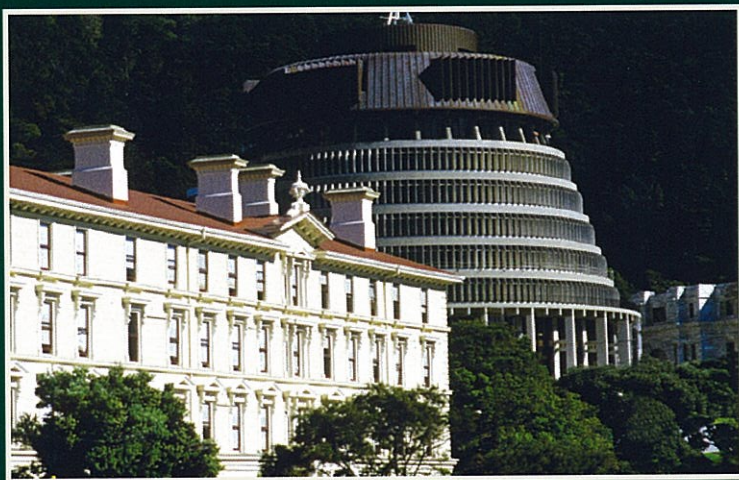


# *New Zealand Journal of Public and International Law*



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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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David Mullan  
Mihia Pirini

Stephen Smith  
Edward Willis  
Ruiping Ye

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UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



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*Te Kauhanganui Tātai Ture*

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# THE DEMISE OF ULTRA VIRES IN NEW ZEALAND: TO BE? NOT TO BE!

*Ruiping Ye\**

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*This article examines whether New Zealand courts have renounced the ultra vires doctrine as the central principle of judicial review. It analyses the meaning of jurisdiction, the relationship between error of law review and ultra vires, the judiciary's attitude towards legislative intent, and the competing concepts of parliamentary sovereignty and common law fundamental rights. This article observes that vires has evolved from the narrow concept of jurisdiction to a general power conferred by Parliament. It argues that the New Zealand courts have treated error of law review as a species of ultra vires, that there is a trend to interpret legislation more strictly without reading in the courts' extra requirements of good administration, that the courts employ legislative intent in dealing with privative clauses and that they avoid expressing a view on the common law fundamental rights discussion. This article concludes that the New Zealand courts have not renounced the ultra vires doctrine.*

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## *I Introduction*

The orthodox view on the justification of judicial review is the ultra vires doctrine. The doctrine was accepted as "the juristic basis of judicial review",<sup>1</sup> which "justified judicial review (by declaring all power to be derived power) and constrained it (by permitting a degree of autonomy to the reviewed body)".<sup>2</sup> The orthodoxy first implies that judicial review is the review of statutory power. Second, it implies that judicial review does not go beyond policing the limit that "a public authority

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\* LLB (Xiamen), LLM (VUW), Barrister and Solicitor of the High Court of New Zealand. This paper was submitted in fulfilment of the VUW LLM programme, and was the recipient of the Legal Research Foundation's Unpublished Student Work Award 2009. Many thanks to Dean Knight for his invaluable advice along the way.

1 *Boddington v British Transport Police* [1999] 2 AC 143 at 164 (HL) per Lord Brown-Wilkinson [*Boddington*].

2 Harry Woolf, Jeffrey Jowell and Andrew Le Sueur *De Smith's Judicial Review* (6th ed, Sweet and Maxwell, London, 2007) at 223 [*De Smith's Judicial Review*].

may not act outside its powers".<sup>3</sup> Both implications have subjected the ultra vires doctrine to criticism. The attack on the doctrine was initiated in 1987 and sparked a debate about the doctrine.<sup>4</sup>

Against the first implication, the opponents of the ultra vires doctrine argue that judicial review has extended from review of statutory power to review of public function, in which case Parliament is not always the "donor" of the power.<sup>5</sup> The defenders of the doctrine readily admit that the doctrine does not provide a juristic basis for review of non-statutory powers.<sup>6</sup> Since the two camps do not disagree on this point, this article does not address this issue. Instead, this article focuses on judicial review of the exercise of statutory power.

Against the second implication, there are two criticisms. The first one relates to the ambit of "power" or, in other words, the meaning of jurisdiction. The opponents of the doctrine argue that since the distinction of jurisdictional error and non-jurisdictional error has been abolished, judicial review is no longer concerned with the notion of vires.<sup>7</sup> The second criticism more directly points to legislative intent. The opponents of the doctrine question the extent to which "the relevant legal rules and their application can be satisfactorily explained by reference to legislative intent".<sup>8</sup> They argue that judicial review is not about policing the power limit, but about checking the lawfulness of public action.<sup>9</sup> On this basis, they advance the common law's ability to control public power and the rule of law as the justification of judicial review.<sup>10</sup>

Professor Philip Joseph's argument of "the demise of ultra vires" in New Zealand largely reflects these two criticisms.<sup>11</sup> Joseph argued that in New Zealand *Peters v Davison* "repudiated the conceptual link between error of law and jurisdictional error" and that "error of law review ...

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3 Sir William Wade and Christopher Forsyth *Administrative Law* (10th ed, Oxford University Press, New York, 2009) at 30.

4 Dawn Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] PL 543. See for example the collection of essays in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000).

5 Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?", above n 4, at 546. See also *De Smith's Judicial Review*, above n 2, 197.

6 Mark Elliott *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford and Portland, Oregon, 2001) at 5 and 165.

7 *De Smith's Judicial Review*, above n 2, at 179.

8 Paul Craig "Ultra Vires and the Foundations of Judicial Review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000) 47 at 49.

9 *De Smith's Judicial Review*, above n 2, at 198.

10 Craig "Ultra Vires and the Foundations of Judicial Review", above n 8, at 69.

11 Philip A Joseph "The Demise of Ultra Vires – Judicial Review in New Zealand Courts" [2001] PL 354 [Joseph "Demise of Ultra Vires"].

relegates the arcane terminologies of 'ultra vires'.<sup>12</sup> He also argued that the ultra vires doctrine was "ahistorical", that "ultra vires and presumed parliamentary intent [were] false gods" and that the courts develop the law as "justice and the rule of law require".<sup>13</sup> Joseph's arguments could be summarised as follows: first, abolishing the distinction between jurisdictional error and non-jurisdictional error renders the ultra vires doctrine dead; second, error of law review has replaced the ultra vires doctrine; third, presumed parliamentary intent is a false god and the superior courts have the inherent power to conduct judicial review. Standing as an opponent of the ultra vires doctrine, Joseph quoted *Bulk Gas Users Group v Attorney-General (Bulk Gas)* and *Peters v Davison* as the evidence of New Zealand judiciary's renouncing of the ultra vires doctrine.<sup>14</sup>

Using Joseph's assertions as measures, this article examines whether New Zealand courts have renounced the doctrine of ultra vires and argues that they have not. Part II of this article discusses the different meanings of jurisdiction and the erosion of the distinction between jurisdictional error and non-jurisdictional error. It argues that the courts have treated the removing of the distinction as the widening of the ultra vires doctrine rather than as the demise of the doctrine. Part III analyses the relationship between error of law review and the ultra vires doctrine. It argues that the courts have treated error of law as a species of the doctrine rather than as replacing the doctrine. Part IV examines the extent to which legislative intent is respected by the courts. It observes that legislative intent often sets the criteria for reasonableness or natural justice, and that increasingly the courts treat legislative intent as the determinative factor in a case. It also argues that the courts' approaches to privative clauses indicate the reluctance of the courts to renounce the ultra vires doctrine. Part V discusses the courts' response to the competing theories of parliamentary sovereignty and fundamental common law rights in judicial review cases. It observes that the courts are reluctant to directly address this issue, with fundamental human rights on the one hand and the political fact of parliamentary supremacy on the other. It argues that this reluctance does not mark the demise of ultra vires. This article concludes that, although at times the courts have reviewed the lawfulness of administrative action, they have done so by presuming legislative intent and the power limit prescribed by Parliament. Therefore, the New Zealand judiciary has not renounced the ultra vires doctrine.

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12 *Peters v Davison* [1999] 2 NZLR 164 (CA). See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 851 and Joseph "Demise of Ultra Vires", above n 11, at 361.

13 Joseph "Demise of Ultra Vires", above n 11, at 354-355. See also Philip A Joseph "The Demise of Ultra Vires – A Reply to Christopher Forsyth and Linda Whittle (2001-2002) 8 Canterbury L Rev 463 at 463 [Joseph "A Reply"]". In the same article, Joseph went further and directly attacked the doctrine of parliamentary sovereignty at 472-475.

14 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) [*Bulk Gas*] and *Peters v Davison*, above n 12, discussed in Joseph *Constitutional and Administrative Law in NZ*, above n 12, at 851.

## II *Beyond Jurisdiction and Ultra Vires*

The notion of jurisdiction was at the centre of the traditional ultra vires doctrine. Traditionally the doctrine confined courts' jurisdiction to errors at the outset, and viewed errors along the way as intra vires.<sup>15</sup> The courts only reviewed those inquiries that the public body was not authorised to enter into or proceed with, and refrained from reviewing a mistake in a matter within the public body's authority.<sup>16</sup> In other words, where the public body entered into an inquiry that was outside its authority, the public body acted without jurisdiction, ultra vires, and committed jurisdictional error; where the errors occurred while the public body was carrying out its authorised function, the errors were within jurisdiction of the public body, intra vires, and non-jurisdictional errors. Thus, within or without jurisdiction pointed to the public body's authority to act, while jurisdictional error or non-jurisdictional error pointed to the courts' power to review. In this sense the notion of a public body's jurisdiction was narrow; it only denoted the entitlement to enter into an inquiry.

The meaning of jurisdiction was broadened in the English case *Anisminic Ltd v Foreign Compensation Commission (Anisminic)*,<sup>17</sup> which was followed by later cases in both England and New Zealand. Joseph argues that since the traditional distinction of jurisdictional error and non-jurisdictional error has been abolished, the ultra vires doctrine is dead. This Part analyses *Anisminic* and the line of cases that followed. It discusses the broadening of the meaning of jurisdiction and the widening concept of ultra vires. It argues that the ultra vires doctrine has developed from the narrow jurisdictional error to the general excess of the power ordained by Parliament.

### A *Jurisdiction: The Meaning Broadened and the Distinction Abolished*

The meaning of jurisdiction has been changing over time. It has gone through a process of widening, narrowing, and widening again. The notion of jurisdiction is "elusive" and the line of jurisdictional error and non-jurisdictional error was not always clear-cut.<sup>18</sup> The distinction came from the modern writ of certiorari between 1635 and 1680.<sup>19</sup> Traditionally the King's Bench would quash the decisions of inferior courts only when they did not have jurisdiction or when the error was on the face of the record.<sup>20</sup> However, at first, "errors committed by inferior courts were almost

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15 *De Smith's Judicial Review*, above n 2, at 181-182. See also Joseph "Demise of Ultra Vires", above n 11, at 359.

16 *Ibid.* See also Wade and Forsyth *Administrative Law*, above n 3, at 212-214.

17 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) [*Anisminic*].

