THE RIGHT TO BE HEARD AND THE IMPOSITION OF RESTRICTION ORDERS UNDER THE INTERNAL SECURITY ACT

> Principles of natural justice are to some minds burdensome; but this price – a small price indeed – has to be paid if we desire a society governed by the rule of law.[1]

A distinguished judge commented recently: "One of the more difficult problems of the doctrine of natural justice is to determine what cases fall within its ambit."[2] This difficulty, fortunately, has not deterred the courts in the common-law community from revitalising this precept, such that, after some time in the wilderness, it appears to have regained its earlier poise. Aided by judicial activism, it now portends to move with greater dynamism in implying the requirements of fair administrative procedures. In many critical areas this notion of procedural due process has been invaluable in safeguarding the citizenry from the arbitrary powers of officialdom. In so doing, it has often helped the maintenance of the rule of law itself; for it can hardly be denied that the concept of the rule of law would lose its vitality if the instrumentalities of the State were not charged with the duty of discharging their functions in a fair and just manner. In Malaysia, a number of statutes repose a very high degree of discretion in the Executive arm of the Government to abridge fundamental human rights accorded by the Constitution. It is proposed to examine whether these vast discretionary powers may be tempered with by one facet of natural justice, the right to be heard, in one such area viz., the imposition of restriction orders under s.8 of the Internal Security Act, 1960 (hereafter referred to as I.S.A.).

This Act, which succeeded the Emergency Regulations 1948, was enacted pursuant to Article 149 of the Constitution which authorises the passing of legislation notwithstanding its inconsistency with the funda-

[1] Sikri J. in *Board of High School et. al. v. Chittra Srivastava* [1969] quoted in 86 L.Q.R. 7.

[2] Megarry J. in *Gaiman v. National Association for Mental Health* [1971] Ch. 317.

mental rights contained in Articles 5, 9 and 10[3] of the Constitution in certain circumstances. This Act authorises, *inter alia*, the detention without trial of persons considered to be security threats. As an alternative to preventive detention, restriction orders (hereinafter referred to as RO) may be imposed. An outline of the procedure and the relevant provisions relating to the imposition of these orders are as follows:

"73(1). A police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe

(a) that there are grounds which would justify his detention under s.8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia. . .

(c) (He) . . . may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him. . .

s. 8(5). If the Minister is satisfied that for any of the purposes mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as a restriction order) imposing upon that person all or any of the following restrictions and conditions:

(a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;

(b) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;

(c) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;

(d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organisation or association, or from taking part in any political activities; and

(e) for prohibiting him from travelling beyond the limits of Malaysia or any part thereof specified in the order except in accordance

[3] Article 5 relates to the liberty of the person, Article 9 to prohibition of banishment and freedom of movement and Article 10 to freedom of speech, assembly and association.

with permission given to him by such authority or person as may be specified in such order."

The RO continues for 2 years and may be extended *ad infinitum*. The conditions and restrictions may even be added to at the discretion of the Minister.

These provisions, abridging severely as they do, the liberty of a subject with all its attendant consequences, affect rights which have traditionally been protected by natural justice rules. But the provisions themselves are silent and do not expressly grant a right to be heard. In these circumstances it is abundantly clear from ". . . a long line of decisions . . . 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."[4] As Lord Guest recently stated in *Wiseman* v. *Borneman*[5]

> It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the question, the Courts will imply into the statutory provision a rule that the principles of natural justice should be applied."

The rationale is ". . . Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. . ."[6] This still leaves undetermined the circumstances which will in fact give rise to an implied obligation to observe the *audi alteram partem* rule. Fortunately a very distinguished Judicial Committee of the Privy Council in *Durayappah* v. *Fernando*[7] has cleared the undergrowth somewhat and specified three matters which may usefully be borne in mind when considering whether this natural justice precept ought to be inferred. First, the nature of the complainant's interest. Secondly, the circumstances in which the administrative authority is entitled to exercise its powers affecting the complainant's interest, and, thirdly, the severity of the sanction it can impose. In *Durayappah's* case, the Minister sent a Commissioner of Local Government to inquire into the affairs of the Municipal Council, plagued as it was by troublous times. The Commissioner in his inquiry, asked no questions of any councillor nor did he give them any opportunity of expressing their views on any matter. Based on his report, the Minister

[4] Byles J. in *Cooper* v. *Wandsworth Board of Works* (1863) 143 E.R. 414, 420.

