6

The Instrumental Value of Legal Accountability

*Jeff King**

A. Introduction

Any proposal to extend the domain of adjudication can reasonably be met with the following good faith question: why? What is valuable about doing that, and about legal accountability more generally? A traditional answer suggests that it is required to protect the rule of law, or prevent the abuse of powers, or protect our rights. But each of these claims is question begging, and not only because these are very ambiguous concepts. Even if we all agreed on the core content of these ideas, we would still need a deeper answer about what institutional features legal accountability possesses that makes it good for serving these ideals.

In this essay, I set out an account of the main instrumental benefits of legal accountability, and defend that account against some common objections. It is intended to provide a general answer to the question, one that is susceptible of proof or falsification in terms that it is hoped will attain some measure of general agreement. That is, it is hoped that if a reader disagrees with any stated benefit, we will agree on what evidence would count as proof or disproof of the assertion. In Section B, I explain that my approach to evaluating the question is instrumentalist. On this view, legal accountability can be seen as a means for achieving ends, and not something to be assessed primarily in terms of its intrinsic value. There is also a list of what I consider to be the essential attributes of legal accountability, and these attributes help us to understand why it is that legal accountability can claim some

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of the benefits that it does. In Section C, I set out a list of ten prima facie benefits. I argue there that legal accountability generates ten features that have instrumental value: focus, principled reasoning, constitutional authority, independence and impartiality, rule interpretation competence, procedural fairness competence, participation, expressiveness, publicity, and inter-institutional collaboration. I defend the claim that legal accountability possesses these features, and that these features produce (or can produce) valuable ends, and I defend both types of claims against some common objections. The entire structure of these claims is in prima facie terms. I accept that the final question of the value of legal accountability is to be determined in particular contexts. It is hoped that identifying a general list of benefits will assist the task of evaluating the case for legal accountability in specific jurisdictions on particular issues.

B. Instrumentalism, legal accountability, and prima facie benefits

Prior to outlining the benefits themselves, there is a need for a rather detailed methodological detour of sorts.

1. Instrumentalism, adjudication, and institutional design

I agree with the view that the function of law generally is to serve *as a means to an end.*[1] By 'law', I mean the set of formal sources and legal standards officially recognized as constituting law,[2] and the set of institutional procedures (the legal process) used authoritatively by adjudicative institutions to identify and uphold the law. Law is used as an instrument, by its authors (and sometimes interpreters) to bring about some state of affairs. Such ends can be intrinsically valuable (eg. equality, liberty, dignity, fairness etc.), or can be ends that are themselves means for obtaining other things of intrinsic value (eg. prosperity, stability, coordination, transparency, etc.). And any instrumentalist account of law's value must acknowledge that the ends secured by law may well be negative, whether by design or accident (eg. domination, exploitation, conservation of harmful customs etc.). Law is typically used to secure a broad range of ends.[3]

[1] I aim to follow the analysis in L Green, 'Law as a Means' in P Cane (ed.) *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010).

[2] See H L A Hart *The Concept of Law* (2nd edn, Oxford: Clarendon Press, 1997), ch VI. It is compatible with the role J Finnis sees for a rule of recognition to play in a system of positive laws, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), ch X, both in the 'selection of viewpoint' (ch I) and in the role for law in securing coordination for the common good (chs IX and X). It corresponds roughly to the the sources identified by legal officials as the 'pre-interpretive' material in the account of law set out in R Dworkin *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), Chs 2–7.

[3] I follow H L A Hart in believing that it is unlikely that law serves any one end in particular, even if it is well-adapted to a variety of ends: see the Postscript in *The Concept of Law,* Hart, *The Concept of Law* at 248-9. See also J Raz, 'The Functions of Law' in his *The Authority of Law* (Oxford: Oxford University Press, 1979).

We can at this point state a weak and a strong thesis about the instrumental value of law. The strong thesis is that the desirability of law is measured *exclusively* by reference to whether it produces desirable ends. On this view, there is nothing intrinsically valuable about law or legal institutions. This is a plausible view in my mind, but it is not my aim to defend it here. The weak thesis is that the evaluation of law and legal institutions is *predominantly* to be evaluated by reference to the ends they produce.[4] Such an account does not deny the possibility of a residual intrinsic dignity to the law or legal processes themselves, but it considers it to be marginal in any inquiry about the true value of law. This paper takes this weaker view. In the main, it is concerned to evaluate the value of some aspect of legal regulation by examining *what it does*. An important consequence of this view is that the value of legal accountability is ultimately contextual.

I consider what I have said above to be broadly consistent with the views of H L A Hart and John Finnis about the nature of (human made) law and legal institutions.[5]Ronald Dworkin's view of what constitutes the law on any given question is not straightforwardly compatible with this position, though his view of the role and desirability of different modes of adjudication plainly is instrumentalist in this manner.[6] Notably, to make such claims about law and legal institutions does not imply any strong view about the role of legal instrumentalism in adjudication.[7] That is, one can be an instrumentalist about evaluating the desirability of legal processes or doctrines, without suggesting that judges should adopt an instrumentalist attitude in their disposal of particular cases.[8] Indeed, as with rule and act consequentialism, the very best case against this type of potential opportunism may be an instrumentalist argument that such an approach undermines the proper ends of a well-functioning legal system. In my view, instrumentalist arguments are most appropriate for the level of institutional design.

2. The meaning of 'legal accountability'

In this essay, I aim to address the value of legal accountability, as defined in this sub-section, and not of *law* as a whole. Marc Bovens offers a 'narrow' sense of the

[4] Note that although instrumentalists speak of law securing 'ends', and that 'ends' can be defined strictly in relation to stated, purposive objectives, instrumentalists typically mean 'ends' in a broader sense to mean 'consequences.' In this sense, legal instrumentalism is in fact best understood as a type of legal consequentialism, which employs the term 'instrumental' as emphasis upon the ideas that is used by persons to achieve goals. Instrumentalists are concerned about side-effects, however. See further, A Vermeule, 'Instrumentalisms' *Harvard L Rev* (2007) 130: 2113, 2117ff.

[5] See Hart, Hart, *The Concept of Law* n 2, ch VI; Finnis, *Natural Law and Natural Rights,* n 2, chs 2, 9, and 10 (the 'selection of viewpoint' (ch I) and in the role for law in securing coordination for the common good (chs IX and X).

[6] Dworkin, n 2 above at 93 (setting out 'the point' of law as being to justify coercion). On adjudication, see R Dworkin, 'In Praise of Theory' *Arizona St L J* (1997) 29: 353, 364 (his theory is 'plainly consequentialist'); see also his *Freedom's Law: The Moral Reading of the American Institution* (Cambridge, Mass: Harvard University Press, 1996), ch 1 (arguing that constitutional judicial review *may* be one effective way to give effect to the constitutional conception of democracy he sets out).

[7] B Tamanaha *Law as a Means to an End: A Threat to the Rule of Law* (New York: Cambridge University Press, 2006), 1.

[8] Green, 'Law as a Means', n 1 above at 3–4, is critical of Tamanaha on this point.

concept of accountability, in the effort to avoid any evaluative dimension and obfuscation sometimes found in a discourse that treats accountability as synonymous with transparency, responsiveness, controllability and so on.[9] He argues that '[a]ccountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.'[10] I follow Bovens in all these respects.

Bovens claims legal accountability is the most 'unambiguous' type of accountability, and he appears to equate legal accountability with resort to courts.[11] However, legal accountability cannot only be defined by pointing to the institutions that are called courts in various countries. The institutional variation in terms of training, structure of adjudication, and tenure of judges is profound. It is more useful, therefore, to offer an account of the attributes of legal accountability. This sheds light on why legal accountability offers certain prima facie benefits. And the existence of those benefits in turn explains the instrumental importance of these particular attributes of legal accountability. Accordingly, I would argue that the following are essential attributes of legal accountability:

(i) an individual right of petition;

(ii) a functionally independent adjudicator;

(iii) adjudicators interpret and apply publically affirmed legal standards;

(iv) adjudicators give decisions that are (a) interpretations of applicable standards, which conform to reasonably demanding professional standards of rationality, consistency, and fidelity to those standards and cannons of interpretation, (b) they are responsive to the principal submissions, and (c) they are ordinarily published;

(v) there is a remedy (which may be declaratory or coercive); and

(vi) the remedy is final (subject to appeal or reversal by due process of law).

It is not my purpose in the present essay to insist upon these attributes as being essential features or a 'central case' of legal accountability in the sense employed in general jurisprudence. I am content to stipulate, for the purposes of this essay, that the benefits claimed in Part C below are for the adjudicative institutions that manifest these attributes, subject only to the additional proviso that the output of such adjudicators is treated with respect and comity by other public institutions and by the public at large.

[9] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' *13 Eur LJ* (2007) 447.

[10] Bovens, 'Analysing and Assessing', 450.

[11] Bovens, 'Analysing and Assessing', 456. He considers ombudspersons a species of administrative accountability. J Mashaw as well appears to equate legal accountability with courts. See his 'Bureaucracy, Democracy and Judicial Review: The Uneasy Coexistence of Legal, Managerial and Political Accountability' in R F Durant (ed.) *The Oxford Handbook of American Bureaucracy* (New York: Oxford University Press, 2010), ch 24. My view, which for reasons of space cannot be pursued here, is that ombudspersons and tribunals share many of the essential attributes of legal accountability outlined in this section, and can thus reasonably be viewed as substitutes for courts of law where circumstances demand.

