

**FALSE DICHOTOMIES IN ADMINISTRATIVE LAW:
FROM THERE TO HERE**

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A Introduction

This article revisits our administrative law journey since the Second World War (1939-1945). It is a journey worth recounting because it reveals how starkly our administrative law has changed over a short, finite period of time. The transformative nature of this change beguiled some into believing that judicial review was a strictly post-war phenomenon. This was palpably not so; judicial review has an absorbing history reaching back to the early jurisdiction of the Court of King's Bench.¹

This article critiques nine judicially-constructed dichotomies that dominated administrative law following the war. These dichotomies were fixed and unforgiving, portraying administrative law as rigorous and analytical. They lent respectability to a subject that naturally spawned suspicion. Senior judges denounced the subject as "Continental jargon"² and the work of "academicians".³ The irony is that the dichotomies employed to invigorate the subject were transparently false. They stultified administrative law reasoning and checked the courts' ability to be effective purveyors of public accountability.⁴

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¹ Sir Geoffrey Cross (ed) *Radcliffe and Cross The English Legal System* (4th ed, Butterworths, London, 1964) at 59-60.

² Lord Hewart of Bury *Not Without Prejudice* (National Book Association, London, 1937) at 202ff. See PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 855-856 ("Joseph").

³ Sir Michael Myers *Journal of Public Administration (NZ)*, Vol 3, No 2 at 41. See JL Robson and KJ Scott, "Public Administration and Administrative Law" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens & Sons, London, 1954) 84 at 90.

⁴ For acknowledgement of the accountability role of the courts, see *Peters v Davison* [1992] 2 NZLR 164 (CA) at 188; *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC) at 388; *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.

From the mid-1960s, a cautious optimism swept administrative law. The courts carefully began unpicking the dichotomies and recasting administrative law principles in direct, accessible language. The courts, de Smith enthused, were “abandoning servitude to their own concepts and asserting mastery over them”.⁵ This process took a full two decades to complete but the transformation marked a new era in administrative law. The transition was from complex, formalist legal principles to an evaluative, contextual approach in judicial review. The subtitle to this article, “From there to here”, caricatures this transition.

The following critiques the post-war dichotomies and fast-forwards to the present day. A charcoal sketch of judicial review provides a fitting end-point against which to record the transformative change that marked this period. The article ends on a slightly pessimistic note: the need to remain ever-vigilant against retrogressive developments in administrative law.

B Post-war administrative law pedagogy

(i) *Binary judicial method*

The doctrinal complexity of administrative law following the war was extraordinary. Nine dichotomies posited binary choices in judicial review.⁶ A case either fell into category X, or it fell into category Y. There was nothing between: it was classic “either”/ “or” doctrine. How the court categorised the case predetermined the outcome. If a court ruled an administrative error *jurisdictional*, the applicant succeeded. But if it ruled the error *non-jurisdictional*, the applicant failed. Only jurisdictional error triggered the ultra vires doctrine. Each of the dichotomies operated so as to select the applicable administrative law principle, which ipso facto determined the outcome of the case. By the end of the 1970s, it was dawning on the courts that these dichotomies were “misleading”, “not easily fitted to the requirements of administrative law”.⁷ These had forced courts to cramp cases into rigid legal categories – categories that were “mutually exclusive and starkly

⁵ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 77.

⁶ There were ten dichotomies if one adds the decision/non-decision distinction. This dichotomy is implicit in the legal rights versus non-legal interests distinction discussed below. Interference with anything less than a legally recognised right was non-reviewable, which meant there had to be a *decision* in order to affect rights in a legally definitive sense.

⁷ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

contrasted”, “invented by lawyers for the purpose of convenient exposition”.⁸ The following commentary addresses each of the dichotomies.

(ii) *Jurisdictional error v non-jurisdictional error*

Many will recount the bruising debate from the mid-1990s over whether the ultra vires doctrine was the constitutional basis of judicial review.⁹ That debate was constructive because it forged a consensus that judicial review was sourced in the common law, flowing from the historical jurisdiction of the Court of King’s Bench to superintend inferior courts and tribunals. However, not always did that view prevail. In its heyday, the doctrine of ultra vires was the “start” and “end” points of judicial review. The doctrine focused on the limits of the decision-making power Parliament had conferred. Had the decision-maker exceeded those limits and committed a jurisdictional error? Jurisdiction meant “authority to decide”,¹⁰ which left decision-makers a licence to err. Errors deemed *non*-jurisdictional were non-reviewable.

The origins of the distinction between jurisdictional and non-jurisdictional error can be traced to the 17th century decisions of the Court of King’s Bench. De Smith observed that the “essential features” of this distinction survived into the mid-20th century so as to fix the scope of judicial review.¹¹ But the distinction was far from self-evident. The trick was distinguishing between the two types of error. Whether or not a decision-maker had jurisdiction was determined as a threshold issue, “at the commencement, not at the conclusion, of the inquiry”.¹² If there was jurisdiction at the outset, errors made in the course of an inquiry were non-jurisdictional. Errors on questions of law or fact that the decision-maker was authorised to make did not expose the decision to challenge.

Judicial review was a lottery. Categorising the error predetermined the outcome. What made some errors jurisdictional and others not? The problem, de Smith lamented, was one of public policy, not logic.¹³ The celebrated decision of the House of Lords in *Anisminic v Foreign Compensation*

⁸ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189-190.

⁹ Much of that debate is recorded in CE Forsyth (ed) *Judicial Review and the Constitution* (OUP, Oxford, 2000). See also CF Forsyth “Of Fig Leaves and Fairy Tales: The *Ultra Vires* doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 55 CLJ 122; MC Elliot *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001); PA Joseph “The Demise of Ultra Vires – Judicial Review in the New Zealand Courts” [2001] PL 354.

¹⁰ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 96.

¹¹ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 81.

¹² *R v Bolton* (1841) 1 QB 66, 74.

¹³ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 98.

*Commission*¹⁴ exacerbated matters: their Lordships scotched the only discernible distinction between the two types of error. They rejected the threshold principle that jurisdiction was determinable only at the outset of an inquiry and not in the course of it. A decision-maker might properly enter upon an authorised inquiry but nevertheless exceed its jurisdiction: it might promote an unauthorised purpose, breach the requirements of natural justice, apply a wrong legal test, or fail to take into account relevant considerations or take into account legally irrelevant ones.

Anisminic is lauded as one of the great administrative law decisions of the 20th century. Yet, it created an insurmountable problem. Having established that jurisdictional error might occur in the course of an inquiry properly commenced, their Lordships affirmed that decision-makers still retained their licence to err within the limits of their jurisdiction (that is, to make *non*-jurisdictional errors). So, which intra-inquiry errors were jurisdictional, and which errors were not? The courts had dug themselves into a hole from which it took many years to recover. After much hand ringing, they jettisoned the concept of jurisdictional error in favour of a broad remit to review material errors of law. Today, the concept plays no role in affixing the scope of judicial review: the question whether or not an error was jurisdictional is relegated to history.¹⁵

(iii) *Judicial v administrative*

In *The King v Electricity Commissioners*,¹⁶ Atkin LJ (as he then was) made a pronouncement that was accorded greater authority than it warranted. Certiorari and prohibition might issue, he said:¹⁷

“... 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 legal authority.”

This pronouncement acquired canonical status, until the House of Lords revisited it in *Ridge v Baldwin*.¹⁸ Atkin LJ’s dictum constrained the reach of judicial review in two ways: this section identifies the first constraint and the section following identifies the second constraint.

¹⁴ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) (per Lord Reid, Lord Pearce and Lord Wilberforce, Lord Morris and Lord Pearson dissenting).

¹⁵ *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181 (discussed below corresponding to nn 115-118). Contrast the position in Australia where jurisdictional error remains the focus of judicial review: see M Aronson and M Groves *Judicial Review of Administrative Action* (5th ed, Law Book Company, Sydney, 2013) at [1.50], [2.30].

¹⁶ *The King v Electricity Commissioners* [1924] 1 KB 171 (CA) at 204-205.

¹⁷ *The King v Electricity Commissioners* [1924] 1 KB 171 (CA) at 204-205.

¹⁸ *Ridge v Baldwin* [1964] AC 40 (HL).

