

Hard Look Review

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In recent times, the phrase 'hard look' has increasingly emerged during judicial review proceedings in the New Zealand courts. 'Hard look' review is an American ground of judicial review, which essentially provides for more invasive scrutiny going to the substance of the administrative decision in terms of its logic and reasons. In New Zealand, the phrase 'hard look' has arisen as part of the fundamental transformation of administrative law in context of Globalisation, Constitutionalisation, Internationalisation and Americanisation. Comparing the 'hard look' to the traditional grounds of review will demonstrate several significant differences. However, the differences may not be so clear-cut after taking a closer look at some of the cases of the last 30 years, particularly as regards Wednesbury unreasonableness. In addition, questions arise as to whether the American doctrine is ill suited to the New Zealand system, and whether importing the 'hard look' doctrine is the best solution available to uphold fundamental civil and political rights.

WHERE DID IT COME FROM?

I. American Influences

1. Environmental and Health Protection

The phrase 'hard look' originated in American courts during the 1960's and 1970's in the context of decisions about public health and environmental protection.¹ Since 'hard look', like most concepts, is a product of its time and circumstances, it is worth taking a closer look at that. In the late 1960's and early 1970's a number of large risk regulation agencies, like the Environmental Protection Agency, were established in the United States. These regulatory bodies set standards in order to protect the environment and human health, having a range of legislative mandates, rule-making procedures and institutional structures at their disposal. The role of science and the public varied considerably across the regulatory regimes resulting in highly uncertain decision-making.²

At that point, a crisis in confidence arose in these new agencies, which meant that judges found themselves increasingly judicially reviewing decisions of a highly technical nature in circumstances of scientific uncertainty and socio-political conflict.³ There was great dissatisfaction with America's standard test for invoking substantive review, which, similar to Wednesbury unreasonableness, required the decision to be "arbitrary and capricious" before the courts could intervene.⁴ The dominant sentiment was that a lower threshold was needed especially with regard to important regulatory areas of public interest.

¹ Elisabeth Fisher "The Rise of the Risk Commonwealth and the Challenge for Administrative Law" (2003) 5 PL, AUT, 455, 456.

² Ibid, 456.

³ Thompson v Treaty of Waitangi Fisheries Commission [15 June 2004] CA, CA247/03 [215].

⁴ See n 3 above.

2. Leventhal's approach

Senior appellate judges, thus, sought to find some middle ground between traditional deference of the courts to administrative discretion and the extreme alternative of merits-based review of decisions.⁵ Amongst them was Justice Leventhal, whose 'hard look' approach to judicial review was validated by the US Supreme Court and has been the blueprint for substantive review in America ever since.⁶ Leventhal's concern was to control the abuse of power by administrative experts. At the same time, he wanted to ensure that expertise was strengthened in its legitimate role as the servant of government as opposed to a legal Frankenstein with no practical limitations on its discretion.⁷

Therefore, Leventhal took a closer look at the substance of decisions so as to ensure that the regulatory agencies had an accurate factual basis for making them, given that he saw their role as one of applying the facts to the legislative mandate.⁸ This also involved decision-makers having to establish the reasonableness of their methodology.⁹ Along these lines, the principles of American 'hard look' review were developed, requiring agencies to provide detailed records of the data and analysis both for and against their own position. The courts examined agency findings of fact, their method of analysis and their chain of reasoning.¹⁰ Taken as a whole, the 'hard look' test today is simply whether the authority has adequately

⁵ Hamilton City Council v Waikato Electricity Authority [1994] 1 NZLR 741, 759.

⁶ Industrial Union Dept AFL-CIO v American Petroleum Institute 448 U.S. 607 (1980). It is worth noting that there were several approaches to "hard look" review. However, my essay is confined to that of Justice Leventhal because it was his approach, which ultimately prevailed. For a discussion on the different methodologies see n 1 above, 476-467.

⁷ See n 1 above, 477.

⁸ See n 1 above, 476.

⁹ See n 1 above, 478.

