

SIR DAVID WILLIAMS LECTURE

Thomas Grey Room, Pembroke College
Cambridge University, England

16 May 2008

Administrative Law for “Living People”

*Sian Elias

Public power has exercised Sir David Williams throughout his distinguished career. He has emphasised in his writing that administrative law, by which such power is controlled, is a subject in perpetual motion, “constantly changing in emphasis, content, and approach”.¹ In this, he echoes Bagehot’s view of the English constitution.² And indeed the control of public power through judicial review lies at the heart of the area of law we call “constitutional”. Felix Frankfurter thought that “in administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions”.³ Recent constitutional shifts have illustrated the point. They have shaken the fig leaves. Of the frenzy of academic repositioning that has followed, Sir David has simply said it was “inevitable” that as “a by-product of the new constitutional developments, the literature on judicial restraint and judicial activism will grow in a haze of genuine anxiety”.⁴ As to how judges might meet such anxieties in controversial cases, his earlier advice presumably still applies. It depends in “each case”, he says, on “good sense and good timing”.⁵ Good luck, Judge!

Mine is a jurisdiction where similar constitutional shifts have occurred. In New Zealand, we too have no single written constitutional instrument. Indeed, it is a widespread misconception that we have no constitutional law or that if we do it begins and ends with the doctrine of parliamentary sovereignty. Our Constitution Act does not purport to be constitutive. Enacted in 1986 to repeal the Imperial Statute of 1852

* The Rt Hon Dame Sian Elias, Chief Justice of New Zealand. A paper in honour of Sir David Williams delivered 16 May, 2008.

¹ D.G.T. Williams, “Justiciability and Discretionary Power” in M. Taggart (ed.), *Judicial Review of Administrative Action in the 1980s* (Auckland 1986) 103, 122.

² W. Bagehot, *The English Constitution* (1867) in M. Taylor (ed.), *Oxford World’s Classic Edition* (Oxford 2001).

³ F. Frankfurter, “The Task of Administrative Law” (1926) 75 *University of Pennsylvania Law Review* 614, 619.

⁴ D.G.T. Williams, “Bias, the Judges and the Separation of Powers” [2000] *Public Law* 45, 51.

⁵ D.G.T. Williams, above note 1, p. 122.

which had originally conferred representative government, it simply recognises that the Parliament consists of the Sovereign in right of New Zealand and the House of Representatives. The Parliament “continues to have full power to make laws”.⁶ There is separate recognition of the Executive Council and the Judiciary, without identification of functions.

These elements remain constant. But since the early 1980s our constitutional landscape has changed. In 1982 we enacted freedom of information legislation which, in addition to providing for access to official information, enables anyone affected by an administrative determination to obtain reasons for it.⁷ Since 1990 we have had a statutory Bill of Rights broadly comparable to the Human Rights Act 1998 (UK).⁸ In 2003 we set up a court of final appeal, the Supreme Court, in place of the Privy Council. In a break from our usual reticence about constitutional fundamentals, the Supreme Court Act provides:⁹

Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.

Neither of these principles (rule of law or parliamentary sovereignty) is identified in other legislation. It seems that the reference to parliamentary sovereignty was initially prompted by concerns to quell judicial overreaching. Parliament balanced it with the rule of law.¹⁰ In New Zealand, Dicey still rules. These reforms mean that in New Zealand we now have a final court of appeal which is visible to New Zealanders, as the Privy Council was not. It means that much of the work of the courts is now concerned with application of overarching and broadly expressed human rights values. And it means that administrative decision-making comes to be assessed in a climate of openness and justification in public administration.

All these changes impact upon the work of the courts in judicial review. As is the case in the United Kingdom, from which our common law did not greatly deviate, modern judicial review in New Zealand is itself the product of cases decided in the last 40 years. This overall newness, of institutions as well as law, means that anxieties about judicial restraint, judicial techniques, political understandings and political controversies, seem amplified.

⁶ Constitution Act 1986, s. 15(1).

⁷ Official Information Act 1982, s. 23.

⁸ New Zealand Bill of Rights Act 1990.

⁹ Supreme Court Act 2003, s. 3(2).

¹⁰ See discussion by the Justice and Electoral Committee in their Report on the Supreme Court Bill (16-2) (16 September 2003), 22-23.

In the light of the Williams' view that a snapshot cannot help but be misleading, I want to talk about some of the dynamics in play in administrative law today and how it addresses power. An antipodean perspective will not be startling because New Zealand law is generally comparable to United Kingdom administrative law. And in this seat of scholarly dispute I do not attempt more than an acknowledgement of the rich academic controversies in the United Kingdom that illuminate – or should illuminate - thinking even at the ends of the earth. At the risk of being taken to admit an un-intellectual strand in New Zealand law, it is necessary to acknowledge that we have tended to pick our way by the simpler path, as Lord Cooke of Thorndon always urged,¹¹ and always mindful of context, which is as Sir David Williams would have it.

A Little Context

When I first studied administrative law in the mid-1960s it was a very new subject. In New Zealand we were only starting to wake up from the torpor which had held administrative law back. The shock expressed by the American public lawyer Kenneth Culp Davis in 1961 at the unwillingness of the English courts to inquire into serious injustice in the administrative process applied equally in New Zealand.¹² We also failed Davis's test of the soundness or unsoundness of judge-made law: its effect on "living people".¹³ Sir William Wade spoke of our courts as well when he said that "in the period of their backsliding" they:¹⁴

declined to apply the principles of natural justice, allowed Ministers unfettered discretion where blank cheque powers were given by statute, declined to control the patent legal errors of tribunals, permitted the free abuse of Crown privilege, and so forth.

In New Zealand, there were a few stirrings. One concerned a very New Zealand issue – the powers of the Dairy Board to control the area of operation of a dairy company. The Court of Appeal, with some fancy footwork distinguished *Nakkuda Ali v. Jayaratne*¹⁵ and side-stepped Lord Hewart's misstatement in *R v. Legislative Committee of the Church Assembly* of Lord Atkin.¹⁶ It held that an administrative body

¹¹ See, for example, Lord Cooke, "The Struggle for Simplicity in Administrative Law" in M. Taggart (ed.), above note 1, p. 1.

