Singapore Journal of Legal Studies
[2019] 177–203

LIABILITY OF SERVANT FOR CRIMINAL BREACH OF TRUST: AN EXERCISE IN HERMENEUTICS

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This article relies on structural arguments derived from the criminal breach of trust provisions of the *Penal Code*, comparisons with the Larceny Acts and common law offences such as misconduct in public office and conspiracy to defraud, as well as the principle of equitable construction, to reach conclusions on the meaning of two important modalities of entrustment. These are entrustment "in such capacity [as servant]" and "in his capacity of a public servant" which are the bases for greater punishment under section 408 and section 409 respectively. The conclusions on the public servant modality are at variance with judicial interpretations of the Indian courts.

I. INTRODUCTION

The liability of a servant, private or, as the case may be, public, for criminal breach of trust under sections 408 and 409 of the *Penal Code*[1] is seriously under-considered. Both enactments take their point of departure from section 405 which defines the offence of criminal breach of trust which is punishable under section 406. If criminal breach of trust is committed by a person who "being a servant or clerk or employed as a servant or clerk" (hereafter "being a servant") is entrusted with property "in such capacity [as servant]", section 408 provides that he shall be punished more severely than under section 406. If criminal breach of trust is committed by "whoever" is entrusted with property "in his capacity of a public servant", section 409 raises the maximum sentence significantly beyond that prescribed by section 408. These capacity phrases, as the case may be, are unmistakably distinctive of both enactments but are obscure. They could be requirements of character or attributes; or amplitude; or duties of office, position or function; or modes of manifestation of attributes or duties; or operational events in the course of or in connection with office, position or function. To add to the ambiguities, it cannot be ruled out that these phrases may be contemplating not some mutually exclusive requirement but a combination, for example, of attributes and office and position or of office and mode of exercise of the duties to be performed by the office holder.

It would be problematic to ascertain the meaning of the first phrase ("in such capacity [as servant]") if it had been created in a legal vacuum. But its genesis in the Larceny Acts has been acknowledged. The accuracy of the opinion stated in 1846

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1 Cap 224, 2008 Rev Ed Sing.

by the Indian Law Revision Commissioners, namely that section 408 took the place of the Larceny Acts, is not questioned.[2] This article will therefore first sketch out in Part II the now obscure common law and English statutory backdrop with a view to elucidating the meaning of the servantly capacity phrase in the Larceny Acts.

With Part II only the starting point is completed. Although the Larceny Acts are an acknowledged source of inspiration for section 408, the transformation in the latter via section 405 of statutory larceny or embezzlement into a comprehensive generalised offence of criminal breach of trust must not be missed. The next step has to involve an examination of the qualifications necessitated by this transformation. Part III therefore examines the phrase "in such capacity [as servant]" more closely by situating as well as comparing section 408's servantly modality and 409's agentive modality against the Larceny Acts. The results confirm that the servantly modality must be considered to be a transaction-facilitating ministerial entrustment.

As far as the section 409 phrase "in his capacity of a public servant" is concerned, the coupling together of private and public criminal breach of trust was an innovation in which the Larceny Acts played a very small, if not negligible, providential role. In England then, the common law offences covered much of the field of liability of a public servant for criminal breach of trust by dishonest breach of duty. Tracing the public criminal breach of trust of section 409 to its counterpart common law offences is legitimate. This is because the provisions of the *Penal Code* generally and those of section 409 in particular were intended to codify and generalise both counterpart common law and statutory law offences. Part IV therefore elicits the distinctive meaning of the section 409 phrase by (1) comparison with the results obtained in Part III; (2) reference to the definition of public servant in section 21(1) of the *Penal Code*; (3) juxtaposition with agentive entrustment in section 409 itself; (4) reference to the light cast by historical perspectives pertaining to such counterpart common law offences such as misconduct in public office and conspiracy to defraud the government; and (5) reference to American principles of equitable construction of penal statutes. The primary result is an equitable construction which yields a meaning resembling in part but also distinct from both transaction-facilitating ministerial entrustment and agentive entrustment.

Part V is the final section. It briefly reviews and controverts a small number of judicial interpretations of the phrase "in his capacity of a public servant". These interpretations have been relegated to the final part so as to reflect the greater importance of historical perspectives and structural comparisons which they have largely omitted.

II. Common Law and Statutory Background

The expression "in the capacity of servant" first appeared in the statute 39 Geo III, c 85. That was the second of what would become a series of piecemeal embezzlement statutes. The earliest such statute 21 Hen VIII, c 7 predicated only delivery by a master of his property to a servant to keep to the master's use. Where the servant was

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[2] As reported in *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at para 191: "They expressly stated that *the offence of CBT in the Indian Penal Code "takes the place" of embezzlement in the English Digest*". The English Digest was a codification of the English penal law including the Larceny Acts.

to carry or convey the master's property to another, he would not have possession but only custody. Further statutory criminalisation was unnecessary since if he converted the property to his own use, he would already be guilty of common law larceny (of asportation or unlawful taking of possession).[3]

A. *Introduction of the Servant Phrase*

The problem dramatically encountered after passage of 21 Hen VIII, c 7 was where a master ordered his servant or employed an employee to receive his property from another for his account. In *Bazeley's Case*,[4] a confidential clerk received possession of his master's property but afterwards fraudulently misappropriated it before the property could reach the master's actual possession. 21 Hen VIII, c 7 could not be applied to receipt of the master's property from another person; and the servant could not be charged with statutory larceny. Nor could he be charged with common law larceny; that charge being legally impossible since the clerk's possession was the master's.

To overcome the problem, 39 Geo III, c 85 was brought in to provide so far as relevant:[5]

> "… That if any servant or clerk; or if any person employed for the purpose in the capacity of servant or clerk, to any person or persons whosoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any [property]… for or in the name or on account of his master or masters, or employer or employers, and shall fraudulently embezzle…".

Conspicuously, the phrase "in the capacity of servant" qualified only the employee, and not the servant.[6] In other words, from inception the capacity phrase could not have been a synonymous expression of the character or attributes of a servant. As further elaboration, we may observe that the separate status-reference to a servant in the first limb was repeated from 21 Hen VIII, c 7. Ensuing case law soon confirmed its status-meaning under both 21 Hen VIII, c 7 and 39 Geo III, c 85. In *R v Negus*,[7] for example, it was held that the test of who was a servant or clerk was that as a matter of fact a servant was bound to obey and under the control of his master.[8] In other cases, it was held that receipt by a servant meant receipt by a person who was a servant who received the master's property as such.[9] It did not matter that he was not a general servant nor that he received it on only one single occasion.[10] It was enough

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3 See *R v Murray* (1830) 1 Mood 276; *R v Metcalf* (1835) 168 ER 1333. Since there could be no larceny which was not trespassory.

4 (1799) 168 ER 519.

5 Although omitted from the operative part, the new statute's use of the word "entrusted" in the preamble was highly suggestive of an intention to produce a more extensive reach.

6 See *R v William Mellish* (1805) 168 ER 694.

7 (1873) LR 2 CCR 34.

8 It was immaterial that the servant was appointed by another than the master. See *R v Callahan* (1837) 173 ER 439. Or that his appointment was invalid. See *R v Hall* (1836) 168 ER 1349.

9 *Williams v Stott* (1833) 149 ER 570. *Cf R v Tyree* (1869) LR 1 CCR 177.

10 *R v Hughes* (1832) 1 Mood 370 [*Hughes*] held that if a servant received property as such, he was liable even though it was only a single instance of receipt.

if the receipt was proximate to his character or general duties as a servant.[11] All of this showed that the phrase "in the capacity of servant" could not be a requirement of receipt by a person having the character or attributes of a servant.[12] Whatever the phrase meant, it had in view the nature or quality of receipt and not the character of the recipient.[13]

B. *Ministerial Receipt under 39 Geo III, c 85*

While the nature or quality of receipt was not further elaborated,[14] its ministerial quality was deducible by a process of elimination. According to 39 Geo III, c 85, there was no statuable larceny if the employee, employed for the purpose of receiving property in the capacity of a servant, never received property by virtue of his employment, for or on account of his master. If he received it for the account of another, not his master, he was not guilty of statuable larceny but common law larceny. More pertinently, if, contrary to his employment, he received it for his own benefit, he was to be charged with common law larceny, not statuable larceny.[15] Receipt for personal benefit thus was an excluded meaning of "in the capacity of a servant". There was furthermore a strong argument from the contrast with the requisite of receipt being by virtue of employment for the purpose of receiving the property. The case law on this showed that it meant receipt by virtue of duty to receive. If there was no duty to receive, there could not be receipt by virtue of employment.[16] This implied that the separate requisite of receipt in the capacity of servant could not duplicitously mean receipt in performance of the duty to receive. By elimination, it had to be ministerial receipt in the passive sense of acting as a mere conduit or machinery. An employee could of course also receive the master's property as an agent for the purposes of

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[11] See *R v Tongue* (1860) Bell 289 [*R v Tongue*] at 295: "If the ordinary duties of a person in the employ of another are proximately connected with the receiving of money, the receipt of money for his employer and appropriation of it to his own use would make him liable to the charge of embezzlement." See also *R v Welch* (1846) 2 Cox CC 85 which indicated that a person employed as a servant fell within the statute even though he had no duty to receive and therefore turn over the specific property. A person employed to receive all moneys receivable and payable by his master and on his master's account as in *R v Squire* (1818) 168 ER 839 would of course be a servant with duties to receive the master's property.

