

## What is This Thing Called Fairness?

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### Introduction

The purpose of this presentation is to discuss the concept of fairness and application to the work of an ombudsman. Fairness is part of the essential work of the office of an ombudsman. The practical application of the concept to the problems presented by our visitors, does not always mean we have deeply considered what fairness actually means. As well as examining the meaning of the word, there are cultural implications which complicate meaning, and different perceptions of the balance required in establishing fairness. In EU jurisdictions, the test of proportionality has often been used to place a gloss on the meaning of fairness and as an aid to interpretation. This presentation will discuss the EU jurisdiction and the application to our work as ombudsman. It will conclude with a general discussion, with particular reference to cultural and gender interpretations.

The starting point for my thinking about fairness came from the IOA Code of Ethics, which refers to the need to “promote procedural fairness and the content and administration of those organisations practices, processes, and policies.”<sup>i</sup>

This is incorporated into the ICANN ombudsman function expressed as the ombudsman being an investigator of complaints about unfairness.<sup>ii</sup> This stems from the jurisdiction to look at things which are done, or not done, within the ICANN community, expressed as problems about delay or unfairness. This is not restricted to organisational ombudsman, and it is typical to find references to fairness by classical ombudsman. See for example the office of the New Zealand Ombudsman, in their opening page, says in bold “fairness for all – it’s why we exist”.<sup>iii</sup> Similarly the International Ombudsman Institute also refers to the role of the ombudsman as typically, among other matters, protecting the people against unfair decisions.<sup>iv</sup>

So the concept of fairness is embedded into the practice of an ombudsman, whether the identification is either as classical or organisational.

### Definition of Fairness

I have taken the conventional approach of looking at the dictionary definition of fairness, and the Oxford English Dictionary<sup>v</sup> says:-

“the quality or condition of being fair; beauty: ....”

And definition 3. “Equitableness, fair dealing, honesty, impartiality, uprightness.”

In Stroud<sup>vi</sup> the definitions are taken from a number of cases the second of which has an interesting approach. The definition is taken from a court case called *McFarlane v McFarlane* [2006] UKHL 24 where it was said:-

“Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, a change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness and any particular case.”

The words, as described from the dictionary definition, includes the concept of fair dealing. This implies a balancing act recognising the interests of each party, and reaching a solution which recognises the different interests in proportion to their priorities and importance. Another way of looking at this is the concept of proportionality to balance out the fairness required for each party. I discuss the concept further in this paper.

So when an ombudsman is presented with a complaint that something is unfair, it appears logical that the first examination is that of the particular facts in each case. The difficulty can therefore be to explain why there should be fairness, based on the particular sets of beliefs and ideas applicable to the area where the ombudsman works.

The concept of fairness for an ombudsman was the subject of a number of articles in the *Journal of the International Ombudsman Association* Volume 4 No 1 2011, which is available online.<sup>vii</sup> I defer to my ombuds colleagues for the comprehensive description and analysis of the concept of fairness outlined in this volume. The volume was opened by David Miller in an article called “Is life fair?”, discussing the range of contributions on the concept of ombudsman fairness and equity.

Gerald Papica<sup>viii</sup> wrote on a suggested guide to handling ombudsman cases with an emphasis on fairness, and discussed how fairness should be analysed. He references well-known writers such as John Rawls on the concept of justice and fairness, and raised the important question of who decides what is fair and by what criteria are some of the issues discussed. He observes that it is important with the ombudsman works in government, organisations, corporate or educational settings. In addition he observes that what may seem equitable to a provider of a service may not seem the same to the recipient. He concludes that the ombudsman has a mandate to ensure the process is applied fairly, be in about the right thing to do and not necessarily always with doing things right. He then provides practical criteria with an ombudsman fairness checklist derived from the Forum of Canadian ombudsman. He suggests that the formula can be that a coordinated, balanced and harmonious combination of administrative fairness and procedural fairness will lead to outcome fairness.

