FOREVER IMMUNE?

Abdul Wahab b. Sulaiman v. *Commandant Tanglin Detention Barracks*[1]

THIS case is of significance to the development of public law in Singapore as it deals with the "judicial power" of the High Court, in particular, with regard to its power to issue the "high prerogative writ" of *habeas corpus.* Unfortunately, the *ratio decidendi* of the decision is split between two apparently contradictory alternatives. The first is as follows:

> As the Military Court of Appeal is a superior court, its jurisdiction and the exercise of its full power to hear and determine appeals from a subordinate military court are matters that cannot be reviewed by any of the prerogative writs or orders of the High Court. It follows that any warrants or orders made for enforcing the decision of the Military Court of Appeal cannot be challenged in the High Court.[2]

In short, the Military Court of Appeal (hereinafter MCA) is immune from judicial review and no writ of *habeas corpus* can lie against anyone enforcing the decisions of the MCA.

What is in this comment denoted the "additional *ratio",* was Mr. Justice Sinnathuray's second holding that the MCA had acted within its jurisdiction because, first, the relevant statute recognised that persons who committed offences whilst in the army might still be subject to military discipline even after discharge; and secondly, once the appeal was entered, the MCA was "seized of" the matter, and this was sufficient to give the MCA jurisdiction to hear any appeal even after the person had been discharged.[3]

This comment will, with respect, take critical issue with both the "judicial review" and the "additional" holding. It will be argued that the first disturbs the constitutional foundation with regard to the "judicial power", though it is important to note from the outset that the Singapore Constitution is not mentioned in the judgment, notwithstanding that the application for *habeas corpus* was brought under the imperative authority of Article 9(2) of the Constitution.[4] The second holding raises questions of the rules of interpretation of statutes. In issue overall, is the nature of the "rule of law" in Singapore.

The Facts

Abdul Wahab bin Sulaiman, a national serviceman, was convicted on April 30, 1984, by a General Court Martial. He had pleaded guilty to committing a civil offence contrary to s. 108 of the Singapore Armed Forces Act[5] (hereinafter the S.A.F. Act), namely, the possession of a controlled drug.[6] The General Court Martial sentenced him to six

1 [1985] 1 M.L.J. 418.
2 *Ibid.*, at 421.
3 *Ibid.*
4 Constitution of the Republic of Singapore, 1980 Reprint.
5 Act No. 7 of 1972.
6 Misuse of Drugs Act, (No. 5 of 1973); 1978 Reprint, s. 6(a). Committing this civil offence is an offence under s. 108 of the S.A.F. Act. Thus, it was the latter which formed the actual charge.

months detention. Two days later, the Head of Legal Service in the Singapore Armed Forces gave notice of appeal to the MCA[7] against the inadequacy of the sentence. With this appeal pending, the prisoner served his sentence until he was released from detention on July 13 (account presumably having been taken of pre-trial detention). On completion of his National Service ten days later, he was discharged from the army. The appeal hearing followed a few days after this discharge — the matter came before the MCA on July 27 and August 11, 1984. The Appellant argued that the MCA no longer had jurisdiction over him as a civilian, but the plea was rejected and the sentence was enhanced to eighteen months detention. From custody, the prisoner applied to the High Court for a writ of *habeas corpus* against the Commandant of the barracks. The application was made under Article 9(2) of the Singapore Constitution and Order 54 of the Rules of the Supreme Court.

The Decision

Several inter-related propositions contributed towards the two holdings of the judgement: it is helpful to set these out clearly.

(a) Decisions of the MCA are not subject to judicial review by way of any of the prerogative writs because:
   i) s. 121(1) of the S.A.F. Act states that the MCA is a "superior court of record";
   ii) the definitions of superior and inferior courts as in *Halsbury* apply here;
   iii) the case of *R.* v. *Cripps ex p. Muldoon & Ors.*[8] (and the propositions derived therefrom) is good authority;
   iv) a comparison between the English Courts-Martial Appeal Court and the Singapore MCA supports the conclusion.

(b) The MCA had jurisdiction to hear and adjudicate the case because:
   i) the Applicant was still subject to military law by virtue of s. 105(1) of the S.A.F. Act, even though he had left the army; and
   ii) the MCA was "seized of" the appeal under s. 123 of the S.A.F. Act from the moment the Head of Legal Service gave notice of appeal to the Registrar of the MCA.

It will be apparent that having dismissed the case by the arguments under (a), it was unnecessary to make the arguments under (b). Before proceeding, therefore, we ought to identify the problems of connecting the two parts of this judgment.

Unfortunately, it is not clear why both parts were included, nor what was the relationship between them. Having set out the facts early in the judgment, the learned judge decided that before considering counsel's submission on the competency of the MCA to hear the appeal, he would address "the question whether a writ of *habeas corpus* can lie against the respondent for his detention of the applicant ordered by the MCA."[9] Once this question had been answered in the negative,

7 Pursuant to the S.A.F. Act, s. 121(9).
8 [1984] Q.B. 68.
9 *Supra,* note 1 at 419.

the learned judge then returned to the first submission, stating simply:

> There is, however, the main argument... that the MCA was not a court of competent jurisdiction ... as the applicant was not subject to military law when it was heard .... This very argument was put to the MCA and the Court, in my view, rightly refused to accept it.[10]

The learned judge then went on to give his two reasons for finding that the MCA did in law have jurisdiction. In essence, therefore, the judgment appears to state that although there can be no judicial review of the MCA, the lawfulness of its jurisdiction can be examined — an apparent and direct contradiction in terms.

It may be that the judge never intended such a contradiction: the key connecting words "There is, however..." are open to generous interpretation. For example, it may be that this second part of the judgment was intended to be in the *alternative,* in case the previous part was wrong. Or, more simply, it may have been intended to deal with the jurisdiction issue for the sake of completion. Such interpretations would accord with the categoric finding on non-reviewability, but given the importance of this finding, the ambiguity is to be regretted. For the purposes of the rest of this examination of the judgment, it will be assumed that the key holding in this case was that on "judicial review", whereas the second part of the judgment was delivered for the sake of completeness only, not in contradiction to the main holding.

With these facts and points in mind, we now turn to an examination of the findings. In so doing, we will advance considerations which support our critical review of this decision.

