# DISCIPLINING PUBLIC SERVANTS: THE EXORCISM OF A PHANTOM DOCTRINE?[1]

IN Singapore as well as in neighbouring Malaysia, judicial interpretation and constitutional amendments have tended gradually to whittle down the special status (outside contract) that public servants have enjoyed hitherto. One of these special traits of public service is the constitutional right to a fair hearing before dismissal or reduction in rank.

> Article 110(3)[2] of the Constitution of Singapore reads:
>
> No public officer[3] shall be dismissed or reduced in rank under the provisions of this Article without being given a reasonable opportunity of being heard.

The question has inevitably arisen in the courts as to whether this provision grants a right to be heard once only, or twice, first at the disciplinary inquiry stage and later, after conviction and before sentence is finally passed by the punishing authority (which will not necessarily be the inquiring authority also). In India, it had been settled that the public servant was entitled to two opportunities to be heard, the Indian Constitution's Article 311(2) having originally provided for "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."[4] The earliest 'local' authority on the matter was the 1960 case of *Surinder Singh Kanda* v. *The Government of the Federation of Malaya,* where Rigby J., in the Malayan High Court (at first instance) entertained a claim for a declaration by a dismissed police officer, Kanda. Rigby J. accepted as "correct" a contention on behalf of the plaintiff that he had a right to be heard both at the time when the charges against him were being inquired into by the adjudicating officer as well as after conviction when the question arose as to the proper punishment to be

[1] The title poses a question raised by the Singapore Court of Appeal decision in *The Attorney-General, Singapore* v. *Lee Keng Kee,* [1982] 2 M.L.J. 6 (C.A.).

[2] Reprint of The Constitution of the Republic of Singapore (1980) published with the authority of the President under Article 93 (now article 155 of the Reprint) of the Constitution of Singapore as amended by the Constitution (Amendment) Act 1979 (Act 10 of 1979), section 8. Article 110(3) is identical to Article 78(3) of the Constitution as it stood before the authorised Reprint was published.

[3] A "public officer", according to Article 2(1) of the Reprint (the Interpretation provision) means the holder of any "public office", which itself means an office of emolument in the public service, or service under the Government. Thus, except for certain offices excluded from the term "public office" in Article 103, public officers appear to be members of the four public services enumerated in Article 102(1), namely the Singapore Armed Forces; the Singapore Civil Service; the Singapore Legal Service; and the Singapore Police Force.

[4] The Constitution of India came into force in the Indian Republic on January 26, 1950. After independence and before this date, it was still governed under the Government of India Act, 1935 which had come into force in 1937.

awarded, following a Privy Council authority from India.[5] Although the Court of Appeal, on appeal from Rigby J., disagreed[6] since the wording of the Indian Constitution differed from the Malayan Constitution's Article 135(2),[7] and the Privy Council, restoring Rigby J.'s decision, expressed no opinion on this 'two-opportunity' question since the question of a hearing on the penalty did not arise (there having been no reasonable opportunity to be heard on the charges themselves, in the court's view), and further doubts on the applicability of the Indian interpretation were laid at the door by Singapore courts in *Jacob* v. *Attorney-General*[8] and *Sithambaran* v. *Attorney-General,*[9] there nevertheless appeared to be acceptance of the principle in two other Singapore cases *Phang Moh Shin* v. *Commissioner of Police & Ors.,*[10] and *Ling How Doong* v. *The Attorney-General, Singapore*[11] and in a Malaysian case, *Isman bin Osman* v. *Government of Malaysia,*[12] at first instance.

Professor Jayakumar, basing his view on the cases decided until 1969, thought that "the cases clearly indicate that for purposes of article 135(2), an opportunity to be heard is not "reasonable" unless the public servant has been granted a hearing not only on the charges and allegations, but (if he is found guilty) also on the question of the proposed penalty".[13]

In 1975, Trindade said:

> Looking at this matter five years later it is difficult to say that the matter is as clear as Jayakumar has suggested.[14]

Since 1975, there had been no decision in point until *Lee Keng Kee* v. *The Attorney-General, Singapore* came before Rajah J. in 1980. Rajah J. granted the application for a declaration by the plaintiff, a dismissed police inspector, that his dismissal by the Public Service Commission (P.S.C.) was null and void and found that a second opportunity to present his views on punishment should have been afforded him "sometime between the termination of the inquiry and the imposition of the punishment or penalty."[15] However, on appeal

[5] (1960) 26 M.L.J. 115. The Privy Council authority, on an appeal from India, was: *High Commissioner for India* v. *I.M. Lall* A.I.R. 1948 P.C. 121.

[6] *Government of the Federation of Malaya* v. *Surinder Singh Kanda* (1961) 27 M.L.J. 121.

[7] Federal Constitution (Malaysia), Reprint No. 1 of 1978. The main body of Article 135(2) is similar to the Constitution of Singapore's Article 110(3), and in fact applied to Singapore by virtue of Section 6(1) of the Republic of Singapore Independence Act 1965 (Act No. 9 of 1965) until the Reprint of the Constitution of Singapore was published.

[8] [1970] 2 M.L.J. 133.

[9] [1972] 2 M.L.J. 175.

[10] [1967] 2 M.L.J. 186.

[11] *Ling How Doong* v. *The Attorney-General, Singapore* [1968] 2 M.L.J. 253 (Winslow J.); on appeal, *Attorney-General, Singapore* v. *Ling How Doong* [1969] 1 M.L.J. 154 (Federal Court in Singapore).

[12] *Isman bin Osman* v. *Government of Malaysia* [1973] 2 M.L.J. 143 (Sharma J.).

[13] S. Jayakumar, "Protection for Civil Servants: The Scope of Article 135(1) and (2) of the Malaysian Constitution as Developed through the Cases" [1969] 2 M.L.J. liv, at p. 1x.

[14] F.A. Trindade, "The Security of Tenure of Public Servants in Malaysia and Singapore," Malaya Law Review Legal Essays, p. 256 at p. 265.

[15] [1981] 2 M.L.J. 220, at p. 228.

by the Attorney-General, the Court of Appeal reversed Rajah J.'s decision and held [16] that the respondent (plaintiff) had in fact been adequately informed of a range of possible punishments under consideration and accordingly, had been afforded the opportunity of being heard on the contemplated dismissal, of which opportunity he had not availed himself. This opportunity, evidently (in the Court of Appeal's view), existed during the inquiry, and was to be utilised at that time or not at all. This decision will be adverted to again after a brief consideration of the propositions of law that can be derived from the decisions up until *Lee Keng Kee,* as these are instructive and an understanding of them may be necessary before an appreciation of *Lee Keng Kee* itself.

## THE LAW BEFORE LEE KENG KEE'S CASE

### *The General Proposition*

Whether there should be one opportunity or two opportunities, it appears to be beyond dispute that natural justice under the Constitution requires a public officer to be given notice not only of the charges against him, but also of the proposed penalty (or penalties) and an opportunity to be heard on *both* charges and penalty.[17] The only dispute lies as to whether *one* opportunity is good enough for making representations on *both* matters.