¹² K.C. Davis, "The Future of Judge-Made Law in England: A Problem of Practical Jurisprudence" (1961) 61 Columbia Law Review 201.

¹³ *Ibid.*, p. 213.

¹⁴ W. Wade, *Constitutional Fundamentals* (London 1980), 78.

¹⁵ [1951] AC 66.

¹⁶ [1928] 1 KB 411, 415 Lord Hewart, purportedly applying Lord Atkin in *R v Electricity Commissioners*, ex p London Electricity Joint Committee Co. [1924] 1 KB 171 at 205, thought it was not enough that a body had the legal authority to

was obliged to apply the principles of natural justice.¹⁷ Indeed, although the two other judges in the majority grounded their decision on the narrower and technical ground that a lis existed between the parties,¹⁸ Finlay J was of the view that the re-zoning of the area in which a dairy company could operate was an issue that inherently required natural justice. The Dairy Board, he said, was not entitled to “act autocratically and in defiance of the fundamental principles of fairness”.¹⁹ That was however the high point of Professor Northey’s casebook for the administrative law class at Auckland University, taught by the very new – and alarming – case method he had introduced from North America.

When I began practising in the courts of New Zealand at the beginning of the 1970s, my practice was largely concerned with what we would now call human rights. “Human rights” were however something invoked in other countries. The people I acted for were often accorded scant dignity by the justice system of the day. There was little protection of the law for those beaten up in the cells before court. The law was confident that the removal of children from parents with disabilities or inadequacies was “for their own good”. There was no redress available to a boxer who was deprived of his livelihood when his licence was withheld in breach of natural justice. For the protestor who told a member of the royal family that she was a “bludger off the peoples of the earth”²⁰ the indignation of the law was undiluted by concern about freedom of speech.

They were days before we thought to invoke in argument international instruments respectful of family relationships or human dignity or political speech. It was before we had ratified important human rights covenants. It was long before we adopted the domestic Bill of Rights Act. It was a time when the courts were deeply suspicious of social or political context. Citation of foreign case law, apart from the case law of the United Kingdom and Australia (which did not count as foreign) was rare. Nor did judges have the Bill of Rights Act responsibility to provide effective remedy to those whose human rights had been infringed. For many who were harmed through abuse of public power, there was no redress to be had. Today, the cases from that period seem to belong to a different world when they are (occasionally)

determine questions affecting individual rights; the duty to act judicially required something more. This view was rejected by Lord Reid in *Ridge v. Baldwin* [1964] AC 40, 75.

¹⁷ *New Zealand Dairy Board v. Okitu Co-operative Dairy Company Limited* [1953] NZLR 366.

¹⁸ Northcroft and Cooke JJ.

¹⁹ P. 407.

²⁰ “Bludger” is defined by the *Oxford Dictionary of New Zealand English* (1997) as “a useless person; one who avoids responsibility or (*fig.*) ‘lives on the back’ of deserving people; a loafer, an idler.”

referred to in support of expansive views of police powers or administrative discretion.

As is well known, from the 1960s the judges of the United Kingdom and some New Zealand judges too executed the series of U-turns described by Sir William Wade. These put the law back on course. In Sir William's opinion this was a response to "the public mood".²¹ The perception of administrative injustice had become too strong to be ignored. The process took some time. It may not yet be complete. It seems now astonishing to recall that it is only recently that it has been generally accepted that requiring natural justice does not undermine prison discipline, and is required for statutory procedures for revocation of licences or the grant of planning consents.²² Disbelief greeted a New Zealand decision that the planning committee of a local council was under a duty to observe natural justice and had breached that duty by not disclosing a planning report prepared by its own town planning officer.²³

In the preface to the essays in honour of Sir William Wade,²⁴ Professor Forsyth takes mild issue with Lord Diplock's verdict that the creation of a comprehensive system of administrative law had been "the greatest achievement of the English courts in my judicial lifetime".²⁵ He points out this was not the achievement of the courts alone:²⁶

Academic writing played a crucial role: it pointed the way, it marked the errors, it urged straying judges back onto the strait and narrow way and it encouraged the bold to develop the law in novel ways. Put more directly, it provided the intellectual foundations for the creation of the modern administrative law. The busy practitioner immersed in the detail of the battle for his client, or the Judge needing only to decide a concrete case, seldom have the opportunity to discuss issues of general principle or to explore the foundations of judicial review. Notwithstanding profound contributions from practitioners and the judiciary, the burden of systemisation and the analysis of principle which gave administrative law its present structure and form beyond the "wilderness of

²¹ W. Wade, above note 14, p. 78.

²² See Lord Woolf, J. L. Jowell and A. Le Sueur (eds.), *De Smith's Judicial Review*, 6th ed. (London 2007), 339-340.

²³ *Denton v Auckland City* [1969] NZLR 256 (SC).

²⁴ C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford 1998), v.

²⁵ As stated in *R v. Inland Revenue Commissioners ex p National Federation of Self-employed and Small Businesses* [1982] AC 617, 641.

²⁶ Above note 24, p. v.

single instances” (Tennyson, Almyer’s Field) fell upon the academics...

It can readily be accepted that the interplay between academic writing and judicial development was critical. Sir David Williams himself has written of the invaluable “behind the scenes” direct advice given by Sir William Wade both before and during the hearing in the House of Lords in *Ridge v Baldwin*.²⁷ The extensive citations from academic writing in the decisions of the House of Lords continues.²⁸ And Sir David Williams’s own contribution to the illumination of the judiciary must be acknowledged. But political actors too must be given credit. And the legislative changes already mentioned have been critical in recent constitutional shift. In addition, there is a further and important dynamic at work in the form of evolving popular expectations. These forces are inter-dependent.

Some constitutional change comes as a result of conscious political choice. Speaking at the time of accession to Europe in 1972, Sir David Williams referred to a sense that the United Kingdom was on the verge of the greatest change since the 17th century.²⁹ Some others such as Lord Denning, saw what was coming. But few are far-sighted enough to recognise when a constitutional moment comes. It took another 20 years for the shift to be acknowledged in *Factortame (No 2)*.³⁰ And by then, it went almost without saying.

