ARTICLE 9(1) AND "FUNDAMENTAL PRINCIPLES OF NATURAL JUSTICE" IN THE CONSTITUTION OF SINGAPORE

Given the normative character of Constitutional Law, the question, "What is the meaning to be assigned to the term *law* found in Article 9(1)[1] (and in Article 12(1))[2] of the Constitution of Singapore?" assumes enormous importance. Though this same, or similar, question had been posed before in relation to the Indian,[3] Malaysian[4] and Burmese[5] provisions, the Privy Council's authority has now been lent in *Ong Ah Chuan* v. *P.P.*[6] to propositions that have the effect of re-opening the issue again. The question cannot be dismissed as elementary. Indeed, there has always been scope for a wider interpretation of these "life and liberty" provisions, and striking in this regard is the transformation of the Indian Supreme Court from the era of *A.K. Gopalan* v. *Madras*[7] to the decision in *Maneka Gandhi* v. *Union of India*[8] relied upon by the appellants in *Ong Ah Chuan.* But any expansion in scope through reliance on "Natural Justice" has its own critics.[9] Pragmatists who disapprove of wholly theoretical Natural

1 "9.— (1) No person shall be deprived of his life or personal liberty save in accordance with law." See the Reprint of the Constitution of the Republic of Singapore, dated 31st March 1980, hereinafter referred to as the Constitution.

2 The *rationes* in the two Privy Council decisions of *Ong Ah Chuan* v. *P.P.* [1981] 2 M.L.J. 64, (1981) A.C. 648 and Haw *Tua Tau* v. *P.P.* [1981] 2 M.LJ. 49, forming the subject matter of this essay extend to both Arts. 9(1) and 12(1). But it is felt by this writer that Art. 12(1) requires a separate treatment since the provision is different, in many ways, from Art. 9(1). The law regarding "constitutional equality" — a principle of Natural Justice, itself — may or may not be able to co-exist with other unspecified "fundamental principles of Natural Justice". Therefore, it is essential to examine these question in a separate and detailed treatment of Art. 12(1) in the light of the P.C.'s *rationes* in these two cases.

3 *A.K. Gopalan* v. *Madras* A.I.R. 1950 S.C. 27.

4 *Arumugam Pillai* v. *Govt. of Malaysia* [1975] 2 M.L.J. 29.

5 *Tinsa Maw Naing* v. *Commissioner of Police* [1950] Burma Law Reports 17. "Rules of Natural Law are as the mirage which ever recedes from the traveller seeking to reach it." For a report of the case see also Harry E. Groves, *Comparative Constitutional Law: Cases and Materials*, Oceana (1963).

6 [1981] 1 M.L.J. 64.

7 See note 3.

8 (1978) Supreme Court Reports 621.

9 None has been more vehement amongst the Benthamites in criticising Natural Law than Bentham himself. Consider his reaction to the French Declaration of Rights of Man and the Citizen:

> "Look to the letter, you find nonsense — look beyond the letter, you find nothing … there are no such things as natural rights — no such things as natural rights opposed to, in contradistinction to legal…. Natural rights is simple nonsense: natural and imprescriptible rights, rhetoric nonsense— nonsense upon stilts. But this rhetoric nonsense ends in the old strain of mischievous nonsense." — Anarchical fallacies: Works (Ed. Bowring), Vol. II, 497, 500 and 501, London (1843). For the links between Natural Law and Natural Justice, see F.E. Dowrick, *Justice according to the English Common Lawyers,* London, 1961, 46.

Law ideas would point to all the unpredictable implications of Natural Law notions, for example, in relation to Judicial Review. They would seek a solution to the question posed here within the terms of the definition in Article 2(1)[10] of the Constitution. If possible, they might examine the definition contained in the Interpretation Act, 1965.[11] These two definitions with their constituent elements may bear detailed analysis but the resulting exigesis may not be called simple by any means. The Privy Council did not attempt such detailed analysis.

It may be that neither a head-long leap in the direction of Natural Law notions nor a search for an etymic meaning for the generic terms used in the Constitution is the correct approach. If the fear regarding the first is that it may crystalize into a Constitution within a Constitution, the inadequacy of the latter is that it whittles away the Constitution till it is no thinner than the paper it is written upon.