*The following more specific propositions, it is submitted, can be laid down:*

(a) If the public officer has been given notice only of the charges against him before the disciplinary inquiry, and has already made representations on these at the inquiry, any notice of the proposed penalty *after* he has made representations on the charges will necessitate a *second* opportunity for the officer to make representations — on the proposed penalty: *Attorney-General, Singapore* v. *Ling How Doong.*[18] In *Ling How Doong,* a police inspector, Ling, faced four charges for breaches of discipline under the Police Force Ordinance. A disciplinary board was appointed by the (acting) Commissioner of Police. Ling was informed by the commissioner that the board having found him guilty on two of the charges, he had accepted the finding and decided to impose a fine of $50 and a reprimand, respectively, for the two offences. Ling was dissatisfied and appealed to the P.S.C., which then decided that he should be dismissed from the service. The shocked inspector then claimed *inter alia,* declarations in the High Court alleging wrongful dismissal. Winslow J. declared his order of dismissal null and void, holding that the P.S.C.'s decision to dismiss him "coming as it must have done, like a bolt from the blue and without any warning whatever that the commissioner intended to take such a course", in his judgment, detracted from the reasonable opportunity rule in article 135(2) of the Malaysian Constitution.[19] Ling was accordingly entitled to have been given a further opportunity of being heard on the proposed punishment of dismissal. The Federal Court, on appeal by the Attorney-General, upheld the High Court decision, and Wee Chong Jin C.J., in delivering the judgment of the court, categorically stated:

16 *The Attorney-General, Singapore* v. *Lee Keng Kee* [1982] 2 M.L.J. 6.
17 See *Isman bin Osman* v. *Government of Malaysia* [1973] 2 M.L.J. 143 at p. 145.
18 [1969] 1 M.L.J. 154.
19 [1968] 2 M.L.J. 253, 259.

> In our opinion, *on the facts and circumstances of this case,* he had a right to know his dismissal was under consideration by the Public Service Commission and therefore a right to be heard on the question of his dismissal.[20]

Tan Ah Tah J. in *Sithambaran* v. *Attorney-General*[21] appeared to qualify *Ling How Doong's* case as involving "somewhat unusual and special facts," as it was a case of enhancement of punishment on appeal without due notice and without a reasonable opportunity to be heard on the proposed enhanced punishment of dismissal, and observed that:

> … in Singapore there is no case which expressly lays it down that the officer must be informed about the proposed dismissal before his plea in mitigation is heard.

If we accept this view and treat *Ling How Doong* as 'a special case' then natural justice must at least require that the officer be given an opportunity to make representations on penalty, or to make a 'plea in mitigation', while not necessarily requiring that he be informed about the proposed penalty. Thus, he must be allowed to make a plea in mitigation on the basis of knowing the *likely* penalty (and not necessarily the 'proposed' one). Presumably, then, the officer, before he makes his plea, should be informed that he has been found guilty, for in *Sithambaran,* that is precisely what happened. The plaintiff officer was found guilty at the end of a disciplinary inquiry, informed of this and asked by the adjudicating officer whether he had anything to say in mitigation. The adjudicating officer then recorded his statement and recommended to the dismissing authority that the plaintiff should be dismissed. Quite understandably, then, Tan Ah Tah J. held that the plaintiff had indeed been given a reasonable opportunity of being heard before he was dismissed.

(b) A single opportunity of being heard on both the charges and penalty at the inquiry stage will, apparently, be adequate if the public servant has earlier been given notice both of the charge against him and of the proposed penalty (or penalties). This is the import of the decision of *Jacob* v. *Attorney-General,*[22] where the plaintiff, a senior cleansing inspector in the public service (for once, it seems, a plaintiff who was not a police officer!) had been informed by letter that consideration was being given to the question of his dismissal from the service on certain grounds that were specified in the letter and framed as 'charges'. He submitted an exculpatory statement and appeared before a committee of inquiry. Wee Chong Jin C.J., held on the question of a reasonable opportunity of being heard, that it had been accorded to the plaintiff. He said:

> In my opinion the plaintiff was left in no doubt at all that if the charges against him were proved he might suffer the extreme penalty of all, namely dismissal from the public service. It follows, in my view, that he had, at the earliest stage in the matter been afforded the opportunity to make representations to the committee of inquiry, if he so wished, as to why he should not suffer the

[20] [1969] 1 M.L.J. 154 at 156. (Italics mine).
[21] [1972] 2 M.L.J. 175.
[22] [1970] 2 M.L.J. 133.

> contemplated penalty of dismissal on the charges enumerated against him. He could have availed himself of the opportunity to be heard on the contemplated dismissal.[23]

In India, under its Constitution's original Article 311(2), one opportunity to make representations was clearly *not* regarded as sufficient: *two* opportunities were considered necessary, one at the inquiry stage, and one again at the post-conviction stage in order to comply with the constitutional right of the servant to an opportunity "of showing cause against the action proposed to be taken in regard to him."[24] The second opportunity has now been abolished in India by a constitutional amendment made in 1976.[25] In India too, then, a public servant is entitled now to merely *one* opportunity to be heard, at which time he may make representations on the charges and on any penalty.

What kind of notice, however, is adequate, of the 'proposed penalty'? In *Jacob's* case, one punishment was contemplated, (i.e. dismissal) notice of it given, and it was in fact awarded. In *Kanda's* case, Rigby J. thought that there had been sufficient notice and opportunity to make representations on penalty, but in that case, only one punishment (dismissal) was, on the facts, contemplated and therefore likely. In *Ling How Doong's* case, Winslow J. in the High Court thought that if the original charges against the plaintiff, Ling, had attracted only one punishment, namely dismissal, he would have been reluctant to interfere with the dismissing authority's decision to dismiss the plaintiff. Winslow J. thus found it highly relevant that the plaintiff instead faced one of a variety of punishments ranging from dismissal to a mere caution.[26] It had thus not been settled by these cases, that notice of the 'proposed penalty' could merely be notice of a variety of possible penalties, including dismissal.

(c) Where no (or inadequate) notice has been given to the public servant of the charges against him before the inquiry proceeding, this alone will amount to a failure to give him an adequate opportunity to make representations in his defence at the inquiry, and there will be a denial of a fair hearing. The question of notice of penalty or opportunity of being heard on the proposed penalty will then ordinarily become academic and unnecessary to examine.

---

[23] *Ibid.,* at p. 136.

[24] *Khem Chand* v. *Union of India* A.I.R. 1958 S.C. 300. (Supreme Court of India). Wee Chong Jin C.J. in *Jacob* v. *Attorney-General* [1970] 2 M.L.J. 133 (at p. 136), however, disagreed with such an interpretation applying to the Malaysian Constitution's article 135(2) because of the different wording of India's original Article 311(2). (See the words quoted in the text above this note).