In the same volume, Ariel Avgar<sup>ix</sup> also discusses a distinction between procedural, distributive and interactional fairness. Distributive fairness is described as the fairness of the ends achieved in contrast to procedural fairness which refers to the means used. She states that “in assessing fairness of a given decision or action, individuals are likely to be examining both distributive (content) and procedural (process) elements.” She then discusses interactional fairness focusing on interpersonal treatment and interactions. She concludes by stating that “when practitioners and scholars refer to fairness in the context of the organisational ombudsman, they are referring to the quality of specific level interactions”. She does warn us that her study is based on perceptions of fairness, rather than more objective measures.

Other writers in this volume such as Christopher Honeyman<sup>x</sup>, provide guidance to evaluation of fairness in a practical approach to ensuring that fairness is achieved in the work of an ombudsman. He makes the most useful observation that “does thinking about evaluation help us to understand fairness?” And answers this by stating “how else will you propose to understand whether you are being fair to actual human beings, if not by some combination of querying them (and in a fashion that more seriously attempts to encourage them to answer thoughtfully than the so-called “happy sheets” routinely distributed by mediation programs” – and querying yourself?”

It would be redundant for me to repeat the analysis and conclusions derived from the *Journal*, which I urge everyone to read because of the depth of scholarship. The purpose of my paper is to provide a different approach to the measurement of fairness using the proportionality tool.

## **Origins**

My thinking on the subject of fairness and proportionality derived from a visit and lecture from Lady Justice Arden DBE, a member of the Supreme Court of England and Wales, who spoke on the subject of proportionality at the Victoria University of Wellington in on 20 March 2013, on Press Privacy and Proportionality<sup>xi</sup>. While this specific lecture was on an aspect of the application of the principle in relation to the Leveson Inquiry in relation to press regulation, the references

to the concept of proportionality led me to read further research on the subject and in particular the application to proportionality as a ground for judicial review. The concept of judicial review, particularly in the Commonwealth jurisdictions, has an analogy with the search for fairness in the jurisdiction of an ombudsman.

Judicial review developed in its more modern form in Commonwealth and other jurisdictions from the 1948 United Kingdom Court of Appeal decision *Associated Provincial Picture Houses v Wednesbury Corporation*.<sup>xii</sup> This decision developed a concept of unreasonableness, explained in the case as something so absurd that no sensible person would ever dream that it lay within the powers of the authority. After this decision, issues such as breaches of natural justice, whether there was a failure to consult, bias or predetermination and issues such as legitimate expectation, and more recently proportionality, became the test. The principles of the case became known as *Wednesbury* principles and are applied frequently in cases about administrative decisions as reviewed in the courts.

Another explanation is that judicial review is “judicial intervention to ensure that decisions are made by the executive or public body according to law even if a decision does not otherwise involve an actionable wrong”<sup>xiii</sup> and from Australia “judicial review is nothing more nor less than enforcement of the rule of law of executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individuals are protected accordingly”<sup>xiv</sup>

A quote from a more recent decision in *Chief Constable of the North Wales Police v Evans*<sup>xv</sup> neatly sums up the application where the court said “judicial review is concerned, not the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will ... under the guise of preventing the abuse of power, be itself guilty of usurping power”

The words of judicial review cases will resonate with an ombudsman. A lay person would describe the actions of the government agency or the administrative body as unfair. They are framed in legal terms using concepts such as breach of natural justice and failure to hear the other side, and failures of process in general. Ombudsman will frequently tackle process issues, because they cause unfairness.

Of course courts have coercive power to ensure that such decisions are examined and if excessive, to make appropriate orders to repair the damage. An ombudsman will often be examining the administrative action, but with only the power of persuasion, to attempt to repair the abuse of power. But it is essentially the same sort of examination.

