# NATURAL JUSTICE AND THE CONSTITUTION

"Myself not judging, I will judges find,
In mine own city, who will make no blind
Oath-challenge to pursuer and pursued
But follow this new rule, by me indued
As law for ever. Proofs and Witnesses
Call ye on either side, and set to these
Your oaths. Such oath helps Justice in her need."

Aeschylus, Eumenides 487-93 (Gilbert Murray's translation).

Lord Diplock's assertion in two recent Privy Council decisions on appeal from Singapore[1] that the word "law" in article 9(1) of the Constitution ("No person shall be deprived of his life or personal liberty save in accordance with law") includes the principles of natural justice opens up new possibilities for constitutional interpretation, not merely in Singapore, but in the Commonwealth generally, and merits some detailed consideration.

Propositions of this kind have been put forward before, but have not generally been accepted by the courts. In *A.K. Gopalan* v. *State of Madras*[2] the Supreme Court of India was asked to interpret a similar provision in the Indian Constitution[3] so as to import the American concept of due process; it politely declined the offer on the ground *(inter alia)* that it would make the ambit of the provision too vague; in the same year (1950) the Supreme Court of Burma was similarly cautious in its approach to a provision in the Burmese Constitution which was identical to the present Singapore provision.[4] As Professor Jayakumar suggested a number of years ago[5] these decisions were based on outmoded ideas of natural justice; they were nonetheless followed in Malaysia in the High Court and the Federal

1 *Ong Ah Chuan* v. *Public Prosecutor; Koh Chai Cheng* v. *P.P.* [1981] A.C. 648; [1981] 1 M.L.J. 64 where the judgments of the High Court and the Court of Criminal Appeal are also reported; and three appeals *sub nomine Haw Tua Tau* v. *P.P.,* Privy Council Appeals Nos. 56 of 1980 and 22 and 23 of 1981, 22nd June 1981, as yet unreported.

2 A.I.R. 1950 (S.C.) 27. However see *Maneka Gandhi* v. *Union of India* [1978] 2 S.C.R. 621.

3 Article 21, which read: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

4 *Tinsa Maw Naing* v. *Commissioner of Police, Rangoon* [1950] Burma L.R. 17, Supreme Court.

5 "Constitutional Limitations on Legislative Power in Malaysia" [1967] 9 Mal. L.R. 96.

Court in relation to articles 5(1) and 13(1) of the Malaysian Constitution.[6]

The interpretation adopted by Lord Diplock is in my view clearly correct, and can perhaps be expected to be followed in Malaysia in spite of the decisions of the High Court, and certainly in other jurisdictions in which appeals still lie to the Privy Council. When the Constitution says "No person shall be deprived of his life or personal liberty save in accordance with law," it would, as Lord Diplock himself asserted, be a mockery to regard "law" as meaning whatever Parliament enacts. It does not require the Constitution to tell us that authority cannot execute or detain a person unless it has statutory authority to do so; the common law tells us just as much. The provision should clearly be seen as a brake on the legislative power. It is either that or it is nothing, and courts are not, surely, to regard an apparently important constitutional provision as meaningless.

The purpose of this article is therefore not to defend Lord Diplock's view, for in my view it needs no defence, but rather to examine how the concept of natural justice might function as a constitutional concept and raise some of the difficulties it might encounter.[7]