[25] See The Constitution (Forty-second Amendment) Act, 1976. Earlier, the Constitution (Fifteenth Amendment) Act of 1963 had sought to substitute a new provision in place of Article 311(2) with the view of circumscribing, to some extent, the second opportunity given to civil servants, by means of restricting representations at the second opportunity to evidence produced at the time of the inquiry and excluding reference to fresh evidence. This amendment of 1963, according to one constitutional commentator, "did not dilute the second opportunity to any significant extent" (see M.P. Jain, *Indian Constitutional Law* (3rd Edition, 1978), p. 632).

[26] *Ling How Doong* v. *The Attorney-General, Singapore* [1968] 2 M.L.J. 253, at p. 259.

This is the approach that seems to have been taken in *Phang Moh Shin v. Commissioner of Police & Ors.,*[27] by Buttrose J. There, Buttrose J. found that the principles of natural justice had been flouted both on the matter of notice of the charge to the plaintiff officer and the opportunity to make his defence, as well as on the matter of his opportunity to be heard on the penalty. However, the *ratio decidendi* of the case appears to be based simply on the real likelihood of bias and a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the *charge* against him.

The same approach is taken where the servant has notice of the charge but not of all the *evidence* that is before the inquiring tribunal and which might have been taken into consideration against him. This will also amount to a failure to give him a reasonable opportunity of being heard on the charge as he cannot properly be expected to make a full answer to the charge if not all the allegations are disclosed to him. This was clearly the view of Rigby J. in *Kanda* with which the Privy Council was in agreement. The Privy Council also disposed of the case on this point, without considering the question of the second opportunity to be heard on the penalty.

## LEE KENG KEE'S CASE

The Court of Appeal's decision in *Lee Keng Kee* represents the final act in this saga of the so-called 'two-opportunities' doctrine. It is the watershed between the single opportunity and the dual opportunity and the Court of Appeal here opted for the single all-embracing opportunity. It finally exorcised what remained of the troublesome dis-embodied second opportunity and it now seems unlikely that the second opportunity will ever re-appear.[28]

Lee Keng Kee was an inspector in the Singapore police force, one of the public services enumerated in the Constitution.[29] Acting under the *Public Service (Disciplinary Proceedings) Regulations* 1970,[30] the (Acting) Permanent Secretary of the Ministry of Home Affairs wrote a letter to Lee informing him that disciplinary proceedings had been commenced against him under Regulation 4 on three charges therein stated; and (in accordance with Regulation 4) requesting him to submit an exculpatory statement in writing. He was also informed that upon conclusion of the disciplinary proceeding, the Public Service Commission (P.S.C.) was "authorised by Section 28A(2) of the Police Force Act to impose upon you any of the punishments prescribed in

[27] [1967] 2 M.LJ. 186, particularly at p. 190 (column 2).

[28] Except by invitation. In a recent decision, *Wong Kim Sang & Anor.* v. *Attorney-General* [1982] 1 M.LJ. 176, where the Permanent Secretary had written a letter notifying the accused police officers of charges and possible punishments in terms similar to those in *Lee Keng Kee,* the High Court in Singapore did not entertain any second opportunity to be heard on penalty. However, on the facts, there was an invitation by the committee to make a plea in mitigation and the invitation was accepted. Kulasekaram J., in this judgment, said that on the facts, the plaintiffs "were more than made aware that they may be dismissed from the service if any of the charges were proved against them..." (at p. 181).

[29] Reprint of the Constitution of the Republic of Singapore, Article 102(l)(d).

[30] No. S184, Republic of Singapore Government Gazette Subsidiary Legislation Supplement, No. 42, Friday, July 10, 1970, p. 409. These "Regulations" were made by the President in exercise of the powers conferred by Article 80C *(i.e.* Reprint, Article 116) of the Constitution of Singapore.

section 27 or 28 of the said Act, whichever is appropriate. The commission may also require your dismissal or retirement from the Police Force as it deems appropriate."[31]

The P.S.C., not finding Lee's exculpatory statement satisfactory, then proceeded to appoint a committee of inquiry under Regulation 4(3). The chairman of the committee which was appointed then himself wrote a letter to Lee informing him of the forthcoming inquiry and providing particulars of it. Lee was permitted to appear by counsel at the inquiry when the date was fixed and did so. He was told he would be notified of the result in due course. Three months later, he was informed that he had been dismissed (by the P.S.C.). It was only upon inquiry by his solicitors of the permanent secretary that he was told he had been found guilty on two of the three charges. Lee thus commenced an action for a declaration that his dismissal was null and void and a consequential declaration that he was still an inspector in the police force.

The crux of the plaintiff's case was that the proceedings before the committee of inquiry were conducted contrary to the rules of natural justice, placing reliance on Article 78(3) of the Constitution of Singapore (presently article 110(3) of the Reprint of the Constitution). Rajah J., after dealing carefully with the plaintiff's submissions, found that the committee in its hearings on the three charges themselves had acted fairly and in conformity with the principles of natural justice. However, the larger question before him was "whether Article 110(3) gives the plaintiff the further right of a reasonable opportunity of being heard on punishment before dismissal."[32] On this, Rajah J., on a careful perusal of the facts, was indeed prepared to say that there *was* a further right to be heard on punishment, although the 'hearing' need not be an oral one. He said:[33]

> The Article would have been satisfied had the public officer been afforded on opportunity to present his views on punishment to the P.S.C. This opportunity could have been afforded to the public officer at the inquiry stage, as was done in the *Jacob* case and that of *Sithambaran.* As the opportunity to be heard had not been afforded to the plaintiff at the inquiry stage then that opportunity should have been provided sometime between the termination of the inquiry and the imposition of the punishment or penalty. The opportunity not having been so provided the rule of fairness was broken and any punishment or penalty imposed in such circumstances is against the rules of natural justice.

The purported dismissal was therefore declared null and void and set aside.

Rajah J. was particularly persuaded by the following factual considerations:

(i) The plaintiff was not categorically told, as was done in the *Jacob* case, that the question of his dismissal from the police force was under consideration, when the permanent secretary wrote to him.

[31] See *Lee Keng Kee* v. *The Attorney-General, Singapore* [1981] 2 M.L.J. 220, at p. 221.
[32] *Ibid.,* at p. 228.
[33] *Ibid.,* at p. 228 (column 2).

In fact what he was told, as being under consideration, was that the punishments envisaged could be any one of seven punishments ranging from a 'paltry fine' to the extreme punishment of dismissal.

