

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Journal of Global Legal
Studies

Volume 2 | Issue 1

Article 13

Fall 1994

Law and Administrative Discretion

Sir David Williams David Q. C.
University of Cambridge

Follow this and additional works at: <http://www.repository.law.indiana.edu/ijgls>

 Part of the [Administrative Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Williams, Sir David David Q. C. (1994) "Law and Administrative Discretion," *Indiana Journal of Global Legal Studies*: Vol. 2: Iss. 1, Article 13.

Available at: <http://www.repository.law.indiana.edu/ijgls/vol2/iss1/13>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Journal of Global Legal Studies* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Law and Administrative Discretion

SIR DAVID G.T. WILLIAMS, Q.C.*

Sir David Williams originally presented this paper as the inaugural lecturer for the Ralph F. Fuchs lecture series at the Indiana University School of Law on April 15, 1993. Professor Fuchs was a faculty member of the Indiana University School of Law from 1945 until his death in 1985. He was an important contributor to the drafting of the Administrative Procedure Act of 1946, president of the Indiana Civil Liberties Union, an active participant in the National Association for the Advancement of Colored People, a leader of the American Association of University Professors, and a fighter for free speech and thought in academic institutions during the McCarthy era.

*Sir David Williams begins his paper with a brief description of the history of English administrative law, noting that it has developed more slowly as compared to administrative law in the United States. He then discusses a case at the root of English administrative law—*Roberts v. Hopwood*, a judgment issued in 1925. Williams proceeds to analyze administrative law development in England, including the doctrines of judicial review, control of administrative discretion, and the complementary, evolving doctrines of administrative discretion and judicial deference, as exemplified by the authoritative dissent in *Liversidge v. Anderson*. Williams also stresses the relationship between democratic ideals and judicial deference to the decisions of local authorities. He concludes by describing the ever-evolving nature of administrative law in England today, arguing that just as in the 1920s, the underlying approach of the courts to questions in administrative law can only be interpreted by taking into account the multitude of circumstances from which such questions arise.*

I. PREFACE

It is with special pride that I inaugurate this series of annual Lectures established in honor of Ralph Follen Fuchs. Professor Fuchs was described, in the course of the Special Commemoration Meeting held in March 1985,

* Professor of Law and Vice-Chancellor, University of Cambridge.

as Indiana University's "Jewel in the Crown"; everything that I have read and heard of his remarkable career in academic and public life confirms that accolade. At the same Commemoration Meeting tribute was paid, in particular, to his belief in "freedom, justice and human dignity."

II. ADMINISTRATIVE LAW: HISTORY AND COMPARISON

Administrative law, an area of the law that gained early sophistication in France, was until well into this century largely unrecognized in the United States. Then, almost overnight, what Felix Frankfurter termed "this illegitimate exotic" overwhelmed the profession "which for years had been told of its steady advance by the lonely watchers in the tower."¹ Since the 1920s the subject has expanded relentlessly, rapidly adapting, both in principle and in case law, to new demands and pressures as demonstrated, for instance, by Dean Aman in *Administrative Law in a Global Era*.²

In the United Kingdom, the subject languished for much longer. In the past two or three decades, however, English administrative law has undergone a revolution and the academic and professional literature is now considerable. Yet, even though English administrative lawyers can now look their American counterparts in the eye, comparisons are not easy and there are important differences of approach and terminology.

Some of the difficulties in drawing comparisons are obvious enough. There is no supreme written constitution in the United Kingdom, and Dicey's doctrine of the sovereignty of Parliament is still internally regarded as preeminent. In other words, there is no judicial review of legislative action: only in the seventeenth century was there any hint of an earlier *Marbury v. Madison* and that was abandoned soon enough when Parliament triumphed over the Crown in the political struggles of the day. Even so, British membership in the European Community since 1973 has radically disturbed the insular confidence of Parliamentary sovereignty. The debates over the Treaty of Maastricht reflect the tensions behind seeking to reconcile the old and the new, national self-sufficiency and supranational assertions.

Reference to two further aspects of Parliamentary sovereignty—the absence of federal government and the absence of a Bill of Rights—brings

1. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 616 (1927).
2. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992).

home the impossibility of speaking in simple, absolute terms. The fact that we have just one primary legislative body compared to fifty-one in the United States should not disguise the fact that there are pressures of fragmentation within the United Kingdom³ and, more important, possibly irresistible federal pressures at the European level. The absence of a Bill of Rights may be a principal reason why the United Kingdom appears to be in total confusion over critical areas of free speech, public assembly, and personal freedom; but, here again and with implications for administrative law, there is some measure of external monitoring generated through the European Convention on Human Rights and the European Court of Human Rights.

To add to the difficulty of comparison in administrative law, consider the fact that there are separate legal systems throughout the United Kingdom for England and Wales, for Scotland, and for Northern Ireland. In these systems, the House of Lords through an Appellate Committee is the supreme court in civil matters. For the Channel Islands and the Isle of Man, the old supreme tribunal for the original colonies, the Judicial Committee of the Privy Council, still operates as the final court of appeal. Next we should note that the United Kingdom does not have great regulatory agencies akin to those developed in the United States since 1887, though we do have an extensive and not unsuccessful network of administrative tribunals. The civil service or public service associated with government departments is powerful and well protected through the convention of ministerial accountability, which is itself historically linked to the judicial deference or timidity familiar up to the late 1950s. Governmental secrecy, a long-term rejection of open government, is part and parcel of central administration in the United Kingdom: there is no Freedom of Information law and there is still an Official Secrets Act that imposes penalties for the unauthorized disclosure of information. Nor is it just a question of central government; local authorities have played a very prominent role in the administration of the United Kingdom over the past century and a half, compensating in part for the absence of units in a federation. Their functions have been important in such areas as public health, planning or zoning, minor criminal

3. Examples of this fragmentation include: Northern Ireland, in the context of the wider Irish problem; Scotland; to a lesser extent, Wales, in the context of devolution or even separation; and the special position of the Channel Islands and the Isle of Man.

offenses, and education; many of the important cases in English administrative law have stemmed from the exercise of such functions.