[12] Besides which, a menial or domestic servant was unlikely to be given possession but merely custody of the master's goods or money.

[13] See also *R v Murphy* (1850-51) 4 Cox CC 101 at 106 where Lefroy B said *arguendo*:

> "the difficulty I feel is this, whether the prisoner … stood in the capacity of clerk or servant at all to the trustees, taking it to be his duty to collect the subscriptions, to account for them, and to keep them safe. If doing this constitutes him a servant, … I cannot distinguish the case of any banker, agent, or receiver."

[14] In *R v Townsend* (1846) 1 Den 168 although it was submitted that the prisoner, an assistant overseer of a township, had received the money in question in the capacity of servant, there was no necessity to decide the meaning of being employed "in the capacity of servant" since even if he had done so he had not received the money for the account of his master.

[15] *R v Harris* (1854) Dears CC 344 was a close enough case although the reasoning was in terms of not receiving for the account of the master. In *R v William Carr* (1811) Russ & Ry 198 a person employed to travel and get orders and collect debts was held to be employed for the purpose in the capacity of a clerk of receiving property of the master though he was also thus employed by others.

[16] Although admittedly, the courts were prepared to construe habitual receipt in the actual course of business as receipt by virtue of employment notwithstanding the absence of any express duty to receive in the contract of employment: see *R v Hastie* (1863) 32 LJMC 63 [*Hastie*].

and as a result of exercising an active discretion (*ie* in a decision-making capacity). But then again receipt in a decision-making capacity could not be receipt "in the capacity of servant". At this time, conversion following receipt by virtue of agency was not a needful subject of statutory larceny, being already an offence under the common law.[17] Where a fiduciary agent was given possession, his possession was separate from the principal's if he was acting in accordance with his mandate or authority. He ceased to be in possession upon breach of mandate or authority by parting with possession other than to his principal or by depositing the property in a place inaccessible to or by his principal. Accordingly, any conversion by the agent would be common law larceny and statuable larceny was not needed to criminalise the fiduciary agent's misappropriation.

The important point that 39 Geo III, c 85 contemplated actual ministerial receipt as essential factum is worth stressing. By instantiating actual ministerial receipt, the statute was to be indifferent as to whether receipt was a discharge of a corresponding duty to receive or otherwise. It served instead, and importantly, to exclude cases of receipt by a person who performed the act of receipt exercising discretion as to when and how to receive and account for the property, or as to what portion of the property to receive, or subjecting his receipt to conditions. Also to be excluded were cases where the recipient received property which the master had lent to him or as absolute owner on the master's authorisation or received it with intent to commingle it, thereafter accounting for the property as part of an aggregate sum rather than as individual property. There would not be a ministerial receipt of the property where the property was changed or transmuted in the course of receipt. Furthermore, as *R v Townsend*[18] showed, receipt of property not of the master but another, by an employee exercising his judgment that the property should be regarded as his master's would not be receipt in the capacity of servant.

In fact, any doubts as to the independent value of the capacity requisite vanished as 39 Geo III, c 85 became enlarged in the course of time. The first consolidation statute 7 & 8 Geo IV, c 29 stated more simply that "If any clerk or servant, or any person employed for the purpose, or in the capacity of clerk or servant, shall by virtue of such employment, receive …".[19] This was the beginning of a delinking between employment for the purpose of receipt and employment in the capacity of clerk or servant to receive.[20] Further simplification was evident when the second consolidation statute 24 & 25 Vict, c 96 was enacted. It provided that: "Whoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant shall fraudulently embezzle any chattel, money or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer …".[21] In substance, receipt by virtue of employment was dropped. The result was a conspectus of three disjunctive conditions of liability; namely, being a servant receiving the master's property or receiving the master's property being employed for the purpose of doing so or being in receipt of the master's property in the capacity of servant (whether or not in

[17] See *R v Thorley* (1832) 168 ER 1296 which held that the case was embezzlement.

[18] *R v Townsend, supra* note 14.

[19] Section 47.

[20] See the manner in which the questions were framed in *R v Tongue, supra* note 11 at 292.

[21] Section 86.

fact a servant or employed for the purpose of receipt). If anything, the ministerial quality of actual receipt in the capacity of servant became in effect more apparent and outstanding.[22]

The last point which should be made in this historical account is that throughout all material times in the evolution of the capacity phrase the original contextual feature of ministerial receipt however remained unchanged. The preamble to 39 Geo III, c 85 made no secret of the fact that it was necessary to protect the property of the master in light of the increasing use of servants in the master's business as recipients of that property (whether as porters, cashiers, debt collectors, clerks, paymasters, or book-keepers or accountants). Ex hypothesi, the contemplated servantly capacity was not to be a capacity to transact business, whether as agent or as banker and so on. It would signify the receipt's context, as being transaction-facilitating, and its provenance in the course of the master's business.[23] We can surmise that the facilitating servant would also be giving receipts for property collected and kept safe by him, whether in specie or in a bank account. It was highly probable therefore that such servant would also be in receipt or custody of the account books, vouchers, and other papers in the capacity of servant. There was, it followed, an obvious contrast with the receipt of property by the servant for domestic purposes of the master and under his direct supervision. In such instances, there would not be the same concern to address the risks attendant on the servant taking charge of the master's property in the course of business. The former had a substantially internal dimension though it might involve receipt from a third party while the latter was essentially external in nature as being in the course of the master's business.

To sum up, it might be helpful to distinguish several common situations of larceny, both common law and statuable, in the period immediately after passage of 39 Geo III, c 85. Where the servant kept the master's property for the master's account, it was a statutory larceny for such servant afterwards to convert the property. This was essentially an internal fraud dealt with by 21 Hen VIII, c 7. As for external frauds, where the servant was to carry the property to another but converted it, he was guilty of common law larceny. Where the servant never intended to receive the property for the account of the master, but converted the property from the outset of receipt, he was guilty of common law larceny. Where a servant received the master's property in the course of his ordinary situation as servant for the master's account but converted it, he was guilty of statutory larceny. Where an employee employed for the purpose of receipt, received ministerially the master's property by virtue of employment, for the master's account, it was a statutory larceny for such servant afterwards to convert the property.

III. Private Servant Modality

With the historical meaning elucidated, our next question broaches the question of correspondence in meaning between the capacity phrases in the Larceny Acts and section 408. Acceptance of the initial starting position (that section 408 offence took the place or "subsumed" the corresponding offence under the Larceny Acts) allows

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22 See *eg Hughes,* supra note 10; *Hastie*, supra note 16.

23 See *R v Hoggins* (1809) Russ & Ry 145.

us to proceed in two short steps. First, we examine whether statuable larceny is fully comparable to the criminal breach of trust of section 408. If despite the similarities there are also differences between them, we shall next need to ask whether the meaning of the phrase must be qualified by reason of those differences.

A. *The Phrase as Modality of Punishability*

There is one inescapable difference in framework. The capacity phrase in the Larceny Acts was of an elemental character, being constitutive of criminal liability. Under the *Penal Code*, however, there is a distinction between liability-creating provisions such as those of section 405 and punishability provisions such as those of section 406 (sometimes described as simple breach of trust) and section 408. Leaving aside the irrelevant section 407, as well as section 409 for now, section 408 differentiates from section 406 so as to provide aggravated punishment if there be entrustment in the capacity of servant.[24] This important difference indicates that the meaning of "in the capacity of servant" in 39 Geo III, c 85 cannot entirely be decisive of the meaning of the phrase in section 408.[25]

With respect to liability-creation, an important difference arises from the generalisations which expand section 405 to encompass both statutory and common law larceny. Compared with 39 Geo III, c 85, section 405 is not confined to fraudulent misappropriations but embraces dishonest misappropriation and dishonest breach of duty. Second, it is not confined to property of the master or employer but covers property of another in business with the master or employer.[26] Third, unlike 39 Geo III, c 85's limited notion of entrustment in terms of receipt of property for the account of the owner, section 405 embraces entrustment of ownership, custody and possession. This is entailed by its rejection of any exclusively possession-based offence of embezzlement. Importantly, as ownership and custody are also proper subjects of entrustment, section 408's entrustment in the end can only mean consent by the trustor to the entrusted person being in possession, ownership or custody, as the case may be, for the benefit of the trustor, whether owner or possessor.

