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## *in the*
# New Millennium

Edited by Richard Gordon Q.C.

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# JUDICIAL REVIEW IN THE NEW MILLENNIUM

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# JUDICIAL REVIEW IN THE NEW MILLENNIUM

*Edited by Richard Gordon Q.C., Visiting Professor in the Faculty of Law, University College, London*

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# PREFACE

Those who practise in the human rights and public law field at the present time have the privilege of participating in what is currently one of the most dynamic and fast-changing areas of law. *Judicial Review in the New Millennium* is both an attempt to understand why this should be so and also to stargaze.

From the entry into force of the Human Rights Act 1998 on October 2, 2000 it was clear that private and public law were going to be altered irreversibly. The early debates about whether the Act would operate horizontally so as to intrude even upon disputes between private citizens have been superseded by longer term, more fundamental considerations of a constitutional nature.

What is the true relationship between the courts and Parliament? How much deference should the courts pay to Parliament and how will the legislature react if the judges show—at least to its mind—insufficient deference? Are Oxbridge educated, white middle class male judges the ideal template for deciding the ultimate "fair balance" that Strasbourg demands in human rights cases? Should we have a Supreme Court on the USA model and, in any case, how should the House of Lords conduct itself in a climate where constitutional issues predominate?

These and other practical issues now seem much more pressing and important than they did on the eve of the millennium. Many of them are addressed in the essays that follow. Most of them were prepared for the Sweet & Maxwell Annual Judicial Review Conference at the end of 2002. I have included other essays here too including one from Lord Lester on deferences, one from Professor Carol Harlow on the important topic of new public management, and one from myself on Parliamentary supremacy. Other Papers, prepared for the Conference, have been up-dated and amended for this book.

The essays are intended to stimulate ideas and discussion. They are modelled on an earlier publication from Sweet and Maxwell entitled *New Directions in Judicial Review* that appeared well over a decade ago and fired my own interest in the subject. If this work has a similar effect on others I will be more than satisfied.

RICHARD GORDON Q.C.
Brick Court Chambers
March 19, 2003

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CHAPTER 1

# WITH GREAT RESPECT AND DEFERENCE

*Lord Lester of Herne Hill Q.C.*

**1–01** It was a particular pleasure to chair the 2002 Judicial Review 14th Annual Conference because of the high quality of the contributions and the diversity of the subject-matter. The topics ranged from Richard Gordon Q.C.'s valuable review of a year in the life of judicial review to Dr Kate Malleson's discussion of criteria for judicial appointment, and Stephen Grosz's presentation of the case for a UK Human Rights Commission. Michael Beloff Q.C. drew attention to the academic influences on today's issues in judicial review, and Professor Andrew Le Sueur explored the influence of the Law Lords on the Administrative Court. Sir Sydney Kentridge Q.C. gave a memorable address illuminating the practical value of using comparative constitutional law to develop and apply judicial review in a human rights context.

A central theme of this conference, referred to by several contributors, and especially by Professor Dawn Oliver in her paper on "Resolving conflicts between politicians and the courts", concerned the degree to which the courts should defer to the other two branches of government in judicial review proceedings engaging the Human Rights Act 1998. In *Human Rights Law and Practice* (Butterworths, 1999), David Pannick Q.C. and I, referred to judicial deference in a passage, that, as Michael Beloff Q.C. noted in his address, has received high judicial approval.

In the light of the way in which deference has become part of the legal lexicon, there is, to coin a phrase, a pressing need to articulate the theory of Parliamentary democracy and separation of powers underpinning the Human Rights Act. This conference brought home the need for the development of constitutional principles relevant to this crucial area of judicial review. Professor Jeffrey Jowell Q.C. has pursued this theme in a forthcoming article which I have seen in draft, an unpublished version of which was cited at the conference.[1]

**1–02** "Deference" is an old-fashioned seventeenth century word with several shades of meaning. The Oxford English Dictionary defines it as "submission to the acknowledged superior claims, skill, judgment etc of another"; and "courteous regard, as one to whom respect is due". British legislators, ministers and judges usually pay courteous regard to the other two branches, to whom respect is due, even if there are occasional lapses from good manners in the discourse of public men and women about the other institutions of government. But when should the courts (or, for that matter, the legislature or the executive) submit to the "superior claims, skill, judgment etc" of another branch of government? And how do the new constitutional arrangements contained in the Human Rights Act and the devolution Acts affect the extent to which each branch should defer to the others?

