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JR55, Judicial Strategy and the Limits of Textual Reasoning

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A. Introduction

The question of how the courts should exert control over the exercise of discretionary power is an important one, particularly when that discretion is statutorily provided for in wide terms. In such cases the judge is obliged to navigate uncertain boundaries between constitutional restraint and what might be thought of as inappropriate activism.¹ This article explores the limits of some of the judicial strategies that can be deployed in managing this exercise, using the Supreme Court judgment in JR55² as the backdrop.

JR55 is an interesting case with which to consider the adjudication of discretionary power because it does not include any reference to human rights or EU law, a focus on which has on occasion come close to drowning out more practical considerations as to the strategies upon which judges base their decision-making. One of the key concerns regarding statutory interpretation has extra-judicially been well described by Lord Sumption, who coincidentally gave the sole judgment in JR55.

If judges go beyond the text and resort to some more general scheme of values, they must necessarily do so either in accordance with their own personal preferences or else in accordance with what they think that the lawgiver would have done if he had addressed other problems which for whatever reason he left alone.³

To avoid the consequent risks of judicial overreach when interpreting legislation, it is sometimes argued that strict textual techniques, as opposed to purposive or contextual techniques, are preferable strategies for judges to rely on.⁴ In JR55 a text-based strategy was applied to give meaning to a very broad discretionary power but, critiquing this approach, this article demonstrates that it is not always appropriate. Further, it is argued that there should be an onus on the judge to be transparent about the reasons for the choice of interpretative technique adopted. The importance of justifying decision-making strategies was very evident in JR55 because, given the nature of the underlying legal problem being addressed, the textual strategies adopted were incapable of providing a transparent tool for judicial decision-making. The outcome is a badly reasoned decision based, ironically, on unspecified policy choices, which has created uncertainty in the law.

A claim of this article is that the context of a dispute should drive the strategy chosen for considering administrative discretion. In JR55, because of the nature of the ombudsman function under review, the circumstances required of the Court a deferential approach, one which was more willing to accept the scale of the discretion conferred by Parliament and instead more focussed on testing the manner in which that power had been exercised. The proposed approach would not necessarily have changed the decision in JR55 but, if applied, would have shown more respect for institutional boundaries, been more transparent and

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¹ Lord Irvine, "Activism and Restraint: Human Rights and the Interpretative Process" (1999) 10 K.C.L.J. 177; Lord Sumption, "Judicial and Political Decision-Making" [2011] J.R. 301.

² In the matter of an application by JR55 for Judicial Review (Northern Ireland) [2016] UKSC 22

³ Lord Sumption, "A Response", in N. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law*. (Hart Publishing: Oxford, 2016), p. 215.

⁴ Lord Sumption, "The Limits of Law", in N. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and the Limits of the Law*. Hart Publishing: Oxford, 2016.

reduced the collateral impact of the case by allowing for a more coherent and manageable adaptation of the law.

B. JR55, comity and the ombudsman sector

JR55 involved a complaint that had been made against a medical general practitioner (GP) by the widow of one of his patients. The Commissioner possessed extensive powers to investigate the complaint, attempt a settlement and make recommendations as to the remedy. The Commissioner found that there had been service failure and maladministration on the part of the GP in his care of the complainant's husband. Following the Commissioner's report, the GP acknowledged this and apologised but disputed the Commissioner's recommendation that he pay £10k compensation. The Supreme Court unanimously ruled the recommendation as irrational and by implication outside of his statutory powers and also ruled unlawful the accompanying suggestion that the Commissioner may consider issuing a special report to the Northern Ireland Assembly on the matter.

To understand the problems JR55 gives rise to it is necessary to consider the background history of the ombudsman sector which raises issues of constitutional comity. Comity is the idea that different institutional branches of the constitution should show respect for the roles and legitimacy of other branches of the constitution.⁵ Ordinarily, the concept is raised in relation to the court's relationship with the executive and Parliament.⁶ However, bodies such as the Commissioner for Complaints which was challenged in JR55 hover in a fluid zone across all three branches and are rarely captured coherently in constitutional theory.⁷

In the UK there are at least 16 statutory schemes⁸ and many other additional non-statutory schemes.⁹ Albeit that there are differences in the operation of different schemes, a common feature is that ombudsman schemes independently process the grievances of citizens that in the main would otherwise remain unattended to, except on the few occasions when access to the courts might be viable. In this area the court-based remedies that may be available are often only a hypothetical option to the citizen. The practice of the sector has received regular scrutiny by legislatures and over time the powers and jurisdiction of schemes have tended to be expanded rather than retracted.¹⁰ One might even argue that the sector has been

⁵ T. Endicott, *Administrative Law*, 3rd ed. (Oxford: OUP, 2015), p. 20.

⁶ A. Horne, G. Drewry and D. Oliver (eds), *Parliament and the Law*. (London: Hart Publishing, 2013).

⁷ C. Gill, "The evolving role of the ombudsman: a conceptual and constitutional analysis of the 'Scottish solution' to administrative justice" [2014] P.L. 662.

⁸ The Parliamentary Ombudsman (Parliamentary Commissioner Act 1967); Local Government Ombudsman (Local Government Act 1974, as amended); Health Services Ombudsman (Health Service Commissioners Act 1993); Pensions Ombudsman (Pension Schemes Act 1993); Housing Ombudsman (Housing Act 1996, section 51 of and Schedule 2); Police Ombudsman Northern Ireland (Police (Northern Ireland) Act 1998, 200, 2003); Financial Ombudsman Service (Financial Services and Markets Act 2000 (as amended)); Scottish Public Services Ombudsman (Scottish Public Services Ombudsman Act 2002); Independent Police Complaints Commission (Police Reform Act 2002); Office of the Independent Adjudicator for Higher Education (Higher Education Act 2004); Public Services Ombudsman for Wales (Public Services Ombudsman (Wales) Act 2005); Police Investigations and Review Commissioner (Police, Public Order and Criminal Justice (Scotland) Act 2006, Police and Fire Reform (Scotland) Act 2012); Scottish Legal Complaints Commission (Legal Profession and Legal Aid (Scotland) Act 2007); Legal Ombudsman (Legal Services Act 2007); Service Complaints Ombudsman (Armed Forces Service Complaints and Financial Assistance Act 2015); Public Services Ombudsman Act (Northern Ireland) 2016.

