ANA ROKOMOKOTI

PUBLIC ACCOUNTABILITY AND PRIVATIVE CLAUSES

LLM RESEARCH PAPER
LAWS522: PUBLIC LAW, AUTHORITY, LEGITIMACY AND ACCOUNTABILITY

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

2020

Abstract

Courts play a vital role in bringing about accountability in public institutions. This synchronises well with Bovens's legal accountability mechanism which he created as part of the accountability framework. Legal accountability mechanism is effectively the process in which an actor, according to Bovens's terms and conditions is compelled to answer or provide explanations to a forum. A privative clause may act as a hurdle to such legal accountability processes, hence preventing if not delaying the courts from investigating or intervening and bringing public officers to account through the allowance of judicial review. However, it is evidenced from the case law consulted in this research, that the courts have been involved in the process of examination of public decision makers' conduct. It is in these instances that the courts have been found to have lifted the shield of protection off public officers with the aim of examining the decision making process. Such judicial responses on privative clauses fits well into this process of Bovens's legal accountability framework. In this context, the actor is representative of the public official decision maker whilst the forum is the courts.

New Zealand and Fiji are both common law jurisdictions and have used privative clauses. This research appreciates that comparative study can be a very useful method of ascertaining the development of common law in the respective jurisdictions.

Word length

The text of this paper (excluding abstract, table of contents) comprises approximately 12057 words.

Subjects and Topics

Public Accountability, Privative (Ouster) Clauses and Public Law

PUBLIC ACCOUNTABILITY AND PRIVATIVE CLAUSES

Table of Contents

"Finality is a good thing, but justice is better"

Lord Atkin in Ras Behari Lal v. King Emperor (1933) ALL E.R. 723 at 726

I. Introduction

The purpose of this research is to compare the New Zealand and Fijian judicial responses to privative (ouster) clauses. Privative clauses can be regarded as shields of protection for public officers and this research will examine the judicial responses when lifting the shield of protection off public office holders in these two jurisdictions. Such judicial responses fit well into Bovens's legal accountability framework. The research simultaneously looks at how each jurisdiction has developed the common law on privative clauses since *Anisminic*.

Courts play a vital role in bringing about accountability. Such processes synchronise well with Bovens's legal accountability mechanism.[1] Legal accountability mechanism is effectively the process in which an actor, according to Bovens's terms and conditions is compelled to answer or provide explanations to a forum. A privative clause may act as a shield of protection and furthermore a hurdle to such legal accountability processes, hence having the effect of preventing if not delaying the courts from investigating or intervening. Some privative clauses may prescribe statutory appeal processes that make it more difficult for aggrieved persons to access the courts rapidly or readily or conveniently. Despite this, it is evidenced from the case law consulted in this research, that the courts have been involved in the process of examination of public decision makers' conduct despite privative clauses. And in some instances have crossed the boundaries laid down by Parliament and have lifted the shield of protection off public administrators. When undertaking their role of check and balance, only needs to be reiterated that the processes and reasoning adopted by the respective courts in determining whether the lifting of the shield of protection is justified or not fits well into Bovens's legal accountability framework. This is done with the ultimate aim of compelling the actor to account, and formalising relationships

[1] Mark Bovens Analysing and Assessing Accountability: A Conceptual Framework (2007) 13 E.L. J. 447.

and accountability manifested though such court processes and decisions and making such processes very valuable hence preventing corruption and abuse of power.

The common law precept of privative clause and legal accountability concept at first appear to sit on opposite ends of the spectrum. Privative clause, at first, can appear to undermine the efficiency and effectiveness the processes of accountability. It looks to be that because it looks to restrain the courts. Whilst privative clauses give that impression of ousting the jurisdiction of the courts it has however become acceptable that this is may only be so with legislation that set up specific tribunals.[2] These include tribunals who convene as appellate tribunals and have specific statutory schemes to adhere to in some cases. But even then, as the judicial responses will show, this may not necessarily be the case all the time. Accountability is the process of having public administrative bodies to answer for their actions to a particular authority or forum as Bovens puts it.[3] Legal accountability is essentially a check and balance process. One method of checks and balances being conducted on public administrative bodies is judicial review. Dame Elias, the Chief Justice (as she was then), stated: [4]

> Judicial review is supervisory jurisdiction. With respect to government and public entities, it was described by Brennan J as neither more nor less than the enforcement of the rule of law over executive action. It checks the boundaries of power conferred on others". And privative clauses with or without statutory schemes may imply just that, the ousting of the court's jurisdiction.

New Zealand and Fiji are both common law jurisdictions and have used privative clauses. This research appreciates that comparative study can be a very useful method of ascertaining the development of common law in the respective jurisdictions.

---

2 ECS Wade and WA Bradley Constitutional and Administrative Law (11ed Longman New York 1993) at 721-722.

3 Mark Bovens, above n 1.

4 Sian Elias, Chief Justice of New Zealand "Judicial Review and Constitutional Balance" (Lecture Theatre 1, Victoria University of Wellington, 28 February 2019).

In judicial review, courts do set precedents and standards of behaviour for public servants. This is to ensure that the rules of natural justice are complied with and furthermore that there is no abuse of power carried out by the executive and her agents. Such ends again settle well within the Bovens legal accountability framework. The New Zealand judiciary shows the ability to accept exclusion of their review oversight where challenges to the decision in question can be brought within the statutory process. The flipside is that review will not be precluded where a decision is not amenable to the statutory process.[5] And it evidenced from the case studies, that judicial response in New Zealand to privative clauses over the years have shifted.[6] The shift shows the tendency of the court to be more aggressive to the extent of making new law.[7] The Fijian approach is slightly different as Fiji adopts a not so aggressive approach, but more so, a slow and restrained approach. Fijian judicial response appears to stick closer to the boundaries set by *Anisminic*[8] and more importantly very distinguishable from New Zealand because the courts have not progressed to stage of creating new laws as has occurred in New Zealand. It could be argued that Fiji is more conservative in that context.

When using terms such "aggressive", "conservative" and "shift" there is a necessity to first consider the boundaries and tone that were set by the first common law jurisdiction case of *Anisminic*[9] and *O'Reilly v Mackman*[10]. Thus, in using them as a benchmark to compare the judicial responses from New Zealand and Fiji over time, we will be able to determine how far have the common law developed on privative clauses in these respective jurisdictions.

Whilst the courts in both jurisdictions have shown the ability to lift the shield of protection off public officers, the Fijian position is more restrained than New Zealand, in that the Fijian court is not prepared to delve into the merits of the respective cases.

---

5 JG Pemberton, The Judicial Approach to Privative Provisions in New Zealand A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago - Te Whare Wānanga o Otāgo October 2014 at 31.

6 See *Bulk Gas User Group*, *Tannadyce* and *H*.

7 *Commissioner of Inland Revenue v Tannadyce Investments Ltd* (2010) 24 NZTC 24,341.

8 *Anisminic Ltd v Foreign Compensation Commission* (1969) 1 AC 147.

9 *Anisminic* at 147.

10 *O'Reilly v Mackman* [1983] 2 AC 237 (HL) at 277; *O'Reilly v Mackman and Others* [1982] All ER 1124.

Even though the New Zealand approach reveals that too, simultaneously, the courts appear to have delved into the merits of the cases. And in the process, the New Zealand courts have engaged in, at least in one instant of actively creating a new law.

The New Zealand approach has undertaken a significant modification of the *Anisminic* and *O' Reilly v Mackman* principles. Such modifications include the development of the presumption against the ousting of court's jurisdiction and the reduction of the differences between jurisdictional error and non-jurisdictional to simply error errors of law[11], creation of a new law in the context of tax administrative processes and delving into the merits of a case when circumstances permit and circumventing the statutory appeal processes. Whether rightly or wrongly is not for this research to determine.

We turn to look at Bovens work on accountability to give us an understanding of his framework.

II. Bovens's accountability framework

This paper borrows various aspects of Bovens's concept of accountability and apply them in this context[12]. The three aspects of his ideas that this paper finds relevant to apply are; the definition of accountability, the legal accountability mechanism and the effects of accountability which incorporates the two perspectives or rationales for accountability. They are relevant because the judicial responses from New Zealand and Fiji to privative clauses fit well into, if not coincides with the concepts of his accountability framework.

Accountability can be wide and all-encompassing but Bovens adopts a narrow sociological sense of the word accountability and describes it as; "Accountability is a relationship between an actor and a forum in which the actor has an obligation to

---

11 Luke Sizer "Privative Clauses: Parliamentary Intent, Legislative Limits and Other Works of Fiction" Auckland University Law Review 23 at 154 -155.

12 Mark Bovens above n 1 at 462.

explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".[13]. Bovens explains the relationship is likened to a principal-agent relation and there is exists an obligation for the actor to explain to the forum. This is process is called account giving. Particularly when looking at public bodies represented through administrative decision makers and or review or appeal tribunals giving account of their decisions to the courts. This resonates well with Bovens legal accountability mechanism. This obligation to account can either be formal or informal.

