

**ADDRESS TO THE
AUSTRALIAN AND NEW ZEALAND OMBUDSMAN ASSOCIATION**

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“Life Beyond Legality”

Sian Elias¹

It is a privilege to have been asked to speak to this association and a very great pleasure to be with you at your conference. The work you undertake as Ombudsmen has transformed our system of justice in my lifetime and in our region. It has been beneficial - and salutary – for me to take some time to reflect on why that is. It has offered me some perspectives on the function I discharge as a judge. It allows me to hope that my perspective as a judge may similarly offer you some insights into your function. I have given my paper the tentative working title of “Life Beyond Legality”. It is taken from an excellent article written a few years ago by the European Ombudsman, P Nikiforos Diamandouros, questioning whether there is a difference between legality and good administration.² I have no difficulty in seeing that there is a difference. My theme is that the concepts overlap and are interdependent and that both are necessary in a properly functioning system of justice. Legality is a condition of good administration, but no guarantee of it. If it had been, there would have been no need to set up the office of Ombudsman.

In offering some perspectives about the place of the Ombudsman in the justice system I should say immediately that I do not take the view that the different roles of the Judge and the Ombudsman turn on application of some sort of doctrine of separation of powers or even functions. Like legality and good administration, our functions overlap. In discharging our different responsibilities, at least when it is well done, we each promote legality and good administration.

Both of us occupy space that is properly regarded as “constitutional”. Even if, in New Zealand, with its unwritten constitution, expressing that notion draws rather blank looks. Our Constitution Act 1986 is not an ambitious statute. It does not purport to be constitutive. It simply recognises that the Parliament of New Zealand consists of the Sovereign in right of New Zealand and the House of Representatives. The Parliament “continues to have full power to make laws”.³ The Constitution Act separately recognises the Executive Council and the judiciary, without identification of their functions. Parliament, the executive and the judiciary are constant elements in the

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

² P. Nikiforos Diamandouros, European Ombudsman “Legality and good administration: is there a difference?” (Speech at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on Rethinking Good Administration in the European Union, Strasbourg, France, 15 October 2007).

³ Section 15(1).

constitution. They are however an incomplete description of its working parts.

With the establishment of the office of Ombudsman in 1962, an important new element in the constitutional landscape arrived. Any account of the constitution of New Zealand today would be inadequate without recognition of the transformative effect of the office. The Commonwealth Ombudsman, John McMillan has called for acknowledgement that we now have a fourth branch of government – what he calls “the oversight, review and integrity branch”.⁴ In that branch are to be found not only the Parliamentary Ombudsmen, but the industry-based Ombudsmen who provide the assurance that important private actors too are accountable and observe principles of fairness and consistency in decision-making. I do not disagree with this characterisation, but I have a question as to whether the courts themselves are not properly located within this grouping.

Before Ombudsmen, before freedom of information, the processes of executive government were largely non-participatory and secret. Who got admitted to the corridors of power was mysterious, although as one commentator put it, “being very rich, or very powerful help[ed] very much”.⁵

I want to start by looking back, before moving to take some stock of where we are, and then attempting to look ahead. I do not intend to be comprehensive. I want to touch on some themes of particular interest to me, and I think important to the justice system today. A subtext of what I say is concerned with the inevitability of change, and the need to maintain the flexibility of mind to meet it.

A little history

With this audience I do not repeat what has been so well recounted before about the development of the office of Ombudsman. In positioning the role of the Ombudsman within the justice system, however, I want to talk about the revolution in administration and in the law under which it operates which has occurred in the last 40 years.

It is easy to forget how new modern administrative law is. When I first studied it in the mid-1960s it was a new subject. The need for it had arisen because of the recent development of the modern administrative state. It was characterised by the conferral of wide discretion and dispersal of executive power, both of rule making and application. Felix Frankfurter, writing in 1926, described how modern administration had made it inevitable that the field of discretion would be greatly widened (opening the door to its

⁴ John McMillan “Ten Challenges for Administrative Justice” (2010) 61 AIAL Forum 23.

⁵ Mauro Cappelletti *The Judicial Process in Comparative Perspective* (Clarendon Press, Oxford, 1989) at 46, quoting Shirley Hufstедler “In the Name of Justice” (1979) 14 Stanford Lawyer 3 at 6.

