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Laws 522

# The Purpose of Remedial Discretion and the Nature of Public Law Rights

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## *I Introduction*

Unlike most litigation, the outcome of a judicial review is not a binary question of winning or losing. Success may involve the applicant being consulted on a decision made afresh which remains contrary to their interests. A declaration of unlawfulness may guide future actions of the public authority but leave the act complained of intact. A judicial review applicant may establish that the public authority has acted unlawfully, but the court may exercise its discretion to decline to grant a remedy.

In this paper I consider the issues relevant to the purpose of the remedial discretion and the nature of public law rights in judicial review. In practice, the remedial discretion is exercised sparingly and most discussion in case law occurs either when the court concludes the discretion should not be exercised, or in applications which fail on other grounds. Arguably, the remedial discretion is in tension with the rule of law given that it allows judges the freedom to order that unlawful executive actions should stand.[1] If there is a tension, it has proved remarkably enduring. Judicial review remedies originate in mediaeval times and, as Lord Bingham notes, they "appear to have been recognised as largely discretionary from the start."[2] The discretion has proved long-lasting; what purpose does it serve? What is the nature of public law rights in judicial review if their breach may pass without a remedy? In contrast to the argument that the remedial discretion is in conflict with the rule of law, I conclude that the discretion supports and upholds the rule of law rather than maligning it.

The paper starts by considering the broad concepts of judicial discretion, the rule of law, and rights and remedies. I then consider both the remedial discretion and the public law rights it relates to. I argue that, on a Hohfeldian rights analysis, the right of the judicial review applicant is a procedural right to have the court supervise the public administration body. Public law duties are not correlative legal duties, although they may be enforced at the discretion of the court; ultimately, such duties are political in nature. Before examining the exercise of the remedial discretion in case law, the paper compares the role of the remedial discretion against standing and ouster clauses; other methods of ensuring that in judicial review "progress is not synonymous with giving judgment for plaintiffs."[3]

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[1] Christopher Forsyth "The Rock and the Sand: Jurisdiction and Remedial Discretion" (2013) Judicial Review, 18:4.

[2] Lord Justice Bingham "Should Public Law Remedies be Discretionary?" (1991) PL 1991, Spr 64-75 at 65.

[3] Cooke J in *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1, 29 (CA) cited in Dean R Knight "Simple, Fair and Discretionary Administrative Law" (2008) 39 VUWLR at 113-114.

## *II Discretion and the Rule of Law*

### ***A The Nature of Judicial Discretion***

Public law remedies are discretionary. The remedial discretion on judicial review is broad but not unfettered and judges are not entirely free to choose what should be done. The nature of judicial discretion in general is that it is not typically unconstrained, but is bound by rules, guidelines and principles.

Some writers seek to differentiate between the exercise of a judgment and a judicial discretion.[4] An example given is the decline of relief on the grounds of undue delay.[5] The judge must determine whether the application was made promptly; a matter of judgment. If the application was not made promptly, the judge must consider whether there were good grounds for the delay – again a matter of judgment. If there were good reasons for delay, and there are no significant contrary factors such as hardship to third parties or adverse effects on good administration, there is no real discretion to be exercised and the applicant should not be refused relief on the grounds of delay. It is only the exercise of balancing the reasons for the delay against any detrimental consequences identified that a judicial discretion is exercised. This suggests that the judicial exercise is predominantly one of judgment, not of discretion. However, in practice the court will generally meld together findings of fact as to the cause and justification for any delay, judgment as to whether such delay was undue, the consideration of adverse consequences and the exercise of discretion whether to decline relief, reaching a conclusion in the round. The fine distinction between judgment and discretion does not provide a beneficial analysis in terms of case law; it suggests that the exercise of judicial discretion is arbitrary, and that judgment is to be preferred.

The converse approach is that discretion is a necessary part of the law. One succinct definition of discretion is that it "may best be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way."[6] A suggested consequence of this is that, as there is no right or wrong answer in the exercise of a discretion it "involves the creation of rights and privileges, as opposed to the determination of who holds those rights and privileges."[7] Such discretionary rights and privileges do not exist until the discretion to confer them is exercised. In the example of

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[4] For example, Lord Bingham, above n 2.

[5] At 68-69.

6 JH Grey "Discretion in Administrative Law" (1979) 17 Osgoode Hall LJ 107 at 107.

[7] At 107.

the decline of relief on the grounds of undue delay, the discretionary judgment of the court creates the right of the applicant to a remedy one way or the privilege of the respondent to avoid one the other. The exercise of discretion is necessary to crystalize the potential rights and privileges in issue.

HLA Hart sees discretion as “a special form of constrained, reasoned decision-making based on appeal to rational principles.”[8] True discretion requires decision-making based on reason, not a whim.[9] Hart argues that discretion is a necessary part of a legal system, given that the law cannot predict the future and cannot regulate for every eventuality. It will always be necessary for judges to ‘make’ law rather than simply to ‘find’ it.[10] Provided that judicial discretion is exercised methodically and by “reasoned elaboration”, such discretion has normative value.[11] Given the inevitable gaps in the law, because it cannot predict every eventuality, judicial discretion is necessary and useful. Judicial discretion is a necessary response to two impediments: the imperfect information available to law-makers, and the imperfect understanding of the aims of the law.[12] Discretion is needed because “lawmakers craft legal rules without knowing everything about the future and in pursuit of aims that are multifaceted and not perfectly determinate.”[13]

For Hart, discretion sits between determinative rule-bound decision-making and free choice.[14] He considers the appropriate way to carry out discretionary decision-making is to place “central importance on rationality, the appropriate selection of factors for consideration, and the means of justification.”[15] Rationality requires a rational method of decision-making as well as a rational outcome. This includes identifying the values to be compromised or sub-ordinated. He associates rationality with not just a logical method, but with practical wisdom or sagacity.[16] The nature of the deliberative process by which the appropriate factors are identified depends on the context: “The set of factors that should be considered in the exercise of discretion is a function of the *type* of discretion at

[8] Geoffrey C Shaw “H. L. A. Hart's Lost Essay: Discretion and the Legal Process School” (2013) 127 Harv L Rev 666 at 668.
[9] HLA Hart “Discretion” (2013) 127 Harv L Rev 651 at 657.
[10] Shaw, above n 8 at 669.
[11] At 672.
[12] Hart, above n 9 at 661.
[13] Shaw, above n 8 at 703.
[14] Hart, above n 9 at 657.
[15] Shaw, above n 8 at 706.
[16] Hart, above n 9 at 656.

issue, and therefore relates to the position in the legal process of the official charged with exercising it."[17] Judicial discretion is not arbitrary, but an essential feature of the judicial role.

### *B The Role of Judicial Discretion*

Courts have considered the exercise of the remedial discretion in judicial review on the basis that "an underlying premise of judicial review…is the maintenance of the rule of law" and that denial of a remedy would subvert this principle.[18] Similarly, Bingham considers that one of the principles of the rule of law is that "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion."[19] Given the discretion inherent in judicial review, this raises the question as to whether the purpose of a judicial review is to determine questions of legal right and liability at all. Bingham goes on to accept that discretion in administrative decision-making is inevitable in a complex modern society and recognises that some judicial powers are discretionary. This reflects Lord Cooke's acceptance of the role of discretion in administrative law, noting that "there is no difference *in essence* between judicial discretion and administrative discretion."[20] At its heart, judicial review represents a discretionary judgment on discretionary administrative decision-making.

Bingham's concern is that the exercise of discretion risks arbitrariness.[21] These concerns are answered by Hart who demonstrates that arbitrary decision-making is one of the consequences of a lack of judicial discretion, not a risk of it. Hart sees discretion as elemental to the rule of law, not an obstacle to it.[22] Part of the rule of law is having the right institutions undertake the tasks they are competent to do. Reasoned elaboration, by which judges should ensure their decisions are transparent, rational and rooted in purpose, is part of the appropriate equilibrium between the different branches of government.[23] The judicial discretion enables courts to defer to other institutions of government where appropriate, for example when declining to determine questions regarded as a matter of policy rather than of law. Judicial review gives the court discretion to determine whether government activity is lawful or not.[24] The discretion to

[17] Shaw, above n 8 at 708.

[18] *Akaroa Marine Protection Society v Minister of Conservation* [2012] NZHC 933 per Whata J at [70].