[5] [1971] A.C. 297, at p. 310. (H.L.).

[6] Cited approvingly by the House of Lords in *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534.

[7] [1967] 2 A.C. 337; [1967] 2 All E.R. 15.

proceeded, almost immediately to dissolve the Council on the grounds that it was incompetent to perform its functions. The question for determination was, *inter alia*, whether there was an obligation on the Minister to give a prior right of hearing to the councillors. In answering the question in the affirmative, the Privy Council held that where the statute itself was unclear, only on a consideration of all the matters (specified above) could the applicability of the natural justice rule be properly determined. Against these tests, the Privy Council held that there was an obligation on the Minister to comply with natural justice requirements; the interest at stake was considerable as it involved dismissal from office and deprivation of property; consequently the severity of the sanctions was equally grave. The condition on which the administrative authority was permitted to encroach was also contingent on a finding of incompetence. It is submitted that these indicia are a useful measure by which we can determine the applicability of the *audi alteram partem* precept to the Minister's power to impose restriction orders under s.8 of the I.S.A. The interest at stake will unquestionably attract the protection of natural justice rules. The most fundamental of liberties, namely, the right to free speech, freedom of movement and freedom of association, are severely abridged. It is also possible to assert that the courts ought to include other interests protected by the law such as reputation under the law of defamation.[8] All restriction orders declare that they are being imposed to prevent the affected from "acting in a manner prejudicial to the security of the nation." Although the facts were conditioned by the turbulent period of the Indonesian confrontation against Malaysia, the High Court in *Syed Husin Ali* v. *Utusan Malaysia*[9] has declared such descriptions as "committed an act of subversion", "spreading subversive ideas", as defamatory. Thus it may be possible to suggest that this similar blemish of the reputation contained in the RO is an interest which ought to come within the protective purview of natural justice rules. The conditions of encroachment are equally grave as serious aspersions are cast on the filiality and patriotism of the affected. Finally the sanctions accompanying the imposition of an RO are most debilitating. A denial of fundamental rights has critical repurcussions. For example, means of livelihood and job opportunities may be seriously impaired. The restrictions deny membership of and participation in professional trade unions as well as all other organisations. The right of addressing meetings is excluded. The conditions require resignation from positions, both honorary as well as paid, held in political, cultural and social organisations. Students of higher

[8] See Paul Jackson, *Natural Justice* (1973) p. 42.

[9] [1973] M.L.J. 56.

institutions, primarily universities, will automatically cease to be such on the imposition of the restriction orders.[10] Undoubtedly, these debilitations far exceed those faced by the Jaffna Municipal Council in *Durayappah* described by the Privy Council as "most serious." Applying the useful tests formulated in *Durayappah's* it is submitted that the Minister is obliged to hear the restrictee before imposing the conditions.

This, however, does not conclude the matter; for an equally "long course of decisions" have recognised that the legislature may expressly or even impliedly exclude the duty to observe natural justice precepts. As Parke B. observed in *Bonaker* v. *Evans*[11], "no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, *unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.*" As s.8 of the I.S.A. eschews any direct reference to representation it remains to be determined whether any factors exist which may by implication be said to negate the right to be heard.

Arguments to the effect that the entire tenor of the I.S.A. is inconsistent with the inference of common-law "procedural due process' are unlikely to gain currency in the light of the logic implicit in *Lee Mau Seng* v. *Minister for Home Affairs, Singapore.*[12] In this case, the applicant alleged that his detention under the I.S.A.[13] was unjustified as, *inter alia*, he was denied his constitutional right to consult a legal practitioner of his choice after he was detained under s.74 of the Act. The Attorney-General, for the respondent, argued that this right was ousted by necessary implication as s.74 of the I.S.A. was wholly inconsistent with Art. 5 of the Constitution, Art. 149 of the Constitution permitting the ouster of such constitutional provisions. As examples of the "heavy inconsistency" were the permissibility of detention exceeding 24 hours without production before a magistrate and the legality of detentions in excess of 28 days by officers of or above the rank of Superintendent of Police. Wee Chong Jin C.J. rejected, correctly it is submitted, the A.G.'s contention in these terms:

[10] S. 15D(3), Universities and University Colleges (Amendment) Act, 1975.

[11] (1851) 16 Q.B.D. 162, 171.

[12] [1971] 2 M.L.J. 137.