“potential abuse, arbitrariness”).⁶ The modern administrative state caught the legal system flat-footed.

In 1961 Kenneth Culp Davis, the American public lawyer, expressed shock at the torpor of English law and the unwillingness of the courts of the period to enquire into serious injustice in administrative process.⁷ That applied equally in New Zealand. Please note the date, 1961. It was no doubt in part in response to the abdication of responsibility by the courts that far-sighted politicians and public servants in New Zealand proposed the appointment of a Parliamentary Commissioner to promote good administration and to stand between the citizen and the government apparatus. The Ombudsman in the United Kingdom was appointed in 1967. A few years before Sir David Williams, a long time advocate for openness in government and the duties to give reasoned and principled decisions, put the case for reform:⁸

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.

Sir David wrote at a time when the courts were in a period of “backsliding”.⁹ In it, as Sir William Wade recognised, they:¹⁰

[D]eclined 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.

As someone who practised in what would now be called the area of “human rights” at the beginning of the 1970s, I can say that it takes great effort to look back and remember how bad things were. “Human rights” happened overseas. The people I acted for were accorded scant dignity by both the system of administration and the justice system of the day. There was, for example, little protection of the law for those in custody. Intervention in the personal lives of citizens was intrusive and often brutally complacent: those were days before we thought to invoke international instruments respectful of family relationships or human dignity or free speech. It was before we had ratified important human rights covenants. It was a time when the courts were deeply suspicious of social or political context. It was a time of expansive police powers and largely unfettered administrative discretion.

In the United Kingdom and in New Zealand the law eventually was wrested back onto course. Sir William Wade considered that this was a response to

⁶ Felix Frankfurter “The Task of Administrative Law” (1926) 75 U Pa L Rev 614 at 618.

⁷ Kenneth Culp Davis “The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence” (1961) 61 Colum L Rev 201.

⁸ David Williams *Not in the Public Interest* (Hutchinson, London, 1965) at 216.

⁹ HWR Wade *Constitutional Fundamentals* (Stevens & Sons, London, 1980) at 62.

¹⁰ *Ibid.*

the public mood.¹¹ The perception of administrative injustice had become too strong to be ignored. It now seems astonishing to remember that it is only recently that it has been accepted that affording natural justice does not undermine discipline in prisons or schools and should be observed in statutory regulatory procedures whether or not the function of the decision-maker is properly described as “adjudicative”.

The office of Ombudsman, then, was a response to the failure of other systems of control and accountability and arose directly out of the popular dissatisfaction with administrative injustice. Official Information reform was reform prompted by the same concerns. It transformed the work of Ombudsmen as of everyone else in the justice system. With its advent, access to the information behind decision-making, and the rising emphasis on rationality shed light on the workings of government and its impact on the lives of individual citizens. It is no exaggeration to say that the effect was revolutionary.

In New Zealand, before the Ombudsman stood up for access, official information was withheld at whim unless released as a matter of grace. There was, as Sir Kenneth Keith noted in 2005, even doubt as to whether the courts could compel production of official information relevant to litigation or whether they had to accept the Minister’s ruling.¹² I remember watching a dramatic exchange between members of the Court of Appeal and the then Solicitor-General in the Aramoana Smelter case in 1981.¹³ The Court succeeded in getting the information they had sought as to the Minister’s reasons and the basis he had for them. But it was a close run thing, requiring the Solicitor-General to be questioned by the Court. The relief of the Judges when the Solicitor-General advised that the Minister acquiesced was palpable.

Access to official information has changed the culture and methods of government but it has also transformed the administration of justice in the courts. Few cases, for example, have had such impact on criminal justice as the decision of the Court of Appeal, upholding the Ombudsman’s decision that the Official Information Act required pre-trial disclosure by the police in prosecutions.¹⁴ Such cultural and procedural shifts throughout the justice system have been achieved by Ombudsmen with the mandate to promote good government. It is not at all clear to me that the courts could have forced such reform without serious political strain. A Parliamentary Commissioner did. The success was in large part because of respect for the office and because the climate of open government the office promoted was embraced by our society.