[19] Tom Bingham, "The Rule of Law" (Allen Lane, London 2010).

[20] Dean R Knight "Simple, Fair and Discretionary Administrative Law" (2008) 39 VUWLR at 113-114.

[21] Bingham, above n 2 at 69.

[22] Shaw, above n 8 at 669.

[23] At 680.

[24] Forsyth, above n 1 at 360.

refuse a remedy when upholding a finding of unlawfulness by the public authority is an essential component of this supervisory role. The remedial discretion provides a safety valve which helps to preserve the appropriate equilibrium between the institutions of government. If it were not available, there may be a greater risk of judicial over-reach and a consequent reaction from the legislature to curtail the judicial review function.

Hart argues that discretionary decision-making is necessary to maintain the rule of law, because it is the appropriate way to resolve cases with no clear answer and avoids or prevents arbitrary decision-making.[25] Additionally, allowance for discretionary decision-making helps to maintain the rule of law and preserve its legitimacy by avoiding the need to make superficially clear rules to address cases where there is no clear answer. Without discretion, legal rules are obliged to falsely claim finality and completeness – as this cannot be achieved, it undermines the law to seek to do so. For Hart, discretion is "essential, not antithetical, to the rule of law: it is *the job to be done* when indeterminacy inevitably arises."[26] It is the first line of defence against "a regime of lawless whim."[27]

## *III Remedies in Public Law*

### ***A Rights and Remedies***

Remedies are at the heart of the reasons to bring a case to court. Avoiding the remedial consequences is the purpose of defending a case at court. The rule of law requires courts to have the power to award effective remedies; there should be sufficient consequences for wrongdoing, and adequate redress for the wronged party.

Zeigler notes that the "principle that legal rights must have remedies is fundamental to democratic government."[28] He quotes the centuries-old authority of Chief Justice Holt concerning the denial of the right to vote in a Parliamentary election: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy…"[29]

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[25] Shaw, above n 8 at 703.

[26] At 709.

[27] At 727.

[28] Donald H Zeigler "Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Court" (1987) 38 Hastings LJ 665 at 665.

[29] *Ashby v White* (92 Eng Rep 126 (KB 1703)) in Zeigler, above n 28 at 672.

The principle that rights should have remedies is so longstanding and taken for granted that there is little discussion of why this is the case. Zeigler seeks to identify the purpose of legal rights; they "define social relations" and "promote well-being in the broadest sense."[30] Rights are a means to an end. Rights preserve human dignity and self-respect, enable wealth accumulation and personal realisation.[31] Legal rights "promote order and predictability, thus enabling people to act upon reasonable expectations in managing their affairs."[32] The consequence of rights that are inadequately enforced is alienation, anger and disconnection from society. The consequences of inadequate protection of legal rights are a reduction in respect for the rule of law and reduced legitimacy of the legal system. Zeigler notes that legal remedies are imperfect – compensation cannot restore bodily injury and punishment of an offender does not undo the crime, or its impact on the victim – but "the fact that rights cannot always be enforced does not diminish the importance of the principle that rights should have remedies…Because rights serve critical purposes, the fabric of society is threatened when rights are not adequately enforced."[33]

This direct and unshakable link between rights and remedies present in private litigation is absent in judicial review as it may be severed by the remedial discretion. Rights may go unremedied. Nevertheless, it is important to note that rights remain important in areas of administrative law. For Varuhas, there is an "increasingly pluralistic legal order" in administrative law rather than a single organising idea, and the concept of rights is of greater importance in some areas than in others.[34] It is evident that not all judicial review or public law matters concern rights; but some do. Courts have consistently held that, where individual rights are directly affected, a remedy will usually follow.[35]

### *B Remedies Demonstrate a Difference Between Public and Private Law*

While private law governs relations between citizens, public law examines the relationship between citizens and public authorities – or increasingly, entities of whatever nature tasked with undertaking public functions. There are fundamental differences in these two spheres, which are reflected in the nature of remedies. As Harlow and Rawlings

[30] Zeigler, above n 28 at 678.
[31] At 678-679.
[32] At 679.
[33] At 681.
[34] Jason N E Varuhas "The Reformation of English Administrative Law: Rights, Rhetoric and Reality" (2013) 72 Cambridge LJ 369 at 371.
[35] For example, *Ririnui v Landcorp* [2016] NZSC 62 at per Elias CJ and Arnold J at [91]. Note here relief was declined due to the impact on third parties, except for narrowly worded declarations.

note, the maxim that citizens are equal before the law cannot readily apply between government and citizens because the right to govern involves inevitable intrusions, exclusions and power imbalances.[36] It is axiomatic that private litigation between a citizen and an emanation of the state, such as a contract dispute, takes place on terms of at least a theoretical equality of arms. Public litigation, involving a citizen's challenge to the exercise of a public power is of a different nature; "there is a distinct interface with public administration, and indeed, the governance of a given jurisdiction."[37]

Chayes describes the traditional role of litigation as "a vehicle for settling disputes between private parties about private rights."[38] He describes five key features of private law litigation: [39]

i. the lawsuit is a bipolar contest between two interests on a 'winner-takes-all' basis;
ii. litigation is retrospective, considering the consequences of events that have already occurred;
iii. right and remedy are interdependent and the remedy results from the right infringed, and to the extent that the right was infringed;
iv. the lawsuit is self-contained, and the judgment applies to the events subject to the lawsuit between the plaintiff and the defendant (for example, a breach of contract claim relates only to the particular contract under dispute);
v. the process, including the evidence to be called, is initiated and controlled by the parties.

This description clearly indicates the differences between private litigation and public law; none of these features would readily be applied to judicial review. A judicial review remedy does not necessarily result from the nature and extent of the right infringed; there is a disconnection between right and remedy in judicial review which marks a difference with private litigation. A judicial review judgment may direct the public authority as to the approach it should take in similar matters, having general application beyond the matter between the parties which is the subject of the litigation. A 'winner-takes-all' basis does not apply in a judicial review where there is a range of discretionary remedies and the outcome of a successful case may not achieve the result desired by the applicant.

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[36] Carol Harlow and Richard Rawlings "Law and Administration" (3rd ed., Cambridge University Press, 2009) at 16.

[37] *Manga v Attorney-General* [2000] 2 NZLR 65 per Hammond J at 126.

[38] Abram Chayes "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281 at 1282.

[39] At 1282-3.

While this could be said to be true of remedies in litigation generally, especially in terms of quantum of damages, it is qualitatively different for a successful applicant to obtain no more than a declaration of rights which leaves the particular decision unaltered, compared with an award of damages which may fall short of the plaintiff's pleaded expectations. Still more, a judicial review applicant may succeed in establishing unlawfulness by the public authority yet receive no remedy. In judicial review "the contours of relief are not derived logically from the substantive wrong adjudged, as in the traditional model."[40]

The issue of standing in a public law matter is another point of difference, as a party with no direct interest in the issue may pursue a judicial review but cannot take part in private law litigation. The private law question is: "does this particular plaintiff have a right to the particular relief sought from the particular defendant from whom he is seeking it?"[41] In a judicial review, the question is less clear-cut. In *Finnigan v New Zealand Rugby Football Union*, the applicants had standing to challenge the decision of an incorporated society which they were not members of.[42] In *Mitchell v Attorney-General*, a declaration of unlawfulness was made in relation to a strip search in prison that the applicant had not endured.[43] The rights of the applicant were not the central issue or determinative of these cases.

One important difference Chayes notes is that private litigation is predicated on concepts of intention and fault,[44] while public law litigation has a wider ambit taking into account regulatory scope and policy issues. In public law, the subjective attitudes of the parties are of secondary importance compared with the goal of promoting the regulatory intention.[45] The court has upheld a judicial review when the respondent "had displayed, albeit inadvertently, a serious disregard for the resource management requirements that it is obliged to adhere to."[46] This points towards the primary importance of judicial review to supervise the actions of the public authority; the impact on the applicant remains important, but of secondary importance to promoting the regulatory intent.

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[40] Chayes, above n 38 at 1296.

[41] At 1290.

[42] *Finnigan v New Zealand Rugby Football Union* [1985] NZCA 52.

[43] *Kerryn Mitchell v Attorney-General* [2017] NZHC 2089.

[44] Chayes, above n 38 at 1285.

[45] At 1296.