As our courts have recognised, the Human Rights Act is no ordinary law. It is a fundamental constitutional measure of greater contemporary significance than any

[1] "Judicial Deference and Human Rights: A Question of Competence", in a work to be published by Oxford University Press, edited by P. Craig and R. Rawlings. See also J. Jowell, "Beyond the Rule of Law: Towards Constitutional Review" [2001] *Public Law*, 671.

previous constitutional measure, apart from the European Communities Act 1972. It has created a magnetic field in which all three branches of government must work to secure a fair balance between individual rights and the general interests of the community. It reconciles formal adherence to the doctrine of parliamentary sovereignty with the need for the courts to provide effective legal remedies for breaches of the constitutional rights anchored in the European Convention on Human Rights. How has this magnetic force altered the relationships between the three branches, and between them and the European Court of Human Rights?

The answers to these questions are central to good government and wise judging. Answering them is made more difficult because of the absence of a written constitution. Perhaps, some might be better answered by a student of political science than by a minister, a lawyer or a judge. The reforms undertaken by the New Labour Government between 1997 and 2000 were piecemeal and pragmatic measures, lacking consistent principles. Unless and until a future government turns the present hotch-potch into a comprehensive and coherent new constitutional settlement, it will be the task of the judiciary to develop the constitutional principles of public law.

**1–03** In his dissenting judgment in *International Transport Roth Gmbh v Secretary of State for the Home Department* [2002] 3 W.L.R., at 376–78, Laws L.J. grappled with the issues and distilled the following four general principles:

> ... .[T]he *first* principle which I think emerges from the authorities is that greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure ... . Where the decision-maker is not Parliament, but a minister or other public or governmental authority exercising power conferred by Parliament, a degree of deference will be due on democratic grounds—the decision-maker is Parliament's delegate—within the principles accorded by the cases. But where the decision-maker is Parliament itself, speaking through main legislation, the tension of which I have spoken is at its most acute. In our intermediate constitution the legislature is not subordinate to a sovereign text, as are the legislatures in "constitutional" systems. Parliament remains the sovereign legislator. It, and not a written constitution, bears the ultimate mantle of democracy in the state.
>
> The *second* principle is that there is more scope for deference "where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified" (*per* Lord Hope in *Ex p. Kebilene* ...).
>
> The *third* principle is that greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts. The first duty of government is the defence of the realm. It is well settled that executive decisions dealing directly with matters of defence, while not immune from judicial review (that would be repugnant to the rule of law), cannot sensibly be scrutinised by the courts on grounds relating to their factual merits .... The first duty of the courts is the maintenance of the rule of law. That is exemplified in many ways, not least by the extremely restrictive construction always placed on no-certiorari clauses.
>
> The *fourth* and last principle is very closely allied to the third, and indeed may be regarded as little more than an emanation of it; but I think it makes for clarity if it is separately articulated. It is that greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts. Thus, quite aside

> from defence, government decisions in the area of macro-economic policy will be relatively remote from judicial control . . . .

The proposition that greater deference is due to Act of Parliament than to subordinate legislation or the exercise of administrative discretion is not controversial. What is the position, however, where Parliament has commanded (in s.3 of the Human Rights Act) that all existing and future legislation must, so far as is possible, be read and given effect in a way compatible with the Convention rights, and has empowered tie courts to give declarations of legislative incompatibility? How much deference should the courts give to the Human Rights Act itself, and how much to the legislation under challenge against the standards required by the Human Rights Act?

**1–04** Does it make a difference to the approach of the courts whether the impugned legislation was enacted before the coming into force of the Human Rights Act, or that it was recently enacted on the basis of a Ministerial statement of its compatibility with the Convention rights, and in the light of a report by the Joint Parliamentary Select Committee on Human Rights? Is it contrary to the Bill of Rights of 1688–89 and Parliamentary privilege for the courts to have regard to the extent to which Parliament has taken the Convention rights into account when making legislation? With the notable exception of Lord Hope of Craighead, the Law Lords in *R. v A* (the rape shield case) displayed scant deference to the will of Parliament, expressed in recent legislation, because of their view of what fairness requires in criminal trials. Was this an example of too little deference? Are more recent decisions examples of courts deferring too much?