For Atkin LJ, judicial review for breach of natural justice was restricted to decision-makers that were under a “duty to act judicially”. Judicial (or quasi-judicial) functions were distinguished from administrative functions, which could not be reached through judicial review. Injury to private interests in the exercise of administrative functions was non-justiciable.¹⁹ But classifying judicial and administrative functions was problematic: how were courts to differentiate when decision-makers of every hue operated as administrative functionaries in administrative settings? De Smith despaired that it was “sometimes impossible” to discern why a court characterised a particular function as judicial or administrative.²⁰ He acknowledged what many had suspected: that the court’s characterisation was often “a contrivance to support a conclusion reached on non-conceptual grounds”. In other cases, the terms “judicial” and “administrative” were used loosely without any apparent deliberation,²¹ although the choice of label effectively decided the case. This was, reflected one commentator, a “highly acrobatic part of the law”.²²

The criteria the courts applied were threefold: conclusiveness, trappings and procedure, and interpretation and declaration. First, a body acting judicially typically issued orders that were binding and conclusive, without need of confirmation by another authority. Such bodies were distinguished from ones exercising powers of an advisory,²³ deliberative,²⁴ preliminary,²⁵ investigatory²⁶ or conciliatory²⁷ character. Secondly, a power of a judicial character usually entailed formal and procedural attributes that resembled the trappings of courts. Such attributes included: disputes inter partes, hearings in public, power to compel witnesses and conduct examination on oath, duty to comply with rules of evidence, power to impose sanctions, and power to enforce obedience to orders. Thirdly, the exercise of judicial power typically involved resolving disputed questions of law or fact by reference to pre-existing rules or objective standards.

¹⁹ *R v Leman Street Police Station Inspector, ex parte Venicoff* [1920] 3 KB 72; *R v Brixton Prison, ex parte Soblen* [1963] 2 QB 243.

²⁰ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 58.

²¹ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 58.

²² J Willis “Administrative Law and the British North America Act” (1940) 53 Harv L Rev 251 at 281.

²³ *Re Clifford and O’Sullivan* [1921] 2 AC 570; *R v MacFarlane, ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518 (HCA).

²⁴ *R v Legislative Committee of the Church of Assembly, ex parte Haynes-Smith* [1928] 1 KB 411.

²⁵ *Jayawardene v Silva* [1970] 1 WLR 1365.

²⁶ *Hearts of Oak Assurance Co v Attorney-General* [1932] AC 392; *O’Connor v Waldron* [1935] AC 76; *Lockwood v Commonwealth* (1954) 90 CLR 177 (HCA).

²⁷ *Ayriss (FF) & Co v Alberta Labour Relations Board* (1960) 23 DLR (2d) 584; *R v Clipsham, ex parte Basken* (1965) 49 DLR (2d) 747.

The courts juggled the criteria as best they could, sometimes engaging in analytical and verbal contortions. None of the supposed criteria was conclusive, and some applied more strictly in some cases than others. Judgments were often “singularly deficient in conceptual analysis”, and the “variations in linguistic usage ... spectacular and frequently puzzling”.²⁸ De Smith concluded: “At this point terminological and conceptual problems may appear to be overwhelming.”²⁹ As of 1973, he took solace that the courts were finally acknowledging the mess they had created.³⁰ In *Ridge v Baldwin*,³¹ the House of Lords conceded the unworkability of the judicial/administrative dichotomy. Lord Reid disavowed any “superadded” duty to act judicially in order to trigger the requirements of natural justice. The rules applied, howsoever the power was categorised (judicial, administrative or otherwise). It sufficed that the exercise of public power affected private rights or interests.³²

No attempt is made today to categorise the nature of the power exercised.³³ Under the Judicature Amendment Act 1972, it is no bar to relief that the respondent was not under a duty to act judicially.³⁴ Earlier High Court Rules continued to refer to the duty but this was viewed as an omission through failure to delete. The revised High Court Rules omit all reference to the duty.

(iv) *Legal rights v non-legal interests*

In *Electricity Commissioners* Atkin LJ spoke of legal authority “to determine questions affecting the rights of subjects”.³⁵ This established another formulaic restraint: only decisions affecting legally recognised rights were reviewable. Interests not legally recognised within the Hohfeldian matrix lacked judicial protection.³⁶

Where did the interests of justice lie? Should a person who was seriously disadvantaged by a public decision, who could assert no legally enforceable right, be disentitled to relief? The doctrinal formalism of the law worked an injustice that had to be addressed. In *Schmidt v Secretary of State*

²⁸ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 77.

²⁹ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 77.

³⁰ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 77.

³¹ *Ridge v Baldwin* [1964] AC 40 (HL).

³² *Re HK* [1967] 2 QB 617.

³³ See for example *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11], [17], [25] and [26].

³⁴ Judicature Amendment Act 1972, 3 4(2).

³⁵ *The King v Electricity Commissioners* [1924] 1 KB 171 (CA) at 204-205.

³⁶ See RWM Dias *Jurisprudence* (5th ed, Butterworths, London, 1985) at 24-25 for Hohfeld’s scheme of jural relations.

for *Home Affairs*,³⁷ Lord Denning MR coined the expression “legitimate expectation” to escape Atkin’s constraint and extend the reach of judicial review. The concept of legitimate expectation broadened the range of protectable interests beyond legally enforceable rights, and provided a much needed fillip for judicial review.

Judicial review today is not confined to the protection of private rights in the Hohfeldian sense (legal rights balanced by correlative legal duties). Interlocutory decisions are fully amenable to review, although they precede a final determination affecting rights.³⁸ Judicial review may lie to review the grant or refusal of a licence (a privilege, not a right),³⁹ or an inquiry whose functions are investigative and recommendatory only,⁴⁰ or a decision not entailing or affecting any legal rights. In *Attorney-General (Hong Kong) v Ng Yuen Shiu*,⁴¹ certiorari quashed a removal order against an illegal immigrant who had no legal entitlement. The immigration authorities had reneged on a public undertaking that illegal immigrants who presented themselves to the authorities would be dealt with fairly. The applicant’s only “interest” was a legitimate expectation that his case would be fairly considered on its merits. The Judicature Amendment Act 1972 codifies the common law position for the review of the exercise of statutory powers. The terms “statutory power” and “statutory power of decision” mean a power to inquire into or make a decision affecting (a) “[t]he rights, powers, privileges, immunities, duties, or liabilities of any person”, or (b) “[t]he eligibility of any person to receive, or to continue to receive, a benefit or a licence, whether he is legally entitled to it or not”.⁴²

(v) *Statutory power v prerogative power*

The distinction between statutory and prerogative powers engaged a dichotomy having an enviable historical lineage. Throughout the ages, the courts distinguished the royal prerogative from discretionary statutory powers, and disavowed a general power to control the former. They claimed jurisdiction to determine the existence and scope of the prerogative but refused to review its

³⁷ *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 (CA).

³⁸ *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA) at 524; *Peters v Davison* [1999] 2 NZLR 164 (CA) at 183; *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC) at 360-361; *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 (CA) at 720.

³⁹ *R v Woodhouse* [1906] 2 KIB 501 (CA); *R v Brighton Borough Justices, ex parte Jarvis* [1954] 1 WLR 203 (DC) (liquor licences); *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association* [1972] 2 QB 299 (CA) (taxi licences); *R v Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 1 WLR 1052 (CA) (street trader’s licence).

⁴⁰ *Re Erebus Royal Commission* [1983] NZLR 662 (PC); *Bradley v Attorney-General* [1988] 2 NZLR 454 (HC).

⁴¹ *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 (PC).

⁴² Judicature Amendment Act 1972, s 3.

manner of exercise.⁴³ Even for many years following the Second World War (1939-1945), the royal prerogative resisted broader developments in administrative law:⁴⁴

“As the courts began flexing their judicial review powers, the prerogative distanced itself, as something of great antiquity to be treated apart from discretionary statutory powers ... Judicial acknowledgement of the court’s duty to prevent abuse of the prerogative was perfunctory and token.”

