

**Legal Research Foundation**

**THE STRUGGLE FOR SIMPLICITY**

**LORD COOKE AND NATURAL JUSTICE**

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## LORD COOKE AND NATURAL JUSTICE

Sixty years ago, the Court of Appeal in England delivered judgment in *Cooper v Wilson*.<sup>1</sup> A former police sergeant claimed that he had not been validly dismissed from the Liverpool police force. By a majority the Court of Appeal held that the purported dismissal had come too late and was hence of no effect; but, mindful of a possible further appeal to the House of Lords, the same two judges accepted an alternative argument that there had been a breach of natural justice in the disciplinary proceedings undertaken against the police sergeant. The alleged breach related principally to the law of bias under the umbrella of natural justice.

Even at the time the decision was regarded as a curate's egg. There was much to applaud, not least the robust view taken of the Chief Constable's presence at the hearing before and at the deliberations of the local watch committee, even though he was in effect the respondent to the sergeant's appeal against his purported dismissal. There is little doubt that bias would be found today in similar circumstances by courts in New Zealand or England and Wales, though Scott L.J. was alone in finding that the hectoring tone of the chairman of the watch committee added to the breach of natural justice. When the police sergeant said at one stage that he had been assisting his "aged parents across the water", the chairman said that "we are too old in the head to believe that, my lad",<sup>2</sup> an exchange not unlike some comments attributed to the Chairman of the Royal Commission in the *Thomas* case in New Zealand where the Court of Appeal considered various issues of natural justice.<sup>3</sup> Reference was made in that case to "sundry strong expressions" in the interrogation of police witnesses.<sup>4</sup>

Another positive aspect of *Cooper v Wilson* was the ruling by the majority that the appellant was not prevented from seeking a declaration simply because he was entitled to seek a writ of certiorari. The dissenting appellate judge, Macnaghten J., refused to countenance a declaration that a decision of a tribunal exercising judicial or quasi-judicial functions ought to be quashed. In the slow emergence of the declaration as a prominent remedy in administrative law, however, *Cooper v Wilson* deserves an honourable mention. The future Lord Cooke of Thorndon would have approved but he would not, by contrast, have welcomed of the strong references to judicial or quasi-judicial as opposed to administrative functions. *Cooper v Wilson* was decided just five years after the publication of the (Donoughmore) Report on Ministers' Powers<sup>5</sup> which, while containing many constructive suggestions, attempted a formal analysis of the difference between judicial and quasi-judicial decisions - offering inter alia the suggestion that "quasi", as used by lawyers, means "not exactly".<sup>6</sup> The Report went on to explain that decisions which are "purely administrative" stand on a wholly different footing.

Such distinctions might seem redundant nowadays and were misleading even at the time, but the most unfortunate feature of *Cooper v Wilson* was that it gave one of the majority judges, Scott L.J., the opportunity to give judicial approval to the Donoughmore analysis. His Lordship said that the definitions of "judicial" and "quasi-judicial" are, "broadly speaking", correct, an approval which did not draw contemporary favour either from Sir Ivor Jennings or from William Robson.<sup>7</sup> The latter, accusing Sir Leslie Scott of employing "ambiguous and nebulous phraseology", deplored "the picture conjured up by a quasi-judge administering quasi-law in quasi-disputes. The

quasi-parties give their quasi-evidence; the tribunal finds the quasi-facts and considers the quasi-precedents and the quasi-principles. It then applies the quasi-law in a quasi-judicial decision which is promulgated in a quasi-official document and given quasi-enforcement. The members of the tribunal, having conducted their quasi-judicial business, then go out and drink quasi-beer before taking lunch consisting of quasi-chicken croquettes. They then go home to their quasi-wives.”<sup>8</sup> One should add that at no point in his judgment did Scott L.J. disclose that he had been a member of the Donoughmore Committee from the outset, that he became its chairman after the Earl of Donoughmore resigned, and that he had been closely involved in the drafting of the Report. To be able to affirm one’s own extra-judicial utterances is in itself a rare privilege, but the particular consequence in *Cooper v Wilson* was that of helping to entrench the artificial language of Donoughmore for many years to come and especially through the post-war period of judicial decisions dramatically described by H.W.R. Wade as leading to the twilight of natural justice.<sup>9</sup>