*Roberts v. Hopwood*⁴ is a leading case, dating from the 1920s and arising in the context of local government, to which I will now turn. An analysis of this case may help to demonstrate that despite the difficulties of comparing English and American law, and despite the impressive range and quality of recent literature on both sides of the Atlantic, there has been a remarkable continuity in the problems posed at the interface of law and administration. A study of the case may also bring out some of the special features of the English system of administrative law.

III. POPLARISM AND JUDICIAL REVIEW

Roberts v. Hopwood, once regarded as the high-water mark of judicial activism in administrative law, was concerned with the control of administrative discretion. In any explanation of the principal grounds of judicial intervention in English administrative law, pride of place belongs to abuse of discretion and to breach of natural justice (or of procedural due process), with which I am not concerned today. Abuse of discretion has spawned an ill-assorted array of words and phrases, often used synonymously, such as unreasonableness, irrationality, ulterior motive, improper purpose, failure to take into account relevant considerations, taking into account irrelevant considerations, bad faith, and much else.

The decision in *Roberts v. Hopwood* arose from events in the Metropolitan Borough of Poplar, then one of the poorest areas of the East End of London and dominated in its elected council by members of the Labour Party. One of the leading figures on the Council was George Lansbury, an early campaigner for women's votes, a protagonist of social justice, and later the Leader of the Labour Party nationally from 1931 to 1935. There was a distinct militancy about him and his compatriots on the Council. For instance, early in the 1920s the Council of Poplar refused to impose elements of local taxation required for other bodies such as the London County Council. After refusing to obey a writ of mandamus, the Mayor and twenty-nine of his colleagues were jailed for contempt of court. The experience of a few weeks of incarceration did little to quench their

4. *Roberts v. Hopwood* [1925] App. Cas. 578.

enthusiasm for a branch of politics that came to be known as "Poplarism," and new battles lay ahead.⁵

In the further pursuit of social justice as they saw it, the Council decided to maintain the position of a model employer. Under the authority of legislation of 1855, which empowered a metropolitan borough council to pay to its servants such wages as the council "may think fit," the Poplar Council resolved in the financial year ending 31 March 1922 to pay its own employees, male or female, a minimum wage of £4.00 a week. The resolution was adopted in the face of a sharp decline in the cost of living nationally and, consequentially, lower rates of wages. The Council might in due course have been challenged politically, but in law they initially felt secure because the legislation appeared to give them the widest discretionary power, couched in subjective terms, to pay such wages as they might think fit.

Much was to be made in resulting litigation of the implicit claim for uncontrolled discretion, a topic familiar enough on both sides of the Atlantic. For many years the English courts were willing to concede the possibility of unfettered discretion, especially with regard to the statutory authority of Government ministers and especially in the face of subjectively-worded powers. Attitudes have changed significantly in light of the leading cases since 1968.⁶ Where local authorities were concerned, however, unfettered discretion was never so readily conceded. Counsel before the courts in *Roberts v. Hopwood* argued that the discretion "conferred upon the council is not an uncontrolled discretion, but must be exercised reasonably,"⁷ and the courts agreed. In a similar vein it has been confirmed in the United States that the "requirement that discretion must be exercised reasonably is not changed by broad statutory grants."⁸ In *Barlow v. Collins*,⁹ for instance, the statutory power of the Secretary of Agriculture to make such regulations "as he may deem proper to carry out the provisions of this chapter" was held not to bar the intervention of the courts. A judge of the Supreme Court of Canada put it neatly when he said that

5. See generally NOREEN BRANSON, *POPLARISM, 1919-1925: GEORGE LANSBURY AND THE COUNCILLORS' REVOLT* (1979); B. Keith-Lucas, *Poplarism*, 1962 PUB. L. 52; G.W. Jones, *Herbert Morrison and Poplarism*, 1973 PUB. L. 11.

6. See *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] App. Cas. 997.

7. *Hopwood* [1925] App. Cas. at 580.

8. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 10.15, at 655 (3rd. ed. 1991).

9. *Barlow v. Collins*, 397 U.S. 159, 165 (1970) (quoting 16 U.S.C. § 590(d)(3)).

“there is always a perspective within which a statute is intended to operate.”¹⁰

The councillors at Poplar had, through the manner in which they exercised their discretion, invited scrutiny and challenge. The challenge, when it came, arose not through the orthodox challenges of judicial review but through the monitoring of local government expenditure by a body of departmental officials known as district auditors. Under the law then in force, district auditors were empowered to disallow any item of account “contrary to law” and to “surcharge” the disallowed sum on the person or persons responsible. This in effect gave the district auditors authority to question the exercise of discretion and to impose monetary penalties as well. Until 1922 even Poplar had been largely free of conflict with district auditors, save for a £10.00 surcharge for the cost of the band that serenaded the councillors during their time in jail for contempt.¹¹ Nevertheless, the truce was now over.

