

DAME SILVIA CARTWRIGHT LECTURE 2009

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In a lecture in honour of someone as protean as Dame Silvia Cartwright it is difficult to know what theme to pick up. She has served New Zealand and New Zealand law in so many capacities: as a successful woman lawyer at a time when it was difficult for women to get into the profession, much less survive in it; as only the second woman appointed to the District Court bench; as an able judicial administrator when the first woman Chief Judge of the District Court; as a Commissioner who had the standing and intelligence to unravel and still a matter of acute public anxiety and was through it responsible for a revolution in medical ethics and accountability; as the first woman appointed as a Judge of the High Court in its 150 year history; as an international figure whose work shaped the Convention on the Elimination of All Forms of Discrimination against Women and who has worked in the international community tirelessly to advance the position of women; and as our Governor General. Today she is presiding over the trial of a man accused of one of the terrible crimes of genocide of the last century, in Cambodia. She is working in conditions of some considerable personal difficulty, but there is nothing new in that for her. Constant in all these endeavours has been her care for the dignity and human rights of those who are disadvantaged. Human rights is the topic with which her name will always be associated and so it is that topic I address.

It is no accident that Dame Silvia has worked all her professional life for the human rights of others. Her own experiences have shaped a special insight. There is endless fascination with the question whether diversity in the judiciary makes a difference. The visibility of women in high judicial office is itself important. It breaks down stereotypes. Sandra Day O'Connor once said that the fact that she was a woman who gets to decide cases is more important than the fact that she decides cases as a woman.² Appearances matter. A judiciary that is not representative of the community it serves lacks legitimacy in the eyes of the people who come before it. The point was made by Nelson Mandela, when on trial in 1962 for the offences of leaving the country illegally and inciting people to take part in a strike. He represented

¹ The Rt Hon Dame Sian Elias, Chief Justice of New Zealand.

² Quoted by Kathryn Mickle Werdegard of the Californian Supreme Court in "Why a Woman on the Bench?" (2001) 16 Wis Women's LJ 31 at 40.

himself because his lawyer had no pass to travel from Johannesburg to Pretoria, where the trial was held. He spoke out against the apartheid practised in the courtroom:

Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anybody honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced? Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin, by his own flesh and blood? I will tell Your Worship why: the real purpose of this rigid colour bar is to ensure that the justice dispensed by the courts should conform to the policy of the country, however much that policy might be in conflict with the norms of justice accepted in judiciaries throughout the civilised world. ... I hate racial discrimination most intensely and in all its manifestations, I have fought it all my life; I fight it now, and I will do so until the end of my days ... I detest most intensely the set-up that surrounds me here. It makes me feel that I am a black man in a white man's court. This should not be.

Indeed, it should not be. It is a reason why we need diversity on the bench and in all places where public authority is exercised, but I am one who thinks that the effect of such representation is not only the visibility of difference. I think the fact that Sandra Day O'Connor got to decide cases as a woman was every bit as important as the fact that she was a woman who got to decide cases. The life experiences of women and minorities are very different to the life experiences of the men who were judges when I started in legal practice and who are still disproportionately represented on the bench. Elizabeth Evatt, the Australian Judge, thought that women and minority judges are more likely to realise how often claimed objectivity is marred by unconscious biases.³ I think you only need to look at the record of the early women appointed to the bench in a number of jurisdictions to see a different take on the matters coming before the Court. Sandra Day O'Connor herself saw issues of equality everywhere. As did Bertha Wilson of the Supreme Court of Canada, and Mary Gaudron of the High Court of Australia. Their experiences, I believe, made them sensitive to difference and the inequalities it leads to, often quite unconsciously. Justice Tony Kennedy of the United States Supreme Court said once of Justice

3 Quoted in Sean Cooney "Gender and Judicial Selection: Should There Be More Women on the Courts?" (1993) 19 MULR 20 at 25.

Thurgood Marshall, the first African-American to sit on the Supreme Court:⁴

The compassion of Thurgood Marshall is Exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges.