(ii) Neither the Committee nor the P.S.C. asked the plaintiff whether he had anything to say in mitigation nor was he given the same opportunity of being heard as was given to accused persons in the courts in Singapore after conviction but before sentence was passed.[34]

Thus the case was distinguishable from both *Jacob* and *Sithambaran,* respectively. If his Lordship had only stopped there, his judgment would have been more palatable to the state counsel (for the Attorney-General) and the Court of Appeal. However. Rajah J. also 'noted' that in the *Jacob* case, only a single (mandatory) punishment of dismissal was possible, and that there, the inquiry committee "was presumably empowered to hear submissions on punishment, and, what is more, did in fact, invite such submissions."[35] Here, he had in fact misread the facts of *Jacob* and the regulations under which those proceedings were brought, and the Court of Appeal were quick to capitalise on this error in holding that Rajah J. had 'erred' in holding that the requirements of Article 110(3) of the Constitution had not been complied with.[36]

## THE COURT OF APPEAL

The appeal by the Attorney-General was to come before the Court of Appeal constituted by Wee Chong Jin C.J., and Sinnathuray and Lai Kew Chai JJ.

Lai Kew Chai J., delivering the Judgment of the court, allowed the appeal, and held that Rajah J. had "erred". He said that Rajah J. had failed to give due attention to the letter of the permanent secretary (accepting the state counsel's submission for the Attorney-General) and had misunderstood the decision of the learned Chief Justice in *Jacob's* case. He underscored the words of the permanent secretary's letter which stated that disciplinary proceedings were to be taken against the respondent (plaintiff) under *Regulation 4 of the 1970 Regulations,* and providing the 'information' that the P.S.C. was authorised by the Police Force Act to impose any of the punishments prescribed in section 27 or 28 and might also require his dismissal or retirement.

> These sentences,[37] according to Lai J.,
>
> showed that the respondent had been informed at the earliest stage that a range of punishments, including dismissal, was under consideration. Although he did not avail himself of the opportunity, the respondent was nevertheless afforded the opportunity of being heard on the contemplated dismissal.[38]

[34] See *Sithambaran* v. *Attorney-General* [1972] 2 M.L.J. 175, where Tan Ah Tah J. seemed to endorse such treatment equivalent to that of accused persons in the courts as being in accordance with Article 135(2) of the Constitution of Malaysia (then applicable to Singapore).
[35] [1981] 2 M.L.J. 220, at p. 228 (column 1).
[36] *The Attorney-General, Singapore v. Lee Keng Kee* [1982] 2 M.L.J. 6, at p. 7.
[37] See text, *supra,* above footnote 31.
[38] [1982] 2 M.L.J. 6, at p. 7.

He also went on to say that Rajah J. had erred in his reference to the facts of *Jacob's* case (as earlier shown). Lai J. then applied the reasoning of the Chief Justice in *Jacob's* case in holding that the respondent had been afforded an opportunity at the earliest stage to make representations to the committee of inquiry and was not therefore entitled to any further opportunity to make representations on punishment, considering that "the material facts in that case and in this case on this issue are identical." (As will be shown later, the Court of Appeal may itself have misunderstood *Jacob's* case and fallen into error in considering the material facts to be "identical").

The Court of Appeal judgment was ostensibly pragmatic, short, and made short work of the respondent's case, in sharp contrast to Rajah J.'s careful consideration of the facts and the law. However, although the writer agrees with the Court of Appeal's criticisms of Rajah J.'s misunderstanding of *Jacob's* case, it appears that the Court of Appeal made rather 'heavy weather' of a rather minor misunderstanding. It was surely no reason for disagreeing with his decision itself, which, in principle, appears to be correct. The reasoning of Rajah J. seems more attractive than the Court of Appeal's, on points of principle. The writer will proceed to explain why, and then consider the implications of the Court of Appeal's decision.

First, the respondent was said to have been "afforded the opportunity of being heard on the contemplated dismissal." Dismissal, surely, was "contemplated" only in the vaguest of senses since, in fact, any of a variety of punishments was contemplated, *including dismissal* by the reference the permanent secretary made (as did section 28A(2)) to sections 27 and 28 of the Police Force Act. Rajah J. had pointed out that the punishments envisaged in the letter of the permanent secretary could be any one of seven punishments ranging from a fine to dismissal. In fact, here, Rajah J. did not go far enough: indeed, seven punishments were contemplated, *apart from* dismissal or retirement as well. Thus, there were *nine* possible consequences of the disciplinary proceedings!

The respondent was said to have been "informed at the earliest stage that a range of punishments, including dismissal, were under consideration." We must seriously ask if this 'information' of a *range* of punishments is good enough notice of the 'contemplated penalty' for an accused public officer to make representations thereon. It is submitted that this is not good enough. In *Ling How Doong's* case,[39] where the charge attracted a variety of punishments the High Court plainly thought the existence of a number of punishments was a factor pointing towards a second opportunity to be heard on punishment. Also, in *Sithambaran's* case although no specific notice of proposed penalty was given, a plea in mitigation was in fact invited by the chairman of the inquiry committee after the public officer was found guilty and informed of this finding. This prompted Tan Ah Tah J. to hold that the officer had been "given the same opportunity of being heard as is given to accused persons in the courts in Singapore after

[39] [1968] 2 M.L.J. 253, at p. 259.

conviction but before sentence is passed."[40] Should not this at least have been expected in *Lee Keng Kee?* The writer finds himself very much in agreement with Rajah J., when he said:

> I venture to suggest that the P.S.C. would avoid contravention of the Article if they were either, to write to the public officer concerned asking him to say what he has to say on punishment, or to invite him to show cause why a certain punishment, such as dismissal, should not be imposed in respect of the charge or charges on which he has been found guilty.[41]

A second criticism is that *Lee Keng Kee's* case is clearly distinguishable from *Jacob's* case, where the public officer was informed in clear language by letter that dismissal (and nothing else) was contemplated and that the question of his dismissal would be brought before the committee of inquiry. In that case, clearly, as the Chief Justice said, the plaintiff was "'left in no doubt at all that if the charges were proved he might suffer the extreme penalty of all, namely dismissal from the public service."[42] In that case, he was indeed informed of the "contemplated penalty of dismissal."[43]

Surely the Court of Appeal was incorrect in saying that the material facts in *Jacob's* case and in *Lee Keng Kee's* case were "identical"? It was incorrect in two respects: first, the letter in *Lee Keng Kee* made reference to a range of punishments, including dismissal; and not to dismissal unequivocally, as in *Jacob;* and second, in *Lee Keng Kee,* regulation 4, notice of proceedings under which was considered sufficient notice by the Court of Appeal of the possible punishments, was not the same as regulation 4 in the old 1962 regulations[44] under consideration in *Jacob's* case. In the old regulation 4, the P.S.C. might have caused disciplinary proceedings to be taken if it was of opinion that the alleged misconduct warranted proceedings *"with a view to dismissal"*. In the present regulation 4 referred to in *Lee Keng Kee,* the wording differs in that the misconduct warrants proceedings *"with a view to dismissal or reduction in rank"*. Further, in the old regulation 4(2), the officer had to be notified in writing of the grounds upon which it was intended to dismiss him, whereas presently, he is to be informed of "the grounds upon which it is intended to dismiss him or to reduce his rank". The wording of the old regulation 4 probably accounts for why, in *Jacob's* case, the officer was given such unequivocal notice of penalty in the letter to him. In rejecting a submission of counsel for the respondent, Lee, the Chief Justice is reported[45] as

[40] [1972] 2 M.L.J. 175, at p. 177. *Cf. Government of the Federation of Malaya* v. *Surinder Singh Kanda* (1961) 27 M.L.J. 121, where Neal J. (dissenting) in the Court of Appeal also thought that in that case, the respondent officer (Kanda) "had received and exercised the same rights as are accorded to an accused person in the courts" and thus needed no additional right to make a further statement in respect of the punishment the adjudicating officer proposed to recommend.