Bovens stipulates that there are three stages of account giving and they are; I. informing the forum about his (actor's) own conduct), II. an opportunity for forum to interrogate the actor and III. the forum to pass judgment on the actor if appropriate and sanctions may be imposed. These sanctions are effectively consequences. And these consequences that the actors may face can be formal.[14]

The whole legal accountability mechanism is also formal process that involve rules and regulations that guide the processes. The inclusion and involvement of the courts embeds the whole process of accountability deeper into legal ground.

Bovens also prescribes that rationales or perspectives and effects of this legal accountability process. These rationales are evaluative in nature. Whilst Bovens proposes three rationales, only one of those perspectives is being used in our that suit our purposes. This is the constitutional perspective which aims to prevent corruption and abuse of power.[15]

When evaluating, a type of accountability he suggests that the obvious key question to ask is what the actual effects are of the various types of accountability and how to judge these effects. He further states that at this level, inadequacies can either take the form of accountability deficits, a lack of accountability arrangements or of

[13] Mark Bovens above n 1 at 450.
[14] Mark Bovens above n 1 at 452.
[15] Mark Bovens above n 1 at 452.

accountability excesses dysfunctional accumulation of a range of accountability mechanisms.[16]

The constitutional perspective promotes the prevention of abuse of power. Whilst there are review processes in place provided by statutory schemes, the courts are the final bastion for checks and balances by being that independent judicial power. Good governance arises from a dynamic equilibrium between various powers of the state is what Bovens argues.[17] The constitutional perspective accountability and equilibrium of power gives the central idea that accountability is essential in order to withstand the ever present tendency toward power concentration and abuse of powers in the executive power. The central evaluation criterion is the extent to which an accountability arrangement curtails the abuse of executive power and privilege.[18]

When considering privative clauses in the context of Bovens's concept, the question that arises is whether privative clauses stand as a hindrance or legal obstacle to accountability which contributes to accountability deficit or excess? It is suggested that privative clauses create a deficit and the result of such may manifest in an erroneous if not irregular decision itself arising out of an erroneous if not irregular manner of decision making.

III. The basics on privative clauses

When there is a privative clause, despite the name and the implications it gives of ousting the jurisdiction of the courts. ECS Wade and WA Bradley Constitutional and Administrative Law (11ed Longman New York 1993) at 721-722 propose that:[19]

16 Mark Bovens above n 1 at 462.
17 Mark Bovens above n 1 at 463.
18 Mark Bovens above n 1 at 466.
19 ECS Wade and WA Bradley Constitutional and Administrative Law (11ed Longman New York 1993) above n 2 at 721-722.

> there is a strong presumption that the legislature does not intend access to the courts to be denied [20]. However, where Parliament has appointed a specific tribunal for the enforcement of new rights and duties, it is necessary to have a recourse to that tribunal in the first instance.

They also state that:[21]

> unless an appeal to the courts is provided by the statute, their justification is limited to general methods of review". But many words of the statutes have contained words designed to oust the jurisdiction of the courts. Such provisions have been interpreted by the judges so as to leave, if at all possible, their supervisory powers intact.

Wade and Bradley did adopt *R v Medical Appeal Tribunal ex Parte Gilmore* position stating:[22]

> the one frequent clause was that a particular decision "shall be final" but it is settled in law that this does not restrict the power of the court to issue a certiorari, either for jurisdictional defects or error of law. In circumstances where the exclusion clauses appear strict and strongly worded then it is usually accompanied with a right of an appeal within a specified time.

The laws which stated "The determination by the commission of any application made to them under this Act shall not be called into question in any court of law" was addressed in *Anisiminic Ltd. Foreign Compensation Commission*[23] . In a nutshell, the conclusion arrived at by the court was that "The question, what is the decision maker's proper area, is one which has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability upon its decisions"[24].

---

20 ECS Wade and WA Bradley Above n 2 at 721-722.
21 At 721-722.
22 At 721-722 and they also cite *R v Medical Appeal Tribunal ex Parte Gilmore* [1957] 1 QB 574.
23 *Anisminic* above n 8 at 148.
24 *Anisminic* above n 8 at 148.

Joseph proposes:[25]

> that courts accept in principle that Parliament might, through express statutory language authorise a decision maker to determine conclusively the impugned question of law. However, he says this claim is a "subterfuge for the directness and honesty of mind displayed by Lord Wilberforce.

Joseph says that modern courts are no more eager to relinquish their review jurisdiction than when the Law Lords delivered their landmark decision.[26]

A privative clause is a legal provision, that limits or excludes judicial review in one way or another.[27] Among other descriptions or definitions, one that is frequently encountered by the courts is that it not be "called into question" .[28] Whichever words are used, all are greeted with short shrift by the court. Whilst we need not go into the facts of each case, it is sufficient for our purposes to highlight the reasoning or remarks of the courts.

IV. Laying the foundation

The two landmark cases are *Anisiminic Ltd v Foreign Compensation Commission*[29] and *O'Reilly v Mackman*[30]. These House of Lords decisions laid down the necessary and legal foundation for us to use to set the tone of this paper.

A. *Anisminic*

---

25 Phillip Joseph Constitutional and Administrative Law in New Zealand 4th edition Thomas Reuters 2014) at 905-906.

26 At 12 and he cites *Anisiminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147.

27 Luke Sizer, above n 11 at 149 and see *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133, 138.

28 Luke Sizer above n 11 at 149 who consults these sources *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133; *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [66]; *Phan v Minister of Immigration* [2010] NZAR 607 (HC) at [30]- [33]; and *InterPharma (NZ) Ltd v Commissioner of Patents* [2012] NZAR 222 (HC) at [63].

29 *O'Reilly v Mackman* above n 10.

30 *Anisminic*, above n 8.

The House of Lords was called to interpret the provision of the Foreign Compensation Act that a determination of the Commission "shall not be called into question in any court of law".[31] Yet the determination of the Commission was questioned for five years before successive courts and in the end the House of Lords granted a declaration that it was ultra vires and a nullity. The court held that :[32]

> (a) unanimously that the ouster clause did not protect a determination which was outside jurisdiction and (b) (by a majority that misconstruction of the order in council which the Commission had to apply involved an excess of jurisdiction because they had based their decision on a ground which they had no right to take into account (1) sought to impose a condition not warranted by the order.

Anisiminic endorsed a concept of jurisdictional error that emasculated the effect of ouster clauses.[33] It established that any misconstruction of the statute or material error of law amounted to a reviewable error, notwithstanding an ouster clause.[34] The House of Lords' ruling included the removal of the distinction between jurisdictional error and non-jurisdictional error.[35] Errors that were described as "jurisdictional" wrongly defined the jurisdiction of the authority's power, whereas "non-jurisdictional" errors were within the authority's jurisdiction.[36] As Joseph puts it:[37]

> The courts have shown no interest in the type of privative clause Parliament may enact-whether a "no certiorari" clause, a "finality" or "conclusiveness" clause or "a shall not be questioned" clause.

Lord Wilberforce did state: [38]

---

31 *Anisminic*, above n 8.
32 *Anisminic*, above n 8.
33 Phillip Joseph, above n 25 at 905.
34 At 905-906.
35 At 12.
36 *Anisiminic*, above n 8; see also *Peters v Davison* [1999] 2 NZLR 164 (CA) at 201-202.
37 Phillip Joseph, above n 25 at 905.
38 *Anisiminic*, above n 8 at 207.

> the question, what is the decision maker's proper area, is one which it has always been permissible to ask and answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability upon its decision.

The Commission had imposed a condition upon the appellants in making their determination that the majority found they were not entitled to impose.[39] And further:[40]

> and if the authority had not made a jurisdictional error, the latter non-jurisdictional errors were immune from review unless they were an error on the face of the record.

The majority in *Anisminic* thus widened the scope of review and opened the way for greater judicial intervention in the presence of privative clauses and the "esoteric distinction" between jurisdictional and non-jurisdictional errors had a significant impact on precisely what a privative clause would protect.[41]

As the majority variously said: [42]

> "an authority's decision would be outside of its jurisdiction and thus a nullity when it 'ask[s] the wrong question' or 'applies the wrong test'",[43] or when it misconstrues its powers, makes a decision it has no power to make, takes account of irrelevant considerations, or departs from the rules of natural justice - the list goes on.[44]

---

39 At 213-214.

40 Luke Sizer, above n 11 at 153; see also *O'Reilly v Mackman* [1983] 2 AC 237 at 278. This statement was affirmed in *Bulk Gas Group Users Bulk Gas Users Group V Attorney - General* [1983] NZLR 129 (CA) at134 and in *Peters v Davison* above n 36 at 201.

41 Luke Sizer, above n 11 at 154; N*ew Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) [New Zealand Engineering] at 285 per McCarthy P.

42 *O'Reilly v Mackman*, above n 27 at 278 per Lord Diplock. See also *New Zealand Engineering*, above n 41, at 285 per McCarthy P, 295 per Richmond J and 301 per Cooke J.

43 *Anisiminic*, above n 8 at 208-211 per Lord Wilberforce.

44 *Anisminic*, above n 8 at 171-172 per Lord Reid; and at 195 per Lord Pearce.