B. *Qualifications to Correspondence in Meaning*

With regard to the qualificatory impact of these differences,[27] the question is substantially one of accounting for the principle of parsimony and the generalised nature of section 405. The instances where a master will choose to use his servant as ministerial non-possessory custodian or as nominal owner under a bare trust will be modest, even if they are no longer exceptional. There is nevertheless a parsimonious need to ensure that a master should be able safely to use his servant as possessor or

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24 A person is charged under ss 406, 408, 407, or 409 as the case may be but essentially the conditions of liability in all these sections are established by s 405. Since these sections are substantially imposing punishments, it will not matter that an accused is punished under the wrong section if essentially the sentence imposed is appropriate and below the maximum prescribed by the correct section. See in effect *Chandi Prasad Singh v State* AIR 1956 SC 149 [*Chandi*] at 153.

25 *Cooray v The Queen* [1953] AC 407 is of little assistance, there being no issue of class limitation.

26 There must be property of another. See *Queen-Empress v Imdad Khan* (1885) ILR 8 All 120.

27 See *R v Foulkes* (1872-75) LR 2 CCR 150.

custodian or bare trustee whenever that suits the nature of the master's business in the circumstances. Consequently, the only other qualification that remains for consideration concerns the manner, if any, in which the more comprehensive scope of entrustment should be accommodated. Section 408's enlarged modality, it may be recalled, is based on the concurrence of two requisites only. The first, namely being a servant or employed as a servant, omits to signify a duty to receive or convey or own property. However, should the second requisite of entrustment in a servantly capacity be interpreted to mean entrusted in a servant who has a pre-existing duty to receive or exercise dominion over or hold as owner the property in question?

One reason in support of such a duty-qualification is that it could make better sense of entrustment by transfer of nominal ownership than actual intentional ministerial receipt or dominion. While ministerial possession and ministerial dominion are unproblematic, there is some difficulty in comprehending what ministerial nominal ownership is or should be. In some cases, transfer of ownership to and taking into possession by the bare trustee coincide. However, where the trust property has yet to fall into the possession of the servant, there will not be any ministerial receipt in the interim. The strength of the argument for the qualification is that the moment a servant's duty to hold the property as bare trustee, and hence his duty to receive it, exists, he should forthwith be regarded as entrusted in the capacity of servant. But since it will be incongruous to prescribe a special requirement of duty to receive for entrustment to a servant as bare trustee, the requirement of a duty to receive or exercise dominion should be general, replacing ministerial receipt or dominion in all instances of entrustment of possession, custody or ownership. There is admittedly an advantage to be gained by this. We shall not need to be concerned with the circumstances pertaining to when ministerial receipt of the property becomes an actuality for a bare trustee in particular and in all other cases generally.

But this alternative solution is of doubtful expedience both as a general rule and as a particular rule. It would entail an examination into the nature and scope of employment contracts which would be inappropriate and an unnecessary complication. Second, to the extent that a distinction between necessary and incidental duties and absence of duties of receipt has to be observed, such a deep degree of scrutiny into subtle legalistic distinctions would be both unworkable and an indulgence in criminal matters. Further to this, if being entrusted "in capacity as such servant" must mean being under duty to receive or exercise dominion over the master's property, there would be very extensive overlap between section 408 and section 406. This would be contrary to the principle of parsimony. Suppose it is postulated that all section 408 requires is that a servant be under duty to receive property of the master. In such a framework, a servant who receives for his own benefit and contrary to duty will be punishable under section 408. A servant who receives for his master's account in fulfilment of his duty but subsequently commits breach of trust will be punishable under section 408 alike. In particular application to the servant who holds property as a bare trustee, it will be a matter of indifference whether when possession falls due the servant determines to take it for his own benefit or taking it into the bare trust, he afterwards commits breach of trust. Both situations will equally attract the application of section 408. Substantially this framework of punishability would inappropriately leave very little scope for section 406.

That result would also not be justifiable by reference to penological policies distinguishing receipt or dominion for a servant's personal advantage from ministerial receipt or dominion. The latter signifies a transaction-facilitating policy of protecting a master against fraud perpetrated by the ministerial servant in the course of the master's business. As such servant is unlikely to be under direct supervision, his fraud for being harder to detect is more serious than the servant's fraudulent conversion for his personal advantage. Suppose an accounts clerk makes out an invoice to his master's customer and requires and obtains payment to be made to his personal account. This is non-ministerial receipt. The clerk receives for his personal benefit and commits personal fraud. Risks of such breach of trust exist but it is easier to detect. External proof outside and apart from the servant will exist with the payor who has made the payment as instructed; albeit collusive cases of course will remain more elusive. Compare next an accounts clerk who receives and deposits his master's cheques in the master's account but then withdraws the funds in favour of fictitious customers as payees for services rendered to his master.[28] This is ministerial receipt with higher risks of subsequent defalcations and greater difficulties of detection. The fact that collusive cases will be rare seems insufficient reason to lessen the gravity of such 'ministerial frauds' or treat them as on par with personal frauds. In the same vein, the bare trustee who diverts the property after possession has been received for the master's benefit will more easily escape detection than the bare trustee who never receives it in trust because he diverts it before the property gets to the trust. There is a similar reason for maintaining a penological difference.

In short, the answer to our qualificatory question should be decided by giving the same meaning of actual transaction-facilitating ministerial receipt notwithstanding the servant is holding the property on a bare trust. Does this mean that the servant who is a bare trustee and commits breach of trust before the property in question has fallen into his possession gets away scot-free? The answer is certainly in the negative. While that servant has yet to be entrusted in the capacity of servant, he has undoubtedly been entrusted with ownership within the meaning of section 405 and will be punishable under section 406.

C. *Transaction-Facilitating Entrustment and Not Agentive Entrustment*

There is further affirmatory proof from the contrast revealed by section 409. Section 409 re-conceptualises the liability of fiduciary agents for common law larceny as criminal breach of trust by a person entrusted "in the way of in his business as agent". There is an illuminating contrast between section 408 and section 409 because together transaction-facilitating ministerial entrustment under section 408 and agentive entrustment under section 409 exhaust the manner in which a master may use his servant or employee in carrying on his business. A dichotomous interpretation of the phrase "in the capacity [as such servant]" to mean ministerial entrustment in opposition to agentive entrustment thus has the logical and salutary effect of creating a complete standard and framework of greater protection for the master who is in business.

[28] See also *State v Kesari Chand* 1987 Crim LJ 549.

The arguments which substantiate this submission premise a controversial point about agentive modality. In *Public Prosecutor v Lam Leng Hung*,[29] the Court of Appeal held that the agentive modality is restricted to a professional agent. Accordingly, it was held that certain directors and a corporate officer who had committed breach of trust in investing the company's funds in sham bonds could not be punished under section 409. They were not professional agents within the meaning of those provisions and were only punishable for simple breach of trust under section 406. That judgment runs counter to the premises of the arguments in this section. Without retracing the criticisms of the judgment made in a recent article,[30] it suffices to mark out the very unattractive consequences of leaving fiduciary servants out of section 409's modality. Applied to a servant who is conducting his master's business as an agent, the judgment has an anomalous effect. It creates a gap in the standard of protection for a master. A servant who is the master's agent to conduct his business will not be subjected to greater punishment under section 409. He will instead be punished under section 406 for simple breach of trust whereas a ministerial servant will be punished more severely under section 408. If such a servant is not to be dealt with under section 406, he must be forced into section 408's modality resulting in a distortionary notion, which is neither ministerial nor non-ministerial. An unrestricted agentive modality, which embraces any person (including a fiduciary servant) authorised to conduct the business of another and who actually does so within authority, is definitely preferable. On the other hand, it would also avoid any dubious penological policy to form a kind of mixture of the two methods of using a servant in the master's business which would treat them as comparable or equivalent in punishability.