The courts refused to examine the appropriateness or adequacy of the grounds for exercising the prerogative,⁴⁵ or to allow bad faith to be attributed to the Crown.⁴⁶ The very non-existence of a power to review was itself a defining criterion of prerogative power. In *R v Lewes JJ, ex parte Home Secretary*,⁴⁷ the Lord Chancellor refused to uphold as a prerogative the withholding of evidence from disclosure in court as the authorities established that the discretion of the Crown was subject to judicial review.⁴⁸

A distinction based on the source of public powers was avowedly formalist. The prerogative surrendered its royal heritage when cabinet government was established over 200 years ago. The Sovereign (or Sovereign’s representative) acts on and in accordance with her/his ministers’ advice, which commits the prerogative to the government’s service. Prerogative power is conceptually and analytically no different than discretionary statutory power. The breakthrough occurred in *Laker Airways Ltd v Department of Trade*,⁴⁹ where Lord Denning MR cast aside the mystique of the prerogative. He saw no good reason for distinguishing public powers according to their source, be they statutory or common law powers. “[T]he prerogative,” he said, “is a discretionary power to be exercised for the public good, [and] it follows that its exercise can be examined by the Courts just as

⁴³ *Prohibitions del Roy* (1607) 12 Co Rep 63, 77 ER 1342; *Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352; *Rustomjee v R* (1876) 2 QBD 69 (CA); *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC); *Chandler v Director of Public Prosecutions* [1964] AC 763 (HL).

⁴⁴ Joseph at [18.6.1], citing *Chandler v Director of Public Prosecutions* [1964] AC 763 (HL) at 811.

⁴⁵ *R v Allen* (1862) 1 B & S 850 (nolle prosequi); *Bugsier Reederei-und-Bergungs A/G v SS Brighton* [1951] 2 TLR 409 (licence granted to enemy company to sue in a British court); *Chandler v Director of Public Prosecutions* [1964] AC 763 at 790-792, 796, 800-801, 814 (disposition of the armed forces). See the further authorities cited by SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 254 (n 39).

⁴⁶ *Duncan v Theodore* (1917) 23 CLR 510 (HCA) at 544; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (HCA) at 257-258.

⁴⁷ *R v Lewes JJ, ex parte Home Secretary* [1972] 3 WLR 279 (HL) at 282.

⁴⁸ Public interest immunity against disclosure of evidence in court was once termed a Crown privilege but it was never prerogative in character: see Joseph at [18.4.2(4)(a)].

⁴⁹ *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA).

any other discretionary power which is vested in the executive.”⁵⁰ The courts might intervene if the prerogative was exercised “improperly” or “mistakenly”.⁵¹

Denning’s initiative cleared the way for more general acceptance of the reviewability of prerogative power. In *Council of Civil Service Unions v Minister for the Civil Service*,⁵² the House of Lords renounced the source of public powers, as no longer relevant to principles of judicial review. Prerogative power was as amendable to judicial review as discretionary statutory power, and on the same grounds, subject to considerations of justiciability. The subject-matter, not the source, of a power determined whether its exercise was reviewable. Several prerogatives remain non-justiciable by nature: foreign relations, defence of the realm, appointment of ministers, etc. Other prerogatives, in contrast, are reviewable.⁵³ A decision refusing clemency under the prerogative of mercy is reviewable if it was arbitrary or perverse, or in breach of fair procedure or the rules of natural justice.⁵⁴ A perverse exercise of other prerogatives would also be reviewable, such as the grant of honours for reward, the waging of a war of “manifest aggression”, or a refusal to exercise the prerogative to dissolve Parliament.⁵⁵ Assimilating prerogative and statutory powers in judicial review cleared the way for purging another false dichotomy – ministerial versus other public decision-making.

(vi) *Ministerial v non-ministerial decision-making*

Following the war years, the courts treated ministerial decision-making differently from other public decision-making. Judicial review of ministers’ decisions, although available in theory, “was little more than perfunctory on matters of substance”.⁵⁶ The judicial attitude bordered on deferential servitude. The courts disclaimed power to review a minister’s exercise of discretionary powers, even where the policy element was negligible. Judges were quick to defer and assert a minister’s

⁵⁰ *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA) at 705.

⁵¹ *Laker Airways Ltd v Department of Trade* [1977] QB 643 (CA) at 706.

⁵² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL).

⁵³ *Burt v Governor-General* [1992] 3 NZLR 672 (CA); *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349 (DC); *Lewis v Attorney-General (Jamaica)* [2001] 2 AC 50 (PC).

⁵⁴ *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 681; *Lewis v Attorney-General (Jamaica)* [2001] 2 AC 50 (PC) at [54] (following *Burt*).

⁵⁵ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498, [2008] QB 365 at [46]. Judicial review of a refusal to dissolve Parliament would not arise in New Zealand. Parliament automatically terminates through expiration of time in the absence of dissolution: Constitution Act 1986, s 17.

⁵⁶ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 28.

responsibility to Parliament, although ministerial responsibility was often no more than token.⁵⁷ The courts intervened only if an error was flagrant, damage to private interests substantial and the decision entailed no policy element. Distinguishing ministerial from other types of decision-making undermined any claim that administrative law was principled and coherent in application.⁵⁸

None of the standard grounds of judicial review seemed to gain traction. The courts typically refused to hold that a minister had: acted ultra vires; promoted an unauthorised purpose; breached the principles of natural justice; failed to have regard to relevant considerations; been improperly influenced by irrelevant ones; or acted unreasonably under the *Wednesbury* test.⁵⁹ De Smith lamented that, if a minister was under a statutory duty to give reasons for a decision, “it was almost impossible to persuade a court to draw adverse inferences from his [or her] silence”.⁶⁰ Where ministers were empowered to decide if “satisfied” that a prescribed state of affairs existed, the courts interpreted the power literally and refused to question the minister’s assertion that the required belief was genuinely held. Similarly, under the then description “Crown privilege”, a minister might withhold documents from disclosure in court merely by certifying that disclosure would be contrary to the public interest. The courts refused to question the objectivity of the minister’s claim.⁶¹

With changing social expectations and standards of public accountability, the courts began subjecting ministerial decision-making to closer scrutiny. As of 1973, de Smith observed that judicial review had become “less technical, less compartmentalised, more imaginative”.⁶² The courts became disinclined to interpret statutes as giving ministers conclusive power to determine the limits of their power. Ministerial assessments as to the existence of states of affairs warranted objective verification. Nowadays, no distinction is made for ministerial decision-making, which is amenable to review on the same principles as apply to other forms of decision-making. Ministers’ decisions are

⁵⁷ *Dyson v Attorney-General* [1911] 1 KB 410 (CA) at 424 (ministerial responsibility a “mere shadow of a name”); *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 202.

⁵⁸ Joseph at [22.2.3]

⁵⁹ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 28.

⁶⁰ SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 28.

⁶¹ *Duncan v Cammell, Laird & Co* [1942] AC 624 (HL). Compare *Robinson v South Australia (No 2)* [1931] AC 704 (PC); *Conway v Rimmer* [1968] AC 910 (HL) (*Duncan’s* case overruled, documents inspected by the court and disclosure ordered notwithstanding the claim of Crown privilege).

⁶² SA de Smith *Judicial Review of Administrative Action* (3rd ed, Stevens & Sons, London, 1973) at 38.

prone to address considerations of the national interest and be held non-justiciable,⁶³ but that is a quite different matter from singling out ministerial decisions for special treatment in judicial review.

(vii) *Void v voidable*

The consequences of invalidity drew a formalist response from the courts: decisions reached in error were either *void* or *voidable*. Different legal consequences attached accordingly.⁶⁴ Ultra vires decisions were outside jurisdiction and of no legal effect (*void*), whereas other decisions vitiated by error were *intra vires* and of continuing legal effect (*voidable*). *Void* decisions were *void ab initio* (a legal *nothing*), whereas *voidable* decisions were valid and effective unless and until a court of competent jurisdiction set the decision aside.⁶⁵

“The distinction was one between *retrospective* and *prospective* invalidation. A declaration that an order was ultra vires entailed retrospective invalidation from the time the order was made, whereas the quashing of a voidable order had prospective effect from the time of the court’s decision. Prior acts carried out under the order were not subject to challenge.”

