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# THINNING OAKS AND GROWING TŌTARAS? A SELECTIVE DOCTRINAL HISTORY OF EARLY ADMINISTRATIVE LAW IN NEW ZEALAND

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# *Abstract*

*Robin Cooke's influence on administrative law's growth in New Zealand has been extensively documented. As a result, administrative law's pre-Robin Cooke period is frequently overlooked. This paper remedies this scholarly deficit by surveying the New Zealand courts' approach to controlling administrative action in the 'pre-Cooke era', which was defined as the period between World War II's conclusion and Robin Cooke's prophesied elevation to the Court of Appeal in May 1976. This paper's core finding is that the pre-Cooke era oversaw a slow, reluctant and non-linear transition in the courts' philosophy, away from formalism and the conservatism it engendered, towards more liberal tendencies. By the time Robin Cooke was appointed to New Zealand's then most senior indigenous court, the pendulum had already begun to swing back in favour of more robust judicial controls on administrative action in New Zealand. In surveying the courts' pre-Cooke philosophy, this paper also sought to paint, in Cooke's words, a "Portrait of the Profession". Thus, in this paper's concluding section, I drew together a range of threads by examining the role that people – in the form of academics, practitioners, politicians, law reformers and judges – in combination with societal circumstances, played in administrative law's progression in the period under review.*

*Key words: administrative law – judicial review – doctrinal history – Robin Cooke*

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# *I Introduction*

In 1956, BJ Cameron – an advisory officer in the Department of Justice – remarked that:[1]

> The truth is that the New Zealand bench and bar incline to a positivist Austinian concept of the function of the Courts. Their jurisprudence is the analytical jurisprudence of Salmond derived from Holland and ultimately from Austin, and some in the legal profession would probably still regard Cardozo's "The Nature of the Judicial Process" as akin to either indecent exposure or open heresy. New Zealand has never produced a Mansfield, a Wright, or a Denning; and, while the prevailing climate continues, it is not likely to do so.

Thirty-one years later, Cameron – then a recently appointed Law Commissioner – declared that:[2]

> At a deep level the history of New Zealand law over the last 30 years or so is the story of legislative (and in a more modest degree *judicial*) emancipation from the stunting shadow of English law. The oaks have been thinned out, the t[ō]taras are growing tall.

These quotes allude to a story of significant legal change in New Zealand. This paper tells that story, through the lens of the judicial control of administrative action between 1945 and 1976.

This paper has three substantive parts. Part II outlines and defines the terminology used in this paper before exploring the courts' approach to controlling administrative action in the period leading up to 1945. Part III then proceeds to comprehensively traverse the courts' approach to administrative law between 1945 and 1976. Part IV concludes by (a) summarising the paper's overall arc; and (b) examining the role that academics, law reformers and judges, in combination with the broader societal context, played in

1 BJ Cameron "Law Reform in New Zealand" [1956] NZLJ 72 at 73.

2 BJ Cameron "Legal Change Over Fifty Years" (1987) 3 Canta LR 198 at 204 (emphasis added).

administrative law's growth in the period under review. Before commencing Part II, it is necessary to both explain this paper's methodology and outline its core findings.

### *A Methodology*

Robin Cooke's[3] influence on administrative law in New Zealand has been extensively documented.[4] As a member and later as the President of the Court of Appeal, Robin Cooke drove fundamental changes in the "vineyard"[5] (as he called it) of administrative law.[6] Indeed, in the 1985 case *Budget Rent A Car v Auckland Regional Authority*, Robin Cooke J declared that the time had come "to emphasise that New Zealand administrative law … [was] significantly *indigenous*".[7]

3 As this paper primarily discusses Robin Cooke's work as an academic prior to his appointment to the Supreme Court, it refers to him in an informal sense, rather than through any of his formal titles. Moreover, as this paper analyses Philip Cooke's work as a Supreme Court judge, it generally uses Robin Cooke and Philip Cooke's first names, to avoid any confusion.

4 See for example Dean R Knight "Simple, Fair and Discretionary Administrative Law" (2008) 39 VUWLR 99; David GT Williams "Lord Cooke and Natural Justice" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1977) 177; Michael B Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1977) 189; Janet McLean "Constitutional and Administrative Law: The Contribution of Lord Cooke" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1977) 221; KJ Keith "Public Law in New Zealand" (2003) 1 NZJPIL 3; and Peter Spiller "Judges at Work: The New Zealand Court of Appeal (1958-1976)" (1993) 1 Wai L Rev 79 at 94.

5 Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1 at 2.

6 Knight, above n 4, at 100–102.

7 *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA) at 418 (emphasis added). Dean Knight has suggested that in making this declaration Robin Cooke was referring to

A consequence of the scholarly focus on Robin Cooke's impact in administrative law in New Zealand is that the pre-Robin Cooke period is often overlooked. This paper set out to remedy this scholarly deficit by surveying the New Zealand courts' administrative law philosophy prior to Robin Cooke's appointment to the Court of Appeal in May 1976.[8] World War II's conclusion was chosen as a starting point to avoid case law directly tainted by the judicial deference paid to the First Labour Government during the War.[9]

To effectively analyse the courts' philosophy between September 1945 and May 1976, I separated the pre-Cooke era into three periods:

(a) post-War through to 1957 (Period I);
(b) the first sitting of the permanent Court of Appeal in 1958 through to the creation of the Administrative Division of the Supreme Court[10] in 1968 (Period II); and
(c) 1969 up until Robin Cooke's elevation to the Court of Appeal in May 1976 (Period III).

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the simplified judicial review procedure introduced by the Judicature Amendment Act 1972 (discussed from page 56): "Importation and Indigeneity: The Quartet in New Zealand Administrative Law" (forthcoming) at 44–45. Philip Joseph has argued that it was in the "*application* of administrative law principles that the Richmond, Woodhouse and Cooke Courts excelled": "The Contribution of the Court of Appeal to Commonwealth Administrative Law" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009) 41 at 45 (emphasis added).

8 While Robin Cooke occasionally sat in the Court of Appeal in a temporary capacity in 1974 and 1975, this arrangement did not allow Cooke to shape the Court's administrative law jurisprudence.

9 See for example RO McGechan "Trends in Administrative Law in New Zealand in 1942" (1943) 5(2) NZJPA 44; RO McGechan "Trends in Administrative Law in New Zealand in 1943" (1944) 6(2) NZJPA 47; and RO McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951" (1951) 14(1) NZJPA 57 at 57–58. For a similar trend in England, see RB Cooke "The Rights of Citizens" in RS Milne (ed) *Bureaucracy in New Zealand* (Oxford University Press, Wellington, 1957) 84 at 86.

10 The Supreme Court was renamed as the High Court in 1980.

The pre-Cooke era was separated into these periods because there were two significant changes to New Zealand's court system in the era – the establishment of the permanent Court of Appeal and the Administrative Division – which had the *potential* to catalyse significant changes in the courts' approach to controlling administrative action.

In examining the courts' philosophy in each of these periods, I first identified the courts' *general* approach towards administrative law before analysing a range of *specific* themes which were either consistent with the courts' general approach or offered an alternative narrative or a particularly interesting insight. The themes chosen – natural justice, restrictions on judicial control, the Administrative Division, Crown privilege and the Judicature Amendment Act 1972 – were based on the subjects and issues which repeatedly arose during this paper's literature review. The cases selected to illuminate each theme were largely based on the cases discussed in an irregular series on administrative developments published in the New Zealand Journal of Public Administration between March 1943 and March 1973. It is hoped that the analysis of these cases and themes will reveal broader insights into the courts' administrative law philosophy in the pre-Cooke era.

The last methodological point to note is that the lack of consistent, generalised commentary on administrative law in the pre-Cooke era necessitated this paper's theme-based methodology. Administrative law's muddled structure likely fuelled the absence of such commentary; at the time, judicial review did not have a clear organising principle.[11]

11 Judicial review was systematised into three grounds – illegality, procedural impropriety and irrationality – in November 1984 in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410 per Lord Diplock: Knight, above n 7, at 40.

### *B Findings*

At this stage, it is convenient to summarise this paper's core finding: at a high level, the pre-Cooke era oversaw a slow, reluctant and non-linear transition in the courts' approach to administrative law, away from formalism and towards more liberal tendencies.

In Period I, the courts generally adhered to England's formalist and thereby, conservative approach to controlling administrative action. Nonetheless, there were indications of liberal inclinations in the courts' natural justice doctrine. In Period II, despite the famous "Quartet of Cases" signalling a "pendulum swing" in favour of the judicial control of administrative action in England,[12] the New Zealand courts' conservative approach continued largely unabated, with one landmark departure in Crown privilege. In the last period reviewed – Period III – the courts noticeably retreated from formalism and moved towards a more liberal philosophy, laying the foundations for Robin Cooke's appellate repudiation of formalism in the years to follow.

## *II Background*

Before traversing the courts' pre-Cooke administrative law philosophy in more detail, this paper (a) defines the terminology used to analyse that philosophy; and (b) briefly discusses the courts' approach before, and during, World War II, to provide contextual background

12 Lord Wilberforce "Foreword" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) ix at ix. For "the Quartet", see *Ridge Baldwin* [1964] AC 40 (HL) (discussed from page 33); *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL); *Conway v Rimmer* [1968] AC 910 (HL) (discussed on page 46); and *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) (discussed from page 52).

to this paper's starting point. It finds that during the War, the courts assumed a more deferential attitude to controlling administrative action than had previously prevailed.

### *A Terminology*

As this paper uses a range of terminology, it is necessary to provide background to each term's intended meaning. First, the term "philosophy" is used to refer to the theories, values and beliefs that steered judicial action in administrative law in the pre-Cooke era.[13]

This paper discerned three philosophies that were prevalent in the pre-Cooke era: formalism, conservatism and liberalism. Formalism required judges to work within categories and classifications which often "determine[d] results without the judges having to deploy … substantive arguments".[14] Formalism and conservativism were linked to the extent that formalism's categories and classifications tended to restrict judicial intervention and thereby, facilitate judicial restraint.[15] Liberalism, on the other hand, refers to a judicial willingness to engage in substantive arguments and scrutinise administrative action.[16] It should be noted that while there is a conceptual distinction between administrative appeals and judicial review (which was noticeably hazy in the pre-Cooke era),[17] any form of judicial control of administrative action is within this paper's purview.

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13 For a similar use of the term, see ILM Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46 at 46.

14 David Dyzenhaus "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 at 450. See also Knight, above n 7, at 42; and Robert Fisher "New Zealand Legal Method: Influences and Consequence" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 25 at 27–28;

15 Fisher, above n 14, at 36–37.

16 See for example Duncan Bell "What is Liberalism" (2014) 42 PT 682.

17 See for example KJ Keith "Appeals from Administrative Tribunals – The Existing Judicial Experience" (1968) 5 VUWLR 123 at 159.

An important aspect of this paper's survey is whether there were any signs of *indigeneity* in the courts' philosophy in the pre-Cooke era. It is often assumed that prior to Cooke's preordained arrival on the Court of Appeal,[18] New Zealand's administrative law developments mirrored those of its coloniser.[19] Numerous factors are advanced to validate this assumption, including; the British origins of New Zealand's Pākehā population,[20] New Zealand's economic dependence on England,[21] the availability of a right of appeal to the Privy Council,[22] New Zealand's limited judicial resources,[23] the schooling of law students' in the common law method[24] and ultimately, "New Zealand's 'Englishness'".[25] This paper interrogates this assumption while examining the courts' philosophy in the pre-Cooke era.

In testing this assumption, it is essential to keep in mind that indigenous jurisprudence is not jurisprudence which abandons "our heritage of the common law";[26] rather, an indigenous legal system is one which exhibits:[27]

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18 "The Swearing in of Mr Justice Cooke" [1973] NZLJ 172 at 172.

19 See for example Knight, above n 7, at 33 and 40–42; Lord Wilberforce, above n 12, at ix; Fisher, above n 14, at 26; Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, New Zealand, 2014) at 856; JL Robson and KJ Scott "Public Administration and Administrative Law" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens & Sons, London 1954) 84 at 90; RB Cooke "The Changing Face of Administrative Law" [1960] NZLJ 128 at 128; and Michael Taggart "The New Zealandness of New Zealand Public Law" (2004) 15 PLR 81 at 82.

20 Cameron, above n 1, at 72.

21 At 72.

22 The right of appeal to the Privy Council was discontinued in 2004.

23 Cameron, above n 1, at 72; and Knight, above n 7, at 33.

24 Cameron, above n 1, at 72; and Knight, above n 7, at 35.

25 Knight, above n 7, at 35. See also Cameron, above n 1, at 72.

26 BJ Cameron, above n 2, at 198.

27 At 198.

> … a willingness to go back to first principles, to be readier to ask … [its] own questions, and to take ideas firsthand rather than through the filter of British acceptance or debate.

Thus, this paper uses the term "indigeneity" as shorthand for a distinctive New Zealand common law.[28]

The last point to note is that it has been said that "to understand fully the New Zealandness [the indigeneity] of New Zealand Public Law one … [must] understand New Zealandness".[29] Various attempts have been made to unearth the essence of New Zealandness (tangata whenua are often overlooked in these discussions).[30] Qualities such as egalitarianism, pragmatism, a preference for the status quo and a deep faith in the state have been identified.[31] However, this paper heeds the extrajudicial doubts expressed by the former Chief Justice, Sian Elias about this sort of inquiry – it is merely a "truism that law reflects the society it serves and speaks with the same accent"[32] – and therefore, avoids making generalisations about the nature of New Zealand's diverse society.

28 For a similar use of the term, see Sian Elias "Interweavers: Contribution of the Judiciary to New Zealand Law" in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission: Papers from the Twentieth Anniversary Seminar* (LexisNexis, New Zealand, 2007) 55 at 56–57.

29 Taggart, above n 19, at 85–86.

30 Elias, above n 28, at 63.

31 Taggart, above n 19, at 85; John L Ryan "The New Zealandness of New Zealand Law" (1972) 1 Anglo-Am L Rev 204 at 215; and Duncan Webb "Judicial Conduct in a Very Small Place: Some Contextual Questions" (2003) 6 Legal Ethics 106 at 108–109.

32 Elias, above n 28, at 63–64. See also Ryan, above n 31, at 205.

### *B The Courts' Philosophy before, and during, World War II*

As the courts' philosophy in Period I (1945–1957) will undoubtedly have been influenced by the preceding period's legal and political developments (both in New Zealand and England), this paper briefly canvasses the courts' philosophy before, and during, the War.

In the first half of the 20th century, the courts were forced to grapple with the legal impact of "two World Wars … a long period of great economic depression and … the social upheaval which issued in the Welfare State".[33] As a result of this turbulence, the courts were faced with a crowd of broadly phrased regulations, created in response to these trying circumstances.[34]

Michael Myers, New Zealand's first home-grown Chief Justice (from 1929 to 1946), played a significant role in the courts' response to the executive's regulatory governance in this period. During Myers CJ's tenure – in which Myers' hospitality often mediated tensions on the bench[35] – the courts' administrative law doctrine was characterised by a purposive interpretative approach and a willingness to examine the substance of administrative decisions.[36] The courts were not bystanders to executive governance; rather, they sought to give "'to every man his due'".[37] In *Carroll v Attorney-General*, for example, Myers CJ confessed, while holding that cl 55 of the Dairy-Produce General Regulations 1933 was ultra vires (beyond the power), that he was "not sorry at being forced to the conclusion" at which he arrived.[38]

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33 David Smith "Bench and Bar 1928–1950" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 90 at 137.

