall be deemed to be in lawful custody in certain circumstances, yet a person detained in the way as in *Chiu Chung-keng* is not "detained by virtue of this Ordinance [Immigration Ordinance]."[95]

In *Chu Wing-hei,*[96] a case decided before the Immigration Ordinance 1971, a

---

[87] Form No. 8 in the First Schedule to Immigration Regulations is used.

[88] cf. Deportation of Aliens Ordinance 1935 s. 4(9), Immigration (Control and Offences) Ordinance 1958 s. 14

[89] S.C. O.J. No. 521 of 1973.

[90] He was detained under s. 27 Immigration Ordinance.

[91] This reasoning is questionable. A person against whom a deportation order is in force will not be a person who has the right to land under s. 8(1) (see s. 20(6)) – he has lost such right while the deportation order is in force. s. 8(2) provides that a condition of stay, whenever imposed, shall have no effect in respect of a person who has the right to land in Hong Kong – under s. 8(1). There is really no circumstance under which the Director could impose a condition of stay contemporaneously with the taking of a recognizance against a person falling within s.8(1). See Wesley-Smith, Note (1975) H.K.L.J. 356.

[92] "Immigration assistant" defined in s. 2 Immigration Ordinance as "any member of the Immigration Service of the rank of immigration assistant."

[93] (1950) H.K.L.R. 65.

[94] Now s. 52(1) of the same Ordinance.

[95] s. 35(4) (a) Immigration Ordinance.

[96] S.C. O.J. No. 168 of 1971.

detention warrant was rendered invalid on the ground that the words on the form used were not appropriate.[97] A similar situation may arise under section 29(2) Immigration Ordinance, where a number of reasons are listed on the form. Thus if a wrong reason is deleted, the detention order may be invalidated on the same ground as in *Chu Wing-hei.*

Return Of Deportees[98]

Under section 43(1) Immigration Ordinance, a person who returns to Hong Kong in breach of a deportation order or lands from a ship or aircraft in which he is to be removed before it leaves Hong Kong, shall be guilty of an offence and liable (i) on conviction on indictment, to imprisonment for seven years and (ii) on summary conviction, to imprisonment for three years. [99]

However subsection (2) provides that a person who has not been given notice (a) of a deportation order against him; (b) of the rescission of a suspension of the deportation order against him, shall not be guilty of an offence. An equivalent provision in Deportation of Aliens Ordinance 1935[100] uses the phrase "without lawful authority or excuse."[101] The "no notice" requirement in the present subsection narrows down the ambit of defence and is much clearer. [102]

CHALLENGING A DEPORTATION ORDER: THE LEGAL RECOURSE OPEN

Section 53(1) of the Immigration Ordinance provides that any person aggrieved by a decision, act or omission of any public officer taken, done or made under the Ordinance may object to that decision, act or omission.[103] Such objection shall be considered by the Governor or the Governor in Council as the circumstances may require.[104] However, this section does not give a person a right to object to a removal or deportation order made by the Governor or the Governor in Council[105] . Nevertheless one may launch non-statutory petitions to the Governor [106] and a removal or deportation order may be challenged in court on one of the following grounds.

Order Is Defective On The Face Of It

Section 63(1) Immigration Ordinance provides that a document purporting to be a deportation or removal order signed by the Governor or the Clerk of Councils or a copy certified by the Chief Secretary or the Clerk

---

[97] The words on the warrant were "in order that further inquiry may be made." This was not appropriate because the summary procedure (s. 3(1) Deportation of Aliens Ordinance 1935) was adopted, under which no further inquiry was necessary. s. 5 (2) Deportation of Aliens Ordinance 1935 specifically provides that in such circumstances, the words on the form should be altered to read "in order that the proceedings may be completed." As the variation was not made, the warrant was held to be invalid.

[98] There is no special provision in the Immigration Ordinance to deal with the penalty imposed when a person against whom a removal order has been made, returns secretly.

[99] cf. Deportation (British Subjects) Ordinance 1936 s. 13(1), Deportation of Aliens Ordinance 1935 s. 13.

[100] s. 13(1) Deportation of Aliens Ordinance 1935.

[101] In *Ng Ngan* (1933) 26 H.K.L.R. 48, the defence of "lawful excuse" was pleaded. It was argued by the accused that he had arranged to go the Dutch Indies and it was necessary to proceed from Hong Kong. This was rejected by the court. In *Leung Wing Cheung* (1958) H.K.L.R. 49, the accused was forced back across the border by soldiers in circumstances amounting to a threat to his life. It was held that the doctrines of necessity and duress provided a lawful excuse for re-entry. It is submitted that the same reasoning would still apply though the words "lawful excuse" are not found in s. 43 Immigration Ordinance. This section, unlike the wording of the legislation in *Larsonneur* (1933) 24 Cr. App. R. 74, does not create an absolute prohibition. In *Wong Pooh Yin v. Public Prosecutor* [1954] 3 All E.R. 31, the Privy Council, while construing a regulation before it, held that the defence of lawful excuse could be set up though no "lawful authority" existed. This approach was adopted in *Leung Wing-Cheung.* Though this defence provides a lawful excuse for entering the Colony, it ceases immediately after entry and thus would not avail a deportee if he is charged with the offence of being found in the Colony in breach of a deportation order.

[102] A Privy Council case *Lim Chin Aik* [1963] A.C. 160 was decided on this ground. The accused, who was not aware that a ministerial order prohibiting him from entering Singapore had been made, could set up his ignorance as a lack of *mens rea.*

[103] 37 objections were lodged under s. 53 in the financial year of 1973/74.

[104] See s. 53(2), (3).

[105] s. 53(6) provides: "Nothing in this section entitles a person to object under this section to any decision, act, or omission of the Governor, the Governor in Council or any court or entitles the Governor in council to review any decision, act or omission of a court."

[106] 243 petitions against removal or deportation orders were made in the financial year 1973/74

of Councils as a true copy shall be admitted in evidence without further proof and presumed that it was made against the person named and on the date specified.

Similar provisions to the effect that a deportation order shall be deemed conclusive evidence it was duly and validly made could be found in the Deportation of Aliens Ordinance 1935 and the Deportation Ordinance 1917.[107] It was held in *R.* v. *Kwok Ping*[108] this provision only applied if the term of the Ordinance had on the face of these proceedings been complied with and a deportation order signed by the Clerk of Councils must be in proper form.[109]

Kwok Ping provides an example of how a deportation order may be challenged by pointing out that the ground stated in the order is not in compliance with statutory provisions.[110] In *Li Hong-mi* v. *A-G of H.K.*,[111] the Privy Council construed the grounds stated in the order strictly. There was "a sweeping allegation" that the appellant had made general practice of champerty and other kinds of misconduct, followed by two specific instances of champerty and other misconduct.[112] The Judicial Committee held that if the two instances had been given as examples of the general charge, the deportation order would have been valid. However, the general charge was introduced as a separate and distinct ground and since the charge was inadmissible in such a form as a ground for making the order,[113] it was vitiated.

In *Chu Wing-hei*,[114] Huggins J. Commented on Form No. 7 used under the Deportation of Aliens Ordinance 1935. He said that the prescribed form left much to be desired since few deportees are likely to be acquainted with the provisions of the various subsections of section 3.[115] Thus they would not know the basis of the order made against them. He recommended that the form should require that the precise ground upon which the deportation order was made be set out clearly in the relevant paragraph of section 3(1).

Under the Immigration Ordinance 1971, no prescribed form of a deportation order has been laid down. Thus the situation is now adverse to a person seeking to challenge a deportation order on the ground it is not made in the proper form. Whether there is an obligation to state the grounds under which the order is made will be discussed later on.

The Audi Alteram Partem Rule

A deportation order may be challenged on the ground that the deportee has no opportunity to make representations and the Governor has not considered all the facts before making the decision. This argument is rather precarious and may be challenged on four grounds:–

a) There is no exercise of a "judicial" or "quasi-judicial" function, so there is no need to hear all representations.

---

[107] s. 16(1) Deportation of Aliens Ordinance 1935; s. 12(1) Deportation Ordinance 1917.

[108] (1933) 26 H.K.L.R. 26. The Crown was relying on s. 12(1) Deportation Ordinance 1917.

[109] Dicta to this effect can also be found in *Li Hong-mi* v. *A-G of H.K.* [1920] A.C. 735.

[110] The case was decided under Deportation Ordinance 1917, under which British subjects were dealt with in s. 4, using Form No. 7 and aliens dealt with in s. 3 using Form No. 7a. The court did not decide which was the appropriate form in this case. If Form No. 7 were to be used, then the words on the form set out an offence not within the provisions of s. 4. If Form No. 7a were to be used, no conviction "in the Colony" has been alleged and the deportee was not informed in its terms of the subsection of s.3 under which the order was issued. Accordingly, the order was held to be defective.

[111] *Supra.*

[112] Under s. 4(14) (a) Deportation Ordinance 1917, a person guilty of a specific offence of this nature may be deported.

[113] The form requires statement of a specific offence or misconduct within s. 4(14) (a), *supra*, and upon some particular occasion.

[114] *Supra.*

[115] Form No. 7 in the schedule to Deportation of Aliens Ordinance 1935 only requires the stating of the relevant subsection of s. 3 under which the order is issued. cf. Form No. 2 in the schedule to Deportation (British Subjects) Ordinance 1936, which requires actual statement of the grounds for the making of the order.

In the landmark case of *Cooper* v. *Wandsworth Board of Works*,[116] the duty to observe the rules of natural justice was inferred from the impact of a decision on individual rights although the public authority was not a court or tribunal or under any statutory duty to follow a judicial-type procedure. However, this principle was brushed aside by the courts in the period from 1920 to 1960. Wide discretionary powers were assumed to be inconsistent with a duty to act judicially unless the authority was determining a lis inter partes.[117]

In *R* v. *Leman Street Police Station Inspector, ex parte Venicoff*,[118] an alien applied for an order of *certiorari* to quash a deportation order made against him. This was refused ostensibly[119] on the ground that the Home Secretary, in making a deportation order, was not acting in a "judicial" capacity.[120] This point was approved of by the Court of Appeal in *R* v. *Brixton Prison Governor ex parte Soblen*.[121]

Since *Ridge* v. *Baldwin*,[122] the courts have widened the ambit of the duty to act judicially and rejected the idea that such duty could only exist where the act or decision was analytically "judicial". This duty may now be inferred from the impact of an act or decision on individual rights or as Lord Denning M.R. has put it, if a person has some "right, interest or legitimate expectation," it would not be fair to deprive him of it without a hearing.[123] Recently the courts have spoken of "a duty to act fairly"[124] regardless of the administrative/judicial distinction.[125]

However, the Privy Council in *Durayappah* v. *Fernando*[126] did not explicitly disapprove of the erratic distinction between judicial and administrative functions referred to in another Privy Council decision, *Nakkuda Ali* v. *Jayaratne*.[127] This raises a nice question whether the local courts are to follow the House of Lords decision of *Ridge* v. *Baldwin* or adopt the Privy Council approach. In *Leung Pak-kin*,[128] Huggins J. discussed, *obiter*,[129] whether there was an obligation on the Governor to observe the rules of natural justice in making a removal order. He was of the opinion that the Governor's decision must be "quasi-judicial"[130] before it attracts the duty to grant a hearing. However, his remarks were brief and no cases were cited in support. It is unclear whether the Privy Council approach was being followed.[131]

b) An alien deportee has no right which merits procedural protection in the courts.

The Privy Council in *Durayappah* v. *Fernando*[132] has suggested three matters to be

---

[116] (1863) 14 C.B. (N.S.) 180.

[117] For instance Lord Atkin's statement in *R* v *Electricity Commissioners, ex parte London Electricity Joint Committee Co. Ltd.* [1924] 1 K.B. 171 at 204-5 "any body having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially . . . " The last phrase was interpreted as an additional requirement.

[118] [1920] 3 K.B. 72.

[119] Lord Denning, in *Schmidt* v. *Home Secretary* [1969] 2 Ch 149, is of the opinion that the decision in *Venicoff* still holds good although the administrative/judicial distinction is no longer valid after *Ridge* v *Baldwin* [1964] A.C. 40. The applicant was an alien and no procedural protection is given by the courts because an alien has "no right to be here except by licence of the crown." This point is examined in the next section.

[120] per Earl of Reading C.J. [1920] 3 K.B. 72 at 80 – "I therefore come to conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good and it is left to his judgment whether upon the fact before him it is desirable to that he should make a deportation order."

[121] [1962] 3 All E.R. 641 at 658, 663, 669.

[122] *Supra*. The judgment of Lord Reid at 71-9 is the leading modern exposition of the rule.

[123] *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175 at 191.

[124] This is probably wider than a duty to observe the rules of natural justice, which imposes no more than bare minimum standards of procedural fairness. A duty to act fairly may be held to arise in a case of abuse of discretionary power. Some judges tend to assimilate the duty to act fairly with the duty to act judicially, while others differentiate between them. See de Smith *Judicial Review of Administrative Action* (Stevens, 3rd ed. 1973) p. 208 to 209, p.303

[125] per Lord Parker in *Re H.K. (An Infant)* [1967] 1 All E.R. 226 at 231. This was approved of by Lord Denning in *Breen* v. *A.E.U., supra, at 190.*

[126] [1967] 2 A.C. 337, 349 per Lord Upjohn.

[127] [1951] A.C. 66.

[128] F. C.M.P. No. 440 of 1973.

[129] It was held that the Governor had given the applicant opportunity to make representations.

[130] This term has been much criticised by writers for its ambiguity. It is capable of having at least three meanings, see de Smith, *Judicial Review of Administrative Action* p. 64; H.W.R. Wade, *Administrative Law* (Clarendon Press, 3rd ed. 1971), p. 190-1.

[131] See Wesley-Smith, Note (1974) 4 H.K.L.J. 171 at 177 on this issue.

[132] *Supra.*

taken into account when considering whether there is a an implied duty to give a hearing.

They are:–
- nature of interest affected;
- conditions under which the administrative authority is entitled to encroach on those interests; and
- severity of sanction it can impose.[133]

It is not to be denied that the last two items are manifest in the case of deportation. The conditions of encroachment in this instance involve interferrence with one's liberty and property and the penalty imposed is severe indeed. It remains to be seen whether a deportee has an interest which merits procedural protection in the courts.

In the case of an alien deportee, the weight of judicial opinion leans against there being any right which calls for protection by the courts. Lord Denning M.R. in *Schmidt* v. *Home Secretary*, after admitting that there is a duty to give a hearing in the case of a public officer having power to deprive a person of his liberty or property, said it has no application in the case of aliens, for "they have no right to be here except by licence of the Crown."[134] This was reiterated by him in *Breen* v. *Amalgamated Engineering Union.*[135] A similar point was made by Piggot C.J. in *Re Lo Tsun Man,*[136] a case decided under the Banishment Ordinance 1882. He said that the banishment order involved the "violation of no right" since the residence of an alien in Hong Kong is "at best leave and licence."

This line of argument is based on the premise that the alien is a person who has no right to enter. It is implicit in Lord Denning's approach in *Schmidt* v. *Home Secretary.* With the tightening of immigration control, certain types of British subjects had their right of entry[137] taken from them and were made liable to deportation.[138] These British subjects, bereft of their common law rights of entry and immunity from deportation, are now placed on the same footing as aliens. Might one argue that they, like aliens, have no right which merits protection?

It is respectfully submitted that the statement that an alien deportee has no right or interest which calls for protection is too wide. *Schmidt* v. *Home Secretary* is not a case of deportation or removal but a case where an extension of stay was refused to aliens. Different considerations may apply in the case of deportation or removal. This is the opinion of Russell L.J.[139] and Widgery L.J. also remarked: "An alien in this country is entitled to the protection of the law as is a native, and a deportation order which involves an interferrence with his person or property may raise quite different considerations; but a deportation order is not the matter with which we are concerned and I forbear to say more about it."[140] Moreover, Lord Denning himself is of the opinion that in the case where a permit of stay is revoked before time expires, an alien ought to be given an opportunity to be heard, for he would have a legitimate expectation[141] of being allowed to stay for the permitted time.[142] This consideration might also apply to a deportee who has been granted permission to stay.

c) A statute may expressly or by necessary implication provide that the right to a hearing is not to be given.

In *Venicoff,* it was argued that the Secretary of State must act judicially because of the use of the word "deems" in the phrase "if he deems it to be conducive to the public good."[143]

---

[133] See S.A. de Smith, *Judicial Review of Administrative Action* p. 157 for a detailed explanation.

[134] [1969] 2 Ch. 149 at 170. He cited as support the cases of *Venicoff* and *Soblen.*

[135] *Supra.*

[136] (1910) 5 H.K.L.R. 166.

[137] The only types of British subjects who have a right of entry under the Immigration Ordinance are Hong Kong belongers and resident United Kingdom belongers.

[138] This includes all British subjects, except for Hong Kong belongers.

[139] [1969] 2 Ch. 149, 172.

[140] *Supra.* at 173-4.

[141] See Lord Denning's observation in *Breen* v. *A.E.U. supra* at 190-1.

[142] *Schmidt* v. *Home Secretary, supra.*, at 171.

[143] Aliens Order 1912 art. 12(1)

Reliance was placed on the observations of Jessel M.R. in *Russell* v. *Russell.*[144] The court in *Venicoff* distinguished *Russell* v. *Russell,* which was a case of expulsion of a member from a society, from a deportation case. In the latter case, the holding of an inquiry before making a deportation order may not always be commendable. This argument was advanced once again in *Soblen's* case, and Pearson L.J. had resort to a rule of construction – *"expressum facit cessare tacitum."* Here a condition precedent to the making of a deportation order is expressed, namely, "if the Secretary of State deems it to be conducive to the public good." That express condition excludes any supposedly implied condition a hearing must be given. Perhaps this construction would be attached to section 20(1)(b), (2)(b) in the Immigration Ordinance, wherein a similar phrase is found.

In *Re Lo Tsun Man,* [145] the court held that under the Banishment Ordinance 1882, the power of the Governor in Council to issue a banishment order was absolute and not subject to judicial review. In *Li Hong-mi* v. *A-G,*[146] the Full Court held that the language of the Deportation Order 1917[147] made it quite clear the powers given to the Governor were not to be challenged, assuming that the procedure laid down by the Ordinance had been complied with.[148] The Deportation of Aliens Ordinance 1935 had an express provision to that effect.[149] The Immigration Ordinance does not use the words "final and conclusive". Section 53(6) only provides that nothing in the section entitles a person to object to any act, decision or omission of the Governor, the Governor in Council or any court. It leaves untouched one's general right to challenge administrative or judicial decisions in the court.

d) The objects of legislation may be defeated if it is always necessary for the Governor to give a person a right of hearing before a deportation order is to be made.

Inquiry of this sort was held impracticable in *Venicoff,* since "it might very well be that the person against whom it was intended to make a deportation order would, the moment he had notice of that intention, take care not to present himself and would take steps to evade apprehension."[150] This point was again made in *Soblen.* Where national policy looms large or where security reasons are concerned, the courts are generally reluctant to intervene.[151]

The Ultra Vires Doctrine: The "Ulterior Purpose" Element

Although a deportation order may be valid on the face of it and all procedures laid down by the statute have been complied with, the court can still go behind the order to see whether powers entrusted by the legislature have been lawfully exercised.[152] One may prove the abuse of discretionary powers by establishing bad faith – the intentional misuse of power for extraneous purposes. The deportee has to set up at least a *prima facie* case that the order is a mere sham to cover up something illegal or to enable some

---

[144](1880) 14 Ch.D. 471, 478-9- "That word 'deems' has more than one meaning, but one of its meanings is to adjudge or decide."

[145] *Supra.*

[146](1918) 13 H.K.L.R. 6

[147]Particularly s.13.

[148]The Full Court decision was reversed by the Privy Council in *Li Hong-mi* v. *A-G* [1920] A.C. 735 on this premise.

[149]s.17.

[150][1920] 3 K.B. 72 at 79-80.

[151]Immigrant Act 1971 s. 13(5), s. 14(3), s. 15(3) provide that no appeal shall lie to the Immigration Appeal Tribunal in instances where an order or refusal of entry is made on the ground of "being conducive to the public good."

[152]*Secretary of State for Home Affairs, ex. p. Duke of Chateau Thierry* [1917] 1 K.B. 922 per *Pickford L.J.; Chiswick Police Station Superintendent, ex. p. Sacksteder* [1918] 1 K.B. 578 per Warrington L.J.; *Governor of Brixton Prison, ex. p. Bloom* [1920] all E.R. 153 per Lord Reading C.J.; *Soblen's* case [1962] 3 All E.R. 641 per Lord Denning M.R.

subsequent act to be done which would be illegal. The burden of proof he has to discharge is a heavy one. Besides, the executive can plead crown privilege when requested to produce documents.[153]

In *Soblen's* case, the deportation order was challenged on the ground it was issued for the unlawful purpose of extraditing a political fugitive for a non-extraditable offence. This contention was rejected by the Court of Appeal since there was not even *prima facie* evidence that the executive had not acted *bona fide.*[154] Possible conflict between the laws of extradition[155] and deportation was canvassed by Lord Denning. He argued that the power to deport was not taken away by the fact that the person was a fugitive offender wanted by his country. If the order is issued on the ground that the deportation is conducive to the public good, it is valid though its result would be to return a wanted fugitive for a non-extraditable offence. In a local case, *Sung Man Cho,* a deportation order was challenged on the same ground and failed for the same reasons.[156] This point was also raised and rejected in *Re Leung Pak-kin.*

We see that bad faith is very difficult to establish, but one may show there has been misuse of powers in good faith, for instance, for an unauthorised purpose or without regard to legally relevant considerations or on the basis of legally irrelevant considerations.[157] The Court may, on the basis of an inference drawn form the material before it, ask what is the "dominant" or "true" purpose of a decision.[158] If there are two grounds for a deportation order and only one of them is bad, the decision will be upheld provided the reasons are independent and not cumulative.[159] Otherwise, the order ought to be set aside because it is impossible to tell how far the introduction of an inadmissible reason may not have influenced the mind of the Governor in Council.

Misuse of power may also be inferred from inadequate reasons, or as the Law Lords observed *obiter* in *Padfield* v. *Minister of Agriculture,*[160] from the absence of any reason given in rebuttal when an aggrieved person has made out a *prima facie* case.

---

[153] As in *Soblen's* case, crown privilege was upheld on the ground it would be injurious to good diplomatic relations to disclose communications passing from the American to the British Government. Some doubt was thrown on the validity of this point by Paul O'Higgins in "Disguised Extradition; the *Soblen* case" (1964) 27 M.L.R. 521 at 537. *Soblen's* case was treated throughout as a civil application for *habeas corpus.* O'Higgins submitted that it would have been more consistent with the argument that the case involved an unlawful extradition had Soblen's counsel treated his application for *habeas corpus* as criminal. It has long been held that *habeas corpus* proceedings to challenge the validity of extradition are criminal. There is some uncertainty as to the extent of Crown privilege in criminal proceedings, for in *Duncan* v. *Cammell Laird* Lord Simon L.C. explicitly made it clear that the decision as to privilege in that case was confined to civil proceedings. [1942] A.C. 624 at 633-4

[154] This decision is criticised by Paul O'Higgins in his article, *op. cit.* He suggested that there was more than sufficient evidence in the judgments alone to raise the most disquieting doubts as to the *bona fide* character of the deportation order. Lord Denning took the view the Home Secretary's purpose was the same throughout, i.e. to see that the original refusal of leave was implemented. Donovan L.J. was quite clear that the original notice of refusal of leave was prepared in response to a request from the United States, [1962] 3 All E.R. 641 at 665. Combining the two views it follows that there was sufficient evidence before the court that, had it wished, could have drawn the conclusion the order was made in bad faith.

[155] Basically, the law of extradition lays down that the government cannot surrender an alleged criminal unless warranted by an extradition treaty with that particular country and it is an extraditable offence.

[156] (1931) 25 H.K.L.R. 62. It was alleged in that case the deportation order was a sham and that the executive was really trying to surrender the applicant to French authorities for a political offence. This was rejected by the Full Court as very clear proof was needed to uphold the assertion and there was lawful use of powers conferred in this case, though it may result in something not within the intention of the Ordinance. The last point is questionable, as will be examined later.

[157] As in *Padfield* v. *Minister of Agriculture* [1968] A.C. 997 The House of Lords held that the Minister had had regard to irrelevant considerations and an order of *mandamus* was issued to direct him to consider the appellants' complaint according to law.

[158] See S.A. de Smith, *Constitutional and Administrative Laws* (Penguin Books, 2nd ed. 1973) p. 590 note 120 – If the Court of Appeal in *Soblen* had asked the question whether the Home Secretary's dominant purpose was to return a fugitive for non-extraditable offence by using the procedure for deportation, the result might have been different.

[159] As in *Paultons Square Properties Ltd.* v. *London County Council* (1965) 63 L.G.R. 159.

[160] *Supra.* See the *dicta* by Lord Reid at 1032-1033, Lord Hodson at 1049, Lord Pearce at 1053-4 and Lord Upjohn at 1061-1062.

To establish improper purpose, the influence of irrelevant consideratons or the disregard of relevant factors, the deportee must have some degree of knowledge of the grounds on which a deportation order is made. In some cases, reasons may be voluntarily stated and a decision may be challenged if these reasons disclose an error of law.[161] In most cases, the authorities may decline to disclose any reason.[162] This raises the primary question whether there is a duty to give reasons in such circumstances.

There is no general rule of English law that reasons must be given for decisions of a tribunal or public body.[163] However, in recent years, the court recognise that in certain circumstances, there may be an implied duty to state the reasons for a decision. In *Breen* v. *A.E.U.*,[164] Lord Denning observed: "....ought such a body entrusted with discretionary powers, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances." He went on to say that if a man seeks a privilege to which he has no particular claim, he can be turned away without giving any reasons. It is only in the case where a person has some right, interest, or legitimate expectation then reasons should be given why he is being turned down. The passage by Lord Denning has been quoted with approval by Huggins J. in *Chan Yat-sen* v. *A-G.*[165]

The observations of Lord Denning in *Breen* v. *A.E.U.* are *obiter,* since reasons were given in that case.[166] Moreover, Lord Denning's view did not find support among his brothers. Edmund Davies L.J.[167] did not recognise any duty to give reasons in that case nor did he refer to rights, interests or legitimate expectations. Megaw L.J. said that the duty to give reasons only arises in certain circumstances, e.g. if the Committee based its decision on a bad reason.[168]

Even holding that there is such a duty to give reasons under certain circumstances, this may not apply in the case of deportees, aliens especially. Lord Denning was of the opinion that they have no right, interest or legitimate expectation that merits protection by the court.[169]

Judicial Remedies

A person against whom a deportation order has been made and who has been detained may challenge the legality of his detention by applying for a writ of *habeas corpus.*[170] If he is subsequently released on *habeas corpus,* he is entitled to recover damages in false imprisonment against the persons responsible for his detention.[171] An order of *certiorari* lies where there is an error of law on the face of the record, where there is an excess or want of jurisdiction,[172] and where there is breach of natural justice. A person may seek a declaration to the effect that

---

[161] Michael Akehurst is of the opinion that absence of a duty to state reasons makes it harder to challenge errors of law in a voluntary statement of reasons. See "Statement of Reasons for Judicial and Administrative Decisions" (1970) 33 M.L.R. 154 at 159.

[162] In this case the court may perhaps be able to intervene only when the person has established *a prima facie* case of misuse of power. See the dicta in *Padfield, supra.*, and dicta in *Soblen,* per Lord Denning M.R. [1962] 3 All E.R. 641 at 661, per Donovan L.J. 664.

[163] *R v. Gaming Board for Great Britain, ex. p. Benaim and Khaida* [1970] 2 Q.B. 417

[164] *Supra.*, at 190-1.

[165] S.C.O.J. No. 27 of 1975. Huggins J. held that the Commissioner of Police was not bound to give reasons for his refusal to grant a licence as the plaintiffs were seeking a privilege to which they have no particular claim.

[166] The question was whether a bad reason given could be withdrawn and whether it played an important part in the decision of the Committee.

[167] *Supra.*, at 195.

[168] *Supra.*, at 200. This is a confused and circular reasoning.

[169] Discussed already under the *audi alteram partem* rule.

[170] Huggins J. in *Re Leung Pak-kin* F.C.M.P. No. 440 of 1973 entertained "grave doubts whether this was an appropriate way to attack this particular order (which was a removal order)." No reasons were given in the judgement for these grave doubts. See Wesley-Smith, Note (1974) 4 H.K.L.J. 171 at 172-3.

[171] See S.A. de Smith, *Constitutional and Administrative Law* p. 469.

[172] For instance, where serious procedural errors are committed, as in *Kwok Ping* v. *R, supra.*

the deportation order made against him is void.[173] It must be borne in mind that even though a deportation order is set aside through one of the above remedies, this does not affect the Governor's power to make another order in lieu of the invalid one.[174]

SUGGESTIONS FOR REFORM

Having examined the methods of challenging a deportation order, one may perhaps reach the conclusion that the legal recourse open to an aggrieved person is not entirely satisfactory. A deportation order is rarely worded or issued in such a way that one can point out a blatant error on the face of it. It is precarious to rely on the grounds of natural justice or the *ultra vires* doctrine since they have not yet been fully explored or consistently followed by the courts in this area.

An alternative channel is a separate appellate system to review the exercise of discretionary power by an immigration officer or the Governor. Such a system was set up in England by the Immigration Act 1971 sections 13-17.[175] Both Commonwealth citizens and aliens are given the right of appeal against deportation orders to the new authorities except where they were made on the recommendation of a court, in which case the recommendation could be appealed to a higher court as before.

The normal channel of appeal from an act or decision of an immigration officer is to an adjudicator and thence to an independent Immigration Appeal Tribunal. If procedures laid down in the Immigration Act have been complied with in making the order, the appeal is dismissed, except so far there is a disputed question of fact. Except where otherwise stated, the Tribunal may review a decision by an Immigration Officer or by the Home Secretary.

Where a deportation order is made against a person on the ground of being conducive to public good, no appeal will lie[176] except that an appeal will lie as to the destination.[177] Similarly, there is no right of appeal against a refusal to revoke an existing deportation order, a refusal of entry, a reduction of or refusal to increase the permitted period of stay on the "conducive" ground above. Though there is no right of appeal in such cases, the person aggrieved could refer his case to a non-statutory 3-man tribunal of advisers. They will hear his representations and tender advice to the Home Secretary, but this advice will not be binding on the latter or be disclosed.

