



# JUDICIAL CAPTURE OF POLITICAL ACCOUNTABILITY

JASON N. E. VARUHAS

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## Executive Summary

1. Institutions such as the Parliamentary Ombudsman play a very important role in the British constitution, promoting governmental accountability through political process. Such political accountability mechanisms are intended to be separate and distinct from courts and legal processes, and much of their value lies in their distinctive nature. The Ombudsman, for example, is constituted to investigate non-legal wrongs – specifically instances of poor public administration which give rise to no legal claim.
2. Traditionally courts have adopted a restrained approach to review of such political accountability processes, aware of the dangers of undermining the distinctive character of these mechanisms and of intruding upon matters which properly lie in the sphere of politics.
3. However, these political accountability mechanisms are increasingly being captured by courts. In recent years the courts have adopted an aggressive approach to judicial review of accountability institutions such as the Ombudsman and public inquiries.
4. This trend gives rise to a number of serious concerns. The judicial action in question undermines Parliament's intent in enacting schemes of political accountability. Through their interventions the courts have extended judicial review into the domain of ordinary politics, undermining the courts' legitimacy, supplanting the role of political institutions and placing political discourse in a legal straitjacket. While often motivated by a concern to enhance political accountability mechanisms, these ill-advised interventions have only undermined their proper functioning.
5. This paper focuses upon developments in judicial review of the Ombudsman process, which are emblematic of wider, troubling trends across judicial review. Ombudsman investigations have increasingly wound up in court, with judicial scrutiny and intervention spreading to all facets of the Ombudsman process. For example, strikingly aggressive judicial approaches have been taken to review of procedures adopted by the Ombudsman as well as to the substantive findings and recommendations in Ombudsman reports.
6. The newest and most radical turn in the case law, on which the paper focuses, is that the courts have extended the scope of review beyond the Ombudsman's reports and procedures to encompass the political aftermath of Ombudsman investigations.
7. Courts have asserted jurisdiction to review Ministerial rejections of findings of maladministration made by the Ombudsman. And they have adopted an exceptionally intrusive approach to review of the substance of such responses. That is, courts have intervened merely on the basis that the court disagrees or is not itself convinced by the Minister's reasons for rejecting the Ombudsman's findings.

8. This new twist in the case law gives rise to serious concerns:
  - a. The Ombudsman scheme was created to better enable Parliament to hold the government to account. The courts, by asserting jurisdiction to adjudicate upon the convincingness of Ministerial responses to Ombudsman findings, supplant Parliament's central role in the process and thereby completely undermine the political scheme of accountability established by the relevant legislation. Under the statutory scheme it is for Parliament to scrutinise governmental responses to Ombudsman reports, not courts.
  - b. The Ombudsman is intended to be a servant of Parliament, an investigatory facility to aid Parliament in holding government to account. By effectively binding government to accept the Ombudsman's findings the courts elevate the Ombudsman above the status of a servant, conferring on the Ombudsman a primary jurisdiction over government, thus bypassing Parliament. In doing so the courts again distort the statutory scheme given there is no provision for Ombudsman findings to have binding legal force.
  - c. The basis for legal intervention is dubious given a Minister's response is made in the province of ordinary politics, such responses not being governed by any statutory provision whatsoever; no response is even required under legislation. Even if review of the substance of Ministerial responses is permissible at all, the fact such responses are not in any way constrained by statute suggests the Minister should have maximal flexibility to respond how he or she sees fit. Instead courts have taken a prescriptive approach, dictating to Ministers what are good or bad reasons for disagreeing with an Ombudsman report.
  - d. The legislation provides for a particular consequence where government does not remedy findings of maladministration: it provides for the Ombudsman to lay a special report before Parliament. It is not for the courts to superimpose upon the statutory scheme their own choice of legal consequence.
  - e. Judicial assertion of a substantial role in the Ombudsman process leads to accountability overkill. Whenever government has disputed major reports by the Ombudsman it has faced unrelenting political scrutiny and pressure from Parliament and multiple other interlocking political accountability mechanisms, which in turn has generally resulted in provision of redress for those who have suffered maladministration. The Ombudsman process, as a mechanism for political accountability, is working as it should. As such, litigation which involves the same actors making the same arguments in respect of the same facts is unnecessary and wasteful.
  - f. Not only is judicial review unnecessary and wasteful but it undermines the intended operation of the Ombudsman process. Increased recourse to lengthy litigation, which the courts are willing to entertain, adds costs, delay, formality and an adversarial process to a mechanism that it intended to be quick, inexpensive, informal, investigatory and distinct and separate from legal process.

- g. The threat of or actual litigation undermines and impoverishes the parliamentary-political discourse that Ombudsman reports were intended to foster. Political actors do not feel they can debate or comment upon matters which are or may be subject to litigation. Further, a court ruling as to the convincingness of a Ministerial response or an Ombudsman's finding operates to trump and cut off political and parliamentary debate of the matter.
  - h. Increased judicial intervention, while sometimes defended on the basis that it may enhance the status of the Ombudsman and his or her reports, has only undermined the Ombudsman. In the course of review of the Ombudsman process the courts invariably, either directly or indirectly, criticise Ombudsman reports and reasoning therein. The Ombudsman is already highly respected, with its recommendations for redress nearly always implemented; judicial interventions are thus unnecessary and only likely to do harm. To these points we may add that the Ombudsman, as a servant of Parliament, is accountable to Parliament. Where courts adjudicate on the merits of Ombudsman reports they once again supplant Parliament's role.
9. These latest developments in judicial review of the Ombudsman process ought to be overruled by the Supreme Court at the next opportunity.
10. These Ombudsman cases are examples of a wider phenomenon of judicial capture of political accountability mechanisms. Other examples include judicial review in the context of public inquiries and in relation to the ministerial veto under freedom of information laws. Across these contexts we find courts reaching deep into the realm of politics, and undermining statutory schemes for political accountability.
11. The expansion of judicial review beyond its proper bounds is not limited to review of political accountability mechanisms, albeit judicial readiness to intervene in political mechanisms such as the Ombudsman process are particularly striking and inapt. The cases considered in this report are part of a far wider trend in which courts are disposed to intervene more readily in the substance of government decision-making, and dictate what count as good or bad reasons for executive action. Judicially-articulated substantive values are becoming the focus of exercise of public power rather than public goals set by Parliament. The result of these developments is that judicial review is being plunged into a legitimacy crisis.



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# 1

## Introduction

This paper examines the increasing capture of political accountability mechanisms by courts. Institutions such as the Parliamentary Commissioner for Administration (the Ombudsman or PCA) are intended to operate in the political sphere, securing accountability through political processes. They are designed to be separate and distinct from courts and legal processes.<sup>1</sup> Much of the value such institutions add to the UK's constitutional framework lies in their distinctive nature. Traditionally courts have been sensitive to the distinctiveness of such mechanisms and the dangers of overstepping into the realm of politics, and adopted a posture of studied restraint in judicial proceedings concerning the Ombudsman, public inquiries and like institutions. However, in recent years, consonant with more general trends in judicial review, courts have evinced an increased willingness to intervene in the operation of such political accountability processes.

This expansionist trend gives rise to a number of concerns. Increasingly frequent and intrusive judicial interventions run against the grain of legislation governing political accountability mechanisms, such as the Ombudsman, and undermine Parliament's intentions that these institutions should be separate and distinct from legal processes. Further, increasing judicial activity in this sphere may lead to courts illegitimately supplanting the role of politicians and political institutions, judicial capture and impoverishment of political discourse, and judges being drawn into ordinary political matters – i.e. those matters we would expect to be the proper province of democratic institutions and processes – which they lack constitutional legitimacy and institutional expertise to determine. Some of these interventions have been premised on the view that judicial intervention will enhance the operation of mechanisms such as the Ombudsman process. Despite the best intentions judicial intervention is both unnecessary for the proper operation of the Ombudsman process and likely to undermine its proper functioning.

These developments are part and parcel of wider trends in judicial review. These trends include increased judicial willingness to intervene in and regulate matters which are quintessentially political; diminished judicial willingness to take statute and Parliament's intention seriously; and increased willingness to intervene in the substance of public decision-making, as opposed to the process by which decisions are made, on the basis of judicial standards reflective of substantive values not sourced in the empowering statute. These changes have not been the direct result of prompts by the legislature, for example via the Human Rights Act 1998, or required by supranational norms, such as EU law. Rather these changes have been effected by domestic judges on their own motion, through decisions

<sup>1</sup> Please note I have sought to keep footnotes to a minimum.

made at common law across a wide range of settings. The stream of decisions on political accountability mechanisms fit within this trend. But of all types of cases these cases are amongst the most inapt for judicial intervention, given such mechanisms are intended to operate in the political realm, and be distinct and separate from courts and legal procedures.

This paper focuses on judicial review of the Ombudsman process, this jurisprudence being emblematic of a more general trend towards greater judicial intervention in political accountability mechanisms. The paper begins by providing some necessary context, setting out the role of the Ombudsman in the British constitution. It then examines the expansionist trend in judicial review of the Ombudsman process. The analysis here focuses on the newest and most striking turn in the case law: the courts have asserted jurisdiction to review Ministerial rejections of Ombudsman findings, and subjected such Ministerial responses to searching scrutiny. The paper identifies a number of concerns raised by these developments, and the more general trend towards increased judicial intervention in the Ombudsman process. These include that the judicial approach is fundamentally at odds with the statutory framework; that increased judicial intervention leads to accountability 'overkill'; that judicial intervention is unnecessary as political mechanisms are effective in holding government to account and securing redress for aggrieved individuals; that the increasing frequency and boldness of judicial intervention threatens to undermine the intended nature and operation of the Ombudsman process; and that ultimately such an aggressive judicial approach is undermining the status of the Ombudsman office. Arguments in favour of this expanded judicial role are considered. Critical examination of these arguments only serves to reinforce the conclusion that the courts have overstepped constitutional boundaries. Lastly, the paper places the Ombudsman line of cases in the context of wider trends in judicial review of political accountability mechanisms, and a more general shift in judicial review towards an open-ended, discretionary approach to review of the substance of executive decisions.

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# 2

## The Role of the Ombudsman

The PCA's role can only be understood fully against the historical and constitutional context in which the office was established. Political events around the middle of last century, such as the Crichton Down affair, showed that there were gaps in the procedures for redress available to individuals vis-à-vis the ever-expanding administrative state. Along with the implementation of many of the recommendations made by the Franks Committee,<sup>2</sup> which had been established to investigate issues relating to administrative justice, the establishment of the office of the PCA in 1967 was an important step towards filling these gaps. Consistent with the British constitutional tradition of favouring political accountability and political control of power, and the principle of ministerial responsibility to Parliament, the PCA was to be a 'servant' of Parliament; a Parliamentary and not a public or governmental institution.<sup>3</sup> The White Paper, which explained the Government's rationale for establishing the PCA, observed that '[i]n Britain, Parliament is the place for ventilating the grievances of the citizen' and proposed that the services of the PCA would provide MPs with a 'better instrument' with which they could 'protect the citizen'.<sup>4</sup> The PCA was to strengthen Parliament's ability to uncover administrative failures which caused injustice to individuals, call the executive to account, and where appropriate secure administrative justice for individuals through political process. It was also envisioned that operation of the Ombudsman mechanism would lead to 'further improvement of administrative standards and efficiency'.<sup>5</sup> Overall, 'The work of the Parliamentary Commissioner is central to the administrative and political process'.<sup>6</sup>

The Ombudsman procedure is governed by the Parliamentary Commissioner Act 1967 (the Act). Under section 5(1) the PCA is empowered to investigate any 'action taken in the exercise of administrative functions' by government departments or other enumerated authorities. The PCA may only launch an investigation where complaints are made by 'members of the public' claiming 'to have sustained injustice in consequence of maladministration', and only if the complaint is made to a MP and that MP decides to refer the complaint; the PCA is not empowered to receive complaints directly from the public or initiate investigations on its own motion. Importantly, the PCA may not investigate complaints where a remedy exists before a tribunal or court of law, unless it is unreasonable to have expected the complainant to resort to such remedy. In this way the PCA is principally a mechanism for investigation of *non-legal* wrongs – specifically, instances of poor public administration which are not unlawful. It is intended to offer a route to redress distinct from courts and legal process.

<sup>2</sup> *Report of the Committee on Administrative Tribunals and Enquiries*, Cmd 218 (1957).

<sup>3</sup> HC Deb vol 734 col 43 18 October 1966; R Gregory and P Giddings, *The Ombudsmen, the Citizen and Parliament* (London: Politico's, 2002) 28.

<sup>4</sup> *The Parliamentary Commissioner for Administration White Paper Cm 2767* (1965) [4].

<sup>5</sup> *Ibid* [13], [15].

<sup>6</sup> C Harlow, 'Ombudsmen in Search of a Role' (1978) 41 MLR 446, 454.

The Ombudsman adopts a flexible, investigatory process, characterised by almost complete discretion as to how the investigation is carried out, in contrast to the adversarial, formal process associated with courts. Its investigations are, unlike court proceedings, conducted in private so as to facilitate free access to official documents. Reflecting the distinctive investigatory nature of the process, the PCA enjoys wide evidence gathering powers, which go beyond those of courts. The PCA does have some powers in common with courts, such as power to compel attendance of witnesses. But such powers are by no means unique to courts; for example parliamentary committees also have them. Indeed, any investigatory body would require such powers to fulfil its tasks effectively.

“In contrast with the delays and costs that characterise litigation the Ombudsman process is intended to be accessible, cheap and speedy”

In contrast with the delays and costs that characterise litigation the Ombudsman process is intended to be accessible, cheap (it is free) and speedy. Often the Ombudsman has been drawn from the civil service, and there is no requirement that the office-holder have formal legal training. Consonant with his or her role as an officer of Parliament, the Ombudsman is accountable to a parliamentary committee: the Public Administration Select Committee (PASC) (recently renamed the Public Administration and Constitutional Affairs Committee).