⁹ For more details see the Ombudsman Association website: <http://www.ombudsmanassociation.org/find-an-ombudsman.php>

¹⁰ Eg Local Government and Public Involvement Act 2007, Part 9; Public Services Reform (Scotland) Act 2010, Section 16.

constructed and allowed to evolve with the legislature's acquiescence precisely because the democratic branch of the state has concluded that the judicial method is structurally incapable of delivering mass administrative justice.

By coincidence, with the Commissioner for Complaints scheme, this apparent faith had been reemphasised just a couple of months previous to JR55 being decided. The Public Services Ombudsman Act (Northern Ireland) 2016 established a new integrated ombudsman scheme in Northern Ireland, including the replacement of the work of the Commissioner. Under the Act it is specified that the new Ombudsman does possess the powers that were disputed in JR55, in particular the power to make financial recommendations¹¹ and to issue special reports in the event of a GP refusing to comply with recommendations.¹²

The growing status of the ombudsman sector is also reflected in existing case law,¹³ in which the courts have regularly recognised that an ombudsman operates with considerable discretion.¹⁴ This legislative design has been taken to imply that, in order to retain loyalty to legislative intention, the court should not generally attempt to establish sophisticated constructions to an ombudsman's discretionary powers. The underpinning rationale for this strategy is that the 'Court's supervisory jurisdiction should be exercised with sensitivity to the special nature of the ... Ombudsman's constitutional role and function',¹⁵ as well as its expertise. This reading of the court's role is repeated in multiple cases with the aim to avoid undermining the ombudsman's capacity to operate effectively.¹⁶ This evolving constitutional relationship suggests that any interpretative endeavour on the part of the court to place restrictions on an ombudsman's power should at the very least be supported by a sustained effort to establish good reasons for undertaking the exercise, such as if a particular statutory provision contains sufficient detail to justify an interpretation on the text alone.¹⁷

Reflecting this position, in court the ombudsman's exercise of powers has tended to be controlled through standard public law grounds - such as fairness in process, consideration of relevant factors and rational decision-making - not statutory interpretation.¹⁸ This 'doctrinal' approach can be understood as compatible with the legislative will because the implications of individual decisions are incremental, often case specific and much less likely to undermine the discretionary power of the ombudsman than placing lasting restrictions on that power through textual interpretation. Notably, even in the application of doctrinal grounds there is a clear reluctance in the case law to find fault too readily in ombudsman schemes, and where this option is taken the emphasis has been on backing up rulings with robust evidence and providing legal guidance for the future.¹⁹

This pre-JR55 settlement in the jurisprudence on ombudsman schemes might be argued to be too deferential towards the ombudsman sector and not allow for sufficient scrutiny of

¹¹ S.11(b)(ii),

¹² See s.16(3) and s.46(2).

¹³ R. v Commissioner for Local Administration Ex p. Croydon LBC [1989] 1 All E.R. 1033; Cavanagh v Health Service Commissioner [2005] EWCA Civ 1578.

¹⁴ R. Kirkham and A. Allt, "Making Sense of the Case Law on the Ombudsman" [2016] JSWFL 211.

¹⁵ Argyll & Bute Council v SPSO [2007] CSOH 168, at [16], per Lord Machphail.

¹⁶ Eg R v Parliamentary Commissioner for Administration ex p Dyer [1994] 1 WLR 621, pp. 626E-G, per Simon-Brown LJ; Siborurma, at [60]; Walker, Re Judicial Review [2013] NIQB 12, at [11]; R (Crawford) v The Legal Ombudsman & Anor [2014] EWHC 182; Muldoon v IPCC [2009] EWHC 3633, at [19].

¹⁷ R (Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd [2014] EWHC 3413.

¹⁸ Eg Balchin v Parliamentary Commissioner For Administration [1996] EWHC Admin 152; R (Turpin) v Commissioner for Local Administration [2002] JPL 326; R (Cardao-Pito) v Office of the Independent Adjudicator for Higher Education [2012] EWHC 203.

¹⁹ F. Mitchell, *The OIA and Judicial Review: Ten principles from ten years of challenges*. (Office of the Independent Adjudicator for Higher Education: Reading, 2015).

ombudsman determinations, but this is a separate debate. As an overarching strategy towards managing the relationship between the courts and the ombudsman, as well as securing judicial restraint and developing legal certainty, this approach has largely been successful. Without explanation, in JR55 a very different strategy was adopted which potentially signals a more interventionist attitude of the courts towards ombudsman schemes.

C. The risks of moving beyond literal interpretation

When discretionary power has been statutorily conferred, a judge is faced with a number of choices as to how to interpret that power, which places a heavy emphasis on how the judge manages his/her interpretative role. The idea that a judge has choices to make in decision-making implies that there is an inherent indeterminacy in the law when it comes to difficult cases such as JR55,²⁰ a claim regularly made over the years by what might be labelled old and new legal realist critiques of judicial decision-making.²¹ At least in hard cases, the judge will often have conflicting case law to make use of and a choice of legal rules to apply which provides them with sufficient opportunity to disguise underlying preferences within their decision-making.²² Such indeterminacy in judicial decision-making creates the space for debate about the appropriate levels of judicial activism/restraint, or the degree and form in which judicial power should be exercised.²³

In response to these problems of indeterminacy, various judicial strategies have been advocated to help channel the choices made by judges in selecting when and how to apply legal doctrine and principle.²⁴ With regard to statutory interpretation, broadly three separate strategies are available to manage the challenge: literal, textual and contextual interpretation. These three strategies can be illustrated through the judgment in JR55.

