The Right Honourable Lord Cooke of Thorndon

Administrative Law Trends in the Commonwealth

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(*b.* 9 May 1926)

Lord Cooke graduated with LLM (first class honours) from Victoria University College, New Zealand. In 1950, he was awarded the prestigious University of New Zealand Travelling Scholarship in Law to study at Cambridge, where he became a Research Fellow (now Honorary Fellow) of Caius College. He subsequently obtained his Doctor of Philosophy (PhD). He was awarded an Honorary Doctorate in Law by Victoria University College and Cambridge University in 1989 and 1990 respectively.

Lord Cooke returned to New Zealand in 1955 to practice as a Barrister. He became a Queen's Counsel in 1964.

His judicial career began in New Zealand with his first judicial appointment in 1971, when he was made a Judge of the Supreme Court. He advanced to become a Judge of the Court of Appeal in 1976. In 1986, he was elevated to the highest judicial position in New Zealand: President of the Court of Appeal of New Zealand. Lord Cooke also sat as the President of the Courts of Appeal of Western Samoa and the Cook Islands.

In 1977, he was made a Privy Councillor, sitting in the Judicial Committee of the Privy Council to hear appeals from some countries of the Commonwealth.

Lord Cooke delivered a dissenting judgment in *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* (1984) 4 PCC 359 (on appeal from Singapore), one of the very few cases where a dissenting judgment was delivered in the Privy Council. Lord Cooke also delivered the judgment of the Privy Council in *Hajjah Tampoi bte Haji Matusin and Others v Haji Matussin bin Pengarah Rahman* (1984) 4 PCC 345 (on appeal from Brunei) (land law).

On Lord Cooke's retirement as a Privy Councillor in October 2001, Lord Steyn paid a tribute to Lord Cooke's "massive contribution to the coherent and rational development of the law in New Zealand, in England and throughout the common law world" (*Delaware Mansions Ltd v City of Westminster* [2001] UKHL 55).

Lord Cooke has written extensively on various legal subjects and many are published in leading law journals. Amongst his major publications are: *The Struggle for Simplicity in Administrative Law in Judicial Review in the 1980's* (1986) Oxford University Press, Auckland; *Judging the World: Law and Politics in the World's Leading Courts* (1988) Butterworths, Sydney.

Lord Cooke is presently the Government nominated Member of the International Centre for Settlement of Investment Dispute (ICSID), World Bank. He is also an Honorary Bencher of Inner Temple, London, and a life member of Lawasia.

At the time the Fifth Sultan Azlan Shah Law Lecture was delivered in 1990, Lord Cooke (then known as Sir Robin Cooke) was the President of the Court of Appeal of New Zealand.

5 Administrative Law Trends in the Commonwealth

Sir Robin Cooke
President of the Court of Appeal, New Zealand

Text of the Fifth Sultan Azlan Shah Law Lecture delivered on 4 December 1990 in the presence of His Majesty Sultan Azlan Shah.

A decade ago, Your Majesty, then Raja Azlan Shah FJ, expressed a basic premise of administrative law: "Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship." [1]

That dictum sums up this body of law. It is a body of law of which in a sense Your Majesty can be said to be the heart, for, in the words of Mohamed Noor J in 1988,

> The right of His Majesty's subjects to have recourse to the courts of law cannot altogether be excluded ...[2]

The learned judge said this when holding that a failure to apply for certiorari within the prescribed time (to quash a decision depriving the plaintiff of the privilege of using a national registration card rather than a passport) did not deprive the court of its discretionary jurisdiction to grant a declaration. His words have a wider application, however, and merit reflecting upon. I believe that they may embody a profound truth, since they may illustrate that in any democracy, whatever the detailed constitutional arrangements, some common law rights are inalienable.

Because of the symbolic central significance of the throne in administrative law, and the judicial career of the present occupant of the throne, it is particularly apt that this, the fifth of the law lectures

1 *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* [1979] 1 MLJ 135.

2 *Sugumar Balakrishnan v Chief Minister of State of Sabah* [1989] 1 MLJ 233 at 236.

dedicated to him, should be concerned with that field. I am doubly honoured to be asked to give it, as the four previous lectures were all by English academic lawyers or Law Lords. Of each it could be said in the words of WS Gilbert:

> He is an Englishman!
> For he himself has said it,
> And it's greatly to his credit,
> That he is an Englishman!

I cannot claim that credit, but it is not my fault, and I can only hope that an offering from the South Seas may in some degree justify, in novelty at least, the hazard of this break with precedent.

This is my second visit to Kuala Lumpur. On a wall of my chambers in Wellington, just below a publication which seems rather out of date now, the *England and Empire Digest,* is a large colour photograph reminding me of my first visit, which was for the Fourth International Appellate Judges' Conference, in April 1987. That conference, organised with notable dignity and hospitality, was surely a major event in the history of the modern Malaysian legal system. Since then there have been the sad events in 1988 concerning the Lord Presidency. It would be artificial to avoid any reference to them, but gratuitously intrusive and provocative to comment. I have read some of the writings, and note that they include an article by Professor FA Trindade,[3] a book by Mr PA Williams QC,[4] with whose advocacy in criminal appeals and trials I am familiar, and a book by Raja Aziz Addruse,[5] with whose advocacy I have not had the opportunity of first-hand acquaintance—which is not the only difference between the two books. The one point that it may be relevant to make here is that, although some aspects of those events were the subject of litigation, that was evidently not so as to the core events themselves. What a challenge for an administrative law system such a case would have presented! But the Malaysian judiciary was spared the problem of constituting a bench able to try it.

3 *The Removal of the Malaysian Judges* (1990) 106 LQR 51.