The second of Laws L.J.'s stated principles is also non-contentious, but again, with respect, it rather begs the question. Some Convention rights are expressed in apparently unqualified terms, but even the right to life, the forbidding of torture and inhuman and degrading punishment or treatment, and the right to a fair trial, involve questions of proportionality and judgment. The principle of proportionality and the search for a fair balance are inherent in the Convention as a whole. It is doubtful whether the judicial task will be significantly different where choices have to be made in concrete cases according to whether the Convention right in question is stated in absolute or qualified terms. What is perhaps more significant is how the British courts will have regard to Strasbourg case law. Will they treat the Strasbourg case law as prescribing minimum but important international standards to be woven into the fabric of UK law, or will they regard the many cases in which the European Court of Human Rights accords a wide margin of appreciation to national public authorities as an invitation to give little weight to Convention principles?

At first sight, the third and fourth principles may also appear to be non-contentious, but there are key questions about the scope and extent of judicial review. Plainly, matters of defence and national security are within the special expertise and competence of the Executive to whom Parliament and the judiciary must defer. However, difficult questions remain. Consider for example, *Secretary of State for the Home Department v Rehman* [2001] 3 W.L.R. 877 (HL), a case about the threat to national security posed by contact with an Islamic terrorist organisation. Although all five Law Lords agreed that Mr Rehman's appeal should be dismissed, there were important differences of approach between Lord Hoffmann and Lord Steyn as to the scope of judicial review and the degree of deference due to the Executive, with Lord Hoffmann laying great emphasis on the accountability of Ministers to the electorate, as he did in *R. (Alconbury Developments Ltd) v Secretary*

*of State for the Environment, Transport and the Regions* [2001] 2 W.L.R. 1389 (HL), in the context of planning decisions. Lord Steyn, on the other hand, while recognising in *Rehman* that the Executive is "the best judge of the need for international co-operation to combat terrorism and counter-terrorism strategies", emphasised that "While a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society?"[2] In my respectful opinion, Lord Steyn's ideas of democracy and judicial review accord better with the principles upon which the Human Rights Act is based than does Lord Hoffmann's Benthamite Utilitarian philosophy.[3]

**1–05** These thoughts have been stimulated by this fine collection of papers. Next year's Sweet & Maxwell judicial review conference will no doubt provide some further answers.

[2] See Jowell's distinction between constitutional and institutional competence in the articles cited in n.1 above.

[3] See Further, Lord Hoffmann, "Bentham and Human Rights", (2001) 54 *Current Legal Problems* 61.

CHAPTER 2

# LAW AND NEW PUBLIC MANAGEMENT: SHIPS THAT PASS IN THE NIGHT?

*Professor Carol Harlow*

## LAW AND ADMINISTRATION

**2–01** In western systems of government, the relationship between law and administration has been much influenced by separation of powers theory.[1] In the course of time, the subtleties of the doctrine have been largely expunged and its meaning boiled down to a two-pronged maxim: first, governmental functions should never be entrusted to a single entity on the ground that power corrupts; secondly, that democracy depends on government being subject to systematic "checks and balances". Out of this understanding has come the triadic division of functions into legislative, executive and judicial with which we are all familiar.

The residual legacy of this simplistic understanding has been unfortunate: the worlds of law and administration have become separate at both practical and academic level. "Administrative law texts aimed at law students and legal practitioners", remarked two American professors of public administration,[2] "lack a realistic grasp of what most public administrators actually do, the organizational settings in which they work, and the values that inform their actions. They focus on overhead and control functions, not on implementation and service delivery".

In terms of separation of powers theory, the function of administrative law, and consequently of the judiciary who see themselves largely as its creator, has been widely understood as being to "check and control" administration, on whose potential for the excess and abuse of all power, but especially discretionary power, lawyers understandably concentrate. Again in line with separation of powers theory, law carries out the control function at two largely distinct stages, at the first of which it delimits and circumscribes the ambit of executive power through legislation and, to a lesser extent, through common law doctrines, where these are left in place. At the second stage, courts step in as independent, autonomous, external assessors to adjudicate on the limited question of whether the powers "delegated" to them have been exceeded. Traditionally, this precludes courts from making decisions "on the merits" as to whether the activities, policies and decisions of the executive are meritorious; the tool used by English courts to evaluate administrative performance has consequently and correctly been to inquire merely whether a decision is "wholly unreasonable".[3]

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[1] E. Barendt, "Separation of Powers and Constitutional Government" [1995] P.L. 599 and *Introduction to Constitutional Law* (Clarendon Press, Oxford, 1998). See further, M.J.C. Vile, *Constitutionalism and Separation of Powers* (Clarendon Press, Oxford, 1967).