18 Edith G Henderson *Foundations of English Administrative Law: certiorari and mandamus in the seventeenth century* (Harvard University Press, Cambridge, 1963) at 117 [*Henderson Foundations of English Administrative Law*]. See also Michael Fordham *Judicial Review Handbook* (4th ed, Hart Publishing, Oxford and Portland, Oregon, 2004) at 833.

19 Henderson, above n 18, at 95 and 116.

20 *Ibid.*, at 145.



invariably assumed to go to jurisdiction".<sup>21</sup> It was not until the early 1800s that jurisdictional error was restrained to its narrow sense of the authority to act.<sup>22</sup> Given its ability to be stretched or narrowed, it is not surprising that the meaning of jurisdiction was later stretched again in appropriate situations.

*Anisminic* was the landmark case that broadened the meaning of jurisdiction. In that case, the plaintiffs claimed that the defendant, the Foreign Compensation Commission, committed an error of law by interpreting a term in its empowering statute erroneously. The House of Lords split in the decision. The minority followed the traditional line and held that the Commission acted within its jurisdiction, since the Commission was carrying out an inquiry within its terms of reference and so the error of law was not committed at the outset.<sup>23</sup> The majority held that the Commission had stepped outside its jurisdiction as a consequence of the error of law and of asking a question that Parliament did not intend it to ask.<sup>24</sup> In Lord Reid's words:<sup>25</sup>

The court must be able to correct that – not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, *they had no right to deal*.

The majority expanded "jurisdiction" from its narrow sense, "authority to inquire into and determine a matter",<sup>26</sup> into "simply 'power'".<sup>27</sup> In contrast to "entitlement to enter on the inquiry in question",<sup>28</sup> exceeding power encompasses any situation that is not authorised by Parliament, which includes situations like the decision-maker acting in bad faith, breaching natural justice, asking the wrong question and not taking into account matters which the decision-maker was required to take into account.<sup>29</sup> The list could go on and *Anisminic* in fact made "the ambit of excess of jurisdiction very wide".<sup>30</sup>

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21 *De Smith's Judicial Review*, above n 2, at 181. See also Henderson, above n 18, at 127.

22 *De Smith's Judicial Review*, above n 2, at 181.

23 *Anisminic*, above n 17, at 182-185 and 194 per Lord Morris; 215-216 and 223 per Lord Pearson.

24 *Ibid*, at 171 and 174 per Lord Reid; 195 and 198 per Lord Pearce; 210 per Lord Wilberforce.

25 *Ibid*, at 174 per Lord Reid (emphasis added).

26 Joseph *Constitutional and Administrative Law in NZ*, above n 12, at 851.

27 Wade and Forsyth *Administrative Law*, above n 3, at 212. See also *Peters v Davison*, above n 12, at 209 per Tipping J.

28 *Anisminic*, above n 17, at 171 per Lord Reid; 195 per Lord Pearce.

29 *Ibid*, at 171 per Lord Reid.

30 *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 at 75 per Geoffrey Lane CJ [*Pearlman*].

Since *Anisminic*, the meaning of jurisdiction has often been used in its broad sense. This gave rise to the claim that the distinction between jurisdictional and non-jurisdictional errors was redundant, although at first opinions differed. Wade argued that *Anisminic* purported to maintain the distinction between error within jurisdiction and error beyond jurisdiction, although he admitted that the widening ambit of jurisdiction had in fact undermined the distinction.<sup>31</sup> This seems to be a fair comment on the judgments. For example, Lord Pearce pointed out that asking the wrong question was excess of jurisdiction, while asking the right question but coming to the wrong answer was within the jurisdiction.<sup>32</sup> Here the distinction between the two is very fine, but nevertheless exists. Later in *Pearlman v Keepers and Governors of Harrow School (Pearlman)*, Lane CJ analysed *Anisminic* and, quoting Lord Reid, drew the conclusion that the question was "not whether [the decision-maker] made a wrong decision, but whether he inquired into and decided a matter which he had no right to consider".<sup>33</sup> On the contrary, Lord Denning suggested in the same case that the distinction between jurisdictional error and non-jurisdictional error be discarded.<sup>34</sup> The Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union (SEA Fire Bricks)* expressly rejected Lord Denning's view and affirmed Lane CJ's view, although embracing *Anisminic*'s wide ambit of jurisdiction.<sup>35</sup> This line of analysis was later overtaken by another view.

A series of cases applied *Anisminic* and established that the distinction between jurisdictional error and non-jurisdictional error was abolished. In *Re Racal Communications Ltd (Re Racal)*, Lord Diplock stated that "errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished [by *Anisminic*]".<sup>36</sup> Later *R v Lord President of the Privy Council, ex parte Page (Page)*<sup>37</sup> and more recently *Boddington v British Transport Police (Boddington)*<sup>38</sup> reiterated this proposition. This line of authority has generally been accepted as representing the current law.

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31 Wade and Forsyth *Administrative Law*, above n 3, at 222-223.

32 *Anisminic*, above n 17, at 195 per Lord Pearce.

33 *Pearlman*, above n 30, at 75-76 per Lane CJ dissenting.

34 *Ibid*, at 70 per Lord Denning.

35 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, 370 and 374 (PC) per Lord Fraser for the Court [*SEA Fire Bricks*].

36 *Re Racal Communications Ltd* [1981] AC 374 at 383 (HL) per Lord Diplock [*Re Racal*]. His Lordship later reiterated this pronouncement in *O'Reilly v Mackman* [1983] 2 AC 237 at 278-279 (HL).

37 *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 at 701 (HL) per Lord Browne-Wilkinson [*Page*].

38 See *Boddington*, above n 1, at 154 per Lord Irvine.

The law as developed in *Re Racal* is not without qualification. Lord Diplock qualified his proposition by stating that the abolishing of distinction was limited to administrative tribunals and authorities and did not extend to inferior courts.<sup>39</sup> In *Page*, the Court differentiated between tribunals and inferior courts on the one hand and university Visitors on the other.<sup>40</sup> This seemed to be indicating a degree of hesitation on the courts' part to abolish the distinction outright.

New Zealand courts have followed the English law, but at some stage the proposition seemed to be less clear. In *Bulk Gas*, Cooke J stated that he saw "no irreconcilable difference in principle between Lord Diplock's approach and that of [*SEA Fire Bricks*]".<sup>41</sup> In *O'Regan v Louish*, Tipping J accepted that "*Anisminic* rendered immaterial the former distinction between errors going to jurisdiction and error within jurisdiction".<sup>42</sup> His Honour quoted *SEA Fire Bricks* together with *Re Racal*, *O'Reilly* and *Page* to support his proposition.<sup>43</sup> In *Peters v Davison* the joint judgment of Richardson P, Henry and Keith JJ also expressed the opinion that the distinction was redundant, but their Honours only quoted *Re Racal*, *O'Reilly* and *Page*.<sup>44</sup> Later in *Zaoui v Attorney-General* (*Zaoui* (HC)), Williams J simply employed the broad sense of jurisdiction and did not discuss the distinction issue.<sup>45</sup> Therefore, it seems that despite the twists and turns, it is now settled law in New Zealand that the distinction was abolished. Academia from the two opposite camps – Wade and Forsyth as the defenders of the ultra vires doctrine and Woolf and Jowell as the opponents of the doctrine – also agree that it is now accepted law that the distinction has been abolished.<sup>46</sup>

## ***B The Concept of Ultra Vires Widened***

Even if the distinction between jurisdictional error and non-jurisdictional error has been abolished, it does not necessarily mean the demise of ultra vires. When seizing the issue of jurisdiction as a means to attack the ultra vires doctrine, some opponents of the ultra vires doctrine direct the attention at the narrow meaning of jurisdiction. Woolf and Jowell define the organising principle of judicial review, the object of their attack, as ultra vires "in the narrow or strict sense".<sup>47</sup>

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<sup>39</sup> *Re Racal*, above n 36, at 383 per Lord Diplock.

<sup>40</sup> *Page*, above n 37, at 702 per Lord Browne-Wilkinson.

<sup>41</sup> *Bulk Gas*, above n 14, at 133 per Cooke J.

<sup>42</sup> *O'Regan v Louish* [1995] 2 NZLR 620 at 626 (HC) per Tipping J.

<sup>43</sup> *Ibid*, at 626 per Tipping J.

<sup>44</sup> *Peters v Davison*, above n 12, at 183 per Richardson P, Henry and Keith JJ.

<sup>45</sup> *Zaoui v Attorney-General* [2004] 2 NZLR 339 at [61] (HC) Williams J [*Zaoui* (HC)]

<sup>46</sup> See Wade and Forsyth *Administrative Law*, above n 3, at 222-225; *De Smith's Judicial Review*, above n 2, at 191-193. Woolf and Jowell admit in some circumstances there will be residual of the distinction. See *De Smith's Judicial Review*, above n 2, at 178.

<sup>47</sup> *De Smith's Judicial Review*, above n 2, at 178.

They further qualify their argument by stating that "[j]udicial review ... is no longer very concerned with the notion of jurisdictional rectitude or vires, in the narrow sense of those terms".<sup>48</sup> Similarly, Joseph argues that by abolishing the distinction between jurisdictional and non-jurisdictional error, *Anisminic* "relegated ultra vires as the conceptual basis of judicial review".<sup>49</sup> He views the terms error at the outset, error beyond jurisdiction, jurisdictional error and ultra vires as synonyms. Once the distinction between error of law at the outset and other errors of law was abolished, he concludes that the distinction between ultra vires and intra vires also became obsolete and therefore the courts have renounced the ultra vires doctrine.

These opponents of the ultra vires doctrine refuse to recognise that the concept of ultra vires has evolved as the courts have developed the theory of the widened concept of ultra vires. This theory runs through the English authorities. In *Re Racal*, Lord Diplock stated that *Anisminic* "ha[d] made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires".<sup>50</sup> In *Page*, Lord Browne-Wilkinson pointed out that the obsolescence of the distinction was achieved "by extending the doctrine of ultra vires".<sup>51</sup> In *Boddington* the House of Lords reaffirmed the central position of the ultra vires doctrine.<sup>52</sup> For the English courts, abolishing the distinction between jurisdictional error and non-jurisdictional error did not mark the demise of the doctrine, rather it widened the doctrine.

In New Zealand Tipping J similarly advanced the widening concept of ultra vires. In *O'Regan v Louish*, Tipping J endeavoured to explain the widening concept of ultra vires,<sup>53</sup> which was essentially the same as that articulated by Lord Browne-Wilkinson. Tipping J's proposition has gained some support in other cases, although there have been fewer cases in New Zealand than in England that directly discussed the issue of ultra vires. For example, in *Peters v Davison* Thomas J endorsed Lord Diplock's view that *Anisminic* had facilitated the development of a "rational and comprehensive system of administrative law on the foundation of the concept of ultra vires".<sup>54</sup> The joint judgment in *Peters v Davison*, in its brief discussion of error of law review, also mentioned *O'Regan* in support of its reasoning.<sup>55</sup> In *Zaoui* (HC), *O'Regan* was again referred to as authority.<sup>56</sup>

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48 Ibid, at 179.