The commentators<sup>xvi</sup> also discuss the relationship between what is described as natural justice and fairness. Natural justice is generally accepted as two principal issues, which is that no person is to be a judge in their own cause, and that no one is to be condemned without the right to a hearing. It is important to note that these are rules about process, and not about correctness of a decision. It is well accepted that the rules of natural justice must be observed by any person or body who acts judicially, but also extends to administrative decisions. Often, when a duty to apply natural justice is considered applies to a problem, the term fairness is often used. So a duty to apply natural Justice is sometimes called a duty to act fairly.

### **Relationship between fairness and proportionality**

Fairness and equity are the labels we place on the distribution of property and rights. Proportionality is the tool we use to measure the shares between the parties. So proportionality is a powerful mechanism to enable us to better understand the appropriate resolution of a dispute about fairness. We can use it as an objective measure of the appropriate remedy for the visitors to our offices. When the concept of judicial review first was explained by the courts, the

common theme was the failure of principles of natural justice. In more recent years the concept of proportionality has been used to explain the remedy to be applied for the breaches of natural justice. It does not replace the concept of natural justice but is a tool to analyse the particular circumstances of each case.

Proportionality is an interesting concept in the law of judicial review because it derives largely from the jurisdiction of European Courts such as the European Court of Human Rights and the Court of Justice of the European Union. The origin in European law is from the Prussian Supreme Administrative Court, an early administrative court of 19<sup>th</sup> Century Germany, when the court considered whether action by the police was excessive having regard to the pursued objective. This eventually became enshrined in law as a constitutional principle of proportionality.

In preparing this discussion, I have relied on an article<sup>xvii</sup> by a Supreme Court judge from the United Kingdom, Dame Mary Arden for a very useful summary of the history. She explains that the principle of proportionality was subsequently developed by the Federal Constitutional Court of Germany, with principles that are certainly useful for an ombudsman considering issues of unfairness in an institution. These issues are suitability, necessity and fair balance. So when an administrative action is examined, it must be suitable to achieve the objective, it should be necessary, but it should not be out of proportion to the restriction imposed. The concept of proportionality requires an examination of fairness of the administration action to see if it is a proportionate response to the issue which it seeks to resolve. This is of course a balancing exercise, which requires an objective approach to analysis of the administrative action. So the action may be, on the surface, suitable and necessary, but after the objective examination, may well be excessive as a disproportionate response to the problem.

Arden describes the tests in more detail and explains how they have been applied in the jurisprudence from the European Court of Human Rights based in Strasbourg.

It is useful to explain the origin and purpose of this court. This is a court set up in Europe by the European Convention on Human Rights under the auspices of the European Council, a body distinct from the European Union of course. It was established in 1959 to deal specifically with issues of human rights referred by countries and individuals, first with a more limited jurisdiction. The court has been re-established under subsequent protocols promulgated by the European Council and sits at Strasbourg. In its current form, it was re-established in 1998 with the adoption of what is known as Protocol 11. The countries which have access to the court are not just members of the European Union, because countries such as the Russian Federation are also members of the court. Article 4 of the Council of Europe Statute specifies that membership is open to any "European" State.

It has developed a very substantial body of law on human rights principles, and Arden has considered this in her article. The principles are explained as Suitability, being "the measure should be suitable for the purpose of facilitating or achieving the desired objective", Necessity as "the measure should be necessary" and Fair Balance as "the measure should not be disproportionate to the restriction which it involved. Those three key elements are amplified in the cases. For example, there has to be a balance test, where something is regarded as necessary, in a democratic society. This requires a balance between the interests of the individuals and of the rest of the community. Arden then explains this by reference to a case about freedom of expression in Austria called *Otto-Preminger-Intitut v Austria* (13470/87). This was a case where the applicant had a private cinema, and wanted to show an antireligious bill. Perhaps provocatively, the location of the screening was in a staunchly Roman Catholic area of Austria. The Austrian authorities therefore thought that this could lead to civil disturbance and obtained a court order to seize and destroy the movie. The case eventually reached the European Court of Human Rights, and it was argued that there was an attack on freedom of expression. The court

was divided in its opinion, but by a majority of six over three, held that there had been no violation of the right of freedom of expression. Their reasoning was that there is also an obligation to avoid expressions which were gratuitously offensive to others.