3. Benefits, prima facie benefits, and costs

I argue in Part C that the prima facie benefits of legal accountability are useful means for achieving valuable ends. At the most general level, I believe that they may secure respect for the following intrinsically valuable ends: individual dignity; individual well-being; equal treatment; and fairness. Furthermore, some of the prima facie benefits also, in my view, secure the following instrumentally valuable ends: the rule of law; democratic accountability (self-government); transparency; and efficiency. Each of these is valuable because it secures further, intrinsically valuable ends, such as those given in the list above.

I call the list below *prima facie* benefits because whether they are real benefits in the final analysis can only be determined by offsetting their positive consequences against their costs. So, 'participation' (eg. through interventions, public interest standing etc.) may appear to be a prima facie benefit, but further study may show that wide participation rights have posed significant challenges for the political process.[12] We will only know whether a prima facie benefit is a real benefit after accounting for such costs. That exercise, furthermore, must be contextual. This therefore raises the question of whether there is any point in speaking of prima facie benefits in the first place. Why not simply defer any question of the value of legal accountability to a wholly contextual analysis that is both jurisdiction- and issue-specific? Would that not provide for a richer set of relevant variables? It certainly would, but in my view there is still a need for a general account of the prima facie benefits of legal accountability. First, it offers an index of putative general benefits, which can be subject to fruitful challenge at a general level, and not just in isolated circumstances. Much of the analysis below is concerned with those general, 'up-front' challenges to the prima facie benefits that I claim for legal accountability. If general arguments are always liable to the criticism of being non-contextual, so contextual arguments are liable to being distinguished as non-generalizable. And furthermore, a general theme emerges in my treatment there. A number of the objections to the prima facie benefits of accountability do not amount to refutations of the prima facie benefit. They amount to qualifications, ones that I believe are addressed through the deployment of interpretive doctrines or curial attitudes that manifest proper judicial restraint. (Such objections may, however, be strong reasons to avoid extending the province of legal accountability too far in particular contexts, for instance where the curative effect of the proposed solution is unrealistic).

Second, a prima facie list helps clarify the institutional component of the instrumentalist claim about law's value. In many discussions about the need for law reform, one hears about the need to respect rights, the separation of powers, the rule of law, and to provide greater accountability. Yet there is a perennial risk of obfuscation when one's case for change is entirely based on such concepts, because people disagree fundamentally on their requirements. A focus on the prima facie

[12] R B Stewart, 'The Reformation of American Administrative Law' *Harvard L Rev 166* (1975) 88: 1669; C Harlow, 'Public Law and Popular Justice' *MLR* (2002) 65: 1.

benefits listed below, which I claim are connected to desirable ends, may help better inform any such discussions by directing our attention towards a set of stipulations are that liable to proof or rebuttal in terms that will command wider approval.

C. The prima facie benefits of legal accountability

The aim of this section is to present a non-exhaustive list of the most important prima facie benefits. It is helpful analytically to think of the key claims set out below as consisting of two broad categories. First, I argue that legal accountability possesses certain *features*, which are the prima facie benefits. I outline ten of them (eg. focus, independence, principled reasoning, etc.). Second, I argue that these features can produce valuable consequences (eg. facilitating the rule of law, protecting individual dignity etc). Some critics deny either or both of these types of claims, and I will take up and reply to some of these important objections.

1. Focus

Legal accountability prompts factual focus on the narratives of particular individuals and how some policy affects them or their rights, and legal focus on a distinct set of legal issues which is isolated in strong measure from the competing political pressures for time and attention. The right of petition, the right to reasons, and the duty to interpret and apply standards, all compel this outcome. This feature of legal accountability promotes respect for individual dignity (showing respect and concern for individuals), fairness and equality (considering legitimate grievances and claims to inconsistent treatment), and the rule of law (enabling challenges to alleged illegality). In respect of focus, legal accountability compares well with administrative, political and market-based options for redress. With administration, the problem is typically inertia. Even sympathetic managers may be unable to address a case adequately.[13] With the political process, the complaint must compete with other issues that take on grander importance on a crowded agenda. It is not a reliable working supposition that issues can be considered in isolation. And it is rare, in many countries, to resort to legal accountability to the exclusion of these avenues when they are in fact available. The market, for its part, offers little to those without bargaining power, and provides little real remedy for abuses of public power. A legal process for justiciable problems ensures that the issue is addressed formally and that there can be, depending on the strength of access to justice in

[13] M Lipsky *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage, 1980); S Halliday *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004); J L Mashaw *Bureaucratic Justice* (New Haven: Yale University Press, 1985). Mashaw celebrates bureaucratic rationality over the moral treatment model employed by courts, but presents much data along the way showing that individualized justice is not the strength of large bureaucracies.

the community, an enforceable demand for an official response to the claimant's arguments.

Objections:

- *Appellate litigation is usually about policy or abstract principles, not discrete issues and compelling narratives.*

Jeremy Waldron argues that this purported feature is largely a myth: '[b]y the time [a case] has reached the high appellate level, almost all trace of the original flesh-and-blood right-holders has vanished, and argument such as it is revolves around the abstract issue of right in dispute.'[14] In some important cases this is true. Yet in many others it is false. There are many cases where factual narratives do provide important insight into the unjust impact of particular policies. These narratives are important, for instance, in cases concerning deportation when life-saving medical treatment is at risk,[15] or measures that condemn late-claiming asylum seekers to total destitution,[16] or national security measures that impose a Kafkaesque bureaucratic procedure upon those who have not been shown to have committed any wrong.[17] Indeed, it is precisely the poignancy of tragic choices in health care allocation, and the susceptibility of the judicial process to such 'flesh-and-blood' narratives, that in Calabresi and Bobbitt's view make adjudication improper for that purpose.[18] Lord Steyn famously said that in law, context is everything.[19] Even if that is an overstatement, it is a very long way from Waldron's caricature. At any rate, the benefit of focus is not only about personal narrative. It is about picking out one policy and considering its legality in the light of relevant facts and legal standards and, where human rights are concerned, comparing its substance with other options in the light of comparative experience. While this analysis is at times also carried out in Parliament and by government, many issues in adjudication are those not considered in the process of legislative drafting or administrative rule-making, or may be sidelined by dense timetables or aggressive party discipline.

- *Litigation is myopic*

Myopic focus on the issues before the adjudicator is the more problematic objection. Judges may have a poor understanding of the dynamic or knock-on effects of their decisions,[20] and courts are said to provide poor mechanisms for participation by those who are ultimately affected by decisions. One example of this is when a court adjudicates a heavily polycentric problem, meaning a problem that comprises an

[14] J Waldron, 'The Core of the Case Against Judicial Review' *Yale LJ* (2006) 115: 1379.
[15] *D v United Kingdom* (1997) 24 EHRR 423 (ECtHR); cf. *N v United Kingdom* (26565/05) [2008] ECHR 453.
[16] *R v SSHD, ex p Limbuela* [2005] UKHL 66.
[17] *A v United Kingdom* (2009) 49 EHRR 29 (ECtHR).
[18] G Calabresi and P Bobbit *Tragic Choices* (New York: W W Norton & Co. 1978).
[19] *R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [28].
[20] A Vermuele *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, Mass.: Harvard University Press, 2006); Mashaw, *Bureaucratic Justice,* n 13 above.

elaborate set of interconnected relationships where changes to one relationship affect many others throughout the network.[21] Focus is needed for obvious reasons in individualized adjudications. Yet with review of broader policy questions, the costs of focus/myopia rise exponentially. This is a real problem, but there have been a host of interpretive doctrines that compensate for it. First, there are a variety of doctrines of judicial deference and restraint that apply in public law, both general and specific.[22] In addition to a constant judicial preoccupation with deference to expertise, there is also a more or less recognized distinction between adjudicative facts and legislative (or social) facts,[23] with a presumption that adjudicators exercise more restraint and caution when determining the latter. Second, there is increased specialization, both within the judiciary and among tribunals and ombudspersons. This increased expertise fosters greater awareness of the knock-on effects of particular decisions. Third, legal accountability offers a measure of remedial flexibility that can adjust to the nature of the problem. Judges can resort to declaratory relief or procedural rights, whereas ombudspersons can frame their recommendations to enable bureaucratic flexibility. Lastly, the decisions of these bodies are subject to considerable feedback, particularly those of the courts. Lessons are learned, and the side-effects of myopia are gradually cured.

2. Principled reasoning

Adjudicators are generally required to advance interpretations of the public standards that are well-reasoned. If they fail to do so, they have failed in their professional duty. The reasoning must be principled in the sense that it presents proofs and reasons in support of a particular interpretation of the relevant sources and policy considerations, and valid arguments connecting all together in the text of the decision. It is principled in the sense of not merely an appeal to preferences (unless the community's preferences are legally relevant), or to values or considerations that lie outside the sources to which it is proper to refer.

This has five important consequences that can be beneficial. First, it entails *logical rigour*. Adjudicators must consider all relevant considerations, observe consistency in their argument, and follow professional interpretive conventions. Second, it ordinarily entails *responsiveness* to the submissions and relevant arguments, and thus treatment of counter-arguments. Third, it engenders *professional scrutiny* of the product, which reinforces the first two consequences. (This third item is particularly true of

[21] See W F Allison, 'The Procedural Reason for Judicial Restraint' *PL* (1994) 452–73. Cf J A King, 'The Pervasiveness of Polycentricity' *PL* (2008) 101.

