RIGHT TO COUNSEL BEFORE TRIBUNALS IN MALAYSIA

The expression "natural justice" has been uncomplimentarily tagged as "sadly lacking in precision"[1] "capricious", and "so vague as to be practically meaningless."[2] Authors of these dismal descriptions may well find added justification when the question of representation before administrative tribunals is raised. Not only has the scope of this right never been definitively described in England and many other jurisdictions, but the right itself awaits consistent judicial affirmation. The steady growth of tribunals in Malaysia and their growing impact on an ever-increasing portion of the populace highlights the need to focus greater attention on this area of the law. Fortunately, the recent decision of Raja Azlan Shah J. (as he then was) in *Doresamy* v. *P.S.C.*[3] affirming the right to representation before tribunals has breathed contemporary life into this otherwise entangled area of the law. It is proposed in the light of this decision to examine whether this right has been accorded a niche in our judicial system; and if so, to define its scope.

The facts of this case were as follows: the applicant, Doresamy, was an office-boy in the employ of the Registry of Societies. Because of his arrest and subsequent restriction under the Emergency (Public Order and Prevention of Crime) Ordinance,[4] he was deemed to have committed a breach of the Code of Conduct under Regulations governing conduct and discipline in that he had "conducted himself in such manner as to bring the Public Services into disrepute." His departmental head invited him to show cause why he should not be dismissed, which he did by letter through his solicitors. The appropriate disciplinary board, after consideration, recommended that disciplinary proceedings with a view to dismissal be instituted against Doresamy. He was given an opportunity to exculpate himself and his solicitors made due representations on his behalf. The Board after deliberation, however, dismissed him. He was then informed of his right of appeal to an Appeal Board which he did in writing through his solicitor. The appeal was dismissed on the ground that the applicant should have appealed "personally in writing" as required by regulation

[1] [1914] 1 K.B. at 199.

[2] S.A. de Smith: *Judicial Review of Administrative Action*, (1973) (3rd. Edition), p. 136. Hereinafter referred to as *de Smith*.

[3] [1971] 2 M.L.J. 127.

[4] No. 5 of 1969.

13(1) of the Public Services Disciplinary Board Regulations, 1967[5] and not through his solicitor. If the appeal had proceeded, a meeting would have had to be convened at which the appellant would have been entitled to be heard. At that stage, the Regulations empowered the Appeal Board in its discretion to permit the Government or the officer to be represented by an officer in the Public Service or, in exceptional cases by an advocate and solicitor. Such permission could be withdrawn if sufficient time was given; provided that where the Appeal Board permitted the Government to be represented, it had to permit the Officer to be similarly represented.

Whereas the issue was articulated in narrow terms: "whether the presentation of the appeal may be made by a solicitor on behalf of an aggrieved person. . . ."[6] the ensuing discussion was clearly directed towards the wider question of the right to representation before administrative tribunals. The narrow postulation was answered affirmatively by drawing substantially ". . . from the exposition of the law in the three authorities cited."[7] These were *Mundell* v. *Mellor*,[8] *Pett* v. *Greyhound Racing Association, Ltd.*[9] and *Enderby Town Football Club* v. *The Football Association, Ltd.*[9] *and Another.*[10] A closer examination of these authorities suggests that they adopted distinctly different approaches. In *Pett's* case, for example, the Court of Appeal talked not only in terms of the agency principle as the foundation for the right to counsel but also the *audi alteram partem* facet of natural justice. It is imperative to discover the true basis of Raja Azlan Shah J.'s decision because different consequences follow from each one. The agency principle, as an example, would deny the use of discretion to oust the right to representation whilst the adoption of the natural justice test would necessarily import discretion. Two possible bases are readily identifiable: (1) the agency principle and (2) the right-to-be-heard rule of natural justice.