4 *Judicial Misconduct,* Pelanduk Publications, Malaysia,1990.

5 *Conduct Unbecoming,* Walrus Books, Kuala Lumpur, 1990.

Reference to those writings reminds me that in the months which have culminated in today I have been sent more than one copy of the Third Sultan Azlan Shah Law Lecture, Lord Oliver of Aylmerton's *Judicial Legislation: Retreat from Anns.*[6] I am not sure why there has been this duplication, yet no copy of Lord Ackner's fourth lecture,[7] though Lord Ackner tells me that his lecture included some good jokes. I rather suspect that it was thought that I might not entirely agree with Lord Oliver. In July, at the Oxford and Cambridge Club in Pall Mall, I happened to meet a distinguished Canadian torts lawyer, who was planning to join in the Canadian Bar Association expedition to Paisley in September, in memory of the alleged snail in *Donoghue v Stevenson.*[8] Having one of the copies of Lord Oliver's lecture with me, I lent it to him overnight. Next day I received through the club porter a note returning the offprint and saying, "This piece by Oliver makes my blood boil. It is an excellent target for me to fire at." That was a tribute in a way to Lord Oliver's force of exposition. His lecture did not produce in me quite the same dramatic elevation of temperature, but in conjunction with the later House of Lords decision in *Murphy v Brentwood District Council*[9] it did stimulate me to a rather extreme reaction, videlicet the writing of an article for the *Law Quarterly Review.* But if anyone is at all interested in my views about the retreat from *Anns,* it will be necessary to be patient until January, as it is not germane to the subject today.

The subject today perhaps contrasts with the issues in *Murphy* in that the leading principles of administrative law can be quite simply stated and by-and-large probably do not admit of much controversy. It was not always so. The subject used to be vexed by such refinements as the doctrine of error of law on the face of the record, Lord Sumner's "inscrutable face of a sphinx",[10] the related concept of jurisdiction as an umbrella under the shelter of which errors of law could be committed safely, the label quasi-judicial, the elusive differences between *nullity, void* and *voidable.* If not totally dispelled, these obscurities are now seen as largely irrelevant, the case which did most to cut through them in England being *Anisminic Ltd v Foreign*

6
(1988) 1 SCJ 249.
See chapter 3, above.

7
The Spycatcher: Why Was He Not Caught? See chapter 4, above.

8
[1932] AC 562.

9
[1990] 2 All ER 908.

10
R v Nat Bell Liquors Ltd [1922] 2 AC 128, 159.

Compensation Commission.[11] For some years I have ventured to suggest that it is not a totally absurd oversimplification to say that the whole of administrative law can be summed up in the proposition that the administrator must act fairly, reasonably and in accordance with law.[12] It is encouraging that in the preface to the sixth edition of his pre-eminent English textbook on *Administrative Law,*[13] Sir William Wade is prepared to entertain this as tenable. Latterly also the House of Lords have used language emboldening one to claim that is not altogether wide of the mark. For instance Lord Diplock has spoken of the three heads of illegality, irrationality and procedural impropriety.[14] Needless to say, such general formulations are not meant to be exhaustive, but the differences between them appear to be little more than semantic.

It is not a totally absurd oversimplification to say that the whole of administrative law can be summed up in the proposition that the administrator must act fairly, reasonably and in accordance with law.

To assert that the struggle for simplicity in administrative law is gradually succeeding is certainly not to imply that cases are simple to decide. If the governing principles are relatively straightforward, their application can be excruciatingly difficult. It is a field where, perhaps more than any other except the closely neighbouring one of constitutional law, the courts are put to the test. On the one hand, there are the inalienable rights of subjects to resort to the courts for the protection of their rights. On the other, there are the rights of governments, ministers and officials to decide policy and make discretionary decisions. The balancing exercise can be fine and demanding: judgments can readily be misunderstood or even misrepresented when not read as a whole: emotive criticism, suggesting either undue subservience to the executive or frustration of the will of the elected representatives of the people, has to be recognised as inevitable. The judges are in a no-win situation but must accept this as inseparable from their role.

That is why as a short title for this lecture I would select *Administrative Law Tensions.* In what follows I will try to give you

11
[1969] 2 AC 147.

12
Third Thoughts on Administrative Law [1979] NZ Recent Law 218; *The Struggle for Simplicity in Administrative Law,* a paper published in *Judicial Review of Administrative Action in the 1980's,* Oxford University Press, Auckland, 1986, 5 et seq.

13
Clarendon Press, Oxford, 1988, viii.

14
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 408–411.

some anecdotal evidence of the results of these tensions, drawn from my own experience on the bench, and then look more widely if briefly at some other jurisdictions, ending with an outside look at Malaysian administrative law. When sitting in Western Samoa some years ago I was struck by the maps of the world on sale there, showing that country as the centre and Asia, Europe, the Americas and Africa as peripheral. I am not beginning with New Zealand cases because of any illusion that New Zealand is the centre of the administrative law world, but only because first-hand evidence can have some freshness for an audience.

New Zealand

Administrative law is much occupied with statutory interpretation. The approach that seems to me right aims at a realistic and sympathetic construction of the statute and an examination of the true grounds of the administrative decision in question, checked against the purposes of the statute and any relevant common law rules, such as natural justice. By no means does this mean that the complainant always wins. I would guess that I have participated in considerably more judgments where the administrative authority has succeeded than where decisions have been held invalid. Let me give one illustration.

Of course we have accepted that the courts must not usurp the policy-making function, which rightly belongs to Parliament, but we do hold that the courts can in a sense fill in the gaps, though only in order to make the Act work as Parliament must have intended.