34 At 137.

35 At 97.

36 Cooke, above n 9, at 86.

37 Smith, above n 33, at 137. See also Cooke, above n 9, at 88.

38 *Carroll v Attorney-General* [1933] NZLR 1461 (CA) at 1474. See also JL Robson and JW Bain "Legal Trends Within New Zealand" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens & Sons, London, 1954) 339 at 343. Nonetheless, in *Carroll*, Myers CJ also noted that "[w]here the Governor-General is given power to make such regulations as [s/]he

It is unsurprising to see that Robin Cooke believed that the New Zealand courts "could lay claim to substantial achievements in administrative law" during Myers' reign.[39] It is equally odd, however, that Myers extrajudicially expressed scepticism about "this so-called Administrative Law" during an address to the New Zealand Institute of Public Administration in 1940.[40]

Notwithstanding the courts' somewhat liberal philosophy leading up to the War, during World War II, the courts were forced to adopt a more deferential attitude towards controlling administrative action.[41] It could be taken "for granted that any regulation … [was] *intra vires*, because it … [was] certain to be validated by an [A]ct of Parliament".[42] In *Thomson v Auckland Metropolitan Milk Council*, for example, the "very popular"[43] Blair J remarked that:[44]

> Looking at the statute [the Emergency Regulations Act 1939] as a whole it is more than doubtful whether the regulations [the Price Stabilization Emergency Regulations

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thinks necessary and any particular regulation that [s/]he makes is within the ambit of the Act, this Court would have no power to interfere, or even inquire into the reasonableness of the regulation": at 1472.

39 Cooke, above n 9, at 86. These comments were repeated in Cooke, above n 19, at 132. Michael Myers was the first New Zealand-born judge to sit on the Judicial Committee of the Privy Council: Peter Spiller "The Courts and the Judiciary" in Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) 187 at 211.

40 Keith, above n 4, at 4–5.

41 See for example McGechan "Trends in Administrative Law in New Zealand in 1942", above n 9; McGechan "Trends in Administrative Law in New Zealand in 1943", above n 9; and McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951", above n 9, at 57–58. For a similar trend in England, see Cooke, above n 9, at 94 and 99.

42 McGechan "Trends in Administrative Law in New Zealand in 1942", above n 9, at 45.

43 Hubert Ostler "Bench and Bar 1903–1928" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 57 at 93–94.

44 *Thomson v Auckland Metropolitan Milk Council* [1942] NZLR 42 (SC) at 48.

> 1939] are intra vires, but that does not now much matter because these regulations have been validated by statute.

The pertinent question for this paper's enquiry is whether the judicial "habits of thought engendered … [by the War] survived in the post-war years".[45]

## *III The Courts' Pre-Robin Cooke Philosophy*

Having both outlined this paper's overall direction and summarised the courts' administrative philosophy before, and during, World War II, I can now begin to analyse the courts' pre-Cooke philosophy, beginning in Period I (post-War through to 1957).

### ***A Period I (1945–1957)***

Before engaging in the courts' post-War doctrine, it is useful to set the scene, given that there was often a clear link between societal and legal change in the pre-Cooke era.[46]

#### *1 Background*

Ten years after the War, the economy was "booming", but socially, New Zealand was in a state of flux.[47] The continuous rise of the welfare state had led to increasing governmental influence in the lives of New Zealanders.[48] The 1954 *Report of the Special Committee on Moral Delinquency in Children and Adolescents* (the *Mazengarb Report*),[49] commissioned

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45 Cooke, above n 9, at 99–100.

46 Joseph, above n 7, at 42.

47 Redmer Yska *All Shook Up: The Flash Bodgie and the Rise of the New Zealand Teenager in the Fifties* (Penguin Books, Auckland, 1993) at 10.

48 Richardson, above n 13, at 46; and RS Milne "The Inevitability of Administrative Discretion" in *Bureaucracy in New Zealand* (Oxford University Press, Wellington 1957) 7 at 10 and 14.

49 OC Mazengarb and others *Report of the Special Committee on Moral Delinquency in Children and*

by the First National Government and chaired by OC Mazengarb, highlights the pervasive nature of governmental power – even in the social sphere – at the time: the *Mazengarb Report* was sent to every home in New Zealand and controversially,[50] it advocated for a return to more traditional social values.[51]

This growth in governmental activities and power necessitated more robust judicial controls and thus, led to the acknowledgment of administrative law as a "distinct subject".[52] This recognition was not universally popular; in the same year the *Mazengarb Report* was distributed across New Zealand, the first published book on public law in New Zealand – *New Zealand: The Development of its Law and Constitution* – stated that administrative law was "the ugly duckling in the legal family".[53]

It is against this backdrop of social, cultural and economic development, invasive governmental power and suspicion about administrative law, that this paper examines the courts' philosophy following the War.

### 2 General philosophy

Before analysing Period I's doctrine, I will briefly summarise the courts' general approach to controlling administrative action in the post-War period. This summary

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*Adolescents* (Government Printer, H–47, 1954).

50 There were "many experienced people" who believed that Mazengarb's "emotions may have prevented him, and through him his committee, from reaching sufficiently balanced conclusions": Smith, above n 33, at 135.

51 Ministry for Culture and Heritage "Mazengarb report released" New Zealand History <https://nzhistory.govt.nz>.

52 RB Cooke "Jurisdiction: An Essay in Constitutional, Administrative and Procedural Law" (PhD, University of Cambridge, 1954) at 1. See also Keith, above n 4, at 5–6; Richardson, above n 13, at 47; and CC Aikman "Some Developments in Administrative Law (1959)" (1960) 22(2) NZJPA 53 at 53.

53 Robson and Scott, above n 19, at 90.

is largely based on information gathered during this paper's literature review, as are the equivalent sections in Periods II and III.

In essence, the courts' post-War doctrine was characterised by conservatism.[54] A wartime jurisprudence hangover led the courts to abdicate "any claim to be an agency of law reform";[55] the courts were often unwilling "to play a constructive part in the evolution of administrative law".[56] There was an inclination to look back in time to resolve cases, rather than forward "into the contemporary community".[57] And, values such as certainty and stability were prioritised.[58]

This conservatism was in part caused by the courts' adherence to a formalist philosophy, under which restrictive classifications and categories guarded access judicial review's grounds of review and remedies.[59] While New Zealand's adoption of formalism is attributable to its English heritage, it will be seen that "on arrival … formalism fell on fertile ground"; the judiciary was content to leave legal innovation to the legislature.[60]

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54 See Cameron, above n 1, at 72; Knight, above n 7, at 42; ; Cooke, above n 9, at 102; Fisher, above n 14, at 27; RB Cooke "The Supreme Tribunal of the British Commonwealth" [1956] NZLJ 233 at 235; and Frederick B Davis "The Finality of Executive Acts in English and New Zealand Law: A Consideration of the Law, Theory, and Procedure of Challenging the Acts of Public and Semi-Public Authorities" (LLM Thesis, Victoria University of Wellington, 1955) at 194–195. Although, in 1960, Robin Cooke wrote that "[a]djectives such as conservative … would be inappropriate, for there may be a departure from older attitudes": above n 19, at 133.

55 Cameron, above n 1, at 72.

56 Cooke, above n 9, at 105.

57 Fisher, above n 14, at 27.

58 At 27–28.

59 Dyzenhaus, above n 14, at 450. See for example Knight, above n 7, at 42; and Fisher, above n 14, at 27–28.

60 Fisher, above n 14, at 28.

### (a) Indigeneity

The passing of the Statute of Westminster Adoption Act 1947 catalysed a decisive break from the prior influence of English legislation on legislative drafting in New Zealand.[61] There was no parallel development regarding English case law. Indeed, at the outset of *New Zealand: The Development of its Law and Constitution*, it was said that:

> It is inevitable that the great bulk of the book should be a discussion of legislation, for it is there that New Zealand has made its contribution rather than in the field of *judicial creativeness*.

The courts were "faithful followers" in the post-War period.[62] Judges' "settled policy" was to follow their distinguished counterparts in the Isles,[63] meaning that case law generally exhibited "unquestioning compliance" with English precedent.[64] At most, if a judge disliked an in-point English case, that judge would express "reluctance" in adopting the legal position mandated by that precedent.[65]

These scholarly assertions suggested that searching for any signs of indigeneity in the courts' post-War jurisprudence was likely to be futile. However, curiously, in an article published in 1957, Robin Cooke remarked that the "New Zealand Courts … [had] been at their best when thinking *creatively for themselves*".[66] This comment

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61 Cameron, above n 1, at 74.

62 Cameron, above n 1, at 74.

63 Robson and Bain, above n 38, at 339. See also Cameron, above n 1, at 74; and Cameron, above n 2, at 209–210.

64 Cooke, above n 54, at 235. See also McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951", above n 9, at 58; Cooke, above n 19, at 128; and Jim Evans "Precedent in New Zealand's Permanent Court of Appeal" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009) 1 at 5.

65 Robson and Bain, above n 38, at 352. See also Cameron, above n 1, at 73.

66 Cooke, above n 19, at 128 (emphasis added). See also Robson and Bain, above n 38, at 342–343.

indicated that there were in fact traces of indigeneity in the court's post-War doctrine. This paper uncovered some of those strains in the first theme explored.

### *3 Natural justice*

Natural justice, or the *audi alteram partem* rule (the right to a fair hearing), was one tool that the courts used to check administrative action in Period I. However, due to the ubiquitous formalism in the area, the courts could only employ this tool if the decision-maker was (a) required to act in a judicial or quasi-judicial manner, as opposed to a legislative or administrative fashion; and (b) had the authority to affect rights.[67]

67 See GDS Taylor and DJ Mullan "Recent Developments in Administrative Law" (1969) 32(1) NZJPA 60 at 69; Frederick Davis "Must a Licensing Authority Act Judicially" [1956] NZLJ 360 at 360; CC Aikman and RS Clark "Some Developments in Administrative Law (1965)" (1966) 28(2) NZJPA 96 at 98–99; JF Northey "Certiorari Made More Certain" [1967] NZLJ 324 at 324; DL Mathieson "Executive Decisions and Audi Alteram Partem" [1974] NZLJ 277 at 278; RB Cooke "Administrative Law – Natural Justice – Right to a Hearing" (1954) 12 CLJ 14 at 14; PE Kilbride "Natural Justice: Bias" (1964) 1 NZULR 314 at 316; Bridget Gillian Nichols "The Emergence of Fairness" (LLM Thesis, Victoria University of Wellington, 1974) at 75; and DJ Hewitt *Natural Justice* (Butterworths, Wellington, 1972) at 284. The imposition of these conditions was due to a misinterpretation of Atkin LJ's (as he then was) judgment in *R v Electricity Commissioners* [1924] 1 KB 171 (CA); Atkin LJ was addressing the "question [of] whether a remedy should be available" not the "circumstances in which natural justice should be complied with". Moreover, applying the Atkin dictum in the area of natural justice was "circular, for it … [said] that … if a body has a duty to act judicially then it has the duty to act judicially (or comply with natural justice)": KJ Keith "*Ridge v Baldwin* – Twenty Years On" (1983) 13 VUWLR 239 at 241–242.

*Sadler v Palmerston North City Corp*,[68] provides one example of formalism's restrict impact.[69] *Sadler* concerned a failed application for an omnibus-driver's licence.[70] The Palmerston North City Council based its decision to decline the plaintiff's application on a Police report which determined that the plaintiff was not a "suitable person to hold an omnibus-driver's licence".[71] A further inquiry, commenced by the Council's Transit Committee, determined that the original decision should stand, in part due to additional negative evidence acquired from the plaintiff's former employer.[72] Importantly, the Committee was under the mistaken impression that the former employer was the plaintiff's current employer.[73]

The plaintiff then applied to the Supreme Court for a writ of mandamus directing the Council to hear his case (and to allow him to respond to the negative evidence).[74] Hutchison J – who was later appointed as the chair of the War Pensions Appeal Board[75] – held that the Council, when evaluating the plaintiff's suitability, was not required to act in a judicial or quasi-judicial manner.[76] The result was that Council's decisions were insulated

68 *Sadler v Palmerston North City Corp* [1951] NZLR 591 (SC).

69 Compare *Connolly v Palmerston North City Corp* [1953] NZLR 115 (SC) at 121–122, where Fair J held that a legislative requirement that a Municipal Council offer an objector a hearing was a quasi-judicial responsibility; and *FE Jackson & Co Ltd v Price Tribunal (No 2)* [1950] NZLR 433 (SC) at 448, where Hutchison J held that the Price Tribunal's act of issuing an order was "judicial in procedure".

70 *Sadler v Palmerston North City* Corp, above n 68, at 592.

71 At 592 per Hutchison J.

72 At 593. See also McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951", above n 9, at 67.

73 *Sadler v Palmerston North City Corp*, above n 68, at 593.

74 At 593.

75 ES Bowie "Canterbury" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 238 at 271.

76 *Sadler v Palmerston North City Corp*, above n 68, at 595.

from review despite the Transit Committee's reliance on "unfavourable",[77] potentially prejudicial evidence.[78]

Notwithstanding formalism's restrictive influence, the Court of Appeal[79] managed to make two liberal and creative contributions – within the accepted formalist framework – to the common law's natural justice jurisprudence in Period I.[80]

(a) *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*

Beginning with *Okitu*, which concerned two dairy companies – the Kia-Ora company and the plaintiff company – who in 1937 had been granted the exclusive right to operate within a defined area in Gisborne.[81] In 1950, the Kia-Ora company wrote to the New Zealand Dairy Board, claiming that the plaintiff had begun "canvassing cream in the area to an extent which interfered with the butter making of the Kia-Ora company".[82] In effect, the

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77 McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951", above n 9, at 67.

78 *Sadler v Palmerston North City Corp*, above n 68, at 595.

79 Until the first sitting of the permanent Court of Appeal in 1958, the Court of Appeal "consisted of judges of the Supreme Court on a rotating basis": Courts of New Zealand "History and role" <www.courtsofnz.govt.nz>.

80 Cooke, above n 9, at 110; Cooke, above n 67, at 15; Hewitt, above n 67, at 276; CC Aikman "Subdelegation of the Legislative Power" (1960) 3 VUWLR 69 at 69; CC Aikman "Administrative Law – II" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens & Sons, London, 1967) 154 at 182; CC Aikman and KJ Keith "Some Developments in Administrative Law (1961–3) Part 1" (1963) 26(1) NZJPA 67 at 82; KJ Scott *The New Zealand Constitution* (Oxford University Press, London, 1962) at 180–181; and GDS Taylor "Natural Justice – the Modern Synthesis" (1975) Mon LR 258 at 261–262.

81 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd* [1953] NZLR 366 (SC and CA) at 370. See also SA de Smith *Judicial Review of Administrative Action* (Stevens & Sons, London, 1959) at 134.

82 McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951", above n 9, at 66. McGechan was discussing Hay J's decision in the High Court (also reported as [1953] NZLR 366).