In the judgments of judges from unconventional backgrounds such as Thurgood Marshall, or Mary Gaudron, or Brenda Hale, or the judges of the Constitutional Court of South Africa, it is possible to see a perspective that is different. I have said on another occasion that I do not think it fanciful to see in the work of judges from such diverse backgrounds an emphasis on human dignity; a greater scrupulousness not to wound or slight; a willingness to express doubt and to change one's mind; and a sense of obligation to lay out the full reasons for decision and to confront any influence openly. The different experiences of such judges are strengths they bring to their work. The same is true of the work of Dame Silvia Cartwright.

In their commentary on s 19 of the New Zealand Bill of Rights Act 1990, Butler and Butler say that "New Zealand case law has failed to develop a consistent approach to the concept of discrimination":⁵

Basic ideas such as different treatment, indirect discrimination, the role of intention, causation and so on are not well understood. ... Both of the Court of Appeal's discrimination judgments to date, *Quilter* and *Lal*, are disappointing as to methodology. The one bright spot is Cartwright J's judgment in *NRHA [Northern Regional Health Authority v Human Rights Commission]* ...

Dame Silvia's judgment in *Northern Regional Health Authority v Human Rights Commission*⁶ illustrates the points I have been making. I remember her mentioning the case to me when she was hearing it. (We had adjoining offices in the High Court.) It did not seem on the face of it to engage an urgent human rights issue. It concerned a white South African-trained doctor entitled to practise medicine in New Zealand who claimed discrimination. The discrimination claimed was a result of the decision by the Northern Regional Health Authority to control the number of general practitioners in its District by using its powers under the Health and Disability Services Act 1993 to deny subsidies for patients of

4 Quoted by Kathryn Mickle Werdegar of the Californian Supreme Court in "Why a Woman on the Bench?" (2001) 16 Wis Women's LJ 31 at 35.

5 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis NZ Limited, Wellington, 2005) at [17.9.33].

6 *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC).

doctors not trained in New Zealand. The New Zealand Bill of Rights Act contains no general requirement of equal treatment, so the case had to amount to discrimination on one of the prohibited grounds. New Zealand qualification was not a prohibited ground. There was no intention to discriminate on the ground of race, colour, descent or national or ethnic origin, but Dame Silvia found indirect discrimination because the effect was to discriminate on the grounds of national origin. She looked to the substance of the matter, being prepared to infer that those qualifying overseas were overwhelmingly non-New Zealand nationals. In reaching her conclusion Dame Silvia rejected the contention that the comparisons to be made were distinct, being within the group of those qualifying in New Zealand or alternatively, within the group of those qualifying elsewhere, so that different treatment as between the two groups did not contravene the Human Rights Act 1993. Dame Silvia held that the comparison required in order to demonstrate discrimination was between those entitled to practise in New Zealand who were non-New Zealand nationals, and those entitled to practise in New Zealand who were New Zealand nationals.

It is interesting to speculate that if Dame Silvia had been on the Court of Appeal in *Quilter*⁷ (the same sex marriage case), Thomas J might well have had an ally. What is of more immediate interest for my purposes here is the way the judgment in *Northern Regional Health Authority* was justified by reference to international and comparative law. Indeed, Dame Silvia made no bones about the importance of this material (which included reference to the General Comments of the United Nations Human Rights Committee and “judicial colloquia”) saying:⁸

New Zealand Courts have increasingly been prepared to look to international interpretations and authorities to gain a better understanding of our own rights-based legislation. Where internationally enunciated principles are the foundation for domestic legislation, the logical path to follow is that which will provide the international framework and understanding which will illuminate and assist local decision making. This is not, as counsel for the plaintiff suggested, an attempt to “roam around other jurisdictions looking for the right results”. The New Zealand Courts have frequently turned for assistance to cases decided under the Canadian Charter of Rights and Freedoms 1982 and have also drawn assistance from international judicial colloquia and the determinations in particular of the United Nations Human Rights Committee.

...

7 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

8 *Northern Regional Health Authority* at 234–5.