Of course we have accepted that the courts must not usurp the policy-making function, which rightly belongs to Parliament, but we do hold that the courts can in a sense fill in the gaps, though only in order to make the Act work as Parliament must have intended. An example is *Northland Milk Vendors Association v Northern Milk Ltd*,[15] where a new regime for home milk supply had been enacted but could not operate until standards applying to the relevant delivery district had been fixed by the new authorities. Yet the old regime had been repealed, so

15 [1988] 1 NZLR 530.

it was argued that, pending the fixing of new standards, milk vendors had a common law right or liberty in Hohfeldian terms to trade as they saw fit—for instance, by reducing the number of household deliveries weekly. Manifestly the particular problem had not been foreseen by those responsible for the drafting. The court held that the Act envisaged *continued* home deliveries (there was a reference to that in the long title) and that to make it workable the former conditions as to frequency of deliveries must continue to apply until new standards were duly fixed. In effect, an operative licensing system was inferred. There were no particular enacting words which could be pinpointed as bearing that meaning. The intention was seen as implicit in the Act as a whole.

That tremor may have been Lord Simonds turning in his grave. It must be acknowledged that he could well have described that decision as "a naked usurpation of the legislative function under the thin disguise of interpretation".[16] One can only plead in defence that to some a constructive approach to interpretation seems as legitimate as a destructive one. So too legislation and common law need not be treated as oil and water. There can be a harmony, a reciprocal influence and interplay. It is true that the function of the legislature is to make laws, the function of the courts to interpret them; but it is also simplistic, for the boundary between legislation and interpretation is destined to remain forever undefined and in dispute.

To some a constructive approach to interpretation seems as legitimate as a destructive one.

Though the administrators win more often than not, it is cases that have gone the other way that tend to stand out more in one's memory, possibly because they sometimes require more of an effort to avoid cowardice. Let me tell you about three "crunch" cases.

In *Finnigan v New Zealand Rugby Football Union Inc* [17] the courts stopped an All Blacks tour of South Africa. I am sufficiently

16 *Magor & St Melons Rural District Council v Newport Corporation* [1951] 2 All ER 839 at 841.

17 Reported at various stages in [1985] 2 NZLR 159; 181; 190.

parochial to believe that a Malaysian audience will know who the All Blacks are. The rugby union is an incorporated society and technically a private sporting body controlling an amateur game, but its de facto standing and significance in the New Zealand community give it a national importance. The distinction created or articulated in England in recent years, chiefly by Lord Diplock, between public and private law has not been one which we have sought to apply rigorously. It can have some relevance to questions of procedure—whether, for instance, the more appropriate remedy is injunction or declaration on the one hand or judicial review on the other.

A statutory judicial review remedy and associated rules were introduced in New Zealand in 1972, making resort to the prerogative writs unnecessary. It was the forerunner of similar reforms in Australia and England, and in turn had been much influenced by the Ontario model. But it has been seen in my country as a procedural change simplifying the review of decisions taken or proposed under statutory powers, rather than as producing a confinement or freezing of the substantive grounds of challenge. The substantive grounds do not necessarily require distinctions between the public and private law. Indeed a 1977 amendment to the Act pointedly ignored the line between public and private territory by bringing within the definition of "statutory power" powers or rights conferred under the constitution or rules of any body corporate. That is healthily wide.

Such was the setting in which, in 1985, two young lawyers, who happened to be members of local rugby clubs, had the temerity to apply for an injunction against the New Zealand union, with which the clubs were ultimately affiliated through a hierarchy. In 1981, there had been a South African tour of New Zealand which had provoked unprecedented discord in the community, with protests sometimes deteriorating into violence (though no lives were lost) and normally law-abiding citizens carrying their opposition to apartheid to lengths quite foreign to their ordinary conduct. By its rules, the first object of the union was to foster the game throughout New Zealand. The

argument of the applicants was that the council of the union had lost sight of that object in their determination to send a side to South Africa in defiance of a unanimous vote in Parliament asking them not to do so and widespread public reaction against the tour.

The first question was standing. The applicants had no contract with the union, being at grassroots level. The Chief Justice of the day struck out the proceedings on that ground, presented on behalf of the union under the heading that the claim was frivolous, vexatious and an abuse of the process of the court. In the Court of Appeal, we certainly did not think that there was anything frivolous about the case and I still remember the look of delight on the face of leading counsel for the appellants when he realised from the questions of the judges that victory was not out of the question. In the event we accorded them standing. It was a unanimous judgment of a court of five. We thought that the plaintiffs could not be dismissed as mere busybodies, cranks or mischief-makers. They were specifically and legally associated with the sport and this was a moment of crucial bearing on its image, standing and future as a national sport. Indeed the New Zealand community as a whole was affected.

The next and as it turned out crucial stage occurred in the High Court, where the plaintiffs applied for an interim injunction before Casey J. The judge heard the matter for three days; some distinguished anti-apartheid witnesses were called, but for reasons which are not altogether clear the defendants did not seek to have any evidence heard at that stage from the chairman of their council. On Saturday, Casey J telephoned me to say that he was giving a decision that afternoon and to ask whether I would reserve time for the Court of Appeal to hear an urgent appeal on Monday. Arrangements were made accordingly. He did not volunteer nor did I ask what way he was going to decide. In the event, he decided that the plaintiffs had established a strong *prima facie* case that the decision would not foster rugby: it was arguable on the evidence that the council had closed their minds to any genuine consideration of the effect of a tour on the welfare of the game. He said:

> … I feel I must have regard to the unique importance of this decision in the public domain and the effect it could have on New Zealand's relationships with the outside world and on our community at large. This was noted by the Court of Appeal and is amply borne out in correspondence from the Prime Minister and the letter from his Deputy which the Union itself requested. I am satisfied that such a situation requires that body (or any other in a similar position) to exercise more than good faith in reaching its decision; it must also exercise that degree of care which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectation of the public.