[41] [1981] 2 M.L.J. 220, at p. 228 (concluding paragraph).

[42] [1970] 2 M.L.J. 133, at p. 136.

[43] *Ibid.,* at p. 136.

[44] *The Public Service (Disciplinary Proceedings) Regulations,* 1962, made under section 86 of the Singapore (Constitution) Order in Council, 1958, by the Yang di-Pertuan Negara. (See State of Singapore Government Gazette, Supprement No. 208, September 21, 1962, p. 1866 (No. S312)).

[45] *Straits Times* Report, Wednesday January 13, 1982, reporting the Court of Appeal's decision at the end of the hearing of the appeal. Its written judgment was delivered later, and reported in the Malayan Law Journal in [1982] 2 M.L.J. 6.

having said that it was plain and beyond any doubt that when Inspector Lee received the letter from the permanent secretary, he knew that he could be dismissed. Certainly he knew he could be dismissed; but he also knew that he could suffer one or more of seven other punishments or compulsory retirement!

Next, although the permanent secretary's letter suggests (by implication), by the mention of disciplinary proceedings "under Regulation 4" that dismissal or reduction in rank are contemplated, and the public service must exercise perspicacity by looking up the said regulation 4 or engaging counsel to discover that dismissal or reduction in rank are contemplated, this suggestion is arguably cancelled out by the letter later adding that a range of punishments under section 27 or 28 of the Police Force Act or retirement, may ensue. Similarly section 28A(1) suggests that dismissal or reduction in rank are contemplated, but section 28A(2) (also mentioned in the letter) suggests also that any of a variety of punishments (in section 27 or 28) may be awarded.

Surely it cannot seriously be maintained that the permanent secretary was, by his letter, giving *notice* of the contemplated penalty? He was merely, it is submitted, mechanically making a statement of fact about the relevant statutory provisions, using the words "for your information". Any intelligent public officer could have found this out for himself. A statement of fact as to the current state of affairs is not as instructive as a statement of one's intentions.

It is submitted that the wording of regulation 4(1)—"with a view to dismissal or reduction in rank" — is for the purpose not of providing *notice* of intended dismissal or reduction in rank, but merely to emphasize that a special *hearing or inquiry must be provided* whenever dismissal or reduction are contemplated, *in order to comply with Article 110(3).*

So also, the range of punishments contained in sections 27 and 28 of the Police Force Act are surely for the purpose of the information of the disciplining authority, rather than for the purpose of serving as *notice* to the accused public officer of his contemplated penalty. Can this realistically be 'notice'? If so, it has the effect of keeping the arraigned public officer in a state of delicious uncertainty about his fate until the end, rather like a punter's patiently awaiting the outcome of an eight-horse race after receiving a 'tip' that any one of the eight could win. If this is 'notice' of the likely result, it is too subtle and sublime for this writer to comprehend.

What are the practical consequences of the Court of Appeal's decision? If some thought is given to this, public servants and their legal representatives (if allowed), in addition to being perplexed, may well be appalled (if not so already). In the first place, once a mechanical reference to the statutory provisions — *i.e.* regulation 4, sections 27 and 28 of the Police Force Act, *inter alia* — is made in a letter to the public servant (police officer), the P.S.C. is given a free hand and an unfettered discretion to impose any of the penalties contained in those provisions that it prefers, once the public servant is found guilty, and then maintain that he had every opportunity to make representations but did not 'use' it.

This leads one to the next point. If the Court of Appeal is right in saying that the public officer is to be given only one opportunity for making representations on the charges as well as penalty, how then is the accused officer at the same hearing on the charges, to 'use' his opportunity and make a plea on penalty without first pleading guilty or otherwise admitting guilt at that hearing? If his contention is that he is not guilty (especially through a total denial of the allegations of fact), how may he then proceed to make representations on penalty, which ought not to arise at this stage? A plea in mitigation is hardly compatible with a total denial of the charges. Any representations on penalty at the stage of enquiry into the charge must be premature. The charge should be found established before the question of mitigation can be considered. Moreover, if a range of punishments is contemplated, it would be unreasonable to expect the accused officer to make a plea in relation to dismissal on the hypothesis that this is what is contemplated, when in fact the committee of inquiry may have in mind only the recommendation of a light penalty, like a fine. Besides, the committee of inquiry are not the disciplinary authority, which is the P.S.C., which would look at the findings of the committee of inquiry and its recommendations before any decision on penalty.

It would be more pertinent to ask what precisely the principles of natural justice should require in this context. If the right to be heard on the penalty is as much a part of natural justice as a right to be heard on the charges, and "the justice of the common law will supply the omission of the legislature,"[46] even if there are no positive words in a written law, then it is arguable that a specific and separate right to be heard on penalty should be implied into the regulations or even the Constitution[47] — after the accused officer has been found guilty. The regulations are silent as to whether the accused officer is to be informed of what the findings or recommendations of the committee of inquiry are, and whether he may further address the committee or the P.S.C. after he is found guilty. It is arguable that natural justice requires that the officer should even be given a copy of the findings and recommendations of the committee of inquiry so that he may then make representations as to penalty — at least to the P.S.C., even if only in writing. In *Kanda's* case, Rigby J. in the High Court below,[48] and the Privy Council,[49] respectively, were prepared to hold that the failure to supply Kanda with a copy of the findings of a Board of Inquiry whilst a copy was supplied to the adjudicating officer appointed to hear the disciplinary charges, amounted to a denial of natural justice. Why should the officer facing discipline not be furnished with a copy of the report of the committee of inquiry before the P.S.C. takes it into consideration and imposes a punishment on him? And why should he not be invited to make an answer to any

[46] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, at p. 190 *(per* Byles J.). These words quoted are now famous, or at least, now, a famous cliche in the law. For natural justice buffs, here is a fuller passage from Byles J.'s judgment:

> … a long course of decisions beginning with *Dr. Bentley's* case and ending with some very recent cases, establish that, although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

[47] See *Ong Ah Chuan* v. *Public Prosecutor; Koh Chai Cheng* v. *Public Prosecutor* [1981] 1 M.L.J. 64, 67 (Privy Council appeal from Singapore).

[48] (1960) 26 M.L.J. 115.