Literal interpretation

The most obvious strategy a judge can adopt in statutory interpretation is to focus only on identifying the natural and ordinary meaning to be given to the measure being interpreted: typically referred to as literal interpretation.²⁵ This strategy limits the judicial role when a legislator confers on an administrative body broad power through ambiguous language.

In JR55 the relevant provision was article 11 of the Commissioner for Complaints (Northern Ireland) Order 1996 which enabled the Commissioner to investigate a complaint and:

- (b) where it appears to the Commissioner to be desirable -
 - (i) to effect a settlement of the matter complained of; or
 - (ii) if that is not possible, to state what action should in his opinion be taken by the body concerned, the general health care provider concerned or the independent provider concerned ... to effect a fair settlement of that matter

Read literally article 11 leaves considerable power in the hands of the Commissioner ‘to effect a settlement’, with no limitations clarified specifically in the Order albeit that it is noticeable that he is not given the power to enforce his proposed ‘fair settlement’ in the

²⁰ B. Leiter, “Legal Indeterminacy” (1995) *Legal Theory* 481.

²¹ V. Nourse and G. Shaffer, “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory” (2009-2010) 95 *Cornell Law Review* 61.

²² J. Conaghan “Celebrating Duncan Kennedy's Scholarship: A ‘Crit’ Analysis of DSD & NBV v Commissioner of Police for the Metropolis” (2014) *Transnational Legal Theory*, 5:4, 601-621.

²³ Eg The Judicial Power Project, available at: <http://judicialpowerproject.org.uk/>

²⁴ J. King, “Institutional Approaches to Judicial Restraint” (2008) 28 *OJLS* 409-441.

²⁵ E. Bell, “Judicial perspectives on statutory interpretation” (2013) 39 *Commonwealth Law Bulletin* 245, 252-54.

courts. The judgment in JR55, however, did not adopt a literal interpretation strategy and instead sought to explain, through different techniques, how the discretionary power was limited in law.

There is plenty of precedent for the courts being unwilling to allow the statutory scope of discretionary power to go uninterrogated²⁶ and the sensitive nature of the facts of JR55 illustrate why deeper judicial scrutiny might be justified. The grievance of the complainant could hardly be more serious than in JR55, but the career implications of the Commissioner's investigation on the GP involved were also such that heightened attention to fair play was deserved. In adjudicating the matter, like all ombudsman schemes, high standards of fairness were expected of the Commissioner, albeit these standards were not detailed in legislation. But the Commissioner operates autonomously and without the backdrop of democratic accountability to scrutinise the office's individual decisions. In this context, and given the court's inherent interest and expertise in adjudicating on justice and individual rights, it is unsurprising that the court should claim an institutional duty to review the decisions of the Commissioner.²⁷ Nevertheless, attempting to constrain administrative discretion through narrow interpretations of the legislative will is a problematic enterprise.

The importance of selecting interpretation strategies according to context

When a judge chooses an interpretative strategy that goes beyond a literal interpretation, there are risks involved. By choosing not to follow the most obvious interpretation - which in JR55 would have entailed accepting that the Commissioner has wide discretion - a court creates uncertainty in the future application of the law. This follows because judicial interventions will be sporadic and focus only on discrete aspects of the discretionary power conferred, leaving only limited case law for future users of the law to understand what the limits on the discretionary power may include. This room for uncertainty will likely add costs to the decision-making process in the office of the primary decision-maker and encourage litigation.

More significantly, in giving itself the task of resolving ambiguities in legislation, the court is obliged to make choices as to how the legislation should be read,²⁸ a task which might be better understood as an exercise in 'constructing' the legislation rather than 'interpretation'.²⁹ These choices go both to the individual decision being considered in the case and the manner in which the legislative power being interpreted will be applied in the future.³⁰ The introduction of these choices leaves the Court vulnerable to the accusation that it is acting contrary to the legislative will or is overreaching its powers. Hence, before going beyond the literal approach to interpretation, it is appropriate for it to reflect upon and be transparent about the reasons why a more expansive interpretative strategy is required. Such an explanation should include consideration of the level of institutional competence it has to take on the challenge³¹ and an explanation of why one interpretive approach is more appropriate than any other. By itself such a duty of candour would encourage self-restraint.³²

²⁶ Eg *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997, at p.1030 per Lord Reid

²⁷ Eg *R v Parliamentary Commissioner for Administration Ex Parte Dyer* [1994] 1 WLR 621. The need for judicial review of ombudsman schemes has been disputed, but this argument will not be addressed here, see Endicott, *Administrative Law*, x.

²⁸ Bell, "Judicial perspectives on statutory interpretation", (2013) 39 *Commonwealth Law Bulletin* 245, 252-54.

²⁹ *T. Endicott, "Legal Interpretation"*. In A. Marmor (ed), *Routledge Companion to Philosophy of Law* (London: Routledge, 2012).

³⁰ A. Ashworth, "Interpreting Criminal Statutes: a Crisis of Legality" [1991] 107 *L.Q.R.* 419, 445.

³¹ C. Sunstein and A. Vermeule, "Institutions and Interpretation" (2003) 101 *Michigan Law Review* 885.

³² B. Harris, "The continuing struggle with the nuanced obligation on judges to provide reasons for their decisions" [2016] 132 *LQR* 216, 222.

Rosen has recently argued ‘that different approaches to statutory interpretation might be appropriate for dealing with different exercises of legislative power.’³³ If correct, this implies that it is incumbent on the courts to take into account the different expectations that lie behind legislation. A feature of the judgment in JR55, however, was that no consideration of this issue, or explanation of the judicial strategy adopted, was provided.