Kia-Ora company was seeking an order debarring the plaintiff from butter making operations in Gisborne.[83] The Board then held a conference with the companies "to settle their differences",[84] at which the existence of the Kia-Ora company's letter was not disclosed.[85] Following the conference, the Board issued a zoning order which excluded the plaintiff from butter making activities in the area.[86] The plaintiff commenced proceedings, seeking a writ of certiorari to quash the zoning order.[87]

In the Supreme Court, the central issue was whether in issuing the zoning order, the Board was required to act in a quasi-judicial manner.[88] It was clear that the Board had breached the principles of natural justice – the order was made "without a proper hearing" and "without affording the plaintiff company an adequate opportunity of being heard".[89] The Board's defence was that because the "statute was silent … there was no obligation to act judicially".[90] Hay J – previously the Mayor of Lower Hutt[91] – held that:[92]

> … once a specific issue … [was] raised before … [the Board] by one of two parties affected so as to call for a decision on its part, the quasi-judicial duty … exist[ed] up to the point that the parties … [were] fully heard.

In the Court of Appeal, a 3-2 majority upheld Judge Hay's decision, holding that the Board had breached its duty to hear Okitu's case.[93] While today, the result in *Okitu* appears

83 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 372.

84 At 373 per Hay J.

85 At 373.

86 At 370.

87 At 369

88 At 381.

89 At 380 per Hay J.

90 McGechan "Survey of New Zealand Decisions in Administrative Law 1949–1951", above n 9, at 66.

91 AM Jamieson "The Coast" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 384 at 405.

92 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 384.

93 At 420 per Cooke J.

unremarkable, the restrictive precedent that the majority manoeuvred around led Robin Cooke to suggest that an "authentic voice of the common law" was discernible within Finlay J's judgment.[94]

The principal obstacle that the majority overcame was the infamous Privy Council decision *Nakkuda Ali v Jayaratne*.[95] *Nakkuda* concerned the Ceylon (now Sri Lanka) Controller of Textiles' decision to cancel the plaintiff's textile licence.[96] On the facts, the Board held that requirements of natural justice were not engaged because:[97] (a) the Controller's decision did not affect rights; rather, it "withdr[e]w a privilege";[98] and (b), licensing, according to the Board, was an administrative act.[99] There was nothing in the Controller's jurisdiction which suggested that he had to "regulate his action by analogy to judicial rules".[100] This latter finding was contrary to the previously orthodox view that licensing involved adjudication and therefore, was a quasi-judicial function.[101]

The majority in *Okitu* were forced to confront *Nakkuda* because of the similarities between the two cases; the Dairy Board's zoning order was "in effect … the revocation of a licence for the [plaintiff] … to collect cream".[102] Under a *Nakkuda* approach, the Board's zoning order withdrew a privilege and involved licensing, thus not impacting rights or triggering

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94 Cooke, above n 19, at 133.

95 *Nakkuda Ali v Jayaratne* [1951] AC 66 (PC). *Nakkuda* was labelled by Taylor, above n 80, at 261, as the "apex of 'revisionism'". DE Paterson went further, suggesting that *Nakkuda* was made "per incuriam": "Lord Reid and the Writ of Certiorari" [1966] NZLJ 107 at 113–114. See also RO McGechan "Survey of Administrative Law 1952–3" (1953) 16(1) NZJPA 43 at 49.

96 *Nakkuda Ali v Jayaratne*, above n 95, at 79–81.

97 At 77. See also Davis, above n 67, at 361–362; Aikman "Administrative Law – II", above n 80, at 182; and Smith, above n 81, at 131.

98 *Nakkuda Ali v Jayaratne*, above n 95, at 78 per Lord Radcliffe (delivering the judgment of the Board).

99 At 72. See also Davis, above n 67, at 361–362; Aikman "Administrative Law – II", above n 80, at 182; and Smith, above n 81, at 131.

100 At 78–79 per Lord Radcliffe.

101 Davis, above n 67, at 361.

102 At 363–364.

a duty to act judicially or quasi-judicially. Moreover, as in *Nakkuda*, there was nothing in the relevant regulations that suggested that the Dairy Board was required to act in a judicial or quasi-judicial manner.[103] It is significant, therefore, that the majority managed to evade *Nakkuda's* seemingly wide-reaching grasp.

Despite Robin Cooke's praise of Finlay J's judgment, Philip Cooke J's judgment (Robin Cooke's father) was seen as the most "salient".[104] On the question of whether the zoning order affected the plaintiff's rights, Philip Cooke J held there was a "cardinal distinction" between *Nakkuda* and *Okitu*:[105] the plaintiff in *Nakkuda* only had a "governmental licence to carry on certain trade",[106] whereas the plaintiff in *Okitu* "had a common-law right ... to trade".[107] The zoning order restricted that right and therefore, involved "the determination of a question affecting the [plaintiff's] rights".[108]

Philip Cooke J's inventive distinction, while prima facie logical, was somewhat manufactured given that the Board in *Nakkuda* did not address the concept of trading rights. Moreover, the plaintiff's common-law right to trade in *Okitu* was subsumed in 1937 when the Board made its initial zoning order, effectively granting the plaintiff a governmental licence to trade. Thus, Philip Cooke J's distinction in actuality "amounted to a virtual rejection" of *Nakkuda*.[109]

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103 At 363–364.

104 McGechan, above n 95, at 49.

105 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 416.

106 McGechan, above n 95, at 50.

107 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 416. See also CC Aikman "Some Developments in Administrative Law" (1957) 19(2) NZJPA 54 at 66.

108 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 417 per Philip Cooke J.

109 Aikman and Clark, above n 67, at 99. See also Paterson, above n 95, at 107; and SA de Smith *Judicial Review of Administrative Action* (2nd ed, Stevens & Sons, London, 1968) at 157.

On the judicial or quasi-judicial criterion, Philip Cooke J inferred from the circumstances in which the Board could exercise its jurisdiction that a quasi-judicial duty existed.[110] There was "something in the nature of a *lis* between the two companies", which was a circumstance or condition that the Board had to consider before reaching a decision.[111] This approach – looking beyond the regulatory text to the circumstances in which that text applied – was generously described by one article as "very flexible".[112]

While Philip Cooke J's attempts to differentiate *Nakkuda* are a shade "unconvincing",[113] the key takeaway is that the majority were willing to act creatively to avoid an illogical precedent that mandated an unjust result.[114] The minority, on the other hand, felt bound by the "indistinguishable" *Nakkuda*.[115] Chief Justice O'Leary, for example, held that "the judgment in *Nakkuda* … [was] sufficient and conclusive authority".[116] The contrast between Philip Cooke J and O'Leary CJ's judgments was characteristic of their judicial personalities; O'Leary, once Victoria University's "brightest star",[117] was a traditionalist, whose "life centred on his desire to reach the top" (which he did), whereas Philip Cooke's judicial imagination made him "the glamour boy of the post World War I legal world in Wellington".[118]

110 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 421–423.

111 At 421–422 per Philip Cooke J (emphasis added).

112 Aikman and Clark, above n 67, at 99.

113 Davis, above 67, at 363.

114 Taylor, above n 80, at 262.

115 Davis, above n 67, at 364.

116 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 399–400.

117 Richard Wild "Seven New Zealand Presidents" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 174 at 174–175.

118 Smith, above n 33, at 130.

(b) *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal*

*Victuallers* was the second creative Court of Appeal decision in Period I in the field of natural justice.[119] It concerned an order issued by the Price Tribunal that established a maximum price that draught beer could be sold for at off licenced premises.[120] Prior to the order, that price had been unregulated.[121] Following the order, the New Zealand Licensed Victuallers Association of Employers – representing several hotelkeepers – commenced proceedings, seeking a writ of certiorari to quash the order "on the ground that … the plaintiff had a right to be heard but was in fact not heard".[122]

In the Supreme Court, Henry J – the resident Judge in Dunedin[123] – held the Tribunal did not affect "rights or liabilities; rather, it applied "economic polic[ies] to the regulation of business transactions".[124] Moreover, the "substance of the Tribunal's functions … [were] legislative or administrative".[125] The requirements of natural justice were thus not engaged.[126]

In the Court of Appeal, a 3-1 majority held that the Tribunal was required to afford the Association a fair hearing.[127] Justice Philip Cooke – having heard Robin Cooke's

119 *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal* [1957] NZLR 167 (CA).

120 At 168–169. See also Smith, above n 81, at 134.

121 *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal*, above n 119, at 168.

122 At 168 and 183.

123 CP Hutchinson "Auckland" in Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 205 at 222.

124 *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal*, above n 119, at 184.

125 At 184.

126 At 184.

127 At 206–207. See also Smith, above n 81 at 134; and CC Aikman "Some Developments in Administrative Law (1958)" (1959) 21(2) NZJPA 103 at 111.

(successful) argument for the plaintiff – held that the Tribunal's order affected the plaintiff's "right to trade".[128] Furthermore, the Tribunal was under a duty to act judicially:[129]

> I think that the language of the statute and the *circumstances* in which the jurisdiction … [was] exercised show that the Tribunal … [was] under a duty to act judicially before reaching its decision, by which I mean it … [was] under a duty to hear the applicant.

*Victuallers* followed the constructive, albeit fictionalised path laid by *Okitu*;[130] the majority's "readiness" to read a judicial duty into the regulatory context again "sharply" contrasted with *Nakkuda*, and also other recent decisions of the Divisional Court of the Queen's Bench Division in England.[131]

*Okitu* and *Victuallers* ultimately revealed a previously unseen judicial willingness to deviate from the restrictive bonds of English precedent and showed signs of a liberal, more rights friendly approach to natural justice.[132] Indeed, the "flexibility inherent" in Philip Cooke's reasoning allowed judges in later cases to go "even further in their search for a duty to act judicially".[133] As a result, natural justice's decline was "never fully realised in

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128 *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal*, above n 119, at 202.

129 At 205 (emphasis added).

130 Cooke, above n 9, at 110; Cooke, above n 67, at 15; and Aikman "Subdelegation of the Legislative Power", above n 80, at 69.

131 Smith, above n 81, at 135. See for example *R v Metropolitan Police Commissioner* [1953] 1 WLR 1150 (QB), which Robin Cooke described as introducing "undesirable refinements into the law of natural justice": above 67, at 14.

132 See Aikman and Clark, above n 67, at 99. Indeed, *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, was recognised "beyond" New Zealand: Williams, above n 4, at 180 citing Robin Cooke advocating before the Court of Appeal in *Buller Hospital Board v Attorney-General* [1959] NZLR 1259 (SC and CA).

133 Aikman and Keith, above n 80, at 82. See for example *Low v Earthquake and War Damage Commission* [1959] NZLR 1198 (SC) (discussed from page 31); and *Low v Earthquake and War Damage Commission (No 2)* [1960] NZLR 189 (SC) (noted at n 191).

New Zealand".[134] Nonetheless, it is important to keep in mind that in both *Okitu* and *Victuallers*, the Court of Appeal worked within the prevailing formalist system, rather than challenging formalism's logic.[135]

### *4 Restrictions on judicial control*

Another theme that this paper explores is restrictions on the judicial control of administrative action. During the War, and in the post-War period, the legislature experimented with different approaches to restricting the courts' supervisory jurisdiction, including through privative clauses[136] and vague, open-ended (and thus, easily satisfiable) empowering provisions.[137]

The courts' tool to combat these restrictions was the ultra vires doctrine; the formalist "classifications of jurisdictional and non-jurisdictional error delineated [which] decisions [were] beyond and [which were] within the power".[138] The courts could (and often did) hold that privative clauses were ineffective when an administrative decision was made beyond the power (it was *jurisdictional*).[139] While "[m]uch … hinge[d] on how errors …

134 Kenneth Keith "Administrative Law Reform 1953–1978" (1978) 9 VUWLR 427 at 440.

135 Williams, above n 4, at 179.

136 Robson and Scott, above n 19, at 123; Smith, above n 81, at 229; and CC Aikman "Some Developments in Administrative Law (1957)" (1958) 20(2) NZJPA 43 at 48. See for example *Allison v Piako County* [1957] NZLR 1214 (SC), which concerned a privative provision (s 44(6)) in the Town and County Planning Act 1953.

137 Robson and Scott, above n 19, at 101–102 and 124; and Aikman, above n 52, at 75. See for example *Wilkinson v Associated Chemists Ltd* [1948] NZLR 216 (SC), which concerned ss 32 and 35 of the Shop and Offices Act 1921–1922.

138 Joseph, above n 7, at 57. See also Knight, above n 7, at 19; and Robson and Scott above n 19, at 124.

139 Robson and Scott, above n 19, at 124; and GP Barton "Inferior Tribunals at First Instance: 'No Certiorari' Clauses" (1969) 3 NZULR 340 at 341. See for example *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (SC), which concerned s 96 of the Industrial and Conciliation Act 1908, and which Robin Cooke labelled a "substantial achievement": above n 19, at 133. See also *Black v Black* [1951] NZLR 723 (SC), where Philip

[were] classified",[140] ultimately, privative provisions in Period I "guarded from scrutiny very few of the sorts of errors with which the judiciary would otherwise have been concerned".[141]

The courts' response to privative provisions, while unoriginal (largely following developments in England),[142] illustrated a willingness to challenge the government, albeit within a formalist framework. Thwarting deliberately open-ended empowering provisions proved to be more challenging; the ultra vires doctrine could be outfoxed by powers "so loosely expressed that no one … [could] say whether the regulations … [were] within or without the authority of the statute".[143]

An example of this problem is apparent in *Hewett v Fielder*,[144] which concerned the validity of the Waterfront Strike Emergency Regulations 1951, made pursuant to the Public Safety Conservation Act 1932.[145] Section 2(1) of that Act provided for the issuance of a Proclamation of Emergency "if at any time it appear[ed] to the Governor-General" to be necessary.[146] And, s 3(1) of the Act allowed the Governor-General "to make all such

Cooke J held that a "failure to observe the rules of natural justice amounts to an excess of jurisdiction", thereby reducing the "effectiveness" of privative clauses: Aikman, above n 127, at 119. Moreover, the courts rejected the proposition that a legislative provision stating that regulations were to have the same force as legislation curtailed their supervisory jurisdiction; only regulations made *within* the power had "the same force and effect as if contained in the Act": Robson and Scott, above n 19, at 101. See for example *Campbell v Frerichs* [1949] GLR 275 (SC) at 278, where Hutchison J held that s 3(6) of the Emergency Regulations Act 1939, under which regulations were to be treated "as if enacted in this Act", did not preclude the ultra vires doctrine.

140 Taylor and Mullan, above n 67, at 79.

141 Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2014) at 16.

142 Robson and Scott, above n 19, at 101–102; Smith, above n 81, at 229; and Aikman, above n 136, at 48–49.

143 AC Stephens "The Abuse of Delegated Legislation" [1947] NZLJ 80 at 81.

144 *Hewett v Fielder* [1951] NZLR 755 (SC).

145 At 756–758.

146 At 759–760.

regulations as [s/]he thinks necessary" once a Proclamation of Emergency had been made. Thus, *Hewett* turned on the validity of the Governor-General's Proclamation of Emergency. Delivering the judgment of the Supreme Court, Fair AC J – a "proud" West Coaster[147] – held that:[148]

> The question [of] whether the Proclamation was necessary or reasonable is one that is not open to the appellant [who had been convicted of a breach of the regulations], for, by the use of the words in s 2(1) "[i]f at any time it appears to the Governor-General", an *absolute discretion* is given, which cannot be challenged except on the ground … that the subject-matter of the Proclamation is *outside the ambit of the power* [it was not]. The Governor-General in Council has plenary authority to decide the question whether it is necessary: … *Liversidge v Anderson* [1942] AC 206 … [(HL)] …

Fair AC J's citation of *Liversidge*,[149] an English wartime decision, speaks volumes. *Liversidge* concerned an order issued by the Home Secretary under the Defence (General) Regulations 1939 (made under the Emergency Powers (Defence) Act 1939) to the effect that he had "reasonable cause to believe" (the requirement under reg 18B) that Mr Liversidge, a Royal Air Force Volunteer Reserve pilot, had "hostile associations and that by reason thereof it was necessary to exercise control over him".[150] The House of Lords, by a 4-1 majority, held that whether the Home Secretary had reasonable grounds for his belief was a "matter for executive discretion".[151]

147 Smith, above n 33, at 123.

148 *Hewett v Fielder*, above n 144, at 760 (emphasis added).