1. *Preliminary support*

It must be conceded from the outset that if the MCA is indeed a "superior" court as the learned judge interpreted, then the decision that a writ of *habeas corpus* would not lie is arguably correct. There is abundant authority for the proposition that a person committed on the decision of ordinary courts in criminal cases, and in particular on the decision of the Supreme Court, does not have the writ available — alternative remedies *(e.g.* appeal, "revision", etc.) must be used.[11] A recent local case setting out some of this authority is that of *Re Datuk Harun bin Haji Idris.*[12] Although not mentioned in *Abdul Wahab,*

[10] *Supra,* note 1 at 421.

[11] See Wade *Administrative Law* (5th ed. 1982) p. 543: "Review by means of *habeas corpus* is naturally available only where the tribunal which has made the order for detention is subject to review by the High Court". See also *infra* n. 40 and accompanying text. Wade's comments apply to the prerogative writ of *habeas corpus* in England and the position would almost certainly be the same regarding this writ in Singapore. However, it is to be noted that Article 9(2) of the Singapore Constitution confers a duty on the High Court to inquire into "complaints" of unlawful detention. There is no mention of exceptions and the duty is apparently quite independent of the prerogative writ of *habeas corpus.* In other words, Wade's limitations must be restricted to the writ — they do not necessarily apply to the constitutional duty under Article 9(2). The matter has never been tested, however, and whether Article 9(2) has an independent existence must await a fuller study.

[12] [1981] 1 M.L.J. 47. The case was affirmed on appeal to the Federal Court of Malaysia [1981] 2 M.L.J. 72.

that case provides support for the decision and it should therefore be examined briefly.

The applicant had been convicted at two separate trials on separate charges under the Malaysian Corruption Act 1961 and his appeals had resulted in the two sentences being confirmed and increased respectively. On expiry of the sentence for the first of the trials, the applicant argued before the High Court that the alteration (increasing his period of sentence) made to the warrant of commitment after his second unsuccessful appeal, was *ultra vires.* Dismissing the application, the High Court cited English and local authority to the effect that an "exception" to the law of *habeas corpus* lies with regard to detention under the judgment of a competent court. The essential reason for this exception is that *habeas corpus* is linked in the judicial mind with jurisdictional review by a superior court of a tribunal subordinate to it — and hence the process could not be used to review decisions of a superior court.[13] The learned judge quoted a local case which had cited the English authority of *Ex p. Lees* [14] to this effect. *Lees* case was in turn relied on in the case of R. v. *Governor of Lewes Prison*,[15] in which an application for *habeas corpus* to test the legality of a field general court martial was refused on the merits. Therein, Avery J. added that in bis judgment the principle that the writ was not available to test judgments in normal criminal cases in the courts, applied

> where a person has been convicted by a duly constituted court martial, proceedings of which have been in due course confirmed by the competent authority.[16]

This sequence of argument in the *Datuk Harun* case, therefore, takes us to the heart of the issues dealt with in the *Wahab* decision. On the reasoning, it follows that if the MCA is indeed "superior" as the judge in *Abdul Wahab* found, then it is immune from *habeas corpus* — but crucially, it does not necessarily follow that the MCA is immune from *all* "orders" of the High Court. Further, the English authority cited *prima facie* supports the additional suggestion that as with the regular criminal courts, courts martial are to be regarded as falling within the "exception" to the general application of the writ of *habeas corpus.*

Before addressing these issues, it is useful to note another uncited local authority which could have provided support for the decision in *Abdul Wahab, viz.* the 1878 case of *Re Madden*.[17] This case held that a person detained under military law could not be discharged under a writ of *habeas corpus,* nor could the proceedings of the military authorities be inquired into.

Though stating essentially the same as *Datuk Harun* a century later, we might subject *Madden* to criticism immediately here, so as to illustrate some of the issues to which we will return in the analysis which follows. Thus, there was no authority cited in *Madden* supporting

[13] Ibid., at 49E-H.
[14] (1858) E.B. & E. 828, 836; the local authority is that of Gurdit Singh's Case [1933] M.L.J. 224.
[15] [1917] 2 K.B. 254.
[16] Quoted in Datuk Harun, supra, n. 12 at 49B, referring to Avery J.'s judgment in Lewes' case, ibid., at 274.
[17] (1878) 2 Ky. 9 (H.C.).

this point. Secondly, there was no mention of contrary earlier authorities like *Re Mansergh* [18] where Cockburn C.J. held that the Court ought to protect the civil rights of a soldier where rights of life or liberty are involved. And in *Blakes Case*[19] a writ of *habeas corpus* was granted on the allegation that a person under military arrest had not been specially tried by a court martial. But even if the decision was correct in 1878, we have to consider today whether the development of judicial review, especially as sanctioned by a superior constitution, has not overturned the arguments as illustrated by both *Datuk Harun* and *Madden.*

In arguing that the MCA is not "superior" in the sense of being beyond the scrutiny of the High Court, and further that the military courts should not be subject to the "exception" to the general availability of the writ of *habeas corpus,* we must examine these issues.

2. *The MCA as a "superior" court*

What "judicial power" does the MCA have in the Singapore legal system? How does the MCA fit into our hierarchy of courts? Assuming that the judicial power of the MCA must be authorised by the Constitution, we turn thence first for answers. Under Article 93. the "judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force". In constitutional terms, therefore, the MCA is either part of the Supreme Court, or it is a "subordinate court" established by a written law. Such constitutional subordination must not be confused with the Subordinate Courts established under the Subordinate Courts Act; *any* constitutionally "subordinate" court may still be designated by another name. In the case of the MCA, the court as established by the S.A.F. Act in 1972 was designated a "superior" court, but this does not of itself mean that it is not in constitutional terms "subordinate" to the Supreme Court. It is important to distinguish this constitutional subordination and the legislative attempt to make the MCA into a superior court. The attempt is apparent from the words of the then Minister of State for Defence when moving that the Singapore Armed Forces Bill be read for the second time:

> The Bill establishes for the first time a Military Court of Appeal... it can hear and determine appeals against decisions made by the subordinate military courts. There is, however, no appeal from the *Military Court of Appeal whose powers are analogous to those of the Court of Criminal Appeal*.[20]

How then, are we to decide *if* the MCA is part of the Supreme Court? The Supreme Court of Judicature Act provides that the Supreme Court consists of the High Court, Court of Appeal and Court of Criminal Appeal.[21] Since the MCA is none of these, it must by definition be constitutionally "subordinate", unless other reasons can be found to equate the MCA with one of these courts. The simplest

18 (1861) 1 B. & S. 400.
19 (1814) 2 M. & S. 428.
20 Singapore Parliamentary Debates (1971-1972) Vol. 31, Col. 1096; (emphasis added).
21 S. 7, Supreme Court of Judicature Act, Cap. 15, Singapore Statutes, 1970 (Rev. Ed.).

means by which one might decide whether the MCA is part of the Supreme Court, is to examine questions of jurisdiction.