Natural justice has had a remarkable history. It has always been an identifiable, if elusive, concept in the common law, but just when the courts seemed about to embrace it as a cornerstone of the rights of the individual under English law,[8] apparently mesmerised by the theory and practice of legislative supremacy they forgot about natural justice during a century of revolutionary social and legal change (1863-1963) in which Parliament led the way and the judiciary followed meekly in its wake. An academic writer was even able in 1951 to refer to the "twilight of natural justice" without fear of protest.[9] *Ridge* v. *Baldwin*[10] changed all that and natural justice as a fundamental principle of administrative, as well as judicial, decision-making is now taken for granted. The cases since *Ridge* v. *Baldwin* represent the latest and greatest creation of the common law. We can now no more do without natural justice than we can do without equity. Equity is a fair comparison, for natural justice is as much a necessary adjunct now to statute law as equity was a necessary adjunct in its day to the common law. As the liberty of the individual has been put under greater and greater pressure, so much the more necessary has it become to supply the frequent omission of the legislature by importing the idea of a fair procedure, the right to put one's case before an impartial tribunal or authority. Thus natural justice is no longer "as the mirage which ever recedes from the traveller seeking to reach it"[11] nor is it true to say that "there is no certain standard

[6] *Comptroller-General of Inland Revenue* v. *N.P.* [1973] 1 M.L.J. 165; *Arumugam Pillai* v. *Government of Malaysia* [1975] 2 M.L.J. 29; *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 M.L.J. 156; *Lui Ah Long* v. *P.P.* [1977] 2 M.L.J. 226. Article 5(1) is *in pari materia* with Article 9(1) of the Singapore Constitution, and Article 13(1), which reads: "No person shall be deprived of his property except in accordance with law."

[7] The merits of the view which this article assumes are discussed in Dr. T.K.K. Iyer's article which appears in this issue of the Malaya Law Review.

[8] See *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.

[9] H.W.R. Wade, "The Twilight of Natural Justice?" (1951) 67 L.Q.R. 103.

[10] [1964] A.C. 40.

[11] *Per* Maung C.J. in *Tinsa Maw Naing*, op. cit. p. 19.

and no measuring rod by which the so-called principles of natural justice can be ascertained or defined;"[12] even Lord Reid when he asserted that natural justice, just because it could not be cut, dried and weighed was not therefore meaningless,[13] seems at this distance to have protested too much: to a large extent it has been cut, dried and weighed, even so as to create fears that it might become a matter of technicality rather than one of substantially fair procedure.

These general remarks concerning natural justice are not intended by way of celebration but to raise some questions which deserve to be asked. As we have seen, natural justice is an English common law concept developed over the last twenty years to create fair procedures in the face of increasing state power. How can natural justice, a specific response to English conditions, be imported into Singapore, an independent country throughout the relevant period, and with vastly different social conditions? How can it be imported as a constitutional concept when English law follows the doctrine of legislative, not constitutional, supremacy, and employs natural justice to check unfair administrative and judicial procedures, not unfair legislation? What, in any event, does "natural justice" involve here? Is it a procedural or a substantive concept?

These questions can I think be answered. Lord Diplock has already hinted at some of the answers and it will be fruitful perhaps to scrutinise his words, which are never chosen for their decorative value only, quite carefully.

In *Ong Ah Chuan* v. *P.P.* his Lordship said:

> "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 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 these fundamental rules."

In other words, granted that the legal system prior to independence embodied certain basic principles of justice, these principles were intended to continue to be operative as part of the Constitution; what previously existed by virtue of the common law and by tacit approval of the legislature was now assured by the Constitution.[14] It may be observed that there is no preamble to the Singapore Constitution assuring the continued enjoyment of rights, but presumably the assurance is implied from the scheme of the Constitution, the circumstances of its adoption, and the express content of the fundamental rights. However, the origins of fundamental rights under the Constitution do not in fact afford hard evidence of any such implied assurance. There were no fundamental rights in the 1959 Constitution[15]

[12] *Per* Kania CJ. in *Gopalan*, *op.cit.* p. 74.
[13] *Ridge* v. *Baldwin, op. cit.* p. 74.
[14] Lord Diplock has treated other constitutions similarly. See, for example *Thornhill* v. *A.G. of Trinidad and Tobago* [1980] 2 W.L.R. 510.
[15] See the Singapore (Constitution) Order in Council [1958] 2 U.K.S.I., 2156 (No. 1956).