In the case of *Anisminic* the court lifted the shield of protection and by reason of their judgment which widened the scope of review for greater judicial intervention in the presence of privative clauses.[45]

Yet, it must be acknowledged that despite *Anisminic* laying down the fundamental legal principles which prescribed when the intervention of courts may be justified, there were conflicting views about the decision that ensued.[46]

B. O'Reilly v Mackman and Others

The implication of the decision of *Anisminic* was not realised in the United Kingdom until *O'Reilly v Mackman*[47] which was more than a decade after the original decision was made. In *O'Reilly v Mackman* prisoners had sued the prison authorities for failing to adhere to procedural principles but the House of Lords said the claim established procedural exclusivity and that the claim ought to have come by way of a judicial review and struck out their claim.

The full effect of *Anisminic* was described by Lord Diplock in this case as:[48]

> "virtually to abolish the distinction between errors within jurisdiction that rendered voidable a decision that remained valid until quashed, and errors that went to jurisdiction and rendered a decision void ab initio".

He also said that: [49]

---

45 *O'Reilly v Mackman*, above n 27 at 154; Luke Sizer, above n 11 at 154; *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) [New Zealand Engineering] at 285 per McCarthy P.

46 See *Re-Racal Communications Limited* [1981] AC 374 at 383E-384G; *R v Environment Secretary ex parte Ostler* [1977] QB 122 at 134A-136B; *Regina v The Registrar of Companies Ex parte Central Bank of India* [1986] QB at 1114 1, 1169 B-D, 1176C, 1178D-G; Permberton above n 5; John Smillie "Judicial Review of Administrative Action – A Pragmatic Approach" (1980) 4 Otago LR 417. For contrasting judicial takes on the decision in New Zealand, compare the restrictive approach to the Anisminic doctrine favoured in *Eastern (Auckland) Rugby Football Club Inc v Licensing Control Commission* [1979] 1 NZLR 367 (SC) with the expansive approach in *Paterson v Dunedin City Council* [1981] 2 NZLR 619 (HC).

47 *O'Reilly v Mackman* [1983] 2 AC 237 and see *R v Hull University Visitor* (ex parte Page) [1993] AC 682 (HL). *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 154, which completed the triumph of *Anisminic*.

48 *O'Reilly v Mackman* above n 10 at 283.

49 At 283; *O'Reilly v Mackman and Others* [1982] All ER 1124 at 1129.

> "It was this provision that provided the occasion for the landmark decision of this house in *Anisiminic Ltd v Foreign Compensation Commission* and particularly the leading speech of Lord Reid, which liberated English Public Law from the fetters that the court had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdictions and errors of law committed by them within their jurisdiction." The breakthrough that *Anisminic* made was the recognition by the majority of this house if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. It's purported "determination" not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.

The effect of this being that privative clause couldn't protect any public decision maker wrong doer if ever there was any error of law found. *O'Reilley* established that the principle of procedural exclusivity that law matters had to be dealt in private courts and public matters ought to be dealt with by judicial review. This case distinguished between private law and public law. The court did not lift the shield of protection off the public body because of the wrong court in which the claim was lodged, yet the House of Lords firmly grounded the decision of *Anisminic*.

Having looked at the basic fundamental principles laid down in *Anisminic* and *O'Reilley*, it is now appropriate to look at the New Zealand judicial response to privative clauses.

V. New Zealand judicial response

The case laws of *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133, *Tannadyce Investments Limited v. Commissioner of Inland Revenue*, *H (SC 52/2018) v Refugee and Protection Officer* are considered to be significant legal authorities in New Zealand on privative clauses. New Zealand has been exceptionally progressive in

their judicial response to privative clauses since *Anisminic* and *O'Reilly*. There is even a suggestion that the Supreme Court in Tannadyce took a very aggressive approach. The reason suggested is that court in interpreting is to look deeply into the traditional meaning of the provisions and only if justified then ought to take an aggressive approach.[50] Hence the traditional approach to interpretation has not been followed. It has also been observed that judicial review in New Zealand differs from that in the United Kingdom in being so far resistant to a strict division between public and private law which treats judicial review as concerned with public law only [51].

A. *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA)[52]

In *Bulk Gas Users Group*, Cooke J said that if an authority applied a wrong test and so did not exercise his or its true powers, "the privative clause would not apply, because there would be a lack of jurisdiction in the sense recognised in *Anisminic*".

In any event, Cooke J recognised that the privative clause did not purport to preclude proceedings for a declaration in advance of the decision:[53]

> It leaves intact the ordinary jurisdiction of the High Court in its discretion under the Declaratory Judgments Act 1908 and the Judicature Amendment Act 1972 to grant declarations as to, for instance, the interpretation of Acts or the validity of proposed exercises of statutory power. Those two Acts overlap, as s 7 of the latter recognises.

Bulk Gas Users Group is argued to have emptied privative clauses by two means. First, the use of a strong presumption against the exclusion of judicial review and, second, by simplifying jurisdictional and non-jurisdictional errors into errors of law.[54] Cooke J in delivering the lead judgment held that a privative clause "does not apply if the

50 Luke Sizer, above n 11 at 169.
51 Sian Elias Above n 4.
52 *Bulk Gas Users Group v Attorney - General* [1983] NZLR 129 (CA).
53 At 135.
54 Luke Sizer, above n 11 at 154-155.

decision results from an error on a question of law which the authority is not empowered to decide conclusively"[55]. But, as he said, there is a presumption against such empowerment. His Honour maintained that the presumption could be rebutted expressly by clear language, or impliedly where the authority had the functions and status of a court, where the error was not significant or where there existed a right of appeal.

It is said that the effect of Cooke J's decision was to 'collapse both jurisdictional and non-jurisdictional error into a single "error of law" category"[56]. After Anisminic, there was thought to remain at least some residual area upon which an authority could err.[57]

In *Bulk Gas Users Group*, however, his Honour: [58]

> did away with jurisdiction - that fickle concept, which once ring-fenced the power of inferior authorities - and so swept away the possibility of there being anything to which the privative clause might apply.

Cooke J said that applying the wrong test would render the decision "invalid" with the result that "the privative clause would not apply, because there would be a lack of jurisdiction in the sense recognised in Anisminic".[59] The jurisdiction of the High Court to supervise error thus expanded far beyond the limits adhered to for the last four centuries. Despite expansions and retractions of the area upon which an authority

---

55 *Bulk Gas Users Group*, above n 52 at 133, 138.

56 Luke Sizer, above n 11 at 155; *Bulk Gas Users Group* above n 51 at 133, 138.

57 At 155 who also consults *Regina v Secretary of State for the Environment, ex parte Ostler* [1977] QB 122 (CA); JA Smillie "Judicial Review of Administrative Action - A Pragmatic Approach" (1980) 4 Otago LR 417 [Smillie "Judicial Review"] at 417-418; South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union, above n 49.
Luke Sizer above n 11 at 155 who also relies on *Bulk Gas Users Group*, above n 52, at 133, 138; *Phan v Minister of Immigration*, above n 28, at [32]; Zaoui v Attorney-General (No 2) [2005] 1 NZLR 690 (CA) [Zaoui (No 2)] at [101]; *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 496; and *Peters v Davison*, above n 36, at 209.
Luke Sizer above n 11 t 155; *Bulk Gas User Group*, above n 52, at 135. See also his comments at 139. This approach has been affirmed in later cases, see for instance Cooper, above n 58, at 496 per Baragwanath J; and *Peters v Davison*, above n 36, at 209 where it was held that "an ultra vires act has no legal effect".

could err, the King's Bench always maintained that the area existed which Bulk Gas Users Group abolished.[60]

In *Bulk Gas Users Group,* the shield of protection was lifted and Cooke J said that if an authority applied a wrong test and so did not exercise his or its true powers, "the privative clause would not apply, because there would be a lack of jurisdiction in the sense recognised in Anisminic". [61]

B. Tannadyce Investments Limited v. Commissioner of Inland Revenue[62]

The Court of Appeal in this case adopted *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue*: [63]

> We accept that judicial review is available where what purports to be an assessment is not an assessment. Associated with this, we accept that judicial review is available in exceptional circumstances and thus may be available in cases of conscious maladministration.

While *Tannadyce* failed in its application for judicial review, the legal principles applicable to judicial review of assessments had not changed to that extent that the law remained that judicial review was available in principle where there were procedural defects arising from ultra vires, unlawfulness and such matters as bad faith, abuse of power and errors of law going to the legitimacy of the process, as opposed to the correctness of the assessment.[64]

An appeal was made to the Supreme Court by *Tannadyce Investments Limited* seeking judicial review of assessments of its liability to income tax made by the Commissioner of Inland Revenue. Section 109 of the Tax Administration 1994 [65] was the subject

---

60 Luke Sizer above n 11 at 156.
61 *Bulk Gas User Group* above n 52.
62 *Tannadyce*, above n 7.
63 *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] NZLR 99, at [59].
64 James Coleman "Tannadye puts limit on Judicial Review" April 2012 <www.jhcoleman.co.nz/articles>.
65 Section 109 of the Tax Administration Act 1994 provided "Disputable decisions deemed correct except in proceedings:

clauses which excluded the intervention of the court. This exclusion was said to be balanced against the right to judicial review as the law does grant a person to right to judicial review.[66]

The court made references to section 138P which permitted challenges that were to be heard de novo on the merits by the review authority. The court dismissed the appeal and held that the statutory scheme provided the processes for review which the appellant was first obliged to utilise. Hence the failure by the appellant to utilise the said processes precluded him from judicial review.

