DISCIPLINE OF STAFF IN THE UNIVERSITY OF MALAYA: THE *NEMO JUDEX* RULE AND THE UNIVERSITIES AND UNIVERSITY COLLEGES ACT 1971

I. THE *NEMO JUDEX* RULE

Two fundamental rules constitute the doctrine of natural justice. One is what is termed "the right to be heard" expressed by the Latin *audi alteram partem.* In essence, it means that before a decision-making body with the ability to make a decision prejudicial to the individual makes such a decision, it must hear the individual concerned. The other is the *nemo judex* rule. The term *nemo judex* is the abbreviation of the Latin maxim *nemo judex in causa sua* meaning "no one may be judge in his or her cause" and is known as "the rule against bias." As no person who has an "interest" in the outcome of any proceedings can be trusted not to take his own interest into account or not to be influenced by it, the rule against bias disqualifies such a person from being a judge in his own cause. Thus, if such a person does not disqualify himself but, instead, decides a matter in which he is "interested" his decision will, upon application, be quashed by the court.

What kinds of interest activate the rule against bias? In this context the authorities distinguish between two kinds of interest: pecuniary interest and non-pecuniary interest. A pecuniary interest is a monetary or financial interest which the decision-maker personally has in the subject matter of the proceedings and may be direct or indirect. Non-pecuniary interest encompasses any relationship between a judge and either the subject matter of, or the parties to the proceedings. Disqualifying non-pecuniary interest is instanced by the decision-maker's prior involvement with the facts of a case (as a prosecutor or investigator) which he later adjudicates as well as by personal friendship or animosity or familial or professional ties.

It has to be noted that while a pecuniary interest, no matter how small, in the subject matter of the proceedings disqualifies a judge,[1] proof of non-pecuniary interest does not *ipso facto* disqualify the decision-maker; the latter is disqualified only upon a real likelihood or a reasonable suspicion of bias being shown. But once such a real likelihood or a reasonable suspicion is established, a presumption of bias arises and suffices to invalidate the decision. Upon proof of pecuniary interest or upon a real likelihood or a reasonable suspicion of bias, the court will apply the presumption without itself undertaking an investigation as to the existence of actual pecuniary or non-pecuniary bias. The use of the presumption is a matter of juristic policy to enable the courts to avoid having to determine whether, amongst other decision-makers, their brother judges are guilty of bias.[2]

In *Rex* v *Sussex Justices ex p McCarthy*[3] the conviction was quashed not because there was any real bias—the evidence indicated there was no bias in fact—but because of the appearance of bias and on the grounds:

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[1] *Dimes* v *Proprietors of Grand Junction Canal* (1852) 3 HLC 759; 10 ER 301.
[2] *Anderton* v *Auckland City Council* [1978] 1 NZLR 657.
[3] [1924] 1 KB 256.

> ... that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[4]

An earlier authority for the rule and its rationale is to be found in the following words of Lord Esher MR in *Allison* v *General Council of Medical Education and Registration*:[5]

> The question is not, whether in fact he was or was not biased. The court cannot inquire into that.... In the administration of justice whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased.[6]

A more recent authority on the point is provided by the words of Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd* v *Lannon*[7] as follows:

> ... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity . It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he were as impartial as could be, nevertheless if rightminded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit....

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[4] *Ibid* at 259 per Lord Hewart.
[5] [1894] 1 QB 750.
[6] *Ibid* at 758.
[7] [1969] 1 QB 577.

> There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when rightminded people go away thinking: "The judge was biased".[8]

The foregoing were cited with approval in *Reg* v *Liverpool JJ, ex p Topping*[9] in which the Divisional Court held that the test as to bias consisted in the question:

> Would a reasonable and fairminded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?