[46] *MacPherson v Napier City Council (First Respondent) and Whatever It Takes Trust (Second Respondent)* [2013] NZHC 2518.

### *C Public Law Remedies*

Public law remedies are generally discretionary, while private law remedies usually follow as of right.[47] The role of the court on a judicial review is to assess the lawfulness of the administrative act or decision, not to substitute the court's own decision. In the words of Lord Bingham:[48]

> Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

The job of the court on judicial review is first to assess whether the public authority acted in this way; and secondly, to determine what, if any, remedy should result. The discretionary nature of public law remedies is an important feature which distinguishes them from private law remedies in general. It encompasses both the court's discretion as to what remedy should result and the discretion to decline a remedy in the face of failings by the public authority. One factor which may lead the court to decline a remedy for unlawful conduct by a public authority is the needs of good public administration. The importance of the needs of good administration reflects the role of the court in judicial review. The applicant is not entitled to a remedy, but to the court's supervision.

### *D Remedial Discretion in Judicial Review Includes the Discretion to Refuse Relief*

The broad discretion of the court on judicial review as to remedies includes the discretion to decline relief. The discretion to refuse a remedy has been apparent since the origins of the writ of certiorari in the mid-seventeenth century, with an early court stating "this Quashing is but by favour of the Court, for the Court is not tyed Ex Officio to do it, but may leave the party to plead unto them, as in many cases they use to do."[49]

The consequence of the remedial discretion is that the court may decide that a public authority has acted or decided unlawfully but that no consequences should follow. It appears contradictory that the administrative state may avoid the consequences of its unlawful actions. This remedial discretion potentially raises a tension between the rule of law and the role of the courts on a judicial review. Is the rule of law upheld when the

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[47] Noting that equitable remedies are generally discretionary, but the need for a remedy when rights are established in equity is not in question.

[48] Tom Bingham, 'The Rule of Law', above n 19 at 60.

[49] Style's *Practical Register* (1657) as cited in Lord Justice Bingham "Should Public Law Remedies be Discretionary?" above n 2 at 65.

court makes a finding of unlawfulness and yet declines relief in the face of it? The remedial discretion has proved sufficiently long-lasting that, if it were in tension with the rule of law, more problems of greater magnitude would have resulted. The remedial discretion is enduring within the rule of law; the supposed tension has not caused significant problems in practice.

## *IV What Purpose Does the Remedial Discretion Serve?*

### ***A The Supervisory Role of the Judicial Review Court***

Asking the purpose of the remedial discretion leads to the purpose of judicial review itself. Judicial review in essence is litigation between the citizen and an arm of the state. The remedial discretion to decline relief is a notable difference between judicial review and other areas of litigation. Seeking to explain the purpose of the remedial discretion to decline relief may help to illuminate the nature of judicial review. The explanation for the remedial discretion should coincide with the nature of judicial review. If it does, it may be that there is no fundamental tension between the remedial discretion and the rule of law.[50] If it does not, the reasons for the enduring nature of the remedial discretion should be examined.

The role of the courts on judicial review is to supervise public administration. This is the reason why the courts cannot substitute their own decision:[51]

> If the judges were themselves to exercise powers which properly belong elsewhere it would be a usurpation of authority and they would themselves be acting unlawfully… But in properly exercising judicial power to hold ministers, officials and public bodies to account the judges usurp no authority. They exercise a constitutional power which the rule of law requires that they should exercise.

For Hammond J, the supervisory role of the court on judicial review is not one of enforcement and confrontation with the executive or the legislature. Rather, "the real power of the Court in this subject area is that of moral persuasion."[52] The role of the judge in public law litigation is different to the judicial function in private litigation.

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[50] Forsyth, above n 1 at 360.

[51] Bingham, above n 19 at 65.

[52] *Manga v Attorney-General* [2000] 2 NZLR 65 per Hammond J at 132.

### *B The Task of the Public Law Judge*

For Chayes, the role of the judge in public law litigation more closely resembles a legislative role than an adjudicative one. The judge defines a problem or identifies a mischief, whether existing or threatened, and tailors a solution to resolve the problem in a way that promotes the public law policies which are at stake. The decision to take no action to cure the mischief, by exercising the remedial discretion to refuse relief, is an essential element of this quasi-legislative role. Where the judgment directs the future actions of the public authority, it is hard to see the difference between this and a legislative act.[53]

If the judge in a judicial review is taking on a quasi-legislative role, this removes the issue one step further from individual rights. If a judge is determining the appropriate approach for a public authority to meet a regulatory goal, it would be inappropriate for this to apply only to an individual litigant. This approach is far removed from the question in private law matters: "does this particular plaintiff have a right to the particular relief sought from the particular defendant from whom he is seeking it?"[54]

The fact-finding role of the court in public law litigation is set in the context of the regulatory goal or public policy which is sought to be achieved.[55] For example, cases about resource consents require consideration of the goals of natural resource management, such as the cumulative impact of water take consents on a water catchment and the public good of sustainable use of the natural resources.[56]

Chayes considers the advantages of the supervisory role of public law judges.[57] Judicial independence allows for the promotion of public law goals without political interference. The judge must respond; a case requires a decision, ensuring that difficult issues are not set aside or deferred as can occur from time to time through a political process. Policy solutions are tailored to concrete problems and can be flexibly adapted. Those who are directly affected are able to participate as litigants and the information they rely on is tested through the adversarial process. There is a strong incentive on the parties to bring all relevant information and to ensure that it is robust. While the administrative process involves multiple parties and layers of institutions, politicians and bureaucrats, the

[53] Chayes, above n 38 at 1297.

[54] At 1290.

[55] At 1298.

[56] *Sutton v Canterbury Regional Council* [2015] NZHC 313.

[57] Chayes, above n 38 at 1308-1316.

judicial process is streamlined and non-bureaucratic, with ad hoc solutions. If the solutions proposed are ineffectual, further litigation is likely to result, creating a new opportunity to resolve the problem.[58]

Conversely, there are disadvantages to an ad hoc approach proposing general solutions to specific issues. Courts may be reasonably adept at balancing competing interests and policy goals in the subject matter before them, but they are unable to balance these interests against unrelated goals in the allocation of scarce public resources.[59] Disadvantaged groups, such as the poor and vulnerable, are less likely to be organised to participate in litigation and their interests may therefore not be considered.[60] Importantly, there are the questions of legitimacy and accountability.[61] Courts are not obliged to favour majoritarian outcomes.[62] Where courts are undertaking a quasi-legislative role, their mandate is unclear at best. Chayes notes that the constraints on judges are "amorphous" and "mark no sharp boundaries."[63] Nonetheless, the constraints are there, and the professional obligations of a diligent and conscientious judge can help to shape judicial performance in this role. Chayes notes that judicial participation is not by way of sweeping statements of the law, but the application of public policy goals, set by the executive or Parliament through legislation, to particular circumstances. Judicial review provides a role for public participation in the policy-making process. Judicial review provides "a continuous and rather tentative dialogue with other political elements."[64] Ultimately, the legitimacy of judicial review and public law results from the demand for justice in society. If the purpose of judicial decision-making is to achieve justice, this applies to public law goals the same as it applies to private party disputes.[65]

[58] At 1308-1309.
[59] At 1309.
[60] At 1311.
[61] At 1314.
[62] At 1315.
[63] At 1315.
[64] At 1316.
[65] At 1316.

### *C Remedial Discretion and the Supervisory Court*

The remedial discretion supports the supervisory role of the court in judicial review. Without it, there would be a risk of the courts usurping authority properly belonging to the executive or the legislature and this would threaten the legitimacy of the supervisory role: "there will always be some anxiety over the effects and parameters of judicial review, and it remains true that the contribution the High Court makes to public administration through its supervisory jurisdiction must always be grounded in public acceptance of the courts' legitimacy."[66]

The discretion to refuse relief could be regarded as one end of the spectrum of remedies. This approach is beneficial if one considers remedies in the context of the public authority, rather than the applicant. For the applicant, there are likely to be particular remedies which are more useful than others. If an applicant is seeking to overturn an adverse decision, a declaration may serve no useful purpose. It may, however, assist the public authority in its future decision-making.

The fundamental issue in a judicial review is that the remedial discretion is exercised in the way that is necessary to properly supervise the public authority. This means that a public authority which can demonstrate that it has undertaken steps to put right whatever went wrong, and not to repeat it, may have a powerful case to argue that no remedy should be granted. An individual may gain little direct benefit from the remedies that are selected by the public law judge; but they may be necessary instead to fulfil the court's supervisory role.