No appeal lies to the court against decisions by these statutory appellate bodies, but their decisions can be impugned on the same grounds as other statutory tribunals.

Zellick [178] attacked the system of appeals against deportation orders as formulated by the Immigration Act on the ground it has failed to simplify and clarify the law. The Wilson Committee Report [179] did not favour two distinct and separate appellate procedures – one for deportation orders made on court recommendation and another for orders made by the Home Secretary alone – since one might be thought less fair than the other. It recommended the abolition of the court's power to make recommendation for deportation altogether.

Nevertheless, these reforms in England are much needed reforms in the right direction and do not cause the slightest inconvenience or embarrassement to the Government since the executive's power to make deportation orders on policy grounds or security reasons cannot be impugned. It remains to be seen whether these reforms will be adopted by the local legislature one day.

---

[173] In *Li Hong-mi* v. *A-G of H.K.*, supra., the Judicial Committee advised the making of a declaration that a deportation order made by the Governor in Council was invalid. In *Chong Yee-Shuen* v. *A-G and Director of Immigration, supra.*, the plaintiff successfully sought a declaration that removal and detention orders made against him were null and of no effect.

[174] In *Sung Man-cho, supra.*, the court held that the validity of a deportation order cannot be impugned by reason only of the fact that it had been made in substitution for the prior order and in anticipation that the court would find the prior order invalid. Futhermore, s. 55(1) Immigration Ordinance provides that the rescission of a deportation order shall not affect the power of the Governor in Council to make another order against the same person.

[175] Which preserved the main features of the Immigration Appeals Act 1969.

[176] s. 15(3) Immigration Act 1971.

[177] This is a humanitarian move. A deportee may face harsh punishments on being returned to a country directed by the authorities. There is certainly no reason why he cannot be sent to another country which is willing to take him. Soblen committed suicide before the authorities could return him to the United States though Czechoslovakia was willing to admit him. Leung Pak Kin, who had obtained a travel document from Taiwan, absconded when he learnt that he would be deported to Vietnam. If this move is adopted, tragic cases will be avoided in future.

[178] G. Zellick, "Power of Courts to Recommend Deportation" *supra.* at 618.

[179] *Supra.*

AUDI ALTERAM PARTEM IN HONG KONG

Ho Mi Mi

INTRODUCTION

It is not at all easy, as with the explanation of most terms, to tell exactly what is "natural justice." De Smith says that it is the "minimum standards of fair decision making." [1] At the most, all one can say is that it is similar to the concept of procedural due process as it exists in the United States. Natural justice consists of two general principles:

a) *Nemo judex in re sua* – every judge must be free from bias;

b) *Audi alteram partem* – no man should be condemned unheard, i.e. every party is to be given a chance to be heard.

It is said that "the law of natural justice is not in a satisfactory state and the authorities disclose some differences of view. It is somewhat lacking in precision on the occasions on which it should apply and what it requires to be done on those occasions."[2] In Hong Kong the situation is equally uncertain. The aim of this article is to investigate how the *audi alteram partem* rule has fared here.

CONTENT OF THE RULE

What is *audi alteram partem?* At once, we are confronted with difficulty, because there is no fixed rule determining its actual scope, which varies according to the context. In the Hong Kong case of *R.* v. *Leong Fatt-chee*[3], Creedon J. said, "The requirement of natural justice may vary according to the exigencies of the particular case the rules under which the tribunal is acting and all the general circumstances which go to make up the matter or proceedings before the court, and no hard and fast rule can be laid down which will guide in every case."[4] In *some* circumstances the rule will include these rights:

a) Sufficient notice of the charge should be given,[5]

b) There should be adequate time to prepare the case,[6]

c) The party or parties should have a right to be heard and an opportunity to contradict or comment on the charge,[7]

d) The party or parties should be allowed to be legally represented.[8]

The content of the *audi alteram partem* rule is not stable and there is a manifest tendency that it is expanding vigorously. One example is whether it is necessary to give reasons for decisions.[9] In the past, the rule was satisfied if the parties are given a chance to be heard and that they had sufficient notice of the charge etc., but nowadays,

---

1 De Smith, *Judicial Review of Administrative Action* (2nd ed. 1973) pp. 142-3.

2 *Per* Ungoed-Thomas J. in *Lawlor* v. *Union of Post Office Workers* [1965] Ch. 712 at 718.

3 [1963] H.K.L.R. 760.

4 *Supra*, at 771.

5 *Maradane Mosque* v. *Mahmud*[1967] 1 A.C. 13, *Perry Jones* v. *Law Society* [1969] 1 Ch. 1, *Leong Fatt-chee* [1963] H.K.L.R. 760, *Att.-Gen.* v. *Ko Che-lung* [1972] H.K.L.R. 19.

6 *R.* v. *Thames Magistrate Court* [1974] 2 All E.R. 1219.

7 *R.* v. *Lau Ping* [1970] H.K.L.R. 343, *Att.-Gen.* v. *Khan* No. 2683 of 1971 O.J. Supreme Ct. of H.K.

8 *Pett* v. *Greyhound Racing Association Ltd.* [1969] 2 All E.R. 221, *Enderby Town Football Club* v. *Football Association.* [1971] 1 All E.R. 215.

9 *R.* v. *Gaming Board for Great Britain* [1970] All E.R. 528, *Chan Yat-san* v. *Att.-Gen.* [1975] H.K.L.R. 503.

the courts are demanding more and more before they rest contented that the decision is really arrived at fairly. Perhaps one can say that "procedural fairness" is defined in much wider terms today than before. The content of this rule will be revealed more clearly in the course of the discussion.

THE LANDMARK CASE OF RIDGE v. BALDWIN 1964[10]

The prevailing attitude of the courts before 1964 was that they were reluctant to hold that an implied duty to give notice and a chance to be heard was imposed on persons and authorities empowered to make decisions in the area of administration. Such a tendency began in the 1920's. In 1915, the House of Lords decided in *Local Government Board* v. *Arlidge*[11] that it was not necessary for the government department determining a hosuing appeal to disclose certain reports to the appellant, even though such reports might be prejudicial to his case. "This decision marked the beginning of a partial retreat by the English courts from their earlier position – a retreat which was not halted till the 1960's."[12] This statement can be justified by looking at the line of cases during this period such as *R.* v. *Leman Street Police Station Inspector, ex parte Venicoff*,[13] R. *v. Electricity Commissioners*[14] in which Lord Atkin said, "The operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as courts of justice. Whenever any body or persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench division exercised in these writs." *Franklin* v. *Minister of Town and Country Planning*[15] and *R.* v. *Metropolitan Police Commissioner, Ex parte Parker.*[16] The most striking illustration of this trend is the Privy Council decision of *Nakkuda Ali* v. *Jayaratne.*[17]

"In 1963, they (i.e. the rules of natural justice) were rescued from oblivion, dressed in modern garb, by the House of Lords."[18] This is the great case of *Ridge* v. *Baldwin.*[19] A dismissal of the Chief Constable of Brighton by the Watch Committee of the Police authority was held to be invalid in the absence of notification of the charge and an opportunity to be heard. The significance of *Ridge* v. *Baldwin* is not that it removed the uncertainty from this area of the law, but that it clearly indicated and brought about a complete reversal in judicial attitude. It gave a wide meaning to Lord Atkin's *dictum,* saying that there were not two separate conditions, but when one was deciding questions affecting the rights of subjects, the natural consequence was that one must act in accordance with the natural justice doctrine. Moreover it removed the narrow conceptuallistic view that the rules of natural justice would only be applied when there was a *lis inter partes.* "This decision gave a powerful impetus to the emergent trend, an impetus which is not yet spent in adminsitrative law." [20] After 1964 the content of the *audi alteram partem* rule as well as the situations when it applies have been expanding gradually but continuously and once more, natural justice revives.

---

10 [1964] A.C. 40.

11 [1915] A.C. 120.

12 De Smith, *Judicial Review of Administrative Action* (2nd ed. 1973) pp. 142-3.

13 [1920] 3 K.B. 72.

14 [1924] 1 K.B. 171.

15 [1948] A.C. 87.

16 [1953] 1 W.L.R. 1150.

17 [1951] A.C. 66. The Judicial Committee held that no hearing need be given. They drew a sharp distinction between judicial and administrative acts and the deprivation of a right and a privilege. They gave a narrow interpretation to Lord Atkin's *dictum* in *R.* v. *Electricity Commissioners:* in order for natural justice to apply, two separate conditions must be present: making decisions affecting the rights of the people *and* with a duty to act judicially.

18 De Smith, *op. cit.* p. 137.

19 *Supra,* note 10.

20 De Smith, *op. cit.* p. 155.

SITUATION IN HONG KONG

Before 1964

In *Lui Man-ma* v. *Governor in Council* [21] the applicant sought an order of certiorari and mandamus relating to a decision of the Governor in Council under seciton 31 of the Landlord and Tenant Ordinance.[22] The Full Court held that certiorari and mandamus should not be granted. This case was decided at a time when the trend was still a retreat from the wide application of the rules of natural justice in various decisions. Not unnaturally, it contained three very dominant characteristics which were common to other cases in the field of administrative law during this period:

a) The ground for not granting certiorari was that the Governor in Council was exercising an administrative or ministerial power, and not a judicial or quasi-judicial one where the writs could be issued. As with many decisions between 1920-1960, the court was making a distinction between judicial and administrative action, and it was said that the rules of natural justice only applied to the former. Hogan C. J. said, "There is a division between the functions of a tenancy tribunal which being concerned with a *lis* are essentially judicial or quasi-judicial, and the functions of the Governor in Council. Although each is a stage in a continuous process that does not affect the distinctive character of the duties discharged by each." [23]

b) Hogan C.J.'s *dictum* showed a second characteristic, i.e. the right to be heard was only available where there was a *lis inter partes*. It was suggested tht there must be a triangular situation.

c) The Full Court here gave a narrow interpretation to Lord Atkin's *dictum* in *R. v. Electricity Commissioners.*[24] The Hong Kong court here followed the same approach of the Privy Council in *Nakkuda Ali* v. *Jayaratne.*[25]

In *Leong Fatt-chee* v. *Lee Miew-ling*[26] the applicant applied for an order of *certiorari* to quash a magistrate's decision on the ground that at no time was he informed of the evidence against him nor of the grounds on which he could have opposed the confirmation of the provisonal maintenance order. The Full Court held that the applicant had not had the opportunity to put his case and of being fully heard. The *ratio decidendi* of the case was that certiorari would lie to quash an order of an inferior court on the grounds of breach of the rules of natural justice. Creedon J. recognised the difficulty of explaining the exact content of the *audi alteram partem* rule, but he agreed that the doctrine of natural justice contained two main principles which have been mentioned above. Even accepting the principle that the right to hearing only applies to a judicial or quasi-judicial decision, the present case gives rise to no problem since it is clearly a judicial decision. Creedon J. therefore did not discuss the quesiton when *audi alteram partem* was to apply.

After 1964

1. Dismissal from Office

In *In re Yeung Lam* [27] a police officer sought orders of *certiorari* and *mandamus* requiring the Commissioner of Police to revoke an order reverting the applicant in rank from staff sergeant to police constable because no reason was given for the reversion. The Full Court held that these remedies were not open to the applicant. "This is a curious case," [28] and it raised several points which are worth commenting on.

a) *Certiorari* was refused because the Full Court was of opinion that this prerogative order would only be granted in respect of

---

21 [1959] H.K.L.R. 177.
22 Cap. 255, L.H.K. 1971 ed.
23 *Lui Man-ma* v. *Governor in Council* [1959] H.K.L.R. 177 at 197.
24 [1924] 1 K.B. 171.
25 [1951] A.C. 66.
26 [1963] H.K.L.R. 760.
27 [1968] H.K.L.R. 454.
28 *Per* Cons J. in *Khan* v. *Att.-Gen. of H.K.* No. 2683 of 1971 O.J. Supreme Ct. of H.K.

judicial or quasi-judicial decision. The same reason was adopted by the courts in *Nakkuda Ali* v. *Jayaratne*[29] and *Lui Man-ma* v. *Governor in Council*[30] . However these two cases were decided before *Ridge* v. *Baldwin* in which the House of Lords laid down that the distinction between judicial and executive power was no longer of any great significance for the rules of natural justice to apply. *Yeung Lam's* case was decided in 1968 and probably the court had "overlooked the comments of the House of Lords in *Ridge* v. *Baldwin.*"[31] In that case, Lord Hodson said that "the cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principle of natural justice."[32] Lord Reid even went further. He emphasised that the duty to act in conformity with natural justice could, in some situations, simply be inferred from a duty to decide "what the rights of an individual should be." The Hong Kong court was obviously behind the trend of judicial attitude, as it often is. In fact ever since the case of *Re H.K. (an infant)* in 1967[33], the English courts are extending the scope of the rules of natural justice even further. Lord Parker C.J. said," .....that is not a question of acting or being required to act judicially, but of being required to act fairly."[34]

b) The Full Court was wrong in saying that *certiorari* could only be issued to a judicial or quasi-judicial decision. This assertion has been contradicted in many cases on the scope of certiorari. The inaccuracy can further be shown if we refer to the development of this writ discussed by Wells J. in the South Australian case of *Hinton* v. *Lower.*[35] He said, "Those features have finally led to the growth of *certiorari* during the 19th and 20th centuries into a remedy that is by no means confined to controlling inferior courts ..... it is used by superior courts to control all kinds of inferior authorities, however created, whose functions affect private rights or interests ....."[36]

c) In *Yeung Lam's* case, the court also held that since the power of the Commissioner of Police was purely an administrative power, and that the power given was unfettered, even if the power had been improperly exercised, the court could not interfere by way of *certiorari.* However in the House of Lords' decision of *Padfield* v. *Minister of Agriculture,*[37] it was held that although the minister had full or unfettered discretion, he was bound to exercise it lawfully. Lord Denning said, "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law ..... They even claim that it is an unfettered discretion with which the courts have no right to interfere. They go too far. They claim too much .....They are not above the law, but subject to it."[38] After 1967 the English courts are ready to interfere with decisions where the rights, interests or some legitimate expectation are affected.[39] The court's power of review cannot so easily be excluded by a so-called pure administrative power, or even an unfettered discretion. Cons J. in *Khan* v. *Att.–Gen. of H.K.*[40] finally came in line

---

29 [1951] A.C. 66.

30 [1959] H.K.L.R. 177.

31 *Per* Cons J. in *Khan* v. *Att.-Gen. of H.K. supra*, note 28.

32 *Ridge* v. *Baldwin* [1964] A.C. 40, at 130.

33 [1967] 2 All E.R. 226

34 *Supra*, at 231.

35 [1971] 1 S.A.S.R. 512.

36 *Supra*, at 536.

37 [1968] 1 All E.R. 694.

38 *Breen* v. *A.E.U.* [1971] 1 All E.R. 1148 at 1153.

39 *Re H.K. (an infant)* [1967] 2 All E.R. 226, *Padfield v. Minister of Agriculture* [1968] 1 All E.R. 694, *Schmidt* v. *Secretary of State* [1969] 1 All E.R. 904.

40 No. 2683 of 1971 O.J. Supreme Ct. of H.K.

with the English authorities. He said, "Then there was a ready acceptance of the suggestion that misuse, or even deliberate abuse of that power was immaterial. That was a view not taken by the English Court of Appeal ....." The recent local case of *Chan Yat-san* v. *Att.–Gen.*[41] also approved the attitude of the English courts on this point.

In the present case, the Full Court distinguished *Ridge* v. *Baldwin* on the ground that the Watch Committee who dismissed the Chief Constable in *Ridge's* case had power to do so conditionally upon them thinking that he was "negligent in the discharge of his duty, or otherwise unfit for the same," whereas in *Yeung Lam's* case, there was no condition imposed on the Police Commissioner before he could exercise his power or reversion. It is submitted that this ground on which the principle of *audi alteram partem* was excluded is very weak. This is all the more so as what is required for the principle to apply after *Re H.K. (an infant)*[42] is only a duty to act fairly.

d) Blair-Kerr J. mentioned that police officers held office during pleasure, but he did not go on to discuss the significance of this. In fact this has a considerable bearing on the applicability of *audi alteram partem.* This point will be discussed later.

The out-dated approach of the Full Court in this case can be explained because we find that the cases relied upon by the judges belonged to the 1920-1960 period. Considerable emphasis were placed, for example, on *R.* v. *Metropolitan Police Commissioner*[43] and *Ex parte Fry.*[44]

In 1974 the court was faced again with a similar situation as *Yeung Lam's* case and that is *Khan* v. *Att.–Gen. of H.K.*[45] In 1968 the plaintiff was promoted to the rank of inspector on trial for three years. At the end of the Probationary Inspectors' Training Course, he was reverted to his substantive rank. The order of reversion by the Deputy Commissioner of Police gave no reason for such decision and the plaintiff was given no opportunity of being heard as to why such an order should not be made. It was not disputed that Khan was given a formal warning letter after the first term of the three-term course. He applied for a declaration that the reversion was unlawful on the grounds, *inter alia,* that natural justice had not been observed. Declaration was refused.

a) Cons J. thought that the principles of natural justice did not apply after considering the nature of the position. "..... [T]hat is essentially a trial office, an office held for the time being to enable the Commissioner to assess the holder and see if he is fit to hold it permanently. It brings temporary advantages but confers no substantive status ....." The court here was distinguishing a trial office from an ordinary office. It meant that the interests and rights of a temporary post was insufficient for the principles of natural justice to apply. It is submitted that there is no ground for drawing such a distinction, and that this distinction is not supported by any authority. Reversion in rank means loss of salary and prestige and there is no reason why he should not be heard before being deprived of these advantages.

It is well established that when a right or property of a subject is affected by a decision, then the body or person making the decision has to observe the principles of natural justice even if the power is an executive or administrative one.[46] Here it is undisputed that the office was a trial one and that Sergeant Khan had no right to be promoted to the rank of Inspector. However, if Khan had some legitimate expectation of promotion, he was entitled to the protection of natural justice. The Court of Appeal put forward the dairy farmers in

---

41 [1975] H.K.L.R. 503.
42 [1967] 2 All E.R. 226.
43 [1953] 2 All E.R. 717.
44 [1954] 2 All E.R. 118.
45 *Supra*, note 40.
46 *Supra*, note 39.

Padfield's case[47] as an example. They had only a legitimate expectation, not a right, that their complaint would be referred to a committee of investigation. The Court held that the minister had to observe the rule. The court in *Breen* v. *A.E.U.*[48] decided that a right of hearing should be given on the same reasoning. Lord Denning M.R. said, "Seeing that he had been elected to this office by a democratic process, he had a legitimate expectation that he would be approved by the district committee unless there were good reasons against him."[49] Coming back to the present case, it is admitted that no rights were involved, but clearly Cons J. had not paid attention to these authorities. According to the reasons put forward by these cases, which are sound, Sergeant Khan should have been given an opportunity to hear the case against him because he had a legitimate expectation that he would be promoted. The facts of the case show that although during the middle of the course, Khan had attained very poor academic results, he achieved exceptionally good marks in the final test. Perhaps the order of reversion was made because there were reports from the Instructor to the Commissioner to the effect that Khan might not possess the required qualities. Accordingly the Commissioner had sent Khan a warning letter. It was alleged that the warning letter and the stage reports which were read to the participants constituted sufficient notice to Sergeant Khan of his shortcomings. However the reports made by the Instructor to Commissioner were never disclosed to Khan and it was obvious that these reports were vital to his reversion. Therefore never having a chance of learning the contents of these reports which were highly prejudicial to him and having attained excellent academic standard in the final stage of the course, Sergeant Khan had every legitimate expectation that he would be allowed to pass. It is only fair that the Police Commissioner should give Khan a chance to put forward his own case before the decision of reversion was made. Nevertheless the decision of the court in this case is correct, though for different reasons.

b) Cons J. also referred to an office held at pleasure. He said, "Then it is said that the principles has no application to an office held at pleasure . . . . . As a general rule that is so, although the court will not confine itself to the immediate words alone but will take into account the whole framework and context of the employement: *Malloch* v. *Aberdeen Corporation.*" But he thought it unnecessary to investigate into this point. This general principle was laid down by Lord Reid in *Ridge* v. *Baldwin.*[50] He thought that dismissal from office could be classified into three categories. The first was a master/servant relationship. "Then there are many cases where a man holds an office at pleasure . . . . . I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons."[51] The last type was where a man could not be dismissed unless he was told of what was alleged against him and that he was given a chance to put forward his explanation. *Audi alteram partem* only applied to the last type and the House of Lorde held that the dismissal of Ridge came within that category. This point was referred to in *Malloch* v. *Aberdeen Corporation.*[52] However, Lord Wilberforce said, "The rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given – action which will vitally affect a man's career or his pension – makes it all the more important for him, in suitable circumstances, to be able to state his case . . . . . So, while the courts will necessarily respect the right . . . . . to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred upon him . . . . . and how far these extend."[53] Lord Wilberforce was not alone

47 [1968] 1 All E.R. 694.

48 [1971] 1 All E.R. 1138.

49 *Supra*, at 1155.

50 [1964] A.C. 40.

51 *Supra*, at 65-6.

52 [1971] 1 W.L.R. 1578.

53 *Supra*, at 1597.

to suggest mitigation for the principle. Megarry J. in *Gaiman* v. *National Association for Mental Health* [54] put forward a similar opinion. D.H. Clark, after examining the cases in his article, said, "Thus the absence of a charge against a member was not viewed *per se* as conclusive against a right to be heard, rather the presence of a charge, if it put at risk a person's reputation, was recognised as possibly sufficient to outweigh other factors militating against the applicability of natural justice." [55] Thus the Full Court's decision in *Khan* v. *Att. -Gen. of H.K.* [55a] that *audi alteram partem* did not apply can be justified on this ground.

Nevertheless one can still doubt the soundness of this decision by referring to a even more liberal idea concerning the applicability of natural justice principles. As natural justice develops, the courts come to hold that all that which is required is only "fair play in action" or "a duty to act fairly." If the Full Court adopts this liberal approach, then Khan should be given the reasons of his reversion and a chance to put forward his own case before the Deputy Commissioner made any decision.

2. Property or Proprietary Right

In this type of case, the judges of Hong Kong have been more willing to apply the principle of *audi alteram partem.* In *Lau Ping* v. *The Queen* [56] the appellant appealed from a detention order of his vehicle by a magistrate on the ground that the order made under regulation 41B of the Road Traffice (Taxis, Public Omnibuses, Public Light Buses and Public Cars) Regulations was *ultra vires* section 3 (1) *(l)* of the Road Traffic Ordinance.[57] The enabling legislation i.e. section 3 (1) *(l)*, does not abrogate the *audi alteram partem* rule; in fact it is silent on this point and the judges were willing to follow the *dictum* of Byles J. in *Cooper* v. *Wandsworth.* [58] However regulation 41B provided that if the owner of the vehicle was in court, he should be allowed to show cause why a declaration order should not be made. But there was nothing in this regulation which required the court to give notice to the owner concerning the charge and the possible detention of his vehicle. "In one sense the regulation does afford an opportunity to an owner of being heard but it is an opportunity which depends entirely upon accident." [59] Thus regulation 41B was held to be *ultra vires.* "A statute is not to be construed so as to deprive a man of his property without first having an opportunity of being heard. If the enabling legislation does not contain the authority to abrogate funamental principles of natural justice then the delegated legislation cannot itself provide that authority." [60] The Full Court's decision was followed by two more cases concerning similar problems.

In *Att.-Gen.* v. *Tsang Kwok-kuen* [61] the court held that the owner of a vehicle should be given notice and an opportunity of hearing before de-registration was effected. The court was of the opinion that the right to use a registered motor vehicle was one of the incidents of ownership and de-registration deprived the owner of a proprietary right. Regulation 17D of the Road Traffic (Registration and Licensing of Vehicle) Regulations was held to be *ultra vires* section 4 of the Road Traffic Ordinance[62] for the same reason as in *Lau Ping's* case. There was no expressed power given by section 4 to make regulations cancelling the registration of vehicles. Furthermore the Full Court held that the respondent had a right for his vehicle to be registered once the prescribed requirements for registration had been complied with. There are three points in this case which demand some notice:

---

54 [1970] 2 All E.R. 362.

55 D.H. Clark, "Natural Justice: Substance and Shadow" [1975] P.L. 27 at 36.

55a [1974] H.K.L.R. 63.

56 [1970] H.K.L.R. 343.

57 Cap. 220, L.H.K. 1971 ed.

58 14 C.B. (N.S.) 180. *per* Byles J.: "... although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature."

59 *Per* McMullin J. in *Lau Ping* v. *The Queen, supra* at 372.

60 *Per* Rigby C.J. at 350.

61 [1971] H.K.L.R. 266.

62 Cap. 220, L.H.K. 1971 ed.

a) Pickering J. said, "The old distinction formerly frequently drawn between the position where an administrative body was acting purely administratively and that in which its function was quasi-judicial has crumbled and the modern tendency is to hold that in both circumstances there is an obligation to act in accordance with natural justice....." Although such a distinction has become insignificant since 1964, there are no Privy Council decisions to the same effect. In *Nakkuda Ali* v. *Jayaratne*[63] the Judicial Committee clearly laid down that such a distinction was necessary in order to apply the rules of natural justice. This case was strongly criticised in the House of Lords' decision of *Ridge* v. *Baldwin* which rendered such a distinction obsolete. In *Durayappah* v. *Fernando,*[64] the Privy Council considered both the above cases. Lord Upjohn, delivering the judgement of the Committee, said, "..... it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case or with his criticism of *Nakkuda Ali* v. *Jayaratne.*"[65] Therefore *Nakkuda Ali's* case has never been manifestly disagreed by any Privy Council decision. Thus we have two lines of cases in conflict. This is where the problem arises in Hong Kong when the doctrine of precedent is involved. In *Reg.* v. *Chan Kai-lap,*[66] Rigby S.P.J. said, "Whilst this Court is bound by decisions of the Privy Council and of the House of Lords, it is not bound by decisions of the English Court of Appeal."[67] Privy Council decisions are binding because it is at the top of the hierarchy of Hong Kong courts and its decisions should be preferred. However according to section 3 of the Application of English Law Ordinance[68] "the common law and the rules of equity shall be in force in Hong Kong." "Common law" here means the common law of England[69] and the House of Lords is said to be "the supreme tribunal to settle English law" in a Privy Council decision.[70] In *Chan Hing-cheung* v. *R.*[71] Pickering J. said, "..... we are fully satisfied that any relevant decision of the Privy Council is binding upon us." If Privy Council decisions are to be preferred, there is a further question as to whether its decisions bind all territories whence appeals may go to the Judicial Committee or only those authorities on appeal from Hong Kong are binding on local courts and that other decisions of the Committee are merely persuasive. Pickering J.'s use of the word "relevant" was not clear-cut or decisive, so in case of conflict between decisions of the Privy Council and the House of Lords, the situation in Hong Kong is doubtful.[72] Perhaps the local court can have a choice of its own. It is unpredictable which decision will be followed here.

b) This is the only case where the Full Court raised the question concerning the effect of breach of natural justice, i.e. whether such a decision is void or voidable; but the court hardly discussed it at all. (This problem will be discussion later in this article.)

c) In both *Lau Ping* and *Tsang Kwok-kuen,* the Full Court held that the respective subsidiary legislations were *ultra vires* the making legislations on the ground that they were silent on the point that *audi alteram partem* should be complied with. It is submitted that the Full Court has misunderstood this issue. These subsidiary legislations can only be declared *ultra vires* if

---

63 [1951] A.C. 66.

64 [1967] 2 A.C. 337.

65 *Supra,* at 349.

66 [1969] H.K.L.R. 463.

67 *Supra,* at 470.

68 Cap. 88, L.H.K. 1971 ed.

69 Interpretation and General Clauses Ordinance (Cap. 1, L.H.K. 1971 ed.) s.2.

70 *Per* Viscount Dunedin in *Robins* v. *National Trust Co.* [1927] A.C. 515 at 519.

71 [1974] H.K L.R. 196.

72 See Bernard Downey and Peter Wesley-Smith, Commentary, (1974) 4 H.K.L.J. 302, for a more detailed analysis.

they expressly say that the vehicle can be detained and the registration can be cancelled without giving reasons and hearing the persons affected. If they are silent on this point, how can it be said that the power delegated by the enabling legislations has been exceeded? The court can always rely on the fact that "the justice of the common law shall supply the omission of the legislation"[73] and assume that it is the intention of the legislature to observe natural justice. Mere silence is not *ultra vires*. There is no doubt that the decisions arrived at are void, but this does not affect the validity of the subsidiary legislation. If silence on the issue of natural justice is sufficient to render a subsidiary legislation *ultra vires*, then the validity of many of these legislations will be on extremely shaky grounds.

The final case in this area is *Att.-Gen.* v. *Ko Che-lung.*[74] It was again concerned with the detention of vehicles. The Full Court followed the cases of *Lau Ping* and *Tsang Kwok-kuen* and held that the court at which and the date when the application for detention would be made must be given to the owners of the vehicle, i.e. sufficient notice must be conveyed. Pickering J. treated the whole matter of natural justice as one of statutory interpretation. He agreed that the common law principle that no man shall be deprived of his property without first being given an opportunity of being heard could be dispensed with by express language of the statutes. How observed, "It has been achieved, not by what . . . . . I termed a stretching of statutory authorization in favour of executive expediency, but by the sovereign act of the Legislature which may, by apt words expressly dispense with the need for notice or a hearing . . . . . "[75] Pickering J. then went on to consider *Ko Che-lung's* case in this light. Section 26C (1) of the Road Traffic Ordinance[76] required the serving of notice of intended application for detention to the person who was the registered owner at the date of issue of such notice. "Registered owner" was defined by section 26A as "an owner of a light bus registered in accordance with the regulations." However, regulation 6 of the Road Traffic (Registration and Licensing of Vehicles) Regulations required the registration of both the owner and the bus. Thus the meaning of section 26C (1) was unclear. Pickering J. took the definition to mean owner of the bus which was duly registered and so he had to rely on the definition of "owner" as provided by section 2 of the Ordinance which included a person by whom the vehicle was kept and used. This need not be the person who had actually bought the bus. "The legislation sets up a situation in which the person with the financial stake in the vehicle need not be served with a notice of intended application for detention. Whether this result was foreseen or not, I do not know. That it is unjust, goes without saying." [77] Nevertheless Pickering J. was ready to exclude the serving of notice if he could find in the Ordinance sufficiently clear language to support this exclusion. The fact that a person who had bought the bus need not necessarily be given notice could only be arrived at, first by referring to section 26C (1) to learn that notice had to be served to the "registered owner", then section 26A had to be looked at to understand the meaning of "registered owner", and finally section 2 had to be read so as to ascertain the meaning of "owner". This led Pickering J. to say that the intention of the Legislature was not merely to serve notice to the driver and custodian of the vehicle. As to the language in the Road Traffic Ordinance, he said, "This is far from constituting express language and the suspicion must rise that the result was arrived at almost by accident."[78]

The fact that natural justice can be excluded by express language has been recognised by writers and judges. Afterall, natural justice principles are no more than common law principles and if the statutes clearly show that the legislature intends to dispense with them, there is no reason why this should be objected. In an early local case, *Li Hong-mi* v. *Att. -Gen.*,[79] the Full Court held that

---

73 *Per* Byles J. in *Cooper* v. *Wandsworth* 14 C.B. (N.S.) 180.