[13] By L.N. 231/63, the Malaysian Internal Security Act was extended to Singapore on its entry into Malaysia in 1963. On Singapore's departure from Malaysia (w.e.f. 15th October, 1964), the Act continued to apply to Singapore vide Modification of Laws. (Internal Security Act, 1960 (Amendment) Order, 1965).

> "If a person detained under s.74 is to be deprived of this constitutional fundamental right then the legislature must do so *in clear and unequivocal language.* Also, if such wide powers are to be conferred on police officers, then the legislature must confer them *in clear and unequivocal language.* I can find nothing inconsistent in the language of the whole of section 74 with the fundamental right given by Article 5(3) of the Constitution . . ."[14]

Analogously, it cannot be argued that the provisions in the I.S.A. are by necessary implication inconsistent with and therefore oust the fundamental common-law principles. Insofar as they are expressly granted, they are a positive reaffirmation; insofar as the provisions are silent, it behoves the courts to engraft the natural justice precept and thus safeguard against the ignorance, carelessness and even the perversity of officialdom. This argument is reinforced by a closer reading of the Constitution. As "law" is defined in Article 160 to include the common law, the common-law principles of natural justice may be said to have been accorded constitutional status *vide* Article 5 which forbids the deprivation of a person's life or personal liberty "save in accordance with law."[14A] Thus only clear and unequivocal language in the I.S.A., may oust these constitutional procedural imperatives.

JUDICIAL, QUASI-JUDICIAL, AND ADMINISTRATIVE FUNCTIONS

For a long time now courts have over-burdened themselves with terminological epithets which tended to defy rational analysis. The terms "judicial", "quasi-judicial" and "administrative" were readily bandied, often as an *ex post facto* rationalisation;[15] the court having decided that a situation is not one in which a duty to comply with natural justice rules can appropriately be imposed, have thought it proper or convenient to classify the functions as administrative and vice versa. Some commentators attribute the use of such artificial classifications to the restrictive interpretation given to, or even a misreading of, Atkins L.J.'s formulation of the scope of *certiorari* in *R. v. Electricity Commissioners.*[16] Strangely, the

[14] *Op. Cit.* n. 12 at p. 141. Emphasis added.

[14A] But see *contra, Gopalan* v. *State of Madras* A.I.R. 1950 S.C. 27; *Tinsa Maw Naing* v. *The Commissioner of Police, Rangoon* [1950] Burma Law Reports 17.

[15] S.A. de Smith, *Judicial Review of Administrative Action* (1973) (3rd. edn.), p. 162. (hereinafter referred to as de Smith). This discussion assumes importance because the imposition of detention orders and restriction orders has been held to be an exercise of an administrative function: see *Lim Hock Siew and Ors.* v. *The Minister of Interior and Defence* [1968] 2 M.L.J. 219, and *P.P.* v. *Musa* [1970] 1 M.L.J. 101.

[16] [1924] 1 K.B. 171, 205.

limitations attached to this remedy "spilled over onto the principle itself."[17] At any rate hopelessly lost in the wilderness of these epithets the court lost sight of long-established precedents which implied natural justice even to administrative decisions.[18] This trend, fast rendering justice anything but "natural", was arrested by the House of Lords in *Ridge* v. *Baldwin*[19] and fortunately for those countries incorporating the Privy Council in its judicial heirachy, by the Privy Council in *Durayappah* v. *Fernando*.[20] In the former case, Lord Reid "scotched the heresy"[21] that before natural justice rules applied (or indeed *certiorari* was granted) it was incumbent to establish a 'super-added' duty to act judicially. Subsequent authorities have cast overboard, for good it is hoped,[22] these confusing classificatory terminologies. In *Re Pergamon Press*,[23] the Court of Appeal explicitly rejected this classification methodology and assessed the applicability of natural justice precepts by reference to the consequences of the investigation and report by the inspectors conducting an inquiry into the affairs of the company under the (British) Companies Act 1948. Sachs L.J. placed significance on the characteristics of the proceedings "not the precise compartment into which it falls." A closer analysis of his reasoning indicates that he was primarily concerned with the consequences of the proceedings on an individual. In his words: "one of the characteristics of the proceedings under consideration is to be found in the inspector's duty to produce a report which may be made public and *may thus cause severe injury to an individual by its findings*."[24] Lord Denning's view, more pointed in this respect, demonstrates the varied factual circumstances which could give rise to a duty to grant a hearing and is, for this reason, worth quoting at length:

> "It is true that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial for they decide nothing; they determine nothing. They

[17] 41 A.L.J. 128.