(1) THE AGENCY PRINCIPLE

The case acknowledged as clearly establishing the right at common law for any person *sui juris* to appoint an agent to act for him is *R.* v. *Assessment Committee of St. Mary Abbot's, Kensington.*[11] Only that aspect of the Straits Settlements decision in *Mundell* and the English Court of Appeal

[5] Regulation 14, P.S. Disciplinary Board Regulations, 1967.

[6] per Raja Azlan Shah at p. 130.

[7] *Ibid.* at p. 130.

[8] [1929] S.S.L.R. 152.

[9] [1969] 1 Q.B. 125; [1968] 2 All E.R. 545.

[10] [1971] Ch. 591; [1971] 1 All E.R. 215.

[11] [1891] 1 Q.B. 378.

decision in *Pett* which placed reliance on *St. Mary Abbot's* was quoted by Raja Azlan Shah J. In particular he referred to Charles J.'s approval of the following passage in *Jackson & Co.* v. *Napper:*[12]

> "Subject to certain well-known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatsoever and . . . he can do so when he is exercising a statutory right no less than when he is exercising any other right."[13]

In *Mundell's* case, an accident resulting in loss of life occurred in connection with the operation of machinery at a soap factory in Singapore. An inquiry was scheduled by the Chief Inspector of Machinery. A partner in the firm, who were the consulting engineers in charge of the factory, was summoned to give evidence. He engaged the plaintiff, an advocate and solicitor, to attend the inquiry and represent him. His right of audience on behalf of the partner was, however, refused. The plaintiff brought a motion for mandamus to enforce his right of representation. Deane J., approving Charles J's dictum above-quoted, emphasised that "every man . . . who has a right to be heard has a right at common law to appear or be heard through an agent in the absence of any express provision restricting or taking away that right."[14] The conclusion then was that a person could appoint anyone — including an advocate and solicitor — as his agent. Raja Azlan Shah J. thus accepted that this common law right to be represented by an agent was accorded express recognition by our judicial system as early as 1929, and further that this right was not absolute; it could be restricted albeit only by an express provision or by necessary implication.[15] It is clear therefore that the agency principle formed a definite basis on which a right to counsel was inferred in the circumstances.

The matter does not rest here, for there have indeed been numerous judicial attempts directed at obviating the precedent established by *Mary Abbot's.* To what extent can these attempts gain currency in Malaysia? In this respect three points need to be emphasized. First, the agency principle necessarily presupposes a right in the principal party to be heard. This logical postulation was expressly referred to by Deane J.

> "But the whole point being as to the right of audience, the question comes back ultimately to the right of Mr. Ritchie [the principal party] to be heard himself. If he has a right to be heard then by common law he has the right to appoint an agent to speak for him. . .

[12](1886) 35 Ch. D. 162 at p. 172.

[13]*Ibid.*

[14]*Op. cit.* (note 8), p. 154.

[15]The last restriction was derived from the other two authorities cited viz., *Pett's* case and *Enderby's* case.

> Now such a position would of course, be logical, since if a man cannot be heard himself, he would have no common law right to appoint an agent to be heard for him. . . ."[16]

This point is important because cases which have attempted to avoid the applicability of *St. Mary Abbot's* have in reality encompassed factual situations in which the applicant himself had no right to audience.[17]

Secondly, attempts to distinguish *St. Mary Abbot's* have been based on classifying the hearing in that case as administrative, as distinct from judicial. Thus it has been suggested that tribunals exercising judicial functions are invested with a greater latitude of freedom to exclude representation. Aside from the real difficulty in comprehending how a judicial function can be said to involve the exercise of greater discretion than an administrative function, a number of other reasons militate against the use of this device for excluding the applicability of *St. Mary Abbot's* in Malaysia. First, the practice of classifying functions of a tribunal for purposes of determining the applicability of certain rules in administrative law (e.g. natural justice) has happily fallen out of favour with our courts. The most recent reinforcement of the rejection of such label-worship came in *Tan Hee Lock* v. *Commissioner for Federal Capital & Ors.*[18] In this case, an order of the Federal Capital Commissioner under s. 18A of the Control of Rent Act 1966 was challenged on the ground that, *inter alia*, it was made in contravention of the rules of natural justice. The lower court's holding that the Commissioner's functions were not amenable to *certiorari* as they were purely administrative, was expressly rejected. Gill F.J., delivering the unanimous Federal Court decision, stated:

