THE NEW ZEALAND
LAW JOURNAL
21 AUGUST 1990

Anns overruled

In *CBS Songs Limited v Amstrad Consumer Electronics* [1988] 2 All ER 484, Lord Templeman commented at p 497 that since *Anns v Merton London Borough Council* [1978] AC 728, it had become fashionable to allege negligence on the basis

> that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that from every mischance in an accident-prone world, someone solvent must be liable in damages.

The fashion, however, has been changing. It has now been changed dramatically. The House of Lords, with seven Law Lords sitting, has explicitly overruled *Anns* and all the cases that purported to follow it. The two principal speeches were those of Lord Keith of Kinkel, and Lord Bridge of Harwich. These were concurred in, with greater or less degree of comment, by the Lord Chancellor, Lord Brandon, Lord Ackner, Lord Oliver, and Lord Jauncey. The case is *Murphy v Brentwood District Council*. Lord Keith of Kinkel, at p 17 of the typescript of the judgment which was given on 26 July 1990, using a form of words very similar to those also used by the Lord Chancellor, stated:

> My Lords, I would hold that *Anns* was wrongly decided as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building by-laws or regulations and should be departed from. It follows that *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 should be overruled, as should all cases subsequent to *Anns* which were decided in reliance on it.

In *Caparo Industries plc v Dickman* [1990] 1 All ER 568, Lord Bridge discussed what he called a tension in the two different approaches, in the series of cases leading up to *Anns*, and the cases that followed after – see the comment in the editorial at [1990] NZLJ 73. In the *Caparo* case, at p 573, Lord Bridge noted

> that decisions of the House of Lords since *Anns*, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope . . .

This new decision in *Murphy v Brentwood District Council* is not altogether unexpected. In *D & F Estates Limited v Church Commissioners* [1989] AC 177; [1988] 2 All ER 992, their Lordships took a very restricted view of the effect of *Junior Books v Veitchi* [1983] AC 520; [1982] 3 All ER 201. For a discussion of this, see the editorial at [1988] NZLJ 293; and where particular reference is made to the risks for New Zealand Courts of becoming too rigidly committed to the idea of developing our own distinct domestic jurisprudence.

The reasons in the *Murphy v Brentwood District Council* decision are interesting in many ways and will no doubt be discussed at length by academics for some time to come. Just three points will be noted here. First, their Lordships took the view that there might be policy reasons for some protection being provided for house-owners against defective workmanship, but that this was a matter for the legislature and not the Courts. Secondly, both Lord Keith and Lord Oliver expressed concern about overruling a decision that had stood for 13 years, and in reliance on which an enormous amount of litigation had been instituted (per Lord Keith at p 17 and Lord Oliver at p 36 of the typescript). In terms of principle, however, they both came to the view that *Anns* should be overruled.

The third interesting point is that some New Zealand cases are referred to. In particular, there is a substantial discussion of *Bowen v Paramount Builders* [1975] 2 NZLR 546, which was noted as having been cited approvingly by Lord Wilberforce in *Anns*. Their Lordships explicitly did not agree with the reasoning in that case. Reference was also made to *Rowling v Takaro Properties Limited* [1988] AC 473 and to the decision of *Stieller v Porirua City Council* [1986] 1 NZLR 84. The decision in this latter case was described by Lord Bridge as "striking", in what would not seem to be a complimentary sense.

Lord Keith, Lord Bridge and Lord Oliver referred with approval to the decision of the High Court of Australia in *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, (1985) 60 ALR 1. In that case, the High Court of Australia declined to follow *Anns*. Their Lordships also cited decisions from the Supreme Courts of both Canada and the United States. There would appear to be no doubt as to the general flow of judicial opinion in the Common Law. It is in the direction of restricting the extent of a duty of care. The floodgates are being closed.

The decision in *Murphy v Brentwood District Council* is summed up by Lord Keith of Kinkel at p 16 of the typescript as follows:

> In my opinion there can be no doubt that *Anns* has for long been widely regarded as an unsatisfactory decision. In relation to the scope of the duty owed by a local authority it proceeded upon what must, with

due respect to its source, be regarded as a somewhat superficial examination of principle and there has been extreme difficulty, highlighted most recently by the speeches in *D & F Estates*, in ascertaining upon exactly what basis of principle it did proceed. I think it must now be recognised that it did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation. It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished. Others have been distinguished in the Court of Appeal. The result has been to keep the effect of the decision within reasonable bounds, but that has been achieved only by applying strictly the words of Lord Wilberforce and by refusing to accept the logical implications of the decision itself. These logical implications show that the case properly considered has potentiality for collision with long-established principles regarding liability in the tort of negligence for economic loss. There can be no doubt that to depart from the decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.

On the same day as their Lordships delivered their decision in *Murphy v Brentwood District Council*, 26 July 1990, they gave their decision in a similar building case, *Department of the Environment v Thomas Bates and Sons Limited*. It is interesting to note that this latter case had been argued for seven days in January 1990, whereas the former case was before their Lordships for six days in May 1990. In the *Murphy* case, the Lord Chancellor and Lord Bridge sat, whereas they had not sat on the *Department of the Environment* case. There were different Counsel in each case. In the *Department of the Environment* case, Lord Keith of Kinkel, giving the judgment of the House, stated:

It has been held by this House in *Murphy v Brentwood District Council* that *Anns* was wrongly decided and should be departed from, by reason of the erroneous views there expressed as to the scope of any duty of care owed to purchasers of houses by local authorities when exercising the powers conferred upon them for the purpose of securing compliance with building regulations. The process of reasoning by which the House reached its conclusion necessarily included close examination of the position of the builder who was primarily responsible, through lack of care in the construction process, for the presence of defects in the building. It was the unanimous view that, while the builder would be liable under the principle of *Donoghue v Stevenson* [1932] AC 562 in the event of the defect, before it had been discovered, causing physical injury to persons or damage to property other than the building itself, there was no sound basis in principle for holding him liable for the pure economic loss suffered by a purchaser who discovered the defect, however such discovery might come about, and required to expend money in order to make the building safe and suitable for its intended purpose.

P J Downey

Case and Comment

Copyright and teaching materials

On 7 June 1990, Doogue J in the Auckland High Court gave judgment in the long-running case *Longman Group Limited and others v Carrington Technical Institute Board of Governors and another* [1990] BCL 1082. Proceedings in this case had been commenced in December 1984, and costs adjudged by Doogue J amounted to $10,000. The case was acknowledged as a test case in which the parties sought clarification as to the extent to which multiple copies of parts of literary and artistic work (in which copyright was held) could be made by teachers in compiling teaching materials for classroom use. It was decided against the background of increasing concern amongst authors and publishers about the use of photocopiers for multiple photocopying in educational institutions. (During the late 1970s and early 1980s, the Book Publishers' Association of New Zealand had tried to reach agreement with educational authorities and teaching unions as to guidelines for the copying of copyright works, with a suggested guideline of up to 10% allowed for research or private study. However, no agreement was reached.)

The teacher in question, Henderikus Meijering, had, for several years, taught an introductory course in technical drawing at Carrington Technical Institute. In 1978, he began organising handout material for his class, and found problems in obtaining material of the required standard, simplicity, comprehension and diversity of topics and examples. By 1981, he had formed the idea of producing a manageable one-volume compilation to have in place all the material needed by the students, in a form that they could readily comprehend and realistically afford. He thus

photocopied extracts (mainly drawings) of varying lengths, from some fourteen works on technical and engineering drawing. (The plaintiffs in this action claimed copyright in five of these works, from which extracts of about 7.5% on average of the total works were copied.) The tutor made minor amendments to the photocopied material and prepared a linking text, though in the resultant compilation the copied work was over 70% of the whole (and the sources of which were unacknowledged). One hundred copies of the work were made and sold to students of the drawing course in 1982, 1983 and 1984. After the commencement of proceedings by the plaintiffs at the end of 1984, the book was not used at the Institute.

The defendants in this action (the Institute and Meijering) admitted that the plaintiffs held copyright in the works which had been copied. However, they denied that a substantial part of each copyright work had been reproduced (as required in s 3(1) of the Copyright Act). They claimed that the extracts were not vital and substantial parts of the books in question because, even if the extracts copied were omitted from the particular books, the works would still be useful texts for the teaching and learning of engineering drawing and their value not significantly reduced. Doogue J specifically rejected this approach, and said that "any work could still be useful, even if substantial parts were taken from it, either in quality or in quantity". The approach which he took was to consider whether the extracts copied were "of material which was of importance and significance and essential to the integrity of the work being copied, and vital to in that sense even if not in the sense that the work could still have some value if it were omitted". He also took into account the particular use for which the parts were taken, and said that he was entitled to infer that the tutor had chosen the best available drawings for his class. He added that a careful appraisal of the works in question lent force to the dictum of Petersen J that "there remains the rough practical test that what is worth copying is prima facie worth protection" (*University of London Press Ltd v University Tutorial Press* [1916] 2 Ch 601 at 610). As to the quantity copied, he said that this was "not to be measured simply in pages [and] cannot be divorced from the content of the copying". He noted that "when the copying consists of a chapter or substantial parts of a chapter or of the drawings relevant to a chapter, the copying is on the face of it a substantial part of the whole of works of this kind". He concluded on the evidence that "the authors used more than negligible skill and labour in creating the parts of the works reproduced and the Carrington book was for the purpose of saving the tutor or the CTI the equivalent skill and labour". He therefore had no doubt that the parts of the copyright works reproduced in the book were substantial.

The defendants also pleaded a number of exceptions to copyright infringement provided by the Coypright Act: these were fair dealing for the purposes of research or private study, reproduction by a teacher for the purposes of research or private study, reproduction by a teacher in the course of instruction, and reproduction for use by an agent of the Crown. The defendants claimed that the first three exceptions showed that the protection for copyright works under the Act had to be balanced with the public interest in ensuring that copyright works were readily available for genuine educational pursuits. They also submitted that the exceptions indicated a more liberal approach in New Zealand compared with that in the United Kingdom, having regard to the provisions of the Copyright Act 1956 (UK) on which the New Zealand Act was based. It was, for example, pointed out that the United Kingdom Act, unlike the local Act, specifically excluded reproduction by the use of a duplicating process, being defined as "any process involving the use of an appliance for producing multiple copies". (In countering this, opposing counsel submitted that by the time the New Zealand Act was passed, photocopiers were not in general use.) Doogue J, however (in rather narrow fashion), chose to interpret the Act "regardless of the state of technological advances and regardless of legislation in other countries", and to "treat our Act as it is". He considered the particular provisions "without any predisposition that they are to be interpreted either strictly in favour of the copyright holder or liberally in favour of educational users who seek to be freed from the bounds of copyright protection". He specifically adopted a purposive approach (to attain the object of the Act according to its true intent, meaning and spirit). He also bore in mind that the Act gave copyright holders "exclusive rights in respect of the copyright work unless those seeking to use the work in a way which would otherwise be an infringement of those rights, come within one of the exceptions created by the Act or, arguably, can establish a public interest defence". (Doogue J did not return to the notion of a public interest defence, which, I submit, is a highly questionable notion in view of the express provisions of the Coypright Act.) He approached the matter on the basis that the exceptions were independent provisions and that the Carrington book had to fall within one of the exceptions. Before proceeding to consider the individual exceptions, he clearly rejected the defendants' submission that, in respect of the exceptions for copying for research and private study, they had understood that up to 10% of a copyright work could be copied. (He noted that, "at the most, 10% appears to have been taken by some [educational consumer groups] as a guideline to the maximum permissible copying of a single copy for research or private study".)

In quick succession, Doogue J rejected each of the exceptions argued by the defendants. In relation to the first exception ("fair dealing with an artistic work for the purposes of research or private study", in ss 19(1) and 20(1)), he held that the dealing by the tutor and the CTI "was not for the purpose of research or private study but for the express purpose of compiling a text book to assist in the teaching of the course". He added that "whilst it may be that students in a classroom are engaging in private study that was not the purpose of the reproduction". He also suggested that the use for research or private study had to be that of the compiler.

Much more surprisingly, Doogue J rejected the second exception raised by the defendants. This exception provides that copyright is not infringed by the making or

supply of a copy of a reasonable proportion of a work "by or on behalf of a teacher at any University or school", provided the copies are supplied only to persons that "require them for the purposes of research or private study and will not use them for any other purpose", and provided only one copy was supplied to each person at a cost not higher than the cost of production (s 21(1)). On the question of cost, Doogue J held that "the spirit of the provision was arguably met in 1982 and undoubtedly met in 1983 and 1984", and found it "impossible to answer" the issue of whether a "reasonable proportion" had been copied. He based his rejection of the exception on two factors. First, he held that the book "was not produced for research or private study but as a textbook for teaching the course in the classroom", and secondly, he held that it was "implicit that there must be a request for supply, not a supply generated by a librarian or a teacher without any request". The first ground shows some confusion with the "fair dealing" provisions previously considered, which requires the *dealing* (in this case, of the compiler) to be for the purposes of research or private study, and s 21(1) which allows the supplying of copies to *persons who require them* for the purpose of research or private study. Whatever the compiler's purpose, it could not be denied that the *students* required the copies for the purposes of research or private study. The second ground is a questionable judicial importation into the Act, and is out of tune with the Judge's stated aim of "treating our Act as it is".

Doogue J then turned to the exception "reproduction in the course of instruction" (in s 21(4)). This provision reads:

> The copyright in a literary, dramatic, musical, or artistic work is not infringed by reason only that the work is reproduced, or an adaptation of the work is made, (a) In the course of instruction, whether at a University or school or elsewhere or by correspondence, where the reproduction or adaptation is made by a teacher or student; or (b) As part of questions to be answered in an examination, or in answer to such a question.

Doogue J's approach to this provision contrasted markedly with his interpretation of s 21(1), as he afforded wide scope for the exception it provided. He made the following observations of the provision:

(1) "There is no statutory limit imposed on the method of reproduction [and] whether photocopiers were freely available or not at the time of the passing of the Act is irrelevant";

(2) "The course of instruction would include anything in the process of instruction with the process commencing at a time earlier than the time of instruction, at least for the teacher, and ending at a time later, at least for the student. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction. 'The course of instruction', when it encompasses correspondence, must enable preparation of the material to be used in the course of instruction and copying of material to be used in the course of instruction by a teacher before the delivery of the instruction. Equally it could not be said a blackboard transcription of copyright work prior to a class was not in the course of instruction";

(3) "There are no words preventing the use of an agent. A physically handicapped teacher or student, for example, cannot in the absence of clear language, be denied the right created by the subsection because of a physical disability to copy in person";

(4) "There is no limitation against multiple copying";

(5) "There is [no] restriction on the length of the extract which can be copied".

For Doogue J, what took the defendants' compilation beyond reproduction in the course of instruction was that "it was assembled not in or before any particular class, term or even teaching year but before 1982 for subsequent use". He specifically added that such a compilation could not be protected, "notwithstanding that a teacher may be able to copy the same extracts from the copyright works in the course of instruction." With respect, it is diffficult to see the difference in principle between a compilation made before the start of each academic year and that made for two or more subsequent years.

Doogue J finally held that the work had not been reproduced for use by an agent of the Crown (s 53(2)), as the book was "not for the use of the teaching staff only at CTI but was also distributed for use by students of the course".

The overall effect of Doogue J's judgment is curious indeed. At first glance the decision in favour of the publishers (and, in particular, the rejection of the "reasonable proportion for research or private study" defence) may justifiably cause consternation amongst teaching institutions, where practices similar to those of Meijering are rife. However, the wide berth given to the "in the course of instruction" defence should provide considerable reassurance. It appears that, provided teachers take care to produce their compilations before each class, term or even teaching year, they may escape liability for copyright infringement, regardless of the length of the extracts copied and the number of copies made.

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Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

Dynamics of the Common Law

Sir Patrick Neill

The topic this morning is "The Dynamics of the Common Law"; not, you will note, the "dynamism". I looked up "dynamics" in the good book, and I discovered it is a branch of physics which treats of the action of force in producing or varying motion, as opposed to statics, which treats a rest or equilibrium under the action of forces. So I think it is a deliberately provocative title we are going to hear about, and it would seem to be particularly relevant to this country when I listened last night to what was said first of all by the Attorney-General when he said that the Judges had been thinking the unthinkable, and then I heard the Chief Justice refer to the corrosive effect of criticism. So it is a very intriguing scene for somebody coming from overseas to encounter.

Now the first of our speakers today needs no introduction. Sir Robin Cooke, as President of the Court of Appeal, obviously needs no introduction to a New Zealand audience. Nor does he need it in any gathering of Commonwealth lawyers. We have watched from afar his judicial career with admiration. In my own case, I have a particular reason to be grateful to him because he was an active supporter of a project which I was engaged on, doing a review of administrative law. *Justice* and All Souls, my college, got together and Sir Robin gave the most enormous support and came to England on two occasions to advise on that project.

Ladies and gentlemen, I have much pleasure in introducing Sir Robin as our first speaker this morning.

Sir Robin Cooke

It is fitting that the Warden of All Souls should chair this session. I regard it as his first action *in loco parentis* to a Visiting Fellow. In the aftermath of the session, it may be necessary to look to him for fatherly protection as I propose this morning to try to put up some sort of a defence to sundry onslaughts launched on me by different powerful forces in recent months. There have been so many that one wonders whether the business Sessions Committee has been subtly stirring up provocation.

First, though, let something agreeable be said. It's a delight to be associated with the beginning of the business of this Commonwealth conference with Sri Ram, whether or not one agrees with all his stances . . .

When inviting Sri Ram to take part in this question, I spoke to him by telephone in his Kuala Lumpur office, a peal of temple bells chiming away at his end of the line for the diversion of the waiting caller until he was available. I explained that the perceptive and amusing discourse that I had heard from him at a Malaysian dinner party had suggeted that he was well qualified to speak of the dynamic Common Law on a Commonwealth-wide occasion. . . .

Applying the conventional legal fiction, I will take [the paper to which I am now speaking] as read. Please bear with me, even spare a shred of sympathy, if you can, when you hear that I have to answer in the following order the strictures of the following: the hard core of the legal profession, coupled with the name of the Editor of the *New Zealand Law Journal*; Professor Sir William Wade; the House of Lords; and, it was once thought, the New Zealand Government, but as to the latter, see below.

By the hard core of the profession, I mean a respected school of thought whose views were epitomised in a piece by one of my former instructing solicitors and old friend, published and expressed in a recent issue of the *Law Journal*. His views are undoubtedly those of a school. The subject allotted by the Conference organisers for the present paper was the dynamics of the Common Law. The school in question believe that this is a non-subject; that the Common Law is not dynamic, or at least should not be.

This is the first of a series of articles that will be published over the next four or five months taken from tapes of some of the proceedings of the Ninth Commonwealth Law Conference held in Auckland in April 1990. The first series of articles will be taken from the four sessions sponsored by the Butterworth Group of companies, and known as the Butterworth Lectures. The four topics of the sponsored sessions were (i) Dynamics of the Common Law, (ii) The Profession: Standards and Independence, (iii) Judicial Review: Future Directions, and (iv) Judging Judges.

The talks and the interventions have been very lightly edited, but not to the extent of avoiding the idiom of linguistic style and the spontaneity of the spoken word.

A subject allotted on another occasion – an annual Conference of the Australasian Universities Law Schools – was fairness. As a name in the Common Law, fairness is anathema to the school of thought to whom I have been referring. For reasons which, perhaps, they do not articulate, they hold that arguments solely from precedent and principle (I quote the words of the piece already mentioned) are likely to produce different results from arguments in which a place is allowed for the notion of what is fair, just, equitable or conscionable.

The first point that apparently needs to be made is that the paper on fairness which drew fire, was dealing, as stated in it at the outset, with new points, grey area cases, cases in which, for the most part, the law is uncertain. A very large portion of the work of the Courts is concerned with issues of fact where there is no significant dispute about the applicable law. That is true, even in Appellate Courts. To talk in domestic terms, the New Zealand Court of Appeal, with its six Judges, could not possibly decide 500 or 600 cases a year if they all raised seriously arguable questions of law. Most of the law is tolerably clear – at any rate, if you take the time and trouble to understand it.

Sometimes time and trouble are required. A practice which is anathema to me is that followed by some Judges and Counsel who, possibly coming anew to a well-tilled field, rehearse a sort of survey of the case or statute law, perhaps with copious quotations, rather than going straight to the points to be decided. A judgment or argument is not the place for self-education, or even legal education of any kind. That should be left to the textbook and article writers who will do it better. Every judicial decision, to some extent, makes law, since cases cannot be decided by computer, but the great majority are not concerned with frontiers of legal development.

It is with frontiers that this session is concerned, including in that term the comparatively rare cases in which an apparently clear precedent is seen to be producing such unsatisfactory results that the question of departing from it arises. I say comparatively rare, because speaking again in the domestic context, the New Zealand Court of Appeal has not been required in recent years to attempt any formulation of the circumstances in which it will be prepared to depart from a prior decision of its own. The writer already mentioned has, as Counsel, just argued that we should depart from a prior matrimonial property dispute in the case call *Brown v Brown*, and this will require careful thought, free of the influence of his piece. But, by and large, people do not spend money on arguing questions of law in cases where the existing law is certain, or almost certain. It is in its approach to grey area cases that a legal system can be most severely tested. That is partly why in the paper I have ventured to describe the Common Law as an attitude of mind, as well as a set of principles or rules.

As to grey area cases, I acknowledge an inability to answer the attack, save by the most elementary truisms. The Common Law cannot help growing. As to strict liability in tort, it did not stop before or after *Rylands v Fletcher*. As to negligence liability, it did not stop before or after *Donoghue v Stevenson*. As to contractual damages, it did not stop before or after *The Heron (2)*. It would seem rather odd if, in helping it grow, whether by way of expanding or narrowing liability, the Judges were expected to take no notice of what is fair. In fact, of course, Common Law Judges have done so from time immemorial, and always will.

What is now occurring, I think, is a more open recognition of this constructive element in the judicial role; hidden policy reasons are less in vogue, but Courts look for more help in it from Counsel; although Counsel do not always respond to this call which can require quite strenuous thought and reading beyond the pages of the more standard law books. A community tends to have commonly accepted values evolving over the years and reflected in contemporary legislation and case law. It can be helpful to the Judges in grey area cases if Counsel assist in identifying these, in bringing out different ways of looking at problems, in moving in a balanced way with the needs of the times. With that kind of help, one can strive to go some way towards avoiding the spectre which the hard core conjure up so frighteningly before us. They call this thing idiosyncrasy. As for the Editor of *The New Zealand Law Journal*, he invites comments on one side or the other regarding this topic for publication. He can be acquitted of all charges, except mercenary motives, and as the Common Law is traditionally tender towards them, I can have no legitimate complaint about him.

In the paper, I expressed pleasure at being able, at this Conference, to leave administrative law to Sir William Wade, Sir Patrick Neill, and others. That was premature. The Sword of Damocles was hanging over an unsuspecting head. Now it is my misfortune to be pitted against legal scholarship of the first rank, the thinking of the leading academic formulist of current English Administrative Law.

What can I muster up in answer to my greatly admired friend, Sir William Wade's charge, that the Courts are too ready to interfere with private and non-legal organisations? No more than that we interfere in extreme cases only; that in a democracy, all power requires some independent check or balance, and that the President of the New Zealand Court of Appeal for the time being happens to agree on this issue with the Master of the Rolls for the time being, and cannot improve on his words. Lord Donaldson of Lymington gave the leading judgments in the cases in which the English Court of Appeal has accepted judicial review jurisdiction over the City of London takeover panel: the *Datafin* case, and the *Guinness* case. In neither of those cases was the decision of the panel set aside. But in each it was held, unhesitatingly it would seem, that some degree of judicial check exists.

The takeover panel exercises *de facto*, self regulatory authority over the United Kingdom securities markets; fortunes in pounds, reputations alleged to be worth fortunes, may turn on its decisions. There are some statutory links, but the true sourse of its power is the assent of institutions. There is, as the Master of the Rolls put it, a public element which can take many different forms. He went on ([1987] 1 All ER 577) to say:

> In this context, I should be very disappointed if the Courts couldn't recognise the realities of executive power and allowed their vision to be clouded by the

> subtlety, and sometimes complexity, of the way in which it can be exerted.

What has evolved is review on the ground that something has gone wrong of a nature and degree which requires the intervention of the Court. Sir William Wade evidently disapproves of that recognition of residual judicial control, just as he disapproves of the approach taken in New Zealand in the Tour case *Finnigan v The New Zealand Rugby Football Union* in 1985, referred to in my paper. No doubt the Courts could, with perfect logic, confine the modern counterpart of the Royal Prerogative Writ jurisdiction to issues classified strictly as going to livelihood or property, leaving within the state major realms where the Common Law does not run. The other view is that there is an untidy, illogical world of power, and the Courts would be abdicating their responsibility if they washed their hands of any scrutiny of tracts of if having major public importance.