If district auditors had not been invented, Poplar’s councillors could have been challenged directly in the courts. The most obvious way would have been by seeking a writ of certiorari or of mandamus. Since 1977, English law has provided for an all-encompassing remedy called “an application for judicial review,” which allows for one or more of the remedies of certiorari, mandamus, prohibition, declarations, and injunctions. The extraordinary expansion of English administrative law in the last fifteen years is inextricably linked to this new mechanism. One distinguishing feature of English administrative law that has been inherited from the old prerogative remedies, a feature that has been rejected in most other common law jurisdictions, is the requirement of leave. In other words, an application for judicial review can be argued only after leave has been granted by the court; the issues that can be raised at the leave stage include standing, exclusionary clauses, the arguability of the case, and other problems such as justiciability and judicial restraint. The requirement has been criticized as an artificial bar to access to the courts and defended both as “a remarkably quick, cheap and easy method”¹² of securing an early judicial ruling and

10. *Roncarelli v. Duplessis* [1959] S.C.R. 121, 140 (per Rand, J.).

11. See Keith-Lucas, *supra* note 5, at 69.

12. Sir Harry Woolf, *Public Law—Private Law: Why the Divide? A Personal View*, 1986 PUB. L. 220, 230.

as an ultimate safeguard against the floodgates opening in particular areas of dispute. The first of those arguments in defense is the more convincing.

Such considerations did not initially arise at Poplar. Instead, the district auditor took objection to the level of wages paid by the Council, disallowed what he calculated as excessive expenditure, and surcharged that sum upon the councillors who had voted for the resolution. The councillors responded by seeking what we now call judicial review. They obtained a rule *nisi* for a writ of certiorari to quash the district auditor's certificate of disallowance and surcharge. At the court of first instance, the Divisional Court of the King's Bench Division (consisting of three judges headed by the Lord Chief Justice, Lord Hewart), the arguments failed and the rule was discharged.¹³ The Court of Appeal, however, by a majority reversed that decision and the rule was made absolute (certiorari was granted).¹⁴ Finally, the House of Lords unanimously overruled the Court of Appeal and restored the decision of the Divisional Court.¹⁵ In terms of the judges involved, the district auditor (named Carson Roberts) had won by nine to two, but—as we shall see—quality and quantity should not be too hastily merged.

The case against Poplar rested on the rejection of unfettered discretion (despite the breadth of the statutory language) and on the ruling that the councillors had abused their discretion. They had abused their discretion, first, by failing to take into account relevant considerations, which would have included the cost of living and the scale of wages being paid by employers in the commercial sector. Secondly, they had taken into account irrelevant considerations: Lord Sumner in the House of Lords said that a council “acts for a collateral purpose, if it fixes by standards of its own on social grounds a minimum wage for all adults,”¹⁶ and Lord Atkinson declared that the councillors had “allowed themselves to be guided . . . by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.”¹⁷ In holding that the councillors had “deliberately decided not to be guided by ordinary economic (and economical) considerations,”¹⁸ the majority judges agreed that the wages paid were, in

13. *The King v. Roberts, ex parte Scurr* [1924] 1 K.B. 514 (D.C.).

14. *The King v. Roberts, ex parte Scurr* [1924] 2 K.B. 695 (C.A.).

15. *Roberts v. Hopwood* [1925] App. Cas. 578.

16. *Id.* at 606.

17. *Id.* at 594.

18. *Id.* at 609 (per Lord Sumner).

many instances, gifts or gratuities superimposed on proper remuneration for services.

It is tempting to regard the tone of the remarks by Lords Atkinson and Sumner as dated and almost quaint. In fact, while Lord Atkinson's words about "socialistic philanthropy" were cited with approval by the Lord Chief Justice in a case of 1960,¹⁹ the words about feminism were omitted. In addition, in 1982 the rejection of excessive wages in *Roberts v. Hopwood* was approved of even though it was judicially recognized that some of their Lordships' comments might, "with the benefit of hindsight, appear unsympathetic."²⁰ The lack of sympathy was quite obvious, even at the time, and neither Lord Sumner nor another of their Lordships in *Roberts v. Hopwood*, Lord Carson, had always been sensitive to the appropriate boundaries of their functions. Judicial members of the House of Lords are also legislative members of the House of Lords, and the convention that is normally observed—as a pale gesture to the Separation of Powers—is that the possessors of that dual role should refrain from overt political matters on the floor of the House of Lords. Yet Lord Carson, soon after becoming a Law Lord, made a speech castigating the Anglo-Irish Treaty of December 1921 in such vehement terms that the Lord Chancellor—who is allowed to be a politician as well as a judge and much else besides—stated in the House that, "as a constructive effort of statecraft, it would have been immature upon the lips of a hysterical school-girl."²¹ Moreover, Lord Carson was supported by Lord Sumner, and both returned to the fray over the legislation of 1922 that led to the creation of the Irish Free State. Neither could have been accused of being amorphous dummies "unspotted by human emotions."²²

It may have been a lurking awareness of their political leanings that led some of the majority judges in *Roberts v. Hopwood* to seek an additional factor to shore up or reinforce their ruling on abuse of discretion. In a broader sense, the courts are bound to be aware of the wide judicial discretion that they exert in questioning the exercise of administrative discretion; it is possible in many decided cases to identify the additional factor that is employed to offer reassurance. A factor that emerged

19. *Taylor v. Munrow* [1960] 1 All E.R. 455, 462.