which introduced internal self-government; the fundamental rights in the Malaysian Constitution applied to Singapore when it was a state of the Federation (16th September 1963 to 9th August 1965), but the State Constitution of Singapore (operative from 16th September 1963), from which the present Constitution derives, contained no fundamental rights, so that on separation the relevant provisions of the Malaysian Constitution had to be continued in force under the Republic of Singapore Independence Act.[16]

His Lordship was far however from wishing to import natural justice as a purely English concept without local connotations. He stressed in both *Ong Ah Chuan* and *Haw Tua Tau* that had the Privy Council felt the slightest doubts about the new arguments raised concerning the Constitution, they would have remitted the case to the Court of Criminal Appeal for argument on the constitutional points, in order to have the "benefit of the opinions of members of the judiciary of Singapore who are resident in the Republic and more familiar than their Lordships with local conditions there."[17] In the latter case his Lordship also said that if it had been thought that the 1976 amendments to the Criminal Procedure Code had had the effect of compelling the accused to submit himself to cross-examination by the prosecution, their Lordships would have sought the views of the Court of Criminal Appeal:

> "as to whether the practice of treating the accused as not compellable to give evidence on his own behalf had become so firmly based in the criminal procedure of Singapore that it would be regarded there by lawyers as having evolved into a fundamental rule of natural justice by 1963 when the Constitution came into force."

In the same passage he stressed that the question would have to be looked at in the light of the complete judicial process, and that natural justice changes with the times.

Thus Lord Diplock appears to have proceeded down a conceptual *cul-de-sac:* the justification for importing the concept of natural justice into the Constitution is that the Constitution assured the citizen of the continuance, substantially unchanged, of the rights he enjoyed at the commencement of the Constitution, and the essence of these rights is natural justice, but on the other hand this essence may change with changing social and legal conditions. This apparent contradiction does not create confidence that the Privy Council is interpreting the Constitution as opposed to interfering with the legislative power. Moreover it tends to give ammunition to those who say that natural justice as a test of validity will lead to a chaos of uncertainty. Whose opinion is to prevail? The English judges', the Singapore judges', that of the Singapore lawyers' in 1963, public opinion, or whose opinion?

The best answer would seem to be that the court must take an objective look at the legal system as it has developed from colonial times to the present day, and ask itself whether the statute is contrary to a principle inherent in that system which can properly be regarded as fundamental. It is hard to see what the opinion of local lawyers in 1963 has to do with such a question. In this context reference

[16] Act 9 of 1965.
[17] *Ong Ah Chuan* [1981] 1 M.L.J. at p. 67G.

to local opinion may not be so much to do with differences between the legal systems of England and Singapore as a recognition of the fact that the local judiciary must assume a genuine role in decisions interpreting the Constitution in preparation for the day when they will have the sole responsibility. It is also worth noting here that in both *Ong Ah Chuan* and *Haw Tua Tau* the constitutional points giving rise to Lord Diplock's *dicta* were taken for the first time before the Privy Council, so that sending the case back to the Court of Criminal Appeal for further argument would have been in any event perfectly proper. It is however difficult to see what "local conditions", other than purely legal facts concerning the legal system, can be relevant to a decision of this nature. We are not, surely, concerned here with social or political conditions; it is not a matter of weighing the individual's right against the requisites of social control in a particular society, but a question of whether the legal system has, as it were, contradicted itself by attempting to remove one of the pillars on which it stands. As Lord Diplock himself said recently, *"The fundamental human right* is not to a legal system that is infallible but to one that is fair."[18]