149 *Liversidge v Anderson* [1942] AC 206 (HL).

150 At 215 per Viscount Maugham.

151 At 222 per Viscount Maugham. Compare *Nakkuda Ali v Jayaratne*, above n 95, at 77 per Lord Radcliffe, where the Board held that the phrase "reasonable grounds to believe" imposed "a condition that there must in fact exist such reasonable grounds".

*Liversidge* has been described as "an example of extreme judicial deference to executive decision-making, best explained by the context of wartime".[152] The Supreme Court's reliance on *Liversidge* in the *post-War* period illustrates that the New Zealand courts' philosophy in Period I was still clouded by deferential attitudes developed during the War.[153]

### 5 *An Administrative Court?*

Period I also saw the inception of what became a recurrent debate – in part fuelled by frustration with the courts' inherent conservatism – in administrative law in New Zealand. The idea of establishing an Administrative Court, with the ability to examine the merits of administrative decisions, was a topic that provoked countless academic articles[154] and numerous governmental reports[155] in the 1950s and 1960s.

Two scholarly contributions from Period I are noteworthy. First, in 1954, JL Robson and KJ Scott questioned whether the ordinary courts were suited to supervising decisions reached by administrative tribunals.[156] However, they concluded that in the short-term an Administrative Court was unnecessary.[157] Next, in 1957, Robin Cooke noted that the

152 AW Bradley and KD Ewing *Constitutional and Administrative Law* (15th ed, Longman, London, 2010) at 674. See also Aikman, above n 52, at 72.

153 See Joseph, above n 7, at 52; and Cooke, above n 9, at 99–100.

154 See for example Cooke, above n 9, at 106; and Robson and Scott, above n 19, at 128.

155 See for example GS Orr *Report on Administrative Justice in New Zealand* (Government Printer, 1964); and Public and Administrative Law Reform Committee *Appeals from Administrative Tribunals: First Report of the Public and Administrative Law Reform Committee* (1968).

156 Robson and Scott, above n 19, at 128. The post-War years were also characterised by a "major debate" about the choice between courts and tribunals: Keith, above n 134, at 464. See also Keith, above n 17, at 123. In 1965, the Solicitor-General HRC Wild fell on the side of the courts: "The Place of the Administrative Tribunal in 1965" in RA Woodman (ed) *Record of the Third Commonwealth and Empire Conference* (Sweet & Maxwell, New Zealand, 1966) 76. For an alternative view, see Aikman "Administrative Law – II", above n 80, at 155.

157 Robson and Scott, above n 19, at 128.

"balance of informed and moderate opinion" was against the establishment of an Administrative Court.[158] Cooke shared this perspective, in part because he believed that the Supreme Court's "mana" was still strong.[159] Thus, dissatisfaction with the courts' conservative approach to controlling administrative action had not yet ignited.

#### *6 Summary*

The administrative law doctrine of the post-War period was largely marked by obedience, formalism and conservatism. There were two significant original and liberal deviations from this trend in the field of natural justice, although the majorities in *Okitu* and *Victuallers* still operated within formalist confines. The judiciary energetically combatted privative provisions but was easily thwarted by deliberately open-ended empowering provisions. And, debate over the establishment of an Administrative Court was underway.

### ***B Period II (1958–1968)***

The permanent Court of Appeal's first sitting on 17 February 1958, noted "sandwiched" in the *Evening Post's* "weekend sports results",[160] provides a natural starting point for this story's next chapter. The culmination of the debate over the formation of an Administrative Court in 1968 offers a logical endpoint. Before analysing whether the courts' philosophy evolved in Period II, it is again useful to outline the social and economic context in which the courts were operating.

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158 Cooke, above n 9, at 106.

159 At 108.

160 Ivor Richardson "The Permanent Court of Appeal: Surveying the 50 Years" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009) 297 at 297. See also ILM Richardson "Some Impressions of the Permanent Appellate Judges: 1958–2002 (2016) 47 VUWLR 663 at 664.

### *1 Background*

Despite popular conceptions about the "Swinging Sixties",[161] "[f]or most New Zealanders … the 1960s were less exciting".[162] The economy remained strong until wool prices dramatically collapsed in 1967, triggering a steep rise in inflation and unemployment.[163] Governmental power steadily became more invasive, which heightened concerns around the adequacy of the existing judicial controls on administrative action.[164] 1967 also saw the publication of New Zealand's first comprehensive book on administrative law,[165] though much of the profession remained sceptical about the need for administrative law.[166]

### *2 General philosophy*

While the "winds of change" were blowing in England in Period II,[167] the New Zealand courts continued to primarily adhere to a conservative philosophy; maintaining the status quo seemed to be a judicial priority.[168]

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161 Joseph, above n 7, at 53.

162 Ministry for Culture and Heritage "The 1960s" New Zealand History <https://nzhistory.govt.nz>.

163 Ministry for Culture and Heritage, above n 162.

164 CC Aikman "Administrative Law – I" in JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens & Sons, London, 1967) 110 at 121.

165 DE Paterson *An Introduction to Administrative Law in New Zealand* (Sweet & Maxwell, Wellington, 1967).

166 JF Northey "The Changing Face of Administrative Law" (1969) 3 NZULR 426 at 427.

167 Guy Powles "The Procedural Approach to Administrative Justice" [1965] NZLJ 79 at 81.

168 Spiller, above n 4, at 101; Cooke, above n 19, at 133; Aikman and Clark, above n 67, at 96; and RB Cooke "Administrative Law: The Vanishing Sphinx" [1975] NZLJ 529 at 529. Nonetheless, progress was again made on the edges. The courts, for example, displayed a readiness to "escape from procedural technicalities" and "widen" their review powers: Aikman "Administrative Law – II", above n 80, at 177 and 179. See also Aikman, above n 107, at 54; and JL Robson "Legal Trends Within New Zealand" in *New Zealand: The Development of its Laws and Constitution* (2nd ed, Stevens & Sons, London, 1967) 477 at 480.

Outside the judicial sphere, law reform bodies and politicians began to recognise that citizens were "entitled to better protection against abuse of power" than the courts provided.[169] The Ombudsman was established in 1962, with broad, inquisitorial powers.[170] A Public and Administrative Law Reform Committee (the PAL) was also formed, in 1966, which ultimately led to a resolution in the debate over the establishment of an Administrative Court.[171]

(a) Indigeneity

There was hope that the creation of the permanent Court of Appeal would catalyse the development of an indigenous common law.[172] Indeed, Sian Elias has indicated extrajudicially that this hope was realised: "the contribution of the New Zealand judiciary to a distinctive New Zealand law became more marked" following the Court's formation.[173]

In administrative law, the 1962 Court of Appeal decision *Corbett v Social Security Commission* symbolised a divergence from English precedent.[174] However, *Corbett* was an outlier; the prevailing judicial attitude in Period II was again largely one of

169 JF Northey "A Decade of Change in Administrative Law" (1974) 6 NZULR 25 at 25. See also Robin Cooke "Third Thoughts on Administrative Law" [1979] NZ Recent Law 218 at 224; and JR Hanan *The Law in a Changing Society: A Policy and Programme for Law Reform* (Government Printer, Wellington, 1965) at 3.

170 Parliamentary Commissioner (Ombudsman) Act 1962. For a discussion on the Ombudsman, see Keith, above n 134, at 441; and Cooke, above n 169, at 224.

171 Cooke, above n 169, at 224. The Public and Administrative Law Reform Committee furthered the cause of administrative law in New Zealand "considerably": DJ Mullan "One Plus Five Equals Six" [1971] NZLJ 512 at 512.

172 Cooke, above n 9, at 111; and Ryan, above n 31, at 215.

173 Elias, above n 28, at 62.

174 *Corbett v Social Security Commission* [1962] NZLR 878 (CA). See Cameron, above n 2, at 209; Elias, above n 28, at 62; and Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Thomson Brookers, Wellington, 2002) at 381.

obedience.[175] The second edition of *New Zealand: The Development of its Law and Constitution*, published in 1967, which Robin Cooke believed had a "quasi-official earnestness",[176] reiterated that creativity was still not a trait of the New Zealand courts.[177] Most common law was "imported" from England.[178] The English courts "'spoke'" and the New Zealand courts "'listened'".[179] Indeed, in the year 1960, English case law "accounted for 79 per cent of all cases cited" in New Zealand courts.[180] However, it transpired that much of the English case law relied upon soon became outdated.

### *3 Developments in natural justice*

Returning to the thread of natural justice, there were notable developments in Period II.[181] *Low v Earthquake Damage Commission*,[182] for example, concerned a failed statutory insurance claim regarding damage sustained by a property during a flood.[183] The Earthquake Commission claimed that a landslide had ultimately caused the damage and therefore, that the Lows were not covered by the statutory insurance scheme.[184]

In the Supreme Court, TA Gresson J – the son of the first Court of Appeal President, Gresson P, but who "needed no nepotism to further his qualifications for judicial office".[185]

175 Spiller, above n 4, at 101; Joseph, above n 7, at 49; Taggart, above n 19, at 82; Richardson, above n 160, at 309; and Robson, above n 168, at 477–481.

176 Lord Cooke "Foreword" in Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) ix at ix.

177 Robson, above n 168, at 477–481.

178 Taggart, above n 19, at 82. See also Spiller, above n 4, at 101.

179 Joseph, above n 7, at 49.

180 Richardson, above n 160, at 309.

181 Aikman and Clark, above n 67, at 99.

182 *Low v Earthquake Damage Commission*, above n 133.

183 At 1200–1203.

184 At 1201.

185 Bowie, above n 75, at 273.

– accepted that there had been a failure to observe the principles of natural justice.[186] The Lows "were not present or represented" when their claim was considered and were also not aware of the existence of expert reports obtained by the Commission.[187]

On the judicial or quasi-judicial question, TA Gresson J determined, applying Philip Cooke J's formula in *Okitu*, that the Commission "was performing a judicial or quasi-judicial function".[188] While there was no *lis* between two independent parties, and the relevant regulations were silent as to the existence of a judicial or quasi-judicial obligation, the Commission acted in a court-like manner when determining matters of fact and law before arriving at a decision.[189] On the rights criterion, the Judge held that the Commission's decision affected the Lows' right to insurance coverage.[190] Therefore, the obligations of natural justice – which had been breached – bound the Commission.[191]

*Low* is another example of the New Zealand courts' readiness to work creatively within formalism's constraints to reach fair outcomes.[192] Indeed, one commentator initially hypothesised that *Low* could "easily attract as much attention as … *Okitu*".[193]

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186 *Low v Earthquake Damage Commission*, above n 133, at 1210. See also Aikman, above n 52, at 65.

187 *Low v Earthquake Damage Commission*, above n 133, at 1203 per TA Gresson J.

188 At 1209.

189 At 1209. See also Aikman, above n 52, at 65.

190 *Low v Earthquake Damage Commission*, above n 133, at 1209.

191 At 1209. See also Aikman, above n 52, at 65. For the certiorari order quashing the Commission's decision, see *Low v Earthquake Damage Commission (No 2)*, above n 133, at 190–191 per TA Gresson J.

192 This tendency was not uniform; see for example *Buller Hospital Board v Attorney-General*, above n 132, at 1313 per Cleary J, where a 2-1 majority in the Court of Appeal (with North J dissenting) held that the Minister of Health was not under a duty to act judicially when appointing a Commission; *Modern Theatres (Provincial) Ltd v Perryman* [1960] NZLR 191 (SC) at 201–202, where McCarthy J held that a licensing officer was not under a duty to act judicially when issuing an exhibitor's licence; and *Watchtower Bible and Tract Soc v Mount Roskill Borough* [1959] NZLR 1236 (SC) at 1245, where TA Gresson J held that the Mount Roskill Borough was not under a duty to act judicially when regulating Jehovah Witnesses' admission to the Mount Roskill Memorial Hall.

193 JF Northey "An Administrative Dilemma" [1960] NZLJ 230 at 230.

*Waitemata County v Local Government Commission*,[194] was another noteworthy case, which concerned the unprecedented issue of whether the Local Government Commission had to give notice to individuals who were "numerous and difficult to ascertain".[195] Richmond J (who was "meticulous and intellectual (but not academic)")[196] approached this issue by holding that the Commission acted reasonably by providing specific notice to the local authorities impacted and giving the general public notice through a newspaper advertisement.[197] This approach was labelled by one article as "sensible and practical".[198] However, local developments such as *Low* and *Waitemata*[199] are largely insignificant when compared to the seismic developments that took place in England in Period II.

*Ridge v Baldwin*,[200] the first of the Quartet, broke through natural justice's formalist binds.[201] Lord Reid's judgment, in particular, heralded a return to more principled

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194 *Waitemata County v Local Government Commission* [1964] NZLR 689 (SC).

195 At 699.

196 Lord Cooke "Foreword" in Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Thomson Brookers, Wellington, 2002) v at vi.

197 *Waitemata County v Local Government Commission*, above n 194, at 699.

198 Aikman and Clark, above n 67, at 101.

199 See also *Thomson v Turbott* [1962] NZLR 298 (SC), where Leicester J avoided "the restriction which the court may have imposed upon itself by adopting the more limited concept of 'right'": HR Gray "The Judicial Function of Administrative Tribunals" (1963) 1 NZULR 145 at 146.

200 *Ridge v Baldwin*, above n 12.

201 See for example Taylor and Mullan, above n 67, at 73; Taylor, above n 80, at 258; Powles, above n 167, at 82; RG McElroy "The Protection of the Individual Against Authority by Means of Administrative Jurisdiction" [1978] NZLJ 1 at 6; KJ Keith "Sources of Law, Especially in Statutory Interpretation with Suggestions about Distinctiveness" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 77 at 84; GDS Taylor "The Unsystematic Approach to Natural Justice" (1973) 5 NZULR 373 at 375; and AG Keesing "Administrative Law – Another Retreat?" [1976] NZLJ 467 at 471–472. It is noteworthy that four years before *Ridge* was decided, Stanley de Smith published the first edition of his renowned text, *Judicial Review of Administrative Action*, arguing that formalism was "riddled with ambiguities": above n 81, at 29. For an alternative perspective on *Ridge*, see Mathieson, above n 67, at 279.

reasoning.[202] The issue in *Ridge* was whether the Brighton Watch Committee had breached the principles of natural justice by dismissing its Chief Constable without notice and without hearing the Constable's case.[203] The Constable had earlier been arrested, and acquitted, on charges of conspiring to obstruct the course of justice and corruption.[204]

The Court of Appeal held that in dismissing the Constable, the Committee was "acting in an administrative or executive capacity".[205] The principles of natural justice did "not come into … [the] case".[206] On appeal, a 4-1 majority in the House of Lords held that the Committee's decision was a nullity.[207] Lord Reid found that the judicial or quasi-judicial criterion was "impossible to reconcile with … earlier authorities" from the 17th, 18th and 19th centuries.[208] *Nakkuda* could not "be regarded as authoritative".[209] Thus, in effect, Lord Reid's judgment abolished the distinction between administrative and judicial functions in natural justice, decidedly widening the circumstances in which the principles of natural justice were engaged.[210]

The logical question, for this paper's enquiry, is whether the New Zealand courts were willing to deviate from their formalist path and "share the attractive vistas opened up to their judicial brethren in the United Kingdom".[211] Essentially, the courts' respect for English precedent – epitomised by McGregor J's declaration in the Court of Appeal in *Smith v Wellington Woollen Manufacturing Co Ltd* that "[t]he principle embodying the

202 Keith, above n 67, at 242.

203 *Ridge v Baldwin*, above n 12, at 42–47.