As the Tour case shows, the role of the law in a multi-racial society is here involved. The High Court Judge in that case found prima facie grounds for thinking, and I paraphrase, that the Council of the Rugby Union had become so absorbed in outwitting opposition to the tour of South Africa, they did not, perhaps could not, assess the long-term consequences for the national sport. While acknowledging that the judicial decisions are open to criticism from a particular theoretical standpoint, I am unrepentant of such part in them, as with other Judges, it fell to me to play. One's sleep is by no means free from disturbance, but it is a little easier for those decisions. They were difficult enough at the time, but in retrospect, I do not think that the New Zealand Courts could responsibly have decided otherwise. The case illustrates how the principles of the country's Common Law have to reflect the national ethos.

One of my friends at the Bar (there are still a few left) on reading the conference paper, said that it was very polite to the House of Lords. May the pendulum not swing too far in the opposite direction as I try to go some way to redress the balance? There was a time when, in the field of torts, for instance, an almost inspirational note was struck by such Judges as Lord Atkin, Lord Reid, Lord Wilberforce, though I hope the Lord Chancellor will permit me to say that it could surely never be suggested of a Scot, like Lord Reid, that his feet were not on the ground. It is a commonplace that in recent years, Lord Wilberforce's *Anns* speech has fallen out of favour. Let it not be overlooked that a good deal of what Lord Reid said is also being undermined. In the *Dorset Yacht Company* case in 1970, he said there had been a steady trend towards regarding the law of negligence as depending on principle, so that when a new point emerges, one should ask not whether it is covered by authority, but whether recognised principles apply to it. I think the time has come when we should say, and His Lordship was referring to Lord Atkins' *Donoghue v Stevenson* statement, that it ought to apply unless there is some justification or valid explanation for its exclusion. Of a public policy argument based on a New York case, that to impose a duty of care on administrators would produce excessive caution, he said:

> It may be that public servants of the State of New York are so apprehensive that they could be influenced in this way, but my experience leads me to believe that Her Majesty's servants are made of sterner stuff.

In the *Dorset Yacht* case, it was held that if prison officers went to bed in breach of their duty so that borstal boys escaped, the Department was liable for property damage, a form of economic loss, be it noted, caused by the boys. I have heard a contemporary Law Lord describe that as a bad decision. His view is consistent with the approach in recent House of Lords and Privy Council negligence cases. Whether to fall into line may be a troubling question for New Zealand common law. The latest example of the Westminster trend is *Caparo Industries v Dickman* mentioned in my paper, though at that stage, a full report of it was not available here; and I wish at this point that Madame Justice Wilson were here to help me as she is very sound on negligence, but unfortunately she is judging a moot, as I understand it.

In *Caparo*, the auditors of a public company, whose published accounts were alleged to show it was particularly vulnerable to a takeover bid, were held to owe no duty of care to shareholders who, in reliance on the accounts, had bought more shares and later made a successful takeover bid. Any duty was held to be confined to the body of shareholders as a whole. In certifying the accounts, the auditors had made no disclaimer of liability to persons other than the company. As to the company, of course, liability could not be excluded under the Companies Act.

The decision is contrary to the majority holding in our Court in 1978 in *Scott Group Limited v McFarlane*. I make no complaint of that. The point is a new and difficult one, open to differences of view, as the judgment of that case of the then President, Sir Clifford Richmond, shows. No one who knows Lord Oliver and his greatly respected judgments could conceivably suggest that he is lacking in perceptiveness or balance. So his misinterpretation of my own judgment in the *Scott Group* case must be put down to my own failure to be clear. I did not intend to base that judgment primarily on Lord Wilberforce's *Anns* speech. It appeared consistent with, and to crystallise, a considerable line of major decisions to which I referred. But I did try to indicate that I would have decided the same way quite apart from *Anns*. Nor did I regard the first step of Lord Wilberforce's two-stage approach as equating proximity with foreseeability. The latter is appoint on which Sir Owen Woodhouse and I differed in several cases.

In *Scott Group*, I tried to say that the degree and magnitude of the risk are important, not merely its foreseeability, and that in cases of takeover, it may be virtually certain that the bidder will carefully consider the published accounts — virtually certain — whereas that can not be postulated of an ordinary purchaser of shares in the market. These matters may have to be canvassed again in New Zealand after *Caparo*, and, if so, the opinions of their Lordships will require careful and respectful and unbiased consideration.

The only thought perhaps worth

adding today is that it would seem that there must now be in England a very strong sense that the duty to one's neighbour, the Christian teaching if you like, should not be allowed to get out of hand, at least not when it comes to brass tacks. Evidently it is seen as so strong, this sense, as normally to outweigh other policy factors when the question of a duty of care or not in a new situation is being considered. If it demonstrates nothing else, this certainly demonstrates the dynamism or dynamics of the Common Law.

It had seemed necessary also to mention certain Governmental speeches. But the Attorney-General's speeches, at the LAWASIA dinner the other night and at the opening of this Conference last night, that is to say the first of the openings, have struck a different note, so that I am happy to be able to conclude this morning by saying that in the matter of the Treaty of Waitangi and what the Attorney-General called the subtle cultural repositioning that is taking place, I am glad to accept his assurance that there is no question of reprisals.

Sir Patrick Neill

Our next speaker will be Gopal Sri Ram who will talk about the dynamics of the Common Law from the Malaysian standpoint. Sri Ram is a distinguished advocate from Kuala Lumpur. For many years, his practice lay in the field of Administrative and Constitutional Law. Perhaps the peak of his success, if he will allow me to say so, was a suit in which he succeeded in dissolving the political party of which the Prime Minister belonged. I think that's a precedent to which many of us as lawyers feel somewhat envious. More recently, his practice has lain in the field of Commercial Law, and that is where the bulk of his work has been. He is now going to address us on the dynamics of the Common Law in Malaysia.

Gopal Sri Ram

Sir Patrick Neill, Sir Robin Cooke, my Lord Chancellor, fellow delegates – it is indeed a tall order to be called upon to follow immediately in the footsteps of someone like Sir Robin Cooke. If, at the end of my oral presentation, I am judged by you all and found to be wanting, I here and now declare that I will accept no blame, for I stand here dwarfed in the shadow of the intellectual giant who has preceded me to this rostrum.

Fellow delegates, for the purpose of this oral presentation, I intend to divide my paper into four broad categories [of reception, application, incorporation and interpretation] while holding to the general pattern of the written text.

Reception

The first heading is *reception*. The development of Malaysian Common Law has been largely through the reception of the English Common Law. The reception is through statutory doors which are to be found in ss 3 and 5 of the Civil Law Act 1956, which you will find at page 11 of the bundle of Conference papers which are before you. To those of you who have read and fully understood these sections, I offer you my heartiest congratulations. To those of us who have to deal with these sections from time to time in our Courts, I expect from all of you your heartfelt condolences.

Application

As for the *application* of the English law, or English Common Law, which is the second part of my oral presentation, it is quite common to find that Malaysian Courts refer and apply English authorities as if they were decisions of Malaysian Courts. There are two primary reasons for this. One are the two sections I adverted to a moment ago; the other is the decision of the Privy Council in a case called *De Lasala v De Lasala* which said, and it is to be found in my paper, that if there is a decision of the House of Lords on a section or on a subject which finds a parallel in another Commonwealth country, then the decision of the House of Lords is as good as the decision of the Privy Council on the subject and at a time when Malaysia had appeals to the Privy Council, we were very largely guided by what the Privy Council said.

It would appear from recent decisions of the Malaysian Courts, that the abolition of appeals to the Privy Council has not changed attitudes in Malaysia. Malaysian Courts adopt a similar approach to decisions from other Commonwealth countries, as our Penal Code and our Evidence Act are reproduced ipsissima verbis to the Indian Penal Code and the Indian Evidence Act, Indian decisions on the sections of these statutes are adopted and applied freely without adverse comment. When examining any question before it, a Malaysian Court frequently, if not always, looks at comparable decisions from the other Common Law jurisdictions in order to effect a uniform growth of the Common Law, subject on which the Privy Council itself has commented, if not in judgment, then in the course of argument.

While on the question of application, I would like to make three points. First, Malaysian Courts, and from my limited reading of some of the decisions of other Commonwealth Courts, even these latter, show a tendency of blindly applying English decisions without reference to particular local circumstances. But those of us from outside the United Kingdom, must call to our memory the words of Lord Sumner which were delivered in a Privy Council case. It is reported in the *All Indian Law Reports*. That case was decided in 1927, and this is what Lord Sumner said:

> It is often pointed out by this Board that where there is a positive enactment of the Indian legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any considerations devised from the previous state of the law or of the English law upon which it may have been founded.

To assuage the sceptic, I would add that on that occasion the other members of the judicial committee were Lord Blanesburgh and Sir John Wallis.

The second point I would like to make is this. It is disheartening for those of us who practise in the Common Law system outside England to find an absence of any attempt on the part of English lawyers and Judges to refer to the decisions of Malaysian, Singaporean, Indian, African, West Indian and Canadian Courts in the course of argument or judgment as the case may be. Australia and New Zealand appear to be the only ones on the list of favourites. The other jurisdictions, let me assure you, have much to offer to the development

of the Common Law. They should not be ignored or overlooked, nor should they be placed on the list below Scotland, or worse still, Northern Ireland.

Through a review and discussion of the cases decided in those other jurisdictions, not only would the English Common Law itself develop, but so will the Common Law of those other jurisdictions.

In my paper, I have referred to a case called the *National Westminster Bank v Morgan*. In that case, Lord Scarman applied a passage from the judgment of the Privy Council delivered by Lord Shaw of Dunfermline in an Indian appeal called *Poosathurai v Kannappa Chettiar*. If it is good enough for Lord Scarman, it must be certainly good enough for the lawyers, the barristers, the High Court Judges and the Judges of the Court of Appeal sitting in The Strand. For Malaysians, it is nothing strange to examine foreign decisions. We do it every day. We are ready, willing, able and liberal enough to undertake a wide ranging survey of the treatment given to a topic in various jurisdictions before accepting a particular approach when arriving at a conclusion in a case. English lawyers should not be shy. They should be prepared to follow and act similarly.

Incorporation

The third point I would like to make is this. It concerns the *incorporation* into the Common Law of principles of American origin – and I confine myself to the United States of America. I am respectfully of the view that we, from the Commonwealth, have much to gain from drawing on the contribution that has been made by the several Courts in the several jurisdictions of the United States of America to the development of the law in general. This is especially so in Commercial Law and Equity Jurisprudence.

Canada and India have already set a vigorous pace in this direction. Australia seems to have taken a hesitant step, not unlike a bather testing the water before taking a dip, and then deciding not to enter it after all. This is evident from the decision of the High Court of Australia in a case called *United Dominions v Brian Pty Ltd* which concerns fiduciary duties between joint ventures. I would commend to those who do not form the timorous souls of the Common Law, the judgment of the New South Wales Court of Appeal in that case, which commends itself not only to logic, but also to good sense and good law.

When importing an American principle, of course, it is important to bear in mind the qualifications to which that principle has been subject in its own domestic context. It is wrong to import the principle and subject it to the qualifications imposed by the law of the recipient jurisdiction. To illustrate, I refer to the case of *Edward Owen v Barclays Bank*, which you will find reported in [1978] 1 QB 159 in which Lord Denning held that performance guarantees were virtually promissory notes and are payable on demand. He said that the only exception was established or obvious fraud to the knowledge of the Bank. In support of that principle, he cited a passage from the judgment of Justice Shientag in a case called *Sztejn v Henry Schroder Banking* decided by the New York Court of Appeal in 1941. Lord Denning went on in the same judgment to treat the fraud exception on the footing of Common Law Fraud; in fact, in later passages in that judgment, he uses words like "fraudulently" and "forged documents", meaning actual Common Law fraud. No one stopped to consider at the time as to whether the New York Court was referring to fraud in the English Common Law sense, or in the context of the domestic Common Law. Some seven years later, Lord Justice Ackner, now Lord Ackner, opened a window and cast some light on the subject.

In *United Trading v Arab Allied Bank*, [1985] 2 Lloyds 159, he made a point of such vital importance that any attempt to paraphrase it would denude it of its content and, by your leave, if I may read it to you, this is what Lord Ackner said:

> While accepting that letters of credit and performance bonds are part of the essential machinery of international commerce, and to delay payment under such documents strikes not only at the proper working of international commerce, but also at the reputation and standing of the international banking community, the strength of this proposition can be over-emphasised. As Mr Justice Neill observed in the judgment under Appeal, it cannot be in the interests of international commerce, or of the banking community as a whole, that this important machinery that is provided for traders should be misused for the purposes of fraud. It is interesting to observe that in America, where concern to avoid irreparable damage to international commerce is hardly likely to be lacking, interlocutory relief appears to be more easily obtainable. A temporary restraining order is made, essentially on the basis of suspicion of fraud, followed some months later by a further hearing during which the Applicant has an opportunity of adding to the material which he first brought before the Court. Moreover, their conception – and these are the crucial words – their conception of fraud is far wider than ours, and would appear to include ordinary breach of contract.

Lord Ackner then goes on to cite three cases.

> These cases (he goes on) appear to indicate that for the purpose of obtaining relief in such cases, it is not necessary for an American plaintiff to demonstrate a cause of action against a Bank, whereas it is as previously stated common ground that a Plaintiff must, in this country [meaning England], show a cause of action. There is no suggestion that this more liberal approach has resulted in the commercial dislocation which has, by implication at least, been suggested would result from rejecting the Respondent's submissions as to the standard of proof required from the Plaintiffs. Moreover, we would find it an unsatisfactory position if, having established an important exception to what had previously been thought an absolute rule, the Courts, in practice, were to adopt so restrictive an approach to the evidence required to prevent themselves from intervening. Were this to be the case, impressive and high sounding phrases, such as "fraud unravels all" would become meaningless.

It does not appear that anyone has taken advantage of the window so opened by Lord Ackner to escape from the bondage of the precedent set by Lord Denning. In the meantime, of course, the High Court of Malaya has already applied *Edward Owen's* case, and included, as part of the Malaysian Common Law, the fraud in the [English] Common Law context. Any reprieve from this is yet to be seen.

Interpretation

My next heading is *interpretation*. Under this head, I would like to confine myself to the interpretation of the written constitution, such as the one that pertains in Malaysia, or its equivalent in Singapore. To a lawyer, fellow delegates, a written constitution is what the Bible is to the devout Christian. The Bible says that the Lord said "Let there be light, and there was light". To us, a written constitution says "Let there be a Parliament, and there was a Parliament; let there be an Attorney-General, and there was an Attorney-General". Everything must be looked at and derived from the constitution itself, and our constitution in Article 4(1) declares itself to be the supreme law of the country.

In *Minister for Home Affairs v Fisher*, with which all public law lawyers should be familiar, the Privy Council described the written constitution as a document *sui generis* calling for its own canons of construction, and for a liberal approach when interpreting it. That said, it is, in my respectful view, more important to approach the construction of the written constitution by viewing the respective tasks of the framer and the judicial interpreter. Now, it may be accepted, I think, as a general rule that it is unsatisfactory to have a constitution that is cumbersome and verbose. We all know that not every eventuality can be provided for, even by the framers of a constitution, so the task of a framer of a constitution is to condense and compress as many ideas and concepts as possible into as few words as possible. Economy of language is in the forefront. It will then transpire that a multitude of ideas and concepts will be locked in a short phrase. To adopt a narrow and pedantic approach when interpreting constitutions is to perform a disservice, and to cut across the very grain which the framer had to mind. Now Article 5 of the Malaysian Constitution declares, for example, that no person shall be deprived of life or liberty, save in accordance with law. Life, in that context, does not mean living or existence. Life means quality of life. It must be interpreted to include wider concepts than mere existence.

So, too, in accordance with the law, does not mean, and cannot mean, in accordance with any law or in accordance with a state enacted law, however harsh and unjust that law may be. Therefore, it is my respectful view that mandamus will lie in appropriate cases against the executive. In our country, it is called the Cabinet. It is the creature of the constitution itself. Mandamus will lie against the Cabinet to compel it to provide basic amenities to people living in rural areas to improve their quality of life.

But here again, as with other areas of the law, it is neccessary to overcome the policy obstacle which Courts have established for themselves. In the United States and in the Philippines (which is also another Common Law country), Courts decline jurisdiction by terming the issue for adjudication on a political question, meaning that it is a matter solely within the province of the executive. In Malaysia, we use the term "non-justiciable" to mean a subject matter over which the Courts will not accept jurisdiction on the ground that it is best left to the executive or the legislature to decide.

Some ousters are expressly provided for in the constitution. So in Article 63 of our constitution, for example, it is expressly enacted that proceedings in Parliament, and in any committee of Parliament, cannot be challenged or questioned in Court. The Courts have no jurisdiction over proceedings in Parliament. Now, there is another article, Article 72, which governs proceedings in legislative assemblies of individual states. But that Article does not contain the word "committees". It only says that the Court cannot question proceedings in the Legislative Assembly – the word "committee" was omitted. So in a case reported in [1986] 2 *Malayan Law Journal* 412, it was argued that proceedings of a Committee of Privileges of a Legislative Assembly were not exempt from judicial review. The applicant was a member of the Legislative Assembly of the State of Sarawak. Although he was a government back-bencher, he was an ardent critic of the government, and on one occasion he went too far. So, the government front benchers got a motion before the Speaker and had this man referred for breach of privilege. So we went into Court and attempted to get leave to issue prohibition. The Judge refused it to us.

So we appealed it to the Supreme Court. The Supreme Court was convened hurriedly, and it sat and said – and mind you, fellow delegates, you must remember, we were at the leave stage; we had not yet even gone into the merits of the case – the Supreme Court compelled us to enter upon the merits of the case and made us argue the case, and then comes the judgment. The judgment. The Supreme Court Judge held that although the word "committee" is missing from Article 72, nevertheless, proceedings of a committee were contemplated by Article 72. Strange, the Commission which drafted this constitution, framed this constitution, was chaired by a man no lesser than Lord Reid himself. I would have thought he knew the difference between an Assembly and a Committee of the Assembly. So the omission is definitely an important one, and the Court, of course, rode rough-shod over it, and said it does not matter, it all means the same thing.

Now, the President of the Court just this year came to a conclusion (I am not concerned with it of course – one only argues a case and then one forgets the case one argues), but it confounds all students of Constitutional Law and Administrative Law. He said that prohibition and other prerogative remedies went only to quasi-judicial bodies and that since the Committee of Privileges – which was going to be constituted by the very man who had moved the substantive motion – he said that this remedy could not go to this Committee because it was purely investigative, overlooking the Privy Council

decision in the *Singapore Estates* case, and brushing aside the dictum of Lord Justice Atkin applied to the facts in the *Electricity Commissioner's* case. It is an example of the Court not wanting to accept jurisdiction over subject matter.

Now, in our constitution, fellow delegates, there is also an equality clause which has been inspired by the 14th amendment of the United States Constitution, and based very largely on Article 14 of the Indian Constitution. It is contained in Article 8 of our Constitution. It declares that all persons are equal before the law, and entitled to equal protection of the law. Of course, those are only words; unless the Courts enforce them, they are only hollow.

Now in Malaysia, we also have a set of emergency regulations which we inherited from the British after 1947. Of course, we improved it considerably by making it even more draconian. Then what they did was they passed the Essential Security Cases Regulations under which trial was by a procedure which was harsher, and less beneficial to an accused, than under the Criminal Procedure Court. For example, on the charge of murder under the Criminal Procedure Court, you must have a preliminary inquiry before you end up before a jury in the High Court for trial. But under the Essential Security Cases Regulations, all that can happen is that you will be produced before a Magistrate, and then your case will be committed automatically without a preliminary inquiry into the High Court.

Of course, it only applied to security offences, and Regulation 2 of these Regulations, defined what a security offence was. In paragraph 1, it set out certain sections in the Internal Security Act which it said were all security offences. Then came paragraph 2 of the Regulations, and under this, anything was a security offence in respect of which the Attorney-General issued a certificate, and the Attorney-General shall issue his certificate, so runs the language, in cases of an offence which, in his opinion, affects the security of the Federation. Now, we argued that this Regulation was invalidated by the constitution. We were sent packing faster than we entered the Court. Lord President Suffian upheld the constitutionality of the Regulations in a decision which, even today, baffles law lecturers, teachers, and students.

So a second challenge was made – we get cleverer each time, the lawyers, or at least we try to, until the Courts point out otherwise. So a second challenge was made. We argued "in the opinion of the Attorney-General" means in the objective opinion of the Attorney-General; it cannot mean the subjective opinion. So we argued for an objective opinion. We were packed out of the Court faster than we came in. We argued that the correct line of authorities, or the high water mark of the correct line of authorities was a decision of the New Zealand High Court (in 1975) in a case called *Labour Department v Merrit Beazley Homes*. We were asked whether there was not a better decision! Unfortunately, we could not find one.

Of course, injured by the attack that the Courts levelled on us, before we could even recover from our wounds, we had salt rubbed into them in the habeas corpus cases in 1987. Now, those cases arose out of an arrest and detention of certain people by the Police under instructions from the Home Minister who was also the Prime Minister. Under Section 73 of our Internal Security Act, policemen arrest, and that can be, as one advocate in that case pointed out, that can be as many arrests as there are policemen. You see, a policeman can arrest whenever he had reason to believe that certain things had happened. Now we argued that reason to believe cannot mean that the policeman's mind was believing that these were the reasons. It has to be based on objective facts. This time, they didn't chase us out of Court – they shot us. They shot us down before we could even take off, and they did it by the oddest of methods. You see, fellow delegates, we all know that *Liversidge v Anderson* is no longer good law. They said, that's all right – it doesn't matter if it is no longer good law in England; we will apply it here. And they applied it. So, all I can say is, and I beg pardon, while doing that of course, they derived great assistance from a dictum of Lord Diplock in the *GCHQ* case where Lord Diplock said, and the statement was taken out of context, of course, he said the Courts are not good judges of security, the executive is the best judge of security. They took it out of context and they used it. Of course, it provided a very convenient wash basin, soap and water in which one could wash your hands when you didn't want to touch the subject matter of the proceedings before the Court. Now, therefore, I can say that whilst the rest of the Commonwealth has placed flowers on the grave of *Liversidge v Anderson*, on which grass is now growing, I regret to announce to the rest of the Commonwealth that *Liversidge* is alive and well in Malaysia.

I now come to the last part of my presentation. By your leave, Sir Patrick, and by the leave of this august house, I seek to dedicate my paper to the unknown warrior of the Common Law; the painstaking advocate who, in anonymity, toils his lonely furrow to formulate a proposition and by the use of the power of preservation which is his alone, obtains its incorporation into a judgment of a Court, thereby establishing yet another principle of the Common Law and making it what it is – dynamic.

Sir Patrick Neill

Well, ladies and gentlemen, after that stimulating address, the time has now come for contributions from the floor.

Unidentified (Pakistan)

I come from Pakistan. I thought this [topic] Dynamics of Common Law in the multi-cultural society – I frankly would not have known how to do justice to it the way the two speakers have done. I think it is absolutely remarkable.

In my country, unfortunately, we have had a very tumultuous political history; constitutions more often than not have been set aside, defied by the various martial law regimes, but then nevertheless, of our Courts of law, the Supreme Court of Pakistan, on three occasions has taken a stand that should do us proud as Common Law lawyers. On one occasion, it was a question of detention. I think of the case of 1967 when a person was detained on the ground that he was a danger to the security of the state

and *Liversidge v Anderson* was quoted that the executive has to have subjective satisfaction. And the Court said, "No, we do not accept that. We must have objective satisfaction." And the Court did away with that principle, and in all detention matters today in Pakistan, it is the objective standard, judicially determinable, that has to be applied.

In a second case, in our country, there was an examination of the meaning of law. When martial law was imposed, a question was as to what is the meaning of law? An announcement was made in this case in the year 1972. It was held that the law does not mean a statutory law; law means all the principles of natural justice, all the principles of fairness that must be a part of the law that we practise in Pakistan; it should not be only the statutory law. Therefore, law as defined in all their comprehension, on the basis whereof it was declared that the regime of a martial law administrator and the imposition of martial law was wrong, and that the regime was illegal . . .