This approach was termed the absolute theory of invalidity. The theory was convenient for upholding rights (unauthorised decisions were *void ab initio* and could not prejudice private interests) and circumventing privative clauses (a privative clause could not protect a decision that in law was a nullity). But the theory also suffered from serious conceptual flaws. In *Ridge v Baldwin*,⁶⁶ the applicant was dismissed from office in 1958 in breach of the rules of natural justice. In litigation challenging the dismissal, the judicial process ground on until 1963 when the House of Lords finally ruled in the applicant’s favour. His dismissal was ultra vires and *void*, which in law meant that he (the applicant) had never been dismissed. Yet, for five years, he had neither held nor performed his office and had received no remuneration. The position he vacated, moreover, had long since been filled. These events left unanswered several questions. The law provided for only one office holder. Consequently, had the applicant’s successor ever held office? If not, on what basis was he receiving remuneration? If the applicant had never in law been dismissed, was he entitled to reclaim five-years’ lost remuneration? Would the incumbent who replaced him be liable to repay the

⁶³ See for example *Curtis v Minister of Defence* [2002] NZLR 744 (CA) (ministerial decisions affecting the disposition of the armed forces non-justiciable).

⁶⁴ See Joseph at [22.10].

⁶⁵ Joseph at [22.10.1].

⁶⁶ *Ridge v Baldwin* [1964] AC 40 (HL).

remuneration had and received? These conundrums were insoluble under the absolute theory of invalidity.

The absolute theory also produced legally absurd results. In *Denton v Auckland City*,⁶⁷ a statutory right of administrative appeal to a higher authority entailed a rehearing de novo, with the appellate body having power to rehear and call fresh evidence. However, the appeal could not cure a breach of natural justice as the initial decision was “a nullity and there was nothing upon which the Appeal Board could proceed”.⁶⁸ A decision reached on appeal was itself a nullity, as the appellate body was without jurisdiction – there was nothing against which to appeal.⁶⁹ These were legally absurd outcomes (*reductio ad absurdum*) for which the law had to find a solution. The void/voidable distinction was as unstable as the distinction between jurisdictional and non-jurisdictional error.

The law did find a solution, although it, too, was not without complication. Lord Diplock was in the vanguard: “My Lords, I think it leads to confusion to use such terms as ‘voidable’, ‘voidable ab initio’, ‘void’ or ‘a nullity’.”⁷⁰ These descriptions derived from the private law of contract and were ill-adapted to public law. The courts sought an alternative approach and applied Sir William Wade’s theory of legal relativity, which circumnavigates the void/voidable distinction.⁷¹ Stark categories such as “void”, “voidable” and “nullity” were jettisoned in preference for more amorphous terms such as “invalid”, “vitiating” or “defective”, which do not fix the legal consequences of invalidity. Decisions or orders tainted by error of law were treated as valid – as having existence in law – until they were successfully challenged on an application for review: “[H]owever wrong they may be, however lacking in jurisdiction they may be, [decisions tainted by error] subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction.”⁷² Under Wade’s theory, the presumption of validity legitimises all public administration in the absence of a successful legal challenge.

The theory of legal relativity avoided the legal contortions that had afflicted courts under the absolute theory. The void/voidable dichotomy was riddled with complexity that caused the law to

⁶⁷ *Denton v Auckland City* [1969] NZLR 256 (SC).

⁶⁸ *Denton v Auckland City* [1969] NZLR 256 (SC) at 269.

⁶⁹ *Denton v Auckland City* [1969] NZLR 256 (SC) at 256.

⁷⁰ *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL) at 399. See also *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189-190.

⁷¹ See Joseph at [22.10.3].

⁷² *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815 (CA) at 840. See also *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL); *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 23 NZLR 713 at [84]-[86].

unravel. However, the solution the courts devised had itself to make significant concessions. A category of “flagrantly invalid” decision was recognised to accommodate the right of collateral challenge in inferior courts; such decisions did not trigger the presumption of validity and were treated as a legal nullity, which any court might declare.⁷³ Moreover, a successfully challenged decision was “hypothetically a nullity” (void from its inception) but treated as presumptively valid in the interim. The conceptual difficulty was treating as valid something that was void ab initio.⁷⁴ That conundrum continues to tax the courts, although some relief has been had from the development of the remedies of partial or prospective invalidation.⁷⁵

(viii) *Mandatory v directory*

In *London and Clydeside Estates Ltd v Aberdeen District Council*,⁷⁶ Lord Hailsham LC shunned from the legal lexicon the mandatory/directory dichotomy. He rejected language which “presuppose[d] the existence of stark categories such as ‘mandatory’ and ‘directory’, ‘void’ and ‘voidable’, a ‘nullity’, and ‘purely regulatory’”.⁷⁷ The mandatory/directory dichotomy is now superseded but it once played a decisive role in judicial review. It did so 60 years ago in an extraordinary challenge to New Zealand’s parliamentary system.

Until *Fitzgerald v Muldoon*,⁷⁸ *Simpson v Attorney-General*⁷⁹ was New Zealand’s landmark constitutional case. No-one seems to know anything about the redoubtable Mr Simpson, or what persuaded him to bring his challenge. He established that administrative oversight had caused the 1946 general election to be held outside of the statutory timetable prescribed under the electoral legislation. This, he argued, invalidated the 1946 general election, and thereto all subsequent elections which likewise had been conducted outside of the statutory timetable. Had his challenge succeeded, all post-1946 legislation and all government spending under it would have been invalid, as would everything purporting to have been done under post-1946 statutory authority. Either the courts would have been forced to draw upon the doctrine of necessity (a last resort in times of

⁷³ See for example *New Zealand Employers Federation Inc v National Union of Public Employees* [2002] 2 NZLR 54 (CA) discussed in Joseph at [22.10.3].

⁷⁴ Joseph at [22.10.3].

⁷⁵ See for example *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815 (CA) at 842; *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 235, 238-241.

⁷⁶ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

⁷⁷ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

⁷⁸ *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

⁷⁹ *Simpson v Attorney-General* [1955] NZLR 271 (SC and CA).

constitutional emergency),⁸⁰ or the government would have needed to request United Kingdom legislation to post-validate the 1946 election and all subsequent elections and legislation, and all actions purportedly taken under such legislation.⁸¹

It was a remarkable constitutional challenge. The Chief Justice reflected that the challenge, if upheld, would have worked “serious general inconvenience”.⁸² “General inconvenience” was a droll euphemism for constitutional breakdown. But was the challenge ever likely to succeed? The machinery of state is geared towards self-preservation and will do everything it can to avert constitutional breakdown. The timetable provisions of the Electoral Act in 1946 were couched in the imperative language “shall”, not “may”, which was indicative of mandatory obligations. Nevertheless, the Court of Appeal applied the mandatory/directory dichotomy and held the timetable provisions to be directory only, which averted constitutional breakdown. Substantial, as distinct from strict, compliance was all that the statutory timetable required.

A determination that a statutory requirement was mandatory or directory entailed a priori reasoning. The choice of classification was a lottery, although it presupposed the outcome of the case (as in *Simpson v Attorney-General*). In many cases, the mandatory/directory distinction was unworkable: binary choices were simply not possible. Some situations cannot be shoe-horned into “one or other of mutually exclusive and starkly contrasted compartments”.⁸³ The context of decision-making may present, not a stark binary choice, but a “spectrum of possibilities in which one compartment or description fades gradually into another”.⁸⁴ Statutory provisions may effectively conflate the classifications, leaving them without a function,⁸⁵ or the descriptors “mandatory” and “directory” may lack utility. In *Howard v Secretary of State for the Environment*,⁸⁶ Lord Roskill found that all of the statutory requirements were mandatory but held that failure to comply did not invalidate the action. Here, the descriptors failed to discharge their purpose of fixing the consequences of invalidity.

⁸⁰ See Joseph at [19.11] for the role of the doctrine.

⁸¹ The Statute of Westminster Adoption Act 1947, s 3(1) would ordinarily require such request and consent to be conveyed by Act of the New Zealand Parliament but the adoption Act would have been invalid and inoperative alongside all other post-1946 statutes.

⁸² *Simpson v Attorney-General* [1955] NZLR 271 (SC and CA) at 275.

⁸³ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

⁸⁴ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

⁸⁵ *Mansell v Legal Services Agency* HC Wellington AP261/02, Goddard J, 9 May 2003. See also *Howard v Secretary of State for the Environment* [1975] QB 235; [1974] 1 All ER 644 (CA).

⁸⁶ *Howard v Secretary of State for the Environment* [1975] QB 235; [1974] 1 All ER 644 (CA).

For modern courts, the question is not one of stark categorisation.⁸⁷ Determining the nature of an obligation entails substantive reasoning and deduction, working from the particular statutory context. Cooke J (as he then was) displayed characteristic prescience:⁸⁸

“Whether [or not] non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.”