[49] (1962) 28 M.L.J. 169.

finding of guilt? The regulations are silent on the matter, and merely provide for the committee to report to the P.S.C. The Court of Appeal has somehow, by its decision, given its blessing to a somewhat unsatisfactory administrative practice in the public service: a public officer may be kept 'in limbo' without being told the outcome of his inquiry, what the findings were, and what recommendations were made, whereas the P.S.C. may have full knowledge of this and may act on the report at their leisure. No one will know whether the P.S.C. actually took into account the relevant considerations, which should be found in the committee's findings. In *Lee Keng Kee* itself, the respondent was kept in the dark for three months and only at the request of his solicitors, informed by the P.S.C. that he had in fact been dismissed. Is this not a 'bolt from the blue'? Yet it seems that there are precedents.

In *Chang Song Liang & Ors.* v. *The Attorney-General Singapore,*[50] it transpired that the plaintiff police officers had gone through a disciplinary inquiry under regulation 4 "with a view to your dismissal," as the Commissioner of Police's letter to them informed them, but after a protracted inquiry, they were not notified of the result and were meanwhile still under interdiction without pay. After their solicitors wrote to the P.S.C.'s secretary, a letter was sent to each of them eight months after the conclusion of the inquiry merely telling them that they were reinstated in the service, two-thirds of their emoluments whilst interdicted were to be forfeited, and that their annual increments would be deferred for two years. No finding of guilt was disclosed. After further letters of inquiry from their solicitors about whether they had been found guilty, a reply finally came stating that the committee's report was "solely for the Public Service Commission's own consideration. It is not to be disclosed. The reinstatement and penalties imposed on your clients were based on facts adduced at the inquiry." When they pressed for a more satisfactory answer, they were finally told (now eleven months after the inquiry) that they had indeed been found guilty. It was then that they brought an action claiming declarations on various grounds, but on which they failed (for reasons that do not concern us here).

It is hoped that the P.S.C. will put an end to this 'policy' of non-disclosure of the committee's report. It is merely a policy, and thus one that can always be changed. Besides, non-disclosure can only be defended on the basis of a privilege, such as documents relating to "affairs of state"[51] or such as "confidential communications",[52] and it is extremely doubtful that a court of law would uphold such a claim of privilege in the public interest because the possibility of disclosure would inhibit those whose duty it is to write such reports or would impede the committee or the P.S.C. in their carrying out their obligations under any written laws.[53] There is a competing public interest in preventing a possible denial of justice to a litigant (here, the public

[50] [1980] 2 M.L.J. 4.

[51] See the Evidence Act (Cap. 5), (Reprint 1982), s. 125.

[52] *Ibid.,* s. 126.

[53] See the test stated in *Campbell* v. *Tameside Metropolitan Borough Council* [1982] 2 All E.R. 791, and generally: *D* v. *National Society for the Prevention of Cruelty to Children* [1977] 1 All E.R. 589; *Science Research Council* v. *Nasse* [1979] 3 All E.R. 673; and *Burmah Oil Co. Ltd.* v. *Bank of England (A-G intervening)* [1979] 3 All E.R. 700.

officer with a direct stake in the outcome of the inquiry), against which the public interest in non-disclosure may have to be weighed.

In England, there had been a long debate over the policy of refusing disclosure to objectors of inspectors' reports (to the Minister) after statutory inquiries in relation to government projects likely to affect citizens' rights or interests (particularly in relation to land use), and natural justice was long thought not to require disclosure of advice or documents including reports on which the Minister's decision might have been based. This thinking was very much due to the false dichotomy between 'judicial' and 'quasi-judicial' functions on the one hand, and 'administrative' functions on the other, the inspector and minister being considered to exercise administrative functions. This classification of functions is very much out of date now, and is hardly capable by itself of resolving the issue of the applicability of the rules of natural justice, although judges do occasionally use the classification as part of their reasoning and statutes or subordinate legislation continue to use the language of classification.[54] The Committee on Ministers' Powers of 1932 (the Donoughmore Committee), in its report,[55] thought that the right solution to the dilemma of inspectors' reports was to publish them, although it was at that time uncertain whether natural justice required publication or disclosure to the objectors. In 1957, the Committee on Tribunals and Inquiries (the Franks committee) considered the matter afresh and recommended that "the right course is to publish the inspector's report,"[56] and that the full text of the report should accompany the Minister's letter of decision and should also be available on request. This was accepted. Since 1958, it has been standard practice for a copy of the report to accompany the Minister's letter of decision.

In the context of disciplinary inquiries in relation to public officers in Singapore, despite Regulation 4(4) of the 1970 Regulations stating that: "The committee in the performance of its functions shall not be deemed to be a judicial or quasi-judicial body", it would be difficult to escape the conclusion, from the nature of the inquiry, that it is under a duty to act fairly and to observe the rules of natural justice.[57] It would also be difficult to escape the conclusion that the P.S.C. itself must act fairly, since it is that body which in fact makes the decision of dismissal or other punishment which would affect the status or livelihood of the public officer[58] and under Article 110 of the Con-

[54] An example is Regulation 4(4) of the *Public Service (Disciplinary Proceedings) Regulations,* 1970, discussed in the text further below.

[55] Cmnd. Paper 4060 (H.M.S.O.), 1932.

[56] Report of the Committee on Administrative Tribunals and Enquiries, 1957 (H.M.S.O., Cmnd. 218), para. 343.

[57] See *Currie and another* v. *Chief Constable of Surrey* [1982] 1 All E.R. 89, where McNeill J., in the Queen's Bench Division, held that a tribunal set up under regulations for a disciplinary hearing was a body exercising "at least quasi-judicial functions." In *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* [1966] A.C. 47, the Judicial Committee of the Privy Council ruled that a commissioner conducting a statutory inquiry was acting in a semi-judicial capacity in which he was bound to observe the principles of natural justice.

[58] See *Ridge* v. *Baldwin* [1964] A.C. 40; and *Durayappah* v. *Fernando* [1967] 2 A.C. 337, 349. In *R* v. *Kent Police Authority, Ex parte Godden* [1971] 2 Q.B. 662 (at 669), Lord Denning said that the decisions of a police authority which might result only in compulsory retirement of a police officer were "of a judicial character and must conform to the rules of natural justice."

stitution, the P.S.C. is given the duty, *inter alia,* to dismiss and otherwise exercise disciplinary control over public officers, and the public officer is given a right to a reasonable opportunity of being heard before dismissal or reduction in rank. The matter, therefore, goes beyond policy considerations. It is arguable that the committee of inquiry's report and the Minister's letter of decision are both part of the 'record' which a court exercising supervisory jurisdiction may scrutinise for errors on its 'face' in an application for a prerogative writ of *certiorari.*

This leads the writer to his next point. Suppose the committee of inquiry has made certain findings of fact and its recommendations in its report to the P.S.C. Suppose, further, that it even finds the charges against the public officer to be not proved to its satisfaction and recommends that he be cleared of the charges. Is it open to the P.S.C. to ignore the report, find the officer guilty and proceed to impose a punishment? In a recent decision of the Singapore High Court, *Wong Kim Sang & Anor.* v. *Attorney-General,*[59] a positive answer was given to this very question.

