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Introduction

The courts and Ombudsman occupy parallel universes. Every legal system contains machinery for resolving disputes between citizens, and citizens and the State, according to law. The judiciary swear to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will".[1] But judges are not the only office-holders securing administrative justice. Ombudsmen, too, serve this ideal. New Zealand's first Ombudsman, Sir Guy Powles, observed the office had but one purpose – "the protection of the people".[2] Since Sir Guy's time, pressures of workload on the Ombudsman have grown immensely. My paper identifies why the office was such a welcome reform 50 years ago, when the office was established.[3]

Litigants seeking administrative justice through the courts faced impenetrable barriers. Principles of judicial review were premised on false dichotomies (judicial v administrative, void v voidable, mandatory v directory, jurisdictional v non-jurisdictional, etc), and were unduly complex and technical. The formalist and unresponsive nature of judicial review induced a lacuna in the State's accountability mechanisms, which the office of Ombudsman was introduced to fill: "To ensure that members of the public in dealing with departments of state have the right and opportunity to obtain an independent review of administrative decisions."[4]

My paper explores two questions. First, has the law of judicial review caught up with the Ombudsman for reviewing administrative conduct? I conclude "yes". In the intervening years, administrative law doctrine has evolved into a sophisticated and coherent set of principles for putting wrongs to rights. Principles of judicial review posit flexible and discretionary standards similar to those applied by the Ombudsman when conducting Ombudsman inquiries. The judicial methodology is simplified, based on fairness, context and overall evaluation.

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[1] Oaths and Declarations Act 1957, s 18 (titled "Judicial oath").

[2] Sir Guy Powles, "The New Zealand Ombudsman: The early days" (1982) 12 VUWLR 207 (words Sir Guy uttered upon his swearing in as Ombudsman on 1 October 1962).

[3] See the Parliamentary Commissioner (Ombudsman) Act 1962 for the establishment of the office. See now the Ombudsmen Act 1975.

[4] National Party 1960 election manifesto.

Secondly, if the courts and Ombudsman now apply similar standards of scrutiny, why is the Ombudsman in such disproportionate demand today? Why have citizens not flocked to the courts, now that principles of judicial review are responsive to citizens' needs? The answer is no shock revelation: Ombudsmen are accessible, courts are not. Ordinary folk do not look to the courts to resolve disputes with the State. Litigation is costly, involves delays, and produces less-than-optimal outcomes through formal judicial remedies.

My paper traces the evolution of administrative law principles from 1962, when the Ombudsman's office was established. Discussion is organised under each of the three grounds of judicial review – illegality, irrationality and procedural impropriety. Stereotypical decisions provide snapshots in time to convey the flavour of administrative law in the 1960s.[5] Then, I fast-forward to modern developments which have simplified judicial review and made it a more coherent enterprise. Finally, I record the systemic reasons why citizens seek the intervention of the Ombudsman and not courts to resolve administration disputes.

Illegality

Snapshot

Ultra vires ("beyond the powers") was the paradigm of judicial review when the Ombudsman appeared on the scene. The ultra vires doctrine turned on the classifications of jurisdictional and non-jurisdictional error, which delineated decisions beyond and within power. My chronology begins with *Hammond v Hutt Valley and Bays Metropolitan Milk Board*,[6] a 1958 decision of the Court of Appeal. It was a case on appeal rather than review, but the court formulated the issue as one of jurisdiction. A statutory right of appeal existed to the then Magistrates' Court against a milk authority's refusal to grant a milk vendor's licence. The Court of Appeal held that the Magistrate had erred and that his error went to jurisdiction. The Magistrate had failed to address the merits of the applicant's case against those of other applicants, and "had shut his ears to the application before him."[7] He had formulated the wrong question for decision which amounted to "a refusal of jurisdiction on the real question".[8]

The classification of error delineated which decisions were jurisdictional (beyond power and reviewable) and which decisions were non-jurisdictional (within power and non-reviewable). Only errors made at the outset of an inquiry were reviewable. In its narrow and original sense, "jurisdiction" meant the power to inquire and proceed. Jurisdictional error occurred where decision-makers entertained questions outside their statutory powers, or erred on preliminary or collateral questions on which their jurisdiction depended. If there was power to proceed, errors (other than errors on the face of the record) were unimpeachable. This was problematic for two

[5] These snapshots were borrowed from my chapter "The Contribution of the New Zealand Court of Appeal to Commonwealth Administrative Law" in R Bigwood (ed), *The Permanent New Zealand Court of Appeal: Essays on the First Years*, Oxford, Hart Publishing, 2009, 41-72.

[6] *Hammond v Hutt Valley and Bays Metropolitan Milk Board* [1958] NZLR 720 (CA).

[7] *Hammond v Hutt Valley and Bays Metropolitan Milk Board* [1958] NZLR 720 (CA) at 730.

[8] *Hammond v Hutt Valley and Bays Metropolitan Milk Board* [1958] NZLR 720 (CA) at 729.

reasons: first, the courts lacked jurisdiction to check wrongs committed in the course of an inquiry properly convened; and, secondly, the distinction between the two types of error was unstable. As the court in *Hammond's* case acknowledged, the courts lacked any credible criteria by which to distinguish reviewable and non-reviewable error. A refusal of jurisdiction, the court in *Hammond* observed, may be conveyed in either of two ways: express refusal or conduct amounting to refusal. "In the latter case", the court lamented:

> "... it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds that it was entitled to take into consideration, and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction."