The High Court has general jurisdiction over all matters and its fundamental duty to maintain "legality" (in the sense of ensuring that legal limits are observed) might be regarded as inherent — hence its power to issue the prerogative writs.[22]

In contrast, the S.A.F. Act specifically limits the MCA's jurisdiction to the hearing of appeals from subordinate military courts — and all military courts only have jurisdiction over military personnel.[23] It would follow on basic principles that whatever the designation of the MCA, as a body of limited jurisdiction it would be subject to the power of the High Court to ensure that such limits are observed.

An abundance of authority supports this fundamental principle. For example, in *R.* v. *Inhabitants of Glamorganshire*,[24] it was held that the King's Bench could examine all jurisdiction erected by Act of Parliament and if such jurisdictions proceeded to arrogate jurisdiction to themselves greater than warranted, it was in the public interest that judicial review by the High Court should be available to persons aggrieved. Similarly, in *The King* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Ozone Theatres (Aust.) Ltd*.[25] the Australian High Court issued a writ of *mandamus* against the Industrial Court despite its statutory description as a superior court of record.[26] And in *A.G. of Queensland* v. *Wilkinson*[27] the same High Court held the Industrial Court to be a court of limited jurisdiction which could be restrained by *prohibition* from exceeding its jurisdiction. This holding was despite the statutory definition of the Industrial Court as a superior court of record, which enjoyed "all the powers and jurisdiction of the Supreme Court in addition to the powers and jurisdiction conferred by this Act".[28] The High Court argued that such sections can mean "no more than that within its own sphere, the Industrial Court may exercise any appropriate power of the Supreme Court."[29] This finding is echoed locally. A decision of the Industrial Arbitration Court (I.A.C.) in Singapore has been similarly reviewed, notwithstanding that the statute establishes that court as "superior" and further allocates to the judge the same immunities and protections as a High Court judge. There is, in addition, an "ouster clause" which provides that a decision of the I.A.C. shall not be subject to appeal

[22] *Ibid*., ss. 15 and 16. Also, s. 18(2) gives the High Court the powers related to the writs provided for in the 1st Schedule of the Supreme Court of Judicature Act.

[23] Ss. 121(4), 121(7) and 3 of the S.A.F. Act. Briefly, persons subject to military law are regular servicemen, full time national servicemen, reservists on recall, all civilians in the service of or accompanying the SAF on active service, and servicemen belonging to a Commonwealth or foreign force when attached to the S.A.F.

[24] Also known as the 'Cardiff Bridge Case' (1700) 1 Ld. Ray 580. See also *R.* v. *Chancellor of St. Edmundsbury and Ipswhich Diocese, ex p. White* [1948] 1 K.B. 195 and *Colonial Bank of Australia* v. *Willan* (1874) 22 W.R. 516.

[25] (1948-49) 78 C.L.R. 389.

[26] Commonwealth Conciliation and Arbitration Act (No. 13 of 1940 — No. 65 of 1948).

[27] (1958-59) 100 C.L.R. 422.

[28] S.6(7) of the Industrial Conciliation and Arbitration Act 1932-1955 (Queensland).

[29] *Op.cit.,* at 431.

or review in any court on any account, nor be subject to the prerogative writs. For all the above, Mr. Justice Choor Singh states simply that:

> Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its jurisdiction without any possibility of correction by a superior court.[30]

It follows therefore, that the MCA, albeit a "superior court of record", can have only limited appellate jurisdiction with regard to persons subject to military law. It would, for example, be absurd if a civilian's divorce could be heard by the MCA with no remedy against this excess of jurisdiction being available.

3. *Halsbury's "superior courts"*

The learned judge in *Abdul Wahab* based his distinction of "inferior" and "superior" courts on the definitions given in the 4th edition of Halsbury's Laws of England.[31] However, it is difficult to see the value of the entries there to the suggestion that the MCA is beyond the reach of the prerogative writs. Paragraph 710 states that there are Superior Courts which are still inferior to the High Courts: the Crown Courts are subject to the supervisory jurisdiction of the High Court and the Ecclesiastical Courts can be stopped from exceeding their jurisdiction by an order of *prohibition.* Paragraph 715 states that the jurisdiction of a court may be limited by statute. Both these paragraphs give support to the contention that the MCA, a creature of statute, is still an inferior court subject to the review powers of the High Court.

His Lordship however relied on a comparison between the Courts-Martial Appeal Court in England and the MCA in that both are superior courts of record created by statute.[32] This aspect will be discussed shortly. It may be pertinent to note however that the previous statute dealing with military courts in Singapore stated explicitly the superiority of the High Court.[33] This explicitness was however, not repeated in the 1972 S.A.F. Act.

4. *The case of R.* v. *Cripps: "Supervisory jurisdiction"*

In *Abdul Wahab,* his Lordship held that the *Cripps*[34] case is authority for the proposition that "an election court was to be regarded as a superior court and accordingly the High Court had no jurisdiction to grant relief by way of judicial review".[35] With respect, this is not what that case held — the judgment makes it abundantly clear that the election court *is* regarded as an inferior court for the purpose

[30] See: *Re Application by Yee Yut Ee* [1978] 2 M.L.J. 142 at 144/5; the 'ouster clause' in question was s. 46 of the Industrial Relations Act (Cap. 124) which reads: "Subject to the provisions of this Act an award shall be final and conclusive, and no award or decision... shall be challenged, appealed against, reviewed, quashed, or called into question in any court and shall not be subject to *certiorari,* prohibition, mandamus or injunction in any court on any account". See also, *infra,* note 46.

[31] Vol. 10 para. 708-714, 4th edition, 1975.

[32] *Supra,* note 1 at 419, 420.

[33] S.2, Singapore Army Act (No. 13 of 1985).

[34] *Supra,* note 8.