Feeling his way through that twilight, the future Lord Cooke wrote an influential case-note<sup>10</sup> in the Cambridge Law Journal in 1954, criticising attempts to introduce “undesirable refinements” into the law of natural justice and contrasting a recent English case concerned with cab-driver licences with the constructive approach of the Court of Appeal of New Zealand in *New Zealand Dairy Board v Okitu Dairy Co. Ltd.*<sup>11</sup> Throughout his professional and judicial career, Lord Cooke has spoken out against undesirable refinements or reliance on vague distinctions or terminology. He has objected to stark categories such as “mandatory” and “directory”, generously supporting Lord Hailsham on this along with similar views “less memorably expressed”, in New Zealand cases;<sup>12</sup> to the use of “void” and “voidable” in administrative law, in such cases as *Reid v Rowley*,<sup>13</sup> and, as he put it in *Bulk Gas Users Group v Attorney General*, to the “rather elusive” and “vague and probably undefinable” concept of “jurisdiction.”<sup>14</sup> Late last July, in speaking on behalf of the House of Lords in *R v Bedwellty Justices, ex p. Williams*,<sup>15</sup> Lord Cooke spoke of “jurisdiction” as “a term used in a number of different senses” suggesting that “possibly its popularity and convenience are partly due to its very ambiguity”.<sup>16</sup>

Not surprisingly, then, Lord Cooke has for many years rejected the distinction between “judicial” and “administrative”, describing the conceptual approach behind the classification of functions as having done “little more than gratuitously obtrude a distracting question into a problem difficult enough already.”<sup>17</sup> In a similar vein Mason J., as he then was, said in the High Court of Australia that the judicial - administrative dichotomy “diverted attention from the need to insist on the adoption in the administrative process of fair and flexible procedures for decision-making, procedures which do not necessarily take curial procedures as their model.”<sup>18</sup> The old distinctions, together with the use of such terms as *lis inter partes*, survived for many post-war years, however, and emergence from the twilight of natural justice initially demanded imaginative use of the old distinctions and terminology rather than their total abandonment. For all his excessive adherence to the Donoughmore analysis, Scott L.J. in *Cooper v Wilson* was prepared to move forward within the terminological constraints - as were the majority of the Court of Appeal of New Zealand in the *Okitu Co-operative Dairy* case and as was Robin Cooke in his note in the Cambridge Law Journal.

As late as 1960, Robin Cooke - in speaking of "The Changing Face of Administrative Law"<sup>19</sup> - was still remarkably hesitant in predicting future developments in natural justice, especially in the English courts and in the more threatening form of the Judicial Committee of the Privy Council. The latter had clouded many issues in *Nakkuda Ali v Jayaratne*.<sup>20</sup> It was also in 1960 that the late S.A. de Smith, in his inaugural lecture as Professor of Public Law in the University of London, spoke of the study of administrative law in England as having suffered from "arrested development" and as "only just passing into adolescence."<sup>21</sup> Robin Cooke would have agreed, contrasting the timid post-war efforts of the English courts with their inheritance from previous centuries of "a body of principles well capable of application and adaptation to more modern problems".<sup>22</sup> Courts in the nineteenth century, he said, "did not find it necessary to expound the law in phrases of vague sophistication",<sup>23</sup> such as "quasi-judicial functions" and "quasi-lis;" and he emphasised particularly, in referring to *Board of Education v Rice* earlier this century, Lord Loreburn's "sweeping dictum, since productive of much nervousness on the part of those who act for administrative authorities lest a present-day Court might take it seriously, that a duty to listen fairly to both sides lies upon "everyone who decides anything".<sup>24</sup> English law only began to get back on course, to return to older and simpler days, after Lord Reid spoke in *Ridge v Baldwin* in 1963.<sup>25</sup> New Zealand had pointed the way, but even in *Buller Hospital Board v Attorney General*<sup>26</sup> Robin Cooke, as counsel before the Court of Appeal, asserted - with reference to the *Okitu* case - that it "would be a most unfortunate and retrograde step if there were any retreating from the approach and decision in that case, the value of which has been recognised beyond this country."<sup>27</sup>