## *V Does Judicial Review Concern Rights?*

Remedies follow rights. If the remedial discretion in judicial review severs the link between rights and remedies, does judicial review concern rights? Varuhas notes that scholars such as Thomas Poole and Professor Michael Taggart consider the increasing importance of individual rights in judicial review is changing the entire nature of administrative law – either transforming the judicial review jurisdiction into a rights-based one or establishing a canon of rights-based law alongside the existing order.[67] If this were the case, the discretion to refuse relief would of necessity be narrowing, given

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[66] John Caldwell "Judicial Review: The Fading of Remedial Discretion?" (2009) 23 NZULR 489 at 494.

[67] Varuhas, above n 34 at 372.

the essential link between rights and remedies and the need to vindicate individual rights.[68]

Varuhas notes that the remedial discretion survives an increased focus on individual human rights.[69] In a sense, the preservation of the judicial discretion enables judges to intervene in public activities and "it is not uncommon to find cases where courts restate the importance of granting relief, while denying it."[70] There is typically a nexus between rights and remedies in English law and it would seem sensible that the discretion would be more limited in cases where rights are at stake. However, in practice judges rely more heavily on a 'rule of law' argument that public authorities should act lawfully.[71] This seems problematic; the rule of law requires both adequate supervision of the exercise of public power and the vindication of individual rights. In many cases, the two interests will coincide; when they do not, the rule of law requires the independent adjudication of a judge to intervene, exercising a discretionary power to determine the issue within guidelines that protect against arbitrary decision-making. The remedial discretion supports the rule of law by providing space for the necessary balance between the twin interests to be struck.

Varuhas notes that courts have extended the duty of procedural fairness beyond cases where a claim right exists and that the procedural protection now applies to a wide variety of interests.[72] For example, where the common law duty to consult applies, this does not depend on the presence of individual rights claims but on a number of factors relevant to the conduct of the public authority and the interests of the individuals concerned. In *Wellington City Council v Minotaur*, while the Court of Appeal concluded that the failure of Wellington City Council to consult the landlord, Minotaur, was not irrational, the arguments did not focus on the fact that it was the rights of their current and future tenants, not Minotaur, that were in issue.[73] The procedural right to be consulted was not dependent on a substantive right at stake. The case did not hinge on the vindication of individual rights.

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[68] For example, vindicating rights is a central feature of arguments for damages under the Bill of Rights Act 1990; *Taunoa v Attorney-General* [2007] NZSC 70.

[69] Varuhas, above n 34 at 384.

[70] At 384.

[71] At 385.

[72] At 380.

[73] *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302.

## *VI Hohfeldian Rights and Duties in a Public Law Context*

If administrative law has a unifying theory of the vindication of individual rights, it is important to identify the nature of those rights. Varuhas relies on the Hohfeldian approach, noting that "Hohfeldian formulations [also] have the important benefit of capturing both the entitlement of the rights-holder, and the obligation of the duty-bearer, and can help to explain why it is the specific claimant and specific defendant, rather than any other two persons, that are brought together in a legal dispute."[74] He notes that Hohfeldian analysis is more usually associated with private law fields and may seem out of place with the "pursuit of collective or public goals."[75]

Hohfeld's classic analysis is as follows:[76]

| | | | | |
|---|---|---|---|---|
| Opposites | {right | privilege | power | immunity |
| | {no-right | duty | disability | liability |
| | | | | |
| Correlatives | {right | privilege | power | immunity |
| | {duty | no-right | liability | disability |

Ziegler states that, in Hohfeldian terms, "a right without a remedy is not a legal right; it is merely a hope or a wish."[77] A claim of right entails a correlative duty, and a duty that cannot be enforced is not really a duty, but a voluntary act. The applicant in a judicial review may have a 'right' without a remedy as a consequence of the remedial discretion. In a Hohfeldian analysis, the applicant therefore does not have rights against the public authority. Instead, it can be seen that the right of the judicial review applicant is the right to have the court supervise the actions of the public authority. This is no more or less than a right of access to the court. The concomitant duty is on the court, not on the public authority; the duty on the court is to scrutinise the actions of the public authority and to consider what, if any, remedy should follow. This relationship of right and duty between the court and the individual applicant entails a correlative relationship between the court and the public authority. The court has the right to assess the lawfulness of the actions of the public authority. The public authority has a duty to submit to the court's jurisdiction. The overriding duty of the public authority is to act in accordance with the public interest. This will usually coincide with the individual rights of the applicant, but it does not

[74] Varuhas, above n 34 at 397.
[75] At 397.
[76] As set out by Hammond J in *Lai v Chamberlains* [2005] NZCA 37 at [165].
[77] Ziegler, above n 28 at 678.

necessarily follow. The public authority's duty to act in the public interest may have legal consequences if breached but essentially it is not a legal duty – rather a political one.

As Varuhas notes "the characteristics of Hohfeldian rights are that they are directly correlative to duties, which mirror the content of the right, and held by a specific individual, the rights-bearer, against a specific individual, the duty-bearer."[78] He notes that often public law rights are conceived of as a bundle of rights. This concept resembles the idea of natural justice, with the applicant having a number of rights at different stages of a public authority's decision-making process: to be consulted; to have the case against one put, and the right to respond to adverse findings; the right to reasons for decisions. In any particular case, one or more of these rights could be at play. The nature of the appropriate procedural safeguards depends, at least in part, on the nature of the substantive rights at stake (if any). This raises the question of whether procedural fairness in a public law sense exists to protect individual rights. Varuhas does not accept that this is the case, and does not consider that procedural fairness is a duty "owed by authorities to specific individuals, and which is correlative to individual rights."[79] If this were the case, there would be a stronger argument for damages to result from breach; there would also be a strong case to argue that remedies should follow as of right.[80]

Varuhas provides *Wednesbury* unreasonableness as an example that Hohfeldian rights do not fit easily with a judicial review or administrative law framework.[81] If a public authority has a duty not to act unreasonably, Varuhas questions who holds the correlative right?[82] If an individual does have a right to require the public authority not to act unreasonably (in a *Wednesbury* sense), it is only enforceable on review and does not exist as a claim right outside the sphere of judicial review. While the primary arbiter of reasonableness is the relevant public authority, and the court's supervisory role is a secondary, it is only through the court's supervision that the right takes form.[83] If an individual is entitled to a claim right that the public authority does not act unreasonably, it is subject to the judgment of the court as to reasonableness, and the discretion of the court as to remedy.

[78] Varuhas, above n 34 at 397-398.
[79] Varuhas, above n 34 at 412.
[80] At 412.
[81] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1.
[82] Varuhas, above n 34 at 407.
[83] At 406-407.

Varuhas cites Matthew Kramer as having convincingly shown that claim rights may be held collectively.[84] These rights share the correlative structure of individual rights, but they are owed to a group or the public as a whole. One way to conceive of public law duties is that the correlative claim right is held by the public as a whole, "thus a breach of duty is not an individual wrong but a 'public wrong.'"[85] It is a matter of debate whether a general duty owed to the public at large can be an individual claim right requiring protection. Sedley J, in *R v Somerset CC, ex p. Dixon*, said, prior to the Human Rights Act 1998 (UK) coming into force, that "public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs - that is to say misuses of public power." [86]

If the Hohfeldian analysis that there are correlative rights to public law duties is accepted, administrative law must be seen to be based on both public law duties and rights. If these rights are collective, this helps to differentiate between private law (individual) rights and public law (collective) ones. There is a normative value of claim rights in administrative law under this analysis, in which the exercise of public power is a relevant concern.[87]

The proposal that public law rights are collective, and often held by the world at large, is initially attractive. However, it does not necessarily resolve the question as to the purpose of the remedial discretion to refuse relief. In Hohfeldian terms, a right must entail a correlative duty - whoever holds it, whether collectively or individually. If public law rights are held collectively by an identifiable grouping or by the world at large, there must still be a correlative duty on public authorities to act lawfully in compliance with public law duties. Such a right should be enforceable; regarding public law rights as collective does not therefore explain the purpose of the remedial discretion which restricts their enforceability. To hold that a right is owed to the world at large, but unenforceable by an individual who seeks to enforce it places the right outside the Hohfeldian rights analysis; it is not an enforceable legal right.

