Constitution: The Supreme Law

> " …TheConstitution[is]theSupremeLaw,unchangeable by ordinary means, … distinct from ordinary law …
>
> It is the Supreme Law because it settles the norms of corporate behavior and the principles of good governance … It is thus the most vital working document which we created and possess. "

—Raja Azlan Shah FJ (as he then was)
Loh Kooi Choon v Government of Malaysia
[1977] 2 MLJ 187, FC at 190

HRH Sultan Azlan Shah

Judicial Career

On His Royal Highness's return from England after his studies, he joined the Judicial and Legal Service of the then Federation of Malaya and served as the Assistant State Secretary of Perak, First Class Magistrate, and as President of the Sessions Court. His Royal Highness was subsequently appointed to the following offices: Federal Counsel and Deputy Public Prosecutor; Legal Adviser of the State of Pahang, and later of Johore; Registrar of the High Court of Malaya; and subsequently the Chief Registrar of the Federal Court of Malaysia.

In 1965, at the age of only thirty-seven years, His Royal Highness was elevated to the Bench of the High Court of Malaya. In 1973, His Royal Highness was made a Federal Court Judge and six years later in 1979, His Royal Highness was appointed the Chief Justice of the High Court of Malaya, an office that he held until his appointment as the Lord President of the Federal Court of Malaysia on 12 November 1982.

The judgments delivered by His Royal Highness on the Bench have now been published in separate volume: *Judgments of His Royal Highness Sultan Azlan Shah with Commentary*, 1986, edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur.

Independence of the judiciary

"The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law.

They are, therefore, essential for the preservation of the Rule of Law."

—HRH Sultan Azlan Shah
Supremacy of Law in Malaysia

“A free democratic society requires the law to recognise and protect the right of the public to the information necessary to make their own choices and decisions on public and private matters, to express their own opinions, and to be able to act to correct injustice to themselves and their family.

None of these rights can be fully effective unless the public can obtain information.”

—HRH Sultan Azlan Shah
The Right to Know

3 The Right to Know

Public Lecture, Universiti Sains Malaysia
Penang, 19 December 1986

I deem it a great privilege to be invited to deliver this lecture which is part of the Public Lecture Series of Universiti Sains Malaysia. When I was first invited to deliver this lecture early this year, I decided that I would speak to you on the topic "The Right to Know", a subject which has been of great interest to me since the time I was on the Bench.

At that stage, I was of the view that the topic would be one which most of you would not have been very familiar with. However, since the time I prepared this lecture, certain events in the country have made the subject of my lecture most topical and they have contributed towards the realisation that an individual's right to know should always be safeguarded. At the same time, under certain circumstances, a certain degree of non-disclosure may be justifiable for the protection of the interests of the State and that of the public. It is this delicate balance between the interests of the

State and that of the individual that one always has to bear in mind when any action is taken to limit the accepted scope of the right to know.

Ladies and Gentlemen, as this lecture was prepared well before the recent events with which all of you are now most familiar, I do not propose to address you on these matters. Some years ago, in 1978, when delivering the judgment of the Federal Court in the important case of *BA Rao v Sapuran Kaur*[1] I said:

> It is best that truth should be out and that truth should prevail.[2]

The main theme, therefore, of my lecture this evening will be on the importance of truth and the process by which an individual may have access to the truth. After all, it is truth and the protection of individual rights which constitute the important aspects of a democratic society.

It is truth and the protection of individual rights which constitute the important aspects of a democratic society.

The term "right to know" is generally used in the context of the right of the general public to have access to information of governmental actions. I shall in this evening's lecture use the term in a wider sense. The term "right to know" is also relevant to an individual when his rights are affected by executive or administrative actions. I propose to deal with the topic to cover two main aspects:

1
[1978] 2 MLJ 146.

2
Ibid at 151.

(i) the rights of the general public to information; and
(ii) the rights of an individual to have information on matters affecting his own rights and interests.

Rights of the public

It was at one time thought that the public should not be informed of all actions, deliberations and decisions made by the executive or other administrative authorities. It was felt that the data which was held by the Government was too important to be entrusted to ordinary people. However, in recent years there has been a growing awareness throughout the democratic world that the general public do have a right to have access to information which is of public interest.

At this juncture, it must be borne in mind that the right to such information cannot be an absolute right. There are certain kinds of information which the Government cannot possibly disclose to the public. These are mainly those affecting the security of the nation which may be to the prejudice of other members of the public. In deciding how much information the State may withhold from the public and how much may be disclosed, a balance has to be drawn between two main principles: on the one hand the disclosure of certain kinds of information may hinder the efficient functioning of the executive and administrative machinery, whilst on the other, the rights of the general public may be restricted if access to certain information is withheld from them.

Though the Federal Constitution does not expressly provide that all persons have the "right to know" (it does not mention the right to information), the fundamental right of expression as

embodied in Article 10(1)(a) will be meaningless if the public do not have the necessary information on which they can express their views.

Though the Federal Constitution does not expressly provide that all persons have the "right to know", the fundamental right of expression as embodied in Article 10(1)(a) will be meaningless if the public do not have the necessary information on which they can express their views.

However, the right to know is not confined to public affairs alone. It arises also in private and family life, employment, the education of children, the health and social security of the family. In short, a free democratic society requires the law to recognise and protect the right of the public to the information necessary to make their own choices and decisions on public and private matters, to express their own opinions, and to be able to act to correct injustice to themselves and their family. None of these rights can be fully effective unless the public can obtain information.