At the conclusion of an investigation the PCA records his or her findings in a report and sends this to the referring MP and the public authority that was the subject of the complaint. Reflecting the different role of the Ombudsman compared to courts, the Act does not confer power upon the PCA to issue legally binding orders. However, in cases where injustice is found to result from maladministration it is common practice for the PCA to make recommendations regarding appropriate remedies and/or improvements to administrative procedures. If it appears to the PCA that injustice has occurred and no remedy has been provided or is likely to be provided to aggrieved individuals, the PCA may lay a special report before Parliament.

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# 3

## Judicial Intervention in the Ombudsman Process

Despite the intention that the Ombudsman process be distinct from courts and legal process, Ombudsman investigations have increasingly wound up in court, and the courts have been increasingly willing to intervene.

Though ‘[i]t is highly improbable that anyone in 1967 foresaw that Ombudsman decisions might one day be judicially reviewed’<sup>7</sup> the courts have been increasingly willing to review and invalidate findings of maladministration made by the Ombudsman. The starkest example of this trend is the *Balchin* line of cases, in which the Ombudsman’s report was subjected to judicial scrutiny in three separate bouts of litigation, the Ombudsman’s findings were for the first time found unlawful, and the Ombudsman’s findings quashed on two separate occasions.<sup>8</sup> More recently the Supreme Court adopted a strikingly aggressive approach to review of the substance of an Ombudsman’s recommendations for redress.<sup>9</sup> As Endicott has observed, ‘[p]ublic administration has little to gain from the general principle that judges, rather than the Ombudsman, should decide the considerations on which the Ombudsman should base their report’; such approach ‘would only be justified ... if judges were generally better at an ombudsman’s work than ombudsmen are’.<sup>10</sup> Furthermore intensive review by one accountability mechanism (the courts) of another accountability mechanism (the Ombudsman) which is itself answerable to the ultimate political accountability mechanism (Parliament) smacks of ‘oversight overkill’.<sup>11</sup> Other aspects of the Ombudsman process have also been subject to challenge in recent years including the procedure adopted by the Ombudsman in conducting their investigation and the Ombudsman’s decisions as to the scope of investigations.

The case law took a radical new turn in the *Bradley* and *EMAG* litigation in the late 2000s, in which the courts expanded the scope of review of the Ombudsman process beyond the Ombudsman’s procedures or report, so that review would now encompass the political aftermath of the Ombudsman investigation.<sup>12</sup> Not only was the scope of review enlarged but in these cases the courts adopted an exceptionally aggressive approach to review. These most recent and highly contentious developments will be the paper’s focus. Instead of applying to judicially review decisions made by the Ombudsman, litigants for the first time sought review of a government Minister’s response to the Ombudsman’s findings of maladministration and injustice. In fact, litigants even went one step further and sought review of the governmental response to the Ombudsman’s recommendations for redress. In these cases the

7 C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge: CUP, 2009) 562.

8 *R v Parliamentary Commissioner for Administration, ex p Balchin (No 1)* [1997] COD 146; *R v Parliamentary Commissioner for Administration, ex p Balchin (No 2)* [2000] 2 LGLR 87; *R v Parliamentary Commissioner for Administration, ex p Balchin (No 3)* [2002] EWHC (Admin) 1876.

9 *In the matter of an application by JR55 for Judicial Review (Northern Ireland)* [2016] UKSC 22 at [30] (albeit this was in the different statutory context of the Northern Ireland Commissioner for Complaints, now superseded by the Northern Ireland Public Services Ombudsman).

10 T Endicott, *Administrative Law*, 3rd edn (Oxford: OUP, 2015) 505–508.

11 *Ibid.*

12 *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116; *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495.

courts not only quashed the Minister's decisions to reject the Ombudsman's findings of maladministration, but in doing so subjected the Minister's views to searching scrutiny, effectively intervening because the court disagreed with or was not itself convinced by the Minister's reasoning or views. In adopting such an approach the courts had insufficient regard for, or gave insufficient weight to, the scheme and purpose of the Act, the distinctive, quintessentially political nature of the Ombudsman process, and the negative impacts such judicial interventionism may have on operation of the Ombudsman process. Indeed it is questionable whether the judicial approach adopted would ever be legitimate in any review context (outside of cases concerning basic human rights), let alone in the context of an inherently political process, intended to be separate from courts.

### Prelude to the *Bradley* and *EMAG* litigation

*Bradley* involved a judicial review challenge to the government's response to the Ombudsman's major report on the winding up of occupational pension schemes. The subsequent case of *EMAG* entailed applications to review the governmental reaction to the Ombudsman's investigation into Equitable Life. Common to both the occupational pensions and Equitable Life sagas is that policyholders lost or stood to lose money entitlements due to collapse of or financial difficulties faced by financial institutions. In both cases it was wholly unlikely that any legal claim for compensation against government, for example through the law of torts, would succeed. A significant number of these policyholders filed complaints, via their MPs, with the Ombudsman, alleging government maladministration in regulation of the relevant financial institutions.

#### Trusting in the Pensions Promise

On 15 March 2006 the PCA published her report, *Trusting in the Pensions Promise*.<sup>13</sup> The report followed over 200 complaints regarding situations where individuals had lost all or part of their final salary occupational pensions upon winding up of pension schemes.

The Department of Work and Pensions had responsibility in government for occupational pensions policy and the related regulatory framework. This included responsibility for publishing official information regarding pensions and approving changes to the 'Minimum Funding Requirement' (MFR), which required each scheme to hold a minimum level of assets.

The PCA made three findings of maladministration. The first and third are relevant here. The first was 'that official information – about the security that members of final salary occupational pension schemes could expect from the MFR ... was sometimes inaccurate, often incomplete, largely inconsistent and therefore potentially misleading'. The third was that the Department had approved a change to the MFR in 2002 without proper consideration of relevant evidence.

The PCA found the complainants suffered injustice in consequence, 'in the forms of a sense of outrage, lost opportunities to make informed choices or to take remedial action, and distress, anxiety and uncertainty'. While government maladministration alone did not cause complainants' financial losses, 'it was a significant factor in creating the environment in which those losses were crystallised'. The PCA made five recommendations. The first and most prominent

<sup>13</sup> HC 984 (2006).

was that Government consider restoring promised benefits ‘by whichever means is most appropriate, including if necessary by payment from public funds’.

In mid-March 2006 the responsible Minister rejected all findings of maladministration, that there was any causal link between the Government’s actions and individual losses, and all but one of the PCA’s recommendations. Some three months later legal proceedings were commenced by individuals who had suffered loss through the winding up of pension schemes, and who were members of the pressure group, Pensions Action Group. They challenged the Minister’s decisions to reject the first and third findings of maladministration, the causal link between government action and individual financial losses, and the recommendation that government compensate individuals.

#### Equitable Life: A Decade of Regulatory Failure

Equitable Life, the oldest mutual assurance society in the world, specialised in provision of pensions, and particularly ‘with profits’ pensions.<sup>14</sup> During the 1990s Equitable Life ran into increasing financial difficulties, and closed to new business in 2000. In consequence of Equitable’s financial difficulties there was a significant reduction in annuity payments to policyholders. The Ombudsman investigation considered 898 complaints by former and current policyholders of maladministration by those public bodies responsible for prudential regulation of Equitable Life and/or the Government Actuary’s Department (GAD). In July 2008,

“In consequence of Equitable’s financial difficulties there was a significant reduction in annuity payments to policyholders. The Ombudsman investigation considered 898 complaints by former and current policyholders of maladministration”

following a four-year investigation, the PCA published her report, *Equitable Life: A Decade of Regulatory Failure*.<sup>15</sup> The report made ten findings of maladministration, and found that six of these instances of maladministration had caused individuals injustice. The PCA recommended that government apologise and consider setting up a compensation scheme for policyholders who had suffered financial loss. In response the government accepted nine

of the findings of maladministration in whole or in part, and three of the findings of injustice. It issued an apology and accepted that some ex gratia payments should be made; however, the government’s proposals for compensation were far more limited than the scheme proposed by the Ombudsman.

Of those findings of maladministration disputed by government, and which formed the focus of the subsequent judicial review litigation, most (but not all) related to: GAD’s failure to raise questions with Equitable Life over information it had published, such as its regulatory returns (findings 2 and 4); GAD’s failure to raise questions over policies adopted by Equitable, such as the Differential Terminal Bonus Policy, which enabled Equitable to adjust the size of the terminal bonus payable to policyholders (finding 3); or GAD’s failure to request information from Equitable, including details of its resilience reserve, this information being necessary to assess Equitable’s valuations of its assets and liabilities (finding 5).

The findings of injustice disputed by government were primarily those indicating that policyholders who had relied on misleading or unreliable

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<sup>14</sup> ‘With profits’ pensions entailed Equitable investing premiums paid by policyholders, and then paying out bonuses from the proceeds.

<sup>15</sup> HC 815-I (2008).

information, which proper government inquiries or action may have cured, suffered financial loss through their reliance, or lost opportunities to make fully-informed decisions. In general government rejected such findings on the basis that the same losses would have been suffered irrespective of regulatory failures.

The matter was in court several months after the government's response. A pressure group, Equitable Members Action Group (EMAG), with a membership of 21,000 current or former Equitable Life policyholders, sought review of the government's rejection or partial rejection of the Ombudsman's findings of maladministration and injustice, and the government's response to the Ombudsman's recommendations for compensation.

### The Judicial Approach to Review in *Bradley* and *EMAG*

In the *Bradley* litigation the courts were for the first time asked to review governmental responses to Ombudsman reports. They obliged. Once the precedent had been set the next challenge was not long in coming: the *EMAG* case was heard under a year and a half later. In each case the courts found the government's rejection of certain of the Ombudsman's findings unlawful, and quashed the Minister's response. As a result the relevant Minister was effectively bound to accept the Ombudsman's findings and reconsider the Ombudsman's recommendations for compensation in this light. In each case the courts also upheld the government's rejection of certain of the Ombudsman's findings as lawful, thus allowing government to sustain its disagreement with the relevant findings.

The basis for these challenges was not that the responsible Minister had acted contrary to the terms of the Act: the statute does not state that the Ombudsman's findings shall be legally binding. Indeed the statute includes no provision directly addressing the government's response, not even imposing a duty to respond. Nor did the challenge relate to the process by which the Minister has come to his view (albeit it is difficult to see how procedural grounds of review could apply in this context). Far more controversially the challenge was to the very substance of the Minister's response itself and not based on any provision of the statute i.e. the claimants sought to impugn the actual decision reached or the substantive reasoning that led the Minister to his view according to judicially-articulated standards. The courts' traditional approach to reviewing the substance of executive decisions at common law has been one characterised by studied restraint, consonant with the orthodox conception of judicial review as a secondary, supervisory jurisdiction. Courts will only intervene if the decision and/or reasons are at the outer edges of acceptability. The standard articulated in the leading case of *Wednesbury* has long stood as a totem of non-intervention: a court may only intervene where the executive decision was one so unreasonable that no reasonable decision-maker could have made it.<sup>16</sup>

The reasons for this traditional approach are axiomatic. Within the allocation of constitutional responsibilities particular matters are properly for Ministers to determine, not courts, and the Minister should retain the freedom to make decisions over such matters (albeit in this context it is not even clear the Minister is making a decision, as discussed below). The high threshold for judicial intervention on the traditional approach ensures the courts do not supplant the Minister's role. Further, the Minister is accountable directly to Parliament and

16 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.



its committees for his or her decisions. Deciding what executive action is best typically requires access to relevant information, such as data or the views of different parties who may be affected by a decision, or expertise, for example in administrative process or public policy, which the administration possesses, and courts do not. Furthermore, if courts do not discipline their interventions, and too readily enter the substance of executive decision-making, they may become embroiled in ordinary politics, undermining their independence from politics and ultimately their legitimacy. At the same time, ordinary, democratic political discourse may be placed in a straightjacket, hijacked by legal discourse and impeded by the constant threat of legal challenge.

In *Bradley* the Court of Appeal's approach to reviewing the government's response to the Ombudsman's findings entailed a radical departure from the orthodox *Wednesbury* standard, though there was no explicit acknowledgement of this departure in the judgment. The Court held that for the Minister to act lawfully he must act rationally in rejecting the Ombudsman's findings. It was not sufficient for the Minister to have his or her own rational view of whether maladministration transpired. Rather, the Minister's rejection of the Ombudsman's view in favour of his or her own must also be rational. Significantly, in *Bradley* irrationality did not equate to the orthodox *Wednesbury* standard, under which the Minister's decision could only be impugned if perverse, outrageous, in defiance of logic or wholly unreasonable. Rather, to be lawful the Minister's rejection of the Ombudsman's findings had to be based on 'cogent reasons'. From the Court's application of this test it is clear that the 'cogent reasons' test effectively involves the court asking for itself whether the Minister's reasons stack up or are convincing. There is very little light between such approach and the court intervening simply because it disagrees with the Minister's view. Thus, if the court disagrees with the Minister's reasons the Minister is effectively bound to accept the Ombudsman's findings – this is not very far at all from the court simply standing in the Minister's shoes and itself determining whether the Ombudsman's findings should be accepted or rejected.

In *Bradley* the Court's method was to set side-by-side the Ombudsman's findings and supporting reasons, and the Minister's rejection of those findings and the reasons in support of that rejection, and in effect determine, for itself, whether the Ombudsman or the Minister had the better side of the debate. Consider the Court's approach to review of the Minister's rejection of the Ombudsman's first finding of maladministration, which concerned official publications. The debate revolved around one official leaflet which the Ombudsman had found misleading. It provided an assurance that the aim of the MFR was to ensure that if a member's pension scheme was wound up, the cash value of accrued rights transferred to another scheme would provide benefits equivalent to those expected under the original scheme. In reality the MFR only provided an even chance of equivalent benefits. The Minister argued the pamphlet was not inaccurate as, among other things, it was only intended to be a brief, non-technical guide to complex legal arrangements; was expressed in qualified terms and provided for a disclaimer that it should not be relied upon as authoritative; while scheme trustees had ultimate responsibility for members' interests, and it is they who should have been consulted for further advice.