Perhaps, the Privy Council has wished to steer clear of both these approaches in order to reach a *contextual* meaning for the term "Law" in Article 9(1)? Can we discern this much from the following memorable passage in *Ong Ah Chuan?:*

> "In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those *fundamental rules of natural justice* that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery."[12] (emphasis supplied)

You may well think the Privy Council has fallen victim to the temptations of Natural Law; that the "contextual interpretation" is only a cloak for the birth of a Natural Law idea. You may reserve judgment for the moment.

Whatever we say of the reasoning in the case, one can grasp soon enough the wide constitutional implications of this *dictum* not only for Singapore but for Malaysia as well (Article 5(1) there is identical to Article 9(1) here). In the short term one may not see any drastic

[10] Art. 2(1)—"'law' includes written law and any legislation of the United Kingdom or other enactment or instrument whatsoever which is in operation in Singapore and the Common Law insofar as it is in operation in Singapore and any custom or usage having the force of law in Singapore;" *cf.* Art. 160(2) of the Malaysian Constitution.

[11] S. 2 — " 'written law' means the Constitution and all previous Constitutions having application to Singapore and all Acts, Ordinances and enactments by whatever name called and subsidiary legislation made thereunder for the time being in force in Singapore;" compare this with the constitutional definition in Art. 2(1) —"'written law' means this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore." Notice any differences? They appear to be more than semantic.

[12] [1981] 1 M.LJ. 64, 71 Col. 1B, C & D.

consequences, but the long-term effect of this dictum would be influential in the growth of Constitutional Law in Singapore. That much one may have to concede irrespective of the view one may take of judicial disapproval of Parliamentary Laws. This essay is confined to the constitutional issues raised by the two cases mentioned above[13] and no attempt will be made to discuss the other vital issues of criminal procedure and evidence raised by the cases. This is made easier by the fact that the two decisions contain much general discussion on constitutional points.

It is felt appropriate to begin by providing a relevant background to the main discussion to follow. After all, there is a historical antecedent to catch up with. Moreover, the Indian decisions referred to below were relied upon in arguments before the Privy Council.

A Comparative Background

The provision in Article 9(1) has "look-alikes" in the Malaysian[14] and Indian Constitutions.[15] There is a distant cousin in the Constitution of USA which is a jurisprudence unto itself. There may well be an ancestral connection between the latter and the provisions in Singapore, Malaysia and India referred to. But courts in these countries have denied the connection (however tenuous that may be), *inter alia,* for the very legitimate fear of importing a, possibly, "unruly horse" of "due process". But the anxiety of the Indian Supreme Court to keep out "due process" had become an unfortunate distraction in its decision in *A.K. Gopalan*, with the result that the Court could not properly determine the scope of Article 21 of the Indian Constitution and, indeed, determine the scope of Judicial Review under the Constitution.[16]

It is worth noting here that the Privy Council in its *rationes* in the two cases has not referred to "due process" but instead approached the basic question posed on its own merit within the scheme of the Constitution of Singapore.

Though the facts[17] in *Ong Ah Chuan* create a context very different from that in the Indian decision of *A.K. Gopalan*, many of the arguments posed by the applicants were similar to those put forward in the Indian case. We may, therefore, conveniently refer to it here and note, briefly, the extent to which a more recent decision of the Indian Supreme Court has over-ruled or reversed *A.K. Gopalan.*

In 1950, the Indian Supreme Court decisively set itself against reading any Natural Justice requirements into the words, "procedure

[13] See footnote 2.

[14] "5. Liberty of the Person. (1) No person shall be deprived of his life or personal liberty save in accordance with law."

[15] "21. Protection of Life and Personal Liberty — No person shall be deprived of his life or personal liberty except *according to procedure established by law."* (emphasis supplied) The words in italics make the Indian provision much narrower than those in Singapore and Malaysian Constitutions.

[16] See T.K.K. Iyer, *Judicial Review of Reasonableness in Constitutional Law,* Madras Law Journal Press (1979), 30.