Freedom of the press

Many read the daily newspapers or weekly journals for news or entertainment. The press in any country is the primary means by which the ordinary citizen is able to obtain information. It is through what is reported in the press that one is able to know what is generally happening in the country. The press is the main means of knowing the laws which are being debated in Parliament; the press is the main means of knowing how these laws, when passed,

are being administered; and it is through the press that the decisions of the courts are made known to the public. The role of the press, therefore, cannot be underestimated.

For the ordinary citizen, therefore, if the right to know is to be of any meaning, society must have access to an independent and responsible press. The English courts have over recent years attempted to maintain the freedom of the press. In a number of significant decisions the courts have emphasised the importance of a free press. It must however be pointed out that it would be wrong to think that in its efforts to play such an important role in the dissemination of information to the general public, the press should have absolute freedom to report or comment on any item which it so desires. Some restrictions are necessary and they are bound to grow as society becomes increasingly developed and has more regard for the protection of others, for example the right to privacy.[3]

Society, for example, accepts that the reporting of certain matters, particularly those affecting the security of the country, should be closely guarded. In a country like Malaysia, we have accepted the fact that it is not only the reporting of items affecting the security of the nation, but also those affecting the peace and harmony of its citizens which should possibly be controlled.[4]

However, in an attempt to maintain peace and security, the controls imposed on the press should be reasonable. Too much control will not only muzzle the press, but also affect the society's right to know. On the other hand, of course, an unfettered freedom of the press may lead to abuse. For example, newspapers are tempted from time to time to increase their readership by indulging in sensational news items. Some of these reports are the writings of journalists who have not researched the report. In every country

3
Editor's note:
See the Seventeenth Sultan Azlan Shah Law Lecture, "Right to Privacy: The Impact of the Human Rights Act 1998", by Lord Phillips of Worth Matravers, reproduced in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell, chapter 17.

4
Editor's note:
For example the Official Secrets Act 1972 (Act 88), discussed below. See also the Sedition Act 1948 (Act 15).

you have such newspapers. However, the irresponsible acts of a few journalists should not be used as an excuse to curb the freedom of the press. As it is often said, "one swallow does not make a summer".

In an attempt to maintain peace and security, the controls imposed on the press should be reasonable. Too much control will not only muzzle the press, but also affect the society's right to know. Unfettered freedom of the press, however, may lead to abuse.

It should not be forgotten that there are other laws, particularly the laws of libel and slander and sedition, which may be used to place a check on irresponsible reporting. In fact in certain countries like France, West Germany, Austria, Sweden, Denmark and Canada, the law expressly provides that an individual has a legal right of reply to any false report published by a newspaper. Maybe, we too in Malaysia should have a similar law. To the Government in power, the press is, of course, a convenient vehicle for the propagation of information which it would like the electorate to have. At the same time, the temptations for placing tighter controls on the press are most appealing to the administration. Governments in certain countries therefore prefer to place some form of direct or indirect control over the press.

Very recently I read a book which was published early this year entitled *Britain, An Unfree Country*.[5] The authors of the book are of the view that the British society over the recent years has become "less open and less free than … other Western nations"

5
Terrence Du Quesne and Edward Goodman, 1986, Hetrodox Books.

and that "at the European Court of Human Rights, Britain has been the worst offender". The authors attribute the lack of access to information as one of the main reasons. One of the conclusions reached by the authors is that:

> Because the management of news by government and bureaucracy is now so sophisticated and effective, the media give a deliberately distorted picture … Information is power, and control of the flow of news provides a potent weapon. It is one which has been exploited by every [British] prime minister in memory.[6]

In certain countries, the editors of newspapers are appointed by the Government in power; in others the issuance of an annual licence may be used as a lever of control. Such controls, when they are not applied for the reasons of public order, public health or national security, should be sparingly used, if need be. Without a free press, as I have said earlier, the right of free expression and the right to know, will mean nothing. To quote Lord Denning:

> It is better to have too much freedom than too much control: but it is better still to strike the happy mean.[7]

It is the responsibility of the press not to abuse the freedom which it has. It is the duty of editors and reporters to maintain a high standard of journalism, so as to give fair and balanced reports.

At this juncture, I should also like to emphasise that it is also the responsibility of the press not to abuse the freedom which it has. It is the duty of editors and reporters to maintain a high standard

6
Ibid at pages 17 and 28.

7
Lord Denning, "The Free Press" published in *The Road to Justice*, pages 64–87.

of journalism, so as to give fair and balanced reports. Journalists who use the investigative technique of reporting must ensure that the facts as reported are verified as much as possible. It is, of course, difficult in certain cases for the journalist to confirm every fact as he may not have the means to do so. In such cases, so long as the good faith of the journalist is maintained, executive interference should be minimal.

Bringing to light the abuses and dangers of certain actions, be it of the executive or of the private sector, will not only benefit the public, but also the Government in general.

The right to know and the right to free expression are as basic and important as any other fundamental right enshrined in the Federal Constitution.