It is perhaps appropriate at the point to digress a little in order to bring out the links between Lord Cooke, the University of Cambridge and the law of natural justice. Lord Cooke was a research fellow at Gonville and Caius College over forty years ago and he successfully submitted for the Ph.D. in 1955. A recent Master of Caius (from 1976 to 1988) and the lawyer responsible both for inventing the phrase "the twilight of natural justice" and, like Robin Cooke, for leading a campaign to return "to basics", was Sir William Wade. An earlier Master, from 1716 to 1754, was Sir Thomas Gooch who served as Vice-Chancellor of the University for three years from 1717 and later became bishop of Ely. According to the Dictionary of National Biography - hereinafter the D.N.B.- there are anecdotes "illustrative of Gooch's adroitness in his own personal advancement". He is best remembered, however, because of the events which led him to seek and secure University approval in 1718 for depriving the Master of Trinity of his degrees. The deprivation followed upon the failure of the Master of Trinity to appear before the Vice-Chancellor's Court to meet certain allegations about his behaviour as Regius Professor of Divinity.

The name of the Master of Trinity College was Dr. Richard Bentley, a distinguished classicist whom Lord Campbell was later to describe as that "very learned and very litigious scholar"<sup>28</sup>. His litigious instinct led him to approach the Court of King's Bench seeking a writ of mandamus for the restoration of his degrees. The case, in Lord Campbell's words, was argued "several successive terms, at prodigious length"<sup>29</sup> before a court consisting of Chief Justice Pratt (described by the D.N.B. as "a sound lawyer, and not without conscience"), Raymond J. (soon to succeed Sir John Pratt as Chief Justice), Powys J. ("a dull, respectable judge", according to the D.N.B., now in his mid-seventies) and Fortescue J. (of whom it was said inter alia by the D.N.B. that he was "a D.C.L. of Oxford, though he was probably not educated there"). In *R v The Chancellor, Masters, and Scholars of the University of*

Cambridge,<sup>30</sup> commonly known as *Dr. Bentley's Case*, these judges issued a writ of mandamus on grounds of a breach of natural justice, and the Master of Trinity finally recovered his degrees in March 1724. Pratt C.J., said Lord Campbell, "acquired considerable credit by his firm conduct" in the dispute.<sup>31</sup>

Indeed, Sir John Pratt spoke in terms which would have shamed some of the English judges of this century. The case was of great consequence, he stated, "not only to the gentleman who is deprived, but likewise as it will affect all the members of the University."<sup>32</sup> Dr Bentley could not be deprived without notice, he added, and he went on to say that "the Vice-Chancellor's authority ought to be supported for the sake of keeping peace within the University, but then he must act according to law, which I do not think he has done in this instance".<sup>33</sup> If such words needed endorsement, this was provided by Fortescue J. who called in aid the events in the Garden of Eden as demonstrating that the laws of God and man enable a party to make his defence, if he has any.<sup>34</sup> The old and simple rule of natural justice was firmly upheld against a Vice-Chancellor who, it should be noted, was also Master of Gonville and Caius - the College of Professor E.C.S. Wade (Robin Cooke's research supervisor at Cambridge), Sir William Wade, Lord Cooke of Thorndon and, most recently, Sir Anthony Mason (the Goodhart Professor 1996-97). It should further be noted that, in the famous case of *Cooper v Wandsworth Board of Works* in 1863, which was frequently referred to in the campaign to get back to basics, Byles J. pointed out that the Board had to determine the offence and apportion the punishment as well as the remedy, thus bringing into play "a long line of decisions beginning with *Dr Bentley's case*" which "establish that, although there are not positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature".<sup>35</sup>