[35] *Supra,* note 1 at 420.

of judicial review, despite it having the same powers, jurisdiction and authority as the High Court. Factors other than the legislative description which were taken into account included: the fact that the court consists of a barrister, not a High Court Judge; the High Court's power to determine certain points of law; the historical subordination of the court to the High Court, with the finding that the present legislation had not materially altered that subordination; an examination of "matters as a whole". All these led to the finding that the court could not possibly be regarded as a branch of the High Court and was therefore inferior for the purposes of considering excesses of jurisdiction. Accordingly, the Queen's Bench issued an order of *certiorari* to correct the excess of jurisdiction.[36] The case was later affirmed on appeal to the Court of Appeal.[37]

His Lordship drew two other propositions from the *Cripps* case which made him decide that the MCA is a superior court:

a) where courts are declared by statute to be superior courts, it is beyond doubt that the High Court has no *supervisory* jurisdiction.[38]

b) The nature of the court has to be looked into, to determine whether that court is a superior court, where it is not expressly stated to be so. "[O]ne relevant fact is whether the court is presided over by a Judge of the High Court".[39]

These two propositions must be questioned. The Singapore High Court's "supervisory jurisdiction" includes both judicial review in the widest sense (using the prerogative writs), and the more limited "supervisory" (or "revisionary") power over courts from which a right of appeal lies to the High Court.[40] Although similar, these are separate and distinct powers. It is trite that the High Court does not exercise the more limited "supervisory power" over the MCA, because there is no appeal from the MCA to any court.[41] But this has nothing to do with the broader "judicial review" powers as set out in the First Schedule of the Supreme Court of Judicature Act. With respect, it would seem that his Lordship confused these powers and simply drew the wrong proposition from *Cripps* case.

Secondly in the *Cripps* case, with reference to the Courts-Martial Appeal Court and the Restrictive Practice Courts of England, the fact that High Court judges sit in both Courts was held to be *just one factor* to be taken into account besides the fact that the Acts creating the courts expressly provide that they are superior courts, It is not conclusive.[42]

36 Supra, note 34 at 88.
37 [1984] Q.B. 686.
38 Supra, note 1 at 420.
39 Ibid.
40 See ss. 24-27 of the Supreme Court of Judicature Act, Cap. 15. 1970 (Rev. Ed.) for the "narrow supervisory" (also sometimes called "revisionary") power. "Subordinate court" in s. 27(1) is defined in s. 2 of the Act as meaning "a court constituted under the Subordinate Courts Act and any other court, tribunal or judicial or quasi-judicial body from the decision of which under any written law there is a right of appeal to the Supreme Court" (emphasis added).
41 S. 154 of the SA.F. Act.
42 Supra, note 8 at 84.

In sum, the case of *Cripps* is contrary authority for the holding in *Abdul Wahab.*

We have already alluded to the questions of the constitution, jurisdiction and powers of the MCA. In further exploring its relationship to the High Court, let us examine the constitutional allocation of "judicial power".

5. *Infringing the "judicial power" of the High Court*

The question of the separation of powers in our Constitution was unfortunately not considered in the *Abdul Wahab* litigation. In particular, the case of *Hinds* v. *The Queen*[43] might fruitfully have been cited.

In that case, it was held by the Privy Council that the Legislature could provide for the establishment of new courts and for the transfer to them in whole or in part, of jurisdiction previously exercised by an existing court, but that this judicial power was to be vested in the manner laid down in the Constitution. The Privy Council also held that the label Parliament attached to the judges in the new court was not important: "it is the substance of the law that must be regarded, not the form".[44]

Following from these observations by Lord Diplock in the *Hinds* case, if the 1972 S.A.F. Act intended to create a new superior court which status was to be the same as that of the High Court, the members of this court *must be* appointed in the same manner and be entitled to the same security of tenure to which holders of judicial offices are entitled under the Constitution, Part VIII.

However, these conditions are not satisfied under the S.A.F. Act for at least two reasons. First by section 121(1) the President of the MCA "shall be, or a person qualified to be, a Judge of the Supreme Court". Therefore, the President of the Court is not necessarily a Judge appointed under Article 95 of the Constitution. Even if the President of the Court is a Judge of the High Court, he can be removed by the Armed Forces Council pursuant to section 133(1) of the S.A.F. Act. Thus even a High Court Judge, as President of the MCA does not have the protection of tenure afforded by Article 98 of the Constitution.

Secondly, the other four members of the Court are selected by the Armed Forces Council, two of whom must be legally qualified persons of five years standing and the other two officers of the Armed Forces. Their remuneration and allowances are determined by the Armed Forces Council which may also prevent any officer from serving as a member of the MCA.[45] Therefore, these members are neither appointed under Article 95 nor afforded the protection of tenure of office and remuneration under Article 98 of the Constitution.

Let us return to the case law. The Privy Council in the *Hinds* case relied on the earlier case of *A.G. for Australia* v. *The Queen,* in

43 [1977] A.C. 195.
44 *Ibid.,* at 213, 214.
45 Ss. 121(2), 121(3) and 133(2) of the S.A.F. Act.

which it was held that that if the Legislature vested judicial power in another body, that part of the Constitution which deals with the Judiciary must be followed.[46] It follows that the Singapore legislature, in creating the MCA could not put it on the same footing as the Supreme Court without having regard to Part VIII of the Constitution.

The *Hinds* case makes it plain that the "distinction between the higher judiciary and the lower judiciary is that the former is given a greater degree of security of tenure than the latter".[47] The MCA could be contrasted with the Industrial Arbitration Court referred to above. The I.A.C. comprises the President or Deputy President, and two other members, one from the employee panel and the other from the employer panel.[48] The President and the Deputy President have the same rights, privileges, protection and immunity as a Judge of the Supreme Court and the Provisions of the Constitution relating to the tenure of office and the terms of office of Judges of the Supreme Court shall be deemed to apply to him as if he were a Judge of the Supreme Court.[49] Similarly, a member of a court, in the performance of his functions under the Act has the same protection and immunity as the President.[50] The Singapore Armed Forces Act does not have similar provisions. It is also to be stressed that the I.A.C. has never been placed on the same footing as the High Court — on the contrary.[51] The MCA is thus only "superior" in statutory form but not in constitutional substance. It must still be "inferior" to the High Court.