All the foregoing passages have been cited with approval and followed by the Malaysian courts.[10]

II. DISCIPLINE OF STAFF

The University of Malaya (hereafter 'the University'), a corporation sole, is deemed to be established under the Universities and University Colleges Act, 1971 (Act 30) (hereafter 'the Act') and is subject to the Act and to its Constitution (hereafter the 'Constitution'). The duties, functions and powers of the University are set out in the Act and the Constitution. The governing body of the University is its Council (hereafter 'Council'). Unless otherwise expressly provided by the Act or the Constitution, the Council can exercise and discharge all the powers, functions and duties conferred on the University by the Act or the Constitution. Under sections 4(1)(m) and 16 of the Constitution, the Council is the employer of University staff.

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[8] *Ibid* at 599.
[9] [1983] 1 WLR 122 at 123.
[10] See *Chong Kok Lin & Ors* v *Yong Su Hian* [1979] 2 MLJ 11; *Maleb bin Su* v *Public Prosecutor*; *Cheah Yoke Thong* v *Public Prosecutor* [1984] 1 MLJ 311; and *David Anthony* v *Public Prosecutor* [1985] 1 MLJ 453.

In the University, the discipline of staff is a statutory matter provided for both in the Act and in subsidiary legislation made by the Council in exercise of the power conferred upon it by section 16C of the Act. The subsidiary legislation in question takes the form of the University of Malaya (Discipline of Staff) Rules 1979 (hereafter 'the Rules').[11]

The administration of the discipline of staff in the University is vested in a 'disciplinary authority'. Section 16A(1) of the Act provides that the disciplinary authority in respect of every staff member of the University shall be the Disciplinary Committee (hereafter 'DC'). The said section also enacts that the DC shall consist of the Vice-Chancellor and two members of the Council elected by the Council. In the Rules, Rule 3 enacts that the 'Disciplinary Authority' shall be the 'Disciplinary Authority' constituted under section 16A(1) of the Act and includes any delegate thereof.

The Rules incorporate what might be termed a 'code of conduct' for staff as well as a 'code of disciplinary procedure' to be followed by the University when a breach of discipline is alleged against a staff member. The code of conduct for staff enjoins certain kinds of conduct and proscribes other varieties of conduct. A breach of any provision of the code of conduct is expressly or by implication a disciplinary offence which can result in disciplinary proceedings.

Before disciplinary proceedings can be commenced, there must be an allegation of a breach of discipline against a staff member (hereafter 'the defendant'). The allegation of misconduct may take the form of a report by a superior of the defendant (hereafter 'the report') or it may be information furnished by any other person whether from within or outside the University (hereafter 'the complaint'). As a code of disciplinary procedure, the Rules begin by stipulating that in every case of an alleged breach of discipline by a staff member, the disciplinary authority shall, in the first

[11]Gazetted as PU (A) 23 of 1979.

instance, before commencing any disciplinary proceedings decide whether the misconduct merits a punishment of dismissal or reduction in rank, or a punishment lesser than dismissal or reduction in rank. Following the disciplinary authority's determination of the foregoing, the Rules require that particulars of the breach of discipline be communicated to the defendant. The Rules also confer upon the defendant the right to defend himself either orally or in writing.[12] The Rules also specify the punishment(s) that may be imposed if an alleged breach of discipline is established.[13] An appeal against a decision of the disciplinary authority lies to the University Council.[14] Thus as a code of disciplinary procedure, the Rules suffer from a curious *lacuna* in not specifying the officer or committee of the University authorised to receive a report or complaint and decide whether disciplinary proceedings should be instituted thereon (hereafter 'the preliminary processing of a report or complaint').