¹¹ Ibid, at 78.

¹² Kenneth Keith “Development of the role of the Ombudsman with reference to the Pacific” (paper presented to the 22nd Australian and Pacific Ombudsman Regional (APOR) Conference, Wellington, 9-11 February 2005).

¹³ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) per Cooke, Richardson and McMullin JJ.

¹⁴ *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) per Cooke P, McMullin, Somers, Casey and Bisson JJ.

The effect was transformative not only for law but also for the way our societies see themselves and for their expectations of government. To this revolution came the advent of human rights. Their standards now permeate administrative decision-making, as required in New Zealand by legislation, and as supervised by Ombudsmen as well as courts.

Administrative decision-making today comes to be assessed in a climate of openness and justification. In addition to the galvanising effect on public administration, these shifts have in turn affected all our institutions, including the courts, and infected all areas where power is exercised, in the private as well as the public sphere.

Where are we at?

The advantages that Ombudsmen have over courts were identified more than 40 years ago by the Quebec Public Protector. Courts he said, must maintain a certain “basic formalism”. They cannot decide matters which extend beyond the specific case.¹⁵

In contrast, because he has no coercive power and can only render opinions which he hopes will be shared by the authorities, and because his investigations are informal, direct and private, the Ombudsman can easily be more available, eliminate all formalities, complete files on his own, discuss solutions freely and, finally go beyond specific cases if necessary to influence administrative policy or even the regulation or legal text concerned. The Ombudsman has certainly not the powers of a court since his action is more or less comparable to that of a conscience but in a way he can go further and, in any case, he does not seek to fill the same need.

The purpose of the office of Ombudsman was to provide simple, inexpensive and direct redress for citizens when adversely affected by the conduct of administration. The reform recognised the impersonality of modern government and the increasing remoteness of legislators. It has been a very successful model. As Sir Anand Satyanand has pointed out, it has influenced the methodology used by a number of other agencies, such as the Police Complaints Authority and the Human Rights Commission.¹⁶

There has been a repositioning of older systems of control. The courts continue to determine the legality of executive action, but leave accountability for policy largely to the political processes. Although in recent years the courts have supervised more closely the scope of discretion, there

¹⁵ Louis Marceau *1973 Report (Quebec) 66* cited by Kenneth Keith “Judicial Control of the Ombudsmen?” (1982) 12 VUWLR 299 at 321.

¹⁶ Anand Satyanand “The Ombudsman Concept and Human Rights Protection” (1999) 29 VUWLR 19 at 21.

remains what Ronald Dworkin described as a “hole in the doughnut”,¹⁷ where courts will not intrude.

The Ombudsman can go into the hole in the doughnut. He or she can insist that, even there, principles behind human rights instruments such as the dignity of the individual are observed. He can prompt generosity in response.

Nor can the courts self-start. We are bound by the dispute that the parties bring before us and by the way they have shaped it. We cannot pick up something that needs fixing just because we see it. We can decide only cases properly constituted under technical rules governing causes of action and procedure. The ability of the Ombudsman to self start is critical to the ability of the office to promote good administration, eliminate systemic problems and fix injustice. In New Zealand we have benefited greatly from such reviews, particularly in the neglected area of prison conditions. Such reviews too are authoritative statements which the courts can use, as we did in the Supreme Court recently in a prison case.¹⁸

The inability of the Ombudsman to bind the executive is a source of strength, not weakness. The promotion of good government through reason may be contrasted with the restraint courts must exercise because their decisions are legally binding and must be obeyed by the executive. That power means that the courts principally police the boundaries of minimum standards. I know that Ombudsmen do not invariably adhere solely to the non-coercive model. In France, Sweden and Finland, they have disciplinary authority. In New Zealand the Ombudsmen make binding determinations about official information disclosure. With coercive power however comes risk of supervision or legality by the courts, setting up jurisdictional challenges which are distracting from the task of promoting good government. (The “Judge over your shoulder” guards the guardians too). More importantly, the moral high ground may be lost and lost too may be the good will that comes with recognition that the Ombudsman is a friend to administration, rather than an enemy. As Sir William Wade rightly saw, the Ombudsman is a friend to administration rather than an enemy:¹⁹

He is a lightning conductor for bona fide grievances and will keep the departments out of many political storms in the long run.