[17] *Ong Ah Chuan* and *Koh Chai Cheng* were appealing against their conviction and death sentence under the Misuse of Drugs Act, 1973. See below, 221. The context in *A.K. Gopalan* was the preventive detention of the petitioner, without trial, under the Preventive Detention Act, 1950.

established by *law"* in Article 21 of India's Constitution. The petitioner *A.K. Gopalan* had been 'preventively detained' upon executive direction under an Act of 1950. He contended that the requirements of Article 21 had not been met insofar as the Act had not provided for a fair procedure in depriving him of his "personal liberty". The term *law* in Article 21 meant not any specific *lex* but the more seminal *jus.* It meant a fair means determined according to the time-honoured principles of natural justice.

More specifically he contended that the following procedural requirements were fundamental to any reasonable and fair legal system:

(1) A certain, definite and ascertainable rule of human conduct for the violation of which (alone) can one be detained;

(2) Notice to the individual of the grounds of his/her detention;

(3) An impartial tribunal, be it administrative, judicial or advisory, to decide whether the detention is justified; and

(4) Orderly course of procedure, including an opportunity to be heard orally, with a right to lead evidence and call witnesses.

By a majority, the Indian Supreme Court denied that *in general terms,* Article 21 could be read in this way. The court could have possibly confined this *ratio* to cases of preventive detention for which the Constitution itself had provided in Article 22 detailed procedural and substantive requirements.[18] In other words, the makers of the Constitution clearly saw preventive detention as a necessary exception to the elaborate scheme of rights they had devised. They deliberately (and notwithstanding the irony involved) put in the fundamental rights part of the Constitution safeguards for those detained without trial merely at the discretion of the Executive. The majority viewed the "Natural Justice" contention as deriving sustenance from the "due process" clause in the Constitution of USA. In retrospect we may say that the "Natural Justice" argument could have stood on its own.[19] After all, the notion of Natural Justice pre-dates the "due process" clause, tracing its roots in European thought to Aristotle, Thomas Acquinas and to the writings of the Natural Law School and in Eastern thought to the Indian concept of *Dharma* as expounded in the four *vedas*.[20] However, by drawing parallels with the Japanese and Irish[21] Constitutions the Indian Supreme Court supported its finding that "by adopting the phrase 'procedure established by law' the Constitution gave the legislature the final word to determine the law."[22]

18 It was in *Kharak Singh* v. *U.P.* (1964) 1 S.C.R. 332 that the Indian Supreme Court considered for the first time the scope of Art. 21 *proprio vigore*, in particular, the ambit of "personal liberty' under the provision.

19 See M.P. Jain, *Indian Constitutional Law* (1978), 483, for a detailed discussion of *A.K. Gopalan.*

20 See the discussion in *The Provincial Bar Federation, Madras — Proceedings of the Seminar,* Oct. 1963.

21 In the Irish case of *The King* v. *The Military Governor of the Hair Park Camp* (1924) 2 Ir. R. 104. Art. 6 of the Irish Constitution ("Liberty of the person is inviolable and no person shall be deprived of such except 'in accordance with law'") was interpreted to mean rules of law in force for the time being.

22 A.I.R. 1950 S.C. 27, 39 Col. 2.

Jurisprudential Questions

Contemplating this last statement one perceives, however faintly, a clash between the principles of Constitutional Supremacy and Parliamentary Supremacy. Perhaps, a further extension of this line of thought may give rise to an interesting Jurisprudential question: "Are constitutional norms by definition always necessarily separate and 'higher' than 'legislatively-created norms'?" Can a written Constitution be said to create any norms at all when all it does amounts to leaving the issue for the periodic determination of the Legislature? In other words, can the Constitution speak thus: "In this matter of protection for the life and personal liberty of individuals we leave it to the Legislature for the time being to enact procedures by which such protection may be ignored and life and personal liberty taken away?" In *A.K. Gopalan* Kania C.J., perhaps, thought so. Relying on *Eshugbai Eleko* v. *Officer Administering the Government of Nigeria* [23] and *The King* v. *Secretary of State for Home Affairs* [24] the learned Chief Justice held that the principle embodied in these cases was, perhaps, incorporated into Article 21.[25] One may surely ask, what is wrong in a Constitution expressly entrenching the principle of *Rule of Law* so familiar to the English Common Law? None whatsoever, except that the Common Law functions within the framework of Parliamentary Sovereignty wherein statute clearly over-rides the Common Law, hence, the insistence only upon conformity to the provisions of enacted law. But in legal systems with "written" constitutions the frequent pitting of Parliamentary Sovereignty against the operation of Constitutional Supremacy calls into question the nature and functions of a written Constitution. Then it is not merely the idealists who may find belief in Constitutional pre-eminence a decorative fiction. It is, indeed, challenging to abide by, and uphold, the principle of Constitutional Supremacy without forgetting the flexible joints in the complex structure. In the process of interpretation of the constitution the desired balance may be achieved. The type of rigidity that characterised the Indian Supreme Court's decision in *Golaknath* [26] in the name of Constitutional Supremacy, it is suggested, was exceptional.