As is often the case, the minority decision had more interesting analysis, and took the view that since there were less restrictive measures available for dealing with the showing of the film, rather than banning and destruction, the ban was not proportionate. It was not enough to conclude that rights were in conflict, but that any measures to restrict the exercise of freedom of expression had to be proportionate. There had to be a balance of the interference with the rights against the behaviour of those seeking to exercise the rights. Because in this case the movie was to be shown in a small art cinema, the outright ban was disproportion.

The way the court approached this is useful to the exercise of an ombudsman's role in investigating a complaint in relation to exercise of rights. The minority bench undertook an analysis which is a useful analogy to the tool is useful to an ombudsman. The first step is a qualitative assessment of each of the rights and issues. The court took care to weigh the right to freedom of expression, which was given great weight, which therefore meant that they rejected a solution which gave it no weight. Balanced against this was the risk that there may be public disorder, but the right to freedom of expression outweighed that risk. In a practical way, the court took care to analyse the facts, observing that each case should not be a theoretical exercise, but a practical application of the analysis and assessments to the actual facts.

When the court considers proportionality it consists of two separate steps: these are a qualitative assessment of each of the rights and issue, weighing the rights, in the above example, to freedom of expression against the risk of public disorder. The facts are then examined to apply the qualitative assessment to the specific facts. This is important because it shows that reaching the balance in an individual case is not an academic or theoretical exercise, but an important dissection of the relevant facts. When this is tied into the three elements of suitability, necessity and fair balance, necessity is often analysed further. In at least some but not all cases from the court, necessity is further refined as "no more than necessary" or "least intrusive means", sometimes referred to as the margin of appreciation. So if on the facts the court considers some action was necessary, it must balance the right, against the departure from the purpose of achieving the legitimate aim. The test is always flexible, perhaps less hidebound by precedent than common law courts, because of the civil law origins of the European courts.

The court must consider whether the objective of the law or policy promulgated by the government or authority is sufficiently important to justify limiting an important right, the measures designed to meet the objective have a rational connection with the objective and are no more than necessary.

### **Application to reality**

When an ombudsman receives a complaint about, for example, a policy promulgated by a university, which substantially restricts certain rights, the ombudsman must consider whether the policy is sufficiently important that those rights may be overridden, but are in any event no more than necessary. So if a policy is brought in by a university to restrict access to a course, based perhaps on increasing the number of indigenous people because of historical lack of opportunity, then there is a balancing exercise. The policy could be seen as restricting the rights of a majority, but the policy is sufficiently important, because of the underrepresentation of indigenous people, to override those rights. The policy could be seen as no more than necessary, because the majority still have access to the course, but the importance of reaching out to underrepresented people outweighs the restriction on the majority.

I propose another example from the complaints which come into an ombudsman's office. Typically an ombudsman is required to investigate issues of diversity such as sexual harassment. In such an example, the right to freedom from harassment would carry great weight. If a complaint is made for inappropriate but perhaps trivial sexist comments, in carrying out the exercise of assessing whether the complaint is one which ought to be investigated and reported, there would be a balance with the serious issue of the right to be safe in a workplace, balanced against what was actually said. Of course, there are a spectrum of views from those who would advocate zero tolerance, through to those who would say that disciplinary action for a trivial remark was disproportionate. But the use of the tools of proportionality, suitability, necessity and fair balance are useful in making the assessment. For purposes of this paper it is the use of the tools which I regard as a structured approach to the investigation.

The tool of proportionality also enables an ombudsman to address the issue of cultural diversity and the way in which different cultures will approach concepts such as fairness through a different cultural lens. So when we look at the three elements of suitability, necessity and fair balance, cultural diversity will inevitably affect all of those. The qualitative assessment will include an appreciation of the cultural differences, and the application of the facts will then have significant culturally defined approaches.