49 Joseph "Demise of Ultra Vires", above n 11, at 359; Joseph *Constitutional and Administrative Law in NZ*, above n 12, at 851.

50 *Re Racal*, above n 36, at 382 per Lord Diplock.

51 *Page*, above n 37, at 441 per Lord Browne-Wilkinson.

52 See *Boddington*, above n 1, at 164 per Lord Browne-Wilkinson; 171 per Lord Steyn.

53 *O'Regan*, above n 42, at 626-627 per Tipping J. His Honour reiterated this proposition in *Peters v Davison*, above n 12, at 207.

54 *Peters v Davison*, above n 12, at 202 per Thomas J.

55 Ibid, at 184 per Richardson P, Henry and Keith JJ.

It appears that although relatively disinterested in the doctrinal discussion of ultra vires, New Zealand courts have accepted *O'Regan* as law.

The widened concept of ultra vires has been generally accepted by academia, even by some opponents of the doctrine. Dawn Oliver concludes that the ultra vires doctrine has two limbs: The first is the traditional position, which is limited to excess of authority to act; the second encompasses anything against the principle of good administration (which is presumed not to be authorised by Parliament).<sup>57</sup> The second limb essentially speaks of parliamentary intention and the general abuse of power. The courts will intervene on breach of either limbs of the doctrine. The successful attack on the first limb of the doctrine therefore does not mark the demise of the ultra vires doctrine. It is necessary to examine the courts' approach on the issues of abuse of power and legislative intent to determine whether the doctrine has been renounced.

### *III Error of Law Review and Ultra Vires*

At the centre of the ultra vires debate is whether judicial review is policing the power limit as set down by Parliament or whether it is ensuring lawful administration. To the defenders of the ultra vires doctrine, the central principle of administrative law is that "a public authority may not act outside its powers" and judicial review is the means to check it.<sup>58</sup> In contrast, the opponents of the doctrine argue that "[i]t is a function of the judiciary to determine the lawfulness" of administrative action,<sup>59</sup> and that "error of law review ... relegates the arcane terminologies of 'ultra vires'".<sup>60</sup> This Part examines the concept of error of law review and observes that the courts have treated error of law review as a species of ultra vires. It argues that although in different cases the courts have engaged different degrees of intervention, they have generally not advanced from checking the abuse of power to asserting the constitutional role of the guardian of the rule of law.

### *A Rule of Law and Ultra Vires: Competing and Reconciled*

The abolishing of the jurisdictional and non-jurisdictional distinction has a more critical effect than the discarding of the narrow concept of jurisdiction. This critical effect is that all errors of law are reviewable. Following the expanding ambit of jurisdiction, the courts are free to label any error of law as beyond jurisdiction and subsequently establish that all errors of law are reviewable. The

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56 *Zaoui* (HC), above n 45, at [60] per Williams J.

57 Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?", above n 4, at 544-545. See also Peter Cane *Administrative Law* (4th ed, Oxford University Press, Oxford, 2004) at 240 and Craig "Ultra Vires and the Foundations of Judicial Review", above n 8, at 48-49.

58 Wade and Forsyth *Administrative Law*, above n 3, at 30.

59 *De Smith's Judicial Review*, above n 2, at 184.

60 Joseph *Constitutional and Administrative Law in NZ*, above n 12, at 851 and Joseph "Demise of Ultra Vires", above n 11, at 361.

ultra vires opponents thus argue that the courts have power to review any error of law without the ultra vires doctrine lending its justification. They argue that the courts' power of judicial review comes from the common law and the courts have a constitutional duty to uphold the rule of law.<sup>61</sup> Thus there are two competing theories: the ultra vires theory insists administrative law is about maintaining Parliament's authority in setting the limit and ensuring administrative body not exceed the limit or abuse the power endowed; the common law theory proposes lawful administration, the courts' constitutional role to do justice and the constitutional mandate of the rule of law. There are two schools of thought within each of the two camps: the traditional ultra vires doctrine and the modified ultra vires doctrine on the one hand, and the strong critics and the weak critics on the other.<sup>62</sup> These four schools display a spectrum, with the modified doctrine and the weak critics sitting closely yet distinctly in the middle. It is these two that have gained more strength and that are now competing with each other.

The modified doctrine of ultra vires, which was developed by Forsyth and Elliott, offers an explanation as to why the courts mix legislative intent and the rule of law. The doctrine purports to reconcile the ultra vires doctrine with the concept of rule of law and reconcile legislative intent with judicial creativity. Forsyth and Elliott accept that Parliament could not and would not envisage the specific circumstances that the courts would have to deal with. They recognise that the rule of law "provides the inspiration for the exercise of the courts' judicial review jurisdiction" and agree that the concept of rule of law underpins all heads of review.<sup>63</sup> However, the rule of law is a "purely aspirational" principle and it is the interpretative process that accords it "*practical* expression" as a legal construct.<sup>64</sup> Therefore, Forsyth and Elliott accept the courts' independent function in developing the law, but argue that because "parliamentary democracy is based on the rule of law",<sup>65</sup> Parliament is presumed to intend that the rule of law should be upheld.<sup>66</sup> Thus they replace the concept of specific intent of Parliament with the concept of general intent. They conclude that Parliament has a general intent that the rule of law and the principles of good administration should

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61 See for example *De Smith's Judicial Review*, above n 2, at 185; Joseph "Demise of Ultra Vires", above n 11, at 355-364; Craig "Ultra Vires and the Foundations of Judicial Review", above n 8, at 50-51; Philip A Joseph "Scorecard on our Public Jurisprudence" (2005) 3 NZJPIIL 223 at 227-231.

62 Forsyth calls opposition to the ultra vires doctrine but not the parliamentary sovereignty doctrine as "weak criticisms" or "weak critics", and opposition to the ultra vires doctrine as well as the parliamentary sovereignty doctrine as "strong criticisms" or "strong critics". See Christopher Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 CLJ 122 at 128 [Forsyth "Of Fig Leaves"]. Most of the ultra vires opponents are weak critics.

63 Elliott *Constitutional Foundations of Judicial Review*, above n 6, at 101-102.

64 *Ibid*, at 108 (emphasis in original).

65 Quoting Lord Woolf "Droit Public – English Style" [1995] PL 57 at 68.

66 Elliott *Constitutional Foundations of Judicial Review*, above n 6, at 110.

be complied with, while leaving the courts to develop the practical principles in specific cases. Put in Elliott's words: "Parliament possesses a general intention concerning the limitation of discretionary power by reference, while leaving it to the courts to translate that general intention into specific legal principles".<sup>67</sup> Forsyth summarises the proposition in another way:<sup>68</sup>

Unless Parliament clearly indicates otherwise, it is presumed to intend that decision-makers must apply the principles of good administration drawn from the common law as developed by the judges in making the decisions.

Therefore, the modified doctrine allows the courts' creativity, but it points to the parliamentary mandate for the judiciary's role. In contrast, the weak critics from the common law camp recognise that Parliament's express will would be obeyed, but propose the judiciary's independent constitutional role in developing the law when Parliament is silent: "Unless Parliament clearly intends otherwise, the common law will require decision-makers to apply the principles of good administration as developed by the judges in making their decisions".<sup>69</sup>

The distinction between the modified doctrine and the weak critics is subtle but fundamental. The weak critics' starting point is the common law principle, which may be overridden by Parliament's expressed intent to the contrary. The modified doctrine's starting point is the presumed legislative intent, which may be overridden by express intent to the contrary. Thus the weak critics see the rule of law and parliamentary intent as two independent concepts, although the rule of law is subject to Parliament's express intent. In contrast, the modified doctrine reconciles the rule of law with the parliamentary intent and incorporates the former into the latter.

The courts have not directly discussed the relationship between these two concepts, but they have often used them together in error of law review. In the cases that established error of law as a head for review, the courts have expressed opinion both ways. In *Pearlman*, Lord Denning made it clear that "no court or tribunal ha[d] any jurisdiction to make an error of law on which the decision of the case depends".<sup>70</sup> He held that when the inferior courts and tribunals "[went] wrong in law, the High Court should have power to put them right".<sup>71</sup> These statements seemed to be a mix of ultra vires and lawfulness, the first relying on the concept of jurisdiction and the second seemingly asserting the Court's inherent power to review administrative action without reference to the administrative power conferred by law.

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67 Ibid.

68 Christopher Forsyth "Heat and Light: A Plea for Reconciliation" in Forsyth *Judicial Review and the Constitution*, above n 4, 393 at 396.

69 Ibid.

70 *Pearlman*, above n 30, at 70 per Lord Denning.

71 Ibid.

The later House of Lords cases affirming Lord Denning's view used the language both of parliamentary intent and of the courts' power to develop the law. In the most quoted case *Re Racal*, Lord Diplock's reasoning lay in the presumed parliamentary intent. He presumed that Parliament did not intend to confer power on administrative authorities to decide questions of law.<sup>72</sup> In his reliance on the presumed parliamentary intent, he commented that the limit of power conferred by Parliament was "a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity".<sup>73</sup> This speech of Lord Diplock's is capable of being interpreted either way and indeed has been relied upon by both the ultra vires camp and the common law camp.<sup>74</sup> However, the common law theory could not explain the judicial reference to legislative intent. If the courts were advancing their constitutional role to do justice, they could do so without any reference to legislative intent. Yet legislative intent was heavily relied upon when the courts reviewed unlawful administrative actions. In the end some members of the common law camp admitted that "the courts have ... [made] the presumption that Parliament intended its legislation to conform to the rule of law as a constitutional principle".<sup>75</sup> This is exactly the essence of the modified doctrine.

### ***B Error of Law – a Species of Ultra Vires***

Wade argued that error of law "has become a species of ultra vires".<sup>76</sup> The courts' later articulation explained the relationship of error of law review and the ultra vires doctrine, which ultimately reflected Wade's argument and the modified doctrine. The House of Lords has expressly affirmed that committing an error of law amounts to violating the ultra vires doctrine. In *Page*, Lord Browne-Wilkinson reasoned that "a misdirection in law in making the decision therefore rendered the decision ultra vires".<sup>77</sup> This speech was endorsed by other Law Lords in *Boddington*.<sup>78</sup> Lord Irvine held that "there was a single category of errors of law, all of which rendered a decision ultra vires".<sup>79</sup> Joseph admits that *Page* "treated judicial intervention for error of law as just another strain of ultra vires review"<sup>80</sup> and *Boddington* was no different.

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<sup>72</sup> *Re Racal*, above n 36, at 383 per Lord Diplock.

<sup>73</sup> *Ibid.*

<sup>74</sup> See for example *De Smith's Judicial Review*, above n 2, at 192-193 on the one hand, and Wade and Forsyth *Administrative Law*, above n 3, at 224 on the other.

<sup>75</sup> *De Smith's Judicial Review*, above n 2, at 13.

<sup>76</sup> Wade and Forsyth *Administrative Law*, above n 3, at 226.

<sup>77</sup> *Page*, above n 37, at 701 per Lord Browne-Wilkinson.

<sup>78</sup> See *Boddington*, above n 1, at 158 per Lord Irvine; 172 per Lord Steyn.

<sup>79</sup> *Ibid.*, at 158 per Lord Irvine.