Again, recently the view of the latest martial law administrator of Pakistan, when he was forced to return to the rule of constitutional law, he enacted a law called the Political Parties Act. He made an amendment and said that in the future elections, it will be a party-less election in the year 1988, and political parties would not be allowed to take part. The matter was challenged by our present Prime Minister, Benazir Bhutto, and the Courts said that there cannot be any election without a political party. If you hold an election without a political party having the right of participation, you take the spirit, the soul of democracy, out of an electoral process. And therefore, as a result of the decision of the Supreme Court in our country, after a long, long time, we had elections – free elections – on the basis of all the parties participating, on the basis whereof the present government functions in Pakistan.

We, in Pakistan, were aggrieved about one aspect of a recent decision by an English Court. That is, about the law of blasphemy. Law of blasphemy, as and when it was enacted, meant that a stray individual, a maverick, should not be allowed to grievously injure the religious susceptibilities of a given people. Now in the dynamic of law of the modern times, and we are all the spiritual inheritors of the great system of law which began in England in the Middle Ages and today encompasses half the world over. That is the dynamic of Common Law. It starts from an island, and today affects the mind and the working conditions and the jurisprudence of more than half of the world. . . . Recently, one man, a Muslim I must say, who calls himself a Muslim, Salman Rushdie, he published a so-called novel, *The Satanic Verses*, that grievously wounded the feelings of Muslims all over the world . . . all over the world, including myself, though I do not regard myself as a very good Muslim or a very devout Muslim. It was the innuendo and subterfuge – a vicious attack was lodged on Prophet Muhammad. Some member of the community challenged that book in a Court of law. And a year earlier, *Spycatcher* was also challenged, and I think an injunction was issued in England against the publication of that book. But strangely enough, the English Courts held that the law of sacrilege or blasphemy does not apply to an injury done to Islam. I would regard this as against the dynamics of the Common Law, because Common Law today is not only England, it is half the civilised world.

L Ayorinde (Lagos, Nigeria)

I have listened to the main speaker very carefully on the written constitution. Nigeria has a written constitution which was fathered by the President of the Law Court, George Jocelyn Elias. On the idea of concepts, the written constitution cannot possibly contain all ideas and concepts, and therefore it must be written in such precise terms that someone should open the box to interpret. But, I should say, if constitutions are written in the language of mathematics, it would be more precise but all the same in Nigeria we have political objectives such as right to education, right to decent living, but these objectives cannot be sued upon. We also have our Section 6, that the Law is supreme, and when you come to an application of the Common Law, we invoke Section 6, sub-section 6 that a Superior Court in Nigeria has inherent power of the Court of similar jurisdiction in England. The dynamics of the Common Law in a Nigerian Court is able, at any time when the occasion arises and there are no provisions in the original Law of Constitutions to use, employ, apply the inherent powers of the Court of Record in the Commonwealth. Thank you very much.

Unidentified (The Gambia)

Mr Speaker, I wish to make reference to one of the points raised by Mr Sri Ram, ie that members of other Commonwealth countries, particularly the more developed Commonwealth countries, should make references to decisions from other Commonwealth countries, particularly developing countries. I think this is a very significant observation. It is very important, because it goes straight to the root of the idea of the Commonwealth, which is what has brought us here today. Is this a psychological block or barrier, vis-a-vis the people of developing Commonwealth countries, that they can pretend that well, there can't be anything good from the Judges of some island away in the Pacific or in a central African country. They tend to mix up the economic problems facing those countries with the minds of Judges; the strength and power of their judicial decisions. I do not know how this association or whichever body can do something about this, but I think it is very, very important. They have a great deal to learn, no doubt.

Secondly, with regard to his observation about mandamus lying to provide basic amenities to the rural areas, I don't know where the Common Law comes in here, but I think it is very important that floodgates are opened, because, I believe, in their dynamism with regard to the Common Law. It must not act in vain as has been often said. If you make a decision that facilities should be provided for 100 or 200 million people in rural areas, and there is no money, there is no point in actually making that decision. The Courts also, I think, are very dynamic in that they do not, in most cases, refuse jurisdiction, but they say, in effect, that we do not know what the size of the public purse is, and there is no point in reaching a decision in which we are ill informed.

Finally, on Sir Robin Cooke's point, I did not get it all, but it seemed to say that there was no way

in which New Zealand Courts could responsibly have decided otherwise. I was worried, and a little bit frightened, although perhaps taking that particular case in mind, it is not so worrisome. If a Court starts off having made its mind up saying there is no other way we can decide this thing otherwise, and that the Court should reflect the national ethos, then the rest is just a sort of rigmarole procedure. We go through the process, but we know that from day one, we have already decided the case.

All I will say now is that perhaps the Court should be more dynamic. The Court is being dynamic in reflecting the national ethos in most cases, like terrorist cases, sexual offence cases, and various other matters which are very worrying to the public. Then the Courts must be seen, and have been seen, to act very swiftly, but I think they must not be allowed — sorry, they must not allow the press, which really tends to appear or pretends to be the gate for the national ethos, to force them into decisions or minds already made up.

Jerome Elkind (New Zealand)

I am an Associate Professor of Law at University of Auckland Law School, and I notice there has been some discussion about written constitutions. I would like to make the point that I think that a written constitution is not really a Common Law institution. A written constitution is a political code, and in many ways it should be addressed in the way that a civil code is addressed. That is, that where it requires broad interpretation, it is very loosely drafted so that the Courts will fill in the interstices; where it needs to be specific, it is as specific and precise as it is possible to be with words.

I would like to make one other point, and that is about blasphemy. What offends me is that the concept of blasphemy could exist in a nation which dedicates itself to the principles of freedom of speech. It seems to me that if people are to be free, they should be free to criticise Jesus Christ, Prophet Muhammad, the Prime Minister, or anyone else.

Mr Naganand (Bangalore, India)

After hearing a very gloomy picture about the Malaysian judiciary, I think I am justified in very proudly saying something about the Indian judiciary and our experience. Though the topic is dynamics of Common Law, we do have a written constitution and therefore maybe I would not be justified in calling it the dynamics of Common Law — maybe the dynamics of the interpretation of our constitution.

We have had a very refreshing experience with the Indian judiciary. We have a completely independent and free judiciary. Judicial review is very freely granted. Of course, in the recent past, there has been a controversy about the scope of judicial review. Would review be granted only in cases where a right arises on the basis of a statute, or in the case of rights arising otherwise than a statute also? But I suppose that will be ironed out by the Supreme Court shortly. In the recent past we have seen a couple of decisions where the Supreme Court has laid down that whenever the State acts in whatever capacity it acts, its decisions have to be reasonable, and they can be judged by Courts with objective standards of reasonableness. So, I'm afraid if anything like what happened in Malaysia were to happen in India, we would have no difficulty at all to go to any of our 18 High Courts and to the Supreme Court, which also has original jurisdiction, to enforce any fundamental right guaranteed under the constitution, because Article 32 confers on the Supreme Court of India original jurisdiction to enforce a fundamental right.

As regards the dynamics of the law, we have two Articles: Article 14, which guarantees the right to equality, and Article 21, which guarantees the right to life. We have been consistently interpreting these two rights in as wide a manner as possible. Though Article 14 talks of the right to equality, the Supreme Court has amplified it to mean the right to non-arbitrariness. Therefore, any State action which is arbitrary can be questioned in the High Court, and the Court will examine whether the decisions of the authorities are arbitrary or otherwise.

As regards the right to life, it has been amplified again to make it more meaningful. Of course, we have the economic problems, like another speaker pointed out — there is no point in having the right to speak when you don't have a meal a day. But that's an economic reality which has to be tackled on a slightly different plane. Nevertheless, the Courts are going in the direction to ensure that the economic development of the country is slowly being made into a part of the right to life, guaranteed under Article 21.

The Supreme Court has been very active in two forms of giving redress to persons who cannot come before the Court, which also is, I think, a very refreshing change, especially in the Third World. How can we think of a person who cannot afford one meal a day to come to the Supreme Court, which is about 4,000 miles away from where he lives?

Well, for that we have the wise system of public interest litigation and social action litigation. When the Supreme Court takes up on the basis of a complaint or information that it receives from a social action group, it tries to redress the grievance, investigates the problem. We have come across several reported cases where bonded labourers have been freed, not on a complaint made by the person who was in bondage, but by a social action group, and we do find that this type of litigation is very, very common today. I am sure in the times to come, the Supreme Court and the High Courts will stand up for what has been laid down now, and will give a meaningful interpretation to the fundamental rights guaranteed under the constitution.

Michael Wong (Singapore)

I would like to ask Mr Sri Ram to clarify the recent remarks made in Malaysia about the Common Law being reinterpreted in the light of Malaysian circumstances. In other words, the Common Law in England is not necessarily the same as the Common Law in Malaysia. While those remarks would seem to have a political flavour in the context in which they were made in Malaysia, I wonder if delegates ought to look at this problem in a broader context and consider whether or not the Common Law ought always to exude an English aroma. There are obviously occasions when Courts in the Commonwealth have differed from English judgments. But more often than not, they dissent on the grounds that English reasoning is wrong and will not be followed. That is a different matter from saying that we do not follow an English decision because it is inapplicable to local circumstances.

To give one example, the Privy Council decision in *Attorney-General for Ceylon v Reid* was unacceptable in Singapore because it gave rise to the proposition that a person who married under a monogamous system of marriage was able, by converting to a different faith, then to contract a polygamous marriage. This was not considered acceptable, and we reversed that decision by legislation. Obviously because the legislature did not trust the local Courts to dissent on the grounds of inapplicability of circumstances, and I wonder if this ought to be considered by the delegates. Mr Sri Ram might say something about that.

Sri Ram

In response to the last speaker, I had intended to make no comment because I thought, and I suppose this comes from too much arrogance, everything is contained in the written paper, everything I said. Obviously, I am wrong again.

The Malaysian Common Law is actually undergoing no change at the moment, but the reference by the Lord President to the fact that we must have our own Common Law in accordance with our own circumstances, is not political in nature at all. In fact, our Agong, or the Supreme Ruler of the Federation, the King, has himself said that we already have our own Common Law. But you see, the receiving sections in 3 and 5 of the Civil Law Act have caused some problems. I think that is the context in which that statement was made. But rest assured, we also follow the English law as closely as possible, and we are also looking forward to people taking a stand and saying that certain English decisions just do not apply because the local circumstances are quite different.

Sir Patrick Neill

Well, ladies and gentlemen, we are under strict instructions to keep an eye on the clock, and I think I must bring this session to a close.

I would like, on your behalf, to thank all the speakers. I think it has shown the remarkably interesting quality of sessions such as this, where we have had people speaking from New Zealand, Malaysia, Pakistan, India, Nigeria, Gambia – names I've written down – and, on the whole, the message has been that the Common Law is a dynamic force. We have had some reference to the statics, as I defined it at the beginning. For example, Mr Sri Ram talked about the slavish adherence to English cases in Malaysia where they are not really applicable; he's referred to the life beyond death of *Liversidge v Anderson*; and the capacity for Judges to place an interpretation on a constitution which it cannot bear in the eyes of any reasonable man. I think all lawyers who practise in any Court will recognise that.

On the public law contribution by Sir Robin Cooke – of course, that theme will come up again on Thursday – but if one compares the position as it was in, say, 1968 – I see Sir William Wade is in the audience here this morning – he wrote, in 1968, about the total failure of the British Courts to recognise such a subject as Administrative Law or Public Law at all. It is a bare 20 years ago. The scene is absolutely transformed in that direction, and major contributions to that have been made in this country.

I would just like to pick up quickly a theme of Sri Ram about the reference to decisions of other Courts, other jurisdictions.

That happens to be something I believe in very strongly myself. It is one thing to believe in it; it's another thing to practise it. It is quite difficult to get access to all relevant decisions. I would like to mention, to those who do not know it, the *Commonwealth Law Bulletin* which is a marvellous publication produced by the Commonwealth Secretariat quarterly, which gives a rundown of statutes, articles and decisions of Courts throughout the Commonwealth. Enormously valuable. I also think that references to American cases are very important for the Common Law lawyers – it is another source of Common Law. Sometimes the Courts in England do a good job on that. In a case I was in about trespass . . . there was an extensive review of American law. In another Privy Council case about duty owed by a customer to his bank, there was a complete survey of Commonwealth practice of banks. But if you look at the recent *Caparo* case, which Sir Robin Cooke has referred to, there is just one very disappointing sentence about the whole of American jurisprudence which says they seem to be in a state of conflict there, so we need not bother to refer to it.

Now the problems are availability of materials; secondly, getting it right – we've just had it pointed out by Sri Ram that Lord Denning's reference to a particular bit of American law left out a vital ingredient. And there is one other factor which hasn't so far been mentioned. We are constantly being told that litigation is beyond the purse of the poor person, indeed of the middle classes. We heard that last night, and we know it to be true. Now the more you take account of and the more you study the comparative materials, the longer time you spend in preparation, and the more time the Court takes in hearing the argument. Now this is a real point – I'm not putting it forward as an argument. I think we should be much more diligent as practitioners to refer to overseas material; but there is a cost involved in it, and it certainly imposes library problems on the volume of books and material that has to be available.

Well, I think, then I want now to conclude this session with asking you to express your thanks in the traditional way to our two principal speakers this morning for leading a most stimulating discussion. □

Why practise law?

Coinciding with a newspaper recruitment advertisement in *The Times*, placed on behalf of "a medium-sized City firm" looking for a commercial property lawyer willing to accept a partnership and a salary of up to £300,000 a year, the American *ABA Lawyer* has published the results of a survey which shows that money is not the most important thing in a lawyer's life.

Asked "What is your favourite part of being a lawyer?" only 9.3 per cent said money. Prestige was cited as the most important factor by 7.5 per cent, just over 35 per cent said it was "helping others", while the most popular factor – "intellectual stimulation" – was mentioned by 43.5 per cent of those lawyers interviewed.

On the down-side, the most frequently mentioned "least favourite part of being a lawyer" was cited by 31 per cent as the long hours. Stress rated 3 per cent, boredom registered 13.3 per cent, and just over 25 per cent said that clients were the worst aspect of legal work.

Solicitors Journal
8 June 1990

Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

The Profession: Standards and Independence

Sir Thomas Eichelbaum

Distinguished guests, ladies and gentlemen, the title of the topic this morning is "The Profession: Standards and Independence". You may be surprised to find a Judge chairing this topic, and I say at once that I did not volunteer to preside over this particular session. Nevertheless, I am glad to have been given the opportunity for this reason. Maintenance of the standards of the profession, and of its independence are matters going to the very heart and life of the profession itself. But their significance in our communities goes even deeper. I regard them as fundamental to the continuation of the judicial system as we know it, and thence of the rule of law.

Speaking for myself, and speaking of New Zealand, I cannot envisage how we could hope to maintain the concept of an independent judiciary without the foundation and the assistance of an independent legal profession adhering to high ethical standards. Thus, any commercial or political pressures which compromise the standing of the profession are of equal concern to the judiciary.

Ladies and gentlemen, our time this morning being limited, I do not wish to take up much of it with introductions. But you will think it proper, I am sure, that I should introduce in a little detail the two speakers who have prepared the main written papers. Our first speaker, William Reece Smith, has his professional base as the senior partner of a large legal firm in Tampa, Florida, but he is a lawyer of international reputation and standing. His career highlights, and I do no more than mention those, include his Rhodes Scholarship in 1952; his term as President of the American Bar Association in 1980-1981; and his current office as President of the International Bar Association.

As well as having given community service in innumerable ways, he is the holder of a rare award – the ABA medal for conspicuous service to the legal profession. I have much pleasure in introducing him to you and asking him to speak to you.

Mr William Reece Smith (United States of America)

It is a great pleasure for me to have an opportunity again to join with my colleagues at a meeting in New Zealand. My first duties as President of the American Bar Association brought me here in 1980; I have known the Chief Justice for many, many years, and a good many other fine and distinguished lawyers of the legal profession in New Zealand. I appreciate, in particular, being invited to participate in this Conference, inasmuch as I said yesterday, I am something of an early-time drop-out from the Commonwealth.

The programme, as Sir Thomas has said this morning, is entitled "The Profession: Standards and Independence". The topic is such that it might well lend itself to separate discussions of professional concerns which find their origins in political and social developments of recent years. Yet each aspect of the topic also speaks of pressures, both real and perceived, that often seem hostile to the role we lawyers play in society, and to our very reason for being.

The paper I prepared for this Conference, which is included in your Conference materials, focuses upon current trends of our calling, trends leading us from professionalism to commercialism. This unhappy development comes as much from change within the profession as from pressures from without. It reflects a change in societal conditions, and in our attitudes about who we are, and what we lawyers do. In some way, I regard this change in professional attitude, this internal change, just as threatening to our independence as the external pressures of government and society upon lawyers and their practice. To paraphrase Pogo, we have met the enemy, and he is us. We lawyers are losing sight of our great professional obligation of public service, of our primary responsibility to assure that our legal systems work well and afford to all access to justice through access to law. We are becoming, instead, enslaved to the billable hour, and the bottom line of commercial enterprise.

This morning I leave to my paper development of the details of this trend toward commercialism, but it is a trend that I deplore, and one that I hope we will reverse. It is a trend that threatens both our standards and our independence, for if we come to accept the guidance of the rules of commerce and forsake our commitment of service to others, there will be little reason for us to be treated differently from others. The need for professional independence may then fairly be put into question. Thus, before all, we must not lose sight of our basic role in society.

Whatever we do as individual lawyers in the practice of law, collectively we lawyers basically serve a fundamental, dual function. On the one hand, we serve to help ensure the existence of a stable, orderly society in which its members can live peacefully and hope to prosper. On the other hand, we serve in seeming contradiction, to secure and protect the individual rights of citizens against intrusion and oppression by the very government we seek to sustain. Societal conditions cause a pendulum to

swing constantly between these two poles, and as it does, the legal profession has a major responsibility to assure that the pendulum does not swing too far in either direction. One direction leads to tyranny, the other to anarchy. We can only discharge this awesome responsibility if, as lawyers and Judges, we cope successfully with the pressures we are encountering from both within and without.

Today, especially in many developing nations, the independence of the judiciary and the profession is truly in jeopardy. Almost daily, in the proper discharge of their duties, Judges and lawyers put at risk their lives, their liberty and their property. They need, and they deserve, our help. We can assist in this regard through our support of declarations of rights, declarations of human rights, through our insistence upon respect for standards of judicial and professional independence. We can help them by sending observers to monitor political trials, and we can help through strong, systematic protest about denials of human rights and interference with professional independence.

But we can do more. We can also assist by helping to strengthen the professional organisations of developing Law Societies and Bar Associations. Often these bodies stand almost alone against governmental intrusion and oppression. This they can do best standing alone, if they are well organised, adequately equipped and wisely led. Strong Law Societies and Bar Associations of developed countries can help immeasurably by selecting a counterpart in a developing nation, and by working with it over a protracted period of time to help improve its legal system and its practices, to effectively organise and operate the Bar Associations and Law Societies themselves, and to improve not only professional education, but also governmental and public understanding of the value of the rule of law to a free and prosperous society.

Others on this panel will speak about the effect of governments hostile to the rule of law and insensitive to human rights. Hence, with these few observations, I turn to the question of professional standards and the changes with which we are faced in that regard. Here you may find my views a bit unconventional, perhaps because they are shaped, primarily, by the experiences of my country.

Because we are members of a learned profession, specially trained in a complex discipline, we lawyers have long enjoyed the benefits of quasi-monopoly and the privilege of self regulation. But our licence to practice law is not a licence to get rich, or even to do things in the same old way. We exist, first and foremost, to serve others, and not our own self interest, and as I have already suggested, we are primarily responsible, because of our privileged position, to assure that our legal systems work well, and that all persons have reasonable access to the benefits and protections of these systems. If we do not do so, we cannot long expect others to leave us alone. They will step in where we have failed, and rightly so.

In my country, our professional standards, our methods of practice, our canons of ethics, our claims to an exclusive right to render particular services have often been under attack by government and by critics, and not without good cause in some cases. Yet we resisted, and we asserted all the old traditional arguments against change. Group legal services, pre-paid legal insurance, advertising, inter-state practice, alternative dispute resolution in non-judicial settings, law clinics where persons of moderate means can be more efficiently served through development by advertising of large volumes of routine legal work that is handled by cost-effective business practices. Each of these changes, and what we thought were standards, were in turn opposed by those fearing change.

Yet when they became a reality, our practices did not suffer materially; plenty of work remained, new needs emerged, the public benefited, the quality of service did not suffer, costs were reduced, access was improved, our professional independence remained intact. Thus, I take the position that we need not fear change and cling mindlessly to time-honoured ways in which we have practised law. When we do so, we only suffer further in the loss of public esteem, and truly then place our independence in jeopardy. For this reason, I believe we lawyers must be in the vanguard, not only in Court reform and law reform, but also as leaders in professional reform. We can not afford for our own sake, and for that of the public, to fall behind the times.

Changes in professional practices, however, need not force us to become yet another commercial enterprise, and we must be careful to ensure that it does not become the case. It is possible to adjust and restructure the way we practise law, and at the same time adhere to our professional obligation of unselfish service to others. Indeed, this is imperative, for it is through unselfish public service that we best ensure the continuation of our professional independence. As we consider maintenance of our independence and our standards, we must be mindful of the fact that, as the influence of other institutions — the church, the community, the family — as the influence of those institutions has waned, the influence of the law has grown. Law has become a major portal to justice. As long as we have a primary responsibility for assuring the fair and proper administration of justice, then more than any others it is our duty to assure for all persons reasonable access to law. We must make law available not only to the wealthy, but also to persons of moderate means and to the poor.

Thus we lawyers are faced with many challenges today. Trends in our attitudes and practices seem to threaten to reduce the learned profession to a mere commercial enterprise. Time has come to make some conscious choices. I hope we act wisely and unselfishly. I hope we insist upon remaining a profession. But if we do so, we lawyers must make the commitment demanded of members of a learned profession. We must make service to others our highest calling, and we must freely use our resources and our special talents and skills in organised effort to assure that the legal needs of all persons are met.

When the public perceives us at work in our historic role of service, its criticisms of our profession moderate. Then we also feel better about ourselves. But there is an even more important reason for us to respond to the challenges before us. Justice is the cornerstone of every

free nation, and the *raison d'etre* of our profession. As a great American Judge once put, if we are to keep our democracy, there must be one commandment – thou shalt not ration justice.

Sir Thomas Eichelbaum

It is now my pleasure to introduce the first of the commentators. In the past year, it is as well known in this part of the world as in others, the legal profession – particularly the Bar – and the judiciary in England and Wales, have felt themselves under a degree of threat. Long-standing practices have been attacked and change has been proposed. Who better to comment on the independence of the profession and its standards than the Chairman of the General Council of the Bar for England and Wales? I have pleasure in introducing to you Mr Peter Cresswell, Queen's Counsel.

Mr Peter Cresswell (England)

The most important principles can be briefly stated. The Lord's Prayer has 56 words, the Ten Commandments 297, the American Declaration of Independence has 300, but an EEC directive on the import of caramel and caramel products requires 26,900 words. The moral is obvious. We live in times of change. The momentous developments in Eastern Europe provide a striking example. With the legal professions subject to pressures for change, it is necessary to be clear as to certain fundamental principles which we must uphold, and I name three. And I find myself in agreement with the excellent paper that has been provided by Mr Reece Smith.

1 An independent judiciary.
2 An independent legal profession. I emphasise the word "profession". We are a profession, not a business.
3 A commitment by all members of the legal profession to access to justice. A system of justice is not worthy of the name if any section of the community is, for any reason, unable to have access to it.

I was particularly struck by some words that the Attorney-General spoke from this platform when opening this Conference. He spoke of the middle income group. It is a matter of concern, in our jurisdiction, that there is a large section of the community who remain outside legal aid limits, but find it difficult to afford access to justice. We must ensure that ordinary men and women have the same quality of representation as that available to the rich, the famous, and the big battalions. We see a trend echoed in the paper of a case for the rich and the famous and the big battalions. I agree, to quote from the paper at page 216, we in the legal profession have a special obligation to resist pressures that threaten to turn our profession into a mere economic enterprise.

The key question is what steps should we take to enhance our professionalism? In addressing this question, I speak as Chairman of the Bar of England and Wales, and by reference to our jurisdiction. Although I speak as Chairman of the Bar, I make it clear that we have the very greatest respect for the very different specialist services provided by English solicitors, both domestically and internationally.

I do not propose to comment on the Legal Services Bill, because it is currently before Parliament. It is outside the scope of this subject, and it would provide an exception to the principle that I identified at the beginning, that the most important things in life can be briefly stated. I would simply record that the changes which the Bar secured between the Green Papers and the White Paper have prevented any question of fusion in our country. I had wished to dissociate the English Bar from the view expressed at the conclusion of the last paper in the bundle, at page 617.