The ultra vires doctrine epitomised post-war attitudes throughout the Commonwealth jurisdictions. The war years had instilled a deep sense of national trust in executive government that took many years to shake.[9] The English writer, Stanley de Smith, observed that the courts remained excessively cautious and deferential, and were quick to take technical points.[10] They routinely declined to review ministerial decisions (ministers were responsible to Parliament, not the courts),[11] and they seemed uninterested in attempts to impugn the exercise of discretionary powers.[12] The only box the courts were concerned to tick was whether the inquiry at the outset had been properly commenced. The logic that sustained this approach was palpably false and constraining, and could not withstand the onslaught that the House of Lords unleashed in *Anisminic Ltd v Foreign Compensation Commission*.[13]

Developments

Changing social expectations caused the courts to reset their institutional relationship with the bureaucracy. In *Anisminic* the House of Lords demolished the distinction between jurisdictional and non-jurisdictional error, and held all *material* errors of law to be reviewable.[14] It mattered not whether the error occurred at the outset of an inquiry or during it. This development exposed decisions to the whole gamut of judicial review (bad faith, improper purpose, relevant/irrelevant

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[9] See SA de Smith, *Judicial Review of Administrative Action*, London, Steven & Sons, 1959, at 19 who observed that wartime precedents and emergency measures continued to colour judicial attitudes long after hostilities had ceased.

[10] SA de Smith, *Judicial Review of Administrative Action*, London, Steven & Sons, 1959, at 28-31.

[11] See eg *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (CA) at 1291 per Gresson P (discussed below, text corresponding to n 59).

[12] See PA Joseph, "The Contribution of the Court of Appeal to Commonwealth Administrative Law" in R Bigwood, *The Permanent New Zealand Court of Appeal: Essays on the first 50 Years*, Oxford, Hart Publishing, 2009, 41 at 52.

[13] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

[14] See *Re Racal Communications Ltd* [1981] AC 374 (HL) at 282-283; *O'Reilley v Mackman* [1983] 2 AC 237 (HL) at 278. For discussion see PA Joseph, "The Contribution of the Court of Appeal to Commonwealth Administrative Law" in R Bigwood, *The Permanent New Zealand Court of Appeal: Essays on the first 50 Years*, Oxford, Hart Publishing, 2009, 41 at 58-62.

considerations and breach of natural justice). For many years, the courts clung to the language of ultra vires but in a strained or extended sense to accommodate the House of Lords decision. *Anisminic* extended the scope of reviewable error to cover any material error made in the course of applying a statutory power. The courts read into an empowering statute the requirements that a decision-maker will: act within the bounds of reasonableness; take into account all mandatory relevant considerations; discount all irrelevant ones; promote the statutory purposes; and give to persons affected a fair hearing.

Anisminic reduced ultra vires to a contrivance, although force of habit caused judges to persist in calling reviewable decisions "ultra vires". The suggestion that reviewable error continued to involve excess of jurisdiction put a strain on the language conventionally used. It was artificial to treat an error as jurisdictional when a decision-maker was conducting an authorised inquiry. Eventually, the courts settled on unadorned "material error of law" as the basis of judicial review under illegality.[15] In *Peters v Davison*,[16] the Court of Appeal repudiated the conceptual link between error of law and jurisdictional error, and held error of law to be a ground of review "in and of itself". "[I]t is not necessary," their Honours explained, "to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction".[17] A simple formulation of the rule of law furnished the constitutional rationale: "The essential purpose is to ensure that public bodies comply with the law."[18]

Those developments promoted the courts' primary task of policing the legality of public decision-making. They cleansed the illegality ground of the constraints which had held the courts' supervisory powers in check. The convoluted language of ultra vires and jurisdictional/non-jurisdictional error had severely repressed the courts' ability to protect the "small guy" from overpowering or oppressive administration.

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[15] *Peters v Davison* [1999] 2 NZLR 164 (CA) at 202 per Thomas J. See also *Pearlman v Keepers and Governors of Harrow School* [1979] Ch QB 56 (CA) at 70; *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA) *passim*; *R v Hull University Visitor; Ex p Page* [1993] AC 682 (HL) at 702.

[16] *Peters v Davison* [1999] 2 NZLR 164 (CA).

[17] *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181 per Richardson P, Henry and Keith JJ.

[18] *Peters v Davison* [1999] 2 NZLR 164 (CA) at 188 per Richardson P, Henry and Keith JJ. See also *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at 850; *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA) at 696.

Irrationality

Snapshot

Associated Provincial Picture Houses Ltd v Wednesbury Corporation[19] is the compelling snapshot to illuminate irrationality (*Wednesday* unreasonableness) as a ground of review.[20] In *Council of Civil Service Union v Minister for the Civil Service*,[21] Lord Diplock proffered the term "irrationality" to describe this ground but I prefer "*Wednesbury* unreasonableness" in recognition of the decision which located the ground.

"*Wednesbury* [is] the most troublesome of modern administrative law decisions."[22] This decision established unreasonableness as a ground of challenge but set an unattainable threshold of review. Unreasonableness review addresses the justification or logic of a decision, which pulls the courts in an awkward direction – towards the merits of decision-making. The courts insisted that they were concerned with the legality of a decision and would not substitute their own view of the preferred policy outcome. In *Wednesbury*, Lord Greene MR issued the curial reminder: "[I]it must always be remembered that the court is not a court of appeal."[23] Review involves sitting in judgment on the correctness of the decision-making process, whereas appeal involves sitting in judgment on the correctness of the decision itself.[24] Appeal entails adjudicating on the merits and may involve the court substituting its own decision for that of the decision-maker.