Note the reference to legitimate expectation. The judge granted an interim injunction. The defendants did not take the opportunity of appealing urgently; instead they cancelled the tour, issued a press statement saying that they now had no opportunity to establish in court that the decision to tour had been right, and later applied for leave to appeal to the Privy Council. In due course that was refused, partly on the ground that the issue was academic once the parties had agreed, as they did, to bring an end to the proceedings by a consent order. Later still their Lordships of the Privy Council refused special leave. The procedural manoeuvres are not necessarily to be criticised: the rugby administrators were wrestling with a novel situation, just as the courts had been. In retrospect, I am glad that in that case the administrative law tensions were resolved as they were by the judicial decisions. Another rugby tour of South Africa is no longer out of the question. Our judgments may have played some small part in the change of approach now apparent there.

The second "crunch" case is *New Zealand Maori Council v Attorney General.*[18] Again it was concerned with race relations, so mention of it may not be out of place in the multi-racial society in which I have the honour of speaking. British colonisation of New Zealand and the establishment of a white majority was the sequel to the Treaty of Waitangi 1840, entered into between Queen Victoria, by her duly authorised representative, and Maori chiefs. The Treaty

18 [1987] 1 NZLR 641. *Editor's note:* See also the Privy Council decision in *New Zealand Maori Council and others v Attorney General of New Zealand and others* [1994] 1 All ER 623, PC (on appeal from New Zealand).

provided that in the new nation all were to be British subjects, but reserved to the chiefs and their peoples *rangatiratanga,* a term of controversial import. The status of the Treaty in law is still under debate. For the Maoris, it has always had very high significance. The community generally is increasingly conscious of its importance as a fundamental document, but its brief language—there are only three clauses, with a preamble and a testimonium—can do little to answer the specific problems of a developed nation 150 years later. There have been many allegations—some well founded, others not—that over the years land has been by various means taken away from the Maoris in breach of the Treaty. In 1975, the New Zealand Parliament established a recommendatory body, the Waitangi Tribunal, to hear claims of such breaches. In 1987, under the pressure of economic circumstances and philosophies, the Government decided to corporatise with a view to privatising (such is the shorthand) a range of state activities. That involved the likelihood of on-sale of lands once in Maori ownership and still retained by the Crown, thus much diminishing any prospect of restoration to the Maori people. Representations at an appropriately high level caused the Government to alter the Bill which became the State-Owned Enterprises Act 1986 so as to provide in section 9 that nothing in it should permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. The Act had some machinery preventing inviolable on-sale from the newly-created corporations called State Enterprises, but these were limited to cases where Maori claims had been submitted by an early deadline date.

In that matrix of facts, the Maori Council applied for judicial review of the Crown's proposal to transfer lands to State Enterprises. The issue reduced to whether the apparently resounding declaration in section 9 should be accorded practical effect or be seen as hardly more than window-dressing. The point was not at all easy, for there was a good deal to suggest that window-dressing may have been precisely what the politicians had in mind. Hansard lent some support to that verdict, and currently the New Zealand courts do not renounce all opportunity of ascertaining by reference to Hansard what the legislators actually thought they were enacting. But in the end, the

court was unwilling to adopt that uncharitable interpretation. Section 9 was held to mean what it said: it was declared that the Crown could not lawfully transfer lands to the new corporations without general safeguards for Treaty of Waitangi claims. Certain amending and safeguarding legislation was negotiated and enacted in consequence. The details do not matter here, nor the subsequent litigation building on the foundation thus laid. Perhaps what is important about the case is that it shows what impartial justice can achieve in the administrative law field in a multi-cultural society where the Rule of Law is observed, with courts that (so we claim at least) are truly unbiased. Incidentally, no member of our court is a Maori. We have found underlying the Treaty the principle of partnership between races. This may have some relevance to your society also.

My last first-hand example of administrative law tension is *Petrocorp*[19] decided as recently as August and as yet unreported. It is about, not race relations, but an equally hazardous subject, oil. Under the New Zealand legislation the Minister of Energy has a dual function. He is the licensing authority for petroleum mining. As well he can take part in the industry himself. The Minister entered into a joint venture with oil companies to prospect for oil in a certain province. The joint venture held a mining licence for a defined area within that province. They discovered a rich oil field extending, within the province, beyond the boundaries of their licence. The Act allowed the Minister in his discretion to extend the limits of a licence. The joint venture, in which the Minister himself held a 38 per cent interest on behalf of the state, applied to him for such an extension. The state would have acquired 38 per cent of the oil in the extended one. The Minister saw, however, that it would be better to have 100 per cent; so he declined the joint venture application, awarded a sole licence to himself for the extended area, and offered to sell it to his joint venture partners at a price to be bargained.

The case shows what impartial justice can achieve in the administrative law field in a multi-cultural society where the Rule of Law is observed, with courts that (so we claim at least) are truly unbiased.

19 *Petrocorp Exploration Ltd v Butcher* (CA 240/89; judgment dated 14 August 1990).

The other joint venture partners brought judicial review proceedings. A High Court judge dismissed them, holding that the Minister's perception of the national interest was paramount. The Court of Appeal, by a majority of four to one, saw the case otherwise: the Minister was acting admittedly for purely pecuniary reasons: fairness, reasonableness and the Act in its true interpretation required him to comply with his obligations to his commercial partners. Moreover the partners had a legitimate expectation of being at least heard, whereas the evidence was that the plan to grant a licence to the Minister only was deliberately withheld from them. Perhaps a billion dollars is at stake.