<sup>80</sup> Joseph "Demise of Ultra Vires", above n 11, at 361.



In New Zealand, the claim that *Bulk Gas* upheld the rule of law over ultra vires is not supported by the case or comments about the case. In *Bulk Gas*, Cooke J unequivocally accepted that if Parliament expressly excluded judicial review in clear terms, a court would have to obey "even though an error of law (in the opinion of the Court) may be apparent on the record".<sup>81</sup> The modified doctrine and the weak critics agree that the courts will obey Parliament's express and defined intention. From Cooke J's comment in *Bulk Gas*, it is not entirely clear to which theory his Honour was more inclined. He quoted and endorsed Lord Diplock's speech that there is a "presumption that ... Parliament ... intends to confine that power to answering the question as it has been so defined".<sup>82</sup> Cooke J further reasoned that Parliament was presumed not to empower the public authority to decide conclusively on a question of law, unless it expressly or by necessary implication indicated otherwise.<sup>83</sup> This is essentially saying that Parliament is presumed to confine the power of an administrative authority within the limits as interpreted by the courts, unless it expressly denies it. This observation is supported by a commentator's view that when proceeding to judicial review, notwithstanding the strong privative clause, Cooke J took the route that "the Court is nevertheless giving effect to Parliament's intention".<sup>84</sup> Thus, it seems that as in *Bulk Gas*, Cooke J was more inclined to the modified doctrine than the weak critics.

Cooke J later indicated that the courts would not accept that Acts of Parliament could deprive the court of their significant general jurisdiction to determine on questions of law.<sup>85</sup> This was a big step from *Bulk Gas*. It has been recognised that Cooke J's views hardened after *Bulk Gas*.<sup>86</sup> This suggests that *Bulk Gas* was not a proper case to prove that New Zealand courts allow error of law review to trump ultra vires review. Extra-judicially, Cooke J distinguished an error in interpreting a statute from misunderstanding the task conferred on the administrator by Parliament, explaining that the latter was the rationale of *Bulk Gas*.<sup>87</sup> The distinction between these two is essentially error of law and error in ascertaining jurisdiction. Sitting with Cooke J in the *Bulk Gas* case, Sir Thaddeus

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81 *Bulk Gas*, above n 14, at 133 per Cooke J. Cooke J also discussed the different degrees of deference a court would give to an administrative tribunal and to an inferior court, as articulated by Lord Diplock in *Re Recal*, but that is not a direct point to this article.

82 *Re Racal*, above n 36, at 382-382 per Lord Diplock, quoted in *Bulk Gas*, above n 14, at 133 per Cook J.

83 *Bulk Gas*, above n 14, at 133 per Cooke J.

84 J A Smillie "Introduction" to Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press and the Legal Research Foundation, Auckland, 1986) xi at xii.

85 Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press and the Legal Research Foundation, Auckland, 1986) 1 at 10 [Cooke "Struggle for Simplicity"].

86 Smillie "Introduction", above n 84, at xii.

87 Sir Robin Cooke "Foreword" to GDS Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) v at vi.

McCarthy refused to "go beyond" the decision of *Anisminic*.<sup>88</sup> Sir Thaddeus expressed some concern at the suggestion that any error of law "whether central to the determination or not" would render a determination void. He implied that such a judicial policy would infringe "the proper boundaries of judicial and legislative functions within the State".<sup>89</sup> While Cooke J was prepared to obey a limit that Parliament might prescribe, Sir Thaddeus was conscious of judicial usurpation of legislative power. It was hardly the case that either judge was putting the rule of law over the concept of vires.

*Peters v Davison* did not relegate the ultra vires doctrine either. An examination of the case reveals that the joint judgment did not express any preference between the two concepts and the individual judgments strongly supported the ultra vires doctrine. The joint judgment's holding that error of law was a ground for review "in and of itself"<sup>90</sup> did not deny the central place of the ultra vires doctrine. It merely stated that error of law is one of many grounds for review which, as the ultra vires proponents argue, are all subject to the ultra vires doctrine. The joint judgment stated that "commissions of inquiry [must] be conducted in accordance with the law".<sup>91</sup> On this, Joseph asserts that the concept of rule of law has "replaced ultra vires as the organising principle of administrative law".<sup>92</sup> However, the term "rule of law" was not mentioned in the judgment. It is doubtful that their Honours were clearly pointing to the rule of law in the judgment. The only statement that could be inferred to mean rule of law was: "it is not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction".<sup>93</sup> Although an inference of rule of law could be drawn, this statement could equally be read as commenting on jurisdictional error and non-jurisdictional error. Furthermore, even if the judgment meant to uphold the rule of law, it is not a denial of the ultra vires doctrine. Thomas J also stated that the Commission was expected to "proceed in accordance with the law",<sup>94</sup> yet he promoted the ultra vires doctrine. The upholding of the rule of law did not exclude the application of ultra vires, and the joint judgment did not do so.

The joint judgment's comment that "[j]udicial review is in general available where a decision-making authority exceeds its powers, commits an error of law..."<sup>95</sup> did not indicate a preference for error of law review over ultra vires as the organising principle of judicial review. At best it treated

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88 *Bulk Gas*, above n 14, at 139 per Sir Thaddeus McCarthy.

89 *Ibid.*

90 *Peters v Davison*, above n 12, at 181 per Richardson P, Henry and Keith JJ.

91 *Ibid.*, at 183 per Richardson P, Henry and Keith JJ.

92 Joseph "Demise of Ultra Vires", above n 11, at 359.

93 *Peters v Davison*, above n 12, at 181 per Richardson P, Henry and Keith JJ.

94 *Ibid.*, at 195 per Thomas J.

95 *Ibid.*, at 180 per Richardson P, Henry and Keith JJ.

excess of power and error of law as separate concepts. This was because the passage described grounds for judicial review. Ultra vires as a ground for review and as the organising principle of judicial review are two different concepts, the former being narrow and direct, the latter being broad and principled. To this day ultra vires in its narrow sense and error of law are two grounds for review under the head of illegality,<sup>96</sup> which is taken to be governed by the doctrine of ultra vires.<sup>97</sup> Furthermore, the joint judgment's comment was taken from *Re Preston* in exactly the original wording.<sup>98</sup> Tipping J explained that Lord Templeman "was clearly not endeavouring to describe clear and mutually exclusive categories".<sup>99</sup> The same explanation is applicable to the joint judgment when their Honours quoted the passage. The joint judgment only mentioned error of law review in passing. The lack of reasoning on this issue creates the temptation and encourages the imagination to fill the gap. However, given that error of law review has been recognised by English authorities such as *Page* and *Boddington*, it is understandable that their Honours said no more on the point. They simply expressed an established proposition in the English law, which could hardly be seen to promote the concept of error of law review over ultra vires review.

The individual judgments were more explicit on the ultra vires doctrine. Tipping J endeavoured to explain that the widening concept of ultra vires has encompassed error of law as a species of ultra vires.<sup>100</sup> His Honour held that the "three classic heads"<sup>101</sup> of judicial review, namely illegality, unfairness and irrationality, were underpinned by the "symmetrical rationale" of ultra vires.<sup>102</sup> This is so because "[t]he power to decide ... is given on the premise that such power will be exercised lawfully, fairly and rationally".<sup>103</sup> Tipping J's proposition accorded with Lord Browne-Wilkinson's articulation:<sup>104</sup>

If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully.

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96 See Fordham *Judicial Review Handbook*, above n 18, at 825 and 842 (Part IC "Grounds for Judicial Review"). See also Crown Law Office *The Judge over Your Shoulder* (Crown Law Office, Wellington, 2005) at 7-8.

97 Fordham *Judicial Review Handbook*, above n 18, at 825. See also *Peters v Davison*, above n 12, at 208 per Tipping J.

98 *Re Preston* [1985] AC 835 at 862 per Lord Templeman.

99 *Peters v Davison*, above n 12, at 207 per Tipping J.

100 *Ibid.*, at 205-209 per Tipping J.

101 *Ibid.*, at 208 per Tipping J.

102 *Ibid.*

103 *Ibid.*

104 *Page*, above n 37, at 701 per Lord Browne-Wilkinson.

Tipping J concluded that error of law was a manifestation of ultra vires.<sup>105</sup> Thomas J did not find Tipping J's explanation necessary. He readily accepted the proposition that error of law was an example of ultra vires as established law.<sup>106</sup> He recognised that acting in breach of the principles of natural justice and acting outside jurisdiction, which included failure to exercise jurisdiction by committing error of law, were both examples of the doctrine of ultra vires.<sup>107</sup> Thomas J and Tipping J echoed each other: Because ultra vires was the basis for review, and because error of law was an example of ultra vires, error of law was a ground for review.<sup>108</sup> The judicial articulation in essence reflects the second limb of the ultra vires doctrine, which presumes that Parliament "withhold[s] from decision-makers the power to act unfairly and unreasonably".<sup>109</sup>

With the joint judgment following *Page* and *Boddington* (and thus implicitly confirming error of law a species of ultra vires) and the individual judgments unequivocally affirming the proposition, *Peters v Davison* has treated error of law review as a species of ultra vires. Likewise *Bulk Gas* did not put the concept of rule of law above the concept of vires.

### ***C Courts Seeking Higher Authority than Common Law Power***

The concept of ultra vires was a natural consequence of the development of early judicial review. Since the early days of judicial review, the courts have struggled to find a justification for it other than common law or the courts' inherent power to do justice.

It was commonly understood that *James Bagge's case* in 1615 was the beginning of the modern remedy of mandamus, and laid the foundation for judicial review.<sup>110</sup> There was no authority to support *James Bagge's case*. The writs of mandamus around that time "said nothing to explain why King's Bench could do this, beyond the bare generality that an injustice had been done and it ought to be set right".<sup>111</sup> It was said that the writ was the "manifestation of Coke's central belief, as a judge, in the supremacy of the common law".<sup>112</sup> However the courts were soon dissatisfied with "inherent power" and "supremacy of common law" as justifications of judicial review. Later cases tried to

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<sup>105</sup> *Peters v Davison*, above n 12, at 207 and 209 per Tipping J.

<sup>106</sup> *Ibid*, at 201 per Thomas J.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*, at 201-202 per Thomas J; 206 and 210 per Tipping J.

<sup>109</sup> Mark Elliott "Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" (1999) 58 CLJ 129 at 143.

<sup>110</sup> See generally Henderson *Foundations of English Administrative Law*, above n 18. See also *De Smith's Judicial Review*, above n 2, at 180.

<sup>111</sup> Henderson *Foundations of English Administrative Law*, above n 18, at 62 and 70.

<sup>112</sup> *Ibid*, at 66 and 70.

justify the court's power to issue mandamus by saying that the power "derived from the residual power of the King himself to do justice", which "the King has delegated to his Court of King's Bench".<sup>113</sup> Therefore, although started as an invention of the common law and justified by the courts' power to do justice, the development of mandamus turned to seek its justification in the higher authority of the King, which later developed into finding justification in the authority of Parliament. The courts thus abandoned the common law theory and invented the ultra vires doctrine as the justification of judicial review. It is not impossible that the courts will revert to the original position again one day but this has not happened yet.