[22] The literature here is vast. For more recent work, see A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' *LQR* (2010) 126: 222; T R S Allan argues against the need for any doctrine: 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' *LQR* (2011) 127: 96; J King *Judging Social Rights* (Cambridge: Cambridge University Press, 2012), P II; P Daly *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012).

[23] K C Davis *Administrative Law Treatise* Vol 2 (St. Paul, Minnesota: West Publishing Co. 1958), 353, at [15.03]. See Rule 201 of the Federal Rules of Evidence (US), which sets out rules relating to judicial notice of adjudicative (not legislative) facts.

the higher decisions of the law courts; less so for lower courts and tribunal decisions). The form of professional scrutiny there includes hierarchical supervision, third-party intervention, academic commentary, comparative analysis by foreign courts, and occasionally public and political scrutiny. Common law adjudicators are in that sense extremely accountable for their decisions, even if not easily removable. Fourth, the process creates a *good faith attempt at objectivity*.[24] Even if being objective is impossible, *trying* to be objective and impartial delivers real benefits and reduces the extent to which law suffers from the vices of opportunism. Legal accountability enables the party to adduce proofs and reasons and compels the adjudicator to give a principled response, in a process largely transparent and open for scrutiny. Fifth, legal accountability enjoys a distinct advantage for *evidence assessment and fact-finding*. Courts are the exemplary institution for the establishment of adjudicative facts and can even, at times, be effective in the difficult task of determining complex questions of causation and sifting through materials relating to the establishment of legislative facts.[25] This is due to the mode of principled reasoning and adjudicator-independence inherent in legal accountability institutions. It is for this reason that judges are at times chosen to conduct important public inquiries.[26]

We have good reason for valuing these consequences. There is a range of decisions a political community may want to resolve through this type of reasoning process. Some such decisions may include jurisdictional disputes between levels of government, border disputes, criminal responsibility, certain questions of rights, deportation, and at least some aspects of the treatment of minorities and marginalized groups more generally. Furthermore, I would contend that this reasoning process is an essential precondition for the rule of law. The resort by individuals to courts would be largely pointless if there were no predictability or legitimacy to the process of reasoning used in the courts.

Objections:

- *Legal standards run out quickly, and then judging is mostly the application of judicial preferences.*

The argument above is not blind to the rise and fall of the legal process school of jurisprudence in the United States,[27] which advocated 'neutral principles' and the principle of institutional settlement.[28] Neither is it ignorant of the insights from

[24] See Tamanaha *Laws as a Means to an End,* n 7 above at 234–41; K Greenawalt *Law and Objectivity* (Oxford: Oxford University Press, 1992), esp. ch 10.

[25] Davis, *Administrative Law Treatise*, n 23 above at [15.03]; see also his 'Judicial Notice' Columbia L Rev (1955) 55:945. Davis pointed out judicial limitations but also felt that the adjudication of legislative facts was inescapable and necessary in litigation.

[26] J Beatson, 'Should Judges Conduct Public Inquiries?' *LQR* (2005) 121: 221.

[27] See H M Hart Jr and A M Sacks *The Legal Process: Basic Problems in the Making and Application of Law* (prepared for publication from the 1958 Tentative Edition and containing an introductory essay by W N Eskridge Jr and P P Frickey) (Westbury, New York: Foundation Press, 1994). See also N Duxbury *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1992), ch 4 for an account of the school's rise and fall.

[28] H Wechsler, 'Toward Neutral Principles of Constitutional Law' *Harvard L Rev* (1959) 73: 1 and see also the introductory essay by Eskridge Jr. and Frickey,

legal realism and critical legal studies. The claims asserted are meant to be comparative only, and furthermore subject to the important qualifications I make below.

The objection stated above would be false, if by it one means that judicial outcomes are chiefly determined by naked preferences. It amounts to a radical and outmoded form of legal realism.[29] Judges' decisions are constrained by a range of legal standards, and their conclusions within the interstices must be plausibly linked to those standards. This is reinforced by the requirements of reason giving, publication of decisions, and professional and academic scrutiny thereof.

It is true that judges will appeal to policy and moral arguments in settling legal disputes, and of course their sense of moral judgment and preferences will affect their evaluation of such arguments. However, even these arguments, to some extent unmoored from the legal standards, are subject to some important basic constraints. First, they must be *generally acceptable* forms of public reason. This does not mean that they command consensus, but it does commonly exclude certain types of arguments, such as (in many though not all liberal democracies) direct appeals to the law of God,[30] appeals to radical theories of law and the state such as those found in Communist or fascist writings, the use of theories positing racial or gender superiority, and so on. Secondly, the moral views espoused must at the very least fit with the principles recognized by the legal system. It is not typically open to judges to apply exotic moral theories, and fit (and perhaps institutional conservatism) is largely the explanation. Third, there is a presumption that policy arguments in particular will be supported by evidence, whether of a legal or factual nature. Now, obviously all of these 'requirements' are ignored from time to time in specific cases. However, when that occurs, judges are departing from their role as a judge. They become open to the criticism that they have breached professional norms of conduct. I take this much to be inherent in the nature of the reasoning process within the framework of legal accountability that I set out in Part B above. When the breach is persistent, we can consider there to be a crisis. But the very fact that that state of affairs constitutes a crisis confirms the appropriateness of the status quo outlined here.

No doubt, the stronger objection here is that these are very weak constraints on the application of judicial preferences. For some courts, depending on their docket, the constraints of precedent, and the nature of the legal questions submitted to them, this may well be true. However, for many others, which move incrementally, take strong account of academic views, have relatively low rates of dissent, and whose decisions are more predictable, this view is not accurate. And we must not commit the fallacy of equating apex courts with the entire system of legal accountability, or indeed, with the broader system of administrative justice. Their dockets are by their very nature made up of hard cases.

[29] Tamanaha, *Law as a Means to an End*,n 7 above at 237–9, also accepts that the institutional constraints of judging are real and not marginal. Attitudinal studies present a challenge to this view and are considered briefly at notes 49–50 below and accompanying text.

[30] Of course such references have occurred and continue to do so, but often in situations in which there is a high degree of consensus that such references are acceptable as evidence of a community's positive morality.

- *Legislators and administrators are better than courts at principled reasoning, so nothing is gained by subjecting their decisions to legal reversal.*

Constitutional review will often require courts to address the same principled arguments and evidence as has the legislature. Yet much of parliamentary debate is exemplary of principled reasoning. Legislatures have certain epistemic advantages as well, given the diverse range of inputs into the legislative process. The committee system in the UK Parliament, for example, has augmented this capacity to a very impressive extent. Ideally, the process works best when government appoints experts to report on an issue, solicits viewpoints at the green and white paper stages, hears further views during drafting and later the committee stages of the legislative process. This happens frequently enough.[31] However, it is common ground that legislatures are subject to pressures that distort principled reasoning in a number of ways, chief among them being party discipline. If committee votes are subject to party discipline, then independence is in fact lacking, and decisions on voting can and often are made before even hearing the evidence meant to inform the decision. Another pressure is time and priorities. Of course legislatures have more time than the courts do, but any bill comprises a massive range of matters, and parties must prioritize in ways that can marginalize even the rights-issues they sympathize with. Above all are the problems of inadequate representation of marginalized groups, and of a legislative process that fails to see the consequences of a certain enactment. All these failings and more are diagnosed and analysed by Rosalind Dixon in her insightful analysis of what she terms legislative 'blind-spots' and 'burdens of inertia.'[32]

- *Administrative agencies are better (indeed normally better) at principled reasoning, objectivity and assessment of evidence than courts.*

This statement is largely true of some very important agencies, and it ties well with the original justification for the growth of agencies in the first place. Yet the objection merely justifies an appropriate level of judicial deference, and does not eliminate the prima facie benefit contended for here. Agencies are obviously better at saying whether global warming is imminent, or whether some drug is likely to be cost-effective. This objection is especially true when the issue under determination is highly complex, and the agency applies its collective expertise to it. And such judgements are not rare either. As a managerial matter, moreover, agencies are much better than judges at evaluating costs and adjusting to the costs and benefits for most larger programmes.[33] This all justifies a strong measure of judicial restraint. However, judicial restraint is compatible with retaining general public law jurisdiction over agencies.

[31] It was what occurred, eg., in the lead up to the passage of the Tribunals, Courts, and Enforcement Act 2007.

[32] 'Creating Dialogue About Socio-economic Rights: Strong-form Versus Weak-form Judicial Review Revisited' *I.CON* (2007) 5: 391; see alsoR Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' *Osgoode Hall Law Journal* (2009) 47: 235, 257-60.

[33] Mashaw, *Bureaucratic Justice*, n 13 above; Vermeule, n 20 above.

In fact this is necessary, as, quite apart from review of routine matters of statutory interpretation and procedural fairness, bureaucracies have their familiar flaws in the area of principled reasoning as well. Administrative behaviour suffers from unstoppable inertia, lack of resources for careful deliberation or reconsideration, and programming and political imperatives that interfere with the reasoning process.[34] Bureaucrats adopt heuristics, which often lead to high error rates that the administration may be slow to acknowledge, and in some cases powerless to correct.[35] The less routine the decision, the more political influence is liable to exert control. All these considerations work against blanket judicial deference to administration, and qualify the familiar case for judicial restraint. Thus the objection is an important qualification, one that justifies a central principle in public law, as it should.