In the premises assumed, agentive entrustment essentially predicates an actuality of exercise of authority to conduct or transact the master's business. What we have to ask is whether there are both doctrinal and penological justifications for distinguishing ministerial entrustment and agentive entrustment to a servant. An affirmative answer should be given. First, agency is not a rank or status like servanthood but a functional relationship of representation. Thus, a servant can be an agent although an agent is not a servant;[31] and so a person in receipt of possession as servant can be authorised to then sell the property but an agent in possession to sell is not a servant in possession.[32] Second, while a servant given control of property to keep safe or deliver to the master's customer or receive from the master's customer on his master's account may be said to do so in the course of the master's business, he does not carry on the master's business. His entrustment is transaction-facilitating but not agentive. Third, while there is a confidential relationship between the master and his ministerial agent, there is a higher and more exacting fiduciary relationship between the master and his true agent authorised to conduct his business in relation to his property (*ie* with decision-making capacity).[33] An agent is empowered to make decisions in his discretion for the benefit of his principal and owes him fiduciary duties to carry

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[29] [2018] 1 SLR 659.

[30] Tan Yock Lin, "Liability of Directors for Criminal Breach of Trust: Recovering a Lost Interpretation" [2018] Sing JLS 57.

[31] See *Lowther v Harris* [1926] 1 KB 393; *R v May* (1861) Le & Ca 13.

[32] See *Lamb v Attenborough* (1862) 121 ER 922 [*Lamb*] recognising the agency of a servant.

[33] *Halton International Inc v Guernroy Limited* [2005] EWHC 1968 (Ch) at paras 138-9; *Tigris International NV v China Southern Airlines Company Limited* [2014] EWCA Civ 1649 at para 155.

on the business loyally and faithfully. In contrast, a servant ministerially entrusted to detain, retain or move property is not trusted for his decision-making abilities to decide a course of action for the master's benefit.[34]

The last-mentioned point may seem obvious but has sometimes been overlooked whenever the term "agency" is sometimes used in an undiscriminating transactional sense to encompass both the ministerial agent and the fiduciary agent. A servant, it has also sometimes been said, has implied authority to do all those things that are necessary for the protection of property entrusted to him. This should not be understood to obscure differences in kind. That servant remains a ministerial servant who will not have general discretion or authority to settle significant matters of business by way of transacting the business of the master. For example, he will not have implied authority to sell and receive payment in his name or to his order.[35] But if he is a mercantile agent to conduct business he will likely have authority to receive payment in his name by virtue of agency.[36]

Fourth, there is a critical difference to notice with respect to the subject property. When an agent receives generic property under the principal's authority, the principal must make a demand for transfer by the agent to him or his nominee. If the agent sells the property before any demand is made by the principal, he has not embezzled. Such sale is authorised in the case of generic property and upon demand, the agent is at liberty to obtain the replacement property from the market to deliver to his principal.[37] No demand is necessary in the case of a servant in ministerial receipt; for his possession is the master's possession and the master is not obliged to demand what is his. Consequently, it is the very property received that he must deliver to the master at first reasonable opportunity unless a time has been specified for deposit or retention. To be sure, the line between receipt as agent and ministerial receipt by a servant can be very slender in some instances. In some Indian cases, persons who might otherwise seem to be high up and trusted with discretion were held to be servants.[38] These situations are fairly explicable where the persons who might otherwise have been acting as agents chose instead to receive without authority and therefore in their capacity as servants of their masters.[39] There are also cases where servants receiving ministerially for a purpose of selling the goods received for or on account of the master were held to have been entrusted in the capacity of servant. The fact that such servants were authorised to sell at some variable price did not seem to matter if the authority was to sell within a very limited range of a price fixed by the master. Nor did it matter that they were paid a commission for the number of sales they made. Difficult and troublesome cases therefore can arise.[40] But this does not deny the difference between ministerial and agentive entrustment. It merely implies that all the circumstances must be looked at to see whether the line has been crossed.

Fifth, where the agent is a fiduciary, the scope of agentive entrustment will impressively be extended. Section 405 clearly embraces the trustee who is entrusted as a fiduciary to provide benefits to the beneficial owners in accordance with the trust

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[34] *R v Bowers* (1866) LR 1 CCR 41.
[35] See *ibid* at 45.
[36] See *Lamb, supra* note 32.
[37] See and *cf J W Webb v The State* 8 Texas App 310 (1880).
[38] See *State v Kesari Chand* 1987 Crim LJ 549, *supra* note 28. *Cf Chandi, supra* note 24.
[39] See *ibid*.
[40] *Pyo Gyi v Emperor* AIR 1919 LB 60.

instrument. For this reason, a dishonest breach of fiduciary duty by a trustee will be punishable under section 406. By the same token, an agent entrusted with funds can be said to be entrusted in the putative sense in relation to designated or identifiable property which he must or ought to acquire with those funds for his principal's benefit. Similarly, an agent authorised to exercise his discretion to find a buyer for his principal's property can be said to be entrusted with the identifiable contingent sale proceeds, which will materialise in the event of a successful sale. These entrustments will not concern an actual receipt of the future property. There is potentiality of receipt, not actuality; but that is not material where receipt is by virtue of agency. In the modern law therefore, the striking impact of fiduciary law is an inevitable force on agentive entrustment, further distancing it from ministerial receipt by a servant. An interesting illustration is furnished by the Indian case of a servant who upon delivering property received from his master to the intended third party was given a present by the third party.[41] It was held that while he might perhaps have owed his master a personal equitable obligation to account for the present, he could not be said to have acted dishonestly in receiving the present which was the third party's property until he transferred it to the servant by way of a gift. It is implied in such reasoning that a servant acting ministerially is not likely in the first place to be entrusted with property in a fiducial sense unlike an agent.

D. *Conclusions on Private Servant Modality*

The solution of giving section 408's modality a transaction-facilitating ministerial meaning corresponds to the main aim of protecting the master's property or dominion over property of another from dishonest misappropriation or misapplication by the servants he is using as ministerial agents to facilitate the master's transaction of business. To come within section 408's modality, the two requisites of being a servant and entrustment in such capacity as servant must concur. Entrustment predicates that the same property belonging to the trustor is intended to be in the possession or custody or ownership of the servant at the time of possession, custody, or ownership for the trustor's benefit.[42]If there be entrustment, dishonest misappropriation or misapplication by a servant will be a criminal breach of trust punishable under section 408: (1) where a servant receives the master's property with intent to carry or convey to the master's business customer; (2) where a servant assumes custody of property from his master, which has been entrusted to the master as a businessman, with intent to carry or convey to the trustor or some other person; (3) where a servant is made a nominal owner of property beneficially owned by the master in the course of business and receives the property when it falls into possession as trustee; (4) where a servant receives the master's property or assumes custody of that property from the master's business customer with intent to turn it over to the master. Dishonest misappropriation or misapplication by a servant will be a criminal breach of trust punishable under section 406: (1) where a servant receives the master's property or assumes custody of that property to carry to another in the course of the master's

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[41] *Supra* note 26.

[42] See and *cf Baines v Swainson* (1863) 4 B & S 270 at 279.

domestic affairs; (2) where a servant receives the master's property or assumes custody of that property from another to carry to the master in the course of the master's domestic affairs; (3) where a servant receives the master's property from another or assumes custody of it for his personal benefit; (4) where a servant takes possession or custody from the master with intent to keep it for the master's benefit; (5) where a servant takes possession or custody from the master for his personal benefit.

IV. Public Servant Modality

It was not only convenient but also structurally necessary to begin with interpretations of the private servant modality. The arguments in Part IV can now be directed at showing that a person entrusted in his capacity of a public servant is one who assumes such public duty as requires him to hold, manage, or account for property or assumes responsibility in the course of or in connection with a public duty not to do anything that will damage or impair identifiable property, whether pre-existing or to arise at some future date.

One contrast between section 408's private servant and section 409's public servant modality is highly notable. Whereas section 408 predicates dual requirements of status (being a servant) and transaction-facilitating ministerial entrustment (in such capacity as servant), the status element seems to be absent in section 409. Section 409 uses the generic "whoever" which ordinarily means "any person" unlimited by class or attribute. So unless there is a compelling contrary context, it would be wrong to require that the person entrusted in his capacity as a public servant should have or possess de jure capacity. Such person may not in fact even be a public officer. Again, he may, without being a public servant (a public officer in the pay of the Government), merely be a public officer (an official in the wider sense including a minister of Parliament or officer in the employ of a government agency). Whoever or whatever he is, the actuality of receipt or dominion in the capacity of a public servant alone is decisive in the absence of compelling context to the contrary. Incidentally, it does not seem that the personal pronoun attached to "his capacity of a public servant" necessarily relates back to the "whoever" subject person so as to demand existence of de jure capacity by virtue of status as a public servant. This relation back would seem justifiable only if the subject of the modality could necessarily only be a public servant. But that is not the case since everyone knows that a public officer can perform the duties of a public servant whether by voluntary assumption, delegation or otherwise.