20. *Pickwell v. Camden London Borough Council* [1983] 1 All E.R. 602, 618 (per Forbes, J.).

21. 48 PARL. DEB., H.L. (5th ser.) 204 (1921).

22. *Berger v. United States*, 255 U.S. 22, 43 (1920) (McReynolds, J., dissenting).

tentatively in *Roberts v. Hopwood* was the so-called fiduciary duty owed by elected councillors to the local ratepayers or taxpayers, a doctrine that was to achieve even stronger support in later cases up to the 1980s. It is at best an ill-considered and inappropriate doctrine, as one of the minority judges in *Roberts v. Hopwood* recognized,²³ not least because of its effect in emphasizing misuse of discretion in the expenditure of money rather than recognizing that there can also be misuse of discretion through what counsel described as “cheeseparings or undue economy”²⁴ in the performance of statutory functions by a local authority. Nevertheless, for many years it provided a security blanket for courts uneasy and uncertain in the control of administrative discretion at the local level. Now that judicial intervention is much more widely accepted at all levels of administration, it is apparently no longer needed.

Other factors were doubtless present in *Roberts v. Hopwood*. A concept that was not to be openly canvassed until many years later is that of proportionality, but the elements were there in *Roberts v. Hopwood*. The councillors agreed, for instance, that the surcharge imposed upon them could “only be justified, if at all, on the grounds that the outlay is so entirely out of proportion to the necessities of the case that some part of it is illegal.”²⁵ Lord Atkinson, returning to the topic of women, said that it did “not appear to me that there is any rational proportion between the rates of wages at which the labour of these women is paid and the rates of which they would be reasonably remunerated for their services to the council.”²⁶ It may well be, as a distinguished academic commentator in England has said, that the principle of proportionality has long been available “as inherent in the principle of reasonableness”²⁷ and *Roberts v. Hopwood* may simply be evidence of that availability.

Another factor that weighed in the decision was the need for informed judgment on the part of those exercising administrative discretion. In the High Court of New Zealand in 1988, for instance, Wylie, J., wished to stress that a statutory discretion entrusted to the Minister of Transport must be exercised in an informed way. He quoted Lord Wrenbury in *Roberts v.*

23. *The King v. Roberts, ex parte Scurr* [1924] 2 K.B. 695, 726.

24. *Hopwood* [1925] App. Cas. at 583.

25. *Id.*

26. *Id.* at 600.

27. SIR WILLIAM WADE, *ADMINISTRATIVE LAW* 429 (6th ed. 1988).

Hopwood to the effect that a person in whom is vested a discretion “must, by the use of his reason, ascertain and follow the course which reason directs.”²⁸ In a similar vein, Richardson, J., said in the Court of Appeal that the duty to exercise the statutory discretion on reasonable grounds “necessarily requires that the Minister be adequately informed as to the relevant considerations and that he takes them into account.”²⁹

IV. JUDICIAL RESTRAINT

The councillors of Poplar had failed, then, on the rejection of unfettered discretion, on the finding of abuse of discretion, and through recourse to additional factors, including the alleged fiduciary duty to ratepayers, the principle of proportionality, and the need for informed judgment. Nevertheless, they enjoyed a triumph in the Court of Appeal, and it is instructive to see what judicial arguments could prevail against the scorn later shown by Lords Sumner and Atkinson. The majority in the Court of Appeal consisted of Atkin, L.J., and Scrutton, L.J., two of the outstanding twentieth-century judges in England, and neither could be accused of an inclination to be unduly deferential to administration. Indeed, Atkin, L.J., was later, at the height of the Second World War (as Lord Atkin), to deliver one of the most blistering attacks ever launched against both the central administration and his fellow judges in the House of Lords.

The case was *Liversidge v. Anderson*.³⁰ The appellant had been detained under the Defence Regulations that allowed the Home Secretary to detain someone where he had reasonable cause to believe that the person concerned was of hostile associations and that, by reasons of such associations, he or she should be detained. By a majority, the House of Lords held that the words “If the Secretary of State has reasonable cause” should mean “If the Secretary of State thinks he has reasonable cause,” and this subjective interpretation meant that the Minister’s discretion to detain was not open to question in the courts. The sole dissent was that of Lord Atkin, who invoked precedent in support of an objective interpretation of the statutory wording. He viewed with apprehension the attitude of fellow

28. *Hopwood* [1925] App. Cas. at 613.

29. *Auckland City Council v. Minister of Transport* [1990] 1 N.Z.L.R. 264, 285 (Wylie, J.), 303 (Richardson, J.).

30. *Liversidge v. Anderson* [1942] App. Cas. 206.

judges who, on a mere matter of statutory construction, showed themselves more executive-minded than the executive. Lord Atkin stated that the arguments advanced by the Attorney General, who represented the Home Secretary, might have been addressed acceptably to the Court of King's Bench in the time of Charles I (that, incidentally, led one of his fellow judges, Lord Maugham, to seek the ultimate recourse under the British Constitution—he wrote a letter of protest to *The Times*). Finally, Lord Atkin declared that he knew of only one authority that might justify the construction adopted by his colleagues: “‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean, neither more nor less.’”³¹