6. *Differences between the Military Court of Appeal and the Courts-Martial Appeal Court in England*

Counsel for the applicant in *Abdul Wahab* contended that the MCA is different from the Courts-Martial Appeal Court in England. His Lordship however disagreed and held that it "is of no consequence because both these Courts are presided over at least by High Court Judges".[52] With respect, it is of consequence.

The composition of the English Courts-Martial Appeal Court consists of either Judges of existing courts or persons of legal experience appointed by the Lord Chancellor.[53] This differs substantially from the composition of the MCA, where two of the members are officers, with no requirement of legal experience, appointed by the Armed Forces Council.

The Courts-Martial Appeal Court in England is *always* presided over by a High Court Judge.[54] As noted, however, the president of

46 [1957] A.C. 288, 313.
47 *Supra,* note 43 at 218.
48 Ss. 3(2) and 11 of the Industrial Relations Act, Cap. 124, Singapore Statutes 1970 (Rev. Ed.). See also *supra,* note 30.
49 *Ibid.,* s.4.
50 *Ibid.,* s. 13. However, the remuneration of the President and other members of the Industrial Arbitration Court is not statutory expenditure and therefore can be subject to questioning in Parliament (*cf.* the remuneration of the Judges of the Supreme Court).
51 See *supra,* note 30 and accompanying text.
52 *Supra,* note 1 at 420.
53 Statutes in Force, Official Revised Edition 1972. Courts-Martial (Appeals) Act 1968 c. 20.
54 *Ibid.,* s.5(2).

the Singapore MCA need not be a High Court Judge but need only be a person qualified to be a Judge of the Supreme Court.

It was also contended that the MCA and the Courts-Martial Appeal Court of England are different bodies with different methods of legal control. The English court is supervised by the House of Lords, a civil court.[55] As noted above, however, in Singapore, there is no appeal and the civil courts have no narrow "supervisory jurisdiction" over the MCA. The comparison of the two military appeal courts in the *Abdul Wahab* decision does not take into account these important distinctions. Let us therefore examine in more detail the crucial question of judicial review.

7. *The High Court's power to inquire into the validity of detention*

In addition to the above reason based on general principle, there are specific reasons why the finding that the MCA is not subject to judicial review is arguably wrong in law.

First, it must be stressed that in preventing *appeal* from the MCA, section 154 of the S.A.F. Act does not purport to "oust" the High Court's review jurisdiction.[56] In any event, as noted above, the intent of such clauses often fails where there is excess of jurisdiction on the part of an inferior tribunal (as it has been argued that the MCA must be). It is imperative that this position is to be maintained as otherwise there would be no remedies available to aggrieved persons. This is especially important where the basic civil rights of a soldier may be affected.[57]

Perhaps the most basic of these rights is the right not to be unlawfully confined. For this reason, the function of the writ of *habeas corpus* is entrenched in the Constitution under Article 9(2):

> Where a complaint is made to the High Court... that a person is being unlawfully detained, the Court *shall* inquire into the complaint and, unless satisfied that the detention is lawful, *shall* order him to be produced before the Court and release him. (emphases added).

The effect of this constitutional *duty* is that irrespective of any contrary English (or other) authority on the limitations of the writ of *habeas corpus* in ordinary circumstances, the Singapore High Court can *never* deny jurisdiction to inquire into any complaint of unlawful detention.

In any event, this duty is not necessarily contradictory to the authority that a judgment by a criminal court, including possibly a military court, would not be subject to *habeas corpus.* Perhaps *habeas corpus* is indeed so limited at common law, provided that the court concerned was operating lawfully. But there are normally other possible actions to deal with the decisions of ordinary courts: appeal, "revision", etc. Where the court concerned is outside of the normal judicial hierarchy, however, it is imperative that either *habeas corpus,* or the

[55] *Ibid.,* S. 39.

[56] A finality clause merely states that there should be no appeal to a higher court whereas an ouster clause attempts to oust judicial review.

[57] *R.* v. *Secretary of State for War, Ex parte Martyn* [1949] 1 All E.R. 242 at 243.

other prerogative orders, or perhaps simply an order based on the authority of Article 9(2) alone, should be available to achieve the functional equivalent. The real issue is the High Court's duty to determine that the court concerned was "competent" and whether its decision was "lawful". If the High Court answers in the affirmative, that is the end of the matter. But it cannot deny its duty to make that answer.

In other words, we need go no further than the basic principle of *ultra vires* which underlies all public law. This principle is of very wide application. Even when dealing with the discretionary exercise of the prerogative power of defence, judicial inquiry is not precluded where abuse or excess of power is in issue.[58] Why should military courts, confined specifically by statute, be immune?

8. *Are military courts sui generis?*

Is there not an argument to say that military courts are really *sui generis* and that they *should* be treated as beyond the reach of the civilian courts? The only Singapore case which supports this view is that of *In re Madden* discussed above. A brief review of other common law jurisdictions sharpens the contention that a *sui generis* approach should not be taken in Singapore.

(a) *Malaysia*

The case of *Datuk Harun,* discussed above, did not deal with military courts although the dicta therein suggest that the writ of *habeas corpus* is not available against military courts. This authority will be considered shortly.

However, in the earlier case of *Peter Chong Gen Onn & Ors.* v. *Col. Adam B. Abu Bakar & Ors.*[59] the Federal Court held *inter alia* that the civil courts could interfere with military courts and matters of military law in so far as the civil rights of a soldier were affected. The Federal Court held also that a civil court would not intervene in matters relating to military law apart from presenting rules for the guidance of officers. There is thus clearly some measure of exclusiveness conferred on the military. However it must be noted that in the case relied upon by their Lordships in *Peter Chong* (*R.* v. *The Army Council Ex p. Ravenscroft*[60]) the accused, like the accused Peter Chong, was still under military law. The cases do not deal with constitutional rights along the lines of this discussion of *Abdul Wahab.* Rather they open the door for intervention by civil courts.

(b) *England*

i. *Historical view*

English civil courts have always been able to subject military courts to their supervision.[61] Military law also could not be exercised over civilians[62] and *Blakes case*[63] held that a writ of *habeas corpus*

58 *Chandler* v. *D.P.P.* [1964] A.C. 763.
59 [1977] 2 M.L.J. 142.
60 [1917] 2 K.B. 504.
61 See *Grant* v. *Gould* (1792) 2 H. Bl. 69 and *Re Mansergh* (1861) 1 B. & S. 400
62 *Wolfe Tone's Case* (1798) 27 St. Tr. 614.
63 (1814) 2 M. & S. 428.

could be granted against a military court. These cases show that even in the eighteenth and nineteenth centuries, military courts were subordinate to civil courts.