The court then added that:[67]

> that judicial review will also be available when what is in issue is not the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside the statutory regime, because it is not provided for within it.

When it came to the substantive decision on the appeal, the Supreme Court had a split decision. The judgments of Elias CJ and McGrath J support the orthodox jurisprudential position as to the availability of judicial review in the tax assessment context, but the Judges concluded that on the facts before them, the judicial review statement of claim was rightly struck out.[68] The facts of the case were not exceptional enough to warrant a review.[69]

In the final analysis the court made a new law saying by the majority Tipping J, Blanchard J and Gault in deciding upon s 109 of the Tax Administration Act 1994 (TAA

Except in objection proceedings under Part 8 or a challenge under Part 8A, — (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects".

66 Section 27(2) Bill of Rights 1990; Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

67 *Tannadyce*, above n 7 at para [59].

68 *Tannadyce*, above n 7 at para [87].

69 *Tannadyce*, above n 7 at para [72], [73].

1994).[70]. The majority have discarded the traditional interpretation of s 109 in the context of judicial review. Their reasoning being that; "it is clear that by means of s 109 Parliament was concerned to ensure that disputes and challenges capable of being brought under the statutory procedures were brought in that way and were not made the subject of any other form of proceeding in a court or otherwise.[71] The exclusion of judicial review is a product of the text and purpose of s 109 in its particular statutory setting.[72]

In summary therefore they held:[73]

> that disputable decisions (which include assessments) may not be challenged by way of judicial review unless the taxpayer cannot practically involve the relevant statutory procedure. Cases of that kind are likely to be extremely rare.

Their conclusion was that the circumstances of *Tannadyce* were not extremely rare and hence did not fall into the narrow category now left for review. The Court has changed the law as to when judicial review may be commenced in a tax context. It did so without being fully informed by counsel at the court of first instant and court of appeal on whether legal tests ought to be different for such a special area or process.[74] A suggestion has been made that rather, the litigation proceeded on settled principles of law, with the only issue being the application of those principles to the facts.[75] Whilst this paper does not intend to dwell on the merits of this suggestion, nevertheless the suggestion is worthy of taken note of.

In *Tannadyce* the court did not lift the shield of protection but prescribed a new law in which the court may intervene, that is that judicial review will also be available when

---

70 Section 109 of the TAA 1994 provides; "Except in …. a challenge under Part 8A –No disputable decision may be disputed in a court or in any proceedings on any ground whatsoever… ".

71 *Tannadyce*, above n 7 at para [61]

72 *Tannadyce*, above n 7 at para [60]

73 *Tannadyce*, above n 7 at para [59]; see also James Coleman, above n 62; James Coleman "The limitation on judicial review in Tannadyce: Has the Supreme Court gone too far?" April 2012 < www.jhcoleman.co.nzjudicial review final>.

74 Above n 64; James Coleman "The limitation on judicial review in Tannadyce: Has the Supreme Court gone too far?" April 2012 < www.jhcoleman.co.nzjudicial review final>.

75 Above n 64.

what is in issue is not the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside the statutory regime, because it is not provided for within it. The court dismissed the appellants appeal and held that the statutory scheme provided the processes for review which the appellant was first obliged to utilise. Hence the failure by the appellant to utilise the said processes precluded him from judicial review.

The court then added that that judicial review will also be available when what is in issue is not the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside the statutory regime, because it is not provided for within it. The majority have discarded the traditional interpretation of s 109 in the context of judicial review, stating that the words "any ground whatsoever" mean what they literally say.[76]

The court also held that disputable decisions (which include assessments) may not be challenged by way of judicial review unless the taxpayer cannot practically involve the relevant statutory procedure.[77]

C. *H (SC 52/2018) v Refugee and Protection Officer* [78]

This case concerns the decline of *H's* refugee application and *H* filed for Judicial Review in the High Court. The matter eventually reached the Supreme Court in which the court made deliberations about section 249 of the Immigration Act 2009[79]. The issue that confronted the court:[80]

---

76 *Tannadyce Investments Limited v. Commissioner of Inland Revenue* [2011] NZSC 158 at para [59].

77 *Tannadyce* at para [60].

78 *H v Refugee and Protection Officer* [2019] NZSC 13 (SC 52/2018).

79 Section 249 of the Immigration Act 2009 "Restriction on judicial review of matters within Tribunal's jurisdiction (1) No review proceedings may be brought in any court in respect of a decision where the decision (or the effect of the decision) may be subject to an appeal to the Tribunal under this Act unless an appeal is made and the Tribunal issues final determinations on all aspects of the appeal. (2) No review proceedings may be brought in any court in respect of any matter before the Tribunal unless the Tribunal has issued final determinations in respect of the matter. (3) Review proceedings may then only be brought in respect of a decision or matter described in subsection (1) or (2) if the High Court has granted leave to bring the proceedings or, if the High Court has refused to do so, the Court of Appeal has granted leave.

80 *H*, above n 78.

> was whether, given the circumstances in which the Refugee and Protection Officer determined that the appellant should not be recognised as a refugee, judicial review proceedings could be brought in respect of that decision (or the antecedent decision to determine the claim without interviewing the appellant) without the appellant having first appealed to the Tribunal and that appeal having been determined by the Tribunal.

The final decision of the court was that H was not precluded by s 249(1) from initiating a judicial review and the court in not barred from dealing with the application for judicial review and therefore the case was remitted to the High Court for a hearing. Effectively, despite the two hurdles that stood in the way of the courts, these being the i. express appeal provisions in places which included the purposes of the appeals and ii. the privative clause, the Supreme Court saw it fit to allow the judicial review.[81]

The approach taken by the Supreme Court in this matter is arguably unusual and showcases the almost eagerness of the Supreme Court to extend its boundaries. The Supreme Court did consider that *Tannadyce* was distinguishable from *H's* case.

They held that:[82]

> the reasoning of the majority in that case rested on the premise that Parliament had created (in the challenge procedure available under Part 8A of the Tax Administration Act) an appeal process that was sufficiently comprehensive to render judicial review unnecessary, except where the challenge process could not be invoked.

The Supreme Court however took advantage of a direction given by the *Tannadyce* in which it was held:[83]

---

81 *H* above n 78.

82 *H* above n 78.

83 At [63]; *Tannadyce*, above n 7, at [56] per Blanchard, Tipping and Gault JJ, citing *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133. The majority in *Tannadyce* held there was no need to strain to reconcile the ouster provision in the Tax Administration Act 1994, s 109, with the general availability of judicial review because the challenge procedure in the Tax Administration Act had a built-in right for the taxpayer to take the matter to the High Court at [57].

> "As noted in the reasons of the majority in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, judges should be slow to conclude that an ouster provision precludes applications to the High Court for judicial review alleging unlawfulness of any kind. That caution is appropriate in this case. What is required is a construction of s 249 that recognises Parliament's intention to prevent duplicative proceedings but also preserves the ability of the Court to supervise the exercise of public power and prevent injustice occurring when a statutory process fails because the decision-maker acts unlawfully and an injustice results.

The jurisdiction of the court remains supervisory. Its availability is discretionary. Its exercise is often declined as inappropriate where a statutory appeal provides adequate remedy.[84] In using its discretion the Supreme Court in New Zealand has certainly broken new grounds, reforming the boundaries set by *Anisminic*. This approach further strengthens accountability and fits well into Bovens's legal accountability framework. Whilst the privative clause in *H* purports that the relevant matter ought not to be interfered with by the courts, the court will lean towards doing justice. That is, the justice of the circumstances warrants the courts to allow judicial review because the court found the protection officer failing in his original duty. Such a response from the courts complements Boven's framework.

In *H's* case, the shield of protection was lifted and the final decision of the court was that *H* was not precluded by s 249(1) from initiating a judicial review and the Court in not barred from dealing with the application for judicial review and therefore the case was remitted to the High Court for a hearing. Effectively, despite the two hurdles that stood in the way of the courts, these being the i. express appeal provisions in places which included the purposes of the appeals and ii. the privative clause, the Supreme Court saw it fit to allow the Judicial Review.[85]

---

84 *H* above n at [77] that the appeal provided for did not overcome the deprivation of the first instance.
85 *H* above n 78.

The approach taken by the Supreme Court in this matter is arguably unusual and showcases the almost eagerness of the Supreme Court to correct an injustice. When the statutory schemes are not sufficient to address what the court perceives as injustice, the court will intervene. Part of the reasoning of the court of the court was when the Supreme Court did consider that *Tannadyce* was distinguishable from H's case. They held that:[86]

> the reasoning of the majority in that case rested on the premise that Parliament had created (in the challenge procedure available under Part 8A of the Tax Administration Act) an appeal process that was sufficiently comprehensive to render judicial review unnecessary, except where the challenge process could not be invoked.

The paper now turns to look at the Fijian context.