You will see a stronger, more determined, separate, independent Bar in our country heading into the 21st century. There will be no compromise in relation to any of the principles that I have identified. I believe that, out of government pressure, out of adversity, come benefits, and one of the benefits of a shake-up is that it causes you to rethink fundamental questions. I turn to certain signposts to enhanced professionalism – entry into the profession, professional standards, maintenance of standards, disciplinary procedures, our cab-rank rule, multi-disciplinary partnerships and contingency fees.

Entry into the profession. Can I couple this with race relations and equal opportunity? We must ensure that no person of ability is precluded from entering the profession for want of means. We are fortunate at the Bar in being able to invite Judges to help us with major issues. We have revolutionised our funding arrangements in England for entrance to the Bar, we have a very active Race Relations Committee. Both matters have been chaired by High Court Judges. John Roberts, one of our black Silks is attending this Conference. We are pressing the government for legislative changes to outlaw discrimination against Barristers and secure equal opportunities. In this field, it is not enough simply to mouth the words that I have just spoken. We must live them.

As to professional standards, it is necessary, as has been suggested, to keep codes of conduct under constant review. We have modified our code to keep out a whole series of unnecessary restrictions, and we now permit advertising. We have adopted written professional standards, and, by way of example only, we have written standards applicable to criminal cases which set out the specific responsibilities under the heading Prosecuting Counsel, Defence Counsel, Confessions of Guilt, etc. Can I suggest that there is a great deal to be said for an exchange within the Commonwealth of our individual codes and our individual standards so that we can be mindful of what each of us is seeking to achieve.

As to the maintenance of standards, experience in our jurisdiction shows that the small collegiate grouping within the Bar plays a key role in maintaining standards. Our Bar is 6,000 strong, it is divided into six geographical circuits, and 12 or so specialist Bars centred on London. On all but the largest circuit, the practitioners are known to each other, to the resident and the presiding Judges and the leader. There is collegiate ethos and peer group pressure and these matters lead to the standards which we seek to maintain. With a larger circuit, the south eastern circuit, whose leader, Robert Seabrook, is at this Conference, it has been found necessary to sub-divide the circuit into Bar messes in order to achieve collegiate ethos.

As to disciplinary procedures, our Professional Conduct

Committee is attended by laymen who have a key role; no complaint is dismissed unless the lay members present agree. It has been held recently that our PCC decisions are subject to judicial review, our disciplinary tribunal is chaired by a Judge with a final appeal to three visiting Judges and our appeal provides that the Lord Chancellor may appoint a Legal Services Ombudsman empowered to investigate allegations about the professional bodies' handling of complaints against practitioners.

So you see [there are] a number of key features, the lay members, the Judges, the Ombudsman, all ensuring that we impose and maintain the highest standards.

The cab-rank rule, that we have recently reaffirmed, requires any Barrister to act, in any field which he practises, in a case, whether it be privately or publicly paid, for any client, regardless of the nature of the cause. As for Multi-Disciplinary partnerships, I believe that MDPs are wholly inconsistent with an independent Bar of sole practitioners providing specialist advocacy and advisory services on a referral basis. We are opposed to contingency fees.

Finally, a word about the independence of the judiciary. I am struck by the pressure that the press now applies on the judiciary. There is a need for the judiciary to perceive themselves to be independent. A great deal will, of course, depend on the personal qualities of the individual members of the judiciary. In England, we are fortunate to have a great Chief Justice who is a great guardian of independence.

As for the future, we need, I believe, to exchange young lawyers in the way we have in the past. We need to focus on the young, we need to support our colleagues in the Commonwealth. We have different problems, but we need to look beyond the Commonwealth to the great opportunities of influencing the development of independent professions in Eastern Europe, and we must never compromise the three principles that I have identified.

Sir Thomas Eichelbaum

Our second main speaker, in the sense that he has written, as Mr Reece Smith has, a principal paper for this session, is Mr Reed Brody. He is an Honours Graduate of the Columbia Law School, and a former Assistant Attorney-General of the State of New York. He now holds the position of Director of the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, and, as such, is stationed in Geneva. I have much pleasure in introducing Mr Reed Brody.

Mr Reed Brody

Like Reece Smith, I come from a country outside your Commonwealth. Like him, however, it is a pleasure to address you today. The Commonwealth tradition of an independent judiciary and an independent legal profession stand as models to the rest of the world.

The increasing frequency of attacks against lawyers, particularly during the 1970s in Latin America, were the cause of growing concern to lawyers' organisations and human rights' organisations around the world. As lawyers began to become more involved in the defence of human rights and sought to ensure that legal representation was available for all sectors of society, governmental forces, and in many cases, para-governmental forces, began to mount attacks against lawyers and against our associations, often trying to identify the lawyer with his/her client, and with his/her client's cause. In 1978, the International Commission of Jurists therefore created a Centre for the Independence of Judges and Lawyers, and today, I would like to discuss with you two aspects of the Centre's work, where I hope to seek your support.

First, in intervening on behalf of colleagues in other countries who are facing harassment or persecution as a result of the discharge of their professional duties; second, in developing international standards to protect the independence of the legal profession.

First, case work. The Centre for the Independence of Judges and Lawyers intervenes with governments in cases involving harassment, persecution, or threats directed against individual Judges or lawyers, or their associations. In serious cases, we solicit the aid of lawyers throughout the world to do likewise, and we often issue press releases to call attention to the situation. Before we intervene, it must be well established that the Judge or lawyer has been persecuted by reason of carrying out his or her professional duties.

Over the years, we have built up a network of hundreds of lawyers' associations, national, regional and local, who distribute our appeals and who act upon them. These organisations have come to recognise that it is their professional duty and responsibility to speak out on behalf of their colleagues who are persecuted in other countries, and that such interventions are not political, but are necessary if the system of justice, based on an independent legal profession, is to be protected. We are particularly pleased that in the last dozen years, other lawyers' organisations have also become active in setting up appeals networks of their own. The most important is probably the International Bar Association, whose President is here on the panel today, which regularly takes up such cases and distributes them to national Bar associations. I hope that you who are here listening today will join us, either through the Centre or through the IBA, or through your national Bar Association, in taking up this vital work.

The cases on which we intervene vary. In 1989, for instance, cases on which we intervened included the assassination of Judges in Colombia; the detention of the President and the National Secretary of the Bar Association of Ghana; the killing of human rights lawyers in Sri Lanka; the arrest of the executive members of the Bar Association of the Sudan; threats against lawyers working with the rural poor in Brazil; the administrative detention of Palestinian defence lawyers in the occupied territories; the assassination of human rights lawyers in Peru; the murder of an attorney in Northern Ireland who took on human rights cases, and defended suspected members of the IRA; the killing of a human rights lawyer in the Philippines; the detention of a prominent attorney in Somalia; death threats against a Judge in Chile for his investigations into torture.

One of the lawyers on whose behalf we have intervened is Gibson Kamau Kuria of Kenya, who was detained for 9 months without charge for filing a law suit on behalf of two detainees who alleged torture. You will note in your programme that

Gibson Kamau Kuria was to be on today's panel. Unfortunately, the government of Kenya refused to give him a passport to be with us here today. We will be urging the Commonwealth Lawyers Association to make its disappointment known to the government of Kenya, and I hope I can count on you in that appeal.

In August of last year, we presented the United Nations with a report called "the harassment and persecution of Judges and Lawyers" describing the cases of over 145 Judges and lawyers who had been harassed, detained or killed in the previous 18 months.

We will publish such a compilation each August, and I would ask that if any of you or your Bar Association have information on these kinds of cases, that you provide them to us.

The second area I want to address is the establishment of international standards to protect the independence of the legal profession. At its inception, the Centre and other organisations attempted to intervene in particular cases based on general rules of the right to counsel before independent Courts. These norms, however, were not of specific help in specific cases, as they tended not to spell out the content of the norms like independent and impartial.

As a result of these experiences, the CIJL, together with the International Bar Association and other lawyers' organisations, began the task of formulating international norms to establish minimum protections for the legal profession. A number of expert meetings were organised, culminating in the World Conference on the Independence of Justice in Montreal, Canada, in 1983. And this Conference produced a comprehensive set of minimum principles on the independence of Judges and lawyers and was prepared by delegates from 30 national and regional Jurists' Associations and representatives of all four international Courts.

These principles then became the foundation for what has become the United Nations draft principles on the role of lawyers, and after two years of consideration by different United Nations Committees, these 29 draft basic principles, which are attached to my paper in your materials, are ready to be submitted for formal adoption to the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders which will meet in Havana, Cuba, in August 1990. These draft principles provide for guidelines on access to lawyers and legal services, special safeguards in criminal justice cases, the duties and responsibilities of lawyers, principles on the qualification and training of lawyers, guarantees for their functioning, freedom of expression and association, and provisions on disciplinary proceedings. Among the most important principles are the following, and I quote:

> Everyone is entitled to call upon the assistance of a lawyer of his choice to protect and establish his rights and to defend him in all stages of criminal proceedings.
>
> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference; (b) are able to travel and to consult with their clients freely, both within their own country and abroad; and (c) shall not suffer or be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

If these principles are adopted, they will become the first international inter-governmental standards on the independence of the legal profession, and the United Nations General Assembly will call on states to respect them and to take them into account within the framework of their national practice. I am not suggesting that if the principles are adopted, governments will automatically respect the independence of the legal profession, but these principles will be available for lawyers' associations all over the world to use in their efforts to protect their independence. And so my second reason for coming today is to make you aware of these principles, and to ask you to call on your governments to support their adoption at the United Nations Congress in August.

Sir Thomas Eichelbaum

Our next commentator is the Honourable Prince Bola Ajibola. After graduating from the University of London, the Prince was admitted as a barrister of Lincoln's Inn, and thereafter practised law in Nigeria for over 20 years, becoming a Senior Advocate in Nigeria, that is the equivalent of the rank of Queen's Counsel, and President of the Nigerian Bar Association. Today, he holds the offices of Attorney-General and Minister of Justice of the Federal Republic of Nigeria. I have pleasure in asking the Prince Bola Ajibola to address you.

Prince Bola Ajibola (Nigeria)

The independence of the person concerned at any level with the dispensation of justice has occupied a central place in juristic discourse on the administration of justice under the rule of law. The concern had traditionally been with the independence of the judiciary. However, it was seen that perhaps the independence of the profession itself ought to have been the primary focus.

Perhaps, also, this question assumes greater significance in developing countries because of the usual absence of sufficient evidence of liberal political traditions and practice. Clearly, guaranteeing the independence of the legal profession in most developing countries is bound to raise far more intricate issues of law and politics than in the politically developed nations, especially in the west. I will, of course, in this short address be basing my observations and conclusions on my experiences in Nigeria where I have worked, both as a practising Barrister, a member of the Bar Association, and as a member of the official Bar for a few years now.

I think it is fair to say that at least in terms of international arrangements and laws affecting the practice of the profession, most developing common law jurisdictions are oriented towards an independent profession. In Nigeria, the profession is regulated by five main organs which are created by statute, namely: the Council of Legal Education; the Body of Benchers; the Legal Practitioners' Privileges Committee; the Legal Practitioners' Disciplinary Committee; and the General Council of the Bar.

The first two are bodies corporate

with perpetual succession and common seals. The Council of Legal Education is concerned, inter alia, with regulating the educational curricula of the Law Faculties of Nigerian Universities, and organising the cost of practical training at a Nigerian Law School which all persons aspiring to be legal practitioners in Nigeria must successfully undergo. Because of these very vital duties performed by the Council to the legal profession, there have been very persistent convictions in some quarters back in Nigeria that it is the most important regulatory organ of the legal profession.

Another regulatory body of no less importance is the Body of Benchers which, in the main, concerns itself with a formal call to the Bar of persons who are generally law graduates aspiring to be legal practitioners. It is made up of the Chief Judges of each State, and legal practitioners of the highest distinction in Nigeria. The policies of the Council of Legal Education and the Body of Benchers can be described from the foregoing, and are complementary, for one can only be called to the Bar by the Benchers if, inter alia, they have successfully undergone the stipulated course of practical training at a Nigerian Law School. Worthy of note at this juncture is the fact that the applicant must satisfy the Benchers that he is of good character, and therefore a fit and proper person to be admitted to practice. If he fails to discharge this duty, his application for call to the Bar would be rejected, even after successfully undergoing the course of practical training.

The Legal Practitioners' Privileges Committee is concerned with recognising and honouring legal practitioners who have distinguished themselves at the Bar. The rank of Advocate of Nigeria is conferred on any deserving person who will then be entitled to practise out of the Inner Bar with the attendant privileges. There is also the Legal Practitioners' Disciplinary Committee which is charged with the responsibility of looking into breaches of the rules of professional conduct.

The General Council of the Bar is charged with the general management of the affairs of the Nigerian Bar Association. The Nigerian Bar Association serves as the umbrella body to which all the other practitioners belong, and is officially represented on each of the statutory organs mentioned above. Interestingly, these various organs have strong representation from the official Bar. For example, the Federal Attorney-General heads the Disciplinary Committee of the Bar, yet the independence of this organisation has never been in doubt, nor have they ever been accused of submitting to the whims of the government of the day. Perhaps the reason for this is a unique professional chauvinism of members of the legal profession, coupled with the fact that the Attorney-Generals are usually appointed from the private bar after several years of distinguished practice. Such appointees serving on statutory bodies are unlikely to allow official loyalties to cloud their judgment in matters concerning the Bar. I believe it is fair [to say they] do not hamper the independence of the profession.

However, there are special problems which arise on account of the particular political dispensations of many developing countries. For example, military rule. By the very nature of the legal profession, especially in Common Law jurisdictions, it will appear that the profession assumes the existence of a democratic structure of governments. Several Common Law principles appear to be premised on the existence of democratic political tradition. This will mean several potential areas of conflict will exist between the profession and the government. However, Nigeria has had a relatively happy experience in the above regard. This is both on account of the political consciousness of members of the profession and the sophistication of the military ruleship itself.

While it is accepted that military rule is a contradiction of democratic government, both the rulers and the profession assert that the rule of law must at least be respected, and that the rights of the people must be strictly maintained. It was little wonder to Nigerians, then, that in 1985 when the present administration came to power, it declared fundamental human rights as a cornerstone of its political philosophy.

Fortunately, also, the Nigerian press has always been free. The press, which was born during the struggle for independence, has always seen itself as the arbiter between the governors and the governed. At the moment, there are over 50 newspapers and magazines circulating in Nigeria. 75% of them are privately owned. The press has therefore been coupled with assisting the legal profession in assuring that an even balance is kept between the exigencies of military rule and the rights of the citizenry.

Perhaps it is most noteworthy that most legal practitioners in Nigeria are privately employed, and handle mainly private clientele. A negligible number are employed by government or its agencies. This clearly prevents a situation where government patronage or employment may erode the independence of practitioners.

May I say in conclusion that, in the final analysis, the independence of the profession is dependent on the calibre of the practitioners and their commitment to the ideas of the profession. By the versatility that the profession confers, lawyers are, even in military regimes, active architects of the socio-political and economic directions of a nation. In a sense, practitioners develop and deserve the political structure that they get.

Sir Thomas Eichelbaum

Our last commentator is Dato Param Cumaraswamy from Malaysia and the former Chairman of the Bar Association of that country. Presently he is Chairman of the International Bar Association Standing Committee on Human Rights. His courageous stand, at great personal risk and cost, in defence of judicial independence in his country has made Param Cumaraswamy a legendary figure in this region of the world. It is a great pleasure to have him here, and I now invite him to address you.

Param Cumaraswamy

After all the revelling last night, it is really heartening to see that so many of you got up so early and returned at 37° south for another session here. It certainly speaks well for the independence of the legal profession.

It is now accepted that the essentials of an independent legal

profession are that the profession should remain self-regulatory, self-administrative, and self-disciplining. The question I would like to pose is can the profession remain independent if these essentials are taken away and left in the hands of another authority like a government agency or even the Courts? I know in the area of self-discipline inroads have been made. Lay persons have been introduced in tribunals. But what if the profession becomes regulated by the government, or for that matter, even by the Courts, as is already happening in some countries, when the Courts, for example, are no longer independent? To use the words of Lord Atkin, when Judges become more executive minded than the executive itself.

About three years ago, Prime Minister Lee Kwan Yu of Singapore, said that self-regulation is a myth; that the profession can remain independent, even controlled by another agency. Now can it really remain independent?

Then I ask another question. What are really the threats, or who are the threats to lawyers' independence? Often when we talk and say that a particular legal profession is threatened, we attribute the threat to the government. Is the government the only threat to the independence of the profession? I am afraid there are other agencies. Sometimes the clients themselves become a threat to the independence of the lawyer. The large corporations, financial institutions who control lawyers, can seriously threaten the particular lawyer's independence. Sometimes the judiciary itself can be a threat to lawyers' independence. We have heard how the powers of contempt are used sometimes to threaten the aggressiveness of a lawyer in the discharge of his duty in Court.

Then there is the other threat, that is, the threat within the profession, which threatens the independence of that same profession. Often it is said that in such and such a country the lawyers are divided on a particular issue. Now I can understand in some of these issues, which do not go to the fundamentals, there would always be a division. But when it comes to serious fundamental issues, when one says that the lawyers in the particular country are divided, then my answer is there is another agency which is controlling that group, and this is a factor which one has to carefully consider.

The next question I ask, why does professional independence get threatened? This can be attributed to several causes. One is the profession itself. Because this self-regulation is left to them, regulation itself is left to them, discipline is left to them, administration is left to them, they become very lackadaisical. The profession sits on its laurels, fails to look into the realities of the situation, the changes in the society, and is not responsive to changes within society. That is a time when the public come with outcries. This has been seen in recent years with regard to discipline of the profession itself.

In the advanced countries, [there are] these threats — there is the other area of threats which affect particularly Third World countries, the Third World legal professions. That is the threat from the government, because the government in power finds that the professional has become a threat to its own survival. This is where the profession becomes very active in the protection of human rights. Not just appearing within the four walls of the Courtroom and litigating a particular issue, but when the profession in general, as a Bar Association, takes up human rights causes publicly and analyses the issues involved and criticises the government. It is in those areas that the government finds the profession a serious threat.

Now in the larger, advanced countries, the profession is spared such form of threat, because in such countries there are channels for such complaints and violations of human rights. You have in this country, and in Australia, the Human Rights Commissions. Then you have the Ombudsman. The public can take their grievances to these agencies. But in the Third World, in the developing countries, these avenues are not available, so the public look upon the profession, the Bar Association, for such assistance; and when the Association rightfully goes to their aid, they get into all this trouble as Reed Brody earlier mentioned.

Now I ask the next question. How does the profession sustain its independence. Here again, it will depend largely upon the profession itself. One of the ways of dealing with this issue is not only to be vigilant at all times and to see that the profession keeps in time with the changes going on in society and adapts itself to those changes, but to be involved, and this is very important in Third World countries, to be involved in social work, particularly in the area of legal aid. Here, let me give a little humble experience in Malaysia.

Since 1983, the Malaysian Bar Council established a legal aid scheme. It is a scheme which is funded by the profession and administered by the profession and manned by the profession and it has gained considerable public momentum, public respect and it continues, with the assistance of a large number of young lawyers.

Let me conclude by saying this. That ultimately, the independence of the profession will depend on the commitment of the individual lawyers themselves. If independence is not written in the hearts and minds of the individual members of the profession, then I'm afraid independence will remain a dead letter.

Sir Thomas Eichelbaum

The subject is now open to the floor, but I would ask you first, please, to allow persons who have questions of any of the panel to speak, and later, if there is time, we will have some contributions from the floor.

Anil Divan (India)

I am particularly interested in two points which have been raised by Param Cumaraswamy. One is that the lawyers become divided on issues, and this has become a very serious development in some of the countries, because in some of the Bar Associations, the lawyers get divided on political lines, and they become identified with political parties, so that in deciding issues with regard to independence of the judiciary, they vote on political lines dictated to them by political parties. Now this has become quite a menace, I think, even in countries like India also, because that is what I find happening most of the time in the Bar Association.

And secondly, with regard to involvement in social work,

particularly of legal aid, there has been a lot of work done by Senior Advocates in so far as legal aid is concerned, and there is practically no one who asks for legal aid who is not granted legal aid by the senior lawyers in the Supreme Court. Would Param kindly elaborate on what he has in mind when he is dealing with this question of lawyers being divided on issues? Does that kind of situation prevail in other countries also?

Param Cumaraswamy (Malaysia)

To answer that question, what I really had in mind is what you just mentioned. I have heard of lawyers being divided on political lines. Not only that. There have been instances recently where we have found that certain quarters from outside who are not very happy with the unity of the Bar, they go all out to divide the Bar, and once the Bar is divided, it is easier for them to deal with the Bar.

About this particular issue, you may recall way back in 1983, during the emergency in Pakistan, because the lawyers were so united, there was an amendment to the legislation whereby it was no longer compulsory for members of the Bar to belong to the particular Bar Association. This is where the government interferes to divide the Bar, and this is now seen in many other countries — I won't name the countries — but it is now quite prevalent. So therefore when people come and hear that, particularly the foreigners, they may not want to interfere in the particular issue which may be a very serious issue affecting sometimes even judicial independence. But because it has been said that the lawyers themselves have been divided on this issue, they dare not come in. And this is a very worrying situation. And that is what I really had in mind.

Tony Holland (England)

I would first of all like to congratulate the last speaker for his superb analysis of the problems of independence of the profession — I enjoyed his contribution very much. The question I have of the panel is this: that in the advanced countries, or the developed countries, I suppose the biggest threat to the independence of the profession is the change, if you like, from professionalism to consumerism. The public, I think, have lost their faith in the professions as such as a means of controlling their services, and seem to be moving more and more to the concept of market forces and consumerism. And that is not necessarily a bad thing, actually. In a way, I think it is a fair development. The question I ask the panel is this: how far do they think this threat from consumerism to independence is a real threat, or in fact is it something that the profession can live with?

William Reece Smith (USA)

I think it's a very real threat in my country. There have always been practitioners who disregarded the tenets and traditions and ethics which have guarded the profession, but the leaders of the Bar, the great bulk of the Bar, are of those traditions and tenets and rules. But, more and more, we see representatives of large law firms who generally have been held in the highest regard crossing the line in a great number of ways in pursuit of sheer commercial gain.

I think they have lost sight of the professional obligations, particularly the obligations of public service, and it was incumbent upon the organised Bar to impress upon them what is happening through crass commercial pursuits. The American Bar Association is currently completing the study on professionalism and seeking to develop a variety of means to help the profession understand what is happening to it, and how much we are losing as we go headlong in pursuit of the billable hour and the bottom line.

Unidentified (Mauritius)

I am the Chairman of the Bar Council. I would like to ask the panel whether it is not within the profession itself that the seeds of independence are cultivated? I say this becuse, in developing countries — maybe it is different in developed countries with liberal traditions — in developing countries, we find increasingly established lawyers refusing to take cases in the absence of conflicts of interest, just because they do not want to incur the displeasure of the authorities. This is, in my opinion, a serious threat to our own professional standards, and I tend to agree with what the last speaker on the panel spoke about, as dangers and threats to the independence of our own profession. But are there any ways in which we can forestall this danger, or is it something that we have to live with because, human nature being what it is, self interest being present in all human dealings, is it something that we have to live with, or is there some method by which we can deal with this problem where the essence of public service and a notion of professional standards are maintained?

The second question I would like to ask Mr Cresswell is why is it that the contingency fee has been discarded entirely, because the contingency fee system could be one way of ensuring the wider access to justice for some people?

Sir Thomas Eichelbaum

I will ask Prince Ajibola to deal with your first question.

Prince Ajibola

In respect of your first question, I think it is a problem that has to be taken care of, perhaps locally. If one looks at the problem this way, it is the tradition that no one should refuse a brief coming to him, however unpopular, however distasteful. One is also minded of the fact that entrenched in some of the written constitutions is a fact that someone who is accused of any offence or any crime is entitled to a lawyer of his own choice. But that is where it stopped. The other one, the plans, and the ethics and the tradition within that environment and, in some cases, you may not be able to force whoever does not want to take any matter up to take it up, and even if you do, you are forcibly asked to go to the brook but asked you may not drink the water. That is one aspect of it.