Any analysis of policy which may directly or indirectly discriminate must be done in the light of the international principles and experience as stated in the relevant conventions and covenants and, where appropriate, assistance may be drawn from overseas cases, whether directed at domestic issues or emanating from statements of international committees or colloquia. Any such assistance as can be derived is just that: assistance. None of the principles or statements are binding on New Zealand Courts. They do, however, paint a backdrop against which New Zealand's obligations and compliance can be placed. Moreover, when the ancestry of the New Zealand legislation is understood it is inevitable that it must be read as broadly as is necessary to comply with the overarching themes promoting and protecting human rights. Whether discrimination is intended or is the effect of actions or policies is immaterial. Whether the discriminatory effect falls on a group which would usually be immune equally is irrelevant; history is littered with instances where even the rich, powerful or famous have been subjected deliberately or otherwise, to measures which have distinguished them adversely from other citizens. Legislation concerned with human rights is concerned with the rights of all humanity.

These comments illustrate the points I have already made. Exhibit A indeed! They lead into the further remarks I want to make this evening concerning human rights and their challenges for judicial function and methodology. I say at once that I do not suggest that courts provide the only or even the most important protection for human rights. Indeed it would be wrong to regard statements of rights as principally directed to the courts or indeed to regard the courts as the principal mechanism for the vindication of rights. Ultimately, whether human rights are observed depends upon whether they are valued and understood by the wider community. The courts have however an important role in explaining the application of human rights values in context. It is in this demonstration of human rights in action that I think the principal contribution of the courts to legislative statements of rights is to be found.

Rule of Law

I start with the Rule of Law. Lord Bingham said flatly in an important paper in 2007⁹ that human rights are part of the rule of law. They were not always seen as such. Indeed, as recently as when Cartwright J

9 Lord Bingham of Cornhill KG "The Rule of Law" [2007] Cambridge Law Journal 67.

delivered her judgment in the *Northern Regional Health Authority* case, human rights were still an exotic transplant still adjusting to New Zealand law.

The Rule of Law was much more familiar. Dicey put it as one of the twin poles (the other being the sovereignty of Parliament) around which the unwritten Westminster-style constitution spun. What the Rule of Law meant was not something there had been much occasion to consider. Occasionally when judges such as Sir Robin Cooke ventured the thought that it might mean that there were constitutional fundamentals that ran too deep to be altered even by a sovereign Parliament, it was thought vaguely impolite to mention such things. Things have changed very fast. It is hard to find any society today which does not profess to live under the rule of law - and in most, human rights are expressed as fundamental.

In many societies which profess to live under the rule of law, it has to be said that the rule of law is not recognisable to us. In our conception (or at least the one I am speaking of) the rule of law prevents arbitrary exercise of power. This has implications for judicial function and methodology. The rule of law checks the powerful. Such checks are not always welcome and not only by those who are *trying* to be above the law. It is very difficult for anyone to resist headlong self-conviction when convinced that the end they have in sight is right. Those who are not acting for personal advantage but for what they believe to be the public benefit or for another good end may be especially indignant or impatient at being questioned. There is little as distorting as a conviction that you are a good guy, that you are on the right side.

In our system the role of the courts is to resist enthusiasms and to express doubts even where ends are good. Courts must be conscious always that decisions taken by public and private actors often impact, directly or indirectly, upon the lives of real people in our society, some of them vulnerable. All are entitled to be treated with dignity and respect. Where they have claims of right, they are entitled to be heard. Adapting Justice Learned Hand, who spoke of liberty, the spirit of the law is one that is not too certain.¹⁰ Sir Robert Megarry in the same vein said that everyone who has ever had anything to do with the law knows very well that it is “strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”¹¹ To many who lack access to the levers of power themselves,

¹⁰ Billings Learned Hand “The Spirit of Liberty” (Speech given in Central Park, New York City, 21 May 1944).

¹¹ *John v Rees* [1970] 1 Ch 345 at 402 per Megarry J.

decisions made by others may seem inexplicable. In my early years in law, it was very often impossible for those most affected by the exercise of public authority to understand why. "Because" is simply not a satisfactory response even for children, but in many cases it was all the answer we were able to get. Over time, uneven distribution of public benefits within society, unequal treatment, absence of explanation for particular outcomes which seriously affect people, have come to be seen as poor government and, more importantly, as unjust.