We return to *A.K. Gopalan* and to Mr. Justice Fazl Ali's thoughtful dissent in favour of the "Natural Justice" argument which has now been, largely, vindicated. The learned judge held:

> "I am aware that some Judges have expressed a strong dislike for the expression 'natural justice' on the ground that it is too vague and classic, but where there are well-known principles with no vagueness about them, which all systems of law have respected and recognised, they cannot be discarded merely because they are, in the ultimate analysis, found to be based on natural justice. That the expression 'natural justice' is not unknown to our law is apparent from the fact that the Privy Council has in many criminal appeals from this country laid down that it shall exercise its power of interference with the course of criminal justice in this country when there has been a breach of principles of natural justice or departure from the requirements of justice."[27]

[23] 1931 A.C. 662, 670.

[24] (1923) 2 K.B. 361, 382 *per* Scrutton L.J. "A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction."

[25] A.I.R. 1950 S.C. 27, 40 Col. 1.

[26] A.I.R. 1967 S.C.

[27] A.I.R. 1950 S.C. 27, 60 Col. 2.

Characterising the four requirements of a fair procedure mentioned above as "not absolutely rigid but... adaptable to the circumstances of each case within certain limits" the learned judge showed that the acceptance of the principles of fair procedure would not lead to any startling consequences. He accepted the principle of preventive detention and most of the provisions of the impugned Act as constitutional. It is not material here to examine the provision he did find unconstitutional.

If there is one Article in Part III of the Indian Constitution that has steadily registered a considerable expansion over the years, it is Article 21. From the limited, and some critics would have it, pusillanimous interpretation it received in *A.K. Gopalan's* case to the recent decision in *Maneka Gandhi* v. *Union*,[28] the provision has acquired considerable edge to it. In the process, the Indian Supreme Court encountered many difficult questions of constitutional interpretation. It eventually arrived at the view that none of the provisions of the fundamental Rights part of the Indian Constitution can be given a restricted meaning merely because there would otherwise be overlapping between the provisions. Each provision has to be given its plain and natural meaning, whatever the consequence in terms of overlapping with other fundamental rights provisions in the same part.

Thus *A.K. Gopalan's* view has been varied over the years. The Supreme Court in *Maneka Gandhi* v. *Union* asked itself the question: "What requirements, if any, should 'procedure established by law' satisfy? Can any procedure, however arbitrary or unreasonable it may be, satisfy Article 21? — precisely the question that the Privy Council has dealt with in *Ong Ah Chuan.*[29] The petitioner, Maneka Gandhi put forward arguments similar to the one raised by the petitioners in *Ong Ah Chum.* Her passport had been impounded by the authorities "in the interests of the general public." Upon the same ground they declined to give Maneka Gandhi the reasons for their action. In her writ petition to the Supreme Court she contended that the procedure, if any, adopted in impounding her passport, was unreasonable, violating Articles 14 (equality) and 21 (personal liberty) of the Indian Constitution. She had not been told of the grounds upon which her passport was impounded nor had she been given an "opportunity to be heard" — a fundamental principle of Natural Justice.