If sometimes change results from conscious political choice, some constitutional shift occurs with changes in social and government culture. The development of the modern administrative state was one such shift. It was characterised by conferral of wide discretion and dispersal of executive power both of rule making and application. Felix Frankfurter, writing in 1926, described how the move to the modern administrative state had made it inevitable that the field of discretion would be greatly widened (opening the door to “its potential abuse, arbitrariness”).³¹ It caught the legal system flat-footed. It should not have. As Frankfurter recognised, although the issues of power were presented in a more acute form and over a wider range of activities, the modern administrative state threw up new aspects of what were familiar conflicts in private and public law between rule and discretion.

²⁷ [1964] AC 40. This is referred to by D.G.T. Williams in his essay in honour of Sir William Wade, “Sir William Wade QC” in C. Forsyth and I. Hare (eds.), above note 24, 1, p. 2.

²⁸ See, for example, *R (ProLife Alliance) v. BBC* [2004] 1 AC 185 at 234 per Lord Hoffmann and *R v. Governors of Denbigh High School* [2007] 1 AC 100, 115 per Lord Bingham.

²⁹ D.G.T., Williams, “The Constitution of the United Kingdom” (1932) 31 Cambridge Law Journal 266, 292.

³⁰ [1991] 1 AC 603.

³¹ F. Frankfurter, above note 3, p. 618.

Providing the restraints which identify and control discretion is a major preoccupation of modern administrative law. It is effectively work of interpretation in which courts act as “junior partners” in the legislative enterprise.³² Where broad discretion or open-textured legislation is in issue, adjudication cannot escape producing what is effectively “supplementary legislation”.³³ And as Sir David Williams has emphasised in his writing, statutory interpretation in administrative law cases must grapple with broad constitutional assumptions.³⁴ The common law value behind the hostility of the courts to ouster clauses and suggestions that administrative tribunals can decide questions of law conclusively is the constitutional assumption that questions of law are for the court.³⁵ Reluctance to intervene in matters of national security or high government policy is also the application of a constitutional value. Williams suggests that this role of the courts in supplementing legislation should be frankly acknowledged, without recourse to fictions.

In addition to changes brought about through political choice or shifts in the nature and institutions of government, constitutional law develops also through cultural and legal drift, often imperceptible. Maitland posed the question “how are we to define constitutional law?” not at the beginning, but at the end of his lectures on constitutional history.³⁶ His view was that the constitution of a country can be discerned only from its general law and only at a particular time.³⁷

A classification of legal rules which suits the law of one country and one age will not necessarily suit the law of another country or of another age. One may perhaps force the rules into the scheme that we have prepared for them, but the scheme is not natural or convenient. Only those who know a good deal of English law are really entitled to have any opinion as to the limits of that part of the law which it is convenient to call constitutional.

The shifting constitution is to be found in general criminal and civil law, as well as in the law of judicial review. Sir David Williams has paid close attention to these sources of constitutional law. He has drawn attention, for example, to the significant supervision traditionally

³² D.C. Pearce, *Statutory Interpretation in Australia* (Melbourne, Butterworths, 1974), 148.

³³ As Sir David Williams accepts, citing Freund, in “Statute Law and Administrative Law” [1984] *Statute Law Review* 157, 163.

³⁴ *Ibid.*, p. 161.

³⁵ Sir David Williams cites for expression of this value Cooke P in a New Zealand case *Bulk Gas Users Group v. Attorney General* [1983] NZLR 129 (CA).

³⁶ F.W. Maitland, *The Constitutional History of England* (1908) (United States 2007), 526.

³⁷ *Ibid.*, pp. 526-527.

exercised in New Zealand over delegated legislation through collateral challenge in criminal proceedings.³⁸ (The benevolent interpretation adopted in *Kruse v. Johnson*³⁹ was not an antipodean impulse.) Policing and public assemblies have been areas of special interest. Sir David considers that the parallels between criminal and administrative reasonableness illustrate the “adaptability” of *Wednesbury* principles, permitting variable intensity control by the courts in the different circumstances of prior restraint (where stricter justification may be required) and on the spot law enforcement (where some allowances for decisions taken under pressure and in circumstances of uncertainty may be appropriate).⁴⁰ These cases may not be as dramatic as some. They are low-order disputes in many respects. But they are important in vindication of law and in setting and developing standards. They impact on the lives of “living people”.

Sir David Williams has rightly insisted that the task of the courts in these cases is “to illuminate as well as to reinforce the processes of accountability”.⁴¹ He suggests that “cautionary dicta” and the expression of doubts are important even where administrative action is upheld. In this he has recognised the importance of “airing the issues at stake” in the deliberative method of the court.⁴² Such examination in itself promotes good administration and ensures that accountability mechanisms adapt to changing circumstances. The audience for public adjudication is wider than the parties to the dispute. Lord Bingham’s admonition in the *AB* case that those who have served their sentences should “not be the subject of intimidation and private vengeance, harried from parish to parish like paupers under the old Poor Laws” was directed at the news media as much as the police.⁴³

Sir David Williams was a long-time advocate for openness in government and thought that duties to give reasoned and principled decisions were an indispensable element in a modern democracy.⁴⁴ In *Not in the Public Interest*, written in 1965, he put the case for reform:⁴⁵

³⁸ D.G.T. Williams, “Criminal Law and Administrative Law: Problems of Procedure and Reasonableness” in P. Smith (ed.), *Criminal Law, Essays in Honour of J C Smith* (London 1987) 170, 171.

³⁹ [1898] 2 QB 91, 99.

⁴⁰ D.G.T. Williams, above note 33, p. 179.

⁴¹ D.G.T. Williams, “Police Accountability” in D. Butler, V. Bogdanor and R. Summers (eds.), *The Law, Politics and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford 1999) 273, 294.

⁴² *Ibid.*, pp. 293-294.

⁴³ *R v. Chief Constable of North Wales Police ex p AB* [1999] QB 396, 414.

⁴⁴ D.G.T Williams, “Freedom of Information: The British Experience” in V. Iyer (ed.) *Constitutional perspectives: essays in honour and memory of HM Seervai* (Delhi 2001) 242, 249-250.