[18] See also Wade, "The Twilight of Natural Justice" (1951) 67 L.Q.R. 103, 105.

[19] [1963] 2 All E.R. 66.

[20] *Op. Cit.* n 7.

[21] *Per* Lord Denning M.R. in *R.* v. *Gaming Board ex. p. Benaim* [1970] 2 Q.B. 417, 430.

[22] Unfortunately these terminological distinctions keep appearing; see *Re Godden* [1971] 3 All E.R. 20, and *Glynn* v. *Keele University* [1971] 1 W.L.R. 487.

[23] [1971] Ch. 388.

[24] *Ibid.*, p. 402; emphasis added.

> only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a *prima facie* case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repurcussions. They may, if they think fit, make findings of facts which are very damaging to those whom they name. They may accuse some, condemn others, may ruin reputations, careers. The report may lead up to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly . . . The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against them. . . ."[25]

Lord Denning was adhering to his views in *R. v. Gaming Board ex. p. Benaim*[26] which was relied upon by our Federal Court in *Tan Hee Lock v. Commissioner for Federal Capital.*[27] In this case an order of the Commissioner under s.18A of the Control of Rent Act 1966 was challenged on the ground, *inter alia*, that it was made in contravention of the *audi alteram partem* rule. The trial judge's reasoning, based on the earlier case of *Md. Ashraff & Anor. v. Commissioner for Federal Capital*[28] that no remedy lay as the commissioner's functions under s.18A "appear . . . to be purely administrative and any act pursuant thereto is not amenable to *certiorari*" was emphatically rejected. Gill F.J., (as he then was) delivering the judgment of the Federal Court reiterated Lord Denning's approach in these terms:

> ". . . Assuming . . . that in deciding an application under s.18A of the Act the Commissioner was performing a purely administrative act, even then, *in view of the serious consequences arising therefrom,* it was necessary for him to have followed the principles of natural justice."[29]

Hence arguing that the Minister is exercising administrative powers under s.8 of the I.S.A. is an inconclusive answer to the question whether natural

[25] *Ibid.* p. 400.

[26] [1970] 2 Q.B. 417, 430.

[27] [1973] 1 M.L.J. 238.

[28] [1972] 2 M.L.J. 69.

[29] *Op. Cit.* n. 27 at p. 240. Emphasis added.

justice rules ought to be implied.[30] The total circumstances, as represented by the three elements in *Durayappah*'s case will have to be independently assessed; as submitted, the "consequences" test may be easily satisfied to warrant the incorporation of the right to be heard before restriction orders are imposed.

WIDE DISCRETIONARY POWERS

Admittedly, the Minister is invested with wide discretionary powers and his decision on the facts is unreviewable: but, a leading authority on judicial review challenges, "why should this fact alone exempt the repository of the discretion from any obligation to listen to representation before it acts?"[31] The Privy Council in *Durayappah* firmly rejected the thesis by which provisions in a statute ostensibly reposing wide discretionary powers by the use of such terminologies as "if the Minister is satisfied", were held to effectively oust the duty to observe natural justice rules. These words can be no more than "introductory of the matter to be considered and give little guidance on the question of *audi alteram partem*."[32] Whether it was an open discretion or a discretion conditioned upon factual evaluation in which case the right to be heard must be inferred, was to be concluded by reference to the three elements referred to earlier. Indeed the greater the discretion, the more necessary it may be to control that discretion by ensuring that the decision-maker is fully apprised of all matters which may affect his decision. Nowhere else is this as imperative as in actions taken under the I.S.A. where it is often difficult to distinguish between the preservation of order and the preservation of the power of the ruling party and between opposition and subversion.[33]

[30] There is a growing body of case-law which gets around this classification contrivance to oust or incorporate natural justice rules by drawing a distinction between the exercise of judicial and quasi judicial functions on the one hand and administrative functions on the other. The bodies exercising the former must observe the rules of natural justice whilst those exercising the latter must act fairly. See Viscount Dilhorne in *Furnell* v. *Whangarei High Schools Board* [1973] 1 All E.R.; Lord Pearson and Lord Salmon in *Pearlberg* v. *Varty, op. cit.* n.6 at p. 17; *Bates* v. *Lord Hailsham* [1972] 3 All E.R. 1019, 1024. The value of this distinction is questioned. As Megarry J. stated, "the distinction . . . even if it exists, is of no importance unless the standards of procedure required by fairness and natural justice are different or if, while breach of natural justice invalidates a decision, a failure to act fairly, where such a duty exists, is merely wrongful." *Gaiman* v. *National Association for Mental Health op. cit.* n. 2, at p. 116.