Confining ourselves to the points directly relevant to *Ong Ah Chuan* we find that the Indian Supreme Court's reasoning was close to that of the Privy Council in *Ong Ah Chuan.* The Supreme Court firmly rejected the proposition that as long as there is a procedure provided by law no more questions need be asked as to the reasonableness or otherwise of that procedure. It held, that the procedure under the law must satisfy the principle of Natural Justice in *audi alteram partem.*

The holding in *Ong Ah Chuan* clearly goes beyond the Indian Supreme Court's decision in *Maneka Gandhi.* For a start, a mere

[28] A.I.R. 1978 S.C. 597; (1978) 2 S.C.R. 621.
[29] [1981] 1 M.L.J. 64.

superficial comparison of the Indian and Singapore provisions show that the Singapore provision is clearly capable of wider scope than the Indian provision:

> "9.— (1) No person shall be deprived of his life or personal liberty save *in accordance with law"*

is substantially different from:

> "21. No person shall be deprived of his life or personal liberty except *according to procedure established by law"* (emphasis supplied).

It would not be easy to suppose that the Singapore provision meant to cover only procedure provided for by the law. Hence the following constitutional arguments put to the Privy Council by the applicant's counsel:

Arguments in Ong Ah Chuan

(1) The prescription that deprivation of life or personal liberty shall be 'in accordance with law' cannot be satisfied by the mere passing of legislation whatever its character may be. If that be the case then there is hardly a constitutional protection offered.

(2) Article 9(1) requires that the enacted provisions are fair, reasonable and just in the matter of deprivation of life and Personal Liberty.

(3) Article 9(1) applies both to procedure and substance. In other words, the notion of Rule of Law extends to the procedural as well as the substantive.

(4) Sections 15 and 16 of the Misuse of Drugs Act, replace the presumption of innocence with a presumption of guilt. Providing for a rebuttable presumption of guilt is not necessarily a violation of the rule of law but the State must justify the departure from the rule regarding innocence. It had not done so.[30]

(5) Fundamental rights enshrined in a written Constitution must be interpreted in a liberal sense. For the rights are guaranteed and placed "beyond the reach of a democratic majority so that there may be no tyranny by the majority, by the executive or by the Courts."[31]

On behalf of the Public Prosecutor of Singapore the following arguments were put forward:

(1) The term 'law' used in Articles 9(1) and 12(1) includes both Statute Law and Common Law. Therefore, a law enacted by the Singapore Parliament is the 'law' referred to in the Articles. There can be no further considerations imported into it such as principles of Natural Justice.

(2) What the term 'accordance with law' does is to secure individuals against arbitrary Executive action.

(3) The definition of 'law' in the Singapore Constitution is exhaustive.

(4) Counsel urged the Privy Council that, "The Public Prosecutor is concerned to protect the Singapore Legislature from any fetter on its power to legislate which would exclude it from passing laws which the courts might consider to be unreasonable."[32]

[30] "[T]he government must show that it is difficult or impossible for the Police to prove that possession is for the purpose of trafficking by any other means than the use of presumption. The presumption of innocence is the starting point and exceptions must be justified." (1981) A.C. 648, 653H. See below, p. 221 & ff.

[31] *Ibid.*, 655B.

[32] *Ibid.*, 661A, B.

(5) While the Public Prosecutor does not lay any claim for absolute Parliamentary Sovereignty what is permitted by the Constitution must prevail (without limitations being imposed which may be contrary to the express terms of the Constitution).

(6) Until the decision in *Maneka Gandhi* the *ratio* in *A.K. Gopalan* as , to the meaning of the term 'law' in Article 21 of the Indian Constitution had applied. The Malaysian case of *Arumugam Pillai* v. *Government of Malaysia,* which is on similar lines, is relied upon.

(7) Counsel for Public Prosecutor of Singapore denied that there were any 'entrenched principles of Natural Justice' derivable from Articles 9(1) and 12(1). Nevertheless, in their application statutes may be read as to include principles of Natural Justice (as is being done by courts in dealing with administrative determinations).