In maintaining the balance between freedom of the press and the control of it by the executive, judges should not overlook their duty. It is, after all, to them that the citizen turns, to ensure that his rights are upheld. For this reason the judges should always maintain their independence, to ensure that the rights of the individual are upheld. They should be bold enough to strike at and to declare unlawful any interference on the freedom of the press or of the right to know which is not in accordance with the law. Except where they themselves are clearly satisfied that a particular act of the executive which restricts these rights is necessary for the maintenance of the security and peace of the nation, they should always aim to protect these rights. It should not be overlooked that the right to know and the right to free expression are as basic and important as any other fundamental right enshrined in the Federal Constitution.

It should further be pointed out that neither the executive nor even Parliament should attempt to curb the course of justice. Judicial independence is a cornerstone in any democratic country, as every lawyer and politician knows. The judges are independent of all—the executive, Parliament and from within themselves—and are free to act in an independent and unbiased manner. No member of the Government, no Member of Parliament, and no official of any Government department has any right whatever to direct or influence the decisions of any of the judges. It is the sure knowledge of this that gives the public their confidence in the judges.

Judicial independence is a cornerstone in any democratic country, as every lawyer and politician knows. The judges are independent of all—the executive, Parliament and from within themselves—and are free to act in an independent and unbiased manner.

The judges are not beholden politically to any Government. They owe no loyalty to Ministers. They have longer professional lives than most Ministers. They, like civil servants, see Governments come and go. They are "lions under the throne" but that seat is occupied in their eyes not by Kings, Presidents or Prime Ministers but by the law and their conception of the public interest. It is to that law and to that conception that they owe their allegiance. In that lies their strength.

There is now a widespread disquiet about excessive secrecy of Government and a call for proper information and democratic consultation and participation. Without reasonable access to information, the people cannot participate or play an effective role

in a country which subscribes to the principles of government of the people, by the people, for the people. To quote Lord Denning again:

> [The] great institutions, Parliament, the Press and the Judges are [the] safeguard of justice and liberty; and they embody the spirit of the Constitution.[8]

Official Secrets Act

There is no denying that even in the most democratic country, there must be certain restrictions on access to certain kinds of information relating to the security of the country. Legislation in the form of the Official Secrets Act, therefore, is in force to restrict the communication of information relating to certain matters usually classified as official secrets.

The origin of the Official Secrets Act lies in the need, particularly during wartime, for restrictions to be imposed on information affecting the security of the nation. The English Parliament was prompted to enact the Official Secrets Act of 1889[9] to prevent spying and "leaks" to enemies. The 1911 Act made not only the communication of certain official information an offence, but also the receipt of such information. Though from its inception, the legislation in England on official secrets has been severely criticised, the Act still remains on the statute book.

The Franks Committee which reviewed the Official Secrets Act of England in 1971–1972 expressed great dissatisfaction with the Act. The Committee pointed out that as the Act was worded, "over

8
See generally, Jowell, *Lord Denning: The Judge and the Law*, 1984.

9
This Act was radically revised and extended in 1911, and further amended in 1920.

2,000 differently worded charges" could be brought under it. The Committee said:

> [The Act] catches all official documents and information. It makes no distinction of kind, and no distinction of degree. A blanket is thrown over everything; nothing escapes.

In his book, *The Right to Know: The Inside Story of the Belgrano Affair,*[10] Clive Ponting, who himself was charged under the Official Secrets Act for giving certain information relating to the 1982 Falklands War to an opposition politician well after the Falklands War, discusses in detail the scope of the Act, its history and the debate on freedom of information.

In this particular case, Ponting had disclosed certain information which showed that the British Government had suppressed certain facts regarding the sinking of the Argentinian cruiser, *The General Belgrano*. The Government had asserted that *The Belgrano* was sunk because it was a threat to the British ships. The information which Ponting had, indicated that far from *The Belgrano* intending to attack the British ships, it was in fact heading home, back to Argentina. I only need to say at this point that the jury acquitted Ponting.

In Malaysia, the Official Secrets Act of 1972[11] is based on the English Act of 1911. When the Act was introduced in Parliament in 1972 it was said that the object of the then proposed Bill was to equip the Government with adequate powers to deal with spies of foreign countries. The Malaysian Act does not define what may amount to "secret information". It is therefore left to the executive to decide what information may be classified as "official secret". It grants a wide discretion to the Minister concerned to determine what should

10
1985, Sphere Books, London.

11
Act 88.
See also Official Secrets (Amendment) Act 1986, Act A660.

be classified as official secrets. Whether, in any particular case, any document or information the Government requires is to be kept from public knowledge or from the knowledge of specified persons depends on the manner the Government treats that document or information. As pointed out by a leading constitutional writer:

> Thus the government is the sole judge of what information is to be kept secret. It is within the sole discretion of the executive to classify information …[12]

The scope of the Malaysian Act and the absolute discretion given thereunder to the executive to determine what may amount to an official secret is indeed very wide and far-reaching. It is in fact, so widely drafted that little leeway is even given to the courts to check any excessive exercise of these powers by the Government.

In *Lim Kit Siang v Public Prosecutor*[13] in delivering the judgment of the Federal Court, I, as the then Chief Justice, had to concede that the courts, on the interpretation of the Act, had no power "to create a right for any person to ignore the provisions of the Official Secrets Act".[14] The Federal Court pointed out that it was for Parliament, if it deemed it necessary, to restrict the scope of the Act.