Joseph admits that the English courts have not renounced the ultra vires concept.<sup>114</sup> In 1999, about the time when the debate was at its most heated, the House of Lords in *Boddington* reaffirmed the central position of the ultra vires doctrine. Lord Browne-Wilkinson reiterated his position in *Page* and stated that "I adhere to my view that the juristic basis of judicial review is the doctrine of ultra vires".<sup>115</sup> Lord Steyn also saw "no reason to depart from the orthodox view that ultra vires is 'the central principle of administrative law' as Wade and Forsyth described".<sup>116</sup> His Lordship emphasised that "this is the essential constitutional underpinning of the statute based part of our administrative law".<sup>117</sup> Lord Steyn later accepted that the ultra vires opponents had convinced him that the ultra vires theory was "a dispensable fiction".<sup>118</sup> However, this was an extra-judicial articulation and his Lordship left the door open by saying that the view was subject to "hearing further argument".<sup>119</sup> There is no case to suggest the English judiciary has changed its attitude towards the ultra vires doctrine since then.

As analysed earlier, *Peter v Davison* did not renounce the doctrine either. Tipping and Thomas JJ's strong voices and the joint judgment's silence on the doctrine sent an overall message that the court was positive towards the ultra vires doctrine.<sup>120</sup> Although Joseph's interpretation of *Peters v Davison* might have some influence on the New Zealand judiciary, the case is not strong. In the

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<sup>113</sup> Ibid, at 66 and 69.

<sup>114</sup> Joseph "Demise of Ultra Vires", above n 11, at 361.

<sup>115</sup> *Boddington*, above n 1, at 164 per Lord Browne-Wilkinson.

<sup>116</sup> Ibid, at 171 per Lord Steyn.

<sup>117</sup> Ibid, at 172 per Lord Steyn.

<sup>118</sup> Lord Johan Steyn "Democracy through Law" (New Zealand Centre for Public Law, Occasional Paper No 12, September 2002) at 4.

<sup>119</sup> See *ibid*, at footnote 8.

<sup>120</sup> See for example *Peters v Davison*, above n 12, at 205 per Tipping J ("[u]ltra vires is the essential underpinning of all grounds for judicial review") and 202 per Thomas J ("any ... statutory body ... is subject to the doctrine of ultra vires").

unreported Court of Appeal case of *Campbell v The Superintendent of Wellington Prison*, McGrath J remarked that:<sup>121</sup>

When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires.

This statement was an opinion expressed in passing as the case was a habeas corpus application and not a judicial review case, and there was no case cited to support the statement. Later the Supreme Court in *Astrazeneca Limited v Commerce Commission and another*<sup>122</sup> declared a decision of the Commerce Commission to be "ultra vires and invalid",<sup>123</sup> when arguably "invalid" alone would have sufficed. This at least suggests that there is no tendency to avoid the term ultra vires.

A Court of Appeal judge has also expressly supported the "abuse of power" theory, although not directly using the term ultra vires. For a start Hammond J opposes the "overarching and all encompassing" simplified approach.<sup>124</sup> In the high profile *Lab Tests Auckland Ltd v Auckland District Health Board*, Hammond J devoted much space to discussion of the two schools of theory: the "traditional orthodoxy" on the abuse of power and the "more modern" thought on the High Court's "independent capacity" to conduct judicial review.<sup>125</sup> Hammond J drew support from the High Court of Australia's opposition to imposing the idea of good administration or good governance and discussed Lord Cooke's simplicity theory.<sup>126</sup> Hammond J then concluded that:<sup>127</sup>

The most obvious candidate is the concept of abuse of power, which lies at the very heart of administrative law ... to act outside one's powers, in genuine error, is still an abuse of power and the traditional "four-corners" doctrine reels in the large majority of abuses of power.

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<sup>121</sup> *Campbell v The Superintendent of Wellington* [2007] NZAR 52 (CA) at [29] per McGrath J for the Court.

<sup>122</sup> *Astrazeneca Limited v Commerce Commission and another* [2009] NZSC 92, [2010] 1 NZLR 297.

<sup>123</sup> *Ibid*, at [41] per Blanchard J for the Court.

<sup>124</sup> As favoured by Lord Cooke and promoted by Joseph. See *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 at [221] (CA) per Hammond J. Although his Honour was referring to the "overarching (and all encompassing) 'reasonableness' test" in the context of the case, Lord Cooke's overarching and all encompassing test was "has something gone wrong? If so, what should be done about it?". See Joseph "Demise of Ultra Vires", above n 11, at 372 and 373.

<sup>125</sup> *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776, at [363]-[367] (CA) per Hammond J [*Lab Tests* (CA)].

<sup>126</sup> *Ibid*, at [369] and [375] per Hammond J.

<sup>127</sup> *Ibid*, at [386] per Hammond J.

Although proposing to consider the judicial review grounds "in functional rather than doctrinal terms",<sup>128</sup> Hammond J clearly identified his principle with that of Wade and Forsyth's.

*Cropp v Judicial Committee* illustrates the different schools of theory in dealing with the rule of law and ultra vires. Although they arrived at the same conclusion, the three courts that heard the case employed different principles. The High Court approached the issue by ascertaining whether the Rules concerned were intra vires or ultra vires.<sup>129</sup> The Court of Appeal, drawing an analogy with the law of torts, held that "breach of the common law fundamental freedoms depends upon the absence of consent".<sup>130</sup> The Court of Appeal rejected the ultra vires approach and blurred the line between private law and public law. The Supreme Court rejected the theory of consent. The Supreme Court quoted and endorsed Wade and Forsyth: "[T]he principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law".<sup>131</sup> Here although the context was waiver of rights, the support for Forsyth's camp and the preference of ultra vires over the common law fundamentals were evident. Thus the Supreme Court has affirmed the doctrine of ultra vires in a direct manner.

Therefore, although academic commentators could not reconcile the two camps and each camp won on substance or on form respectively,<sup>132</sup> the judiciary leans to the ultra vires side. Individual jurists might have changed camp, but the English courts have not renounced the ultra vires doctrine. Likewise in New Zealand although there were some signs of influence by Joseph's argument and the courts were often silent about the doctrine, Tipping J's voice has been echoed and the Supreme Court has in the end spoken to uphold the doctrine.

#### *IV Legislative Intent and Judicial Review*

At the centre of the ultra vires debate is legislative intent. The common law model argues that legislative intent is a "false god".<sup>133</sup> The ultra vires camp argues that attacking legislative intent would ultimately lead to attacking parliamentary supremacy. This Part examines the courts' approaches to legislative intent, in the contexts of statutory application and privative clauses.

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<sup>128</sup> Ibid, at [381] per Hammond J.

<sup>129</sup> *Cropp v Judicial Committee* [2007] NZAR 465 at [91] (HC) per Andrews J.

<sup>130</sup> *Cropp v Judicial Committee* [2008] NZAR 50, at [13] and [16] (CA) per Fogarty J for the Court.

<sup>131</sup> *Cropp v Judicial Committee & Ors* [2008] NZSC 46, [2008] 3 NZLR 774 at [20] per Blanchard J for the Court, quoting Sir William Wade and Christopher Forsyth *Administrative Law* (9 ed, Oxford University Press, Oxford, 2004) 239.

<sup>132</sup> As Paul Craig admits. See Paul Craig "Competing Models of Judicial Review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000) 373 at 380 [Craig "Competing Models of Judicial Review"].

<sup>133</sup> Joseph "Demise of Ultra Vires", above n 11, at 354.

## A Statutory Application

Joseph argues for the courts' creativity in interpreting legislation and uses this as a means to attack the ultra vires doctrine.<sup>134</sup> However, the modified doctrine accepts that the courts could develop the law when Parliament leaves room for interpretation and presumes that Parliament intends the courts to interpret legislation as consistent with the rule of law. Furthermore, although some opponents directly attack the parliamentary supremacy doctrine,<sup>135</sup> the weak critics endeavour to prove that they do not wish to challenge it.<sup>136</sup> They admit that Parliament's express intent in the legislation would be obeyed by the courts.

As discussed earlier, the modified doctrine and the weak critics share common ground: If Parliament speaks clearly, the courts would obey; if Parliament speaks generally, the courts would interpret and apply the law to specific circumstances as they encounter them. The courts have articulated this in principle. For example, in *Bulk Gas* Cooke J admitted Parliament's overriding authority.<sup>137</sup> In *Staunton Investments Ltd v C E Ministry of Fisheries*, Gendall J expressly stated that "the starting point must be the intent, purpose, and aims of the legislation".<sup>138</sup> The Court of Appeal also ruled that "[i]t was a question of statutory interpretation whether and if so on what principled basis judicial review of the exercise of a particular statutory power was available".<sup>139</sup> These cases were expressing the common ground between the two sides of the ultra vires doctrine and could not be read as leaning to one side or the other.

The crucial issue is how far legislative intent could govern interpretation and application once the courts interpret and apply legislation. The development of grounds and standards of judicial review, such as the emergence of natural justice and *Wednesbury* unreasonableness, and the extension of review from "process-oriented rights" to "substantive fundamental rights", are often used as weapons against the ultra vires doctrine.<sup>140</sup> Craig admits that "the enabling legislation must be considered when determining the ambit of a body's powers", but questions "how far the relevant legal rules and their application can be satisfactorily explained by reference to legislative intent".<sup>141</sup>

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<sup>134</sup> Joseph "A Reply", above n 13, at 473-474.

<sup>135</sup> See for example Joseph "A Reply", above n 13, at 472-473.

<sup>136</sup> See for example Craig "Competing Models of Judicial Review", above n 132, at 381.

<sup>137</sup> *Bulk Gas*, above n 14, at 133 per Cooke J.

<sup>138</sup> *Staunton Investments Ltd v C E Ministry of Fisheries* [2004] NZAR 68 at [17] per Gendall J (HC).

<sup>139</sup> *Hawkins v Minister of Justice* [1991] 2 NZLR 530 at 536 per Richardson J (CA).

<sup>140</sup> See discussion in Elliott *Constitutional Foundations of Judicial Review*, above n 6, at 4-10. See also Bradley Delway "The Principle behind Common Law Judicial Review of Administrative Action the Search Continues" (2002) 30 FL Rev 217.

<sup>141</sup> Craig "Ultra Vires and the Foundations of judicial Review", above n 8, at 49.



This section examines the courts' recent trend in interpreting and applying statutes. It argues that the courts nowadays are taking a strict approach in applying statutes.

Craig's question implies that although the courts consider the enabling legislation, they do not rely on it alone but just treat enabling legislation as a factor to be considered. Contrary to this implication, in many cases the enabling statute involved was the determining factor rather than a matter for consideration. The empowering statute often provided an answer to whether the decision at issue was unreasonable or breached natural justice.