VI Fijian judicial response

This part of the research covers the judicial response to privative clauses. It is essential to first explain Fiji's constitutional background as this ought to provide a better understanding of the context in which privative clauses operate in Fiji in some instances. Fiji's constitutional history is distinguishable from New Zealand as Fiji has a written constitution, after having had three between 1970-2009.

A. Fijian constitutional backdrop

Fiji's abrogation of the its 1970 Constitution in 1987 and the 1997 Amendment Constitution in 2009 (inclusive of the alleged abrogation of the 1997 Constitution in 2000) saw the introduction of decrees[87]. The decrees of 1987 were legally adopted into the 1990 constitution and consequently into the 1997 Constitution whilst the 2009 -

---

86 Above n 78.

87 See s 1 of Fiji Constitution 1970 Revocation Decree 1987; Existing Laws Decrees 1987; See s 1, 2 of Fiji Constitution Amendment Act 1997, Revocation Decree 2009; Fiji Existing Laws Decree 2009; See s 1, 2 of the Revocation Decree 2000 (Fiji); Existing Laws Decrees 2000.

2014 decrees were incorporated into the 2013 Constitution.[88] Some of these decrees contained privative clauses. It is not the aim of this research to cover extensively every privative clause and Fijian case law addressing such privative clauses however, it is a valuable exercise to consider what the courts have said in response to privative clauses contained in decrees. To date, the 2013 Constitution remains the supreme law of the land..[89] An aspect of the 2013 Constitution on privative is discussed under two differing approaches in the High Court of Fiji.

B. Fijian cases considered

The three case laws examined herein are; *Ratu Jeremaia Natauniyalo v Native Land Commission and Ratu Akuila Koroimata* [1998] FCA 41; *Kubou v. The State, The Appeals Tribunal and Another* [2008] FCA 60; *Jemesa Ramasi v The Native Lands Commission, The Native Lands Appeals Tribunal, The Attorney General of Fiji, The ITaukei Land Trust Board* Civil Appeal ABU 0056 of 2012(High Court Civil Case No. HBJ 15 of 2009). These cases, are so far, the authority on privative clauses in Fiji.

There are two other separate High Court cases that is also looked at for the purposes of showing two different ways in which privative clauses have been responded to at that level. These are; *Simione Rabaka v Public Service Appeals Board, Public Service Commission* HBJ 45 of 2008 and *State v. The Sugar Industry Tribunal Ex Parte the Sugar Cane Growers Council* 1990 FLR 37.

Ahmadhu and Nand write on the practice of privative clauses in Fiji..[90] They propose that the main objective of having privative clauses (at least from the common law perspective), is to limit judicial activism in causes of action that would otherwise negatively impact upon the sound administration of the State..[91] They further suggest three ways in which this is done, one of which has and still evokes fierce objections

88 See s 168 of 1990 Constitution, ss194 and 195 of 1997 Constitution (Fiji) and s 173 of 2013 Constitution (Fiji).
89 See s 2. -(1) of the 2013 Constitution (Fiji) provides; This Constitution is the supreme law of the State.
90 M L Ahmadhu and N Nand Judicial Review Applications in Fiji Principles and Materials Institute of Justice and Applied Legal Studies University of the South Pacific 2001.
91 At 105.

especially in democratic set ups that have had the experience of military rule. A stated earlier they do acknowledge that Fiji's experience of military rule has introduced laws by decree whereby in certain instances, the courts are legally prevented from hearing certain cases. A good example of this is reflected in the High Court case of *Rabaka*.[92] discussed below is an example of an encounter with such a prevention[93]. The court in the *Rabaka* case considered the privative clause in the Administration of Justice Decree 2009 (Fiji) and a decision was handed down in June 2015.

C. Two differing High Court responses

The Administration of Justice Decree 2009 (Fiji) is one decree that was put in place in April 2009 after the abrogation of the 1997 Constitution. This decree included clauses that prevented the courts from either accepting or hearing certain challenges to specified acts of the State and her agents. The decree further empowered the Chief Registrar to issue Certificate of Termination to terminate certain legal proceedings that were caught under the given provisions.

In the *Rabaka* case the Chief Registrar issued a Certificate of Termination ("COT") of the proceeding. The COT was dated 18 May 2009.[94] Subsequently on 25 March 2014 the applicant filed a motion and challenged the decision of the Chief Registrar on the grounds that the decision to terminate the proceeding was wrongful, ultra vires and contrary to s. 15(2) of the 2013 Constitution of the Republic of Fiji.

The court concluded that the only issue that it had to decide upon was whether the applicant should be allowed to proceed to seek leave of the decision of the Public Service Commission (PSC) on the grounds that he is not precluded by the Administration of Justice Decree 2009 (AJD) to challenge that decision. The court held that if the court allowed the decision of the PSC to be challenged, the decision of the Public Service Appeal Board (PSAB) which upheld the decision of the PSC will also

92 *Simione Rabaka v Public Service Appeals Board, Public Service Commission* HBJ 45 of 2008.
93 Above n 92.
94 See s 23 (3) (e) (g) of the Administration of Justice Decree 2009" now embedded in s 174(1) of the 2012 Constitution.

be under challenge and thereby in breach of the Constitution as well.[95] This position that the court held stemmed from two reasons upon which the court relied. The first reason is that the result of allowing the challenge to the decision of the PSC will lead to absurdity if the substantive cause is decided in favour of the applicant and the second if the decision of the PSC is allowed to be challenged and the Court quashes the decision of the PSC then indirectly the decision of the PSAB has been challenged by virtue of hearing the matter against the PSC.[96]

An observation that can be made is that such reasoning is not based on any clear case law, rule of law or legal principle. The reason for such lack is not explained by the courts. Logic seemed to be the basis of the court's decision. The lack of dependence on legal principles in such a ruling indicates that the court in this instant may have been more concerned about consequences of entertaining such an application that would breach of the 2013 Constitution.

One further point of observation is how the court managed to determine that there was only one legal issue for the court to decide.[97] Whilst this determination is based on the applicant's positon and discretion of the court and by restricting itself to that issue, it arguable that the court was effectively prevented from consulting widely from Fijian case laws on privative clauses. Even then, the court was confronted with a privative clause and ought to have discussed the law on this. But this never occurred.

Whilst the 2013 Constitution is the supreme law of the land, the question on what is the common law position on privative clauses in Fiji is necessary to be stated and reconfirmed, especially in light of a challenge to a privative clause that originally stems out of a decree and thereafter made entrenched in 2013 Constitution. It can be remarked that the manner in which the privative clause was addressed in *Rabaka' s* case was not as exhaustive as it should have been. *Rabaka* failed to consider and apply

95 *Rabaka*, above n 92 at paragraph 23.

96 *Rabaka,* above 92.

97 The only issue that it had to decide upon was whether the applicant should be allowed to proceed to seek leave of the decision of the PSC on the grounds that he is not precluded by the AJD to challenge that decision.

Natauniyalo in its decision making. The court may have side stepped the question of privative clause and in the process missed an opportunity to discuss Fiji's common law position on privative clauses in the high court, especially in light of a privative clause transplanted into the 2013 Constitution. The shield of protection was not lifted in this case.

On the other hand, the 1990 High Court case of the *State v. The Sugar Industry Tribunal Ex Parte the Sugar Cane Growers Council*[98] dealt exhaustively with the question of privative clause contained in the Sugar Industry Act Cap 206[99]. The court in this case eventually rejected the arguments of applicant and held that the decision made by the Master of Awards was made in full compliance of the Sugar Industry Act.[100] The court adopted and followed the legal principles laid down in the landmark case of *Anisminic*[101].

As part of the courts deliberations, the court considered the arguments by both counsel on the special nature of the tribunal. The judge reiterated the arguments made by the applicant in that Parliament is intended to set up a special tribunal to deal finally with the matter with its own checks and balances with references to sections 65(1), (3),(4) and sections 66(1)(d), 67(3) and 68. The opposing counsel however submitted that the situation in Fiji was different from England in that persons with grievances complaining against government, government department or administrative tribunal only has the court to seek redress from. Therefore, it is vital for courts to look at closely at any attempt to restrict its supervisory jurisdiction. This argument appealed to the Byrnes J. The shield of protection in this instant was not lifted.

---

98 *State v. The Sugar Industry Tribunal Ex Parte the Sugar Cane Growers Council* 1990 FLR 37.

99 64(3). The particular provision read; "When made, the Master Award shall be final and conclusive, shall not be challenged or appealed against, reviewed or quashed or called into question in any court, and shall not be subject to any prohibition, mandamus or injunction in any court".

100 Above n 98.

101 At 98.

When comparing this response to that of Rabaka, one further observation that can be made is that Rabaka had missed an opportunity to apply Anisminic in the least, in the issuance of the COT as did the judge in 1990 *State v Sugar Tribunal*. The reason for this can only be inferred from the court's very basic reasoning. The reasoning was merely focused on ensuring that the supreme constitutional law provisions was not being breached yet lacked the fundamental legal basis.