In this case, the plaintiffs, a police sergeant and constable respectively, were informed that disciplinary proceedings under Regulation 4 of the 1970 Regulation had been commenced on certain charges, were also informed (in terms similar to those in *Lee Keng Kee)* that the P.S.C. could impose on them any of the punishments prescribed in Sections 27 or 28 of the Police Force Act and might also require their dismissal or retirement and they were asked to submit exculpatory statements. Eventually, an inquiry was held on the two charges against them, evidence was taken, and at the end of the inquiry, the committee of inquiry chairman invited them to say whatever they wished in mitigation of punishment if they should be found guilty and indicated that whatever they said would be taken down and submitted to the P.S.C. for their consideration. Counsel for both the plaintiffs did in fact make pleas in mitigation on their behalf and these appeared in the record of the committee's proceedings. The plaintiffs were eventually informed by letter of their dismissals and of their having been found guilty on one of the charges. The plaintiffs sought, *inter alia,* declarations on a number of grounds claiming that their dismissals were illegal, void, and inoperative.

One of the grounds was that the P.S.C. had acted wrongly when it found the plaintiffs guilty on one charge, as the committee (from reference to its report which was in the agreed bundle of documents) had stated that both the charges had *not* been proved; and that the P.S.C. had no power to differ from the findings of the committee and substitute its own finding of guilt on one of the charges and proceed to punish them for that offence. Kulasekaram J. did not accept this submission. His study of the Regulations led him to the conclusion that the Committee

> is only for collecting the information and reporting on the case. Its function, it would appear, is not to make any finding as to whether the officer is guilty or not guilty on the charge. That is a matter left entirely to the P.S.C. after considering the report of the committee. If the committee in its report makes any finding

[59] [1982] 1 M.L.J. 176.

> as to the guilt or otherwise on the charge preferred against the subordinate officer concerned it is only expressing its opinion and no more, and it is at best a matter which may be taken into consideration by the P.S.C. and is by no means binding on the P.S.C.[60]

Kulasekaram J. went on to say that the P.S.C. "were perfectly entitled to differ from the views of the committee on the question of whether the officers concerned were guilty, on the charge or not" and rejected the plaintiffs' submission that the High Court could interfere with the P.S.C.'s decision on the basis that there was no evidence or insufficient evidence to support a finding of guilt and that as no reasonable person would have come to the conclusion of guilt, the P.S.C. had acted arbitrarily and capriciously. In this, he was aided by Wee Chong Jin C.J.'s judgment in *Jacob* v. *The Attorney General*[61] which stated that the High Court in the exercise of its supervisory jurisdiction over inferior tribunals would not interfere merely on the ground of insufficiency of evidence. Any answer the tribunal gave, even if wrong, would still be an answer that lay within its jurisdiction.

In this particular case, *Wong,* it appeared from the record of proceedings that a key prosecution witness had had his credit impeached by counsel for the Attorney-General himself. However, the learned judge felt that on an examination of the record, even "if [the witness's] evidence is totally disregarded I can't still say it was not open to the P.S.C. on the rest of the evidence placed before them to find both the plaintiffs guilty on the charge."[62]

It is indeed conceded that there might have been some other evidence to justify a finding of guilt even if a key witness's evidence was impeached or otherwise disbelieved, bearing in mind the standard of proof may not be as high as proof beyond reasonable doubt. However, how is the P.S.C. to assess the evidence in the committee's report and reach a conclusion of guilt, against the finding of the committee, when it did not itself see and hear the witnesses? Is the P.S.C.'s assessment likely to be more correct?

Apart from this, the judgment in *Wong's* case raises a fundamental issue in administrative law: whether a finding based on insufficient or no evidence is susceptible to judicial review. The judgment suggests it is not susceptible to review. The writer humbly submits that this is not so.

It is always the province of a tribunal of fact to make findings of fact and an appeal court or court exercising supervisory jurisdiction will be loath to interfere with these findings. However, it has always been recognised at common law that the question whether a particular inference of fact can be drawn from evidence given, is one of law. The sufficiency of evidence to logically support a finding of fact is a question of law. It had been recognised early that "to convict without evidence" was an error of law, although the error might not go to

[60] *Ibid., p.* 180.
[61] [1970] 2 M.L.J. 133.
[62] [1982] 1 M.L.J. 176 at p. 181.

jurisdiction.[63] This kind of error was appealable, if appeal was available, or capable of being quashed on an application for a writ of *certiorari* for error 'on the face' of the record.

Ever since the landmark case of *Anisminic Ltd.* v. *The Foreign Compensation Commission,*[64] however, even this view may now be considered over-restrictive, based on a limited concept of jurisdiction. Thus, insufficiency of evidence may well be considered an error of law that goes to the jurisdiction of the inferior tribunal. The error may, however, be characterised as an error coming under any of the well-established heads of jurisdictional error, such as: failure to accord a fair hearing (contrary to natural justice); deciding without regard to relevant considerations; deciding on the basis of irrelevant considerations; applying the wrong test; addressing oneself to the wrong question; or reaching a conclusion that no reasonable tribunal would come to.[65]

H.W.R. Wade concludes:[66]

> Despite reservations about the *Coleen Properties* case, and despite the lack of any decision reviewing the authorities for and against a 'no evidence' rule, it seems clear that this ground of judicial review ought now to be regarded as established on a general basis. There have been so many sporadic references to it on this assumption, and it conforms so well to other developments in administrative law, that one can only assume that the older authorities to the contrary, impressive though they are, may now be consigned to the limbo of history. 'No evidence' seems destined to take its place as yet a further branch of the principle of *ultra vires,* so that Acts giving powers of determination will be taken to imply that the determination must be based upon some acceptable evidence. If it is not, it will be treated as 'arbitrary, capricious and obviously unauthorised.'
>
> The time is ripe for this development as part of the active judicial policy of preventing abuse of discretionary power. To find facts without evidence is itself an abuse of power and a source of injustice, and it ought to be within the scope of judicial review."

The writer endorses these views and cannot agree that insufficiency of evidence is not a ground for review. Kulasekaram J. was admittedly applying Wee Chong Jin C.J.'s reasoning in *Jacob's* case,[67] but it is submitted that Wee C.J. was wrong in *Jacob's* case in that he cited *Anisminic*[68] as authority for a proposition that cannot be derived

[63] *R* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128 (Judicial Committee of the Privy Council, *per* Lord Sumner). See also *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175, at 177, 179 *(per* Abdoolcader, J.).

[64] [1969] 2 A.C. 147 (House of Lords).

[65] See, e.g. the judgments in the Court of Appeal and the House of Lords in *Secretary of State for Education and Science* v. *Metropolitan Borough of Tameside* [1976] 3 All E.R. 665; and see *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320. In one more controversial case, the Court of Appeal (England) seems to have applied a 'no evidence' rule *simpliciter* without characterising it as any particular type of jurisdictional error or head of *ultra vires: Coleen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433.

[66] H.W.R. Wade, *Administrative Law,* 5th ed. (1982), p. 293.