204 At 64.

205 *Ridge v Baldwin* [1963] 1 QB 539 (QBD and CA) at 599 per Harman LJ.

206 At 599 per Harman LJ.

207 *Ridge v Baldwin*, above n 12, at 136.

208 At 75.

209 At 79 per Lord Reid.

210 Taylor, above n 80, at 258. *Ridge* was followed by *Durayappah v Fernando* [1967] 2 AC 337 (PC) at 349 per Lord Upjohn, where the Privy Council identified three factors to be borne in mind when considering whether natural justice was engaged.

211 Northey, above n 67, at 327.

duty of *obedience* of this Court to the House of Lords is settled"[212] – was pitted against their innate conservatism. While the scholarly response to *Ridge* in New Zealand was sceptical, even dismissive,[213] it was expected that the courts would follow *Ridge*, deferring to the revered opinion of London.[214]

However, New Zealand's wartime jurisprudence hangover proved to be overpowering; the courts continued to operate within a formalist framework in the period immediately following *Ridge*.[215] While *Ridge* was "warmly received"[216] by the "impressive" North P led Court of Appeal[217] in *Jeffs v New Zealand Dairy Production & Marketing Board* in 1965,[218] it took another eight years for *Ridge* to be directly "enthroned" in New Zealand law by an indigenous court.[219] The courts' hesitance to follow *Ridge* and abandon formalism – which will be explored more deeply in Period III – is illustrative of the degree to which conservatism was entrenched in the courts' philosophy.

212 *Smith v Wellington Woollen Manufacturing Co Ltd* [1956] NZLR 491 (CA) at 499 (emphasis added).

213 See for example Northey, above n 67, at 326; Paterson, above n 95, at 107; Paterson, above n 165, at 110–112; JF Northey "The Electricity Commissioners and the Chief Constable" [1963] NZLJ 448 at 450–451; and AC Holden "*Ridge v Baldwin*: A Century of Progress" (1964) 1 NZULR 317 at 318.

214 Aikman and Keith, above n 80, at 83.

215 Knight, above n 7, at 4–5; Keith, above n 67, at 244–254; and Aikman "Administrative Law – II", above n 80, at 182. See for example *Denton v Auckland City Council* [1969] NZLR 256 (SC) (discussed at n 314); *Forbes v Johnston* [1971] NZLR 1117 (SC) (discussed at n 314); and *Hamilton City v Electricity Distribution Commission* [1972] NZLR 605 (SC) (discussed on page 49).

216 Knight, above n 7, at 4.

217 Richardson, above n 160, at 666.

218 *Jeffs v New Zealand Dairy Production and Marketing Board* [1966] NZLR 73 (CA). McCarthy J stated that *Ridge* had his "respectful admiration": at 98. The Privy Council overturned the Court of Appeal: *Jeffs v New Zealand Dairy Production Marketing Board* [1967] 1 AC 551 (PC).

219 Keith, above n 67, at 244. See also Knight, above n 7, at 5.

### *4 Developments in the restrictions on judicial control*

In the area of restrictions on judicial control in Period II, the courts continued to actively undermine privative clauses.[220] *Cameron v Auckland Transport Board*,[221] for example, concerned s 93A of the Transport Act 1949, which expressly excluded reviewing the Metropolitan Licensing Authority's decisions.[222] The Authority had renewed the plaintiff's public taxi-cab service licence subject to certain *conditions*.[223] The plaintiff, displeased with one of the conditions imposed, sought a writ of certiorari to quash the Authority's decision.[224] In the Supreme Court, the "sweet-natured" but steely Turner J[225] (who was appointed to the Court of Appeal in 1962, becoming President 10 years later) held that the Court:[226]

> … while prohibited by s 93A from inquiring into the decision of a Licensing Authority on account of any alleged defect in form or procedure, may nevertheless inquire in every case whether the Authority was acting *within its jurisdiction* in entering upon the matter and making its decision.

Nonetheless, the plaintiff's claim failed, with Turner J holding that the Authority "had the jurisdiction necessary to impose" the challenged condition.[227]

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220 Aikman, above n 52, at 70–71; Taylor and Mullan, above n 67, at 79; and Barton, above n 139, at 341. In England, the Franks Committee's (formed in response to the Crichel Down Affair) criticism of privative clauses led to "statutory action": Aikman, above n 52, at 71.

221 *Cameron v Auckland Transport Board* [1959] NZLR 941 (SC).

222 At 945.

223 At 942–943.

224 At 942–943.

225 Lord Cooke, above n 196, at vi.

226 *Cameron v Auckland Transport Board*, above n 221, at 945 (emphasis added).

227 At 950.

As in Period I, the courts were also faced with broad empowering provisions.[228] In the 1959 case, *Reade v Smith*,[229] Turner J adopted a more proactive approach to such a provision than had previously been taken, either in New Zealand or England.[230] *Reade* involved a challenge to reg 11 of the Education (School Age) Regulations 1943, which regulated the transferring of children from one school to another.[231] Section 161(1)(k) of the Education Act 1914 empowered the Governor-General to make regulations "for all purposes which [the Governor-General] *thinks necessary*".[232] Under a *Hewett* or *Liversidge* approach, attempting to use the ultra vires doctrine to regulate s 161(1)(k) would have been futile; whether there were reasonable grounds for the Governor-General belief would be a "matter for executive discretion".[233] Turner J, however, held that:[234]

> … the Court … may always inquire, in any case, whether the Governor-General (or the Minister, as the case may be) could *reasonably* have formed any opinion, on the law or on fact, which is set up as a foundation for any regulation.

228 Aikman, above n 52, at 71–74.

229 *Reade v Smith* [1959] NZLR 996 (SC).

230 Aikman, above n 52, at 73.

231 *Reade v Smith*, above n 229, at 998.

232 Emphasis added.

233 *Liversidge v Anderson*, above n 149, at 222 per Viscount Maugham.

234 *Reade v Smith*, above n 229, at 1001 (emphasis added). See also *Robb v Smith* [1959] NZLR 114 (SC) at 118, where Turner J held that the phrase "reasonable grounds for believing" imposed a condition that "there must exist reasonable grounds for his[/her] belief". Compare *Buller Hospital Board v Attorney-General*, above n 132, where North J "recognised that there were clear limitations to the right of the Court to examine the question of the adequacy of the reasons which caused a minister to exercise a … power": Aikman, above n 52, at 74. Ministers' responsibility to Parliament, as opposed to the courts, was the appropriate accountability mechanism: *Buller Hospital Board v Attorney-General*, above n 132, at 1265; and *Low v Earthquake and War Damage*, above n 133, at 1207, where TA Gresson J held the Court was "'not competent to canvass the considerations which have or may have led … [the Governor-General] to deem such [a] regulation necessary or expedient'".

While *Reade* was labelled as contrary to authority,[235] it was also thought to part of a "trend … towards a less benevolent attitude than … [had] prevailed in the English Courts" to the interpretation of administrative discretion.[236]

It was surprising, therefore, to find that towards the end of Period II, it was suggested in one article that there were "signs" that the courts were transitioning *back* towards a more deferential approach to privative clauses.[237] *Horowhenua County v Nash*,[238] was one indication of this perceived trend. In *Horowhenua*, the "forceful and assertive" Wild CJ[239] remarked that:[240]

> Whatever may be thought of the wisdom and justice as a matter of general legislative policy of privative provisions … it is the duty of the Court to give effect to the intention of the Legislature where, as I think here, it is clearly stated.

As a result, Wild CJ "gave effect" to a private provision "despite the fact that the error made was a jurisdictional one".[241] Ultimately, the muddled authority in this area in Period II demonstrates administrative law's growth in New Zealand was often non-linear.

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235 Aikman, above n 52, at 74 saw *Reade* as "an extension" of *Nakkuda Ali v Jayaratne*, where, as mentioned at n 151, a majority of the Privy Council reached a similar conclusion regarding the phrase "reasonable grounds to believe".

236 Aikman, above n 52, at 75. See also KJ Keith "Administrative Powers and Purposes" (1977) 7 NZULR 264 at 269. *Reade* led to the repeal of s 6 of the Education Amendment Act 1915 (No 2) (another provision which empowered the Governor-General to issue regulations, which Turner J had criticised): Alexander Kingcome Turner "Changing the Law" (1969) 3 NZULR 404 at 406.

237 Taylor and Mullan, above n 67, at 29 (published in 1969 and reflecting on the preceding two years).

238 *Horowhenua County v Nash* [1968] NZLR 525 (SC).

239 Spiller, above n 4, at 92–93.

240 *Horowhenua County v Nash*, above n 238, at 528.

241 Taylor and Mullan, above n 67, at 79. See also Barton, above n 139, at 340–341. One commentator described *Horowhenua County v Nash* as "a departure from well-established principles": Barton, above n 139, at 342. See also Taylor and Mullan, above n 67, at 80.

### *5 The Administrative Division of the Supreme Court*

The debate over the establishment of an Administrative Court continued into Period II. In 1960, Robin Cooke reversed his position, advocating for the establishment of a Supreme Administrative Court with the power to *review* the merits of administrative action (with the Crown's consent).[242] In addition, Cooke suggested establishing statutory *appeal* rights to the proposed Court on a "piecemeal" basis.[243] Members of the bench also weighed in, arguing that the ordinary courts were "ill-equipped to consider *appeals* from administrative tribunals on fact and merit".[244]

Government action followed, beginning with GS Orr's *Report on Administrative Justice in New Zealand* (Orr's Report).[245] Orr recommended establishing an Administrative Court with the capacity to consider the merits of administrative tribunals' decisions, on statutory *appeal*.[246]

The cause was then advanced by the PAL, which was one of four part-time law reform committees established by the then Minister of Justice, the Hon JR Hanan MP[247] in June

242 Cooke, above n 19, at 134. See also Aikman, above n 164, at 127–128; Paterson, above n 165, at 233; Northey, above n 166, at 437; and JF Northey "An Administrative Division of the New Zealand Supreme Court – A Proposal for Law Reform" (1969) 7 Alta L Rev 62 at 64.

243 Cooke, above n 19, at 134.

244 Aikman, above n 52, at 62 (emphasis added), referring to statements made by Gresson J (as he then was) and Finlay J.

245 Orr, above n 155.

246 At [228]. See also Aikman "Administrative Law – II", above n 80, at 175; and GS Orr "An Administrative Court: Its Scope & Purpose" (1966) 28(2) NZJPA 1 at 15.

247 The Hon JR Hanan MP was a "key figure" in law reform in the 1960s and early 1970s in New Zealand: Geoff McLay "Institutional law reform in New Zealand: The importance of independence" (2018) 6 TPLeg 167 at 172.

1966.[248] The committees were an "indigenous" response[249] to the "wider vision of law reform" that emerged in New Zealand in the early 1960s.[250] They sat under a part-time Law Revision Commission,[251] but were ultimately "autonomous" bodies, "appointed" by, and "responsible" to, the Minister of Justice.[252]

The committees were comprised of leading legal practitioners, government lawyers and academics.[253] The PAL's initial membership included JL Robson (the chairperson), CC Aikman, Robin Cooke and JF Northey, amongst others.[254] Northey (who succeeded Robson as chair in 1975) had a "marked" influence on the PAL's proposals,[255] which is noteworthy given that Northey's scholarship was often characterised by a preference for the (formalist) status quo.[256]

248 Public and Administrative Law Reform Committee *Appeals from Administrative Tribunals: Second Report of the Public and Administrative Law Reform Committee* (1969) at [1]. See also BJ Cameron "The Law Reform Committees 1966-86" (1988) 13 NZULR 123 at 123. The PAL "operated in a rather different way from the others": at 134.

249 Grant Hammond "The Part-time Law Reform Committees: An Overview" (1988) 13 NZULR 135 at 135. See also McLay, above n 247, at 174–175.

250 Cameron, above n 248, at 126.

251 McLay, above n 247, at 174.

252 Hammond, above n 249, at 138. See also McLay, above n 247, at 4.

253 McLay, above n 247, at 174; James Farmer "The Work of the Public and Administrative Law Reform Committee" (1988) 13 NZULR 155 at 155; and AB Thomson "Changing the Law: The Law Revision Commission" [1969] NZLJ 477 at 478.

254 Public and Administration Law Reform Committee, above n 248, at [1]. See also CC Aikman and RS Clark "Some Developments in Administrative Law (1966)" (1967) 29(2) NZJPA 48 at 48.

255 Farmer, above n 253, at 155.

256 See for example Northey, above n 67, at 326, where Northey argued that widening the meaning "of the duty to act judicially … to include those who must act fairly … would … do violence to the origins of certiorari"; and JF Northey "The Basis of Judicial Review in Administrative Law" (paper presented at the Auckland Law Faculty Seminar Series 1981, 18 August 1981) at 26, where Northey advocated for a distinction between judicial (which required compliance with natural justice) and administrative functions (which required compliance with a general duty of fairness). See also JF Northey "The Aftermath of the *Furnell* Decision" (1974) 6 NZULR 59 at 63; JF Northey "The

On the day the PAL was established, Mr Hanan set out its "first task": to undertake a "review of the rights of appeal from decisions of administrative tribunals".[257] Around 18 months later, the PAL's First Report, entitled *Appeals from Administrative Tribunals*, was published.[258] In that Report, the PAL concluded that it "would be clearly advantageous to provide rights of appeal to an Administrative Division of the Supreme Court".[259] Later that year, the Judicature Amendment Act 1968 was enacted, establishing an Administrative Division of the Supreme Court.

The Division was "a New Zealand creation".[260] However, the Act did not establish, and the PAL did not recommend the establishment of, a "truly specialist Administrative Court".[261] Instead, the Division – a branch of the Supreme Court, staffed with existing Supreme Court judges versed in the judicial method[262] – was considered a "half-way house" between leaving appeals to the Supreme Court in its ordinary capacity and the formation of an independent Administrative Court (Orr's proposal).[263] Prerogative writ (*review*) applications were left to the ordinary courts (except as directed by the Chief Justice), with the Division tasked with examining administrative action on *appeal*.[264] The

Exclusion of Natural Justice by a Code" [1972] NZLJ 307 at 312; and JF Northey "The Problem of Characterization" (1954) 32 CBR 87 at 93–94.

257 Aikman and Clark, above n 254, at 48.

258 Public and Administrative Law Reform Committee, above n 155.

259 At 36.

260 Robin Cooke "The Public and Administrative Law Reform Committee: The Early Years" (1989) 12 NZULR 150 at 151.

261 JA Farmer "Administrative Division of the Supreme Court – An Experiment in Administrative Suicide" [1969] NZLJ 106 at 107.