D. The Court of Appeal responses

The appellant in the 1997 Court of Appeal case of *Ratu Jeremaia Natauniyalo v The Native Land Commission and Ratu Akuila Koroimata* appealed against the decision of Byrne J. of the High Court.[102] The Court of Appeal in Natauniyalo also distinguished this case from the previous case of *Nava v NLC and NLTB* (1994) 40 FLR which held:[103]

> Section 100(4) of the 1990 Constitution[104] did not exclude an examination by the High Court to determine whether the principles of natural justice had been breached in reaching the decision impugned.

The Court of Appeal in Nava held that English laws did not apply for the basic reason that Fiji had a constitution whilst England did not. Simultaneously Nava referred to the Chief Justice remarks in an earlier decision by the Native Lands Commission concerning dispute of chiefly titles and appeal who said:[105]

> "At this point it should be made clear that this Court has no jurisdiction to decide the merits of the Ka Levu dispute. The Court has no function in that regard. The Court's function is to ensure that the process by which the Commission arrived at its decision in the inquiry under Section 17 (1) of the Act was done in accordance with the law. In

---

102 *Natauniyalo Ratu Jeremaia Natauniyalo v The Native Land Commission and Ratu Akuila Koroimata* 1990 FLR 37.

103 Above n 102 at para C.

104 100.- (4) For the purposes of this Constitution the opinion or decision of the Native Lands Commission on(a) matters relating to and concerning Fijian customs, traditions, and usages or the existence, extent, or application of customary law; and(b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands, shall be final and conclusive and shall not be challenged in a court of law."
Bulou Eta Kacalaini Vosailagi of Cuvu Nadroga and The Native Lands Commission and Ratu Sakiusa Kuruicivi Makutu of Cuvu Nadroga and Native Land Trust Board (High Court Civil Action N0 19 of 1988) (Unreported Judgment of the High Court dated 22 June 1989).

other words, it is the decision-making process of the Commission as a statutory tribunal which is under review by this Court and not the merits of the decision itself."

At page 20 the Chief Justice continued:

> As already noted it is not for this Court to decide the merits of the Ka Levu dispute. That decision belongs elsewhere. The function of this Court is to ensure that the Commission as a statutory tribunal acted in accordance with the law in relation to the inquiry held under Section 17 (1) of the Act. Whether the Commission came to the right or wrong decision according to Fijian custom and tradition is not for this Court to say.

Contrary to the decision in Nava, the Court of Appeal in Natauniyalo relied on gave recognition to *Anisminic* [106]. Justice Byrnes of the High Court who initially presided over the case at first instant relied on Anisminic and this was supported by the Court of Appeal [107] In their reasoning, Natauniyalo Court of Appeal also considered *Ridge v Baldwin*.

In effect, Natauniyalo held [108]:

> The principles laid down in *Ridge v. Baldwin* (supra) were underscored by the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission and Anor*. [1969] 1 A.C. 147 Lord Wilberforce's speech in that case is so well-known and authoritative as to make two quotations from it sufficient.

Natauniyalo noted that Judge in the High Court (first instant) held that s.100(4) of the 1990 Constitution did not prevent judicial review of a decision of the first respondent, the Native Lands Commission. [109] In considering the privative provision of s.100(4),

---

106 Anisminic above n 8.

107 *Natauniyalo above n at para G.*

108 *Natauniyalo* above n at para G.

109 The content of s 100(4) of the 1990 Constitution reads as follows:
"(4) For the purpose of this Constitution the opinion or decision of the Native Lands Commission on (a) matters relating to and concerning Fijian customs, traditions and usages or the existence, extent, or application of customary laws; and (b) disputes as to the headship of any division or sub-division of the Fijian people having the customary right to occupy and use any native lands, shall be final and conclusive and shall not be challenged in a court of law.

Byrne J. applied the well-known dictum of Lord Reid in *Ridge v. Baldwin* whereby it was court held: [110]

> whereby it was court held "Time and time again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood v. Woad* (1874) LR 9 Ex. 190. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case", as was emphasised by the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission and Anor*.

Ridge v. Baldwin [111] adopted the Lord Wilberforce's speaking "privative clauses" in Anisminic Ltd. v. Foreign Compensation Commission and Anor and in particular, when he remarked: [112]

> when he remarked that these privative clauses in their nature can only relate to decisions given within the field of operation entrusted to the tribunal. And just because the court nullifies a tribunals' decision, it is not disregarding the privative clause. For the courts duty is to merely ensure that the tribunal works within their designated area of speciality. In this his lordship did not consider it a struggle between the legislature and the executive as the courts role is to ensure that those se boundaries are not crossed.

Natauniyalo went to this length to distinguish itself from *Nava*. *Natauniyalo* placed much emphasis on the right to be heard. *Natauniyalo* was willing to lift the shield of protection when the tribunal failed to comply with this natural justice principle. Whilst this is an important aspect, an additional observation to be made is that even though the subject tribunal is established virtue of a statutory scheme, there was no

110 *Ridge v. Baldwin* [1964] A.C. 40 at 80.
111 *Ridge v. Baldwin* [1964] A.C. 40, 80.
112 Anisminic above n 8; see Anisminic [1969] 1 A.C. 147 at 207G and at 208B.

legal analysis made by the court on this aspect. The court did not make any reference to statutory scheme.

It can be drawn from this emphasis that the *Natauniyalo* placed much reliance on *Anisminic* and has been used to steer the judicial response in that direction. There is also an emphasis indicated by the *Natauniyalo*, that in future cases, the courts will look into the manner in which a tribunal has exercised its power, ensuring the tribunal works well within the ambits of the legislature had intended them to. *Natauniyalo* emphasised on the need to ensure that all parties are heard prior to decision making. This confirms the courts commitment to see that such an important principle of natural justice is not breached. And also the *Natauniyalo* held that the deciding tribunal, when processing and deciding relevant matters, stay within the ambits of what they are empowered to do by law. Further they must only deal with matters pertaining to the special field they are entrusted with by legislation to deal with. Anything outside this will give grounds to the courts to intervene. It therefore, arguable that in future cases the courts will examine, even the questions asked by tribunals in the process of decision making. The responses to these questions ought to determine whether tribunal has strayed or not.

Natauniyalo, did, in the final analysis hold that the *Anisminic* principles are part of the law of Fiji.[113] The appeal as dismissed and the case referred in High Court for the judicial review to proceed in its merits[114].

It is therefore established that when considering privative clause which a tribunal may use to hide behind, the courts would look into the manner in which a tribunal has exercised its power, ensuring the tribunal works well within the ambits of the natural justice principles despite a constitutional entrenched privative clause.

---

113 *Natauniyalo* above n at para E.

114 This merits here refers to the merits that may exist in the judicial review and not the merits of the case before the tribunal at first instant.

And in this case, despite the express constitutional privative clause, the shield of protection was lifted to allow judicial review in *Natauniyalo*. This decision remains the principle authority in Fiji. It demonstrates the judicial commitment to ensuring that whilst the court will not interfere with the merits of case, the court will not be prevented from intervening merely because the privative clause is a constitutional one.

The 2008 decision of *Kubou* was made adopted the principles set out *Natauniyalo*. This was a leave application for judicial review that came before the Court of Appeal.[115] The applicant sought leave for judicial review in the High Court but was denied and this led him to the Court of Appeal. The applicant's substantive contention was that he was prevented from giving oral evidence at the tribunal hearing. The Court of Appeal considered that the issue before the tribunal was a genealogical one, one of fact. The court has previously shown its reluctance to delve into and or determine questions of facts before decision makers.

In this case the court considered section 7(5) of the Native Lands (Appeals Tribunal)(Amendment) Act 1998.[116] The court held that the decisions of the tribunal are unimpeachable provided that they are valid decisions, reached in accordance with the principles of natural justice.[117] Again, the focus was on the need for decision making tribunal to adhere to principles of natural justice. The Court of Appeal in *Kubou* did hold as follows:[118]

> It is not for this Court or any Court to determine the issue of who is to succeed to the title of Tu Navatu and the Court can express no opinion on that question but in being denied natural justice a substantial wrong has occurred. The trial judge ought to have given leave for judicial review for the reasons set out above

115 *Kubou v State* [2008] FJCA 60.
116 This section provided that "Decisions of the Appeals Tribunal are to be final and conclusive and cannot be challenged in a court of law".
117 *Kubou*, above n 106; Natauniyalo above 86.
118 *Kubou*, above n 113 at para [31].

and in light of those reasons the High Court would have been obliged to grant judicial review".

So the courts did not see it their role to delve into the merits of the claims or otherwise but the court was procedure focused. In this case the shield of protection was lifted.

The decisions of these *Kubou* is evidence of that decision makers of public institutions are accountable to the courts in Fiji despite the finality clause that purports to protect or shield them. And that protection only remains so far as they are in compliant with the rules of natural justice. *Kubou* herein did not necessarily break new grounds to recreate or radically modify or transform Anisiminic. As much as possible they have adopted and adhered to traditional approach to interpreting the relevant clauses in alignment to Natauniyalo. Yet such responses complement Bovens's framework of legal accountability. Even if there is a written constitutional privative clause, courts will still bring tribunals to account should there be any breach of the rules of natural justice.