III. THE VICE-CHANCELLOR'S PRIOR INVOLVEMENT WITH THE FACTS OF A CASE

Prior involvement in the facts of the case by an adjudicator disqualifies him as such primarily because his decision has to be based on facts presented and established at the hearing. This is so because to be meaningful, the right to be heard requires that the party who appears before the adjudicator must have knowledge of the facts on which the adjudicator is going to make his decision and the opportunity to explain and controvert those facts: *Surinder Singh Kanda* v *Government of Federation of Malaya*.[15] The adjudicator's prior involvement with the facts of a case

[12]See Rules 24 to 32.
[13]See Rules 33 to 36.
[14]See Rules 37 to 40.
[15][1962] MLJ 169

> ... raises questions both as to the value of the opportunity to be heard and the impartiality of the hearing itself. . . (the adjudicator) may find it difficult not to interpolate facts and information discovered *ex parte* even though this information would not be sworn and, more importantly, not subject to cross-examination and rebuttal. Moreover, a man who has buried himself in one side of an issue may not be able to bring to an adjudication the dispassionate judgment required....[16]

Of the three members of the DC, it is the Vice-Chancellor who gets involved with the facts of a case before it comes up for adjudication by the DC. It is when, following his prior involvement with the facts of a case, the Vice-Chancellor sits in adjudication of that case as one of the three members of the DC that the *nemo judex* rule is breached.

In practice, it is the Vice-Chancellor who receives most reports or complaints and decides whether disciplinary proceedings should be instituted thereon. He is thus involved with the facts of a case before he participates in its adjudication. In Disciplinary Case Number UM11/91/A(Ak), a government agency had investigated an information against a staff member and forwarded its findings in a report classified secret to the Vice-Chancellor. Acting on the secret report, the Vice-Chancellor had caused disciplinary proceedings to be instituted. When the disciplinary hearing commenced, the staff member had yet to see the secret report. Accordingly, the staff member intimated that because of his prior involvement with the facts of the case, the Vice-Chancellor should disqualify himself from sitting as a member of the DC to hear the case. (In theory, the Vice-Chancellor could have deflected this application merely by saying that he had caused disciplinary proceedings to be instituted without reading the report at all or after reading only a few of its many hundred pages). The DC replied that as the Vice-Chancellor was appointed one of

[16]Flick GA, *Natural Justice: Principles and Practical Application* (Butterworths, 1979) p 129.

the three members of the DC by section 16A(1) of the Act, he (the Vice-Chancellor) would not disqualify himself.

In declining to disqualify the Vice-Chancellor, the DC effectively took the stand that the *nemo judex* rule was displaced by statute *ie* by section 16A(1) of the Act. At first blush, the DC's position appears to be correct in principle for, being a creation of the common law, the *nemo judex* rule can be displaced by statute.[17] But where a decision-maker has an interest in a matter which he is by statute required to adjudicate, the statutory provision will not *ipso facto* displace the *nemo judex* rule. To do that, the statute must not only appoint the decision-maker but must also either authorise him to make the decision notwithstanding his interest in the matter in question or else authorise him to have the interest. The authority for this proposition is the decision of the Privy Council in *Jeffs and Others* v *NZ Dairy Production & Marketing Board*.[18] In that case, the respondent Board was established under the New Zealand Dairy Production and Marketing Board Act 1961 (hereafter 'the 1961 Act') to, *inter alia*, determine the allocation of milk from different zones to milk processing companies and, in effect, to recover loans given by its predecessor to milk processing (dairy) companies under its jurisdiction. The Board's allocation was challenged on the grounds that it held two debentures from Ruawai Company, one of the two companies to whom it had allocated milk from a specific zone. The appellants contended that in view of the board's pecuniary interest, it should not have adjudicated on the zoning matters, and that it had acted as a judge in its own cause contrary to the *nemo judex* rule. The Privy Council held that as the 1961 Act required the board to determine zoning applications, even though its own pecuniary interests might be affected, this showed the legislature's intention to make an exception to the *nemo judex* rule. However, the board's right to adjudicate on zoning applications was upheld on

[17]See 1 *Halsbury's Laws of England* (4th ed) para 67; *Dickason* v *Edwards* (1910) 10 CLR 243 at 259; *Lower Hutt City Council* v *Bank* [1974] 1 NZLR 545 at 549 and *Anderton* v *Auckland City Council* [1978] 1 NZLR 657 at 680.
[18][1966] 3 All ER 863.