If judicial review does not relate to individual (or indeed collective) rights, this leads to the question of what exactly is the nature of the duty of the public authority? If the individual right in a public law sense is the right of judicatory supervision of the actions

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[84] Matthew Kramer "Rights Without Trimmings" in "A Debate Over Rights", (eds M H Kramer, N E Simmonds and H Steiner) (Oxford 1998).
[85] Varuhas, above n 34 at 408.
[86] Varuhas, above n 34 at 410 citing *R v Somerset CC, ex p. Dixon* [1998] Env. L.R. per Sedley J at p121.
[87] Varuhas, above n 34 at 411.

of the public authority, the concomitant duty is on the court to reach a judgment and to consider exercising its discretion as to consequences. It may be that the legal nature of public law duties is that the public authority has a duty to respond to and co-operate with the court's supervision, beyond any responsibility of an ordinary litigant to assist the court and to participate in litigation. While a party to private litigation may legitimately decide not to take part in court proceedings, leaving the opponent with the burden of proving their case to a satisfactory legal and factual standard without attempting rebuttal, it is questionable whether a public authority facing a judicial review would be afforded the same privilege. The correlative duty to the right of the individual to have the court supervise the public authority may be for the public authority to submit to judicial supervision.

It still remains to be explained what the nature of public law duties is, if there is no correlative right. One answer is that public law duties are not duties at all, but voluntary responsibilities of public authorities to act in the public good. The responsibility to act in the public good could be seen as an overarching duty, owed to the public at large rather than an individual applicant. This responsibility to act in the public good could feasibly be reconciled with the remedial discretion, if it is accepted that strict adherence to public law principles is not necessarily always in the public interest, or that the public interest may mitigate against relief even in the face of a failure of a public authority to comply with public law principles. If there are public law rights, held individually or collectively, they are not absolute rights but are defeasible by other interests, such as the needs of good public administration and third party interests.

If there is a duty on public authorities to act in the public interest, and a right of the public to insist that the public authority acts in the public interest, how is it enforced? Ultimately, perhaps, these rights and duties are extra-judicial. The duty on public authorities to act in the public interest is a political duty, not a legal one. A public authority that does not act in the public interest will be held to account in forums other than the administrative court.

## *VII Procedural Rights and Access to the Public Law Court*

The judicial discretion to decline relief permits access to the court of judicial review while setting a boundary on its potential utility for applicants. The discretionary nature of judicial review remedies creates uncertainty for applicants; I have sought to demonstrate that this is a necessary consequence of the supervisory function. There are other ways of setting boundaries on judicial review, with two principle examples being standing and

ouster clauses. The use of these alternative methods does not preserve the procedural right of access to the court for the purposes of supervision of the actions of the public authority. An applicant who lacks standing cannot access the court, and a matter which is subject to an ouster clause is removed from the jurisdiction of judicial review. Two further issues are briefly discussed below which illustrate the procedural right of access to the public law court: the discretionary remedy of public law damages and habeas corpus, the right to review of detention by the court. The availability of declaratory and prospective orders helps to preserve access to the court consistent with the needs of good public administration.

### *A Standing*

To have standing, a judicial review applicant must have a sufficient interest in the matter under review; what is a sufficient interest is in the discretion of the court.[88] Standing may be considered by the court as a preliminary matter or as part of the discretion as to relief.[89] In recent times, traditional rules of standing have been significantly relaxed to permit public law challenges to proceed.[90] It is rare for an application to be refused on the grounds that the applicant does not have standing, and rarer still for the court to find unlawfulness but exercise its discretion to refuse relief on the grounds of standing. If the applicant's standing is in question, this may go more to the nature of relief than the question of whether to grant relief at all; an applicant whose standing is in question may fail to convince the court to order more stringent remedies such as a mandatory order.[91] The court is unlikely to permit unlawfulness by a public authority for the want of standing.

Varuhas notes that the relaxed rules of standing reflect the focus away from individual rights.[92] If standing were dependent on an individual right being contested, much of public interest litigation brought by pressure groups and individuals would fall away. Varuhas notes that "the dominant factor remains the merits of the case rather than the effect on the applicant's interests."[93] He quotes Lord Reed's finding that equating standing with rights is incompatible with the court's role to "exercise a supervisory jurisdiction" which "necessarily requires a different approach to standing".[94] In order to

[88] *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 at 220.
[89] At 220.
[90] Caldwell, above n 66 at 507.
[91] Forsyth, above n 1 at 377.
[92] Varuhas, above n 34 at 381.
[93] At 382.
[94] *AXA General Insurance Ltd. v HM Advocate* [2011] UKSC 46 at [169].

preserve and enhance the rule of law, the courts should not restrict judicial review based on individual rights but recognise the primacy of the supervisory function. Both the relaxed rules as to standing and the remedial discretion to refuse a remedy to the individual applicant support the court's role on judicial review of supervising public authorities and assessing the lawfulness of their actions.

### *B Ouster Clauses*

For Harlow and Rawlings, ouster clauses raise a key constitutional question for the rule of law.[95] If 'red light' theorists consider that the important role of the courts is to restrict the power of the executive, how can the rule of law sustain the ability of the legislature to exempt certain government activities from judicial oversight?[96] Is Parliament seeking to preserve the interests of good administration by preventing the impediment of judicial review, or does it compromise the rule of law to deny judicial scrutiny of the actions of a public authority?[97]

If the primary function of the court on judicial review is to supervise the actions of the public authority, and the right of the individual is to subject the actions of the public authority to the court's supervision, this explains significant concerns regarding ouster clauses. Ouster clauses prevent the court from undertaking its primary supervisory function. Strong justification is required for the legislature to enact an ouster clause if this excludes a legal right; particularly in the context where the remedial discretion can operate as an effective constraint on judgment for the plaintiff where constraint is considered necessary. The concerns about ouster clauses – and the importance of having sufficient alternative methods in place to obviate the need for them – helps to explain the benefits of the remedial discretion. There is less justification for denying an individual access to the supervisory role of the court where the remedial discretion provides an alternative safeguard.

### *C Declarations and Prospective Remedies*

A declaratory order is primarily a prospective remedy focused on the future conduct of the parties "not to compensate for past wrong"[98] It is only indirectly related to the legal wrong suffered in the particular case and "provides for a complex, on-going regime of

[95] Harlow and Rawlings, above n 36 at 25.
[96] At 25.
[97] Hanna Wilberg "Interrogating 'Absolute Discretion': Are New Zealand's Parliament and Courts Compromising the Rule of Law?" (2018) 45 Federal Law Review 541 at 543.
[98] Chayes, above n 38 at 1298.

performance."[99] The court's involvement in a case is necessarily ongoing as a result of a declaratory order, bringing the parties' future conduct under the supervision of the court.[100] As a declaratory order is principally prospective in effect, it will apply to non-parties and it will not directly remedy the wrong to the judicial review applicant. It is squarely targeted at supervising the conduct of the public authority and may only vindicate the individual rights of the applicant as a secondary consequence, by a side wind.

Prospective remedies provide certainty as to the future use of state power but "represent pyrrhic victories for successful litigants, who gain no victory but an assurance against a repetition of the misapplication of power."[101] This approach is justified by the social benefit of good public administration outweighing the interests of the individual concerned. The potential for courts to provide prospective-only remedies is an important alternative to the refusal of a remedy and an important feature of the court's role to supervise public authorities. It enables the court to provide a remedy in a case which may be moot for the particular applicant, or which may cause difficulties for the conduct of good administration if applied to existing circumstances, but which can provide guidance for the future activities of the public authority.

### *D Public Law Damages*

Other features of public law support the primary supervisory role of the court. At common law, damages are prohibited for public law wrongs.[102] There is an exception in *Baigent's case*[103], providing for damages where this is necessary to provide an effective remedy for breach of the New Zealand Bill of Rights Act 1990. This is an exception to the general rule that remedies other than damages are usually effective to vindicate the public law rights claimed. It is suggested that the remedy of public law damages offends against the constitutional separation of powers between the executive and judiciary, as it removes the considerable leeway given to public agencies as to how they respond to a traditional public law remedy.[104] However, where public law damages may be available, the remedy is discretionary. Classic damages assessments including causation, general and special damage, mitigation and calculations of future loss are unlikely to apply to a

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[99] At 1298.

[100] At 1298.