However, the case of *R.* v. *Governor of Lewes Prison ex p. Doyle,* noted above,[64] appeared to state the contrary. This was a case involving a civilian involved in the Irish rebellion, at a time when martial law had been declared. Under the provisions of the martial laws, he was tried in a field court martial for assisting the enemy and sentenced to death. On revision, the conviction was confirmed, but the sentence was reduced to three years jail. From jail, he commenced his application for *habeas corpus* challenging the validity of the proclamation, and the legality of the whole trial which had been held in camera, with no civilian injury etc. The main judgments were delivered by Viscount Reading C.J. and Darling J. Both constitute very full examination of the jurisdiction of the court martial, with no suggestion that the High Court did not have jurisdiction so to inquire. It was acknowledged that there was a distinction to be drawn between custody *before* and *after* a judgment of a military court. However, this only raised the difficulty of proof of illegality. Darling J. concluded:

> In my judgment the General exercised powers which he was perfectly entitled to exercise, and that he had very good reason for exercising them is shown by the evidence and documents which have been placed before this court.[65]

Concurring briefly with the main judgement, Avery J. remarked that *habeas corpus* would not lie where a person had been convicted by a duly constituted court.[66] However, it must be stressed that in the context of this case, all he was saying was that *provided the court was acting lawfully,* the writ would not lie.

In short, as regards questions of jurisdiction, military courts have for centuries been subject to the review powers of the High Court in England.

ii. *Present view*

The present view can be determined by looking at the Courts-Martial (Appeals) Act 1968. The Act provides for appeal to the House of Lords, a civilian court. It also provides for the members to be appointed by the Lord Chancellor and to be legally trained. The case of *R.* v. *Secretary of State for War ex p. Martyn* [67] held that where the civil rights of a soldier were involved the civil courts would interfere. These depict the view contrary to a "pure" *sui generis* stand. The case of *R.* v. *Army Council ex p. Revenscroft*[68] may perhaps restrict the role of civil courts but still does not support the pure *sui generis* argument. In that case the King's Bench held that civil courts cannot intervene when military rules prescribing guidance of officers are involved. However the case did not close the door to review by civil courts.

[64] *Supra,* note 15 and accompanying text.
[65] *Ibid.,* at 274.
[66] *Ibid.*
[67] [1949] 1 All E.R. 242.
[68] [1917] 2 K.B. 504.

(c) *Australia*

The case of *R.* v. *Bevan & Ors, ex p. Elias & Gordon*[69] held *inter alia* that the Constitution of Australia granted to the High Court of Australia power to adjudicate upon a military matter. There is no question of *sui generis.*

(d) *United States of America*

By way of contrast, the Constitution of the United States provides for the *sui generis* nature of military courts. In the case of *Dynes* v. *Hoover,*[70] the court held that Article 1 s. 8 clauses 13 and 15 of the Constitution of the United States of America confers on Congress the

> powers to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilised nations; and that the power to do so is given without any connection between it and the 3rd article of the Constitution defining the judicial power of United States; indeed, the two powers are entirely independent of each other.[71]

However, military courts are not allowed to adjudicate where the accused is no longer part of the military.[72]

It can therefore be seen that unlike the Singapore, Malaysian, English and Australian position, the U.S. Constitution provides for the existence of *sui generis* military courts. However, even these courts are still "limited" in that they may only deal with military personnel.

From an overview of other common law jurisdictions, it can be seen that military courts can only be considered *sui generis* where the Constitution provides for such. In the light of precedent and the above discussion it is submitted that the military courts in Singapore are subject to the ordinary rules of review. The cases show that civil courts can intervene although sometimes in restricted circumstances. The courts would usually leave military matters to the military but when a civil right is affected (or where there is excess of jurisdiction), they would intervene. In *Abdul Wahab,* a constitutional right provided by Article 9(2) was in issue. If the High Court, the guardian of the Constitution, denies its own role, to whom can military personnel turn? As in other common law countries, the Singapore High Court has a duty to intervene, especially where a fundamental right is affected.

The discussion to this point has argued with respect, that the "judicial review" holding of the *Wahab* case is contrary to the case law and other authority, to basic principle, and perhaps to the Constitution itself. Before turning to the "additional holding" of the case, we must briefly consider the question of whether the S.A.F. Act might have impliedly amended the Constitution.

8. *Implied amendment*

Although not mentioned in the arguments or decision, this case raises the important issue of implied amendments to the Constitution.

69 (1942) 66 C.L.R. 452.
70 (1858) 61 U.S. 65.
71 *Ibid.,* at 79.
72 *US. ex rel. Toth* v. *Quarles, Sec. of the Air Force* (1955) 350 U.S. Rep 11.

The S.A.F. Act does not expressly state that it amends the constitution, nor can this be implied from a reading of the Act or the parliamentary debates.[73] However, if (contrary to the arguments advanced in this comment) the Act did indeed create a court equal to the High Court, then in light of the discussion above with regard to the "separation of powers", the Act is in conflict with the Singapore Constitution. Bearing in mind that the Act was passed while the procedure for constitutional amendment required only a simple parliamentary majority, the question of implied amendment therefore arises.

What is the scope of "implied constitutional amendment"? The Privy Council has laid down several rules which are of use here.

In *McCawley* v. *R.*[74] the Privy Council held that in a constitution without any special formality for amendment, there could be implied amendments by ordinary statutes. On referring to the Colony of Queensland Constitution Act 1867[75] the Judicial Committee could not discern from the preamble "the least indication that it is intended for the first time to make provisions which are sacrosanct".

From reading the judgement it can be seen that as the Constitution of Queensland then was not supreme, the legislature could enact any inconsistent law. The Queensland Constitution and the case must be contrasted with the Singapore position. In 1972, the then Article 52 (now Article 4) of the Constitution of Singapore assured that "any inconsistent law shall to the extent of the inconsistency, be void". In *McCawley,* the Board held that the provisions made under the colonial laws gave complete power to the Queensland Legislature. Article 52 makes it clear that no such general power existed in Singapore. However, to cover the arguments fully it is necessary to discuss two other cases relating to implied amendments and also the period between 1958 and 1979 to see whether there could possibly have been implied amendments in Singapore.