But very more serious is the issue that has already been touched on by my colleague here, one of our speakers, as well as mentioned by you, that a house divided against itself cannot stand. We find that in most of our developing countries now, the serious problem rearing its head is politicising the Bar Association. It is sad to note that whenever there is a very serious issue, perhaps, for example, the independence of the judiciary, one would have thought that our Bar Association will come out boldly and strongly in favour of

the independence of the judiciary when there are scathing remarks being made against Judges, and the Judges, not being able to defend themselves, that the Bar Association will stand up boldly and stoutly and defend our judiciary. But you just find that the Bar Association will take a stand and some other groups dissenting from that will vocally through the press take another stand. I think the serious trap of this one should be something that should be taken home by a lot of our Bar Associations here. It is a trend that we cannot ignore.

William Reece Smith (USA)

One response I would offer to the question just asked about taking difficult cases and maintaining independence on the part of individual lawyers. My response is no matter what lawyers do as individuals and how courageous they are, they are far more effective if they act in an organised context. I urge the strengthening of Bar Associations, particularly in developing countries, so that they can act collectively, they can act in concert, they can support one another, they can resist interference. I think it is far more effective if there are strong Law Societies and Bar Associations available. This is why I believe that developed Bar Associations and Law Societies should assist developing Bar Associations and Law Societies through programmes that they have mutually developed and which they mutually carry forward.

Peter Cresswell (England)

Can I just add a word on the first question.

Our cab-rank rule in England I believe sets an example to the Commonwealth. The rule that you must take any case within your field of practice, whether publicly or privately funded, irrespective of the party, irrespective of the nature of the case, irrespective of any belief or opinion which the advocate may have formed as to the character, reputation, cause, guilt or innocence of the client, represents, certainly in our view, an absolutely key element of access to justice.

As to the second question, we will have, as a result of our Bill, contingency fees in England and Wales – an adaption of the Scottish model. The lawyer will recover his fees, plus an uplift if the case is successful. Our concern about such arrangements is in relation to the independence of the advocate. It is so important that the advocate fights the last inch of the way for the particular cause, irrespective of any pressures placed by a recovery of fees or the like. I remember participating in the thalidomide case, for one of the dissentient parents, when there was an application to remove seven parents as guardian ad litem to their own children at a time when the offer was £3 million. Lord Denning upheld the parents' view as against the advice of those representing the body of parents and we secured, in the end, £25 million. It is so important that there is no compromise when you are fighting for people in trouble.

William Reece Smith (USA)

May I express an American view? We have had the contingent fee for many, many years. Certainly we have seen no compromising of the independence of advocates. Quite the contrary, particularly those who practise in the personal injury field, are accused, if anything, of being super-aggressive or super-independent. So we come from different backgrounds and arrive at different conclusions on that particular point.

We also argue that it does improve access to the judicial system, particularly for persons of moderate means or for poor persons.

Hon Justice Kolo (Nigeria)

I concede that there may be many bodies which may constitute a threat to the independence of the judiciary or the profession. But in the main, when we are talking of threat, I think we have the government in mind. Now in the event of a threat from the government to the independence of the judiciary or to the profession, my question to the panel is what measures would you suggest to ward off such threats? Now, can a boycott of the Court by the members of the Bar, or the Judges, be the answer? Is it proper for the Judges to boycott the Court? That is the question.

Unidentified (India)

May I supplement that question with is it permissible for lawyers to go on strike on issues relating to the profession? That has often been happening in India lately, and it is the subject of public discussion as to whether, when some reform is brought out in the law which the legal profession or the particular Bar Association does not like, or something happens to a lawyer somewhere in the country, that the lawyers go on strike. Now there, there is a conflict of interest, sometimes between the client and the lawyer, because many a time the client does not get relief because the lawyers are boycotting the Court and the legal system stops functioning.

Prince Ajibola (Nigeria)

I take the first shot at this very unusual question which is unique in itself. Should lawyers boycott Courts? Judges too – must they? I must say that, to begin with, I happen to be an involved or interested person, in my days as President of the Nigerian Bar Association. But leaving that behind, one looks at it more deeply and more seriously. To begin with, it is not part of the ethics and the behaviour and the traditional of lawyers to go on strike, to boycott Courts. There it is, and this is not far fetched. In most cases, if you carefully look at the issue involved, you can easily still get the redress within the judicial set-up or within the Courts themselves. So instead of going on strike, why can't someone file an action, and a proper one for that matter, still in the same Court, and ask for one redress or the other. Some of these issues that have been brought to my notice, on reflection I have found that they could easily be resolved by taking the matter back to the same Court, rather than boycotting that Court. That is my view about that.

Sir Thomas Eichelbaum

As the only member of the judiciary on the stage, I would just like to add a brief comment. My own view is that it would be unthinkable, quite unthinkable, that the judiciary would ever, as it were, go on strike. I do think it is a pity that there is not a greater public and media perception of that fact.

I call on the gentleman at the back who has been waiting the longest.

Sri Ram (Malaysia)

My question is addressed to Mr Peter Cresswell.

The English Bar has traditionally trained all of us, and we owe our presence here in the main to that fact. Apart from the unity of language, we also have the unity of the common law. I therefore ask the Chairman of the Bar Council of England and Wales, what that body has done to voice opposition to the implementation of the new Education scheme in England whereby Commonwealth students will be segregated from local students in legal education?

Peter Cresswell (England)

I am not sure that any segregation is intended. We value enormously our links with the Commonwealth. We value enormously the fact that we have many members of the Commonwealth coming to London. There are certain differences in relation to practical exercises for students who are going actually to practise in London, but the commitment to continuing to provide the education we have always provided remains.

Sri Ram (Malaysia)

Might I disabuse you, sir? From next year onwards, students coming from the Commonwealth will *not* write the same examinations as students from your islands. In those circumstances, is the Bar going to appraise itself of up to date matters in legal education in England and Wales and take a stand on this matter?

Peter Cresswell (England)

I think we could talk about this separately, but we have a new course which is geared to advocacy skills in London. There is no intention to segregate. There is an intention to provide the sort of training that is useful throughout the Commonwealth. If it is felt that we are ceasing to do that, I will take every step to ensure that we provide it.

Sri Ram (Malaysia)

Thank you very much, Mr Cresswell. The darkness wasn't my idea.

Sir Thomas Eichelbaum

We are running out of time. There are three speakers waiting and we will try and take their questions, and that is the most that we will have time for.

Donald Yap

I am the President of the Law Society in Hong Kong.

My question is one arising from the speakers is of the threat of internationalisation of the profession, of the legal services which it will affect and maybe a threat to the local profession. The problem is, for the local profession, seeing foreign law firms coming to their jurisdiction. And coming back to the question of consumerism of the large foreign firms who appear to be taking up the cream of the work and the local profession perceiving themselves as having to do the rest of the small work, and also expected at the same time to carry out their public duties. How does the panel see that, and how will they be able to reconcile that?

William Reece Smith (USA)

I'll address it by analogy. I come from the State of Florida where we have a benign climate. Lawyers in the cold, cold north enjoy being in my State, particularly in the winter. Of the 150 largest law firms in the United States, where are now over 50 which have developed offices in the State of Florida and compete with Florida law firms for the better corporate business in the State of Florida. The only way we have been able to deal with it is to be better than they are, and we're doing that.

David Pannick (England)

My concern is the wide divergence between the aspirations which have been expressed this morning by the panel, and the practicality. My question is to Reed Brody, an objective outsider. Will he say how many Commonwealth nations, in the opinion of the ICJ, fail to respect the basic norms of the independence of the judiciary and the independence of the legal profession; and will he, if he thinks it appropriate to do so, say which countries they are?

Reed Brody

I may be an outsider, but I don't know that I am objective. I think it is not fair to describe countries as either failing or not failing. Clearly, the case of Malaysia in which, in the last year, the Lord President and two of his brethren were dismissed for their attempts to uphold the rule of law is a situation that I think is of great concern to us and to many of the lawyers here. We are concerned when a country like Kenya passes a constitutional amendment allowing the President to sack Judges – basically on his own say so, basically copying the Malaysia principles. There are many other countries – I don't think it is particularly helpful to rate countries. The Commonwealth has a tradition of an independent judiciary that is not found in other countries in the developing world, but as the case of Malaysia, as the case, I mentioned, of Kenya shows, it is a tradition that has to be fought for and protected every day.

Hon Justice Akanbi (Nigeria)

I want to draw a distinction between developing countries and developed countries. The basic problem is the problem of poverty of means. The people are generally poor in developing countries, and I would want to know what the Commonwealth body is doing to raise the economic level of the people so that they can more effectively assert the independence of the profession. I am talking of the ordinary people who have heard about legal aid schemes, but the standards in some of these countries are such that unless their economic standard is raised, talking about the independence of the profession would mean practically next to nothing to the ordinary man.

Now the second point is education. Educating people to know that it is in their interest that the profession is independent. . . . Now these rights are there for the public to appreciate, but they need to be educated. In this respect, I see Nigeria as being very lucky. There is a continuing eduction for the judiciary. But I think the ordinary people should also be educated to know their rights under the law, and to that extent, I would want to know whether this body has any special programme by way of educating the masses in the various countries of the Commonwealth?

William Reece Smith (USA)

The International Bar Association has programmes whereby we encourage Bar Associations of industrial nations to twin, as we call it – not a very good term – with the Law Societies and Bar Associations of developing nations. One of the things that we encourage in these twinning arrangements is the development of legal literacy programmes. At the current time, the Bar of Norway is twinned with the Bar of Nepal. They are helping Nepalese lawyers develop a Bar Journal, a legal aid programme, particularly for the protection and advancement of the causes and rights of women, and finally a legal literacy programme.

There are a number of agencies outside of the legal profession that also provide funds to advance the programmes of legal literacy, helping general members of the public understand their rights. I know for a fact that the Ford Foundation is sponsoring such a programme in Bangladesh, whereby a Professor of Law at the University of Dacca goes out into rural villages all over Bangladesh and meets with women in this case, and helps them understand the rights that they have under the laws of that country. Interestingly, their concerns are primarily about the laws of divorce and the laws of property, but it is through both the work of what I call the organised Bar, the organised legal profession and international agencies such as Ford and others that I think programmes such as these should be developed and can be advanced.

Sir Thomas Eichelbaum

When Mr Pidgeon and I met with the speakers yesterday in order to outline the format of the programme of today, Mr Pidgeon and I, at any rate, quickly reached the conclusion that in an hour and a half we would do no more than scratch the surface of the very important topics of the standards and the independence of the profession. And so it has proved.

I think you will agree that to introduce and lead the discussion on those topics today, we have had an outstanding gathering of speakers and I ask you now to join with me in showing your appreciation to them for their contribution. □

Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

Judicial Review: Future Directions

Mike Taggart

The two sessions this morning have been designed to complement one another. The first will review recent developments in judicial review; the second, after the break for morning tea, will examine an alternative means of securing administrative justice, that is, independent review on the merits. I hope all of you can come to the second session.

It's my function to acknowledge the sponsor of the session and to introduce the Chairperson. This session is sponsored by the Butterworths group, one of Australasia's largest publishers – their assistance is much appreciated.

The Chairperson of this session is Mr Justice Thomas of the High Court of New Zealand. For over 20 years, Ted Thomas was a litigation partner in the Auckland law firm of Russell McVeagh McKenzie Bartleet & Co. He went out as a Barrister sole in 1979, took silk in 1981 and, earlier this year, was appointed to the New Zealand High Court bench. At the Bar, Mr Justice Thomas argued many important Administrative Law cases, perhaps the best known to this audience is *Finnigan v the New Zealand Rugby Union* – the case which caused the cancellation of the All Black Rugby tour to South Africa in 1985, a case that I know will be discussed this morning. It is my great pleasure to hand over to Mr Justice Thomas.

Mr Justice Thomas

I suspect that if we were to be frank and honest, we would admit that the phenomenon called "hero worship" is not restricted to one's childhood. So it is with me. Although it may appear unseemly in a grown up High Court Judge, I am prepared to confess that throughout most of my adult years, I have vested a short-list of two persons with something akin to god-like status. One is Sir William Wade, and the other is Richard Hadlee. And indeed, and this will startle Australian delegates, even in that order.

It is my intention to convey that there could be no higher praise from a New Zealander for one who is Master of Gonville and Caius College at Cambridge; the Rowse Ball Professor of English Law at Cambridge; and also Professor of English Law at Oxford. To have Sir William attend this conference and speak at this session on the topic "Judicial Review: Future Directions" is, indeed, a great honour.

I cannot possibly repeat the immense number of honours and distinctions which Sir William has achieved in the course of his lifetime – a quite awful mixed metaphor will have to suffice. Sir William has scaled the heights of academic achievement; he has been prepared to march to the beat of his own drum, and he has planted the seeds of numerous principles now well established in Administrative Law. If you have been listening closely, you will also already know that Sir William's listed recreations are mountaineering, music, and gardening. I do, however, single out for specific mention and special tribute what all practitioners around the Commonwealth would want me to do – to acknowledge the

unexcelled excellence of Sir William's classic text, *Wade on Administrative Law*. Practitioners seeking a statement to suit their case, and a footnote with twenty or more case references will refer to de Smith, and both sides can do that. The practitioner seeking a statement of principle will refer to *Wade on Administrative Law*, but only one side will achieve that.

Unfortunately, busy practitioners tend to read texts of this kind in bits and pieces, beginning with the Index. It was not until I was on sabbatical leave that I had the opportunity to read *Wade on Administrative Law* from cover to cover, and it was a profound experience. Administrative law is presented with unsurpassable insight and articulation, as a cohesive subject with a true and great underlying function. Now this revelation had a most significant consequence for me. I do not know when the idea germinated, but while at the Bar, I formed the burning ambition to complete an entire argument in a judicial review proceeding without referring to one case or authority, other, that is, than references from *Wade on Administrative Law*. No barrister, I thought, could accomplish a greater personal tribute to Sir William, and I accomplished that just last year. My disconcerted, and I might say openly hostile juniors, confirmed that while not referring to a single case, I cited *Wade on Administrative Law* 27 times, and on another 4 or 7 occasions (the juniors disagreed) incorporated extracts from his book in my submission, apparently without acknowledgment. I regret to have to advise you, Sir William, that you lost that case.

Today, Sir William will speak to his paper in which he seeks to make out the case for restricting judicial review to the exercise of legal powers having direct legal consequences.

Sir William Wade

I don't in the least know how to comment on the quite excessive generosity of Mr Justice Thomas's remarks about me. But I can tell you a little thing about that book which shows that it has not always been treated with the respect that he has indicated.

Some years ago, at the time of the Vietnam war, there was a protest march in London against the American Embassy, and it was disorderly, and missiles were thrown and there were scuffles with the Police, and there were quite a lot of students in it, including law students. A few days afterwards, one of the law students was brought up in the Magistrates Court in London, and the charge was that he was found in possession of an offensive weapon, to wit, *Wade on Administrative Law*. Now the beat of my drum, as Mr Justice Thomas has called it, if it has not done anything else, has at least caused a small ripple of controversy on the surface of what would otherwise be the bland sea of a law conference. And I'm bound to say that the comments which it has provoked have caused me a number of surprises.

First of all, there was an issue of the *Aotea Advocate* last February – our Conference magazine – which contained some quite tendentious comments on it, saying, amongst other things, that I was criticising the New Zealand Court of Appeal in the *Rugby Union* case which, in point of fact, was quite untrue, and saying also that Sir Robin Cooke was an old pupil of mine. I would, indeed, be proud if that were true, but it is not. And I expect Sir Robin would consider it an even more injurious falsehood than the other. And then, later on I received Sir Patrick Neill's paper, and you can easily see from that, that he is taking a critical view of my suggestions. He will have his say in a minute, but you can very easily see from his paper that there is controversy there.

And then finally, last Tuesday, when I was seated comfortably in this hall, enjoying the mellifluous discourse of Sir Robin Cooke, I was suddenly astounded to find myself listed in his catalogue of antagonists. The pill was coated with the sugar of flattery, and that part I am not objecting to. I have always liked the story of the lady who had sat next to both Gladstone and Disraeli at dinner parties and said that when you were sitting next to Mr Gladstone, you thought he was the cleverest man in the world. But when you sat next to Mr Disraeli, you thought that you were the cleverest woman in the world. A little flattery is usually acceptable.

I have unbounded respect and admiration for Sir Robin Cooke, and the last thing I ever intended to do was to criticise in any way anything that he had said. And I hope you won't be disappointed if I say that in my opinion, this is really a non-controversy, despite all this apparent conflict of opinions, because really, I must have completely failed to get my message across. What I am attempting to do in my paper is to draw attention to a series of cases, in Britain particularly, where the Courts have passed beyond the legal world within which they normally operate, and are taking in with a wide sweep a whole new area of human life, and extending legal control to non-legal situations. I am not objecting to this. I am saying that it is a novel phenomenon; that it needs study and criticism; that it contains all kinds of problems and paradoxes which are only to be expected. The Courts, it seems, are, as it were, taking off for outer space, removed from the forces which normally keep lawyers' feet on the ground.

Lord Diplock said in the *Civil Service Unions* case, in which he set out in text book style a number of fundamental propositions about administrative law – that case is briefly referred to in my paper – Lord Diplock said that you had to have one of two things for judicial review: one was power derived from statute, and the other was power derived from the Royal Prerogative. But that now seems to be completely outmoded. The Courts have opened up a new area where it is impossible to see what the limits are, and they may be very wide indeed. There are a good many arguments, pro and con, and I have mentioned some of them in my paper. But what I really say – and it is on page 440 of the printed version – is that I find it difficult to make up my mind, and I think we will need a good deal more elucidation and a good many more decisions before we can see where the limits of this new exploration may be.

At the heart of it, or at the centre of it, is the case about the Takeover Panel, which is the only one of these cases which has yet reached our Court of Appeal, where the Master of the Rolls, Lord Donaldson, in an outstanding judgment, analysed the problems that might arise in trying to apply ordinary legal remedies and procedures to business in the City of London which, above all, is required to be rapid, confidential and effective. And he acknowledged that the system of remedies would

have to be completely re-organised, and he spoke of the Court's control being historic rather than contemporaneous, that is to say, the Court might not say that they would quash a decision of the Takeover Panel this time, but probably they would do so next time, and in the meantime would make no order. This is reminiscent of the Supreme Court of the United States in the doctrine that it occasionally resorts to of prospective over-ruling, saying that not this time but next time, and is an entirely novel idea in our English jurisprudence.

The Takeover Panel, of course, was a body set up in the manner dear to the hearts of the business community without any statutory basis, and it nevertheless wields powers of professional life or death over security dealers if it finds that they have broken its rules which it itself promulgates. Sir Patrick Neill can tell you more about this with much greater authority than I can, having himself been Chairman of that Panel. And it is acknowledged by the government that it is part of the scheme of control, and has been left as a private body without any statutory backing, for the very reason that it has to operate in this speedy and confidential way.

Now that means, as the Court of Appeal pointed out, that it is, *de facto*, part of the government's overall plan, some of which is statutory, and some of which is not, for regulating the securities market. And it is in that aspect, as a quasi public authority, that the Court of Appeal decided that it was subject to judicial review. They did not quash its decision in this case; they found that it had interpreted its rules correctly, and so the proceedings failed. But, of course, it is a very curious constitutional phenomenon, as I mention in my paper, that you should have these rules, which the Court will, as it were, enforce by quashing decisions which are contrary to them, which have not been made by Parliament, or under any sort of statutory authority, but merely the rules which the Panel has laid down for itself. And that is one of the many problems which has to be faced if the Courts are to undertake to review the activities of informal non-statutory bodies.

Now I think, among all these various cases, there are some which can be regarded as pretty well uncontroversial, and at the other end of the scale, there are one or two that, I am bound to say, seem to me to go too far, and in the middle, there are some intermediate ones where there are arguments, pro and con. The uncontroversial group are cases like the Criminal Injuries Compensation Board. That was where this novel idea first worked its way into our law — back in 1967, when that Board, for compensating the victims of violent crime, had been set up as a non-statutory body, but by the central government, and it was provided with money, it made its awards, it published its rules, its rules were even laid before Parliament, but never enacted. And I think it would be quite wrong that a public body like that, dispensing public money, should be able to escape from judicial review, merely by the device of being set up on a non-statutory basis. If the government could get away with that, then there would be a gap in the proper scope of review. It is interesting, if you look back at that case, to find that Lord Justice Diplock, as he then was, made out a case as it seemed to him for saying that they were, in fact, exercising legal power. I was not entirely convinced by it, but it is entirely in accord with what he said in the *Civil Service Unions* case, and shows that he, at any rate, felt that it was necessary to find a bit of solid legal ground to stand on.

Then came the *Civil Service Unions* case itself in 1985, where the Royal Prerogative was brought within the scope of judicial review. Our Judges have a rather curious attitude to the Royal Prerogative, holding that it means whatever is done by the Crown. But I have always thought that the Prerogative really ought to be what the Crown can do and what the ordinary subject cannot do. Special things, like giving assent to Acts of Parliament, creating somebody a Peer, and so forth. But I am afraid that I must admit that I have lost my chance now forever of persuading the Judges what the Royal Prerogative is, and we have to accept it as laid down in the *Civil Service Unions* case as comprising ordinary contracts of service under the Crown.

Then, I also welcome, as I have made clear, the decision about passports in the *Everett* case, which has long been, it seems to me, a shocking lacuna in our law in Britain, where we have not ever established any legal basis for a passport. In common law, I believe that a subject has the right to come and go from the realm freely, but everybody knows that you cannot do that if you do not produce a passport in practice. And therefore, as in other countries — the United States, numerous other countries — a passport should be based on legal right, and I am happy to find now that the Judges, although they did not find in favour, although the proceedings were unsuccessful in that case, the Court made it quite clear that refusal of a passport on insufficient grounds would be subject to judicial review.

Now at the other end of the scale, the least justifiable cases, as it seems to me, are cases like the case of the Government's leaflet about the new tax about which you will have heard quite a lot through the newspapers, commonly called the poll tax, and which is being introduced as an alternative source of revenue for local government in Britain. Now there, the Department had simply put out a leaflet for public information, and this was challenged on the ground that there were inaccuracies in it. It had not mentioned one particular rule about people who cohabit, as opposed to those who are truly and lawfully married, and by omitting this particular detail, it was said it was so misleading, that it ought to be quashed.

Now if the Courts are to undertake the scrutiny and criticism of every piece of mere information put out by the government, it seems to me that they will be kept very busy and will go a good deal beyond their proper sphere. This is not the exercise of any power at all. Anyone may put out information, and those who do it, including the government, have got to have an eye on the law of libel and various other things, but the accuracy of what they say is a matter for them. And, of course, if it is done by the government, then it is a matter for Parliament, and the Minister will be criticised, and that is the proper constitutional remedy. But I am bound to say I feel uneasy about the Courts entertaining this. The proceedings failed, as so many of

these cases have done of those that I have instanced.

And then I have referred to a case about the Jockey Club. And there, it was not a question of depriving somebody of their livelihood by banning him from the turf, it was simply a question of who they should choose to be Chairman of some of their committees. And, there again, it seems to me that that is something, when it is based on no sort of public law or statutory authority, that the Court really ought not to interfere with. And then in between, the intermediate class of case, are cases like the *Takeover Panel*, which I have already instanced, and the *Advertising Standards Authority*, which is related on page 438 of my paper, where, it seems to me, the arguments are both ways. There are certainly problems to be faced, as the Master of the Rolls explained in the *Takeover* case, if the position is to be satisfactory.

But what I do suggest is that if we are to have this sweeping extension of judicial review, that it must be within more or less definable limits. The trouble at the moment, as it seems to me, in the *Takeover Panel* case, is that the Court said that all you need is a public element. Now there are innumerable bodies in which you can say that there is a public element — councils, committees, universities all kinds of bodies, and where you draw the line seems to me completely uncertain. And that is why I suggest that if we are to have this development, it ought to be within parameters which are reasonably clear and categorical, and that is why I suggest, for example, that livelihood and property are the spheres where it is most justifiable. A man should not have his livelihood destroyed in breach of the principles of natural justice. And probably you could say the same thing about property. And then there will be other such regions which the Courts can identify as litigation proceeds. But, at any rate, there must be something definable.

Now, I have put off for as long as possible mentioning the *Rugby Union* case, because, of course, that is an explosive mixture of two things about which New Zealanders are particularly sensitive — South Africa and Rugby football. In thinking about it, I was reminded of what Dr de Bono was telling us on Tuesday about creative thinking as he calls it, and he also talked about feelings disguised as logic. Now, I do not think there is anything abnormal in decisions which are made in circumstances of great political excitement and pressure, and clearly that was something of an element in the final decision in the *Rugby Union* case. But every lawyer can produce examples like that from his own system. What I say in my paper about that case is that every element of it can be matched by something that has recently been happenng in Britain. And all the various strands, as it were — the borrowing of public law to help out in the sphere of private law and the invocation of the doctrine of relevant and irrelevant considerations — all those elements can be found in the cases which I have mentioned in my paper, and most of which I have mentioned this morning.