These are certainly not perverse arguments, and the Court was willing to accept the Minister's view was rational. However, this was not enough to convince the

Court. Not only did the Minister have to have good reasons for his own view. No matter how strong those arguments, he also had to have good reasons for rejecting the Ombudsman's contrary view. As the Court in *EMAG* and members of the Supreme Court have observed,<sup>17</sup> it is rather difficult to draw this distinction: is the holding of a particular view for excellent reasons not a good enough basis for preferring your view to another view? Putting these vagaries to the side, the Minister's reasons for rejecting the Ombudsman's view included that (a) he thought a reader would read the pamphlet differently to the way the Ombudsman had interpreted it, and (b) the pamphlet was only intended as a brief introduction, so that inclusion of more technical information would have introduced too much complexity. The Court weighed the Minister's reasons against the reasons given by the Ombudsman in support of her finding of maladministration. The Court quashed the Minister's decision on the basis that in the Court's view the Minister's arguments could not 'withstand scrutiny'. On point (a) the Court adopted its own view of the meaning of the pamphlet, and found that this matched the Ombudsman's view. On point (b) the Court also sided with the Ombudsman's reasoning that because more detailed information had been given in other documentation the Minister could not 'sustain' his view. As is apparent, the Court was not here saying the Minister had taken leave of his senses. Rather the Court simply took a different view of things, not being convinced by the Minister's reasoning, and finding the Ombudsman's reasoning more convincing on balance.

The Court's approach in *EMAG* was similarly intrusive, the Court saying that the 'cogent reasons' test required it to undertake 'careful examination of the facts of the individual case'. For each contested finding the Court set out the Ombudsman's findings, the reasoning in support of those findings, the Minister's basis for rejecting those findings, and the Minister's supporting reasoning. The Court then proceeded to arbitrate between the competing views, as if it were resolving a dispute between the Minister and Ombudsman on its merits, ultimately determining the dispute by giving its own view on which reasoning it found most plausible. Take for example the Court's review of the Minister's rejection of the Ombudsman's second and fourth findings of maladministration. Recall that the Ombudsman had found maladministration on the basis that the GAD had not asked or resolved questions relating to Equitable's regulatory returns, so that the returns were unreliable. The government rejected this finding on the basis that if the GAD had made inquiries this would have made no practical difference as the returns did not breach any regulatory standard, and the Ombudsman did not find that inquiries would have led to the prudential regulator taking action. Having pored over the government's response and the Ombudsman's report, the Court found the response lacked cogency and was thus unlawful. It did not come to this conclusion on the basis that the Minister's reasons evinced a clear abuse of power or defied logic or were wholly unreasonable. Rather, it did so on the much finer point that given 'the correct interpretation of the Ombudsman's report' – that is, the interpretation which the Court considered correct – the Minister, in his response, had failed to appreciate the wider context of the Ombudsman's findings; in other words the response was too narrowly targeted or not responsive enough to the Ombudsman's report, as the Court had construed it according to its own 'holistic' approach to interpretation of the report.

17 *R (Evans) v Attorney General* [2015] 1 AC 1787, [159].

The EMAG litigation is also notable for the efforts made by litigants to push the bounds of review even further. The litigants went beyond seeking review of the Ombudsman's findings or review of governmental rejections of Ombudsman's findings, to seeking review of mere observations or comments made in passing by the government in its written response to the Ombudsman's report in the course of accepting the Ombudsman's findings; the litigants were evidently not happy with the way in which the findings had been accepted. These challenges failed on their merits but the Court did seem to countenance them – that is, to view them as permissible in principle – even if not with particular enthusiasm on the facts of this case.

Thus, the approach to review adopted in these cases represents a striking departure from the courts' traditional restraint, as encapsulated by the high standard for intervention set by the *Wednesbury* test. Review according to the 'cogent reasons' standard, which is 'not a precise test' (as the Court in EMAG observed), too easily collapses into the courts intervening simply because they disagree with the merits of the Minister's view. In this way the courts have trespassed into territory properly occupied by the Minister. It is of course true that the *Wednesbury* test has often been criticised as lacking precision. But what that test put beyond any doubt was that the primary decision was for the repository of the power, that non-intervention was the starting point, and that judges needed very strong reasons for impugning the substance of executive decisions: the decision had to evidence a clear or patent abuse of power, that is, irrationality had to leap from the page. This traditional approach is some distance from courts intervening simply because they feel the Minister's reasons are not particularly convincing or the Minister had not quite engaged with the Ombudsman's report to the court's satisfaction.

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# 4

## Respecting Parliament's Intent: Judicial Review and the Terms of the Act

This paper's central argument is that *Bradley* and *EMAG* are clear instances of judicial overreach. It is questionable whether the courts ought to engage in scrutiny of the substance of the Minister's response at all. And even if review of the substance of the decision is permissible the exceptionally low threshold for judicial intervention adopted under the 'cogent reasons' test cannot be justified. Statements in both *Bradley* and *EMAG* demonstrate the Courts were aware of the inherently political nature of the Ombudsman process and wary of overstepping the proper judicial role on review. This concern about encroaching upon the political sphere and the role of Parliament led the Courts to reject the extreme proposition that the Minister should never be permitted legally to reject the Ombudsman's findings. However, there was no serious consideration or discussion of (1) whether the courts ought to engage in scrutiny of the substance of the Minister's response at all, and if such review were permissible (2) how the nature of the Ombudsman process should affect the court's approach to conducting substantive review, including the test that should govern substantive review, and how the test should be applied.

This chapter argues that the approach adopted in *Bradley* and *EMAG* is inconsonant with the Act and undermines Parliament's intent in creating the Ombudsman scheme. Chapters 5–8 then go on to articulate further, wider concerns which tell against the approach in *Bradley* and *EMAG*.

Let us turn to the statutory scheme. There are strong reasons stemming from the provisions, scheme and policy of the Act which tell against courts engaging in substantive review of Ministerial responses at all. But even if one rejects these arguments and considers that courts ought to engage in substantive review it is clear that the statutory context cannot support the 'cogent reasons' approach; rather, if courts do engage in substantive review, they ought to apply either the orthodox *Wednesbury* standard, intervening only if the Minister's response is perverse, or preferably a 'super-*Wednesbury*' standard (discussed below), which sets the bar for judicial intervention even higher.

The Act does not address the status of the PCA's findings, and does not provide that they are capable of binding government. If Parliament had wished the findings to have legal force it could have provided for this in the Act. If there were any doubt over this, other features of the Act, and the scheme it creates,

strongly tell against this conclusion. The Ombudsman is a servant of Parliament, an investigatory facility designed to aid Parliament in holding the government to account and remedying grievances. If the Ombudsman could itself hold government to its findings – or a claimant could convince a court to hold government to those findings – the Ombudsman would cease to be acting as a servant of Parliament, but would rather bypass Parliament, exercising a primary jurisdiction over government. The design of the Ombudsman scheme – as an informal, investigatory mechanism distinct from courts, authorised to inquire into matters involving no legal wrong – reinforces that there was no intention for findings to have legal force. The power to make legally binding decisions is a characteristic we would associate with formal judicial processes, while one reason we accept courts making legally binding findings is because they follow strict and formal procedures, which provide for oral argument and testing of arguments in open court. The Ombudsman process is not characterised by these features.

Lord Neuberger, discussing *Bradley* in a subsequent case, described the Ministerial response as the second of ‘two decisions ... provided for in the same statute as part of an overall procedure’, the first decision having been taken by the Ombudsman.<sup>18</sup> However, the statement is doubly problematic: the Ministerial response is not a ‘decision’ and the statute provides for no procedure of which the response forms a part. This has ramifications for whether it is permissible for the courts to engage in review of the Minister’s response. It is first important to be clear that the Act includes no statutory provision addressing governmental responses to Ombudsman findings. There is not, for example, any provision under which the Minister makes a decision to accept or reject a finding. There is no provision requiring a formal response.<sup>19</sup> There is no provision setting out a process for response. There is no provision setting out criteria which a response must meet. Given these features it is difficult to characterise the government’s response as a ‘decision’ as such, and certainly not a decision pursuant to a statutory grant of decision-making power. Equally the Ministerial response does not involve an administrative act taken pursuant to a statutory duty to act. Ministerial rejections of Ombudsman findings are thus far removed from the paradigm case in which judges exercise judicial review; that is, a case in which a government official makes a decision pursuant to an express statutory power of decision, and thus with legal consequences. Such a decision might, for example, create legal entitlements or alter legal rights or legally-recognised interests i.e. the decision has direct legal ramifications. Similarly, where some administrative action is taken pursuant to a statutory power to do that act, or in fulfilment of a statutory duty, that act has some formal legal basis so that it is legitimate for courts to assume jurisdiction over such matters. There is in such cases a clear legal dimension to the administration action. In contrast the Minister’s response to the Ombudsman’s findings is more in the nature of a view or opinion taken by the Minister of the convincingness of the Ombudsman’s findings. It is hard to see how the espousal of such a view has any formal legal consequences. It is not grounded in a statutory power nor made in pursuance of a statutory duty; the Minister is simply voicing a difference of opinion. This explains why, at times, the respective courts in *Bradley* and *EMAG* struggled to identify what the Minister’s ‘decision’ was on particular findings; this is because the Minister is not, in his or her response, working towards a decision-outcome, as he or she would be

<sup>18</sup> *Evans* *ibid* [64].

<sup>19</sup> Further, if such a statutory duty to respond were provided for it would logically be framed as a duty to respond to *Parliament* rather than the claimant, given the whole premise of the Ombudsman scheme is that it is designed to facilitate Parliament’s ability to call government to account. The presence of such a provision would be another significant factor telling *against* judicial scrutiny of the governmental response, given scrutiny would be for Parliament, to which the response would be owed.

in exercising a statutory power of decision. That the Minister's response is more naturally characterised as a view or opinion as opposed to a formal legal decision in itself reinforces that courts should be reticent about reviewing the response at all, let alone readily intervening on substantive grounds. If there is no formal legal quality to the Minister's response it is difficult to see why the courts should be involved. As Laws LJ has observed, courts are properly concerned with 'legal obligation, and not merely good government practice'.<sup>20</sup> The courts will have manifestly overstepped constitutional boundaries if they take to adjudicating the convincingness of mere views or opinions espoused by a Minister in the course of political discourse and debate. There was no consideration of the nature of the Minister's 'decision' in *Bradley* or *EMAG* or any consideration of how the character of the Minister's response should impact upon review.

Notwithstanding how Ministerial rejections of Ombudsman findings are characterised, it is clear that the Minister's response is not expressly constrained by statute. Indeed it is not issued pursuant to any provision of the Act, and nor is there any duty to even issue a response under the terms of the Act. The lack of statutory provision for a response or of any express statutory language governing a response has ramifications for whether and to what extent the courts may properly engage in review of the response on substantive grounds. In an iconic statement of principle Lord Reed in *AXA* said that the court's proper role on review depends on various factors, including 'the extent to which the powers of the authority have limits or purposes which the courts can identify and adjudicate upon'.<sup>21</sup> As he went on to say,<sup>22</sup> if statutory powers are very widely drawn it will be difficult for a court to intervene in exercise of those powers on the basis that the decision-maker took into account irrelevant considerations, exercised their power for an improper purpose, or acted irrationally. By conferring a broadly framed power Parliament's intention is to afford the decision-maker maximal scope to determine what considerations are relevant to its decision, the purpose for which its powers should be exercised, and what constitute good or bad decisions. Thus where a statutory power is broadly framed the range of rational decisions lawfully open to the decision-maker are correspondingly widened so that a court will be extremely cautious about intervening on the basis of substantive grounds, and where the power is expressed in the broadest possible terms the court may well refrain from intervening on substantive grounds at all. This approach is one respectful of parliamentary intent. It also reflects that a broadly framed power, in contrast to a narrowly framed power, offers no 'cues' or objective 'pointers' by reference to which a court can judge what sorts of considerations or decisions are permissible or impermissible. Absent such objective pointers it will be difficult to see judicial intervention on the basis of the substance of a decision as anything other than intervention according to a mere subjective difference of opinion. If the courts are (rightly) unwilling to scrutinise the substance of decisions made pursuant to broad statutory provisions, then they should surely be even more reluctant to

“Where a statutory power is broadly framed the range of rational decisions lawfully open to the decision-maker are correspondingly widened so that a court will be extremely cautious about intervening on the basis of substantive grounds”

<sup>20</sup> *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] 1 WLR 3667, [46].

<sup>21</sup> *AXA General Insurance Ltd v The Lord Advocate* [2012] 1 AC 868, [142].

<sup>22</sup> *Ibid* [142]-[143].

enter the substance of a Ministerial response to an Ombudsman's finding given the Minister's response is not governed by any statutory provision whatsoever.

Another important consideration in examining whether it is permissible for the courts to engage in substantive review of a given decision is that judicial review, as traditionally characterised, is a supervisory, secondary jurisdiction, and a jurisdiction of last resort. The corollary of these basic propositions is that judicial review is only to be available where alternative routes to redress, particularly those provided for in statute, are unavailable, even if review would afford a more effectual, convenient or speedy remedy. If Parliament has specifically provided a route to challenge decisions, then the courts should not undermine that legislative choice by providing an alternative. In the context of the Ombudsman scheme the Act expressly provides such a route for challenging governmental refusals to implement an Ombudsman report; while the Courts in *Bradley* and *EMAG* made reference to this procedure they did not consider how it affected their jurisdiction to hear the case. Section 10(3) provides that if no redress is forthcoming from government, then the Ombudsman may lay a special report before Parliament, drawing the government's refusal to Parliament's attention. That the Act provides for this mechanism is not surprising given the Ombudsman was constituted to facilitate Parliament's traditional roles of holding government to account and redressing citizen grievances. It is true to say that access to judicial review is discretionary, so that a court may exercise its discretion to hear a case even if alternative mechanisms exist. But given all of the other powerful arguments against judicial intervention canvassed in this paper it is difficult to see why the courts should deviate from the default that review is a last resort. Thus the very decision to review the Minister's response to the Ombudsman's findings involves marked deviation from the orthodoxy that judicial review is a secondary, supervisory jurisdiction, and evinces a failure to consider carefully how the legislative scheme bears on the courts' role on review.