The notion of reasonableness review has attracted much discussion, but where statutory power is involved the empowering statute often provides a guide to the decision. For example, *Whata-wickliffe v Treaty of Waitangi Fisheries Commission* involved a complicated scheme to distribute fishing settlement assets, which the applicants claimed to be unreasonable.<sup>142</sup> Section 8 of the Maori Fisheries Act 2004 requires the Treaty of Waitangi Fisheries Commission to satisfy a series of criteria in carrying out its functions. The criteria are broad and general, such as having regard to Maori custom and conducting consultation "from time to time". The Court of Appeal, although it scrutinised the Commission's decision, did not try to read any extra requirement into the statutory criteria, and found the decisions under review "met the statutory criteria and were not unreasonable".<sup>143</sup> Hence the measure of reasonableness was the criteria set out in the statute.

*Department of Corrections v Taylor* was a good example of the measure of natural justice being the statutory provision.<sup>144</sup> Taylor was charged with an offence against prison discipline. A hearing adjudicator referred the case to a Visiting Justice under s 134 of the Corrections Act 2004 and the Visiting Justice convicted Taylor. The High Court, whose decision was overturned on appeal, found that not giving Taylor an opportunity to make submissions was a breach of natural justice, and that taking into account the applicant's previous conviction was an error of law.<sup>145</sup> The Court of Appeal focused on the statutory requirements in the Correction Act 2004. Upon finding that the Correction Act 2004 did not require a hearing nor did it prohibit taking previous conviction into account, it found there had been no breach of natural justice.<sup>146</sup> The Supreme Court refused Taylor's application for leave to appeal, holding that a right to hearing could not be read into s 134 of the Act.<sup>147</sup> Similarly, in *J v Bovaird and Board of Trustees of Lynfield College*, a student was

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<sup>142</sup> *Whata-wickliffe v Treaty of Waitangi Fisheries Commission* [2005] 1 NZLR 388 (CA).

<sup>143</sup> *Ibid*, at [185] per Glazebrook J for the Court.

<sup>144</sup> *Department of Corrections v Taylor* [2009] NZCA 129, [2009] 3 NZLR 34 [*Taylor* (CA)]; *Department of Corrections v Taylor* [2009] NZSC 80, [2009] 3 NZLR 34 [*Taylor* (SC)],

<sup>145</sup> *Taylor v Visiting Justice at Auckland Prison* [2008] NZAR 613, at [33]-[36] and [46]-[50] per Wylie J (HC).

<sup>146</sup> *Taylor* (CA), above n 144, at [42]-[68] per Ellen France J for the Court.

<sup>147</sup> *Ibid* (SC), at [2] Judgment of the Court.

suspended and subsequently expelled by the school. The High Court found the school breached natural justice by not involving the student's mother when making the decision, notwithstanding that the school acted in good faith.<sup>148</sup> The Court of Appeal ruled that there was no breach of natural justice, since under the Education Act 1989 and the relevant rules there was no requirement to involve parents.<sup>149</sup> The courts did not read in a requirement because natural justice required it and Parliament happened to be silent on that matter. On the contrary, the statutory language was strictly interpreted and applied as the measure of natural justice. The courts construed the statutes narrowly and made legislative intent the governing factor of a decision.

The Court of Appeal in the *Lab Tests* case also embarked on a narrow construction of statutory requirements. The case concerned the award of a contract of service by three District Health Boards (the DHBs) to Lab Tests. The application by Medlab, the service provider prior to the contract, was on several grounds, including bias, breach of legitimate expectation, irrationality, unfairness and inadequate inquiry. The High Court, having found that the defendant DHBs made serious procedural errors and failed to consult under the New Zealand Public Health and Disability Act 2000, held that the DHBs acted ultra vires, in its broad sense.<sup>150</sup> The Court of Appeal overturned the High Court's decision. However, the overruling was not because the Court of Appeal rejected ultra vires, but due to the stricter approach the court took in assessing the facts against the statutory requirement. The joint judgment of Arnold and Ellen France JJ was "particularly troubled by the [High Court] Judge's view that DHBs could follow the statutory procedures ... yet still be found to have breached their public law obligations".<sup>151</sup> This again was a case of not imposing extra requirements of good administration upon an administrative body. Hammond J went a step further and made it clear that the concept of abuse of power still lay at the heart of administrative law.<sup>152</sup> The Supreme Court refused Medlab's leave to appeal.<sup>153</sup>

These highly authoritative cases demonstrate that New Zealand's higher courts have read legislation strictly. They abided by the criteria set down by the statute and avoided imposing their own requirements under the notion of good administration. Amongst the many grounds of review, legislative intent may determine the outcome of a case by providing measurements for the grounds.

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148 *J v Bovaird and Board of Trustees of Lynfield College* [2007] NZAR 660 at [75]-[77] (HC) per Keane J.

149 *Bovaird and Board of Trustees of Lynfield College v J* [2008] NZCA 325, [2008] NZAR 667 at [54] per O'Regan J for the Court. It should be noted that the outcome of the case was not favourable to the school due to other breaches of the statute by the decision-maker.

150 *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832, at [330]-[333] (HC) per Asher J.

151 *Lab Tests* (CA), above n 125, per Arnold and Ellen France JJ.

152 *Ibid*, at [386] per Hammond J.

153 *Diagnostic Medlab Ltd v Auckland District Health Board & Ors* [2009] NZSC 10.

Legislative intent is a determining factor in judicial review, rather than just a matter for consideration.

## **B Privative Clauses**

Privative clauses, sometimes called ouster clauses, are Parliament's express attempts to restrict or exclude judicial review of executive action. In dealing with privative clauses, the courts have three options: The first is to obey the plain language of the statute and give the privative clause effect; the second option is to look at Parliament's intent to determine whether the privative clause is effective; the third option is simply to assert the courts' inherent power and independent authority to exercise judicial review. Where the language of the statute is clear and the intention cannot be construed to differ from the plain language, there is no question of adopting the first or second option; if the courts do not give effect to the privative clause, they are plainly defying legislation. Where the legislation leaves room for interpretation and the courts assume the legislative intent differently from what the language suggests, it is necessary, before deciding whether the courts are being disobedient to legislation, to enquire whether the courts take the second or the third option and their reasons for doing so.

In the first situation, where the language and intention of legislation accord, the courts always give effect to privative clauses and never take the third option. Examples include cases on a variety of privative clauses. In *MR v Refugee Status Appeals Authority*, the judge faithfully applied the three months limit and dismissed the application for judicial review which was filed out of time.<sup>154</sup> In *Westpac Banking Corporation v Commissioner of Inland Revenue* the Court of Appeal refused to reconcile the statutory provision that every disputable decision is deemed to be "correct in all respects" with "the proposition ... that it is none the less [sic] invalid and ineffective".<sup>155</sup> It held that "correct in all respects" extended to its validity and a challenge to the validity was a "flat defiance" of the statute.<sup>156</sup> If the statute expressly states that jurisdiction should be construed in its narrow and strict sense, the courts have paid due respect to Parliament's intention. For example, in *New Zealand Rail Ltd v Employment Court*, the privative clause required narrow construction of jurisdiction. Cooke P dismissed the judicial review application upon finding that the Employment Court did not exceed its jurisdiction in the narrow sense.<sup>157</sup>

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<sup>154</sup> *MR v Refugee Status Appeals Authority* [2008] NZAR 655 (HC) per Wylie J.

<sup>155</sup> *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 at [60] per William Young J for the Court.

<sup>156</sup> *Ibid.*

<sup>157</sup> *New Zealand Rail Ltd v Employment Court* [1995] 3 NZLR 179 at 181-182 (CA) per Cooke P for the Court.

It has been observed that among the five categories of privative clauses,<sup>158</sup> conclusive evidence clauses in statutes "were successful to endow [an executive action] with finality" and time-limited clauses were "effective bar[s] to review after the time limit has expired".<sup>159</sup> General formulae clauses could be effective or ineffective, depending on the wording and circumstances.<sup>160</sup> The more problematic categories are the finality clauses and no certiorari clauses. When faced with these two types of privative clauses, the courts often adopted the second situation and construed the intention of Parliament differently from that expressed by the language. Because these privative clauses have often failed to exclude the courts from reviewing the administrative action concerned, this failure is often used as evidence of the courts' disobedience to legislative intent. Joseph argues that privative clauses "carry a universal meaning" which is directing "the courts to 'keep out'".<sup>161</sup> The failure of privative clauses to exclude the courts from reviewing executive action has been described as "polite rebellion".<sup>162</sup> This view is not without support.<sup>163</sup> However, the route the courts took to achieve the result should be examined rather than looking at the result alone.

*Anisminic* is the leading case where the decisions at issue were reviewable despite Parliament's express words that decisions of that certain statutory body were final or were not to be questioned in any court of law. The salient cases in New Zealand are *Bulk Gas*, *O'Regan* and the *Zaoui* cases, all of which followed the rationale of *Anisminic*. The majority decision in *Anisminic* was reached by defining "determination" and stretching the meaning of "jurisdiction". In *Anisminic*, s 4(4) of the Foreign Compensation Act 1950 specified that "[t]he determination by the [Foreign Compensation Commission] of any application made to them under this Act shall not be called in question in any court of law".<sup>164</sup> The House of Lords reasoned that a determination protected by s 4(4) should be a "determination which [was] not a nullity".<sup>165</sup> The Court was "not prevented from inquiring whether the order of the commission was a nullity", since such a purported determination did not exist as a

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<sup>158</sup> They are finality clauses, no certiorari clauses, conclusive evidence clauses, time-limited clauses and general formulae clauses. See *De Smith's Judicial Review*, above n 2, at 185.

<sup>159</sup> *Ibid*, at 188-189.

<sup>160</sup> *Ibid*, at 189.

<sup>161</sup> Joseph "A Reply", above n 13, at 476.

<sup>162</sup> G de Q Walker *The Rule of Law – Foundations of Constitutional Democracy Justice* (Melbourne University Press, Melbourne, 1988) at 161, as quoted in Michael Kirby "Lord Cooke and Fundamental Rights" (New Zealand Legal Research Foundation Conference, Auckland, 4-5 April 1997) <www.hcourt.gov.au>.

<sup>163</sup> See for example Craig "Ultra Vires and the Foundations of Judicial Review", above n 8, at 52. See also David Dyzenhaus "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000) 141 at 155.

<sup>164</sup> As quoted in *Anisminic*, above n 17, 169 Lord Reid.

<sup>165</sup> *Ibid*, at 170 per Lord Reid

determination.<sup>166</sup> Thus, their Lordships ignored the express language of Parliament. While so doing, their Lordships maintained that the court was "carrying out the intention of the legislature".<sup>167</sup> Lord Reid found that there was no precedent for a rule that a nullity was protected by privative clauses. If Parliament intended to introduce a new type of privative clause, it would have made a more specific statement rather than "a bald statement" such as the present one.<sup>168</sup> Lord Pearce and Lord Wilberforce devoted most of their reasoning to finding Parliament's intent.<sup>169</sup> Lord Pearce cited precedents where "no certiorari" clauses did not protect decisions made outside jurisdiction, and expressed a view similar to that of Lord Reid.<sup>170</sup> Lord Wilberforce accepted that Parliament could expressly exclude judicial review, but like the other two Law Lords, his Lordship found that *Anisminic* was not such a case.<sup>171</sup> Therefore, *Anisminic* was decided on the basis of presumed parliamentary intent and their Lordships did not mention the common law root of judicial review or the court's inherent power. In fact, Lord Pearce particularly pointed out that the court's intervention was "simply an enforcement of Parliament's mandate to the tribunal".<sup>172</sup>

Closely following *Anisminic*, *Bulk Gas* was similar in the empowering statute, the drafting of the privative clause and the rationale of the decision. Section 96 of the Commerce Act 1975 specified that:

Except on the ground of lack of jurisdiction, no order, approval, proceeding, or decision of the Secretary under this Part of this Act shall be liable to be challenged, reviewed, quashed, or called in question in any Court ...