Sir Robin Cooke spoke on Tuesday of the dynamism of the Common Law and here, certainly, is an area where its dynamism is going great guns and clearly it is one of the areas in which the Judges are showing signs of being most enterprising.

I have noticed in New Zealand a tendency to think, among New Zealand lawyers, that the Courts here in New Zealand are particularly innovative at present, and that they are exploring new legal avenues in a way which we are refraining from doing in Britain. But I hope that I have shown you at least one area where I do not think that this comparison is true, not because the New Zealand Judges are not enterprising, but because the British Judges are at least equally enterprising. We have two countries, both blessed with adventurous Judges.

Mr Justice Thomas

Thank you, Sir William. I should mention that if anyone were to come before me charged with an offence of using your book for a criminal purpose, they will be treated with the utmost severity, although I would accept, no doubt, in mitigation if it were an out of date edition.

And now, in the blue corner, weighing in with a formidable intelligence, and an outstanding record in administrative law himself, is Sir Patrick Neill, QC.

When Sir Patrick is not undertaking some major international arbitration in Geneva, the Middle East, Hong Kong, Singapore, or wherever, he is to be found at Oxford. Since 1977, he has been the Warden of All Soul's College. He was also, from 1985 until last year, Vice Chancellor of Oxford University; a fitting honour for one who won an outstanding number of scholarships and prizes while a student at that same august institution. Sir Patrick has since been the Chairman of many important bodies and tribunals in the United Kingdom, such as the Press Council, the Council for the Securities Industry, and the like, and a member of many others — the Panel on Takeovers, which Sir William has mentioned. It is typical of Sir Patrick's thoroughness that when he undertook a study for *Justice* on administrative law many, many years back, he should, with a colleague, have travelled to New Zealand and spoken with the then but now abolished Public and Administrative Law Reform Committee in this country. The courtesy and competence inherent in his visit was much appreciated then and still is.

Sir Patrick is a most agreeable fellow, but this has not prevented him from disagreeing with Sir William on the desirability of extending judicial review to non-statutory bodies, exercising powers of a public character.

Sir Patrick Neill

Well it is a little daunting to be opposed by an opponent who is described by the introducer as having a god-like status. However, the reference presumably was to the gods of Greece and Rome, and it will be a question for you, which god? Of course there was a Jove or Jupiter on top of Olympus, there was another gentleman operating further down.

I wondered whether I could go home at an earlier stage when Professor Wade said this is really all a non-controversy and that he was not really objecting to the decisions, and that he found it difficult to make up his mind. Well, as he went on, I think it did become clear that he was objecting to some cases, and I hope, perhaps, I might be able to help him make up his mind on some of the

borderline cases.

Can I begin like this, with this proposition. I believe that if one looks at the history of Administrative Law, you would find that it has, from time to time, suffered from the stultifying effect of the creation of rigid categories of one sort or another. One calls to mind the time when certiorari was restricted to bodies exercising judicial or quasi-judicial functions. The hunt was to see what type of function, whether they fitted into these pigeon holes. And then one had the doctrine that certiorari would not lie to a body that was performing an administrative function. So that if you could label the function administrative, apparently they fall outside the net. It took Lord Hodson in *Ridge v Baldwin* to say that of course it does not follow that simply because you are performing an administrative function, you may not simultaneously be required to behave judiciously. So that fallacy fell away, but it was a category that held the field for a long time. We have now got another category that has come in per Lord Diplock in *O'Reilly v Mackman*, the rather rigid division you found in that case between public law and private law. I am happy to see there has been quite a lot of backing off that as a rigid categorisation, in particular in the Court of Appeal case in New Zealand to which Sir William has referred – the *Rugby Union* case. And I would personally deplore the creation of some new rigidity. I rather got the impression that Professor Wade was saying – well, if it affects livelihood or property, if the body exercising the power has an influence on livelihood or property that is all right, but unless you are within that category, that won't do.

If one looks also in the books, you will find a large number of warnings starting in the 1950s onwards about the dangers of categorisations – there is a passage by Lord Justice Widgery, as he then was, in the *Hull Prison* case, where he said it would be a bad day if it was ever possible to decide a certiorari case simply by looking up a book and finding whether or not the particular body came within the required definition. And Lord Justice Parker, in the *Criminal Injuries Compensation Board* case – he, of course, was an acknowledged master in the field – gave a very strong warning about the need to retain flexibility, as, indeed, did Lord Diplock in the *Civil Service* case which has been mentioned this morning. So I am a great believer in the common law in this field retaining flexibility – of course, accompanied by common sense.

Now, therefore, I would submit that the right way of looking at this new and interesting group of cases is that one should ask oneself what is the nature of the duty being performed, or the function being carried out, and what effects will be produced by it in the real world? Is the decision mandatory or compulsory in character. I accept as one possible limb of it, would it affect property rights, would it affect livelihood, would it affect reputation? Or would it determine the manner in which the public, or a significant section of the public, carry on their affairs? That is the sort of approach that I suggest one should adopt to these cases.

By way of supporting authority, may I just refer to Lord Justice Lloyd in the first *Takeover Panel* case (this is from [1987] 1 QB 484), so once again one comes back to what I regard as a true view: that it is not just the source of the power that matters, but also the nature of the duty. And there was an interesting case in the Federal Court of Malaysia – one of the advantages of these Conferences is that one learns some law by coming to them – you will recall Sri Ram's inspiring talk on Tuesday morning in dialogue with Sir Robin Cooke, and we were talking about the need for people to be aware of the case law of the Commonwealth, and when I talked to him afterwards about the subject I was discussing, he said, well, do you know the case of *OSK v Tenku* in [1983] *Malayan Law Journal* at 179 – he even knew the page reference. I had to confess that I did not know it. He gave me that case where the Federal Court held that the Stock Exchange was amenable to judicial review and the basis of the decision was the nature of the power being exercised. They rely very much on a Criminal Injuries Board. I should, in fairness, say I think it is the duty of Council to mention cases the other way. He also referred me to a case on a Produce Control Board – *Gander Oil v Tenku* in [1988] 1 *Malayan Law Journal* 174, where the Highest Court on, I say, different facts decided otherwise and held there was no judicial review. But at any rate, my authorities are the nature of the duty. Now that is my general approach.

Then let me take the cases. It so happens that the cases that I thought were interesting are the ones which Professor Wade thinks are either controversial or wrong. Can we take the *Takeover Panel* case. Now Counsel for the *Takeover Panel*, Mr Robert Alexander as he then was, actually contended that the Panel were not performing a public duty, and he really seems to have forgotten the history of the Panel.

There is a very interesting book by Sir Alexander Johnston, who, for many years, was Deputy Chairman of the Takeover Panel, and in the early pages of that, he describes some of the transactions in the city which led to the creation of the Panel. I can just give you one example which I recall very well from his account of it. There had been a case of a takeover where the bidder or the company that was try ing to acquire shares had succeeded in acquiring by Friday night in a particular week about 51%, and they then made a triumphant announcement that they were now in control. The Board of Directors went away quietly for the weekend to a country house, were told by the Secretary of the Company that they had a power under an earlier resolution of a general meeting years back, to issue further shares. They then proceeded on Sunday to issue a whole batch of additional shares. They issued them to their cronies and were able to announce on Monday morning that the bid for the takeover had failed, and that they were only a minority holder, and of course somebody else had a much larger slab of shares. Now that is what actually happened. There was criticism in Parliament; the then Prime Minister had some fairly strong words to say about that and other city transactions – it was not Mr Heath talking about the unacceptable face of capitalism, though that would have been a very good description – it was, in fact, Mr Harold Wilson.

Well in the face of episodes like that, the Governor of the Bank of England thought that the stables required some cleaning, and so the precursor of the Panel was set up, with the support of the merchant banks and the Stock Exchange, to

regulate the conduct of takeovers in the city, and it was perfectly clear that this was a move into the public field to control the way in which any takeover could take place within the market in the United Kingdom. And with the support of the institutions I have described and the big investors like the insurance companies, the system was set up and operated, I think, with enormous efficacy. I was never Chairman of it, as Sir William said – I happened to be a member when I was Chairman of the Council of Securities Industry – and it owes an enormous amount to Lord Shawcross who acted as Chairman and to Sir Alexander Johnston, who would sit up every night and write the judgment so it was ready for the following morning. They operated with enormous speed.

And so if you look at the history like that, it seems to me totally irrelevant what the source of the power was – whether it came from statute, or how it came about. If you look at the nature of the function, the Takeover Panel was exercising – and the colossal power it wields in terms of money and the shareholding of private individuals and major corporations – you come to the conclusion, I think, very readily, that it would be unacceptable to allow that to operate in the Alsatia of which Lord Justice Scrutton spoke in the *Czarnikow* case for those who remember the Arbitration session. So you are only disturbed, I think, by a decision like that if you come to the case with preconceptions or labels, or neat little pigeon holes into which cases have to fit.

Now I agree with Sir William that the *Advertising Authority* case goes further than that, because you have not got a background of a similar character at all. But you have got a set of arrangements whereby there was a public dissatisfaction in the United Kingdom with the contents of advertisements that were being used by some companies, almost deliberately misleading or just inside the law, or very unsatisfactory in other ways. And so, there was set up by those concerned, with no public backing, an authority to which complaints could be made about the conduct of the contents of advertisements, and that system has been operating for many years. Then comes a case where the officials of the Authority, no doubt for reasons which they thought were good, failed to disclose to the Judges part of the defence of one of the advertisers, who was held up in front of the Authority. Now in any other sphere, one would say at once a gross violation of natural justice where part of the defence is removed from the Judges. The Court felt it right to extend judicial review to that case, and it seems to me to be perfectly proper that they should have done so.

There is another case which I do not think Sir William mentioned today, but which he wrote about in his article – I would just like to refer to it. It is a disciplinary case, and that was the one of the Professional Conduct Committee of the Bar Council which operated, so to speak, as a sifting committee to decide whether or not a charge should be preferred, and if so, whether it was a grave charge or a lesser charge. It was all being a necessary step on the road to being prosecuted in front of the Committee which would have power either to acquit or disbar or suspend from practice. In the piece he has written, Sir William takes the position that the ultimate deciding body, though no doubt that could be reviewable, that the sifting committee on the route was not – with respect, I venture to disagree with that. The sifting committee operated really like a Grand Jury finding a true Bill – incidentally, the Grand Jury is still alive and well in America and, indeed, in the Bronx if you have read *The Bonfire of the Vanities*. But that case seems to me to be a case where the Court quite properly thought that somebody would be imperilled by the activities of the Professional Conduct Committee, and therefore their professional livelihood was at stake, and therefore there was a public interest, and the Court should intervene.

Let me take last the Poll Tax leaflet case. That, I think, does reveal a sharp division of opinion between myself and Sir William Wade. What was alleged in that case was that the Government was insisting on distributing a misleading leaflet – a leaflet which would mislead the public as to the nature of the requirements of the relevant legislation. Now to, as it were, consider that, I think you simply have to assume that the allegation was correct. It is no good looking at the actual facts, because it was held on the facts by the Court that the omission of a reference to a particular section did not render the leaflet misleading, and so there was nothing to correct or find fault with. But if you assume, as I did in the piece I have written, assume that the Government is insisting on issuing a leaflet which falsely describes the contents of a Public Statute, and that is of relevance to people's conduct – and, as you may have read, the Poll Tax has aroused some interest amongst the public in the United Kingdom – but if you suppose a false description of the requirements of the Act and a refusal by the Government to withdraw that leaflet when that is pointed out to them, I see no reason at all why the Courts should not intervene. And that is not just my opinion. In the *Gillick* case, cited by Lord Donaldson in the first *Takeover Panel* case, he does refer to the *obiter* expression of views of two Law Lords in the *Gillick* case that the Court could intervene in a case where the law was misleadingly stated. So I do not think it is any argument. He has two answers, Sir William, to that. He says, first of all, the old one of flood-gates – the Courts would get very busy if they took on every leaflet where there was a fault in it. Well, we will wait and see. I think it nearly always turns out that the flood-gates argument is not a reality.

The second argument is, oh well, anybody else can issue a leaflet. But again, with great respect, there is a difference between a government leaflet, describing the contents of the law with which you have to comply, and me, or anybody else, writing a leaflet and distributing it to the public. I have to say, I think they are viewed somewhat differently. I do not think his arguments against the Poll Tax leaflet are impressive. I think it was a proper function, too, of the Courts to correct in a case of a misleading leaflet.

Well I think it does emerge, then, that there is a bit of controversy between us, and I look forward to the debate which will now ensue as to which side you come down – Olympus or lower down.

Mr Justice Thomas

Professor Dagtoglou is the Professor of Law at the University of Athens, in Greece, specialising in Administrative Law, Constitutional Law and European Community Law.

Professor Dagtoglou (Greece)

It is a great honour, but also a diffcult task, for a Continental lawyer to comment on the views of English lawyers. This is so not only because the English lawyers in this case are men of particular distinction, but also because the ways of Continental and English law are different, though the problems remain, of course, essentially the same.

In this respect, Administrative Law is much more international than, say, Constitutional Law, and not only because the United Kingdom has, unlike the other European countries, no formal constitution. I do not propose to go into the details of the cases commented upon by Sir William and Sir Patrick, but to concentrate, I am afraid in a manner of a Continental lawyer, on some central questions.

Professor Wade asks whether public law is to be brought in to redress the imbalance of power in the commercial world, where private law hitherto has reigned supreme. He doubts whether judicial review, which has been revised and developed for controlling governments, is suitable for non-government activity.

The problem and the question marks are all too familiar to a Continental lawyer, although the approach is not always the same. I shall focus on two main aspects: the concepts of an administrative act or decision, and the role of human rights in judicial review.

The concept of an administrative decision or, as it is usually called in Europe, administrative act, has been devised and developed in the context of judicial review. Both in France and in Germany, the act administrative was conceived in the latter part of the last century, as the object of judicial review to be exercised by the Conseil d'Etat in France and the Administrative Courts in Germany. The desire to protect the individual is an argument in favour of a broad definition of the administrative act, since only decisions that fall under this category could be reviewed.

Restrictions came from two directions – public policy, or should we say, *raison d'etat*, dictated the exclusion of the so-called acte du gouvernement that is the political act of state. Private autonomy, on the other hand by which I mean the right of every individual to determine his own affairs by private law means, mainly by contract – excluded from judicial, review any decision that was not issued by a public authority exercising executive power. The concept of administrative act has developed at the period of continuous expansion of state activity exercised by government authorities, or by public corporations – so-called legal persons – governed by public law. Problems arose well after the Second World War when two not quite new phenomena became quite common. Private bodies were entrusted with public tasks and powers, at the same time public bodies or corporations were transformed into private companies. They were privatised, although they went on pursuing exactly the same activities. Should the decisions be subject to judicial review? How far was it important that the body issuing the decision is or is not formally a part of the Government machinery? What decided on the admissibility of the application for judicial review? The quality of the agency that issued it, or the quality of the decision challenged?

Under the first view, any decision which was issued by bodies governed by private law escaped the judicial review exerised by the Administrative Courts and was subject only to remedies of private law before Civil Courts. The protection provided for in this case was, first of all, more limited, took longer and cost more.

The second view looked at the decision itself. If this constituted exercise of public power, the application was admissible, regardless of the official quality of the body that issued it, whether as a public authority or not. What was important was not whether the body that issued the decision in question was officially a public authority, but whether it was entrusted with the exercise of public power. This view prevails in Germany, and basically in France. In Greece, on the other hand, the Council of State – that means the Supreme Administrative Court – still sticks to the first view with very few and narrow exceptions.

However, Continental Europe does not have the broad tradition of voluntary self-regulatory bodies that are common in the United Kingdom. The phenomenon of a purely de facto authority, in Sir Patrick Neill's terminology, without any statutory foundation is, as far as I know, unknown on the Continent. The power of associations, professional organisations, trade unions, political parties etc to expel their members is subject, in extreme cases, to review of the ordinary Civil Courts under the provisions of the Civil Code of Special Statutes.

My second comment refers to the role of human rights in the development of judicial review in Europe. The development towards a wider admissibility of the application of judicial review is not unconnected with an understanding of human rights as it prevailed in Continental Europe after the Second World War. This understanding has been mainly developed in West Germany where the 80 volumes of Law Reports of the Federal Constitutional Court published to date contributed decisively to the development of human rights from vague aphorisms to fundamental legal rules. In France, where the locals traditionally do not examine the constitutionality of the Acts of Parliament, the Constitutional Council – a quasi-judiciary body with power to review the constitutionality of bills extended, a few years ago, the scope of this review to include, via the preamble of the French Constitution, the human rights guaranteed by the declaration of 1789 and reconfirmed by the preamble of the 1946 Constitution.

Today's human rights include the right to judicial protection. This right is entrenched in civil European constitutions and is declared also in the European Convention of Human Rights which is signed by all West European countries, including the United Kingdom. The right to judicial protection does not include a claim to the particular Court or jurisdiction or proceedings. However, no-one can be deprived of this right by the law simply declaring an area as being extra-legal or not subject to judicial review, or even by the Government

or Parliament refraining from legislating in a particular field and leaving it clear for an extra-legal body. Nor can the Courts restrict themselves to giving declaratory guidance for the future, instead of providing remedies for the litigant. Professor Wade has given several examples of all these cases.

However, the right to judicial protection is only a procedural right. It guarantees judicial protection only if another substantive right – for instance, the right to privacy or to religious freedom, is violated. The State cannot free itself from the binding force of human rights by simply transforming a public authority into a private body, or by withdrawing from a field so that the field is left clear to a private extra-legal body.

It is clear that we have come a long way since the days when administrative law was castigated as being a sinister device to deprive citizens of their freedoms. Today litigants very often prefer to make the remedies of Administrative Law to those of private law or even for self-regulation. The reason is that the judicial protection provided by Administrative Law is often broader and more effective. I agree with Sir William Wade and Sir Patrick Neill in their assertion that judicial review is not suitable for every kind of human activity, and certainly not for the commercial activity of commercial entities. I am, however, of the firm view, that the privatisation of a state activity should not be used as a reason for reducing the judicial protection hitherto afforded to the citizen consumer or, even further, for replacing it with a jurisdiction of an extra-legal self-regulatory body.

Mr Justice Thomas

I am instructed by the Conference organisers that from the floor I must first ask for questions, and then secondly statements and/or speeches. An opportunity will be given to make those before the session ends. Because the Common Law has traditionally paid heed to substance rather than form the instruction would necessarily include statements or speeches that end with a question.

Anthony Lester (England)

The question will be, does Sir William Wade agree with the following statement? First of all, will he forgive me, as his former pupil and as a Cambridge man, for the fact that I am about to vote for the Warden of All Souls, Oxford, who clearly is not the same Warden of whom James Bryce once said that he was draping the mantle of arbitrary power around the bust of liberty?

I just want to say something, for example, about the *Advertising Standards Authority* case which can serve as an example for all. This is a body which is privatised in the sense that it exists solely under contract. It exercises draconian powers that affect not only livelihood and property, but also another right to freedom of expression. There is no doubt under European Community Law that it is treated as a voluntary self-regulating body in place of a public authority. That means that under European Community Law, if it acts in abuse of its powers, it is treated in exactly the same way as if the Advertising Standards Authority were set up under a statute – see the misleading advertising directive. Similarly, if one looked at the other body of European law, the law of the European Human Rights Convention, there is little doubt that if the Advertising Standards Authority deprives someone of their property or livelihood, or unreasonably interferes with free speech, the UK would be responsible, under the European Human Rights Convention, for the ASA as though it were a public authority in the real sense.

Exactly the same applies to the Professional Disciplinary Committee of the Bar Council. It is true that in the UK, that body is "private", but it is in exactly the same position through European eyes as the Belgian, or German, or French disciplinary bodies that regulate the legal profession. Therefore, quite apart from all the other reasons given by Sir Patrick Neill, with which I respectfully agree, it seems to me that Sir William is being a little too Anglo-Saxon in his approach to administrative law, and these days, we need to be aware of the European dimension in the way in which we approach the subject. Does Sir William agree?

Sir William Wade

This sounds to me like a trap question settled by Counsel and intended to inveigle me into some injudicious statement. But if I understood Mr Lester correctly, it seems to me quite possible that the European element may supply the legal foundation which would bring the Advertising Standards Authority within the recognised realm of public law. Because, under the Act of 1972, all the law laid down in Europe by the authorities in Brussels and by the Court in Luxembourg is accepted in, and incorporated into, English law. So, if that is the case, there is something for which the UK Government is responsible, and it ought, therefore, to provde the legal nexus by legislation, presumably, which would enable it to fulfil its obligations by making the Advertising Authority conform to the standards laid down by the European authorities. And that, it seems to me, would solve the question. I put the Advertising Authority case into my intermediate and doubtful category, where I could see arguments both pro and con. And indeed, it might well be possible, in certain cases, to fit it into my livelihood category, where I am in favour of the Courts protecting livelihood by extending their jurisdiction for review. If it was a livelihood case, then I would think differently than if it were merely one about some commercial advertising on which nobody's job depended.

Mr Justice Thomas

Is there another more pure question, perhaps, from the floor?

Unidentified (Mauritius)

I will start by a question, and then follow it up with a statement. Is the panel aware that in many new Commonwealth jurisdictions, the term "Administrative Law" has taken a different name? And that is Constitutional Review. Because Judges, the judiciary is empowered not only to declare legislation unconstitutional, but the judiciary is also empowered to pronounce on any breaches of fundamental rights. I would indicate to Sir William that if he wants to have a precise idea of the

category of cases in which the Courts should intervene, they should perhaps read the Fundamental Rights Charter of modern constitutions given to many Commonwealth countries by the British Government itself. And they would find that they accord, almost area for area, with what is included in the European Convention on Human Rights and in the covenant on civil and political rights.

Mr S G Sundaraswany (India)

The Supreme Court of India has said that any decision of a public body, government or other public companies, if it is unreasonable, if it is arbitrary is open to judicial review. Does this stretch the scope of Administrative Law beyond what is its generally contemplated limits, or would the panel members agree that this is well within the parameters of administrative review?

Sir Patrick Neill

Well as I followed it, I think the question was the Supreme Court of India extended the law of judicial review beyond what would be thought to be its natural confines by holding that any decision of a public authority, if unreasonable, was amenable to judicial review. Have I got it right?

Yes.

I would agree that that would be extending the definition because if one simply took that proposition, it would cover, I take it, any commercial decision, any decision by an electricity authority as to the rates it would set or to how it would set about its business, decisions by Harbour Authorities as to how they were to exercise their powers — I could imagine a vast array of exercises of commercial decisions by public bodies that certainly traditionally one would not in the United Kingdom think of as being amenable to judicial review. Possibly some other form, some civil action might be possible, but if I have understood the question correctly, that doctrine — I do not know the cases — would be extending my notion of judicial review. I do not know whether Professor Wade agrees with that.

Sir William Wade

Yes, I would agree entirely.

Professor Dagtoglou

The decisions of public authorities are always liable to be reviewed by administrative Courts, and on the Continent there are many cases where constitutions will provide for that so that it is not even possible for Parliament to exclude a particular decision or a category of decisions from the judicial review. In this respect, if I understood you well, what the Supreme Court of India has said is common practice on the Continent.

Sri Ram

To the panel members, and specially to Sir Patrick Neill and Sir William Wade, I want to draw their attention to the Australian trend. In 1934, in a case called *Cameron v Hogan* — thank you for your compliment, Sir Patrick, but I could not remember the name of this case — I had to run into the Law Book exhibition table and locate it — *Cameron v Hogan*, the Australian High Court had held that the Court will not intervene in the expulsion of a member of a political party, in that case the Labour Party (the word "labour" having been spelt wrongly — the Australians apparently spell it without the "u" which probably accounts for the disability that party suffers from), but may I ask the panel this. In that case, expulsion from a political party resulted in the Court declining intervention. In 1974, Justice Wootton, in complete disregard of judicial discipline, in a case called *McKinnon v Grogan*, refused to follow it and said that the Australian High Court was wrong. Both of you, Sir William and Sir Patrick, spoke of the division between public law and private law. Do you think that the proper approach to take is not so much whether there is property involved, reputation involved or a livelihood involved, but whether there is a duty to act fairly? Whether the people who have acted were, in all the circumstances of the case, under a duty to act fairly, and that would depend on the circumstances of each case. Would that not achieve the flexibility which Lord Justice Widgery had in mind?