> "It is submitted that assuming for the sake of argument 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."[19]

Secondly, even if it is argued that the rejection of label-worship is far from settled,[20] it is possible to reply that in *Mundell's* case the inquiry by the tribunal was thought of as being the performance of a judicial task. Deane J., in answering the question whether the tribunal was bound to hear the

[16] *Op. cit.* (note 8), p. 160.

[17] For example, see *Ex. p. Death* (1852) 18 Q.B. 645.

[18] [1973] 1 M.L.J. 241.

[19] *Ibid.* at p. 240.

[20] See *Gylnn* v. *Keele University* [1971] 1 W.L.R. 487, which appears to revert to the classification scheme. See also H.W.R.W., "Nudism and Natural Justice" [1971] 87 L.Q.R. 320 at p. 321.

plaintiff, went to inordinate lengths to demonstrate the close similarity between the functions of that tribunal and a court proper, delving in particular into the judicial trappings of the tribunal, such as "... the power to enforce the attendance of witnesses, and to take their evidence upon oath for the purpose of being able to arrive at findings. ..."[21] His telling conclusion in this respect was that "the truth is that the tribunal created by this Ordinance is really a court of inquiry held in order that certain facts may be investigated judicially in order that judicial findings may be arrived at on which the local authority may take measures affecting a certain class of persons."[22] It was thus clearly directed at proving that the cumulative effect of the trappings of the tribunal justified its being treated as performing a judicial task.[23] It is submitted therefore that this 'label-worship' formula to restrict the use of the agency principle has been denied currency in Malaysia. Besides mitigating the harsh injustices caused by an over-refined analysis of functions, this is encouraging because "often ... the method of characterisation can be seen as a contrivance to support a conclusion reached on non-conceptual grounds."[24] Thirdly, it is pertinent to inquire whether the Singapore High Court judgement of Wee Chong Jin C.J. in *Jacob* v. *A.G.*[25] can be used to persuade the court that authority exists, albeit merely persuasive, that the right to representation ought to be excluded. The approach of this case, it is submitted, was solely in terms of the natural justice rule and cannot possibly affect a right derived from another source.[25a] The agency principle as a basis for the right was therefore left open.

This common law right of every man to be heard, to appear or to be heard through an agent is by no means absolute. It can be excluded by "any express provision restricting or taking away that right" or by "necessary implication," Deane J., re-echoing Charles J. in *Mary Abbot's* stated emphatically that the right of Advocates and Solicitors to appear in court was not founded on statute; it was a right derived from the common law. The Courts Ordinance was in fact an example of the "... express provision restricting or taking away that right," inasmuch as it confined

[21] *Op. cit.* (note 8), at p. 160.

[22] *Ibid.*

[23] An attempt along similar lines to demonstrate that the assessment committee was discharging a judicial function is discernible on a closer examination of Lord Esher's judgement in *St. Mary Abbot's.* See J.E. Alder, "Representation before Tribunals" [1972] Public Law 278, at p. 289.

[24] de-Smith, *op. cit.* (note 2) p. 58.

[25] [1970] 2 M.L.J. 133. For a discussion of the facts and holding in this case see *infra,* p. 35.