74 [1972] H.K.L.R. 19.

75 *Supra*, at 39.

76 Cap. 220, L.H.K. 1971 ed.

77 *Per* Pickering J. in *Att.-Gen.* v. *Ko Che-lung, supra* at 39.

78 *Supra*, at 40.

79 (1918) 13 H.K.L.R. 6.

when a statute had provided a special procedure applicable to particular cases, the general implications of English law in favour of the liberty of the subject might be excluded if the intention of the legislature to that effect was clearly and definitely expressed. In *R.* v. *Governor of Brixton Prison, Ex parte Soblen,*[80] Lord Denning M.R. also agreed with this idea. He observed, "A statue may expressly or by necessary implication provide that the person affected is not to be given a right to be heard."[81]

3. Aliens

In *Re Leung Pak-kin,*[82] the Governor exercising powers under section 19 of the Immigration Ordinance,[83] made an order for the removal of Leung, who arrived in Hong Kong illegally, to South Vietnam. He contended that the Governor had not considered all the facts before the order was made.[84] This submission was rejected. Huggins J. said, "The Director of Immigration is an executive officer of the Government and the decision upon which he had to advise His Excellency was, as I see it, entirely administrative, and it is not proper for this Court to intervene."[85] The question on drawing a distinction between administrative and quasi-judicial power has been discussed above. Here the court might feel themselves bound by the Privy Council decision of *Nakkuda Ali* v. *Jayaratne.*[80] However this proposition is not very strong since the Full Court cited no authorities at all to support its decision and the dictum was only *obiter.* Although there is no precedent concerning the exercise of a power to remove an illegal immigrant, (not deport), the court in Hong Kong would probably be influenced in its decision by the case of *Re H.K. (an infant).*[87] There Lord Parker C.J. laid down a new trend which enables the principles of natural justice to be applied more extensively. The case concerned the admission of a Commonwealth immigrant. If the immigrant was under sixteen, he had a right to be admitted. ".....[E]ven if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters .....This is not a question of acting or being required to act judicially, but of being required to act fairly." "I do not understand him to be saying that if there is no duty to act judicially then there is no duty even to be fair."[88]

In spite of the liberal attitude suggested in *Re H.K. (an infant),* there is another line of cases which are more conservative and *Re Leung Pak-kin* is in line with them. In an early local case, *In re Lo Tsun Man*[89] the Full Court held that the decisions which apply the principle *audi alteram partem* to all cases where action prejudicial to a person is taken by virtue of a statutory provision, have no application in case of banishment orders. One of the reasons given by the Chief Justice was that the order involves the violation of no right. He said, "Aliens.....have no right to reside in this country.....of the residence of an alien is at best leave and license....."[90] In *R.* v. *Leman Street Police Station Inspector, Ex parte Venicoff*[91] the Secretary of State issued an order of deportation to an alien. The question was whether the Secretary had to hold an inquiry before he made the decision. Earl of Reading C.J. said that there was no need for an inquiry, "because the person concerned would, the moment he had notice of that intention, take care not to present himself and would take steps to evade apprehen-

---

80 [1963] 2 Q.B. 243.

81 *Supra,* at 290.

82 No. 40 of 1973 M.P. Supreme Ct. of H.K. This is an unreported case and the information about it is taken from an article by Mr. Peter Wesley-Smith in (1974) 4 H.K.L.J. 171.

83 Cap. 115, L.H.K. 1971 ed.

84 Because before Leung was removed to South Vietnam, he obtained a visa for Taiwan.

85 (1974) 4 H.K.L.J. 174.

86 [1951] A.C. 66.

87 [1967] 2 All E.R. 226.

88 *Per* Lord Parker C.J. at 231-2.

89 (1910) 5 H.K.L.R. 166.

90 *Supra,* at 179.

91 [1920] 3 K.B. 72.

sion."[92] The Chief Justice also paid attention to the nature of the power. "I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgement whether ..... it is desirable that he should make a deportation order."[93] *Venicoff's* case was expressly approved in *R.* v. *Governor of Brixton Prison, Ex parte Soblen*[94], where habeas corpus was refused to an American who had been ordered by the Home Secretary to be deported. Lord Denning M.R. agreed that no right to be heard before deportation order was made was necessary.[95] Finally, in *Schmidt* v. *Secretary of State for Home Affairs*[96] the right of entry of an alien was in question. Lord Denning M.R. observed that the position of an alien was different so far as natural justice was concerned. "He has no right to enter this country except by leave ..... If his permit is revoked before the time limit expires, he ought to be given an opportunity of making representations ..... Except in such a case, a foreign alien has no right and, I would add, no legitimate expectation, of being allowed to stay."[97]

Nevertheless it is suggested that these English authorities need not be followed because they are only Court of Appeal decisions. In *Chan Kai-lap* v. *R.*,[98] it was decided that the courts of Hong Kong is only bound by House of Lords and Privy Council decisions. Thus the authority of these cases are weakened. Moreover the local case of *Lo Tsun Man*[99] is not directly to the point since it was concerned with an order for banishment and not deportation. In fact, in the case of *Soblen,* though Lord Denning M.R. ruled that no right to hear need be granted to an alien, he raised the point that, "It may be a question whether, after a deportation order is made and before it comes to be executed ..... an alien may not in some circumstances have a right to be heard."[100] In *Schmidt,* Widgery L.J. concurred with Lord Denning M.R., but he suggested that the position might be different in case of deportation. "An alien in this country is entitled to the protection of the law as is a native, and a deportation order which involves an interference with his person or property may raise quite different considerations ....."[101] However he did not go on to discuss this since this point was not at issue in that case. The question raised by Lord Denning M.R. and Widgery L.J. is relevant in *Re Leung Pak-kin* and should be discussed by the Full Court. Nevertheless, the judges did not mention this point at all.

4. Granting of Licences

In *Chan Yat-san* v. *Att. -Gen.*[102] the Commissioner of Police exercised power under section 13 of the Gambling Ordinance[103] and refused to grant a licence to the applicant who therefore sought the remedy of declaration which was granted. This case is primarily about the exercise of statutory discretions and the duty to give reasons for the decisions. Huggins J. clearly accepted the concept of "the duty to act fairly". He relied on *Breen* v. *Amalgamated Engineering Union*[104], in which Lord Denning M.R. said that "It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly .... The giving of reasons is one of the fundamentals of good administration."[105] Huggins J.'s judgment raised the issue of the meaning of "the duty to act fairly." "The duty to act

---

92 *Supra*, at 79 and 80.
93 *Supra*, at 80.
94 [1963] 2 Q.B. 243.
95 *Supra*, at 290.
96 [1969] 2 Ch. 149.
97 *Supra*, at 171.
98 [1969] H.K.L.R. 463.
99 (1910) 5 H.K.L.R. 166.
100 *Supra*, at 298-9.
101 *Supra*, at 173.
102 [1975] H.K.L.R. 503.
103 Cap. 148. L.H.K. 1968 ed.
104 [1971] 1 All E.R. 1138.
105 *Supra*, at 1153.

fairly" was laid down manifestly by Lord Parker C.J. in *Re H.K. (an infant).*[106] Although this new idea enables natural justice to apply to more situations, it is intrincsically very vague. No limit and no degree has been put down and there cannot be a definite meaning of "fairly". In the case of *Chan Yat-san,* although the judge was discussing the problem of giving reasons, he did not mention "natural justice" or *"audi alteram partem"* at all; he only mentioned that the Police Commissioner had to act fairly. Thus a question arose as to whether "the duty to act fairly" meant the same thing as natural justice.

In *R.* v. *Aston University Senate, Ex parte Roffey,*[107] Donaldson J. said that *"audi alteram partem* will certainly apply in every case in which there is a right to natural justice." In the case of *Breen,* the Court of Appeal unanimously held that a trade union district committee, when exercising its discretion to approve the member's election as shop steward, had to observe the rules of natural justice. Edmund Davies and Megaw L.JJ. decided that although natural justice was applicable, the committee need not observe *audi alteram partem.* Only Lord Denning M.R. differed from their view. Thus "the duty to act fairly" did not mean exactly as natural justice.s,

Hugging J. in *Chan Yat-san* 's case adopted the same approach. He said, "What is said here is that the duty to act fairly under s.13 requires the giving of reasons .....", but he did not include the right to have a chance to be heard. The judge also recognised the flexibility of "acting fairly". He observed that "It is often difficult to be dogmatic as to the fairness or unfairness of a particular course of action ....." The degree might vary according to the particular context of the case and the statutes giving discretions to the officers. A further factor was the distinction between a right and a privilege. It was not disputed in this case that the plaintiffs were seeking a privilege, but this did not deprive them of the protection of fair dealing. "It does, however, mean that the Commissioner could discharge his duty of acting fairly without necessarily having to do all that he might otherwise have been required to do." Where a privilege was concerned, there was still a duty to act fairly, but the officers need not give the party a chance to hear the case against him. The right to be heard did not require as much as when a right was asked. In the present case Huggins J. regarded "the duty to act fairly" as having been complied with although no reasons were given by the Commissioner as to why the plaintiffs' application was rejected. He thought that in this particular context and under section 13 of the Gambling Ordinance the duty to act fairly did not include the right to hear the case against the applicant. Thus, although "the duty to act fairly" may in certain circumstances be the same as natural justice, as in *R.* v. *Gaming Board for Great Britain, Ex parte Benaim,*[108] its content will change according to the context and the relevant statutes, and perhaps, the subjective attitudes of the judges so that an opportunity to hear the ease would be excluded, as in *Breen* v. *A.E.U.* and *Chan Yat-san.* Therefore it is not very accurate to say that "the duty to act fairly" and natural justice are the same.

The High Court's judgment given on the occasion of the third application for licence in *Chan Yat-San* v. *Att.-Gen.* (1976)[108a] reinforces the aforesaid analysis. Cons J. repeated the distinction between application for a privilege and a right. He said, "A person who seeks a privilege – which the Club does in the present case – has no right to be given an explanation if that privilege is refused." In this case, "acting fairly" was again referred to throughout the judgment. Fortunately the High Court offered a clearer explanation to it. "This generally involves two principles. Firstly, that the decision maker should not be guided by irrelevant considerations: *Breen* v. *A.E.U.*; and secondly, that the decision maker should not abuse the powers vested in him, for example, by using them to cloak some ulterior purpose: *Reg.* v. *Governor of Brixton Prison, Ex parte Soblen."* The right to be heard was again excluded.

It is submitted that Lord Denning M.R.'s decision in *Breen's* case, which held that there should be an opportunity to be heard, was too wide and general, and it differed from the majority

---

106 See *ante,* note 87, 88.

107 [1969] 2 Q.B. 538.

108 [1970] 2 All E.R. 528.

108a Nos. 265 and 266 of 1976, M.P.H. Ct. H.K.

of the Court of Appeal. However his decision was supported by D.H. Clarke who criticised the majority decision strongly.[109] He thought that the two general principles, viz. *nemo judex in re sua* and *audi alteram partem,* could not be severed if natural justice was held to apply and the duty of acting fairly meant acting in compliance with natural justice. "Severed from both the rules .....natural justice is devoid of meaning. To equate it with fairness is useful in so far as the essentially practical nature of the concept is thereby emphasised. Its essence, however, remains fairness in procedure .....", "natural justice is embedded in the concept of due process .....notice and opportunity to be heard are its very marrow."[110] Thus it can be seen that this question has not been settled yet.

EFFECT OF BREACH OF NATURAL JUSTICE

This question was raised for the first time in Hong Kong in *Att. -Gen.* v. *Tsang Kwok-kuen.*[111] Unfortunately the Full Court did not investigate into it since the de-registration would be invalid anyway owing to the finding that regulation 17D was *ultra vires* section 4 of the Road Traffic Ordinance.[112] The crux of the matter is to decide whether the decision concerned is void or merely voidable. "Was it void *ab initio* or was it voidable only at the instance of the owner of the vehicle but good as against the rest of the world?"[113] This question has attracted much attention recently and it has brought considerable confusion to administrative law. "Although it might be better to say that it is only recently that the question has been discussed rather than to suggest that there used to be a clear rule which has been unsettled by the case law of the last few years."[114] In the past, the courts only labelled a decision either as valid or void. Parties to litigation were contented so long as the decision concerned could not stand. Therefore when the question was discussed in *Ridge* v. *Baldwin*[115] and then in *Durayappah* v. *Fernando,*[116] there was no direct authority, or rather, the old authorities were not very useful because the term "void" might not bear the same meaning. ".... [T]he word 'void' has often been loosely used as a synonym for 'defective', thus including the concept of 'voidable'."[117] Thus the House of Lords in 1964 may be considered as laying down a new rule when they dealt with this problem. By a majority of three to two the House held that the decision of the Watch Committee was void. Lord Evershed was the dissentient on this point. He admitted that there was no precedent to be found in cases and the question was neither discussed in textbooks, but he said, "The granting of a declaration in a case of this kind must *prima facie* be discretionary and if that is so it must equally follow that the question whether the decision of the Watch Committee is such that the court can quash it or otherwise interfere with, it involves the conclusion that such decision was voidable and not void."[118] Lord Devlin did not discuss this issue at all and he merely concurred with Lord Evershed without giving any reason.

In 1967 the Judicial Committee of the Privy Council unanimously agreed that a decision in breach of natural justice was only voidable and not void in the case of *Durayappah.* Lord Upjohn, delivering the judgement of the Committee, expressly said that they might not necessaily agree with *Ridge* v. *Baldwin.* He said, "Their Lordships therefore are clearly of opinion that the order .....was voidable and not a nullity. Being voidable, it was voidable only at the instance of the person against whom the order was made, that is the Council."[119] Thus we have a conflict between a House of Lords decision and a Privy Council decision again. The court of Hong Kong, being bound by both, is confronted with the same problem of following either one of them. In the local case of *Att. -Gen.* v. *Tsang Kwok-kuen,* the Full Court declined to follow both since the question was not at issue in the case. The judges displayed, as usual, their conservative attitude when dealing with a controversial problem. Rigby C.J. concluded his judgement in the following way, " .....I decline to be ensnared into the trap

109 Clarke, "Natural Justice: Substance and Shadow" [1975] P.L. 27 at 30.

110 *Supra* at 32-3.

111 [1971] H.K.L.R. 266.

112 Cap. 220, L.H.K. 1971 ed.

113 *Per* Rigby C.J. in *Tsang Kwok-kuen's* case, *supra* at 276.

114 Paul Jackson, *Natural Justice* (1973) p. 66.

115 [1964] A.C. 40.

116 [1967] 2 A.C. 337.

117 M.B. Akehurst, "Void or voidable – Natural Justice and Unnatural Meanings.", (1968) 31 M.L.R. 8.

118 See *Ridge* v. *Baldwin* [1964] A.C. 40 at 87.

in venturing to consider whether it might conceivably be possible that what would appear to be the majority decision of their Lordships in *Durayappah* v. *Fernando* might be wrong . . . . . I would be prepared to consider the point as and when the occasion for its consideration necessarily arises. This is not such an occasion."[120]

As to a voidable decision, H.W.R. Wade commented that "This is a new arrival in the legal bestiary, and its pedigree is altogether questionable."[121] Wade thought that this "hybrid creature" brought great confusion and had caused worse rules to replace better ones. In fact the conflict on this point between *Ridge* v. *Baldwin* and *Durayappah* v. *Fernando* is not as great as it appears to be. Although the House of Lords held that the dismissal was void, it did not mean that any stranger could take advantage of the situation. No stranger could have come forward and said that Ridge's successor was acting without authority because Ridge was still the valid holder of the office. In that case, the remedy sought was declaration which "will not be available to all and sundry, a declaration will not be granted unless the plaintiff has some clear interest in the proceedings."[122] Here Ridge was the person directly affected by the dismissal and therefore, there was no problem that the House granted relief to him once it was shown that the Committee was in breach of the rules of natural justice.

In *Durayappah*'s case, the Privy Council agreed that the Minister had to observe the *audi alteram partem* rule before dissolving the Municipal Council, but they refused to grant certiorari to the Mayor because he was not the one against whom the decision was directed. The reason was that they held that the decision was only voidable, and for a voidable act, it was good against everybody except the person against whom the order was made. The Judicial Committee refused to hold the decision void because they thought that "void" implied a meaning that anyone could claim for relief. Lord Upjohn understood Lord Reid's statement in *Ridge's* case, when the latter said that the dismissal was void, as meaning null for all purposes. It is submitted that he had misinterpreted the majority decision of the House of Lords. It was this misinterpretation which caused Lord Upjohn to introduce a further distinction between nullity and voidable. He said, "It is better . . . . . to employ the verbal distinction between whether it is truly a nullity, that is to all intents and purpose, of which any person having a legitimate interest in the matter can take advantage, or whether it is 'voidable' only at the instance of the party affected."[123] This further complicated the whole matter, because it is absured to differentiate "void" and "null" and in fact, it is not possible to do so. Lord Upjohn created all these in order to say that the decision would stand valid until declared void by the court when the aggrieved party successfully challenged it. He embodied this idea by the word "voidable". In fact if someone other than Ridge were to sought declaration from the House of Lords he might have been refused since declaration was not available to a stranger and then the dismissal would still carry legal effect. The House of Lords called this "void" rather than "voidable". Therefore the House of Lords and the Privy Council were talking about the same thing i.e. a decision in breach of natural justice would stand until challenged by the right person asking for the right remedy. Only that they employed different labels and they attached different meanings to the same label. This conflict, afterall, arises from a verbal confusion. "The principle, so simple in its essence, has been bedevilled by confusion of terms."[124] Probably the Privy Council did not want to admit frankly that when there is no remedy a void act has the same legal effect as a valid act. This may sound illogical, but this is the fact. If the void decision is not challenged because the person affected acquiesces, or is barred by his own misconduct or if considerable time lapses, then that decision stands safe and sound and carries with it all the legal consequences of a valid decision. "The Act does not say that the order shall be valid: it merely says that it shall not be questioned in legal proceedings. But it is obvious that the only meaning of cutting off the remedy is to render valid what would otherwise be invalid."[125] Lord Upjohn called such acts "voidable" because he thought that "voidable" contained within it a certain degree of legality and so when it was not challenged, it had full right to become valid again. He might not have considered that his somewhat subtle manipulation of the label would have roused such confusion which is still going on.[126]

---

120 at 277.

121 H.W.R. Wade, "Unlawful Administrative Action: Void or Voidable?": (1967) 83 L.Q.R. 499.

122 *Per* Wells J. in *Hinton* v. *Lower* [1971] 1 S.A.S.R. 512 at 537.

123 at 353.

124 *Per* A.L. Goodhart, "The Twilight of Natural Justice," (1951) 67 L.Q.R. 103 at 106.

125 *Per* H.W.R. Wade in "Unlawful Administrative Action: Void or Voidable?" (1967) 83 L.Q.R. 499 at 511.

The use of "voidable" has been frequently critised. "A decision reached by tribunal wholly outside its jurisdiction and in complete defiance of natural justice is about as void as anything can be, but if nobody who is entitle to challenge does so .... it remains in being. Yet to describe such a decision as being 'voidable' is to use that word in a sense that is not only very special but also liable to mislead."[127] The Supreme Court of New Zealand "finds it a little confusing that the same act should or should not be valid according to the *locus standi* of the person challenging it ....."[128] The Supreme Court of South Australia also casted doubt on the word and seemed to approve H.W.R. Wade's opinion on this aspect.[129]

Moreover the Privy Council was probably wrong in refusing the Mayor a remedy of certiorari. A look at the development of this order shows that it can be asked for as of right by the one against whom the decision is made and, in case of a stranger, it is at the discretion of the court.[130]

Lastly the authority of *Durayappah* v. *Fernando* is much weakened since the Judicial Committee came to its decision relying on a wrong understanding of Lord Morris's judgment in *Ridge* v. *Baldwin*. Lord Morris held that the dismissal was void and of no effect. "The word 'voidable' is therefore apposite in the sense that it became necessary for the appellant to take his stand: he was obliged to take action, for unless he did, the view of the Watch Committee would prevail. In that sense the decision of the Watch Committee could be said to be voidable."[131] Lord Morris was only prepared to call the decision voidable subject to these conditions. H.W.R. Wade was right to say that there was no voidness in the absolute sense, void was relative in the sense that the right person must sought the right remedy. Therefore the crux of the problem finally turns on the difference between administrative remedies rather than "void" and "voidable" or "null" and "voidable". It is admitted that the House of Lords' decision is more acceptable and reasonable and this is also agreed to in other Commonwealth countries.

CONCLUSION

"Whatever the uncertainty about the limits to the application of the rules of natural justice, whatever the uncertainty about the contents of the rules themselves, the case law since *Ridge* v. *Baldwin* was decided in 1964 show beyond all doubt that for the present at any rate natural justice is enjoying a vigorous revival."[132] This is probably due to the fact that the courts will not be so ready to uphold a decision by the bureaucracy unless such decision is arrived at with all the due procedure of law. Ever since 1964, natural justice has been extended to decisions of domestic tribunals such as clubs and trade unions.[133] The last few years have also seen a number of cases involving the applicability of natural justice to universities.[134] Since *Re H.K. (an infant)*[135] the criteria for the rules of natural justice to apply was laid down simply as "a duty to act fairly" although as has been discussed before, "the duty to act fairly" may not be the same as natural justice. "We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done." The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action'."[136] The vagueness of the test of "fairness" and the unwillingness to even try to lay down firm rules is part of the current judicial attitude. Such a general criterion enables the courts to review a large num-

---

126 See (1974) 90 L.Q.R. 154, where Wade discussed the Court of Appeal case of *La Roche* v. *Sec. of State for Trade and Industry* [1973] 3 W.L.R. 805. "The Court of Appeal may be congratulated on having added relatively little to the prevailing confusion." The question was discussed by Lord Denning M.R. who said that the decision was certainly not void, if void meant absolutely void.

127 *Per* Megarry J. in *Hounslow* v. *Trickenham* [1971] Ch. 233 at 257.

128 *Per* Splight J. in *Denton* v. *Auckland City* [1969] N.Z.L.R. 256 at 268.

129 *Hinton* v. *Lower* [1971] 1 S.A.S.R. 512.

130 See Wells J.'s judgement in *Hinton* v. *Lower supra.*

131 at 125.

132 Paul Jackson, *op. cit.* p. 79.

133 *Lawlor* v. *Union of Post Office* [1965] 1 W.L.R. 579, *Leary* v. *National Union of Vehicles* [1970] 2 All E.R. 713, *Gaiman v. National Association for Mental Health* [1970] 2 All E.R. 362, *Breen* v. *A.E.U.* [1971] 1 All E.R. 1148.

134 *R.* v. *University of Aston* [1969] 2 All E.R. 964, *Glynn* v. *Keele University* [1971] 1 W.L.R. 487, *Herring* v. *Templeman* [1973] 3 All E.R. 569.

135 [1967] 2 All E.R. 226.

ber of decisions. The law at present is probably best expressed by Megarry J., "It may be that there is no simple test, but that there is a tendency for the court to apply the principles to all powers and decisions unless the circumstances suffice to exclude them." [137]

The position has now been reached when a judge has felt impelled to sound a warning, "the principles of natural justice are of wide application and great importance but they must be confined within proper limits and not allowed to run wild." [138] However a most recent case showed that natural justice is still extending. The newest criterion laid down by the court was this, "The test to be applied was whether a reasonable person, viewing the matter objectively and knowing all the facts known to the court, considered that there was a risk that the procedure adopted by the tribunal had resulted in injustice and unfairness." [139] The test of a reasonable man and its being objective gives the court a greater chance still to apply natural justice principles.

In spite of these vigorous developments in England, Hong Kong seems to be affected only to a minor degree. The development here is gradual, or rather, so gradual as to be slow and behind the trend. There are probably several reasons for this. The first, which has been discussed, is that Hong Kong is bound by the decisions of the Privy Council and some of these decisions are in conflict with the decisions of the House of Lords which are also binding on local courts. The second reason is the traditional conservative and passive attitude of the local courts. In addition, there are relatively few cases where natural justice is in issue which are brought before the local courts. Therefore even if the Hong Kong judges are eager to investigate this area of the administrative law, they have to wait for the appropriate chances which are so rare. This may be explained by the fact that administrative tribunals are not many here, so, questions concerning natural justice do not arise very often. It is submitted that the relative few cases and the attitude of the court play a dominant part in shaping the slow development of natural justice principles in Hong Kong.

---

136 *Per* Lord Morris in *Wiseman* v. *Bourneman* [1969] 3 All E.R. 275 at 278.

137 *Gaiman* v. *National Association for Mental Health* [1970] 2 All E.R. 362.

138 See note 127.

139 *Per* Kerr J. in *Lake District Special Planning Board* v. *Secretary of State for the Environment* The Times Newspaper Feb. 18, 1975.

INTERVIEW:
THE DIRECTOR OF LEGAL AID
MR. DESMOND O'REILLY MAYNE, Q.C., J.P.

Photograph by courtesy of Mr. Ng Hung Cheung.

Mr. Desmond O'Reilly Mayne tells us, in this interview, the way he sees the possibility of fusion of the two branches of the legal profession, the feasibility of introducing an inquisitorial system and the mechanism of the Legal Aid Department.

Q. *How do you find the present position in the Legal Aid Department?*

A. I think it is as good as can be expected of a fairly new department. The area about which I am still far from happy is the area where we grant aid to applicants and then send their cases down town to be conducted by private practitioners. I find that most solicitors and most barristers are terribly slow with their paper work. I understand the difficulty with private practice in that it needs a lot of discipline to settle pleadings and other legal documents after a day in Court. It can be done and it should be done; but it has not been done to my satisfaction. We have got enormous cooperation from the Bar and from the Law Society (especially from their senior members), but nevertheless, many of our cases are delayed beyond all reasonable excuse, and this is due mainly to lethargy on the part of solicitors.

Q. *To overcome this delay with paper work and to improve general efficiency, do you think the Legal Aid Department should be run on a similar line as the Legal Department where they have their own counsel?*

A. We already have our own litigation unit comprising 11 professional officers and 20 law clerks and they got through an enormous amount of work very fast. If we had a larger litigation unit, no doubt, the public would get a much better service. At the same time, I have always been a believer in having a healthy and independent legal profession working more or less as a conscience in the community. I would not like to nationalize litigation, but unless practitioners start handling our cases

better and faster than before, I shall have to consider very carefully making certain proposals to the Government to enlarge my litigation unit. We can't allow our clients to suffer unnecessarily.

Q. *How much would counsel get on each brief and is there a fixed amount as to the maximum?*

A. In criminal cases fees are not taxed but we mark the brief fee when the case is given to the member of the Bar concerned. The fees are on the low side. They were fixed back in 1959. I think it is not irrelevant to mention as between 1959 and now, Government lawyers' salaries have gone up by about 100%. I think there should be an increase in fees. This would be good both for the Bar and for our clients – since I could more readily obtain the services of the type of barrister that I would want to conduct the Department's cases. The maximum fee for a junior counsel is $1,600 on the brief and $500 per day as refresher. If the barrister represents two or more defendants, then he is entitled to a greater fee. At present, there is no limit to this. We take into account the complexity of the case, its probable duration, the seniority of the member at the Bar concerned, the weight and responsibility that the case carries and so on in deciding what the fees to mark. I think that the fees we mark, generally speaking, are well accepted by the Bar. We work on very much the same principles as those pertaining in the United Kingdom.

Q. *What are the criteria as to the allocation of briefs?*

A. There is only one criterion, ability. There has been discussion about the fact that we do not brief on a roster system, but legal aid is for needy litigants, not necessarily for all needy lawyers. If we kept a careful list and gave each barrister a client in turn, the clients who were unfortunate enough to get incompetent barristers would be the persons who would suffer. The sole criterion in this Department for allocating briefs to counsel is that we try to get the best man (or woman) available for each type of case. I would also add that we are all the time on the look out for young members of the Bar who appear to be good and who appear to have potential. If they have these two qualifications, we certainly try to employ them – partly because we know they will work hard on the case, and partly because I want to build up in so far as possible, a larger panel of barristers and solicitors able to do a good job in Legal Aid cases.

Q. *What are your views as to a fusion of the two branches of the legal profession? In particular, would fusion help to reduce exorbitant legal costs?*

A. I think it probably would. This is a very complex and very important issue and I think this is really a matter for a Commission of Inquiry to decide. Certainly litigation in Hong Kong is terribly expensive and there are in effect trade union rules in this profession, namely, that if you brief a Queen's Counsel, you have to brief a junior counsel as well, to employ either you must first employ a solicitor. In a very complex case, two heads are better than one, but there must be few cases that need three heads! About 95% of cases handled by Queen's Counsel do not require junior counsel. What they require is good instructions from solicitors, and they need somebody there to take a very careful note of everything that is said in Court. Under our present system, you first of all go to a solicitor and that will cost a great deal of money. Then you get a junior counsel, he will cost plenty too. Then you get your Silk, and he costs a fortune. On the face of it, it does seem to me to be a cumbersome system, but the matter is of such great importance that it is not a step to be taken lightly until after serious consideration, and after hearing the views of members of the Bar and of the Law Society. One thing occurs to me in this context – the present system is such that qualified lawyers have a monopoly of the right of audience in Court and they are charging such high fees as to put themselves outside the reach of the ordinary man in the street. The only persons who can afford to go to law these days are the very rich, who find these heavy fees a burden but they can pay them, and the poor because they get legal aid. It is the

in-between people who are left without Justice – the lower middle class, middle class, upper middle class.

