NATURAL JUSTICE

It is only on rare occasions that we meet with a case in Malaya involving a consideration of the application of principles of law to voluntary associations. As such *Tharmalingam* v. *Sanebanthan*[1] cannot fail to evoke some comments, especially in view of the interesting issues it raised.

The plaintiff, a member of the Malayan Indian Congress, was suspended by the president of the Congress purporting to act under section 28 of the party constitution, without being given an opportunity of being heard. Rule 28 empowers the president

6. *Cf. Baindail* v. *Baindail* [1946] P. 122; [1946] 1 All. E.R. 342, where a woman domiciled in England went through a ceremony of marriage in England with a Hindu domiciled in India. She later discovered that he had a wife in India and petitioned for nullity on the ground that the marriage was bigamous and therefore void. By the *lex domicilii* the status of the respondent was that of a married man and the court accorded recognition to the status possessed by the respondent, and the Hindu marriage was regarded as a bar to the subsequent marriage.

7. (1929) 73 S.J. 402. See *Thynne* v. *Thynne* [1955] P. 272; [1955] 3 All. E.R. 129 where a decree dissolving the second marriage was amended to dissolve the first and actual marriage, thus implying the utter ineffectiveness of a second marriage entered into during the subsistence of the first.

8. [1906] P. 136. The case is authority for the proposition that English courts will always recognize decrees of dissolution recognized by the courts of the domicile of the parties.

1. (1960) 26 M.L.J. 257.

to suspend a member if he is satisfied that that member is acting in a manner detrimental to the Congress. As a precaution against the abuse of this power, the aggrieved person has the right to be heard at any subsequent meeting of the working committee whose decision after hearing both the appeal and the president's justification of his action is to be final and conclusive. The plaintiff did not pursue his right of appeal, but brought an action for a declaration that his suspension was null and void, an injunction to restrain the defendant from denying him the exercise of his rights and privileges as a member, damages and costs.

The first question raised is whether the president in exercising his power of suspension was under an obligation to observe the *audi alteram partem* rule, *i.e.* whether the words "if he is satisfied" import a requirement that any proceedings for suspension shall be in accordance with the rules of natural justice. Ong J. after a consideration of *Ross-Clunis* v. *Papadopoullos*[2] held that he was unable to read into these words any further implication that, apart from the subjective test, other conditions must be complied with before the president could take valid action to suspend a member. In simpler language, rule 28 vests an unfettered discretion in the president and by implication the application of the *audi alteram partem* rule is excluded. Authorities for such a proposition are notably dicta from *Russell* v. *Duke of Norfolk*[3] and *Maclean* v. *Workers' Union*[4] which were considered by neither counsel nor the court, a remarkable omission in view of their importance on this point. In the former case, which is often cited, the Jockey Club had an unfettered discretion to withdraw or suspend a trainer's licence and therefore these functions could be exercised in complete disregard of rules of natural justice. It would thus appear that a rule authorizing expulsion in the unfettered discretion of the competent authority will impliedly exclude the application of the *audi alteram partem* rule. However, it is submitted that it is not clear how far the duty to observe rules of natural justice may be excluded by the rules of an association, or that of a political party. There are a number of dicta which support the view that even an express provision of the rules of a voluntary association enabling it to condemn a member unheard might be invalid as being contrary to public policy. The latest authority on this point is Lord Denning's pronouncement in *Lee* v. *Showmen's Guild of Great Britain*[5] where he said: [6]

" There are important limitations imposed [on domestic tribunals] by public policy. The tribunal must for example observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary will be invalid. They cannot stipulate for a power to condemn a man unheard."

He referred to the dicta of several other judges to the same effect.[7] In the light of this conflict of views it is inexplicable why rule 28 was not impugned as being contrary to public policy if it were interpreted by the court to oust the rules of natural justice. That this is regrettable is clearly seen in the fact that the prevailing climate of opinion is such that the courts are loth to permit a body exercising important disciplinary powers to contract out of an implied duty to observe rules of natural justice.

2. [1958] 2 All E.R. 23. The Judicial Committee reiterated the proposition that to "satisfy himself" was a subjective test though if it could be shown that there were no grounds on which the appellant could be so satisfied, a court might infer either that he did not honestly form that view or that in forming it, he could not have applied his mind to the relevant facts.

3. [1948] 1 All E.R. 490-491, Lord Denning dissenting.

4. [1929] 1 Ch. 623-624.

5. [19B2] 2 Q.B. 329; [1952] 1 All. E.R. 1175.

6. [1952] 2 Q.B. 342.

7. *Dawkins* v. *Autrobus* (1881) 17 Ch. D. 615, 630; *Wood* v. *Wood* (1874) L.R, 9 Ex. 190, 196; *Abbott* v. *Sullivan* [1952] 1 K.B. 189, 198; [1952] 1 All. E.R. 226.