The other members of the House of Lords in *Liversidge v. Anderson* were doubtlessly influenced by the fact that the Defence Regulations had been made for the safety of the realm, and the safety of the realm was by no means assured on 3rd November 1941, the day the judgment was delivered. Only a few months had gone by since the German invasion of Russia; only a few weeks remained before Pearl Harbor. Many years later, Lord Diplock judicially recognized “that the majority of this House in *Liversidge v. Anderson* was expediently and at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin, was right.”³² That comment could, it seems, be turned around to say that the majority was right in the context and circumstances of the case. Whether in the United States or in the United Kingdom, it is all too easy to make retrospective corrections of legal decisions made in times of national emergency. What the majority judges in *Liversidge v. Anderson* did was to employ the national emergency to strengthen the traditional doctrine of ministerial responsibility, to leave the decision on the detention of aliens to the political rather than to the legal arena, and in consequence to exercise powerful judicial restraint in refusing to intervene. Accountability for the Home Secretary's decision, if any, would be on the floor of the House of Commons.³³

Ministerial responsibility is no longer, as it was during the Second World War and for some years afterward, an automatic formula to be

31. LEWIS CARROLL, *ALICE THROUGH THE LOOKING GLASS*.

32. *Inland Revenue Commissioners v. Rossminster Ltd.* [1980] App. Cas. 952, 1011.

33. See generally Colin Turpin, *Ministerial Responsibility: Myth or Reality?*, in *THE CHANGING CONSTITUTION* 53 (Jeffrey Jewell & Dawn Oliver eds., 2d ed. 1989).

invoked to ensure judicial restraint in challenging the central administration. Nevertheless, the courts are often divided when confronted with discretionary decisions made by Ministers on major issues of national interest. A vivid example of such divisions occurred in a decision of March 1991 in the Judicial Committee of the Privy Council. The Judicial Committee, which is the alter ego of the House of Lords, is still the final appellate court for New Zealand. This case concerned a Minister's discretion in New Zealand in the award of licenses for oil exploration.³⁴ The trial judge in the High Court of New Zealand, anxious to avoid appearing to question the merits of the Minister's actions, emphasized "that questions of policy are not for the Courts but are for the policy makers, the Minister, the Cabinet, and the Government."³⁵ His ruling in favour of the Minister was overturned by a four to one ruling of the Court of Appeal of New Zealand in which the statutory wording and statutory context were closely analyzed. The majority recognized that there are "wide areas" of ministerial discretion "where a political judgment of the national interest must prevail," but on the facts before them they were not prepared to abdicate responsibility.³⁶ A unanimous Judicial Committee of the Privy Council, however, overturned the Court of Appeal, echoing the view of the dissenting appellate judge in New Zealand, Richardson, J., who voiced concern about "the constitutional and democratic implications of judicial involvement in wider issues of public policy and public interest."³⁷ There are limits, he insisted, to the democratic acceptability of judicial review of administrative action.

The problems of judicial restraint and judicial activism are well recognized in the literature of constitutional law in the United States. In England the same problems have inevitably been highlighted in administrative law, sometimes expressed in terms of judicial restraint and at other times in terms of justiciability. At first sight, it may seem paradoxical that judicial restraint should loom largest in cases affecting the central government, for in reality the courts are not dealing with Ministers but with the often anonymous civil or public servants who are shielded by the doctrine of ministerial responsibility; the "democratic" obstacles to judicial

34. See *Petrocorp Exploration Ltd. v. Minister of Energy* [1991] 1 N.Z.L.R. 641.

35. *Petrocorp Exploration Ltd. v. Minister of Energy* [1991] 1 N.Z.L.R. 1, 15 (per Greig, J.).

36. *Petrocorp*, 1 N.Z.L.R. at 38 (per Cooke, P.).

37. *Petrocorp*, 1 N.Z.L.R. at 46 (Richardson, J., dissenting).

intervention would seem to be remote. The “democratic” element would seem to be much more relevant at the level of local government, where locally elected councillors are closer to the voting booth and the wishes of the electors. Perhaps the greater prominence accorded to judicial restraint at the level of central government stems more from judicial deference in the face of what is deemed to be greater expertise in government departments. Further, in light of a blurring of the line between parliamentary and executive power between Westminster and Whitehall, challenges to Ministers’ powers in areas of wide policy entrusted to them by parliamentary legislation might seem to be close to challenging the legislation itself. The judicial deference may have slackened of late, but one should not underrate the importance of a legacy of heavily centralized government based in London.

Local authorities, in the vanguard of many administrative developments from the mid-nineteenth century in particular and—as we have seen—compensating in part for the absence of a distribution of legislative and executive power elsewhere in the United Kingdom, were, however, early on given their own doctrine of judicial restraint based upon arguments of local democracy. At the end of the nineteenth century, the Divisional Court of the Queen’s Bench Division—sitting exceptionally as a panel of seven judges rather than the usual two or three—heard, in a criminal appeal, a challenge to a bylaw enacted by a local authority. The case was *Kruse v. Johnson*.³⁸ In the course of his judgment, the Lord Chief Justice stated that the actions of public representative bodies should be supported if possible; they should be benevolently interpreted; and credit should be given to those responsible for administering bylaws so that they will be reasonably administered. This doctrine of benevolent interpretation has been used over the years in response to challenges to all forms of local authority action, not just to the rather more formal legislative area of by-laws and their enforcement. *Kruse v. Johnson* has been cited as the guideline in a remarkable number of cases in common law jurisdictions outside as well as inside the United Kingdom.

In the House of Lords in *Roberts v. Hopwood*, some consideration was given to *Kruse v. Johnson*. Lord Buckmaster said that the discretion entrusted to Poplar Council was a wide one, and he agreed with the

38. *Kruse v. Johnson* [1898] 2 Q.B. 91.

principle “that when such a discretion is conferred upon a local authority the Court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised.”³⁹ Lord Sumner significantly conceded that the courts

often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another. This, however, is not a recognition of the absolute character of the local authority’s discretion, but of the limits within which it is practicable to question it.⁴⁰

Furthermore, Lord Sumner had no doubts about the delimitation of the powers of Poplar Council.