There is one thing to be remembered about criminal and civil cases: in criminal cases, an unrepresented defendant can make quite a good fist of defending himself, and of course, the Judge leans over backwards to help him. My concern at present is largely for civil cases. In criminal cases, there are no real pre-trial complexities, but in civil cases, the position is quite different. No layman can launch a High Court Action. He cannot go through the procedural matters which go before the trial – the precise Statement of Claim, Interlocutory matters, etc. – these are absolutely outside his ability. So, he is the person for whom there is a denial of Justice if he does not qualify for legal aid. That is a very serious matter. There is now a denial of Justice in civil cases for a very large number – some hundreds of thousands – of our population.

As I see it, the arguments for and against fusion really boil down to two things – what system would be (i) most efficient, and (ii) least expensive. In saying that, I am not at all suggesting an able lawyer is not entitled to make a good living, but there must be some system which will, in effect, make a denial of Justice impossible. I think the profession ought to look at this matter calmly. Possibly, we ought to have a Commission of Inquiry to keep emotion out of it, and then get together to see how we can better serve the public.

Q. *On the subject of Courts, we have seen in the recent years the setting up of the Labour Tribunal and the Small Claims Tribunal whose nature is largely inquisitorial. Do you think the introduction of an Inquisitorial System on an even greater scale would be suitable to the local temperament?*

A. As you probably know, this idea of introducing an Inquisitorial System has been talked about and thought about a lot in the United Kingdom and elsewhere, without anything final coming out of it. Irresspective of the merits in the United Kingdom, what we have to concern ourselves with is the merits in Hong Kong. The conditions, the culture, the way of thought are different from the United Kingdom. I am all for making the law less formal, less frightening, less pompous and more friendly; and I think particularly in Hong Kong, our litigants and witnesses would benefit greatly from being in a position more or less to tell their own stories in their own way as distinct from being put into the witness box and being examined in accordance with some rather unnatural rules of evidence. Furthermore, as you know, under our present system, each case is a contest – in civil cases, between the plaintiff and defendant; in criminal cases, between the Crown and the accused. In that contest, the Judge acts as referee. No doubt, if in this contest, one litigant has a better advocate than the other side, then he has a tremendous advantage. The function of an advocate is not only to present his client's case but also to decimate his opponent's case. In racing parlance, if you put a very good jockey on a mediocre horse, he may well win the race, but if you put a bad jockey on to a good horse, he may well lose it. I think we should go this far – to let a Commission of Inquiry examine the feasibility and desirability of the Inquisitorial System, so that the matter can be really thrashed out in public with people in every walk of life giving their opinion as to what system of law would best suit this particular community.

Q. *Suppose a person who has got legal aid has been convicted of an offence but is indifferent as to appeal despite having good grounds. Would you contemplate taking the initiative and grant him aid to appeal?*

A. We cannot force anyone to appeal. It is a matter for him as to whether he wants to or not. If he wants to appeal and if he applies for legal aid, then we process the application and the decision as to the grant of aid is left with us. We go through the case record meticulously to see if there are any valid grounds for appeal. If there are any valid grounds, then we grant aid. In terms of criminal cases, we have a different policy in relation to our approach to trials and to appeals. In

trials in Supreme Court or District Court, an accused will always get legal aid provided he comes within the means test. Applicants get legal aid because of the gravity of the offences charged, and because of the possible severity of the sentence. There is not what you might call a merits test. Even if the person is guilty and says so, and only wants to plead guilty and have a plea in mitigation, he gets legal aid. But in criminal appeals, we only grant aid if there are valid grounds of appeal. In that matter, we may be guided by counsel's certificate but we make the ultimate decision. One point that should be borne in mind is that in relation to grant or refuse aid in criminal cases, there is no appeal against our decision; but the Court hearing the trial or the appeal has the power under the Legal Aid in Criminal Cases Rules[1] to grant a certificate. In other words, aid can be granted by this Department *or* by the Court.

Q. *Coming to the present requirements with regard to disposable income and disposable capital, would you like to see any change in these requirements?*

A. I think we must raise the means test as much as possible and as soon as possible. Looking at the Legal Aid Ordinance,[2] it is $700 a month for disposable income and $4,000 a month for disposable capital. As for the next financial year, I hope that the $700 will be raised to $1,000 and that the $4,000 be raised to $10,000.

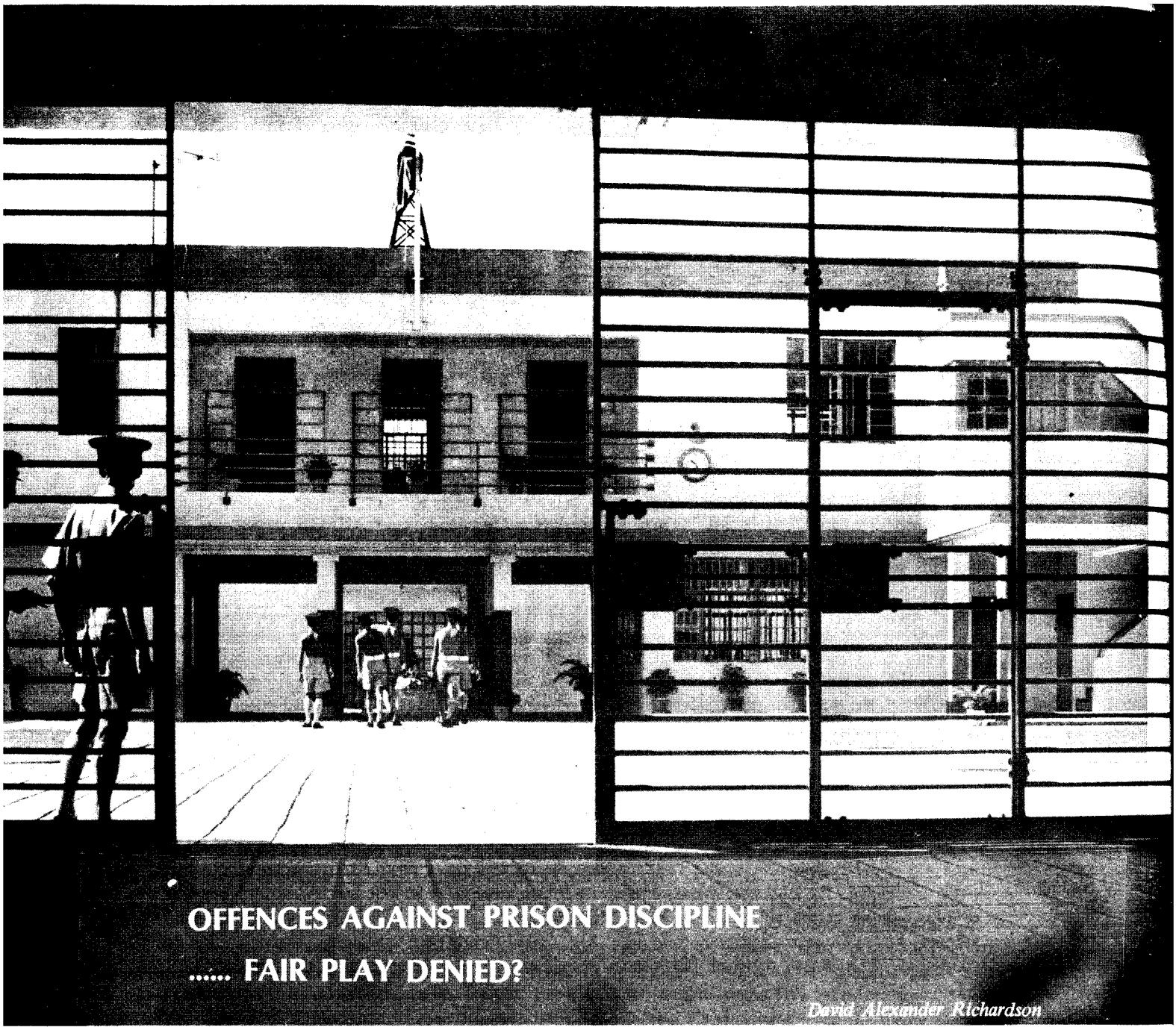
A lot of people have wrong impressions about the means test by reason of what is said in the Ordinance. They are not fully aware of the enormous allowances that persons are allowed under the Legal Aid (Assessment of Contributions) Regulations.[3] There, in regulation 4, when we look at capital, we do not count the amount of any debt owed (other than a secured debt), the first $40,000 of the value of any interest in a person's house, the value of household furniture and effects, personal clothing, tools and implements of trade; and in respect of each dependant we give an allowance of $1,500. If we are dealing with the income side, we make an allowance in respect of all rent; and then there is a personal allowance and allowances for each dependant. Furthermore, we are allowed, in deciding what is disposable income, to take any 12 month period that we like, so we can project it 12 months forward to 12 months back or take it any convenient time which would best suit the aided person. And, of course, we lean over backwards to bring people within legal aid. Nevertheless, the means test does not always work out fairly. Take a man who works hard through his life and has managed to save a bit of money for his old age, if anything happens to him and he comes in here, his disposable capital may prevent us from granting aid to him. Whereas his next door neighbour who may have gone through life not saving a penny may be granted aid. It is not all that fair, but it is so throughout other social services in the World.

Q. *To your knowledge, are there any other chanels for legal aid then the Legal Aid Department?*

A. Yes, there are two such services. There is first of all the Neighbourhood Advice Council which has a panel of lawyers that give their services voluntarily on a roster basis, they do good work but the volume of work handled is not great, really a drop in the ocean. Then you have the University's Legal Aid and Advice Scheme, it offers its service free of charge for the litigants and is an excellent service, but is of necessity a small one.

On top of that, the Bar and the Law Society traditionally are very charitable and individual barristers and solicitors do an awful lot of work for no fee at all when they meet a deserving case. Of course, they get no publicity and they get very little thanks!

1 Cap. 221 D1
2 Cap. 91
3 Cap. 91 B1



OFFENCES AGAINST PRISON DISCIPLINE ..... FAIR PLAY DENIED?

David Alexander Richardson

Photograph by courtesy of Hong Kong Government (G.I.S.)

INTRODUCTION

"A short 'Ordinance for the Regulation of the Goal of Hong Kong' is the fruit of the wisdom of our Legislative Council in the first nine months of 1843. It invests the Sherrif and the Gaoler with irresponsible powers in enforcing discipline within the Goal" – South China Morning Post, 13th October, 1843.

Over a century has passed since this article appeared. The object of this enquiry is to approach the low-visibility area of prisoners' rights and to determine the present situation of a convicted prisoner in a local prison, charged with an offence against prison discipline.

THE VICE OF VAGUENESS

The statutory provisions dealing with Offences against Prison Discipline are embodied in the Prison Rules,[1] made under section 25 of the Prisons Ordinance,[1] by the Governor in Council.

Rule 61 lists the offences; there are 21. There is an open-ended nature about most of these subsections. Subsection (p) provides that an inmate commits a disciplinary offence when he "in any way offends good order and discipline." This is clearly designed to be the "catch-all" provision to deal with acts not covered by the other subsections.[1a]

This vagueness is contrary to the requirement that offences be defined with precision in advance of punishment – the principle of legality. The rationale of this rule is that "conformity can be maximised only if the punitive system has a rational base. If punishments were imposed irrationally or capriciously, the citizen would be unable to determine which rules he should conform to."[2] In short, advance notice is necessary for justice.

If this concept is accepted, then it follows that it has particular importance in the prison context. The prison population is characterised by a general lack of respect for authority. As the Secretary for Security, Mr. Lewis Davies, has recently avowed,[3] the officials of the prison regime intend to change that attitude so that inmates do not revert to crime on their release. But the vagueness of rule 61 permits officials, ranking from the pettiest of guards upwards, to decide if someone is within or outside the ambit of a vague law, basing it on his own particular values, idiosyncrasies and prejudices. The enforcer has a "charter of authority" to charge whom he likes, when he likes, with what he likes.

This alienates the inmates. They are aware that they have very little control over their lives. Decisions concerning what they wear,[4] what work they engage in[5] and whether or not they are allowed to drink liquor[6] or to smoke are not made by them. The thought that what small area of their lives not subject to obvious control is still susceptible to official intervention, reinforces the sense of oppression.

The authorities would probably argue on two lines. Firstly, that this vagueness allows for control of conduct not specifically prohibited by the Prison Rules, but which is considered to be reprehensible. This consideration savours distinctly of the principle (though since disaffirmed) which led the House of Lords in *Shaw* v. *D.P.P.*[7] to state that the courts have a residual power to deal with gaps in the criminal law which "will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society".[8]

Secondly, that regulations similar to rule 61(p) can be found in legislation governing citizens, in a special class, who are also subject to a disciplinary code, over and above the ordinary criminal law. For instance, section 31(1)(c) of the Police Force Ordinance[9] states that "any non-commissioned officer or constable who is found guilty by an appropriate tribunal of .... conduct to the prejudice of *good order and discipline*, shall be liable to be punished by such tribunal ...." What is overlooked, however, by those who have this value preference in the prison regime, and who look to the police model for justification, is that the police force exists primarily to protect the security of society; it does not exist to reshape the lives of policemen in order to make them better people when they leave their ranks. The modern prison, however, exists not only to protect society, but also to

---

1 Prison Rules, Cap. 234, L.H.K. 1975 ed.
Prison Ordinance, Cap. 234, L.H.K. 1969 ed.

1a In the financial year 1973-74, 22% of the charges brought under r.61 were brought under this subsection; the highest percentage – Annual Departmental Report by the Commissioner of Prisons, 1973–4.

2 D.R. Cressey, *The Functions and Structures of Criminal Syndicates*, at page 45.

3 In reply to questions raised by the Unofficial Members in the Legislative Council on Nov. 6, 1975 – S.C.M. Post Nov 7, 1975.

4 r.26.

5 r.38.

6 r.25 (1).

7 [1962] A.C. 220.

8 At p.268, per Lord Reid.

9 Cap. 232, L.H.K. 1964 ed.

perform a reformatory task lacking in the police institution. Prison rules, therefore, cannot simply be based on what is the most efficient way of regulating prison life and maintaining security, but must also take into account the need to legitimatise authority in the captives' eyes.

On a balancing test, with the gaoler's interest on the one end of the scale, and the captive's interest on the other, the author comes to the conclusion that the balance should be tipped in the latter's favour. Life is much more routine in a "bastille of incarceration" than life on the outside. It is accordingly less difficult to establish in advance a reasonably clear set of rules as to the limits of acceptable behaviour, leaving little margin for unanticipated behaviour.

A further facet to the vice of vagueness is that there is no requirement in the Prison Rules for notice of the offences stated to be given to the convicts on entry into the "society within society". It seems to be the expectation of the staff that inmates will learn the limits of acceptable behaviour as they go along and/or they already know what the limits are because of their prior prison experiences. And even if there were such a requirement, the inmates could not maintain an action on it even "if he can show some departure from the prison rules which caused him inconvenience or detriment."[10] As was said in *Becker v. Home Office*[11], they are "regulatory directions only".[12]

PRE–TRIAL

There is no filtering-out process for breaches of section 61 not viewed as important enough for a charge[13] to be laid. Section 60 is cast in an imperative tone: "Every offence against Prison discipline shall be reported immediately ..."

It is the duty of the Superintendent[14] to investigate the report speedily; "not later than the following day, unless that day is a general holiday".[15] Rule 59 conforms to the "plain as a pikestaff" requirement referred to in *Ridge v. Baldwin*[16] that a prisoner must be informed of the facts alleged against him[17] and he must be afforded an opportunity of a reply. Up till this point, natural justice has been complied with.

But as to the Rule against Bias, there seems to be a possible cloud on impartiality. The Superintendent continually receives reports on the movements and activities of the inmates, especially the troublemakers and the "Big Bosses". This extensive knowledge is of course a valuable thing, since it allows for informed sentencing decisions. But on the other hand, it might mean that on the adjudication of an issue, the Superintendent might be biased, either because of his previous dealings with the inmates or because of special information which he may have received concerning the convict, outside the confines of the enquiry, and perhaps unrelated to the issue at all. It is not inconceivable for the Superintendent to rationalise, "This inmate is always getting into this kind of trouble. Of course he must be guilty. He always is."[18]

This consideration is perhaps relatively unimportant in a large institution like Stanley Prison, with an inmate population of approximately 2770[19] but it has particular significance in the smaller jails.

Added to this might be a preference for official testimony, based largely on the need for boosting official morale and it thus seems that fair play might be ignored.

---

[10] *Arbon v. Anderson* [1943] 1K.B. 252 at 255.

[11] [1972] 2 ALL E.R. 676, per Goddard L.J.

[12] at p.682, per Lord Denning M.R.

[13] Vividly referred to as a "declaration of war" by Lord Devlin in *The Criminal Prosecution in England*, Chap. 2.

[14] S.2 of the Prisons Ordinance: "A senior officer of the Prisions Department holding the rank of superintendent of prisons".

[15] r.60.

[16] [1940] A.C. 40.

[17] Sir George Jessel M.R. referred to the need for "fair, adequate and sufficient" notice of a charge in *Fisher v. Keane* (1878) 11 Ch. D. 353.

[18] The Commissioner of Prisons, Mr. Tom Garner, revealed that criminal leaders are singled out for special security attention. "The dossiers on them are continually being added to. Whenever a whisper is picked up, it goes into the file ...It is a good criminal intelligence in the fullest sense." S.C.M. Post 22 Jan, 1974.

[19] Annual Departmental Report by the Commissioner of prisons, 1973-4.

The possibility of the occurrence of this unfavourable result could be minimised by the setting up of an independent tribunal, populated by members of the Prisons Department with only one job to do: to adjudicate upon issues offending prison discipline. This would be preferable, as the authorities are understaffed, and the Superintendents of every prison, with heavy administrative workloads on their hands, would be much relieved by this innovation.

ADMINISTRATIVE REVIEW

If a prisoner feels aggrieved by an order made by the Superintendent, he may, within 48 hours of the issue of the order, give notice to the Superintendent that he wishes to appeal to the Commissioner of Prisons of the Colony. Execution of the order will be suspended pending the hearing of the appeal.[20]

There are no detailed rules of procedure in relation to this hearing and especially, no details as to the right to legal representation. The only provision on this area relating to procedure is that the inmate may either appear in person or submit his case in writing.[21] This is probably because the officials view the regular criminal system, with its adversary ideal, its rules of evidence and the inevitable lawyers, as designed to enable hardened criminals, past masters at the "cops and robbers" game, to evade responsibility by letting their wily lawyers fight it out for them.

This question of administrative review is connected with the controversial area of the requirement (or non-requirement) of legal representation in a hearing before the Commissioner.

Legal Representation

The issue of legal representation opens up practical and legal avenues, and these two are at odds with each other.

1. Practical Aspect

Before the hearing, the prisoner will have been placed in segregation.[22] This is mandatory, as the section dealing with this is in an imperative tone. This makes the preparation of his defence almost impossible, as no requirement is placed on the authorities by the Prison Rules to provide him with facilities to interview possible witnesses or even writing facilities to draft a defence.

In the actual hearing itself, the assistance of counsel may be necessary in view of the inmate's age, mental condition or education; he might not even be able to read or write. Even if he is not thus handicapped in seeking his rights, he might be uneasy and possibly frightened. He certainly will not have the ability to bring out points in his favour or to concentrate on the weaknesses of the other side. Added to this is a possible tendency for the preference of official testimony. So if it is his word against an officer's, his word will not go far. The right to call witnesses is largely illusory. Other inmates will be reluctant to expose themselves to possible victimisation. If the prisoner in question speaks up against another inmate, he may be in trouble with other inmates. If he makes an allegation against a prison official reckoned to be "false and malicious", he could be charged with an offence against discipline himself.[23] If he *repeatedly* complains about this and finds his complaint disbelieved, either because of insufficient evidence or because his word is suspect, he may find himself the subject of disciplinary proceedings for having persisted in his complaints.[24]

To acknowledge Lord Denning's own words in *Pett v. Greyhound Racing Association (No.1),*[25] "it is not every man who has the ability to defend himself on his own".[26]

---

[20] r.63 (2).
[21] r.63 (3).
[22] r.58.
[23] r.61 (s).
[24] r.61 (t).
[25] [1969] 1 Q.B. 125.
[26] At 132.

2. Legal Aspect

The Court of Appeal, in the recent (August, 1975) decision of *Fraser v. Mudge,* dealt a severe blow to fair play in disciplinary proceedings. The decision was concerned with a hearing before the U.K. system of board of visitors. For the purposes of this enquiry, this case will be taken to be applicable to the local system of proceedings before the Commissioner of Prisons. They are both one step removed from another hearing. In the former, from proceedings before the Governor of the Prison. In the latter, from a charge before the Superintendent.

A brief review of some of the cases previous to *Fraser v. Mudge,* and connected with it, will simplify matters.

In *Pett v. G.R.A. (No.1),* the Court of Appeal was concerned with the question of whether the appellants, an organisation exercising control over a large part of the greyhound racing industry, could be restrained from holding an inquiry into the running by the respondent, a trainer, of his greyhound, unless he was allowed to be legally represented. (Traces of barbiturate had been found in the urine of the hound on the day of a race it was entered in).

The court granted the injunction.

Lord Denning M.R. conceded that there might be no right to legal representation "when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation."[27] But not if the tribunal is "dealing with matters which may affect a man's reputation or livelihood or any matters of serious import."[28] Basing his decision on the rationale of agency, in that the respondent "is entitled not only to appear by himself, but also to appoint an agent to act for him,"[29] his Lordship dismissed the appeal.

In the twin case of *Pett v. Greyhound Racing Association (No.2)*[30] where the trainer sought a declaration that the organisation was acting *ultra vires* in refusing to allow his legal representation, Lyell J. reviewed Lord Denning's dictum in *Pett v. G.R.A. (No.1)* but preferred the dictum of the Privy Council in *University of Ceylon v. Fernando,*[31] which was not cited to the Court of Appeal, where the Board referred to those "elementary and essential principles of fairness, to meaning that firstly "the person accused should know the nature of the allegation made, secondly that he should be given an opportunity to state his case and, thirdly, of course, that the tribunal should act in good faith".[32]

Lyell J. felt that it is "difficult to say that legal representation before a tribunal is an elementary feature of the fair dispensation of justice. It seems to me that it arises only in a society which has reached some degree of sophistication in its affairs."[33]

But the author submits that the learned judge is wrong. Firstly, the question whether the respondent in *University of Ceylon v. Fernando* need be legally represented was never raised. The Board's statement is merely *dictum,* and then again, a very ambiguous *dictum.* Secondly, the whole scope of natural justice since *Ridge v. Baldwin*[34] has been expanding, and it seems illogical that the Privy Council were actually attempting, by way of *dictum,* to limit this growth by denying an elemental feature of *audi alteram partem.*

One aspect of natural justice is that the applicant should be "given an opportunity to state his case".[35] but what the opportunity means will vary with the facts of the case. The opportunity may, in certain circumstances, include legal representation. Lord Denning's *dictum* in *Pett v.G.R.A. (No. 1)* may have been too wide, but that was no reason for its absolute rejection. It could have been pruned to fit the case in question.

(The sequel to this case was that G.R.A. hurriedly altered the Rules of Racing, and

---

[27] At p.132-3

[28] At p.133.

[29] At p. 132.

[30] [1970] 1 Q.B. 46.

[31] [1960] 1 W.L.R.223.

[32] At p. 232.

[33] At p.66.

[34] [1964] A.C. 40

[35] *University of Ceylon v. Fernando,* quoted by Lyell J. [1970] 1Q.B. 46 at 65.

allowed the plaintiff the right to be legally represented at the enquiry. The appeal was, by consent, dismissed.)

In *Fraser v. Mudge*,[36] the plaintiff, a prisoner serving a long term of imprisonment, was charged with an offence against prison discipline. A writ was issued on his behalf, seeking a declaration that he was entitled to be legally represented before the hearing of his case by the board of visitors.

The judge at first instance refused to grant the application.

On appeal, their Lordships affirmed the judge's decision.

Pett v. G.R.A. (No.1)[37] was distinguished by Lord Denning on the ground that "disciplinary cases fall into a very different category"[38] and by Roskill L.J. in that in the former case, "there was a contractual or quasi-contractual relationship between the plaintiff and the defendent."[39]

Lord Denning based his decision on expedience. Breaches of prison discipline "must be heard and decided speedily."[40] Roskill L.J. based his decision on similar grounds and Ormrod L.J., in a two sentence judgement, agreed.

It is arguable that legal representation should not be required in the case of a disciplinary committee, created by statute, to deal with prisoners who have forfeited their freedom. The answer is that there are two ways of looking at the prison regime. The first is that the prisoners lose all their rights, upon entry into these places of incarceration, except those which the law allows them to retain. The second is that prisoners keep all their fundamental rights except those expressly taken away by statute. The argument advanced in favour of the non-requirement of legal representation in the prison context savours of the first theory. The author prefers the second. The modern trend of penal jurisprudence has been to regard prisons more as reformatory, than as retributory institutions. Only enough of prisoners' rights should be taken away to achieve this end and no more.

Thus, it is submitted that *Fraser v. Mudge* is not a satisfactory case and should not be followed by local courts, which are not bound by Court of Appeal decisions.[41] Expediency is an insufficient justification for the denial of natural justice.[42] The hearing must be fair. The concept of fairness varies from age to age.[43] But in the modern prison context, how possibly could a hearing be fair without the aid of counsel, considering the obstacles placed before an inmate charged with an offence?

Assuming that the local courts will discard *Fraser v. Mudge* by the wayside, and allow legal representation before a disciplinary hearing before the Commissioner of Prisons, there is still the problem area of the ability of an inmate to correspond with a solicitor.

CORRESPONDENCE

There are provisions for visits by the legal adviser of a prisoner "who is party to proceedings, civil or criminal."[44] But this assumes that a client-solicitor relationship has already been established.

The present rule, rule 47, allows the control not only of the number[45] and contents[46] of the letters which an inmate may write or receive, but also allows control over to whom he may write to or receive letters. The general provision is that

---

[36] [1975] 1 W.L.R. 1132.

[37] [1969] 1 Q.B. 125.

[38] At p.1133.

[39] At p.1134.

[40] At p.1133.

[41] *R. v. Chan Kai Lap* [1969] H.K.L.R. 463.

[42] Roy Jenkins, the British Home Secretary, adopts a contrary view. He curtly dismissed the notion of legal representation before the U.K. system of board of visitors on the basis that to do that would make the administration of the prison service almost impossible – 21st November, 1974, House of Commons Hansard.

[43] *Russell v. Duke of Norfolk* [1949] 1 ALL E.R. 633.
Nagel v. Feilden [1966] 2 Q.B. 633.

[44] r.52 (1).

[45] r.47 (a) (i).

[46] r.47 (b).

he may only contact "his relatives and friends" [47] and this is subject to the above overriding considerations "for the maintenance of discipline and order in the prison and the prevention of crime."[48] (This might seem draconian but it should be viewed in the proper perspective. In Germany, for example, the courts themselves are involved in the control of prisoners' letters).[49]

The effect of rule 47 is that a client-solicitor relationship can be prevented from being established in the first place; all his letters, with any reference to an intention to contact a solicitor, can be censored, as his correspondence might be seen by the very people he was complaining about. The convict could, of course, contact the Superintendent to request permission to write a "special" letter for a "special purpose."[50] But this is up to the discretion of the Superintendent, and that is exactly what it is; a discretion. It may or may not be exercised in the convict's favour.

A practice whereby contact with a solicitor about possible legal proceedings is refused because the executive authority has determined that the prisoner has no good legal claim[51] not only cannot be justified as "necessary"; it cannot be justified at all. It involves the usurption of what is essentially a judicial function. The author does not throw doubt on the good faith of the authorities. But the executive should not indulge in judicial findings. Pro-"constructive censorship" arguments that prisoners are frivolous litigants cannot be substantiated. A case can be struck out as frivolous or vexatious or as disclosing no cause of action (analogus to the "abuse of the right of petition", or "manifestly illfounded" petition in Europe). This can be, and usually is, done long before the case would otherwise have reached the trial judge, had it gone forward for trial. It may be done by a minor judicial authority, but the judicial character, both of the authority and the proceedings, remain.

Thus, the conclusion that can be drawn is that if legal representation is taken to be an essential ingredient of a fair trial before the Commissioner, then this requires redrafting of rule 47.

In *R. v. Golder*[52] somewhat similar provisions in the equivalent Prison Rules in Britain were held by the European Court of Human Rights to be in violation of the European Convention of Human Rights. (Due to the sparcity of judicial statements on the topic of prisoners' rights in Hong Kong and in the U.K., it is submitted that a decision which, though not delivered by an English Court, concerns that country, should be of extreme persuasiveness).

The facts were that, while serving a sentence for armed robbery, Mr. Golder alleged that he was wrongly accused by a prison guard of asault and accordingly, wished to sue him for defamation. By a large majority, the European Court held that the Home Secretary had infringed the Convention by refusing to allow Mr. Golder to contact a solicitor.[53]

The question left unanswered by the court was how far the requirement of respect for correspondence must go in the context of incarceration. It is accepted in the Colony that the control of letters is a necessary adjunct to penal administration. Otherwise, for example, escape plans might be entrusted to the post. But to what extent must this control be allowed? Must every particular act of interference be justifiable on its own facts under the consideration for "the maintenance of discipline and order in the prison

---

[47] r.47.

[48] r.47. In the American case of *Brenneman v. Madigan* 343 F. Supp. 128, the court found no adequate justification for severe limitations on prisoners, one of which was as to correspondence. It would not "confer *carte blache* .... to justify every restriction and deprivation" by involving the rule of "security" or "discipline".

[49] James Fawcett, *Application of the European Convention on Human Rights* at p.195.

[50] r.47 (c).

[51] As one prisoner in England remarked: "You virtually have to prove your case to them, when all you want is to see someone who can tell you if you have got a case or not ... They decide what is important for you and what is urgent *and* act as a judge and jury of your rights". The Times, 20th Feb., 1975.

[52] Guardian Gazette, 29th Feb., 1975.

[53] The Solicitors' Journal 29th Feb., 1975, p.141.

and for the prevention of crime?"[54] Or can the authorities claim a margin of discretion once they have shown that the circumstances involved justify a general interference on the basis of the above listed principles? If it is the former interpretation which is correct, this would mean that prisoners' correspondence would be all but freed from control. The power to read letters and to examine them for contraband would remain, but to be stopped, the letter would actually have to offend one of the listed considerations. Even if the alternative interpretation is the right one, it would seem that it would allow prisoners to correspond freely with solicitors.