[2] See generally D. Rosembloom and R. O'Leary, *Public Administration and Law* (2nd ed., Marcel Dekker, New York,1996) (hereafter Rosenbloom & O'Leary) and the literature there cited.

[3] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 K.B. 223. See for discussion C. Harlow and R.W. Rawlings, *Law and Administration* (2nd ed., Butterworths, London, 1997) pp.79–83. For a defence of the rule, see Lord Irvine of Lairg Q.C. "Judges and Decision-makers: The Theory and Practice of *Wednesbury* Review" [1996] P.L. 59.

**2–02** Although this account of the relationship between law and administration is admittedly simplified, it is nonetheless broadly recognisable and reflected in leading texts. Thus Wade and Forsyth define administrative law almost entirely in terms of controls[4]:

> A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject .... The primary purpose of administrative law is ... to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok .... As well as power there is duty. It is also the concern of administrative law to see that public authorities can be compelled to perform their duties if they make default .... The law provides compulsory remedies for such situations, thus dealing with the negative as well as the positive side of maladministration.

Thus, as the classical framework which we have inherited sets law and public administration in permanent tension, so the two disciplines of administrative law and public administration in turn become antithetical. The conception of separate functions means also that it has not been thought necessary for lawyers to understand the goals and objectives of administrators. Indeed, classical constitutional theory may even preclude these goals from coming into existence, since the primary function of the executive is to execute or implement policies which have been embedded by the legislature in statute.

At this point English and American administrative law have taken different turnings. Dicey's celebrated theory of equality before the law is both prescriptive and descriptive. It is based on, and has tended to perpetuate in legal theory, personal and individual liability; to put this differently, Dicey's equality theory tends to *individuate* administration, which is reduced to a set of individual actors, responsible for their own actions and decisions before the "ordinary" courts of the land. In line with this thinking, for example, a police constable is said to answer to no superior in the exercise of his "independent discretion"[5] and to be solely responsible for his use of police powers, patterned prior to PACE[6] on the common law powers of citizen arrest. This picture is uneasily coupled to vicarious liability when the Crown, itself a legal fiction personified in monarchical terms as a "corporation sole", is said to be liable "to the same extent as a private person of full age and capacity"[7] There is little room in this cosy common law world for a Weberian theory of bureaucracy nor of the way in which bureaucracy has to be organised nor for any real understanding of bureaucratic values. The most sophisticated effort of English administrative law to explain bureaucracy was the so called *Carltona* doctrine,[8] which does no more than

[4] H.W.R. Wade and C. Forsyth, *Administrative Law* (8th. ed., Clarendon Press, Oxford, 2000), (hereafter Wade & Forsyth) p.37. Harlow and Rawlings describe this as a "red light" theory of administrative law because of the emphasis on external and retrospective controls: C. Harlow and R.W. Rawlings, *Law and Administration* (2nd. ed., Butterworths, London, 1986), (hereafter Harlow & Rawlings), Chap 2. See also M. Loughlin, *Public Law and Political Theory* (Clarendon Press, Oxford, 1994), p.184–90, who uses the term "conservative normativism".

[5] *Fisher v Oldham Corporation* [1930] 2 K.B. 364.

[6] Police and Criminal Evidence Act 1984. See Report of the Royal Commission on Criminal Procedure (Cmnd 8092, 1981).

[7] s.2 of the Crown Proceedings Act 1947.

[8] *Carltona Ltd v Commissioner of Works* [1943] 2 All E.R. 560. See M. Freedland, "The rule against delegation and the *Carltona* doctrine in an agency context" [1996] P.L. 19.

acknowledge the obvious truth which lies behind the classical constitutional doctrine of ministerial responsibility, that ministers delegate many of their functions, including the development of government policy, to civil servants. This may, however, reflect a shared attitude within the public service. The nineteenth-century Northcote/Trevelyan reforms were not primarily directed towards the creation of a "lean and mean" bureaucracy. True, they aimed "to abolish patronage and corruption [and] to establish honesty and efficiency and equality before the law as the basis of public service"[9] but these were values with which lawyers could feel broadly comfortable and which are, indeed, reflected in Lord Nolan's restatement of standards in public life (below). In other ways, the package was compatible with contemporary legal values, being aimed at "scrupulous administration of the law without any uncomfortable inquisition into its social disposition".[10] This is a sentiment with which Lord Greene could have felt comfortable.