It is submitted that the latter of the two diametrically opposing views is preferable. It is desirable on socio-economic grounds that since the exercise of disciplinary functions by trade unions and the like may often involve the deprivation of a man's livelihood, compliance with the *audi alteram partem* rule should be demanded either by implication or where it has been explicitly excluded, the excluding provision declared invalid. Since the exercise of disciplinary powers are penal in character, to it, more than to the exercise of any other powers, the *audi alteram partem* rule should be sacrosanct.

Prom the analytical point of view, it is not a concomitant of the existence of absolute discretion ("is satisfied" being held indicative of it) that rules of natural justice must of necessity be disregarded. The two are not incompatible and one does not logically flow from the other. To say that the "is satisfied" clause precludes the courts from going behind the president's satisfaction in the instant case is not to say that in the process of arriving at his decision the president need not give the person involved a hearing. A distinction should be drawn between the actual making of the decision, and what goes on prior to the exercise of the discretion, the latter importing the need to adhere to rules of natural justice.

The learned judge in saying that he was unable to read into the words "if he is satisfied" any further implication that, apart from the subjective test, other conditions must be complied with before the president could take valid action to suspend a member was fortified by the fact that rule 29 of the party constitution which relates to suspension and expulsion by the working committee provided for a hearing to the supposed defaulting party, whilst rule 28 did not. The inference drawn was that the *expressio unius est exclusio alterius* rule was to operate. It is submitted that this maxim should be employed with great caution. Indeed it is said that "the maxim ought not to be applied, where its application having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice."[8] Both rules 28 and 29 provide for suspension as well as a right of appeal to the working committee and the Malayan Indian Congress committee respectively, but under rule 29, the person involved is given a right to show cause why he should not be suspended or expelled. It may thus be argued that by implication a similar right is vested in a person suspended under rule 28 by the president. To interpret otherwise is to create a distinction between suspension by the president and suspension by the working committee which is unwarranted and inconsistent in the light of the identical characters of the functions.

The ruling that it was incumbent upon the plaintiff to pursue his appeal to the working committee before he issued his writ raises the interesting question of the exhaustion of remedies doctrine. In *White* v. *Kuzhch*[9] the Judicial Committee decided that a trade unionist who had been expelled by his union was prevented by appropriate provisions in the union constitution from resorting to the courts unless and until he had appealed to a domestic forum within the general framework of the union. This rule is to apply even where the expulsion proceedings were tainted and vitiated by bias, prejudice and non-compliance with rules of natural justice. Not surprisingly the case has been subject to much criticism[10] and it is submitted that it should not be followed here since our courts are not bound by the Privy Council on appeals from Canada. Instead it would be more desirable to emulate the American experience where the courts have made exceptions to this doctrine, so much so that Professor Summers regards the exceptions as reaching the point where they substantially qualify if not nullify the original rule;[11] these exceptions being made when it is

8. *Colquhoun* v. *Brooks* (1887) 19 Q.B.D. 400. 406.
9. [1951] A.C. 585; [1961] 2 All. E.R. 435.
10. Lloyd, "Judicial Review of Expulsion by a Domestic Tribunal" (1952) 15 *M.L.R.* 413.
11. (1961) 64 *Harvard L.R.* 1086-1092. See also Chafee (1930) 43 *H.L.R.* 1019-20 and Davis, *Administrative Law Treatise,* vol. 3, chapter 20, pp. 56, 97.

apparent that appeal to the domestic forum would be futile, inadequate or where it will involve irreparable injury. In the present case, the plaintiff asserted that an appeal to the working committee under rule 28 would have been futile because the Selangor State delegates conference was to take place within two days after the receipt of the notice of suspension and by the time the working committee met, it was too late as he would have been deprived of his right to vote and of his patrimonial interest and right to be elected to office. The door is thus not shut against the court making an exception to the strict rule requiring the exhaustion of domestic remedies within the framework of the Malayan Indian Congress.

In conclusion, it may be asked that supposing the court had decided to grant relief, would an injunction be the appropriate instrument to call in aid? An injunction will issue to protect property rights but not where the matter involved is trivial. It is submitted that since the right to vote in a domestic association constitutes a property right[12] and similarly, a patrimonial interest in an office,[13] the injunction, together with the declaration and a claim for damages are appropriate remedies to be resorted to.

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12. *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540; *Amalgamated Society of Engineers* v. *Smith* (1913) 16 C.L.R. 537, 553.

13. *Craddock* v. *Davidson* (1929) Q.S.R. 328; *MacQueen* v. *Frackleton* (1909) 8 C.L.R, at 694 and 724; *Forbes* v. *Eden* (1867) L.R. 1 H.L. Sc. 568.