⁴⁵ D.G.T. Williams, *Not in the Public Interest* (London 1965), 216.

The public interest has many facets, and it would be deplorable if the assessment of the public interest were to become the exclusive province of the executive itself. Secrecy and security have to be balanced against the legitimate demands for an informed public opinion which is, when all is said and done, the essential element in a country which claims to be democratic.

I have attempted this slight review of some of Sir David's work because it identifies themes for further consideration. They are the contextual constitutional values and movements against which judicial review is exercised today, and the use properly to be made of those values in doing justice to the "living people" affected by public power.

The shifting constitution

The constitution as formerly understood and described⁴⁶ was "the entire body of law, institutions and customs that comprised the commonwealth".⁴⁷ Martin Loughlin has remarked on the modern alteration in meaning, which he attributes to the influence of the American constitution. The common law constitution however was not a constitutive instrument but a developing system indistinguishable from the law of the realm, the sources of which Salmond put as "legislation, custom, precedent, professional opinion and agreement".⁴⁸ The strength of the English common law system has been attributed to its combination of "stability with elasticity".⁴⁹ The sovereignty of Parliament is a doctrine of the common law.⁵⁰ Dicey's scientific method did not however allow for the dynamism of the common law in the doctrine of parliamentary sovereignty. He expressed it, rather, as unalterable and universal truth. When it came to be increasingly out of step with the realities of post-war constitutionalism, devolution of empire, and treaties of accession, Sir William Wade was pressed to describe such constitutional change in terms of revolution, rather than organic development.⁵¹ This theory is difficult to reconcile with what actually happens and does not reflect the long history of co-operation between Parliament and the courts which has shaped the modern

⁴⁶ For example, by F.W. Maitland, above note 36, W. Bagehot, above note 2, and W.S. Holdsworth, *Some Lessons from Our Legal History* (New York 1928).

⁴⁷ M. Loughlin, *The Idea of Public Law* (Oxford 2003), 120.

⁴⁸ P.J. Fitzgerald (ed.), J. Salmond, *Salmond on Jurisprudence*, 12th ed. (London 1966), 112.

⁴⁹ W.S. Holdsworth, above note 46, p. 9.

⁵⁰ As recognised, for example, by Sir Owen Dixon in "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240, reprinted in *Jesting Pilate*, 2nd ed. (New York 1997) 203 and Lord Cooke in *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78 (CA).

⁵¹ W. Wade, "The Basis of Legal Sovereignty" [1955] *Cambridge Law Journal* 172, 189.

constitution.⁵² In a common law tradition where judges say what a statute means and must make statutes and common law work together, the efforts of both Parliament and the courts are essential to the working legal system.

The view that the constitution does not evolve except by revolution sets up a rather jerky view of the constitution. It is a theory that does not fit.⁵³ Changing values have to be accommodated in any legal system. Richard Posner was clearly right to say that it was not “pondering over the text of the 14th Amendment” that caused the Supreme Court in *Brown v. Board of Education*⁵⁴ to reverse *Dred Scott*.⁵⁵ The light bulb was illuminated because the judges realised that the world had moved on. Judges need to have insight into the values of their societies. They certainly need to bring those insights to bear when they are required to assess what is in the public interest, or what is demonstrably justified in a free and democratic society, or what is reasonable or fair.

To the extent that these values are identified in human rights legislation, they have additional democratic legitimacy, but indeed even without such statements it is impossible for the courts to avoid engagement with fundamental values. Their identification takes place within a constitutional framework which includes, in a Westminster system, parliamentary sovereignty, ministerial responsibility and the separation of judicial functions from the political functions carried out by the legislature and executive. This institutional framework may keep the overall system in some balance, but, if seen as marking out entirely distinct spheres of responsibility, on its own it would be unacceptably tolerant of governmental power.⁵⁶ As the New Zealand Supreme Court Act indicates, and as judges have been recently affirming in the United Kingdom, the principle of the separation of powers is shadowed by the principle of the rule of law. These are the two points around which the constitution appears to move today. Their content and the relationship between them is the context in which administrative law comes to be considered in actual controversies.

⁵² As to which, see J.W.F. Allison, *The English historical constitution: continuity, change and European effects* (Cambridge 2007), 114. W.S. Holdsworth, above n 46, refers at pp. 39-40 to the co-operation between the judges and Parliament, which he contrasts with the “jealousy between the lawyers and the Legislature” which marked jurisdictions where fundamental laws governed the State.

⁵³ A view I have taken in “Sovereignty in the 21st century: Another spin on the merry-go-round” (2003) 14 *Public Law Review* 148 and do not revisit here.

⁵⁴ 347 US 483 (1954).

⁵⁵ *Dred Scott v. Stanford* (1856) 60 US 39; R. Posner, *The problems of jurisprudence* (United States 1990), 307.

⁵⁶ See discussion in P. Cane, “Public and Private Law: a study of the analysis and use of a legal concept” in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence*, 3rd series (Oxford 1987) 57, 59-60.

The scope of administrative law today

Before considering the constitutional principles of the rule of law and the sovereignty of Parliament, it is necessary to touch on the reach of administrative law in the corporatised and pluralist modern state.⁵⁷ It is impossible to draw the line on a division between public law and private law, as Dawn Oliver and others have convincingly shown.⁵⁸ A strict distinction ignores both the distribution of public power and the overlap and development of legal principle and remedies. The liability in negligence of public bodies, for example, raises questions about consistency in the standards of reasonableness and accountability. Nor can the boundaries of administrative law be confidently drawn on the classification of the actors as public or private. We have seen some wrong turns by the courts on this approach. Public powers are increasingly exercised by private bodies.⁵⁹ Even if a functional approach to power is adopted, the lines are not clear cut. There are risks in seeing the principles of the common law as if they follow from the classifications into which it is convenient for us to subdivide areas of law. Many of the principles and values are common, as the cases relied upon by Lord Reid in *Ridge v. Baldwin* illustrate. The common law pays close attention to power, wherever it is found. In equity, company law, employment law and criminal law as well as in administrative law it confronts power imbalance and abuse. When I was on the New Zealand Law Commission and working on company law reform, one of my colleagues expressed concern about the use public law principles. But the principles which guide control of power overlap and cross-refer and are developed out of similar values.⁶⁰ It impoverishes the development of law if the thinking is kept in separate compartments.