As to what public functions implicate a public servant's capacity, the term 'public servant' is defined extensively if not exhaustively in section 21(1) of the *Penal Code*. It would be sufficient merely to consider section 21(1)(h) as an illustration. It states that:

> "The public servant is every officer whose duty it is, as such officer, to take, receive, keep or expend any property, on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of

> any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty".

Sub-section (h) which lists a compendious catalogue of the functions of a public servant implies that any one of those functions will fall within the capacity of a public servant. Also illuminating is the duty element which is an integral part of the definition. By virtue of the duty element, it would not be possible to act in the capacity of a public servant unless and except a person act under such duty as corresponds to an enumerated public function. That also explains why the indefinite article is appended in the phrase "capacity of a public servant". It signifies that there is not to be consideration of some generalised public duty to receive or control public funds but of the particular public duty assumed by the actor. Incidentally, this would also not compel us to read "whoever" in section 409 as being restricted to a de jure public servant. It remains true that any person though not a public servant may be entrusted in the capacity of a public servant if he is placed under or voluntarily assumes a pertinent duty bearing on a public function specified in section 21(1) (hereafter "a public servant").

The foregoing observations on the public servant modality sufficiently indicate that no assistance as to its meaning will be derived from a consideration of the Larceny Acts. The statute 2 Wm IV, c 4 (or the *Embezzlement Act* 1832) was limited to criminalising fraudulent conversion or misapplication for purposes other than the public service by a person employed in the public service who had received the Government's property by virtue of employment.[43] In contrast, the public servant modality is without any status or character requirement and employs a capacity phrase which nowhere appears in the 1832 Act. A little more assistance is forthcoming from comparisons with the capacity phrase in section 408. Its structural comparability to section 409's public servant modality indicates firstly the exclusion of receipt or dominion for personal benefit from both public servant modality and private servant modality alike. Second, like the private servant modality, the public servant modality must be an actuality of receipt or dominion. If so, the recipient is not required to be performing a valid pre-existing generalised public duty to receive or control the property or any other pertinent public duty. It is sufficient that he intends to do so for the purposes of a relevant public function (and hence duty).

A. *Structural Comparability with Agentive Entrustment*

Arguments from the internal structure of section 409 are more illuminating. First, comparisons with section 409's juxtaposed agentive modality establish that the public servant modality contemplates external third party contexts. The 'business' temporality and contingency affecting an agent excludes possession, custody or ownership for the agent's own benefit. Similarly, a person who seeks his own advantage by inducing an entrustment is not acting in his capacity of a public servant. Again, he may be a public servant but if he obtains a subsidised and privileged loan from the government to purchase a motorcar for his own use he is not entrusted with property in his capacity of a public servant.

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[43] For a case on the statute, see *R v Moah* (1856) Dears 626.

Second, the business contingency affecting an agent signifies his acting upon his authority to conduct business as an external dimension distinct from the agent's personal business preferences. Likewise in the case of a public servant. In the abstract, it would be difficult to define positively the external dimension involved in the case of a person intending to undertake public duties. A public servant has no external authority in the business sense of conducting a business. One sometimes speaks familiarly but unhelpfully of the business of government intending to mean that the Government exercises a prerogative to govern for the sake of the peace, good order and good will of the country. However, any potential difficulties of setting out the pertinent external acts of a public servant have been resolved by the defining provisions of section 21(1). These set out the public functions of a public servant comprehensively. The upshot is that the requisite modality of entrustment exists if the function for which the person purports or intends to be in possession, custody or ownership (hereafter "receipt" or "control") of the property in question is one enumerated in section 21(1).

Third, the agentive modality involves exercise of discretion. Likewise, while the public servant modality includes ministerial receipt or dominion it must extend beyond that to receipt or dominion in the exercise of such discretion as is called for in the course of the pertinent public duty. There are lower ranking public servants who are no more than ministerial recipients or custodians. But there are also higher ranking recipients or custodians who exercise discretion in the dispensation or accumulation of governmental resources. It would be meaningless to punish more severely the ministerial public servant under section 409 but subject those with discretion to the lower and more lenient scales of section 406.

All this means that where the person purporting to be acting under public duty is not in fact obliged so to do, he will nevertheless be punishable for any criminal breach of trust under section 409. He may lack the de jure power to act, but if he has acted in his capacity of a public servant he is obliged so to act without criminal breach of trust. In these cases, it has to be asked at the end of the day whether the offence committed by such person has caused loss to anyone in accordance with section 24 of the *Penal Code* which announces that without loss there can be no dishonesty. If the public servant receives public property as such acting under duty, but fails to account for it the loss falls on the Government. If the public servant is not in fact empowered to receive public property from the payor, the payor seeking to discharge a liability to the government will not be discharged and is in jeopardy of double payment. There is loss to him as well as the Government. It cannot therefore matter whether there is in fact power to act or none. What is decisive must be whether the public servant has received or controlled property in the course of public duty.

There is of course a more circumscribed way of interpreting section 409 which would align it exactly to agentive entrustment by positing receipt or dominion by a public servant under authority and actual receipt or dominion within that authority. This alternative interpretation would also advance the aim to protect the public against betrayal of public trust but not as fully; since if there was no authority, the modality would not be satisfied. Only the private servant modality would exist. However, as a solution which produces a lower level of protection to victims of betrayal of public trust, there is much less to be said in its favour. Second, there is superfluity in the alternative interpretation. It is implicit in receipt or control under duty that receipt or

control is authorised in its generality, meaning there is de facto or de jure power to receive or control. The notion of authority to receive or control property as a public servant would add nothing to the requirement of receipt or control under public duty. Third, it follows that an interpretation based on authority to receive or control is confusing because it confuses authority with power. An unattractive conflation which results is that a public servant specifically authorised by the Government to act as agent with authority to bind the Government would fall within both the public servant modality as well as the agentive modality. The penological consequences may not matter since both will be punishable in the same correspondingly more severe terms. But while the overlap may not lead to intensification of punishability, there is sacrifice of greater clarity and logic. The public servant acting under public duty is acting for the public good. He should not be confused with the public servant acting as agent by authority for the benefit of the Government.[44]

B. *Misconduct in Public Office Perspectives*

The last structural point zooms in on a point of the fiducial quality of entrustment to an agent of the government. There are two significant effects arising from enduing a public servant as agent with authority to act for the benefit of the Government. One is that he assumes fiduciary duties which are essentially prophylactic and negative in nature. The other is that he can be said to entrusted with property in the putative sense where the purposes of constituting him an agent in possession, custody or ownership of funds are to bring into existence a future proprietorial state of affairs (such as acquisition of new property with those funds) for the benefit of the Government. In the premises assumed earlier, an agent is not necessarily a professional agent,[45] and a public servant acting as the Government's agent for the Government's benefit can be said to be equitably or fiducially entrusted in the way of his business as an agent. This entrustment of present funds in relation to future but identifiable property to be acquired for the Government by exercise of authority makes it possible to regard the agent as putatively entrusted with the future property. If he is thus entrusted, any dishonest breach of trust by acquiring the future property for himself is no longer merely a simple breach of trust. It will be a section 409 breach of trust by an agent entrusted with property (albeit equitably and putatively) in the way of his business.

There is no doubt that a public servant acting for the public good is not an agent of the government subject to fiduciary duties as a general rule. But if fiducial entrustment exists in relation to the agentive modality, should it not also exist, not as a generality but exceptionally, in relation to the public servant modality? Suppose a senior public servant exercises control over those who collect the funds and make disbursements from those funds in the course of operating a regulatory scheme for the public benefit. This person can be said to be entrusted with control over movements of the funds which are received and disbursed. If he uses confidential information derived from his control of movements of the funds so as to benefit personally by acquisition

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[44] As explained in Peter G Watts, *Bowstead & Reynolds on Agency* (London: Sweet & Maxwell, 18th ed, 2006) at para 8-044, "apparent authority may be extremely difficult to prove in a Crown or public agent". *Cf Marubeni & South China Ltd v Government of Mongolia* [2005] 1 WLR 2497.

[45] See text above at 9 & 10.

of property, can he not be said to have committed breach of trust punishable under section 409? As to this, structural arguments are inconclusive although both agentive and public servant modalities are juxtaposed in section 409. We must look elsewhere to the common law offences for the answer.