Modern courts occasionally use the descriptors “mandatory” and “directory” but not as a matter of categorical classification. The descriptors are used as end-points in the court’s analysis, not, as before, as preliminary findings that predetermined the judicial outcome. Courts look to the scheme of the legislation and the relationship of the statutory requirement to it.⁸⁹ What were the consequences of non-compliance? Was it likely to cause prejudice, administrative difficulty or disruption to industry? The courts assess whether the breach was of a flagrant nature that compromised the integrity of the scheme, or whether it was of a minor or procedural nature that might safely be ignored.⁹⁰ The effects of non-compliance are assessed using the standard methodology of overall evaluation.⁹¹

(ix) *Standing v non-standing*

“Locus standi” denotes the legal capacity to challenge a decision. Until a landmark decision of the House of Lords in 1982,⁹² the courts applied the law of locus standi strictly, as a preliminary, gatekeeping requirement of judicial review. Standing was an onerous obstacle. Would-be litigants had to establish particular or special damage that distinguished them from the rest of the community. Applicants who suffered in no direct or appreciable way lacked standing to bring their case.

Standing was a jurisdictional issue addressed separately from the substantive challenge. In the leading decision at first instance, Lord Widgery CJ stated: “Before we embark on the case itself, we

⁸⁷ See *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

⁸⁸ *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630 (CA) at 636.

⁸⁹ See *Steinborn v Minister of Immigration* [2002] 1 NZLR 639; [2002] NZAR 36 (CA); *Mansell v Legal Services Agency* HC Wellington AP261/02, Goddard J, 9 May 2003.

⁹⁰ *London and Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189.

⁹¹ *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4.

⁹² *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

have to decide whether the [applicant] has power to bring it at all.”⁹³ The common law recognised differing standing rules for the separate writs of certiorari, prohibition and mandamus.⁹⁴ These technical rules survived even the liberalising provisions of the Judicature Amendment Act 1972, which assimilated the separate writs into a single application for review. Certiorari and prohibition lay as of right to a party aggrieved: one who suffered “a particular grievance” rather than a grievance “in common with the rest of the subjects”.⁹⁵ Mandamus imposed a yet more exacting requirement.⁹⁶ Litigants had to establish “a legal specific right to ask for the interference of the Court”.⁹⁷ The duty, whose enforcement was sought, had to be owed to a particular class of persons of whom the applicant was a member.⁹⁸ If the duty was in favour of the public at large, then an applicant had to establish a “special interest” that distinguished the applicant from all other citizens.⁹⁹ Strict rules also hedged the remedies of injunction and declaration adapted from the private law sphere. An applicant had to establish that an interference with a public right also infringed a private legal right, or that the applicant suffered special damage not suffered by the public at large.¹⁰⁰ “Special damage” was damage different in quality from, or greater in degree than, that suffered by the general public.

Remedies were not *ex debito justitiae* (as of right). The restrictive standing rules were protective floodgates to guard against vexatious litigants harassing public bodies and swamping the courts.¹⁰¹ Allowing busybodies to prosecute their eccentric causes would consume the courts’ time and resources, and clog the wheels of justice. Remedies were correlative with rights and only persons whose rights were directly and substantially affected might seek a remedy. The one respite was through the relator action, which bypassed the technical rules. The Attorney-General as the first law officer of the Crown might consent, on the request of a private person (a “relator”), to sue a public body for transgressing the law.

⁹³ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 917 (HL) at 630 per Lord Wilberforce quoting Lord Widgery CJ, expressing a view rejected on appeal.

⁹⁴ For discussion see Joseph at [27.6.2].

⁹⁵ *The Queen v Justices of Surrey* (1870) LR 5 QB 466 (DC) at 747. See also *Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 (HL) at 283; *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators’ Association* [1972] 2 QB 299 (CA) at 308-309; *Paterson v Dunedin City Council* [1981] 2 NZLR 619 (HC) at 621.

⁹⁶ *R v Hereford Corporation, ex parte Harrower* [1970] 1 WLR 1424 (DC) at 1428 (“a far more stringent test”).

⁹⁷ *The Queen v Guardians of the Lewisham Union* [1897] 1 QB 498 (DC) at 500, followed in *R v Commissioner of Customs and Excise, ex parte Cooke* [1970] 1 WLR 450 (DC).

⁹⁸ *Environmental Defence Society Inc v Agricultural Chemicals Board* [1973] 2 NZLR 758 (SC).

⁹⁹ *The Queen v Cotham* [1898] 1 QB 802 (DC) at 804; *Victoria University of Wellington Students Association Inc v Shearer (Government Printer)* [1973] 2 NZLR 21 (SC) at 23.

¹⁰⁰ *Boyce v Paddington Borough Council* [1903] 1 Ch 109 (CH).

¹⁰¹ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 630.

The standing/non-standing dichotomy worked a serious disadvantage to litigants. Changing social expectations demanded more pro-active policing of public decision-making, whether or not special damage might be established. In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd*,¹⁰² the House of Lords finally prised open the floodgates. The decision was a circuit-breaker for public interest groups and publicly-spirited citizens concerned to vindicate the rule of law. It would be “a grave lacuna in our system of public law”, Lord Diplock observed, were a concerned citizen prevented from having the law enforced.¹⁰³ Standing was no longer a bridge to be crossed before the substantive hearing but was considered as part of the application for review. Standing was a question of mixed law and fact to be assessed according to the merits of the case.¹⁰⁴

Common-sense trumped fears of judicial overload and vexatious litigants. *Inland Revenue Commissioners* liberated the law from a dichotomy that constricted the right of access to justice. There was no apparent increase in vexatious or frivolous litigation following the relaxation of the rules.¹⁰⁵ The financial costs involved are usually sufficient to deter even the obsessed from indulging in unmeritorious litigation. An American study long ago exposed the fallacy of the “meddlesome interloper”. That fictitious character “haunt[ed] the legal literature, not the courtroom”.¹⁰⁶

(x) *Public v private bodies*

Administrative law is concerned to uphold the legality of public administration. So, the courts set about distinguishing public bodies from private bodies and confining judicial review to the former. This entrenched another constraining dichotomy which took many years to undo. While the focus of judicial review remains on public decision-making, the distinction between “public” and “private” is not dispositive today of questions of reviewability. Classifying a body as “public” or “private” is not a preliminary jurisdictional matter but is indicative only of the reach of judicial review. It is merely one among several considerations factored into the overall mix of judicial review.

¹⁰² *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL).

¹⁰³ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 644. See also *R v Greater London Council, ex parte Blackburn* [1976] 1 WLR 550 (CA) at 559 (“a matter of high constitutional principle”).

¹⁰⁴ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 631 per Lord Wilberforce, 653 per Lord Scarman. See also *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (HC and CA) at 178.

¹⁰⁵ See Lord Woolf, J Jowell and A le Sueur *De Smith’s Judicial Review of Administrative Action* (6th ed, Sweet & Maxwell, London, 2007) at 100-102.

¹⁰⁶ KF Scott “standing in the Supreme Court: A functional analysis” (1973) Harv LR 645.

Under the former public/private dichotomy, bodies were caricatured according to their functions or powers. Public bodies exhibited defined characteristics: they exercised public regulatory functions and/or were empowered under statute to discharge prescribed public purposes. Private bodies, in contrast, neither performed public regulatory functions nor exercised public power. They lacked any public persona but were indelibly “private”, attending to interests within the “private” sphere, or exercising private commercial functions. Decisions involving commercial judgment were termed “private” and beyond the reach of administrative law.¹⁰⁷

The binary approach to public versus private bodies could not survive the modern regime of judicial review. Private bodies per se are not immune from review. The following bodies have been judicially reviewed: the New Zealand Rugby Union,¹⁰⁸ a political party operating under first-past-the-post elections,¹⁰⁹ a financial market’s regulatory body,¹¹⁰ an advertising industry standards authority,¹¹¹ and the New Zealand Stock Exchange’s administering body.¹¹² Each of those organisations was a private rather than public entity, although it was amenable to review. These developments trump the public/private dichotomy and subject it to the same fate as the other dichotomies. Today, there is no appetite for a priori labels when fixing the reach of judicial review or adjudging the legality of decision-making of a public nature or having significant public consequences.