This redrafting of rule 47 would mean that the local penal system would be one step closer to rule 19 of the United Nations Declaration of Human Rights[55] which is not binding in Hong Kong, not being a member of the United Nations. But this charter sets an international standard which the Colony should strive to attain.

JUDICIAL REVIEW

An inmate's disciplinary record is a significant factor in the making of any important decision by the officials concerning him. Privileges, like an allowance by the Commissioner of the possession of tobacco,[56] are exactly that. Privileges. And even relatively minor infractions may jeopardise the chances of a prisoner in obtaining them. These are the indirect consequences behind the punishments prescribed. But is the Commissioner's decision final? Should there not be a right of recourse to the courts?

In *R. v. Institutional Head of Beaver Creek Correctional Camp ex parte Mac Caud,*[57] a decision of the Ontario Court of Appeal, this question was in issue. The Canadian court addressed itself to the "somewhat bald" question: "Is an Institutional Head, acting in his disciplinary capacity, amenable to *certiorari* if he acts without jurisdiction?"

The availability of *certiorari* depends on the nature of the power itself, and not the nature of the office held by the person exercising it. If the power is judicially or quasi-judicially exercised, the remedy is exercisable. It is not available if the process is administrative. For instance, in the local case of *Re Yeung Lam,*[58] the court refused to grant the order on the ground that power conferred on the Commissioner of the Police to revert a staff sergeant to the post of police constable was purely administrative. To distinguish between an administrative and a judicial act, the Canadian Court held that "the proper test to be applied is to ask whether the proceedings sought to be reviewed have deprived the inmate wholly or in part of his civil rights in that they affect his status as a person as distinguished from his status as a convict. If the application of this test provides an affirmative answer, in arriving at that decision, the institutional head is performing a 'judicial' act".[59]

Though this decision is not binding on the local courts, the author submits, in the absence of authoritative decisions in England or Hong Kong on this point, that this Canadian case should be of highly persuasive authority. If the process is deemed to be judicial or quasi-judicial, the Full Court in *The District Judge of Hong Kong ex parte the Attorney General*[60] has concluded that the prerogative writ *may* be issued in the prisoner's favour where there has been an error of jurisdiction, or where a tribunal given reasons for its decision and those reasons are wrong in law, to correct an error of law where revealed on the face of an order or decision, or irregularity, or abscence of, or excess of jurisdiction.

A procedural difficulty stemming from the fact that the Prison Rules do not lay down any requirement that the disciplinary committee must put down their reasons

---

[54] r.47.

[55] "Everyone has the right .... to seek, receive and impart information and ideas through any media and regardless of frontiers".

[56] r.25 (1).

[57] (1969) 2 D.L.R. (3d) 545.

[58] [1969] H.K.L.R. 454.

[59] at p.550.

[60] [1956] 40 H.K.L.R. 260.

in writing, can be conveniently sidestepped, thanks to Hogan C.J. in *R. v. Chee Quan Lim and another.*[61] Feeling that it would be capricious if the Full Court were to hold "that when reasons are reduced to writing they can be inquired into and where erroneous, *certiorari* may flow, but if they are expressed orally, then *certiorari* is not available", the Chief Justice felt that it would be "consistent with logic and common sense" to require the tibunal in question to complete the "record" by stating their reasons. As what precisely constitutes the record has not been precisely determined in decided case,[62] his Lordship gave it an extended scope.

This is consistent with *R. v. Chertsey Justices, ex parte Franks*[63] where an oral decision was treated as a record, though this decision was, in fact, much criticised at that time.[64]

If legal representation were allowed at the disciplinary committee stage, counsel's notes of the oral reasons could be treated, as the court did in *Chee Quan Lim and another,*[65] as part of the record.

Thus, it seems that it is only when an excess of jurisdiction has been alleged that additional evidence is allowed. If the prisoner in question relies on an error on the face of the record, he is bound by it, and cannot rely on additional evidence to show the error.[66]

But the courts will not allow the writ to be used to bring up a decision for rehearing. It cannot be employed as the cloak of an appeal in disguise. It is a discretionary remedy, exercised at the pleasure of the courts. The prisoner cannot insist on it being issued.

PUNISHMENTS JUDICIALLY REVIEWABLE

There are seven forms of punishments that can be imposed in the local prisons for breaches of discipline.

a) Separate confinement on a punishment diet for a period not exceeding seven days.[67]
b) Separate confinement for a period not exceeding 28 days.[68]

The Ontario Court of Appeal in *Beaver Creek Correctional Camp ex part Mac Caud*[69] decided that alteration of the local or the nature of the confinement does not affect the civil rights of an inmate.[70] Thus, the above two forms of separate confinement are non-reviewable by a court though the author notes with regard to the latter form of punishment, that a federal court in the United States has ruled that solitary confinement for a period exceeding fifteen days "is plainly cruel and unusual punishment as judged by present standards of decency."[71] This is not binding on the local courts but it is hoped that they will take this rather humanitarian American approach into account if a case of this form reaches them.

The basis of the court's classification of judicial and adminsitrative decisions is that those decisions affecting "liberty" and "personal security" are judicial while those affecting the "place and manner" of the confinement are administrative. But the fallacy of this argument is that a change of the locale of the confinement, from an ordinary cell, to the dreaded "hole", drastically affects the qualitative nature of the confinement. Liberty should not be viewed as an "all or nothing" proposition; graduations of institutional freedom exist after the denial, by incarceration, of liberty in its traditional sense.

The Canadian court's classification of separate confinement as administrative is also suspect on another basis. Since the court considers a decision on corporal

---

[61] [1963] H.K.L.R. 866.

[62] *Hung Wong-shi v. Yeung Say-ying* [1959] H.K.L.R. 278. Tucker L.J. in *Baldwin & Francis v. Patents Appeal* Tribunal [1959] A.C. 633 at 687.

[63] [1961] 2 W.L.R. 442.

[64] 77 L.Q.R. 157.

[65] [1963] H.K.L.R. 866.

[66] *R. v. The District Judge of Hong-Kong, ex parte the Attorney-General* (1956) 40 H.K.L.R. 260. per Hogan C.J. at 270.

[67] r.63 (1) (a).

[68] r.63 (1) (b).

[69] (1969) 2 D.L.R. (3d) 545.

[70] At p.551.

[71] *Sostre v. Rockefeller* 312 F. Supp. 863 at 871, per Motley J. .

punishment as judicial because of its impact on the personal security of a convict, it follows that punishment of separate confinement can also be justified as judicial on this ground. In the former it is physical personal security which is threatened; in the latter, psychological.

c) Forfeiture of remission for a period not exceeding one month[72].

By section69(1), on admission to prison, an inmate is credited with the full amount of remission he is able to earn and this is deducted from his total sentence.[73] The date arrived at is recorded as the earliest date of discharge and the date his total sentence expires is the latest date of discharge.[74]

The court drew a distinction between "statutory" remission and "earned" remission, under the Canadian Parole Act. The only difference in the Statute suggesting such a distinction is that statutory remission "shall" be credited, and earned remission "may" be credited; the former is mandatory, the latter discretionary. If this is the true basis of the distinction, then the Hong Kong Prisons have a system of statutory remission, as rule 69 (d) (i) is cast with the imperative word "shall".

The court was inclined to find that this was a judicial action, as "forfeiture would entail the prolongation of the period of confinement beyond the time for which the inmate has been sentenced less the statutory remission with which he is entitled to be credited,[75] in that extent it would affect his liberty".

d) Forfeiture of privileges no greater than three months.[76]

The Court held this to be administrative.[77]

e) Corporal Punishment

This can be awarded under rule 64(1) for mutiny, incitement to mutiny or gross personal violence against an officer of the Prisons Department. It is amenable to the jurisdiction of the courts. It is "punishment inflicted upon the person . . . as opposed to punishment of the person' which affect "the civil rights of an inmate to personal security."[78]

There are two other forms of punishment in Hong Kong which the court in *Beaver Cree k* did not address itself to:–

f) "Deprivation of earnings or part thereof."[79]

g) "Deduction from earnings of the cost of any Government property lost, or wilfilly damaged or destroyed by the prisoner."[80]

But bearing the judicial rationale behind the case in mind, as to whether the punishment affects the convict's status as a person as distinguished from his status as an inmate, then it seems the two forms above stated can be administratively classified.

This means that the majority of the forms of sentences which may be imposed, are left to the expertise of the administrators.

CONCLUSION

Throughout this enquiry, a single theme pervades; the presence of substantial obstacles in the path of an inmate, preventing him from conforming to acceptable standards of behaviour and, when judged, on the vaguest of articulated criteria, or even no criteria at all, to vindicate his rights.

Prisons are "total institutions", designed to be retributory, deterrent and reformatory. It follows that the purpose of incarceration is inconsistent with the notion of gaols as free societies.The

---

[72] r.63 (1) (c).
[73] r.69 (1) (d).
[74] r.69 (1) (d) (ii).
[75] At p.551.
[76] s.63 (1) (d).
[77] At p.551.
[78] At p.551.
[79] r.63 (1) (e).
[80] r.63 (1) (f).

Prisons Department must have the authority to abridge some rights of the inmates to achieve the ends desired.

But as the then Attorney General stated on the first reading of the Prisons Bill in the Legislative Council, "criminals sent to prison are entitled to be humanely treated while undergoing their sentences"[81] as well.

Inmates are an insular minority and lack the power to effectuate legislative reform. To put it bluntly, there is a danger they might become "slaves of the State". To lean too hard on the side of the gaoler would result in the forfeiture of all the captives' personal rights.

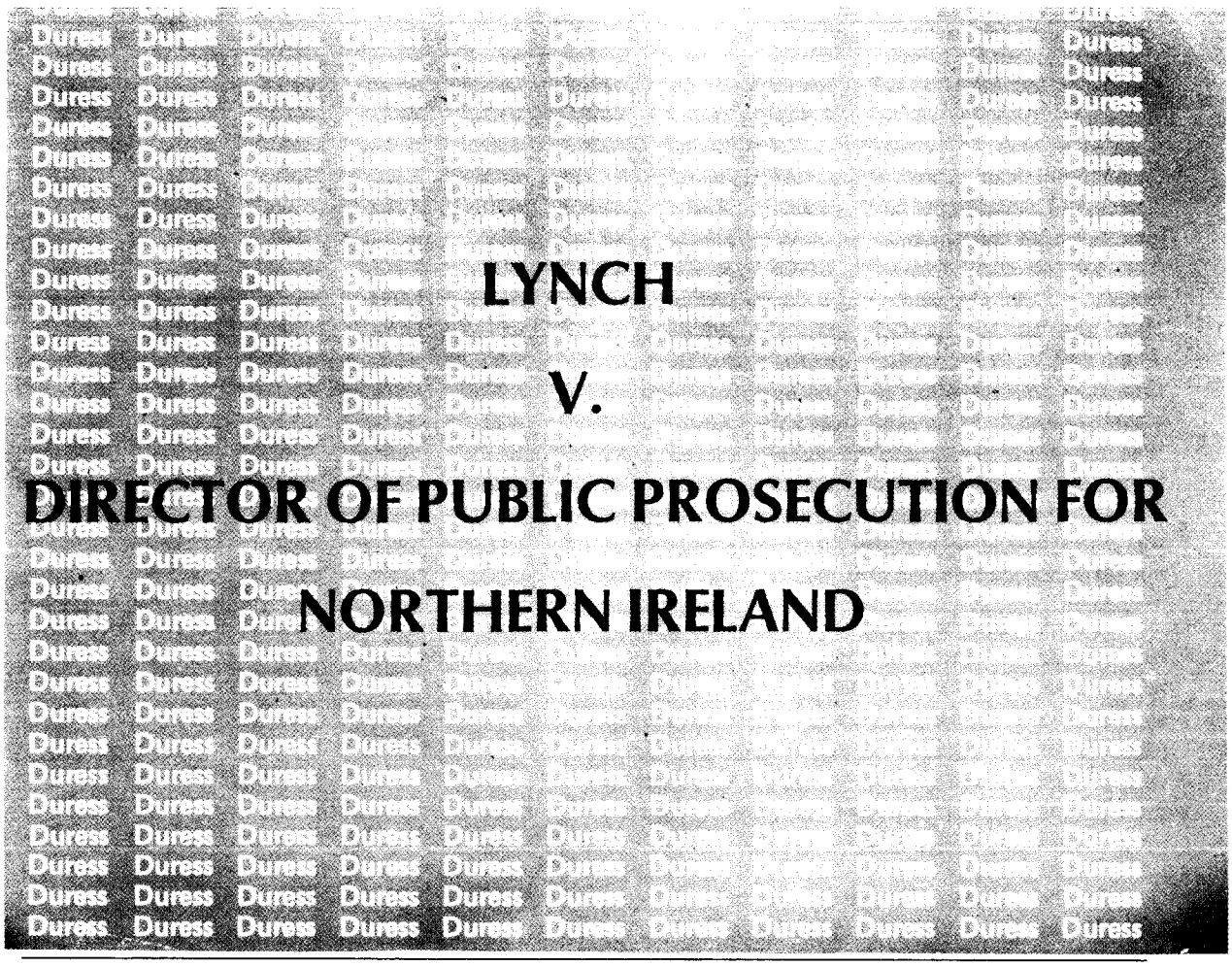
This should not be taken to be a condemnation of jail administrators in the Colony. They are faced with the task of establishing a system which must serve multiple and often conflicting purposes: to punish, to deter, to rehabilitate, to maintain discipline, to promote staff morale and to gain immate respect.

These cannot always be reconciled, and, in conclusion, the author opts in favour of the captives. With improvement optimistically in sight, it is hoped that the local gaols will move one step beyond being "lawless agencies."[82]

---

[81] H.K. Legislative Council Hansard 1954.

[82] "The Prison as a Lawless Agency" (1972) Buff. L. Rev. 799.



Clarence Cheng Che Kit

INTRODUCTION

A is threatened by B that unless he helps B to kill C, he himself will be killed. On a charge of murder of C, should the defence of duress be available to A?

The question is not easy to answer. It involves not only legal principles but also moral and policy considerations. This is the type of question facing the House of Lords in *Lynch* v. *Director of Public Prosecutions for Nothern Ireland.*[1]

The law relating to the defence of duress to a criminal charge is not well developed and remains vague and unsatisfactory. There are only few cases in which the defence is raised and its nature, elements, limit and scope have not been clearly determined. Lord Edmund-Davies declares that "the questions certified in the present appeal have never hitherto been considered here (the House of Lords) and, as far as I am aware, have never even been the subject of obiter dicta."[2] Though the opinion of their Lordships is not unaminous, it is fortunate enough that the highest court of the judicial hierarchy has the opportunity to examine the various aspects of the defence authoritatively in the present appeal.

The Facts And The Decision

The incident occurred in 1972 during the turmoil in Northern Ireland. Joseph Lynch was summoned to a house in which three men armed with rifles and automatic guns instructed him to hijack a car and later to drive it. One of the men was Sean Meehan, a well known member of the

[1] [1975] 1 All E.R. 913.

[2] *Ibid.*, at 954.

Irish Republican Army and a ruthless gunman. Lynch did accordingly and drove the men to a garage where the three killed a police constable. The accused then drove the killers back to the house. Lynch was convicted of murder as an aider and abettor by Gibson J. and a jury in June 1972. "The verdict of the jury shows that they were satisfied that the appellant participated actively in an enterprise with knowledge that his disobedience of the gunman's instructions would cause him to be shot immediately."[3] The trial judge ruled that the defence of duress was not available in a charge of murder and did not leave the issue to the jury.

Lynch appealed against conviction. The Northern Ireland Court of Criminal Appeal[4] upheld the conviction stating unaminously that as a matter of law the defence is not available to a principal in the first or second degree charged with murder. However, their Lordships expressed the opinion that on the facts there was a clear issue of duress and gave leave to appeal.

In the House of Lords, it was held by a majority that the defence of duress was open to a person accused as principal in the second degree in a charge of murder. Lord Morris of Borth-y-Gest, Lord Wilberforce and Lord Edmund-Davies allowed the appeal and ordered a new trial while Lord Simon of Glaisdale and Lord Kilbrandon delivered dissenting judgments dismissing the appeal.

The Judgments

There are two points of law of general public importance before the House. However, the controversy centres around the first point of law and the second point[5] is not dealt with at length. This paper will limit its discussion to the first point of law, viz.,

> "On a charge of murder is the defence of duress open to a person who is accused as a principal in the second degree (aider and abetter)?"

The majority launch an extensive review of the defence of duress in criminal law. Lord Morris approaches the defence from the standpoint of justice. After an examination of authorities, his Lordship considers duress as a possible defence in such a case and that "both general reasoning and the requirements of justice lead me to this conclusion."[6]

Lord Wilberforce expresses the opinion that "I find no convincing reason, or principle, why, if a defence of duress in the criminal law exists at all, it should be absolutely excluded in murder charges whatever the nature of the charge;"[7] and that "to admit the defence in such cases involves no departure from established decisions."[8]

After a systematic examination of the law, Lord Edmund-Davies comes to the conclusion that "I find myself unable to accept that any ground in law, logic, morals or public policy has been established to justify withholding the plea of duress in the present case."[9]

While the House of Lords decides that duress is open to a principal in the second degree to murder, the question whether it is also available to a principal in the first degree is left open. Lord Wilberforce expressly states that "I would leave cases of direct killing by a principal in the first degree to be dealt with as they arise."[10]

---

3 *Per* Lord Morris, *Ibid.*, at 917.

4 Lowry C.J., Curan L.J. and O'Donnell J.; 27th June 1974, unreported.

5 The second point is:
"Where a person charged with murder as an aider and abettor is shown to have intentionally done an act which assists in the commission of the murder with knowledge that the probable result of his act, combined with the acts of those whom his act is assisting, will be the death or serious bodily injury of another, is his guilt thereby established without the necessity of proving his willingness to participate in the crime?"
This question arose out of the hearing in the Court of Criminal Appeal and led O'Donnell J. to deliver a dissenting judgment on this issue. In the House of Lords, all their Lordships, except Lord Wilberforce who did not consider this point at all, express their approval of the reasoning of the majority in the Court of Criminal Appeal delivered by Lowry C.J. that it is not necessary for the prosecution to prove this additional 'intention' to participate in the crime. This is in line with authority: *Callow* v. *Tillstone* (1900) 83 L.T. 411 and *Johnson* v. *Youden* [1956] 1 All E.R. 300. When a person has knowledge (a) of the essential facts of the principal offence, and (b) that his own act will give assistance or encouragement to the commission of the offence, the person is thereby liable as a secondary party.

6 [1975] 1 All E.R. 913, at 924.

7 *Ibid.*, at 927.

8 *Ibid.*, at 929.

9 *Ibid.*, at 956.

10 *Ibid.*, at 930. However, it seems that his Lordship is willing to extend the defence to such a case. *Ibid.*, at 927. On the other hand Lord Morris contended that "It may be that the law must deny such a defence to an actual killer, and that the law will not be irrational if it does so." *Ibid.*, at 918.

The dissenting judgments of Lord Simon and Lord Kilbrandon are based on the argument that duress is a type of necessity, which was held to be no defence to a charge of murder in *Dudley and Stephens.*[11] Their Lordships maintain that there is the whole weight of opinion excluding the defence of duress to murder and that to allow the defence will overturn the consensus for centuries. Their Lordships also disapprove the distinction made by the majority as to principal in the first degree and principal in the second degree. Lord Simon mentions the social evils of allowing the defence and considers that the extension of this branch of the law, being closely related to public policy, should be left to the Parliament. Lord Kilbrandon refers to the undesirability for the judges to create a new defence to murder and change the law without wide consultation.

Each of their Lordships' judgments needs close perusal. Before dealing with the question of duress as a defence to murder, this paper will first review the previous authorities and trace the development of the defence. The elements of duress and its juridical basis will also be discussed so as to enable a better understanding of the defence. This will pave the way to the discussion of the reasoning of their Lordships' judgments and their examination of principles, policies and authorities relating the question of duress and murder.

DEVELOPMENT OF THE DEFENCE OF DURESS

Early Authorities

Lord Wilberforce asserts that "a defence of duress is known to English law . . .the defence is admitted in English law as absolving from guilt."[12] Well known writers, such as Smith and Hogan,[13] Granville Williams,[14] share the same opinion that duress is a general defence. There is a whole line of cases allowing the defence of duress. The early cases show that some form of treason is excusable on ground of duress. In the *Oldcastle's case*[15] cited by Hale,[16] the accused, being charged with treason in supplying victuals to rebels, was acquitted because the act was done under the threats of the rebels. In the direction to jury by Lee C.J. in *M'Growther,*[17] the existence of the defence was admitted: "the only force that doth excuse is a force upon a person and present fear of death."

Crutchley [18] was an important decision in which the defence of duress was clearly and firmly established in the common law. The accused was acquitted of a charge of malicious damage because he had been compelled by a mob to strike a blow at a threshing machine. However, in *Tyler and Price* [19] Lord Denman C.J. said:

> ". . . the law is that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind ... the apprehension of personal danger does not furnish any excuse of assisting in doing an act which is illegal."

On the face, the statement seems to exclude the defence of duress. Yet the observation must be read as applying to the murder charge then being tried and the particular facts[20] of the case. Indeed the case should be decided on the ground that there was on evidence no threats of death or serious bodily injury and that duress

---

[11] *Per* Lord Simon, *Ibid.*, at 936:
". . . the instant appellant can, I think, only succeed if *R.* v. *Dudley and Stephens* (1884) 14 Q.B.D. 273 is overruled." In *Dudley and Stephens* three men and a cabin boy got into an open boat after the sinking of the Mignonette. Without food and water for many days, the two accused killed the boy and the three men fed on the boy's body. Four days later they were rescued. The two accused was charged with murder and the jury returned a special verdict on the findings of fact. Relying on these facts, the court found the accused guilty.

[12] [1975] 1 All E.R. 913, at 927.

[13] Smith and Hogan *Criminal Law* (3rd ed. 1973) p. 164.

[14] Granville Williams *Criminal Law: The General Part* (2nd ed. 1961) p. 751.

[15] (1419) Hale: *Pleas of the Crown,* Vol. 1, p. 50.

[16] Hale drew a distinction between acts done in time of war or rebellion and acts done in peace time. He said that duress can excuse even treason in war time but in peace time the fear of death will not excuse treason, murder or robbery. It is submitted that such a distinction between war and peace is of no application in modern society.

[17] (1746) Fost, 13.

[18] (1831) 172 E.R. 909.

[19] (1838) 173 E.R. 643 at 645.

[20] The two accused were members of an armed gang under the leadership of a lunatic named Thom. Thom shot a constable's assistant who came to arrest him and the accused helped to throw the wounded man into a ditch where he died. They tried to excuse themselves on ground of duress but were convicted of murder as principals in the first degree.

was not available to persons who voluntarily joined in a conspiracy and later being forced to commit crimes.[21]. Thus, Lord Denman C.J.'s observations is, with respect, too widely stated and not necessary for the decision.

Authorities Allowing The Defence

There are plenty of cases in which the defence of duress is allowed. In *A.G.* v. *Whelan*,[22] the Court of Criminal Appeal in Ireland quashed a conviction of receiving stolen goods on the ground that the defence of duress should have been available to the accused but excluded by the trial judge.

In *Purdy*[23] the fear of death excused a British prisoner of war charged with treason in having assisted in German propaganda in W.W.II. *Subramaniam* v. *Public Prosecutor*[24] admitted duress as a defence to a charge of possession of ammunition. The defence is also available to a charge of arson *(Shiartos)*,[25] larceny pursuant to a conspiracy *(Gill)*[26], and larceny contrary to section 26(1) of Larceny Act 1916 *(Bone)*.[27] *In Kray*,[28] one of the accused, Antony Barry, being charged as an accessory before the fact to murder, was acquitted on the ground of duress. In the most recent authority prior to the present appeal, *Hudson and Taylor*,[29] the defence was extended to a charge of perjury. Widgery L.J. summed up the English case law by stating that "it is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal)." Decisions from other jurisdictions referred to by their Lordships concerning the defence to a charge of murder will be considered later.[30]

The Criminal Codes

The Criminal Code Bill Commission 1879 had prepared a draft code in which compulsion[31] was recognized as a defence subject to limitations. Section 23 provided that:

> "Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission of any offence other than high treason ...murder, piracy, offences deemed to be piracy, attempting to murder, assisting to rape, forcible abduction, robbery, causing grievous bodily harm and arson ..."

However, the draft code was not enacted and had no effect on the common law. The criminal codes of Canada,[32] New Zealand[33] and India[34] follow the same line in restricting the availability of duress from specified offences. On the other hand, the American Law Institute's Model Penal Code[35] excludes the plea of duress from no criminal charge. Moreover, the Law Commission[36] in its Working Paper No.55 recommends that the defence of duress should be available to all offences.

THE ELEMENTS OF DURESS

Lord Simon defines duress as "such fear, produced by threats, of death or grievous bodily harm, if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it."[37] It is submitted that the

[21] Granville Williams, *op. cit.* fn. 14 p. 759. See also the discussion of fault in "The Element of Duress" below.

[22] [1934] I.R. 518.

[23] (1946) 10 Jour of Crim. Law 182.

[24] [1956] 1 W.L.R. 965.

[25] (1961) unreported, cited in *Gill* [1963] 2 All E.R., 688.

[26] [1963] 2 All E.R. 688.

[27] [1968] 2 All E.R. 644.

[28] (1969) 53 Cr. App. Rep. 569
This case is much discussed in their Lordships' judgments and due examination will be made in the context of duress and murder.

[29] [1971] 2 All E.R. 244.

[30] The South African case of *State* v. *Goliath* [1972] 3 S.A. 1 and the Australian cases of *Brown and Morley* [1968] S.A.S.R. 467 and *Hurley and Murray* [1967] V.R. 526.

[31] "Duress" and "compulsion" are used synonymously.

[32] *The Criminal Code of Canada, s. 17.*

[33] *New Zealand Crimes Act, s. 24.*

[34] *Indian Penal Code, s. 94.*

[35] *American Law Institute's Model Penal Code,* Section 2.09.

[36] Law Commission *Working Paper No.55: Codification of the Criminal Law, Defences of General Application* para. 25.

[37] *Lynch* v. *D.P.P.* [1975] 1 All E.R. 913 at 931.

definition correctly states the law. His Lordship goes on to express doubts as to the various constituents of the defence.[38] It is important to consider the elements of the defence because they have direct bearing on the applicability of the defence to a particular case.

Fear Or Threats?

The usual formulation of duress always includes threats. However, on the facts of the present case, the accused was not threatened overtly by the terrorists. It was only his belief that if he disobeyed he would be shot. The Court of Criminal Appeal regarded such belief as sufficient to ground duress:

> "The constraint ....can be implied, as well as express, and, once there is evidence that A has somehow caused B to fear for himself or his family, it is a question of fact whether the reasonable possibility of this having occurred has been disproved by the Crown."[39]

As long as there is fear, it is unrealistic to insist that there must be overt threats. This means an extension of the law to cover situations where the circumstances[40] impose threats.

Existence Of Threats

Since the court look at the belief of Lynch, the test of existence of such fear produced by threats employed by the court is a subjective one. This means that the existence of threats is tested by reference to the particular accused's own belief. The court in *Hudson and Taylor* required the threat to be "effective to neutralise *the will of the accused* at that time."[41] The Canadian Criminal Code[42] and the New Zealand Crimes Act[43] provide the defence "if he (the accused) believes that the threats will be carried out." On the other hand, an objective approach is taken by the American Model Penal Code,[44] that the threat should be such "which a person of reasonable firmness in his situation would have been unable to resist."

It is also argued that the reasonable man test can prevent the undue extension of the defence by providing that the plea is available only when a reasonable man will submit to the threats. However, it is submitted that the subjective test should be employed because the defence is a concession to human infirmity in time of peril and the question is whether the accused in fact believes the existence of threats in that particular situation. Moreover, the test of reasonableness may be difficult to apply since it is hard to set up a standard of 'reasonable' reactions of a human being toward particular circumstances.

Kinds Of Threats

It is submitted that the threats should be of death or serious personal injuries. It was held in *M'Growther* [45] that a threat of injury to property was no defence. Williams argues that there should be a balance of harms so that "a sufficiently serious threat of property must excuse a sufficiently minor crime."[46] Such an approach, as rightly pointed out by Howard,[47] put the

---

[38] *Ibid.*, at 931 "whether the fear induced by threats must be of death or grievous bodily harm, or whether threatened loss of liberty suffices .... whether the threats must be of harm to the person required to perform the act, or extends to the immediate family of the actor, or to any person."

[39] *Per* Lowry C.J., quoted by Lord Edmund-Davies, Ibid., at 947.

[40] For example, as in the present case, the terror-ridden country of Northern Ireland, with violent members of the I.R.A.

[41] [1972] 2 All E.R. 244 at 246 emphasis added.

[42] *Op.cit.*, fn. 32.

[43] *Op.cit.*, fn. 33.

[44] *Op.cit.*, fn. 35.

[45] (1746) Foster 13. The Duke threatened the accused to burn down the house and drive off the cattle.

[46] Granville Williams, op.cit., fn. 14 p.756

[47] Howard *Australian Criminal Law* (2nd ed. 1970) p. 415.
O'Regan, in "Duress and Murder" (1972) 35 M.L.R. 596 suggests two reasons against the balance-of-harm concept: the 'sorry history of the doctrine of proportionate response in self-defence and provocation' and secondly 'if the will of the accused is overborne by threats it is beside the point to ask whether the harm done is commensurate with the harm threatened.' The Law Commission (*Working Paper No.55*) takes the same view, saying in addition that the concept cannot operate satisfactorily where the offences involved are of an entirely different character.

emphasis in the wrong place because the problem in duress is not what the accused did but whether when he did it he was acting under threats. Moreover, if the human instinct of self-preservation, which Lord Morris regards as "powerful and natural", is recognised as a ground for the defence, the threat that excuses should be a threat against the person. This requirement should be kept strict otherwise the defence may be extended too widely. It is submitted therefore that threatened loss of liberty or anything short of bodily harm should not suffice.

Injury To The Accused Or A Third Person?