And further and more importantly for this research, the responses of the court, stepping in to allow for the examination the conduct of decision makers fall well within Bovens's legal accountability framework and precepts.

In *Kubou*, the Court of Appeal allowed the leave to judicially review the matter hence the shield of protection was lifted.[119] The court's response to was that the decisions of the tribunal are unimpeachable provided that they are valid decisions, reached in accordance with the principles of natural justice.[120]

The Court of Appeal in *Kubou* also held:[121]

---

119 *Kubou*, above n 106.
120 *Ridge v Baldwin* above n 110; *Natauniyalo v Native Land Commission* [1998] FCA 41.
121 *Kubou*, above n 106; *House v The King* [1936] HCA 40; [1936] 55 CLR 499.

> if the Tribunal is going to consider ancient hearsay, and allow one party to give oral evidence, it would be a clear denial of natural justice to confine the other party to documentary evidence and deny them the opportunity to give oral evidence; The decision of the trial judge to refuse leave for judicial review was a discretionary one and an appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising of the discretion and a substantial wrong has occurred.

In this case, for the reasons set out at paragraphs 16-20 above the trial judge has erred in finding that the Tribunal afforded the appellant fair and reasonable process.

In the end, the court held that it was not for this court or any court to determine the issue of who was to succeed to the title of Tu Navatu and the Court can express no opinion on that question but in being denied natural justice a substantial wrong has occurred. The trial judge ought to have given leave for judicial review for the reasons set out above and in light of those reasons the High Court would have been obliged to grant judicial review.

It is certain that the Court of Appeal continues to look for breaches of natural justice when tribunals are deciding. The courts look for gaps in the observance of such rules and when the courts are able to determine that there has been a hint of a breach of natural justice, the courts will not hesitate to lift the shield of protection.

The *Ramasi* Court of Appeal decision, which is an additional relevant case study was handed down in May 2015, a month before the *Rabaka* case was handed down.[122] This case is one that has been decided after the adoption of the Fiji's 2103 Constitution. A remark to be made is that the response of the court in *Ramasi* was more hopeful and principled than *Rabaka* because it canvassed the common law position on privative

---

122 *Jemesa Ramasi v. Native Lands Commission, Native Lands Appeals Tribunal, Attorney General of Fiji and I-Takei Lands Trust Board* Civil Appeal ABU 0056 of 2012.

clauses in a more sufficient manner. The High Court in *Rabaka*, in its deliberations did not consult this authority of Kubou. Whilst this may be entirely the discretion of the court, it is proposed that, had the *Rabaka* case adopted and applied the principles laid out in *Ramasi*, the outcome of that High Court case may have been different.

It is appreciated that whilst *Ramasi* does not present the opportunity to discuss a constitutional privative clause (the constitution being the supreme law of the land) as was encountered in *Rabaka*, it is the application of precedents that is the substantive interest.

The problem encountered in *Ramasi' s* case was again a subordinate law, that us section 7(5) of the iTaukei Lands Act Cap 133[123]. The grounds of appeal that the appellant depended on were that the judge at first instant erred when he did not hold the first respondent as having acted in excess of jurisdiction, that the said judge also erred when he did not hold the matter res judicata and that he also erred when he decided that there was undue delay in making the application for judicial review.

The Court of Appeal accepted the said section 7(5) to be a privative clause. Justice Calanchini held that it is open for a person to apply for judicial review of a decision of the tribunal alleging either lack of jurisdiction or a denial of natural justice. A denial of natural justice means an existence of bias on the part of the tribunal or procedural impropriety. These issues are not concerned with the merits of the decision. This means that whenever a challenge to a decision on the Tribunal is based on lack of jurisdiction or a denial of natural justice, the High Court has the necessary jurisdiction to consider and application for judicial review under Order 53 of the High Court Rules notwithstanding section 7(5) of the Act. However, he held that in this case the challenge by the Appellant went to the merits of the Tribunal's decision and for that reason there was no right to apply for judicial review.

[123] Section 7(5) of the iTaukei Lands Act Cap 133 provides that the decisions of the tribunal are to be final and conclusive.

The response of the court in the *Ramasi* case took the traditional direction set by *Natauniyalo* and *Kubou* in dealing with privative clause which prescribed the circumstances in a court can intervene when faced with a privative clause. [124]

The judge considered the case of *Natauniyalo v The Native Land Commission and Koroimata* [1998] FJCA 41 and the privative clause contained in the 1990 Constitution (Fiji) which stated: [125]

> For the purpose of this Constitution, the opinion of decision of the Native Lands Commission on (a) matters relating to and concerning Fijian customs traditions and usages or the existence, extent or application of customary laws; and (b) disputes as to the headship of any division or sub-division of the Fijian people having customary right to occupy and use any native land, shall be final and conclusive ad shall not be challenged in a court of law". [126]

Justice Calanchini held that the court in that case did not exclude an examination by the High Court to determine whether the principles of natural justice had been breached in reaching the decision impugned. He also held that the same question was revisited in *Kubou v. The State, The Appeals Tribunal and Another* [127] following its decision in *Natauniyalo v Native Land Commission* applied the same principle when considering section 7(5) of the said Act. [128] Ramasi held that it was not the court's function to review the merits of the decision in respect of the application made but the decision-making process itself. [129]

Justice Calanchini concluded in his judgment that whenever a challenge to a decision of the Tribunal is based on a lack of jurisdiction or a denial of natural justice, the High

---

124 *Ramasi* above n 121.

125 Above n 101 at para [7].

126 The 1990 Constitution of Fiji was Fiji's second constitution succeeding the 1970 Constitution and preceding the 1997 Constitution which was abrogated in 2009 and replaced with the 2013 Constitution; The name "Fijian" in this legal context refers to the natives or indigenous people of Fiji under the then law, now referred to as iTaukei.

127 [2008] FCA 60.

128 The court in *Kubou* did hold that the effect of this section is that decisions of the Tribunal are unimpeachable provided that they are valid decisions, reached in accordance with the principles of natural justice; [1998] FJCA 41.

129 *Kubou*, above n 114 at para 25.

Court has the necessary jurisdiction to consider an application for judicial review under Order 53 of the High Court Rules notwithstanding section 7(5). However, he further said that in Ramasi' s case the challenge by the Appellant went to the merits of the Tribunal decision and for that reason there was no right to apply for judicial review.

Justice of Appeal Basnayake in a separate judgment concluded the appellant was only challenging the decision and that wanted the courts intervention to correct that decision. There was no challenge to the process of decision making. He held that the appellant did not make any complaints of being denied natural justice therefore the court agreed with the judge of subordinate court who rejected the appellant's arguments. This court in this matter did not allow a judicial review of the appeal tribunal decision.

Ramasi again like the two previous cases, confirms that the court is able to lift the shield of protection. Ramasi shows the court is the legal accountability mechanism that compels the tribunal to answer for its decision making. This is especially so in the case whether processes are tainted with irregularities and breaches of principles of natural justice. However, the court will not be used to as a mechanism to substitute decisions of the tribunals.

In *Ramasi* case the protection was not lifted.[130] The grounds of appeal that the appellant depended on were that the judge at first instant erred when he did not hold the first respondent as having acted in excess of jurisdiction, that the said judge also erred when he did not hold the matter res judicata and that he also erred when de decided that there was undue delay in making the application for judicial review.

However, despite there being a claim by the appellant of the tribunal acting in excess of his jurisdiction, the court held that in this case the challenge by the Appellant went to the merits of the Tribunal's decision and for that reason there was no right to apply

[130] Section 7(5) if the iTaukei Lands Act Cap 133 provides that the decisions of the tribunal are to be final and conclusive.

for judicial review. This also means getting into the merits of the matter is not for the court to get involved in.

The response of the court in the *Ramasi* case again showed the courts express reluctance to get involved in the merits of the claim.[131]

The court is able to discern when there is an attempt by a party who merely wants to correct a decision. The court will not assist. The court therefore will only lift the shield of protection off the Tribunal when there is lack of jurisdiction or breach of the rules of natural justice.

VII. Application to Bovens's accountability framework

A privative clause may shield or protect a public officer decision maker from being subjected to the courts scrutiny like the Secretary of Energy in the *Bulk Gas Group User* case or the Commissioner of Inland Revenue in the case of *Tannadyce* or the Refugee and Protection Officer in *H's* case or the tribunal in *State v. The Sugar Industry Tribunal Ex Parte the Sugar Cane Growers Council* or the Chief Registrar in *Rabaka* and the Natives Lands Commission in the *Natauniyalo*.[132] The clause acts as a hurdle, an obstacle causing deficiency in public account giving. This may be even so with the statutory appeal processes in place. Privative clauses with statutory schemes do not necessarily give aggrieved parties easy access to courts. There may be an instance where an error has occurred. Whether the error is administrative, logistical or legal, such an error may affect the decision of the public officer. The impact of the error may be minimal or significant on the aggrieved party and access to the courts for the accountability of decision maker and the decision making process may become an absolute necessity.

---

131 *Jemesa Ramasi* above n 121.