262 Judicature Amendment Act 1968, s 2; and Farmer, above n 261, at 107.

263 Taylor and Mullan, above n 67, at 61

264 Judicature Amendment Act 1968, s 26. See for example Northey, above n 166, at 438; Cooke, above n 260, at 153; and JF Northey "The Administrative Division of the New Zealand Supreme Court – A Postscript" (1977) 15 Alta L Rev 186 at 190.

form of an appeal – whether on the law or the merits and facts – was determined by the relevant statutory appeal right.[265]

The expectations placed on the Division were high,[266] particularly as its enactment implied that the ordinary courts' formalist approach to controlling administrative action was inadequate.[267] The question of whether the Division fulfilled these expectations is explored in Period III.

### *6 Crown privilege*

A common barrier to bringing litigation against the Crown in the 20th century was Crown privilege;[268] those bringing proceedings against ministers or public servants could not access government documents through the normal discovery processes.[269] Furthermore, the Crown could withhold the release of those documents if it was in the "public interest" to do so.[270]

Period II saw "unique developments" regarding the extent of the Crown's privilege.[271] However, before exploring those developments, it is necessary to outline the common law's morass of precedent that existed in the area of Crown privilege at the time. The New Zealand courts, as a result of the 1936 case *Gisborne Fire Board v Lunken*,[272] which followed the 1931 Privy Council decision *Robinson v State of South Australia (No 2)*,[273]

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265 Northey, above n 166, at 438; Cooke, above n 260, at 153; and Northey, above n 264, at 190.

266 Taylor and Mullan, above n 67, at 60; and JA Farmer and PA Evans "Two Criticisms of *Padfield v Minister of Agriculture*" [1970] NZLJ 184.

267 Taylor and Mullan, above n 67, at 61; Keith, above n 134, at 442; and Paterson, above n 165, at 233.

268 Aikman and Clark, above n 271, at 45.

269 Aikman and Keith, above n 80, at 67.

270 Crown Proceedings Act 1950, s 27(1).

271 CC Aikman and RS Clark "Some Developments in Administrative Law (1964)" (1965) 27(2) NZJPA 45 at 45. See also Aikman and Keith, above n 80, at 67.

272 *Gisborne Fire Board v Lunken* [1936] NZLR 894 (CA).

273 *Robinson v State of South Australia (No 2)* [1931] AC 704 (PC).

adhered to a discretionary approach to Crown privilege.[274] The courts could inspect government documents to determine whether the public interest would be "prejudiced by their production".[275] During World War II, the House of Lords chartered a different, more deferential, route in *Duncan v Cammell Laird*.[276] In *Duncan*, the Court held that a minister's objection to the discovery of government documents was "conclusive" if the objection was "validly" made.[277] The New Zealand Supreme Court followed *Duncan* on two occasions in the 1950s.[278] In 1962, the conflict between *Duncan* and *Robinson* reached the appellate level, in *Corbett v Social Security Commission*.[279]

*Corbett* concerned the Social Security Commission's decision to decline to pay the Corbett's family benefit payments while the family was temporarily absent from New Zealand.[280] George Barton – a family friend of the Corbett's – agreed to take an action without fee, seeking writs of certiorari and mandamus against the Commission and the Minister of Social Security.[281] Barton successfully obtained an order for discovery against the Commission, which caused the Minister of Social Security to intervene, directing that the Commission should not produce the documents in the interests of confidentiality.[282] Barton – recognising that the Minister's instructions raised the conflict between *Duncan* and *Robinson* – applied for an order directing the Minister and Commission to release the

274 *Gisborne Fire Board v Lunken*, above n 272, at 902. See also Knight, above 7, at 15.

275 *Gisborne Fire Board v Lunken*, above n 272, at 904 per Ostler J (delivering the judgment of the Court). See also Knight, above 7, at 15.

276 *Duncan v Cammell Laird and Co Ltd* [1942] AC 624 (HL). See also Knight, above n 7, at 15.

277 *Duncan v Cammell Laird and Co Ltd*, above n 276, at 642 per Viscount Simon LC. See also Spiller, above n 174, at 381.

278 Aikman and Keith, above n 80, at 73. See *Carroll v Osburn* [1952] NZLR 763 (SC); and *Hinton v Campbell* [1953] NZLR 573 (SC).

279 Knight, above n 7, at 15. See *Corbett v Social Security Commission*, above n 174.

280 *Corbett v Social Security Commission*, above n 174, at 899.

281 Spiller, above n 174, at 382.

282 *Corbett v Social Security Commission*, above n 174, at 913.

documents for inspection.[283] This application was removed to the Court of Appeal for determination.[284]

The Court of Appeal, by a 2-1 majority, rejected *Duncan*, with North J – who was described by one colleague has having "'the best legal bones in New Zealand'"[285] – holding that:[286]

> I am of opinion that we should re-affirm that Courts in New Zealand still possess the power to overrule a ministerial objection to the production of documents in respect of which privilege is claimed if they think it right to do so, but it should nevertheless be borne in mind that it is a power to be held in reserve and not to be lightly exercised.

On the facts, the majority did not exercise its power of inspection:[287]

> The question then remains whether the power should be exercised in the present case. In my opinion it should not. The case … is of very small proportions … On any view of the matter it appears to be clear that the Commission has a very wide discretion whether to pay the whole or any part of the benefit to a beneficiary who is temporarily absent from New Zealand. In my opinion, if we were to accede to the plaintiff's request in the present case, it would be necessary to do so in almost every case. This would mean that what clearly is an exception to a general rule would become, in the course of time, the rule itself.

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283 Spiller, above n 174, at 383.

284 *Corbett v Social Security Commission*, above n 174, at 913.

285 Spiller, above n 4, at 83–84. At the time of North's appointment to the Court of Appeal, he was the fifth-ranked Supreme Court judge (after the Chief Justice): Spiller, above n 39, at 229.

286 *Corbett v Social Security Commission*, above n 174, at 911. It is noteworthy that in *Hinton v Campbell*, above n 278, at 576, North J deferred to *Duncan v Cammell Laird and Co Ltd*, above n 276, but expressed concern about the harm that the conclusive approach *could* cause.

287 *Corbett v Social Security Commission*, above n 174, at 911–912 per North J. However, the Corbett's "[m]oral victory … was not lost on the Crown Law Office"; on the recommendation of Crown counsel – GS Orr – the Commission "disclosed the disputed file": Spiller, above n 174, at 385.

The "robust, down-to-earth" Gresson P, who had been wounded at Gallipoli,[288] and was "always very respectful of precedent, particularly English appellate cases",[289] unsurprisingly dissented:[290]

> … I do not feel free to do otherwise than to accept the *Cammell Laird* decision in all its comprehensiveness as authoritative for the Courts of New Zealand unless and until the Privy Council should qualify or modify it. One would hope that it would find some way to do so.

On the whole, the Court approached the conflict between *Duncan* and *Robinson* from a constitutional perspective – about whether the Court of Appeal should follow the House of Lords or Privy Council – rather than from a principled position.[291] Nonetheless, *Corbett* denotes the beginning of an (albeit delayed) movement towards a more indigenous administrative law in New Zealand.[292] Indeed, North J's judgment was described as providing:[293]

> … a courageous and landmark statement of a New Zealand legal identity distinct from that of England and marked a shift from the derivative and Anglophile approaches that had hitherto characterised New Zealand Court of Appeal judgments.

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288 Lord Cooke, above n 196, at vi. At the time of Kenneth Gresson's appointment as the President of the Court of Appeal, he was the most senior Supreme Court judge following the Chief Justice: Spiller, above n 39, at 229.

289 Richardson, above n 160, at 665. See for example *R v Naidanovici* [1962] NZLR 334 (CA) at 337, where Gresson P referred to a "strict rule of evidence" which was "settled in England by a strong trend of authority and stated to be the law by all the English textbook writers".

290 *Corbett v Social Security Commission*, above n 174, at 898.

291 Knight, above n 7, at 15. It "never occurred to any … [of the judges] to suggest that the Privy Council decision might not be binding in New Zealand … because it was on appeal from South Australia": Evans, above n 64, at 12.

292 Cameron, above n 2, at 209; Joseph, above n 7, at 47; Elias, above n 28, at 62; and Spiller, above n 174, at 386.

293 Spiller, above n 174, at 385. See also Spiller, above n 4, at 84; Joseph, above n 7, at 45; Evans, above n 64, at 8; and Lord Cooke, above n 196, at vii.

Six years later, in *Conway v Rimmer*, the third of the Quartet, the House of Lords reframed "English [privilege] law to coincide with New Zealand law":[294]

> To such extent as *Duncan's case* proceeded on the view that … a ministerial objection to production had to be treated as conclusive I think that it must be accepted that such view was a mistaken one.

While *Conway* did not reference *Corbett*,[295] it is said that *Corbett* "played a part in the subsequent change of English law".[296]

### 7 Summary

In Period II, the developments (or the lack of developments) in the courts' natural justice doctrine and their confused approach towards restrictions on judicial control are indicative of the courts' continued conservatism. The establishment of the Administrative Division, while legislatively creative, was in part necessitated by this conservatism. *Corbett* offered a glimpse at a more indigenous and liberal future, but it did not immediately trigger a change towards such jurisprudence.

294 Knight, above n 7, at 16. See *Conway v Rimmer*, above n 12, at 961 per Lord Morris.

295 Knight, above n 7, at 16.

296 Spiller, above n 174, at 386. See also Powles, above n 167, at 82, referring to *Wednesbury Corp v Ministry of Housing and Local Government* [1965] 1 All ER 186 (CA), which also strove "to bring Britain back into line with New Zealand [privilege] law".

### *C Period III (1969–1976)*

The last period evaluated by this paper begins in 1969, the year after the creation of the Administrative Division, and ends with Robin Cooke's prophesied elevation to the Court of Appeal in May 1976. It is again convenient to set the broader scene.

#### *1 Background*

Britain's entry into the European Economic Community in 1973 was a "blow" to New Zealand's "status as 'Britain's farmyard'".[297] Oil shocks in 1973 and 1978 highlighted New Zealand's new-found economic vulnerability.[298] In the social sphere, while protests against a range of injustices proliferated,[299] "social restlessness had hardly yet begun to be reflected in litigious issues".[300] Nonetheless, in a lecture given at Canterbury University in 1971, Chief Justice Wild extrajudicially acknowledged that the law protected "the right to object and to campaign for change".[301]

Against this backdrop, and in response to a "growing and articulated concern about governmental power",[302] the pendulum began to fall in the judicial arena.

#### *2 General philosophy*

The year before Robin Cooke's appointment to the Court of Appeal, his Honour extrajudicially enthused that the courts had begun to transition away from formalism,

297 Ministry for Culture and Heritage "The 1970s" New Zealand History <https://nzhistory.govt.nz>.

298 Ministry for Culture and Heritage, above n 297.

299 Ministry for Culture and Heritage, above n 297.

300 Lord Cooke, above n 196, at vii. When "legal issues of broader cultural and social significance" did reach the Court of Appeal, the "Court's cautious stance was most clearly revealed": Spiller, above n 4, at 103–104.

301 Richard Wild "The Courts in the Seventies" [1971] NZLJ 371 at 371.

302 Keith, above n 134, at 430.

enabling "justice to be done in administrative law".[303] The courts' approach in Period III was "constructive";[304] indeed, Sian Elias extrajudicially stated that the Court of Appeal was at the "vanguard" of administrative law's developments in Period III.[305] The "seeds" for Robin Cooke's appellate repudiation of formalism "were being sown".[306]

### (a) Indigeneity

The decisive judicial developments in Period III were "largely derivative";[307] the courts' tendency was still to defer to "English example".[308] It is telling that many in the legal profession remained "enthusiastic supporters" of the right of appeal to the Privy Council.[309] Nonetheless, some saw a "growing independence glimmering out of the mass of case law".[310] This independence was catalysed by the realisation that "the New Zealand Court of Appeal [was] … a judicial body of world stature";[311] in Period III, the Court became increasingly comfortable in experimenting with "*imaginative* and sometimes *innovative* applications of administrative law principles".[312]

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303 Cooke, above n 168, at 535. See also Cooke, above n 169, at 219.

304 Cameron, above n 2, at 198–199.

305 Elias, above n 28, at 62–63.

306 Lord Cooke, above n 196, at vii.

307 Cooke, above n 168, at 533.

308 Cameron, above n 2, at 209.

309 BJ Cameron "Appeals to the Privy Council – New Zealand" (1970) 2 Otago L Rev 172 at 178. For an alternative perspective, see Richardson, above n 160, at 323; Wild, above n 301, at 373; and AM Finlay "A Pacific Regional Court of Appeal" [1974] NZLJ 493 at 496.

310 Ryan, above n 31, at 215. See also Spiller, above n 4, at 104; and Cameron, above n 2, at 198–199.

311 At 215.

312 Joseph, above n 7, at 54 (emphasis added).

### *3 Further developments in natural justice*

As noted in the preceding section on natural justice, it took 10 years for an indigenous court to directly adopt *Ridge*.[313] Indeed, the formalist approach was followed by Richmond J in as late as 1971 in *Hamilton City v Electricity Distribution Commission*.[314]

In *Hamilton City*, the Judge held that the Electricity Distribution Commission, while formulating a proposal for the reorganisation of electricity distribution reorganisation in Waikato, was acting in an *administrative* capacity.[315] *Hamilton City* was thus "not a case where the Court … [was] justified in engrafting an additional right of hearing where no such right … [was] given by the [Electricity Distribution Commission] Act [1967]".[316]

*Whangarei High Schools Board v Furnell* was another missed opportunity for the New Zealand courts to incorporate *Ridge*.[317] *Furnell* concerned a high school teacher who was suspended by the Whangarei High Schools Board pending an investigation into his conduct

313 Knight, above n 7, at 5; and Keith, above n 67, at 244.

314 *Hamilton City v Electricity Distribution Commission*, above n 215, at 626. See also *Forbes v Johnston*, above n 215, at 1222, where Woodhouse J determined that the "audi alteram partem principle was not applicable" because the assistant general manager of engineering in the Government Railways Department acted in a "purely administrative capacity"; and *Denton v Auckland City Council*, above n 215, at 259, where Speight J held that a Town Planning Committee exercised quasi-judicial functions, and therefore, was bound by the principles of natural justice (which it breached).

315 *Hamilton City v Electricity Distribution Commission*, above n 215, at 629. See also Mathieson, above n 67, at 281.

316 *Hamilton City v Electricity Distribution Commission*, above n 215, at 628 per Richmond J.

317 *Furnell v Whangarei High Schools Board* SC Auckland, 22 October 1970; and *Whangarei High Schools Board v Furnell* [1971] NZLR 782 (CA). For a debate over the impact of the Court of Appeal's decision in *Furnell* – which concerned the issue of whether the courts could add to procedural provisions contained in empowering legislation – compare Northey "The Exclusion of Natural Justice by a Code", above n 256, at 307 with DJ Mullan "Procedural Codes – A Second Opinion" [1973] NZLJ 41. See also Geoffrey A Flick "Natural Justice in New Zealand: A Comment" [1976] NZLJ 296 at 299.

at Kamo High School.[318] The teacher claimed that he was entitled to present his case prior to his suspension.[319] The teacher's claim was successful before Speight J[320] – previously a Crown Solicitor in Auckland[321] – but the Court of Appeal reversed the Supreme Court's decision.[322] *Ridge* was cited only once in passing in Wild CJ's judgment and was not even mentioned in North P's judgment.