The search for an answer from backdrop common law perspectives is not an easy one but four tentative conclusions are possible from the ensuing discussion. First, the betrayal of public trust which underscores the common law offence of misconduct in public office is also the hallmark of section 409. Second, the extended requirement of acting in connection with public duty which is an element of misconduct in public office suggests a similar extended application of the public servant modality. Third, the prominent inclusion of non-feasance in the common law offence of conspiracy to defraud suggests that section 409 was from inception also intended to protect public property against dishonest non-feasance on the part of public servants. Fourth, comparisons with the principle of equitable construction adopted in the US law on conspiracy to defraud the government indicate that a notion of equitable non-feasance on the part of public servants would appropriately meet the ambition of sections 405 and 409 to criminalise equitable breach of trust, not just breach of civil trust.

C. *Modern Developments in Offence of Misconduct in Public Office*

Specific to the public servant, there were four relevant common law offences; namely, receipt of a bribe by a public servant, extortion by a public servant, misconduct in office, and conspiracy to defraud the government. The first two common law offences were codified and enacted as sections 161 to 165 of the *Penal Code*. There was however no overt codification of the common law offences of misconduct in public office and conspiracy to defraud. Section 119 of the *Penal Code* fell short of the creation of such offences, being merely the creation of a specific offence for a public servant to conceal a design to commit an offence which it is his duty to prevent.[46] We are accordingly not wrong to focus on comparisons of section 409 and the two last-mentioned common law offences when seeking answers to the question of the extent to which section 409 was an innovation to deal with problems resolved by both.

That there are differences between section 409 and the offence of misconduct in public office almost goes without saying. Recent decisions in Victoria and HKSAR are especially helpful in shedding light on the hitherto obscure offence of misconduct in public office. In *R v Quach*,[47] the Victorian Court of Appeal outlined the elements of the offence as follows: there must be (1) a public official; (2) who in the course of or connected to his public office; (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty; (4) without reasonable excuse or justification; and (5) where such misconduct is serious and merits criminal punishment having regard to the objects and responsibilities of the office and the nature and extent of the departure from those objects.[48] The second

46 In *Re Saifuddin Ahmad Khan* (1957) 2 Andh WR 298, it was held that section 119 and section 409 proscribed very different offences.

47 [2010] VSCA 106.

48 Applying *Sin Kam Wah & Lam Chuen Ip v HKSAR* [2005] 2 HKLRD 375 [*Sin*]. See also Paul Finn, "Official Misconduct" [1978] 2 Crim LJ 307.

element (an acting connected with public office) was highlighted in the Hong Kong case of *Sin Kam Wah & Lam Chuen Ip v HKSAR*. It was held to be satisfied if the relevant conduct though not done in the course of duty bore such a relation with the official's public office as to bring that office into disrepute.[49] Another point worth noticing is the re-characterisation of the common law offence as being one of abuse of public trust.[50] There is consequently no restriction as to what duties must have been violated. Any duty suffices if its violation is capable of detrimentally lowering public trust in the administration and good governance of the country.

These modern developments mark a dramatic expansive trajectory from earlier conceptions of misconduct in public office. The offence in the formative period was made up of three strands.[51] The first comprised the bribery cases. Extortion cases were the second. The 17*th* century was replete with the third kind of cases of public servants' obtaining property from the public by acting in excess or default of duty or power when discharging public duty. These were the fraud cases. From about the turn of the 20*th* century, the common law offence appeared to have receded in significance as specific statutory offences became more prevalent. Then, around the middle of the century, a marked revival became manifest in the decisions highlighted in the preceding paragraphs. Although at first revolving around the fraud cases, the modern developments do not formulate as an essential requirement that property should have been obtained under colour of office. There is a shift in emphasis to the responsibilities of the office (whether or not it involves any property or public funds) and breach of duty in the course of or in connection with the office. The offender is a public officer who must be acting as such public officer when breaching the public trust. So a public officer may be carrying out his duties (issuing traffic warrants for example) but if the misconduct alleged is that he beat up a person who obstructed his passage, that misconduct if proven will not be one occurring whilst acting as a public officer.[52]

The rationale of betrayal of public trust in a non-proprietorial sense has come to the forefront, as was said. Consequently, the fraud cases which focused on misappropriation of property have been re-characterised as being a narrower sub-set addressing the betrayal of public trust by misappropriation or misuse of property. To constitute the offence of breach of public trust in this narrower conception, dishonesty is an essential element. There is some flexibility. Breach of trust in this sense notably is not confined to entrustment of property. It covers also acquisition by theft or fraud or making improper claims for public funds in the circumstances. This can be seen from *R v W*[53] where a police officer used an official card for personal purchases, and it was held that he could not be convicted absent proof of dishonesty.

[49] *Sin, supra* note 48. It was not essential that the public officer should have made a wrongful gain or caused a wrongful loss to another person.

[50] See *Obeid v R* [2017] NSWCCA 221; *HKSAR v Hui Rafael Jr* [2017] 4 HKC 283.

[51] See Graham McBain, "Modernising the Common Law Offence of Misconduct in a Public or Judicial Office" (2014) 7 Journal of Politics and Law 46.

[52] See The Law Commission, *Misconduct in Public Office: Issues Paper 1: The Current Law* (2016) at 34-37.

[53] [2010] EWCA Crim 2799.

D. *Probable Derivation of Section 409 from Offence of Misconduct in Public Office*

It is not difficult to show that section 409's breach of trust by a person entrusted in the capacity of a public servant was derived from the fraud cases. In *R v Bembridge*,[54] the defendant, an accountant in the office of the Receiver and Paymaster General of the Forces corruptly concealed public money by omitting it from a final account for which he was responsible. Lord Mansfield CJ stated that:

> "The duty of the defendant is obvious; he was a trustee for the public and the paymaster, for making every charge and every allowance he knew of ... Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit; is answerable criminally to the king for misbehaviour in his office; this is true, by whomever and whatever way the officer is appointed... Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the king and the subject it is indictable. That such should be the rule is essential to the existence of the country."[55]

In the light of those seminal remarks, it would be very surprising if section 409 which was intended to codify both criminal breach of private and public trust was not a re-cast of the offence of misconduct in public office by misappropriation of property.[56]

Stephen's *Digest of the Criminal Law* offers further substantiation.[57] In Article 121, Stephen defined frauds and breaches of trust by public officers as follows: "Every public officer commits a misdemeanour who, in the discharge of the duties of his office commits any fraud or breach of trust, whether such fraud or breach of trust would have been criminal or not if committed against a private person." In Article 122, Stephen defined neglect of official duty as follows: "Every public officer commits a misdemeanour who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform, provided that the discharge of such duty is notattended with greater danger than a man of ordinary firmness and activity may be expected to encounter."

Stephen's Article 121 was the subject of detailed judicial observations in an important Canadian judgment. In *R v Boulanger*,[58] the Canadian Supreme Court dealt with section 122 of the Canadian Criminal Code which for convenience read as follows: "Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person." The Court's analysis shows that section 122 was intended to codify only Stephen's Article 121 and not also Article 122's wilful neglect of official duty. This made it imperative that there should

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[54] (1793) 99 ER 679.

[55] *Ibid* at 681.

[56] See also illustration (e) accompanying section 405.

[57] James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes & Punishment)* (London: Macmillan and Company, 1887) at 86.

[58] [2006] 2 SCR 49.

not be any conflation between misconduct in public office which predicated malfeasance and wilful neglect of official duty which predicated non-feasance. McLachlin CJ, delivering the Court's unanimous judgment, underlined the important point that only the first offence was incorporated into the Criminal Code in 1893. A distinctive implication was that "the *mens rea* and the *actus reus* of s. 122 must be determined by reference to the common law authorities on misfeasance in public office, not those relating to the different offence of neglect of official duty."[59] The ensuing analysis showed the Court's adopting certain post-1893 common law developments such as "the seriousness requirement of *Shum Kwok Sher* and the *Attorney General's Reference*".[60] This was possible and legitimate as the "conduct at issue, in addition to being carried out with the requisite *mens rea*, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour."[61] That was also the shared rationale for the modern common law requirement. Turning to the *mens rea*, the Court again was willing to be instructed by relevant common law authorities for its conclusion that "public officials, entrusted with duties for the benefit of the public, carry out those duties honestly and for the benefit of the public, and that they not abuse their offices for corrupt or improper purposes."[62]

There is little doubt that *R v Boulanger* demonstrates that a comparison of section 409 with its common law antecedents is both useful and legitimate. As in that case, there are obvious similarities between Stephen's Article 121 and section 409. We can simply refer to our earlier observations that section 409 was intended to criminalise breach of trust by public servants.[63] Moreover, section 409 goes beyond dishonest misappropriation for personal use and benefit just as Article 121 goes beyond that to include abuse of office for corrupt and improper purposes. But there are also two obvious differences. First, section 409 postulates entrustment of property. Second, section 409 is not only concerned with malfeasance. It also encompasses wilful neglect or dereliction of official duty where that amounts to wilfully suffering another to commit criminal breach of trust.