My country, unlike Malaysia since 1985, retains the appeal to the Privy Council. Perhaps we lag behind you in perception of what maturity requires. The decision in *Petrocorp* may ultimately be made in the fine building in Downing Street next to No 10, where I have often had the privilege of sitting. How their Lordships will respond to the tension, whether even they will see any tension, it is not for me to try to foretell. What I can say without reservation from the point of view of a judge having to decide the issue in the national community wherein it arose is that the case provides a stern test of a judicial system.

England

In a less personally involved way, let me now speak briefly of case law elsewhere in the Commonwealth. To this audience there can be little new that I can tell about English administrative law. From reading many Malaysian judgments, it is evident that English precedents are still very often the main stock on which courts and counsel here draw. The landmark English cases in the field are so well-known that it is virtually enough to recite a list of judges. When the following names are mentioned, most of them will conjure up in the minds of the *cognoscenti* one or more famous or possibly in one or two cases, infamous decisions: Sir Edward Coke, Sir John Holt, Lord Denman, Lord Esher, Lord Loreburn, Lord Sumner, Lord Atkin, Viscount Simon, Lord Thankerton, Lord Radcliffe, Lord Goddard, Lord Parker, Lord Reid, Lord Denning, Lord Wilberforce, Lord Diplock.

That list and what it evokes will serve as an outline of the history of English administrative law. At the Commonwealth Law Conference in Auckland in April 1990, one of the highlights was a polished debate between two men, both of whom I greatly admire and have the privilege of counting as friends: Sir William Wade and Sir Patrick Neill. Regretfully it has to be said that Wade looked askance at the rugby union case, and for similar reasons, voiced misgivings about the willingness of the English courts to review such non-statutory bodies as the Takeover Panel[20] and the Professional Conduct Committee of the Bar Council.[21] Neill took the view that the courts should not abdicate from the responsibility of checking that justice is done in areas of public significance (this is but a brief paraphrase), and as it seemed to me, carried with him the chairman of the session and most of those present. If so, the victory lay in the inherent strength of his argument, for there was assuredly nothing between the duellists in skill and elegance of presentation.

To the history of English administrative law just given, there can perhaps be added as a statement of its current essence a quotation from Lord Donaldson of Lymington MR in *Guinness:*[22]

> It may be that the true view is that, in the context of a body whose constitution, functions and powers are *sui generis,* the court should review the panel's acts and omissions more in the round that might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation. It was Lord Diplock who in *Council of Civil Service Unions v Minister for the Civil Service* [23] formulated the currently accepted categorisations in an attempt to rid the courts of shackles bred of the technicalities surrounding the old prerogative writs. But he added that further development on a case-by-case basis might add further grounds.[24] In the context of the present appeal he might have considered an innominate ground formed of an amalgam of his own grounds with perhaps added elements, reflecting the unique nature of the panel, its powers and duties and the environment in which it operates, for he would surely have joined in deploring any use of his own categorisation as a fetter on the continuous development

20
R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] 1 All ER 564; *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All ER 509.

21
R v General Council of the Bar, ex parte Percival [1990] 3 All ER 137.

22
[1989] 1 All ER 509 at 512–513.

23
[1985] AC 374.

24
Ibid, at 410.

> of the new "public law court". In relation to such an innominate ground the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take.

Although that passage is nominally confined to *sui generis* bodies, consider the words "as always": it is really all there.

Canada

One of the strongest courts in the English speaking world is surely the Supreme Court of Canada. How administrative law tensions may stretch a court is illustrated by their decision in 1989—after an unsurprising gestation period of ten months—in *Paccar of Canada Ltd v Canadian Association of Industrial and Mechanical and Allied Workers.*[25] The case was about industrial relations, a fertile source of fairly novel problems in administrative law, as Malaysian experience also bears out. The court was divided as to whether a decision of a Labour Relations Board should be set aside. It is instructive that even the more conservative view, which prevailed, recognised that under a collective bargaining regime quite a different approach is called for than was once customary in considering contract cases between master and servant. La Forest J said :

> … it no longer makes sense to speak of the common law. The collective bargaining relationship is governed by the provisions of the Labour Code, not the common law.

A collective agreement having expired, attempts to agree on a new one had not succeeded, and the employer gave notice discontinuing negotiations and announcing terms and conditions on which it was prepared to employ workers henceforth. They were less advantageous to the workers than the old terms, but the workers did not strike, preferring to remain in work. The Board held that the employees action was lawful. The British Columbia courts, influenced by common law contract concepts, held that terms could not be

25 [1989] 2 SCR 983.

unilaterally imposed by an employer. The majority of the Supreme Court held otherwise, saying that "curial deference" was appropriate towards a specialist tribunal: the tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be supported by the relevant legislation and demands intervention by the court on review. (The note struck by the Master of the Rolls seems to be echoed.) The minority judges, Wilson and L'Heureux-Dube JJ, did not differ from the majority in principle but they thought that the Board's decision failed even that liberal test. In the words of Wilson J, it was "completely inconsistent with the concept of freedom and equality of bargaining power and the paramount role of the collective bargaining process in labour dispute resolution".

Frank recognition that legislation does not always have one inevitable meaning, that it may be open to more than one reasonable construction, offers one way through the thicket of difficulties occasioned by a hard-dying idea: namely the idea that a limited tribunal must be expected to have jurisdiction to decide some questions of law conclusively. Courts have wrestled with this for years. There are many conflicting decisions. Malaysian case law has shown some movement towards another solution, as will be shown shortly.