¹⁰ Genevra Richardson "The Duty to Give Reasons: Potential and Practice" (1986) PL, AUTUMN, 437, 439.

reviewed all relevant factors and considerations to ensure that the best reasoned decision was reached.¹¹

II. Hard Look Review in New Zealand

1. Administrative Law Reinvented

a) Different influences and Broad changes

The increasing expression of the idea of 'hard look' review by the New Zealand courts is a considerably recent phenomenon. In the last thirty years, and especially on account of the so-called Cooke era, administrative law has undergone fundamental changes, particularly in terms of its starting premises and influences. The internationalisation of administrative law, for instance, did not stop short of New Zealand. As follows, international trends, including the rise of human rights norms have been readily adopted. Cases like Tavita¹² gradually eroded the orthodox dualist approach to domestic and international law, so that international human rights instruments, like the Convention on the Rights of the Child, could be regarded when determining the content of domestic law and the resulting discretions.

Judicial globalisation is also part of this general trend towards human rights, as judges around the world are increasingly able to transcend their boundaries and engage in global dialogue. International best practice as specified during the 1998 Bangalore Conference, included the judges' duty to interpret and apply national constitutions and ordinary legislation in harmony with international human rights norms, irrespective of whether they were incorporated into domestic law or not.¹³ Along these lines, we saw a move from the judicial deference exemplified by Richardson in

¹¹ See n 3 above [217].

¹² Tavita v Minister of Immigration [1994] 2 NZLR 259 (CA).

¹³ Michael Taggart "Lecture Notes" 2005.

Ashby¹⁴ towards a more interventionist approach, as illustrated by Cooke in Tavita,¹⁵ who ignored the traditional distinction between statutory interpretation and discretion in addition to concerns about backdoor incorporation.

In view of that, the Americanisation of New Zealand administrative law is not to be forgotten. In context of increased privatisation of public bodies resulting in high levels of delegated powers of un-elected and non-accountable agencies, similar to the American experience discussed above, the desire grew to circumvent the high standard for review of Wednesbury unreasonableness.¹⁶ Traditionally, the courts could only interfere where a decision was “so unreasonable that no reasonable authority could ever have come to it”.¹⁷ Seeing that this standard is virtually impossible to attain it was often thought to be too deferential to the Executive. As communication networks grew, so did judicial globalisation, which progressively enabled judges to look for a solution outside their national jurisdiction.

To attempt to resolve the problem of super-Wednesbury unreasonableness, some judges resorted to importing the ‘rights-talk’ of American constitutional adjudication in support of a more invasive review, including the ‘hard look’ employed by US courts.¹⁸ In the words of Thomas J: “The modern focus on fundamental human, civil and political rights ensures a close review – what might be said to be a hard look – at any decision affecting those rights.”¹⁹ The resulting new rights-based approach is a broad change in the law and society, including a greater role for the courts. On the whole, the above influences and changes have brought

¹⁴ Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA).

¹⁵ See n 12 above.

¹⁶ Sian Elias, “Hard look and the judicial function” (1996) 4 Waikato LR, Issue 2.

¹⁷ Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, 230.

¹⁸ Michael Taggart “Reinventing Administrative Law” *Administrative Law Casebook*, 105, 115.

¹⁹ Waitakere City Council v Lovelock [1997] 2 NZLR 385, 403 per Thomas J.

about the constitutionalisation of New Zealand's administrative law and 'hard look' review is part and parcel of this development.

III. When does 'Hard Look' Review Arise?

1. Varying the Review Standard

It is clear that there is a fundamental clash between old deferential culture that Wednesbury²⁰ is emblematic of, and the new rights-based 'hard look' one, where the courts can be quite intrusive when certain rights are involved. The New Zealand courts have embraced varying standards of scrutiny ranging from so-called super-Wednesbury unreasonableness to 'hard look' review.²¹ The court intuitively identifies the appropriate threshold depending on context, that is the factual and statutory setting.²² Relevant factors to consider include the functions and status of the decision-maker, whether the deciding body is democratically elected, the democratic accountability, the degree of consultation, the procedures adopted, the political or policy content of the decision, whether there is room for differing views,²³ and the "overall justice"²⁴ of the case. In general, local authority rating cases such as Wellington City Council²⁵ fall at the strict Wednesbury end of the spectrum, seeing that they are often decisions democratically elected councils and their accountability to ratepayers. So intervention will only occur in a "clear and extreme case".²⁶ By contrast, decisions affecting basic human or civil rights are at the opposite 'hard look' end of the spectrum.²⁷

²⁰ See n 17 above.