Sir William Wade

I am all in favour of the duty to act fairly and I think I have done my best to make that clear over many years. But all kinds of people ought to act fairly — in family life, in education, in all sorts of spheres of human activity. It does not follow that that can always been enforced by Courts of law. Family life, for example, might get rather complicated if that were so.

Sir Patrick Neill

Well, in my paper I cited the well known statement by Lord Thorburn in *Board of Education v Rice*, that anybody who has to decide anything has a duty to act fairly, so I would support the general proposition of Sri Ram. I say nothing about the domestic matters to which Sir William Wade has referred — I do not think I can shed any useful light on that. But I think there may be situations where the remedy is not a public law remedy by judicial review, but might be a remedy in the field of contract. I can think of cases where a Trade Association might have a duty to act fairly in its dealings with a member, an expulsion or disciplining or fining order, where the remedy would not be a public law remedy but would be a private remedy for breach of contract — the implied term that the deciding body would act fairly. So in principle, I think there should be a remedy, but whether it be public law or private law I think might depend upon the circumstances.

Bill Hodge (Faculty of Law)

This is a very short and simple question for the panel. One of the peculiar animals in our constitutional, and yet private landscape, is the political party. Let us assume, for the purposes of my short, simple question that the political party is not publicly funded for the purposes of election or anything else, although perhaps on the side, when it is in power, it may borrow public funds to do various things that it should not be doing with that public money. That is not the question. Should the Court review an unreasonable, say outrageous, failure by that party to control its

party members who are in the house, that is in the legislative body (call them the caucus); when that caucus itself unreasonably fails to control its leaders (call them the Cabinet); when that Cabinet itself unreasonably fails to control one of its members (call that member a Minister); when that Minister insists on reasonably introducing an unreasonable Bill and reading it in the House?

Sir Patrick Neill

Can I go first? The answer is "no".

Sir William Wade

That must be a very peculiar country.

Bernard Clark (Auckland)

Mr Chairman, through you I would like to address a question particularly to Professor Wade, if I may. It is my impression, sir, that Lord Diplock did rather go away in his later years from *Wednesbury* reasonableness because he found it too hard. Am I right in that supposition, and the second question, was Lord Diplock right in his movement?

Sir William Wade

Lord Diplock had a tendency, particularly towards the end of his life, to lay down in an *ex cathedra* manner a series of propositions, and that is a rather dangerous activity for a Judge in the framework of one particular case. Because in one particular case, you cannot see all the angles. And he also would like to translate it into his own language – for example, he tried to supplant the good old term unreasonableness by irrationality, whereas, in point of fact, I think that the old term is much the more appropriate, and because virtually everything the public authorities do is rational, in the sense that they have intelligible reasons for doing it. But it does not follow that it is legally reasonable.

Now those are comments on remarks that Lord Diplock made, and I trust that they have something to do with the question.

Mr Shetty (India)

I would like the panel to enlighten me on one matter. For example, a group of Indians raise debentures or shares from the public for a commercial enterprise. In many countries, country planning restricts where the industry should be located, licence in civil laws provides licences have to be regulated, labour laws provide how the labour has to be employed, how the various conditions have to be regulated. In this situation, if this company does certain actions which does not affect a region beyond the area of affecting one's right to livelihood or right to property, would there not be judicial review? I would like Professor Wade to react on this and then after I would like Sir Patrick Neill to enlighten on this.

Sir William Wade

Well again, as I follow it, and I am not sure I have got it completely, it was about a body which had a number of different functions, some of which would be regarded as purely commercial and trading, and others of which might affect livelihood or reach out into the sort of traditional areas. If I have understood it correctly, I think that in such a case, one would look at the nature of the function being performed and might, as regards some functions, think that judicial review was appropriate. As regards others, and I would instance the commercial decisions, as falling outside the category where the Judges ought to venture.

Mr Udaya Holla (India)

I have one small question to ask. That is, the right to livelihood, as some person said, would include the right to law and would include within its confines every act of civilised behaviour. Would it be right if I said that the confines of the boundaries of Administrative Law can be expanded by expanding or taking into account the expanded definition of livelihood?

Second, I have noticed with great curiosity this *Bar Council* case and the comments by Professor Wade on it. Recently, we had some little problem, as far as the delegates from India are concerned, some of us applied for the RBI, that is the Reserve Bank of India for release of foreign exchange for us to attend this Conference. And one of the recommendatory bodies was either the Bar Council, which is a statutory body, or Bar Association of India, which is a non-statutory body. The Bar Council refused to recommend anyone, and the Bar Association recommended a certain number of persons. A writ was filed, and the Courts did intervene, and I feel that it was a just cause where a judicial review was imperative in the case of a private body. I would like the panel to comment about it.

Sir William Wade

Well, it sounds as if the Court took the correct distinction, as I would look at it, between the body that was statutory, and the body that was not. But I did not understand the account clearly – the fact was, perhaps, I may have got it wrong that the Court insisted on interfering with the non-statutory body, was that the case?

Yes

Well, for my own part, I think I would agree with the comments of the speaker. As regards the first part of his statement, of course, what is or is not livelihood is a very arguable proposition.

Sir Patrick Neill

I imagine the speaker has put his finger on the difference of view between Sir William and myself. I suppose I would have favoured intervention in both cases, and I would not be concerned with whether part of the machinery was non-statutory.

Mr Justice Thomas

Ladies and gentlemen, you will agree with me that we have indeed been highly treated, well treated, by the panel at this session. I suspect that Professor Wade, Sir William Wade, is so open minded and fair and so polite that it is very difficult for him to be controversial, even, in fact, when he is being controversial.

Sir Patrick, of course, took a different view, and I am pleased that as the Chairperson of this session, I have been able to remain sufficiently objective so as to fail to indicate that

in fact I favour his view rather than Sir William's. It is ironic that I would put that down to the fact that I am steeped in the principles of *Wade on Administrative Law.*

We have heard outstanding speakers – Sir William Wade, Sir Patrick Neill and Professor Dagtoglou from Greece. We are indebted to them all. We will no doubt reflect on the issue that has been at the heart of the discussion, and we will watch with interest to see how that issue is developed in the years to come. □

Ninth Commonwealth Law Conference April 1990

The Butterworth Lectures

Judging Judges

Alan Galbraith, QC

Welcome to the opening of the session entitled "Judging Judges".

The members making up this panel have a great depth of experience in this subject, and we would ask that in making contributions from the floor, you make them by way of questions initially, and we'll see if there is time for comments later. If you could make them by way of questions so that we get the chance to draw upon the ability of the panel, rather than have them sidelined after they have made their presentation to you. And, of course, would you please keep all questions as they should be – short.

The session is sponsored by Butterworths, the Australasian legal publishers. Their assistance is greatly appreciated.

The Chairperson this morning is the Lord Chancellor, Lord Mackay of Clashfern, and I would ask you to welcome him to the chair.

Lord Mackay

To open this important session, we have David Pannick, a Barrister practising in England, a Fellow of All Souls College, Oxford and the author of *Judges.* David Pannick.

David Pannick

An advocate who addresses the subject of Judges must be careful not to commit a contempt. Rash advocates have faced contempt charges for a variety of insults to the judiciary in Court, such as – I quote from the *Law Reports* in America: "You ought to be ashamed of yourself. That is the most outrageous statement I have ever heard from the Bench."

My comments today will be a little milder in tone and will, I hope, not make it necessary for me to call on the professional assistance of the many skilled defence lawyers present today.

It is, however, not mere flattery or prudence on my part that causes me to emphasise at the outset that Judges do a most difficult job. You do what the rest of us seek to habitually avoid – make decisions. Those decisions have a vital impact on the lives of those who are unfortunate enough to come before the Court. Should this man be sent to prison? Should this woman be deported? Who should have custody of this child? But it is precisely because of the complexity of the judicial function, the sensitivity which Judges must display, and the importance of their decisions for the future of individuals and of society, that it is essential for us to adopt and to apply the very highest standards of judicial administration.

Debate about those standards is, I emphasise, not a criticism of those who hold judicial office. It is rather a recognition that as people become ever less willing to accept uncritically the demands of authority, the judiciary, like all other public institutions, will be subject to a growing amount of analysis to ensure that standards are maintained and, if possible, made even better than they already are in most parts of the Commonwealth.

Now there are a number of topics in judicial administration which merit your consideration, and the first of those is the subject of appointment to the Bench. Who should be eligible for appointment? And I would suggest, as a basic principle that it is our task to ensure that Judges do not reflect the narrow backgrounds and interests of a limited slice of society. An important way to encourage respect for the law is to show those whose behaviour it regulates that the law is made by those whom it binds. How to secure the more frequent appointment to the Bench of women and members of ethnic minorities is occupying the attention of many legal systems. The claims of academic lawyers to appointment to the Bench also deserve consideration in this respect, as do lawyers who have worked in industry, or who have worked for trade unions, or have had other legal experience. I would also suggest that there is no justification for the practice in some jurisdictions, of appointing lawyers to the Bench not when they are at their intellectual and physical zenith, but only at an age when their contemporaries are planning for retirement. It should not be forgotten, Lord Chancellor, that when Solomon decided which of two women should have custody of a baby, he was, in his own estimation, a mere child.

Can I turn then to the method of

appointment of Judges. In some jurisdictions, the greater use of independent bodies to recommend candidates for appointment and to consider the merits of those who have been nominated for appointment by politicians is vital to the maintenance of the highest standards of judicial performance. The English legal system has hitherto worked on the doubtful premise that the Lord Chancellor and his department can, through informal contact, assess the character and the ability of candidates for judicial office. As the pool of eligible candidates is expanded, as the number of vacancies increases, I would suggest that that premise of informal knowledge and contact becomes ever more doubtful. Hence, the Head of Chambers in John Mortimer's fictional Barrister Rumpole's book searches through his letters each morning in the hope of finding an invitation to play golf with the Lord Chief Justice. A more public procedure, I would suggest, which involved input from the Bar, from consumer groups, perhaps even the odd psychologist might contribute to informed choice in this important context, and it would also serve the important function of encouraging public understanding and debate about the role of the judiciary in our society.

The training of Judges. That middle aged lawyers who are starting a new career as Judges might need some job training should not be a controversial proposition, but many legal systems have resisted the idea of establishing a judicial college at which newly appointed Judges would receive some instruction in the basic crafts of the job. Lectures and seminars, supplemented by mock trials, would avoid the danger of the Judge learning his craft at the expense of the first litigants who appear in his Court.

Judicial discipline. If, as occasionally happens, a Judge errs in law, then there is at least one appeal to older, wiser and more numerous Judges, and they will provide a remedy. But if a Judge acts in an injudicious manner, there is often much less that the aggrieved litigant can do. Yet, as Mr Justice Jackson of the US Supreme Court said in 1952, and it is true of the Commonwealth as well, Judges, of course, are human beings. Those who make their way to the Bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir. It is, of course, important to preserve judicial independence from interference by the executive branch of Government. But I would suggest that judicial independence was not designed as, and should not be allowed to become, a shield for the rare occasions of judicial misconduct or incompetence, and preserving and promoting public confidence in our legal system – a vital goal – justifies, I suggest, the creation of an independent body to investigate and to report publicly on allegations of judicial misconduct, apart from complaints of erroneous judgments which, of course, are a matter for the Appeal Courts.

Publicity. So long as Judges confine themselves to issues relating to the administration of justice, and so long as they do not speak up out of Court on pending or forthcoming cases, there is much to be said for our judiciary contributing to informed debate in society by interviews, lectures and books. One of the first acts of our Lord Chancellor, on his appointment in 1987, was to abolish the quite absurd rules which had previously prohibited the judiciary from contributing to radio and television programmes in any circumstances. I recognise, of course, that not all Judges will exercise this right responsibly. Earlier this year, an English Judge, James Pickles, called a press conference. He criticised the Lord Chief Justice, Lord Lane, for reversing one of his decisions. Judge Pickles took the opportunity to describe Lord Lane as "an ancient dinosaur". I read this month that Judge Pickles has started to write a regular gossip column for a newspaper.

But such excesses, and that is what they are, should not deflect us from recognising that when a lawyer becomes a Judge, he does not take a vow of silence and he retains a responsibility to contribute to the administration of justice out of Court as well as in Court.

Finally, can I turn to the topic of judicial administration generally, and the demands on the Judges' time. Now it is clear that the workload of the Judge has increased significantly over the centuries. We are told that in the 15th century, the Judges never sat more than three hours a day, from 8 in the morning till 11. By the beginning of the 19th century, judicial duties had become burdensome. Robert Louis Stevenson's fictional Judge, Lord Hermiston, had no time to talk to his young son. Every evening he would take the decanter and the glass and be off to the back Chamber, looking on the meadows, where he toiled on his cases till the hours were small.

Judges need, in the interests of better administration of justice, time out of Court each week, and a sabbatical term every few years, to enable them to keep up to date with legal and extra-legal developments, and to give them an opportunity to make a contribution out of Court to issues relating to the administration of justice. If my judicial audience agrees with nothing else that I have said, that, I am sure, will receive an appreciative response.

Lord Mackay

Thank you very much, David. Our next contributor is Nicholas Liverpool of the Faculty of Law of the University of the West Indies. He is the Project Director of the Caribbean Justice Improvement Project, and a Justice of Appeal of Granada and Belize.

Nicholas Liverpool

The paper which was circulated this morning attempts to provide the background and sets the scene to the conditions in which the judiciary operates in the Commonwealth Caribbean. In so doing, I assure you that I have not lost sight of basic principles of independence and integrity on which our great profession is based. This is, therefore, an exercise to share knowledge with colleagues who may face similar problems in their own jurisdictions. The paper is divided into three main parts: an introduction, the selection process, which forms the basis of the second part, and that is itself divided into a part dealing with Magistrates, the lower judiciary, and Judges. And

Part 3 concludes with some thoughts on the judicial function. It also contains an appendix which I am sure participants may find useful. The time allotted to me this morning will, therefore, be spent on clarifying or expanding on some points made in the paper.

In the introduction, mention is made of 11 separate Court systems in the Commonwealth Caribbean. I ought to add that the only common elements which bind them together are the University of the West Indies, and the Council of Legal Education, which both provide training. The University awards an LLB degree after completion of a three year course of training, and the Council of Legal Education, with law schools in Jamaica and Trinidad and Tobago, issues certificates to participants of a two year practical training programme, and is about to embark on a continuing judicial education programme. The Council is also encouraging the adoption of a system of clerkship to Judges. Further, there is an ongoing effort to establish a Caribbean Court of Appeal which will replace the Judicial Committee of Privy Council.

The paper continues by stating at page 3 that in some jurisdictions, it is the established pattern to appoint magistrates on short-term contracts, but warns that this decision has not been imposed by the executive branch of government. It has been brought about by the increasing mobility of this level of judicial officer in certain countries, and the consequent inability of government to persuade them to make a career of the magisterial service. In many instances, it is insisted upon by the officers themselves, who are lured by the prospect of a tax free gratuity at the end of their period of service. However, it has at long last been appreciated in some jurisdictions that judicial salaries need not be tied to civil service scales, and in the jurisdiction in which this link has been broken, greater flexibility has been introduced in fixing the remuneration of both Judges and Magistrates.

The paper goes on to discuss the qualities to be sought in making judicial appointments, and quotes a former distinguished Chief Justice of Trinidad and Tobago (at pages 3 and 4) of the hidden perils which the Judge may face in executing his functions. And two of these which he mentions are the timely withdrawal of paper on which to record the judgment of a Court, the publication of which could have been damaging to the results of a pending election; or, the delays of a pliable Registrar in bringing on an appeal with political implications.

This concern has been expressed even more elegantly elsewhere in these works, and I quote:

> Since the legislature holds the purse and the executive the sword, the judiciary has practically nothing with which to enforce its decisions or commands, except the power of reason and appeal to conscience.

One matter for consideration, therefore, is whether the Supreme Court should be given power to appoint all administrative officials and employees who form a necessary part of the system of administration of justice.

The paper then deals with the matter of appointment of Judges in the various jurisdictions where, it will be noticed, that the constitutions provide for independent commissions to be appointed either to make the appointments themselves, or to make recommendations to the heads of state. It mentions the prevailing practice in some jurisdictions of appointing part-time Judges of Appeal for short periods. It has never been openly suggested that this provides an opportunity for the executive to influence the judiciary since appointments have so far been made of persons who are not likely to stand coercion or intimidation. However, it is only fair to state that in certain quarters the fear still exists that the manipulation of the Bench could be achieved by this process.

This part of the paper, that is, on the appointment of Judges, concludes by suggesting that the involvement of members of the legal profession in the choice of Judges should be encouraged. It suggests that the Jamaica model, and that is the model in which the profession is represented on the appointing body, should be emulated in other Caribbean territories and, indeed, in the wider Commonwealth. This suggestion is predicated on the notion that the practising members of the profession have an inherent right as one of the main partners in the administration of justice to be consulted, and that consequently, the profession should have a say in how the members of the judiciary are recruited and their positions enhanced. Bar Associations should, therefore, play their part in ensuring that consultation of the profession in the appointment and promotion of Judges should become a standard feature of the process.

One looks at the judicial function and observes that where weaknesses have been detected in delivering judgments or in performing judicial functions generally, this could be attributed to the shortcomings of the individual Judge rather than a reflection of the judiciary generally. However, Lord Chancellor, there is still room for improvement. For example, it is sometimes felt that the most urgent cases do not always receive prior attention. There are still pockets of resistance to the idea that decisions should be delivered in a timely manner. Counsel continue, in some jurisdictions, to feel aggrieved when a judgment does not contain the main points argued, except, of course, in a case where the decision has gone in Counsel's favour. This may be due, in part, to the tedious ritual of taking notes in longhand, but here, modern recording methods are coming to the rescue.

There is evidence to suggest that some Judges tend to be impatient, and the plea is that one should never allow one's patience to be worn thin by lawyers who insist and persist in pressing the claims of their clients. In one instance that may have led a particular Judge to disclaim jurisdiction when the applicant sought redress on the ground that his constitutional rights were being infringed. Personal remarks about litigants, and even witnesses, should be kept to a minimum, especially in small island societies where the same individual may appear as a successful party one week, and as an unsuccessful party in a subsequent case. And this is necessary for fear of branding all litigants and witnesses as liars at some time or another.

The paper ends by stating that a proper exercise of the judicial function, therefore, will be based not only on the moral uprightness, professional honesty and intellectual

strength of the Judge and his ability to ignore and reject improper influences and pressures, but most importantly also on his behaviour in and out of office. This last factor is certainly the most crucial from a public point of a view of a Judge's performance and should be constantly borne in mind, because in the final analysis, it is the force of public opinion and not the personal attributes of the Judge which are most likely to influence an executive which attempts to whittle away the independence of the judiciary. This, I would suggest, is a very important point to be borne in mind because when the executive finds it necessary to bring pressure to bear upon the judiciary, extraordinary efforts are made to justify those pressures before the Bar of public opinion. And, in these instances, because of the polarisation of the local Bar in small communities along political lines, there is very little which the profession, as a body, can do to stem the tide, and this, at a critical time, when the support of the legal profession as a whole would be so important.

Lord Chancellor, we have our fair share of class B and class C Judges, as Donald Dugdale defines them in his presentation entitled "Techniques of Judicial Reasoning" at pages 95 to 97 of the Conference papers. But a fair assessment of the performance of all Judges reveals that the A's have it by a very substantial majority. And despite the few suggestions made and notes of concern expressed in the paper, I have to report that the administration of justice is generally in good hands, and is alive and well in the Commonwealth Caribbean.

Lord Mackay

Our next contributor is Mrs Justice Manohar of the Supreme Court of Bombay, India.

Mrs Justice Manohar

Last week, the Chief Justice of Bombay High Court, to which I belong, and a Committee of Judges interviewed 200 judicial officers for promotion to the listed judiciary after scrutinising about 1,000 judgments. Therefore the question of judging Judges is very fresh in my mind.

We have adopted several methods for selection of the Judges at different levels, and found quite a few of these methods not quite adequate. Therefore, I would like to put before you what we are doing and leave it to you to decide which you consider is the most suitable method.

I will start with the apex Court, which is the Supreme Court where the Chief Justice of India selects Judges from out of about 400 Judges of the High Court in different High Courts of the country. It is a formidable task for him to be familiar with the work of so many Judges, and he is also to juggle factors like representation to minorities, to backward classes, to women, and he has also to bear in mind the general considerations giving adequate representation to different teachers also. So he has a very difficult task before him, and he sends his recommendations to the President of India, and appointments are made by the President of India. Formerly, it used to be a one-way traffic in the sense that the Chief Justice sent his recommendations to the executive. Nowadays, it has become a two-way traffic, which has caused some concern to the public, and the present government has made proposals for appointing judicial commissions for selection of Judges at the High Court and Supreme Court levels.

The acceptability of this measure will depend upon the extent to which independence of these commissions is guaranteed, and by independence I mean independence from executive interference. At the High Court level, we have the English practice of the Chief Justice inviting members of the Bar to accept Judgeships. At the time when the Bar was small and the Chief Justice was familiar with the work of members of the Bar who appeared before him, this was a very satisfactory process. But now the Bar is very large, and some of the High Courts have permanent Benches in different cities of the State, so that the Chief Justice has to sit on these various Benches to familiarise himself with the work of the Bar at those places. In addition, we have a further complication that the Chief Justice is nowadays transferred to the High Court from another State, so that he takes some time to find his feet and to familiarise himself with a new Bar. In the meantime, if he is asked to make recommendations, he may have to consult his colleagues to arrive at a satisfactory panel.

In addition, of course, we also have the system of inviting District Judges for appointment to the High Court. This is a relatively simple task, because the work of the District Judges is very much before the Chief Justice. The problem is further compounded by the fact that eminent members of the Bar, who ought to be on the Bench, decline Judgeships in my country for various financial and other constraints which a Judgeship places on them, with the result that it has become increasingly difficult to find suitable people for appointment to the High Courts. The High Courts also have to bear in mind factors like giving representation to minorities, to backward groups, to women. So the task of selection has become a very complicated task. Formerly, we used to have the same system of inviting members of the Bar for appointment to the District judiciary also, but we have changed the system some time ago, and now we invite applications from members of the Bar for appointment to the District judiciary. And I think this has made it more difficult to find suitable candidates for appointment.

We also have a judicial service, as I told you at the beginning of my speech, where people are recruited at the lowest levels from out of law graduates and promoted through the ranks to come up to the District judiciary, and ultimately to the High Court. The standard of training which these people have is not very satisfactory, so we have, in my State, started a special training institute for Judges. This is in addition to the in-house training which the Judges receive when they are first appointed to the junior-most judiciary where they sit with a Senior Judge for about a month or so, and after they complete a year of judicial work, they are sent to this institute for further training. When we started this institute two years back in my State, it is the only State which has a separate institute for training judicial officers and our experience

has been very encouraging.

The only other topic on which I wish to comment is maintaining discipline within the judiciary. This has become a problem area, with the result that we have to devise ways of dealing with complaints of misconduct. The Chief Justice of each State is in charge of the entire judiciary under him and we have appointed a special officer of the rank of the District Judge to look into these complaints of misconduct. In many ways, disciplining the judiciary is a problem because in the process, you should not damage the image of the judiciary in the public eye because if the public loses confidence in the judiciary, it is going to be very difficult to administer justice properly. At the same time, you cannot also sweep these complaints under the carpet because that will also damage the image of the judiciary. So how to tackle this question of discipline is a major problem. Sometimes, discreet reprimands are resorted to. In my country sometimes we transfer the Judge from one area to another if there is a problem, and of course, for the lower judiciary, sometimes their credentials are noted with the complaints which are being made and it will affect the chances of promotion.

So these are the ways in which we try to discipline the judiciary. As Mr Pannick said, there are always some members of the judiciary which create more embarrassment than others, but I think that is a fact of human nature and we have to accept that sort of a situation.

Lord Mackay

The next contributor is Dame Silvia Cartwright, the Chief District Court Judge of New Zealand. Judge Cartwright, in addition to being the Chief District Judge, has recently chaired the Cartwright Committee which led to radical changes in the medical profession's approach to women's health issues.

Dame Silvia Cartwright

A few weeks ago, New Zealand Judges woke stunned to hear on the early news that we were being criticised by one of Her Majesty's Counsel, a prominent evergreen member of the Criminal Bar. In fact, the David Pannick of the New Zealand Bar. I thought it was one of those occasions when the Chief Judge should defer to the leader of the Bench, the Chief Justice, and allow him to comment publicly. For my part, I maintained what I know was interpreted as a slightly hurt, but dignified silence. Of course, a casual reading of Peter Williams' full speech demonstrated well argued and robust views about the independence and responsibilities of judicial officers.