Unreasonableness review is inherently merits-based. So, Lord Greene MR insisted that a decision must be outrageous or perverse for a court to intervene under this ground of review.[25] The decision had to be "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[26] The court could then claim that it was reviewing the legality rather than the merits or correctness of the decision. Lord Greene MR gave the example of the school teacher who was dismissed because she had red hair.[27] Such a decision, lacking any ethical or rational foundation, would trigger the *Wednesbury* threshold.

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[19] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[20] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[21] *Council of Civil Service Union v Minister for the Civil Service*[1985] 1 AC 347 (HL) at 410.

[22] PA Joseph, "The Contribution of the Court of Appeal to Commonwealth Administrative Law" in R Bigwood, *The Permanent New Zealand Court of Appeal: Essays on the first 50 Years*, Oxford, Hart Publishing, 2009, 41 at 63.

[23] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 228.

[24] *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 155; *R v Entry Clearance Office; Ex p Amin* [1983] 2 AC 818 (HL) at 829; *R v Sloan* [1990] 1 NZLR 474 (HC) at 479; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 397.

[25] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 229-230.

[26] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 229.

[27] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 229, citing *Short v Poole Corporation* [1926] Ch 66 at 90-91 per Warrington LJ.

The *Wednesbury* threshold was devised to maintain the integrity of judicial review. By insisting that a decision must be manifestly outrageous or perverse, a reviewing court would not be usurping the policy functions of the mandated decision-maker. But there was a problem: the *Wednesbury* standard was practically unattainable. The House of Lords established that the decision-maker, to be subject to review, must have "taken leave of his senses".[28] But decision-makers do not act in this way, even when they err. Decision-makers are rational and collected. They may be calculating or underhand, but they do not take leave of their senses. In reality, the *Wednesbury* standard for judicial intervention was never "reached" (administrators do not have brain explosions).[29]

Wednesbury unreasonableness provided little comfort to litigants who alleged administrative error. In practice, it was not a viable ground of review and exerted no discernible discipline on decision-makers. *Wednesday* challenges inevitably failed, unless there were independently reviewable errors that could sustain a finding of irrationality: "A finding that a decision was unreasonable is typically a surrogate finding based on reviewable errors established under the primary grounds of illegality or procedural impropriety."[30] A court might add that the decision was also unreasonable to denounce the decision-making and mark the court's disapproval. But, from a litigant's perspective, the *Wednesbury* ground was superfluous and offered no comfort to aggrieved citizens.

Developments

Wednesbury principles lacked subtlety and finesse. Judges remained fixated with the red haired school teacher, dismissed because she had red hair. Something had to give, and it did. From the 1980s, courts began relaxing the *Wednesbury* standard and intervening on a lower threshold of unreasonableness. Three pioneering House of Lords decisions departed from *Wednesbury* principles: *Bromley London Borough Council v Greater London Council*,[31] *R v Inland Revenue Commissioners; Ex p Preston*,[32] and *Wheeler v Leicester County Council*.[33] Similar departures occurred in New Zealand. The Court of Appeal stated that fairness was a substantive concept that embraced more than procedural protections.[34] The courts quashed decisions without holding them to be irrational.[35] In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*,[36] the court asked whether the decision was "unreasonable and unfair", and applied a

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[28] *Nottingham County Council v Secretary of State for the Environment* [1986] A AC 240 (HL) at 247 per Lord Scarman. See also *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484 (HL) at 518 per Lord Brightman.

[29] See PA Joseph, "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73 at 81-85.

[30] PA Joseph, "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73 at 82.

[31] [1983] 1 AC 768 (CA & HL).

[32] [1985] AC 835 (HL).

[33] [1985] AC 1054 (HL).

[34] *Canterbury Pipelines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 (CA) at 357. See also *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 149 ("Fairness need not be treated as confined to procedural matters").

[35] *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA); *Van Gorkom v Attorney-General* [1978] 2 NZLR 387 (CA).

[36] *New Zealand Fishing Industry Association Inc v minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

balancing test: "I do not say on balance that the Minister went beyond reasonable grounds."[37] To decide "on balance" is not suggestive of decision-makers taking leave of their senses.

The selective raising and lowering of the threshold for unreasonableness review led to acceptance of the varying intensities and contextual trappings of judicial review. The law now recognises that there is not one monolithic standard of unreasonableness, applicable to all decision-makers under all circumstances. In 2005 a High Court judge observed: "I am satisfied the time has come when the *Wednesbury* test of 'unreasonableness' is no longer to be regarded as the inevitable or universal test in New Zealand public law."[38] Former English Law Lord, Lord Steyn, rationalised the varying intensities when he famously said: "In law context is everything."[39] Today, factors that affect the intensity of judicial review include: the functions and status of the decision-maker;[40] the democratic nature of some decision-makers;[41] the procedures that the decision-maker exercises or adopts;[42] the political or policy content of a decision;[43] the commercial nature of some decisions;[44] genuine scope for differing views;[45] the effect of the decision on individuals (including the plaintiff);[46] and the overall "justice" of the case.[47]

All public decision-making is now potentially subject to challenge for unreasonableness, depending on the above factors. In some cases the courts apply *Wednesbury* principles; in others they apply the standard of unreasonableness simpliciter. In challenges to local authority rating decisions, the courts have emphasised the democratic decisions of elected councils and their accountability to ratepayers through the ballot box.[48] They have applied the strict *Wednesbury standard* and

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[37] *New Zealand Fishing Industry Association Inc v minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 557 per Casey J.

[38] *Chief Executive of the Department of Labour v Refugee Status Appeals Authority* 19/10/05, Winkelmann JHC Auckland CIV-2004-404-6314, at [30].

[39] *R (Daly) v Secretary of State for the Home Dept* [2001] 2 AC 532 (HL) at 548.