I do not suggest that a sense of public power is not an important concept. The issues of control of power thrown up by deregulation and what has been called “the contracting state” have brought some welcome attention to what it entails. There is more emphasis on identification of “public law values”.⁶¹ Michael Taggart has suggested that the starting point for a division between private and public law is

⁵⁷ See T.R.S. Allan, “Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction” [2003] Public Law 429.

⁵⁸ See, for instance, D. Oliver, *Common Values and the Public-Private Divide* (Cambridge 2004).

⁵⁹ The line drawn in *R v. Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 1 WLR 909 (CA) strikes me as unsustainable. Certainly, it does not seem to fit the right to justice contained in our Bill of Rights Act, which requires observance of human rights by anyone who exercises functions that affect the rights and interests of others.

⁶⁰ See, for example, J. Finn, “Controlling the Exercise of Power” (1996) 7 Public Law Review 86.

⁶¹ M. Taggart, “The Province of Administrative Law Determined?” in M. Taggart (ed.) *The Province of Administrative Law* (Oxford 1997) 1, 3.

where self-regarding behaviour starts. On his view, administrative law is concerned with the primacy of “public-regarding” (or other-regarding) behaviour.⁶² That is similar to the opinion expressed by Laws J in *R v. Somerset County Council ex p Fewings*,⁶³ building on Professor Wade. A public body under this conception exists for no other purpose than to fulfil the duties which it owes to others. That insight is important. The considerable overlap and cross-fertilisation between private law principles and public law principles will continue,⁶⁴ but perhaps we will see greater attention to the nature of the wrong being asserted and a re-interpretation of the scope of public law to make it more useful.

Separation of Powers and the Rule of Law

Lord Diplock described the separation of powers “as it had been developed in the unwritten constitution of the United Kingdom” as “taken for granted” in all constitutions derived from the “Westminster model”.⁶⁵ His focus was protection of the judicial power, in support of which the doctrine has been effectively deployed to resist legislative encroachment in a number of jurisdictions, notably Australia in its development of Chapter 3 of the Constitution.⁶⁶ More recently, in a cluster of cases the House of Lords has used the concept of separation of powers when considering issues of institutional competence.⁶⁷

Separation of powers is a doctrine to be used with some caution. It is difficult to uncouple it, at least in popular understanding, from the well-known American context. Its lazy repetition may have obscured the very different position of the executive in Westminster systems. Sir David Williams is also sceptical, describing separation of powers as a doctrine “at best selective in application”.⁶⁸

⁶² *Ibid.*, p. 5.

⁶³ [1995] 1 All ER 513.

⁶⁴ As D. Mullan suggests in “Administrative Law at the Margins” in M. Taggart (ed.), above note 61, 134, p. 142. See also J. McLean, *Intermediate Associations and the State* in M. Taggart (ed.), above note 61, 160, p. 160.

⁶⁵ *Hinds v. The Queen* [1977] AC 195, 212-213 (PC): “What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v. The Queen* [1967] 1 AC 259, 287-288.”

⁶⁶ See discussion in Chapter 17 “Statutory Restriction of Review” of M. Aronson, B.D. Dyer and M. Groves, *Judicial Review of Administrative Action*, 3rd ed. (Sydney, 2004), 830-868.

⁶⁷ *R v. Secretary of State ex p Venables* [1998] AC 407; *R v. Secretary of State for the Home Department ex p Fire Brigades Union* [1995] 2 AC 513; *R (Pro-Life Alliance) v. BBC*.

⁶⁸ D.G.T. Williams, above note 4, p. 47.

Difference between legislative and judicial function can be readily acknowledged (although in filling in the gaps in statutes and discretion the courts are engaged in a process that is partially legislative, as has already been suggested). But recognition of difference does not make drawing the line straightforward in many cases. Much of the debate about justiciability takes place in this space.

The greater difficulty is the application of the doctrine to the executive. In our system, the executive has no independent authority, as it has under the constitution of the United States. The executive must identify a statutory or prerogative authority for everything it does. Trevor Allan is right to point out that the perception may be different. He thinks it a central problem for administrative law control of administrative discretion that the executive is widely seen as an “independent source of policy formulation and governance, reflecting its own views of the public interest”.⁶⁹ Such perception does not however alter the constitutional position or the supervisory role of the court. Recognising the executive as a source of authority independent of Parliament *would* be revolutionary. If the foundational constitutional elements remain Parliament and the courts, as in the New Zealand Supreme Court Act the twin constitutional doctrines of parliamentary sovereignty and the rule of law suggest, then the executive is answerable to both. The executive is responsible to Parliament, politically, and to the courts for the lawfulness of what it does.⁷⁰ Sir Stephen Sedley develops this to suggest a “bi-polar sovereignty of the Crown in Parliament and the Crown in its courts”, to both of which the executive is accountable.⁷¹ Invocation of the troublesome concept of “sovereignty” may however be avoided without detracting from the centrality of the two constitutional co-ordinates. Under them, the courts determine the legality of executive action, while acknowledging that political accountability is to Parliament. In some cases (the ones in the “hole in the donut”⁷²) political accountability is the only accountability. With this compass, the difficult questions thrown up at the margins are addressed through the processes of democracy and under the security of law. At the end of the day, Parliament can loosen constraints imposed by the courts if it thinks the courts have restricted administrative freedom of action too much.

⁶⁹ T.R.S. Allan, above note 57, p. 433.

⁷⁰ As Lord Diplock recognised in *R v. Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

⁷¹ S. Sedley “Human Rights: A Twenty-first Century Agenda” [1995] Public Law 386, 388-389.

⁷² To use Ronald Dworkin’s metaphor: *Taking Rights Seriously* (United States 1977), 31.