In addition to these contentions directly bearing on the interpretation of Article 9(1), there were others on the question of mandatory death penalty[33] and the unfairness or unreasonableness of it in general, as well as in the context of the Misuse of Drugs Act. Counsel for the appellants assailed as unfair, both under Articles 9(1) and 12(1), the classification made by the Misuse of Drugs Act as to the quantity of drugs in possession which, according to counsel, results in the reversal of the presumption of innocence.[34]

The Privy Council's reasoning in Ong Ah Chuan on the Constitutional points

Though the appeals failed, the appellants' arguments succeeded most in regard to the Judicial Committee's approach to interpreting the fundamental rights provisions of the Singapore Constitution. It was held that the Rights provisions of a written constitution such as that of Singapore should receive a generous interpretation so as to provide individuals the "full measure" of these provisions. The courts must avoid the "austerity of tabulated- legalism" in constitutional interpretation and should be careful not to accept readily the "presumptions that are relevant to legislation of private law."[35]

After this clarification the Privy Council went on to reject, what it termed, the "narrow view" of Article 9(1) which would have it that if there was "properly enacted" legislation covering Executive/ administrative acts the Article would be satisfied. Such a view was also logically defective insofar as it begged the question *(petitio principii)* of the constitutionality of those very Acts of the legislature. The definition of "written law" in Article 2 spoke of Acts "for the time being *in force* in Singapore" and this would clearly raise the question of their constitutionality. That cannot be answered by the "narrow view" contended for on behalf of the Public Prosecutor of Singapore.

> "So the use of the expression 'law' in Articles 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963

[33] *Ibid*., 656F, G & H. Petitioners arguments regarding the death penalty were characterised by the respondent as 'abolitionist'.

[34] "Where the fact to be proved is the possession of a quantity of a drug and the conclusion presumed is trafficking, the amount in possession ought to be a commercial quantity and more than merely the necessary supply for an addict." More on this see below p. 221 & ff.

[35] Quoting *Minister of Home Affairs* v. *Fisher & Anor.* [1980] A.C. 319, 329.

> and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void."[36]

If, therefore, a meaning has to be found for the term "law" in Article 9(1) —a meaning that can, sensibly, be used to test the constitutionality of Parliamentary enactments — then it has to be suitably general and transcendental. Indeed, this poses a difficulty in regard to Article 9(1) though the transcendental or general nature of constitutional norms is not a ground for rejecting them. Clearly, the Judicial Committee's next step in the reasoning process must result in something, regrettably vague, as the "fundamental principles of Natural Justice" as being the meaning of the term "law" in Article 9(1). In order, perhaps, to make this tantalising phrase less vague the Judicial Committee held that the makers of Singapore's Constitution would have assumed that the term "law" would have included all those:

> "fundamental rules of natural justice that had formed part and parcel of the Common Law of England that was in operation in Singapore at the commencement of the Constitution."[37]

A further elaboration of how these 'fundamental principles of Natural Justice' may be determined is to be found in the case of *Haw Tua Tau.*[38] In *Ong Ah Chuan*, whatever the principles may have meant, they did not affect the constitutionality of the two sections of the Misuse of Drugs Act that had been impugned before the Privy Council. To appreciate this, we need to look at the following facts.

Briefly, under Section 15 of the Misuse of Drugs Act any person found in possession of more than (e.g.) two grammes of heroin shall be presumed to be holding the drug for purposes of trafficking — an offence under Section 3 — *until the contrary is proved.* Their Lordships held this presumption to be based on a fair inference where the accused — already in unlawful possession of drugs — transports a large quantity of it, larger than normally required for his/her individual consumption, that it was for purposes of trafficking. In this connection, their Lordships made it clear that 'mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence."[38a] In a crime of 'specific intent', where the purpose for which an act was done constituted an essential element, proof of such purpose was often inferred when other obvious and innocent explanations could not apply. Therefore, the Court would have to turn to the accused to put forward evidence which, on the balance of probabilities, might displace the inference. Such proceedings whereby the accused had the onus of proving facts 'peculiarly within his/her knowledge's could not be regarded as reversing the 'presumption of innocence'[39] (a description their Lordships put under inverted commas throughout).

[36] [1981] 1 M.L.J. 64, 70.
[37] *Ibid.*, 71 Col. 1.
[38] See below, 222.
[38a] [1981] 1 M.L.J. 64, 69 col. 1.
[39] "Their Lordships would see no conflict with any fundamental rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused), that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them." *Ibid.*, 71 col. 2.