The decision of the Federal Court, however, should not be taken to mean that any person once charged under the Act will in all cases be convicted of the offence. The courts still have the power, limited though it may be, in cases where no offence is clearly committed under the provisions of the Act, to acquit a person. I would at this stage like to emphasise that as such wide powers are given to the executive under the Act, and as little discretion is given to the courts in the interpretation of these provisions, it is left to

12
Professor MP Jain, "Official Secrets Act and Right to Information", a paper presented at the 1985 Malaysian Law Conference, Kuala Lumpur.

13
[1980] 1 MLJ 293, FC.

14
Ibid at 297.

the Attorney-General to ensure that prosecution is brought only if he is clearly satisfied that the security of the nation is prejudiced by the communication of any such information. A careful and sparing exercise of this power given to the Attorney-General is the only check on the wide powers given to the executive. As the Franks Committee pointed out:

> … the catch-all provision of [the English] Act is only saved from absurdity in operation by the sparing exercise of the public prosecutor in prosecuting.

That the Official Secrets Act makes serious inroads into the individual's right to know, few would deny. Yet, fewer still would deny that the Government in power must have the power to restrict the communication of information affecting the security of the country. The difficulty then is in seeking a delicate balance between these two interests. In a free and democratic country like ours, where fundamental rights are guaranteed under the Constitution, executive encroachment on these rights should be closely guarded.

The three branches of the Government—the legislature, the executive and the judiciary—should ensure that the means of obtaining information is made available to the people, so that they can play a meaningful role in the participation of an open Government.

In upholding these rights, the three branches of the Government—the legislature, the executive and the judiciary—should ensure that the means of obtaining information is made available to the people, so that they can play a meaningful role in

the participation of an open Government. It should not be forgotten that members of the legislature are representatives of the people, who have been elected to legislate on their behalf, and that the responsibility of the executive (which is usually made up of elected representatives) is to administer the country on the people's behalf. The executive possesses no other power except that which has been given to them by the people themselves. Therefore in the exercise of these powers, the executive should ensure that they do not clothe themselves with excessive powers which in turn may be invoked by them to curb the rights provided for by the Constitution.

Whatever ought to be done by the Government, ought to be guided by the opinion of the people. That is the greatest strength of our democratic system. But once the majority is omnipotent, it becomes an absolute farce.

The same caution should also be displayed by the members of the legislature. In a country where the Constitution may be amended by a two-thirds majority, members of the legislature (both of the Dewan Rakyat and Dewan Negara) should always bear in mind the interests of the people over and above the interests of their political party, or I may add, even their own. Whatever ought to be done by the Government, ought to be guided by the opinion of the people. That is the greatest strength of our democratic system. But once the majority is omnipotent, it becomes an absolute farce.

Therefore, any amendment to the Constitution or any proposed law should be carefully deliberated. The interests of the State and the rights of the individual should always be maintained.

I have no doubt in my mind that sometimes this is not an easy task. But, however difficult it may be, Members of Parliament should never forget the fact that they are merely representatives elected by the people with a duty to protect the interests of the State and the people. I hope we shall never forget that we created this nation which we call Malaysia, not to serve ourselves, but to serve certain ideals of mankind. They should therefore not lose sight of this fact, especially when they are weighing the interests of the State and individuals' rights. They should provide adequate checks on any powers given to the executive under a proposed legislation, and more importantly, members of the legislature should resist the temptation of introducing legislation which has far-reaching consequences on the individual's rights no matter how expedient it may seem.

I hope we shall never forget that we created this nation which we call Malaysia, not to serve ourselves, but to serve certain ideals of mankind.

Ladies and Gentlemen, in this regard, I must point out to you the development as to the right to know in other countries.

There is a trend in many countries over the recent years for the introduction of legislation which expressly gives the people the right to have more access to information, especially to documents which are in the possession of Ministers, Government departments and public authorities.

In 1966, the Freedom of Information Act was introduced in the United States of America. The enactment of this Act was regarded

as a "landmark event" in the history of American administrative law. The Act entitles anyone to have access to any identifiable document. A positive duty is imposed on the Government to supply such information as may be required by the public. The Act imposes a general duty on the Government to supply all information except those falling within the specified categories. The exempted categories are mainly those relating to national defence or foreign policy. It must be stressed that the Freedom of Information Act makes disclosure the general rule and not the exception.

In 1982 the Canadian Parliament passed the Access to Information Act. This Act specifically provides for the right to request and to be given access to any record under the control of a Government institution. The Act also provides for every Minister to publish on a periodic basis information on the activities of his ministry. Certain information, however, is exempted from disclosure. This relates mainly to international affairs and defence, information obtained in confidence, and that concerning the economic interests of Canada.

In 1982 also, the Australian Freedom of Information Act, and the Official Information Act of New Zealand were introduced by Australia and New Zealand respectively.

An open Government must be the hallmark of a truly democratic country.

The Australian Act provides that all persons have a legally enforceable right of access to documents of an agency and of official documents of a Minister. However, to this general rule a number of

documents are exempt from access, for example, those which are regarded as contrary to the public interest to disclose, that is, such documents affecting security, defence or international relations.

The New Zealand legislation gives both New Zealand citizens and permanent residents a right to request official information. Except in certain cases, the appropriate authority is under a duty to disclose such information as requested. Besides reasons of security, defence and international relations, the New Zealand Act, like the Canadian Act, expressly provides that any disclosure of information which would be damaging to the economy of the country need not be disclosed.