During the 40 years I have been in legal practice, there has been a revolution in how public power is exercised and checked. The most important changes have not been achieved through courts. The significant advances have been through the over-arching principles provided by general statutes like the Official Information Act 1982, the Ombudsman legislation, and the New Zealand Bill of Rights Act. The Official Information Act has achieved a revolution in the culture of authority because it requires justification for the exercise of all public authority. This shift has had implications for the exercise of judicial authority also. Close attention to reasons is now critical. The days when a judge could say "Application denied. Next Case" or "Five years. Stand Down" are long gone. That is a good thing. Arbitrary power is no less ugly for being exercised by a judge.

The challenge of rights

Human rights bring especially challenges to the judiciary. In modern societies, often secular or with diverse beliefs, law seems now a principal way in which we identify the principles by which society operates civilly. The deliberative discourse of law is an important process in achieving social adjustment without disruption. In such process, a Judge needs to articulate the values he or she is acting on and usually attributing to the community. Richard Posner made this point about the great civil rights case of *Brown v Board of Education*.¹² He said that the Supreme Court's about-face did not come from pondering the text of the 14th Amendment. It came from an insight that the nation's social and political climate had changed.¹³

Litigation in New Zealand does not entail such high stakes as were in play in *Brown* because of the more modest constitutional role of courts. Modern litigation throws up some of the more intractable moral problems of the times. Judges cannot avoid hard cases if they are properly brought before them. In jurisdictions operating as we now do under a

¹² *Brown v Board of Education of Topeka* 347 US 483 (1954).

¹³ Richard Posner *The Problem of Jurisprudence* (Harvard University Press, Cambridge, 1990) at 307.

Bill of Rights, the legal process is in part a process of mediating conflicting legitimate claims, raising fundamental values of the legal order in the circumstances of actual cases.

These cases are extremely difficult. No one has yet come up with an answer to “incommensurability” - the problem when there is no common scale upon which to weigh and measure disparate rights. Justice Scalia memorably commented once that balancing rights is “like judging whether a particular line is longer than a particular rock is heavy.”¹⁴ Pragmatic, unintellectual habits of judicial reasoning may no longer be good enough. We need to engage not only with the international and comparative case law but with the intellectual scholarly tradition it draws on, little of it judge-made.

Grappling with these issues of legal policy is not easy in our tradition. The legal historian Holdsworth considered that a consequence of the hold of positivism on law has been the impoverishment of ethical reasoning in the strict separation of morals from law and a hard and fast line between moral and legal rights.¹⁵ As a result of this ethical impoverishment he thought that utilitarianism had filled the gap. A utilitarian calculus, though appealing to judges schooled in positivist tradition, may be inadequate to their role under bills of rights. Nor is it possible always to draw a bright line between law and policy, as judges in the past have purported to do. The effort was probably always illusory. Even a judicial sceptic like Professor Carol Harlow (a great woman academic) is of the view that Dicey made a malignant contribution to English public law by obscuring the close relationship between law and politics.¹⁶ Today, claims which invoke human rights such as equality make it impossible to refuse to engage with substantive outcomes, as is demonstrated by the argument and reasons in *Northland Regional Health Authority*. That is why a number of commentators have expressed the view that human rights are revolutionising our understanding of law.¹⁷ If so, I am not sure that the implications have yet been fully absorbed.

One of the implications is the risks associated with identifying underlying values. The courts risk legitimacy if they misread the values of the community. Sometimes such assessment is very difficult. There is a fine line between identifying the shared values in a community and determining actual cases on the basis of majority preferences. (It may

¹⁴ *Bendix Autolite Corp v Midwesco Enterprises* 486 US 888 (1988) at 897.

¹⁵ William Searle Holdsworth *Some Lessons from our Legal History* (The Macmillan Co, New York, 1928) at 158.

¹⁶ Carol Harlow “Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?” (2000) 48 *Political Studies* 356 at 357.