[31] de Smith, *op. cit.* n. 15 at p. 163.

[32] *Op. Cit.* n. 4 at. p. 155, *per* Lord Upjohn.

[33] See also Mathews & Albino, "*The Permanence of Temporary*" (1966) 83 South African Law Journal, 16.

In Malaysia, where an essentially one-party controlled Parliament renders accountability largely illusory, the incorporation of the *audi alteram partem* rule would not only reduce the incidence of arbitrariness but, as well, provide an accepted standard against which the Minister's action may be measured.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

This maxim which is no more than an interpretation aid suggests that where provision is expressly made in one part of the statute for, say, a right to be heard, and no such provision exists in another part, then it can be implied that the legislature did not intend to grant this right in the latter case. S.8 empowers the Minister to make, *inter alia*, detention orders and restriction orders. S.11 of the I.S.A. gives a person served with a detention order the right to make representations to an Advisory Board. Further, both detention orders and restriction orders, once imposed, may be extended by the Minister. In the event of an extension of the detention order, the rights under s.11 are expressly reserved for the detenu. In both situations, the I.S.A. is conspicuously silent as to the right to a hearing for those on whom a restriction order is imposed. What inference can we safely draw? It is crucial to keep foremost in mind that this exclusio maxim is an interpretation aid designed merely to elucidate legislative intent. It must necessarily be confined to a marginal role, especially when critical personal rights are under review. The proviso to s.8(7)[33A] of the I.S.A., it may be noted, is focussed on defining the circumstances which render an existing detention order, a fresh one. The rights that accrue on the making of a fresh detention order are then mechanically enumerated. It is submitted that s.8(7) is thus silent on the status and rights attaching to a restriction order. Wills J. in *Colquhon v. Brooks*[34] rightly cautioned against the undue use of an interpretation rule which had been "... frequently

[33A] s.8(7) The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either –

(a) on the same grounds as those on which the order was orginally made;

(b) on grounds different from those on which the order was originally made; or

(c) partly on the same grounds and partly on different grounds.

Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12 (1) shall apply as if for the words "such person was detained" the words "his detention order was extended" were substituted.

[34] (1887) Q.B.D. 402, 406.

misapplied and stretched beyond due limits." Lopes L.J., having warned that this maxim was "a dangerous master to follow in the construction of statutes or documents" warned against its use when it application "having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice."[35] Nonetheless, the maxim has been applied by both the Privy Council and the House of Lords and the precedent-value of these decisions remains to be determined.

In *Pearlberg* v. *Varty*[36] a Commissioner gave to an inspector of taxes leave under s.6 of the Income Tax Management Act 1964, to make tax assessments on the appellant. S.6(1) of the Act required that before certain assessments were made the Commissioner had to be "satisfied by an inspector ... that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person." No opportunity was given to the appellant to present his case in opposition to the inspector's application for such leave. The appellant's argument that this constituted a denial of natural justice was rejected by the courts. A closer reading of the desions of both the Court of Appeal and the House of Lords suggests that an *exclusio* interpretation of s.6 which made no reference to a hearing while other sections expressly granted a hearing was not really the sole factor which influenced the outcome of the case. The nature of the sanctions imposable because of the provisional nature of the proceedings was certainly "a significant factor."[37] The determination of guilt was to follow much later at which stage the right to a hearing was provided for. In Lord Pearson's words:

> "The Commissioner's decision to give leave for an assessment to be made is analagous to a decision by the A.G. or the D.P.P. to give his consent to a prosecution in cases where such consent is required by statute. This function differs in character from the decisions of a magistrate – that there is a prima facie case for the prosecution justifying committal of the accused for trial."[38]

Indeed, their lordships never lost sight of the fact that the appellant could appeal against the assessment at which stage he was entitled to a hearing. It

[35] *Colquhoun* v. *Brooks* (1888) 21 Q.B.D. 52, 65 (C.A.).

[36] [1972] 1 W.L.R. 534.

[37] *Per* Lord Hailsham, [1972] 2 All F.R. 6, 10.