In relation to the first difference (confinement to entrustment of property), *R v Boulanger* recognises that the breach of trust in the discharge of public duty as conceived by Stephen's Article 121 embraces breach "in connection with public duty" as codified in section 122 of the Criminal Code. Section 409's confinement to entrustment of property means that the *actus reus* is not to be defined, as in the Canadian case, by reference to a requirement of serious effects of breach on the public interest. It is already defined more narrowly in terms of entrustment of property for the sake of avoiding loss to the owner. But we shall see in the immediately ensuing discussion that, unlike Article 121 and section 122, section 409 contemplates the possibility of equitable entrustment. Inclusion of entrustment in connection with public duty is a practically important and not insubstantial response to criminal breach of trust by equitable non-feasance. According to the submissions which will be made, where a public servant entrusted to expend public funds for the public benefit has assumed fiduciary duties to do so loyally and faithfully but dishonestly

[59] *Ibid* at para 48.

[60] *Ibid* at para 52.

[61] *Ibid*.

[62] *Ibid* at para 55.

[63] See text above at 18-19.

breaches his fiduciary duties by making secret profits, he can be said to have been entrusted with those profits in connection with public duty and to have committed criminal breach of trust with respect to those profits.

E. *Equitable Construction of Conspiracy to Defraud Government*

With respect to the second difference (inclusion of non-feasance in section 409), *R v Boulanger* has little to say. Stephen's Article 122 is also of little assistance. First, section 409's wilfully suffering another to commit criminal breach of trust is absent in Article 122. The common law offence of wilful neglect of official duty was never conceived as a breach of trust. Second, section 405 clearly encompasses equitable entrustment to a trustee or fiduciary agent. Only specific duties by common law and statute were referenced in Article 122, however. No reference was made to equitable duties.

Comparisons with the modern law of misconduct in public office are strictly speaking also out of place. As demonstrated in *R v Boulanger*, there was historically considerable conflation and confusion between malfeasance in office and neglect of official duty until the English House of Lords unified both offences under the offence of misconduct in public office in *A-G's Reference No 3 of 2003*.[64] The currency of this development would detract from attempting to construe section 409 by reference to the modern law.

But comparisons with the common law offence of conspiracy to defraud are of greater assistance. At section 409's inception, the common law of conspiracy to defraud the government was rudimentary. It had considerable potential to suppress fraud by non-feasance; in particular, to deter third persons from conspiring to deceive a public officer into neglecting his public duty in relation to property. Despite this, this head of conspiracy only attracted keen attention many years later in the leading case of *Scott v Metropolitan Police Commissioner*[65] where it was decided that loss to the government was irrelevant and not a constituent element of the offence. To be sure, the potentiality mentioned was partially realised. Conspiracies to pervert the course of justice by knowing non-feasance (*ie* public officers' conspiring with third persons to defraud the government) were among the oldest offences at common law.[66] However, modern cases were sparse. In *R v Boston*,[67] arguably an example of knowing non-feasance, the High Court of Australia upheld a conviction on a charge against a participatory parliamentarian who accepted a payment to corruptly use his position as parliamentarian to influence the government in relation to the use of public funds for the purchase of designated property. The Court reasoned that there was an agreement which tended to produce a public mischief and therefore amounted to a species of conspiracy to defraud. Since that decision, however, the existence of an offence of conspiracy to effect a public mischief has been denied completely.[68]

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[64] [2004] 3 WLR 451 [*A-G's Reference (No 3 of 2003)*].

[65] [1975] AC 819.

[66] *R v Rogerson* [1992] LRC (Crim) 680 at 701.

[67] (1923) 33 CLR 387.

[68] See *DPP v Withers* [1975] AC 842. See *R v Freeman* [1985] 3 NSWLR 303 at 307. See also *A-G's Reference (No 3 of 2003), supra* note 64 and *R v Dytham* [1979] QB 722.

There was nothing fundamentally misplaced with seeking to deal with Mr Boston's non-feasance by charging him with conspiracy to defraud. The problem was the lack of a notion of equitable fraud. *R v Boston* was essentially a case of corrupt breach of equitable duty not to take unconscientious advantage of a position of honour and trust. Such a case has a civil law analogue in the case of *R v Reading*[69] where an army officer used his army uniform during off-work hours to obtain advantages of inspection-free passage for a third party's trucks, making secret profits for himself. He was held to be a fiduciary of the Government and constructive trustee of those profits. What was lacking in the conspiracy offence of which lack *R v Boston* was illustrative, was a notion of equitable non-feasance that could determine the boundaries of criminal equitable fraud by a public servant. That missing dimension, however, was boldly imputed at the turn of the last century to statutory developments in the US law on conspiracy to defraud the government. Goldstein has provided a definitive account of how the seeds of a judicial re-cast of the offence of conspiracy to defraud the government in equitable terms were sown at the beginning of the 20*th* century.[70]

In *Haas v Henkel*,[71] Holmes, an Agriculture Department statistician was bound by departmental regulation and custom to keep certain information confidential. In breach of obligation, he disclosed the information to Haas who neither bribed him nor made a false representation to induce him to do so. It was held that Haas had defrauded the US by participation in Holmes's breach of confidential obligation. Significantly, loss to the Government was not required. Haas profited from the information though not at the expense of the Government. It was nevertheless enough that Haas took unconscientious advantage of Holmes's breach of equitable duty causing notional and presumed damage to the public interest or confidence in public integrity. From thence the way was clear to charge a public servant with criminal 'equitable fraud' under the legislation proscribing defrauding the US. In *Tyner v US*,[72] the Court followed *Haas v Henkel*, and although demanding proof of loss, conceived of loss in terms of damage to the public interest. More fundamentally, the Court recognised the "well settled [rule] that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction".[73] Consequently, the notion of acts to defraud was conceived as including "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."[74]

F. *Equitable Construction of Public Servant Modality*

The US jurisprudence and experience indicate that an equitable notion of betrayal of public trust is feasible and workable in relation to an offence for the public good. But applying a principle of equitable construction of offences for the public good to section 409's public servant modality is not self-evident. Three things have to be

69 See also *Akita Holdings Ltd v Attorney General of the Turks & Caicos Islands* [2017] AC 590.
70 A Goldstein, "Conspiracy to Defraud the United States" (1959) 68 Yale LJ 405.
71 216 US 462 (1910).
72 23 App DC 324 (1904) at 362-363.
73 *Ibid* at 362.
74 *Ibid*.

said about that by way of substantiation. First, it would not be out of character with the intrinsic equitable complexion of section 405 to posit that section 409 accepts that equitable non-feasance or failure to avoid acts of dishonesty by a fiduciary are as much a criminal concern as affirmative acts of dishonesty. Second, when Lord Mansfield CJ stated in *R v Bembridge*[75] that criminal breach of public trust was from the outset to be conceived of as a matter between King and subject and therefore a fit and proper subject for the criminal law, he was not suggesting that it would be right to advance any notion of protection of the public interest as courts might deem fit. If there are never any circumstances under which a public servant acting for the public good can under civil law be said to be a fiduciary except when he is an agent for the benefit of the Government, it would be unthinkable to contemplate that despite this there can be entrustment to a public servant subject to fiduciary duties for the purposes of the criminal law. The need to maintain a clear line between administrative fault and criminal behaviour would not permit this laxity. Today however, with the expansion of fiduciary law the possibility of a public servant fiduciary otherwise than as agent would no longer be as exceptional as once supposed. This article is not the place where one can go into the details of the public servant as a fiduciary under civil law and one remark will have to suffice. While a public servant cannot as a general rule be said to be a fiduciary for the benefit of the public at large,[76] it may be different if he acts for the benefit of a special segment of the public, evidenced by the specific and discriminating beneficial nature of the public duty which he is to discharge.

Third, in view of that, unless equitable construction of a penal statute for the public good is applicable to section 409, a huge gap will emerge in meeting the purposes of suppressing external fraud by a public servant by way of dishonest non-feasance. Criminal breach of fiduciary duty by a trustee which has only internal victims is already punishable as simple breach of trust under section 406. Criminal breach of trust by an agent is punishable more severely under section 409 by reason of its more harmful external effects. It would be anomalous to punish criminal breach of trust by a public servant who is entrusted as a fiduciary otherwise than as agent as a simple breach of trust, and thus completely ignore the external effects of the breach suffered by external victims. This anomaly will be produced if we deny that entrustment "in his capacity of a public servant" includes entrustment of putative property subject to proscriptive fiduciary duties. Moreover, the real difficulties of protecting against external effects will not be dispelled merely by construing public servant modality to include entrustment subject to fiduciary duties. Such entrustment can occur in the course of public duty but also in connection with public duty. So again, unless the modality is construed equitably to embrace both aspects, namely fiducial entrustment in connection with public duty, elimination of the anomaly will be incomplete.