You will therefore notice that positive steps have been taken by the legislatures in these countries which I have mentioned to introduce laws which specifically confer on their citizens a right to know. It is to be hoped that similar legislation will be introduced in Malaysia. As I have stated, the legislation in these countries not only gives citizens the right to the disclosure of information, it at the same time spells out expressly the circumstances under which the executive need not disclose information affecting the security and interests of the country. The rationale behind this legislation is, of course, to enable citizens to participate in the affairs of the Government. If I may quote the words of our first Prime Minister, Tunku Abdul Rahman, from his latest book, *Political Awakening*:

> … everybody has political rights under the Constitution to participate in the government business …[15]

An open Government must be the hallmark of a truly democratic country.

15 At page 96.

The more information that is available to the public, the less are the rumours and suspicions relating to the conduct of Government. The more the lid is kept firmly on the pot, the hotter the steam that escapes. The more the information, the greater the credibility and confidence. A carefully drafted law in Malaysia should give citizens access to certain official information, and at the same time give the executive the right to withhold such information only if it affects security, national interest or the economy of the country.

The more information that is available to the public, the less are the rumours and suspicions relating to the conduct of Government. The more the lid is kept firmly on the pot, the hotter the steam that escapes. The more the information, the greater the credibility and confidence.

Rights of the individual

Right to be heard

I now move on to the second aspect of my lecture dealing with the right of an individual to have information on matters affecting his rights and interests. Many administrative actions are taken by government departments or agencies affecting an individual's right. It is not unheard of for action to be taken against a citizen to deprive him of a licence, his citizenship, his liberty or property. In these circumstances, does the citizen have a right to know the basis of the action taken against him? Should he be told of the reasons for the purported decision?

In these cases, the citizen will not be in a position to defend his affected rights unless he has a right to know the reasons. It is only when he is able to defend himself effectively that he can challenge the arbitrary exercise of a power given to the relevant authority.

Cardinal in Administrative Law are the rules of natural justice: the rule against bias and the right to be heard.

The Privy Council in the case of *B Surinder Singh Kandha v Government of Malaya*[16] observed:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him.[17]

In this area of the law, usually called Administrative Law, where individuals' rights are affected, I am happy to say that the development of the law in Malaysia has generally been towards the protection of the individual. The recent Supreme Court decision[18] involving the *Asian Wall Street* journalist clearly indicates this. It must also be emphasised that it is in this area of the law that the courts have played an effective role to establish that a person has a right to know the reasons or grounds upon which executive action is based. Cardinal in Administrative Law are the rules of natural justice: the rule against bias and the right to be heard. In delivering the judgment of the Federal Court in *Ketua Pengarah Kastam v Ho Kwan Seng*[19] I observed:

> The principles of natural justice … play a very prominent role in Administrative Law … In my opinion, the rules of natural justice

16
[1962] AC 322.

17
Per Lord Denning, ibid at 337.

18
John Peter Berthelsen v DG of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC.

19
[1977] 2 MLJ 152, FC.

> that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action … The silence of the statute affords no argument for excluding the rule, for the "justice of the common law will supply the omission of the legislature".[20]

The right to be heard manifests itself in a number of ways: the right to be informed of the grounds of arrest, and the date, place, and time of the hearing, time to prepare one's case in answer, the right to be represented by counsel and the right to have access to all relevant materials and information relating to one's case.

It is, of course not feasible nor in fact, desirable for administrative bodies to follow all these various aspects of the right to be heard in every case where a decision is made affecting an individual's rights. A strict adherence to the various procedural aspects of the right to be heard tantamounts to a full hearing as in a court of law. If every administrative action, therefore, has to be preceded by such a procedure, the entire administrative system in any country will come to a virtual standstill. It will not only be expensive but the time factor involved in conducting a full hearing will result in chaos in the bureaucratic procedure. For example, it would not be possible for an immigration officer at the airport to conduct a full scale hearing before admission into the country is refused to any immigrant.[21] All that an immigration officer should do is to inform the immigrant the reasons for refusing entry. It is then the duty of the immigrant to satisfy the officer as to why he should be granted entry.

For this reason, the courts have attempted over the recent years to strike a compromise between the need to protect an individual's right against abuses by administrative bodies and the

20
Ibid at 153–154.

21
See *Re HK (an infant)* [1967] 2 QB 617.

need to maintain the efficiency of the administration. The courts have been conscious of the fact that greater injustice may be caused by inefficient administrative actions. There is over the recent years a growing body of cases on this important aspect of the law.[22]

If I may summarise the present position, it seems to be as follows: the right to be heard is not an absolute right given to every individual who claims that he has been adversely affected by an administrative decision.

Though the important decision of the House of Lords in *Ridge v Baldwin*[23] seems to suggest that any body having the power to make decisions affecting rights of individuals is under a duty to give a fair hearing, the recent trend appears to be that this rule should not only be extended to decisions affecting vested rights, but also to decisions affecting the legitimate expectations of individuals.

> Ministers and public bodies are expected to live up to the legitimate expectations which they have aroused in others by their statements or conduct.

The legitimate expectations doctrine[24] is new, the precise limits of which have yet to be worked out. But it is an interesting development. In essence it is to the effect that Ministers and public bodies are expected to live up to the legitimate expectations which they have aroused in others by their statements or conduct. Therefore, a person who has a legitimate expectation relating to a benefit which is discretionary in nature, should be given a right to be heard if in the exercise of the discretion the decision-maker refuses to grant the benefit.