Crucial to determining the permissibility of and proper approach to substantive review is recognition that the PCA is a mechanism for securing political accountability and redress for aggrieved individuals through political processes. The PCA was 'originally established as an adjunct to Parliament, and thus a part of the political and administrative regimes',<sup>23</sup> and was designed to strengthen Parliament's ability to call the government to account where individuals had suffered injustice.<sup>24</sup> In other words the *raison d'être* of the Ombudsman scheme is to inform Parliament of instances of governmental maladministration causing injustice so that it can hold the government to account through whatever action it considers appropriate, if any. As such, any challenges to the substance of the Minister's response should be made in the realm of politics; this argument applies with especial force to challenges to the bare convincingness or cogency of the Minister's response. Where the courts scrutinise the substance of the Minister's response they risk supplanting Parliament's role and 'short-circuiting' the entire political scheme of accountability set up under the Act.

Significant features of the statutory scheme cast Parliament as the relevant institution for calling the government to account for findings made by the PCA. The PCA can only consider a complaint referred by a MP, thus preserving Parliament's primacy. The PCA must then report the results of the investigation to the referring MP and the relevant public authority. Yet notably there is no statutory

<sup>23</sup> M Seneviratne, 'Ombudsman 2000' (2000) 9 Nott LJ 13, 17–18.

<sup>24</sup> See further Lord Sumption's observations in *In the matter of an application by JRS5 for Judicial Review (Northern Ireland)* [2016] UKSC 22 that the Ombudsman, as an 'officer of the legislature ... was conceived as supporting the traditional constitutional function of Parliament of receiving the grievances of citizens and holding ministers individually and collectively accountable' (at [26]).

requirement that the findings be made available to the complainant. Further, the PCA may only make recommendations based on his or her findings, having no statutory power to make coercive orders. This leaves it to the government to decide upon appropriate steps and the MP to follow up the PCA's findings through Parliament and political channels. If no action is taken or is likely to be taken by the government the PCA can, as we have seen, lay a special report before Parliament detailing his or her findings and recommendations, leaving Parliament to pursue the matter. Lastly, the PASC can follow up the PCA's report, liaising with the government and reporting to Parliament on the government's implementation.

These features of the Ombudsman process 'make clear that the Ombudsman in Britain has been grafted into the British parliamentary tradition'.<sup>25</sup> The Courts in *Bradley* and *EMAG* observed many of these features of the Ombudsman scheme. But they did not take the important next steps of considering what implications the statutory framework had for (1) whether the court ought to engage in substantive review of the Minister's response, and if so, (2) the intensity of substantive review that ought to be applied. Where a court omits to take these next steps there shall be a significant risk that the court's approach will cut across Parliament's intentions as to how the statutory scheme ought to operate. Courts ought to actively seek to give effect to Parliament's intent, rather than frustrate it.

If the courts engage in substantive review of the Minister's response they risk trespassing upon Parliament's role in the accountability process. They shall clearly trespass upon that role if they adopt an approach to substantive review which entails the court adjudicating upon the mere cogency or convincingness of the government's view. Rather than allowing the substance and strength of the government's response to be debated and weighed against the merits of the Ombudsman's findings and reasoning in Parliament and its committees this debate will play out in the courts, as it did in *Bradley* and *EMAG*.

In addition, litigation on substantive grounds may result in the government effectively being bound to accept the Ombudsman's view. In turn this hijacks and can render moot political debate over the convincingness of the Minister's response vis-à-vis the Ombudsman's reasons for his or her findings. Even if the Minister ends up convincing Parliament of the strength of his or her reasons for rejecting the Ombudsman's findings, he or she shall nonetheless be bound by the court's conclusion that those reasons are irrational, and thus forced to accept the Ombudsman's findings.

Indeed in *Bradley* and *EMAG* there were indications that the Courts went so far as to formally bind the Minister to their view of the convincingness of the Ombudsman's findings. In *Bradley* the Court indicated no rational Minister could reject the Ombudsman's first finding; in other words it was not legally open to the Minister to reject the finding. In *EMAG* the Court seemed to indicate that the Minister must alter his approach to redress given the Court had ruled against the Minister on his rejections of certain Ombudsman findings. In this way the courts' approach also elevates the Ombudsman above the status of a servant of Parliament, contrary to Parliament's intent in creating the scheme: government may have no option but to accept the Ombudsman's findings even if a majority of Parliament comes to side with the Minister's reasoning. On the other hand, if the court declared the Minister's response to be rational then the Minister could

25 P Giddings et al, 'Controlling Administrative Action in the United Kingdom: the Role of the Ombudsman and the Courts Compared' (1993) 59 *Intl Rev Admin Sci* 291, 298.



use that as a defence to parliamentary accountability and scrutiny. It would be hard for a parliamentarian to sustain an argument that the Minister's view is unconvincing where a court has endorsed it as cogent, while there would be little point in the Ombudsman and PASC continuing to apply pressure on government to accept the relevant findings. In consequence it is the court's account of the rationality or robustness of a Minister's decision which becomes the dominant or determinative one.

Thus the scheme of the Act, and intended operation of the Ombudsman process, reinforce those arguments made above that courts either should refrain from review of the substance of Ministerial rejections of Ombudsman findings, or at the very least adopt a restrained and cautious approach to intervening on substantive grounds. The aggressive approach to scrutiny of the Minister's responses adopted in *Bradley* and *EMAG* cannot be justified. Such approach casts the courts as the primary forum for deliberating the merits of the Minister's response. By adopting this role the courts completely undermine the political nature of the Ombudsman process and supplant Parliament's role, and by their interventions impoverish the political-parliamentary discourse the PCA's reports are intended to spark.

The inaptness of the Courts' approach in *Bradley* and *EMAG* is made even clearer if we place that approach in the context of the wider judicial review landscape. Whereas judicial review is intended to be a secondary, supervisory

“The inaptness of the Courts' approach in *Bradley* and *EMAG* is made even clearer if we place that approach in the context of the wider judicial review landscape”

jurisdiction the Courts in *Bradley* and *EMAG* were effectively exercising a primary, determinative jurisdiction over the merits of the Minister's reasoning. There are very few contexts in which such approach would be permissible, and even in these limited circumstances the approach remains contentious. For

example, invalidating an executive decision on the basis that it lacks cogency or convincingness would not be permissible, traditionally at least, even in common law review challenges concerning very basic rights, such as freedom of expression or life, where the most intensive, 'anxious scrutiny' variant of *Wednesbury* is deployed. Even under this test a high threshold of intervention is maintained. In some contexts, such as claims under the Human Rights Act 1998, the courts exercise determinative judgment as to whether a right has been violated. But that is because this jurisdiction has been conferred by Parliament. In passing the HRA Parliament created actionable legal rights, and adjudication and enforcement of legal rights is the province of the judiciary. Indeed the approach taken in *Bradley* is nearly identical to that taken where basic rights are at stake, where courts have said that a test of 'cogent justification' applies.<sup>26</sup> However, the Ombudsman process is far removed from questions of legal right let alone questions of fundamental right. Recall the Ombudsman process is specifically intended to govern cases of *non-legal* wrongs, i.e. cases where no legal rights or obligations have been infringed and the only possible route to redress lies in the domain of politics. Indeed, the Ombudsman cases are at the complete opposite end of the spectrum from cases of legal rights; they are cases in which the decisions being challenged, if they can even be characterised as decisions, are ones made in the realm of politics, and do not affect or alter any legal entitlement whatsoever

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<sup>26</sup> *R (Bourgass) v Secretary of State for Justice* [2015] 3 WLR 457, [126].

or have direct legal consequences. These are matters far removed from the constitutional responsibilities and competencies of courts.

If we assume that courts are justified in engaging in substantive review of Ministerial rejections of Ombudsman findings (itself a dubious proposition, as we have seen), then rather than modifying the ordinary *Wednesbury* test so that it is easier for the courts to intervene on substance, the threshold for intervention should be set even higher than usual. Such a super-*Wednesbury* test has been applied where the courts are called upon to review decisions made at the Ministerial level of government and which are quintessentially political in character.<sup>27</sup> In such cases the courts limit themselves to only intervening where the claimant can show the Minister has acted with bad faith or with patent irrationality.

One might argue that application of the ordinary *Wednesbury* standard or the super-*Wednesbury* standard offers a happy middle way between the courts completely abstaining from substantive review, on the one hand, and judges illegitimately engaging in intensive review under the cogent reasons test on the other. Under such approach the court would limit itself to a supervisory role, aimed at upholding the integrity of the Ombudsman process by requiring the Minister to issue a response which is not wholly irrational or motivated by bad faith, the issuance of such a response facilitating political accountability, while the high threshold for intervention would guard against courts illegitimately supplanting Parliament's central role in the Ombudsman process and the more general legal capture of politics.

Undoubtedly such approach would be preferable to the cogent reasons approach and more faithful to the statutory scheme. However, despite the inevitable attraction of any argument which presents itself as a 'middle way', the rationale for such approach is not without problems. First, there are all of the strong arguments traversed above which tell against the courts engaging in substantive review at all. Second, judicial review is not required to facilitate political accountability. In response to significant Ombudsman investigations the Minister issues substantial written and oral responses as of course, without the need for a legal prompt.<sup>28</sup> As the analysis in the next chapter shows, the political process of accountability has worked very well, whereas legal interventions, rather than improving an already well-functioning process, risk distorting and undermining the operation of the political process and impoverishing the political discourse Ombudsman reports were intended to spark. Third, albeit there is an intuitive appeal to the idea that the courts should intervene if the Minister's response is outrageous or obviously motivated by bad faith, are these not the very circumstances in which we would expect the Minister to invariably come under intense political pressure and be forced to think again? Substantive review is thus otiose. Yet in-principle availability of review on substantive grounds, even if the threshold for intervention is set very high, will nonetheless encourage legal challenges by those disappointed with the Minister's response. This in turn carries risks of judicialisation of the Ombudsman process, while as we have seen, we cannot necessarily rely on the judicial capacity for restraint where courts conduct substantive review.

<sup>27</sup> *R v Secretary of State for the Environment, ex p Nottinghamshire CC* [1986] AC 240.

<sup>28</sup> There is formal governmental policy guidance to this effect: HM Treasury, *Managing Public Money* (2013) [4.12.2] ('If departments decline to follow the [Ombudsman's] advice, they should lay a memorandum in parliament explaining why').

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# 5

## Accountability Overkill

There are wider reasons which strongly militate against judicial intervention on the basis of the substance of the Minister's reasons, and which particularly tell against the approach adopted in *Bradley* and *EMAG*. Many of these reasons relate back to ensuring that the scheme of political accountability envisioned by the Act is allowed to operate as it was intended to. These reasons are considered in this chapter and chapters 6–8.

First, there is the problem of accountability 'overkill', i.e. the doubling-up of multiple mechanisms for accountability. Each additional accountability mechanism adds costs and tends to be of diminishing marginal utility, as the same type of accountability exercise is applied to the same facts in different fora, and the same types of arguments repeated over and over again by the same actors. Some might argue that the vigorous judicial approach to reviewing Ministerial rejections of Ombudsman findings adopted in *Bradley* is justified on the basis that 'Parliament is ill-equipped to call the executive to account by itself'<sup>29</sup> or 'relatively weak',<sup>30</sup> while lawyers tend by their nature to be sceptical of processes which lack the bite of binding legal authority; in turn 'the pull of the judicial model may be keenly felt'.<sup>31</sup> However, examination of the political history of both the occupational pensions and Equitable Life sagas reveals that Parliament and its committees have subjected the government to searching scrutiny where it has disputed a major Ombudsman report, and also that Parliament is not alone in holding government to account. Indeed even in the political sphere there has arguably been a wasteful doubling-up of accountability mechanisms, this being especially evident in the Equitable Life affair. In turn examination of the political history of these two sagas suggests the Ombudsman process is working as it should, fostering a healthy political discourse oriented towards securing accountability and administrative justice. This raises the question of why the courts need add to existing mechanisms by themselves scrutinising the government's response to Ombudsman findings, let alone engaging in searching scrutiny of that response.

In the occupational pensions case the Ombudsman's report precipitated a formal departmental response, oral and written governmental responses in the House of Commons, and four special reports presented to Parliament by the Public Administration Select Committee (PASC), three of which engendered a formal written response from the Government. There was much debate regarding the PCA's report in the House,<sup>32</sup> including in high profile fora such as Prime Minister's Questions,<sup>33</sup> and within the media. Through this sustained political discourse all major stakeholders had numerous opportunities to exchange and debate views on the government response, including the Ombudsman, the PASC,

29 T Buck, R Kirkham and B Thompson, *The Ombudsman Enterprise and Administrative Justice* (Farnham: Ashgate, 2011) 217.

30 M Elliott, 'Ombudsmen, Tribunals and Inquiries: Refashioning Accountability Beyond the Courts' in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford: OUP, 2013) 250 (but note that Elliott does not consider judicial intervention to be a panacea for weak political institutions).

31 *Ibid* 246.

32 eg HC Deb cols 512–547 7 December 2006.

33 eg HC Deb col 1450 15 March 2006.