This idea may be the key to some of the difficulties I have raised. Natural justice is a principle which is inseparable from the common law type of legal system. To that extent it is an English concept, but not one which cannot assume particular attributes when planted amid the alien corn, so to speak. One can see the American concept of due process for example as very much a derivation from (albeit also a development of) basic principles of the common law. Natural justice is not simply a system of more or less technical rules to be applied in relation to proceedings before administrative tribunals or the criminal courts, but as a legal concept of general application it represents the detailed application of one basic principle — that a person should not suffer a penalty without a fairly conducted hearing before an impartial authority. This right is *"the* fundamental human right" because a legal system which fails to observe it scarcely answers to the description "legal system"; it is a system which perpetuates the exercise of naked tyrannical power. To say that, viewed in this way, natural justice is a procedural, not a substantive concept, is perhaps misleading in that it suggests that natural justice is a limited idea which does not hit at the root of unfairness; perhaps when viewed at this fundamental level substance has no meaning without procedure — the medium is the message; if we regard natural justice as fundamental in this sense, we can perhaps agree that it is a matter of procedure, and not substance. This may be seen by some as a narrow conception of natural justice, but it is the only sense that is known to the common law, and the only sense which is clear enough to permit natural justice to function properly as a constitutional concept.

This kind of justification can be described as a logical, as opposed to historical, justification. It would appear to be superior because it allows the judiciary to develop the concept along indigenous lines, and because it is more realistic: natural justice was hardly even a legal doctrine.in 1963, let alone a constitutional doctrine — the real reason for importing it into Singapore is not that the people of

[18] *Maharaj* v. *A.G. of Trinidad and Tobago (No. 2)* [1979] A.C. 385, emphasis added.

Singapore were assured of its continuance when the Constitution came into force, but that it is inherently desirable to prevent Parliament from enacting oppressive laws which allow the taking away of a person's life or liberty without the observance of a basically fair procedure to ascertain whether the person is guilty of what is alleged against him.

On the basis that the importation of natural justice can be justified in some such manner we can now examine the decisions. The relevant argument in *Ong Ah Chuan* was that section 15 of the Misuse of Drugs Act 1973, which creates a rebuttable presumption that the possession of a given quantity of a controlled drug was for the purpose of trafficking, is contrary to the presumption of innocence and therefore contrary to natural justice and articles 9(1) and 12(1) of the Constitution.

The way in which the Privy Council dealt with this argument is instructive:[19]

> "One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. To describe this fundamental rule as the "presumption of innocence" may, however, be misleading to those familiar only with English criminal procedure. Observance of the rule does not call for the perpetuation in Singapore of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution. These are largely a legacy of the role played by juries in the administration of criminal justice in England as it developed over the centuries. Some of them may be inappropriate to the conduct of criminal trials in Singapore. What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged.
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> "In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less serious purpose if such be the fact. Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition."

To assert that there should be material before the court that is logically probative of the relevant facts does rather gloss over the difference between a civil and a criminal trial which is fundamental to the common law. Surely there is a principle that an accused person is presumed innocent until proved guilty (most people who know nothing of the law would regard this as fundamental and Lord Diplock himself adopted this view in *Haw Tua Tau)?* Another clear principle

[19] [1981] 1 M.L.J. 71E ff.

is that the prosecution must prove its case beyond reasonable doubt. What we have here is surely an argument which is far from "fanciful" but, on the contrary, stems from basic principles. I do not suggest that any use of presumptions to establish criminal liability is unconstitutional, but I do suggest that it is a question of degree: does the provision in effect deny an accused person the benefit of reasonable doubt? Does it amount to legislative conviction? I feel sure that Lord Diplock would not dissent from this, but his words do rather restrict the potentiality of judicial review on the natural justice issue where it is most needed. The phrase "logically probative" might be in issue here. One assumes that it means "logically probative in accordance with the accepted principles of evidential inference," in which case the word "logically" is perhaps superfluous or even inappropriate. Read in this way, I take it that the passage would not be the prosecutor's charter it might at first sight appear to be, though it can hardly be regarded as a sure-footed and auspicious baptism for natural justice as a constitutional concept. Natural justice surely does include a presumption of innocence, and Parliament should not be encouraged to secure a higher proportion of convictions by hedging the offence around with presumptions which amount, when taken together, to a reversal of the burden of proof.