[40] See *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) (intensive scrutiny justified as the commission exercised a self-assumed regulatory jurisdiction).

[41] See *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA); *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 (CA); *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) (the *Wednesbury* standard applied to the rating decisions of elected councils).

[42] For example, adopting inflexible guidelines (see *Pub Charity v Attorney-General* [2003] NZAR 512 (HC)) or rules affecting a fair hearing, such as excluding rights to legal representation (see *Drew v Attorney-General* [2002] 1 NZLR 58 (CA)).

[43] See *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA).

[44] See *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC); *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA).

[45] See *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL).

[46] See *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA).

[47] See *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at149.

[48] *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA); *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 (CA); *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).

intervened only in a "clear and extreme case",[49] where there was "something overwhelming".[50] In cases involving human or civil rights, on the other hand, they have emphasised the sanctity of individual autonomy and engaged in intensive scrutiny of the impugned decision.[51] In other cases, they have emphasised the functions and status of the decision-maker as bearing upon the intensity of judicial review. In *Electoral Commission v Cameron*,[52] the Advertising Standards Complaints Board exercised a self-assumed consensual jurisdiction to police the industry's advertising codes of practice. As the board had set its own boundaries and procedures, the court accepted that the conventional grounds of review lacked relevance and called for broad evaluation of the board's decisions, without regard for the usual disciplines.

A significant liberalising development occurred in 1994. In *Thames Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd*,[53] the Court of Appeal loosened *Wednesbury's* grip and upheld substantive unfairness as a named basis of review, "shading into but not identical with unreasonableness".[54] This ground specifically endorsed the methodology of variable-intensity review, making it responsive to the particular decision-making setting. "The merit of the substantive unfairness ground", said Cooke P, "is that it allows for a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked."[55] The law would be defiantly deficient were only capricious or absurd decisions open to correction for unreasonableness.

Thames valley had cathartic effect in liberating judicial review from *Wednesbury* constraints. But, like *Wednesbury* itself, *Thames Valley* has had very little actual impact in the cases. No reported decision has upheld a challenge for substantive unfairness, although decisions applying variable-intensity review might implicitly have done so (for example, where the reviewing court has engaged in intensive scrutiny of the decision-making process).[56] There are now suggestions that variable-intensity review may have subsumed substantive unfairness as a stand-alone ground of review. If that is so, substantive unfairness now represents a particular entry point for courts along the unreasonableness continuum, denoting high level intensity of review.[57] However, the real significance of *Thames Valley* lies in the acceptance that there could be varying intensities of review, which dealt the quietus to the monolithic *Wednesbury* standard.

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[49] *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.

[50] *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

[51] *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 66.

[52] *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

[53] *Thames Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA).

[54] *Thames Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA) at 652 per Cooke P.

[55] *Thames Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA) at 653.

[56] See eg *Taiaroa v Ministry of Justice* 4/10/94, McGechan J, HC Wellington CP 99/94, at p 67; *Shaw v Attorney-General* [2003] NZAR 216 (HC) at [114]; *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

[57] See *Air New Zealand v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [33]-[34].

Procedural Impropriety

Snapshot

The decision in *Buller Hospital Board v Attorney-General*[58] is a revealing snapshot which would dismay most lawyers today. *Buller Hospital* epitomised the rule formalism that controlled the grounds of review as at 1962 – including procedural impropriety. The minister exercised his statutory power to appoint a committee to inquire into the functioning of the board. He received the committee's report, which was highly critical of the board, and exercised his further power to appoint a commission to replace the board and exercise its functions and powers. When challenged, the minister and the investigating committee were held not to be bound by the rules of natural justice. The minister was under no duty to give notice to the board that it was under investigation, or that it might be replaced. His powers were "administrative" rather than "judicial", and did not trigger the protections of natural justice. Nor was the committee of inquiry a body required to act "judicially". The committee was under no obligation to give notice of investigation to the board, or to receive submissions from it, or to make available the report that it had compiled for the minister.

The appellant also failed in challenging the minister's decision to invoke his statutory powers. The minister had to be "satisfied" that the board was in grave dereliction of duty, but the court required no affidavit evidence to verify the minister's belief. The minister's notice appointing the commission was evidence itself that the minister was so satisfied. He was accountable to Parliament, not the courts. Gresson P captured the flavour of the times:[59]

> "[M]any matters are placed by Parliament in the hands of a Minister in the belief that the Minister will exercise his power properly and in the knowledge that if he does not do so he is liable to the criticism of Parliament; and that, in such cases, it is clear upon the language of the statutory provision that Parliament intended him to be answerable only to Parliament, then it is not competent for the Court to question the bone fide opinion that action was necessary in the interests of the State."

Those expressions of judicial attitude would astound most public lawyers today. There were no requirements as to notice, no duties of disclosure, no need to verify the minister's belief, no duty to hear, and no need to uphold ministerial accountability through the courts.[60] Parliament was the appropriate forum to ask questions, if questions be asked. The principles of natural justice had narrow application to a particular class of decision-maker, which excluded most persons or bodies exercising discretionary statutory powers.

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[58] *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (CA).

[59] *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (CA) at 1291.

[60] See also *Jeffs v New Zealand Dairy and marketing Board* [1966] NZLR 73 (CA), where the board based its decision on a report it commissioned but was under no obligation to disclose it to interested parties. The court's decision was successfully appealed to the Privy Council but not on the duty of disclosure point: *Jeffs v New Zealand Dairy and marketing Board* [1967] NZLR 1057 (PC).