²¹ Philip A. Joseph "The Shifting Terrain of Judicial Review" (1999) NZLJ, AUG, 279, 279.

²² Ibid.

²³ See n 3 above [222]-[223].

²⁴ Daganayasi v Minister of Immigration [1980] 2 NZLR 130, 149 (CA)

²⁵ Wellington City Council v Woolworths (New Zealand) Ltd (No 2) [1996] 2 NZLR 537.

²⁶ See n 25 above, 537, 546.

²⁷ See n 21 above, 279.

HOW DOES IT DIFFER FROM WELL-ESTABLISHED DOCTRINES?

I. Substance vs. Procedure

1. Terminology

As a preliminary point it is worth noting that it is unclear whether 'hard look' review in New Zealand is, like in America, a ground of review in itself, or whether it is just a methodology invoked in relation to traditional grounds of review, like Lord Diplock's irrationality,²⁸ or more modern and controversial grounds of review such as the so-called innominate ground.²⁹ In my opinion, it is only a methodology at present. Besides, the fact that 'hard look' review is mentioned in relation to substantive fairness raises further interesting issues. The Pharmac case,³⁰ for instance, sanctioned substantive unfairness, discussed by Lord Cooke in Thames Valley,³¹ as a ground for intervening in cases concerning human and civil rights and the American methodology of 'hard look' review.³² In view of that, it might be that the American doctrine is used to fuse procedural with substantive fairness under the general heading of 'fairness'. Along these lines, Lord Cooke's three overlapping grounds of review come to mind and his string-pulling in terms of substantive unfairness. In any case, these thoughts are merely speculative, and for the purposes of my essay, the comparison with well-established review grounds will concentrate on substantive grounds of review, especially Wednesbury unreasonableness.

²⁸ Wolf v Minister of Immigration [2004] NZLR 414 (HC).

²⁹ Shaw v Attorney-General (No 2) [2003] NZAR 216, 244-245 (HC).

³⁰ Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd [1998] NZAR 58, 66 (CA).

³¹ Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd [1994] 2 NZLR 641 (CA).

³² See n 21 above, 279.

2. The Doctrine of Precedent

a) *Precedent?*

The application of 'hard look' review is uncertain partly due to being dependent on the courts' intuition in setting the standard of review. The courts are to a certain extent able to pick and choose rights, depending on whether they want closer scrutiny or not. In Pharmac, for instance, Thomas J expressed the view that "while it may not be classified as a human right, the principle of equal treatment is a fundamental plank of the rule of law, and it would seem sensible to extend the same ['hard look'] approach".³³ This flies in the face of some of the key elements of the classical model of judicial review, namely the strict application of the doctrine of precedent.³⁴ But, as per usual, there is disparity between theory and practice. As discussed above, 'hard look' review was imported into New Zealand's administrative law as a response to Wednesbury unreasonableness, often said to be emblematic of the classic model. However, looking more closely at the subsequent cases, the application of the Wednesbury test is certainly not emblematic of a consistent approach in line with the law of precedent. In fact, the decisions of the courts often do not reflect the severity of the test.

This is clearly demonstrated by Lord Cooke's attempt at simplification of the Wednesbury test, that is "an unreasonable decision in the ordinary sense is one outside the limits of reason or one which no reasonable body could reach".³⁵ This test was applied in the New Zealand Fishing³⁶ case where the Court of Appeal examined whether the action at issue was one, which a reasonable Minister could take. It was held that the Minister had to give genuine and not merely token or superficial regard to all the mandatory considerations. The relative weight given to each consideration was still for the Minister to decide but subject to the qualification that it had

³³ See n 30 above, 95.

³⁴ See n 18 above, 105.

³⁵ Webster v Auckland Harbour Board [1987] 2 NZLR 129, 131-132.

³⁶ New Zealand Fishing Industry Association Inc v Minister of Agriculture [1988] 1 NZLR 546 (CA).

to be “within the limits of reason”.³⁷ Therefore, the new reasonableness test is not just a purely procedural one but considers weight and, thus, the substance of the decision, as is further discussed below. Consequently, New Zealand Fishing³⁸ demonstrates that the courts in practice are willing to impugn decisions, which are far from absurd or perverse but clearly rational.³⁹ It seems the courts have deliberately departed from precedent of Wednesbury so as to apply closer scrutiny to the decision-making. In view of that, ‘hard look’ review appears more honest, in that, now, the courts are doing more openly, what they have been doing all along.