In *Haw Tua Tau's* case the principle involved was the so-called right of silence, or right against self-incrimination, which the appellants contended had been removed by sections 188(2), and 195(1), (2) and (3) of the Criminal Procedure Code, introduced into the Code by the Criminal Procedure Code (Amendment) Act 1976. However, instead of deciding whether this principle *(nemo debet se ipsum prodere)* is a fundamental principle of natural justice, the court preferred to decide the case on a narrower ground: having drawn a distinction between "a genuine *compulsion* on the accused to submit himself at his trial to cross-examination by the prosecution" and "a strong *inducement* to him to do so," it was concluded that the 1976 amendments constituted the latter rather than the former, so that the right had not been removed. However, the amendments in question had the double effect of removing the accused's right to make an unsworn statement and allowing the court to draw adverse inferences from his failure to give sworn evidence and submit himself to cross-examination. In view of this the distinction between a compulsion and an inducement seems almost grotesque when used in relation to a person accused of an offence carrying a mandatory death sentence; certainly the amendments do not legally compel an accused person to give evidence, but to conclude from this that the right of silence has not been removed is surely to be guilty of the very legalist fallacy which natural justice was designed to rectify.

How then might the Privy Council have dealt with the question whether the principle *nemo debet se ipsum prodere* is a fundamental principle of natural justice? Lord Diplock's *obiter dicta* on this point are unfortunately equivocal. His Lordship noted that the 1976 amendments followed closely the draft Bill appended to the Report of the Criminal Law Revision Committee in 1972 and that the recommendation of that Committee was endorsed by the Royal Commission on Criminal Procedure in 1981; on the other hand his Lordship, referring to the absence of a right of this kind from the Universal Declaration of Human Rights and the European Convention on Human Rights,

pointed out that the absence of such a right in an inquisitorial system would not preclude its existence as a fundamental feature of an adversarial system. Although the point is clearly open, one is disposed to think that the Privy Council would have held the right of silence not to be a fundamental principle of natural justice. Given however that the point is regarded as open, it seems first of all somewhat strange that their Lordships were prepared to hold that the right had not been taken away in the absence of any careful discussion as to what the right actually involves, and, secondly, unfortunate that they did not in this case go to the nub of the matter and decide the issue on its merits instead of on what seems to be a technical point, and a pretty dubious one at that.

It is perhaps typical of the English judges to lay down a broad principle in *obiter dicta,* and leave it to the stately processes of litigation to shape the principle in future cases. Lord Diplock was wise enough expressly to refrain from cataloguing the fundamental principals of natural justice; to do so would unduly restrict argument in relation to matters which require the fullest argument. To attain the peaks of justice one needs to negotiate the valleys of uncertainty, and it is in just such a valley that we find ourselves after these two cases. However, we must not be put off by uncertainty, but endeavour to negotiate the difficulties even if the destination is a little obscure. How can we advise the parliamentary draftsman?

The first problem arises from an examination of Article 9 itself. Clause (6), which was inserted by the Constitution (Amendment) Act 1978 reads as follows:

> "(6) Nothing in this Article shall invalidate any law
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> (a) in force before the 16th day of September, 1963, which authorises the arrest and detention of any person in the interests of public safety, peace and good order; or
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> (b) relating to the misuse of drugs which authorises the arrest and detention of any person for the purpose of treatment and rehabilitation,
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> by reason of such law being inconsistent with clauses (3) and (4), and, in particular, nothing in this Article shall affect the validity or operation of any such law before the 10th day of March, 1978."

Thus it would appear that the two types of legislation referred to,[20] insofar as they may conflict with the rights referred to in clauses (3) and (4),[21] are saved by clause (6), but must still conform with natural justice; since natural justice includes in particular the right to be informed of the charges against one, and arguably includes also a right to legal representation,[22] the legislation might, to the extent that it purported to exclude those rights, still be invalid under Article 9(1). Thus the scope of natural justice is not limited even with regard to legislation coming under clause (6).