¹⁷ See, for example, Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 127.

be illustrated by the divisions in the Supreme Court in *Taunoa*¹⁸ and *Brooker*¹⁹). The content of individual rights is not a matter for majoritarian determination. I am not sure that notion is widely accepted. Quite apart from avoiding deference to majority opinion, there is always the risk that invocation of community standards really masks judicial preference which is destructive of human rights. This is the problem of the unexpressed major premise or unconscious bias, to which I now turn.

Unconscious bias

Cultural values and gender and class assumptions may distort impartiality quite unconsciously. This is the risk of the “inarticulate major premise” described by Oliver Wendell Holmes.²⁰ If judges come from narrow sections of society, discovering and suppressing such unconscious prejudice may not always be easy. Even judges who pride themselves on strict legality may not see that they are captured by a particular ideology because of their narrow life experiences. A couple of illustrations can be given.

Lord Devlin identified an underlying “Victorian Bill of Rights” which was assiduously applied by English Judges at the end of the 18th century.²¹ By it, any legislation which interfered with the freedom of contract and the sacredness of property. Similar forces were at work in the United States to thwart Roosevelt’s New Deal legislation before his Court-packing threat.

I have in other papers²² referred to my view that during the 1970s New Zealand judges were hostile to the reforms introduced by matrimonial property legislation. They had no insight into the extent to which their own world-views as to traditional roles in marriage were responsible for a bias in approach. They did not appreciate the extent to which their views were out of step with the community, as reflected in the legislation.

Perhaps one of the more serious illustrations is to be found in the abdication of judges in England and in the Commonwealth of their responsibility to supervise the Executive during the period dubbed by Sir

¹⁸ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

¹⁹ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

²⁰ Oliver Wendell Holmes *The Common Law* (Little Brown and Company, Boston, 1881).

²¹ Patrick Arthur Devlin *The Judge* (Oxford University Press, Oxford, 1979) at 15.

²² See, for example: “Impartiality in Judging and the Passions of Mankind” (Raffles City Convention Centre, Singapore, 3 November 2004); “Equality under the law” (Waikato University, 6 July 2005).

Stephen Sedley as the “long sleep” of administrative law.²³ The distinguished American administrative lawyer Kenneth Culp Davis was shocked at the position he discovered in the United Kingdom in 1961. The courts, he thought, were unwilling to inquire into serious injustice. He thought they had fallen into a “law is law” formalism.²⁴ That is a verdict later endorsed by Sir William Wade who referred to the “deep gloom” which had settled over English administrative law.²⁵ Eventually there was a u-turn as the courts realised “how much had been lost”.

Illustrations such as these indicate why diversity in appointments matters. Some commentators have seen the period of “backsliding” in administrative law in England in the first half of the twentieth century as attributable to the cosy relationship that developed between judges and administrators who were educated in the same schools and ate in the same clubs. They thought they were on the same side. I have expressed the view elsewhere that had women been on the bench many of the unconscious assumptions acted on in matrimonial cases in New Zealand in the 1970s would have evaporated.²⁶ So a more representative judiciary in an age of human rights is important strategy - but it is not sufficient strategy.

The culture of justification

The best way through these shoals of unconscious bias and conscientious discharge of the responsibility to give effect to human rights is close attention to judicial method and scrupulous honesty.

A South African academic coined the term “culture of justification” to describe the change in the law in which law is now seen.²⁷ It is a view that has struck a chord with commentators and judges in other jurisdictions.²⁸ In such a culture those in authority must justify the exercise of power.

I do not think this climate has come about solely or even mainly because of increased suspicion of government. Nor do I think it is wholly

²³ Stephen Sedley “The Sound of Silence: Constitutional Law without a Constitution” (1994) 110 LQR 270 at 282.

²⁴ Kenneth Culp Davis “The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence” (1961) 61 Colum L Rev 201.

²⁵ H Wade and C Forsyth *Administrative Law* (Clarendon Press, Oxford, 1994) at 17.

²⁶ “Equality under the law” (Waikato University, 6 July 2005).

²⁷ Etienne Mureinik “Emerging from Emergency: Human Rights in South Africa” (1994) 92 Mich L Rev 1977 at 1986.