the ground that sections 63 and 64 of the same Act authorised the making of loans to dairy companies. It follows then, that where a decision-maker has a disqualifying interest in a matter which he is by statute required to adjudicate, the statutory provision will not *ipso facto* displace the *nemo judex* rule. To do that, the statute must not only appoint the decision-maker but must also either authorise him to make the decision notwithstanding his disqualifying interest in the matter in question or else authorise him to have such interest. Thus, section 16A(1) of the Act does not, by itself, displace the *nemo judex* rule. To do that, section 16A(1) would have to expressly provide for the Vice-Chancellor to sit in adjudication of the case of any staff member against whom he causes the institution of the disciplinary proceedings. Clearly, section 16A(1) does not do this.

The *nemo judex* rule could also be overcome by the existence, alongside section 16A(1) of some other statutory provision expressly imposing upon the Vice-Chancellor a duty or conferring upon him a power to receive a report or a complaint and decide whether disciplinary proceedings should be instituted thereon. The only statutory provisions relating to the duties and powers of the Vice-Chancellor are to be found in sections 9(4) and 9(5) of the Constitution.

When contained in a statute '... a duty is an express or implied obligation to do something; and a power is at least a capacity conferred by the Act to do something for the purpose of fulfilling a duty under the Act'.[19] In the context of statutory provisions, a power is thus ancillary to a duty and consists in the capacity or authority to do something incidental to the discharge of the duty enjoined by the statute. For our purposes then, the Vice-Chancellor's 'duties' would encompass those things which he is under a statutory obligation to do and his 'powers' would be the authority or ability or faculty to do that which is required to discharge his duties.

[19] *Patch* v *Ebbage, ex parte Patch* [1952] St R Qd 32 at 41.

Section 9(4) makes it the duty of the Vice-Chancellor to, *inter alia*, see that the provisions of the Constitution as well as University Acts, University Statutes and University Regulations are observed and clothes him with all such powers as may be necessary for this purpose. Section 9(4), however, does not impose upon the Vice-Chancellor the duty or endow him with the power to receive a complaint/report and decide whether disciplinary proceedings should be instituted thereon. Further, no such duty or power of the Vice-Chancellor is to be found in the rest of the Constitution or in any of the University Acts, University Statutes or University Regulations (hereafter referred to collectively as 'the said University legislation') as well as in the Act or the Rules.

Section 9(5) of the Constitution enacts that subject to the provisions of the Constitution, the 'Vice-Chancellor shall ... exercise general supervision over the arrangements for instruction ... and discipline in the University' and may exercise such powers as are conferred upon him by the said University legislation. This enables the Vice-Chancellor *merely* to exercise *general supervision* and even that, *merely* over *arrangements* for 'instruction ... and discipline'. Just as it cannot be claimed that this provision imposes upon the Vice-Chancellor, as Vice-Chancellor, a duty to personally teach any of the courses offered by the University, it cannot be claimed that it imposes upon him a duty to decide whether disciplinary proceedings should be instituted on a disciplinary report or complaint. That the Vice-Chancellor 'may exercise such powers as may be conferred upon him by' must necessarily refer to such powers as are necessary to discharge his duty to exercise general supervision over arrangements for 'instruction ... and discipline'. Consequently, it can be asserted that section 9(5) of the Constitution does not impose a duty or confer a power upon the Vice-Chancellor to handle the preliminary processing of a report or complaint.

Section 9(3) of the Constitution declares that 'the Vice-Chancellor shall be the principal executive ... officer of the University'. Under section 7(1) of the Act, the University is a body corporate. It is thus a statutory corporation.

Does the principal executive officer of a statutory corporation have the inherent right to decide whether disciplinary proceedings should be instituted upon a report or complaint? As no 'inherent rights' can be claimed on behalf of an entity created by statute, it follows that an officer thereof cannot pluck such inherent powers out of the air. Thus there is no inherent right in the Vice-Chancellor as the principal executive officer of a statutory corporation to handle the preliminary processing of a report/complaint.