Old authorities[48] indicated that only violence to the accused can constitute duress. But the defence should be available to the accused if his immediate kindred is threatened.[49] This is the law in Germany provided by section 52 of the German Penal Code.[50] In *Hurley and Murray*[51] the Supreme Court of Victoria held that threats to kill the accused's *de facto* wife amount to duress.[52] There is no logical reason to object to such an extension. It might be that the defence should be available where the threat points to a complete stranger taken as hostage to be killed if the act is not performed.

'Immediate' And 'Present'

It is obvious that the duress must be operative at the time the offence is committed. Murnaghan J. in *A.G.* v. *Whelan*[53] said:

> ". . . .threats of *immediate* death or serious personal violence . . . the overpowering of the will was operative at the time the crime was *actually* committed."

In *Hurley and Murray,*[54] the defence of duress is available to an accused who, claiming to be under fear, went all the way from Melbourne to Sydney to get a car for the escapees, because his *de facto* wife was held captive. In such a case, the question is not whether the accused is under immediate threats of death (which is obviously not during the travel) but that the threat is only avoidable by the accused's compliance with the demand.

The law extends further in *Hudson and Taylor*[55] when two girls charged with perjury plead duress on the ground that they were threatened by a friend of the accused not to identify the accused at the trial. When they gave evidence in court, the friend reinforced his threat by his presence in the public gallery. The recorder directed the jury that the threat was not 'present and immediate' at the time the girls perjured themselves. Quashing their convictions, the Court of Appeal (Criminal Division) held that the immediateness and the presence test was satisfied when the defendant's will was neutralised at the material time. It is very clear that at the time of the perjury the girls are fully protected by the court.[56] Widgery L.J. stated the law.[57]

> "When, however, there is no opportunity for delaying tactics, and the person threatened must make up his mind whether he is to commit the criminal act or not, the existence at that moment of threats sufficient to destroy his will ought to provide him with a defence though the threatened injury may not follow instantly, but after an interval."

---

[48] Hale, 1 P.C. 52: "actual and inevitable danger of his own life." Also in *M'Growther*: "force upon the person."

[49] Edwards: "Compulsion, Coercion and Criminal Responsibility" 14 M.L.R. 297 at 304: "Many a man who regards his own personal safety as of little consequence will be subjected to the most extreme stress of mind if confronted with a threat to skill or seriously injure his wife or child."

[50] *German Penal Code, s.* 52.

[51] [1967] V.R. 526.

[52] Smith J. goes so far that one requirement of dures will be "under a threat that death or grievous bodily harm will be inflicted unlawfully upon *a human being* if the accused fails to act." *Ibid.*, at 543.

[53] [1934] I.R. 518 at 526 emphasis added.

[54] *Hurley and Murray* [1967] V.R. 526. The charge was being accessory after the fact to an escape from gaol. Hurley was convicted because the jury found no duress as a matter of fact. Murrary was convicted because of his voluntary assistance to the convicts.

[55] [1971] 2 All E.R. 244. This decision is applied in New South Wales in *Williamson* [1972] 2 N.S.W.L.R. 281.

[56] The threat could not be executed immediately though the learned judge was of the opinion that it "could be carried out in the streets of Salford the same night." *Ibid.*, at247.

[57] *Ibid.*, at 247.

Although this extension meets with certain criticism,[58] it is submitted that the law moves in the right direction. In terms of potential effectiveness a threat is just as irresistable whether its execution is 'immediate' and 'present' or some time in the future. Lowry C.J. correctly points out that "the question is not when the threats are made, but whether they overbear the will of the accused at a material time."[59]

Any Fault By The Accused?

In order that the defence is available, the accused should not be at fault on his part, either in failing to take a reasonable opportunity to escape or to seek police protection, or in placing himself in a position or joining in a conspiracy in which he may be subjected to pressure.[60] In *Hudson and Taylor* [61] Widgery L.J. refused to take the issue of failure to seek police protection as a rule of restriction because the police could not always be able to supply effective protection.[62] In *Hurley and Murray*[63] the majority held that Murray could not rely on duress because his association with the whole enterprise was voluntary. Such restriction was referred to as 'both good law and good sense.'[64] These two points, however, do not arise in the present case[65] though they are important qualifications to limit and control the defence of duress.

Burden Of Proof

It is well settled in *Gill*[66] and in *Bone*[67] that the evidential burden is on the defence to raise the defence at first instance. Once the defence is set up, the legal onus of proof is on the Crown to negative the defence.

THE JURIDICAL BASIS OF DURESS

Although it should be noted at the outset that "not every morally exculpatory circumstance has a necessary bearing on these legal ingredients *(mens rea* and *actus reus)* of crime",[68] the two theories of the basis of the defence merits consideration. Adoption of one theory rather than the other will determine the nature of the rules necessary to establish the defence.

Theory One: Superimposition On Intention And Act

Under this theory, the basis of the defence is an excuse to the intentional commission of an act. The victim of duress has made a conscious choice and intentionally though reluctantly commits the crime; and such defence excuses him from guilt. G. Williams wrote:[69] "True duress is not inconsistent with act and will as a matter of legal definition, the maxim being *coactus volui.*" It is an excuse for behaviour and not a justification of it, since one is not justified to commit a crime because of threats.[70]

Theory Two: Negation Of Criminal Intent

It is argued that the victim of duress has his will overborne to the extent that he does not have the necessary criminal intent, i.e. the threats affect *mens rea* and negative the formation of intention necessary to constitute the offence, whatever its nature, with which he is charged.

[58] Regarding the statement by Widgery J. the editor in 121 N.L.J. 238 asked: "If however he could at any time make up his mind in regard to it (the act of perjury), can duress ever be pleaded even where a threat is 'present and immediate'?" This stimulated the discussion of the case by Zellick, "Perjury and Duress" *Ibid.*, at 845 and by Goodhart, "Perjury and Duress – a Rejoinder" *Ibid.*, 909.

[59] Cited by Lord Edmund-Davies, [1975] 1 All E.R. 913 at 940.

[60] See Ashworth, "Reason, Logic and Criminal Liability" [1975] L.Q.R. 102. Also O'Regan, "Duress and Criminal Conspiracies" [1971], Crim. L.R. 35.

[61] [1971] 2 All E.R. 244.

[62] *Per* Widgery L.J. *Ibid.*, at 247 "We recognise the need to keep the defence of duress within reasonable bounds but cannot accept so severe a restriction on it."

[63] [1967] V.R. 526.

[64] *Per* Winneke, C.J. & Pape, J. *Ibid.*, at 533. Similar restriction is found in Codes e.g. New Zealand Crimes Act. s. 24.

[65] It may be argued that when Lynch had hijacked the car and before being summoned for the second time to the house by the terrorists he had an opportunity to seek police aid. As regards the second restriction, Lord Wilberforce notes in passing that "... coercion would not avail one who, e.g. took orders from the head of the gang of which he was a voluntary member."

[66] [1963] 2 All E.R. 688

[67] [1968] 2 All E.R. 644

[68] Turpin, "Duress and Murder" [1972 A] C.L.J. 205

[69] *Op.cit.*, fn. 14 p.751

[70] There is a detailed discussion in Hall *General Principles of Criminal Law* (2nd ed. 1960) p. 288 post. The learned writer comments that the allocation of coercion (duress) to either excuse or justification is difficult. If coercion is a justification, the coercer should not be liable on general principle, but he is liable. On the other hand, excuse implies complete exculpation, no matter what harm was committed. But, according to the learned writer the coerced person is guilty of murder in Anglo-American Law. Such analysis, it is submitted, suggests the desirability to open the defence to all charges so as to fit in the juridical basis of duress as an excuse.

The usual authority cited for such proposition is the unsatisfactory decision in *Steane* in which the threat is said to negative the criminal intent of the charge.[71]

It is submitted that Theory One should represent the true basis of the defence. This is well supported by cases, by the criminal codes in other countries which speak of the commission of an offence under compulsion, and by academic writing. If Theory Two is accepted, it would made duress an effective defence to every charge, including murder, in which the formation of a criminal intent is a necessary element in the definition of the crime[72]. Duress will, strictly speaking, not be a defence of a crime as such because according to Theory Two the threats which deprived the accused of the necessary *mens rea* would prevent the elements of a crime requiring guilty intent to be proved at all so that no crime is committed. Hence a person under duress must be acquitted of murder because the threats will prevent the formation of malice aforethought and there is in effect no murder.

Their Lordships in the present House express unaminous favour of Theory One in the judgments. Lord Edmund-Davies, regarding the plea as 'confession and avoidance', approves the view of Lowry C.J. in the Court of Criminal Appeal:

> " ... the defendants Whelan, Gill, Subramaniam, and Hudson intentionally received stolen goods, stole, took possession of ammunition and committed perjury, even though the reason that they did so was that their respective wills were overborne by threats."[73]

Lord Morris regards "what is done will be done most unwillingly but yet intentionally." Lord Wilberforce points out the nature of duress:

> "duress *per minas* is something which is superimposed on the other ingredients which by themselves would make up an offence, i.e. on an act and intention .... the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime."[74]

Lord Simon and Lord Kilbrandon also adopt the view that duress does not affect intention, though their Lordships regard the defence not as an excuse from guilt but only a factor in mitigation.

DURESS AS A DEFENCE TO MURDER

For Or Against?

Duress is often said to be no defence to murder. Hale set down the rule:

> "Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; *for he ought rather to die himself, then kill an innocent.*"[75]

---

[71] [1947] 1 All E.R. 813. The accused was charged under the Defence Regulations with doing an act likely to assist the enemy with intent to assist the enemy. Lord Simon comments on the case that "the offence charged is difficult to classify as to its *mens rea*." It is submitted that the case decided only that a guilty intent cannot be presumed and must be proved and that where the crime charged involves proof of specific intent it is necessary to prove that the accused has that intent. Duress can at most affect the specific intent of the accused. Though the accused may not have the intent to assist the enemy (a specific intent) because of duress, he did have the intent to do an act likely to assist the enemy, viz. to broadcast.

[72] Williams argues that if duress is said to negative the will (the mental accompaniment of voluntary movement) it would negative an act, which by definition requires will; if it negatives the existence of an act it would negative crime, which with rare exceptions requires an act. Op. cit. fn. 14 p.751.

[73] [1975] 1 All E.R. 913 at 951.

[74] *Ibid.*, at 926.

[75] Hale: 1 P.C. p.51 The ground given by Hale was that the writ of *de securitatae pacis* was available to protect the people. This is unrealistic because even today the law cannot afford adequate protection to everybody.

Other textbook writers[76] of criminal law agree with the same restriction though Lord Wilberforce thinks "that great writer (Hale) .... would recognise that legal thought and practice has moved far since his time."[77] There is no judicial authority which explicity excludes the defence to murder. Lord Denman C.J.'s observation in *Tyler and Price*[78] is already said to be too widely stated and that decision could be reached on other grounds. There are *obiter dicta* in *Hudson and Taylor*[79] that duress is not available to murder as a principal, leaving the question of secondary parties open. The court in *Whelan*[80] also said *obiter* that "murder is a crime so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification."

How do their Lordships deal with these statements? Lord Wilberforce regards heinousness as a word of degree and states that heinousness itself is not a good reason to reject the defence. It only means that "a defence of duress in relation to it should be correspondingly hard to establish.[81] Recognition of degrees of heinousness means that there may be degrees of involvement in homicide. His Lordship draws a distinction between a secondary party and the actual killer, holding that the defence may be admitted to lesser degree of murder. Lord Morris, too, distinguishes degrees of participation in crime and adopts a similar distinction between principal in the second degree and principal in the first degree. His Lordship agrees that the general rule that duress is no defence to murder is not absolute and not intended to "cover all cases of accessories and aiders and abettors."

Such a distinction on degree of participation is difficult to draw, the reasons being, in the words of Smith & Hogan,[82] "the contribution of the secondary party to the death may be no less significant than that of the principal." It is the author's submission that no distinction can be drawn between principal and secondary party (so far as liability is concerned) for the purposes of allowing the defence. There is no reason to suppose that the secondary party plays lesser role in bringing about the *actus reus*, Lord Simon and Lord Kilbrandon also do not recognise any such distinction.

Lord Edmund-Davies points out that the emphasis on heinousness of crime may be based on public policy that duress, being a defence easy to raise but hard to rebut, should not be available to a murderer. However his Lordship contends, which this writer respectfully agrees, that "the risk of a miscarriage of justice by a guilty man being acquitted is no greater in murder trials than in those other cases in which the plea of duress is, on the authorities, clearly available, despite their gravity, for example, in attempted murder[83] where an intent actually to kill is an essential ingredient.[84] It is an anomaly that the defence is not available to murder, which can be committed even the intention is not to kill but only to inflict grievous bodily harm.[85] Thus the argument that the gravity of murder bars the defence is not a convincing one. G. Williams wrote:[86]

> "the proper approach is not to exclude crimes by name but to consider in concrete detail what the accused has done and what harm he was trying to avoid."

This is a valid suggestion that the law should not *a priori* exclude the defence to murder, though the balance-of-harm concept, as already mentioned, is of doubtful value if regarded as a rule of law.

In disallowing the defence, Lord Simon

---

[76] For example, *Kenny's Outline of Criminal Law* (19th ed. 1966) at p.71 "It certainly will not excuse murder." Smith & Hogan, op.cit. fn. 13, p.166 "The authorities generally agree that the defence is not available to a murder charge." *Perkins on Criminal Law* (1957) p.845 approving the statement in *State* v. *Nargashian* 26 R.I. 299 (Hall & Glueck *Cases on Criminal Law and its Enforcement,* p.281) Homicide is "a consummated act, irreparable after commission, and hence to be guarded against by a stricter rule."

[77] [1975] 1 All E.R. 913 at 927.

[78] See fn. 20.

[79] [1971] 2 All E.R. 244.

[80] [1934] L.R. 518 at 526.

[81] *Per* Lord Wilberforce, (1975) 1 All. E.R. 913 at 926.

[82] Op. cit. fn. 13 p. 166.

[83] His Lordship is referring to *Fegan*, an Northern Ireland unreported case, in which it was held that duress was available on a charge of aiding and abetting in attempted murder.

[84] [1975] 1 All E.R. 913 at 953.

[85] The intention in murder is discussed in *Hyam* v. *D.P.P.* [1974] 2 All E.R. 41.

[86] Op. cit. fn. 14 p. 761.

speaks of the social evils of "inscribing a charter for terrorists, gang-leaders and kidnappers." It is submitted that his Lordship takes the question too seriously. To allow the defence does not mean an acquittal of the murderer. It is still a question of fact for the jury whether the elements of duress are present to constitute the defence. In *Williamson*[87] an Australian case not cited in the present House, the court allowed the appeal against conviction on a charge of accessory after the fact of murder, holding that the defence should have gone to the jury. At the retrial, in which the issue of duress was of course left to the jury, the accused was found guilty.

Both Lord Simon and Lord Kilbrandon recognise duress as a mitigating factor in punishment and, in the case of murder where the sentence is mandatory, as a ground for declaring diminshed responsibility reducing murder to man-slaughter. It is submitted that the stigma which attaches to even a 'technical' conviction of murder is not neutralised by a reduced sentence. Is it fair to impose a life stigma of conviction on those who commit a crime under the threats of death? Does the criminal law achieve anything by convicting?[88] Lord Morris will answer these questions in the negative because justice demands the victim to be excused. "It could not be just to lay it down that in no circumstances, whatever they were, could duress ever be a defence to a charge of aiding and abetting murder."[89] Such an approach should be adopted since it is only fair that the accused be allowed a chance to raise the defence of duress. To exclude the defence as a matter of law to a charge of murder in every case is, it is submitted quite unjust.

The issue of judicial functions is raised by Lord Kilbrandon. His Lordship does not allow the defence because to do so "your Lordships would be for the first time declaring the existence of a defence to a criminal charge which had up to now by judges, text writers and law teachers throughout the common law world, been emphatically repudiated."[90] With respect, his Lordship's statement presumes that the law does not allow duress to a murder charge. This is the precise question to be determined by the Lords, and, as this writer endeavours to show, no such exclusion is found in judicial decisions. Lord Wilberforce correctly asserts that "it would be our duty to accept such a law if it existed, but we are also entitled to see if it does."[91]

Lord Simon argues that the defence of coercion provided in section 47 of the Criminal Justice Act 1925 expressly excludes treason and murder; duress, being a concept similar to coercion, should also not be available to murder. Similar provision is found in Hong Kong in section 100 of Criminal Procedure Ordinance (Cap. 221) but the absence of cases tends to show that this statutory defence is merely an unnecessary anomaly. Lord Edmund-Davies regards the provision as an incomplete statement of the common law. While 'coercion' is not defined in the statute, it is submitted that it is a wider defence than duress and the intention of the Parliament is to impose certain restrictions on its application.[92]

Similar argument is raised by Lord Kilbrandon that the draft Criminal Code 1879 and the penal codes of other jurisdictions, like Canada and New Zealand exclude murder from the defence of duress. It is sufficient to point out that all these provisions have no effect on the common law. Moreover, there are other provisions, e.g. American Model Penal Code and German Penal Code, in which the defence is avialable to all crimes.

---

87 [1972] 2 N.S.W.L.R. 281.

88 The common objectives of the criminal sanctions – deterrance, retribution, reform – are not achieved.

89 [1975] 1 All. E.R. 913 at 923.

90 *Ibid.*, at 943.

91 *Ibid.*, at 925.

92 This is the view preferred by Smith & Hogan, op. cit. fn. 13 p. 167. G. Williams, op. cit. fn. 14 at p. 765, points out that "the opinion expressed in the debate on the Bill was that coercion included moral coercion." Coercion could not be equal to duress because there is no certainty as to the crimes excluded from duress and the Parliament would not have set out to resolve this uncertainty for married women while leaving it in existence for everyone else.

Dudley And Stephens: Authority Against Having The Defence?

Lord Simon regards duress as "a particular application of the doctrine of necessity" and Lord Kilbrandon finds the difference between duress and necessity "narrow and unreal." Both argue that since the defence of duress is similar to the defence of necessity, it is not available to murder because *Dudley and Stephens*[93] held that necessity is no defence to murder.

It is submitted that there may indeed be a difference between necessity and duress – a necessity situation is not brought about by a person while in a duress situation there is a person who is responsible for creating the situation and to whom criminal liability can be attached. Even acknowledging the similiarity of duress and necessity, it is also submitted that the *ratio decidendi* of *Dudley and Stephens* is obscure and is of doubtful value as a precedent. It can be argued that the case decided nothing about necessity because no necessity existed.[94] Moreover, though the accused were convicted of murder, they were not hanged but only imprisoned for six months; and the court knew that they would not be hanged.[95] The court may also be influenced by the revolting fact of cannibalism in addition to murder and the difficulty to answer the question "Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured?"[96] It seems that the decision depends entirely on its peculiar facts.

The main criticism of the case is that it proceeded on moral considerations. Lord Coleridge C.J. observed that "To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it" and accepted that "we are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy."[97] Is such an approach acceptable *today?* Must the law enforce the same standards as those of morality? The answer is to be found in the judgment of Rumpff A.R. in *State* v. *Goliath,*[98] a clear decision that duress can constitute a complete defence on a charge of murder. Lord Wilberforce and Lord Edmund-Davies approve the decision and regard it as a persuasive authority to allow the instant appeal, though Lord Simon remarks that the case only decided on Roman-Dutch law. A long passage of the judgment is quoted by Lord Wilberforce[99] as a statement of principle:

> "In the application of our criminal law in the cases where the acts of the accused are judged by objective standards, the principle applies that one can never demand more from an accused than that which is reasonable ...that which can be expected of the ordinary, average person in the particular circumstances. It is generally accepted ...that for the ordinary person in general his life is more valuable than that of another ...Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person."

The statement is self-explanatory and correctly expounds the modern standard of our criminal law. In effect, it will be unsatisfactory to rely on *Dudley and Stephens* to exclude duress from murder. The law should not proceed

---

[93] (1884) 14 Q.B.D. 273 See fn. 11 for the facts.

[94] The argument bases on one passage of the judgment delivered by Lord Coleridge C.J. *Ibid.*, "They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act." See also Hall, op. cit. fn. 70 at p.434.

[95] G. Williams *op. cit.* fn. 14 p.741.

[96] To allow a man to make such a choice may involve people taking the law in their own hands. Stephen points out in his *Digest of the Criminal Law*, p.10, that "great danger would be involved in admitting a principle which might be easily abused." He argues that "an error on the side of severity is an error on the safe side."

[97] (1884) 14 Q.B.D. 273 at 287.

[98] [1972] 3 S.A. 1 This case is not cited to the Court of Criminal Appeal.

[99] [1975] 1 All E.R. 913 at 929.

on the assumption that the ordinary man is a hero who will sacrifice his life. An ordinary man under threats of death may well think:[100]

> "If I doe it not I die presently; if I doe it, I die afterwards; therefore by doing it, there is time of life gained."

Kray: Authority For Having The Defence?

In *Kray,*[101] one of the accused, Anthony Barry, was charges as an accessory before the fact of murder. The case against him was his having carried a gun from one place to another knowing that one of the accused intended to use it in a projected murder. He pleaded duress on ground of his fear for the safety of himself and his family if he disobeyed the Krays. He was acquitted and Widgery L.J. said in the judgment:

> "We are further satisfied that Barry had a viable defence on the basis left to the jury....that by reason of threats he was so terrified that he ceased to be an independent actor."[102]

There can be no distinction, as contended by Lord Wilberforce and Lord Edmund-Davies, between the act of Barry who under duress carried the murder weapon to the scene of the crime and the act of Lynch who under duress drove the terrorists to and from the murder scene. The defence available to Barry should also be available to Lynch. Lord Kilbrandon tries to distinguish the defence of Barry as available to an accessory who is not present at the commission of the crime. It is submitted that such subtle distinction is not valid because "a party who is absent may in fact played a more significant role in the killing than one who is present"[103] and the defence should be available to both. The fact that the defence of Barry was uncontested by counsel, as pointed out by Lord Simon, does not affect it as an authority. While there is no judicial authority excluding the defence to murder, *Kray* can be relied on as an authority for the extension of the defence to secondary parties of murder.

A Dissenting Judgment Gains Favour

In *Brown and Morley* [104] both accused were charged with the murder of a woman. Brown was alleged to be a principal in the second degree in covering up Morley's approach to the victim's bedroom by coughing. Brown claimed that he was acting under the compulsion of Morley. The court by a majority held that duress cannot excuse a person who performed an act which he intended to be in furtherance of a proposed murder.[105] The strong dissenting judgment of Bray C.J.,[106] which favoured the opening of the defence in such a case, is accepted with approval by Lord Morris, Lord Wilberforce and Lord Edmund-Davies. The argument is that "authorities which say or appear to say that duress is not a defence to murder generally do not necessarily prove that it is not a defence to any conceivable type of complicity in murder, however minor."[107] Therefore, when "the threatened harm was so grave and imminent, and the connection of the act demanded under threat with the likely, or indeed the actual death of the victim so remote, that the interests of justice are better served by allowing the defence than by leaving the prisoner

---

100 Hobbes, *Leviathan* (1651), pt.2, at 157. Cited by O'Regan, "Duress and Murder" 35 M.L.R. 596 at 603.

101 (1969) 53 Cr. App. Rep. 569.

102 *Ibid.*, at 578.

103 J.C. Smith, "A Note on Duress" [1974]. Crim. L.R. 349.

104 [1968] S.A.S.R. 467.

105 The majority think that formidable difficulties would attend any concession that duress is available to some forms of complicity in murder. "How grave and imminent must the threat be before it can be treated as sufficient excuse? How proximate to the killing must the acts before they are incapable of being excused? Is there to be a relative standard between sufficiency of threats and proximateness of acts?" However, it is submitted that the difficulties which might be experienced in defining duress as a defence to murder cannot, of themselves, consitute a good reason to deny the defence altogether.

106 Bray C.J. gives a heading to his judgment: "the question of the legal effect of duress as a defence to a charge of minor participation in murder."

107 [1968] S.A.S.R. 467 at 493.

to the uncertain possibility of a mitigated punishment."[108] Such an approach is relied upon by the majority of their Lordships to allow the instant appeal.[109] Taking this statement of principle together with *Kray* there is a strong case in allowing the defence of duress in aiding and abetting murder.

CONCLUSION

For the purpose of this appeal, Lord Morris and Lord Wilberforce distinguish between the aider and abettor and the actual killer, allowing the defence to the former and leave the question open for the latter. It has already been suggested by the writer that such a distinction could not be drawn between different modes of participation so far as liability to conviction and punishment is concerned. Thus the writer submits that the decision to allow the present appeal should not be based on such a distinction between principal in the second degree and principal in the first degree. The issue to be decided is essentially whether it is *just* in principle to extend the defence to murder in the light of present authorities.

While Lord Simon and Lord Kilbrandon also cannot draw such a distinction, their Lordships regard that the law has to draw a line somewhere and accordingly allow the defence to every charge except murder. It is submitted that such arbitrary categorisation by the name of the crime has no valid ground. It must be noted that their Lordships are not called to decide whether a conduct is or is not a crime (in this case the law has to draw a line) but to decide the availability of a defence. Smith rightly observed that "to allow a defence to crime is not to express approval of the acts of the accused person but only to declare that it does not merit condemnation and punishment.[110] It is the spirit of the law -- fairness and justice -- which allow the defence to an accused. It is a matter for the jury, the reasonable men, to decide on the particular facts of the case whether there is duress. If there is as a matter of fact, justice demands such person be excused. The whole basis of the defence, as the Law Commission puts it, is "its recognition of the infirmity of human nature, the impossibility of requiring ordinary people to react in the manner suggested by Blackstone, and consequently the futility of imposing penalies and in the circumstances."[111]

Regarding the authorities, it has been pointed out that there is no existing decision excluding the defence to murder and reliance cannot be placed on *Dudley and Stephens* in view of its obscure *ratio* and the changed standard required by the criminal law, as expounded in *State* v. *Goliath.* The availability of the defence to Barry in *Kray* and the logical judgment of Bray C.J. in *Brown and Morley* both point to allowing the defence. To conclude, their Lordships "must reflect contemporary views of what is just, what is moral, what is humane"[112] and answer the certified question: Yes.

The writer ventures to suggest an answer to the issue left open by their Lordships, i.e. whether duress is also available to a principal in the first degree. If it is accepted that there can be no distinction between the principal in the first degree and the principal in the second degree as regard to liability and conviction, and that the defence is available to a principal in the second degree (relying on the present case), then it logically follows that the defence is also available to the principal in the first degree. The whole argument favouring allowing the defence to an aider and abettor can also apply to a principal offender. Once the defence is established, it is hard to find a limit to its availability.

This extension is further justified by the fact that murder can be committed not only with an intention to kill but also an intention to

---

108 *Ibid.*, at 497.

109 This dissenting judgment is also preferred by Howard, *Australian Criminal Law* (2nd ed. 1970) p.412.

110 Smith, *op. cit.* fn. 103 at 352.

111 Law Commission, *op.cit.* fn. 36 para 25.

112 *Per* Lord Diplock in *Hyam* v. *D.P.P.* [1974] 2 All E.R. at 65.

cause grievous bodily harm. Since the difficulty concerns duress and murder only, no one suggests that duress is not available to a person charged with causing grievous bodily harm with intent, under section 17 of Offences Against the Person Ordinance (Cap.212). Then the following hypothetical situation may result:

> Acting under duress, D strikes V with an iron bar. D is charged with causing V grievous bodily harm with intent but is acquitted solely on the ground that he is acting under duress.[113] V then dies of the injury received. D is now indicted for murder.[114] He is convicted because duress is not an available defence to a principal in the first degree of murder.

Is it just that an act and the same act previously held to be excusable would be rendered retrospectively inexcusable by V's death? Why should the defence of duress not be a general one applicable to all crimes? The proper course is, it is submitted, to allow the defence to a principal in the first degree in murder.

POSTSCRIPT

Eight months after this paper was written, the Privy Council held by a narrow majority in *Abbott* v. *The Queen*[1] that the defence of duress was not in law available to a person charged with murder as a principal in the first degree. *Lynch* is distinguished by the majority (Lord Hailsham, Lord Kilbrandon and Lord Salmon) on the ground that it only makes duress available as a complete defence to a person charged as principal in the second degree whereas in the case before their Lordships the person charged is clearly a principal in the first degree. The majority also explain that when Lord Simon and Lord Kilbrandon in *Lynch* said that there was no such distinction they meant that since duress is no defence to murder it should be available to neither a principal in the first degree nor a principal in the second degree.

The majority are also very much worried by the effect of allowing the defence as, reiterating Lord Simon in *Lynch*, "a charter for terrorists, gang leaders and kidnappers." Their Lordships give an example of a man under duress places a bomb in a passenger aircraft and as a result hundreds of people are killed while this man will be acquitted on the ground of duress.

With great respect, the majority do not say why a flat declaration that in no circumstance will the defence of duress be available to an actual killer is good law. In effect, the majority opinion amounts to side-stepping the decision in *Lynch* and to do so without advancing cogent reasons. Most of the argument have already been mentioned by Lord Simon and Lord Kilbrandon in their dissenting judgments in *Lynch*. It is already submitted in the main paper that no distinction can be drawn between a principal in the first degree and a principal in the second degree for the purpose of attaching liability. The "charter for terrorists" argument, used by Lord Simon in *Lynch* and strongly relied on by the majority here, is, with respect, no good reason for denying the defence. It is again pointed out in the main paper that to allow a defence does not mean automatic acquittal of the accused nor the approval of his acts. Indeed, according to Lord Salmon,[2] on the re-trial of Lynch, the jury rejected the defence of duress and he was again convicted of murder. In short, the writer is not convinced by any reason which justifies the automatic exclusion of the defence to a person charged with murder, whether he is a principal in the first degree or a principal in the second degree.

The writer's view is supported by the dissenting judgment in *Abbott* delivered by Lord Wilberforce and Lord Edmund-Davies. Their Lordships point out that the majority thinks "as though the pleas of duress had merely to be raised for an acquittal automatically to follow." The realistic view, as pointed out by their Lordships and with which the writer entirely agrees, is "that the more dreadful the

---

113 It is assumed that the crime is committed and the person is guilty but for the defence.

114 A person can be indicted for murder notwithstanding he was acquitted of wounding with intent to cause grievous bodily harm because before the victim dies, there is no *actus reus* of murder. cf. *Thomas* [1949] 2 All E.R. 662; *Hogan* [1974] 2 All E.R. 142.

POTSCRIPT

1 [1976] 3 All E.R. 140.