D. Textual interpretation and the Commissioner for Complaints Order 1996

Possible benefits of textual interpretation

Beyond a literal interpretation of legislation, a judge can choose between textual and contextual strategies.³⁴ Most of the effort throughout the judgment in JR55 was focused on a textual interpretation strategy, a phrase used here to describe a judicial endeavour to construct meaning to a legislative provision from the text alone and without consideration of context. At only one point were comparisons drawn from other ombudsman schemes.³⁵ Minimal energy, if any, was invested in factoring into the interpretation the context in which the Commissioner scheme operated or the purposes for which it was created. This approach also meant that the Court paid very little attention to judicial precedent, citing only two cases.³⁶

Evidence that the Court was attracted to an interpretation strategy based on the text alone can be seen in the judgment’s neat rebuttal to any claim that the ombudsman sector exists as a discrete and important branch of the administrative justice system, operating in part according to its own growing body of operational and legal norms.³⁷

The various [ombudsman] enactments have a strong family resemblance. But some of them have distinctive features which mean that considerable caution is required before principles derived from one legislative scheme can be read across to another.³⁸

Textual interpretation strategies might appear the most appropriate approach towards understanding administrative discretion because they require the judge to focus only on the legislation in hand. Through such a strategy, the democratic will may be claimed to dominate and not the policy preferences of the judiciary,³⁹ with any subsequent need for judges to reach out to judge-made (and non-legislative) legal doctrine thereby narrowed. Indeed, any use of judicial precedent needs some justification if the legislation is adequate to provide the answers. Likewise the textual approach encourages the judge to avoid considering the morality of the decision. If this approach leads to difficult outcomes the solution is for the legislature to revise the law. The legislature possesses a more appropriate set of competences to amend the law, as opposed to the court which has neither democratic legitimacy nor the procedural or resource capacity to factor in the requisite body of polycentric matters needed to devise new policy-loaded solutions. This leads to another purported strength of the textual approach, it reduces the potential for a judge to create new unforeseen problems through misconceived contextually based interpretations.

These claims in favour of textual interpretation should be taken seriously, but it will be argued here that in the context of JR55 the limitations in this strategy were demonstrated.

³³ A. Rosen, “Statutory Interpretation and the Many Virtues of Legislation” [2016] OJLS (forthcoming).

³⁴ Eg. W. Eskridge, “Dynamic Statutory Interpretation” (1987) U. PA. L. REV. 1479; John F. Manning, “Textualism and the Equity of the Statute” (2001) Columbia Law Review 36.

³⁵ JR55, [26]-[27].

³⁶ *Croydon and R (Bradley) v Secretary of State for Work and Pensions* [2008] ECWA Civ 36.

³⁷ R. Kirkham and A. Allt, “Making Sense of the Case Law on the Ombudsman” [2016] JSWFL 211.

³⁸ JR55, [1].

³⁹ John F. Manning, “Textualism and the Equity of the Statute”, (2001) 101 Columbia Law Review 36.

Textual interpretation is not always constrained or neutral

It is disingenuous to claim that the interpretation of a discretionary power is ever completely neutral or entirely focused on the legislative will. Beyond literal interpretations, choices are always being made when a statute is being interpreted and those choices will inevitably have policy implications. The simplest example in JR55 to illustrate this point is the finding on the quality of the settlement process that the Commissioner applied, as allowed for in article 11. The judgment finds in one sentence that the ‘Commissioner never sought to operate the settlement procedure’.⁴⁰ But to assess the legality of the Commissioner’s use of the settlement process, we require (i) some understanding of what a lawful settlement procedure looks like; and (ii) some evidence that the Commissioner’s processes did not match that understanding. On paper at least, the judgment provides answers to neither issue.

Lack of clarity in judicial reasoning is not an attribute isolated to textual interpretations, but this example demonstrates the conceptual difficulties faced with this judicial strategy. The problem here is that article 11 does not tell us what the features of the settlement process are, how it should operate or what its outputs might look like. The only way that such meaning could be constructed without adding extra-legal input is if there is another legal source available that provides us with clues as to the answer, yet none is provided in JR55. Maybe the Court had a clear conception of what an appropriate settlement procedure might look like and by oversight only did not inform us. But even if the Supreme Court had provided an explanation that provided the foundations of a model settlement process, this extra-legislative input would require interrogation. Indeed, once it is concluded that the statutory discretion of the Commissioner is not to be taken at literal value, it is hard to see how a judicial interpretation of the settlement process provided for in legislation could be anything other than a decision based on judicial pre-conceptions to be found external to the legislation.

Reading around the legislation does not necessarily prevent the intrusion of policy

The best reading of JR55 is that it attempts to derive clarity as to the scope of the Commissioner’s power through an analysis of a range of different provisions in the 1996 Order. This is a classic technique in statutory interpretation whereby the judge moves beyond the individual provision being interpreted and look to the four corners⁴¹ of the legislation in question in order to get an improved sense of both its purpose and interlocking functionality. The relevant provisions included:⁴²

- Article 7 – the receipt of complaints against public bodies.
- Article 8 – the receipt of complaints against other bodies and individuals supplying public services.
- Article 11 – the Commissioner’s powers of investigation and settlement
- Articles 16-18 – granting only complainants under article 7 the right, if necessary, to pursue their grievances in the County Court using the Commissioner’s report as a ground of action.
- Articles 19 –the Commissioner’s reporting powers.
- Plus various other powers of the Commissioner on discovery and confidentiality.

Only some of these provisions specifically describe the inter-relationship between them, but clearly all refer to the operation of the Commissioner scheme as a whole and thereby rely upon each other to a certain degree. But how they do so is open to disagreement. A key issue that drove the judgment was the inclusion in article 16 of the legal right for the complainant

⁴⁰ JR55, para. 22.

⁴¹ *Carltona Ltd. v. Commissioners of Works* [1943] 2 All E.R. 560, 564.