In addition to providing an outlet for concerns and complaints, the method of the Ombudsmen is a rare and valuable source of independent, deliberative feedback to administrators and policy makers in their roles. The ability to self-start allows systemic problems to be addressed. Any good administrator knows the value of a mechanism for clearing away grievances and helping the administrator see the bigger picture.

¹⁷ Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, United States, 1978) at 31.

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

¹⁹ HWR Wade “The British Ombudsman: A Lawyer’s View” (1972) 24 Admin L Rev 137 at 148.

Ombudsmen have been at the forefront in a shift of culture, in which rationality is emphasised and increasingly, they have been drawn into the application of human rights norms on the ground. The European Ombudsman in a speech on 15 October 2007²⁰ expressed the view that the exercise of administrative discretion must be in accordance with human rights. As a result, today there is an increasing degree of potential overlap between judicial review of the exercise of discretion and the work of an Ombudsman, making recourse to the courts for vindication of rights unnecessary in many cases.

The focus on rights and principles “are much the same whether they are applied by an Ombudsman or by the courts”. The European Ombudsman talks about “a culture of service” in which administrators act:

- openly, fairly, reasonably, carefully and consistently
- take into account and balance all interests involved
- avoid unnecessary delay
- are courteous and helpful and sensitive to individual circumstances, needs and preferences
- acknowledge mistakes and offer apologies where appropriate; and
- aim for continuous improvement in performance.

He makes the point that “an exclusive focus on legality”, such as is applied by courts, is insufficient to establish and sustain a culture of service in this sense: “there also needs to be room” for “life beyond legality”.

The work of Ombudsmen and the creation of industry-based Ombudsmen build on the insights the courts, too, are reaching, if reluctantly, that in the corporatised and pluralist modern state²¹ it is impossible to draw a confident line on the division between public and private law.²² Such strict distinction ignores the distribution of public power and the overlap and development of legal principle and remedies. Difficult problems are arising in law in areas such as the liability in tort of public bodies and in respect of consistency in application of standards of reasonableness and accountability. Although the courts have had some difficulty here, it is worth remembering that the principles applied often cross any public or private divide, as the cases relied on by Lord Reid in *Ridge v Baldwin*²³ illustrate. Many of the principles and values applied by law are common to public and private law because they are concerned with the exercise of power over others, wherever it is found.

²⁰ P. Nikiforos Diamandouros, European Ombudsman “Legality and good administration: is there a difference?” (Speech at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on Rethinking Good Administration in the European Union, Strasbourg, France, 15 October 2007).

²¹ TRS Allan “Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction” [2003] PL 429.

²² Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999).

²³ *Ridge v Baldwin* [1964] AC 40 (HL).

This insight has led to the creation of industry-based Ombudsmen. Privately constituted, they are not however consumer complaints mechanisms, which any organisation might establish to meet customer expectations as good business. Like the public Ombudsmen, they check and promote good administration, a function essential wherever power is exercised. It may be expected that the insights into good government in such organisations provided by Ombudsmen will be picked up by the courts as well as by public administrators.

The future

In looking to the future, there are a number of challenges and opportunities ahead.

First, the very success of the office presents challenges in workload which you will be better placed to assess than me. The increase in workload, certainly in New Zealand at a time of austerity in public spending, carries risks to the office. The workload shows the popular expectations of the office and its utility. Keeping faith with those expectations may not be easy. Allies are needed. The support of Parliament and better understanding by the news media may be essential

A further challenge may arise with middle age. All of us miss the mote in our own eyes. Over time, there is nothing so warping as the belief that one's own intentions are good. Vigilance is needed if we are not to suffer from the same sort of atrophy that afflicted the law in dealing with the modern administrative state. The legal system should have coped better then. As Frankfurter recognised, although issues of power presented in the administrative state in a more acute form and over a wider range of activities, it simply threw up new aspects of what were familiar conflicts in public law and in private law and between rule and discretion. Indeed, as I have mentioned, in the great case of *Ridge v Baldwin*, Lord Reid drew as much on private law control of power as public law.