2 [1976] 3 All E.R. at 143 d.

circumstance of the killing, the heavier the evidential burden of an accused advancing such a plea, and the stronger and more irresistable the duress needed before it could be regarded as affording any defence."

As regards the distinction between a principal in the first degree and a principal in the second degree their Lordships say "the simple fact is that no acceptable basis of distinction has ever now been advanced." This statement supports the writer's submission, though it seems to the writer that in *Lynch* Lord Wilberforce did use such a distinction for the purpose of allowng the defence to the aider and abettor.

In addition to the example given by the wirter in the main paper, their Lordships also use another example to illustrate that the defence should be available to the actual killer as a matter of justice. The example is worth quoting:[3]

> "D attempts to kill P but, though injuring him, fails. When charged with attempted murder he may plead duress (*R.* v. *Fegan* 20th Sept., 1974 unreported, Belfast City Commission). Later P dies and D is charged with his murder. If the majority of their Lordships are right, he now has no such plea available."

---

3 [1976] 3 All E.R. at 151 f.

UNINCORPORATED

ASSOCIATIONS

Albert Thomas da Rosa, Junior

"In democratic countries, the science of association is the mother of science; the progress of all the rest depends on the progress it has made."

De Tocqueville[1]

INTRODUCTION

Every congregation of human beings grouped together for the pursuit of some common purpose or purposes with rules creating legal rights and liabilities between one member and another and with power to exclude outsiders is an association.[2] Those associations which the law recognises as having a separate existence apart from the individual members are known as corporations.[3] All others are unincorporated associations. Those unincorporated associations that are formed by persons carrying on a business in common with a view of profit are known as partnerships[4] which, though not being a corporate body as such, have been granted certain attributes of a corporation[5] by the Partnership Ordinance. What is left then is a host of associations varying in degrees of formalities when formed and differentiating in size and object – such associations are the subject of this paper.[6]

While the law seems to be evolving towards providing remedies for the little man[7] and controlling the big corporations,[8] it has not yet seen fit to provide rules for these small unincorporated non-profit-making associations as such.[9] Seen in microcosm, each association may be insignificant; taken in macrocosm, however, unincorporated non-profit-making associations transcend all sectors and classes of society and affect every citizen. Their importance lies not in their individual size but in their aggregate quantity.[10]

It is the purpose of this paper to illustrate the inability of the present much neglected law on the subject to cope with the situation and to attempt suggesting some possible solutions. Problems arise mainly either because of the law's reluctance to recognize the informal nature of some associations or the law's failure to recognize the complexities of others.

FORMATION AND REGISTRATION

While the legislature has devised some statutes to enable associations carrying out some specific purposes to be incorporated,[11] it has not yet provided a statute to govern the overall position of unincorporated associations. Further, incorporation under those existing statutes is normally not compulsory.[12] An unincorporated association can be formed rather informally. The only ordinance applicable to associations generally seems to be the Societies Ordinance's requirement of registration,[13] (again subject to exceptions) with a prerequisite of a constitution.[14] This section examines the provisions of the ordinance to see if they provide a sufficient framework for the operations of associations.

The Scope Of The Societies Ordinance

Although the Ordinance calls for the registration of all societies the term "society" has not really been defined in the Ordinance.[15] Under section 27 of the Societies Ordinance, where it is proved that an association is in exist-

1 2 De Tocqueville *Democracy in America* 134 (Bowen ed. 1863) quoted in "Judicial Control of Private Associations" (1962) 76 Harvard Law Review 983.

2 c.f. Martin (ed.), *Daly's Club Law* (Butterworths, 6th ed. 1970). *Yim Wai-tsang* v. *Lee Yuk-har* [1973] H.K.L.R. 1.

3 Gower, *The Principles of Modern Company Law,* (3rd ed. 1969), Chapter 4.

4 Partnership Ordinance (Cap. 38, L.H.K. 1964 ed.) s.3(1). c.f. Ford, *Unincorporated Non-profit Associations* (1959), p.51 citing *Carlisle and Silloth Golf Club* v. *Smith* (1913) 3 K.B. 75 and saying that the acquisition of gain does not make a non-profit association a partnership if it is merely incidental to its proper purpose.

5 Partnership Ordinance. ss. 6, 7, 8.

6 For the purpose of this essay, all associations whose main purpose, as opposed to collateral purpose, is not for pecuniary gain are deemed to be non-profit-making associations.
It should be noted that s.24 of the Inland Revenue Ordinance (Cap. 112, L.H.K. 1975 ed.) will make an association liable for 'profits tax' if more than half of its annual income is from members. This test of profit-making only affects the incidence of taxation and does not affect the rules governing the relations of an association within itself and with others.
For the sake of brevity the subject matter with be referred to merely as associations.

7 For example (a) the Tenancy Tribunal and the Landlord and Tenant (Consolidation) Ordinance (Cap. 7, L.H.K. 1975 ed.).
(b) the Labour Tribunal and the Workmen's Compensation Ordinance (Cap.282, L.H.K. 1974 ed.).
(c) the Small Claims Tribunal Ordinance (Cap.338, L.H.K. 1975 ed.).

8 The Companies Ordinance (Cap.32, L.H.K. 1975 ed.).
The Securities Ordinance (Cap.333, L.H.K. 1974 ed.).

9 The law is borrowed from that governing the relationship among individuals.

10 In 1974-75 there were 2,366 registered societies and 381 societies exempted from registration under the Societies Ordinance (Cap.151, L.H.K. 1964 ed.), *Commissioner of Police 1974-75 Annual Report* p.31 para. 169.

11 For example the Credit Union Ordinance (Cap.119, L.H.K. 1968 ed.) and the Co-operative Societies Ordinance (Cap.33, L.H.K. 1964 ed.).

12 See s. 9 of the Credit Union Ordinance and ss. 3,4 and 7 of the Multi-storey Buildings (Owners Incorporation) Ordinance, (Cap.344, L.H.K. 1970 ed.). Sometimes it is impossible to incorporate, see s.3 of Companies (Prevention of Evasion of Societies Ordinance) Ordinance, (Cap.312, L.H.K. 1964 ed.).

13 Societies Ordinance s.5. For the sake of brevity, the Societies Ordinance will be referred to as the "Ordinance" in this section of the paper.

14 Societies Ordinance s.8(1).

15 Societies Ordinance s.2(1). c.f. *Yim Wai-tsang* v. *Lee Yuk-har* [1973] H.K.L.R. 1 where failure to register makes the association illegal and the court refuses to enforce contracts made to further its purposes.

ence, it shall be presumed that such an association is a society within the meaning of the Ordinance unless the contrary is proved. Thus, the Ordinance covers all associations less those excepted by the provisions therein.

Section 4 of the Ordinance provides that an association shall not be deemed to be established in Hong Kong if it is organized and operated wholly outside Hong Kong and with no place of meeting, no register of members, and no subscription maintained or procured in Hong Kong. The section is couched in such narrow terms that the exception is almost meaningless.

Another exception, which is more substantive, is provided in section 2 (2) of the Ordinance where Scheduled Associations are outside the scope of the Ordinance. Scheduled Associations include certain corporations,[16] partnerships[17] and companies,[18] and the following unincorporated associations:

1) Any pupils' association registered under the Education Regulations.[19] Such type of association does not usually have a comprehensive constitution; nor does it necessarily have any record of membership.
2) Any Lodge of Freemasons regularly constituted under any of the registered governing bodies of Freemasons in the Commonwealth or the Republic of Ireland[20]
3) Any Chinese temple registered under the Chinese Temples Ordinance.[22] Such an association does not have a common fund and its affairs are controlled by a board with a member who has corporate status under the Secretary For Home Affairs Incorporation Ordinance[21]
4) Any Mutual Aid Committee which is approved for the purpose of the Societies Ordinance by the Secretary for Home Affairs or the District Commissioner, New Territories by notice in writing.[23] It is the practice of those having the power of approval to require such an association to adopt a model constitution; although not a very comprehensive one.
5) Any association or group of persons which –
   a) is formed for the sole purpose of recreation or training;
   b) conducts its activities wholly or largely in a Community or Youth Centre; and
   c) was formed with and continues to have the approval of the Director of Social Welfare.[24]

   Such an association usually does not have a comprehensively written constitution and its membership is usually fluid.
6) Any association of which
   a) one or more of the directors, trustees or other office holders; or
   b) the committee or board or other body having the management of the association, is or are incorporated by any Ordinance.[25]

   It seems that this category includes sub-associations of a corporation incorporated by Ordinance. Such sub-associatons may carry out activities in their own name without indicating that they are branches of a corporation.

---

16 See paras. 1, 2, 3, 5, 9 and 10 of the Schedule to the Societies Ordinance.

17 See para. 6 of the Schedule to the Societies Ordinance.

18 *ibid.*

19 See para. 4 of the Schedule to the Societies Ordinance and Education Regulations (Cap.279, A5, L.H.K. 1971. ed.) reg. 71-74. Registration can be completed simply through the application by the supervisor and principal of the school concerned and no particular form is prescribed.

20 See para. 7 of the Schedule to the Societies Ordinance. A similar institution has been held in the Australian case of *Hall* v. *Job* (1952) 86 C.L.R. 641 as not amounting to an association but a branch thereof.

21 (Cap.1044, L.H.K. 1964 ed.).

22 See para. 8 of the Schedule to the Societies Ordinance and the Chinese Temples Ordinance (Cap.153, L.H.K. 1964 ed.).

23 See para. 11 of the Schedule to the Societies Ordinance.

24 See para. 12 of the Schedule to the Societies Ordinance.

25 See para. 13 of the Schedule to the Societies Ordinance.

Though it can be noted that with the exception of 6) above, these unincorporated bodies are formed rather informally, the members may well have involved themselves in tortious liabilities and in such situations the responsible office-bearers may not easily be found. It is therefore submitted that total exemption from registration is not desirable.

Information To Be Registered

In order to comply with the Societies Ordinance, every association will have to apply for registration within fourteen days of formation.[26] Every application must contain the following information as prescribed in the application form: [27]

1) the name and address of the society;
2) the objects of the society;
3) the particulars of persons eligible for membership;
4) the number of members permitted;
5) the titles of office-bearers; and
6) the names and addresses and occupation of the office-bearers at the date of application.

Further, each association has to have a constitution[28] which includes the matters prescribed by rule 5 of the Societies Rules. Societies established solely for religious, charitable, social or recreational purposes, however, may, at the discretion of the Registrar of Societies, be exempted from the provision of a constitution.[29]

The Registrar is under a duty, according to section 9 of the Societies Ordinance, to enter the particulars given in the application form into a register. The register shall be available for the inspection by members of the general public.[30]

Is The Societies Ordinance Adequate?

The Societies Ordinance is primarily a device used by the government to control undesirable associations.[31] As such it is not designed to contain any proviso to alter the position of an unincorporated association in civil law. One side effect of the Ordinance is the provision of a register giving information of the responsible officers of an association to enable an aggrieved person to seek out his defendants. Unfortunately, however, there is no obligation on either the Registrar of Societies or any office-bearers of an association to keep a membership list. More unfortunate still is the fact that there is no duty to give up-to-date information on the particulars of new office-bearers should there be any change.

The requirement of a constitution may have the effect of forcing the members of an association to define their rights and obligations. The framework provided by rule 5 of the Societies Rules, however, only lists out the headings or areas which have to be dealt with in the constitution. No attempt is made to fill in the details and the promoters of an association is left to anticipate all the contingencies that may confront their association in its future vicissitudes. Laymen are apt to be imprecise and promoters of a social club seldom anticipate unhappy differences among the members. A constitution drafted to satisfy the Registrar of Societies is therefore likely to leave many things unprovided for. Associations which are exempted from the requirement of having a written constitution will have to rely on implied terms or long practice to govern the relations of members *inter se*. The duties of an arbitrator or adjudicator would then be more difficult should disputes arise out of those associations.

THE RELATIONSHIP OF MEMBERS INTER SE

When a member sues the other members or committee members of an association on matters arising therefrom, the court will have to decide their relative legal relationship. The court will decline jurisdiction unless the Plaintiff can point to some specific legal interest arising from pro-

---

26 Societies Ordinance s.5(1).

27 See r.2(1) of the Societies Rules and Forms 1 & 2 thereof (Cap.151, A1, L.H.K. 1964 ed.).

28 Societies Ordinance s.8(1).

29 Societies Ordinance ss.5(2), 9(3).

30 Societies Ordinance s.9.

31 See *1968 Hong Kong Legislative Council Minutes* page 615.

perty interests or contractual rights.[32] The reason generally given is that the court will not interfere with these internal matters of social organizations or otherwise the court will be asked to determine a vast number of petty domestic disputes.[33] It is the purpose of this section to examine whether the requirements of these legal interests reflect any appreciation of the nature of modern associations.

Property Interests

A court may intervene in an association's affairs in the absence of contractual relationship among the members if the Plaintiff member can show that there is infringement of his property interests. In some early cases it has been suggested that property interests is the sole ground of action.[34] A member's property rights in an association may arise out of his subscriptions or out of the duties owed to him by the trustees of any gift to the association in which he is one of the beneficiaries. The propriety of each of these two bases is examined below.

1. *Subscriptions*

A member's subscription remains his own property unless he sells it or gives it away as a gift.[35] In the absence of any of the two alternatives, the sum is held by the treasurer of the association as agent or bailee and the member may claim back the sum at any time. If the treasurer is authorised to use the sum as part of the 'common fund' to purchase property, the subscribing member will become a joint owner of the property with other members.[36] If a member is entitled to a share in the common fund because of the existence of a contract, he is also a joint owner of property purchased with that fund.

Given such an interest, the member may ask the court to vindicate his right to enjoying that interest if the majority in the association tries to expel him. Further the aggrieved member may invoke his tortious remedies of assault and battery if the other members try actively to prevent him from gaining access to his property.[37]

Property interest may enable the court to do justice. It is submitted, however, that such an approach, without the finding for contractual rights, may back-fire. A member who has been expelled after due observance of the procedures laid down in the constitution may refuse to sever his share of interest in the common property of the association. Is the court then bound to give effect to his property rights which means reinstating his membership in substance?

2. *Trusts*

As will be explained later, a gift to an association may be interpreted as a gift to the committee members or treasurer to hold on trust for the rest of the members either present or both present and future.[38] Although trusts can be created orally and informally, the duties that ensue are far from simple. A trustee is in a fiduciary relationship with his beneficiaries and the follwoing duties arise:[39]

1) a duty not to permit a conflict of interests;
2) a duty not to take any secret profit;
3) a duty not to misuse confidential information; and
4) a duty to be impartial.

In fact such duties may arise under the principal-agent relationship as well.[40]

On top of these duties, the committee members as trustees also have to perform the following duties:

1) to ascertain the subject matter of the trust;[41]
2) to ascertain who are the beneficiaries

---

32 See *Cameron* v. *Hogan* (1934) 51 C.L.R. 358.

33 *Ibid.*

34 See *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540 at 562 *per* Fletcher Moulton L.J..

35 In the case of a proprietary club, the subscription will be regarded as the consideration provided by the member to the proprietor for the enjoyment of the facilities provided. *Baird* v. *Wells* (1890) 44 Ch. D. 661.

36 See *Morley* v. *Bird* (1798) 3 Ves. 628 where the presumption at law is in favour of joint ownership.

37 c.f. *Stephens* v. *Myers* (1830) 4 C. & P. 349.

38 See p. 80 post.

39 *Bray* v. *Ford* [1896] A.C. 44 at 51 per Lord Herschell.
McPhail v. *Doulton* [1971] A.C. 424.
Re Hayes's Will Trusts [1971] 2 All E.R. 341.

40 c.f. *Bentley* v. *Craven* (1853) 18 Beav. 75.

41 *Hallows* v. *Lloyd* (1888) 39 Ch. D.686.

and in what shares and to distribute accordingly;[42] and

3) to render account to the beneficiaries.[43]

The performance of these latter duties requires the appreciation by the committee members of themselves being trustees. Unfortunately, whether a gift to an association creates a trust or not is usually not determined when the gift first takes effect.[43a] A treasurer will usually not apply to the court for direction when the value of the gift is not too great as to warrant the legal costs. It is only natural for the treasurer to mix the sum of the gift with the common fund in the honest belief that the gift is to be used for the purpose of the association. In so doing he is already in breach of the duty to render account which includes, in the words of Lindley L.J.,[44]

> "(a duty) to give all his *cestuis que trust*, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is."

Further complications may arise upon the dissolution of the association when the donor may not be alive to testify to his original intention. The court may find that the gift is in fact to the treasurer or his successor for the benefit of the then members of the association.[44a] However, by applying the trust fund for the general purpose of the association before dissolution (which includes benefit to new members), the treasurer has committed another breach of trust for not distributing the trust assets to the correct beneficiary.

It is true that in the above example, the treasurer who is usually unpaid is only bound to use such due diligence and care in discharging his duties as an ordinary prudent man may use in the management of his own affairs.[45] It is also true that under section 60 of the Trustee Ordinance Cap. 29 the court may grant relief to a trustee who has acted honestly and reasonably. However, it has been suggested that in its application, the standard required is rather on the more stringent side.[46] The scarcity of cases on trustees' duties with respect to trusts for members of associations makes it more difficult to predict what the court will do should the occasion arises. Cases on other areas of law involving committee members show that the balance does not tilt in their favour.[47]

Contract

If contractual relationship is to be found in the congregation of human beings into an association, each member is supposed to have made a contract with all the other members individually.[48] To find such a contract the court will have to be satisfied that (a) the parties intend to create legal relationship, (b) consideration has been supplied by the promisee who is trying to enforce the contract, and (c) the terms of the contract are agreed to by the parties. The court will have to look for all these factors objectively.

1. *Intention*

The general rule governing the finding for or against an intention to create legal relationship has been said to be that where it is a commercial transaction such intention is presumed to exist; but where the transaction is a domestic or social arrangement no intention to create legal relationship is presumed and the parties alleging its existence will have to adduce evidence to prove it.[49] In purported application of this

---

42 *Harrison* v *Randall* (1852) 9 Hare 397.

43 *Low* v. *Bouverie* [1891] 3 Ch. 82.

43a See p. 80 post.

44 *Low* v. *Bouverie, supra,* at 99.

44a This is the *prima facie* construction preferred in *Leahy* v. *A.G. of N.S.W.* [1958] A.C. 457.

45 *Speight* v. *Gaunt* (1883) 9 A.C. 1

46 Parker & Mellows, *Modern Law of Trusts* (Sweet & Maxwell, 3rd ed. 1975), p. 273.

47 See p. 84 post. Further, it does not seem fair that the honorary trustee should bear the stigma of having breached his trust obligation only to be pardoned from punishment by section 60 of the Trustee Ordinance (Cap.33, L.H.K. 19 ed.).

48 See *Clarke* v. *Earl of Dunravan* [1894] A.C. 59. In the case of the proprietary clubs, the contract is one with the proprietor. See Martin (ed.), *Daly's Club Law* (Butterworths, 6th ed. 1970) pp.2-6.

49 *Balfour* v. *Balfour* [1919] 2 K.B. 571.

principle, an Australian bench[50] unaminously finds that the intention does not exist in the case of a person joining a certain political party. The count's approach can be seen from the following extract from the judgement:

> "(Unincorporated associations) are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but unless there were some clear positive indication that the members contemplated the creation of legal relations *inter se*, the rules adopted for their governance would not be treated as amounting to an enforceable contract."

Further, the court stresses very much the fact that by the political party's constitution members do not have any material gain except their right to vote in the application of the common fund and that, upon the party's dissolution, the members will not get any share in the common fund. It is submitted that branding an association as 'social' does not negative the intention of the parties to be bound by legal relationship. The proper test still remains and should remain whether the 'relationship' among the members is personal or not. If the association is small and the members know each other or will know each other personally then it may be reasonable to say that they do not intend to enter into any legal relationship. However, it seems absurd to say that a person who joins a nation-wide association, which is held out to be for some specific purposes and which is controlled by people whom he does not know personally, will not rely on the binding effect of the constitution which sets out the purpose and proper procedure of doing things. Why is it that a person who is not seeking for private gain and material advantage should be presumed to have no intention to contract for the furtherance of an object which he cherishes? How much more "positive indication" is required?

2. *Consideration*

Like intention to create legal relationship, the doctrine of consideration is a fluid concept. Consideration has been defined as "the price for which the promise of the other is bought."[51] A new member may be said to have provided consideration by his subscription or promise to subscribe to the common fund of the association. This analysis cannot be applicable with equal force to the existing members who are already bound by their contracts *inter se* to pay the subscriptions.[52] The court may easily find the presence of consideration if it wants. Those who are already members may be said to have provided consideration by

1) allowing the new member a right to a share in the existing facilities, or (if no such facilities are provided)
2) allowing the new member to have a say (i.e. vote) in directing the usage of the common fund.

Such consideration may be minute but the court will not look at the adequacy of consideration unless equitable relief is sought.[53]

3. *Terms*

When the court is to enforce a contract it will have to be certain of its terms.[54] It is generally accepted that the written constitution or rules of an association contain the agreed terms.[55] However, as noted above, a comprehensively written constitution is not necessary for

---

50 *Cameron* v. *Hogan* (1944) 51 C.L.R. 358. An Australian case is chosen because there are no English or local authorities on this point.

51 *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge* [1915] A.C. 847.

52 c.f. *Scotson* v. *Pegg* (1861) 6 H. & N. 295, *Shadwell* v. *Shadwell* (1860) 9 C.B. (N.S.) 159. Treitel, *The Law of Contract* pp. 83-86 3rd ed. Stevens.

53 *Bainbridge* v. *Firmstone* (1838) 8 Ad. & E.743.

54 c.f. *Scammell* v. *Ouston* 1941] A.C. 251, *Nicolene* v. *Simmonds* [1953] 1 Q.B. 543. That is to say if the court is satisfied of the other requirements to find for the existence of a contract.

55 *Harrington* v. *Sandal* [1903] 1 Ch. 921 at 926 per Joyce J.: "When the Plaintiff becomes a member ..... he has agreed to be bound by the written contract that is found in the rule."

associations formed in Hong Kong. Thus, besides looking at the constitution the court may also look at the whole circumstances and apply the "officious by-stander test"[56] to include implied terms. Any such implied terms must be both obvious and necessary to give to the transaction such business efficacy as the parties must have intended.[57] The rule that a member who resigns deprives himself of his property rights in his share of the common fund is one such implied term.[58] It has also been suggested that there is an implied term that a member is liable to pay his subscription until he resigns by giving notice to the secretary of the association.[59] It is submitted that such a term is not really that obvious to be implied into the constitution. The normal expectation of a member will be that his term of membership ends when the next subscription is due. A reasonable man would have thought that he can impliedly resign from the association by not paying the next subscription.

4. *Certainty of Terms and Judicial Intervention*

The underlying reason in declining jurisdiction on matters arising from associations is the court's dislike of members' unmeritorious impeachment of the members in the committee for inability in carrying out the objects of the associaiton. Hitherto the court has based its decision on the lack of intention to create legal relationship between the parties. A distinction may be drawn between (a) terms concerning the objects of the association and (b) terms concerning the proper procedure to be followed. While the former type of terms is usually vague and constitutes the court's main objection, the latter does not inherit the vice. It is submitted that the court can still effect its policy by insisting on certainty of terms without resorting to finding against the intention to create legal relationship. One objection to this approach may be found in the argument that in so doing the court will be upholding part of a contract only. However, it is submitted that such approach is not unprecedented.[60]

ABILITY TO ACQUIRE RIGHTS AND PROPERTY

An "association's assets" are generally obtained through subscriptions by members, contracts with third parties, or gifts from various sources. A layman may think that the "association's assets" really exist. At common law, however, an association is not a legal person and as such it cannot hold any property or acquire any rights.[61] What interests that are believed to "belong to the association" is at law vested in the members constituting it. The disability of associations to hold property or acquire rights *eo nomine* has led to many analytical and theoretical problems which if taken up by a disgrunted member may make the life of the other members, especially those in the executive committee, very difficult. This section attempts to illustrate the incompatability of this aspect of the law with the attitude of the layman and the inconveniences it creates.

Subscriptions

The incidence of the duty to pay subscriptions is one arising out of contract. The court has generally accepted the notion that subscriptions once paid are irrecoverable upon resignation of the member[62] if a contract is found in the first place. The resigning member's contribution in the common fund is to stay in the common fund and is to be shared by the remaining members.[63] Further, a new member is entitled to an equal share in the common fund formed by the subscriptions.[64] To achieve these results, the court has to put in artificial implied terms into the contract of association.

---

56 *Shirlaw* v. *Southern Foundries* [1939] 2 K.B. 206 at 277 affirmed in [1940] A.C. 701.

57 *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108 at 137.

58 *Re Sick and Funeral Society of St. John's Sunday School* [1973] Ch. 51.

59 *Halsbury's Laws of England* (4th ed.) 1973 Vol. 6 Para. 230 citing *Labiuchere* v. *Earl of Wharncliff* (1879) 13 Ch. D. 346 at 354.

60 c.f. *Steadman* v. *Steadman* [1974] 3 W.L.R. 56, *Nicolene* v. *Simmonds* [1953] 1 Q.B. 543, *Goldsoll* v. *Goodman* [1915] 1 Ch 292.

61 *Leahy* v. *A.G. of New South Wales* [1959] A.C. 457.

62 *Re Sick and Funeral Society of St. John's Sunday School* [1973] Ch. 51. This is the situation when a contract is presumed. If, however, the court cannot find a contract, the subscription will remain the member's property absolutely. See page p. 75 supra.

63 *Ibid.*

64 *Ibid.*

1. *Vesting of Property on Resignation*

A member who joins an association is deemed to have agreed that upon his resignation, his share in the common fund at the time of his resignation will accrue to all those who will still be members of the association at that time. As the agreement can only be made with the already existing members, those memebrs who join after the resigning member's entry to the association cannot enforce this agreement.

2. *Vesting of Property in Future Members*

In order to benefit future members as well, the resigning member must be deemed to have contracted with the existing members to keep an offer open to be accepted by whoever shall join the association in future. The terms of the offer will include

a) the offeror will leave to each future member a share of the offeror's interest at the time of the future member's entry into the association. The share offered will be calculated by dividing the offeror's share in the common fund at the time of the new member's entry by the number of members at that time plus the new member; and

b) should the offeror resigns, his share in the common fund at the time of his resignation will accrue to all those who will still be members of the association at that time.

The consideration to be provided by the future members will be (a) their joining the association and paying the subscriptions and (b) their agreeing to keep an offer open in the same terms.

It can be noted at once that such analysis is artificial and cumbersome. Few persons joining an association will ever think of contracting to keep an offer open; however, it is the only possible way where the court can help to keep the common fund of an association intact even after some of the members resign. Further problems may arise if the common fund is used to purchase interests in land e.g. a lease of more than three years, or equitable interests. Such interests cannot be disposed of except by writing.[65] Such formal requirements can never be satisfied by implied terms or implied offers.

Contracts

Upon the same principles that an association as such is not a legal entity, an association cannot enter into any contract. In *Woo Lam of the Hong Kong Garments Manufacturers Association* v. *Tong Yee*[66] Charles D.J. mapped out the position of contracts made in the name of an association. A contract purportedly made in the name of an association only binds those who actually participate in the acts of making the contract; the contract does not confer any right or interest or impose any obligation upon any other member of the association except where agency, assignment, or trusts relationships can be established.

1. *Agency*

A contract made by a member of an association does not necessarily indicate that he is making the contract on behalf of the association — he still retains his private capacity. The contract must be purportedly made on behalf of the members before they can enforce it.[67] Future members of the association cannot have given their authority at the time when the contract has been made and thus, no agency relationship can possibly be created between the contracting member and the future members. Also, the future members cannot ratify the act in future because the contract must be purportedly made for them before they can ratify subsequently.[68] Thus relying on agency principles the contract made by a member of an association as such can at best benefit the existing members. If the court construes the

---

65 Law Amendment and Reform (Consolidation) Ordinance (Cap.23, L.H.K. 1971 ed.) s.6. Here it is necessary to distinguish between a disposition of land which needs only a memorandum in writing and disposition of existing equitable interest where the transaction itself needs to be in writing.

66 *Woo Lam of the Hong Kong Garments Manufacturers Association* v. *Tong Yee* (1956) D.C.L.R. 11.

67 *Pole* v. *Leask* (1863) 33 L.J. Ch. 155.

68 *Jones* v. *Hope* (1880) 3 T.L.R. 247 at 251 per Thesiger L.J.: "If there is one legal principle better established than another it is this, that nobody can ratify a contract purportedly to be made by an agent except the party on whose behalf the agent purported to act."

contract as being made for all the existing members jointly and if one of those members resigns subsequently, the remaining members cannot enforce the contract because they all have to act jointly.[69]

2. *Assignment*

In order to take the benefit under a contract made before their entry into the association, future members will have to prove that there is a valid assignment of the contractual rights to them. Although it is true that there may be an implied term of assigning such contractual rights to the future members and such an assignment binds the outgoing members and the incoming members at the suit of the latter, the outsider who is the promisor under the contract from which the benefit is claimed may not be bound to the incoming members directly. The assignment cannot be a valid statutory assignment under section 9 of the Law Amendment and Reform (Consolidation) Ordinance because

a) the assignment itself being implied into the contract of association is not itself in writing; and
b) the new members only acquires part of the interest of each existing member.

In such circumstances, the assignment can only take effect as an equitable assignment and the assignee (new member) will have to join his assignor either as plaintiff or defendant before he can claim against the original promisor.[70] If the assignor resigns, it may well be impossible for the furture members to re-locate him if legal actions have to be taken. In such cases, the members of an association will find it very difficult to enforce their contractual rights against a third party.

3. *Trusts*

When a member makes a contract with a third party, he may do so as the trustee for the members of the association. This proposition is attractive in that the legal interest will vest in the trustee only and in case legal action is brought, the other members will not be necessary parties to it. Attractive though this proposition may seem, it is submitted that the method is not workable. If the member acts as trustee for the present and future members, the rule against perpetuities[71] will work against him. If he holds the interest on trust for the present members only, new members will be unable to benefit from it because under section 6 (1) (c) of the Law Amendment and Reform (Consolidation) Ordinance, the disposition of the present members' equitable interest to the future members has to be in writing which is usually lacking in association transactions. Further discussion of other difficulties in applying the trust concept to associations will appear in the next section on gifts to associations. Given all these difficulties, an enthusiastic member may wish to facilitate the association by contracting personally instead of as agent or trustee for the other members. However, as noted above, after the contracting member's resignation, there will be no person in the association competent to enforce the agreement unless there is valid assignment. Further, the contracting member runs the risk of being personally liable under the contract.