Developments

Procedural impropriety underwent rationalisation earlier than the grounds of illegality and irrationality. In the *Buller Hospital* case, neither the minister nor the committee was under a duty to comply with the rules of natural justice, because their powers were administrative and not judicial in nature. The requirement that powers had to be classified as "judicial" or "quasi-judicial" was a by-product of the technical rules that hedged the prerogative remedies of certiorari and prohibition. In *R v Electricity Commissioners; Ex p London Electricity Joint Committee Co (1920) Ltd*,[61] Atkin LJ held that the remedies might issue:[62]

> "whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their authority."

Ridge v Baldwin[63] was the legal landmark that liberated the rules of natural justice. The House of Lords established that the protections of natural justice had application irrespective of the classification of the decision-maker's powers. Their Lordships discounted the interpretation later courts had placed on Atkin LJ's dictum (the result of "misunderstanding"),[64] and held that the "judicial" element may be inferred from the nature of the power exercised, as affecting rights.[65] In *Daganayasi v Minister of Immigration*,[66] the Court of Appeal confirmed that the rules of natural justice were not limited to occasions that might be termed "judicial" or "quasi-judicial". The liberation of the rules coincided with a general movement to cull the dichotomies that had encumbered administrative law scholarship. The classification "administrative v judicial" was otiose and irrelevant to the legal test. Today, even the exercise of a contractual power may engage the protections of natural justice if the exercise of power has public consequences.[67]

Atkin LJ's dictum posited a further limitation on the reach of natural justice. His classic dictum narrowed the class of bodies bound by the rules to those "having legal authority to determine questions affecting the *rights* of subjects".[68] Later courts confined the term "rights" to Hohfeldian rights, positing correlative and enforceable legal duties. Decisions affecting broader legal interests, not positing correlative legal duties, failed to attract the protections of natural justice. Forty-five years after the *Electricity Commissioners'* case, Lord Denning MR coined the concept of legitimate expectation to escape Atkin LJ's constraining reference to "rights".[69] Decisions affecting a legitimate expectation, not amounting to a "right", might also attract the protections of natural justice. Today,

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[61] *R v Electricity Commissioners; Ex p London Electricity Joint Committee Co (1920) Ltd* [1924 1 KB 171 (CA).

[62] *R v Electricity Commissioners; Ex p London Electricity Joint Committee Co (1920) Ltd* [1924 1 KB 171 (CA) at 204-205.

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

[64] *Ridge v Baldwin* [1964] AC 40 (HL) at 72, 74 per Lord Reid.

[65] *Ridge v Baldwin* [1964] AC 40 (HL) at 76 per Lord Reid.

[66] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

[67] *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 566.

[68] *R v Electricity Commissioners; Ex p London Electricity Joint Committee Co (1920) Ltd* [1924 1 KB 171 (CA) at 204-205 (emphasis added).

[69] *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).

the rules will apply to protect a range of legally recognised interests: including status rights, rights in property, personal liberty or privilege, rights to livelihood or reputation, and legitimate or reasonable expectations of retaining or obtaining a benefit. The New Zealand Bill of Rights Act 1990 affirms the right to natural justice whenever a decision-maker has power over a person's "rights, obligations, or interests protected or recognised by law".[70]

The Court of Appeal decision in *Daganayasi v Minister of Immigration*[71] evidences the full reach of the modern duty of fairness. This decision was a powerful endorsement of the need for candour in public decision-making. The minister declined the applicant's appeal on humanitarian grounds against an order for her deportation. He based his decision on a medical referee's report which he did not disclose to the applicant, and this failure vitiated the decision. The court found the report "misleading" and "inadequate", conveying impressions prejudicial to the applicant that were unsupported on the facts. Failure to disclose the report denied the applicant the opportunity to challenge its content and findings, and correct any factual errors.

Daganayasi marks the progress of the law. Formerly, the applicant would have lacked the protections of natural justice. The minister could not have been said to be under a duty to act judicially (as that concept was formerly understood),[72] and the minister's decision affected an expectation, not a right. The applicant's challenge would have failed both limbs of Atkin LJ's test.

Overall evaluation

The methodology of judicial review evolved alongside the simpler and more direct principles of judicial review.[73] In *London & Clydeside Estates Ltd v Aberdeen District Council*,[74] decided in 1979, the House of Lords eschewed the old dichotomies that had defined administrative law. Their Lordships rejected language which "presuppos[ed] the existence of stark categories such as 'mandatory' and 'directory', 'void' and 'voidable', a 'nullity', and 'purely regulatory'". These terminologies, commented Lord Hailsham LC, were borrowed from the private law of contract and were "misleading", "not easily fitted to the requirements of administrative law".[75] Their adaptation had forced the courts to cramp cases into rigid legal categories – categories Lord Hailsham termed "mutually exclusive and starkly contrasted ... invented by lawyers for the purpose of convenient

[70] New Zealand Bill of Rights Act 1990, s 27(1).

[71] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

[72] As in *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (CA), ministers of the Crown were routinely held to be charged with matters of policy which placed them outside the duty to act judicially. Ministers were responsible to Parliament, not the courts.

[73] See PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 852-853.

[74] *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 (HL) at 883 per Lord Hailsham LC. See also *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL) at 399.

[75] *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 (HL) at 883 per Lord Hailsham LC.

exposition".[76] In *F Hoffman-La Roche & Co AG v Aberdeen District Council*,[77] Lord Diplock likewise observed that the terminologies borrowed from the language of contract had caused confusion and were ill-adapted to public law.

Today, there is less emphasis on fixed principles of legality in favour of a more flexible, integrated approach in judicial review. Judicial review is "inherently discretionary".[78] The courts claim a general power to rectify injustices based on "overall evaluation". In *AJ Burr Ltd v Blenheim Borough Council*,[79] Cooke P stated:

> "The determination by the Court whether to set aside the decision or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account."