The underlying reason for including fiducial entrustment in connection with public duty relates to an important difference between the performance or non-performance of public functions and the exercise of an agent's authority. Agentive modality stops at actual exercise of authority and does not extend to determining the parameters of

[75] (1793) 99 ER 679.

[76] There is a presumption against imposing trust obligations in respect of public functions on public servants: see *Tito v Waddell* (No 2) [1977] Ch 106 at 217. But there is no rule to prevent imposing ordinary trust obligations: see *Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145. The critical point is whether the Government will be held to be vicariously liable.

authority which is the function of the principal. The performance of public functions however is hierarchical and without stopping at details, it is sufficient to notice that public servants higher up the hierarchy behave more like principals than agents. This observation may be expressed in terms of the power to influence the deployment of resources of the government. There are public servants who construct the immediate parameters of dealing with the property to be invested or to be acquired. Others higher-up influence, approve or draw up the objectives to be accomplished. A wider and more flexible entrustment characterised by assumption of equitable duties in connection with public duty is needful and significant. This is because in many instances a senior public servant charged with supervision of purchases of property by use of public funds, although not directly handling the funds, can be said to determine in substance how the funds will be deployed or used. It is this control over the resources in a planning perspective which ought to be highlighted by recognising that such public servant can be said to be entrusted with the funds in his capacity as public servant. Such public servant is not truly akin to an agent and more like a principal when he is endued with power to make decisions which will influence the involvement or disbursement or expenditure of public funds or acquisition of property in and for the sake of the public interest. If he has assumed equitable duties in the performance of these higher order duties which have a bearing on actual entrustment of property, he can be said to satisfy the modality. Again, in perhaps many more cases, he can be said to have assumed equitable duties of supervisory oversight of the lower ranking public servants who are to turn the policies drawn up into functional realities. Thus, although the public servant and agentive modalities are juxtaposed in section 409, there is no absolute reason that their respective modalities and measures of level of punishment must be perfectly comparable in every respect and that the level of the agent exercising authority within those limits must be the common denominator.

The penological considerations which support equitable construction of the public servant modality include the fact that conversion by a public servant in his personal capacity for his own benefit is perhaps the least to be feared. More urgent is diversion of funds for partisan interests and purposes. It has become abundantly clear that the most serious cases of breach of public trust are not those where the public servant fraudulently misappropriates public funds for his own benefit. Changing the destination of designated funds or diverting them to other purposes and not so much converting them to personal use can cause much greater loss in terms of disruption of economic and financial, social and political activity or damage to authority or public institutions or public trust; and hence loss of the resources devoted to them. It is also hard to detect. It is not contended that fraudulent misappropriation by a public servant is easy to detect.[77] Particularly challenging to forensic experts are cases of billing the government for other expenditure on fictitious goods and services to a false vendor or expense reimbursement for non-existent expenses claimed to have been incurred. However, frauds which do not involve changing the basic character or destination of public funds are clearly even more challenging to uncover. A common example is corruption which does not involve changing the destination of public funds but leads to an award of tender to an inefficient bribing firm. Other similar examples include financial statement frauds which cover up financial losses for non-pecuniary benefit

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[77] Where he has acted in accordance with both the public interest and personal interests, it will be challenging to determine which interest was predominant.

or channel or divert public funds to other projects for political advantage or purposes to which the public servant is sympathetic or pre-disposed. Third, the integrity of an impartial public service cannot be less than the integrity of commercial agents. If anything, it must be more. If an equitable entrustment applies to fiduciaries who conduct business for their principals, there is good reason also to apply it in the suppression of the most serious kinds of public servant frauds. Without it, the high ambition aimed at, namely the suppression of equitable breach of trust, becomes of doubtful efficacy.

V. Authorities and Conclusion

The conclusion of this article that the private servant modality is actual ministerial receipt in the course of the master's business corresponds to the results in such Indian authorities as have been cited in the pertinent discussion. That discussion, it is hoped, has contributed to revealing the underlying rationality in those authorities. It remains only to clarify whether the same can be said of the conclusions of this article **à** propos the authorities on the public servant modality. According to the Supreme Court of India in *Superintendent and Remembrancer of Legal Affairs, West Bengal v Roy*,[78] it was held by the same apex Court in *State v Babu Ram Upadya*[79] that receipt of property obtained by the recipient using his official capacity was entrustment in the capacity of a public servant.[80] The reasoning was terse but happily, although not a decision of the Supreme Court, the reasoning in another case *Bhag Singh*[81] to the same effect was fuller. Plowden J said:

> "In order to bring a case within s 409, it is … necessary to show that property was entrusted, to a public servant and that he accepted the property entrusted, being in his public capacity required or authorised to accept it. Otherwise in accepting the property he acts as a mere volunteer, and is not entrusted with it in his capacity of a public servant. It is not sufficient to show merely that a person delivered the property to him because he was a public servant. The motive which induced the person to deliver the property cannot alone determine the quality of the trust created. The mistaken belief of the person delivering the property or of the person accepting it, or of both, that the latter was authorised to receive it in his public capacity cannot alter the facts and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust by a public servant."[82]

Also to be considered are two indirect authorities; indirect because they are substantially decisions on the juxtaposed phrase "in the way of his business as an agent" in section 409. In *RK Dalmia v Delhi Administration*,[83] the Indian Supreme Court explained the difference between the two phrases of agentive entrustment and public servant entrustment, saying:

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[78] AIR 1974 SC 794.

[79] AIR 1961 SC 751.

[80] The majority however merely held that there was an entrustment under section 405 because property was taken by the sub-police inspector in discharge of his duty of inspection and return. Of the moneys so taken, a portion was without consent and knowledge retained for personal benefit.

[81] (1876) PR No 24 of 1876 at 46; also cited in *Wan Ali bin Wan Abdullah v PP* (1939) 8 MLJ 85 at 85.

[82] *Ibid*.

[83] AIR 1962 SC 1821.

> "What s. 409 I.P.C. requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression 'in the way of his business' means that the property is entrusted to him in the ordinary course of his duty or habitual occupation or profession or trade."[84]

The Court went on to reason that this interpretation was supported by

> "the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression 'in the way of his business' is used in place of the expression 'in his capacity', to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make (1) the criminal breach of trust by the agent a graver offence than any of the offences mentioned in ss. 406 to 408 I.P.C. The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent."[85]

In other words,

> "A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of s. 409 [of the Indian Penal Code] if any breach of trust is committed by that person."[86]

The other is *Public Prosecutor v Lam Leng Hung*,[87] where the Court of Appeal was not persuaded that agentive entrustment was to be interpreted as being entrustment to someone in the position of an agent and in connection with his duties as an agent. However, it appears that there was no dissent from the meaning accorded to "in the capacity of a public servant", namely that of an entrustment to a person who is indeed a public servant.

Thus, on the state of the Indian authorities, the public servant entrustment envisages (1) a person holding the status of a public servant (2) who receives property (3) being authorised to receive property as such public servant. It seems that while there must be actual receipt of the property entrusted, there is no requirement that the public servant must be entrusted in the course of or in connection with his public office. The absence of authority to receive property is decisive proof of absence of public servant modality.[88] The cumulative result of stressing authority to receive as well as denying the requirement of connection with public office is that victims of betrayal of public trust are afforded a lower level of protection compared with the conclusions of this article. The Indian authorities however were not reached with the benefit of the subsumptions, historical perspectives, as well as structural comparisons which this article has argued to be important considerations. They also pose serious problems of espousing an increasingly narrow and inappropriate scope for

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84 *Ibid* at para 96.

85 *Ibid*.

86 *Ibid.*

87 *Supra* note 29.

88 See *Queen v Banee Madhub Ghose* (1867) 8 WR (Cri) 1. *Cf The Queen v Ram Dhun Dey* (1870) 3 WR (Cri) 77.

section 409; demonstrated by the conclusions this article has reached: that (1) public servant status is not a requirement because section 409's "whoever" includes a person, who not being a public servant is entrusted in his capacity of a public servant; (2) the decisive consideration is whether the person has received property or assumed control of it under public duty, *ie* in the course of or in connection with that public duty; and further that (3) in considering whether there is connection with public duty, equitable non-feasance where it exists in the circumstances cannot be ignored.