[38] *Ibid.* p. 18. Insofar as it is clear that a provisional finding of a *prima facie* case may nonetheless have serious consequences, the House of Lords reasoning is suspect. In *Wiseman* v. *Borneman op. cit.* n. 5, three members of the House of Lords deprecated the distinction drawn by the Court of Appeal between provisional and final determinations from perspectives of inferring natural justice rules.

was this reason probably which led Lord Pearson to comment that "(f)airness ... does not necessarily require a plurality of hearings or representations and counter representation. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply."[39]

Similar considerations characterised the Privy Council decision of *Furnell v. Whangarei High Schools Board.*[40] Furnell, a school-teacher, alleged a denial of natural justice as at the preliminary investigation by a sub-committee, set up because of a complaint against him, and which later reported to the schools board that he may have committed offences under the Education Act, he was given no opportunity to be heard. The occurrences listed by the investigating sub-committee were sufficiently serious; consequently he was suspended from his duties pending the determination of the charges. Only at this stage was he entitled to proffer his explanations either in writing or personally. As in the *Pearlberg* case, the Privy Council was contrasting the different stages of a single process, namely, the disciplining of a teacher. While deciding by reference to the *exclusio* interpretation guide which gave no hearing at the investigation stage but made elaborate provisions for a hearing at later stages of the inquiry, the Court was significantly influenced by the fact that when the case came to be finally determined, he was entitled to a hearing. As Lord Morris remarked, "The regulations draw a distinction between a complaint and a charge. A complaint may be still-born, but once there is a charge the correct course of procedure is prescribed."[41] The Privy Council even appeared to support their denial of natural justice at the earlier stage by suggesting that the investigation, inserted by an amendment to the principal act, was an additional protection accorded to the teacher as it could help to eliminate complaints based on "idle tittle-tattle." Thus it is submitted that the Courts were essentially looking at the procedure and assessing whether it operated unfairly. The consequences and their finality were crucial considerations in this determination. The *exclusio* interpretation clause was merely one factor in ascertaining legislative intent. This approach, made applicable to the exercise of the Minister's powers under s.8(5) of the I.S.A. would, it is submitted, yield a different result:

[39] *Ibid.* p. 17.

[40] [1973] 1 All E.R. 400.

[41] *Ibid.* p. 406. *Contra*, Viscount Dilhorne's and Lord Reid's view that the description of the sub-committee's proceedings as "investigation" suggested that both sides should be heard. Viscount Dilhorne equated the hearing granted only at the later stages to "a prisoner being asked whether he has anything to say before he is sentenced." (p. 421).

for at no stage of the whole process is a hearing permitted. The decision is final and very substantially impairs the liberty of the subject with all its attendant disabilities.

DISCLOSURE PREJUDICIAL TO THE PUBLIC INTEREST

If the *audi alteram partem* facet of natural justice is to be a real right, it must enable the affected to know the case against him so that he can effectively controvert it.[42] This may impose an obligation on the authority to disclose all relevant information, even if it be prejudicial to the security of the nation to do so. As Parliament could not have intended to authorise the disclosure of matters inimical to the nation's interest, goes the argument, any provision necessitating such disclosure must be inferred to exclude the right to be heard. It is respectfully submitted that this argument is untenable. At its maximum, it only warrants a modification of the rule, not its total extinction. Only if a modification is found to be totally incompatible with this natural justice rule ought it to be denied altogether. In *R* v. *Gaming Board ex p. Beniam*[43] the Gaming Board refused the applicants a licence for certain premises. The Board refused to disclose the sources of the information on which they acted nor did they disclose any reasons for their refusal. The applicants alleged a breach of natural justice as they were being deprived of a business without knowing the case they had to meet. The need for confidentiality of the information was recognised by the courts. But this in itself was held insufficient to extinguish the right. It was held that the applicants must be furnished with sufficient particulars to afford them a proper opportunity to answer them. All that the board need do, said Lord Denning, delivering the Court of Appeal's decision, is to let the applicants "know what their impressions are so that he can disabuse them." The court thus demonstrated its preparedness to adapt the flexible notion rooted in fairness despite the difficult contextual circumstances, rather than abandon it all together. This compromise led it to modify the content of the rule somewhat; thus the court held that the applicants could not insist on knowing the source of the evidence in the Board's possession. This approach provides a clue to an interpretation of s.8 which is wholly consistent with fairness. While upholding definitively the right to a hearing, confidentiality could be adequately protected by requiring the disclosure of an outline of the case sufficient to be responded to effectively by those affected; sources of information could be withheld from disclosure without necessarily

[42] see *S.S. Kanda* v. *The Govt. of the Federation of Malaya* [1962] M.L.J. 169 (Privy Council).