3. Constitutional authority

Courts have a form of constitutional authority owing to their historical constitutional role, their role in protecting the rule of law, and as a forum for asserting individual rights. They are thus accorded respect by political institutions and the public. Judges tend to have high intelligence, rigorous training, and follow transparent procedures. They play an extensive role in shaping and creating many rules governing private and public relations, most of them against a backdrop of moral considerations. As an organized political community, we seek not just dispute resolution from courts, but *justice* and the preservation of the rule of law. Courts are regarded as having a constitutional responsibility to enforce and to some extent fashion these values. This constitutional authority is peculiar to courts, but other formal accountability mechanisms may eventually come to share this attribute.

This authority has four potentially valuable institutional consequences. The first is *political responsiveness*, namely, that government and the public ordinarily accord court rulings respect and take them seriously.[36] The power to award enforceable remedies—ranging from fairly lax to quite intrusive—can in principle ensure political responsiveness, at least in the case at bar. The second important consequence is *judicial confidence*; namely, the willingness of judges to take a controversial stand on matters with significant policy or social ramifications. There are several cases involving issues that rest significantly on this type of political confidence,[37] constituting

[34] See Lipsky, *Street Level Bureaucracy*, n 13 above; M Derthick *Agency Under Stress* (Washington, DC: Brookings Institution Press, 1990).

[35] K C Davis *Discretionary Justice: A Preliminary Enquiry* (Chicago: University of Illinois Press, 1971); Derthick, *Agency Under Stress*, ch 2; Mashaw, *Bureaucratic Justice*, n 13 above; King,*Judging Social Rights*, n 22 above, ch 8.

[36] P Cane, 'Understanding Judicial Review and its Impact' in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004), 15, 19: 'It is certainly arguable that the status of the Administrative Court is critical to its ability to entertain complaints against the political executive of central government in the reasonable expectation that any finding against the government will be taken seriously.'

[37] *R v Inspectorate for Pollution, ex p Greenpeace (No 2)* [1994] 4 All ER 329 (QBD); *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386 (QBD) (standing);

what Peter Cane describes as 'high profile judicial review.'[38] A third valuable institutional consequence is that courts (though not tribunals or ombudspersons) have *general jurisdiction*.[39] This helps to ensure that there are few holes in the regime of accountability, and that there is a general presumption of legal accountability in play that cannot be ousted easily or in piecemeal fashion. A fourth aspect is *remedial flexibility*. Judges can choose a broad range of remedial responses to problems of illegality, and the common trend in bills of rights is to give courts the power to award 'appropriate remedies' or 'just satisfaction.' This flexibility helps them adapt legal accountability to the needs of modern administration. All these features can and often do faciliate the attainment of the broad variety of ends identified in Part B.3 above.

Objections:

- *These 'benefits' are actually detriments.*

It is a fair charge that for all the above reasons, the blade of legal accountability cuts deeper into administration and politics than it ought to.[40] It is true that this 'benefit' of legal accountability is ultimately dependent on whether the costs of judicial intervention are outweighed by the benefits. It is therefore admitted that the link between the feature of legal accountability and the desirable end is less straightforward than with some of the other benefits. The benefit here is more in the realm of a potential benefit. It is akin (to borrow a familiar example) to a blade that cuts well, but which can ultimately be used for good or bad. Its potential for good makes it a prima facie benefit. If so, a sceptic may ask, why not call it a prima facie detriment? The answer here is that in my view the evidence on the whole supports the view that the practice is generally beneficial.[41] No critic of the judicial review of administrative action to my knowledge goes so far as to say that we can do without it.

- *This argument overestimates the impact of legal accountability.*

There are a range of studies about the impact of adjudication. Some focus on the impact of constitutional rights litigation in particular, and other forms of

Anisminic v Foreign Compensation Commission [1969] 2 AC 147 (HL) (construction of ouster clauses); *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (CA) (the vires of regulations that infringe on subsistence rights); *R v North East Dev on Health Authority, ex p Coughlan* [2001] QB 213 (CA) (the enforceability of a substantive legitimate expectations); *A and others v Secretary of State for the Home Department* [2004] UKHL 56 (detention without trial); *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia)* [2006] UKHL 26 (admissibility of torture evidence); *R v Secretary of State for the Home Department, ex p Limbuela* [2005] UKHL 66 (ministerial capacity to forbid support to certain indigent asylum seekers).

[38] Cane, 'Understanding Judicial Review', n 36 above at 18.

[39] At times courts will contract this general jurisdiction, either through doctrines of justiciability, or through procedural rulings such as the rule in *O'Reilly v Mackman* [1983] 2 AC 237 (HL) that public law rights claims could only be raised through the judicial review procedure.

[40] J A G Griffith *The Politics of the Judiciary* (5th edn, London: Fontana Press, London 1997).

[41] I consider these arguments in more depth in King, *Judging Social Rights*, n 22 above, ch 3.

cause-lawyering.[42] These studies are mostly American, and deal with a sub-set of legal accountability. In that literature, the tide has turned against (and indeed never swam with) a strong version of the 'hollow hope' argument famously offered up by Gerald Rosenberg,[43] an argument that largely overlooks (or relegates to a late chapter) the iterative relationship between law and politics that cause-lawyers have navigated with significant success over the years since the early days of the civil rights movement.[44]

The UK studies focus on the impact of conventional judicial review.[45] Halliday's study of homelessness decision-making in London local authorities provides notable insight into the limitations of judicial impact. He shows that, in the authorities he studied, there were few applications for judicial review, little absorption of legal standards into local authority behaviour, and a problem of 'creative compliance' whereby authorities use their knowledge of the legal process to evade legal control.[46] This literature is an antidote to quixotic notions of what legal accountability can deliver. It qualifies but does not refute the premise of political responsiveness, however. That responsiveness is evident in too much of judicial review, including several statutory amendments after cases taken under the Human Rights Act 1998 (HRA 1998) or won in Strasbourg, in the nearly one million tribunal cases disposed of annually, and in the near total rate of compliance with the recommendations of the Parliamentary Commissioner of Administration (Ombudsman) and local government ombudsmen.[47]

4. Independence and impartiality

The independence of the judiciary from strong political pressure is often offered as a leading argument in support of judicial review,[48] and of course recourse to

[42] Surveys of the voluminous literature are provided in the chapters by McCann and Epps in K E Whittington, R D Kelemen and G A Caldeira (eds) *The Oxford Handbook of Law and Politics* (New York: Oxford University Press 2008), chs 32 and 37. See also A Sarat and A Scheingold (eds) *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2010).

[43] The classic is G Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, Chicago: University of Chicago Press, 2008). See also D Horowitz *The Courts and Social Policy* (Washington DC: Brookings Institution, 1977), and M Klarman *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004).

[44] See the essays above, n 69. I analyse the hollow hope argument and this literature in King, *Judging Social Rights,* n 22 above, ch 3.

[45] The leading current exemplar is Halliday, *Judicial Review and Compliance with Administrative Law,* n 13 above, and a survey of other current literature is available in Hertogh and Halliday, *Judicial Review and Bureaucratic Impact,* n 36 above.

[46] Halliday, *Judicial Review and Compliance with Administrative Law*, 61–5, n 13 above; see also I Loveland *Housing Homeless Persons* (Oxford: Oxford University Press, 1995), ch 11 for similar conclusions.

[47] I have answered this important objection more fully in King, *Judging Social Rights*, n 2 above, ch.3. For a snapshot of the European Convention's strong recent impact on domestic law and policy, see Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights* (Cmnd 8432, 2012). On compliance with local government ombudsmen reports, the 2011–12 Annual Report of the Local Government Ombudsman for England and Wales states that out of 3,347 remedies issued, councils 'resisted' in two cases only (see <http://www.lgo.org.uk/publications/annual-report-2011-12-perf-measuring-success/> (accessed 5 November 2012)).

[48] *Rhodes v Chapman* (1981) 452 US 359 (Brennan, J., concurring). J H Ely *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass: Harvard University Press, 1980).

independent courts is a central feature of the rule of law. Independence here means functional (not formal) immunity from control or improper influence, and impartiality means the absence of bias in favour of one side to a dispute. Functional independence is compromised by political control of adjudicators, but also by effective control or influence by religious authorities, or private groups such as militias, nationalist or ethnic groups, threats by crime syndicates and so forth. Bias is often a byproduct of lack of independence, but it can be voluntary when adjudicators abandon professional norms of interpretation and show preference for a party. This may be done due to political or personal favouritism, or simple corruption.

Functional independence and impartiality produce clearly valuable consequences, the most notable being those associated with the rule of law. It is a precondition for any effective judicial review (of the administrative law variety). It straightforwardly reinforces many of the benefits listed elsewhere in this essay, such as principled reasoning, constitutional authority and procedural fairness competence. And there is also little doubt that independent adjudication is a precondition for reliable contracting and thus efficient commercial relationships, which can produce economic efficiency and hence growth.