MPs, and policyholders, especially through organised pressure groups such as the Pensions Action Group, while the government also had opportunities to respond. More generally the Ombudsman report was one strand in an ongoing political discourse over creation of and the terms of a compensation fund for those who had suffered losses as a result of the winding up of their pension schemes. These issues had been subject to extensive debate as the Pensions Act 2004 proceeded through Parliament, and then also during passage of the subsequent Pensions Bill 2006–07: there were ‘sustained attempts to further improve the compensation’ available.<sup>34</sup> Subsequently there have been multiple reviews of the scheme. To all of this we may add that in addition to the *Bradley* litigation, there was a partly successful challenge to the government’s compensation arrangements in the European Court of Justice, while the Pensions Action Group, or members of it, had also threatened and filed additional, follow-up proceedings (which did not reach trial), which sought to challenge the Minister’s extension of the compensation scheme following the High Court’s decision in *Bradley*.<sup>35</sup>

Let us turn to the Equitable Life affair. Prior to publication of the Ombudsman report that was the focus of the EMAG litigation, there had been other major investigations into Equitable Life. These included: another, separate Ombudsman investigation; an interim report by the Treasury Select Committee; a review by the Financial Services Authority; a major investigation by Lord Penrose, commissioned by the Treasury, resulting in a 818-page report; and a major inquiry by a committee of the European Parliament, specifically into UK regulation of Equitable Life, which resulted in a 383-page report, and echoed calls for compensation.<sup>36</sup>

Following release of the Ombudsman’s report the PASC quickly issued a report pre-empting the government’s response and placing significant political pressure on government to accept the Ombudsman’s report in full. The Minister subsequently gave an oral response to the Ombudsman’s report in the House. This was accompanied by a 50-page written response, laid before Parliament, which took account of representations government had received from key stakeholders including Equitable Life and policyholder action groups. Subsequent to the government’s response the Ombudsman laid a special report before Parliament pursuant to section 10(3) of the Act, on the basis that she did not consider the injustice identified in her report had been remedied or would be remedied. This report included the Ombudsman’s response to the government’s reasoning for rejecting certain of her findings, and its approach to implementing her recommendations. The Ombudsman also took it upon herself to write letters to all MPs, criticising steps taken by government.<sup>37</sup>

The PASC issued three subsequent reports scrutinising the governmental response and the steps government had taken to implement the Ombudsman’s report. In preparing these reports the PASC took written and oral evidence from key stakeholders including policyholder pressure groups (such as EMAG), Equitable Life, the Ombudsman, and government. It subjected the government to strong criticism, which included scrutiny of the government’s rejection of the Ombudsman’s findings. Importantly the PASC offered an important forum for the Ombudsman to continue to offer her views on the convincingness of the government’s response. The government issued a formal response to each PASC report; in the course of one such response it observed, ‘the Government’s response

34 House of Commons Library, “Financial Assistance Scheme – developments to 2007”, SN 2010 (10 May 2008) 37.

35 *Parr v Secretary of State for the Department of Work and Pensions*, Claim CO/4863/2007; *ibid* [8.2].

36 HC 809 (2003); HC 272 (2001); HC 244 (2001); HC 290 (2004); *Report of the Committee of Inquiry into the Crisis of the Equitable Life Assurance Society* (2006/2199(INI)), AG-0203/2007 (2007).

37 HC 485 (2010) 6.

[to the Ombudsman’s report] has been the subject of much scrutiny’.<sup>38</sup> Other committees and institutions have also scrutinised the government’s response. The Public Accounts Committee, for example, criticised the government’s handling of compensation payments to policyholders, and the government issued a formal reply. The National Audit Office (NAO) too issued a report critical of the government’s approach,<sup>39</sup> which precipitated a follow-up session before the Public Accounts Committee in the course of which officials were questioned on issues raised by the NAO report.<sup>40</sup>

An All-Party Parliamentary Group for Justice for Equitable Life Policy Holders was established, which now has a membership of 195 MPs (nearly one-third of the members of the House of Commons) and is closely aligned to EMAG. It has steadfastly campaigned in the interests of policyholders; its purpose is specifically stated to be: ‘To provide a cross-party forum in which to hold the government to account on the issue of properly compensating Equitable Life policy holders’.<sup>41</sup> Formal pressure groups, including EMAG and Equitable Life Trapped Annuity Holders, were established and have been effective in mounting a sustained campaign for redress from government. This has included making submissions to parliamentary committees and to those reviews charged with setting the criteria for payment of compensation. Equitable Life’s Chair and Board of Directors have also been active in arguing for full implementation of the Ombudsman’s report. There have been multiple debates in the House of Commons and in Westminster Hall, including recent debates scheduled by the Backbench Business Committee, and proposed and led by the two MPs who head the All-Party Parliamentary Group. As one of these MPs observed, ‘It is fair to say that the all-party group and EMAG have been on the backs of the Treasury Ministers responsible’.<sup>42</sup>

Thus the government has, before and since its formal response to the Ombudsman’s report, faced unrelenting scrutiny in the political sphere. Importantly, many of the same arguments that were made in the EMAG judicial review litigation have been made repeatedly in the course of political discourse, including by EMAG itself.

Further in both *Bradley* and EMAG the very same players were involved in the litigation as were engaged in the political process. The litigation was brought by pressure groups involved in sustained political campaigns, the government was defendant, while the Ombudsman, Speaker of the House, and Attorney-General were involved variously as either interested parties or interveners. In fact one could say the litigation resembled a political process, characterised by multiple players and multiple clashing interests, more than a traditional legal process, characterised by two parties and a dispute over defined legal rights.

The foregoing account of the occupational pensions and Equitable Life affairs suggests the Ombudsman scheme, as a political mechanism for accountability, is working as it ought to, and that the wider political machinery for holding government to account is in good working order. This is not to say political mechanisms are perfect or beyond criticism. But the narrative that courts must intervene to sure up supine, dysfunctional or weak political institutions is at odds with reality.

Does it follow from the foregoing that if political institutions were not in good working order the approach in *Bradley* and EMAG would be justifiable? The answer is ‘no’. Showing that political processes have been effective in holding

38 HC 953 (2009) 2.

39 HC 1043 (2013).

40 HC 1275-I (2014).

41 [www.publications.parliament.uk/pa/cm/cmllparty/register/equitable-life-policy-holders.htm](http://www.publications.parliament.uk/pa/cm/cmllparty/register/equitable-life-policy-holders.htm).

42 HC Deb col 508 26 February 2015.

the government to account where it rejects Ombudsman findings is important because it offers a necessary corrective to arguments that courts should intervene to sure up weak political processes. But even if political processes did not work as effectively as they did in the occupational pensions and Equitable Life cases this still would not justify intensive judicial review of government responses to Ombudsman reports. This is because we are not here concerned with open-ended questions of institutional design. The institutional design of the Ombudsman process is set by the terms of the Act, and the terms of the Act designate Parliament as the institution responsible for holding the government to account for its responses. The courts would radically undermine the legislative scheme by taking Parliament's place in the process because it was felt Parliament was not up to the job; it is not open to the courts to fundamentally rewrite the Ombudsman scheme. As we shall see below, in any case it is far from clear that greater judicial intervention would improve the Ombudsman process, while it may in fact have serious negative consequences. If it is felt that Parliament is not performing as it should the response is not to substitute litigation for meaningful political accountability – this would be an imperfect substitute in any case – but to strengthen political processes. For example the PASC has proposed that standing orders could be amended so that a debate in the House of Commons is triggered where the Ombudsman lays a special report before Parliament.<sup>43</sup> However, any debates over institutional reform premised on the view that Parliament is weak or supine are hypothetical because the reality is that, as the Equitable Life and pensions episodes show, where government has disputed Ombudsman findings it has been subject to searching scrutiny in the political realm.

“If it is felt that Parliament is not performing as it should the response is not to substitute litigation for meaningful political accountability but to strengthen political processes”

43 HC 107 (2009) 5.

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# 6

## Securing Redress through Political Process

Not only has government been subject to searching political scrutiny where it has rejected major reports issued by the Ombudsman, but operation of the political process has generally been sufficient to ensure government provides redress for individual injustice caused by maladministration, including in those cases where government initially disputes the Ombudsman's findings and recommendations.

It is first important to observe that government typically accepts findings of maladministration causing injustice and implements recommendations in full of its own volition, without external political pressure. As the PASC has observed, 'the Ombudsman has an excellent record of achieving a remedy for people who have suffered injustice. She investigates thousands of complaints each year, a large proportion of which are upheld in full or in part. Where she recommends compensation for individuals, it is almost unheard of for the public body not to comply'.<sup>44</sup> In this respect it is noteworthy that the Ombudsman has only laid a special report before Parliament (under section 10(3) of the Act), to draw Parliament's attention to an injustice which the Ombudsman considers has not been remedied or will not be remedied, on seven occasions in nearly 50 years since the office of Ombudsman was first established (albeit such reports have become relatively more frequent over time).

As the PASC observes, the government's record of full implementation of reports is more mixed where the Ombudsman has undertaken a major investigation which makes recommendations with significant financial implications for the public purse.<sup>45</sup> But it is important to emphasise such reports and government responses have been relatively uncommon, and in this respect the occupational pensions and Equitable Life cases are exceptional. Further, one might consider it is only natural that government is more cautious in its response where literally billions of pounds in public money are at stake, as was the case with the pensions and Equitable episodes; indeed the political value of fiscal responsibility would demand a studied approach. It is also important to observe that in each case where government has initially disputed Ombudsman reports, it has eventually afforded some redress for affected parties.<sup>46</sup>

In both the occupational pensions and Equitable cases, government made provision for redress, despite disputing the Ombudsman's report. The government had already, through the Pensions Act 2004, created a £400 million Financial Assistance Scheme which covered that class of policyholders to whom the Ombudsman's report pertained, even if the scheme did not go as far as either

<sup>44</sup> HC 219 (2009) [83].

<sup>45</sup> *Ibid.*

<sup>46</sup> HC 1081 (2006) Appendix.

the Ombudsman or policyholders wished. Similarly, in respect of Equitable Life the government, in its response to the Ombudsman's report, accepted that compensation should be made available to those disproportionately and thus most badly affected, albeit the government's approach was less generous than that recommended by the Ombudsman. The reasons for the government's alternative, narrower proposal included considerations of rationing of public resources and that Equitable was itself the principal cause of losses rather than government.

Importantly, in each case political pressure resulted in gradual expansion of the terms on which compensation was made available, and increases in the amount of compensation to be paid.

In the Equitable case the Court decision in EMAG had the effect of moving the government closer to the Ombudsman's model compensation scheme. The government had commissioned Sir John Chadwick to advise on various matters pertinent to the setting up of a compensation scheme. As a direct result of the EMAG decision, Sir John's terms of reference were amended and widened to reflect that the government now accepted those findings which the Court held had been irrationally and unlawfully rejected. While many might consider this a 'good' outcome, this broadening of the scheme would in all likelihood have happened anyway through the ordinary operation of the political system. In 2010 a new Coalition Government was formed. The Coalition Agreement pledged, 'We will implement the Parliamentary and Health Ombudsman's recommendation to make fair and transparent payments to Equitable Life policy holders, through an independent payment scheme, for their relative loss as a consequence of regulatory failure'.<sup>47</sup> That the Ombudsman's report figured so prominently in the new programme for government, a totemic political document, reflects the importance with which the institution is held in the political system. In the 2010 Spending Review the new government made clear that it accepted all of the Ombudsman's findings of maladministration and injustice, and made a £1 billion allocation for a compensation scheme, envisioning £1.5 billion would be allocated in total. The government stated that its position had been that the Ombudsman's findings should be accepted in full since 2008 when in Opposition. Following the new government's acceptance of all of the Ombudsman's findings, it proceeded to establish a new Independent Commission to investigate the terms of a compensation scheme. Through sustained, unrelenting political pressure from multiple sources (documented above) the original terms of the new government's compensation scheme were steadily widened over time; this included expansion in eligibility criteria and the amounts of compensation to be paid.

The terms of compensation under the Financial Assistance Scheme established by the Pensions Act 2004 faced political pressure from the moment the scheme came into existence. This scheme made provision to compensate those who had lost out through winding up of their pensions, where winding up began before the Pensions Act 2004 entered force, specifically between 1 January 1997 and 6 April 2005 – this applied to the class of persons covered by the Ombudsman's report. This scheme was less generous than that which applied to those whose pension schemes began winding up after the Act entered force. Because of this clear disparity, there were sustained criticisms that this difference could not be justified and that the schemes should be equalised. And indeed, over time the schemes have more or less come into alignment. Prior to the *Bradley* litigation

<sup>47</sup> *The Coalition: Our Programme for Government* (May 2010) 26.



the Ombudsman report had been one factor which had prompted expedition of a review of the Financial Assistance Scheme, and had also played a role in one expansion of the scheme. Following the *Bradley* litigation and an ECJ ruling the government effected a significant expansion in the FSA, so that the Court decision directly resulted in a far more generous scheme. Again, this may be considered a ‘good’ outcome by some, however given the degree of ongoing political pressure to equalise the schemes, and given the Ombudsman’s excellent record in eventually securing redress, it cannot be ruled out that the scheme would eventually have been widened through political process, as envisioned by the Act, even if precisely the same result may not have been achieved. In this respect it is notable that further extensions to the scheme were made subsequently.

The foregoing analysis has shown that the political process has generally been effective in delivering redress for those who have suffered injustice through maladministration. This analysis is important because some may argue for a more substantial judicial role in reviewing the Ombudsman process on the basis that the political process may otherwise fail to furnish redress for aggrieved individuals. Such arguments clearly fail on their own terms in the light of the preceding discussion. However, it is important to further observe that the preceding discussion should not be taken as endorsing the view that an expanded judicial role would be justified if political process did not deliver redress. The Ombudsman scheme established by the Act clearly contemplates that some who the Ombudsman finds to have suffered injustice may not be afforded redress. If the intention were that aggrieved individuals should invariably be granted a remedy the obvious way to achieve this would have been to grant the Ombudsman coercive legal powers to order remedies where he or she finds injustice. Instead the scheme leaves the matter of whether remedies should be granted, and on what terms, to the political process. There are good reasons why the scheme is designed in this way. First, the whole Ombudsman process exists to better enable *Parliament* to hold the government to account and redress grievances. As such, whether redress should be forthcoming is ultimately a question for *Parliament* to determine as it sees fit; in some cases it may consider a remedy is warranted, and in others it may not. Second, in the absence of any denial of a legal entitlement or other legal wrong, the question of whether losses suffered through maladministration should be compensated raises bare questions of distributive justice, such as whether it is justifiable to divert billions of pounds of public money away from other public ends to compensate those who suffered economic losses through the failure of regulated businesses. Such open-ended questions over the distribution of scarce resources are properly for political institutions to determine. Whatever one’s subjective view of what the public interest requires in any particular case, one cannot dispute that *Parliament* is the most legitimate institution to determine how the balance between competing demands on resources should be struck.