22
Editor's note:
See generally de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edition, 1995, and First Supplement, 1998.

23
[1964] AC 40, HL.

24
Editor's note:
See further notes at the end of chapter.

Cases on legitimate expectations are usually those where a person applies for the renewal of a licence or permit.[25] But in *Attorney-General of Hong Kong v Ng Yuen Shiu*[26] the Privy Council pointed out that illegal immigrants who had entered Hong Kong from Macau had a right to be heard. They had a legitimate expectation to be allowed to stay in Hong Kong based on an assurance given by the Hong Kong immigration department that they would be treated as if they were illegal immigrants from anywhere other than China.

In *Council for Civil Service Unions v Minister for the Civil Service*, commonly referred to as the *GCHQ* case,[27] the House of Lords held that members of a trade union who had been deprived of their right to belong to their union, would have had a legitimate expectation of consultation before the ban was imposed by the Government, especially since they had always been consulted before changes in working conditions were made.

These cases suggest that legitimate expectations may be created as a result of:

> … establishing a known [lawful] policy guideline, or of consistently following a particular [lawful] course of conduct, or of giving [a lawful] undertaking or assurance which leads citizens dealing with it reasonably to believe that they will be treated in that way.[28]

In such cases, failure to comply with these policies, guidelines or undertaking without first giving the applicant a right to be heard as to "why he ought to be treated in the way he expected" would render the administrative action illegal.

I should perhaps also point out that though in many of the cases dealing with legitimate expectations, judges tend to say that

25
See *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149; *R v Gaming Board, ex parte Benaim and Khaida* [1970] 2 QB 417.
See also *R v Wear Valley DC, ex parte Binks* [1985] 2 All ER 699.

26
[1983] 2 WLR 735.

27
[1984] 1 WLR 1174.

28
Cane, *Introduction to Administrative Law*, OUP, 1986, page 73.
See also *Westminster City Council v Greater London Council* [1986] 2 All ER 278, 288.

the decision maker is under a duty to act fairly and not necessarily under a duty to comply with the rules of natural justice, both these concepts clearly embody the principle that the individual has a right to know the reasons as to why he is being deprived of his legitimate expectation.

Since the preparation of this lecture, I am pleased to note that the Supreme Court of Malaysia has now delivered the judgment in the *Berthelsen* case.[29] The Supreme Court held that the action by the executive to cancel the work permit of the *Asian Wall Street* journalist before the time limit expired was unlawful as the journalist was not given a right to be heard. The Supreme Court held that the journalist had a "legitimate expectation" of being heard.

It is an activist decision by a pragmatic court whose fidelity to judicial enforcement of a fundamental right gave a clear signal to judges, officials and the public. That important decision reiterates the court's commitment to safeguard the rights of an individual under the Constitution. It provides an interesting insight into what constitutes abuse of power by the executive.

As the twentieth century witnessed the increasing influence of Government decisions on the lives of many individuals, abuse of power is inevitable, and the extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the Rule of Law against such abuse.

Therefore, Ladies and Gentlemen, once again the courts have clearly established the principle that an individual has a right to know when his vested rights to legitimate expectations are adversely affected by administrative actions.

29 *John Peter Berthelsen v DG of Immigration, Malaysia & Ors* [1987] 1 MLJ 134, SC.

For fear that I may have given you the impression that the courts have established the rule that there is always a right to be heard before any administrative action is taken against every individual, I should point out that in a number of circumstances, the application of the principle of the right to be heard has been excluded by the courts.

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For example, in the *GCHQ* case the House of Lords in pointing out that the members of the trade union whilst having a legitimate expectation of consultation before the ban was imposed, did not, in the circumstances of the case, have a right to know because information relating to national security was involved.

Furthermore, it does not necessarily mean that in cases dealing with legitimate expectations of the exercise of discretionary powers, there can be no change of policy or practices. The very nature of a discretionary power must entail the power to change. Therefore so long as such changes are not an abuse of power or unreasonable, and so long as the applicant is given the opportunity

to show why such changes should not be implemented, any change in such policy or practice will not be held to be unlawful.

The cases have also established the rule that even though a decision may affect an individual adversely, so long as they do not relate to rights or legitimate expectations, a strict compliance with the rules of natural justice is not necessary. It has, therefore, been said that in cases where an individual applies for a licence or office which he has not held before, a strict compliance with the rules of natural justice is not necessary. In such cases it is said that as the applicant has no right or a legitimate expectation to a licence or office, the administrative authority need not inform him of the reasons for its refusal. The administrative body, however, must act fairly.

In conclusion it may therefore be said that the rules of natural justice apply to forfeiture cases, that is where an individual is deprived of a right or position which he already holds, or to legitimate expectation cases, that is where an individual applies for a renewal or confirmation of a licence or post which he already holds. In the third category of cases, the "application cases", the individual who applies for a licence or post which he does not already have is not entitled to a hearing.[30]

I would like to emphasise that this classification of cases into forfeiture, legitimate expectation and application, though useful and convenient, should not, however be used as a conclusive test for the application of the rules of natural justice. In certain cases, public interest may demand that certain information, especially that affecting the security of the nation should not be disclosed. This is particularly so in cases where prerogative powers are exercised, for example, the granting of pardons by Rulers of any State.[31]

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This classification was enunciated by Megarry VC in *McInnes v Onslow Fane* [1978] 1 WLR 1520 and was followed in *R v Secretary of State for the Environment, ex parte Brent London BC* [1983] 3 All ER 321.