A corporation can do such acts as are reasonably incidental to the carrying out of the objects of the corporation and the power so to do is in the governing body of the corporation. Normally such actions are performed by the principal executive officer of the corporation acting under powers delegated to him by the corporation's governing body. This would apply to the Vice-Chancellor as the principal executive officer of the University when he receives a report or complaint and decides whether disciplinary action should be instituted thereon if, in the first instance, the Council has the power to exercise disciplinary functions. However, by virtue of sections 7, 16A and 16C of the Act and section 4 of the Constitution, the Council has no such power. This was decided by the Federal Court in *Fadzil bin Mohamed Noor* v *Universiti Teknologi Malaysia*.[20] (The Universiti Teknologi Malaysia is a university established under the Act and has a constitution which is, save for the name of the university appearing therein, in *pari materia* with the Constitution). Thus for the Vice-Chancellor to purport to handle the preliminary processing of a report or complaint as an action reasonably incidental to the carrying out of the objects of the University would be to act *ultra vires* the Act.

Another issue that has to be addressed is whether section 16A(1) of the Act appointing the Vice-Chancellor a member of the DC invokes the exception to the *nemo judex* rule known as the 'rule of necessity'

[20][1981] 2 MLJ 196.

> ... which is perhaps the greatest single common law exception to the general rule that an adjudicator who appears to be biased or prejudiced must disqualify himself from participating in a proceeding. The rule is firmly established in both English and Commonwealth jurisdictions and in American jurisdictions and it is to the effect that disqualification of an adjudicator will not be permitted to destroy the only tribunal with power to act. The rule applies regardless of whether the disqualification arguably arises from the combination of prosecutorial and judicial functions, pecuniary interest, personal hostility or bias....[21]

As the Act has not provided any alternative, section 16A(1) could be said to leave the Vice-Chancellor with no option but to act in terms of the said section. That is to say, the Vice-Chancellor is bound to act *ex necessitate* or under the rule of necessity. There are, however, limitations on the operation of the rule of necessity. One such limitation is

> ... that the rule is inapplicable if the disqualification of a member will leave a quorum of the administrative agency capable of acting. Clearly the rule is inapplicable where the statute provides an alternative to the biased tribunal or where the statute contemplates that a majority of the agency can reach a decision.[22]

Another is

> ... that even the rule of necessity will not justify an adjudicator sitting where actual bias can be shown. The rule as to bias rests upon the existence of a real likelihood of bias and the consequences that a hearing may be unfair:....[23]

Performing as an adjudicator in terms of section 16A(1) of the Act is just one of the many statutory functions of

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[21] *Supra* n 16 at pp 138-139.
[22] *Ibid* at p 140.
[23] *Ibid* at p 141.

the Vice-Chancellor. Attending meetings of the Council, of which he is a member under section 15(1) of the Constitution, is also a statutory function of the Vice-Chancellor. There is no requirement in the Constitution that at a meeting of the Council, the Vice-Chancellor must disqualify himself from participation in any discussion relating to any business in which he is interested. Yet if the Vice-Chancellor does not so disqualify himself, he would be guilty of an offence under section 2 of the Emergency (Essential Powers) Ordinance No. 22/1970 as is established by the decisions of the Federal Court in *Public Prosecutor* v *Datuk Tan Cheng Swee & Anor*[24] and *Haji Abdul Ghani bin Ishak & Anor* v *Public Prosecutor*.[25] In other words, the Vice-Chancellor is disabled from performing his statutory function by law. If it can be said that the Vice-Chancellor has predetermined the guilt of a staff member charged with a disciplinary offence, the situation becomes one in which he is unable to act as an adjudicator as the law, that is, the *nemo judex* rule has cast a disability on him to act in the same way as section 2 of the Emergency (Essential Powers) Ordinance No. 22/1970 has cast a disability on him to act whenever the Council transacts any business in which he is interested.[26]