Under Section 29 and the Second Schedule to the Act, the offence of trafficking in (e.g.) fifteen grammes of heroin carries the mandatory death penalty. After disclaiming any concern 'in their judicial capacity' with the merits or otherwise of capital punishment their Lordships held that the classification of offences and what punishments they should carry were, ultimately, matters of 'social policy' to be left to the Legislature to decide. The only test of constitutionality there was:

> "that the factor which the legislature adopts as constituting the dissimilarity in circumstances (between various classes of offenders) is not purely arbitrary but bears a reasonable relation to the social object of the law...."[40]

Though they held that fixing mandatory sentences would not be *ipso facto* unconstitutional under Article 9(1) their Lordships recognized that there 'may be considerable variation in moral blameworthiness' as between offenders all of whom suffer the same mandatory sentence.

> "In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed."[41]

In that case may this variation amount to discriminatory treatment under Article 12(1)? The answer was no, as indicated in this following short passage,

> "But Article 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt."[42]

Reasoning in Haw Tua Tau v. *P.P.*

In *Haw Tua Tau* sections 188(2) and 195(1), (2) and (3) of the Criminal Procedure Code were impugned as violating Article 9(1) and void for unconstitutionality. It was said for the petitioners that the sections went against a fundamental principle of Natural Justice, *viz.,* the rule against self-incrimination expressed in the maxim, *nemo debet se ipsum prodere.*[44]

Under Section 195(1), in any criminal proceedings (excluding committal proceedings), the accused may only make sworn statements that may be cross-examined. The section took away the right, previously enjoyed by accused persons, of making unsworn statements that could be immune from cross-examination.

Under Section 195(2) if the accused declines to offer testimony when called upon by the Court (acting under Section 188(2)) then the Court "may draw such inferences from the refusal as appear proper". As if to clarify, Section 195(3) says,

> "Nothing in this section shall be taken to render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed in the circumstances described in paragraph (a) of subsection (2)."

40 *Ibid.*, 72 col. 2.
41 *Ibid.*, 72/73.
42 *Ibid.*, 73 col. Positivists would surely approve. Jurisprudence teachers may use the passage as a good example of law divorced from morals!
43 [1981] 2 M.L.J. 49.
44 'No one is obliged to betray himself.'

The presiding judge addresses the accused in the standard form of allocution summing up the law contained in these sections. The question was whether the Judicial Committee could judge these provisions, taken together with the judge's allocution to the accused, as amounting to a violation of any fundamental principles of Natural Justice?

Characterising the previously enjoyed right of making unsworn statements as the 'anomolous privilege', the Privy Council had no difficulty in upholding the constitutionality of the impugned sections. Said the Judicial Committee,

> "English law has always recognised the right of the deciders of fact in a criminal trial to draw inferences from the failure of a defendant to exercise his right to give evidence and thereby submit himself to cross-examination. It would in any event be hopeless to expect jurors or judges, as reasonable men, to refrain from doing so."[45]

By way of further elaboration of their earlier decision in *Ong Ah Chuan* their Lordships made the following points:

(1) The notion of 'fundamental principles of Natural Justice' is not static but liable to change with the times.

(2) Also,.. .'in considering whether a particular practice adopted by a Court of Law offends against a fundamental principles of Natural Justice, that practice must not be looked at in isolation but in the light of the part which it plays in the complete judicial process.'[46]

(3) By making references to the United Nations Declaration of Human Rights, 1948, the European Convention of 1950 and the practice of civil law countries in criminal trials the Judicial Committee has indicated that what may amount to a fundamental principles of Natural Justice would be determined not upon a narrow view of the matter but upon a broadest canvas possible.

(4) Article 9(1), and the interpretation it had been given in *Ong Ah Chuan*, do *not*, at all, mean the perpetuation of any particular set of rules of procedure, rules of evidence or rules governing the treatment of the accused in all their details. In other words, taking a broad view of the fundamental principles of Natural Justice many minor and major changes can be made to these rules so long as, viewed over all, no fundamental principles of Natural Justice is violated.

(5) It would be 'imprudent' for a court of law to attempt to list comprehensively what would constitute the fundamental principles of Natural Justice even in the one field of criminal procedure.