⁴² See also *Girvan LJ in the Northern Ireland Court of Appeal* [2014] NICA 11.

to bring a claim for financial remedies in the County Court following an article 7 investigation if he has not gained satisfaction through the Commissioner. At the risk of oversimplifying the ruling, the conclusion arrived at was that this residuary legal right impacted on how both articles 8 and 11 should be interpreted. JR55 concerned an article 8 investigation, not an article 7 investigation. Therefore, depending on how you interpret the judgment, either it was simply not available to the Commissioner to make a recommendation of financial remedies (because by inference these are only available to article 7 investigations) or it was unreasonable for the Commissioner to make such recommendations (because the investigated GP could not later defend himself in the County Court).⁴³

Either way, the judgment relies upon making a connection between the various articles of the Order which was not specified in the Order itself. This lack of specificity means that there is at least one other interpretation of the Order. The Order's provision might be read as dealing with two completely separate processes. In the first process, article 7 and 8 investigations are dealt with by the Commissioner through the powers of article 11, by way of investigation and, if necessary, an attempted settlement. At this stage there is no restriction on the remedy that can be recommended by the Commissioner, but nor is there a compulsion on the investigated party to comply. In the second process, which only applies to article 7 investigations, if the individual complainant is dissatisfied with the outcome of the complaint to the Commissioner he/she can then apply to the County Court, which then separately makes an order for a financial remedy.

To resolve such an interpretive dilemma, Ekins has argued that 'interpreters should read the statutory text asking what the presumptively rational and reasonable legislature that enacted it intended to convey by enacting it'.⁴⁴ However, with an example such as the above, the reasons for the choice of construction adopted might reduce the options available but it remains unclear which is the rational best choice.⁴⁵ Therefore, unless contextual factors are explored, the choice must be based on something else, such as the judge's intuition, bias or claim to authority.⁴⁶

A focus on textual interpretation risks blinding the judge to wider ramifications

Textual interpretation is in part justified because of its claimed narrow focus. In practice though, often general points of law exist that will not just be relevant to the legislation at hand, but will be repeated across a whole range of statutory situations. One such issue that was raised in JR55 is the legal status of a private provider of public services. The judgment found that a GP 'is not a public body, but merely provides services to a public body under a contract or some other consensual arrangement'.⁴⁷

The finding on the legal status of GPs was not a necessary one according to the wording of the Order, which was silent on the issue. Article 8 merely allowed the investigation of complaints against a range of health service providers, other than those public bodies specifically listed in schedule 2 of the Order. If the point was important, the Court could have adapted existing case law but here the answer is unclear and deserved further analysis.⁴⁸ As it

⁴³ Contrary to the Supreme Court, the Northern Ireland Court of Appeal also ruled that it was unlawful for the Commissioner to recommend a financial remedy in any investigations, [2014] NICA 11, at [33].

⁴⁴ R. Ekins, "The Intention of Parliament" [2010] PL 709, 726.

⁴⁵ D. Feldman, "Statutory interpretation and constitutional legislation" [2014] 130 LQR 473, 479.

⁴⁶ R. Cahill-O'Callaghan, "The Influence of Personal Values on Legal Judgments" (2013) 40 *Journal of Law and Society* 596; R. Posner, "What is wrong with the Federal Judge, yet eminently curable, Part II" (2016) 19 *Green Bag* 257.

⁴⁷ JR55, at [20].

⁴⁸ Eg *YL v Birmingham CC* [2007] UKHL 27

stands though, even if we treat the finding only as obiter and easily distinguishable in future cases, the rather perfunctory treatment given to such an important point of law looks like an attempt to smuggle into the judgment a view as to the law which can only be based on certain undisclosed preconceptions as to what the law should be.⁴⁹

The creation of uncertainty

An argument in favour of textual interpretation might be that it minimises the impact of judicial decision-making to the statutory scheme concerned but this will sometimes be a naïve assumption, with cases on the ombudsman sector an example. In JR55, the judgment failed to isolate the law being interpreted to the Commissioner for Complaints scheme alone. Nor could it given the myriad of overlaps in legislative terminology and themes in the case which were relevant to other ombudsman schemes designed with much the same powers. These similarities included: the subject matter, which was the investigation of GPs; the selection and definition of complaints for investigation; the nature of the remedies that can be recommended; and the means of enforcement pursued.⁵⁰

The Court's ruling that it was unlawful for the Commissioner to recommend a financial remedy in this case is the starkest example of its knock-on impact. Confusingly, at two points the judgment refers approvingly to the power of ombudsman schemes, including the Commissioner, to make financial recommendations against bodies paying 'out of public funds'.⁵¹ But, as outlined above, the Court's fluid approach to the task of statutory interpretation led it to quash a recommendation for financial compensation.

A further uncertainty sowed by JR55 relates to the circumstances when a complaint can be accepted. Article 9 of the 1996 Order is very similar to equivalent provisions in other ombudsman schemes and states that:

[T]he Commissioner shall not conduct an investigation ... in respect of any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law. The Commissioner may conduct an investigation notwithstanding that the person aggrieved has a right or remedy ... if the Commissioner is satisfied that in the particular circumstance it is not reasonable to expect him or her to resort or to have resorted to it.

This provision allows an ombudsman scheme to accept a complaint for investigation, notwithstanding the potential for the complainant to access an alternative remedy such as a judicial remedy. Here is a discretionary power the meaning of which the courts have disagreed on in two Court of Appeal cases Croydon⁵² and Liverpool.⁵³ Both these cases involved the Local Government Ombudsman, not the Commissioner for Complaints, but the almost precise copy of the wording in the separate items of legislation make the case law highly relevant. In Croydon, it was found that the provision established a presumption in favour of judicial redress. By contrast, in the later case of Liverpool the Court ruled that the decision to accept a complaint was a discretionary decision challengeable only on Wednesbury unreasonable grounds.⁵⁴

⁴⁹ Remarkably, and unnecessarily, in an obiter statement the Court also found that another scheme, the Parliamentary Commissioner for Administration (PCA) 'has no power to investigate complaints against private individuals providing services to government departments or public bodies' JR55, para. 26.