[25a] This point is discussed further, see *infra,* p. 35 et.seq.

the choice of an agent to an Advocate or Solicitor of the Court ". . . by reserving to Advocates and Solicitors the exclusive right to appear before those Courts."[26] What one may inquire, is the position if the regulation or legislation is silent on the matter? Raja Azlan Shah J. in *Doresamy* stated categorically that in such a situation exclusion is unwarranted. This formulation, it is submitted, is correct in law and supports an interpretation that is least restrictive of important personal rights. It is unfortunate, however, that Raja Azlan Shah J. marred this otherwise sound conclusion, by preceding his views on this subject with a questionable interpretation of Lord Denning, M.R.'s judgement in *Enderby's* case. In this case, the Enderby Football Club was fined and censured by their county association, whereupon they appealed to the Football Association (FA). The FA rejected the Club's claim to be represented by a lawyer, placing reliance on rule 38(b) of the FA, which expressly excluded legal representation except where the chairman or secretary of the club in question happened to be a lawyer. The question of first importance in this case was whether a party who is charged before a domestic tribunal is entitled as of right to be legally represented? Lord Denning approached this issue by observing that "much depends on what the rules say about it. When the rules say nothing, then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal."[27] In terms of the agency principle, this postulation, it is submitted, does not accurately represent the law. The agency principle cannot be excluded as a matter of discretion. Lord Denning's comment is itself a departure from his earlier judgement in *Pett No. 1*, and the only way to reconcile his last statement with the former is to suggest that as the agency principle had no application because it was expressly excluded by rule 38, Lord Denning was reasoning in terms of the natural justice poser. For this reason Raja Azlan Shah J.'s citation of this case to explain the "well-known exceptions" to the agency principle appears misplaced.

Nevertheless, Raja Azlan Shah J.'s acceptance of the agency principle assumes added significance for a final reason. The Court of Appeal's decision in the interlocutory application (*Pett No. 1*) was not followed by Lyell J. in *Pett No. 2*.[28] He rejected the applicability of the agency principle by stating that "(i)t seems to me that that right must be ousted when it is sought to be exercised in circumstances in which another rule of the common law does not permit it."[28] It is unfortunate that Lyell J. failed to identify what he termed "another rule of the common law," hence opening the issue to speculation. Could the rule be a reference to the rules

[26] *Op. cit.* (note 8), at p. 161. See s. 120 of Courts Ordinance XXX of 1907.

[27] *Op. cit.* (note 10), [1971] 1 All E.R. 215 at p. 218.

[28] *Pett v. Greyhound Racing Association Ltd.* (No. 2) [1970] 1 Q.B. 46.

of natural justice? This interpretation is open to serious objections. The right to representation could flow from two alternative sources viz., natural justice and the agency principle; "another rule of the common law" cannot possibly oust a right derived from an alternative source. It is thus submitted that *Doresamy's* case could have earned itself greater prestige as precedent if Raja Azlan Shah J. had consciously directed his mind to the contrasting decision in *Pett No. 2* in coming to this conclusion thereby foreclosing the verbal acrobatics which could ensue from the fact that his decision was made in *per incuriam* of subsequent persuasive authority.

2. THE NATURAL JUSTICE PRINCIPLE

The second unsatisfactory feature of the *Doresamy* case was its failure to make an express reference to the alternative line of reasoning – the right to be heard – by which the Court of Appeal in *Pett No. 1* inferred the existence of the right to representation. Two reasons render such reference important. First, representation vide the agency principle can be excluded by contract or by legislation. Not so when this right is founded upon natural justice. While it is true that in the context of statutory bodies, procedural requirements are stipulated and the rules of natural justice function merely in a residuary capacity, if the right to representation could be held to be a facet of natural justice, then only the most express or "clearly implied" stipulation could oust its application. More importantly, in the context of domestic bodies there is a growing index of cases supporting the proposition that the requirements of natural justice cannot be excluded by contrary contractual provisions.[29] Secondly, Wee C.J. in the Singapore High Court decision of *Jacob* v. *A.G.*,[29a] purporting to follow Lyell J. in *Pett No. 2* and the Privy Council decision of *University of Ceylon* v. *Fernando*,[30] rejected the argument that the right to legal representation constituted a facet of the *audi alteram partem* rule. It can of course be plausibly stated in defence of Raja Azlan Shah J.'s judgement that since representation was inferred from one source, it was unnecessary to contemplate the natural justice source to legal representation. It is

[29] See *Edward* v. *S.O.G.A.T.*, [1971] Ch. 354, 376, 381; *Enderby's* case, *op. cit.* (note 10), and *Faramus* v. *Film Artists Asson.* (1964) A.C. 925, 941.