In the Court of Appeal, *Kruse v. Johnson* loomed larger. Scrutton, L.J., spoke, for instance, of the “wide powers” entrusted by Parliament, of “the reasonable limits of discretion in a representative body,” and of a “wide margin of error” being allowed for error of judgment.⁴¹ For his part, he would not have sanctioned the minimum wage adopted by Poplar but, for the financial year in question, he did not feel that the acceptable line had been crossed. His dissenting colleague, Bankes, L.J., saw the drawing of the line as “extremely difficult”⁴² and proceeded to find that, in the “actual existing circumstances,” it had been crossed. The difference of emphasis in judicial approach, however, is especially shown in the judgment of the second majority judge, Atkin, L.J. Given the breadth of the statutory power allowed to the councillors—to pay such salaries or wages as they “may think fit”—he immediately asked whether the Council had “unfettered discretion” or whether the council must conform to an objective standard of reasonableness. He settled for unfettered discretion, subject only to the restriction that the Council should act in good faith, a term (admittedly vague) that he saw as preventing the Council, for instance, from fixing the amount of wages “as a dole or as a bribe, or with any object other than that

39. Hopwood [1925] App. Cas. at 588.

40. *Id.* at 607.

41. *The King v. Roberts, ex parte Scurr* [1924] 2 K.B. 695, 719-21.

42. *Id.* at 709-10.

of fairly remunerating the servant."⁴³ In other words, the powers must be exercised honestly.

The view taken by Atkin, L.J., may seem at variance with that which he eloquently adopted in *Liversidge v. Anderson*. In fact, he showed remarkable consistency in his approach to subjectively-worded powers. Had the Minister's power in *Liversidge v. Anderson* been couched in subjective terms, it is clear that he would have agreed that the Home Secretary's decision was immune from judicial review. His heroic dissent in 1941 should not obscure the fact that, in an almost simplistic acceptance of unreviewable discretion based on often fortuitous statutory wording, he was a man of his times.

In his judgment in *Roberts v. Hopwood*, Atkin, L.J., fortunately went on to consider the alternative proposition, namely, that the discretion should be controlled, that there was a requirement to pay reasonable wages. Here we see evidence of his eloquence at its best. Apart from a rigorous rejection of the so-called fiduciary duty to ratepayers ("the duty of the council," he said, "is to the local community as a whole"⁴⁴), he emphasized, in his own words, that it is "essential to remember that we are dealing with powers given to public bodies consisting of representatives elected by the public on a wide franchise for comparatively short periods"⁴⁵ and, in the words of the Lord Chief Justice in *Kruse v. Johnson*, that "such representatives may be trusted to understand their own requirements better than judges."⁴⁶ In addition, he spoke of a heavy onus on those who allege unreasonableness "in cases of this kind" and he was satisfied on the facts that the wages paid were not so unreasonable as to be *ultra vires* to the council.⁴⁷

The two Lord Justices—Scrutton and Atkin—stood alone in the proceedings. Their judgment was to their judicial colleagues, just as Lord Sumner described the original resolution of Poplar Council and its wide rejection by other local authorities,⁴⁸ *vox clamantis in deserto*.

43. *Id.* at 725.

44. *Id.* at 726.

45. *Id.* at 725-26.

46. *Id.* at 727 (quoting from *Kruse v. Johnson* [1898] 2 Q.B. 91, 99).

47. *Id.* at 727-29.

48. *Hopwood* [1925] App. Cas. at 609.

V. THE AFTERMATH: POPLARISM AND BEYOND

The district auditor, vindicated by the House of Lords, continued to disallow and surcharge in subsequent financial years, but no money was paid over by the councillors. Instead they sought remission of the surcharges by application to the Minister, and the relevant Minister (Neville Chamberlain) eventually did so remit. The remission was granted reluctantly, but the Government had no stomach for a second round of imprisoning the councillors, this time for refusing to respond to the surcharges. Large commercial ratepayers of Poplar were outraged, however, and they chose John Dore, a former councillor opposed to the majority, to instigate a legal challenge through certiorari to quash the remission.⁴⁹ John Dore succeeded, on grounds of statutory construction, and the Minister was left exposed.

That decision was handed down on St. Valentine's Day 1927. Given the urgency of the political situation, the law had proceeded in a leisurely way. The rule *nisi* allowing John Dore to proceed was granted on 29 July 1926, and legal argument in court did not take place until the following January and February. More recently, in the aftermath of the reform of remedies in 1977, the speed of judicial review has often been stressed. In a major case involving rulemaking or subordinate legislation in 1984, for instance, the Master of the Rolls pointed out that leave to apply was granted on 28 November, the application was heard and dismissed on 6 and 7 December, the appeal was heard in the Court of Appeal less than a week later, and judgment was given some days before Christmas. The Master of the Rolls went on to comment that "in some other jurisdictions the timetable would be regarded with some surprise, not to say envy. I mention the matter not in any spirit of complacency, but merely in order to counterbalance the well justified complaints which are sometimes made of the law's delays."⁵⁰ Unfortunately, the success of the revolution in English administrative law has brought in its train the pressures of time on the judiciary and the legal profession, and litigants may now, in some circumstances, expect serious delays before their cases come before the courts. This is a development scarcely in tune with the demands of good

49. *The King v. Minister of Health, ex parte Dore* [1927] 1 K.B. 765.