"Obscure concepts hinder progress," said Lord Cooke in 1986,<sup>36</sup> and he would consistently have welcomed the re-affirmation of the line of cases going back to 1724. In 1975 he had stated that Lord Reid's greatest judgments may have been in administrative law, and "no small element in their quality has been steadfast adherence to simple principles."<sup>37</sup> A consistent theme of Lord Cooke's judicial and extra-judicial contributions to administrative law has also involved what he terms "the struggle for simplicity."<sup>38</sup> The implication in the context of natural justice of the struggle for simplicity has been to underline the importance of not setting up a new bundle of artificial rules with regard to the content of natural justice. In the Supreme Court of the United States, Frankfurter J., with reference to due process, once said that we cannot assess any given situation "by loose generalities or sentiments abstractly appealing;" and, in the same case, Warren C.J. said that the exact boundaries of due process "are undefinable, and its content varies according to specific factual contexts."<sup>39</sup> Lord Cooke, looking back to English cases such as *Russell v Duke of Norfolk*,<sup>40</sup> has readily agreed, stressing in *Daganayasi v Minister of Immigration* that the requirements of natural justice vary with the powers being exercised and the circumstances.<sup>41</sup> Similar views have been expressed in Australian courts - for example, by Mason J., in *Kioa v Minister for Immigration and Ethnic Affairs*.<sup>42</sup>

A leading case where the courts, including the Judicial Committee, had to adapt natural justice to a novel situation was *Re Erebus (No.2)*,<sup>43</sup> which arose from the crash of an Air New Zealand DC10 aircraft in November 1979. A one-man Royal Commission - Mahon J. of the High Court - had been appointed to investigate the events, and in

the course of his Report of 1981 the Commissioner made allegations against some employees of Air New Zealand of “a pre-determined plan of deception” and of “an orchestrated litany of lies”. Lord Cooke was one of a five-member Court of Appeal which held that the Commissioner, in making those statements, had acted without jurisdiction and contrary to natural justice. The circumstances of the case were without precedent, and Lord Diplock - in the Judicial Committee - was anxious to lessen the severity of the ruling as far as the Commissioner was personally concerned.<sup>44</sup> What the judicial proceedings achieved, however, was a re-examination of the procedural aspects of such inquiries.

Anxieties had been expressed in the past, not least with regard to some inquiries in the United Kingdom. Of the Profumo inquiry conducted by Lord Denning, Sir Cyril Salmon in the Lionel Cohen Lecture of 1967 had condemned the procedure; for instance, none of the witnesses “heard any of the evidence given against him by others nor had any opportunity of testing it.” The Report, he added, gained a large measure of acceptance “only because of Lord Denning’s rare qualities and high standing”.<sup>45</sup> Anxieties persisted, and in the so-called V and G Report of 1972 (the Vehicle and General Insurance Report), James L.J., chairman of the Tribunal of Inquiry, recognised “the real concern of those whose professional conduct is subject to close scrutiny and the strain on witnesses who are examined in public about matters which took place some years ago.”<sup>46</sup> Much more recently we have had the Scott inquiry into the Arms for Iraq affair. Sir Richard Scott outlined some of the procedural difficulties in Volume 1 of his Report of 1996, and he spoke of “the need that the procedures should be fair to those at risk of criticism.”<sup>47</sup> In particular he spoke of the process of inviting comments by individuals on provisional criticisms of them, a process which occupied the Inquiry for over twelve months of its work. “The process of writing and considering comments was a central part of the Inquiry’s procedures designed to affirm fairness and accuracy”,<sup>48</sup> he added, in terms which might have been designed to meet *Erebus* - style complaints about breaches of natural justice. As for the substance of the Scott Report it suffices to say that there are several grounds for disquiet, but they mercifully fall outside the boundaries of natural justice.