²⁸ See, for example: Murray Gleeson “Outcome Process and the Rule of Law” (2006) 65 AJPA 5 at 12.

attributable to the post-war emphasis on human rights, although as I have tried to suggest I think it is the best policy in these difficult cases. In New Zealand variable intensity in judicial review predated the adoption of a statutory statement of rights. Such variable intensity responds to the obvious insight that in decisions of great importance, it is not possible to be indifferent to what happens within the four corners of vast discretion. Similar shifts led to the openness embraced with freedom of official information. As I have already mentioned, under our legislation citizens are entitled not only to the information about decisions that affect them, but reasons for them. These requirements for information and reasons respond to a human need to know why official action is taken which affects them. It is an aspect of human dignity, facilitating their participation in society and preventing them being regarded as objects. Similar underlying themes have led to legislation which enables individuals to obtain information held about them by public agencies and by employers.

Where human rights are engaged it is no longer good enough for decision makers to assert plenary authority, or good intentions, or even financial constraints.²⁹ In a culture of justification, proportionality analysis is inevitable and engagement with substantive values cannot be avoided. In the days when it was widely thought that the courts were concerned only with the procedure followed by tribunals and officials and not the outcome, intervention for error of law on the fact of the record was explained by Professor Wade on the basis that the urge to intervene was “more than judicial flesh and blood could resist”.³⁰ I do not think that is simply a judicial reflex. Decisions which are wrong are deeply offensive to everyone. The spread of justificatory processes in administrative decision-making is a response to that sense of outrage.

That does not mean that it is necessary to throw the baby out with the bathwater and substitute in all cases the view of the judge for the judgment of the responsible official or tribunal. It all depends. Lord Cooke expressed long ago the view that decision-makers must act in accordance with law and fairly and reasonably. What is fair or reasonable is an intensely contextual assessment. It turns on the nature of the interests affected and relative institutional competencies. This is an area where the law cannot be said to be settled.

Where human rights are engaged, the scope for deference to the decision-maker remains controversial. On the approach taken, for

²⁹ Lorraine Weinrib “The postwar paradigm and American exceptionalism” in Sujit Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2006) 84 at 96.

³⁰ William Wade quoted by Mark Aronson, Bruce Dyer and Matthew Groves in *Judicial Review of Administrative Action* (4th ed, Lawbook Co, New South Wales, 2004) at 104.

example, by the House of Lords in the *Denbigh High School* case, whether human rights have been infringed is always a matter for the courts.³¹ The court is not concerned simply with whether the decision-maker took human rights into account. The assessment is objective, in fulfilment of the obligations directly imposed by the Bill of Rights Act on the judicial branch.

In considering whether a limitation is reasonable in a free and democratic society, it seems that a majority in the House of Lords takes the view that the views of the primary rule-maker are entitled to weight. That was the approach adopted by the majority in *Belfast City Council v Miss Behavin' Ltd*, a case about planning approval for a sex shop in Belfast in which freedom of expression was in issue.³² The majority of the House of Lords thought that a margin of appreciation was appropriate if the assessment is one of judgment and if the responsible authority has addressed the question and offered adequate justification for the conclusion reached. On this approach, close and objective assessment by the courts will be necessary only if the decision-maker has not properly addressed the human rights dimension and come to a decision not reasonably available.³³ If it has, the decision may well be decisive.

In the minority in the *Miss Behavin'* case Lord Hoffmann took the view that the majority was acting inconsistently with the earlier decision in *Denbigh High School*. He criticised the approach of the majority saying that that it would lead to a check for rationality only, a “tick the box” process potentially destructive of human rights. And he also thought it “quite impractical”:³⁴

What was the Council supposed to have said? “We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil”? Or: “Taking into account article 10 and article 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil”? Would it have been sufficient to say that they had taken Convention rights into account, or would they have had to specify the right ones? A construction of the 1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the

³¹ *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100.

³² *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420.

³³ This approach is similar to that taken by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 at [11]–[12] in holding that the role of the court is not a “secondary, reviewing, function”, but that the judgment of the primary decision-maker is “always relevant and may be decisive”.

³⁴ At [13].

refusal infringed the applicant's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of article 10 or the First Protocol.