In the course of my work at ICANN were required to engage with many different cultures and one of the tools were used to appreciate the diversity is a software program called GlobeSmart<sup>xviii</sup>. This uses comparison of different elements in cultures, and I use an example from their website to show the spectrum.

## independent

## interdependent



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|---|--|
| <ul style="list-style-type: none"> <li>• Take individual initiative</li> <li>• Prefer quick decision-making</li> <li>• Openly express opinions or disagreement</li> <li>• Speak openly about personal achievements</li> </ul> | <ul style="list-style-type: none"> <li>• Collaborate well with others</li> <li>• Prefer group decision-making processes</li> <li>• Express disagreement or opinions cautiously</li> <li>• Have an appreciation for protocol</li> </ul> |
|---|--|

## egalitarianism

## status



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|---|--|
| <ul style="list-style-type: none"> <li>• Be comfortable challenging the views of superiors</li> <li>• Treat everyone much the same</li> <li>• Be relatively flexible regarding roles</li> </ul> | <ul style="list-style-type: none"> <li>• Prefer not to challenge those above them</li> <li>• Have a formal interaction style with more junior staff</li> <li>• Adapt their behavior depending on relative</li> </ul> |
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So when policy or rules are introduced, the suitability of the rules needs to be considered by identifying where the parties to the complaint fit in. An assessment of the balance will depend very much on where people sit on the spectrum.

## Conclusion

In this paper I have introduced a useful tool to measure our engagement with complainants/visitors. I discuss the concept of judicial review and its reflection on rules of fairness, and how the European concept of proportionality has become a useful tool in considering judicial review. But I also assert that the approach to judicial review and the tool of proportionality are equally useful to an ombudsman in dealing with issues of unfairness.

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- <sup>i</sup> From the IOA Website at <http://www.ombudsassociation.org/about-us/code-ethics>
- <sup>ii</sup> from the ICANN ombudsman site <http://www.icann.org/en/help/ombudsman>
- <sup>iii</sup> from the New Zealand ombudsman website <http://www.ombudsman.parliament.nz/>
- <sup>iv</sup> from the IOI website <http://www.theioi.org/the-i-o-i/about-the-ioi>
- <sup>v</sup> 2<sup>nd</sup> Edition Clarendon Press Oxford 1989
- <sup>vi</sup> Stroud's Judicial Dictionary of Words and Phrases 8<sup>th</sup> Edition Thomson Reuters
- <sup>vii</sup> [http://www.ombudsassociation.org/sites/default/files/JIOA%204%281%29\\_0.pdf](http://www.ombudsassociation.org/sites/default/files/JIOA%204%281%29_0.pdf)
- <sup>viii</sup> His article is "The Ombudsmans Guide to Fairness"
- <sup>ix</sup> Her article is "The Ombudsman's Ability to Influence Perceptions of Organizational Fairness: Toward a Multi-Stakeholder Framework"
- <sup>x</sup> His article is "Fairness and Evaluation"
- <sup>xi</sup> From the Victoria University Year in Review at page 8,  
[https://www.victoria.ac.nz/law/pdf/valum/v\\_alum\\_2013-web.pdf](https://www.victoria.ac.nz/law/pdf/valum/v_alum_2013-web.pdf)
- <sup>xii</sup> [1948] 1 KB 223
- <sup>xiii</sup> Mercury Energy v ECNZ [1994] 2 NZLR 385
- <sup>xiv</sup> Church of Scientology v Woodward (1982) 154 CLR 25 at 70
- <sup>xv</sup> [1982] 1 WLR 1155
- <sup>xvi</sup> Such as Halsbury's Laws of England, Judicial Review (Volume 61 (2010) 5th Edition)/Para 629
- <sup>xvii</sup> Proportionality: The Way Ahead? The Right Hon, Lady Justice Arden DBE [2013] 498 Public Law July 2013
- <sup>xviii</sup> <http://corp.aperianglobal.com/>