3. Appeal/Review distinction

a) Procedure and Deference

The traditional approach, as exemplified by Wednesbury unreasonableness, was characterised by deference to the administrative decision-maker – avoiding ‘policy’ issues, ensuring the dispute was justiciable and requiring the satisfaction of high thresholds for intervention.⁴⁰ Along these lines, the dominant sentiment was that judges should step back to leave the decision-making up to the administrators, particularly where politics were involved. This is clearly reflected by the judgment of Richardson J in Ashby, where he held that the identification of relevant considerations affecting the exercise of the Minister’s statutory discretion in immigration matters was not justiciable.⁴¹ Richardson J asserted that immigration was a highly sensitive political issue and better be left to the Minister, thus, reaffirming the appeal/review distinction.⁴²

Moreover, the courts conventionally sought to reiterate the distinction between the methodology of an appeal in the courts and that of review. On

³⁷ Ibid, 552.

³⁸ Ibid.

³⁹ See n 19 above, 399.

⁴⁰ See n 18 above, 105-106.

⁴¹ See n 14 above, 230.

⁴² Ibid, 231.

appeal, the judges were happy to look at the merits of the decision, whereas judicial review was strictly method-based. In addition, the traditional emphasis on the judge's impartiality and the lack of expertise added to the feeling that value judgments were not for the courts. Consequently, in line with parliamentary intent, the courts would only consider the process and logic of the decision-making, especially when deciding whether a decision was Wednesbury unreasonable. Puli'Uvea⁴³ provides a good illustration of this point. Keith J stressed that he is only concerned with the legality of the decision, that is whether the Minister applied the right test and whether he took into account all of the mandatory relevant considerations.⁴⁴ Thus, it is just a case of ticking the different relevant considerations boxes, irrelevant of the weight accorded to them by the administrator. So long as they are mentioned, the Minister cannot be said to have acted unreasonable. All in all, irrationality can be characterised as a purely procedural ground of review so as to ensure that the court does not step into the shoes of the legitimate decision-maker and decides for them.

b) Values and Activism

By contrast, 'hard look' review rejects the appeal/review distinction seeing that it is content rather than method-based.⁴⁵ This is because the deference afforded by Wednesbury unreasonableness is thought to be inappropriate in cases where human rights or fundamental values are affected. As Thomas J declared in Waitakere.⁴⁶

"It is incongruent that the Court should ask of an authority's decision affecting, say, the life of an individual, whether the decision is so unreasonable that no reasonable authority could have arrived at it. Such a vital decision surely need not

⁴³ Puli'Uvea v Removal Review Authority (1996) 2 HRNZ 510 (CA).

⁴⁴ *Ibid*, 522.

⁴⁵ Philip A. Joseph. "The Demise of Ultra Vires - Judicial Review in the New Zealand Courts" (2001) PL, SUM, 354, 367.

⁴⁶ See n 19 above, 403.

be outrageous, absurd or perverse before the Courts would be prepared to intervene.”

Consequently, the focus of the new rights-centred inquiry differs from that under the classic model of administrative law. Instead of the procedure by which the decision was reached, the starting point here is the fundamental right allegedly infringed by the exercise of discretionary power. Next is the inquiry into whether this right has been reasonably, that is logically or justifiably, limited. In doing so, the judges will often scrutinise closely the logical and factual bases for the decision, including all of the relevant policies and factors bearing on discretionary policy choices.⁴⁷ If the limitation placed on the right is found to be unreasonable, and the statute does not preclude the exercise of the discretionary power in conformity with the right, the court will strike down the decision and the decision-maker must decide in accordance with this fundamental human, civil or political right at issue.⁴⁸

Accordingly, the methodology is openly aimed at vindicating fundamental rights and, therefore, overtly acknowledges that judicial review is values-driven and involves the court in the merits of the decision.⁴⁹ In view of that, ‘hard look’ review may be described as a constitutional ground of review rather than an administrative one.⁵⁰ This impression is reinforced by why it is that a ‘hard look’ can be taken in the first place. As discussed above, the rights, values or norms are so important to our society that the courts are justified in determining the limits of a reasonable exercise by taking a more invasive approach to the decision. Along these lines, judges during ‘hard look’ review sometimes have to evaluate the social objectives sought by the decision-maker, weigh these against any intersecting public law values, and make a judgment as to where the balance of public welfare

⁴⁷ Hamilton City Council v Waikato Electricity Authority [1994] 1 NZLR 741, 759. .