Australia

In reply to my impossible request to name one case epitomising the approach of another distinguished Commonwealth court, the High Court of Australia, to administrative law, Chief Justice Sir Anthony Mason nominated *Kioa v West*.[26] One reason why I am glad to mention that decision of 1985 is that it largely mirrored a New Zealand decision five years earlier, *Daganayasi v Minister of Immigration*[27] in holding that in certain circumstances natural justice or procedural fairness must be observed

The content of the doctrine of fairness is flexible but "a strong manifestation of contrary statutory intention" is needed to exclude it.

26
(1985) 159 CLR 550.

27
[1980] 2 NZLR 130.

by the Minister or his delegate in considering the making of deportation orders. The content of the doctrine of fairness is flexible but, as Mason CJ put it, "a strong manifestation of contrary statutory intention" is needed to exclude it. Perhaps one can say that such an intention is required at the very least.

Probably more striking than *Kioa*, however, is a three-two decision of the High Court in June of this year, to which Sir Anthony also referred me, *Haoucher v Minister of State for Immigration and Ethnic Affairs*.[28] There the Minister had decided to proceed with a deportation notwithstanding an Administrative Appeals Tribunal recommendation that the deportation order be revoked. Earlier the Minister had announced in Parliament that such recommendations would be overturned by him in exceptional circumstances only, and only when strong evidence could be produced to justify his decision. The case was referred by the court to the Minister yet again. The majority of the High Court responded to the administrative law tension by holding that the appellant had a legitimate expectation entitling him to know what was "exceptional" about his case and what the "strong" evidence was. The expectation arose from the Minister's statement to Parliament.

Like so many common law developments in all the national jurisdictions in the second half of the 20th century, the principle that the duty to act fairly may arise from a "legitimate expectation" is an invention of Lord Denning.

Like so many common law developments in all the national jurisdictions in the second half of the 20th century, the principle that the duty to act fairly may arise from a "legitimate expectation" is an invention of Lord Denning.[29] Like many of his other ideas, it flourishes because it helps to satisfy a widely-felt human sense of what natural justice requires. Since the categories of situations in which a legitimate expectation may be recognised can hardly be closed, it may prove a most fruitful invention.

28
(1990) 93 ALR 51.

29
Schmidt v Secretary of State, Home Afairs [1969] 2 Ch 149, 170.

South Africa

Earlier I had occasion to mention South Africa in terms not particularly warm, so it is pleasing to be able to insert something now about administrative law in that non-Commonwealth country. It was also pleasing that two South African judges attended in September, the Fifth International Appellate Judges' Conference in Washington—a sign of the times.

Last year, the Appellate Division of the South African Supreme Court decided *Administrator, Transvaal v Traub.*[30] Some young qualified medical practitioners serving in a Soweto hospital had applied for certain appointments. They had favourable recommendations from the local departmental head. Nevertheless, the Transvaal director of hospital services did not approve their applications because they had signed a certain letter protesting in abrasive language at the disgusting and despicable conditions in the medical wards. In a judgment with which the other members of his court concurred, Corbett CJ held that they had not been fairly heard. A quashing of the refusal to approve was upheld. Interestingly, in the meantime the reconsideration ordered in the court below had resulted in their receiving appointments. Possibly more interesting still, the appeal judgment is based solely on legitimate expectation.

Malaysia

So finally I come to grasp the nettle of Malaysian administrative law. How are your courts responding to the tensions? It is necessary to stress the limits of my knowledge. Such as it is comes from general impressions and more particularly from reading in recent weeks some scores of reported decisions. I am in no position to be judgmental. It would be rash to do more then throw out a few prima facie thoughts. But to do less would be to fail my audience.

30
1989 (4) SA 731.

Two thoughts concern style and technique rather than substance. First, the conciseness of the Malaysian judgments is impressive. Your judges do not go in for elaborate disquisitions, loaded with case and article references, and smacking of the lamp. Their judgments are easy to read and assimilate. They avoid Scylla. As long as they can steer clear of Charybdis—the danger of too cursory a consideration of cases, especially at the highest level— this commands admiration.

Secondly, on the surface there may seem to be a dependence on English precedent more heavy than appropriate after Merdeka. But further acquaintance suggests that such a verdict would be superficial. Albion is not perfidious, but fortunately consistency is not high among the features of 20th century English case law in the administrative field. Within the rich jurisprudence high authority can be found for almost any possibly tenable proposition. The shades of difference can be subtle and multiple. If we take only three modern House of Lords cases so well known that they require no citations, *Padfield,*[31] *Bromley,*[32] *GCHQ,*[33] we may equip ourselves with a range of options for own approach to a new case. A Malaysian court may be making a truly Malaysian choice when it decides which English dictum to convert to its own use. For this reason, I may very well be doubtful whether there is substance in the criticism sometimes voiced that the Malaysian courts are still colonialist at heart.

As for substance, in *Sabah Banking Employees' Union v Sabah Commercial Banks' Association*[34] Abdul Hamid LP has said:

> The writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as the guarantors of due process and the fair administration of law.

The Lord President there sounds a note close to that struck by Your Majesty in the pronouncement quoted when I began this lecture. While such words represent the spirit in which Malaysian

31 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; [1968] 1 All ER 694, HL.

32 *Bromley LBC v Greater London Council* [1983] 1 AC 768; [1982] 1 All ER 153, HL.

33 *Council for Civil Service Unions v Minister of State for the Civil Service* (*GCHQ* case) [1985] AC 374; [1984] 3 All ER 935, HL.

34 [1989] 2 MLJ 284 at 286.

administrative law is administered, there will be confidence that administrative law and the Rule of Law are safe in Malaysia.