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# 7

## Placing Politics in a Legal Straightjacket

When viewed against the background of increasing judicial review challenges to the Ombudsman process more generally (documented above), the legal developments in *Bradley* and *EMAG* add to fears that core characteristics of the Ombudsman process are being or will be compromised by increasing recourse to litigation.

The Ombudsman process is not an alternative to going to court. Rather it is intended to be a discrete procedure that is to operate in the political realm, where legal redress is unavailable i.e. a political procedure for redress of non-legal wrongs. Importantly it is intended to have core characteristics which mark it out from legal processes, including speed, informality, and low cost. However, consider the developments in the occupational pensions case. The PCA started her investigation in 2004, and issued her report in 2006. Two years later both the High Court and the Court of Appeal had issued decisions. The Government then unsuccessfully sought leave to appeal, later confirming it would not pursue the matter, while other judicial review proceedings had also been filed. None of this sits comfortably with the intended nature of the Ombudsman process: recourse to lengthy litigation adds delay, cost, formality, and an adversarial process to a mechanism that is meant to offer a quick, inexpensive, informal, and investigatory path to redress in the political sphere. The courts' aggressive approach to scrutiny of the ministerial response only encourages litigants. It is notable that in the very next major case following *Bradley* in which the government disputed an Ombudsman report, the *Equitable Life* case, the matter once again ended up in court. One can understand why the claimant's solicitors would have advised litigation in the light of the judicial approach and outcome in *Bradley*, and competent solicitors will no doubt offer the same advice in future cases where government disputes Ombudsman findings.

The problem of delay is particularly pronounced in cases in which government disputes Ombudsman findings. Until the status of the Ombudsman's findings, and the validity of the government's response have been legally determined it is difficult to see how the political process can move forward, because much rests on those determinations – in particular the government's approach to implementing the Ombudsman's recommendations. It is important to observe that in the *Equitable Life* case in particular time was of the essence as many of those who stood to receive compensation were elderly. It is thus unsurprising that the PASC, upon learning that *EMAG* was consulting its lawyers regarding

the potential judicial review, warned that this would likely mean further delays in establishment of a compensation scheme.<sup>48</sup> The PASC had earlier emphasised that speed was of paramount importance given policyholders had already been waiting for over a decade for redress, many Equitable policyholders were in the later years of their life, and further delay would lead to further instances of justice being denied: ‘the main priority must be prompt redress’.<sup>49</sup> And indeed the litigation did lead to Sir John Chadwick being further delayed in reporting to government on information vital to setting up a compensation scheme, because the terms of reference he had been working to had to be fundamentally rewritten

“Thus, if the Ombudsman process increasingly ends up in court the intended nature of the scheme, as a mechanism distinct from courts, is undermined”

in the light of the Court’s decision in EMAG. Obviously no scheme – whatever its generosity – could be established until Sir John had completed this work.

Thus, if the Ombudsman process increasingly ends up in court the intended nature of the scheme, as a mechanism distinct from courts, is

undermined. In addition increasing recourse to litigation may have ‘knock-on’ effects for the Ombudsman mechanism itself. The process depends for its effectiveness on maintenance of good relations between the Ombudsman and public authorities. Government generally cooperates with the Ombudsman, for example making official documents freely available to the Ombudsman office. In the Equitable Life investigation the Ombudsman was required to seek the government’s permission to extend the scope of her inquiry to consider actions of GAD. The government consented. This was significant because many of the subsequent findings of maladministration pertained to GAD’s actions. Such collegial relations are fostered by an informal process, which does not lead to binding legal orders, and allows government flexibility and freedom as to how it responds to reports. If government must increasingly defend its responses in court, and courts increasingly find government bound to accept findings made by the Ombudsman, such collegial relations between the government and Ombudsman may break down, to the detriment of the Ombudsman scheme. Similarly if the stakes of the Ombudsman process are raised by courts, the Ombudsman process may itself become more formalised and adversarial, as there shall be more at stake for interested parties. Again the result would be that Parliament’s intentions as to the distinctive nature of the scheme would be undermined. In turn the distinctive contribution the Ombudsman scheme can make to the UK’s constitutional framework would be lost, as the Ombudsman process, at least in major investigations, would come to more closely resemble a surrogate court.

Against this background it is unsurprising to find that public sector Ombudsmen themselves argue against conferral of legal enforcement powers on the office for fear of undermining the distinctive nature of the Ombudsman mechanism.<sup>50</sup>

Above I raised the further concern that the increasingly active role of the courts in this sphere will lead to legal capture and impoverishment of the political discourse Ombudsman reports were intended to foster, and that the courts rather than Parliament will become the principal forum for debating core matters raised by Ombudsman reports.

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48 HC 219 (2009) 10.

49 HC 41 (2008) 4.

50 *Public Services Ombudsmen*, Law Com No 329 (2011) [5.121].

We see concrete examples of this in the occupational pensions and Equitable Life episodes. Once litigation is initiated key political actors do not feel they can comment on matters under dispute, so that political debate of the government's response to the Ombudsman's report is shut down or impeded. Further, the question of the convincingness of the government's response to the Ombudsman's findings has, since the precedent in *Bradley*, been conceptualised as a legal matter and therefore transmuted into one that political actors do not feel they can comment on. For example in the course of the Equitable Life saga the PASC said, 'It is for the courts to decide whether or not the Government's arguments are "cogent"',<sup>51</sup> while the Ombudsman said similarly, 'The lawfulness of the Government's response is of course a matter for the courts',<sup>52</sup> with the result that neither institution engaged with the government's response to specific findings to the extent one might have expected. Another effect of litigation is that rather than debating the issues raised by the Ombudsman's report, political debate turns to the subject of the litigation itself.

When the court decision is issued it has operated as a trump, serving as a definitive conclusion on the government's response to the Ombudsman's findings. Thus in both the occupational pensions and Equitable Life sagas the government immediately capitulated following the claimant's successful judicial reviews, accepting those findings which the Court found it was irrational for the government to have rejected. Indeed in both instances it seems the government may have had no legal choice but to simply accept the relevant findings; in *Bradley* the Court had held the government could not rationally dispute the Ombudsman's first finding, while in *EMAG* the Court said the Government would have to change Sir John Chadwick's terms of reference given the Court's rulings on its rejections of the Ombudsman's findings. This suggests there is no space at all for meaningful political debate of these matters. In any case a Minister who must come to Parliament and report that his or her reasoning was held by a court to be irrational will find it virtually impossible to maintain their objections to the relevant findings.

It is also important to note that in each case the Courts' rulings had the direct effect of capturing and altering the government's approach to implementing the Ombudsman's *recommendations* for redress. This is because it is very difficult to disaggregate the government's response to the Ombudsman's *findings* from its approach to provision of *redress*: the government's response to the Ombudsman's findings is a core step in the government's reasoning as to how it intends to respond to the Ombudsman's recommendations for redress. This intrinsic link between the two has been ignored by the courts, which have tended to treat the two as strictly separate: while the courts adopt an aggressive approach to review of governmental responses to the Ombudsman's *findings*, the courts generally consider that responses to *recommendations* for redress are quintessentially political, and are reluctant to intervene. But such approach ignores that government responses to findings are substantive steps in government's process of determining how it will respond to recommendations.

To all of this we may add that where the courts have upheld the government's objections to the Ombudsman's findings as rational and lawful, this effectively ends any chance that the government may be persuaded, through political discourse, to change its mind.

51 HC 219 (2009) 13.

52 HC 435 (2009) 5.

Against this backdrop it is difficult to accept claims of those who seek to defend the courts' approach, that 'what the *Bradley* ruling does is make the government work harder in defending its position when it presents its case to Parliament'.<sup>53</sup> If only the effects of *Bradley* were so modest. As we have seen, the effects of the ruling go well beyond this: rather than facilitating healthy political discourse, the Courts' approach in *Bradley* and *EMAG* leads to legal capture and ultimately the impoverishment of the political discourse that the Ombudsman process was intended to foster.

<sup>53</sup> Buck et al, above, 217.

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# 8

## Strengthening or Undermining the Ombudsman?

It may be tempting to welcome the approach in *Bradley* and *EMAG* on the basis that it reinforces the authority of the Ombudsman, and that the Ombudsman's findings ought to be respected.

However, as noted above, the Ombudsman's reports are already highly respected. That this is so is reflected in the fact that the Ombudsman's reports are generally complied with, and where disputed, engender a significant political backlash, which generally secures provision of redress. Further, one may respect an institution's findings, whilst also disagreeing with them.

Indeed, the courts' increasingly active role in this context may in fact undermine rather than foster respect for the Ombudsman's office. For example, we saw above that the courts have been increasingly willing to uphold direct challenges to the substance of Ombudsman's findings. While at first glance cases such as *Bradley* and *EMAG* might be thought to enhance the status of and respect for the Ombudsman's findings, by making it more difficult for government to dispute those findings, closer inspection suggests matters are not so straightforward.

In *Bradley* the PCA herself intervened in the litigation to raise concerns that proceedings seeking review of the governmental response to her findings could involve collateral attack upon the validity of the Ombudsman's findings. The Court sought to assuage the Ombudsman's concerns by emphasising that it was the Minister's response that was under scrutiny, and that a judgment by the Court that the Minister is entitled to reject a finding should not be interpreted as a challenge to the validity of that finding.

However, in both *Bradley* and *EMAG* the Courts' method for scrutinising the government's response did involve scrutiny of the strength of the Ombudsman's findings and the underlying reasoning upon which they were based. In assessing the government's response the Courts set out and weighed the strength of the Ombudsman's reasoning against the strength of the Minister's reasoning. This method, by its nature, involves the courts commenting upon the credibility and quality of the Ombudsman's reasoning. Where a court concludes that a Minister has cogent or convincing reasons for rejecting an Ombudsman's finding, this does not directly affect the legal validity of the finding. However the court's reasoning and conclusion does effectively entail judges accepting that the Ombudsman's findings are open to legitimate criticism. In *Bradley* the Court's scrutiny of the Ombudsman's finding went one step further: in finding the Minister was entitled to reject one of the Ombudsman's findings the Court of Appeal opined that the

High Court was ‘correct’ to hold the Ombudsman’s finding irrational. In the light of this, it would be understandable if the Ombudsman remained concerned that challenges to governmental responses offered an opportunity for claimants or government to challenge the Ombudsman’s findings via the back door. As such, one would expect to see the Ombudsman intervening in future litigation to defend his or her findings.

One last point remains to be made. Recall that the Ombudsman is a servant of Parliament. A defining aspect of this relationship is that the Ombudsman is ultimately accountable to Parliament for his or her actions. Thus, for example, the Ombudsman is routinely questioned by and called to account before the PASC on behalf of Parliament; scrutinising the Ombudsman’s work is one of the PASC’s core duties. By scrutinising the convincingness of the Ombudsman’s findings or the quality of the Ombudsman’s investigations more generally, the courts are once again impinging upon Parliament’s primacy in the Ombudsman scheme. If MPs are unconvinced by the Ombudsman’s findings it is open to them to express this, and to ignore those findings. The courts, by ruling on the substantive rationality of the Ombudsman’s findings, pre-empt and indeed close off parliamentary scrutiny of the Ombudsman’s work. Because judicial review of Ministerial rejections of Ombudsman findings invariably involves the courts ruling upon the quality of the Ombudsman’s findings this is yet another reason for the courts to refrain from engaging in such review.

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# 9

## Attempts to Justify Judicial Intervention

Some commentators have sought to defend the courts' approach in *Bradley* and *EMAG*. Brief analysis of these arguments only serves to reinforce the inaptness of the courts' approach.

Two such arguments have already been addressed in the course of analysis above. First, there is the argument that political institutions including Parliament are weak and unable to hold government to account where it disputes the Ombudsman's findings. The courts are required to enter the fray in order to facilitate greater political accountability. As we saw above the political histories of the Equitable Life and occupational pensions affairs showed this argument to be out of step with reality, while the analysis also showed clearly that increased judicial intervention can in fact undermine the intended nature of the Ombudsman process and political accountability.

Second, there is the argument that the judicial approach in *Bradley* and *EMAG* reinforces respect for the Ombudsman's findings. This argument was addressed in the immediately preceding chapter, and found to be problematic.

A further core argument that may be made in defence of the approach in *Bradley* and *EMAG* is linked to the previous argument. The argument runs as follows: the Ombudsman, in reaching his or her findings of maladministration and injustice, has undertaken a large-scale independent investigation and has significant expertise and experience in matters of administration, and therefore the government ought to have good reasons for disagreeing with those findings. As an argument for a greater judicial role in regulating governmental responses to Ombudsman findings this argument is flawed and should be rejected. Most would not dispute the proposition that the government should treat the Ombudsman's findings with respect and have good reasons for disagreeing with those findings. But acceptance of this proposition does not in itself provide a convincing justification for the Courts' approach in *Bradley* and *EMAG*, because it ignores the question of who ought to determine whether the government's reasons are good enough.