Speaking extra-judicially, Sir Robin Cooke emphasised the specific factual and interpretive issues and down-played refinements in the background doctrines of administrative law. [80] For him, the "governing factors" were "statutory interpretation" and "the judicial attitude of mind".[81] Context was paramount in judicial review, which is conducted on a case-by-case basis, and the doctrine of precedent had less relevance than in other areas of the law: "The ingredients of the problem at hand dominate."[82]

Essence of judicial review

The essence of judicial review can be captured in three ways. First, judicial review is concerned to root out anything that is not "fair play in action". That phrase ("fair play in action") first appeared in the judgment of Harman LJ in *Ridge v Baldwin*[83] but it has been repeated many times since. In an appeal from New Zealand, the Privy Council explained: "Natural justice is but fairness writ large and juridically ... 'fair play in action'."[84] In *Shaw v Attorney-General*,[85] the High Court employed a

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[76] *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 (HL) at 883 per Lord Hailsham LC.

[77] *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL) at 399.

[78] *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 236, quoting *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 (HL) at 883 per Lord Hailsham LC.

[79] *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4.

[80] Sir Robin Cooke, "Foreword" in GDS Taylor, *Judicial Review: A New Zealand Perspective*, Wellington, Butterworths, 1991, at v.

[81] Sir Robin Cooke, "Has administrative law gone too far?", paper presented to the International Bar Association, 25th Biennial Conference, Melbourne, October 1994.

[82] Sir Robin Cooke, "Foreword" in GDS Taylor, *Judicial Review: A New Zealand Perspective*, Wellington, Butterworths, 1991, at v.

[83] *Ridge v Baldwin* [1963] 1 QB 539 (CA) at 578.

[84] *Furnell v Whangarei High Schools Board* [1973] AC 660 (PC) at 679; [1973] 2 NZLR 705 at 718 (Viscount Dilhorne and Lord Reid dissenting). See also *Lower Hut City Council v Bank* [1974] 1 NZLR 545 (CA); *Stininato v Auckland Boxing Association* [1978] 1 NZLR 1 (CA); *Attorney-General v Bay of Islands Timber Co Ltd* [1979] 2 NZLR 511 (CA); *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

[85] *Shaw v Attorney-General* [2003] NZAR 216 (HC) at [114].

"combination approach". While a marginally adequate decision-making procedure plus a marginally adequate decision, viewed separately, would not justify the court intervening, the procedure and decision, viewed cumulatively, was not "fair play in action". The court held:[86]

> "I consider that is exactly the position here: the unacceptable combination of a suspect procedure culminating in a surprising decision ... I simply cannot regard what occurred ... as 'fair play in action' ... I repeat the phrase here because it captures so simply and well the very essence of judicial review."

Secondly, judicial review is concerned to determine whether something has "gone wrong", requiring curial intervention. These words ("gone wrong") are taken from the "innominate" ground of review, coined by Lord Donaldson of Lymington MR in *R v Panel on Take-overs and Mergers; Ex p Guinness plc*.[87] His Lordship identified "the ultimate question": "as always ... whether something had gone wrong of a nature and degree which required the intervention of the Court, and, if so, what form that intervention should take." Sir Robin Cooke applauded Lord Donaldson's innominate ground, as "capturing the essence of the law of judicial review".[88] For Lord Cooke of Thorndon (as he was then), the reception of the innominate ground into New Zealand law was a "refreshing and healthy move away by the New Zealand courts from the more formalistic constraints once orthodox".[89]

"Has something gone wrong?" is the litmus test for determining which cases are deserving of the court's intervention, and which cases are not. One Supreme Court judge reflected on this reality in an entertaining exchange between bench and bar. "[I]n the end," he said, "you interfere if you think you should:"[90]

> "[T]he Court must interfere where it must. You either feel driven to interfere or you don't, and that will depend on what sort of right it is and what the whole shebang is."

No amount of rule formalism can relieve the courts of their instinctual task in judicial review. This is not to suggest that the judicial impulse is unconstrained and free, lacking discipline and focus. Four things inform the options in judicial review: the judge's knowledge and experience of the law, judicial acceptance of the need not to trench on administrative policy or discretion, the disciplines of the judicial role, and the commitment to do practical justice.[91] If the judicial impulse is to intervene, the judge must identify a ground of review and explain the decision in familiar administrative law language.

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[86] *Shaw v Attorney-General* [2003] NZAR 216 (HC) at [114]. See also *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC) at [31]-[32].

[87] *R v Panel on Take-overs and Mergers; Ex p Guinness plc* [1990] 1 QB 146 (CA) at 160.

[88] Sir Robin Cooke, "Foreword" in GDS Taylor, *Judicial Review: A New Zealand Perspective*, Wellington, Butterworths, 1991, at v.

[89] Lord Cooke of Thorndon, "Foreword" in PA Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed), Wellington, Brookers, 2001, at vi.

[90] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, Transcript SC 53/2008, 21 April 2009 at 178-182. See D Knight, "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393 at 400-401 for the transcript of the exchange.

[91] See further PA Joseph, "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73 at 78-81.

Thirdly, the doctrinal foundation of judicial review reduces to simply: decision-makers must act "in accordance with law, fairly and reasonably".[92] That was Sir Robin Cooke's formulation, which he judicially repeated in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*.[93] The duty to act in accordance with law, fairly and reasonably transcends the rule formalism and circumlocution that formerly beleaguered the law of judicial review. Sir Robin contended that his was a tripartite legal standard resembling Lord Diplock's classification of the three primary grounds of review – illegality, irrationality and procedural propriety.[94] Cooke P added that the "threefold duty merges rather than being discrete",[95] which brings us back to the basic methodology of judicial review – overall evaluation.