20 Namely the Criminal Law (Temporary Provisions) Act, Ch. 112, and the Misuse of Drugs Act (Act 5 of 1973).

21 The right to be informed of the grounds of arrest, the right to counsel, and the right to be produced before a magistrate within 24 hours of arrest.

22 The authorities are conflicting. Wee Chong Jin C.J. has taken the view that natural justice does not include a right to legal representation, see *Jacob* v. *A.G.* [1970] 2 M.L.J. 133, but there has been a welter of English authority since that case was decided. See Wade, *Administrative Law,* (4th edition) p. 463.

The second problem is a general one which I think will also be a thorny one for the draftsman because it arises from the novelty of natural justice as a constitutional concept. When conferring a new power on authority, must he provide a procedure designed to conform with natural justice, or must he leave the courts to supply the omission of the legislature? In either case he may fall foul of the natural justice argument. In *Tinsa Maw Naing*, the Burmese case referred to earlier,[23] the natural justice argument was used against a preventive detention provision which provided no procedure; the court's reasoning strongly suggests that had they thought that "law" included natural justice they would have held that the statute had contravened it. However it would be hardly consistent to argue that a statute which is silent as to natural justice is contrary to natural justice, when a fair procedure can be read into the statute according to principles which are now settled and clear.[24] On the other hand, the statute may concern an area where natural justice is not generally regarded as applying, for example one which gives a power to confer a benefit or privilege, such as a licence or immigration permit granted for the first time, or a statute concerning defence or internal security; in such cases it would be tendentious for the Privy Council to demand the full rigour of natural justice, but it may nonetheless demand such fairness as is appropriate,[25] so that even here it may be unwise to provide inquisition-like procedures. Another difficulty of this kind may occur where a procedure is laid down but is not complete: here again the court will presumably, so far as is necessary, read natural justice into the statutory provisions; but if the procedure attempts, by being completely watertight, as it were, to oust natural justice, then the court will presumably hold it unconstitutional. At this point natural justice as a constitutional concept would depart from natural justice as a common law concept, for it would override, not yield to, the statute. There is I think no contradiction here: the statute must bend with the wind, but if it cannot, then it must break.

Thirdly, harking back to Lord Diplock's words in *Ong Ah Chuan* quoted earlier, it might seem that the word "law", *wherever* it appears in the Constitution, includes natural justice; however, on closer examination it is clear that this is only true where the word "law" refers to a system of law, as opposed to a particular statute — in other words, where it means in effect "the law", not "a law". It therefore becomes necessary to examine the use of the word "law" in the Constitution.

"Law" in Article 2(1) is defined to include "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 operation in Singapore and any custom or usage having the force of law in Singapore." This definition would not appear to be of any great interest, but it is surprising, in view of the reference to the common law, that Lord Diplock did not adduce it to support his contention that "law" includes natural justice. The definition notwithstanding, Lord Diplock's observations indicate that all the

[23] See footnote 4.
[24] See, for example *Malloch* v. *Aberdeen Corporation* [1971] 2 All E.R. 1278.
[25] See for example *R.* v. *Gaming Board, ex parte Benaim* (1970) 2 Q.B. 417.

references to "law" fall into the two categories I have suggested.[26] A discussion of each of the many instances would be tedious,[27] but a close examination of one provision, namely Article 12(1), is necessary.

Article 12(1) reads: "All persons are equal before the law and entitled to the equal protection of the law." The judgment of Lord Diplock in *Ong Ah Chuan* expressly bracketed this provision with Article 9(1) as one which incorporates natural justice. Here is a real problem. Clearly Article 12(1) is designed to prevent *substantively* unfair *(i.e.* discriminatory) legislation. Is the incorporation of natural justice merely cosmetic? Has Lord Diplock failed to appreciate what Article 12(1) is aimed at? Or has he opened the door to arguments based on natural justice as a concept of substantive as well as procedural fairness?