In the Privy Council,[323] a 3-2 majority upheld the Court of Appeal, finding that the mandated statutory process was fair, meaning that the principles of natural justice were dispensable.[324] Lord Morris, while also not citing *Ridge*, endorsed the abolition of the distinction between judicial or quasi-judicial functions and administrative actions, in an obiter comment:[325]

> Natural justice is but fairness writ large and juridically. It has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions.

Lord Morris' comment introduced *Ridge*-like principles to New Zealand *law* in 1972 and in 1973, the New Zealand *courts* finally "grasp[ed] the nettle".[326] Two Supreme Court decisions laid the foundations for an appellate rejection of natural justice's formalist framework.[327] Then, the Court of Appeal in *Lower Hutt City Council v Bank* made the

318 *Whangarei High Schools Board v Furnell*, above n 317, at 786.

319 At 788.

320 *Furnell v Whangarei High Schools Board*, above n 317, at 18–19.

321 Hutchinson, above n 123, at 222.

322 *Whangarei High Schools Board v Furnell*, above n 317, at 794 per Wild CJ and 795 per North P. See also David J Mullan "Developments in New Zealand Administrative Law (1971–72)" (1973) 35(2) NZJPA 1 at 21.

323 *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC).

324 At 718 per Lord Morris.

325 At 718.

326 Mathieson, above n 67, at 281.

327 At 281. See *Smit v Egg Marketing Authority* SC Wellington A 189/293/296/71, 21 March 1973; and *Pagliara v Attorney-General* [1974] 1 NZLR 86 (SC).

decisive break.[328] In the course of holding that the Lower Hutt City Council's decision on objections to the stopping of portions of Queens Road and Bloomfield Terrace was tainted by bias, the "strong and emphatically practical" McCarthy P[329] – who was "reputed to have a knack of getting to the heart of the case"[330] – noted in an obiter comment that:[331]

> … the clear-cut distinction, once favoured by the Courts, between administrative functions, on the one hand, and judicial functions, on the other … is not in these days to be accepted as supplying the answer … Former clear-cut distinctions have been blurred of recent years by directions from highest authority to apply the requirement of fairness in administrative actions as well, if the interests of justice make it apparent that the quality of fairness is required in those actions. Lord Reid noted this in *Ridge* …

Following *Bank*, the New Zealand courts began going "straight to the question of fairness".[332] *Bank*, while entirely derivative of English authority,[333] is clearly liberal – it expanded judicial review's scope[334] and contributed to the reinvigoration of natural justice.[335] However, it is illustrative of the court's ingrained conservatism that, notwithstanding *Bank*, formalism's remnants continued to appear in New Zealand's natural justice doctrine for at least another decade.[336]

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328 *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA). See also Cooke, above n 168, at 531.

329 Lord Cooke, above n 196, at vi.

330 Joseph, above n 7, at 51.

331 *Lower Hutt City Council v Bank*, above n 328, at 548.

332 Cooke, above n 168, at 531. See also Knight, above n 7, at n 15 citing inter alia *DG Allan Ltd v Blakely* [1974] 2 NZLR 723 (CA); and *Otago Polytechnic Council v Teachers Court of Appeal* [1976] 2 NZLR 91 (SC) as "following" *Bank's* "suit": at 5. Thus, in the pre-Cooke era, "change took place" on a "case by case" basis "so that … [New Zealand] almost reached the stage where a general standard of fairness … [was] applied": Nichols, above n 67, at 75.

333 Cooke, above n 168, at 533.

334 Mathieson, above n 67, at 277.

335 Keith, above n 134, at 440. For a criticism of *Lower Hutt City Council v Bank* see Mathieson, above n 67, at 282.

336 Cooke, above n 5, at 5; and KJ Keith "Courts and the Administration: A Change in Judicial Method"

### *4 Further developments in the restrictions on judicial control*

In the area of restrictions on judicial control, Period III's landmark case was *Anisminic v Foreign Compensation Commission*,[337] the last of the Quartet. *Anisminic* concerned the Foreign Compensation Commission's decision to deny Anisminic Ltd the right to participate in the Egyptian Compensation Fund, which was established to compensate owners of property which had been seized during the Suez Incident in 1956.[338] The problem, for Anisminic Ltd, was that a privative clause contained in s 4(4) of the Foreign Compensation Act 1950 shielded the Commission.[339] Nevertheless, the House of Lords, by a 3-2 majority, held that the Commission had made a *jurisdictional* error in misconstruing art 4 of the Foreign Compensation (Egypt) (Department and Regulation of Claims) Order 1962, which specified who could participate in the Fund.[340]

*Anisminic* helped release judicial review from its theretofore "excessive formalism and technicality",[341] by "cast[ing] away" the "protective cloak of non-jurisdictional errors".[342] It did this through developing "a much wider concept of jurisdictional error than was

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(1977) 7 NZULR 325 at 326–327. See for example *Meadowvale Stud Farm Ltd v Stratford County Council* [1979] 1 NZLR 342 (SC) at 349, where Mahon J returned to the distinction between judicial or quasi-judicial functions and administrative functions.

337 *Anisminic v Foreign Compensation Commission*, above n 12. While *Anisminic* was decided at the end of Period II, on 17 December 1968, it could not have significantly influenced the New Zealand courts' doctrine in that period, so is discussed in Period III.

338 *Anisminic v Foreign Compensation Commission*, above n 12, at 150–153.

339 At 162.

340 At 201 per Lord Pearce. See also Taylor and Mullan, above n 67, at 81.

341 Joseph, above n 7, at 53–54. See also Keesing, above n 201, at 471–472.

342 Knight, above n 7, at 19.

previously thought to exist".[343] Indeed, Lord Reid's judgment contained a non-exhaustive list of jurisdictional errors that seemingly covered every aspect of judicial review.[344]

In the New Zealand context, it was said that *Anisminic* "established a fertile landscape that our courts wasted no time in nurturing and tilling".[345] However, in actuality, the New Zealand courts were slow to react to *Anisminic*.[346] In *Commercial Broadcasting Services Ltd v New Zealand Broadcasting Authority*,[347] for example, Wild CJ in the Administrative Division dismissed the plaintiff's claim for certiorari and prohibition despite effectively acknowledging, in a separate *appeal* case which concerned the same Broadcasting Authority decision – *New Zealand Broadcasting Corp v Stewart*[348] – that there were "sufficient grounds to review for jurisdictional error".[349] Neither decision cited *Anisminic*.[350]

Unsurprisingly, Robin Cooke was the first New Zealand judge to "seize on *Anisminic's* approach to matters jurisdictional", during his short time as a Supreme Court judge.[351] In *Car Haulaways v Attorney-General,*[352] which concerned a privative clause contained in s 164 of the Transport Act 1962, Robin Cooke J described *Anisminic* as the "one of the great

343 Taylor and Mullan, above n 67, at 81. See also Mullan, above n 322, at 14; and Josh Pemberton "The Judicial Approach to Privative Provisions in New Zealand" [2015] NZ L Rev 617 at 626.

344 *Anisminic v Foreign Compensation Commission*, above n 12, at 171. See also Taylor and Mullan, above n 67, at 82; and DJ Mullan "Some Developments in Administrative Law (1970)" (1971) 33(2) NZJPA 76 at 94–95.

345 Joseph, above n 7, at 53–54. See also Keith, above n 134, at 438.

346 DJ Mullan "Abuse of Discretion: Jurisdictional Error" (1973) 5 NZULR 280 at 280–281.

347 *Commercial Broadcasting Services Ltd v New Zealand Broadcasting Authority* [1972] NZLR 550 (SC).

348 *New Zealand Broadcasting Corp v Stewart* [1972] NZLR 556 (SC).

349 Mullan, above n 346, at 280–281.

350 At 280–281.

351 Knight, above n 7, at 19.

352 *Car Haulaways v Attorney General* SC Auckland A8/73, 8 August 1973.

landmarks of administrative law.[353] Furthermore, his Honour stated that "the majority opinions should be accepted as authoritative in New Zealand".[354]

While Robin Cooke J was overturned on appeal,[355] much of his "imprimatur of *Anisminic* was recorded without dissent from counsel or the Court of Appeal".[356] Despite this apparent implicit approval, all told it took 10 years for *Anisminic* to be directly incorporated into New Zealand law (by Robin Cooke in the Court of Appeal).[357] The courts' slowness to embrace *Anisminic* is again indicative of the extent to which conservatism was entrenched in the courts' philosophy, even after adopting *Ridge*. Progress was still slow; once more, conservatism trumped obedience.

### *5 The Administrative Division's doctrine*

Some commentators described the Administrative Division's decisions in Period III as "unduly restricted to legal and technical points".[358] It behaved as though it only had legal powers of *review*, ignoring its *appellate* jurisdiction:[359]

> … It [the Administrative Division] has not enthusiastically embraced the new powers which enable it to go beyond sterile questions of law to an examination of the economic and social policies the legislation was designed to achieve. On questions of

353 At 36.

354 At 36.

355 *Attorney-General v Car Haulaways* [1974] 2 NZLR 331 (CA). *Anisminic* was discussed by the Court of Appeal in *New Zealand Engineering Union v Court of Arbitration* [1976] 2 NZLR 283 (CA), where Robin Cooke J, sitting in a temporary capacity, was "quick to show his support for *Anisminic's* trajectory" in obiter comments: Knight, above n 7, at 21.

356 Knight, above n 7, at 21.

357 At 22. See *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136.

358 Cooke, above n 168, at 534–535 citing "some observers".

359 Northey, above n 264, at 190.

> law the Division has moved with confidence, as was to have been expected. But the Public and Administrative Law Reform Committee hoped for more than this …

In *New Zealand Broadcasting Corp v Stewart*,[360] for example, which concerned an appeal from the Broadcasting Authority's decision to rearrange the control of commercial radio in Christchurch,[361] Wild CJ noted that:[362]

> Before considering the merits of the *appeal* … it is as well to restate the principle as set out by this Court in N*ZBC v Independent Broadcasting Co Ltd* (unreported, Wellington, 24 July 1970 …). It was there said:
>
>> The Court is not at liberty merely to substitute its own opinion for that of the Authority. What it may do is limited by well established principles governing the scope of *review* of the exercise of a discretion …

While Wild CJ ultimately allowed the appeal, his Honour's decision was grounded in legality:[363]

> It may be thought that the Authority should have stronger powers which would enable it effectively to bring about the kind of rearrangement contemplated by its decision in this case. That, however, is a matter for Parliament and not for the Court which can only apply the law as it stands.

Robin Cooke was more sympathetic about the Division's performance, suggesting extrajudicially that it was "feeling its way over controversial ground", and advocating, in 1975, for an extension of the Division's powers.[364]

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360 *New Zealand Broadcasting Corp v Stewart*, above n 348.

361 At 557.

362 At 558 (emphasis added).

363 At 560.

364 Cooke, above n 168, at 535.

However, the Division ultimately heard a sufficient number of appeal applications in Period III to acquire "the same mastery" in the subject-matter of the appeal as the relevant tribunal and therefore should have engaged more deeply in the merits of administrative decisions.[365] The Division's reluctance to do so is emblematic of the courts' ingrained conservatism. Despite *encouragement* to interrogate the substance of administrative decisions, the Division was unable to shed its deferential disposition on questions of policy.[366]

### 6 *A new judicial review procedure*

The last theme that this paper briefly explores is the reform of the complex prerogative writs that historically governed judicial review in New Zealand.[367] The impetus for reform was generated in part by Orr's Report, which proposed replacing the writs with a "simple uniform method of review".[368] Orr's Report was followed by the PAL's Fourth Report, which also recommended introducing a new and simplified judicial review procedure.[369] Part 1 of the Judicature Amendment Act 1972 then articulated the PAL's recommendation,[370] establishing a "sympathetic environment" for judicial review applications in New Zealand.[371] In particular, the Act avoided the prerogative writs'

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365 Northey, above n 264, at 190–191.

366 For a discussion of this disposition see Aikman "Administrative Law – II", above n 80, at 159. The Administrative Division was ultimately abolished by s 3(1) of the Judicature Amendment Act 1991. The PAL itself was disbanded upon the establishment of the Law Commission in 1986.

367 For a criticism of the writs, see Paterson, above n 165, at vii; and Northey, above n 166, at 436.

368 Orr, above n 155, at [324]. See also Aikman and Clark, above n 271, at 68.

369 Public and Administrative Law Reform Committee *Administrative Tribunals: Constitution, Procedure and Appeals: Fourth Report of the Public and Administrative Law Reform Committee* (1971) at 22. See also Cooke, above n 168, at 534; Mullan, above n 171, at 512; and McElroy, above n 201, at 10.

370 The Judicature Amendment Act 1972's "antecedents" are found in an Ontarian 1968 Royal Commission (the McRuer Commission): David Mullan "Judicial Review of Administrative Action" [1975] NZLJ 154 at 154.

371 Knight, above n 7, at 44.

"procedural complexities".[372] The Act was also another driver behind the eventual abandonment of formalism in New Zealand; it removed certain formalist constraints that had previously shielded particular remedies.[373] Certiorari and prohibition, for example, no longer only lay against judicial or quasi-judicial acts that impacted rights.[374]

The early jurisprudence under the Act reveals that the judiciary were content with the reform. In *Environmental Defence Society Inc v Agricultural Chemicals Board*,[375] Haslam J – the first law student at the University of Canterbury to be awarded a Rhodes' Scholarship[376] – remarked that the Act created "a more flexible single procedure for judicial review".[377] In *Auckland Medical Aid Trust v Taylor*, McCarthy P noted that the Act vested "considerable discretion" in the courts.[378] However, the Act was imperfect; in *Bank*, the plaintiff's counsel had sought a writ of prohibition due to the understandable but erroneous belief that the Act "did not cover the matter in question".[379]

### *7 Summary*

While the Division's failure to realise its potential, and the courts' response to *Anisminic*, was indicative of the extent to which conservatism was ingrained in the courts' method, Period III ultimately oversaw significant liberal developments. The courts embraced *Ridge*,

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372 At 44. The Act's critics argued that it should have entirely discontinued the prerogative writs: Mullan, above n 370, at 166; and JA Smillie "The Judicature Amendment Act 1977" [1978] NZLJ 232 at 232 and 242.

373 Knight, above n 7, at 44–45; and Cooke, above n 169, at 224.

374 Davis, above n 67, at 361.

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

376 Bowie, above n 75, at 256.

377 *Environmental Defence Society Inc v Agricultural Chemicals Board*, above n 375, at 763.

378 *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 739. See also Cooke, above n 168, at 534.

379 David Mullan "Reform of Administrative Law Remedies – Method or Madness" (1975) 6 Fed L Rev 340 at 355.

which, alongside the enactment of the Judicature Amendment Act 1972, ultimately contributed to the disuse of formalist reasoning in New Zealand. It appeared that the "institutional memory that had clung to the war years was [finally] dimming".[380]

## IV Concluding Remarks

The story of administrative law's development in the pre-Cooke era paints, in Cooke's words, a "'Portrait of the Profession".[381] In recording the courts' gradual progression towards liberal tendencies in administrative law, this paper sought to underline the essential role that people, and circumstances, played in administrative law's growth in the pre-Cooke era. Before further exploring these ideas, it is necessary to summarise the story's overall arc.