The governing test is whether the exercise of power is “in substance public” or has “important public consequences”.¹¹³ Even private bodies exercising commercial functions may be susceptible to review. Modern courts are sensitive to the impact of commercialised public functions and the public consequences of commercial decisions by private bodies.¹¹⁴ The decisions of state-owned

¹⁰⁷ See *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 (CA).

¹⁰⁸ *Finnigan v New Zealand Rugby Union Inc* [1985] 2 NZLR 159 (HC and CA).

¹⁰⁹ *Peters v Collinge* [1993] 2 NZLR 554 (HC) (political parties operating under the mixed member proportional electoral system have greater statutory recognition and public profile under the Electoral 1993 than under the former first-past-the-post legislation).

¹¹⁰ *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815 (CA).

¹¹¹ *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

¹¹² *Wilson v White* [2005] 1 NZLR 189 (CA).

¹¹³ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11.

¹¹⁴ See for example *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388; *O’Leary v Health Funding Authority* [2001] NZAR 717 (HC) at 727; *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at 850, 853; *Dunne v CanWest TV Works Ltd* [2005] NZAR 577 (HC); *Easton v Human Rights Commission* [2009] NZAR 575 (HC).

enterprises, for example, are reviewable.¹¹⁵ It is a question of degree “the point at which a private commercial operation [may] merge into a public one attracting judicial review”.¹¹⁶ One judge was pragmatically honest: it may reduce to a “matter of impression” whether a commercial body’s decisions have sufficient public impact as to attract judicial review.¹¹⁷

C Judicial review today

The unpicking of the post-war dichotomies provides glimpses into the modern law of judicial review. This section captures the flavour of judicial review today. It sketches the key features of an enterprise that espouses judicial directness and honesty of mind over the formal trappings of pedagogy and legal doctrine. The sketch provides a fitting end-point to the transformation that administrative law underwent.

(i) *Simple, untechnical, prompt*

Today’s commitment is to keep judicial review “relatively simple, untechnical and prompt”.¹¹⁸ This approach presents a sharp departure from the judicial method that was wedded to ultra vires and jurisdictional/non-jurisdictional error. The simpler construct “material error of law” replaced ultra vires as the central plank of judicial review.¹¹⁹ In *Peters v Davison*,¹²⁰ the Court of Appeal emphasised the rule-of-law rationale that public bodies must comply with the law that regulates their decision-making powers. Their Honours were intent on burying the ultra vires doctrine. A

¹¹⁵ Albeit on the narrow grounds of fraud, corruption or bad faith: see *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC); *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551 (CA); *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 2 NZLR 776 at [91]; *Attorney-General v Ririnui* [2015] NZCA 160 at [77].

¹¹⁶ *He Putea Atawhai Trust v Health Funding Authority* HC Auckland CP497/97, 8 October 1998 at 5.

¹¹⁷ *Ministry of Health v Dalley* HC Christchurch M569/96, 12 August 1998 per William Young J.

¹¹⁸ *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353. Numerous courts have repeated those words: for example *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA) at [19]; *Edwards v Toime* [2005] NZAR 140 (HC) at [20]; *Wilson v White* [2005] 1 NZLR 189 (CA) at [25]; *Commerce Commission v Powerco Ltd* CA123/06, 9 November 2006 at [40]; *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [342]; *Orlov v New Zealand Law Society* [2012] NZCA 12 at [21]; *Attorney-General v Kim Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [39].

¹¹⁹ *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA); *Miller v Commissioner of Inland Revenue* [1995] 3 NZLR 664 (CA); *Peters v Davison* [1999] 2 NZLR 164 (CA).

¹²⁰ *Peters v Davison* [1999] 2 NZLR 164 (CA) at 183, 129. See also *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC) at 388; *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.

material error of law was reviewable “in and of itself”, they held: “[I]t [was] not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction.”¹²¹

(ii) *Three features*

Three features distinguish judicial review in the modern era: it is “inherently discretionary”,¹²² it involves “overall evaluation”¹²³ and it is pre-eminently contextual.¹²⁴ These observations must be tempered with a degree of realism: the emphasis on discretion, evaluation and context does not release courts from the established disciplines. Constitutional and democratic constraints circumscribe the acceptability of judicial review.¹²⁵ The institutional separation of powers checks the judicial function and counsels courts against trespassing on matters of executive or administrative policy.¹²⁶ Parliament authorises public decision-making and the courts are careful not to usurp the functions of the mandated decision-maker. Thus, the larger the policy content of an impugned decision, the less inclined the courts are to intervene.¹²⁷ Decision-making that engages “wide-ranging or ‘macro-political’ issues of policy” will seldom, if ever, be amendable to review.¹²⁸

The High Court’s jurisdiction to review is inherent, having no a priori limits: “[A] superior court of general jurisdiction, such as the High Court of Justice, has the jurisdiction to determine ... the limits of its own jurisdiction.”¹²⁹ The only *legal* limits are those that the particular empowering legislation might impose.¹³⁰ Nevertheless, the courts abide their self-assumed disciplines and assess challenges to public decision-making in accordance with accepted principles of judicial review. The reviewing court must select the appropriate ground of review (illegality, unreasonableness/irrationality or procedural impropriety), weigh the specific factual and interpretive features of the case, and exercise judgment as to what the justice of the case requires. Seldom does judicial review reduce to

¹²¹ *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181 per Richardson P, Henry and Keith JJ.

¹²² *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 236.

¹²³ *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) at 4.

¹²⁴ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28].

¹²⁵ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.

¹²⁶ *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 45-46.

¹²⁷ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546. See also *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 198.

¹²⁸ *Abdi v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69]. The paradigm decision exemplifying non-justiciability in New Zealand is *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) (the government decision to disband the combat wing of the Royal New Zealand Air Force held non-justiciable).

¹²⁹ *R v Bedwellty Justices, ex parte Williams* [1997] AC 225 (HL) at 232. See also *New Zealand Waterside Workers’ Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC) at 707; *Re Kestle (No 2)* [1980] 2 NZLR 353 (CA) at 358.

¹³⁰ See *Kaur v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592 at [18]-[22], [44]-[46], [64].

a formulaic exercise in statutory interpretation: Did the decision-maker act within the four corners of the power Parliament conferred?¹³¹ Applications for review are typically assessed within the particular context of the decision-making and involve overall evaluation of the procedural and cognitive processes that led to the impugned decision.

(iii) *Instinctual nature of judicial review*

The courts acknowledge the instinctual nature of judicial review.¹³² An exchange between Bench and Bar in *Ye v Minister of Immigration*¹³³ exemplified the evaluative and contextual nature of the court's task.¹³⁴ In the parry and thrust with counsel, Tipping J alluded to the reality of judicial review: "[I]n the end, you interfere if you think you should."¹³⁵ He acknowledged the instinctual judgment that drives judicial review.¹³⁶

"And 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."

The "whole shebang" meant *context*: "In law context is everything."¹³⁷ Thus we return to the three determinants that trigger the decision to intervene: discretion, evaluation and context. There are differing formulations for describing the instinctual impulse, although the classical formulation was Lord Donaldson's direct but penetrating question in *R v Panel on Take-overs and Mergers, ex parte Guinness plc*:¹³⁸ "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".¹³⁹ Woolf LJ, too, reduced the question to one of instinctual impulse: Did the decision inflict "real injustice"?¹⁴⁰ Findings of injustice typically unearth errors in the decision-making procedures, deliberative

¹³¹ Compare *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

¹³² See generally Joseph at [22.4].

¹³³ *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. The exchange is recorded in the Transcript of the case SC53/2008, 21 April 2009 at [178]-[182].

¹³⁴ See D Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Rev 393 at 400-401; PA Joseph "Exploratory Questions in Administrative Law" (2012) 25 NZULR 73 at 85-86; Joseph at [22.4.3].

¹³⁵ *Ye v Minister of Immigration* Transcript SC53/2008, 21 April 2009 at [182].

¹³⁶ *Ye v Minister of Immigration* Transcript SC53/2008, 21 April 2009 at [178]-[182].

¹³⁷ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28] per Lord Steyn.

¹³⁸ *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA).

¹³⁹ *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA) at 160.