There are some strategies worth bearing in mind to combat the laziness of mind that inhibits insight.

Good administration and the promotion of human dignity must be found in humble places, in low order disputes. If good government cannot be promoted here, in its impact on the lives of living people, it will not be found in more dramatic confrontations. If the habit of good government, based on reasons and openness spreads, it provides social glue at times of stress.

Secondly, those who work to promote good government either by patrolling the boundaries, as in the case of courts, or by going straight to the heart of discretion, as the Ombudsmen is empowered to do, have the tasks of not only reinforcing the processes of accountability but illuminating them as well. Attention to explanation matters very much. Expressions of doubt are important even where administrative action is upheld. Airing the issues at

stake in a process that is deliberative itself promotes good administration. So effort here is worthwhile beyond individual complaint.

Thirdly, it is important to keep in mind that the personal authority and standing of Ombudsmen is critical to their effectiveness. This is potentially a weakness. One not shared I think by the courts which are more institutionally robust. It means that close attention to the quality of work, the patient exposition of reasons for critical conclusions, impeccable fairness and integrity are essential for the Ombudsman.

Fourthly, it is necessary to be careful about the pressures that come with success, especially the pressures to take on roles that may undermine the authority of the Ombudsman. The experience in New Zealand with making the Chief Ombudsman *ex officio* a member of the Human Rights Commission was an unhappy one. Eventually the Commission's broad policy advice role led to the Ombudsman withdrawing from it as incompatible with his functions.

Similarly, there is need to question the pressure to become an advocate for individuals. Independence depends on recognition that the Ombudsman advocates for good administration. In a complaint comfortable society, care has to be taken that complaints do not become simply what the European Ombudsman called a denunciation rather than a constructive solution to a problem. As an advocate for good administration the Ombudsman has to build up strong working relations with the public sector and industry groups which appreciate that they benefit from independent scrutiny. But in some ways, not having an advocacy role reduces public visibility. I wonder whether public expectations arising out of experience with bodies with advocacy functions, such as the Health and Disabilities Commissioner, may bring pressure to bear. Ombudsmen may need to make the case for restraint in this.

A fifth challenge arises out of the success of Ombudsmen in promoting close attention to process. Process is very important but ultimately, it is not enough. Sir Stephen Sedley some years ago expressed the fear that, in the hands of judges, human rights might take on the "throwaway status of *Wednesbury* reasonableness".²⁴ The same risk I think is present in the case of all who work to check the exercise of power. If the emphasis on rationality and decisionmaking leads to a "tick the box" scrutiny of process, we may once again slip into torpor and require fresh methods to galvanise us to better efforts. Process then is not enough. One American writer once said that "in Hell there will be nothing but law, and due process will be meticulously observed".²⁵

The climate of openness and emphasis on reasons and rationality has effected a change in administration. It has created expectations of justification and rationality of outcome. Review for procedural exactness

²⁴ Stephen Sedley *Freedom, Law and Justice* (Sweet & Maxwell, London, 1999) at 21.

²⁵ Grant Gilmore *The Age of American Law* (Yale University Press, New Haven, 1977) at 110–111.

alone will not meet these expectations. People want to know the reasons why official action is taken which affects them. It is an aspect of human dignity. It facilitates their participation and prevents them being treated as objects to be “administered”. Similar underlying themes enable individuals to obtain information held about them by public agencies and employers.

Dignity is a standard which underpins the UN Declaration and the International Covenants. If people are given the dignity of reasons, they want them to justify the outcome. Decisions which are wrong on their face rankle equally whether the error is one of fact or law. Substantive unfairness rankles as much as unreasonableness. No one in real life thinks that an unreasonable decision is one so unreasonable it must have been made by someone deranged. Holding the line against merits review in the courts, always difficult, is now strained to breaking point in the new climate of openness that our societies have come to expect. The courts cannot defer to assertions of:²⁶

plenary political authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints.

Nor can Ombudsmen.

Codes of conduct can too often degenerate into minimum standards instead of prompting improvement. The European Ombudsman illustrates this by the example of a code of conduct that required letters to be answered within 15 days but made an exception for correspondence which need not be answered “if it can reasonably be regarded as improper, for example, because it is repetitive, abusive and /or pointless”. There was evidence that some administrators treated this as a rule that repetition began at the second letter. That sort of approach does not promote a service culture.