A law, if considered under Article 12(1), must either offend or not offend that provision. If it offends, it is void under Article 4 so that any incidental inconsistency with natural justice is immaterial. If it does not offend, in the sense that it provides a reasonable classification having a nexus with the purpose of the statute, can it be argued that it is still void because it offends natural justice? Such an argument in my submission is wrong, because it means that any law which does not offend Article 12(1) because it does not involve unconstitutional discrimination can nonetheless be void for inconsistency with natural justice; in other words any Act of Parliament *whatsoever* is open to being struck down on the ground that it offends natural justice. This cannot have been the intention of the Privy Council because such a position would render the lengthy discussion of the scope of Article 9(1), which is the whole thrust of both the recent decisions, totally irrelevant. * I therefore conclude that Lord Diplock has not fully appreciated the sweeping potential of his linkage of equality with natural justice, and intended to refer to Article 12(1) only by way of comparing its usage of the word law. For this reason I am fortified in my thesis that the natural justice referred to is a procedural concept only. Bearing in mind the breadth of Article 12(1) even apart from natural justice, clearly any substantive unfairness, by which I mean unequal treatment, will be caught by that provision, or, in the case of executive acts, by that provision or the law relating to abuse of discretion.

26 In fact there are also references to a particular body of law, which do not, strictly, fall into either category, *e.g.* Article 112(1) "The law applicable to any pension, gratuity or other like allowance...." The numerous references of the kind "Parliament may by law" clearly refer to particular statutes which Parliament may choose to enact.

27 I have discovered only two instances where, on the view I take, the word "law" could be interpreted in Lord Diplock's sense, other than Articles 9(1) and 12(1).

(1) Article 15(3)(c): "Every religious group has the right to acquire and own property and hold and administer it in accordance with law." (Does this mean that a statute authorising compulsory acquisition of religious property or some other denial of the rights contained in this provision, must conform with natural justice?).

(2) Article 142: "No tax or rate shall be levied by, or for the purposes of, Singapore except by or under the authority of law." (To maintain that this provision requires a statute providing for arbitrary interim tax assessment to conform with natural justice would no doubt invoke wrath on a wide scale, but it is not altogether unreasonable).

Fourthly and lastly, it will be noted that Article 149 allows Parliament to enact legislation against subversion which will be valid even if inconsistent with Article 9 (though not Article 12). Such inconsistency must be express,[28] otherwise the rights in Article 9 will be imported into such legislation. Thus legislation passed under Article 149, which allows deprivation of life or personal liberty, must conform with natural justice unless the rights afforded by natural justice are expressly excluded.

I hope to have shown that natural justice can function as a constitutional concept in Singapore, and no doubt similar considerations will apply to constitutions with similar provisions. The problems which will arise will not be easily solved, and in fact the decisions in *Ong Ah Chuan* and *Haw Tua Tau* themselves are not free from serious difficulty with regard to the justification for, and the application of, the doctrine propounded. I do not think however that, provided the courts confine their attention to natural justice as procedural concept, which it is and must remain, these problems will prove intractable. The adoption of natural justice as a procedural concept only will in my view make a substantial contribution to justice in common law jurisdictions, without intruding unnecessarily on the powers of the legislature. Social control is in no way impeded by the requirement that a person must not suffer a penalty without a fair hearing. To paraphrase Professor Wade, as liberty is subtracted, justice is added. Natural justice, viewed in the way I have argued it should be, represents an addition to which no serious objection can be raised, and the citizen will I think regard the legislature with all the more confidence if he knows that basic fairness will act as a brake on its activities.

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[28] See *Lee Mau Seng* v. *P.P.* [1971] 2 M.L.J. 137.

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