The circumstances of a case are also critical when there are allegations of bias. “What is fair in a given situation,” said Richardson J. in the *CREEDNZ* case, “must depend on the circumstances. The application of the rules against bias must be tempered with realism.”<sup>49</sup> In that case, of course, allegations of bias - based on an argument of predetermination - were only part of a battery of challenges. On the right to be heard, Cooke J. was content to state that for the Court it was “a question of applying reasonably well settled general principles to the particular statute and facts,” pointing out that “a streamlining of procedures” was the very purpose of the National Development Act.<sup>50</sup> On bias he spoke, like Richardson J., of a need for realism, stressing that the “only relevant question can be whether *at the time of advising* the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of opinion that the criteria were satisfied.”<sup>51</sup> There was no evidence of closed minds or, in the words of Richardson J., of “impermissible predetermination.”<sup>52</sup>

In the very different context of the *Thomas* case, the Court of Appeal was faced with arguments of bias based on alleged prejudgment and partisanship. There were difficult issues involved; but, bearing in mind the “extraordinary” role of the Royal Commission, in investigating the background to the conviction of Thomas of two

murders, the Court was satisfied that there was no real likelihood of bias. The judgment was that of the entire five-member Court.<sup>53</sup> More recently, in the case of *Auckland Casino Ltd v Casino Control Authority*,<sup>54</sup> Cooke P. considered the law of New Zealand, of England and of Australia on the appropriate test of bias and described the distinction between the English and Australian versions as “very thin”. He added characteristically that one “must query whether the law should countenance such refinements.”<sup>55</sup> In New Zealand, it seems, the courts are satisfied that in cases of non-pecuniary bias the test is whether, in all the circumstances of the case, there was a real possibility of bias. The courts retain considerable flexibility through reference to all the circumstances of the case.

Lord Cooke’s concern for simplicity of approach is developed in his extra-judicial utterances. In a speech on “Fairness” in 1989, for instance, he emphasised that variations “occur in the mood of the courts from time to time, and moods differ from country to country; the problems become ever more difficult and challenging as society becomes ever more complex and conscious of the possibility of legal remedies against the administration; but the problems are essentially of fact, to be resolved in the main by the application of tolerably well settled principles.”<sup>56</sup> Indeed, as he argued in the preface to Graham Taylor’s perceptive work on *Judicial Review*<sup>57</sup> which appeared in 1991, most cases in administrative law “turn on an analysis of the particular facts and an application of the particular provisions, usually but not always statutory, which are the source of the administrative power in question. Typically the result of the case flows from the facts and the statute or rule . . . The ingredients of the problem at hand dominate.”<sup>58</sup>

At first sight, the struggle for simplicity might appear to have left natural justice to the mercy of judicial whim and fancy. Shorn of the old problems of classification of functions and with the content of natural justice reduced to a broad search for fairness on the facts and in the statutory or other context of a particular case, what are the criteria available to lawyers in advising clients and what are the rules and guidelines taught to law students? In a dissenting judgment in *Hannah v Larche*<sup>59</sup> in the Supreme Court of the United States, Douglas J. criticised a “chameleon-like” and “free-wheeling” concept of due process which ought not, he claimed, to “reflect the subjective or even whimsical notions of a majority of this court as from time to time constituted”.<sup>60</sup> Such remarks immediately bring to mind Lord Reid’s recognition in *Ridge v Baldwin* that in “modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless”<sup>61</sup> and his observation that such opinions are “tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally unsusceptible of exact definition but what a reasonable man would regard as fair procedure in particular cases and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law . . .”<sup>62</sup> Moreover natural justice is not so vague: through the cumulative impact of several decisions, especially in the last forty years, we have seen the adoption of understandings and assumptions about the right to be heard and the rules of bias, so much so that the need for litigation has been reduced. In some areas - the disciplining of students is a good example, the treatment of prisoners is another - there has been a revolution in approach, with adherence to written codes and respect for the entire notion of due process or natural justice.

There is now a general acceptance that observance of proper procedures may be costly and time-consuming, even though from time to time an old-style impatience may be evident. A good illustration of the perils of speed is provided by the action taken by Trinity College, Cambridge in 1916, when a young lecturer at the college had been convicted in the courts of publishing, in defence of a conscientious objector, "statements likely to prejudice the recruiting and discipline of His Majesty's forces." The young lecturer was Bertrand Russell. His appeal against his conviction was lost on 29th June and on 11th July the Council of Trinity College removed him from his lectureship. Years later one of the Fellows of the College, G.H. Hardy, who had opposed the removal, severely criticised the Council for holding in effect "that any lecturer found guilty of an offence under the Defence of the Realm Act should be dismissed, without regard either to the importance or the nature of the case, and without any opportunity of being heard in his own defence."<sup>63</sup> He added that he did "not accuse any member of the Council of malice or vindictiveness: their failure was a failure of imagination and common sense."<sup>64</sup> "The Council's action, it should be noted, was taken at a time of high emotion - the Battle of the Somme had started on 1st July - but, even so, a number of Fellows, who were not members of the Council, opposed the dismissal at the time; and, in retrospect, Bertrand Russell's removal bears out Douglas J.'s remark in *Hannah v Larche* that it is the "temptation of many men of good will" to "cut corners, take shortcuts, and reach the desired end regardless of the means."<sup>65</sup>