In sharp contrast, in the United States, a clash of bureaucratic with legal values began to develop around the end of the nineteenth century, under the influence of managerial public administration theories. As early as 1887, Woodrow Wilson wrote[11]:

> It is the object of administrative study to discover, first, what government can properly and successfully do and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy.

In this seminal passage, we find the genesis of today's public management values of Efficiency, Economy and Effectiveness. The development may have contributed to a change whereby agencies and delegation have long been a central preoccupation of the case law and form the focal point of many American student texts.

A large part of the novelty of the work of K.C. Davis, an American lawyer sharply critical of Dicey's simple rule of law formula for control of administration, lay in his open acknowledgment of the bureaucratic character of modern administration. Administrators are not, as the English common law tends to depict them, "citizens in uniform". Typically, they do not exercise "independent discretion" but are part of a hierarchy or system. They respond to orders and are largely controlled by a network of rules, directives and memoranda, the building blocks of which are clearly visible in the reorganization of police powers which took place in England following PACE: numerous sets of regulations, Codes of Practice, countless Home Office Circulars and Notes for Guidance, still often dismissed by lawyers as "quasi-legislation",[12] underlie the governing statute. Without the underpinning of "soft law", the policy objectives of the modern state could not be achieved; as K.C. Davis observed, where independent discretion is entrusted to junior officials, it is often exercised unlawfully. From this he deduced that control must be primarily hierarchical and internal with adjudication as a last resort. To put this differently, ability to control administrative discretion lies in *prospectively* structuring discretionary power through rulemaking, rather than in *retrospective* control through adjudication.

**2–03** As described by Rosenbloom and O'Leary, a conflict has developed

[9] H.R.G. Greaves, *The Civil Service in the Changing State* (Harrap, London, 1947), p.10.
[10] *ibid.*
[11] W. Wilson, "The study of administration" republished in (1941) 56 *Political Science Quarterly* 481.
[12] G. Ganz, *Quasi-Legislation* (Sweet & Maxwell, London, 1987). The term is borrowed from R. Megarry, "Administrative Quasi-legislation" (1944) 60 L.Q.R. 125. See for further exposition, Harlow & Rawlings, Chap.7.

between American public administration and the judges, sparked off by the problem that dominant public administrative theory and practice does not readily fit inside its system of constitutional democracy. Its managerial culture embraces "values and structural arrangements that are at odds with those embedded in the Constitution".[13] By better understanding effective public administration, the authors argue, judicial review can contribute more effectively to governance. It will be better placed to negotiate a number of tensions and clashing values inherent in modern democratic systems, such as: bureaucracy versus democracy; collective versus individual liberty; efficiency versus fairness and privacy; standardisation versus individualisation and equity; neutral administrative expertise versus public participation; and cost-effectiveness versus individual dignity and autonomy.[14]

To these American authors, the legal value-system largely is *constitutional* in character, a view shared by the Canadian professor, Wade MacLaughlan. Public management, he argues,[15] is concerned "with flexibility, experimentation, responsiveness, cost-effectiveness, cost-cutting and performance. It assumes the state is too large and costly, and that centralised or rule-oriented solutions are part of the problem". In contrast, public law "concerns itself with constitutional and near-constitutional values, with hierarchical order, with due process, rules and standards, with systemic coherence, and with the manners and sustainability of institutional practices". In the United Kingdom, (although also in other common law countries where the public service tradition was until recently less managerial), it is perhaps less appropriate to define tension between lawyers and administration in terms of this particular clash of values. As the next two sections indicate, however, just such a tension is beginning to emerge. Inside administration the public/private line has been blurred by programmes of privatisation and regulation, while successive governments have committed themselves to a managerial culture in the public services. On the other hand, judicial commitment to rights and a rights culture, derived in part from common law sources, in part from international conventions, is making itself felt. This is precisely the antithetical tension which Rosembloom and O'Leary describe.