[101] Philip A Joseph "Constitutional and Administrative Law in New Zealand" (3rd ed., Cambridge University Press, 2009) at 1081.

[102] At 1078.

[103] *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA).

[104] Peter Cane "Damages in Public Law" (1999) 9 Otago LR 489 at p493.

discretionary award of public law damages. This is because the award does not relate directly to the right to a remedy for the loss suffered; as McLay has noted, "the right to damages becomes then more of an ability to petition the court to consider compensation, and in deciding the court has to balance public and private interests in a way that would be foreign to private damages suits."[105] Public law damages, to the narrow extent they are available, are not a remedy as of right. Public law damages result when the court considers the award of damages to be a necessary outcome of its supervisory role.

### *E Habeas Corpus: Why the Remedial Discretion is Not Universal*

Habeas corpus is not a judicial review remedy, with a specific writ of habeas corpus provided for under the Habeas Corpus Act 2001. Nonetheless, it is a traditional prerogative writ as are the writs available on judicial review. As it is a public law remedy which is not discretionary but is available as of right, it may help to inform consideration of the discretionary nature of judicial review remedies.

The right to habeas corpus is, almost literally, a right to bring the body before the court. The right is to have the court review the legality of the detention, while the court must order release if there are no lawful grounds for the detention to continue. This brings it within the framework of judicial supervision of executive actions and the right of access to the court. The public authority is obliged to submit to the court's supervision: "a feature of entitlement to the writ is the right to require the person who detains you to give an account of the basis on which he says your detention is legally justified."[106]

There is no discretion as to remedy. The only permissible remedy for a detention that is unlawful is that the detention cease; a mere declaration as to its unlawfulness would be as inadequate and impermissible as a refusal to grant relief. One way to approach the lack of the remedial discretion on a writ of habeas corpus is to consider the grounds on which the discretion to decline a remedy may be exercised: conduct of the applicant including delay; the facts and context of the case; the needs of good administration and the rights of third parties. It is submitted that none of these factors could justify a court in condoning and authorising an unlawful detention. The conduct of the applicant cannot weigh against their right to be protected from unlawful detention; there cannot be good administrative reasons to permit an unlawful detention; there cannot be third party interests that outweigh the interests of the person not to be unlawfully detained; and there cannot be

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[105] Geoff McLay "Damages for Breach of the New Zealand Bill of Rights - Why Aren't They Sufficient Remedy?" (2008) NZLR 3 at 360.

[106] *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48 per Lord Kerr at [41].

good reasons for the court to permit an unlawful detention by a public authority. The issue may be determined by simple policy reasons why the general discretion to refuse relief does not apply to applications for habeas corpus; the legitimacy of the court would be diminished by justifying an unlawful detention.

## *VIII How is the Discretion to Refuse a Remedy Exercised in Practice?*

### ***A The Common Law Discretion is Preserved in Statute***

The common law remedial discretion is supplemented by statute providing that, on judicial review, the court may grant relief or exercise its discretion to refuse relief, including on the grounds that the defect is minor or technical and no substantial wrong has occurred. In relation to the exercise of a statutory power, the court may direct that the matter be reconsidered, either generally or in respect of specific matters.

The legislative discretion was set out in the Judicature Amendment Act 1972, repealed and re-enacted by the Judicial Review Procedure Act 2016.[107] The 2016 Act explicitly stated that its purpose was to re-enact and update Part 1 of the 1972 Act without altering the interpretation or effect of those provisions.[108]

Section 16 of the 2016 Act states that the High Court "may, by order, grant an applicant any relief that the applicant would be entitled to in proceedings…"[109] Under section 18, the court may refuse to grant relief on any ground where it had the discretion to refuse relief prior to the enactment of the 1972 Act.[110] Section 19 specifically provides that the court has discretion to refuse to grant relief for defect in form or a technical irregularity, where the court finds that no substantial wrong or miscarriage of justice has occurred, as well as making an order validating the decision "from such time and on such terms as the court thinks fit."[111] It is perhaps significant that the statutory power of discretion for the court is both to refuse relief and to validate the otherwise unlawful decision; the court may leave an unlawful decision untouched while also declining relief.

Section 17 provides that the court may direct reconsideration of a matter to which a statutory power of decision relates, whether or not it also grants relief.[112] The court may

[107] This was done as part of a broader programme of reforming the legislation concerning court procedure.
[108] S 3, Judicial Review Procedure Act 2016.
[109] S 4(1) Judicature Amendment Act 1972 (the 1972 Act).
[110] S 4(3), 1972 Act.
[111] S 5, 1972 Act.
[112] S 4(5) 1972 Act.

direct reconsideration generally or in respect of specific matters, and must give reasons for the direction. The court may make an interim order in respect of the matter to be reconsidered. The reconsideration must have regard to the court's direction and reasons.

### *B Case Law: The Remedial Discretion and the Supervisory Role of the Court*

The judicial discretion is broad but not unfettered. Factors relevant to the exercise of the discretion include: conduct of the applicant, including delay; inevitable outcome; no substantial prejudice to the applicant; the error is immaterial to the outcome; there is no real benefit to the applicant; the needs of good administration; and the effect on third parties.

The factors are set out in different ways by academics and courts. Bingham identifies nine grounds on which a judge may properly exercise the discretion to refuse relief for an unlawful act by a public authority, including standing as one of the remedial discretion categories.[113] Caldwell groups the different reasons for refusal of relief into three broad categories: conduct of the applicant; circumstances of the case; and the wider public interest.[114]

Whichever way they are classified, the factors relevant to the exercise of the judicial discretion to refuse relief are not fixed. They support the duty of the court to do overall fairness to the parties as well as to third parties. Multiple factors will usually be relevant. The range of potentially relevant factors provides guidance and it is for the court to determine the weight and application of those factors in all the circumstances. Factors such as the nature and extent of the unlawfulness, the materiality of the error and the prejudice to the applicant should be considered in the round. Delay may not be fatal, but an applicant who does delay can expect their conduct generally to be carefully scrutinised. Adverse impact on blameless third parties may present a significant obstacle to relief, particularly when exacerbated by delay. These issues are balanced against the applicant's case that unlawful executive actions should be corrected. Relief may be granted to promote better decision-making in the future or may be refused to preserve the needs of good administration.

The exercise of the remedial discretion depends on the facts and context of the case. Courts should take a nuanced approach to the exercise of remedial discretion "reflecting

[113] Bingham, above n 2 at 68.
[114] Caldwell, above n 66 at 497.

the gravity of the error in the context of the circumstances of the case."[115] The premise is that there must be extremely strong reasons to refuse relief where the applicant has suffered substantial prejudice.[116] Typically, multiple relevant factors will overlap and the consideration of the remedial discretion will involve a balancing and weighing exercise.

In practice, the discretion to decline a remedy when the court has found that the public authority acted unlawfully is exercised infrequently. The Court of Appeal has held that "a discretionary withholding of relief is not the normal outcome of a successful attack on a reviewable decision."[117] Exercise of the remedial discretion is exceptional.

Judicial comment on the remedial discretion often arises in two contexts. Either the court considers exercising its discretion to decline a remedy and determines not to exercise it; or the court comments where it has found that the public authority did not act unlawfully, perhaps by a narrow margin, that it would in any event have declined relief. This practical application, or non-application, of the discretion indicates that remedial action is largely determined to be a necessary and appropriate response in the face of unlawful actions of a public authority.

### *1 Conduct of the Applicant Including Delay*

Factors relating to the applicant's conduct may be relevant to a judge's exercise of discretion as to remedy. Hammond J in *Kung v Country Section NZ Indian Association Inc* compared the factors relating to conduct of the applicant to the equitable 'clean hands' doctrine.[118] Notably, that application failed on substantive grounds and there are few, if any, examples in the case law where what may be categorised as misconduct by the applicant has led to a decline of relief.

The common factor of applicant's conduct which is weighed in the exercise of the remedial discretion is delay. This is sometimes regarded as indicating tacit acceptance of the decision now complained of or waiver of the right to challenge. There is generally no time limit on an applicant bringing judicial review proceedings but failure to commence proceedings promptly may be a factor in the exercise of discretion to refuse relief.

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[115] *Sutton v Canterbury Regional Council*, above n 56 at [69] referring to *Rees v Firth* [2011] NZCA 668 at [48].

[116] *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26 at [61].