Anxieties about a free-wheeling notion of natural justice should be allayed when one takes into account a number of checks and balances. The appellate system itself is important, as Lord Wilberforce recognised last year in a debate on the floor of the House of Lords: he commented at one point "that following a period of enthusiastic expansion of judicial review since 1968 there are signs now of a rather more cautious attitude in the higher courts, in the Court of Appeal and in your Lordship's Appellate Committee. They are alive to the wisdom of not letting a valuable instrument of control get out of hand."<sup>66</sup> The debate itself was on the judiciary, and a number of participants, including Lord Wilberforce, stressed the importance of judicial restraint. Lord Cooke, who also participated, spoke in measured terms, indicating that any concern felt that in the United Kingdom "about what is often, but somewhat misleadingly, called "judicial activism" can be tempered" by the consideration that the English courts have been more conservative in public law than the Canadian, Australian and New Zealand courts.<sup>67</sup> Writing in 1985, incidentally, Lord Cooke described the term "activist" as "of dubious import but often having a connotation of trendy."<sup>68</sup>

The courts are also able to check inappropriate applications of natural justice through the exercise of judicial discretion at the stage of awarding a remedy. Lord Cooke has consistently attached importance to the exercise of judicial discretion in administrative law. In the context of the distinction between mandatory and directory express procedural requirements, he said in *A.J. Burr Ltd. v Blenheim Borough Council*<sup>69</sup> that the determination "by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account."<sup>70</sup> In the context of natural justice, Lord Cooke stressed the reserve discretionary powers in *Reid v Rowley*,<sup>71</sup> the case involving the New Zealand Trotting Conference; in *Stininato v Auckland Boxing Association*<sup>72</sup> he declared that concern "for the development of administrative law as an effective and realistic branch of justice must imply that the discretionary remedies should not be granted lightly;" and, more recently in the *Auckland Casino* case,<sup>73</sup> he expressly returned



to the issue of judicial discretion with regard to a party who has not moved with reasonable expedition. Clearly the courts and especially appellate courts, in seeking an “overall evaluation” of all the circumstances in a case when a breach of natural justice is alleged, can ensure that the law is applied sensibly and realistically.

In the entire field of natural justice, Lord Cooke’s contribution, extra-judicially as well as judicially, has been immense. He was in the vanguard of the assault on the artificial elements in the classification of functions; he has led the way in seeking a simple approach, based on the facts and the statutory or other powers relevant to the case in hand, to the application of natural justice; and he has not lost sight of the need for the courts to act responsibly in the exercise of judicial review. His admiration for some of those who have contributed to the advances in administrative law is noteworthy: the list includes Sir William Wade, Lord Reid, Lord Denning, Lord Wilberforce and Lord Diplock, the last-named being described in an obituary written by Lord Cooke in 1985 as “the only Law Lord in recent years to do the *Times* crossword regularly”.<sup>74</sup> The significance of the last remark is best appreciated by consulting Lord Cooke’s own recreations as stated in *Who’s Who*.