[29a] *Op. cit.* (note 25) and discussion in the text.

[30] [1960] 1 All E.R. 631. In *Fernando's* case, which involved disciplinary charges, it was held that a fair hearing had been given although witnesses had been heard in Fernando's absence. He had been given a sufficient account of what they had said and he had not requested to confront or cross-examine them. It has been queried "whether it was reasonable in the circumstances to make Fernando's right to cross-examine contingent on his taking the initiative in making such a request; he was not legally represented." see *de Smith*, p. 188, note 75.

submitted, however, that a close perusal of Raja Azlan Shah J.'s decision clearly demonstrates its near-congruity to Lord Denning's reasoning based on natural justice. Thus Raja Azlan Shah J. concluded his judgement with the following remarks:

> "The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before administrative tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage."[31]

It must be immediately pointed out that the agency principle operates independently of an assessment of "the considerations" requiring assistance of counsel. Nor is it necessary under the agency rationale, to give special weight to matters such as a person's reputation and livelihood being jeopardised. The irresistible inference to be drawn from this excerpt is that the question of representation was viewed from the natural justice perspective. "The considerations", in Raja Azlan Shah J.'s contemplation which required assistance of counsel in disciplinary proceedings in the circumstances, were hardly at variance with those articulated by Lord Denning in *Pett No. 1*, where he said that "it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence."[32] In short, both Lord Denning and Raja Azlan Shah J. were illustrating how unfair it was, in the circumstances, to expect the parties themselves to state their case. It is submitted therefore that the right to representation was also based on the *audi alteram partem* rule of natural justice; mayhap unconsciously.

It remains to determine whether the logic implicit in the Singapore High Court decision in *Jacob* v. *A.G.*[33] renders this conclusion untenable. In that case the plaintiff challenged the committee of inquiry's finding against him on the ground, *inter alia*, that he was denied the right to be represented before the committee by an advocate and solicitor. After making extensive references to the Privy Council decision of *University of Ceylon* v. *Fernando*, Wee C.J. disposed of this ground by arguing:

> "This court is bound to follow a decision of the Privy Council and if the Privy Council has decided that a right to question the witnesses brought against a man is not required by natural justice and that the principles or rules or requirements of natural justice are, apart from impartiality, those elementary and essential principles of fair-

[31] *Op. cit.* (note 3), at p. 130.

[32] *Op. cit.* (note 9), (1968) 2 All E.R. 545 at p. 549.

[33] *Op. cit.* (note 25).

> ness as contained in the passages from *De Verteuil* v. *Knaggs*[34] and *Byrne* v. *Kinematograph Renters Society Ltd.*,[35] I am *bound* to decide that the committee of inquiry has not denied the plaintiff a reasonable opportunity of being heard merely because it has refused the plaintiff's request to be represented before it by an advocate and solicitor."[36]

The formulation of his conclusion is unfortunate in more than one respect. First, *Fernando's* case brought into sharp focus the highly variable content of the natural justice concept and demonstrated the need to evaluate each set of factual circumstances on its own merits. The factual situation of one case – no less *Fernando's* – is certainly no precedent for subsequent cases. Previous cases are at best guides that are illustrative of the application of an abstract principle of law to the reality as presented by the facts in the dispute. For the Chief Justice to hold himself "bound"[37] by the Privy Council decision without an appraisal of the circumstances surrounding the case at hand, displayed a lack of comprehension of the relative nature of natural justice precepts. Secondly, the "elementary and essential principles" of fairness referred to by Wee C.J. do not, it is submitted with respect, eschew the right to representation. One of the requirements of natural jsutice, so neatly put by Harman J. in *Byrne's* case is ". . . that [the petitioner] should be given an opportunity to state his case."[38]

The Privy Council stated explicitly in *S.S. Kanda* v. *the Government of the Federation of Malaya*[39] that courts should always examine whether the right to be heard is "a real right which is worth anything."[40] This is the broad principle of law to which Wee C.J. ought to have found himself bound. Admittedly this does not require that a person be allowed to 'state his case' in the most persuasive manner; it suffices if it is

[34] [1918] A.C. 179.