132 See the public officer holders in *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153; *H (SC 52/2018) v Refugee and Protection Officer* [2018] NZSC 79; 1990 FLR 37; *Simione Rabaka v Public Service Appeals Board, Public Service Commission* HBJ 45 of 2008; *Natauniyalo v Native Land Commission* [1998] FCA 41; *Kubou v State* [2008] FJCA 60; *Jemesa Ramasi v. Native Lands Commission, Native Lands Appeals Tribunal, Attorney General of Fiji and I-Takei Lands Trust Board* Civil Appeal ABU 0056 of 2012.

The statutory process may cause more injustice than not. It is in these circumstances that

courts have shown their willingness to intervene despite those statutory appeal processes, in particular in New Zealand. The courts have proven that despite the appeal processes in place, public officers may still err and statutory schemes may still be insufficient to address an injustice or the wrong, hence the need for judicial intervention. Even when the court has not ordered a judicial review in the past like Tannadyce the courts have simultaneously showed eagerness to be involved.

The encounter of privative clauses by the courts and the judicial response of disallowing the shielding where not deserving, settles well with Bovens's definition of account giving. Bovens's legal accountability mechanism is a type of accountability between the actor and the forum.[133] The actor being the public officer and the forum represented by the court.

Anisminic and *O'Reilley* commenced the work on the weakening of privative clauses. This very first landmark decision immensely benefits if not complements Bovens's legal accountability framework. The absolute protection of public officers was now nullified. The fact that public officers could no longer hide behind the shield of protection of privative clause satisfies the requirements of Boven's framework. The implication of the judicial decisions is that injustices can still occur within the statutory appeal processes even they are proven and justified in their own right.

Whilst Bovens extensively prescribes the elements of his accountability framework there are three aspects of his work that are considered relevant and useful to the purposes of this research. These are; the narrow definition of accountability that he adopts, the legal accountability mechanism as a type of accountability framework or dimension and the systematic evaluation framework that evaluates that legal accountability mechanism in preventing corruption and abuse of power. This

133 Mark Bovens above n 1.

evaluation framework is captured under what Bovens terms as the constitutional perspective[134].

Bovens adopts the narrow sociological sense of the word accountability and describes it as:[135] "Accountability is a relationship between an actor and a forum in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences". Bovens explains the relationship is likened to a principal-agent relation and there is exists an obligation for the actor to explain to the forum. This is called account giving. This obligation can either be formal or informal. The lifting of the shield of protection in cases, whether there are statutory schemes are prescribed or not means the judicial commitment to remedy an injustice. After all, the court in New Zealand has held that even statutory schemes may be insufficient to address an injustice. The lifting of the shield of protection in cases of express constitutional privative clauses also demonstrates that very same commitment from the courts, both in New Zealand and Fiji. Such judicial responses fit well into Bovens work.

Bovens promotes that the legal accountability mechanism is one that formalises social relations. This formalisation occurs when the courts become involved in determining the conduct of public officers. The determination is whether the public officer has acted within or outside the law, rules and regulations.

With the incoming judicial responses from *Bulk Gas User Group*, *Tannadyce* and *H*, the presence of the shield of protection appears to become obsolete. Obsolete because arguably such protection exists only in name and the courts will intervene when they see it fit. For the purposes of Bovens legal accountability requirements, such judicial responses can only strengthen public accountability processes. From the accountability perspective, such responses encourage public officers to be more cautious considering that shield of protection can easily be lifted, in particular in New

134 Mark Bovens above n 1.
135 Above n 1.

Zealand. The New Zealand courts have aggressively developed *Anisminic*. As in *Tannadyce*, they've ousted the presumption that is favour of the protected, they created a new law in which the court held that that disputable decisions (which include assessments) may not be challenged by way of judicial review unless there is a practical difficulty in working of the relevant statutory procedure.

Tannadyce held that cases of that kind are likely to be extremely rare. Their conclusion was that the circumstances of *Tannadyce* were not extremely rare and hence did not fall into the narrow category now left for review.[136] Accordingly, the court has changed the law as to when judicial review may be commenced in a tax context. And as was shown in *H* the court held that *H* was not precluded by s 249(1) from initiating a Judicial Review and the Court in not barred from dealing with the application for Judicial Review and therefore the case was remitted to the High Court for a hearing. Effectively, despite the two hurdles that stood in the way of the courts, these being the i. express appeal provisions in places which included the purposes of the appeals and ii. the privative clause, the Supreme Court saw it fit to allow the Judicial Review.

The Fijian judicial response whilst relies on *Anisminic* ultimately has kept its response arguably simple. The court agrees that protection is not absolute. The shield of protection may be lifted. The circumstances would be when there is a breach of natural justice principles or a lack of jurisdiction. The courts prescribe the need for public institutions to be cautious of procedural requirements and remaining within the jurisdiction of the empowering legislation. Such responses were shown in *Natauniyalo*, *Kubou* and *Ramasi*.

Bovens states that "legal accountability is of increasing importance to public institutions as a result of the growing formalisation of social relations, or because of the greater trust which is placed in courts rather than parliaments"[137]. Such a remark demonstrates so significantly the connection between the judicial responses to

136 Tannadyce above n 7para [59]; James Coleman above n 70.
137 Mark Bovens above n 1 at 456.

privative clauses and the valuable contribution the courts make in evaluating privative clauses. In their evaluation the courts determine whether the conduct of public officers have digressed outside given boundaries of the law. And any such erroneous will nullify the protection. Even though parliament has prohibited the intervention of courts, the courts will still intervene because of the role it plays in bringing about legal accountability. This leads us to one of Bovens's evaluative perspective that is relevant to his research which is the "constitutional perspective". This perspective sees the legal accountability mechanism as a vessel that prevents corruption and abuse of power. Bovens says that "the main concern underlying this perspective is that of preventing the tyranny of absolute rulers, overly presumptuous, elected leaders or of an expansive and "privatised" executive power. The remedy against an overbearing, improper, or corrupt government is the organisation of checks and balances, of institutional countervailing powers".[138]

The judicial responses to privative clauses demonstrate how Bovens legal accountability framework proves correct and true. Having outlined the Bovens precepts that apply to this research, the next step is to turn to the selected case laws in New Zealand and thereafter Fiji to view the courts attitude towards privative clauses and see how far would the courts go to protect public officers.

VIII. Conclusion

Judicial review in the 1960s in the UK faced sweeping changes, that is when the principles of judicial review were being transformed into a body of 'coherent principles' and leading the charge was Lord Reid modernising the rules on judicial review. This included at first the law of procedural fairness then substantive review, and aspects of the relationship between the law and the Crown was reformulated and strengthened. The area of jurisdictional review was revisited.[139] And finally reforms that swept away what Lord Reid saw as unnecessary out-moded restrictions and

138 Above n 1at 463.
139 Anisminic above n 8.

technicalities of the past, and to replace them not with a detailed serious of rules, but rather with wide-ranging judicial discretion so that the law could be further developed and clarified case by case basis future. The discretion introduced gives the needed space to develop the laws of judicial review.[140] It is this very discretion that has been used to develop the common law on privative clauses.

These sweeping *changes* also manifested in New Zealand although be it almost 20 years after Anisminic. The changes show aggressiveness, boldness and confidence of the courts. New Zealand's attitude shows a major shift from Anisminic. The aggressive modification of the Anisminic and O'Reilley v. Mackman in Bulk, Tannadyce and H reflects that shift.

The Fijian attitude has not been as daring, and not as aggressive so as to remove the distinction between jurisdictional and non-jurisdictional error. The courts accept the Anisminic principles as part of Fijian law and yet focus more on the conduct of hearing. And whilst the courts in Fiji accept that the shield of protection is not absolute nor permanent, it has been arguably more restrained than New Zealand in its venturing. The courts will intervene only in cases where the matter concerns the lack of jurisdiction of the tribunal or commission or there is a breach of natural justice principles in the conduct of the decision maker. Even though the High Court case of *Rabaka* is an appalling response of the court to privative clause, the higher courts have established that privative clauses are not an absolute cover and protection. The court is able to remove that cover should the empowered tribunals act outside the given powers. However, the Fijian court will not temper with the merits or the demerits of a case.

Having considered the cases in New Zealand and Fiji, it is evident that courts have not relinquished their power to supervise despite the strong words from Parliament manifest through in legalisation. Court will always intervene if they deem in fit and

140 Adam Tomkins Public Law Clarendon Law Series Oxford University Press 2003 at 171-172.

just. Therefore, one may argue that ousting the jurisdictions of the court is merely a myth in New Zealand and Fiji.

The courts willingness to lift the shield of protection at various intervals is evidence of the judicial commitment to ensure that proper accountability of decisions is taken. The commitment is a serious and warranted one in their view because the courts in the process of holding lifting the protection are in effect overstepping the boundaries of legislation.

The judicial responses to privative clauses in the respective jurisdiction demonstrates how Bovens's legal accountability framework works. The reasons given by the courts for the removal of protection and their subsequent intervention through judicial review answers the constitutional perspective which is to prevent abuse of power. Such processes of visiting and investigating the privative clauses and the circumstances in which they are applied sufficiently satisfies the necessary "checks and balances"[141] of the legal accountability requirements.

141 Above n 1 at 463.