[117] *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 at [39].

[118] *Kung v Country Section NZ Indian Association Inc* [1996] 1 NZLR 663 at [5].

While delay may be a ground for refusing relief, delay alone will not usually justify the withholding of relief. In *Beach Rd Preservation Society v Whangarei District Council and another*[119], the court cited an academic's view that "delay in bringing proceedings will seldom, if ever, be the only reason for refusing relief."[120] Here, where the applicant sought to resolve the matter without recourse to expensive public law litigation, the respondents knew of the applicant's objections and there was no substantive prejudice to third parties resulting from the delay, such delay was not a factor justifying the withholding of relief.

When it does arise, the applicant's conduct is either directly related to the needs of administration or the effect on third parties. In *Wellington City Council v Minotaur Custodians Ltd* the Court of Appeal overturned a High Court decision in favour of the applicant, but additionally held that delay was a reason for which it would have otherwise declined relief.[121] The respondent had deferred implementation of the policy under challenge to allow the applicant to make further representations which were not forthcoming. The applicant had commenced the judicial review almost two and a half years after indicating to the respondent that it intended to do so. Other parties had adapted to the new policy. Such inaction would have disentitled the applicant to relief.

*West Coast Province of Federated Farmers of New Zealand (Inc) v Birch* demonstrates the principle that delay by the applicant can weigh heavily in favour of exercising the discretion to refuse relief when combined with an adverse effect on third parties.[122] The Court considered the issues complained of in the grant of licence were technical and errors of process were minor. During the period of delay, the third party had spent significant sums in reliance on the licence granted. The Court held that "the more liberal allowance of standing in administrative law, accorded in recent years and exemplified in the present case, carries with it an obligation to proceed promptly" and refused relief because of the combination of delay, no flagrant invalidity and the adverse effect of delay on the respondent.[123]

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[119] *Beach Rd Preservation Society v Whangarei District Council and another* [2001] NZAR 483 (HC).

[120] Paragraph 2.38 of Dr Graham Taylor, "Judicial Review: A New Zealand Perspective" (Butterworths, Wellington, 1991) at [51].

[121] *Wellington City Council v Minotaur Custodians Ltd*, above n 73.

[122] *West Coast Province of Federated Farmers of New Zealand (Inc) v Birch* CA25/82, 16 December 1983.

[123] At 6.

These cases indicate that the purpose of the review of the actions of the public authority is to promote the public interest. If the conduct of the applicant has contributed to the circumstances arising, it will be much harder to persuade the court that relief should follow.

### *2 Does the Unlawful Action Have an Effect on the Applicant?*

The exercise of the remedial discretion may be in issue because the actions of the public authority do not have an effect on the applicant. This can arise where there is no substantial prejudice to the applicant resulting from the actions of the public authority.[124] The applicant may have an alternative remedy available to them.[125] Relief may bring no substantial benefit including where the decision is now academic for the applicant.[126] Where the court considers that the unlawfulness is immaterial to the decision that affects the applicant's interests, there is a fine distinction between the court declining the judicial review on the basis of immateriality,[127] and declining to award relief because of it.[128] This underlines the fact-specific nature of judicial review – immaterial errors may not amount to unlawfulness or may not lead to any relief. The outcome depends on what the court thinks is necessary to undertake its role of supervising the public authority.

The absence of a real benefit to the applicant may be a factor in the court's exercise of discretion whether to grant a remedy but it is unlikely to be determinative. Whether or not the applicant benefits from the outcome, the needs of good public administration may lead the court to grant a remedy in respect of an unlawful decision or action by a public authority. This may be particularly so in respect of a declaration, which may serve as judicial notice that particular conduct is unlawful. The impact on the public authority is of greater importance.

In *Thomson v the Minister for Climate Change Issues* the court exercised its discretion to refuse a remedy because relief was unnecessary.[129] The applicant won on one of four grounds that the Minister's approach was unlawful, but the High Court declined to grant a remedy because the new Government had announced plans to review the impugned target. A declaration would bring no substantive benefit. The Court held that "a declaration would now be of historic interest only. This judgment is a sufficient record of

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[124] *Tauber v The Commissioner of Inland Revenue* [2012] NZCA 411.

[125] *Gabler v Queenstown District Council* [2017] NZHC 2086.

[126] *Just One Life Ltd v Queenstown Lakes District Council*, above n 117.

[127] *Gabler v Queenstown District Council*, above n 125.

[128] *Northland Regional Council v Rogan and others* [2018] NZCA 63.

[129] *Thomson v the Minister for Climate Change Issues* [2017] NZHC 733.

the Court's view on this cause of action."[130] This suggests that the judgment itself, resulting from the court's scrutiny of the executive actions, may be regarded as an adequate remedy. It raises the question whether there is any substantial difference between a judgment and a declaration, in terms of establishing the correct legal position between the parties and influencing future decision-making by the public authority.

Conversely, in *Mitchell v Attorney-General* the minimal impact of the unlawfulness on the applicant was no bar to relief.[131] Multiple factors combined to ensure that delay of five years was not fatal to the applicant's successful challenge to a strip search which she did not endure. In finding for the applicant, the court noted "the constitutional importance of judicial review"[132]

The Crown accepted that the strip search complained of was unlawful but argued that no remedy should result. The applicant's rights had been vindicated in the most meaningful way when she refused to comply and was subjected to a lawful rub down search instead. The error in law could not be considered material as it did not affect the outcome for Mitchell. A declaration would have no effect. The applicant suffered no substantial prejudice from the unlawful action.

The Court held that "once a reviewable error is found, the plaintiff is prima facie entitled to a remedy."[133] In circumstances where the applicant had understandable reasons for delay and the respondent could show no prejudice resulting, the delay was "not material to the decision of whether to grant relief."[134] The judge accepted that the applicant should not benefit from a declaration that a strip search which she did not suffer was unlawful. However, the need to guide future decision-making of prison officers exercising a statutory power, and the fact that the procedure was invasive and degrading, led to a declaration that the strip search was unlawful.

This case perhaps shows the flexibility of the remedial discretion and the fact-specific nature of the inquiry. Presumably, the constitutional importance of judicial review weighs more heavily given the coercive nature of the state power being exercised here and the significant vulnerability of a serving prisoner. The judge sought to prevent a repeat of the

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[130] At [98].

[131] *Kerryn Mitchell v Attorney-General*, above n 43.

[132] At [44].

[133] At [34].

[134] At [39].

error of law by a public authority in a position of considerable power. The need to adequately supervise the actions of the public authority was paramount; the remedy which resulted had little or no impact on the applicant.

### 3 *The Public Interest: The Needs of Good Public Administration and the Impact on Third Parties*

The absence of substantial prejudice to the applicant is often mirrored by a significant adverse impact on third parties. In *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* the Court of Appeal upheld the High Court decision to decline to grant relief because of the effect on third parties and held that "prejudice to innocent third parties is a particularly relevant consideration in the exercise of a reviewing court's decision whether to grant a remedy."[135] There was no substantial prejudice to Ngāi Tai and the errors of law identified were minor.

The absence of substantial prejudice to applicants may also combine with the needs of good public administration to result in the discretionary decline of a remedy. In the recent case of *Northland Regional Council v Rogan and others*, there was no real benefit to the applicant and significant adverse consequences for public administration if a remedy resulted.[136] While the Court of Appeal accepted there were defects in Northland Regional Council's rate-setting process and that the council had failed to comply with its statutory obligations, the court held that "this proceeding lacks complaint of substance."[137] The points taken were overly technical. No individual actually affected was identified. Some of the council's errors would have been to the advantage of ratepayers. The Court noted the expense of the proceeding to the general body of ratepayers in the area. The Court declined relief and validated the unlawful rates and penalties decisions under section 5 of the Judicature Amendment Act 1972.

Both the needs of good public administration and the effect on third parties were relevant in *Just One Life Ltd v Queenstown Lakes District Council*.[138] The High Court held that the Resource Management Act 1991 did not permit the council to delegate the consenting power to a private company as it purported to but declined to grant any declaration because the issue was now moot. The claimant appealed seeking a declaration as to the

[135] *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* [2017] NZCA 613 at [61]. The applicant was granted leave to appeal to the Supreme Court [2018] NZSC 41 and the appeal was heard in August 2018 with judgment reserved (SC 11/2018).