Lord Diplock was of the view that the executive was responsible to Parliament alone in respect of “efficiency and policy”.⁷³ Where policy ends and unlawfulness starts is however a line that is incapable of precise definition.⁷⁴ Much recent scholarship has been devoted to the porous nature of fact, law, and policy.⁷⁵ A categorical approach based on strict distinction between law on the one hand and fact or policy on the other is plainly unworkable and is not a line the courts observe. Judicial review cannot help but engage with policy. The difficult task of the courts is determining the area of discretion. That is the boundary they police. It is not capable of determination except in context. The boundary is set by reference to the substantive values of the legal system.⁷⁶

There is nothing new in this. All questions of legal liability, responsibility or authority are considered against such values. They are also used in statutory interpretation to determine the meaning of legislation. The view that in supervising administrative decision-making the courts are engaged in the same interpretative exercise both in deciding what limits are set by the words conferring discretionary powers and by the context in which they are exercised has already been mentioned. On the basis that the approach is substantially an interpretative one, values such as the principle of legality (itself tapping into deeper substantive values in the legal order) and presumptions of conformity with international law attach equally to discretionary decisions.⁷⁷ Through these values judicial review is being repositioned under the constitutional doctrine of the rule of law.

What are the principal values as applied to administrative action? In addition to legality, they entail reasonableness and fairness. Perhaps more controversially, they may include human rights and, in so far as it is not a separate human right, the notion of equality before the law.⁷⁸

⁷³ *R v. Inland Revenue of Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 644.

⁷⁴ C. Harlow blames Dicey for leaving a “disabling legacy for English constitutional law” by obscuring the close relationship between law and politics even though it was a relationship which he recognised. “Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?” (2000) 48 *Political Studies* 356, 357.

⁷⁵ Dicey, in contrast, D. Dyzenhaus says, had a very rigid view of the distinction and deliberately constructed the rule of law as an “ideological obstacle” in the way of the growth of administrative agencies. “Judicial Review and Democracy” in M. Taggart (ed.), above note 61, 279, p. 281.

⁷⁶ As T.R.S. Allan has been at the forefront in pointing out. See, for instance, *Law, liberty and justice: the legal foundations of British constitutionalism* (Oxford 1993).

⁷⁷ M. Taggart, “‘Australian Exceptionalism’ in Judicial Review” (2008) 36 *Federal Law Review* 1, 13.

⁷⁸ T.R.S. Allan suggests that the rule of law “entails and requires a judicial commitment to consistency and rationality. “Fairness, Equality, Rationality:

Human rights as part of the rule of law?

Is the protection of human rights part of the rule of law? Certainly, the preamble to the International Covenant on Civil and Political Rights asserts that it is. And Lord Bingham, politely disagreeing with Raz on the point, maintains that human rights are part of the rule of law, while allowing that the rule of law component may not be the same as the catalogue of rights which may be enacted or codified at any particular time.⁷⁹ The content of human rights may be contestable. But in pointing out that the principle of the rule of law loses “much of its virtue” if it does not include human rights values, Lord Bingham taps into an important insight about the validity of law in any society.⁸⁰ It is one expressed by Lord Radcliffe when he suggested, only partly in jest, that we should find another name for statute law other than “law”.⁸¹ The point Lord Radcliffe was making was the serious one that if law means little more than the “vast and complicated mass of things [a citizen] is compellable to do or not do by virtue of some Act of Parliament or some order or regulation”, then people will adhere to it only for the purely practical reason of keeping out of trouble.⁸² If that is so:⁸³

Something has gone wrong. Some clue has been lost.

Trevor Allan says that a human rights approach requires “an abandonment of formal rationality and unqualified deference to official value judgments in favour of an appraisal attuned to the moral imperatives discerned”.⁸⁴ He suggests that it is important for the courts not to confuse the moral standards of the community, which account for the special importance accorded to human or fundamental rights, with “official views about the merits of a particular policy, based largely on utilitarian grounds”.⁸⁵

There are risks for human rights in their enactment. Sir Stephen Sedley some time ago expressed the fear that, in the hands of judges, human rights may take on the “throw-away status” of *Wednesbury* reasonableness.⁸⁶ And the “balancing” undertaken by the courts in

Constitutional Theory and Judicial Review” in C. Forsyth and I. Hare (eds.), above note 24, 15, p. 17.

⁷⁹ Lord Bingham, “The Rule of Law” (2007) 66 Cambridge Law Review 67, 76.

⁸⁰ *Ibid.*, p. 76.

⁸¹ Lord Radcliffe, “Law and the Democratic State” in *Not in Feather Beds* (London 1968) 45, 47.

⁸² *Ibid.*, p. 50.

⁸³ *Ibid.*, p. 51.

⁸⁴ T.R.S. Allan, “Fairness, Equality, Rationality: Constitutional Theory and Judicial Review” in C. Forsyth and I. Hare (eds.), above note 24, 15, p. 29.

⁸⁵ *Ibid.*, p. 29.

⁸⁶ S. Sedley, *Freedom, Law and Justice* (50th series, The Hamlyn Lectures) (London 1999), 21.

human rights litigation carries the risk of erosion of the standards they set. The methodology adopted by the courts in such cases needs care. Some of the more difficult cases coming before the courts are rightly concerned with method.⁸⁷ If the emphasis on rationality in decision-making leads to a “tick the box” scrutiny of process, if rights are “balanced” to blandness, if justifications for incursions on rights are used to manage them down, then there will be set-backs for human rights. Swings in such things are inevitable. And human rights themselves evolve. What may be more important is that the statements are accessible standards for the legal system and administrative law and they are standards against which judicial decisions will themselves be judged. In this, they are rightly seen as having effected a “radical shift” in the relationship between citizen and state and a reconfiguration of “the architecture of public law”.⁸⁸

Equality

As in the Human Rights Act 1998 (UK), there is no reference to “equality before and under the law” in the New Zealand Bill of Rights Act.⁸⁹ The White Paper which in New Zealand preceded enactment of the Bill of Rights Act considered that the term was “elusive and its significance difficult to discern”.⁹⁰ It expressed the view that “the general notion” of equality before the law was implicit in the rule of law.⁹¹

The extent to which the concept of the rule of law contains the notion of “equality before the law”, as suggested by the White Paper, remains unexplored in New Zealand.⁹² The case law we have to date on discrimination on one of the identified proscribed grounds in our Human Rights legislation suggests that that the concept of equality is not a free-standing one, demonstrated by identifying a comparator. It suggests that the principle of equality requires assessment of the justification for any distinction, in context.⁹³

Formal equality in application of law is an essential general principle of justice. It underpins the democratic foundation of modern legal systems by demonstrating that each individual is equally valued. It is a

⁸⁷ See, for example: *R v. Hansen* [2007] 3 NZLR 1 (SC); *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557; *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256.