If one looks to the Act, it is obvious that it is for Parliament to hold the government to account for its reasons. But even if we put this to the side, there are additional factors linked to expertise and experience which tell against the courts entering the fray. When government rejects Ombudsman findings it is disputing that its conduct constituted maladministration or maladministration causing injustice. For example in the occupational pensions case the government



disputed that it had committed maladministration by not including certain technical details of pension schemes in an official pamphlet; government argued that while inclusion of these details may have made the pamphlet more accurate, it would have undermined the intended nature of the pamphlet as an introductory, non-technical guide. In the Equitable Life affair government contested whether it could be said to have committed maladministration by not following up with third-party rating agencies, such as Standard and Poor's, regarding what use they were making of Equitable Life's regulatory returns; the government doubted whether it had any such responsibility to third parties, while there was no legal obligation to follow up. In each case the dispute or disagreement between government and Ombudsman is grounded in competing views over what constitutes good or bad administrative practice, and how far administrative responsibility extends beyond

“Of all parties therefore it is the courts that are in the weakest position to judge what constitutes good or bad administrative practice or technique or the scope of administrative responsibility beyond law, yet they have arrogated to themselves a decisive role in making such assessments”

formal legal duties.<sup>54</sup> When the court conducts review in cases such as *Bradley* and *EMAG* it asserts to itself the role of arbitrating between the convincingness of the government's reasons for why it considers its administrative practices were sound, and the convincingness of the Ombudsman's reasons for finding that those practices were unsound. But of the three institutions in play, the courts are the least well-equipped, in terms of experience and expertise, to assess what does or does not constitute good or bad

administrative practice. The Ombudsman has vast experience of investigating and scrutinising administrative practices. The Minister and his or her senior advisors also have considerable experience of and/or expertise in public administration. The courts on the other hand are expert in law and legal questions, not the discipline of public administration. Of all parties therefore it is the courts that are in the weakest position to judge what constitutes good or bad administrative practice or technique or the scope of administrative responsibility beyond law, yet they have arrogated to themselves a decisive role in making such assessments.

Furthermore if the Ombudsman's experience, expertise and thorough investigatory processes are reasons why the Minister should be held to a high standard if he or she wishes to disagree with the Ombudsman's findings, then should it not also follow that the courts should be reticent to intervene in the Ombudsman's findings for the very same reasons. Indeed the argument for non-intervention is even stronger, as the court's experience and expertise in administration pales in comparison to that of government. Yet, as already recorded, the courts have been increasingly active in directly reviewing the Ombudsman's findings, and invalidating them. In *Bradley* and *EMAG* the courts showed little hesitation in evaluating the convincingness of the Ombudsman's reasons, in the course of assessing the cogency of the Minister's response, while in *Bradley* the Court even concurred in the lower court judge's conclusion that one of the Ombudsman's findings was irrational. This judicial readiness to assess the substance of the Ombudsman's findings is difficult to marry up with the view that the Ombudsman's findings ought to be afforded significant respect.

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<sup>54</sup> Note that 'maladministration' is not defined in the Act.

To the foregoing we may add that disagreements over whether government action constituted maladministration, whether maladministration caused injustice, and whether individual injustice or prejudice were in fact suffered, are not uncommonly grounded in factual disputes, or have a significant factual dimension. As the Court in *EMAG* said, the cogent reasons test requires ‘careful examination of the facts of the individual case’. However, as has been recognised since the judicial review procedure was first established, that procedure is not an appropriate forum for the resolution of complex factual disputes because it does not typically provide for oral evidence or disclosure, unlike ordinary civil proceedings. We see this issue bubbling to the surface before the courts. For example in the *Equitable Life* affair government disputed certain findings of maladministration made by the Ombudsman on the basis that, in the government’s view, they were at odds with findings made by Lord Penrose, in a separate, major report on *Equitable Life*, prepared for the Treasury. The Court in *EMAG* had to acknowledge that it was not possible ‘for us to resolve the differences between the experts within the limitations of the present judicial review proceedings’. In the end the Court did not consider it had to resolve the factual dispute in order to dispose of the case. With respect, this was a questionable conclusion, and one might reasonably view it as a ‘workaround’. But in any case the Court’s acknowledgement of the limits on its capacity to resolve difficult factual questions on review does cast doubt on courts’ abilities to competently mediate between competing claims made by the Minister and Ombudsman which, as the courts have acknowledged, have a significant factual element.

Lastly, there is the intuitively appealing argument that government should not be judge in its own case.<sup>55</sup> The argument is flawed. When government disagrees with an Ombudsman finding it is held to account for that view by Parliament and its committees. Put another way, the argument assumes that the Ombudsman should be judge in the government’s case. Yet ‘[t]he Ombudsman is not a judge, but a parliamentary investigator’.<sup>56</sup> It falls to Parliament, for whom the Ombudsman works, to adjudicate upon the strength of the government’s case. There is a similar flaw in the Law Commission’s view that the Ombudsman is ‘a “system of justice” in its own right’.<sup>57</sup> If one accepts this view, one is likely to analogise the Ombudsman to other free-standing justice institutions such as tribunals or courts, and consider that the process ought to have greater legal ‘bite’. But the Ombudsman is not a system of justice in its own right – it is a servant of Parliament. It is from this fundamental feature that all other features of the system flow. If the Ombudsman could itself bind government it would usurp its master’s role as ultimate arbiter of government’s conduct. It is worth noting that some would prefer the Ombudsman office to be a free-standing office. I express no view on this, except to say that this is not the nature of the office as it presently exists.<sup>58</sup>

55 HC 41-1 (2008) 3, 41.

56 HC 219 (2009) 13.

57 *Administrative Redress: Public Bodies and the Citizen*, Law Com Consultation Paper No 187 (2008) [5.25].

58 Possible reform of the Ombudsman system has been the subject of a recent consultation exercise by government: Cabinet Office, *A Public Service Ombudsman: Government Response to Consultation* (London 2015). For other recent proposals for reform see: *Public Services Ombudsmen*, Law Com No 329 (2011); HC 655 (2014).

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# 10

## Wider Trends of Judicial Capture of Political Accountability

*Bradley* and *EMAG* not only form part of a trend of increasing judicial intervention in the Ombudsman process, but also wider trends both in judicial review of political accountability mechanisms, and judicial review more generally.

There have latterly been a number of high profile cases in which claimants have challenged Ministerial decision-making in the context of public inquiries. Consonant with trends in the Ombudsman context there are, within this stream of jurisprudence, clear examples of judicial overreach into the very heart of politics. The most glaring example is the *Litvinenko* case.<sup>59</sup> This case evinces many of the same features of the decisions in *Bradley* and *EMAG*, including application of searching judicial scrutiny to an inherently political decision taken at a high level of government, as well as lack of judicial sensitivity to statutory context. After consideration of this case this chapter goes on to consider the *Evans* case,<sup>60</sup> decided in the different context of freedom of information legislation. The case illustrates the creep of the approach propounded in *Bradley* into contexts beyond the Ombudsman system, and offers another striking illustration of an aggressive judicial approach to review of a decision-making power conferred on a high-ranking Minister, which operates to undercut a process for political accountability and nearly completely undermines legislative intent.

The *Litvinenko* case entailed a judicial review challenge to the Home Secretary's decision not to initiate a public inquiry into the death of Alexander Litvinenko, who died in London in 2006; the likely cause of death was ingestion of radioactive material. Following a police inquiry prosecutors determined there was sufficient evidence to charge two Russian nationals with murder. However, Russia would not extradite the suspects. Once it was clear criminal proceedings would not eventuate, the coroner began an inquest. In the course of the inquest the coroner wrote to the Lord Chancellor requesting that a statutory inquiry be established. His main concern was that he could not, in the course of the inquest, consider sensitive government documents relevant to the question of whether the Russian state was culpable for Litvinenko's death; there is no provision for closed hearings in an inquest. On the other hand public inquiries can hold private hearings, which could be utilised to consider documents relevant to state culpability. The Home Secretary declined this request, although the matter was to be kept under review; in the meantime the inquest would continue. The Minister's letter to the coroner identified factors favouring an inquiry, such as the coroner's informed view that one should be held and the advantage provided by the power

<sup>59</sup> *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194.

<sup>60</sup> *R (Evans) v Attorney General* [2015] 1 AC 1787.

to consider sensitive material in private. The letter also identified factors against. These were fully reasoned and included that whether a public inquiry should be established is best judged at the conclusion of the inquest, that the material excluded from the inquest would not be made public through an inquiry anyway, cost implications, and concerns of international relations.

Litvinenko's widow sought judicial review of the Minister's refusal to initiate a public inquiry. The central challenge was to the substance of the Minister's reasons.

In contrast to the traditional, restrained *Wednesbury* approach the Court in *Litvinenko* pored over the Minister's reasons against holding an inquiry, showing little hesitation in quashing the decision. Various factors relied on by the Minister were dismissed in the following terms: 'The proposition ... is ... in my view a bad one'; 'I have found the Secretary of State's reasoning difficult to accept'; the reasoning 'fails to address the thrust of the Coroner's concerns'; and '[the Minister] will need better reasons'. These statements do not suggest a Minister taking leave of her senses or a manifest abuse of power. Rather they indicate the Court merely disagreed with or was not itself convinced by the Minister's reasoning. Crucially, the Court never directed itself as to the appropriate approach to review. However, the Court's general approach was laid bare in its conclusion: 'I have upheld the claimant's challenge to the adequacy or correctness of the ... reasons given by the Secretary'. This is not exercise of a long-stop, supervisory jurisdiction geared to catching clear abuses of power. Rather, this approach entails the court standing in the Minister's shoes, deciding which reasons are 'correct'. As we have seen, this approach would be impermissible even in common law review challenges concerning basic rights, where the most intensive, 'anxious scrutiny' variant of *Wednesbury* is deployed. Yet there are no rights in play here: 'No one is entitled to a public inquiry'.<sup>61</sup>

Far from calling for intensive review, the statutory context supports a very high threshold for judicial intervention. The Minister made her decision under section 1 of the Inquiries Act 2005 which states that the Minister 'may' initiate an inquiry where 'it appears to him' that 'there is public concern that particular events may have occurred'. Whether events give rise to a public concern such that an inquiry is warranted is the sort of open-ended question on which reasonable people will naturally disagree, which in turn tells against courts readily intervening because they simply take a different view; 'in a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them'.<sup>62</sup> Under the Act, whether an inquiry should be held rests on the Minister's subjective view. This further tells against any court imposing its own view of what sort of reasoning is permissible, as does the complete absence of any express statutory constraints on the discretion. As Lord Reed observed in *AXA*, in the case of 'wide powers, the scope for applying irrationality ... is correspondingly limited'.<sup>63</sup>

Parliament intended the relevant Minister to have ultimate responsibility for and maximal control over core decisions in respect of inquiries. This is evidenced by the Act's significant features: it is for the Minister to set and amend the terms of any inquiry; appoint members of the panel and dismiss them; inform Parliament of establishment of an inquiry; and suspend or terminate the inquiry. The final report is delivered to the Minister. In other words, the Act makes clear that

61 *Persey v Secretary of State for Environment, Food and Rural Affairs* [2003] QB 794, [69].

62 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, [69].

63 *AXA General Insurance Ltd v The Lord Advocate* [2012] 1 AC 868, [143].

decision-making over inquiries is quintessentially the preserve of government. It is therefore difficult to see how it could ever be permissible for a court to quash a Ministerial decision whether to hold an inquiry on the basis that the court was not itself convinced by the Minister's reasons.

The Court, when considering remedies, did observe the 'very broad' nature of the discretion, and that the decision whether to hold an inquiry is 'difficult and nuanced'. Yet the Court, having identified these features, failed to consider their relevance to the approach to review more generally.

Another factor in favour of restraint is that the Minister is directly responsible to Parliament, and is, as Home Secretary, regularly called to account in Parliament and its committees; thus, there is no pressing need for the court to act as an accountability mechanism. That Ministers may be held to account publicly for their determinations as to the public interest is one of the key reasons why they rather than anyone else are responsible for deciding on inquiries. Judicial intervention may muddy this otherwise clear line of accountability: rather than taking responsibility for initiating an inquiry the Minister can assert that his or her hand was forced by the courts. This could close off legitimate political debate. Further, the decision to establish an inquiry is in significant respects a decision over allocation of public funds. A core reason why Ministers are bestowed with wide discretion is that inquiries often involve heavy expenditure. Resource-allocation is quintessentially a function for the executive branch, not courts. Similarly, given lack of judicial experience of foreign affairs and lack of judicial knowledge of the intricacies of the state of foreign relations between the UK and foreign powers (specifically Russia), the confidence with which the Court in *Litvinenko* dismissed the Minister's invocation of such concerns was striking.

None of these concerns – of legal principle, statutory context, or democratic and institutional legitimacy – were considered by the Court. In the end, to what extent does the Minister retain the wide freedom which Parliament intended them to have to decide whether an inquiry should be held or not, when a decision is vulnerable to being vetoed by a court on the simple basis that the court disagrees with the Minister's reasons?

We find in *Evans* another striking example of an aggressive approach to judicial review of a broadly framed Ministerial power, conferred by Parliament to ensure decisions over the public interest are subject to ultimate scrutiny by those who are politically accountable to Parliament. Ekins and Forsyth have, in a previous policy paper written for the Judicial Power Project, convincingly demonstrated that the judicial approach to review in *Evans* was flawed.<sup>64</sup> It is worth however briefly touching on the case, as it is yet another illustration of the trend identified here, and some members of the Supreme Court relied on *Bradley* to justify their approach.

The Freedom of Information Act 2000 establishes a scheme to govern citizen access to official information. The scheme provides that there is an entitlement to access information, subject to certain public interest exemptions. If an authority refuses to disclose certain information on the basis of one of these exemptions the disappointed applicant may apply to the Information Commissioner, an office established by the Act, for a determination as to whether the authority's refusal complies with the Act. If the Commissioner finds non-compliance he or she is required to issue a decision notice specifying the steps the authority must take to

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<sup>64</sup> R Ekins and C Forsyth, *Judging the Public Interest: The Rule of Law vs The Rule of Courts* (London: Policy Exchange, 2015). Available at: <[www.policyexchange.org.uk/images/publications/judging%20the%20public%20interest.pdf](http://www.policyexchange.org.uk/images/publications/judging%20the%20public%20interest.pdf)>

remedy its failure, and he or she may also issue an enforcement notice requiring compliance. The scheme provides for appeals to the tribunal system. Importantly, and at the heart of the litigation in *Evans*, section 53 of the Act confers on an ‘accountable person’ – a Cabinet Minister or the Attorney General – a wide power to override a decision or enforcement notice by presenting the Commissioner with a certificate within a specified time frame, signed by the accountable person and stating that he or she has, on reasonable grounds, formed the opinion that by refusing to release the information the relevant public authority has not failed to comply with the Act.