⁴⁸ See n 18 above, 112

⁴⁹ See n 45 above, 373.

⁵⁰ For a discussion see Philip A. Josep “Constitutional Review Now” [1998] NZLR, 85.

lies.⁵¹ The right in question, then, can be described as a constitutional trump preventing the decision-maker from exercising the discretionary power in a way that infringes that right. In this way, the courts step in and make the decision for the decision-maker in order to uphold these higher values. Overall, public interest litigation is encouraged, which means the courts have to play a greater constitutional role. Rather than merely scrutinising individuated decision-makers, they now act as guardians of fundamental rights in the public interest.

c) Traditional Outcomes

However, it is arguable that the appeal/review distinction has always been unstable, especially in terms of the final outcome, again in context of Wednesbury unreasonableness. The courts often leave very little or no room to manoeuvre for reconsideration of the decision or even decide for the 'legitimate' decision-maker, as was the case in Fjordland Venison.⁵² In this case the Minister of Agriculture refused to reissue a venison-slaughtering license. In reaching his decision he took into account irrelevant considerations. In general, a court in this situation would remit the decision back to the Minister who would then decide again. However, the court resorted to declare that a license should be granted because a significant amount of time had lapsed since the Minister's first refusal, which meant that he would not be acting unreasonably if he refused to grant the license in the new circumstances.⁵³ Therefore, the court effectively stepped into the Minister's shoes and made a decision for him. But similar consequences appear in less controversial decisions, too. If a decision-maker is held to have acted for an improper purpose or failed to take into account mandatory relevant consideration, the courts legal determinations will often not only affect the process of the decision-making. The courts directions that certain considerations have to be taken

⁵¹ See n 45 above, 373.

⁵² Fjordland Venison v Minister of Agriculture [1978] 2 NZLR 342 (CA).

⁵³ *Ibid*, 351.

into account or that the decision-maker must act according to the statutory purpose, which is of course determined by the court, ultimately go to the heart and so the substance of the decision, even as regards well-established doctrines.

d) *From Ashby to Tavita*

In addition, judicial review has always been inherently values-driven and dependent on social and political context. As a result, the methodology of the traditional grounds of review has not affirmed the appeal/review distinction at all times. This is best illustrated by Wednesbury unreasonableness and the fundamental change in starting points in Ashby⁵⁴ and Tavita.⁵⁵ As discussed above, Richardson J's approach in Ashby was that immigration issues are political and not for the courts to decide.⁵⁶ In view of that, Cooke J mentioned that even in statutes concerned with immigration and policy, "a certain factor might be of such overwhelming or manifest importance" that it could not possibly have been intended to be ignored.⁵⁷ "Such a situation," he said, "would shade into the area where no reasonable Minister could overlook a certain consideration or reach a certain result".⁵⁸ So even in an immigration context there was a possibility that the courts could identify mandatory relevant considerations. Nevertheless, the starting point remained tied to the decision-making process.

About ten years later, we see a significant shift of attitudes in this respect. With regard to mandatory relevant considerations, the cases are no longer just about ticking the box. Now the courts are dealing with weight. This approach is reflected in Tavita where Cooke J held: "It would appear therefore that under the European Convention a balancing exercise is

⁵⁴ See n 14 above.

⁵⁵ See n 12 above.

⁵⁶ See n 14 above, 230.

⁵⁷ See n 14 above, 226.

⁵⁸ Ibid.

called for. A broadly similar exercise may be required under the two international instruments relevant in the present case, but the basic rights of the family and the child are the starting point".⁵⁹ Accordingly, the court is clearly just concerned with procedure. In light of this, it seems that the courts have come to concede, at least implicitly, that administrative law is often deeply involved in the merits and substance of decision.

e) Constitutional Review

Moreover, the constitutionalisation of administrative law can also be seen in respect of well-established review grounds. The approach of the court in Ngai Tahu,⁶⁰ for instance, comes very close to constitutional review. Ngai Tahu had the only whale-watching permit and sought judicial review to stop the grant of a license to another competitor because they had invested heavily in their business and wanted a five-year monopoly to establish themselves. The court held that the Treaty was not only an expressly mandatory relevant consideration but also a residual factor of weight to be taken into account.⁶¹ As a result, the Director-General was acting unlawfully because he did not approach the issue by giving the Treaty a sufficient degree of prominence and was, thus, acting inconsistent with it. Again, the Court of Appeal moves away from the mandatory relevant consideration 'ticking the box' approach to one where the decision-maker must exercise his discretionary power consistent with fundamental rights, here those guaranteed in the Treaty of Waitangi.