In *The Bribery Commissioner* v. *Ranasinghe*[76] the Privy Council had to decide on the validity of an Act[77] which provided for the appointment of members of the Bribery Tribunals in Ceylon by the Governor-General on the advice of the Minister of Justice. This was because the Act was in plain conflict with the requirement in section 55 of the Ceylon (Court) Order in Council 1946 where the appointment of judicial officers was vested in the Judicial Service Commission. The Ceylon Constitution provided in section 29 that the certificate under the hand of the Speaker of Parliament was needed whenever there was a Bill which amended or repealed any of the provisions of the order.[78] The Bribery Amendment Act 1958 did not have such a certificate. The Board rightly rejected the argument that no court could enquire into any procedural matter. *Lord* Pearce went on to say:

> Once it is shown that an Act conflicts with a provision in the constitution, the certificate is an essential part of the legislative

[73] *Supra,* note 20.
[74] [1920] A.C. 691, at 706-9.
[75] Constitution Act of 1867 (31 Vict. No. 38).
[76] [1964] 2 W.L.R. 1301.
[77] Bribery Amendment Act 1958 of Ceylon.
[78] Ceylon (Constitution) Order in Council 1946.

> process. The court has a duty to see that the constitution is not infringed and to preserve it inviolate.[79]

The Board went further by distinguishing *McCawley* v. *The King*. That case was held to have involved a legislature with full power to make laws by a simple majority and it was able to amend the Constitution without requiring any special legislative process. Here in *Ranasinghe's* case was a special legislative process which was not complied with. The Act was therefore held to be *ultra vires* and invalid. The case suggests that in such a constitution, a legislature is able to enact an inconsistent law as long as the special legislative process set by the Constitution is complied with. In Singapore in 1972, there was no special legislative process required. However the statement of supremacy in Article 52 may at the very least, have required an explicit statement of intention to amend — the equivalent of the Speaker's certificate in Ceylon.

The requirement of express amendment was confirmed in *Kariapper* v. *Wijensiha*.[80] The Board drew a distinction between the form and substance of an inconsistent law and emphasized that only when an Act altered the Constitution would it require the formality of the Speaker's certificate[81] which would show that Parliament had put its mind to an amendment of the Constitution despite there being no express wording of such intention. In sum this case also requires some explicit indication of intention to alter the constitution. Again it is to be noted that the Ceylon Constitution did not contain a similar provision to Article 52 of the Singapore Constitution.

A brief note on the constitutional history of Singapore between 1958 and 1979 supports the writers' contention that to the extent of inconsistency the Singapore Armed Forces Act should not be regarded as an implied constitutional amendment. The Singapore (Constitution) Order in Council 1958 provides that amendments to the Order could be made by the Legislative Assembly under s. 105. It required a two-thirds majority for an amendment. However the extent to which amendments could be made was limited by the Third Schedule to the Order. This included Part X; dealing with the Judiciary, which was thus outside the ambit of the amending power of the Legislative Assembly.

Later in 1963 when Singapore became a member state of Malaysia, section 90 of the Third Schedule to the Sabah, Sarawak and Singapore (State Constitution) Order in Council 1963 ensured that the Singapore Constitution required a two-thirds majority (with exceptions listed out in Article 90(3)). And as noted, by virtue of Article 52 the Constitution was supreme. But in 1965 Article 90 was amended to allow a simple majority for an amendment to the Constitution. However Article 52 itself was not amended. It is contended here that the change to a "simple majority" amendment procedure does not affect the argument against the legality of implied amendments.

From 1965 to 1979 there were thirteen constitutional amendments. Because Article 52 was still operating, if Parliament wanted to pass

[79] *Supra,* note 76 at 1308.
[80] [1968] A.C. 717.
[81] S. 29 of the Ceylon (Constitution) Order in Council, 1946.

an inconsistent law, it amended the Constitution explicitly on each occasion. In 1965, Parliament considered it necessary to amend Article 90 (from a two-third to a simple majority amendment procedure) because of the constitutional changes then prevailing.[82] It did not, however, abolish the need for constitutional amendments to be specific if they were not to contradict Article 52. It is thus submitted that Parliament would have amended any relevant constitutional provision had it considered it necessary in passing the S.A.F. Act in 1972. Further, it is to be noted that the setting up of the judiciary was made through a constitutional amendment in 1969. Parliament would surely have expressly amended this part in 1972 had it intended the MCA to be part of the Supreme Court. It is therefore submitted that there was no implied amendment by the passing of the Act. Further, there would be a great deal of legal uncertainty if implied constitutional amendment was recognised in Singapore. It follows from this argument, that to the extent that the S.A.F. Act attempted to create a body in conflict with the judicial provisions of the Constitution, it would be void.

Before concluding this paper, we have finally to examine the "additional holding" of the *Abdul Wahab* case.

9. *Was the MCA acting intra vires?*

His Lordship in *Abdul Wahab* upheld the decision of the President of the MCA in that by section 105(1) of the S.A.F. Act, the applicant was treated as continuing to be subject to military law notwithstanding that he was no longer in the army when the appeal was heard.[83]

Section 105(1) reads:

> 105.-(1) Subject to section 107 of this Act where an offence under this Act triable by a subordinate military court or by a disciplinary officer has been committed or is reasonably suspected of having been committed by any person while subject to military law then in relation to that offence he shall be treated for the provisions of this Act relating to arrest, keeping in custody, investigation of offences, trial and punishment by a subordinate military court or by a disciplinary officer (including review) and execution of sentences as continuing to be subject to military law notwithstanding his ceasing at any time to be subject thereto.