Parallel universes

As observed at the beginning of this paper, the courts and Ombudsman occupy parallel universes. They never intersect, except on very rare occasion when the Ombudsmen are themselves the subject of judicial review proceedings.[96] The demands on the office of Ombudsman are discussed below. The number of complaints to the office has risen steadily over the past 50 years and the annual increase shows no sign of slowing. In contrast, only very few citizens turn to the civil courts to resolve differences involving the State's administrative agencies. For most people, the courts are utterly foreign territory. They are inaccessible, expensive, intimidating and, for persons swept up in litigation, emotionally draining.

A New Zealand Law Commission study on the courts in 2004 produced unexpected findings.[97] The study had expected that persons at the social and economic margins might find the courts intimidating but the reaction of alienation was experienced "across the board". "[T]he message of alienation and discomfort came from across the board," the study found, "as much from big business and corporate entities as from ordinary New Zealanders."[98] The study summarised submitters' concerns:[99]

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[92] Sir Robin Cooke, "Third thoughts on administrative law" [1079] NZ Recent Law 218 at 225.

[93] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 per Cooke P.

[94] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410.

[95] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 per Cooke P. See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 229 (the grounds of invalidity "overlap to a very great extent" and "run into one another").

[96] Such proceedings are usually commenced against the Ombudsman for recommending information release under the Official Information Act 1982, rather than for Ombudsman inquiries under the Ombudsmen Act 1975. See eg *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 (HC), [1988] 1 NZLR 385 (CA); *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 (HC).

[97] *Delivering Justice got All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004).

[98] *Delivering Justice got All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004), at 6.

[99] *Delivering Justice got All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004), at 6.

- a lack of information or understanding about what the system is, how it can be used to initiate action, and what possibilities exist when someone is drawn into it against their will;
- the high legal costs and filing fees, coupled with the economic consequences of the distraction from other productive activities which inevitably arises;
- the time and delay involved and the exhaustion of being caught in the system;
- people feeling they are not able to tell their story, to be understood or be responded to in a way which is meaningful to them.

The study also identified the "eurocentric culture" that dominates in the courts and the difficulties this caused for Maori and other minority cultures.[100] The study observed:[101]

> "Many of the concerns of Maori were not dissimilar to those of other groups in our society: the system is mysterious and often unfriendly; basic information is hard to get; legal representation is expensive and often not satisfactory; and the mode of operation is almost exclusively monocultural and alienating to those whose cultures are not derived directly and relatively recently from the United Kingdom."

Legal fees incurred through instructing counsel to argue cases far outstrip filing fees in the courts. As of 1 July 2011, the filing fee to commence proceedings in the High Court was $1,330 (or $483 for concession rate proceedings).[102] The fee to file an application or notice of Appeal in the Court of Appeal was $1,088. These sums pall by comparison to the costs incurred in legal fees and/or costs awards against an unsuccessful party. It is not exceptional for counsels' fees in judicial review proceedings to reach six figure sums – sums which ordinary folk could never contemplate. A strong theme of the Law Commission study in 2004 was the concern about litigation costs and their effect on limiting access to justice. The study concluded:[103]

> "For those who do not qualify for legal aid, lawyers' fees are perceived as the most significant contributor to high costs. There was a widespread, cynical view that 'you get the justice you pay for'."

The Ombudsman's procedures are the antithesis of those of courts. They are flexible and informal, and inquisitorial rather than adversarial. They are also accessible and inclusive. The Ombudsman's services are free, and they are responsive to citizens' concerns. The Ombudsmen conduct investigations in private and may make such inquiries and invite such responses as they think fit.[104] Ombudsman investigations, although informal, do not lack "teeth". The Ombudsmen may require persons to furnish information or produce documents, and may summon and examine on oath any officer or employee of an organisation under investigation.[105]

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[100] *Delivering Justice got All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004), at 6-7, 51-62.

[101] *Delivering Justice got All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004), at 7.

[102] High Court Fees Regulations 2011.

[103] *Delivering Justice got All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004), at 36.

[104] Ombudsmen Act 1975, s 18(2)(3).

[105] Ombudsmen Act 1975, s 19(1)(2).

The Ombudsmen do not exercise a binding power of decision but may report and make recommendations to remedy administrative wrongs. Their grounds for report approximate to the grounds on which courts may determine applications for judicial review: namely, where a decision appears to be contrary to law, or was unreasonable, unjust, oppressive or improperly discriminatory (notwithstanding that it may be authorised by law), or was based on mistake of law or fact, or was "wrong".[106] The Ombudsman may also report and make recommendations on the same grounds as a court might judicially review an exercise of discretionary power (improper purpose, relevant/irrelevant considerations, etc). They might also report where reasons should have been given for the exercise of a discretionary power.[107] If an Ombudsman recommendation is not implemented within a reasonable time, the report may be referred to the Prime Minister or Parliament as the Ombudsman thinks fit.[108]

The pressures of workload on the Ombudsmen are considerable, albeit not surprising. In the first full year of operations (1963/64), the office received 760 complaints.[109] For the year ended 30 June 2012, the office received 8,950 complaints (nearly 12 times the number as in 1963/64). This number of complaints represented a "significant increase" on previous years, which the Ombudsmen attributed partly to complaints against the Earthquake Commission following the Canterbury earthquakes.[110] Notwithstanding the earthquakes, the office received on average 7,740 Ombudsmen Act complaints during the previous three years (June 2008-June 2011). Official Information Act complaints compound the pressures of workload. For the year ended 30 June 2012, the office received 1,236 complaints under the Official Information Act 1982 concerning information requests. This represented an increase of 25 percent on the number of complaints received the previous year (2010/11).[111] Official Information Act complaints are more resource-intensive and costly to resolve on average than Ombudsman Act complaints.