Objection:

- *Judges are political.*

When people make this objection, they may employ the term 'political' in a narrow or broad sense. The narrow sense is the claim that adjudicators and especially common law appellate judges decide some cases primarily with the objective of achieving their personal policy preferences. There has been an extensive amount of increasingly sophisticated empirical analysis exploring this premise over the last sixty years, mostly in relation to American appellate judges.[49] This literature delivers a strong blow to the conventional view that law constrains judges. However, its conclusions are not straightforward support for the claim that judges act to further political ends.The leading studies focus on the atypical US Supreme Court, and the phenomena highlighted in such studies appears more acute in America than abroad.[50]

Nonetheless, there is a broader sense of 'political' which is that adjudicators, even if they do not implement their political preferences directly, do so indirectly because of the inescapability of judicial discretion or judgement, especially when

[49] For a review of the different models of judicial decision-making, see L Baum, 'Motivation and Judicial Behavior: Expanding the Scope of Inquiry' in Klein and Mitchell (eds) *The Psychology of Judicial Decision-Making* (Oxford: Oxford University Press, 2010). The leading attitudinal study is J A Segal and H A Spaeth *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002). I am very grateful to Cheryl Thomas for diverting me from an unduly simplistic analysis of the attitudinal studies.

[50] These points merely echo those of others and are not meant as a rebuttal of the studies: see R Posner *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008), 25–9; Tamanaha, *Law as a Means to an End*, n 7 above at 240. For a detailed critique and new model, see M A Bailey and F Maltzman *The Constrained Court: Law, Politics and the Decisions Justices Make* (Princeton: Princeton University Press, 2011).

enforcing vague norms. Posner, for instance, is a critic of the narrow version of the argument that judges are political, but an advocate of this broader statement.[51] Almost no one doubts, however, that a judge's view of political morality will influence the decisions she renders.[52] But that fact does not destroy an adjudicator's independence. Indeed, in many cases of adjudication (perhaps all) we *want* judges to apply their moral sensibilities in their assessment of what the law requires in a given case. Can we imagine a morality-blind family or tort law? The claim about legal accountability made here is that the adjudicators are independent and impartial as between the parties, and that they make a good faith attempt at objectivity, *not* that they are wholly objective in their application of the law.

One might argue in agreement with Marxists and structuralist philosophers that the entire institution of law is so suffused with class or ideological bias that even the noblest of adjudicators cannot help but take the wrong side by exhibiting a systematic and pernicious class bias. Yet the historian E P Thompson, himself a Marxist, refuted these claims in his *Whigs and Hunters*, a study of the use of the Black Act 1723 to criminalize the encroachment by persons onto royal forests. He did so by affirming the very benefits set out here:

> It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity. [. ..] Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.[53]

Thompson showed how particular laws were tools for extending and protecting class interests, but also that a system of at least reasonably impartial legal accountability (the 'rule of law') was more or less essential for the maintenance and legitimation of that system. That system to him represented a 'cultural achievement of universal significance' and the rule of law an 'unqualified human good' .[54]

Now, to invoke Thompson in this way is not a mere appeal to leftist authority to settle the matter of the impact of class bias on the law. That would be a fallacy, and there are anyway many others who might be cited for a contrary proposition. However, as with the views of Harold Laski that I discuss in the next section, the fact that Thompson pushed back against this aspect of Marxist doctrine is telling. It was, in my view, a rare moment of clarity and honesty within an industry of

[51] Posner, *How Judges Think,* 25–9.

[52] Certainly Dworkin does not take such a view: see his *A Matter of Principle*, (Cambridge, Mass: Harvard University Press, 1985), ch 1.

[53] E P Thompson *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1976), 262–3.

[54] Thompson, *Whigs and Hunters,* 265. This conclusion was treated by Thompson's left-wing contemporaries as 'apostasy', as Daniel H Cole puts it in 'An Unqualified Human Good: E.P. Thompson and the Rule of Law' *Journal of Law and Society* (2001) 28: 177, esp. at 189ff. Marx himself, and his later and most influential work, owed much if not all to the protection of the rule of law in nineteenth century England.

obfuscation. It is important to pin down the leftist objection, however, to know whether it amounts to more than an evocative and ambivalent complaint about a defect in law. When those who advance the class bias argument actually confront the spectre of unaccountable power by considering the option as a real legislative possibility,[55] or see it in comparative historical perspective (as did Thompson, by comparison with other European states in the nineteenth century, and some obvious candidates in the twentieth), one is forced to be honest about the true significance of the claim. It states the limits of the benefit, rather than a negation of it. Those who press the point too far offer solace to tyrants.

5. Rule interpretation competence

Legal adjudicators are good at rule interpretation. The type of reasoning used in legal adjudication possesses several pertinent sub-features: it employs an elaborate set of interpretive cannons of interpretation;[56] it provides a suitably forensic process and forum for considering competing interpretations of complex texts; the respect for consistency (an observable objective of all well-functioning legal systems) produces fairness between similarly situated persons, and predictability for legislators; and the publication of decisions about interpretation, coupled with intense professional and appellate scrutiny, reinforces all the above and provides transparency and thus general accountability.

The greatest advantage of all the above is that it facilitates democratic government. The rule of law is an essential feature of a proper functioning democracy, and a body with rule interpretation competence is an essential feature of the rule of law. The rule of law is required in order for Parliament to be assured that its choices will be respected. A body with rule-interpretation competence of the sort described above protects such choices. When legislation is drafted, it is done consciously in awareness of the cannons of interpretation,[57] and in the expectation that courts will pronounce upon compliance. Any new government inherits a large range of past political commitments embodied in legislation. The rule of law guarantees that the government of the day is legally accountable for such commitments, and requires that they only be undone through the same forum in which they were enacted.

The relevance of rule-interpretation competence extends well beyond the interpretation of statutes. The legal regime governing a modern bureaucracy is also interlaced with regulations, guidance, circulars, precedent and stated policy. These standards pervade and structure the discretion of officials throughout government, and in Kenneth Culp Davis' view, their proliferation was crucial for promoting the rule of law in bureaucracy.[58] The profusion of such written standards, coupled with

[55] See the discussion in the next sub-section discussing Harold J Laksi's position on special courts for interpreting statutes.

[56] F A R Bennion (K E Goodall ed.) *Statutory Interpretation* (5th rev edn, London: Butterworths, 2007).

[57] Bennion, for example, was Parliamentary Counsel (drafting UK government legislation) from 1953–65 and 1973–5.

[58] Davis, *Discretionary Justice*, n 35 above.

legal accountability, means that government must operate in a reasonably transparent and consistent manner, treating like cases alike and providing real remedies for those adversely affected by executive conduct that diverges from the stated policy. This accountability empowers persons by conferring real rights on them (whose enforcement admittedly depends on the health of access to justice), by providing recourse to a system that formally demands a consistent interpretation and application of such standards. A further byproduct of the system is the preservation of the rationality and consistency of the entire scheme, which not only furthers respect for rule of law values (eg. predictability) but is also important for the effective delivery of policy and maintenance of clear lines of political accountability.

Objection:

- *Judges have a poor track record with statutory interpretation.*

The dangers of overzealous adherence to 'extravagant' notions of the rule of law are well known.[59] There is a voluminous critical literature, particularly in the United States, on what the correct approach to the interpretation of statutes ought to be — particularly agency statutory interpretation — replete with strong criticisms of existing and past approaches.[60] Early workers' compensation and industrial legislation in Britain was often interpreted in conservative ways that impeded statutory objectives.[61] One can agree with many of the criticisms found in such literature while also maintaining that rule interpretation competence is a prima facie benefit of legal accountability. The tenor of the criticisms here again speaks to the need for judicial restraint, not in total denial of benefit. This nuance is best exemplified in position of the political theorist and public intellectual, Harold J Laski, who sat on the Donoughmore Committee that reported in 1932 on the appropriate types of accountability that might accompany the rapidly expanding role of administrative discretion and delegated legislation in the new British welfare state. Laski set out a separate opinion in an addendum to the Report of the Committee, commenting on the issue of whether to oust the jurisdiction of the law courts from the interpretation of statutes:[62]

I wholly concur in the conclusion of the Committee that it is undesirable to transfer the interpretation of statutes which define and control the administrative process (whether

[59] Davis, *Discretionary Justice,* 28–42; C Harlow and R Rawlings, *Law and Administration* (3rd edn, Cambridge: Cambridge University Press, 2009), ch 1.

[60] For some of the American literature, see Vermuele, *Judging under Uncertainty*, n 20 above, ch 7; W N Eskridge Jr *Dynamic Statutory Interpretation* (Cambridge, Mass: Harvard University Press, 1994); F B Cross *The Theory and Practice of Statutory Interpretation* (Stanford: Stanford University Press, 2009). See also C R Sunstein, 'Law and Administration After *Chevron*' *Columbia LR* (1990) 90: 2071; C R Farina, 'Statutory Interpretation and the Balance of Power in the Administrative State' *Columbia LR* (1989) 89: 452. For an interesting contrast with the UK position, see T A O Endicott *Administrative Law* (2nd edn, Oxford: Oxford University Press, 2011) at 325–330.

[61] See the 'Note by Professor Laski on the Judicial Interpretation of Statutes', Annex V to the Report of the Committee on Ministers' Powers (Donoughmore Committee), Cmd 4060/1932 (1932) 135–6. See also F Frankfurter and N Greene *The Labour Injunction* (New York: Macmillan, 1930).