[136] *Northland Regional Council v Rogan and others*, above n 128.

[137] At [88].

[138] *Just One Life Ltd v Queenstown Lakes District Council*, above n 117.

unlawfulness of the purported delegation, but no longer pursued a declaration that the original grant of the actual resource consents was unlawful.

The council argued that the negative impact on public administration in granting such a declaration was a powerful factor against relief. There were a large number of resource consents, not otherwise complained of, which would be impacted by the declaration. There was no benefit to the applicant, as the latter decision to grant resource consents was lawful.

The Court of Appeal held that exercise of the remedial discretion is exceptional.[139] Relief should be granted unless it obviously had no practical value; relief may vindicate the claimant's concerns. Costs were in issue. Consequently, the Court of Appeal vacated the High Court judgment and remitted the matter back to the High Court to consider both relief and costs.[140]

Multiple factors may combine to persuade the court that, in all the circumstances, the needs of public administration require that an unlawful decision is not set aside. That was the view of the Court of Appeal in *Unison Networks Ltd v Commerce Commission*.[141] The Commission had set two pricing thresholds in the energy sector under a new statutory power. The applicant challenged the initial threshold as unlawful and asserted that the revised threshold was so closely linked to the flawed initial threshold that it should also be set aside. The Court of Appeal held that the revised threshold was lawful and there was public interest in its continued operation. There was not enough information to justify setting aside the initial threshold. Most of the industry accepted the thresholds and there was evidence of disruption if either threshold were set aside.[142]

In *Ririnui v Landcorp and others*, the Crown's original unlawful failure to consider Ngāti Whakahemo's Treaty of Waitangi interests when Landcorp was selling a farm was challenged by Ririnui.[143] He succeeded at an interim hearing,[144] but was refused relief at the final High Court hearing as a Ministerial reconsideration had cured the initial

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[139] At [39].

[140] No further case is reported, suggesting that a pragmatic approach to costs may have avoided further legal argument as to remedy.

[141] *Unison Networks Ltd v Commerce Commission* CA 284/05, 19 December 2006.

[142] The matter was further appealed to the Supreme Court, but it held that both thresholds were lawful and did not need to consider the issue of discretionary relief.

[143] *Ririnui v Landcorp and others* [2016] NZSC 62.

[144] [2014] NZHC 1128.

unlawful act.[145] The case was appealed to the Court of Appeal[146] and ultimately the Supreme Court. Ririnui obtained declarations as to unlawfulness of the original failure to take account of Ngāti Whakahemo's interests and to sell the farm to a private purchaser; all other forms of relief were refused by a divided court, primarily because of the effect on the private purchaser as an innocent third party.

The public interest in judicial review often requires the court to focus on supporting the policy intent of the legislative framework, as illustrated by two resource consent cases.

In *MacPherson v Napier City Council (First Respondent) and Whatever It Takes Trust (Second Respondent)*, the respondents unsuccessfully opposed a judicial review of the decision to grant a residential building resource consent on multiple grounds.[147] The respondents argued the errors were technical, the applicant was disentitled to relief on the grounds of delay, and there was substantial prejudice to the second respondent which had relied on the grant of resource consent and suffered expense.

The Court held that there was no delay to factor into the remedial discretion. It considered the gravity of the error, the absence of an injustice, the question of the practical value of relief and the inevitability of the outcome as overlapping matters to be considered in the round. The seriousness of the error should be considered in all the circumstances of the case. The absence of an injustice may be a factor lending towards a refusal of relief, but countering this is the role of the court in judicial review to maintain the rule of law.

The Court concluded that the outcome would not inevitably be the same and, as the errors of law were more than minor, the decision should be quashed. While the error of law belonged to the council, the second respondent not free from fault; its application for a resource consent was deficient. Relief was a necessary response to the council's "serious disregard" for the policy intent of the resource management legislation.[148]

Similarly, in *Sutton v Canterbury Regional Council*, when confronted by multiple factors in exercising the discretion whether to grant a remedy, the High Court held that overall

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[145] [2014] NZHC 3402.
[146] [2015] NZCA 160.
[147] *MacPherson v Napier City Council (First Respondent) and Whatever It Takes Trust (Second Respondent)* [2013] NZHC 2518.
[148] At [113].

fairness favoured relief.[149] The consent was decided based on incorrect figures included in the second respondent's resource application and accepted by the council. The second respondent was not free from blame, and it should have been aware that it ran the risk that a deficient resource consent may be set aside on judicial review. A failure to set the decision aside would "effectively condone the reviewable errors."[150]

Any delay by the applicant was minimal and the council's errors were more than mere technicalities. The second respondent argued that they would be severely prejudiced by the grant of relief, any error of law was immaterial and the same outcome was inevitable. The Court did not accept this and stated that there was real practical value in having the resource consent assessed by the correct statutory standards.[151] On balance, the court said: [152]

> This application for judicial review has succeeded because the Council's grant of resource consent did not achieve the legislative intent. Consequently, granting relief for the purpose of remedying the errors will not undermine, but rather, will support the intent of the RMA.

In both cases, the policy intent was the determinative issue. The court is undertaking a role quite different from the arbitration of a dispute between two parties to determine rights and consequent remedies.

### *C The Remedial Discretion is Exercised in Practice in the Public Interest*

In practice, courts consider the exercise of remedial discretion in context and in all the circumstances of the case. The question is considered in the round; this is demonstrated by different cases where immateriality of error leads to a decline of judicial review or a decline of relief. A declaration is a limited victory for an applicant, but the judgment itself may sometimes suffice to fulfil the court's supervisory role. The impact on third parties and the needs to protect and enhance good public administration demonstrate that the court is overseeing the public authority's paramount duty to act in the public interest.

The public interest may diverge from the interests of the individual applicant. The role of the applicant in a judicial review may be regarded as not dissimilar to that of an alleged victim in a criminal case; as an important participant but not a primary party. A judicial

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[149] *Sutton v Canterbury Regional Council and others*, above n 56.
[150] At [75].
[151] At [73].
[152] At [76].

review concerns the relationship between the court and the public authority, in the context of the case brought by the applicant. A public authority which has acted unlawfully may persuade the court that no consequences should follow by way of relief. This is particularly so when the potential adverse impact on the needs of good public administration exceed the likely benefits of correcting the unlawfulness. The interests of the applicant are balanced against the broader need for efficient conduct of public administration and the public interest.

## *IX Conclusion*

Do we need the remedial discretion? Bingham answers acutely: "Well, yes, probably, in some cases, up to a point, provided the discretion is strictly limited and the rules for its exercise clearly understood."[153] In the final analysis, public law rights are not strictly legal rights. If they were, they would attract concomitant duties. If there were public law rights, they would be enforceable because 'where there's a right, there's a remedy.' The opposite of right, in a Hohfeldian analysis, is no right. There is no right to a judicial review remedy, therefore there is no correlative duty. The public law right in judicial review is the right of access to the court. The correlative duty is the court's duty to undertake the supervision of the public authority.

The remedial discretion shows that the role of the court on judicial review is not to enforce rights; except where this is necessary to undertake its primary role to supervise public authorities. Such supervision, at its high point, is a form of constitutional dialogue and the remedial discretion facilitates the conversation by ensuring that the judicial branch of government is not placed in a superior position to the executive. The judiciary does not have the final word; this is a necessary safeguard to protect comity and to avert the risk that the jurisdiction of the court to undertake its supervisory review role is ousted.

This does not mean that public law duties are not important, nor that courts have nothing to say about them. It also does not mean that public law duties and individual rights are antithetical – in most instances, they will coincide. The court's supervision of the public authority will require a remedy that, to a greater or lesser extent, vindicates the rights of the individual. Courts will not lightly refuse a remedy to an individual who has been wronged; but the power to do so remains an integral feature of administrative law.

The discretion constrains the power of judges. It supports the role of judicial supervision of public authorities – at the instigation of the individual – which has advantages it is

[153] Bingham, above n 2 at 64.

beneficial to preserve. The remedial discretion ensures that the decision-making role of the executive is paid due respect by the judiciary. The judicial discretion to refuse a remedy does not amount to arbitrary judicial decision-making; it is the avoidance of this and also protects against arbitrary governmental decision-making. The discretion to refuse relief preserves the ability of the court to supervise public authorities. Public law duties are ultimately not legal duties, but political ones. The primary public law duty is the duty to act in the public interest.

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