In its 2011/2012 report, the Ombudsmen reported that the office was "significantly under resourced".[112] Around 300 Ombudsman complaints were on hold and could not be investigated, owing to lack of resources. Surveys recorded that workload pressures had witnessed a decline in consumer satisfaction with the service. Previous annual reports recorded similar workload

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[106] Ombudsmen Act 1975, s 22(1).

[107] Ombudsmen Act 1975, s 22(2).

[108] Ombudsmen Act 1975, s 22(4)

[109] *Report of the Ombudsman for the Year Ended 31 March 1964* [1964] AJHR A.6 at 6.

[110] *Report of the Ombudsman for the Year Ended 30 June 2012*, Annual Reports: Office of the Ombudsman Website<http://www.ombudsman.parliamet.nz/resources-and-publications/corporate-documents/annual-reports>

[111] *Report of the Ombudsman for the Year Ended 30 June 2012*, Annual Reports: Office of the Ombudsman Website<http://www.ombudsman.parliamet.nz/resources-and-publications/corporate-documents/annual-reports>

[112] *Report of the Ombudsman for the Year Ended 30 June 2012*, Annual Reports: Office of the Ombudsman Website<http://www.ombudsman.parliamet.nz/resources-and-publications/corporate-documents/annual-reports>

pressures.[113] In February 2012, Chief Ombudsman, Dame Beverley Wakem, informed Parliament that the office was under "considerable pressure", and was effectively "in a crisis".[114]

Conclusion

Tracing the evolution of New Zealand's administrative jurisprudence explains why the Ombudsman's office was an important innovation in 1962. Shortcomings in the law of judicial review induced the need for a "grievance representative".[115] In the years following, the courts progressively unshackled the law of judicial review from the distracting formalism that had hampered their task. They unpicked the false dichotomies in the law and introduced a more flexible methodology that could achieve nuanced and responsive judicial outcomes. They honed their jurisprudence to the point that they could justifiably claim to apply similar standards to those of the Ombudsman, when reviewing public decision-making. The courts had, indeed, "caught up". Yet, this did not move the courts' universe any closer to that of the Ombudsman. The work of the courts will never substitute for that of the Ombudsman, and vice versa. The civil courts still, today, remain aloof of the bump and grind that typifies the work of the Ombudsman.

Ne'er the twain shall meet. The realities of courts and Ombudsman are too starkly contrasting to draw meaningful comparisons. They are fundamentally different institutions, serving different consumers, pursuing different outcomes, and promoting different cultures. Both institutions serve the national interest, the courts as the third branch of government, the Ombudsman as the people's grievance representative. Both are indispensible to the rule of law and just public decision-making. However, on this occasion – the 50th anniversary of the New Zealand Ombudsman – we should pay special tribute to the Ombudsman and congratulate the office on its many achievements and success, and wish it well for the next 50 years.

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[113] *Report of the Ombudsman for the Year Ended 30 June 2010* and *Report of the Ombudsman for the Year Ended 30 June 2011*, Annual Reports: Office of the Ombudsman Website<http://www.ombudsman.parliamet.nz/resources-and-publications/corporate-documents/annual-reports>

[114] "Ombudsman snowed under", *Otago Daily Times* (online ed, 16 February 2012); "Ombudsman needs funds", *Waikato Times* (online ed, 2 April 2012).

[115] From the Scandinavian term "ombudsman", meaning "entrusted person" or "grievance representative": see PA Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 366.

PARALLEL UNIVERSES
OMBUDSMAN AND COURTS

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Illegality

- *Hammond v Hutt Valley and Bays Metropolitan Milk Board*
  [1958] NZLR 720 (CA)

  "....it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds that it was entitled to take into consideration, and those cases where it has heard and determined upon grounds outside and beyond its jurisdiction."

- *Anisminic Ltd v Foreign Compensation Commissioner* [1969] 2 AC 147 (HC)

Irrationality

- *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA)

- *Thames Valley Electric Power Board v New Zealand Forest Products Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA)

Procedural Impropriety

- *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (CA)

> "Many matters are placed by Parliament in the hands of a Minister in the belief that the Minister will exercise his power properly and in the knowledge that if he does not do so he is liable to the criticism of Parliament; and that, in such cases, it is clear upon the language of the statutory provision that Parliament intended him to be answerable only to Parliament, then it is not competent for the Court to question the bone fide opinion that action was necessary in the interests of the State."

- *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA)

Overall Evaluation

- *London & Clydeside Estates Ltd v Aberdeen District Council*
  [1979] 3 AII ER 876 (HC)

- *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLE 1 (CA)

  "The determination by the Court whether to set aside the decision or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account."

Essence of Judicial Review

- *Furnell v Whangarei High School's Board* [1973] AC 660 (PC)

- *R v Panel on Takeovers and Mergers Ex p Guinness* [1990] 1 QB 146 (CA)

> "The ultimate question is whether something had gone wrong of a nature and degree which required the intervention of the Court, and, if so, what form that intervention should take."

Ye v Minister of Immigration [2009] NZSC 76, [2010] 1 NZLR 104, Transcript SC 53/2008, 21 April 2009

> "The Court must interfere where it must. You either feel driven to interfere or you don't, and that will depend on what sort of right it is and what the whole shebang is."

- *New Zealand Fishing Industry Association Inc v Minister of Agricultural and Fisheries* [1998] 1 NZLR 544 (CA)

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