The performance of the courts may conveniently be looked at in terms of the threefold criterion, "fairly, reasonably and in accordance with law". With regard to fairness, there have been some decisions which in my humble opinion an impartial examiner should give an alpha plus. I mention the *Berthelsen* case,[35] where cancellation of the employment pass of a press correspondent was quashed for failure to hear him. It is an application in this country of the legitimate expectation doctrine, in line with the trends elsewhere on which I have dwelt. The outsider is struck by the fact that the Malaysian Bar was represented at the Supreme Court hearing by no less than six counsel on watching brief. Param Cumaraswamy, Mooney, Sidhu, Sri Ram, Cyrus Das, Thomas. What a constellation! Further as to personalia, one of the rewards of reading for this lecture has been closer acquaintance with the judgments of Abdoolcader SCJ. This is the one describing another case as being about "a pesky and pernicious epiphenomenon of transnational beachcombing"—and hence easily distinguishable of course from a case about a representative of the Asian Wall Street Journal.

I mention, too, the judgment delivered by Salleh Abas LP in the *Keruntum* case,[36] managing to resist the blandishments of my persuasive friend Michael Beloff QC and holding that the Director of Forests, Sarawak, could not treat a licence as automatically forfeited for transfer of controlling shares: again the firm insistence on an opportunity of a hearing accords with international trends as well as Malaysia's own well-established domestic jurisprudence.

For the moment, it is better to leave out reasonableness and go straight to "in accordance with law". I have read some perceptive judgments interpreting statutes in a way giving effect not merely to their literal meaning but to their true intent and spirit. In that category is the judgment[37] of a court consisting of Abdul Hamid, then acting Lord President, Mohamed Azmi and Abdoolcader SCJJ, quashing

35
JP Berthelsen v Director General of Immigration, Malaysia [1987] 1 MLJ 134.

36
Minister of Resource Planning v Keruntum Sdn Bhd [1988] 2 MLJ 226.

37
Chai Choon Hon v Ketua Polis Daerah Kampar [1986] 2 MLJ 203.

as unreasonable a decision restricting the number of speakers at a solidarity dinner to seven:

> on the overwhelming legal ground put by Abdoolcader J that one unduly prolix and periphrastic speaker might be an even worse evil than excessive numbers. Likewise the decision[38] that a delay of seven years in holding a land acquisition inquiry, when compensation was tied to the date of the gazette notification, was outside the purview and scope of the Act.

Doctrinally two particularly valuable Malaysian cases on error of law are *Inchcape*[39] and *Enesty*,[40] both in 1985, holding that although the Industrial Court was properly seized of matters after references from the Minister, that court did not have power to determine conclusively whether a director was a "workman" or whether workmen were "on strike" if their union issued a strike notice. In a sense, both decisions were straightforward applications of *Anisminic*[41] but it is to the credit of your Supreme Court that they were not diverted from the straight path into the more tortuous windings resulting from the apparent inconsistency between Lord Diplock's expositions in *Racal*[42] and *O'Reilly v Mackman*[43] and the Privy Councils reversion in *Fire Bricks*[44] to an older approach described by Salleh Abas LP as having "jolted the Malaysian judiciary".

A fundamental error of law by a limited tribunal or administrator justifies judicial review and there is no need to add the further puzzling, perhaps spurious, question, "Does it go to jurisdiction?"

Seah and Mohamed Azmi SCJJ have left Malaysian administrative law in their debt by suggesting in those cases that the Malaysian courts might come to adopt the Denning–Diplock view that a fundamental error of law by a limited tribunal or administrator justifies judicial review and that there is no need to add the further puzzling, perhaps spurious, question, "Does it go to jurisdiction?"

38 *Pemungut Hasil Tanah v Ong Gaik Kee* [1983] 2 MLJ 35, Wan Suleiman, Salleh Abas and Abdul Hamid FJJ, the judgment being delivered by Salleh Abas then CJ (Malaya).

39 *Inchcape Malaysia Holdings Bhd v Gray* [1985] 2 MLJ 297.

40 *Enesty Sdn Bhd v Transport Workers Union* [1986] 1 MLJ 18.

41 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, HL.

42 *In re Racal Communications Ltd* [1980] 2 All ER 634.

43 [1983] 2 AC 237.

44 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 MLJ 165.

At least that is a paraphrase of this line of thought, a line which I have long found compelling. It cuts through the mystery of the concept of jurisdiction on which, incidentally, I wrote my PhD dissertation at Cambridge too long ago and accords with two more important concepts. One is that it is the inalienable province of the courts to determine the law, that not being the province of any other authority, high or low. The other is that for practical reasons judicial review has to be discretionary: the reviewing court should normally hold its hand if the error of law is insufficiently important, or there is adequate appeal machinery, or undue delay or other solid ground appears for refusing to intervene.

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The ultimate authority of the courts to decide the law brooks no exceptions, though on occasion the correct decision for the courts on the law is that the parties have freely and effectively contracted to submit to private arbitration or the like. A good Malaysian example of this principle of omnicompetence is the Federal Court decision in *OSK*[45] that certiorari lies to the stock exchange. An example of a different kind, however, seems to be the inconsistent Supreme Court decision in *Ganda*[46] that the writ will not go to a commodity exchange. There are echoes here of the Wade–Neill debate and the rugby tour case. Certainly legitimate arguments can be raised about whether the procedure should be by prerogative writ or its modern equivalent or by declaration and injunction, but the functioning of such powerful bodies in the community should be amenable to review some kind of procedure. I have to admit that Hashim Yeop A Sani SCJ and his colleagues were led astray by a New Zealand precedent[47]—not a New Zealand President as the excellent typist thought; for they followed a decision of the Court of Appeal of which I am a member, apparently renouncing ability to review the stock exchange. That is an excuse for Malaysia, but not for New Zealand. The New Zealand case rests, in my opinion, on misinterpretation of earlier case law in our court. You may not be surprised to learn that I did not sit in the case. Some of my judicial friends decided it while I was out of the country.