[62] 'Note by Professor Laski on the Judicial Interpretation of Statutes'.

local or central) to special Courts. No gain which might result therefrom in flexibility of construction seems to me to counterbalance the value of the independent assessment of statutory intention which is now afforded by the ordinary Courts. The historical principle of the rule of law cannot, I think, be better protected than by making ordinary judges the men who decide the legality of executive action.

Laski was quick to add, however, that 'this is not to say the methods of interpretation now used by the Courts are satisfactory.'[63] The bulk of his note illustrated the potential dangers of judicial interpretation, outlining a critique of legal formalism in the United States and Britain that few liberals would disagree with today.[64] His concluding remark on interpretive doctrines fits with the conclusions of this essay.

6. Procedural fairness competence

The courts' competence in respect of procedural fairness is reflected well in their history of fashioning and protecting the rules of the paradigm of procedural justice, namely, the judicial process. This is reflected in the two principles of natural justice (ie. that an adjudicator must be impartial and hear both sides). Furthermore, judges have devised and evolved procedures concerning the admissibility of evidence, and procedures for pleading, notice to opposing parties, transparent reasons etc. These practices reflect a cultivated institutional memory concerning basic procedural fairness for parties to a dispute. The role for courts in giving such protection has been recognized around the world in both administrative and constitutional law.[65] Procedural fairness secures a range of ends, including individual dignity for the affected person, equal treatment of similarly situated persons, and accuracy in administrative and judicial decision-making.

Objection:

- *The judicial conception of procedural fairness is too warped around the model of the trial.*

One concern is that judges may seek to impose the paradigm of the judicial process upon a complex bureaucracy that can ill-afford the procedural luxuries observed in the criminal and civil courts. Bureaucracies can groan under the weight and expense created by extensive oral hearings for items such as the termination of welfare benefits. This is the crux of Mashaw's argument in *Due Process in the Administrative State* (and his particular target was constitutional due process rights in the welfare state, a particularly difficult issue). [66] Mashaw felt that judges did not understand the dynamic impact that was created by their judgments, and they

[63] 'Note by Professor Laski on the Judicial Interpretation of Statutes', 135.

[64] 'Note by Professor Laski on the Judicial Interpretation of Statutes' at 135–6.

[65] See, generally, D Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press, Oxford, 1996); F Michelman, 'Formal and Associational Aims in Procedural Due Process' in J Penock and J Chapman (eds) *Due Process, Nomos XVIII* (New York University Press: New York, 1977).

[66] J L Mashaw *Due Process in the Administrative State* (New Haven: Yale University Press, 1985); see also Harlow and Rawlings, *Law and Administration*, n 59 above, ch 14.

were powerless to reverse changes they promoted that turned out to be dysfunctional. This can be connected more broadly with Vermeule's concern that judges cannot see the dynamic effects of their judgments, and that they should therefore employ a type of formalism that embraces strong judicial restraint.[67]

These are potent warnings, but none of the above suggests any more than a qualification to the claim that procedural fairness is one benefit of legal accountability. Mashaw, notwithstanding his criticism, ultimately saw an essential role for legal accountability: 'Individualized hearings, before independent decision-makers with demands for proof and judgment on the record are a major bulwark against state oppression.'[68] Furthermore, the evolution of procedural rights in public law has proceeded at a glacial pace in the United Kingdom, a special light-touch review applies to fair trial rights in the administrative process (both in the UK and in the relevant Strasbourg authority under the ECHR),[69] and the American phenomenon of regulatory ossification is largely confined to that country.

7. Participation

A number of rights advocates claim that legally enforceable rights will provide a much- needed avenue of participation for those marginalized and vulnerable groups which are effectively excluded from legislative or executive decision-making.[70] On a more pedestrian level, trials and hearings give people the right to complain about the decision affecting them, and the enforceable power to be heard. Even a lost hearing is more satisfying than no hearing at all. The take-up rate of this right to a hearing is in fact very low, an issue driving extensive studies in legal needs.[71] However, the influence of law is felt well beyond the courtroom, in settlement activity, often made possible by the ultimate recourse to judicial remedies.[72] Expanded rules on standing and intervention have facilitated greater means for participation and representation.[73]

[67] Vermeule, *Judging under Uncertainty*, n 20 above.

[68] Mashaw, 'Bureaucracy, Democracy and Judicial Review', n 11 above.

[69] For UK administrative law, see *R v Home Secretary, ex parte Doody* [1994] AC 531 (HL). For the interpretation of Convention rights under the HRA1998, see *Ali v Birmingham City Council* [2010] UKSC 8; and for the position of the Strasbourg Court see *Bryan v United Kingdom* (1996) 21 EHRR 342 and *Tsfayo v United Kingdom* [2006] All ER D 177; (2006) 48 EHRR 18.

[70] Ely, *Democracy and Distrust*, n 48 above; A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' *Law and Philosophy* (2003) 22: 451; S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), 77–9, 105–7. See also *I CON* (2007) 5: 183, the entire issue being an exploration of the comparative effectiveness of courts as a forum for the participation of the marginalized.

[71] H Genn *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford: Clarendon Press, 1987); M Galanter, 'Why the Haves Come out Ahead' *Law & Society Rev 95* (1974). 9: 95.

[72] V Bondy and M Sunkin, 'Settlement in Judicial Review Proceedings' *PL* (2009) 237.

[73] See JUSTICE, *To Assist the Court: Third Party Interventions in the UK* (London: JUSTICE, 2009). Cf Harlow, 'Public Law and Popular Justice', n 12 above; Stewart, 'The Reformation of American Administrative Law', 1760ff, n 12 above. Despite Stewart's criticisms of the model, see 1805–13 for his more nuanced conclusions.

Objections:

- *People are alienated by the judicial process and have little say in hearings.*

This claim is no doubt partly true, but often overstated. (Access to justice is particularly jurisdiction-specific, so I have chosen the UK as my home jurisdiction in the discussion that follows). In Hazel Genn's *Paths to Justice*, broad surveys of civil justice revealed, for instance, that courts and tribunals were considered more stressful and alienating than mediation.[74] Yet while eighty-five percent of tribunals and court users said they would definitely or probably repeat the process, only sixty-seven per cent of those using mediation said the same.[75] Most interestingly, the most common response of claimants disappointed with how they resolved their justiciable problem was that they did pursue sufficiently formal means.[76] This is not an incoherent set of results. Standing up for one's rights can be both frightening and ultimately rewarding, just as with some sports, or avant-garde art.

What about lawyers, then, who do much of the standing up? Of those court and tribunal users represented by lawyers, ninety-three per cent of represented respondents said that they would not have been better off at the hearing without representation, and ninety-two per cent thought they were represented either very well or fairly well.[77] Sixty-five per cent said they had a chance to get across everything they wanted to say at the hearing, and another ten per cent said they got most of what they wanted to say across. About ninety per cent said they understood what was going on at the hearing. While it is wise not to be romantic about civil justice in the courts, we sell legal accountability short by understating its value for most citizens.

- *Only the rich have reasonable access to courts.*

That is quite a common claim, but the true picture is far more complex. According to Genn's study, over a quarter of those respondents who incurred legal costs in Britain were legally aided.[78] Other recent studies have found that judicial review is actually higher in London boroughs that are more marginalized and poorer.[79] Indeed, the poor in Britain are actually *more likely* to consult a lawyer in a grievance against the government than are the wealthy or the middle classes.[80] This phenomenon is not only explained by the UK's relatively generous legal aid system, though that is no doubt relevant. Herbert Kritzer consolidated comparative studies on legal needs covering eight countries.[81] His findings were 'remarkably consistent' in

[74] H Genn (et al) *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) 194–5.
[75] Genn *Paths to Justice*, 218, 222.
[76] Genn *Paths to Justice,* 205.
[77] Genn *Paths to Justice,* 2__.
[78] Genn *Paths to Justice,* 166.
[79] L Platt, M Sunkin and K Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' *Journal of Public Administration Research and Theory* (2010) 20: 243.
[80] H. Kritzer, 'To Lawyer or Not to Lawyer? Is that the question?' *Journal of Empirical Legal Studies* (2008) 5: 875, fig.12 (citing the data of P Pleasence, N Balmer and A Buck,*Causes of Action: Civil Law and Social Justice* (2nd edn, London: Legal Services Research Centre, 2006)).
[81] Kritzer, 'To Lawyer or Not to Lawyer?, 875.

showing that 'income has relatively little impact on decisions to seek the assistance or advice of a lawyer.'[82]

- *Judicial review in fact disrupts a more meaningful mechanism for participation; namely, voting.*

This objection is ordinarily only true of the subset of cases involving the review of legislation for its constitutionality. The objection amounts to the following argument: the remedy given to the person who comes before the court invalidates a statute adopted in a procedure that gives more meaningful participation to everyone equally. Those whose decision is represented in the statute are not represented in the hearing at which their interests are effectively decided. In that sense, the 'participation' of one person or group in court is the negation of many others' participation at the ballot box. This argument is true in a formal sense, but its significance depends on (1) the quality of a claimant's participation in the legislative process, and (2) the adequacy of the representational role played by counsel for the state in such hearings. As to the first, John Hart Ely presented the most sustained analysis of how judicial review might compensate for the representative deficiencies of the majoritarian legislative process. As for the second, we must recall that the non-participation of the aggrieved voter in the legal process does not mean that she is not represented in the process. The state and judges alike both represent that public interest. And unlike the marginalized claimant in the political process, the average voter is *well-represented* in the legal process to the point of being presumed correct until an onerous burden is met in showing otherwise. In my view, nevertheless, this objection has enough to it to merit the adoption of a theory of constitutional judicial review that gives strong prominence to the issue of representation in judicial review.[83]

- *The administrative and legislative processes are far better at facilitating inclusion.*

People can participate in the legislative and administrative process by responsing to consultation exercises during the green and white paper phases of the legislative process, or submit observations to parliamentary committees, or lobby parliamentarians by post, in the flesh at the constituency surgery, or by e-petition. In the United States, the Administrative Procedure Act 1946 provides for a quite elaborate notice-and-comment procedure for much rule-making. Advocacy groups need no lessons on the availability and limitations of these channels. The important point is that there is no reason to think that these various avenues of participation are incompatible with using adjudicators as well. Legal accountability offers individuals the right to lodge claims about compliance with public standards (law), not merely an additional view to be added to the heap.