⁵⁰ For instance, the Health Services Ombudsman, the Scottish Public Services Ombudsman and the Public Services Ombudsman for Wales all have jurisdiction over health.

⁵¹ JR55, [24]. See also [22].

⁵² Croydon LBC [1989] 1 All E.R. 1033.

⁵³ R (Liverpool City Council) v Commissioner for Local Administration [2000] EWCA Civ 54

⁵⁴ Liverpool, at [41], per Chadwick LJ.

The ruling in JR55 did not address this legal history but instead, citing only Croydon, implied that article 9 not only impacted on the Commissioner's discretionary power to accept a complaint for investigation but also necessarily went to the nature of the remedy that could later be recommended. The degree to which an ombudsman is required to limit the scope of an investigation according to the facts of the case, as known at the time of the original complaint, is a point of law that has also received judicial attention, and again is relevant to other schemes than the Commissioner. The case of Cavanagh⁵⁵ suggests that there are limits in the extent to which an investigation can be extended beyond the original complaint, whereas Miller⁵⁶ treats this as a discretionary decision best dealt with through the rationality test. In Miller it was accepted that it will often be unrealistic for a complainant to be capable of capturing the full nature of the grievance because they will not be aware of all the facts. Thus there will be occasions when, following preliminary investigation, it might be appropriate for an ombudsman scheme to expand its inquiry in order to interrogate matters likely to have caused the grievance but which were not originally identified in the complaint.

Once more the Supreme Court did not consider the previous case law and inferred from the facts that the complainant in JR55 had complained 'looking for explanations rather than money'.⁵⁷ This is an unusual way to describe the receipt of a complaint by an ombudsman. Nevertheless, contrary to the reasoning in Miller, given the original complaint the Court ruled that it was '[im]proper for [the Commissioner] to recommend a payment of money and threaten to report on the respondent's failure to pay it'.⁵⁸

Given that very similar legal questions can be asked of other ombudsman schemes, the implications of the ruling in JR55 might extend beyond the now closed Commissioner for Complaints scheme. Indeed, contained in JR55 is a powerful train of thought that challenges the lawfulness of the recommendation of financial remedies by all schemes, with the most vulnerable comparable scenario those other ombudsman schemes that investigate GPs. This ruling goes against current practice in more than one ombudsman scheme,⁵⁹ not all of which include an expressly worded statutory provision authorising the recommendation of financial settlements. It quite possibly follows from JR55 that either ombudsman schemes should avoid altogether recommending financial recommendations or, in the alternative, that because financial remedies might be obtainable through other legal channels, complainants that indicate any interest in the pursuit of a financial remedy should be encouraged to go to court rather than the ombudsman.

E. Contextual interpretation

If literal interpretations are to be rejected, other solutions than textual strategies are available to interpret legislation.⁶⁰ In this regard, contextual interpretation strategies might be argued to be preferable in replacing 'unsubstantiated references to the intention of Parliament' with 'a more open and systematic consideration of any legislative purpose, and of any relevant principles (and policies)'.⁶¹ However, because contextual interpretation strategies call for the judge to consider the purposes of legislation, they create considerable space for the judiciary

⁵⁵ Cavanagh v Health Service Commissioner [2005] EWCA Civ 1578.

⁵⁶ Miller v Health Service Commissioner [2015] EWHC 2981, at [59].

⁵⁷ JR55, at [17].

⁵⁸ JR55, at [17].

⁵⁹ Eg Parliamentary and Health Service Ombudsman, Report by the health service ombudsman for England of an investigation into a complaint made by Mr and Mrs M. HC. 132 (2013–14), pp. 84–86.

⁶⁰ Eg. W. Eskridge, 'Dynamic Statutory Interpretation'. 135 U. PA. L. REV. 1479 (1987).

⁶¹ A. Ashworth, "Interpreting Criminal Statutes: a Crisis of Legality" [1991] 107 L.Q.R. 419.

in their interpretation of legislation. The question thereby arises as to how such judicial power can be explained and justified without the judiciary overreaching its powers. Several techniques were available to the Court in JR55 to arrive at plausible contextual interpretations but only one was taken up.

Compare the legislation with other similar legislative provisions

If a legislative provision is ambiguous can assistance be derived from similar legislative provisions in other Acts? At one point, the judgment deploys this strategy in JR55. One of the legal questions that had to be resolved was whether or not the Commissioner possessed the power to issue a special report to the Assembly highlighting the refusal of the GP to pay the recommended compensation. This raised yet another point left unspecified in the legislation. Article 19 stated that in addition to annual reports the Commissioner could lay ‘such other reports before the Assembly as he thinks fit’. An interpretation of this provision is that it could be implicitly meant to allow reports, such as the one proposed to highlight the GP’s non-implementation of a recommendation. The Supreme Court, however, chose this point to expand its compass beyond the textual approach otherwise deployed in the judgment. In order to gain an insight into the best interpretation of ‘report clauses’ the judgment referenced two equivalent schemes, the Parliamentary Ombudsman⁶² and the Northern Ireland Assembly Ombudsman.⁶³ Both schemes allow specifically for special reports to be submitted to the legislature on occasions where non-compliance occurred. Therefore, the inference was made in JR55 that drafting practice tended towards the specification of the power to issue a special report, leading to the conclusion that where such a power was not specifically referred to, as with the Commissioner, then such a power could not be exercised.

The conclusion drawn here is not an essential inference. Just because two other statutory schemes operate this way does not require the broad discretionary power of another statutory scheme to be restrictively constructed. But in this instance at least the explanation provides a transparent, easily comprehensible and above all defensible account of Parliament’s intention.