## The Advent of "New Public Management"

**2–04** It was in fact the package of public service[16] reforms introduced by the Thatcher Government which introduced "NPM" values into the public services. Although, as we shall see, there is some disagreement as to what these values really are, a common core is readily discernible. In his seminal article,[17] Hood describes NPM as a technique of "hands on professional management" rooted in institutional economics and managerialism, in which private-side standards and measures of performance are evaluated through "output controls". There is much concern with resources and the need to "do more with less", coupled with heavy reliance on competition within public services and consequently on "downsizing" or disaggregation, and "contracting out". In a slightly different presentation, Oliver and

[13] Rosenbloom and O'Leary, p.2.
[14] Rosenbloom and O'Leary, p.303.
[15] H. Wade MacLaughlan, "Public Service Law and the New Public Management", in *The Province of Administrative Law* (M. Taggart ed., Hart Publishing, Oxford, 1997) (hereafter Taggart), p.118.
[16] This term will be used hereafter in a general sense to cover all forms of public administration, including central, regional and local government as well as the administration of semi-autonomous agencies.
[17] C. Hood, "A Public Management for All Seasons" (1991) 69 *Public Administration* 3.

Drewry single out three broad themes as central to NPM reforms: government by contract, empowerment of the consumer, and "taking the politics out of public service provision".[18] In terms of accountability, they argue, there is a swing from political accountability to accountability through exposure to the market and reliance on enhanced consumer power. We have also seen a steady programme of privatisation and liberalisation, designed to end monopoly in public services. A further characteristic of NPM is reliance on techniques of audit. The well-run public service lays out its objectives, transmutes them into a series of performance indicators, quantifying them so far as possible, allows for their evaluation through "Value-for-Money" audit, and publishes the results. In this transformation lie the seeds of a major transfer of powers from the legal profession to auditors and accountants.[19] To put this differently, up until this point, law was recognised as the primary regulator inside public administration, though financial regularity, imposed by auditors and the Treasury ran it close; the NPM reforms reversed this order, with the auditor's standards and values taking precedence.

**2–05** In the introduction to his collection of essays, Taggart, observing the profound changes brought about by deregulation, commercialisation, corporatisation, public sector downsizing, privatisation and globalisation, asserted that they had fundamentally altered the political and social landscapes in countries around the world. Yet he thought that lawyers, as a group, had been rather slow to appreciate the impact of these changes on legal systems and societies.[20] In fact, this was not strictly true. Leaving aside the United States where, as already indicated, regulation by agency was a standard component of administrative law teaching, privatisation had been the subject of much detailed study by British and Commonwealth writers.[21] Regulation, originally perhaps seen mainly as a "staging post" on the journey of ex-public services into the private sector,[22] has emerged not only as a vehicle for the preservation of public service values[23] but is now threatening to swamp its progenitor; it has indeed been recently been remarked of regulation that it is "so pervasive you cannot see the invisible hand of the market."[24] In the United Kingdom, the legal profession had also experienced NPM at first hand. The legal aid system was first re-shaped with a view to "leanness and meanness"[25]; the review of civil

[18] D. Oliver and G. Drewry, *Public Service Reforms, Issues of Accountability and Public Law* (Pinter, London, 1996), p.26.

[19] M. Power, *The Audit Explosion* (Demos, London, 1994) and *The Audit Society, Rituals of Verification* (Oxford University Press, Oxford, 1997).

[20] M. Taggart, "The Province of Administrative Law Determined?", in Taggart, p.2.

[21] Notably T. Prosser, *Nationalised Industries and Public Control* (Blackwell, Oxford, 1986); C. Graham and T. Prosser, *Privatising public enterprises: constitutions, the state, and regulation in comparative perspective* (Clarendon Press, Oxford, 1991); T. Prosser, "The State, Constitutions and Implementing Economic Policy: Privatization and Regulation in the UK, France and the USA" (1995) 4 *Social & Legal Studies* 507. On the implications for public law, see C. Graham and T. Prosser (eds.), *Waiving the Rules, The Constitution under Thatcherism* (Open University Press, Milton Keynes, 1988).

[22] The Littlechild Report, *Economic Regulation of Privatised Water Authorities* (1986). And see M. Taggart, "Corporatisation, Privatisation and Public Law" (1991) 2 *Public Law Review* 77 and "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" (1993) *New Zealand Recent Law Review* 343.

[23] T. Prosser, "Regulation, Markets and Legitimacy", in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (4th ed., Clarendon Press, Oxford, 2000).