[35] [1958] 2 All E.R. 579.

[36] *Op. cit.* (note 25) at p. 136, emphasis added.

[37] It is also a moot point whether a decision of the Privy Council is necessarily binding in countries other than that from which the appeal arose. Courts in many jurisdictions have declared themselves unfettered by such decisions. See *Hare* v. *Trustee of Health* (1884) 3 Cape S.C.R. 33 [South Africa], *Pesona* v. *Babonchi Baas* (1948) 49 N.L.R. 442 [Ceylon], *Vishundas* v. *Gov.-General* A.I.R. 1947 Sind. 154 [India], *Will* v. *Bank of Montreal* [1931] 3 D.L.R. 526 [Canada], *Fenton* v. *Danville* [1932] 2 K.B. 333 [England]. See also Ahmad Ibrahim, "Privy Council decisions on Wakaf. Are they binding in Malaysia?" [1971] 2 M.L.J. vii.

[38] quoted in *Jacob* v. *A.G. op. cit.* (note 25), at p. 135.

[39] [1962] M.L.J. 169, P.C.

[40] Per Lord Denning, *ibid.* at p. 172.

presented in a fashion consistent with fairness. Given this test, it is surely possible to envisage factual situations where representation could be imported as a necessary ingredient of natural justice. To suggest that this could never be the case is to create a postulation not representative of judicial authority. It is generally agreed, for example, that a patent denial of natural justice is occassioned where only one party to a dispute is permitted legal representation.[41] Further, Lyell J's view in *Pett No. 2*, on which Wee C.J. placed heavy reliance, that legal representation could be regarded as elementary only in a society which has acquired ". . . some degree of sophistication in its affairs,"[42] misinterpreted the Privy Council decision in *Fernando*. As a commentator has stated, "it (the Privy Council in *Fernando's* case) was not contrasting primitive and sophisticated societies as the learned judge suggests but basic principles common to all courts and tribunals as opposed to the highly technical rules of evidence peculiar to common law courts."[43]

One final matter merits discussion. It is often articulated that insofar as legal representation causes the proceedings to be dilatory by introducing over formality as well as inflating expenses incurrable, it negates the *raison d'etre* for tribunal proceedings. Where the right is inferred by rules of natural justice however, this objection is not insurmountable. Natural justice, encompassing the concept of fairness, is a highly fluid notion necessarily varying with different factual situations. If legal representation can be seen to work obvious inequities, then fairness demands its denial. It may indeed be argued that speed and reasonable costs themselves are aspects of justice.[44] Perhaps; but it is submitted that natural justice refers to only one facet of justice, viz. procedural safeguards to ensure compliance with notions of fairness, and that it ought, in certain factual situations, to be accorded priority over other relatively lesser facets of justice.[45] As succintly stated by one researcher on administrative law, "I personally can never accept the idea that fair procedures and high quality judicial review inevitably result in inefficiency. Perhaps there is some delay; but this seems to be a cheap price to pay for fairness in administration."[46]

[41] See e.g. *de Smith*, p. 187.

[42] [1970] 1 Q.B. 46, at p. 65.

[43] Paul Jackson, *Natural Justice* (1973), p. 17.

[44] This is implicit in Cairns L.J.'s judgement in *Enderby* v. *The Football Association Ltd.*, *op. cit.* (note 10).

[45] "Convenience and justice generally have never been on speaking terms with each other. Justice ought not to be sacrificed at the altar of convenience," *Abd. Majid* v. *Disciplinary Committee of the Univ. of Punjab* P.L.D. 1970 Lahore 416.