Gifts

It is not uncommon for people who are sympathetic to the objects of an association to donate money to it. Past members of the better established associations may wish to leave property to their associations at their death. All

---

69 *Rodriguez* v. *Speyer Brothers* [1919] A.C. 59 at 103 per Lord Atkinson: "It was laid down ..... long ago ..... that it is necessary that all persons with whom a contract is made should join in an action at law to enforce it." It is submitted that in most cases, the incidence is joint because it will be too artificial to divide the consideration by the number of consenting members and assert that the consideration is provided severally.

70 *Performing Right Society* v. *London Theatre of Varieties* [1924] A.C. 1 at 14.
It will be noted that contractual rights as such are legal choses in action as opposed to equitable choses in action. See *Torkington* v. *Magee* [1902] 2 K.B. 427 and thus the assignor has to be joined.

71 Perpetuities and Accumulation Ordinance (Cap.257, L.H.K. 1970 ed.).

these attempts will be faced with the hard fact that an association as such cannot at law hold any property. If a gift is made to an association *eo nomine* it seems that the donor's intention will probably be to benefit the group enterprise or to further the purpose of the association. However, it has been held that the *prima facie* construction for such a gift is that it is one to the members of the association as at the date of gift absolutely.[72] The validity of this *prima facie* construction and the difficulties involved in the other possible interpretations are examined below.

1. *The Purpose Trust Theory*

If a gift is interpreted as one for the purpose of an association it must take the form of a trust. It has been laid down in *Morice* v. *Bishop of Durham* that "every other trust (i.e. non-charitable trust) must have a definite object. There must be somebody, in whose favour the court can decree performance."[73] Emphasising the necessity of the court's ability to decree performance it has once been thought that apart from very few, narrow and anomalous classes of purpose trusts — commonly called the horse, tomb, and mass cases — a purpose trust must fail.[74] In the recent case of *Re Denley's Trust Deed* [75] Goff J. distinguishes between "purpose or object trusts which are abstract or impersonal" and which will be void on the principle set out above, and a trust which "though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals." The latter type of "purpose trust" is held to be outside the mischief prohibited by the *Morice* v. *Bishop of Durham*[76] case because the individuals who are intended by the donor to be benefitted may enforce the trust even though they are not entitled to any legal or equitable interest in the settled property. It is submitted that the same analogy is applicable to gifts to unincorporated associations *eo nomine*.

Like any other trusts, a purpose trust which may be be saved by the principle in *Re Denley's* case[77] must still comply with the three certainties rules before it can be effectual. The first certainty is the certainty of words which means that the court must be able to construe from the words used by the donor that a trust obligation is imposed on somebody. [78] If the gift is simply one expressed to be for an a association without the name of the trustees being included, the court may either hold that there is no trust because there is no trustee or alternatively the court may hold that on construction of the whole gift it must have been the donor's intention to make the office-bearers of the association trustees of the gift property. Whichever interpretation will be preferred by the court is uncertain. It seems that the balance depends on the circumstances of each case and the court may take into consideration the effect of not finding for a trust and the amount of the gift and then subject all these considerations to the overriding objective of giving effect to the donor's intention.[79] The certainty of subject matter or property [80] does not present any special problem in the case of associations. The third requirement of certainty, that of objects [81] does, however, require further consideration. In situations salvaged by the principle in *Re Denley's* case,[82] the object of the trust will be identified with the purpose of the association. However, as indicated above a written constitution is not an absolute necessity for all associations. Further, even if there is a written constitution, the object clause may be drafted in terms vague so that the court is unable to ascertain the purpose to enforce the trust and the gift will still fail.

---

72 *Leahy* v. *A.G. of N.S.W.* [1959] A.C. 457.

73 *Morice* v. *Bishop of Durham* (1805) Ves. 522. Charitable trusts have special rules applicable to them. For a detailed discussion see *Tudor on Charities*, (Sweet & Maxwell, 6th ed. 1967). It must be noted at this juncture that it is very difficult to determine whether the gift is to take effect as a charitable trust especially when the gift is construed as one on trust to a semi-charitable institution. See Plowright, "Public Benefit in Charitabe Trusts" (1975) 39 Conv. 183.

74 *Re Astor's Settlement Trust* [1952] Ch. 534.

75 *Re Denley's Trust Deed* [1969] 1 Ch. 373.

76 See note 73, *supra.*

77 See note 75, *supra.*

78 *Re Adams and the Kensington Vestry* (1884) 27 Ch. D. 394.

79 *Ibid.*, see also *Re Robertson* (1975) 10 S.A.S.R. 189 (South Australia).

80 *Sprange* v. *Barnard* (1789) 2 Bro. C.C. 585.

81 *Morice* v. *Bishop of Durham*, note 73, *supra.*

82 See note 75, *supra.*

Besides satisfying the three certainties rules, the trust will still have to overcome the hurdle that the gift must not infringe the rule against inalienability.[83] If the object of the trust is identified with the object clause of the assocaition as at the date of gift, the trustee may be unable to dispose of the property within the perpetuity period and the gift will be void.[84] If however, the purpose of the trust is to be identified wih the object of the association from time to time, the gift may then be valid if the purpose of the association may be changed by the members.[85] It has been suggested by Lord Denning[86] that the members may change the constitution and hence the objects of the association at any time if they act in concert even if the original constitution prohibits the change. However, in view of the Societies's Registrar's discretion to refuse any amendment of the constitution,[87] such a proposition may not be applicable in Hong Kong.

2. *Gift on Trust for Both Present and Future Members*

An alternative interpretation of gift to an association *eo nomine* will be that the gift is to benefit both the present and future members. In order that there should be an immediate gift, the gift must be interpreted as on trust for the beneficiaries which include the future members.[88] The validity of such a trust will have to satisfy the three certainties rules as mentioned in the above sub-section. The requirement of certainty of objects again presents certain problems and the validity of the gift will depend on whether the trust is a fixed trust or discretionary trust. If it is of the fixed trust type, which is usually the case because a gift to an association *eo nomine* will be interpreted as to the beneficiaries equally, the gift will have to satisfy the *Broadway Cottages* test[89] which requires that the whole range of objects is ascertained or capable of ascertainment at the date when the trust comes into existence[90] as otherwise the trustee cannot distribute the property. As an association cannot predict who may join them in future, the gift will fail for uncertainty of objects. If the gift gives the trustee a discretion as to which members of the association are to be benefitted and in what sum,[91] the gift will not be void for uncertainty of objects because a different and more relaxed test is applicable. The court in *McPhail* v. *Doulton*[92] has laid down the test for certainty of object for descretionary trust as

> "Whether it can be said with certainty that any given individual is or is not a member of the class."

The class can include future members when the class is conceptually certain, the exact number of persons in that class need not be known.[93]

Apart from the certainty of objects, the gift on trust for the benefit of the members must vest the interest in the beneficiaries within the perpetuity period. Where the trust is expressed in such terms that the interest of some of the beneficiaries will vest outside the perpetuity period, section 89 of the Perpetuities and Accumulation Ordinance Cap. 257 will operate to close the class to those beneficiaries whose interest will vest within the

---

83 *Crane* v. *Long* (1860) 2 De G.F. & J. 85 at 80.

84 *Re Nottage* [1895] 2 Ch. 649.

85 *Re Drummond* [1914] 2 Ch. 90.

86 *Abbatt* v. *Treasury Solicitor* [1969] 3 All E.R. 1175.

87 Societies Ordinance s.8(2).

88 The discussion in this sub-section is also applicable to situations where the donor expressly makes the gift to both the present and future members of the association beneficially.

89 *I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20, see also *Re Endacott* [1959] 3 All E.R. 526.

90 *Re Hain's Settlement* [1961] 1 All E.R. 848.

91 This will arise only when the donor expressly or by necessary implication indicates so.
It is rather unlikely that the court can construe such power from a gift to an association *eo nomine* simpliciter.

92 *McPhail* v. *Doulton* [1971] A.C. 424.
See Pettit, *Equity and the Law of Trust*, (Butterworths, 3rd ed. 1974) p.28 for the proposition that the test in the present case is not applicable to fixed trusts.

93 *Re Baden's Deed Trusts (No. 2)* [1972] Ch. 607.

perpetuity period. When the beneficiaries take the interest they can dispose of it without regard to the interest of the association at all.[93a]

3. *Direct Gift to Present Members*

Perhaps it is the realization of the difficulties involved in the two interpretations above that has led the Privy Council in *Leahy* v. *Attorney General for New South Wales*[94] to decide that the *prima facie* construction of gift to associations *eo nomine* is one to the individual members of the association at the date of gift for their own benefits as joint tenants or tenants in common and each individual may take his share away whether he continues to be a member of the association or not. It is submitted that such construction seldom in fact complies with the donor's intention on which the court places much emphasis. It is obvious that the donor intends to benefit the whole group enterprise when he makes the gift in the name of the association. Giving the property to the individuals will enable them to withdraw the gift from the group enterprise unless there is a term in the constitution saying that each member will have to place into the common fund any fund that he receives as a member of the association. Such clauses are rarely found in associations' constitutions. The same objection is applicable to the second interpretation above.

4. *Gift to Take Effect According to the Constitution*

Lastly, the gift may be interpreted as one to the existing members of the association beneficially but on the basis that the subject matter of the gift falls to be dealt with in accordance with the rules of the association and thus becomes an addition to the common fund which is the subject-matter of the contract the members have made *inter se*.[95] In such a case, even if the constitution prohibits distribution, the members may nevertheless, amend the constitution so as to avoid conflicting with the rule prohibiting allienation as inconsistent with the gift.[96] Attractive though this suggestion may be, it fails to explain how the gift is to be linked to the contracts of the members *inter se* without creating a trust and in this way it is just another way of expressing either the first or second interpretation above. Further, if what it means is that the gift is to take effect absolutely as in the third interpretation above but that the agreement between the members will impliedly include as common fund any fund acquired by the members through membership to the association, the gift in fact turns on the interpretation of the constitution and not the gift itself.

Given the present *prima facie* construction rule,[97] the court will use the third interpretation above whenever possible. In this way, it seems paradoxical that if a donor expresses his intention clearly his intention may probably fail whereas, if he is not so precise, the court will try its best to effect his intention by using the third interpretation above and pray that the donees will not swindle the gift immediately.

Branch Property

Besides the difficult constructions enumerated above, further complicatons may arise in deciding on whom the property vests if the property is contracted or given in the name of a branch of an association. In an Australian case *Hall* v. *Job*,[98] where subscription by the members of a branch association was used to purchase land for a meeting place for the branch, it was held that the dissolution of the branch did not entitle the branch members to distribute the property among themselves. The property was held to belong to the main association. The court based its decision on the construction of the true intention of the donors and placed much emphasis on the dependence of the branch on the main body.

> "The immediate object they (the donors) have in view must have been

---

93a A further objection may be found in the possibility that the present members may purposely refuse to admit any new members even before the perpetuity period lapses.

94 *Leahy* v. *A.G. of New South Wales* [1959] A.C. 457.

95 *Re Recher's Will Trust* [1972] Ch. 526.

96 *Abbatt* v. *Treasury Solicitor* [1969] 3 All E.R. 1175, but see s.8(2) of the Societies Ordinance.

97 The rule in *Leahy* v. *A.B. of New South Wales* [1959] A.C. 457.

98 *Hall* v. *Job* (1952) 86 C.L.R. 641 see also *Williams* v. *Hursey* (1959) 103 C.L.R. 30 at 53-55 *per* Fullagar J.

> the provision of a meeting place (for the branch); but since the branch was not an association by itself but was simply one of the groups into which the general body of members was divided for the purpose of the working of the Institution, the donors must be taken to have had as their general object the provision of facilities for the attainment of the purpose of the Institution through the instrumentality of that body in the branch." [99]

The court only glossed over the fact that when the property was purchased, the purchaser declared that the property was being held on trust for the members of the branch association. It is submitted that the true test in every case is one of the intention of the donor. In the present case,[100] the decision can be supported on policy grounds if the donor is not a member of the association because then the court's decision will give effect to the donor's wish to benefit the purpose. However, when the donors are themselves participants, as in the present case, it may well be their intentions to facilitate their own activities as long as they are together.

LIABILITIES

Just as it is impossible for an unincorporated associations as such to acquire rights or property it is equally impossible to fix them with liabilities. Where a contract made in the name of an association is breached or when a tort is committed in the furtherance of an association's objects, question may arise as to who are responsible. The law, as it now stands, tends to favour finding responsibility on those who has taken part directly or through his agent in the particular event.[101] A general provision in the constitution authorising the committee members to manage the affairs of the association will by itself not make the other members principals when the committee members commit some wrongful act in the course of the management.[102] The question remains whether such a policy in finding responsibility is compatible with the expectation of those concerned and with the development of other areas of law.

The General Rule Of Agency

If a person other than the one who does the wrongful act is to be made liable, he has to be the principal of the wrongdoer. Like contract, agency is not presumed by the mere fact of association.[103] The general rule on the creation of agency relationship is stated by Lord Cranworth in *Pole* v. *Leask* [104] is that

> "No one can become the agent of another except by the will of that other person."

The test is an objective test to infer the intention of the parties.[104a] If agency is established "the extent of an agent's authority, if in doubt, must be determined by inference from the whole circumstances."[105] The leading case in the area is *Bradley Egg Farm* v. *Clifford* [106] which demonstrates the problem when the general principles are applied to specific situations involving associations.

The Bradley Egg Farm Case

The case involved a society which was formed with the objects of, *inter alia,* giving expert advice to all persons interested in poultry breeding and investigating certain poultry diseases. A "technical manager" of the society offered the association's services to the Plaintiff and in the course of testing the Plaintiff's birds for a certain disease the "expert" of the association negligently passed the disease to all the Plaintiff's birds with the result that all the poultry died. It was held that all the members of the executive committee were liable for both breach of contract and negligence. Lord Goddard L.J. found

> "In view of the objects of the society, it is plain that persons must be engaged to further them, and that this appointment and allocation of duties among them would be part of the management and administration conferred on the council (executive committee)." [107]

---

99 *Hall* v. *Job, supra* at 654.

100 *Ibid.*

101 *Bradley* Egg *Farm* v. *Clifford* [1943] 2 All E.R. 376.

102 *Ibid.*

103 *Hollman* v. *Pullin* (1884) digested in *Empire Digest* Vol. 1 at page 79.

104 *Pole* v. *Leask* (1863) 33 L.J. Ch. 155.

104a See Fridman, *Law of Agency* (Butterworths, 4th ed. 1975) pp. 176-187.

105 *Ashford Shire Council* v. *Dependable Motors* [1961] A.C. 336 at 349.

106 *Bradley Egg Farm* v. *Clifford* [1943] 2 All E.R. 378.

107 *Ibid.* at 381.

Yet in deciding the case the court held that the contract of employment of the technical manager and the expert were made with the members of the executive committee only and not with the general members. In this way, the court managed to hold the memebrs of the executive committee liable as principals of the technical manager and the expert; and the general members were not liable to the Plaintiff. In so finding the court was also basing on the observation of Lord Lindley that it is a fundamental term of association that

> "no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscription required by the rules of the club to be paid as long as he remains a member."[108]

Goddard L.J. added that

> "Otherwise a person who pays a subscription of 7s. 6d. to this society might find himself involved in liabilities of an unknown amount."[109]

Is the decision just?

Is The Policy Behind The Case Valid?

It is true that the members of the committee have control of the management. They should be personally liable if they obtain goods on credit without the consent of the general members. In that case they know definitely that they are pledging someone's credit. That was the situation of the Victorian clubs at London's West End from which the rule developed.[110] However, an honorary committee which is being sued for "consequential damages" requires different consideration. In *Bradley's* case, the members of the committee are not themselves negligent. They are being held vicariously liable for the negligence of the servants. The objects of the association anticipate employing servants. If the true intention of fundamental terms of association is that the general members will have limited liability why is it that the committee members are not protected by this limitation?

The answer should be one of policy. As the dissenting judge Scott C.J. put it in the case, the Plaintiff subjectively contemplates making a contract with somebody whom the law may hold responsible and in doing so it has to balance the interest of all the parties. In finding liability beyond the expert who has participated in the act, the court has the Plaintiff's interest in mind. If more persons are liable, the Plaintiff's chances of getting sufficient fund to meet his loss is greater. In finding the members of the committee liable, the court however, prevented the Plaintiff from getting at the common fund[111] which a layman would naturally have in mind when making a contract with an "association". The negligent aspect in the case leads one to think about the trend towards distributing the burden of compensation to as many person as possible.[112] Are the member of the committee's activities beneficial to the association at large? What care should they take in performing their duty which they voluntarily undertake? When it is within the objects of the association to employ servants should the general members be allowed to exclude their liability from matters arising from the employment of the servant? It is submitted that pinning liability on the members of the committee in such situations, if widely appreciated by members of associations, will hamper the growth of such organizations unduely.

Procedural Difficulties

Even if the act of the members of the committee is authorised by all the members of the association, suing every member is not practical because of the difficulty of locating every one of the defendants. As already stated, there is no public record of all the members of an association. Further, suing everyone will inflate the cost of the litigation. What the Plaintiff may do will be perhaps to take out a representive action under Order 15 Rule 12 of the Rules of Supreme Court.

A representative action is not a simple matter. The representatives chosen must really represent all shades of interest in the suit.[113] The liability of the committee members may be different from the rest of the membership; new

---

108 *Wise* v. *Pertetual Trustee Co. Ltd.* [1903] A.C. 139.

109 See note 106 *supra.* at 381.

110 *Fleming* v. *Hector* (1836) 2M. & W. 172, *Re St. James' Club* (1852) 2 De Gm& G 383.

111 The members who own the common fund are not personally liable.

112 c.f. the courts' treatment of the area in tort cases in *Prole* v. *Allen* [1950]1 All E.R. 476 and *Campbell* v. *Thompson* [1953] 1 Q.B. 445. See also Fleming, *The Law of Torts*, (4th ed. 1971) pp. 7-14.

113 See for example *Strickland* v. *Weldon* 28 Ch.D. 426 where the committee members were held to be agents and that they cannot sue another agent, the former committee members, in a representative action, for money paid by the principal, the former members of the association.

members may have a good defence in that nobody could have purportedly contracted for them.[114] If a meeting had been held before the transaction in question took place, the members who opposed the transaction may perhaps be in a better position than the rest. The choice of the right representatives is so complicated that few ever endeavoured to bring such action against unincorporated associations. The complexities is amply shown in the case of *In the Matter of the Pentecostal Mission, Hong Kong and Kowloon*[115] in 1962 which has finally gone on to become *Sung Sheung Hong and 2 others* v. *Leung Wong Soo-Ching and 2 others*[116] in 1965.

The stringent test applied to finding agency relationship between members of a committee and the members of the association together with the procedural difficulties in getting remedies from transactions involving unincorporated associations leads one to suspect that many prospective actions stop short of the court and the persons liable are allowed to escape liability.

HAS THE LEGISLATURE THOUGHT OF ASSOCIATION?

Owing to the fact that the legislature has not directed its thoughts to the law governing unincorporated non-profit-making associations, difficulties arise from the interpretation of certain seemingly unrelated statutes.

Section 345 Of The Companies Ordinance

The section provides *inter alia* that "no association consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association, or by the individual members thereof, unless it is formed in pursuance of some ordinance."

One may be led to ask what is the ambit of the section? In *Smith* v. *Anderson,*[117] Brett L.J. said

> "The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object."

On the meaning of "gain" Jessel M.R.[118] said that

> "It is not limited to pecuniary gain."

On construction according to the above principles, the section seems to cover, say, a film club whose constitution (or object clause) provides for an annual film show where outsiders will be admitted on payment of certain fee as a fund-raising campaign to provide funds for their cinematographic pursuit. In other words nearly all associations which have annual fund-raising projects may become illegal.[118a] This interpretation will be strengthened by section 24 of Inland Revenue Ordinance[112] which provides that any association with more than half of its annual income from non-members is liable for profits tax as a separate entity.

Besides the above quoted nineteenth century cases there seems to be another interpretation on section 345 of the Companies Ordinance Cap. 32. In *Armour* v. *Liverpool Corporation*[119] Simonds J. said

> "Neither 'business' nor 'gain' is a word susceptible of precise or scientific definition. The test is what ordinary person would describe as the carrying on of business gain."

This latter interpretation will give the court more flexibility in giving sense to the statute and enables the development of desirable associations possible. Unfortunately however, Simonds J.'s test has only been laid down in a first instance case against the more inflexible tests of the Court of Appeal in the two other cases. The proper meaning of the statute therefore remains uncertain.

In *Marrs and others* v. *Thompson*[120] an association registered under the Friendly Societies Act, which like the local Societies Ordinance provides for the registration as opposed to formation of certain type of associations, has been held to be an association "formed under an Act of Parliament" for the purpose of being ex-

---

114 See note 68, *supra.* See further *Campbell* v. *Thompson* [1953] 1 Q.B. 445.

115 *In the Matter of the Pentecostal Mission, Hong Kong and Kowloon* [1962] H.K.L.R. 171.

116 *Sung Sheung Hong and 2 others* v. *Leung Wong Soo-Ching and 2 others* [1965] H.K.L.R. 602.

117 *Smith* v. *Anderson* (1880) 15 Ch. D. 247 at 227-8.

118 *Re Arthur Average Association* (1874-75) 10 L.R. Ch. App. 542.

118a For the effect of illegality, see Gower, *The Principles of Modern Company Law* p. 26; *Greenbury* v. *Cooperstein* [1926] Ch. 657.

119 *Armour* v. *Liverpool Corporation* [1939] 1 All E.R. 363 at 371.

120 *Marrs and others* v. *Thompson* (1920) 86 L.T. 759.

cepted from the equivalent provision of section 345 of the Companies Ordinance. However, in *In Re Ilfracombe Permanent Mutual Beneficiary Building Society*[121] Wright J. said

> "I am inclined to think that 'formed under the provisions of some other Act of Parliament' must mean formed and having its existence recognised by another Act of Parliament."

It is therefore again uncertain whether registration under the Societies Ordinance can be said to be recognised by the Ordinance and thus exempted from the provisions of section 345 of the local Companies Ordinance.

Section 3 Of The Interpretation And General Clauses Ordinance Cap. 1

The word "person" has been defined in the Ordinance to include

> "any public body and any body of persons, corporate or unincorporated, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation."

Section 5 of the same Ordinance states:

> "Where any word or expression is defined in the ordinance, such definition shall extend to the grammatical variations and cognate expression of such word or expression."

Provisions of the ordinance is made applicable to the interpretation of all other past, present or future statutes by section 2 except where a contrary intention appears. The interpretation is also applicable to any instrument made under any statutes.

In section 49 of the Landlord and Tenant (Consolidation) Ordinance, "tenant" or "sub-tenant" has been defined to include, *inter alia*,

> "unincorporated body of persons who is a tenant or sub-tenant of premises the subject matter of a tenancy or subtenancy to which this Part (of the ordinance) applies."

Can an unincorporated association thus sue or be sued in its own name to vindicate rights arising under that Ordinance?

Authorities on this subject is sparse. In those cases where unincorporated associations has been held to be unable to sue, the definition of person in the Interpretation and General Clauses Ordinance has not been referred to in argument.[122] In England there are cases giving effect to the definition.[123]

On which side will the judicial balance lean when the question falls to be determined is unpredicatable.[124]Regard must be taken of old cases like *Jarrott* v. *Ackerley* where unincorporated associations have been held categorically to be unable to hold leases. Would the court let the common law be swept away by a side wind? Or will the court give effect to the express words of the statutes?

CONCLUSIONS

The Need For A New Framework

The above discussion shows that the present law governing unincorporated associations is borrowed from that governing individuals. Many associations are formed very informally without even a written constitution. These associations, given time, may grow in complexities in their activities. The law relating to the concepts of agency, trusts and contract are so framed that much depends on the circumstances of the case. The balance seems to depend on the policy as seen by the particular judge in the particular case. This when added to the procedural difficulties in bringing actions to court only means that those who have to resolve disputes arising from unincorporated associations will have little guidance.

---

121 *In Re Ilfracombe Permanent Mutual Beneficiary Building Society* [1901] 1 Ch. 103 at 113.

122 *Jarrott* v. *Ackerley* (1915) 113 L.T. 371.

123 *Davey* v. *Shawcroft* [1948] 1 All E.R. 827, *R.* v. *Minister of Agriculture and Fisheries* [1955] 2 All E.R. 130

124 See note 121 *supra.*

The law's reluctance or failure to recognise the complexities into which unincorporated associations may grow is also reflected through the difficulties involved in interpreting situations involving gifts to associations and sub-associations. The stress on agency and the disadvantageous position that the members of the executive committee is placed if widely realised will also hinder association developments. In some sectors of the Social Sciences studies it has been observed that the involvement of the community not only in the administration but also in the planning of community centres is the essential element which makes for success.[125] While the Hong Kong government is at pains to promote the neighbourhood spirit and sense of belonging in the community, it is submitted that the above statement is equally applicable to other unincorporated associations as to community centres.

The Small Claims Tribunal Ordinance[126] will give rise to a simple machinery to enforce rights especially debts below $3,000.00.[127] Proceedings which hitherto has been turned away by the high cost of litigation in the normal courts may find their ways to the Tribunal. There, the procedure is informal[128] and it is more important for the adjudicator to know what the law is to give a fair judgement.

Piecemeal judicial law-making is inadequate to profile the law relating to such widespread but seldom litigated problems arising from unincorporated associations. The present trend of the legislature, if it ever directs its mind to the problem, is to give corporate status to those associations carrying on certain specific activities.[129] Giving corporate status to all associations is not going to solve the problems. If the corporated body has limited liability, it only means that the liability of the members are limited to the common fund which is usually very small. If the corporated body has unlimited liability, the members will be liable over and above their subscriptions.

Points To Consider

It is submitted that the problem should be looked upon as a whole and a new piece of legislation should be made. Perhaps the following terms may point to the right direction:

1. *Registration of All Office-bearers*

   All office-bearers of unincorporated associations should have a duty to inform the Registrar of Societies of their offices, names, addresses, and occupatons. Further they should have to give up-to-date information to the Registrar should any of the particulars be changed. This will enable the prospective plaintiff to seek out his defendants. Office-bearers of societies exempted under the present Societies Ordinance will have to be registered with their "parent bodies" with which they are connected in that ordinance.

2. *Registration of Associations to Benefit from the New Statute*

   A separate register should be kept for all associations that wish to be governed by the new statutory provisions. It should then be conclusively presumed that there is no intention to create legal realtionship among members *inter se* for associations not registered under the section.

3. *Registration of Members*

   The office-bearers of each association should have a duty to keep up-to-date particulars of their membership and such record should be available to whoever that wishes to bring representative actions against memebrs of an association.

4. *Inspection*

   All registrations mentioned in the previous sections can be inspected by the members of the public.

5. *Constitution*

   A similar device as Table A of the Companies Ordinance[130] should be in-

---

125 G.C.P. Riches *Urban Community Centres and Community Development Hong Kong and Singapore,* Centre of Asian Studies H.K.U. 1973 at page 71 quoting from the *Report of the Asian Seminar on Urban Development* U.N. (1962) at page 37.

126 Small Claims Tribunal Ordinance (Cap. 338, L.H.K. 1975 ed.).

127 Small Claims Tribunal Ordinance s.9(1).

128 Small Claims Tribunal Ordinance s.16.

129 Multi-storey Buildings (Owners Incorporation) Ordinance (Cap.344, L.H.K. 1970 ed.).
Trade Unions Ordinance (Cap. 332, L.H.K. 1971 ed.).
Credit Union Ordinance (Cap.119, L.H.K. 1968 ed.).
Co-operative Societies Ordinance (Cap.33, L.H.K. 1964 ed.).

cluded in the new statute to provide a framework of a constitution and subject to the members' right of exclusion, inclusion and amendment made applicable to all associations registered under 2) above.

6. *Right to Hold Property*

All associations registered under 2) above should be able to hold property in its own name and act through the agency of the office-bearers provided that certain procedures laid down by the new ordinance will have to be satisfied before the office-bearers may dispose of the association property. Property will not be tied up unduely for purposes which may become obsolete as time goes by. Further, the registrar should have discretion to direct the allocation of the common fund upon dissolution of an association.

7. *Right to Sue and Be Sued*

All associations registered under 2) above will have the right to sue and be sued in its own name in which case an agent should be elected to represent the association. The association's common fund will be used to satisfy claims for the *bona fide* acts done by its members purportedly for the association for the furtherance of its objects. If the common fund is insufficient, the Plaintiff can execute against the members who are personally liable.[131] In this latter case the Plaintiff will have to have joined the particular members as defendants with the association at the trial.

While these suggestions are based on the observations on the defects of the present law, the above proposal is not intended to be a proposed bill. It is only hoped that knowing the discrepencies between legal theory and actual reality will help to bring unincorporated non-profit-making associations into the proper perspective in the eyes of the law.

---

131 This seems to be the existing situation for corporated bodies registered under the Multi-storey Buildings (Owners Incorporation) Ordinance. See especially ss. 16 and 17 of the Ordinance.

ACKNOWLEDGEMENTS

The Editorial Board wishes to thank the following for their generous sponsorship of this review:

The Honourable Mr. Justice T. L. Yang

Mr. Oswald Cheung, Q.C.

Mr. John J. Swaine, Q.C.

Mr. Denis Chang

Mr. Anthony Corrigan

Mr. Martin C. M. Lee

Mr. Richard Mills-Owens

Mr. A. R. Suffiad

Mr. Robert W. N. Wei

Messrs. Baker & McKenzie

Messrs. Chan and Ho

Messrs. Fairbairn, Kwok & Wang

Messrs. Hon & Co.

Messrs. Johnson, Stokes & Master

Messrs. Lau, Wong & Chan

Messrs. D. W. Ling & Co.

Messrs. David Szeto

Messrs. Wilkinson & Grist

Mr. Ho Ti Chien

Publisher : HONG KONG UNIVERSITY LAW ASSOCIATION
H.K.U.S.U.
Department of Law,
Knowles Building, 5th Floor,
Hong Kong University,
Hong Kong.

Printer & Typesetter : WORLD TYPESETTING COMPANY
Flat 9A, Golden Hill Mansion,
211, Hennessy Road,
Wanchai, Hong Kong.