Cooke J identified *Anisminic* and *SEA Fire Bricks* as the leading modern cases on similar types of privative clauses.<sup>173</sup> In *SEA Fire Bricks* Lord Fraser, delivering the judgment of the Court, pointed out that if a tribunal acted without jurisdiction the privative clause would not have effect, but if the tribunal made an error of law which did not affect its jurisdiction the privative clause would be effective.<sup>174</sup> Cooke J expressed the same idea in slightly different terms: His Honour accepted that if

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<sup>166</sup> Ibid, at 170 and 171 per Lord Reid. See also *ibid*, at 196 and 199 per Lord Pearce; 207-208 per Lord Wilberforce to the same effect.

<sup>167</sup> Ibid, at 208 per Lord Wilberforce.

<sup>168</sup> Ibid, at 170 per Lord Reid.

<sup>169</sup> See generally Lord Pearce's and Lord Wilberforce's judgments in *ibid*. In particular, Lord Pearce discussed parliament's intent at 194-199, and Lord Wilberforce at 207-212.

<sup>170</sup> Ibid, at 200 per Lord Pearce.

<sup>171</sup> Ibid, at 212 per Lord Wilberforce.

<sup>172</sup> Ibid, at 195 per Lord Pearce.

<sup>173</sup> *Bulk Gas*, above n 14, at 133 per Cooke J.

<sup>174</sup> *SEA Fire Bricks*, above n 35, at 370 per Lord Fraser for the Court.

Parliament expressly authorised an authority to decide a question of law conclusively, the court would obey even where an error of law was present.<sup>175</sup> His Honour did not use the term "jurisdiction", but Parliament's empowerment was directly referred to.

Joseph claims that *Bulk Gas* established the ground of judicial review "in the court's constitutional duty to uphold the rule of law", which replaced legislative intent.<sup>176</sup> The evidence was Cooke J's presumption that Parliament did not intend an administrative tribunal to have the authority to decide questions of law conclusively. This view does not accord with the clear articulation by Cooke J. Apparently Cooke J was talking about presumption of parliamentary intent rather than the rule of law. This position was consistent with his Honour's extra-judicial statement that privative clauses were not effective where "the impugned decision can be seen to fail to carry out the intention of Parliament".<sup>177</sup>

Another authority on privative clauses is *O'Regan v Louish*.<sup>178</sup> It involved a comprehensive privative clause in the Maori Affairs Act 1953, which essentially was the *Anisminic* and *Bulk Gas* type of no certiorari clause. Tipping J held that the privative clause could not exclude review of orders that were made without jurisdiction, including orders erroneous in law, and unfair or unreasonable orders. His Honour employed the doctrine of ultra vires in determining the case, and said his view was "in harmony with the essential thrust" of *Bulk Gas*.<sup>179</sup> More recently, the *Zaoui* cases continued and completed the line of authority in New Zealand. *Zaoui* again resembles *Anisminic* both in the language of the privative clause and the rationale of the decisions. In the High Court proceeding, the Crown accepted the line of reasoning in *Anisminic*, and in fact relied on *Anisminic* and *Bulk Gas* where the decisions indicated the weight to be given to "empowering legislation" and "statutory interpretation".<sup>180</sup> In contrast, *Zaoui*'s counsel extensively quoted *O'Regan* and relied on the widening concept of ultra vires that Tipping J advanced.<sup>181</sup> Counsel's different arguments essentially represented the literal interpretation and interpretation by presuming intention respectively. *Zaoui* (High Court) was decided on the traditional basis that *Anisminic* and *Bulk Gas* founded, namely excess of jurisdiction in its broad sense. Williams J further took into account the express language to protect the right to judicial review in s 27(2) of the Bill of Rights Act 1990. In reaching the conclusion, that in the present case judicial review could not be excluded,

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<sup>175</sup> *Bulk Gas*, above n 14, at 133 per Cooke J. See discussion on this point in Part IIIC of this article.

<sup>176</sup> Joseph "Demise of Ultra Vires", above n 11, at 360.

<sup>177</sup> Cooke "Struggle for Simplicity", above n 85, at 8.

<sup>178</sup> *O'Regan*, above n 42,

<sup>179</sup> *Ibid*, at 627 per Tipping J.

<sup>180</sup> *Zaoui* (HC), above n 45, at [54] per Williams J.

<sup>181</sup> *Ibid*, at [60] per Williams J.

his Honour acknowledged that judicial review "may be debarred or limited by other provisions of the [Immigration] Act".<sup>182</sup> The High Court decision thus was based on the traditional ground.

The Court of Appeal upheld the High Court decision that the privative clause at issue did not exclude judicial review. Anderson P affirmed that any material error of law was lack of jurisdiction.<sup>183</sup> Glazebrook J resorted to parliamentary intention which she recognised as the court's usual approach.<sup>184</sup> William Young J essentially said that the continued enactment of privative clauses in the form of "except on the ground of lack of jurisdiction", after the decisions in *Anisminic* and *Bulk Gas*, was the "legislative indication" that Parliament intended "lack of jurisdiction" should be construed in its broad sense, as *Anisminic* and *Bulk Gas* had determined.<sup>185</sup> Thus, the *Zaoui* cases are consistent with *Anisminic* and *Bulk Gas*, with the extra support of the Bill of Rights Act 1990. The rationale in the cases is that the courts look at the intent rather than the plain language of Parliament.

Why then is the presumed parliamentary intent of the courts contrary to what has been plainly expressed? Craig argues that this represents tensions within the ultra vires doctrine.<sup>186</sup> Another commentator argues that:<sup>187</sup>

... to invoke a statutory basis for review in order to evade the statutory command in the ouster clause not only begs the question of what authorises this judicial exercise of power, but seems on its face incoherent.

These are strong arguments, as the courts somehow strain the plain meaning of the statute to reach their conclusion. However, interpreting legislation in light of the legislative intent rather than the language has been the consistent legal tradition. It has been pointed out that "it is almost universally asserted that the most fundamental principle of interpretation is that statutes should be interpreted according to the intention they convey".<sup>188</sup> Although *Anisminic* has been cited as the leading case in this line of approach to privative clauses, it was not the first one to prefer legislative intent over statutory language. Nor was it the first to render a no certiorari clause ineffective. Lord Pearce cited many cases in support of his reasoning. It has been observed that finality clauses "were ineffective

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182 Ibid, at [64] per Williams J.

183 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690 at [16] (CA) per Anderson P.

184 Ibid, at [87] per Glazebrook J.

185 Ibid, at [179] per William Young J.

186 Craig "Ultra Vires and the Foundations of Judicial Review", above n 9, at 52.

187 Dyzenhaus, above n 163, at 155.

188 Jeffrey Goldsworthy "Parliamentary Sovereignty and Statutory Interpretation" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 187 at 191.

to abridge or attenuate judicial review",<sup>189</sup> and the courts "persistently declined to construe the words [of the 'no certiorari' clauses] literally".<sup>190</sup> The cases cited to support these observations were decided in the 1800s and early 1900s,<sup>191</sup> when the ultra vires doctrine first emerged.<sup>192</sup> Therefore, the courts' approach in rendering some privative clauses ineffective has been applied at times when the ultra vires doctrine was the central justification of judicial review. The ineffectiveness of privative clauses does not represent tension within the ultra vires as much as Craig argues.

The third option for dealing with privative clauses – to assert the courts' inherent power to judicial review – is an easier and more straightforward route to take. However, the courts took the long way and thus preserved the validity of ultra vires. John Laws comments that "[t]he fig-leaf was very important in *Anisminic*; but fig-leaf it was".<sup>193</sup> This is very true for *Anisminic*, as well as later English and New Zealand judicial review cases. The presumed parliamentary intent might be a "fairy tale" or a "fig-leaf",<sup>194</sup> but it is a fairy tale that is still told by the judiciary and a fig-leaf that has not been discarded.

According to Forsyth, without the ultra vires doctrine, privative clauses would cause undesirable effect. Forsyth analyses a South Africa case, *Staatspresident v United Democratic Front*,<sup>195</sup> where a privative clause was involved. In that case, the court, giving effect to a privative clause and rejecting the ultra vires doctrine, refused to strike down subsidiary legislation which was arguably so vague that it should have been void. Forsyth argued, and Craig accepted, that the decision resulted from the fact that the Court rejected the ultra vires doctrine as developed by *Anisminic*.<sup>196</sup> This suggests that while the privative clauses were rendered ineffective through the application of ultra vires, this

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<sup>189</sup> *De Smith's Judicial Review*, above n 2, at 186.

<sup>190</sup> *Ibid*, at 187.

<sup>191</sup> See the cases cited in *De Smith's Judicial Review*, above n 2, at 186-187 in particular footnotes 61 and 64-66. See also the precedents cited in *Anisminic*, above n 17, in particular at 200 per Lord Pearce.

<sup>192</sup> The term ultra vires was first used in the mid 1800s in relation to municipal corporations, then to other local government authorities, and finally to the Crown and its servants and even to inferior judicial bodies. See *De Smith's Judicial Review*, above n 2, at 183.

<sup>193</sup> John Laws "Illegality: the Problem of Jurisdiction" in Michael Supperstone and James Goudie *Judicial Review* (2nd ed, Butterworths, London, 1997) ch 4 at [4.34]. This remark does not appear in Laws' same article in the 3rd edition of *Judicial Review* (3rd ed, LexisNexis Butterworths, London, 2005) ch 6.

<sup>194</sup> These two terms were first used by Lord Woolf and Sir John Laws respectively and have since been widely used. See Forsyth "Of Fig Leaves", above n 62, at footnotes 3 and 4.

<sup>195</sup> *Staatspresident v United Democratic Front* [1988] 4 SA 830 (A).

<sup>196</sup> See the discussion in Forsyth "Of Fig Leaves", above n 62, at 122. Craig accepts that "it could ... happen in another legal system which chose to reject the ultra vires principle", but argues that this is not an inevitable consequence. See Craig "Ultra Vires and the Foundations of Judicial Review", above n 9, at 55.



process of application in return renders ultra vires indispensable, if the courts want to uphold the principles of good administration.

In summary, ineffective privative clauses are not inconsistent with the ultra vires doctrine. It has been observed that Parliament nowadays rarely enacts privative clauses.<sup>197</sup> However, courts admit that Parliament has the power to exclude judicial review through express language. Where the statutory language is clear enough, the courts obey, which is the case with the majority of the privative clauses. Where the statutory language is either wide or vague so as to leave room for different interpretation, the courts engage the presumed parliamentary intent to approach the issues. Whether the privative clauses are effective or not, the courts' approach could hardly be said to be repudiating legislative intent or the ultra vires doctrine. The case law prior to *Anisminic*, which rendered some privative clauses ineffective at the time when the ultra vires doctrine was regarded as the orthodox principle, also proved that the ineffectiveness of privative clauses did not contradict the ultra vires doctrine.