50. *Regina v. Her Majesty's Treasury, ex parte Smedley* [1985] 1 Q.B. 657, 664-65.

administration, though Neville Chamberlain in 1926 and 1927 may have welcomed the delay.

Now faced with the adverse decision early in 1927, the Minister had at hand a device that is not easily available in the United States at federal or state level. He turned to legislation, and the result was the Audit (Local Authorities) Bill which, on the one hand, increased the sanctions against defaulting councillors in the future and, on the other hand, wiped the slate clean as to existing surcharges.⁵¹

The doctrine of Parliamentary sovereignty and the absence of constitutional inhibitions about retrospectivity mean that there is an effective, if infrequently invoked, final weapon in the hands of Government. In the mid-1960s, to take a later example, the House of Lords held that the government of the day had to pay compensation for the destruction of oil installations in Burma in 1942. The Government responded by securing the War Damage Act 1965, overriding the decision and preventing any such payments in the future.⁵² When the Government has an absolute majority in the House of Commons (as British governments usually do), legislation can be brought in with remarkable speed as well. The Official Secrets Bill 1911 went through all of its stages (including the committee stage) in the House of Commons in less than half an hour, in light of what seemed to be the imminence of war with Germany; one or two doubting Members of Parliament were even forcibly pulled back into their seats. The Minister who introduced the Bill that day devoted a paragraph to the events in his memoirs, concluding with the words that:

to the eternal honor of those members, to whom I now offer, on behalf of that and all succeeding governments, my most grateful thanks, not one man seriously opposed, and in a little more time than it has taken to write these words that formidable piece of legislation was passed.⁵³

As Poplarism gradually faded after the anticlimax of 1927, *Roberts v. Hopwood* remained a leading case. An outstanding and controversial example of its application was *Prescott v. Birmingham Corporation*⁵⁴ in the

51. See NOREEN BRANSON, *supra* note 5, ch 14; Keith-Lucas, *supra* note 5, at 74-75.

52. *Burmah Oil Co. Ltd. v. Lord Advocate* [1965] App. Cas. 75.

53. J.E.B. SEELY, *ADVENTURE* 145 (1930).

54. *Prescott v. Birmingham Corporation* [1955] 1 Ch. 210, 211.

mid-1950s. The Corporation had resolved, in operating a municipal bus service where they had statutory authority to charge such fares as they saw fit, to offer free travel to women over 65 and men over 70. A local ratepayer sought an injunction to stop the scheme, and the judge at first instance granted the injunction on the grounds that the nationwide plight of old-age pensioners was a matter for Parliament and that the Corporation had shown "an excess of misplaced philanthropic zeal."⁵⁵ The Court of Appeal agreed, and no further appeal was heard. In the Court of Appeal, Jenkins, L.J., drew parallels to ordinary business practices; hence, concessions to children were acceptable because they were made by commercial bus companies, and existing concessions to the blind and disabled might not be strictly justifiable but could be classed as "a minor act of elementary charity to which no reasonable ratepayer would be likely to object."⁵⁶ The decision once again embarrassed the Government because several local authorities already had similar schemes in operation, so the Public Service Vehicles (Travel Concessions) Act 1955 was duly enacted to legitimate existing schemes including that in Birmingham. Finally, soon after a Labour government was voted to power in 1964, the Travel Concessions Act of that year permitted schemes of free travel for specified classes of the community in all local authority areas.

In the early 1980s the Greater London Council (GLC), then one of the most powerful local authorities in the world, introduced a scheme reducing the general level of fares on bus and underground services run by the London Transport Executive. GLC had a new Labour majority and the legal challenge to the legitimacy of the scheme was bound to be highly politically charged.⁵⁷ In a matter of weeks the case for judicial review was heard by the High Court, which held for the GLC, and by the Court of Appeal and the House of Lords, both of which fiercely held against the GLC. Both *Roberts v. Hopwood* and *Prescott v. Birmingham Corporation* were widely cited, and there were dutiful gestures towards judicial restraint in considering the actions of elected bodies. Lord Wilberforce stressed that "the GLC, though a powerful body, with an electorate larger and a budget more considerable than those of many nation states, is the creation of statute and

55. *Id.* at 226.

56. *Id.* at 236.

57. See *Bromley London Borough Council v. Greater London Council* [1982] 1 All E.R. 129 (C.A. and H.L.).

only has the powers given to it by statute . . . [I]ts actions, unlike those of Parliament, are examinable by the courts”⁵⁸ In the Court of Appeal, Oliver, L.J., echoed Atkin, L.J., in stressing the burden on those who allege abuse of discretion, but he went on to say that the question “is not one of what is socially just or desirable but of what Parliament has authorized and of the propriety of the exercise of the statutory discretion entrusted to a statutory body”⁵⁹ Impropriety, Lord Oliver added, “is no less an impropriety because it is or can be said to be a politically motivated impropriety.”⁶⁰ The Greater London Council lost not only its case but also its future, and it was not long before the Government had plans under way for its abolition, which was achieved by legislation in 1985.

VI. CONCLUSION

In the course of this paper I have covered ground that would not be unfamiliar to English administrative lawyers, and my aim has been to emphasize and illustrate the tangles in which the courts can find themselves when they seek to control the exercise of discretionary power. *Roberts v. Hopwood* and the differing views expressed in the different courts seem to have anticipated, to a remarkable extent, the problems of later and more litigious years.