[82] Kritzer, 'To Lawyer or Not to Lawyer?, 900. This discussion has been adapted from King, *Judging Social Rights*, n 22 above at 79–81, where some relevant further studies are considered, including those expressing reservations about Kritzer's conclusion.

[83] I have done so in King, *Judging Social Rights,* n 22 above, ch 6. See also the work of Rosalind Dixon, 'The Supreme Court of Canada' n 32 above.

8. Expressiveness

Legal accountability can play an expressive function in law by applying key principles, policies or other values in the text of published decisions. These values become part of the fabric of public discourse, and can have an impact in subtle ways. In Genn's study, nearly three quarters of respondents agreed that '[c]ourts are an important way for ordinary people to enforce their rights.'[84] Scholars also recognize the expressive function of law in enshrining values and providing a normative framework for moral debate, particularly with respect to legislation.[85] This is doubtless a key part of adjudication, in both private and public law, which employ a range of normative concepts such as fairness, reasonableness, discrimination, good faith, equity and so on. There is a range of important things that society cannot do without judicial or quasi-judicial hearing: child custody and child protection, criminal conviction, deportation, eviction, and many others. Our basic understanding of courts is that they ought to provide not just dispute resolution, but *justice*. As Owen Fiss stated: 'The judicial role is limited by the existence of constitutional values, and the function of the judiciary is to give meaning to those values.'[86] Variants of this view are also advanced in the work of Ronald Dworkin, T R S Allan, and Robert Alexy.

Expressiveness is not merely empty rhetoric, but it does have an uncertain relationship to consequences; a point that threatens its value as an instrument. The expressive elements of published legal judgments do not tend to generate large and sudden changes to institutions. Yet they may have real and valuable effects. For one, they can be of immediate and profound psychological importance to petitioners, for whom a declaration alone can constitute just satisfaction even of a human rights violation. More importantly, expressiveness about basic values can reinforce systemic values (eg. the rule of law, good administration) that buttress a complex system of politics. For example, the principle of the rule of law in the United Kingdom was developed first by the courts of law, expounded by some doctrinal writers, and later recognised by both Parliament and government as being a cardinal constitutional principle.[87] If Dicey were believed, most of the civil liberties the English came to cherish (and ultimately export) also arose this way.[88]

[84] Genn (et al), *Paths to Justice*, n 74 above at 227.

[85] C R Sunstein 'On the Expressive Function of Law' *U of Penn L Rev* (1995–6) 144: 2021; W van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' *Law & Philosophy* (2001) 20: 31.

[86] O Fiss, 'Foreword: The Forms of Justice' *Harvard L Rev 1* (1979) 93: 1, 11.

[87] AV Dicey *Introduction to the Law of the Constitution* (8th edn, London: MacMillan, 1915), Pt II; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL); Constitutional Reform Act 2005, s 1. There is a brief mention of the principle in *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (London: Cabinet Office, 2011), 49 [6.4].

[88] Dicey, *Introduction to the Law of the Constitution*, ch.V-VII. At 124, he contrasts the law of England with foreign bills of rights by arguing that 'with us freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the Courts.'

Objection:

- *Symbolic legality is of limited value.*[89]

This objection is true, but consistent with what has been said above. Symbolism and expressiveness are of some value on an ethical level. Suppose that midway through some human rights or sexual harassment litigation, the respondent offers to settle by giving the claimant all that he or she seeks (including an apology). Would the claimant still have a good case for taking the claim forward, or should the court dismiss the case for mootness? The answer is that the claimant has a right not just to claim compensation, but justice. Legal accountability offers authoritative resolution, publicity, and an affirmation not just of wrongdoing or mistake, but of *illegality* and *injustice*. A symbolic end still counts as a real end, as it is connected with the well-being of individuals who have legitimate interests in obtaining that type of satisfaction.

I have already noted the way in which expressiveness can have important systemic consequences. Many thought *Brown v Board of Education* had this effect, though there is much evidence to the contrary.[90] Important cases can reinforce an attitude of respect for rights and the rule of law. These influences may be weak, but they are not negligible. Even so, and as Sunstein notes, expressiveness can also have important immediate consequences.[91] The common law facilitates its own growth by grand statements of expressive principle. Today's obiter dicta become tomorrow's ratio decidendi.

9. Publicity

Legal accountability can generate publicity and political salience. Litigation can become a locus for political action and can form an instrumental part of a political campaign. This is the key observation being returned from legal mobilization studies in law and politics, which document a series of iterative exchanges between legal and political avenues for change used by litigators seeking policy reform.[92] Episodes of political activity are followed by legal cases, which may lead to fruitful political outcomes even when cases are lost. Awful judgments can lead to legislative amendment.[93] Controversy surrounding judicial rulings or court activity often ignites the

[89] Rosenberg, *The Hollow Hope*, n 43 above at 424 ('[S]ymbolic victories may be mistaken for substantive ones, covering a reality that is distasteful.'); Mashaw, *Bureaucratic Justice,* n 13 above at 11 ('But what are we to do when symbolic legality wears thin?').

[90] 347 US 483 (1954). Rosenberg, *The Hollow Hope*, n 43 above; Klarman, *From Jim Crow to Civil Rights*, n 43 above.

[91] Sunstein, n 86 above, at 2045–2048. This has been confirmed in some studies: P Funk, 'Is there an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines' *American Law and Economics Rev* (2007) 9: 135.

[92] See the studies cited above, n 42. For an excellent UK/Canadian study in this vein, see L Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge: Cambridge University Press, 2011).

[93] As occurred in *R v Hillingdon LBC, ex p Puhlhofer* [1986] 1 AC 485 (HL) case (reversed in Parliament, in the Housing and Planning Act 1986, s14(2), amending the Housing Act 1985, s 58),

public consciousness, media and political process. The interplay between courts, parliamentary committees, advocacy groups, and Parliament itself can mean that court battles actually invigorate the overall political process by focusing its attention on rights-issues, and by providing narratives that give living colour to general social problems. In this respect, even lost cases can represent political victories, as the exposure of poignant stories can create sympathy and increase the costs of political interference or apathy.[94]

Objection:

- *Assuming legal episodes do create publicity and political salience, it can be as negative as it is positive.*

The legal mobilization studies have shown that advocates do use legal battles in iterative combination with political campaigning to achieve their objectives. However, there are other case studies as well, demonstrating the phenomenon of backlash. Anyone familiar with the tabloid press in Britain will know that the salience of the HRA 1998 on its pages is no triumph for legal accountability. The backlash phenomenon in parts of America has been much worse. It has occured when groups mobilize in reaction to litigation, but in the effort of reversing the effects of the court judgment—sometimes violently (as in the case of reactionary racist groups in southern America after *Brown*), sometimes by means of agitating for constitutional amendment (as in many American states on the issue of gay marriage), or by mobilizing to advance a political agenda (such as libertarianism) through the courts and legislature, or by politicizing the judicial appointments process to an undue extent.[95] This phenomenon is less familiar to Commonwealth countries, but the experience in Britain is that the influential tabloid press has succeeded in generating considerable political opposition to human rights legislation.[96]

This is admittedly an area in which there is evidence that cuts both ways. I have elsewhere argued that the backlash phenomenon is both disputed in the United States and at any rate is a phenomenon that may be peculiar to that country in particular.[97] The argument that anti-human rights publicity generated by legal accountability

and with whether private care companies ought to be regarded as public authorities under the HRA 1998 (Health and Social Care Act 2008, s 145 reversing *YL v Birmingham CC* [2007] UKHL 27).

[94] This effect is often doubted, but it was what occurred, for instance, in the famous *R v Cambridge Health Authority, ex p B* [1995] 1 FLR 1056 (QB); 2 All ER 129 (CA) case (see C Ham, 'Tragic choices in health care: lessons from the Child B case' *British Medical Journal* (1999) 319: 1258). The same occurred in the protracted dispute concerning the Chagos Islanders, as recounted in the judgment of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61. Vanhala, *Making Rights a Reality?* n 93 above, also documents a number of such cases.

[95] On civil rights and the backlash more generally, see Klarman, above note 43, ch.7. More generally, see R Post and R Siegal, 'Roe Rage: Democratic Constitutionalism and Backlash' *Harvard Civil Rights-Civil Liberties Law Review* (2007) 42: 373.

[96] As noted with great concern in Equality and Human Rights Commission, *Human Rights Inquiry: Report of the EHRC* (London: EHRC 2009).