These are formidable arguments, the answers to which have practical effect on the protection of human rights. The Supreme Court of Canada has also divided on the approach, in *Multani v Commission scolaire Marguerite-Bourgeois*.³⁵ The majority adopted a similar approach to that in the *Denbigh High School* case and the minority approach of Lord Hoffmann, adhering to *Denbigh* in *Miss Behavin'*. The minority in the Supreme Court of Canada favour the approach adopted by the majority in *Miss Behavin'*. With such divisions, the topic has unsurprisingly attracted a great deal of academic comment.³⁶ The last word has clearly not been said, at least in the UK. (Where the last word may be that of the European Court of Human Rights).

In New Zealand, the position is not yet settled. In the *Moonen* litigation, the Court of Appeal focussed on the process followed by the Film and Literature Board of Review in making its classification that a publication was "objectionable".³⁷ In the first case, the Court held that the Board had failed to weigh the right to freedom of expression in its determination. It remitted the classification for further consideration. In the second case, after such reconsideration, the Court refused to supervise more closely than to consider whether there was evidence before the Board upon which it could have come to its conclusion and whether the determination was reasonably open to it. This approach is similar to that taken in the English Court of Appeal in *Denbigh High School* (and repudiated by the House of Lords) and it is similar to the approach taken by the majority in *Miss Behavin'* (repudiating *Denbigh*) and by the minority in the Canadian Supreme Court in *Multani v Commission scolaire Marguerite-Bourgeois*.³⁸

As these opinions show, such reasoning exerts a powerful attraction to courts. It accords with familiar principles of modern administrative law. What the cases in the United Kingdom and Canada do make clear is that it is one thing for the courts to find the reasoning of the primary decision-maker convincing, and it is quite another thing to defer to that agency unless its conclusion is irrational. *Wednesbury* has clearly been

³⁵ *Multani v Commission scolaire Marguerite-Bourgeois* 2006 SCC 6, [2006] 1 SCR 256.

³⁶ TR Allan "Human Rights and Judicial Review: A Critique of Due Deference" [2006] Cambridge Law Journal 671 at 675.

³⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA).

³⁸ Deschamps, Abella and Le Bel JJ.

abandoned in the United Kingdom and Canadian human rights cases, although in New Zealand in *Moonen* we seem still to be attracted to it.

Purists may take the view that the courts which are themselves bound to observe the Bill of Rights Act cannot avoid concluding objectively whether rights have been infringed. I am not unattracted to that view, but I do not think it prevents the court giving the weight it thinks appropriate in the circumstances to well-justified conclusions of the agencies primarily responsible. The reasons they give will be key to the courts having confidence in their conclusions. If they do not give convincing reasons why the human right should yield, the courts will have to undertake close scrutiny and make the determination unless there are reasons why the decision-making body should have to reconsider the matter.

Deference may have more scope in consideration of remedies for breaches of rights. Crafting a remedy may be better left to the political branches:³⁹

When a democracy is in moral flux, courts may not have the best or the final answers. Judicial answers may be wrong. They may be counterproductive even if they are right. Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation.

In cases of high controversy, that may be good policy. The gay marriage cases in the United States demonstrate the risks here. In Vermont and in Massachusetts, in claims that the prohibition on same-sex marriage was a breach of the right to equal treatment, the courts accepted the claim.⁴⁰ Solutions were not however immediately imposed by the courts. In both states changes in the law were eventually made by legislation. In Hawaii, the determination by the court that gay couples be allowed to marry caused something of a political melt-down. California has gone through similar convulsions.

The Future

Through the New Zealand human rights legislation we are now plugged into an international community of ideas, as Cartwright J recognised in the *Northern Regional Health Authority* case. Nor is our statutory rights

³⁹ Cass Sunstein "Leaving Things Undecided" (1996) 110 Harv L Rev 4 at 101.

⁴⁰ *Baker v State of Vermont* 744 A 2d 864 (Vt 1999); *Goodridge v Department of Public Health* 798 NE 2d 941 (Mass 2003).

model unique any longer. Some of the solutions we adopted when we thought we were unique are being rejected in other jurisdictions. That may prompt us to reconsider our own case-law. We are now being stretched by the developing case-law in the United Kingdom. Instead of the diet of drunken drivers and petty criminals, the courts in the United Kingdom have been pitch-forked into applying human rights in the most contentious cases of the day, those involving terrorism. Such context certainly sharpens the thoughts.