⁸⁸ M. Loughlin, above note 47, p. 114.

⁸⁹ C.f. Canadian Charter of Rights and Freedoms, s. 15.

⁹⁰ *A Bill of Rights for New Zealand: A White Paper* (1985), at para. [10.81].

⁹¹ *Ibid.*, at para. [10.81].

⁹² *Ibid.*, at para. [10.81].

⁹³ See *Quilter v. Attorney-General* [1981] 1 NZLR 73. See also *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 at para. [134] per Baroness Hale.

central plank in the culture of law and law-mindedness, essential to the rule of law and the protection of human rights under it. In addition, even application of law is a protection against arbitrariness and bad laws. This is the thinking that led Justice Jackson in *Railway Express Agency Inc v. New York* to the view that:⁹⁴

Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

The same consideration can be seen at work in the decision of the House of Lords in *A v. Secretary of State for the Home Department*.⁹⁵

Whether or not a stand-alone right, equality of treatment is a measure of its reasonableness for the purposes of considering the proportionality of any limitation on a provision of the Bill of Rights Act or reasonableness in the exercise of statutory powers more generally. Linked to the principle of equal treatment is the question of rule-making and the extent to which a rule of law justification for judicial review may require administrative processes to ensure equality of treatment. The balance between maintaining discretion to deal with individual cases and making sure benefits and detriments are not arbitrarily distributed has not been greatly explored to date, at least in New Zealand.

Equal protection of law is not enough to secure substantive equality. Over the past half century therefore there has been a developing appreciation that the unequal effect of apparently equal laws is “the snake in the legal grass” (as Sir Stephen Sedley put it in his Hamlyn lectures in 1999).⁹⁶ If substantive inequality is properly seen to arise in part from historic social and economic disadvantage, its removal entails redistribution of advantage through positive measures to promote equality. That is so whether the strategy is affirmative action or reasonable accommodation. Here judges of traditions which do not contain social and economic rights become uneasy.

A culture of justification

Quite apart from the emphasis on substantive values in the legal system, through enactment of statements of rights and invocation of the rule of law, is it fanciful to think that there has been a shift in the way in which law is seen in our societies? The Chief Justice of the High Court of Australia recently described a developing culture of

⁹⁴ 336 US 106, 113 (1949).

⁹⁵ [2005] 2 AC 68.

⁹⁶ S. Sedley, above note 86, p. 41.

justification in his country.⁹⁷ This climate, which is to be seen in many societies, has not come about solely or even mainly because of increased suspicion of government. Nor has it come about because of statutory recognition of rights. The trends were there before. They have clearly been affected by the post-war adoption of statements of fundamental rights, and the vocabulary and organising principles supplied by such statements dominate thinking. Their invocation in judicial review has undoubtedly been facilitated by relaxation in rules of standing which, as Peter Cane says, has encouraged the use of judicial review as a “surrogate political process” and a “quality control mechanism”.⁹⁸ But what is cause and effect here?

Perceptions of the role of government too have changed. Archibald Cox, considering the role of the Supreme Court in the United States, spoke of a feeling that:⁹⁹

[M]odern government is simply too large and too remote, and too few issues are fought out in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial.

Recourse to substantive values in political and legal discourse emerged as a feature of post-war societies. It was given arguments shaped by the international standards set by the post war Covenants. It was refined and led by scholarly writing, particularly that influenced by Ronald Dworkin’s emphasis on legal principle. Variable intensity review responded to the insight that in decisions of great importance, judicial indifference to what happens within the four corners of vast discretion does not meet the needs and aspirations of the community.

A further cause for the shift in culture may be seen in the increasing diversity of modern societies, an increased concern that social ends need to be balanced with individual autonomy, and the increased openness in government. These influences overlap. In pluralistic modern societies, often secular or with diverse beliefs, law is one of the more important sources of the principles by which society operates civilly. The concept of human dignity as developed in the South African Constitutional Court, for example, is concerned not only with impact upon the individual but with the interest of the whole community in promoting mutual respect not only for individual difference but for group

⁹⁷ M. Gleeson, “Outcome, Process and the Rule of Law” (2006) 65 *Australian Journal of Public Administration* 5, 12.

⁹⁸ P. Cane, “Mapping the Frontiers” in Birks (ed.), *Frontiers of Liability* (Oxford 1994) 137, 153.

⁹⁹ A. Cox, *The Role of the Supreme Court in American Government* (New York 1976), 115-118.

difference.¹⁰⁰ Some commentators see law providing an outlet for clashes of cultures.¹⁰¹

The virtue of judicial process is to still controversies. That is sometimes done through vindication of claim of legal right in public law. But much more frequently it is done through authoritative vindication of administrative conduct which is substantively compliant with legal obligations, including obligations of fairness and reasonableness. Although bold decisions may raise the temperature from time to time (and inevitably provoke charges of judicial activism), those cases are rare. Providing legitimacy is a principal contribution of legal process to the rule of law. It is not achieved through supervision for procedural exactness but extreme deference in matters of substance. (Indeed the courts may forfeit their own legitimacy to legitimate administrative action if they abdicate responsibility in this way, to the detriment of the rule of law.) Nor does such deference permit the contribution to wider civil discourse.¹⁰² Full exposition of the issues that may have been glossed over or overlooked in the political process is a benefit of the deliberative process of litigation which is valuable in itself. Those who litigate are demonstrating expectations about the system. They are working within it. And sometimes in the patient examination of claims dismissed out of hand in less deliberative, less disinterested processes there are important gains irrespective of formal outcome. In New Zealand, litigation by Maori in the 1980s achieved a substantial shift in social and political values. The decisions in the landmark cases about lands, forests, fisheries and language delivered relatively modest direct results. But they demonstrated a just claim, long ignored, and resulted in political will to respond. Similarly, cases formally lost in seeking recognition for same sex marriages in New Zealand and some US jurisdictions led to the enactment of civil union statutes through the political process. The reasoning of the courts in these cases demonstrated the justice to which the political processes responded.