[43] [1970] 2 Q.B. 417.

offending against concepts of fairness. This reasoning is reinforced by the provisions of the I.S.A. relating to detention orders. A right to make representations is clearly accorded by s.11 of the Act before the detention order is confirmed.[44] It is obvious that an individual on whom a detention order is served is deemed a graver threat to the nation's security, yet he is entitled to be furnished with the grounds of detention, allegations of facts as well as other particulars to enable him to make representations. The only qualification is the right of the Minister to with-hold disclosure of facts in the limited situations when he feels disclosure would harm the national interest. It is therefore submitted that reasons of disclosure harmful to the public security cannot be successfully relied upon to oust the right to be heard under s.8 of the I.S.A.

PROMPT, REMEDIAL ACTION

The Courts have countenanced the view that where the power granted must necessarily be exercised with promptitude and natural justice implies delays (because of hearings, representation), then this logically excludes the inference of natural justice requirements. One obvious area where this ouster may be applicable is in the maintenance of public security. Such an interpretation, it is submitted, should only be acceptable in situations demanding urgent remedial measures. A situation which would meet this requirement may be illustrated as follows: a person is to address a meeting in the next day or two, and the Minister is satisfied that such an address would seriously jeopardise public order. To allow a hearing which could take some time, would prevent prompt remedial action. Only in such a situation could a right of hearing be deemed to be excluded by necessary implication. None of these considerations are valid to oust natural justice rules under s.8. The restriction order is of a general character and operates for a 2 year period. It is almost always imposed within a preliminary 60-day detention. The hearing will be held while the detenu is being confined to prison. No serious urgency exists, nor is any quick preventive action forseeable at this stage. Lord Parmoor's comment in *De Vertiuil* v. *Knaggs*[45] contemplating situations whence a public official may be excused from the obligation to grant a hearing was confined to an "emergency when promptitude is of greatest importance." Even then, the applicant was subsequently given the opportunity of answering the case against him. Similarly in *Rex* v. *Halliday*[46] Lord Atkinson countenanced

[44] Insofar as the hearing is granted after the decision is made, it may be possible to argue that there has been a failure to observe the rules of natural justice. The position is unclear. See further de Smith *op. cit.* n. 15 at p. 170.

[45] [1918] A.C. 557.

[46] [1917] A.C. 260.

prompt action necessitating internment in times of emergencies; but he pointed to procedures which subsequently guaranteed the right to a hearing "to prevent error or abuse."

The prime focus of this article has been to determine whether a right to be heard exists at all. The further question of the *content* of this right will have to be ascertained by reference to the totality of the facts of each case. It is difficult, and may be even inappropriate, to formulate the specific procedural requirements of such a fluid concept. A delicate balancing process between the rights of a citizen and the duty of a State will have to be undertaken to ensure that the minimum procedural requirements are consonant with the rule of law. At the very least, the rights accorded to a detenu under Article 151 of the Constitution and ss.9 and 11 of the I.S.A. ought to be granted to a restrictee. Briefly stated, these provisions grant a detenu the right to make representations to an Advisory Board. He is entitled to a copy of the detention order and a statement in writing of the grounds on which the order is made, the allegations of fact on which the order is based[47] and of other particulars which are reasonably necessary, in the Minister's opinion, for the detenu to make representations.

This writer has thus far been emphasising the need for procedural due process in a fundamental area affecting the liberty of a subject. But it is as well, when discussing 'rights' under the omnipotent Internal Security Act, to bear in mind the

> "... danger in submitting decisions to 'procedural due process' where 'substantive due process' is not possible; a danger of what has been referred to as 'symbolic reassurance' — a technique whereby the myths and symbols surrounding the state are invoked in order to achieve the 'quiescence' of a potentially critical public. In other-words, the inquiry may be used to give the false impression of the

[47] As to the disclnction between grounds and allegations of facts, see the judgement of Suffian, F.J. in *Karam Singh* v. *Minister of Home Affairs* [1969] 2 M.L.J. 129.

'objective' weighing of competing interests, obscuring the role in the decision of political power and value judgements. An aware public is likely to grow restive with these 'charades.' "[48]

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[48] Jeffrey Jowell, *"The Legal Control of Administrative Action"* [1973] Public Law 178, 217.

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