Differences in interpretation can be resolved through appeal to rule of law norms

To aid interpretation, the courts sometimes use legal norms to establish the expectations of the rule of law.⁶⁴ As noted above, a crucial question in JR55 was whether within the Commissioner’s general power to effect a settlement it was lawful for the office to recommend financial compensation. To resolve the matter, the judgment of Girvan LJ in the Northern Ireland Court of Appeal (NICA) contained just such an appeal to a legal norm. He found that:

... it would require clear wording to infer that the Commissioner has a power to make a recommendation that a body or individual pay monies in consequence of a finding of maladministration. Such a power would have to be found in express wording or by necessary implication from the relevant legislation.⁶⁵

Thus for the NICA, because the power to recommend financial compensation had not been explicitly granted to the Commissioner by law, the Commissioner’s recommendation of financial compensations contravened the legal norm.

This proposed legal norm did have the merit of providing a strong underpinning ground with which to establish coherence to textual efforts to interpret the 1996 Order in the round. The difficulty with the legal rule proposed by Girvan LJ, however, is that no authority or justificatory analysis was provided to support the norm. The wording deployed did mirror

⁶² Parliamentary Commissioner Act 1967, s.10(3).

⁶³ The Parliamentary Commissioner (Northern Ireland) Act 1969, s.10(3).

⁶⁴ Lord Irvine, “Activism and Restraint: Human Rights and the Interpretative Process” (1999) 10 K.C.L.J. 177.

⁶⁵ JR55 (NICA), at [31].

very closely a line adopted in several cases on civil liberties,⁶⁶ but to transfer this line of reasoning across to the work of ombudsman schemes would represent a significant expansion. In JR55 there was no means by which the recommendations of the Commissioner could be enforced in law and the matter at stake was the payment of a non-career threatening sum of money.

Notably the Supreme Court did not follow the NICA in applying this legal norm to support its judgment. Indeed, this example illustrates that as a judicial strategy, the use of legal norms to resolve a matter of statutory interpretation should be treated cautiously and only if supported by detailed exposition of the reasons in favour of their application.

Consider the purpose behind the legislation and the context in which it operates

The major absence from the Court's toolkit in JR55 was any apparent endeavour to contextualise either the reasons that laid behind the passage of the 1996 Order or the manner in which the scheme evolved or later operated. It is surmised here that this absence was not an accident, but was due to a belief that to do so would open the Court to the critique that it was allowing value judgments to creep into its decision-making or distract it from arriving at the most rational interpretation of the Order.

⁶⁶ Eg R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539, at p. 575 per Lord Browne-Wilkinson; R v Home Secretary ex p. Simms [2000] 2 AC 115.

If the Court had chosen to consider contextual factors, other questions and sources of information could have been used to aid the Court's interpretation of the Order. For instance, what such an inquiry would have revealed is that the 1996 Order derived from the Commissioner for Complaints Act (Northern Ireland) 1969. In drafting this legislation, the extraordinary sectarian problems in Northern Ireland in the late 1960s, in particular for employment relations in local government, led to the inclusion of the original version of the article 16 provision⁶⁷ which almost uniquely in the sector entitled complainants to use an ombudsman's report as a cause of a legal action.⁶⁸ Without this added power, it was felt that the Commissioner scheme would sometimes struggle to persuade local authorities to comply with its recommendations. By contrast, the jurisdiction to investigate health service complaints (later replicated in article 8) was added at a much later date, by which time the need to provide extra support to the commissioner scheme by creating a right of access to the court was less pressing. Indeed, the article 16 process had gone largely unused. Thus the expansion of the jurisdiction of the Commission under article 8 essentially mirrored equivalent legislative provisions from other UK schemes, as did the wording of the Order. With these same powers, other ombudsman schemes in the UK responsible for investigating health services have made financial recommendations.⁶⁹

In this context, it is difficult to read too much into the exclusion of article 8 investigations from the province of article 16. Had the Supreme Court taken account of these contextual factors, then it would have been much more difficult for it to justify construing the Order as implying that financial recommendations were excluded. At the very least, a positive benefit of integrating a contextual analysis into the judgment might have been that it would have required the Court to provide a much more robust defence of its decision than a solely textual strategy allowed for. A further outcome is that it could have assisted the Court in making a decision as to whether it was appropriate for it to move beyond the most obvious literal interpretation of the Order where the evidence of clear intent on the part of the legislature was so thin. In this instance, therefore, whatever the outcome on the facts, both judicial certainty and transparency would have been enhanced by a consideration of contextual factors.

F. Using public law grounds to demonstrate judicial restraint

It is not being argued here that it is never appropriate to interrogate the scope of discretionary power to ensure that its potential limits have been properly identified or that its underlying purposes have been fulfilled.⁷⁰ However, there must be a limit to the viability of this enterprise. In its attempt to interpret legislation, the ruling in JR55 depended upon reasons which were never addressed or fully explained and which upon deeper analysis could not have been coherently explained without a full exposition of the policy choices being made. This lack of openness in judicial decision-making lends itself to the critique of judicial overreach, which cannot be rescued by an appeal to Parliamentary intention if no evidence is provided of that intention.

To reduce the potential for such a controversial outcome, a better approach is for the courts to pre-empt an attempt to engage in statutory interpretation with an assessment of the appropriateness of the exercise. This stage in judicial reasoning should include a consideration of the available detail in the legislation, the context in which the legislation was

⁶⁷ Originally, s.7(2).

⁶⁸ B. Thompson, "The court's relationship to ombudsmen – supervisor and partner?" [2015] J.S.W.F.L. 137.

⁶⁹ Parliamentary and Health Service Ombudsman, Report by the health service ombudsman for England of an investigation into a complaint made by Mr and Mrs M. HC. 132 (2013–14), pp. 84–86.