[46] Mr. Harry Whitmore who, along with 3 others, was appointed a member of an Administrative Review Committee by the Australian Federal Government to

On the question of expenses he was equally emphatic: "The obstacle [high costs] is something of a sham – of course fair adjudication costs more than unfair adjudication. The price just has to be paid."[47] This is especially so where, as in *Doresamy's* case, the applicant was threatened with grave social and financial ruin; compounded by the fact that Doresamy was an office boy and, at best, semi-literate.

The variable content of the *audi alteram partem* rule as a contrivance for including or excluding representation was convincingly illustrated by Lord Denning in *Pett No. 1* and *Enderby's* case. In *Pett's* case, the potential consequences of the proceedings were the suspension or non-renewal of the licence. Lord Denning was clearly mindful of the fact that the livelihood of a trainer was dependent on the possession of this licence.[48] In disproving Maugham J.'s views in *Maclean v. Workers Union,*[48a] which denied the right of representation before domestic tribunals, Lord Denning opined that while this holding "... may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation...," it certainly did not apply "... to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import."[49] In contrast *Enderby's* case did not involve a severe penalty and was most certainly not attendant upon any loss of livelihood. Hence the decision that natural justice rules were not breached although representation was excluded. The other consideration of importance was the appropriateness of a legally trained person to participate in the proceedings. In *Pett's* case the charge was one of drugging a dog. The hearing was to be oral. The methods of inquiry and the establishment of the facts were closely analagous to an ordinary criminal trial for which a legally trained person was specially suited. Not so in *Enderby's* case where, for example, Fenton Atkinson L.J. referred to the adjudicators as men "... with a great fund of common sense and experience of football and the rules in question."[50] Lord Denning pronouncing on the same theme, stated:

"... in many cases it may be a good thing for the proceedings of a

investigate and report on the subject of administrative justice and judicial review. His research led him to examine in some detail the role of the lawyer in administrative decision-making in England, the U.S.A., New Zealand and Australia. See Whitmore, "The Lawyer in Administrative Justice", (1970) 33 M.L.R. 481

[47] *Ibid.*, at p. 492.

[48] *Op. cit.* (note 32), at p. 549.

[48a] [1929] 1 Ch. 602 at p. 621; [1929] All E.R. Rep. 468 at p. 471.

[49] *Op. cit.* (note 32), at p. 549.

[50] *Op. cit.* (note 27), at p. 221.

> domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game."[51]

These in-built devices implicit in the flexible attributes of the natural justice rules, permit the exclusion of legal representation in situations when the parties to the proceedings are seriously disadvantaged thereby. This also permits the tribunal to regulate the kind of representation it will allow having regard to the nature of the hearing; for it is possible to envisage situations where a non-legal representative, e.g. a trade union leader in labour cases, would be considered more suitable to "state the case."

Can the agency principle be similarly regulated? A clue is provided by Lord Esher M.R.'s statement that "no doubt the assessment committee would have some discretion and might refuse to hear a manifestly *improper person* as agent" (emphasis added).[52] "Improper person" was nowhere defined in the judgement. It is submitted that it could be employed by the courts to exclude only those with a personal disability e.g. insanity, from acting as representatives. Its value therefore as a useful devise "... to meet the objection that a general absolute right to representation is an undesirable, a counter productive element of tribunal procedure having regard to the variety of kinds and procedures of administrative decision making bodies,"[53] is considerably minimised. Be that as it may, the current trend is clearly towards expressly permitting representation. In England, the *Franks Report*[54] paved the way for extension of legal representation before statutory tribunals. Steadily this idea has gained a pride of place in disciplinary procedures in universities and national sporting organisations. Indeed it is unlikely that any tribunal or domestic body would exclude this right altogether. Not, at least, without contemplating Lord Denning's premonitory note in *Enderby's* case that it may not be "... legitimate to make a rule which is so imperative in its terms as to exclude legal representation altogether."[55]

[51] *Ibid.* at p. 218.