In *Evans* the relevant public authority had refused to release correspondence between the Prince of Wales and Government Ministers on the basis of a public interest exemption. The Commissioner upheld the refusal but the matter was appealed to the Upper Tribunal, which held that the applicant was entitled to disclosure of the information. Subsequently the Attorney General issued a section 53 certificate to override the tribunal decision. The Attorney General’s decision was challenged via judicial review. In the Supreme Court a majority upheld the review challenge, with the result that the correspondence was disclosed.

Lord Neuberger’s judgment, in which one group of majority judges concurred, imposed on section 53 an interpretation so restrictive that the scope for a Minister to exercise the override was radically narrowed with the effect that section 53 was more or less airbrushed out of the Act. Adoption of such a restrictive interpretation was explicitly motivated by a judicial concern to preserve the constitutional principle that a decision of a court is binding. The Upper Tribunal, which held that disclosure should be made, is a court of superior record, such that exercise of the Ministerial override would involve breach of the said principle. The problem with this ‘interpretation’ of section 53 is that Parliament’s intent was clearly to abrogate that principle by conferring in plain and clear language a broad power of override. Parliament had itself weighed the relevant competing concerns and clearly come down on the side of providing for an override: provision for a Minister to ensure protection of the public interest was a price to be paid for the more general opening up of government information under the Act, and conferral of enforcement powers on the Commissioner and courts. One may or may not agree with the inclusion of section 53 in the Act, but that was the choice made by Parliament. It is illegitimate for the courts to reopen the balance struck by a sovereign, democratic legislature, themselves striking a new balance which deviates markedly from the settlement reached by Parliament in the plain terms of the Act, and which favours those concerns which the relevant judges consider ought to be prioritised. As Ekins and Forsyth record, the ‘judgment reads much more like an argument for not enacting section 53’;<sup>65</sup> it was with some justification that Lord Wilson observed, in dissent, that the majority approach entailed a re-writing of section 53, not an interpretation. It is telling that although Lord Neuberger and those judges that concurred in his judgment were in the majority as to the result in the case – i.e. they considered the information should be released – their interpretation of section 53 represented a minority position; the other judges considered Parliament’s intent was so clear that it was impermissible to read down the provision. It is important to record that there is an established principle, the ‘principle of legality’, which holds that Parliament must speak clearly where it wishes to displace constitutional principles. Lord

65 Ibid 15.

Neuberger relied on this principle to justify his ‘reading’ of section 53. But if one considers section 53 to be unclear in its purpose and effect, it seems no statutory provision could ever be clear enough to justify abrogation of judicially-articulated constitutional values. If judicial application of the legality principle is such that Parliament can *never* speak clearly enough then the principle becomes a proxy for judicial supremacy over Parliament.

Another group of majority judges, Lord Mance and Lady Hale, while refusing to warp the plain meaning of section 53, nonetheless adopted an intensive approach to substantive review of the Ministerial exercise of the override. Despite the difference in technique between the majority judges – inventive interpretation versus intensive substantive review – the effect of both approaches was more or less the same in that the Minister’s override power was radically narrowed, so that it may now only be used very rarely. Thus each approach frustrates Parliament’s intent to the same degree and both are equally illegitimate.

Drawing inspiration from *Bradley*, Lord Mance considered that the Minister, in exercising his or her discretion, could only possibly deviate from the tribunal’s findings of fact or law if he or she had the ‘clearest possible justification’ for doing so, and it would be an ‘unusual’ case where the Minister could show justification. This is obviously a significant deviation from the *Wednesbury* standard, and is akin to or even more intrusive than the ‘cogent reasons’ approach adopted in *Bradley*. Lord Mance’s application of his stated approach was similar to the way the *Bradley* and *EMAG* Courts applied the cogent reasons test. The convincingness of the Minister’s reasons for his view of various factual matters were evaluated and weighed vis-à-vis the Upper Tribunal’s reasons for its different findings, Lord Mance arbitrating between the differing views and determining which he considered more convincing. When it came to differences between the weight the Minister had given particular matters compared to the weight the tribunal had given them, and the balance struck by the Minister between competing public interests, Lord Mance did not propound as intrusive an approach to review. But nonetheless he considered that the Minister must have ‘solid reasons’ for disagreeing with the balance struck by the tribunal. This again signals an approach more intensive than the ordinary *Wednesbury* standard, but which is not intended to be as intrusive as the exceptionally stringent ‘clearest possible justification’ standard applied to disagreements over factual findings. Overall, the result of Lord Mance’s approach is, consonant with Lord Neuberger’s approach, to radically curtail the scope for exercise of the override. Indeed Lord Neuberger said of Lord Mance’s approach that it ‘will normally yield the same outcome as mine. We have very similar views in practice as to the ability of the accountable person to differ from a tribunal decision on an issue of fact and law, and in reality it will, I think, normally be very hard for an accountable person to justify differing from a tribunal decision on the balancing exercise on Lord Mance’s analysis’.<sup>66</sup>

Compared to the Ombudsman scheme, there are stronger reasons for exercise of the section 53 power to be reviewable on substantive grounds in principle. For example, a power of legal decision is in fact conferred by the relevant legislation, the decision of the Upper Tribunal is otherwise legally binding, while the underlying purpose of the freedom of information legislation is different from the purpose of the Ombudsman legislation, the whole Ombudsman scheme being underpinned by a concern to promote political accountability.

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<sup>66</sup> Evans, above, [93].

But there are factors that tell strongly against any departure from the *Wednesbury* standard, and very strongly against the kind of intrusive approach proposed by Lord Mance. Principally it is clear that Parliament, by conferring the override, considered it important that decisions over release of information could ultimately be made by someone politically accountable – thus the description of such a person as the ‘accountable person’ in the legislation – given such decisions are decisions concerning the public interest. Decisions over the public good are most appropriately made by Parliament or those directly accountable to Parliament. In this respect it is important to note that the statutory scheme requires the Minister to lay a copy of the override certificate in each House of Parliament, directly facilitating political accountability, and also suggesting that if the accountable person is to be held to account this should principally be through political rather than judicial process. Reinforcing this view is legislative provision for the Information Commissioner to lay reports before Parliament, a power which the Commissioner can use and has used to draw parliamentary attention to and critique particular exercises of the section 53 veto. Importantly, the override power is in broad terms, which clearly indicates an intent that the Minister have maximal scope to determine on what basis the power should be exercised; if Parliament had wished the power to be very tightly circumscribed it could have said so in the terms of the Act. Lord Mance, by adopting an approach which radically curtails the override power, so that it is close to a dead letter, patently undermines Parliament’s intention that the release of official information should ultimately be subject to oversight by a person who is politically accountable; this is a fundamental aspect of the decision-making process established under the Act. Further, it follows from Lord Mance’s ‘clearest possible justification’ and ‘solid reasons’ tests that the ultimate decision as to the merits of any exercise of the section 53 power effectively lies in the hands of the courts – the very institution the Act empowers the Minister to overrule. Of course, in contrast to *Bradley*, in *Evans* a constitutional principle was in play – that court decisions should be binding – which would, *ceteris paribus*, generally justify a more intensive form of substantive review (albeit Lord Mance himself did not refer to this principle). But this is only one factor and must be set against the other powerful factors discussed here which tell against lowering the *Wednesbury* standard. In any case what is clear is that the presence of this constitutional principle cannot justify the approach adopted by Lord Mance because that approach is one that overrides Parliament’s clear intention.

Two important points remain to be made. First, it is not clear why the tribunal’s decision is given *a priori* weight in Lord Mance’s analysis, so that the Minister has to have clear justifications for departing from the tribunal’s decision. Section 53 calls on the Minister to reach their own ‘opinion’ as to whether the authority ought to have released the information. Thus the legally salient question on review ought

“Lord Mance, by adopting an approach which radically curtails the override power, so that it is close to a dead letter, patently undermines Parliament’s intention that the release of official information should ultimately be subject to oversight by a person who is politically accountable”



to be whether that opinion is rational, not whether it was rational to depart from the tribunal's decision. It would be one thing to hold, as Lord Wilson did, that the tribunal's decision and reasoning are legally relevant considerations which the Minister must have regard to, given both the tribunal's and Minister's decisions form part of a single statutory scheme and decision-process. But it cannot be legitimate for the court to say that the tribunal decision can only be departed from if the court considers such a course justified. Such approach entails the court effectively arrogating to itself the very power of decision that Parliament intended to confer on the Minister, and for which the Minister could be held to account in Parliament.

Second, in *Evans* Lord Mance considered that the differences of view between the Minister and tribunal were of a factual nature, and thus applied the exceptionally stringent requirement that the Minister must have the clearest possible justification for departing from the tribunal's view. One might consider that it is right that the Minister should have very strong reasons to deviate from factual findings in particular, given those are findings reached through rigorous court procedures. However, the 'factual' matters in dispute in *Evans* were not issues 'of "fact" in any ordinary sense of that word'.<sup>67</sup> For example one point of difference between the Minister and tribunal was whether a constitutional convention existed, the nature and scope of that convention, and whether the Prince of Wales' correspondence fell within that convention. Another point of difference was whether there existed a risk that if the correspondence were disclosed this could create the misperception that the Prince of Wales favoured one political party over another, and the degree of this risk. These are not cut and dried questions of fact, but matters that require the exercise of judgement. In other words these are matters on which reasonable people may have different views. In such a situation, and in the context of a very broadly framed power concerning the public interest, the courts ought to adopt a restrained approach to review. Furthermore, as discussed above, if the crux of the litigation is a dispute over facts then judicial review is not an appropriate forum for the hearing of such a case. Provision for oral evidence and disclosure, which are required for fair and just determination of factual matters, are not generally available in judicial review proceedings, and the Supreme Court, as an appellate court, is especially poorly placed to mediate between competing factual contentions.

Thus the Ombudsman cases are not isolated phenomena but form part of a wider trend of increasing challenges to decisions made in the course of political accountability processes, and increasingly aggressive judicial approaches to reviewing such decisions. This stream of decisions on political accountability mechanisms are themselves part of an even wider trend within the law of substantive review. In the last few years the higher courts, and particularly the Supreme Court, have taken steps towards reforming the law of substantive review. The courts are seemingly increasingly attracted to a free-floating, 'contextual' approach to scrutinising the substance of executive decisions, which typically involves open-ended judicial weighing of disparate considerations on a case by case basis.<sup>68</sup> The principal focus of analysis in such cases increasingly tends to be judicially-articulated substantive values, the bounds and application of such values being for the judges to determine. The public interest goals which statutory powers and duties are intended to serve only tend to enter analysis as

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<sup>67</sup> *Evans*, *ibid*, [182] (Lord Wilson dissenting).

<sup>68</sup> eg *Kennedy v The Charity Commission* [2014] UKSC 20; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

background or countervailing considerations, whereas the statute was once the analytical starting point. It is now rare to find judicial review cases in which the parent statute is the focus of judicial analysis, is engaged with seriously and fundamentally shapes the approach to substantive review; this is of a piece with the approaches in *Bradley*, *EMAG*, *Litvinenko* and *Evans*. Typically such free-floating approach results in the courts intervening according to a far lower threshold than the orthodox *Wednesbury* test – which the courts now suggest might be expunged from the law altogether. The argument made to legitimate this free-floating, essentially discretionary approach to substantive review is that courts will exercise self-discipline. Cases such as those considered in this paper, and many more, suggest this is wishful thinking.

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# 11

## Conclusion: a Legitimacy Crisis in Judicial Review

The increasing frequency and boldness of judicial interventions into the very heart of political accountability processes raises serious concerns. These include that judges are adopting an approach to review which runs fundamentally against the grain of the statutory frameworks governing political mechanisms; that courts are supplanting the role of political and democratic institutions; that increased judicial intervention is undermining the distinctive nature of political mechanisms; instances of accountability overkill; that judges are adjudicating matters which they lack experience and expertise to adjudicate competently, and constitutional legitimacy to determine; and that such interventions are leading to the legal capture, warping and quieting of political discourse, and the politicisation of courts and law. While these developments may well be driven by a desire to enhance the effectiveness of political accountability mechanisms, judicial intervention on this basis is not only wrongheaded and unnecessary but has the inverse effect of impeding the proper functioning of the very mechanisms the courts are seeking to bolster. As Lord Justice Wall opined, in his separate judgment in *Bradley*, when it comes to political mechanisms such as the Ombudsman process, the claimant's 'remedy is political, not juridical'.<sup>69</sup> If the Ombudsman scheme is to operate as Parliament intended the Supreme Court should overrule *Bradley* at the next opportunity. Perhaps foreshadowing such a re-examination of *Bradley* is Lord Sumption's recent observation in the Supreme Court decision in *JR55* that, although the matter did not arise in that case, 'The decision in *Bradley* raises delicate questions about the relationship between judicial and Parliamentary scrutiny of a minister's rejection of the recommendations of the Parliamentary Commissioner for Administration'.<sup>70</sup>

Unfortunately the trends in judicial review identified herein are not limited to review of political accountability processes, albeit judicial readiness to intervene in political mechanisms such as the Ombudsman process are particularly inapt. As the courts increasingly and more readily encroach upon the executive sphere, determining what are substantively good or bad reasons for executive action, the traditional conception of judicial review as a secondary, supervisory jurisdiction begins to break down, as do the dividing lines between the responsibilities of courts and government, and the provinces of law and politics. This is highly problematic because the ideas that judges were only exercising a long-stop, supervisory jurisdiction on review, and that the judicial

<sup>69</sup> *Bradley*, above, [141].

<sup>70</sup> *In the matter of an application by JR55 for Judicial Review (Northern Ireland)* [2016] UKSC 22, [20].

role is one distinct from the functions of government and removed from ordinary politics have long served to legitimise judicial review. If those struts are removed, judicial review shall be plunged into a legitimacy crisis. Arguably we are already there.



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