While the Court of Appeal in Ngai Tahu does not go as far as to expressly say that the Director-General acted unreasonably, the judgment does implicitly so, as it accords the Treaty a substantial degree of weight. The weight becomes decisive in terms of the outcome despite the fact that the court emphasises marine mammals as the primary consideration, and that

⁵⁹ See n 12 above, 265.

⁶⁰ Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA).

⁶¹ *Ibid*, 560.

Treaty is not determinative of the outcome.⁶² In effect, it is very difficult to think of a way the decision could have been decided again, in accordance with the judgment, where the outcome would amount to anything other than the five-year monopoly period for Ngai Tahu. Hence, the Treaty here is so decisive that the Director-General can no longer exercise the discretion without deciding in accordance with it. That is to say, where the discretion unreasonably infringes on a Treaty interest that no reasonable Treaty partner can possibly exercise, the courts transcend the proceduralism of 'ticking the boxes' and turn it into a constitutional trump. The same is true, as regards cases concerned with International Human Rights instruments such as Tavita.⁶³ To conclude, the appeal/review distinction has not always been endorsed in the New Zealand courts even as regards the traditional grounds of review.

II. Is 'Hard Look' Review in New Zealand Legitimate?

1. Ultra Vires vs. the Rule of Law

In the past, judicial review was considered to be ultra vires review, which worked well with the appeal/review distinction and deference to parliamentary sovereignty. As discussed above, the courts focused mechanically on the procedures of decision-making and eschewed substantive principles of judicial review. By contrast, 'hard look' review, no longer concentrates primarily on statutory intention and rejects the formalist methodology as applied by traditional grounds of review.⁶⁴ The legitimacy of these more invasive review powers flows from the historical role of the courts to uphold the rule of law. As follows, the rule of law provides both, a justification for judicial review and a substantive basis for quashing decisions, seeing that the courts often turn to values and

⁶² See n 60 above, 560.

⁶³ See n 12 above.

⁶⁴ See n 45 above, 368.

principles found in the common law to reach their decision.⁶⁵ Thus, on the face of it, 'hard look' review appears legally and constitutionally justified.

The courts constitutional responsibility may be a good thing since the past emphasis on parliamentary sovereignty discounted higher law values and marginalised the role of the courts.⁶⁶ Surely, judges should not always remain passive to the ethical justification of governmental or administrative decision-making. It is also important to note that administrative law developments have overtaken the ultra vires doctrine as sound justification for judicial review even as regards the well-established grounds.⁶⁷ In Electoral Commission v Cameron,⁶⁸ for instance, the Broadcasting Standards Complaints Board was held to be amenable to review, although it was a non-statutory body exercising de facto powers. In the end, the decision was struck down but it defies description to say that it was ultra vires.⁶⁹ More generally, presumed parliamentary intent cannot account for what the courts do when they overturn decisions like that in Fjordland Venison. Eventually, even as regards traditional grounds of review, the courts re-embraced the rule of law as primary justification, exemplified by Peters v Davison.⁷⁰ As a result, 'hard look' and the well-established review grounds appear to be similar in terms of their underlying justification.

2. New Zealand is not America

Nevertheless, it is important to note that New Zealand does not have a written and entrenched Constitution committed to the purposes of limited

⁶⁵ Ibid, 373.

⁶⁶ Ibid, 368.

⁶⁷ See n 45 above, 366.

⁶⁸ Electoral Commission v Cameron [1997] 2 NZLR 421 (CA).

⁶⁹ See n 45 above, 366.