[97] King, *Judging Social Rights*, n 22 above, ch 3.

can be politically regressive has little support in the United Kingdom. It is true that human rights cases have generated the ire of the press, but the agitation is for a return to the status quo before the adoption of the HRA 1998. That cannot be considered regress unless the HRA 1998 is considered progress. The argument is therefore self-defeating.

10. Inter-institutional collaboration

The process of legal accountability, and its reasoned interpretive output, in my view is better understood to be in a collaborative relationship with the other branches of government, than functioning as a mere 'check' or 'veto' upon them.[98] Are procedural fairness rights best understood as an impediment or a contribution to efficient administration? Does requiring agencies and ministers to act within the powers set out in their empowering statute interfere with effective government? Should the orders of the Information Tribunal to disclose information be regarded as fundamentally punitive, or ultimately as measures that can improve administration by rendering it more transparent? We *could* in each case frame the relationships as those of warden and delinquent. However, it is more accurate to understand them as akin to that between a free press and a well-functioning government. To say they are fundamentally 'opposed' is to misunderstand the relationship. The relationship is tense at times, but good government in fact *depends* on a free press, just as it depends on a healthy respect for the rule of law. When the government does its job the press helps it get the message out to the public. When it does not or is evasive, it exposes the lapse in the hopes for correction.

In my view, each of the branches essentially collaborates (at a respectful distance) with the others in the implementation of key public goals, for example respect for human rights, allocative efficiency, environmental protection, public and workplace safety, the best interests of children, and many others. Parliament scrutinizes government on the implementation of these goals, and opens it up to challenge in myriad ways. Parliamentary committees offer important guidance and criticism on a range of matters considered by both the executive and the courts. The House of Lords Constitution Committee and the Joint Committee on Human Rights, though obviously attractive to lawyers, are nonetheless exemplars in this regard. Both engage in bill scrutiny and draw upon principles expounded by courts as well as other non-legal sources of constitutional principle and policy. The executive, for its part, also engages in considerable work at promoting and giving effect to the aforementioned principles. While it takes the lead with respect to the environment, efficiency, and regulation of the workplace, it also plays a strong role in promoting respect for human rights principles. Ministers must carry out compliance research before issuing statements of compatibility under s19 of the HRA 1998. The

[98] For a discussion of the traditional theory and a more modern theory that accords better with the view presented here, see E Carolan *The New Separation of Powers* (Oxford: Oxford University Press, 2010). For judicial review as a veto, which I consider contrary to the analysis here, see R H Fallon Jr, 'The Core of an Uneasy Case for Judicial Review' *Harvard L Rev* (2008) 121: 1693.

government also creates and funds bodies that are vigilant in addressing human rights issues, such as the Equality and Human Rights Commission and Citizen's Advice. Furthermore it has issued a considerable amount of guidance to its own departments and to local authorities on the topic of human rights.[99]

This type of collaboration is a phenomenon, but it is also a prima facie benefit offered by courts because they have institutional features that can further it. In particular, general jurisdiction, an inherent law reforming power, and remedial discretion allow adjudicators, especially in public law, to complement the system of accountability by adjusting the scope of review and range of substantive remedies to shifting demand over time. For example, in the early days of the welfare state, when there was a perceived need for courts not to impede the practice of demolishing housing deemed unfit for human habitation, the House of Lords refused to extend to an aggrieved landlord a right to an oral hearing, and a right to see the report of the inspector that formed the basis for the closing order.[100] By 1964, the House of Lords decided in *Ridge v Baldwin* that there could be a duty of procedural fairness in respect of ordinary administrative decisions as well as those by judicial or quasi-judicial bodies.[101] Thirty years later, what was announced as possible in 1964 was confirmed as always applicable in *ex p Doody*, but with the caveat that the requirements of fairness were to be particularly flexible and depend entirely on the circumstances.[102] In all three cases, the courts adjusted to the needs of modernizing administration and administrative justice. The development is not always a matter of increased judicial scrutiny, either. For example, there has been an increased recent emphasis on the importance of deference to tribunal expertise,[103] which is something of a departure from the formal approach taken in cases such as *Anisminic v Foreign Compensation Commission*.[104]

When the comity between institutions is healthy, it is possible for the inherent flexibility of public law principles and remedies to be adjusted as needed to suit evolving needs for accountability in the contemporary state. The remedy of declaratory relief, in particular, offers the possibility of facilitating this type of collaboration by giving the executive latitude by way of response. A declaration of incompatibility under s 4 of the HRA 1998 offers similar latitude to Parliament in respect of primary legislation found incompatible with the European Convention. This flexibility and adaptability breeds comity and collaboration, which in turn

[99] On guidance, see Dept. of Health, *Human Rights in Health Care: A Framework for Local Action* (2nd edn, 2008); Dept. of Communities and Local Government, *Guidance for Local Authorities on Contracting for Services in Light of the Human Rights Act 1998* (2005); Borders and Immigration Agency, *Asylum Policy Instructions: European Convention on Human Rights* (2006, 're-branded' in 2008) and *Article 8 of the ECHR* (2009) and *Considering Human Rights Claims* (2009). Other codes of practice highlight the importance of compliance with the HRA 1998 among their general principles: see Dept. of Health, *Code of Practice: The Mental Health Act 1983* (2008) ch 1, esp.1.7. On the bureaucratic impact of the HRA 1998, see EHRC, *Human Rights Inquiry,* n 97 above.

[100] *Local Government Board v Arlidge* [1915] AC 120 (HL).

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

[102] *R v Home Secretary, ex p Doody* [1994] AC 531, 560 (HL).

[103] *R (Cart) v The Upper Tribunal; MR (Pakistan) v The Upper Tribunal* [2011] UKSC 28 [48]-[49].

[104] [1969] 2 AC 147 (HL).

allows legal accountability to meet the ebb and flow of demand for it. Since accountability in modern government promotes fairness, individual dignity, the rule of law, and respect for democratic accountability, its ultimate value is or at any rate can be quite positive.

Objection:

- *Legal accountability is comparatively quite rigid.*

Adjudication initially appears to be quite rigid. It must be triggered by a petitioner. There is a limited range of remedies. The court cannot make recommendations or insist on apologies, or (generally speaking) call large meetings to thrash things out and compromise. It is also constrained doctrinally in all the ways mentioned above. And there are strong limits on what kind of further research judges can do when an issue is raised in litigation. They cannot (in the common law world) visit the site of the disturbance and knock on the neighbours' doors.

This is all true, but these limitations flow from the same features that give legal accountability its hard edge, its relative degree of autonomy, and its constitutional authority. Its working methods are not as flexible as those of a minister or inspector, but neither is the judge removable. And judges cannot change their minds from one day to the next, but nor should they when their decisions are reported and relied upon. The fact is that legal accountability is flexible enough to facilitate adaptation and collaboration over time, but its flexibility is suited to its character as a potent form of relief. Furthermore, different potential forms of legal accountability show different potential for flexible approaches. The Parliamentary Ombudsman shares many important attributes with legal accountability. Yet the ombudsman also has investigative powers, has fashioned principles of good administration, and commonly makes policy recommendations that aim to improve administration. While there are occasional areas of friction,[105] her role is essentially complementary rather than entirely antagonistic.

D. Conclusion

The ten prima facie benefits outlined above in my view constitute a core of instrumental value offered by legal accountability. In most cases, the benefit asserted is at least to some extent contingent. It is not asserted that the existence of each feature leads inexorably to the attainment of a beneficial end (net of its costs). It is rather contended that in many systems of legal accountability that possess these features, it will be common for them to function as prima facie benefits that are nonetheless rebuttable. The benefits, again, are: focus; principled reasoning; constitutional authority; independence and impartiality; rule-interpretation competence; procedural fairness competence; participation; expressiveness; publicity;

[105] R Kirkham, 'Challenging the Authority of the Ombudsman: The Parliamentary Ombudsman's Special report on Wartime Detainees' *MLR* (2006) 69: 792.

and inter-institutional collaboration. Whether these prima facie benefits amount to actual benefits will depend on the contexts in which they are applied. It is hoped the list will help point out fruitful areas for inquiry, and perhaps emphasize, as a form of feedback, which aspects of legal accountability stand out as particularly important for securing these prima facie benefits. For instance, the requirement of giving reasoned decisions appears to be more greatly respected in some legal systems than in others. And of course, in those systems where the judiciary is not independent, the analysis suggests that we have reason to doubt whether it is appropriately called legal accountability at all.

This leaves one difficult methodological issue that I will address by way of conclusion. It is the problem of incommensurability. A list of benefits and stated costs may imply to some that I envisage some heaven of commensuration wherein if we had all relevant information, all the variables could be compared and that an arithmetical operation would yield the answer to any question of legal institutional design. I have no such idea in mind. At the end of any fully informed analysis, some public figure will need to decide just how much individual consideration is worth a reduction of allocative efficiency, and whether some amount of judicial independence is worth a novel extension of responsibilities through, for example, a new tribunal or bill of rights. The fact that these public choices require difficult judgement and are not reducible to any calculus does not mean that an account of benefits and costs is useless to the task. Sure, someone must simply decide, but they must decide in light of the best information. And if we accept that legal accountability is a means, we must have an approach to public decision-making that is susceptible to evidence of its success and costs before any sensible choices can be made.