A critical role played by law in our societies is as a method of argumentation. That insight has been a major theme of Sir Neil MacCormick.¹⁰³ Expression of the values which bear on the outcome promotes understanding and participation. This is not a claim for a "process-based" theory of the constitution.¹⁰⁴ It is the more modest and

¹⁰⁰ See, for example, *Harksen v. Lane* [1998] 1 SA 300.

¹⁰¹ See W. Eskridge in "Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics" (2000) 114 *Yale Law Journal* 1279, 1298.

¹⁰² See S. Fredman, "From Deference to Democracy: the Role of Equality Under the Human Rights Act 1998" (2006) 122 *The Law Quarterly Review* 53.

¹⁰³ See N. MacCormick, "Argumentation and Interpretation in Law" *Ratio Juris* 6 (1993), 16-29.

¹⁰⁴ Such theories are described by P. Craig as "deeply problematical" in *Administrative Law*, 5th ed. (United Kingdom 2003), 27-28.

practical point that the explanation of constitutional law through common law method in real controversies is valuable in itself.

In any event, the cat is out of the bag on this one. The climate of openness and the emphasis on reasons has effected a change in the way law is seen. It has created expectations of justification and rationality of outcome which cannot help affect administrative law. Review for procedural exactness alone does not meet these expectations. In administrative law today, the practical issues for supervision of discretion cluster around the questions “by what authority and with what justification?”

People want to know the reasons why official action is taken which affects them. It is an aspect of human dignity. Such knowledge facilitates participation and prevents human beings being treated as objects. Similar underlying themes are responsible for legislation which enables individuals to obtain information held about them by public agencies and employers. References to “human dignity” make some people queasy. They fear its malleability in the hands of judges bent on vindicating personal preferences. It should be said that there are plenty of malleable legal concepts in law for those on missions. Dignity is however a standard which underpins the United Nations Declaration and the international covenants based on it, as the South African Constitutional Court has emphasised.¹⁰⁵ South Africa may have acute reasons for some such social glue, but that hardly means the rest of us have no need for some ourselves.

And if people are given the dignity of reasons, they want them to justify the outcome. Sir William Wade explained judicial review for error of law on the face of the record, on the basis that it was more that judicial flesh and blood could bear.¹⁰⁶ That is not a judicial reflex only. Decisions which are clearly wrong rankle equally whether the error is one of law or fact.¹⁰⁷ Substantive unfairness rankles as much as substantive unreasonableness, and probably does amount to unreasonableness in popular estimation too. And since no one in real life thinks that an unreasonable decision is one so unreasonable that it must have been made by someone deranged, those adversely affected will hardly think kindly of the rule of law if told there is nothing to be done. Holding the line against merits review, always difficult, is strained to breaking point in the new climate of openness that our societies have come to expect.

¹⁰⁵ *Harkson v. Lane* [1998] 1 SA 300.

¹⁰⁶ M. Aronson, B.D. Dyer and M. Groves, above note 66, p. 104 citing W. Wade and C. Forsyth, *Administrative Law*, 7th ed. (Oxford 1994), 306. This passage was dropped from the current edition of Wade.

¹⁰⁷ As Cooke P saw in *Daganayasi v. Minister of Immigration* [1980] 2 NZLR 130 (CA).

It is not necessary to throw the baby out with the bathwater. Review does not entail the court substituting its discretion for that of the decision-maker, although in some cases the scope for discretion will be narrowly restricted because of the significance of what is at stake. The courts cannot however simply defer to assertions of “plenary political authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints”.¹⁰⁸

What then of the basis for intervention on judicial review? Lord Cooke long expressed the view that the grounds of judicial review can be summed-up on the basis that a decision-maker must act in accordance with law and fairly and reasonably.¹⁰⁹ He contended that there is no need for any amplification of reasonableness or fairness and that both took their shape from context.¹¹⁰ On the Cooke approach to reasonableness, proportionality analysis is simply a method for assessing what is reasonable in context. The discipline of proportionality analysis may be preferable,¹¹¹ but it is directed at the same variable standard. I am not sure why we have strained so long at this. Contextual standards apply throughout the law.

Fitting administrative law for living people

Lord Denning thought that doing justice between man and the administration was as important as doing justice between man and man.¹¹² That is the work of judicial review in administrative law, although it is easily overlooked. Sir David Williams’s recipe for doing justice in administrative law is simple. As mentioned at the outset, in New Zealand, we prefer the simpler path. So it is appropriate to end with the views he expressed:¹¹³

the application of the principles of administrative law can sensibly be considered only with proper regard for the statutory, institutional and broader social or policy context of a particular case.

And:¹¹⁴

¹⁰⁸ L. Weinrib, “The Postwar Paradigm and American Exceptionalism” in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge 2006) 84, 96.

¹⁰⁹ Lord Cooke, “The Struggle for Simplicity in Administrative Law” in M. Taggart (ed.), above note 1, p. 5.

¹¹⁰ See his comments in *R v. Secretary of State for the Home Department ex p Daly* [2001] 2 AC 532, 549.

¹¹¹ As Craig suggests, above n 104, p. 630.

¹¹² Lord Denning, *Freedom under the law* (Hamlyn Lectures) (London 1949) 96.

¹¹³ D.G.T. Williams, “Criminal Law and Administrative Law: Problems of Procedure and Reasonableness”, in P. Smith (ed.), above note 38, p. 170.

¹¹⁴ D.G. T. Williams, above note 33, p. 168.

[I]n the long term the courts would help in the development of a more ordered legal system if they insisted on clear authority where clear authority is needed, if they classified as "legislative" actions which deserve that classification, and if they intervened where intervention is constitutionally desirable.

That really says it all.