⁷⁰ Peters v Davison [1999] 2 NZLR 164, 188 (CA).

government as the Americans do.⁷¹ The executive and legislative powers of the United States are subject to judicial review whereas in New Zealand, only executive decision-making is reviewable. However, legislation and the common law in New Zealand are separate systems of law, although clear legislation will prevail over the common law in cases of conflict.⁷² As discussed above, the courts no longer purely rely on the ultra vires doctrine to justify review but the rule of law, which may be regarded as a more constitutional substitute to legitimise 'hard look' review in New Zealand. In light of the above, 'hard look' review may be regarded as appropriate and moreover adequate to the New Zealand setting, especially seeing the Americanisation of New Zealand society in recent years.

3. Separation of Powers

However, the American way of constitutional adjudication might undermine our Westminster style constitution in several ways. First of all, not all principles and values the courts resort to in reaching their decision, are part of the common law or statute law in general. Where the courts uphold values embodied in unincorporated international human rights treaties, it becomes a lot harder to justify 'hard look' review as exercise of constitutional responsibility, seeing that these values have not been recognised as part of the system yet. In America, Parliament is more involved in the Treaty making process, which justifies the courts in looking at international values in this respect. New Zealand courts, on the other hand, may be seen to exceed their constitutional role where they uphold unincorporated treaty values, and, thus, incorporate them by the backdoor. In view of that, courts also act as legislator to a certain extent, as judicial treaty incorporation can have significant effects on domestic law. In addition to impinging on Parliament's constitutional role, the same is true

⁷¹ See n 45 above, 355.

⁷² Ibid, 357.

for the Executive. The courts might be inclined to not only look closely at the decision but also impose their own point of view. Even evidence in the American setting suggests that there is too much involvement by the courts second-guessing everything.⁷³ Consequently, the courts put their own legitimacy at risk.⁷⁴

4. Public Interest Litigation

In addition, importing 'rights talk' and 'hard look' review from the United States may foreshadow the legalisation of politics and politicisation of the judiciary in New Zealand. But unlike in America, New Zealand does not have specialised administrative law courts. As a result, various questions arise as to whether the un-elected judiciary is better equipped to deal with policy issues than administrative officials, especially in terms of expertise. Capacity is another issue, seeing that the judges are not allowed to make inquiries into the case themselves but are only able to hear what the parties bring forward. Therefore, many voices are bound to remain unheard.

Moreover, as regards the upholding of fundamental values one must ask about whose values are involved. This is of particular importance because public interest litigation often arises in respect of highly controversial matters where reasonable views can differ. An example is the right to life often emphasised as one of the fundamental rights, which triggers 'hard look' review. However, if litigation was commenced in context of abortion, invasive review may not be the best option, seeing that judges may naturally be inclined to draw on their personal values in assessing what is in the public interest, irrelevant of whether there is room for differing views.

⁷³ Genevra Richardson and Maurice Sunkin "Judicial Review: Questions of Impact" (1996) 22 PL, SPR, 79.

⁷⁴ Geoff Airo-Farulla "Rationality and Judicial Review of Administrative Action" (2000) 24 Melb ULR 543, 560.

CONCLUSION

To conclude, 'hard look' review in New Zealand requires the justification of alleged rights-infringing behaviour and, therefore, inherently rejects the traditional appeal/review distinction. Well-established substantive grounds of review, on the other hand, are often characterised in narrow terms of procedural review. However, this emphasis on procedure obscured the fact that administrative law is often deeply involved in the merits of the decision at issue. In fact, examining the case law more carefully shows that the judges have been taking a closer look at the substance of decision-making all along. Wednesbury unreasonableness, for instance, is inherently values-driven. In highly political cases, however, the judges have always been able to fall back on the original Wednesbury test and leave the decision to the administrator. In context of 'hard look' review, that is no longer so.

There are ever more hooks, including fundamental common law, civil, political and human rights, with which to pull controversial claims out of the political waters. Internationalisation accentuates that development by reinforcing, and in some cases adding to, the rights that claim recognition from the courts.⁷⁵ In view of that, the courts have to be careful not to cast their lines too widely, seeing that they might undermine their own legitimacy. Nevertheless, judges do have a constitutional responsibility in upholding the rule of law. Accordingly, the protection of fundamental rights should not always defer to a decision-maker who is manifestly wrong even if acting in good faith. But questions remain as to how far the judiciary should go and perhaps whether a more principled and explicit test is needed.

⁷⁵ See n 18 above, 105-106.