The rule of necessity would operate if, in spite of the Vice-Chancellor's predetermination, his disqualification as one of three adjudicators would leave the DC unable to discharge its disciplinary functions. This could happen if all three members were required to constitute the quorum for the DC. The Act and the Rules are silent on the question of the quorum required for a meeting of the DC. As no quorum is specified for a meeting of the DC, the common law relating to meetings applies. The common law rule is that if no quorum is specified, a majority of the body must be present for its proceedings to be

[24][1980] 2 MLJ 276.
[25][1981] 2 MLJ 230.
[26]The argument in this paragraph is indebted to the judgment of the Singapore High

valid: *Re Murray & Municipal District of Rockyview No 44.*[27] The common law aside, the DC is subject to section 38 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) which reads:

> Where by or under a written law any act or thing may or is required to be done by more than two persons, a majority of them may do it.

Thus the Vice-Chancellor does not have to be present for the DC to discharge its disciplinary functions. Accordingly, the rule of necessity cannot operate if the Vice-Chancellor is disqualified by reason of bias.

IV. PREDETERMINATION BY THE VICE-CHANCELLOR

Even when the abrogation of the *nemo judex* rule is effected by the legislature, a decision by an adjudicator will be invalidated if actual bias on his part can be shown: *Re Gooliab and Minister of Citizenship and Immigration.*[28] An instance of actual bias is actual predetermination: *Re O'Driscoll, Ex p Frethey*[29] and *Anderton* v *Auckland City Council.*[30] Disqualifying predetermination of the guilt or innocence of a staff member can occur when the Vice-Chancellor exercises the very wide powers conferred upon him by section 18 of the Constitution to appoint and to remove at will academic heads, that is, heads of academic units of the University (hereafter 'the section 18 power').[31]

Court in *Anwar Siraj* v *Tang I Fang* [1982] 1 MLJ 308 at 310.

[27](1980) 110 DLR (3d) 641 at 658 (Alta CA). Lanham D, "The Quorum in Public Law" (1985) *Public Law* 385 cites judicial decisions which suggest that where the body is small and the power is relatively important, the whole membership of the body must exercise the power in question. Those decisions cannot apply to section 16A(1) of the Act because it is governed by section 38 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989).

[28](1967) 63 DLR (2d) 224.

[29](1902) 21 NZLR 317.

[30][1978] 1 NZLR 657.

[31]See *Dr Amir Hussein bin Baharuddin* v *Universiti Sains Malaysia* [1989] 3 MLJ 298.

Disqualifying predetermination infringing the *nemo judex* rule would arise if, in exercising the section 18 power:

(a) the Vice-Chancellor informs the academic head that the ground for revoking his academic headship is that he (the Vice-Chancellor) is in possession of facts which reveal a breach of discipline by the academic head; AND,

(b) the Vice-Chancellor by words or conduct indicates his belief that such a breach of discipline has been committed by the academic head; AND,

(c) in disciplinary proceedings subsequently instituted against the former academic head in respect of the facts of which he was informed by the Vice-Chancellor as the grounds for revoking his appointment, the Vice-Chancellor sits as a member of the DC which meets to hear the case against him.

This is clearly illustrated by the case discussed next.

The defendant in Disciplinary Case No: UM-12/91/A(Ak) had been appointed a Deputy Dean by one Vice-Chancellor who was replaced in 1990 by yet another Vice-Chancellor (hereafter 'the new Vice-Chancellor'). The defendant was summoned by the new Vice-Chancellor who, after telling him that he had breached a specific provision of the Rules, asked him to resign from his appointment as Deputy Dean. The defendant refused to resign. Shortly after, the defendant was stripped of his academic headship by a letter of revocation which gave no reason. The new Vice-Chancellor subsequently caused disciplinary proceedings to be instituted against the defendant. At the disciplinary hearings, the new Vice-Chancellor sat as a member of the DC. It has to be noted that the defendant did not object to the new Vice-Chancellor's membership of the DC.