Those who provide checks on the exercise of power need to have insight into the values of their societies. They are essential insights to bring to bear on what is in the public interest, what is demonstrably justified in a free and democratic society and what is “reasonable” or “fair”. Keeping in touch with the values of our society is a challenge for those who supervise power.

Conclusion

In preparing what I might say, it was not entirely welcome to discover that in the estimation of one writer, the judge is a “repressive control type, reactive, coercive and exercising authority ‘unilaterally’”.²⁷ The Ombudsman, by contrast, exercises “reflective control” which is “co-operative, facilitative,

²⁶ 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.

²⁷ M Hertog “The policy impact of the Ombudsmen and administrative courts: a heuristic model” (1998) 2 *International Ombudsmen Year Book*, 63.

proactive and persuasive,” with empowerment of others as the goal.²⁸ I have no doubt that what matters is not the caricature but the complementarity which eggs each office on to better performance. Sir William Wade viewed the Ombudsman as an ally of an independent judiciary “who can supplement the rule of law with the rule of administrative good sense and even of generosity”.²⁹

Our system of justice is built on a belief that rule of law exists to prevent the exercise of arbitrary power. It exists to check the powerful. As I have suggested it is very difficult to resist headlong self-conviction when carried along by a project. We do not want to underestimate and do understand pressure that comes on people trying to do their conscientious best in difficult circumstances. Administrators are not acting for personal advantage but in what they conceive of as the public interest. They are the good guys. But ultimately, there is nothing so warping as the conviction you are on the right side. The most notorious recent example of that was the infamous 1 August 2002 memorandum signed by the Assistant Attorney-General of the United States, Jay S Bybee, which provided justification for the use of torture against suspected terrorists. None of us is of course immune from such pressures. We all want to belong, particularly when we are convinced of the righteousness of the ends we serve. The danger of slipping into justification of the means is acute. It is critical to recognise these pressures for what they are and to insist on shared ethical standards and principles to ensure professional detachment. It is considerations such as these that prompted Justice Learned Hand to say that the spirit of liberty is one that is “not too sure”.³⁰ Cromwell expressed the same feeling when he besought the members of the General Assembly of the Kirk of Scotland to think it possible they might be wrong.³¹ Sir Robert Megarry memorably reminded us that as all lawyers come to realise, the law reports are full of “open and shut cases, which somehow were not; of unanswerable claims which, in the event, were completely answered”.³² Your role as Ombudsmen is to doubt. That takes real integrity and strength. The role of the Ombudsman encourages fresh look and cool appraisal and we all need that.

I mentioned Kenneth Culp Davis and his gloomy verdict on the works of the English courts in administrative law in the 1960s. He considered it the work of bricklayers rather than architects.³³ His view was.³⁴

²⁸ Linda Reif *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers, Leiden, The Netherlands, 2004) at 19.

²⁹ HWR Wade “The British Ombudsman: A Lawyer’s View” (1972) 24 Admin L Rev 137 at 141.

³⁰ Billings Learned Hand “The Spirit of Liberty” (Speech at “I am an American Day” ceremony, New York City, 21 May 1944).

³¹ Letter of 3 August 1650 to the General Assembly of the Kirk of Scotland, prior to the Battle of Dunbar.

³² *John v Rees* [1970] Ch 345 (Ch) at 402.

³³ Kenneth Culp Davis “The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence” (1961) 61 Colum L Rev 201 at 220.

³⁴ *Ibid* at 213.

Most of the judge-made public law that will govern England during the century from 1961 to 2061 is yet to be created. Some of the judges who will do the creative thinking are as yet unborn. Many of the facts they will use – social and economic facts – are yet to come into existence. The social science that will guide them is largely to be developed in the future. They will deal with governmental processes that will continue to evolve, and the understanding even of the processes that remain the same is likely to change significantly.

That prediction has certainly come about even in terms of the supervision conducted by the courts for legality. What was not anticipated was the huge changes brought about outside the courts. There is life beyond legality.