Conclusion

The view one may have formed of the notion of 'fundamental principles of Natural Justice' on a reading of *Ong Ah Chuan* may have to be considerably revised after a reading of *Haw Tua Tan.* There appears to be a conscious attempt made in the later decision to tame the 'unruly horse' let loose in *Ong Ah Chuan.* It is understandable that in the first place the Judicial Committee wished to give some meaning to Article 9(1). When the constitutional norm read into that provision turned out to be nebulous though conceivable; turned out to be too general though not unfamiliar to constitutional lawyers; turned out to be difficult to determine, the Privy Council thought fit to say more about the notion of 'fundamental principles of Natural Justice'. It was very desirable for it to do so.

[45] [1981] 2 M.L.J. 49, 52F, col. 2.
[46] *Ibid*., 53B, col. 2.

As far as the 'judicial methodology' went, this writer feels, it was necessary to further elucidate the notion. In fact, throughout these two decisions the Privy Council had not lost sight of the important factor of judicial 'self-restraint'. It was conscious of having laid down a very important constitutional principle, almost certain to influence the evolution of case law in many parts of the British Commonwealth. But in the invocation and application of the principle the Privy Council had shown, perhaps by way of example, considerable restraint. While one would approve of this, with respect, insofar as one would recognise that judicial self-restraint has its place in constitutional decisions, there is a lingering doubt whether the Privy Council had overdone their restraint to the extent of enfeebling the grand concept of 'fundamental principles of Natural Justice' so emphatically declared in the earlier case of *Ong Ah Chuan.*

No doubt, the dicta of their Lordships should be read in the light of the actual facts and arguments presented to them. For instance, in *Ong Ah Chuan* they were concerned to reject the contention that as long as there was a legislative enactment the provision in Article 9(1) was satisfied. But the general points made by the Privy Council that have been summarised above, are far reaching in emasculating the sort of judicial inquiry their Lordships have envisaged under Article 9(1). When their Lordships say that the impugned provision "must not be obviously unfair",[47] one wonders about how obvious the unfairness should be before the provision in Article 9(1) could be invoked. Further, if comparisons have to be made with such wide ranging material as has been mentioned in the summary above, including the reference to the practices of Civil Law countries, could not most provisions of law that one may wish to impugn be termed 'not unfair' under Article 9(1)? In wishing to tame a wide and normally unmanageable principle of Natural Justice have their Lordships thrown the baby along with the bathwater? Notwithstanding these doubts this writer feels that the following proposition of Constitutional Law may be laid down as arising from the dicta in these two cases.

The duty of the Court under Article 9(1) is to examine contentions that may be advanced on the basis that legislative provisions impugned before the Court may be violative of one or more principles that the Court would recognise to be fundamental principles of Natural Justice. In other words, the Court would hear arguments on the matter of one or more of these principles that could demonstrably be involved in the discussion of issues of constitutionality under Article 9(1) and be willing to exercise their powers of review.

There is no doubt that this judicial inquiry would cover both the substantive and procedural provisions of the impugned law. As far as Article 9(1) is concerned there is no room for making this distinction with a view to restricting Judicial review to the procedural provisions only.

If that is the case, the obvious parellel between the 'due process' concept and the fundamental principles of Natural Justice cannot escape notice. However, even as a comparative exercise it would be

[47] *Ibid.*, 50C. D, col. 2.

misleading to recall the 'due process' concept under the U.S. constitution. Not only the history of case-law in many Asian countries in the neighbourhood of Singapore but also the warning by the Privy Council in *Ong Ah Chuan*[48] against the uncritical application of U.S. Constitutional concepts in the interpretation of the provisions in the Singapore constitution, make it inappropriate to seek a comparison.

The point is Article 9(1) connotes a judicial inquiry — judicial review — into the 'fairness' of the law tested against certain principles regarded as fundamental to the legal system in theory and in practice. One need not cloud this proposition by comparisons that advance one no further forward. Judicial review is judicial review under whatever name.

One final point may be made that this review power now vested in the Singapore Courts is to be welcomed by those that wish to see the continued healthy evolution of Singapore's Constitutional system. Considering that the strengthening of constitutional pillars always aids in the strengthening of the economic and social structures, we should all welcome this development.

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[48] [1981] 1 M.L.J. 64, 70B, col. 2.

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