In telling the defendant that he had breached a specific Rule, the new Vice-Chancellor was saying that he had decided that the defendant was guilty of the breach of

discipline subsequently alleged against him. The new Vice-Chancellor's requesting the defendant to resign from, and his stripping him of his academic headship upon his refusal to accede to his request also bespoke the new Vice-Chancellor's decision that he was guilty. The new Vice-Chancellor thus had predetermined the very issue (the guilt or innocence of the defendant) that the Disciplinary Committee was subsequently convened to determine. Predetermination by a decision-maker activates the *nemo judex* rule which disables the decision-maker from sitting in adjudication: *Ng Yuk-kin* v *R*[32] and *Committee for Justice & Liberty* v *National Energy Board*.[33] Thus, the Vice-Chancellor should have been disqualified from sitting on the DC. This conclusion is fortified by the fact that section 18 of the Constitution does not provide that any action thereunder shall be without prejudice to the Vice-Chancellor's membership of the DC established under section 16A(1) of the Act and by the fact that section 16A(1) does not state that the Vice-Chancellor shall not be disqualified from membership of the DC by reason of any action he might have taken under any other provision of the Act.

V. CONCLUSION

It is the prior involvement of the Vice-Chancellor with the facts of a case in respect of which he subsequently sits to adjudicate as a member of the DC that breaches the *nemo judex* rule. The Vice-Chancellor's prior involvement occurs because of a *lacuna*; neither the Act nor the Constitution nor the Rules authorises any one or more or all three members of the DC or any other Authority or body or officer of the University to receive a report or complaint and to decide whether disciplinary proceedings should be instituted thereon. In practice, this *lacuna* is overcome by the Vice-Chancellor receiving most reports or complaints and either causing disciplinary action to be taken thereon or to directing that no action be

[32](1955) 39 HKLR 111.
[33](1978) 68 DLR (3d) 716 (SCC).

taken on the complaint or report. Clearly, the Act needs to be amended to enable some designated officer of the University to handle the preliminary processing of a report or complaint. Currently, most reports or complaints are directed to the Vice-Chancellor as the head of the University and there is no reason to suppose that this practice will change. Amending the Act to enable the-Vice-Chancellor to handle the preliminary processing of a complaint or report would abrogate the *nemo judex* rule specifically in relation to an adjudicator's prior involvement with the facts of a case. It would not, however, quell the uneasiness generated by the statutory fusion of the 'prosecutorial' and the 'judicial' functions in the Vice-Chancellor. But this uneasiness will disappear if, as is suggested in the next paragraph, the Act is also amended to replace the Vice-Chancellor on the DC.

Predetermination, as discussed above, arises because the Vice-Chancellor's power to remove an academic head under section 18 of the Constitution, when exercised on disciplinary grounds, conflicts with his functions as a member of the DC under section 16A(1) of the Act. Technically, the conflict could readily be resolved by amending either section 18 of the Constitution to provide that any action thereunder shall be without prejudice to the Vice-Chancellor's membership of the DC established under section 16A(1) of the Act or section 16A(1) to provide that no decision of the DC shall be invalidated by reason of any action that the Vice-Chancellor might have taken under any other provision of the Act or the Constitution. However, neither amendment addresses the genuine fear that following the exercise of the section 18 power in circumstances involving an alleged disciplinary offence, the Vice-Chancellor cannot be unbiased in adjudicating the case of a staff member charged with the very misconduct for which he (the Vice-Chancellor) revoked his academic headship. Thus, unless there are compelling grounds to the contrary, the better solution to the problem of predetermination would appear to be an amendment to section 16A(1) of the Act to replace the Vice-Chancellor on the DC with, perhaps, the Deputy Vice-Chancellor in charge of person-

nel matters. This would enable the Vice-Chancellor to exercise the section 18 powers as necessary without impinging on any associated disciplinary proceedings.

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