⁷⁰ R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at [8], per Lord Bingham.

introduced and has evolved, and the duty of the court to exercise constitutional restraint. If following such an assessment the justification for moving beyond a literal interpretation is slim, then other strategies of judicial control should be pursued.

One ruling in JR55 illustrates just such an alternative strategy available to the court to uphold rule of law values, which could have driven the decision. A number of generalisable public law grounds, such as procedural fairness, could have been used in JR55 to interrogate the discretionary decision made. In the event, the Court only considered the rationality test, finding that the Commissioner's recommendation of £10k had been 'plucked out of the air' and was 'lacking any rational basis'.⁷¹ Whilst this finding makes uncomfortable reading for the former Commissioner's office, this is the one aspect of the case that does not represent a significant departure from existing case law. The rationality finding in JR55 is founded on the requirement for an ombudsman scheme to base its decisions on reasoning which links its findings and recommendations closely to the alleged administrative failure,⁷² and for the derivation of financial compensatory recommendations to be clearly articulated.⁷³

The rationality test normally receives a mixed reception in legal circles, primarily because it can be portrayed as one of the most interventionist grounds that a court can apply, involving as it does a judgment-call on the substantive merits of a decision of a primary decision-maker. But in the context of managing the institutional relationship between the ombudsman sector and the court, the rationality test rescues the court from having to indulge in creative interpretation of an ill-defined statute. In JR55, once it had been established that the Order did not directly address the matter at hand, this raised a fundamental question as to what was the most appropriate judicial strategy for dealing with the discretionary power. Rather than attempting to interpret an item of legislation that was never designed to be so interpreted, the Court could have acknowledged the very clear discretion given to the Commissioner by the legislature and focused instead on the rationality of the decisions that resulted. This is a review function that the legislature would have been able to anticipate when the Order was passed.

With wide discretionary powers, the rationality test provides a 'safety valve' function, through which the court can (a) redress any demonstrable instances of ombudsman overreach; (b) send out a reminder to the ombudsman sector that robust and appropriate decision-making is a key feature of the rule of law; and (c) articulate with some specificity some of the forms of substantive decisions and processes that the Court is uncomfortable with. This latter point interlinks with a broader benefit of developing legal doctrine in an incremental fashion to define the limits of an ombudsman's discretion. Along just these lines, the Office of the Higher Independent Adjudicator (OIA) has laid out ten lessons that can be derived from the scheme's case law, most of which are only indirectly attributable to an interpretation of the relevant legislation and owe more to the experience of fine-tuning general principles of public law specifically to the ombudsman sector.⁷⁴

Reliance upon public law doctrine does not remove the risk of judicial overreach but the most important reason in favour of legal doctrine over expansive textual interpretation is that it is the most transparent option. In public law judges are always required to make choices in areas where policy considerations are in play, JR55 demonstrates this very well. Judicial strategies may be available to reduce the judge's capacity to allow underlying biases to drive

⁷¹ JR55, at [30].

⁷² *Atwood v The Health Service Commissioner* [2008] EWHC 2315, at [29]-[31].

⁷³ *Cardao-Pito, R (on the application of) v Office of the Independent Adjudicator for Higher Education & Anor* [2012] EWHC 203 (Admin).

⁷⁴ Mitchell, *The OIA and Judicial Review*.

their decision-making but an overriding demand on the judiciary is that they should be clear and open about the reasoning that they employ. The overall impression from reading the judgment in JR55 is that the Court viewed with great reservation the imposition of a financial penalty on a private practitioner (notwithstanding that the penalty was only a recommendation) through an ombudsman scheme that had only been implicitly given that power. One might also speculate that the Court viewed with suspicion the capacity of an ombudsman scheme to provide the requisite level of procedural fairness that such a penalty deserves. Both these sets of findings could have been expressed very clearly as demonstrating the ground of irrationality and if expressed as such would have sent out a much clearer and more respectful message as to the expectations of the law in the future than the judgment we received.

G. Conclusion

Judicial decision-making is not a science and there are a range of soft variables that can intervene to affect a case's outcome, such as the barrister's performance and the background pressures on the court. With JR55, at a late point in the process one judge had to recuse himself⁷⁵ and the hearing itself was hastily curtailed despite many of the legal issues raised in this article having not been interrogated. Given this context, it might be tempting to conclude that the shortcomings in the JR55 ruling simply reflect a bad day at the office.

There are two reasons for not being so sanguine about JR55. First, the history of the case law on the ombudsman suggests that it will probably be a long time before another case will be heard in the Supreme Court to clarify the points of law left confused by the ruling. Even though the judgment referred to the case as 'moot' because it involved a closing ombudsman scheme,⁷⁶ this article has shown that the shadow cast by the judgment may be lengthy because of the transferable points of law it tackled. By deploying an inappropriate judicial strategy there is much about the ruling that could create a chilling effect on the sector and a recurrent need to distinguish JR55 in future case law.

Second, it is entirely possible that far from the judgment in JR55 being a bad decision, in the sense of being rushed and inattentive to case law, it was a deliberate exercise in judicial strategy designed to send out a message as to how public law cases should be resolved. It is the efficacy of this second possibility that this article has deconstructed given that its implications might go wider than the ombudsman sector. However, the body of case law on the ombudsman sector illustrates that there already exists the foundation of a preferable model for reviewing discretionary power. It is probable that the appropriate judicial strategy towards discretionary power depends very much on the context. But the model outlined here, whereby rigorous statutory interpretation is only attempted once the court has provided clear reasons to justify this approach, might provide an institutional strategy which could be applied more generally to the judicial task of reviewing administrative discretion.⁷⁷

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⁷⁵ Lord Kerr.

⁷⁶ JR55, at [5].

⁷⁷ For a fuller analysis of institutional approaches to judicial restraint, see J. King, *Judging Social Rights* (Cambridge: CUP, 2012).