### *A The Doctrine*

This paper set out to analyse the often-overlooked pre-Cooke era in New Zealand administrative law. It ultimately uncovered a slow, reluctant and non-linear transition in the courts' philosophy, away from formalism and the conservatism it engendered, towards more liberal tendencies. In Period I (1945–1957), the courts' doctrine was generally characterised by obedience and conservatism, although there were significant liberal deviations in natural justice's terrain. The courts enthusiastically combatted privative provisions but were easily outmanoeuvred by broadly worded empowering provisions. In Period II (1958–1968), the courts' conservatism was largely unremitting, despite the Quartet heralding a judicial "reawakening" in England.[382] Nonetheless, the creation of the Administrative Division, alongside *Corbett*, was thought to have opened the door to a more

380 Joseph, above n 7, at 58.

381 Robin Cooke (ed) *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969).

382 Knight, above n 7, at 40.

liberal future. The last period reviewed (1969–1976), notwithstanding the Division's perceived failures, oversaw the establishment of a more liberal administrative law framework. Therefore, despite popular scholarly conceptions about Robin Cooke's irreplaceable role in liberalising administrative law,[383] by the time he was elevated to the Court of Appeal, the pendulum had already begun to swing back in favour of more robust judicial controls on administrative action in New Zealand. Fertile land was left for Robin Cooke to plough.

This paper's analysis of certain themes – particularly natural justice and restrictions on judicial control – should illustrate that the courts' jurisprudence in the pre-Cooke era was frequently temperamental. In specific areas, and at certain times, the courts were noticeably liberal, while in others, at different times, the courts' jurisprudence was antiquated. Natural justice's evolution best illustrates this point. In the 1950s, *Okitu* and *Victuallers* showcased a judicial willingness to operate both innovatively and liberally; the Court of Appeal actively sought to avoid formalism's worst vices. Yet, when England began dismantling administrative law's formalist framework in the 1960s, the New Zealand courts were reluctant to follow their judicial brethren, despite the courts' theretofore respect for English precedent and several opportunities for an appellate rejection of formalism arising. All told, it took until 1973 for an indigenous court to abandon natural justice's formalist bonds.

It might be said that the New Zealand courts were slow to repudiate formalism in the 1960s because *Okitu* and *Victuallers* had already manufactured a liberal space within natural justice's formalist sphere. This theory may contain some truth, but it is indisputable that by the turn of the decade, the English legal system provided a far more favourable administrative law landscape to a prospective plaintiff.

383 See n 4 for a range of these scholarly conceptions.

### *B The Circumstances*

It is equally undeniable that *circumstances* played a significant role in administrative law's growth in the pre-Cooke era. Earlier in this paper, I outlined how under Myers CJ's stewardship, and until the outbreak of World War II, the courts' approach to administrative law was marked by a willingness to scrutinise the government's decisions.[384] The War, and the accompanying regulatory landscape, then engendered a pendulum swing to a more deferential, and thereby conservative, attitude to administrative action. The question of whether the judicial "habits of thought engendered … [by the War] survived in the post-war years" was then posed.[385] It is clear, having traversed the subsequent three decades, that the judicial tendencies developed during the War lingered for many years.[386] Indeed, numerous societal factors, including the growing breadth of governmental power, exacerbated the continuing influence of wartime attitudes in the pre-Cooke era.

While this paper avoided making generalisations about the nature of New Zealanders, it set the scene for each period reviewed to highlight the interconnection between societal and legal change. In Period I, the courts' conservative philosophy was consistent with both the government's increasingly pervasive power and the legal profession's scepticism about administrative law. Interestingly, in Period II, concerns about the adequacy of the existing judicial controls on administrative action did not immediately translate into more liberal jurisprudence. However, in Period III, the social transformation that transpired in Zealand ultimately "mirrored" administrative law's transition to a more liberal landscape.[387]

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384 Cooke, above n 9, at 86.

385 At 99–100.

386 Joseph, above n 7, at 52.

387 At 52.

### *C The Individuals*

In telling the story of administrative law's growth in the pre-Cooke era, this paper attempted to draw attention to the period's key players. In New Zealand's (then homogenous) small legal community,[388] these actors – in the form of academics, practitioners, politicians, law reformers and judges – were able to play an outsized role in administrative law's development. It is apparent from this paper that in a legal profession as condensed as New Zealand's was, strong personalities often steered institutional direction. Individual judges – particularly Court of Appeal Presidents – were able to shape the judiciary's "personality",[389] while three key law reformers – Mr Cameron, JL Robson and BJ Cameron – "left a legacy not just …[in] particular [areas] … but also on the idea of law reform".[390] Moreover, academics – and none more than Robin Cooke – frequently provided the severe criticisms necessary to catalyse judicial action.[391] I will now briefly explore the role that these actors, and others, played in the courts' slow and hesitant transition away from conservatism and towards liberalism in the pre-Cooke era.

#### *1 The academics*

I set out to write about administrative law's pre-Cooke era, which I defined as the period between September 1945 and Robin Cooke's appointment to the Court of Appeal in May 1976. It is evident from this paper's extensive references to Robin Cooke (in both the main text and footnotes) that Robin Cooke's influence in the supposed "pre-Cooke era" was

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388 Webb, above n 31, at 107; and McLay, above n 247, at 167–168.

389 Joseph, above n 7, 50.

390 McLay, above n 247, at 174.

391 See generally William Twining and others "The Role of Academics in the Legal System" in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003) 920.

widespread. As an academic,[392] then as an advocate[393] and finally, as a Supreme Court judge,[394] Robin Cooke vigorously and continually attacked administrative law's formalist foundations. In retrospect, Robin Cooke's early scholarship – beginning with his doctoral thesis, written while studying at the University of Cambridge, which highlighted the "incoherence of our law of jurisdiction"[395] – was a precursor to his illustrious history on the bench.

While conducting this paper's literature review, I was struck by the *distinctiveness* of Robin Cooke's scholarship. Cooke was always the strongest, and even at times the lone dissident against administrative law's reliance on categories and classifications to mediate judicial intervention. Cooke's singularity is best highlighted by contrasting his scholarship with JF Northey's.

The "legendary" Northey,[396] a former Dean of Law at the University of Auckland, wrote relentlessly in the pre-Cooke era (this paper utilised 16 journal articles written by Northey between 1954 and 1977). Northey's academic oeuvre, particularly in the area of natural justice, was generally characterised by a reluctance to depart from England's formalist tradition. Indeed, Northey refused to accept that *Ridge* had disbanded formalism in natural justice, instead arguing that it introduced "a concept of 'fairness'" that applied to administrative actions, while natural justice's more onerous requirements only applied to judicial or quasi-judicial actions.[397]

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392 See for example Cooke, above n 9; Cooke, above n 19; Cooke, above n 52; Cooke, above n 54; Cooke, above n 67; Cooke, above n 168; and RB Cooke "The Board or the Lords" [1962] NZLJ 453.

393 Robin Cooke is responsible for the first recorded use of the term "administrative law" in the New Zealand Law Reports, in argument before the Court of Appeal in *Buller Hospital Board v Attorney-General*, above n 132, at 1272: Keith, above n 4, at n 7.

394 See for example *Car Haulaways v Attorney General*, above n 352.

395 Cooke, above n 52, at 21.

396 "Half century for tireless law teacher" (19 February 2012) Auckland Law School <www.auckland.law.ac.nz>.

397 Northey "The Aftermath of the *Furnell* Decision", above n 256, at 63. See also Northey, above n

In light of Northey's conservative scholarship, it was unsurprising to find an addendum recording prickly conference discussions about Robin Cooke's philosophy in two of Cooke's articles published in the New Zealand Law Journal.[398] In one such addendum, DL Mathieson – a Professor of Law at the Victoria University of Wellington – was recorded as remarking that:[399]

> Mr Justice Cooke discerns a readiness by the Courts (and I quote the paper) to get to the substance of administrative law issues. I hope that his Honour will be able to assure me that this is not an obscure way of praising the tendency which exists in many minds, it would seem, to treat an application for judicial review as though it was the exercise of a right of appeal.

Robin Cooke's philosophical distinctiveness prior to his elevation to New Zealand's then most senior indigenous court reinforces his claim as the founding father of modern administrative law in New Zealand.

This emphasis on Robin Cooke is not intended to downplay the role played by other academics in administrative law's progression. While an Assistant Secretary in the Department of Justice, JL Robson, for example, was responsible for the publication of New Zealand's first book on public law;[400] DE Patterson, when a Senior Lecturer in Law at the University of Otago, claimed the same honour in the narrower field of administrative law. In 1943, while the Professor of Jurisprudence and Constitutional Law at Victoria University, the "shy and charming" RO McGechan[401] established a journal series on

67, at 326; Northey "The Basis of Judicial Review in Administrative Law", above n 256, at 26; Northey "The Exclusion of Natural Justice by a Code", above n 256, at 312; and Northey "The Problem of Characterization", above n 256, at 93–94.

398 See for example Cooke, above n 19, at 135; and Cooke, above n 168, at 536.

399 Cooke, above n 168, at 542.

400 JL Robson (ed) *New Zealand: The Development of its Laws and Constitution* (Stevens & Sons, London, 1954).

401 DL Mathieson "Some Academic Lawyers" in Robin Cooke (ed) *Portrait of a Profession: The*

administrative law decisions, a time where scepticism about administrative law was rife.[402] After McGechan's death in a plane crash in Singapore in 1954,[403] a range of "junior colleagues" continued the series,[404] some of whom – CC Aikman, KJ Keith, and DJ Mullan – elsewhere wrote extensively about administrative law in the pre-Cooke era.[405] Mullan was another noteworthy objector to the courts' reliance on formalism.[406] However, while the influence of these academics, and others, is noteworthy, this paper was ultimately about administrative law's *doctrinal* developments in the pre-Cooke era.

### *2 The bench*

A range of homogenous judges, each with a judicial philosophy somewhere on the spectrum between conservatism and liberalism, led administrative law's doctrinal developments in the pre-Cooke era. Throughout this paper, I have scattered titbits of background information about these judges, in an attempt to elucidate the human element to law-making.

Under Gresson P's stewardship, the Court of Appeal embodied Kenneth Gresson's judicial disposition.[407] Upholding the legal tradition – which necessitated deference to the courts'

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*Centennial Book of the New Zealand Law Society* (AH & AW Reid, Wellington, 1969) 188 at 200.

402 Keith, above n 4, at 4–5.

403 Mathieson, above n 401, at 200.

404 Keith, above n 4, at n 10.

405 For examples of CC Aikman's scholarship see Aikman "Subdelegation of the Legislative Power", above n 80; Aikman, "Administrative Law – II", above n 80; and Aikman, above n 164. For examples of KJ Keith's scholarship see Keith, above n 17; KJ Keith "*Corbett's* Case" (1963) 1 NZULR 124; and KJ Keith *A Code of Procedure for Administrative Tribunals* (Legal Research Foundation, Auckland, 1974). For examples of DJ Mullan's scholarship see Mullan, above n 171; Mullan, above n 317; Mullan, above n 346; Mullan, above n 370; Mullan, above n 379; and DJ Mullan "Case Notes: Was Justice Really Seen to be Done" (1969) 3 NZULR 440.

406 See for example Mullan, above n 317.

407 Joseph, above n 7, at 51.

counterparts in England – was prioritised.[408] Even in *Corbett*, where the Court famously broke from a House of Lords precedent, Gresson P had (albeit "regretfully") felt bound by that precedent.[409]

The "watershed" judgment in *Corbett* was delivered by North J,[410] who ultimately succeeded Gresson P upon his mandatory retirement in 1963. Under Alfred Kingsley North's leadership, the Court's identity transitioned, reflecting a "conscious appreciation of the need to develop a distinctively New Zealand law".[411] Indeed, Robin Cooke went so far as to declare the permanent Court of Appeal's pre-1976 term as the "North era".[412] North P's creative, searching jurisprudence is apparent in his Honour judgment in *Corbett*; at one-point, North J firmly stated that:[413]

> It is all very well to say that it is the Judge who is in control of the trial, not the executive, and that the decision ruling out the documents is the decision of the Judge, but this statement has a somewhat hollow ring if the Judge has no power whatever to overrule an objection made in proper form by a Minister of the Crown …

Such incisive statements are easily contrastable with Gresson P's conservatism,[414] which while evident in *Corbett*, shines through in *Buller Hospital Board v Attorney-General*, where his Honour commented that:[415]

> … many matters are placed by Parliament in the hands of a Minister in the belief that the Minister will exercise his power properly and in the knowledge that if he does not

408 At 51. See also Lord Cooke, above n 196, at vi.

409 *Corbett v Social Security Commission*, above n 174, at 898.

410 Evans, above n 64, at 8.

411 "Court of Appeal President: An Interview with Rt Hon Sir Robin Cooke" [1986] NZLJ 170 at 174. See also Richardson, above n 160, at 666.

412 Lord Cooke, above n 196, at vii.

413 *Corbett v Social Security Commission*, above n 174, at 911.

414 Spiller, above n 4, at 82; Richardson, above n 160, at 665; and Lord Cooke, above n 196, at vi.

415 *Buller Hospital Board v Attorney-General*, above n 132, at 1291.

> do so he is liable to the criticism of Parliament; and that, in such cases, if it is clear upon the language of the statutory provision that Parliament intended him to be answerable only to Parliament, then it is not competent for the Court to question the bona fide action of the Minister, and further will not require the Minister to tender evidence that he considered the matter and formed a bona fide opinion that action was necessary in the interests of the State.

The intellectual tension (relations on the Court were "cordial")[416] between Gresson and North was not uncommon on the bench; indeed, across the pre-Cooke era, there was a prolonged struggle on the bench between the conservatives and the liberals. This philosophical tussle was reflected in the unease between O'Leary CJ and Philip Cooke J's judgments in *Okitu*, where Philip Cooke J acted innovatively to reach a liberal outcome while O'Leary CJ pointedly deferred to *Nakkuda's* "conclusive authority".[417]

While liberalism prevailed in *Corbett* and *Okitu*, in *Buller* and other cases, conservatism triumphed. In this way, the judiciary's intellectual inconsistencies produced the *non-linear* nature of the courts' jurisprudential growth in the pre-Cooke era.

### *3 The law reformers*

As a final point, the efforts of law reformers should not go unmentioned. This paper focused on doctrine, but two innovative law reforms were discussed. While the Administrative Division failed to fulfil its founder's expectations, its establishment in 1968 reflected a disquiet about administrative law's formalist status quo. The Judicature Amendment Act 1972, once altered by the Judicature Amendment Act 1977,[418] had more

416 Lord Cooke, above n 196, at vii.

417 *New Zealand Dairy Board v Okitu Co-Operative Dairy Co Ltd*, above n 81, at 399–400.

418 See Smillie, above n 372.

success, helping facilitate the wholesale rejection of formalism in New Zealand. This paper also briefly noted other reforms, such as the establishment of the Ombudsman in 1962.

All of these reforms, and more, were driven by "three key figures":[419] the Hon Ralph Hanan MP, the Minister of Justice and Attorney-General from December 1960 to July 1969, JL Robson, the Secretary of Justice for most of Mr Hanan's term and BJ Cameron, a public servant whose scholarship was quoted at this paper's outset. Even the PAL's First Report, which led to the Administrative Division's formation, was instigated by Mr Hanan. The reforms ushered in by these figures, perhaps even more than the doctrine of the time, reflected the "need to create New Zealand law which [took] … account of New Zealand circumstances".[420]

419 McLay, above n 247, at 172.

420 At 177. See also Hanan, above n 169, at 3.

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