[52] *Op. cit.* (note 11), at p. 383.

[53] Alder, *op. cit.* (note 23), p. 287.

[54] *Report of the Franks Committee on Administrative Tribunals and Enquiries*, Cmnd. 218 (1957).

[55] *Op. cit.* (note 27), at p. 219. *Contra*, s. 63 of the Singapore Industrial Relations Act, Chapter 124, which expressly excludes the right to be represented by an advocate and solicitor or paid agent in proceedings before the Industrial Arbitration Court, except in proceedings relating to contempt of that Court, or by leave of the Court in the very limited proceedings in which the Attorney General has intervened.

Finally, if representation is thought of in such imperative terms, and according to Raja Azlan Shah J. "if the idea of equality before the law is to be meaningful every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage,"[56] then what of the indigent who through lack of funds is unable to obtain the guiding hand of counsel in cases where the assistance of legal representation constitutes an essential requirement of justice. Indeed one rationale for keeping costs to the bare minimum in cases of tribunal proceedings is that it affects a high number of indigents. The injustice of appearing before a tribunal without a representative can be real as one investigation of the working of tribunals has demonstrated:

> "The commonest situation before tribunals — very common indeed — is that the claimant or party is completely inarticulate. Sometimes he or she is literally trembling before the tribunal. How justice can be accorded to someone who fails to say anything, or merely mumbles a few words, I fail to see. In many cases the applicant is confronted by an official, or an employer, or a landlord's solicitor who has the facts fully marshalled and is prepared to argue the point at issue. I have seen many cases in which the claimant quite obviously did not understand what the issue was and certainly, he was unable to present facts or arguments in any coherent way. In others the applicant did not know what documents were relevant. When evidence as to facts is given — perhaps by an official, or an investigator — the applicant is in no position to test veracity by cross examination."[57]

It may be possible to argue that the imperative formulation of representation before administrative tribunals, at least statutory bodies, when read together with Art. 8(1) of the Malaysian Constitution,[58] imposes a constitutional obligation upon the Government to extend legal aid or to create special arrangements to eliminate unequal treatment of people who are like-circumstanced.[59] This postulation however is not altogether free from difficulties, the nature of which will have to await elucidation in another comment. As one commentator remarked appre-

[56] *Doresamy* v. *P.S.C.*, *op. cit.* (note 8), at p. 130.

[57] H. Whitmore, *op. cit.* (note 46), at p. 485.

[58] Art 8(1): "All persons are equal before the law and entitled to the equal protection of the law."

[59] Sheridan and Groves think it "probable that these articles [Art 8(1) and Art 5(3) of the Malaysian Constitution] would be regarded as imposing a constitutional obligation on Malaysia to ensure that any person charged with a serious crime is provided with counsel at public expense if he cannot find the fee himself." *The Constitution of Malaysia*, (1967), p. 39. The position is analagous. See also Huang-Thio (1963) 12 *Int. & Comp. L.Q.* 113.

hensively: "Any attempt, through the extension of legal aid, to encourage professional representation as a norm in the tribunal sphere, may mark the beginning of a tendency perhaps unwelcome, towards uniformity in administrative procedures."[60]

In Malaysia, there may not yet be the overgrowth of tribunals seen in the United Kingdom and elsewhere, nor has our legal aid scheme travelled very far from the incubation stage, but nonetheless it is of urgent importance to realise that a genuine issue of equal justice exists and that the remedial approach, when it comes, must reflect more than a "mere grudging gesture to a ritualistic requirement."[61]

Gurdial Singh Nijar*

[60] Alder, *op. cit.* (note 47), at p. 297. But see *contra* Abel Smith and Stevens, *In Search of Justice* (1968): "... even bearing in mind the dangers of excessive legalism, we think it dangerous that any form of legal aid is unknown before most tribunals."

[61] Per Mr. Justice Fortas in *Kent* v. *United States* 383 U.S. 541 (1966).

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