Judges, like other human beings, thrive on praise, and wilt under criticism. It is well known that once appointed to judicial office, a Judge will rarely, if ever, hear direct criticism about himself or herself. A natural consequence of that is that many Judges will feel that they are doing a better job than in fact they are.

Peter Williams, in arguing that Judges must be prepared to accept criticism said perhaps these are the reasons why Judges should be the subject from time to time of fair comment, so that at least the Judges can be aware that unfair behaviour on their behalf or warped or jaundiced pronouncements by them have caused public concern. In a sense, openness to criticism is a form of accountability. In most professions and walks of life, accountability is a real issue and is backed up by sanctions. Consumers are now protected from unfair doorstep sales, from shoddy products, from indifferent service. A tenant in New Zealand can seek redress quickly and cheaply from a landlord; lawyers, accountants, company directors, real estate agents and even religious advisers increasingly face the obligations imposed by fiduciary duties. Judges are not accountable in the way that these professions are.

But our independence, while pivotal to our role, does not imply indifference to our obligations. It seems to me that our first obligation is to the public and then to the people in the Courtroom, be they litigant, witness, or lawyer. No doubt many in the legal profession would quickly assemble a list of judicial duties to the public. Mine, which borrows heavily from David Pannick's paper and his book, *Judges*, would include developing and maintaining a good knowledge and understanding of the law; demonstrating fairness to all who appear in Court, regardless of one's own personal views or bias; dealing promptly and courteously with all litigants and witnesses; keeping one foot in the community so that the Judge understands the concerns and passions of the ordinary person, maintaining a decent private life; maintaining absolute confidentiality about sensitive information; communicating clearly with the public and with those in the Courtroom; being familiar with the reality of the sentences imposed; being prepared to develop new skills, for example, in mediation; understanding and honouring other cultures; and finally, being decisive.

Judicial work is reviewed by appeal and by public comment which, regrettably, is often ill-informed, or which springs from the understandable prejudice of an unsuccessful litigant. We increasingly hear rude remarks about ourselves from politicians, from journalists, from members of the public, all of whom feel free to comment on our wisdom and our common sense. Naturally, Judges must accept criticism and learn from it. Maintaining a dignified silence, however, is unlikely to educate the public. It is helpful, for example, if the public knows that in New Zealand, a charge of careless use of a motor vehicle causing death or injury carries a maximum term of imprisonment of three months, and that therefore no Judge can lock the offender up and throw away the key. The public is entitled to know, too, just how difficult Judges find their responsibilities in sentencing offenders, and with what anguish many judicial decisions are made. Perhaps, then, with more information and understanding about the human being inside the Judge struggling to get out, criticism will be more constructive and less angry.

Providing the public with information alone is not sufficient. In other professions and trades, there are forms of quality control which are mandatory. In industry, a business must maintain quality if it is to be competitive. In the medical profession, review of one's work by peers is a form of quality control or audit. While in the judiciary this could be said to be

done by appeal, peer review in the medical profession, to be effective, requires the clinician to seek full advice from medical colleagues and from others who can offer a different perspective on the patient's condition. It also involves a willingness to analyse one's own work, and to learn from past professional experiences.

Peer review, or audit, implies the ability to know when consultation is necessary or desirable, and to have the will to consult. To be effective, peer review must be organised, and there is no similar concept operating within the New Zealand judiciary. Many doctors would say that peer review on an organised basis endangers their clinical freedom. Those doctors believe that they have the right to practise medicine in the way they wish according to their professional beliefs, training and experience, and to currently accepted methods and standards. Judicial independence implies similar concepts. A Judge must be free to exercise his or her judicial duties according to professional beliefs, training and experience, and to currently accepted law and standards. But what if the doctor or Judge fails to reach those standards? How, then, can the public be confident that its interests are being served, and is the public likely to wait silently while Judges continue to work as isolated and solitary symbols of wisdom and justice, holding great power over the liberty of the offender, reparation for the victim, and enormous influence over lives and livelihoods. I think it is highly unlikely that the public will remain in awe of the majesty of the law.

[The rights of accused persons and victims] have been stressed, often to the detriment of the rights of the public as a whole. Victims say it is not the State that was injured, it was me. Why should I not receive reparation for my injuries? Consumers demand protection. Offenders know and exercise their rights more and more confidently. Members of different cultures demand a voice in the way disputes are determined.

These pressures for the enhancement of individual rights have been recognised in New Zealand legislation in subtle, but significant, ways. In some instances, offenders are given the right to negotiate what type of sentence would be acceptable to them. Take, for instance, the requirement that an offender not only understands, but also consents, to the imposition of a sentence of community service. The Criminal Justice Act 1985 gives an offender the right to call a witness to give evidence as to his cultural or family background and, in short, speak on behalf of that person. The trend, therefore, is unquestionably towards more direct intervention on behalf of the victim, and for the offender, rather than on behalf of the public as a whole. As Dr Weeramantry has said at this Conference, in the next century, swirling currents will surround the judiciary such as we have not known in the past, and conceptual and institutional frameworks which protected the Judges in this century may no longer hold. It seems to me that the time has come for Judges to think seriously about an organised form of peer review or audit, and to consider how we can protect the public, who we have sworn to serve, by preserving our independence while at the same time being accountable to the public and being seen to be accountable.

If peer review is the answer, perhaps that will enable a Judge to walk a mile in another Judge's moccasins, and more consistency will be achieved. But it would have to be organised, constructive, and fiercely protective of the individual Judge's responsibility to make the *ultimate decision*. Whatever the answer might be, we Judges cannot afford to be complacent and expect a community of well educated, articulate individuals from different cultures and with no common moral or ethical guidelines any longer, to accept that we, the judiciary, have superior powers of understanding, and know what is best for each one of them. It seems to me that public pressure for more judicial accountability is increasing, and while the judiciary must always be a little behind public opinion, it must, at least, be grasping its coat tail, and hurrying at the same pace.

Lord Mackay

The final panellist is Lord Hope, the Lord President of the Court of Session in Scotland, and the Lord Justice General, that is to say, the head of the Supreme Civil Court and the Supreme Criminal Court in Scotland. Lord Hope has held these offices for something like 200 days.

Lord Hope (Scotland)

I think that it is inevitable that one's perspective on the issues which we are discussing today will differ according to the size and traditions of the country to which one belongs. But the issue, who is to judge the Judges, is almost as old as the civilised world itself. I am reminded of the Latin question, *quis custodiat ipso custodias?* This is a question which came from the days of Imperial Rome when the responsibility for the defence of the Constitution, such as it was, was vested in the Praetorian Guard, and the question was put: Who is it who will guard the guards themselves? To my recollection, there was no single or satisfactory answer which emerged from the Latin texts, it was really a circular question to which there was no answer, since the ultimate guardians were the guards themselves.

And so, in a sense, it is with the Judges, and I believe that the best you can do is to ensure, so far as this can humanly be done, that those who are appointed to be, in effect, the guardians of the rule of law in our civilisation, are fit and fully qualified for that office. And when they are in office as Judges, they should then be left free from all pressures which could undermine their independence as Judges in upholding the rule of law. Now my perspective on these matters differs somewhat from that of Mr Pannick, and I have to confess that I am not wholly attracted by, or convinced by, what he has said about the use of Commissions for the appointment of Judges, and especially Commissions for the disciplining of Judges.

I can offer, perhaps, two explanations for this. The first is that I live in a country which lies to the north of Hadrian's Wall. Now you have been provided with a visual aid this morning, to my surprise and pleasure [a brochure with a map of Scotland]. Hadrian's Wall lies at the bottom of the prominent square that you see on the cover of the booklet. Now that wall has served a variety of purposes

over many years, but one of the results is that Scotland has its own separate legal system, and its own separate judiciary. We live in a relatively small country with a relatively small legal profession, and a relatively small judiciary, as compared with the country with which Mr Pannick is familiar.

The second explanation is that my own relatively recent appointment allows me to see both sides, and especially now as head of the judiciary in Scotland, I find myself facing at first hand some of the problems to which he has referred in his paper. Perhaps at this point I should give a very brief description of the judicial system [in Scotland]. There are, putting it very simply, three tiers with which I have to be concerned. At the bottom, there is a sophisticated system of tribunals and lay Criminal Courts; in the centre there is the Sheriff Court system, which has many of the attributes of the County Courts in many of the Common Law countries; and then at the top there is the Supreme Court of Scotland, of which I am the President. This is a Court which works both in the first instance and on appeal. In civil matters, there is an appeal to the House of Lords in London, but in criminal matters, there is no appeal to any other body, and therefore my Court is, in effect, the Supreme Court.

Let me touch, very briefly, on the question of appointments as we deal with them in Scotland. We have no Judicial Appointments Commission, although it has been suggested from time to time that we should have one. The matter has been raised, as I have said, but never taken up by Government, and my own view is this: that it is not required in a country of our size, although I have to say that my objection to the use of such a Commission diminishes as one goes down the scale from the higher levels to the lower levels. And in fact, this is the theme of the short address which I make this morning – that the more senior the appointment and the more senior the level of Judge with which you are having to deal, the more important it is that the executive should be involved as little as possible, whether by some statutory body or otherwise, and especially in the matter of the disciplining of Judges.

The appointment process which we operate in Scotland is essentially one of consultation. Appointments are made at tribunal level, in some cases by myself after taking advice; in the case of Sheriffs or senior Judges, I am consulted and certain members of the profession are also consulted by the senior Law Officer who, in due course, makes a recommendation to the responsible Cabinet Minister for Scotland, who then is ultimately responsible to Parliament. In our experience, there is no shortage of information, either about the possible candidates, or indeed, their qualities. That is a product of the size of the country in which we live. These appointments are made from those who practise regularly in our Courts. In some instances, they are made by promotion from those who have served as temporary Judges in the Sheriff Court, or as permanent Judges in that Court.

The emphasis throughout is on professional experience and professional qualities. That is to what we look, and for my part I would not wish to compromise on those qualities, simply in order to suit particular interest groups. Now if one wanted, I suppose one could dress this system up into the form of a Commission. One could in fact call all those who are consulted a Commission and ask them to meet and do their process in a single room together. But that would not alter the essentials of the system. But if the process, or if the purpose of this Commission is to bring others into the process, such as Mr Pannick has suggested, that is, consumer bodies or psychologists, then I believe you will start a process which has much danger within it and not, I believe, very much to commend it.

One always has to ask, when a body such as a Commission is being suggested, who is it who is to be a member of the Commission? What is its remit to be? What publicity is to be given to its work. And especially, what publicity is to be given to the names of those who have been considered for appointment and rejected, the reasons for their rejection, and no doubt the reasons why those who have been appointed have been appointed as well. If the need is for an informed choice, then each country must find its own solution, and I can understand that in large countries it may well be necessary for some formalised structure to be set up to gather information. But if the purpose of a Commission is to introduce pressure groups, interest groups into the system, then I think in the end that may tend to diffuse the essential quality which is the professionalism and expertise of the people who are being appointed to these important positions.

The more serious matter, however, is that of judicial discipline, and here again, Mr Pannick has suggested a Commission. He has paid what I think may be, if I am not being unfair to him, lip service to the preservation of judicial independence. But I fear that his approach is somewhat simplistic, and if one scratches the surface a little, one will see that great dangers lie beneath, particularly in the case of the superior Courts.

If I can revert to the Scottish system briefly, in the case of tribunal appointments, there is no real problem. These are appointments for short terms. Unsatisfactory tribunal members can be removed under statutory powers or, more usually, simply not reappointed. When we come to the central core of the Scottish system, in the Sheriff Court, the County Court, Parliament has addressed this issue by statute and it is significant that it has given very great weight, even at this level, to the essential quality of judicial independence. There is a very limited power to suspend or remove the Sheriff from office under statute, and the method which is provided is that of a joint report by the two most senior Judges in Scotland (of which the Lord President is one). That report is made to the responsible Cabinet Minister, and even then the suspension or removal can take place only on a joint resolution of both Houses of Parliament. Similarly, there is a very restricted and carefully controlled measure by which Sheriffs may be moved against their will from one Court to another. Now these powers are very, very rarely exercised, and beyond that, there is a system, if one can use that word, of day to day control, which is vested in the Chief Judge of each of the six regions in which the Sheriff Court system is divided.

The Sheriff Principal has the usual powers of a Chief Judge, that is the powers of advice, encouragement or rebuke, and our experience is that, by and large, these are all that are required.

Now of course in our system, as in any other, complaints are made. Judges, after all, are made not of ice or stone. They are human beings, but if one is considering the question of balance, the better side of the balance is that Judges should be independent and, as far as possible, free from disciplinary procedures of a formal nature.

Now I come to the Supreme Court Judges, and I can include in this the two Scottish Lords of Appeal who sit on the Appellate Committee in the House of Lords and also, from time to time, in the Judicial Committee of the Privy Council. Now in their case, there is no statutory procedure whatever for disciplining, and I believe that is the right position. I confess that I am reminded of the Judicial Oath which I took myself some six months ago, and it has been my privilege to administer it from time to time since then to a number of Judges at various levels. The words will be familiar to many of you, because I think they are used widely throughout the Commonwealth. A Judge takes the judicial oath to do right to all manner of people without fear or favour, affection or ill will. When I hear and repeat these words from time to time, I am particularly struck by the words "fear or favour", and it seems to me that these are words of increasing constitutional importance as one ascends the scale within the hierarchy of the system.

Now Supreme Court Judges are no less human than those of the inferior Courts, and I would certainly not claim for them any immunity from the disciplinary process simply on grounds of merit, seniority, or other such distinction, although it should be said that the character of the work that they do and the greater collegiate atmosphere within which they tend to work exposes them less to the forces which usually create problems in the lower Courts, and at the same time I think makes them more amenable to the process of peer group pressure.

My point is a more fundamental one than simply to say that formal procedures for them are unnecessary. I believe that their existence would be damaging and even dangerous at the higher levels of the judiciary. Mr Pannick's suggestion is that a Commission would provide, as he puts it in his paper, "the means by which Judges can be disciplined in appropriate cases". Now I have quoted these words because I suggest that beneath them there lie a number of questions which need to be examined with great care. What are these means to be? And what are the cases in which it would be right for this Commission to intervene? What are the sanctions to be, and, once again, what publicity is to be given and what publicity would the system attract? One must remember that if a Commission, a formal body of this kind, is set up, one would have to expect it to be used, and it may be difficult to avoid its use, even in the case of what may seem to be trivial or irresponsible complaints.

One must also remember the power of the media and its ability, and sometimes even zeal, to expose Judges whose conduct may seem to them to be eccentric or unsatisfactory. Now I come back again to those words "fear or favour" because Judges, after all, have considerable powers over the media – one need only think of cases of contempt or defamation to appreciate that point. For their part, the press and television have significant powers of criticism. They can expose people to public ridicule and Judges are by no means immune from that. Popularity with the media may be comfortable, but for a Judge to court popularity to avoid the risk of criticism which may lead to disciplinary proceedings and all the publicity which that may attract, would carry with it the very grave danger that the proper administration of justice may be impaired.

Now we in Scotland have at least seven daily newspapers, three evening papers, several television companies, all of which compete with each other for public attention, and we read, and sometimes enjoy, papers from south of the border as well which have the same aims. My concern is that a Commission, with disciplinary powers over senior Judges, would itself be exposed to the media and, ultimately, to political pressure, and these two are never very far apart. As Mr Liverpool has put it, one must always bear in mind the force of public opinion which is very often the product of what appears in the media. By gradual process of erosion, this could undermine the very high standards of independence which the judiciary, both in my own country and throughout the Commonwealth, has achieved.

So on this important matter, who judges the Judges, my reply is: leave this to the Judges themselves. Leave it to senior Judges to advise and, if necessary, correct their own Judges in such manner as they think best. In this way, judicial independence will be preserved, and in an imperfect world, I believe that that is the greatest good which we should be seeking to achieve.

Lord Mackay

And now it's the turn of the floor, and I hope that what you will be kind enough to do is to put questions to the panel – we have here a panel of great experience and I think it's good to make use of that experience. I hope that you might be able to frame questions all the more effective for their brevity. And in putting the question, please begin by saying who you are.

Unidentified (Pakistan)

My question is that the only suggestion that has been given about judging the Judges is that we should leave it to the senior Judges to judge the other Judges. Is there any other way of judging the Judges?

David Pannick

As I have explained, there are, in many parts of the world, Judicial Performance Commissions which judge the Judges by looking at complaints which have been made by people and the Commissions or tribunals which have been created vary in the scope of their jurisdiction, the procedure they adopt, the powers they possess and the sensitivity they display. But they do share the objectives of seeking

to deter injudicious conduct to provide a means by which an independent body can say this won't do. They also perform the function of vindicating, by an independent report, a Judge who has been unfairly criticised, and they also provide the essential function, in my view, of enabling aggrieved persons to have their complaints considered by someone who is not a Judge.

Colin Amery (New Zealand)

Her Honour Judge Cartwright mentioned the book of Peter Williams which has just been published here. I would hasten to add that it is a book that is mainly critical of Judges in Malaysia, and not here. But however, I would just like to raise one point which is in that book. Peter Williams mentions the case of a Judge here who was recently appointed whose husband is actually a policeman. We have had several references to the question of the independence of Judges and the last speaker in particular said that the executive should be involved as little as possible. I just wonder what the comments of any of the panel might be as to that situation in relation to the independence of the judiciary.

Nicholas Liverpool

I am not sure that it would make any difference whether the husband of the Judge was a policeman or a lawyer or a plumber for that matter. I think the focus should be on the work of the Judge herself: her conduct, how it's displayed; the decisions which are given – how objective they are; whether the arguments of Counsel have been taken into consideration; whether the relevant points of law have been discussed. I don't think that should affect the independence of the Judge at all.

Hon Justice Malimuth (Chief Justice of High Court, India)

I am tempted to ask my question to the panel members by the presence of the Lord Chancellor. We had two unfortunate episodes in India – the supersession of three senior-most Judges in the matter of appointment to the position of Chief Justice of India. The entire Bar of the country and the entire judiciary of the country, felt that the action is unconscionable. They expressed themselves in unequivocal terms on this behalf. But the supersession did take place, and we, the Judges, including myself, maintained dignified silence and suffered. Encouraged by this, I think, a few years later another episode took place of a similar nature, another senior and distinguished Judge of the Supreme Court was superseded and a junior Judge was appointed.

On both these occasions, the Bar and the Bench felt very much concerned, but apart from maintaining dignified silence, nothing else was done. I am asking this question myself as to whether the other Judges who felt that there has been an assault made on the independence of the judiciary by this process have acted rightly in maintaining silence. I request the Lord Chancellor in particular to give us an answer as to what should be the Law Lords' attitude to be taken by other Judges in situations like this?

Lord Mackay

Well, I think it is fair to say that the Lord Chancellor has been invited to take the Chair, and in that situation, is not open to questions. I would therefore like to pass the question to one of the participants, and perhaps Lord Hope might have something to say about this.

Lord Hope

There's a lot to be said for the right to silence in these situations. But to be serious, I think the position of dignified silence is the proper position to adopt. That really goes hand in hand with the point I was seeking to make in my contribution. That if the Judges are to be placed, as they are, in this position of independence, then there goes with it the penalty, if you like, or the responsibility, if you prefer, of accepting criticism without complaint, no doubt heeding it, and bearing it in mind next time. But above all, remaining silent, because that is the proper position to adopt.

Lord Mackay

Perhaps the other David might like to say something.

David Pannick

Yes, could I just answer that. Lawyers always look for precedents in these matters, and you may be interested to know that there are a number of examples of Law Lords sending letters to *The Times* newspaper in response to criticisms of their judgments. Lord Davey in 1904, Lord Maugham in 1941, and Viscount Dilhorne in 1975. And also in 1975, Mr Justice Bridge adopted what he called the exceptional course of again writing to *The Times* to respond to criticism of one of his decisions.

Justice Bernhard (High Court Judge of Guyana)

My question is directed to Mr Liverpool who, in his presentation, suggested that the profession should be involved in the appointment of Judges as pertains in Jamaica. I am wondering whether this is not a dangerous situation because it seems to suggest that a Judge will be courting popularity at the Bar and might always labour under the apprehension that he or she owes his or her appointment to the Bar. I would like to find out from Dr Liverpool how this works in practice in Jamaica.

Nicholas Liverpool

I am not aware that it works adversely in Jamaica, or that the Judges in Jamaica consider that they owe their appointments to members of the Bar. In Jamaica, the profession sends a list of six names to the appointing body, and two of these names are chosen, so that is an indirect appointment. In addition, some of these names must be of persons who are in actual private practice, but certainly none of my Jamaican friends have expressed any doubt at all that the system works, and works well.

Justice Muhammad (Judge from Kiribati)

I ask Mr Liverpool in a situation like has been created by Judge Pickles, is it not conceivable that, like the Bar Council has its own system by which the members are disciplined, that the Judges, too, form an association of perhaps senior Judges who are in control of the discipline of their colleagues and all junior members of the judiciary?

Nicholas Liverpool

Well my information is that the conduct displayed by Judge Pickles has not yet reached the level of seriousness which would justify disciplinary action being taken against him. Otherwise I suspect that this process should have been put in motion. I think it is displaying as what another panellist has referred to as the independence of the judiciary.

Param Cumaraswamy (Malaysia)

I am glad that one of the panellists raised the book of Peter Williams. Peter Williams in his book on the Malaysian judiciary crisis which happened in 1988 has argued a point which seems very puzzling to many of us. His argument is that however much the Prime Minister of Malaysia has been attacking the Judges and the judiciary, the judiciary have no right whatsoever to get into a public controversy and reply. No, what happened in Malaysia was that the Lord President was replying, and to maintain the independence of the judiciary, he made some speeches on occasions where he was invited to speak on legal platforms, and Peter Williams had argued that the Lord President had no right whatsoever to reply to all those things publicly. The essence of his argument is Judges should not get involved in any public controversy. Now I understand he had also delivered a speech in New Zealand, and I had the benefit of reading that speech last night. I understand there was reply by the Chief Justice of New Zealand to what is said. Now would Peter Williams say, for example, according to his own argument, that the Chief Justice of New Zealand should not have got into a public controversy? Now would it be right, or what is the view of the panel now? Wouldn't it be right in such circumstances for the head of the judiciary to reply and place the matter on record so that it will accord with what has been suggested by one of the panellists that Judges are accountable to the public. In doing that, can Judges be subjected to discipline and dismissed? This is the question I want to pose to the panel, Lord Chancellor.

Dame Silvia Cartwright

It is obviously my view that in the 1990s, on occasions Judges will need to comment publicly. We can no longer pretend that modern communications have passed us by. However, I think there is a very great difference between becoming involved in a public controversy, perhaps about a Judge, and between providing information which is correct to the public so that the public is properly informed on an issue. I believe that, in our country, the Chief Justice does have a role, albeit still a very limited role, to play in making public comment.

Lord Hope

Lord Chancellor, I would just endorse entirely what has just been said. I think that the circumstances will vary from case to case. The Chief Justice should not, himself, become involved in the public debate, but there may be circumstances where correctly expressed and properly timed information may do some good to defuse a situation of controversy.

Mrs Justice Manohar

I would also like to agree with what has been said. Because the media are not always accurate, when the information which is given out or when comments are made at best on incorrect information, I think it is necessary to set the record straight. But instead of the Chief Justice himself replying, perhaps he can ask the Registrar of the Court or the Senior Administrative Officer to send a reply to correct the factual position.

Unidentified

My question is based on an actual incident. There was an English Chief Justice by name, if I remember correctly, Douglas Young, who was very friendly with a lawyer and in a matter where this friendly lawyer was appearing on one side, another on the other, the other side ended his argument by saying: Justice is on my side. And the friend answered by saying: But the Chief Justice is on my side. And the Chief Justice prevails. Now this was case of no fear, but favour, perhaps. How do we deal with a situation like this, when the top man in the judiciary, who was not a Judge of the Supreme Court – there was no Supreme Court then, it was a Privy Council for India. But he was a top man of the judiciary in that State. The contempt rule is no defence. Therefore one could not have truly said, without facing consequences, if we were to leave it to dignified silence, but that is the situation of favour without fear will remain unsolved.

David Pannick

Well you've given an example of the difficult position that may arise. A similar position arose last year – the question of Judges recusing themselves because they know some of the individuals themselves. The House of Lords were asked to rule on an application made that one of the Law Lords should not sit to hear a motion for contempt, and the judgment of the Lords simply states the House was unimpressed by the submission that the circumstance that the father of one their Lordships had been Mr Tiny Rowlands' dentist many years ago made him an unsuitable member of the Committee. That was one submission by Counsel that did not find favour with the Court. □