Apart from the text of the Act and the international statements and law it invokes, judges have to draw on wider constitutional values in identifying the scope of rights and their limitations. Since the Act invokes the standard of a “free and democratic society” in the limitation of rights, it is necessary to engage with these values. They are not ones we have been accustomed to think much about. The New Zealand Bill of Rights Act does not contain a general right to equal treatment beyond the right not to be discriminated against on one of the prohibited grounds.⁴¹ The White Paper that preceded enactment of the legislation maintained that equality was an aspect of the rule of law,⁴² itself a fundamental value in the constitutional order as the Supreme Court Act 2003 now makes clear.⁴³ Such values immanent in the constitution may need to be brought into human rights evaluations. To date, there is little exploration of these values, with the exception of privacy.⁴⁴

What is more controversial is the question whether human rights can be limited to protect values or principles which advance social or government policy but which cannot be ranked as fundamental or as human rights in themselves. In a number of New Zealand cases justifiable limits have been assumed to arise from interests not equivalent to human rights or fundamental constitutional principles. Some greater focus may be necessary. In the United Kingdom, Professor Ashworth has criticised decisions that seem to favour “broad balancing” of rights against other less fundamental public interests.⁴⁵ Jeremy Waldron, however, accepts that many conflicts between rights and utility as well as between rights are best addressed by balancing – although he stresses the need for care, context and relativity in time and place.⁴⁶

⁴¹ Section 19.

⁴² Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984-1985] I AJHR A6 at 86.

⁴³ Section 3(2).

⁴⁴ See, for example, *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 and *Lange v Atkinson* [1997] 2 NZLR 22 (HC) and [1998] 3 NZLR 424 (CA).

⁴⁵ Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, London, 2002) at 62–64. He cites *Salabiaku v France* (1988) 13 EHRR 379 (ECHR).

⁴⁶ Jeremy Waldron “Rights in Conflict” in *Liberal Rights* (Cambridge University Press, New York, 1993) at 223 and “Security and Liberty: The Image of Balance” (2003) 11(2) *The Journal of Political Philosophy* 191.

Most commentators assume that the values advanced in limitation of rights must be of the same rank, thus setting up “intra-constitutional conflict”.⁴⁷ The point may not be of great practical importance, because competing governmental objectives which are the basis for limitation of rights can usually be taken back to equivalent rights or values, but it is possible to be left a little uneasy at the lack of conceptual clarity.

Lord Cooke of Thorndon long ago foretold the gradual creation of an international law of human rights.⁴⁸ He also took the view that the New Zealand Bill of Rights Act was intended to be woven into the fabric of New Zealand law.⁴⁹ Next year the Act will be 20 years old. I am not sure that it yet fulfils the central place in New Zealand law that Lord Cooke predicted. My impression is that it is not widely resorted to by the profession except by those practising in the fields of criminal law or refugee law or defamation law. In the United Kingdom, by contrast for example, human rights law has had a significant impact on the law of torts, at least in relation to the liability of public bodies. Similar familiarity with the New Zealand legislation by those practising private law here cannot I think be assumed. I may be wrong about that, but that is the experience I have had when I have raised the provisions of the Act with counsel who are arguing access to justice points in litigation, as I cannot sometimes resist doing. It is very clear that many have never read the text of s 27 at all. Over the long haul, I think Lord Cooke will be proved right. In the meantime, we have some distance to go. A good start would be with the ideas so lucidly explained by Dame Silvia Cartwright in *Northern District Health Authority*. Maybe then Butler and Butler will find other bright spots in the New Zealand law of human rights to write about.

⁴⁷ Alec Stone Sweet and Jud Matthews “Proportionality Balancing and Global Constitutionalism” (2008) 47 Colum J Transnat’l L 72.

⁴⁸ *R v Barlow* (1995) 14 CRNZ 9 (CA).

⁴⁹ *R v Goodwin* [1993] 2 NZLR 153 (CA) at 156.