[24] R. Baldwin, C. Scott, C. Hood (eds), *A Reader on Regulation* (Oxford University Press, Oxford, 1998), p.1. Many years earlier, R. Baldwin and C. McCrudden (eds.), *Regulation and Public Law* (Weidenfeld and Nicolson, London, 1987), p.3 predicted that regulatory agencies were "here to stay".

[25] Legal Aid Act 1988.

justice conducted for the Lord Chancellor's Department[26] was redolent of NPM thinking; since then the administration of administrative and criminal justice have each been the subject of reviews placing economy, efficiency and effectiveness high on the agenda.[27]

What Taggart was really noting, however, was the generally unfavourable response of administrative lawyers to the new managerial methods of organising public services together with the *threat to their subject* which some academics were beginning to perceive. Concern centred on three closely linked issues. First, at a procedural level, just as administrative law seemed to be in the ascendancy and judges were congratulating themselves on the creation of a sophisticated system of public law for England,[28] they were faced with a serious retrenchment of the boundaries of their new kingdom. The expected problem materialised in the key case of *Datafin*.[29] The ensuing case law has been exhaustively discussed,[30] and the debate, for the time being largely moribund, can be summarised by saying that the judiciary proved able to devise a workable jurisdictional solution, though it has to be said that it has never yet been rationalised, at least to the satisfaction of academics.[31]

Secondly, the fear that contract law would push to one side a carefully constructed system of administrative law—reflected in the punning title of Harden's study of "The Contracting State"[32]—was not a purely territorial worry. The fears were deeper and more substantive, concerning on the one hand the impact of NPM on public law values and, on the other, concern over gaps in private law. Freedland and Harden[33] both focused on defects in the law of contract. Freedland's main concern was with employment law, while Harden, focusing on health services, deduced that public law contracts were "special" in character, hence incapable of being resolved by the application or evolution of common law principles. As Daintith had observed earlier,[34] the problem would be magnified in the type of case where one of the contracting parties had its disposal the the regulatory power of the sovereign legislature (powers of "imperium"). This situation emerged in *Roy*,[35] where challenge to the contract of employment between a doctor and the NHS revealed the extent to which the terms of the contract were embedded in regulation, though the case itself was decided on a jurisdictional point.

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[26] Lord Woolf, *Access to Justice, Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (London, Lord Chancellor's Department, 1995) and *Report to the Lord Chancellor on the civil justice system in England and Wales* (London, Lord Chancellor's Department, 1996).

[27] Sir Jeffery Bowman, *Review of the Crown Office List* (London, Lord Chancellor's Department, 2000). Sir Andrew Leggatt, *Tribunals for Users, One System, One Service* (HMSO, London, 2001). Sir Robin Auld *Review of the Criminal Court of England and Wales* (Lord Chancellor's Department, September, 2001).

[28] Sir Harry Woolf, "Public Law—Private Law: Why the Divide? A Personal View" [1986] P.L. 220 and *Protection of the Public—A New Challenge*, The Hamlyn Lectures (Stevens, London, 1990).

[29] *R. v Panel on Takeovers and Mergers Ex p. Datafin* [1987] 1 Q.B. 815. For comment, see P. Cane, "Self Regulation and Judicial Review" (1987) 6 *Civil Justice Quarterly* 324.

[30] *Inter alia*, by Harlow & Rawlings at 552–560; Wade and Forsyth at 654–6; C. Harlow, "Why Public Law is Private Law: An Invitation to Lord Woolf", in *The Woolf Report Reviewed* (R. Cranston and A. Zuckerman ed., Clarendon Press, Oxford, 1995).

[31] For a rational solution, see J. Black, "Constitutionalising self-regulation" (1996) 59 MLR 24, where the unsatisfactory case of *R. v Jockey Club Disciplinary Committee Ex p. Aga Khan* [1993] 1 W.L.R. 909 is analysed.

[32] I. Harden, *The Contracting State* (Open University Press, Milton Keynes, 1992).

[33] M. Freedland, "Government by contract and public law" [1994] P.L. 86.

[34] T.C. Daintith, "Regulation by Contract: The New Prerogative" [1979] *Current Legal Problems* 41. And see T. Daintith, "The Techniques of Government" in *The Changing Constitution* (J. Jowell and D. Oliver ed., 3rd ed. Clarendon Press, Oxford, 1994).

[35] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624. And see J.Jacob, "Lawyers Go to Hospital" [1991] P.L. 258.