31
See de Smith, *Constitutional and Administrative Law*, 5th edition, page 592. See also *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494.

Crown or Government privilege

I now turn to another area of the law in which the courts have made significant contribution towards the establishment of the right of an individual to have access to certain information or documents which are within the sole knowledge of the Government.

In certain proceedings brought by an individual (usually but not necessarily against the Government) challenging certain executive actions and where the disclosure of certain information held by the executive is most relevant for the success of the action brought by the individual, it is not uncommon for the executive to refuse the disclosure of such information, mainly on the ground that the disclosure of the information sought affects the interests of the State.

This common law rule is embodied in sections 123, 124 and 162 of our Evidence Act 1950[32] which provide that certain unpublished official records relating to affairs of State or any information the disclosure of which would be detrimental or prejudicial to the public interest cannot be disclosed as evidence in court. This wide protection given to the executive against non-disclosure in the interest of the public was in certain situations capable of abuse by the executive. In cases where the disclosure of certain information held by the Government would cause the Government some embarrassment, the executive could apply for protection against disclosure on the grounds that the information would be prejudicial to the public.

In a number of reported cases, particularly in England,[33] the Government attempted to take refuge by refusing the disclosure of certain information on the ground that the disclosure was against

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Act 56.

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Editor's note:
See further notes at the end of the chapter.

the public interest. In some of these cases, the Government was merely attempting to conceal certain information which would reveal the Government in a bad light. To curtail such abuses, the courts have now said that the issue as to whether the disclosure of certain information would be prejudicial to the State or not will be decided not by the executive itself but by the courts.

The House of Lords in the case of *Conway v Rimmer*[34] unanimously held that the Minister's assertion as to the effect of disclosure was not to be accepted as conclusive and that it was for the courts to inspect the documents in question privately in order to determine whether public interest in suppressing them outweighed the interests of the parties to the proceedings and the general public. In that particular case, the House of Lords having inspected the documents overruled the Minister's claim for Crown privilege. The Court ordered the disclosure of the documents.

The Malaysian courts, too, have adopted a similar attitude: In *BA Rao v Sapuran Kaur & Anor*[35] in delivering the judgment of the Federal Court which was concurred by Gill CJ and HS Ong FJ, I observed:

> In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest.[36]

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[1968] AC 910, HL.

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[1978] 2 MLJ 146, FC.

36
Ibid at 150.

I then further observed:

> Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of state is involved", before it permits non-disclosure.[37]

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In that case the respondents had claimed damages on behalf of the estate of the deceased for the death of the deceased as a result of the negligence of the medical officers of a district hospital. A committee of inquiry had been held into the death of the deceased and the respondents had issued a notice to produce the reports and findings of the committee of inquiry. The appellants objected on the ground that the notes and findings of the committee were unpublished official records and therefore privileged from disclosure under section 123 of the Evidence Act 1950.

The trial judge disallowed the objection and ordered production of the reports and findings of the committee. The Federal Court dismissed the appeal and held that the objection as to production and the question of admissibility under sections 123 and 162 of the Evidence Act 1950 should be decided by the court on the consideration of all available evidence. It was for the court, not the executive, ultimately to determine that there was a real basis for the claim that "affairs of State were involved" before it could

37 Ibid.

permit non-disclosure, and a mere assertion of confidentiality and that affairs of State were involved without evidence in support could not shut out relevant evidence. The court, however, held in that case that the documents in question were not unpublished documents relating to affairs of State.

Consequently where the Government or the doctor was sued for negligence, the Government could not screen the alleged wrongful act from the purview of the court on the ground that it was an affair of State demanding protection.

This is a landmark decision insofar as the power of the Government to refuse the production of documents in the court has been subjected to judicial review. The significance of that case lies in the fact that an antiquated provision (section 123 of the Evidence Act 1950) has been interpreted so as to bring the relevant law in Malaysia in line with the law in England, India, the United States, Australia and New Zealand.

Ladies and Gentlemen, I should perhaps point out to you that one of the arguments which has often been relied upon by the State or the executive against disclosure of certain documents is that such disclosure will hamper the day to day administration of the civil service. It is said that if certain documents are subject to disclosure, civil servants writing reports on certain matters will not have the "freedom and candour of communication" with and within the public service. This argument, however, has not gained the favour of the courts. It was scorned at by the House of Lords in *Conway v Rimmer* and in *BA Rao*'s case I observed:

> [If] this unsound argument is allowed to run riot, free rein would be given to the tendency to secrecy which is inherent in the public

> service. Freedom and candour of communication is not a factor in itself that will persuade the court to order that information be not disclosed.[38]

The world of secrets would make us feel less free and less democratic than we like to believe.

Furthermore, I do not think that public servants would shirk from giving honest opinions just because there is a distant chance that their report may one day happen to be disclosed in open court. I am sure that you would agree with me that our civil servants are "made of sterner stuff".

Finally, Ladies and Gentlemen, I would like to emphasise a point—a point which I have consistently emphasised during my tenure on the Bench:

> In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.[39]

Conclusion

The right of access to information has assumed greater importance in recent years as one of the steps in achieving the concept of open government. In our country the movement towards open

38
Ibid at 151.

39
Ibid at 151.

government has started to take form and shape, but progress has been somewhat slow.