More generally, the variability of the principles of abuse of discretion has been stressed in countless cases. For example, in a leading New Zealand decision of the 1980s, *CREEDNZ Inc. v. Governor-General*,⁶¹ Richardson, J., in the Court of Appeal, stressed that “there is no universal role as to the principles on which the exercise of a discretion may be reviewed” and that the willingness of the courts to intervene “must be affected by the nature and subject-matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power.”

In English administrative law relating to abuse of discretion, local authorities have remained important over the years. This means in effect that the map of the case law looks very different from that familiar in the

58. *Id.* at 154.

59. *Id.* at 145.

60. *Id.* at 149.

61. [1981] 1 N.Z.L.R. 172, 197-98.

United States. Even the case (decided in 1947) most commonly cited as setting out the principles of abuse of discretion—expressed by Lord Greene in language that means all things to all men—arose from the actions of a local authority: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.⁶² This so-called *Wednesbury* case, perhaps the most cited case in English administrative law, overshadows *Roberts v. Hopwood* in the textbooks and the courts. I believe that the *Wednesbury* principles had already been anticipated by *Poplar*, which only lacked some refinements, but that *Wednesbury* captured the judicial imagination partly because it was a post-war case and partly because it lacked the passion and the fury that lay behind *Roberts v. Hopwood* sixty-five to seventy years ago. *Wednesbury* could therefore be cited more brazenly as a *Baedeker* guide to abuse of discretion, partly because the principles in *Roberts v. Hopwood* were set out in scattered dicta in several courts and lacked the compact, confident sweep of Lord Greene's words in 1947.

Both cases, *Wednesbury* and *Hopwood*, are appropriately cited or citable at all levels of challenge to administrative action, at central and local level and with regard to other governmental or quasi-governmental bodies. Also, they vividly reveal the extent of judicial discretion in the application of very broad principles, and it is significant that in English administrative law this judicial discretion is called upon at various stages of an application for judicial review: at the leave stage, when (as we have seen) the arguability of a submission can be considered; in determining whether to order interrogatories, discovery of documents, or cross-examination; in applying the *Wednesbury* principles at the substantive hearing; and, finally, in deciding what remedy to award or, even if the substantive case has been argued successfully, in deciding whether to grant a remedy at all. Judicial discretion can, in other words, create formidable obstacles in the face of an application for judicial review, and even at the last much can happen between the stirrup and the ground. The broth created by the combined ingredients of administrative discretion and judicial discretion would have delighted the witches in *Macbeth*. From the legal practitioner's viewpoint, advising possible applicants—under tight timing requirements that again are subject to judicial discretion—can be perilous, and when legal aid is not available, there are unpredictable problems of costs.

62. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223.

Moreover, legal practitioners recognize that the facts of each case are crucial, that there are often critical problems of evidence, and that administrators have to administer. In a mid-1980s case, a young woman had been refused a local authority grant to pursue higher education.⁶³ One of the sensitive features of the English education system is that of student grants which, subject to a means test, assist attendance at universities. A central issue in this case was whether the local authority, which had refused a discretionary grant, had given sufficient reasons to the court to explain its refusal. The Court of Appeal accepted that, with regard to one of thousands of similar discretionary decisions regarding student grants, a local authority could not be expected to list *seriatim* all the factors that it considered and that an applicant for a grant should not be permitted, simply because leave to apply for judicial review had been granted, to seek a detailed description of every step in the local authority's decision. On the other hand, a local authority should not be allowed to get away with a blanket or ritualistic response to the courts, and Parker, L.J., stressed that the sanctions available to a judge included that of proceeding to discovery and interrogatories or alternatively granting relief on the basis of the prima facie case submitted by the applicant. The Master of the Rolls, Lord Donaldson, pointed out that a public authority, with all the information at its command, should operate "with all the cards face upwards on the table."⁶⁴ Clearly there are powers available to the courts in the face of obstructive public authorities.

Enthusiasm to control administrative discretion should not delude the courts into thinking that such control is invariably accepted or acceptable. Public servants can fight back, as can local elected councillors, and it is worthy of note that in 1987 the civil service in Britain produced an internal pamphlet entitled *The Judge Over Your Shoulder*.⁶⁵ The document showed great puzzlement and uncertainty as to the range of judicial intervention, and implicitly it seemed to echo Felix Frankfurter's words of over sixty years ago that the "all too common depreciation of men in public service is at once shallow and cruel. It mocks when it should praise; it debilitates when it should encourage."⁶⁶ More recently an English appellate judge made a

63. *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 (Eng. C.A.)

64. [1986] 2 All E.R. at 945.

65. CABINET OFFICE, MANAGEMENT AND PERSONNEL OFFICE, *THE JUDGE OVER YOUR SHOULDER* (1987).

66. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 133 (1930).

similar comment about local authorities: the vast majority of their elected members, he said, “perform without fear or favour tasks in the public service, yet experience shows that they receive as a result more brick-bats than bouquets.”⁶⁷

Roberts v. Hopwood was a faraway case where the brick-bats flew, the courts and a local authority became embattled, and some principles, guidelines, and lessons emerged. The underlying approach of the courts, then and now, can be interpreted only by taking into account the special circumstances in which litigation arises and the special factors that are called into play. There are no hard and fast rules.

67. *R. v. Barnet and Camden Rent Tribunal, ex parte Frey Investments Ltd.* [1972] 1 All E.R. 1185, 1194 (per Edmund Davies, L.J.).