45 *OSK & Partners Sdn Bhd v Tengku Noone Aziz* [1983] 1 MLJ 179.

46 *Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange* [1988] 1 MLJ 174.

47 *New Zealand Stock Exchange v Listed Companies Association* [1984] 1 NZLR 699.

It is to be hoped that nothing of that sort is happening this week. It would add a new terror to lecturing overseas.

Lastly I come back to reasonableness: the merits, substance, how far will the courts go? Here the Malaysian picture is mixed. Let it be clear that no one, anywhere, suggests that the courts can substitute their discretion for that of the administrative authority, or intrude into policy formation and application where the policy is consistent with statute. Even the administrator's view of the facts is at least highly likely to be accepted if reasonably open: for it is doubtful whether the concept of jurisdictional fact has validity any longer. The concern is to check that the decision of the Minister or other authority is one that could reasonably be reached on the facts and in the light of the relevant law. It is no severe test; to refrain from insisting even on compliance with this generous test would be to abandon proper judicial responsibility. Often lawyers round the world speak of *Wednesbury* unreasonableness. I venture to think that there is nothing arcane or special about the subject requiring the geographical epithet. The duty is simply to act reasonably, that is to say in accordance with reason.

The courts must be willing to get as close as they can to the real heart of the issue in order to see whether the test is satisfied. An admirable Malaysian example is the *Merdeka University*[48] case, where the rejection of a petition for the establishment of a University based on the Chinese language was held not to be an unreasonable exercise of discretion. The careful examination of the facts by Abdoolcader J at first instance and the historical and constitutional exposition of the importance of Bahasa for national unity by Suffian LP on appeal are models of their kind. Those eminent judges did not renounce jurisdiction. The Government succeeded but judicial review was seen at its best.

Unfortunately, there are cases about which one cannot be so enthusiastic. Thus a "crunch" case where the administrative law tensions may be seen in severe operation is *Government of Malaysia*

48 *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356; [1982] 2 MLJ 243.

v Lim Kit Siang[49] decided in March 1988. Surely if a member of Parliament has arguable grounds for alleging impropriety in the award of a public contract it is in the public interest that the courts should be prepared to sift the matter impartially and thoroughly. Of course the allegation may turn out to be baseless, and, if so, well and good; but, if by any chance the reverse were to prove to be the case, manifestly the proceedings will be justified. To strike out in limine must tend to undermine faith in the judicial system. Yet it must be acknowledged that both Salleh Abas LP and Abdul Hamid CJ (Malaya) as they then were, were of the majority who adopted that course. I have respectful sympathy for them and cannot be confident how I would have responded in their shoes, but the reasoning of the minority is hard to rebut.

A more recent case which also seems rather worrying is *Aliran,*[50] where the Supreme Court allowed an appeal from a High Court decision quashing the rejection of an application for a permit to publish a magazine in Bahasa Malaysia. Attentive reading of the judgment leaves one unclear as to the reason why the application was refused; and if the court cannot identify any good reason, the administrative decision should fall. Ministerial discretion is to be respected, but the corollary is that the grounds of the ministerial decision should be apparent, unless indeed some compelling reason of national security dictates otherwise—in which case the court must at least be satisfied by sufficient evidence that national security was truly the ground.

A somewhat similar approach appears in cases concerned with the Internal Security Act 1960. The Malaysian courts have been scrupulous in insisting on strict compliance with the procedure for deprivation of liberty, as well illustrated by the judgments of Mr Justice Hashim Yeop Sani, in *Public Prosecutor v Koh Yoke Koon* [51] (continued detention unlawful after unauthorised two-day period) and *Tan Hoon Seng v Minister for Home Affairs, Malaysia*[52] (future date for commencement of detention not able to be specified). But now the Singapore Court of Appeal have held[53] in effect that the Malaysian courts have unnecessarily abandoned the possibility of

49
[1988] 2 MLJ 12.

50
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351.

51
[1988] 2 MLJ 301.

52
[1990] 1 MLJ 171.

53
Ching Suan Tze v Minister of Home Affairs [1989] 1 SCR 103.

checking whether there are substantial security reasons, by labelling the discretion as "subjective". It would be presumptuous for a New Zealand judge to intrude into the facts of the internal security cases. I know next to nothing about the security position in Malaysia and Singapore. But as a matter of legal principle, it must be permissible to suggest that the so-called objective-subjective dichotomy here is misleading. No discretion is either wholly subjective or wholly objective. With every discretion the question is always whether it has been exercised in a way reasonably open.

In sum, the Malaysian administrative law has some notable achievements, but perhaps as well the tensions have taken their toll. The tensions will not relax. As in other countries, one can predict from experience that administrative law cases will continue to get harder. A guiding thought for those charged with judicial responsibility is that in this field, judicial review is an aspect of democracy. To suggest, as some people unreflectingly tend to do, that democracy equates with majority rule is simplistic and fallacious. A dictionary definition of democracy is "a state of society characterised by equality of rights and privileges". Administrative law is a servant of such a society.

The so-called objective-subjective dichotomy is misleading. No discretion is either wholly subjective or wholly objective. With every discretion the question is always whether it has been exercised in a way reasonably open.

Just as in a sense, Your Majesty, we of the law are all your servants. My wife and I acknowledge with gratitude your bountiful and considerate hospitality.