¹⁴⁰ *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA) at 194.

processes or application of statutory power. The forensic task is to identify what, in short, caused the decision-making to misfire.¹⁴¹

A variation is the “abuse of power” analysis advanced in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*.¹⁴² Applying a public power for an unauthorised purpose is often described as an abuse of power. So, too, is breach of a legitimate expectation: it is an abuse for decision-makers to renege on their public undertakings.¹⁴³ In *Bancoult* the impugned Orders in Council revoked the British Government’s undertaking to allow the former inhabitants of the Chagos Islands to return to their homeland. These Orders were “so profoundly unfair”, the Court held, as to be an “abuse of power”.¹⁴⁴ For Sedley LJ, the expression “abuse of power” was sufficiently generic that it could be used to embrace a raft of decision-making errors.¹⁴⁵

(iv) *Struggle for simplicity*

Former President of the Court of Appeal, Sir Robin Cooke, railed against the formulaic language that encumbered judicial review in the years following the war. His doctoral studies at Cambridge brought home the distracting formalism that was choking the courts.¹⁴⁶ Thirty years on, his seminal address, “The struggle for simplicity in administrative law”,¹⁴⁷ became synonymous for the direct and uncomplicated language that now defines judicial review. Sir Robin’s aspiration was to keep judicial review “relatively simple, untechnical and prompt”.¹⁴⁸

¹⁴¹ Joseph at [22.4.2].

¹⁴² *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA Civ 498, [2008] QB 365.

¹⁴³ See *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA); *Staunton Investments Ltd v Chief Executive of the Ministry of Fisheries* [2004] NZAR 68 (HC); *Abdi v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [67]; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA 498, [2008] QB 365 at [60], [73].

¹⁴⁴ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA 498, [2008] QB 365 at [73].

¹⁴⁵ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] EWCA 498, [2008] QB 365 at [60].

¹⁴⁶ RB Cooke “Jurisdiction: An Essay in Constitutional, Administrative and Procedural Law” (PhD, University of Cambridge, 1954) discussed by MB Taggart “The Contribution of Lord Cooke to scope of review doctrine in administrative law: A comparative common law perspective” in P Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997).

¹⁴⁷ Sir Robin Cooke “The struggle for simplicity in Administrative Law” in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (OUP, Auckland, 1986).

¹⁴⁸ Sir Robin was the first to utter these words in delivering judgment of the Court in *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353. See n 116 for a long list of decisions that have since repeated his words.

The “struggle for simplicity” does not extol the impossible. The law of judicial review is not, and never has been, “simple”. A specialist area of law, judicial review draws on deep understanding of first principles and an extensive knowledge of case law. The struggle for simplicity is an admonition against making the law more complicated than it needs to be. Administrative law prospers from a few analytical models, doctrinal overlays and binary choices as is rationally possible to support a coherent regime of judicial review.

E Questionable developments

The unpicking of the post-war dichotomies has cleansed administrative law of the shibboleths that afflicted the discipline. It has been honed so that it is now freed of distracting complexities. But is it? Might there be aspects of our administrative law that give cause for unease? Four developments are singled out for scrutiny.

(i) Unreasonableness review

Variable intensity review has all but superseded *Wednesbury* unreasonableness as a ground of challenge.¹⁴⁹ *Wednesbury* attracted its fair share of criticism.¹⁵⁰ It posited a single, monolithic standard of unreasonableness that was oblivious to context and the impact of impugned decisions. Variable intensity review evolved to fill the void. It factors into the evaluative exercise both context and impact in calibrating the appropriate intensity of review. Nevertheless, how much understanding has been achieved around this variegated ground of challenge?

Variable intensity review is at risk of collapsing under a proliferation of terminologies. Eleven distinct expressions calibrate the intensities of review.¹⁵¹ These range from super-*Wednesbury* unreasonableness at one end of the spectrum to correctness review at the other, with a range of intensities between (unreasonableness simpliciter, substantive unfairness, hard look, anxious

¹⁴⁹ The *Wednesbury* standard of review is retained in certain statutory contexts: see for example *Kaur v Chief Executive, Ministry of Business, Innovation and Employment* [2015] NZCA 592.

¹⁵⁰ See Lord Cooke of Thorndon’s withering pronouncement in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [32].

¹⁵¹ *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. The exchange is recorded in the transcript of the Court’s hearing: Transcript SC 53/2008, 21 April 2009 at 178- 182. The exchange is reproduced in D Knight “Mapping the Rainbow of Review: Recognising Variable Intensity” [2010] NZ L Rev 393 at 400-401.

scrutiny, etc).¹⁵² It has been suggested that this proliferation of terminologies might lead to a “resurgent formalism” in administrative law.¹⁵³ More ink has been spilled on this ground of review than the others combined, leaving real doubt whether the benefits outweigh the costs.

Might unreasonableness challenges be dispensed with in their entirety?¹⁵⁴ The standard response is “no” as there should always be a fall-back ground of last resort. Variable intensity review provides redress for misuses of administrative power that might otherwise go unchecked. However, how valuable is unreasonableness review? This ground is rarely, if ever, successfully pleaded in its own right. It is, for all intents and purposes, “forensically parasitic”.¹⁵⁵ It typically comes into play only after other reviewable errors in the decision-making are uncovered.¹⁵⁶ Three judicial review cases this century (2000-2015) have succeeded on a stand-alone finding of unreasonableness (on average, one decision every five years).¹⁵⁷ A cost/benefit analysis of *Wednesbury’s* legacy might support the decision to jettison the ground.

(ii) *Giving of reasons*

The law governing the giving of reasons for decisions is woefully deficient. Decision-makers are under no general duty to explain their decisions.¹⁵⁸ Fairness may require the giving of reasons in individual cases¹⁵⁹ but this is the exception rather than the rule. Is this not a spectacular revelation in an age of public accountability? The absence of a legal obligation to account frustrates public expectations of open and accountable decision-making, and places the law out of step with good administrative practice.

It is remarkable that this lacuna should persist. There is lacking a duty even where decision-makers must swear affidavits when their decisions are challenged in judicial review. The duty of candour is a

¹⁵² Joseph at [22.8.4]. See also M Taggart “Administrative Law [2006] NZ L Rev 75 at 82-98 (“all the colours of the rainbow”). And see more generally M Taggart “Proportionality, Deference, *Wednesbury*” [2008] NZ L Rev 423, and the several articles in response in [2010] NZ L Rev 229-431.

¹⁵³ Joseph at [22.8.4]-[22.8.5].

¹⁵⁴ PA Joseph “Exploratory Questions in Administrative Law” (2012) 25 NZULR 73 at 81-86.

¹⁵⁵ PA Joseph “Exploratory Questions in Administrative Law” (2012) 25 NZULR 73 at 85.

¹⁵⁶ Joseph at [[24.2]; PA Joseph “Exploratory Questions in Administrative Law” (2012) 25 NZULR 73 at 82.

¹⁵⁷ *C v Medical Council of New Zealand* [2013] NZHC 825, [2013] NZAR 712; *Carroll v Auckland Coroner’s Court* [2013] NZHC 906, [2013] NZAR 650 at [72]; *McGuire v Wellington Standards Committee (No 1)* [2014] NZHC 3042 at [86]. I acknowledge there may be other such decisions of which I am unaware.

¹⁵⁸ See for example *R v Awatere* [1982] 1 NZLR 644 (CA) at 646-647; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [75]; *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [16]. See Joseph at [25.4.11(1)n 481] for a more extensive list of citations.

¹⁵⁹ See for example *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

public responsibility, not a legally compellable obligation.¹⁶⁰ The only sanction for a failure to give reasons is the drawing of adverse inferences when decisions are challenged. A court might conclude that a decision was unreasonable,¹⁶¹ or that it lacked an evidentiary foundation and was arbitrary,¹⁶² or that mandatory relevant considerations were ignored or irrelevant ones relied upon.¹⁶³

The obligation to account is the fulcrum of modern public administration. Parliament acknowledged this when it enacted the Official Information Act 1982. A government department, minister or public organisation that is subject to the Act must provide reasons on request for a decision affecting an individual.¹⁶⁴ A general common law duty to provide reasons would not impose a burdensome obligation.¹⁶⁵ The duty would be of variable strength, depending on the decision-making. The Canadian courts have held that the duty posits a flexible standard that leaves leeway for decision-makers.¹⁶⁶ The duty might range from a tick-box exercise for minor, low-level decision-making to an explanation of the cognitive processes of decision-making for decisions significantly affecting individuals. The duty would be entirely contextual, taking account of the particular circumstances of the decision-making.