It is to be noted this section is a penal provision in that it provides, *inter alia,* for arrest and punishment of offenders. By the ordinary rules of statutory interpretation, penal provisions are to be construed strictly and any ambiguity is to be resolved in favour of the liberty of the subject.[84] Section 105(1) applies in a situation where an accused whilst subject to military law, commits an offence contrary to the S.A.F. Act and the crime is not detected until after he is released from the Army. The accused, when arrested, would then still be subject to "trial and punishment by a subordinate military court or by a

82 See Singapore Parliamentary Debates, (1979) vol. 30, col. 295.
83 *Supra,* note 1 at 421.
84 *Heydon's case* (1584) 2 Co. Rep. 7a. See also *Ang Chin Sang* v. *P.P.* [1970] 2 M.L.J. 6 and *The Bank of Canton Ltd.* v. *Dart Sim Timber Pte. Ltd.* [1981] 2 M.L.J. 58.

disciplinary officer".[85] It is respectfully submitted that section 105(1) does not contemplate the *appeal* situation in the present case. It is limited to a trial and punishment by a subordinate military court and does not cover an appeal. The MCA is never mentioned in the section. Furthermore, the section is found under Part V of the Act which deals with trial by Subordinate Military Courts. It is therefore submitted that both the MCA and the High Court may have misconstrued the scope of the provision.[86]

Secondly, his Lordship in *Abdul Wahab* held that the MCA was already "seized of the appeal" by the time the applicant had left the army. This was because the Head of the Legal Service gave notice of appeal to the Registrar of the MCA against sentence imposed on the applicant by the subordinate military court under section 123 of the S.A.F. Act while the accused was still in the Army. By analogy with appeals to the Court of Appeal, his Lordship argued that the jurisdiction "vested" once the appeal was entered, not only at the date of actual hearing.[87]

It is respectfully agreed that this "vesting" statement is correct as it stands. However, it is submitted that the real question is whether the "vesting" *lapsed.* It is perfectly possible that subsequent events, such as unlawful delays, or withdrawal by the appellant, will withdraw the matter from the court's appellate jurisdiction. In this case, the issue was whether allowing a person to leave the army caused the appellate jurisdiction to lapse. The MCA could only validly deal with the appeal in accordance with the S.A.F. Act while the persons were subject to military law.[88]

Some guidance may be taken from the American case of *US. ex Rel Toth* v. *Quarles, Secretary of the Air Force*[89] where it was held that since the accused had already been discharged from the Air Force, he was beyond the jurisdiction of the military courts. Article 1 of the United States Constitution was held not to extend to civilian ex-soldiers who had severed all relationship with the military and to hold otherwise would require an extremely broad interpretation of the language used. Similarly, sections 105 and 123 of the Singapore Armed Forces Act do not contemplate such situations as the present case; the language of these sections should not be stretched beyond their natural meaning.

For these reasons, it is submitted that the court had several months during which it was indeed lawfully "seized of" the matter. However, once the respondent had left the army, the hands of "seizure" were lawfully prised open; the net had been lifted.

We have also to consider the implications of countenancing delay. In this case, the delay was only a few days, but how long might a respondent have to wait? According to this case, once an appeal was

[85] S. 105(1) is subject to s. 107 of the Act.

[86] Under s. 105(2), a person will be subject to the Act during the term of his sentence notwithstanding that he was no longer subject to military law before his arrest. This sub-section also does not contemplate the situation in *Abdul Wahab.*

[87] *Supra,* note 1 at 421.

[88] See ss. 121(5) and 3 of the S.A.F. Act, and *supra,* note 23.

[89] (1955) 350 U.S. Rep. 11.

entered validly, the MCA might retain jurisdiction forever — could a person be brought back to the MCA ten years after he had left the army and given an increased sentence? Since none of the prerogative writs would lie even if such was contrary to the S.A.F. Act, the effect of this judgment is profoundly unsettling.

Quite apart from the possibility that the MCA might impose *increased* penalties long after a sentence was served, what about the possibility that a sentence might be *reduced?* In the *Abdul Wahab* case, it was lawfully possible that the court might have found that the sentence was too severe — by delaying the appeal until the prisoner had served his sentence, a situation of great complexity might have been created. The possibility that to allow the MCA to retain its jurisdiction after a person has left the army might be to allow an abuse of process, cannot therefore be excluded.

Conclusion

With regard to the "judicial review" holding in the *Abdul Wahab* case, if the MCA is indeed a superior court beyond the reach of judicial review, then Parliament would at one stroke have created a body both limited and unlimited. Whatever one's views on "parliamentary" or "constitutional" supremacy,[90] common law jurisprudence is extremely reluctant to recognise such a creation, as evidenced by the cases on "ouster clauses".[91] It is no doubt possible to restrict the powers of civil courts as long as the military courts operate within their jurisdiction, but the holding in the *Abdul Wahab* case goes much further. In so doing, the case raises the host of issues that have been alluded to in this comment. It has been argued that the weight of authority on judicial review in general and on military courts in particular, is against this finding. In addition, the case produces a number of constitutional problems which were apparently not argued. Most simply, there is the direct conflict with Article 9(2) of the Constitution, which *requires* the High Court to inquire into allegations of unlawful detention. The more complex constitutional issue relates to the infringement of "judicial power" under Article 93 of the Constitution. In turn, the uncertain question of implied amendment is raised.

The second holding in this case, that the MCA was a court of competent jurisdiction, has also been critically reviewed (as has the difficulty of connecting this to the finding on immunity from judicial review). It has been suggested that there are alternatives to the findings of the case on this point. No doubt it may offend one's sense of justice were a person to get away with a lighter sentence than might have been thought necessary. However, it has been argued that other factors must be weighed: certainty in the law. the requirements of a fair legal process, and the need to interpret penal provisions restrictively. There must be limits, carefully observed, especially by the institutions entrusted with the maintenance of law.

What, then, of Abdul Wahab bin Sulaiman. who spent eighteen months in Tanglin Detention Barracks? At least, recurrence must be

[90] A.J. Harding's article, "Parliament and the Grundnorm in Singapore" (1983) 25 M.L.J. 351 should be read for further discussion.

[91] See, for example, the line of cases leading up to *Re Application by Yee Yut Ee* [1978] 2 M.L.J. 142.

prevented. On basic principle it is clear that the legislature should not attempt to avoid the over-arching jurisdiction of the High Court. As *Cripps* case demonstrates, such attempts fail, even where there is no superior constitution. In the Singapore legal system, any attempt to create a variant species of High Court without having regard to the Constitution, is simply misconceived. More specifically, it would avoid future confusion if legislation were passed to provide for the Military Court of Appeal to have jurisdiction over persons who have left the army (if such is thought necessary).

With regard to the judicial process itself, since many of the matters canvassed in this comment were not apparently argued, an important prevention might be careful advocacy on public law issues: the constitutional basics must be addressed. Finally, it is submitted that the High Court should be wary of apparently abandoning its *inherent* review jurisdiction: to say that a matter will not be reviewed in the instant circumstances is different from the suggestion that a body is forever immune. At stake is the rule of law.

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