### *V The Ultimate Issue: Parliamentary Sovereignty*

The debate around the ultra vires doctrine ultimately leads to the fundamental issue of parliamentary sovereignty. This is agreed by all parties to the ultra vires debate except the weak critics.<sup>198</sup> Although the weak critics deny that it challenges parliamentary sovereignty, the insistence that the courts apply common law rules which bear no relation to the legislative intention "inevitabl[y] involves the judicial review court in indirectly challenging legislative supremacy".<sup>199</sup> The doctrine of parliamentary sovereignty is a topic in its own right; therefore this Part only examines the courts' responses to arguments about whether the courts could invalidate statutes that are inconsistent with common law fundamental rights, in the context of judicial review. It argues that, although extra-judicially some jurists prefer the fundamental common law rights over parliamentary sovereignty, when the two conflict, the judiciary generally has not supported that proposition.

Some jurists and legal scholars agree with Joseph that when the legislation and the fundamental common law rights conflict, the latter should prevail. Lord Cooke was one of the leading jurists in this regard. In *Fraser v State Services Commission (Fraser)*, Cooke J opined: "it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the courts to

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<sup>197</sup> See for example *Peters v Davison*, above n 12, at 185 per Richardson P, Henry and Keith JJ. Cooke J campaigned for fewer enactments of privative clauses: see Cooke "Struggle for Simplicity", above n 85, at 8.

<sup>198</sup> See statements from different camps, for example, *De Smith's Judicial Review*, above n 2, at 178; TRS Allan "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) CLJ 87 at 89; Forsyth "Of Fig Leaves", above n 62, at 129; Christopher Forsyth and Linda Whittle "Judicial Creativity and Judicial Legitimacy in Administrative Law" (2001-2002) 8 Canterbury L Rev 453 at 453-454.

<sup>199</sup> Forsyth "Of Fig Leaves", above n 62, at 129.

have destroyed them".<sup>200</sup> This proposition has been embraced by many jurists.<sup>201</sup> The opposing arguments are equally strong.<sup>202</sup> The debate has been intense, but the judiciary has "tiptoed around" Lord Cooke's proposition.<sup>203</sup>

Sitting with Cooke J in *Fraser*, which concerned an alleged breach of natural justice, Richardson J rejected the view that he should "start by assuming what Parliament has done is unfair".<sup>204</sup> The approach his Honour took was to "supplement a procedure laid down in legislation" and to "consider the scheme and context of the governing statute".<sup>205</sup> In a later High Court case, where the effectiveness of a time-limit clause was at issue, the applicant relied on Cooke J's articulation on fundamental rights.<sup>206</sup> Baragwanath J, holding that judicial review was barred by the privative clause, stated that he was "relieved" that this issue was an "extra-judicial debate" and that.<sup>207</sup>

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200 *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121 per Cooke J (CA) [*Fraser*]. In *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398 (CA), Cooke J expressed dicta to the same effect. Later in an extra-judicial speech, Sir Robin Cooke again postulated the extreme, and stated that if Parliament acted unconstitutionally, "the Courts have not committed themselves to accepting an alternative": see Sir Robin Cooke "Fundamentals" [1988] NZLJ 158 at 163. See also Robin Cooke "The Road Ahead for the Common Law" (2001) 53 ICLQ 273 at 278.

201 See for example E W Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5; Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-go-round" (2003) 14 PLR 148; Beverley McLachlin "Unwritten Constitutional Principles: What is Going on?" (2006) 4 NZJPIL 147.

202 For the opposition's arguments, see Kirby "Lord Cooke and Fundamental Rights", above n 162. Kirby J later softened his view against Lord Cooke's proposition in the New Zealand context, considering New Zealand's particular constitutional setting would naturally cause the judges to "speculate about the availability of judicial means to protect the people in truly extreme cases, even against a statute apparently valid on its face". His Honour nevertheless insists that Australia is another story. See Michael Kirby "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 NZJPIL 195 at 218. See also Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 [Goldsworthy "Is Parliament Sovereign?"]; Gerard Brennan "The Purpose and Scope of Judicial Review" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press and the Legal Research Foundation, Auckland, 1986) 18 at 28.

203 Keith Mason "The Rule of Law, Judicial Review and the Public-Private Divide" (Forum Address Testing the Boundaries of New Zealand's Public Law Domain, Wellington Town Hall, 20 March 2006) <[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>.

204 *Fraser*, above n 200, at 124 per Richardson J.

205 *Ibid.*

206 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC).

207 *Ibid.*, at 484 per Baragwanath J.

... the good sense of parliamentarians and Judges has kept theoretical, as to whether in any circumstances the judiciary could or should seek to impose on the exercise of Parliament's legislative authority to remove more fundamental kinds of substantive rights.

At the very start of the judgment, his Honour expressed a view that was more directly different from that of Cooke J: Baragwanath J held that "the Courts would give effect to an Act of Parliament according to its terms" as a "settled rule of law" and that "both Parliament and the Courts [should] observe, and must be clearly seen to observe" such convention.<sup>208</sup> A similar situation arose in *Shaw v Commissioner of Inland Revenue*, where the Court of Appeal affirmed Baragwanath J's approach.<sup>209</sup> The Court declined to rule on whether the judiciary had such power to invalidate legislation, since the issue did not arise at the present case. The Court further commented that:<sup>210</sup>

New Zealand's constitutional arrangements are based on conventions that delimit the respective roles of the Legislature, the Executive, and the Courts. The legitimacy of each institution depends to no small extent on the respect it pays to these conventions and to the other branches of government. And by convention *there can be no doubt that the Courts' function is to give effect to the intention of Parliament.*

Thomas J, tentatively arguing for the courts' constitutional power, nevertheless agreed that the Court was right to leave the debate unresolved "until such time as the courts are in fact confronted with" unconstitutional legislation.<sup>211</sup> Such time has not arrived.<sup>212</sup> Elias CJ "seems reluctant to assert that New Zealand courts have authority ... to invalidate legislation".<sup>213</sup> Thomas J only explores the "possibility" for the courts to invalidate unconstitutional legislation.<sup>214</sup> One commentator observes that while Cooke P "asserts very broad *theoretical* powers of judicial review, in practice the New Zealand Court of Appeal has shown considerable restraint in the *exercise* of its powers".<sup>215</sup> It is precisely because the courts' constitutional role has not been realised that the proponents have to campaign for it.

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208 Ibid, at 483 per Baragwanath J.

209 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 at [17] (CA).

210 Ibid, at [16] (emphasis added).

211 Thomas, above n 201, at 7.

212 The recent case of *Boscawen v Attorney-General* observes that whether the declaration of inconsistency of legislation with the Bill of Rights Act 1990 is an available remedy is still to be resolved: *Boscawen v Attorney-General* [2009] 2 NZLR 229 (CA) at [56] per O'Regan J for the Court.

213 Goldsworthy "Is Parliament Sovereign?", above n 202, at 17.

214 Thomas, above n 201, at 36.

215 Smillie "Introduction", above n 84, at xv.

## VI Conclusion

Ultra vires "up to a point" is a label with substances attaching to it.<sup>216</sup> The increased or decreased use of the term does not necessarily indicate the judiciary's support or rejection of the doctrine. New Zealand courts are generally disinterested in discussing ultra vires at the doctrinal level. However, the examination of the statements on the key concepts of the ultra vires doctrine reveals that the New Zealand courts have not renounced the doctrine.

The key concepts of the ultra vires doctrine are jurisdiction and legislative intent. The concept of jurisdiction is elastic; it could be narrow or broad depending on the circumstances. Since *Anisminic* widened the concept, later cases both in England and in New Zealand followed. Academia has accepted the widened doctrine of ultra vires, which manifests itself in two limbs: the narrow sense of jurisdiction and the broader sense of general legislative intent. The expansion of the ambit of jurisdiction by *Anisminic* and subsequent cases did not mark the demise of the ultra vires doctrine.

The opposition to the concept of legislative intent includes three arguments. The first is that error of law review has replaced ultra vires review. The second is that legislative intent could not be the sole justification of the legal principles applied by the courts, especially when the courts disobey legislation by disregarding the privative clauses. Following the first two, the ultimate proposition is that the courts have an independent constitutional role in guarding the fundamental common law rights, which role may be beyond the reach of the parliamentary sovereignty doctrine.

At the centre of the error of law review issue is the question whether judicial review is about ensuring administrative action is lawful or within the power limit. The modified ultra vires doctrine reconciled these two. It proposes that Parliament is presumed to intend powers being used lawfully and that Parliament authorises the courts to develop the law according to the rule of law. The approach taken by the English cases *Anisminic*, *Page* and *Boddington* reflects this. The New Zealand cases *Bulk Gas* and *Peters v Davison* have not broken new ground from the English authorities. The individual judgments in *Peters v Davison* explicitly treated error of law review as a species of ultra vires and the joint judgment simply followed the English authority. Most of the decisions in these cases expressly supported the orthodoxy that ultra vires is the central principle of judicial review. Although most of the time New Zealand courts were silent about the ultra vires doctrine, *O'Regan v Louish* and *Peters v Davison* unequivocally endorsed the doctrine. The Supreme Court has also signalled a trend to actively support the ultra vires doctrine in *Cropp*. These signs run against the claim of the demise of ultra vires.

Legislative intent was also used to measure the different heads of judicial review, whether reasonableness or breach of natural justice. In some high profile cases, such as the *Lab Tests* case,

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<sup>216</sup> Cooke "The Road Ahead for the Common Law", above n 200, at 275.

the courts avoided reading requirements into the empowering statutes and gave legislative intent determinative weight. Furthermore it was by looking into the legislative intent rather than the language that the courts rendered some privative clauses ineffective. From *Anisminic* to New Zealand cases like *Bulk Gas* and *Zaoui*, the courts explicitly acknowledge that they are carrying out the intention of Parliament. Taking this route rather than asserting their inherent common law power indicates the courts' reluctance to renounce the ultra vires doctrine. The ineffectiveness of privative clauses existed even when the ultra vires doctrine was viewed as the orthodox principle by all. The ineffectiveness of privative clauses does not mean the demise of the ultra vires doctrine.

The debate on the parliamentary sovereignty doctrine has also been intensive. At the heart of the ultra vires debate is the parliamentary sovereignty issue. Parliamentary sovereignty is ultimately a political fact. Although many judges joined the debate extra-judicially, the courts have declined to express favour for either side. This uncertainty does not support the assertion of the demise of ultra vires.

Whether the ultra vires doctrine is worth preserving is another matter. However, the New Zealand courts have enough "wisdom" not to renounce it.<sup>217</sup> Like the debate on the parliamentary sovereignty doctrine, it is because the ultra vires doctrine is still alive that the ultra vires opponents need to argue so vigorously to attempt to send it to the grave.

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217 Sir William Wade "Constitutional Realities and Judicial Prudence" in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000) 431 at 431.