(iii) *Unauthorised purposes*

The Court of Appeal decision in *Attorney-General v Ireland*¹⁶⁷ laid down a principle that controverts our basic understanding of public accountability. It established that decision-makers exercising statutory powers may properly pursue purposes that Parliament had not authorised. Unauthorised purposes will not vitiate the exercise of power, as long as their pursuit does not impede achievement of the authorised purpose.

¹⁶⁰ *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 554,562 and 567-568; *Minister of Energy v Petroleum Exploration Ltd* [1989] 1 NZLR 348 (CA) at 352; *Inder v Commissioner of Crown Lands* HC Christchurch CIV-2009-409-1219, 28 May 2010 at [30].

¹⁶¹ See *Zhang v Minister of Immigration* [2013] NZHC 790 at [28].

¹⁶² *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 554; *R v Secretary of State for Trade and Industry, ex parte Lonrho plc* [1989] 1 WLR 525 (HL) at 539-540; *Zhang v Minister of Immigration* [2013] NZHC 790 at [28].

¹⁶³ See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 977 (HL) at 1061-1062; *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) 345-346; *Raceway Motors Ltd v Canterbury Regional Planning Authority* [1976] 2 NZLR 605 (SC) at 612; *Leiataua v Minister of Immigration* HC Wellington CIV-2003-485-742, 26 November 2003.

¹⁶⁴ Official Information Act 1982, s 23.

¹⁶⁵ Joseph at [25.4.11(2)].

¹⁶⁶ *Baker v Canada* [1999] SCR 817.

¹⁶⁷ *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA).

Ireland swims against the tide. Modern-day administrative law advocates a strengthening of public law disciplines, not a weakening of them.¹⁶⁸ Unauthorised purposes cannot be condoned. If Parliament had intended a decision-maker to pursue additional (that is, unauthorised) purposes, it would or could have provided so. Discretionary powers must be exercised so as to promote the statutory purpose(s),¹⁶⁹ not pursue ulterior agenda. The courts have rejected any notion of an unfettered power and affirmed that all public powers have legal limits which circumscribe and control the exercise of power.¹⁷⁰ Unauthorised purposes are an alien concept.

No analogy may be drawn to mandatory and permissible relevant considerations.¹⁷¹ Decision-makers may properly have regard to considerations that are relevant to the decision-making, should they wish. It falls to the decision-maker's judgment whether or not to weigh such considerations in the exercise of discretion. Permissible considerations are distinguished from mandatory relevant considerations, which decision-makers must take into account as a matter of legal obligation.¹⁷² These considerations are set out in the enabling statute and must be factored into the exercise of discretion.¹⁷³

Unauthorised purposes are not analogous to permissible considerations. Purposes are qualitatively different from considerations. A purpose for acting is the primary motivation which permeates the entire action, whereas a permissible relevant consideration is merely one of potentially several considerations that may/may not affect the outcome of a decision. No major adjustment was required for the courts to accommodate permissible relevant considerations, granting decision-makers leeway. The same cannot be said of the accommodation *Ireland* made for unauthorised purposes. This concession significantly undermined the *Padfield* discipline,¹⁷⁴ representing a major departure from established doctrine. It was, in short, a wrong turning in the law. *Ireland* signals a

¹⁶⁸ See for example Joseph at [22.2.4], [23.2.3(4)] for the courts' insistence on intensive scrutiny of the cognitive processes of decision-making, when decision-makers must weigh mandated relevant considerations. Modern courts show no patience for "tick-box" decision-making.

¹⁶⁹ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1030, 1060; *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545; *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [53].

¹⁷⁰ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

¹⁷¹ For a contrary view see H Wilberg "The *Ireland* Principle for Multiple Purpose Cases: An Exploration and Defence", *Administrative Law in New Zealand*, Auckland, 30 January 2015.

¹⁷² *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

¹⁷³ Compare *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) (a mandatory relevant consideration arose by implication of the decision-making and its effect on sectional interests).

¹⁷⁴ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) (all public powers must be exercised so as to promote the statutory purpose).

retreat from modern standards of public accountability and should be revisited at the earliest opportunity.

(iv) *The bias rules*

Fortunately, we can now put this sorry tale of the law behind us. The *Saxmere* litigation brought to an end the confusion that had beset the bias rules in administrative law. This episode exemplifies how the law may suffer when courts make imprudent changes that require downstream remedial action.

Traditionally, bias allegations were assessed through the eyes of the hypothetical lay observer, who was fully informed and impartial.¹⁷⁵ This test gave proper weight to maintaining public confidence in the impartial administration of justice. Then, the House of Lords jettisoned the objective test and assessed bias allegations through the eyes of the presiding judge, who personified the fair-minded lay observer.¹⁷⁶ Our courts uncritically followed suit and likewise jettisoned the objective test in preference for the English approach.¹⁷⁷ But the story then took an unexpected twist. The subjective test was incompatible with European law,¹⁷⁸ so the House of Lords reinstated the objective test based on the fair-minded lay observer.¹⁷⁹ This left New Zealand alone among the common law jurisdictions applying the discredited subjective test.

The law was betwixt and between. For several years, there followed incessant toing-and-froing between differently constituted panels of the Court of Appeal. It was an unedifying spectacle, with some panels of the Court affirming the subjective test,¹⁸⁰ and others championing the objective test.¹⁸¹ To everyone's relief, *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 1)*¹⁸² finally brought an end to the confusion. The Supreme Court endorsed the English development and reinstated the objective test, premised on the hypothetical "fair-minded lay observer": Would that person reasonably apprehend that the decision-maker might not bring an impartial mind to the

¹⁷⁵ *Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA). The relevant authorities are collated in Joseph at [25.5.4].

¹⁷⁶ *R v Gough* [1993] AC 646 (HL).

¹⁷⁷ *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA).

¹⁷⁸ *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 (CA) at [35]; *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103].

¹⁷⁹ *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

¹⁸⁰ *R v Jessop* CA13/00, 19 December 2005; *Lamb v Massey University* CA241/04, 13 July 2006.

¹⁸¹ *Ngati Tahinga and Ngati Karewa Trust v Attorney-General* (2003) 16 PRNZ 878 (CA); *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 16 PRNZ 1014 (CA).

¹⁸² *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35 at [3], [89] and [127].

decision-making?¹⁸³ The law had turned full circle but it was a journey that should never have been embarked upon.

F Conclusion

The principal burden of this article has been to expose the false dichotomies that compromised judicial review during the middle years of last century. The period from the immediate post-war years to the present offers a fascinating window of legal change. Different mind-sets from today were at play following the executive-fixated war years. Wartime measures had fostered attitudes of judicial deference that lingered for many years, until changing social expectations began raising the temperature and energising the courts. The legal power-plays under the dichotomies that defined judicial review were enervating, diverting attention away from administrative wrongdoing. The stark binary choices were distractions that were unresponsive to the high public interest in promoting public accountability.

That period has now passed. Three macro-developments characterise post-war judicial review: the shift away from a priori labels in administrative law (jurisdictional/non-jurisdictional, judicial/administrative, void/voidable, etc), the broadening of the grounds under which the courts might quash decisions, and the resolve to avoid doctrinal complexity.¹⁸⁴ Robin Cooke's struggle for simplicity represents the best defence against slippage into the world of tabulated legalism. He pioneered the ideal of simple, untechnical and prompt proceedings, unencumbered by doctrinal issues. Yet, the need for vigilance remains. The vagaries of litigation will continue to test the courts, which must mind-wrestle complex issues and reconcile public and private interests. They are not immune from taking wrong turnings in the law, as when they condoned unauthorised purposes in public decision-making and the absence of a duty to provide reasons for decisions. The courts have acknowledged that these two issues will need to be addressed.¹⁸⁵ Happily, they have repaired the damage they inflicted on the bias rules but there remains one issue that no-one seems willing to address. Variable intensity review is the elephant in the room.

¹⁸³ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35 at [3], [89] and [127], following *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [6] and [33].

¹⁸⁴ See *Bugg v Director of Public Prosecutions* [1993] 3 All ER 815 (DC) at 820-822 per Woolf LJ.

¹⁸⁵ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 564 (CA) at [85] (on the "duty" to give reasons); *Criminal Bar Association of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [55] (on the *Ireland* principle).