I believe that we need a Freedom of Information Act, under which members of the public have a right of access to specifically requested public records, and that these should be made available, as of right, within a reasonable time. A Freedom of Information Act will greatly improve the climate of trust in this country.

> The right to know expresses, then, much more than mere curiosity. It is based upon a natural human desire for the truth, insofar as mortal man isable to achieve that truth.

The right to know expresses, then, much more than mere curiosity. It is based upon a natural human desire for the truth, insofar as mortal man is able to achieve that truth.

Two thousand years ago, a Roman judge asked, in a notable trial, "What is truth?" We are told that he did not wait for an answer. To discover the truth of any matter, whether within a civil or criminal trial, in investigative journalism or historical research is not, as many of us know, an easy task.

Editor's notes

This lecture is referred to in MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edition, Malayan Law Journal, 1997, at page 611.

Legitimate expectations: As to legitimate expectations, generally, see 1(1) *Halsbury's Laws of England*, 4th edition, paragraphs 90 and 92; and MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edition, Malayan Law Journal, 1997, pages 527–538. See also de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edition, Sweet & Maxwell, 1995, paragraphs 8-037 to 8-066, and 13-026 to 13-035; and the *First Supplement to the Fifth Edition*.

Public interest immunity: The doctrine of crown privilege is now more commonly known as public interest immunity. In recent years, there has been tremendous development under English law in the area of public interest immunity.

In a paper prepared in 1996 by the Treasury Solicitor's Office entitled "Paper on Public Interest Immunity", it was said:

> 2.1 The law on PII [public interest immunity] has changed significantly since the time of *Matrix Churchill*. In 1992, it was understood by those advising ministers that where a document attracted PII it was the duty of ministers, according to the judicial authorities, to identify and advance to the court the public interest in the document being withheld from disclosure. Ministers were not permitted to waive PII or to decide that the document should be disclosed notwithstanding its PII status The only exception to this was where it was clear that no realistic balance of competing public interests by the court could come down otherwise than in favour of disclosure. Ministers were advised that in all but that exceptional case the task of deciding whether the document should be disclosed was one for the court and not for them. Their PII certificates were the means of putting the issue to the court.

> 2.2 Since then the subject has moved on. The major change in the law has been the case of *R v Chief Constable of West Midlands, ex parte Wiley* in 1994 [[1994] 3 All ER 421, HL, reversing [1994] 1 All ER 702, CA]. Lord Woolf made it clear that a minister could discharge his responsibility regarding material which is subject to PII by making his own judgment on whether the overall public interest favoured its disclosure. If he thought that it did, he could make disclosure without asserting PII. If he thought that it did not, or if he was in doubt, he should put the matter to the court.

See also The Right Hon Sir Richard Scott, "The Use of Public Interest Immunity Claims in Criminal Cases", The Earl Grey Memorial Lecture, University of Newcastle upon Tyne, 29 February 1996, first published in *Web Journal of Current Legal Issues* in association with Blackstone Press Ltd; and also Adam Tomkins, "Public Interest Immunity After *Matrix Churchill*" [1993] PL 650.

See generally, de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edition, Sweet & Maxwell, 1995, paragraphs 1-130 to 1-159; and 8(1) *Halsbury's Laws of England*, Reissue (2003), paragraph 501, as to the disclosure of medical reports, police reports and cabinet discussions.

Access to information and open government: See the discussion under English law, particularly on the repeal of section 2 of the English Official Secrets Act 1911, by the Official Secrets Act 1989 in de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edition, Sweet & Maxwell, 1995, paragraphs 1-123 and 1-126.

Freedom of Information Act 2000 (UK): This Act was introduced in 2000, though many of the provisions will only come into effect on

30 November 2005. See generally 8(1) *Halsbury's Laws of England*, Reissue (2003), paragraphs 583–617.

Data Protection Act 1998 (UK): This Act was introduced to replace the Data Protection Act 1984. The purpose of this new Act is "to harmonise data protection legislation throughout the European Union in order to protect the fundamental rights and freedom of the individual, in particular the right to privacy with respect to the processing of personal data ... ": see 8(1) *Halsbury's Laws of England*, Reissue (2003), paragraph 503. As to the right to privacy, see the lecture by Lord Phillips, "Right to Privacy: The Impact of the Human Rights Act 1998", published in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, Professional Law Books and Sweet & Maxwell, 2004, chapter 17.

Laws relating to press freedom: Some of the laws affecting the freedom of the press in Malaysia are: Printing Presses and Publications Act 1984, Act 301; Official Secrets Act 1972, Act 88; Sedition Act 1948, Act 15; and Internal Security Act 1960, Act 82. But see section 3 of the Communications and Multimedia Act 1998, Act 588, where it is provided that "Nothing in this Act shall be construed as permitting the censorship of the Internet".

Contempt of court proceedings against journalist: See the Court of Appeal decision in *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321, CA, where a Canadian journalist, Murray Hiebert, of the *Far Eastern Economic Review*, was charged for contempt of court, and sentenced to six weeks' imprisonment for a story he wrote that was critical of the Malaysian judicial process.

Fundamental rights

"As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution …

The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. "

—Raja Azlan Shah FJ (as he then was)
Loh Kooi Choon v Government of Malaysia
[1977] 2 MLJ 187, FC at 189