[67] See [1970] 2 M.L.J. 133, at 135.

[68] [1969] 2 A.C. 147.

from that case. On the contrary, *Anisminic* may be authority for saying that deciding upon a lack of evidence may amount to jurisdictional error! Kulasekaram J. has unfortunately perpetuated this misconception and possibly thought he was bound by *Jacob's* case since he referred to the Chief Justice in *Jacob* as having delivered "the judgment of the Court of Appeal."[69] The Chief Justice was, however, sitting very much alone, exercising his original jurisdiction in that case. On the actual facts of *Wong,* however, it is arguable that Kulasekaram J. was not incorrect in refusing to interfere as there was probably still *some* evidence that could support a finding of guilt, and it was by no means clear that such a finding was wholly unreasonable and against the weight of the evidence. Also, for Kulasekaram J. to have interfered, he would have had to find the error of law to be jurisdictional and nothing less, as the plaintiffs had applied for declarations, and not a writ of *certiorari,* whereby it would have been possible to quash such an error (being on the face of the record) even if thought to be only an error *within* the jurisdiction.

## CONCLUSIONS

The Court of Appeal of Singapore may well have scotched all future attempts to revive 'second opportunity' arguments in relation to Article 110(3). However, it is hoped that this will not be the last judicial word on the subject. For even if Article 110(3)'s wording does not suggest *two* opportunities to be heard (unlike the previous wording of article 311 of the Indian Constitution), surely before one restricts public servants to a single opportunity, there must first be clear, unequivocal notice both of charges and of penalty? It is submitted that this was not the case in *Lee Keng Kee,* or a single opportunity may have been quite acceptable, as on the facts of *Jacob's* case. However, far from being in line with previous authority (purportedly, *Jacob's* case), *Lee Keng Kee* represents a departure from previous authority and is difficult to reconcile with either authority or with general principles (of natural justice).

As *Lee Keng Kee* really departs from *Jacob's* case, whilst purporting to follow it, the result is unsatisfactory. It would have been preferable for the Court of Appeal to have recognised that the facts of *Lee Keng Kee* were significantly different, and applied its own test. It would have been clearer and more pragmatic if it had positively stated that it intended to depart from the previous law (which it was entitled to do, as a Court of Appeal) and dispensed with the notion of giving notice of the proposed penalty altogether, thus overruling *Jacob* on this point. It could have said that notice of the charges was all that was required under the Constitution and any regulations made thereunder, and a single opportunity to make representations on the charges should be accorded, at which time the accused officers could, as a matter of practice be allowed to make representations by way of a plea in mitigation, *if* they felt so inclined — whether or not notice of 'penalty' was given. As it stands, what *Lee Keng Kee* has done has been impliedly to permit a notice of 'penalty' that is in fact *not* clear and unequivocal. In future cases, it will never be necessary to cite *Jacob's* case on the question of notice of penalty, as *Lee Keng Kee* goes much further. It is hoped that a future Singapore court

[69] [1982] 1 M.L.J. 176 at 180 (second column).

will give a clear answer on whether the right to notice of penalty does in fact exist any longer. It seems clear enough that a second (and separate) opportunity to make representations on penalty is already unnecessary except in the special situation where notice of penalty was in fact given by the tribunal *after* the officer had finished making his representations on the charges — as in *Ling How Doong's* case.[70]

It is to be hoped also that many of the existing government practices in relation to disciplinary proceedings begun by the P.S.C. may be clarified or otherwise improved. It is suggested that the following practice (for which provision is not made in the 1970 Regulations) should be followed:

(a) At the end of the inquiry, the committee (perhaps through its chairman) should inform the officer accused of a charge whether it is satisfied that the charge has been proved and whether he is guilty, and whether it intends to recommend dismissal or any other particular penalty to the P.S.C., telling him also that the P.S.C. is not bound by its recommendations.

(b) The officer should then be invited to make a statement or plea in mitigation, which, if made, will be recorded and transmitted to the P.S.C.

(c) A copy of the committee's report should be sent to the officer, in any case not later than the letter informing him of the P.S.C.'s decision on guilt and punishment, if any. It would be convenient if the report could be appended to the letter, but if not, it should at least be available on request to the officer. The writer would re-emphasize that it is highly controversial whether the reports in fact deserve the veil of governmental privilege and in any case, any application for review of the decision by the officer will probably necessitate the record of the proceedings in the inquiry, including the report, being placed before the superior court exercising its supervisory jurisdiction (as was the situation in *Wong Kim Sang*[71]).

(d) The P.S.C. should itself have a working dead-line by which to inform the accused officer of its decision and punishment, if any. The officer should not have to be kept 'in limbo', writing letters to his permanent secretary or the P.S.C., begging for its decision, which appears to come most reluctantly, judging from recent cases.[72] The longer the officer waits, the longer he is prejudiced through suspension or interdiction without pay.

(e) The P.S.C., when it makes its decision, should append the committee's report, give reasons for its findings where possible, and should generally follow the committee's findings particularly where the finding is one of *not* guilty. The ultimate punishment to be awarded is of course, for the P.S.C. alone to decide, and the P.S.C. should not, in this

[70] [1969] 1 M.L.J. 154.
[71] [1982] 1 M.L.J. 176.
[72] *Chang Song Liang & Ors.* v. *The Attorney General, Singapore,* [1980] 2 M.L.J. 4; and *Wong Kim Sang & Anor.* v. *Attorney-General,* [1982] 1 M.L.J. 176.

respect, be bound by the committee's opinion. It is the *findings of fact* of the committee that should especially receive the most careful consideration, rather than its *recommendations.* These should be distinguished, when referring to the committee's 'opinion'.

The writer's suggestions in (a) and (b) above are apparently already being followed to the extent seen in *Wong Kim Sang.*[73] However, it would be useful to amend the present 1970 Regulations to make this practice part of the required procedure, to ensure fairness to the officer accused and to make meaningful the notice of penalty and opportunity to make representations on penalty, if they still (it is so purported) exist under Singapore law.

Finally, the writer would like to hope that the 'no evidence' rule at common law will be recognised by the Singapore courts and applied, if our administrative law is to develop, and if we are not to take 'one step forward, two steps backward'. The English common law, although somewhat caught in a morass in the field of administrative law, has developed a reasonably adequate 'no evidence' rule. English academics nevertheless look with admiration at the United States of America, which already has a well-developed statutory 'substantial evidence' rule which requires that findings be supported by substantial evidence on the record as a whole.[74] We in Singapore have failed even to hitch a ride with the train of the common law, and have indeed got aboard only to uncouple our wagon which is slowly grinding to a halt....

Can we start again, please?

V.S. WINSLOW*

[73] *Supra,* foot-note 72.

[74] Administrative Procedure Act (U.S.A.), 1946, s. 10(e).

* M.A., LL.B. (Cantab.); Barrister-at-law, of the Middle Temple, London; Advocate & Solicitor of the Supreme Court of Singapore; senior lecturer, Faculty of Law, National University of Singapore.