Another figure of influence was, of course, Lord Cooke’s father, who died in November 1956 but who gave invaluable support for a new departure in natural justice through his participation in the case which Lord Cooke himself so strongly relied upon: *New Zealand Dairy Board v Okitu Co-operation Dairy Co. Ltd.*<sup>75</sup> In paying tribute to the late Mr Justice Cooke, the Chief Justice in 1956 said that he “had a passion for justice”.<sup>76</sup> In one of his last judgments, Lord Cooke’s father - in a case in which his son appeared as counsel - delivered a comprehensive and positive ruling on natural justice.<sup>77</sup>

To conclude, we have come a long way from *Cooper v Wilson*. At the same time, the unpredictability remains, and the courts - as Lord Cooke has indicated - will inevitably have to grapple with complex and demanding issues when their initial task will be to establish the facts and assemble the statutory and other material before applying the understandings of natural justice. The road ahead has many traffic-calming devices, but we should be thankful that unnecessary obstructions have been removed.

The newer and more complex areas in which the law of natural justice or fairness will have to be applied are perhaps sign-posted in the First Report of the Committee chaired by Lord Nolan into Standards in Public Life.<sup>78</sup> The Committee restated the general principles of conduct which underpin public life, identifying selflessness, integrity, objectivity, accountability, openness, honesty and leadership as seven principles relevant to all who serve the public in any way. Accountability and openness alone would, as described in the Nolan Report, be highly relevant in administrative law, not least in natural justice. Accountability, according to the published summary of the Report, means that holders of public office “are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office”. Openness means that holders of public office “should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.” Those who served on the Justice/All Souls Committee on Administrative Law<sup>79</sup> - a committee which benefited greatly from the

advice of Lord Cooke - would regard the latter statement as underlining its own recommendation that there should be a general duty to give reasons in matters of administration.

Lord Cooke would surely welcome the expansiveness and adaptability of natural justice in the future as much as he led the way in favouring expansiveness and adaptability in the past. He would reject any efforts to turn the clock back: administrative law, he has stated, “develops and changes according to current perceptions of what is required of the Courts in their distinctive judicial function,”<sup>80</sup> but it is unlikely that Lord Cooke envisages a diminution of the judicial role. In one case concerning the right to be heard, he declared “that it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.”<sup>81</sup> There is more than a hint there of the famous dictum in *Dr Bonham’s case*<sup>82</sup> uttered by someone he once described as “my quite well-known forbear, Sir Edward Coke.”<sup>83</sup> It goes without saying that the Coke of the early seventeenth century and the Cooke of the late twentieth century have brought distinction, if not an agreed spelling, to the name and that each has left a priceless legacy of judicial and extra-judicial imagination and courage in the common law. For Lord Cooke of Thorndon, whose contributions are not yet complete, the rescue and reinvigoration of natural justice is a significant part of that legacy.

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<sup>1</sup> [1937] 2 K.B. 309, C.A.

<sup>2</sup> *Id.*, at 345.

<sup>3</sup> *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, C.A.

<sup>4</sup> *Id.*, at 277-78. See report of the Royal Commission to inquire into the circumstances of the conviction of Arthur Allan Thomas for the murders of David Harvey Crewe and Jeanette Lenore Crewe (1980).

<sup>5</sup> Report of the Committee on Ministers’ Powers, Cmnd. 4060 of 1932.

<sup>6</sup> *Id.*, at 73, para. 2.

<sup>7</sup> See W.I Jennings, “Administrative Law” in *Annual Survey of English Law 1937* (1938), at 62-64; W.A. Robson, *Justice and Administrative Law* (3rd ed., 1951), at 494-95.

<sup>8</sup> *Id.*, at 495 - 96.

<sup>9</sup> H.W.R. Wade, “The Twilight of Natural Justice” (1951) 67 LQR 103.

<sup>10</sup> R.B. Cooke, “Administrative Law - Natural Justice - Right to a Hearing” [1954] Cambridge L.J. 14-19.

<sup>11</sup> [1953] NZLR 366, C.A.

<sup>12</sup> See *London and Clydeside Estates Ltd. v Aberdeen District Council* [1979] 3 All E.R. 876, 883 H.L. (Lord Halisham); *A.J. Burr Ltd. v Blenheim Borough Council* [1980] 2 NZLR 1,4, C.A. (Cooke J.)

<sup>13</sup> [1977] 2 NZLR 472, 478, C.A.

<sup>14</sup> [1983] NZLR 129, 135-36, C.A.

<sup>15</sup> [1996] 3 WLR 361.

<sup>16</sup> *Id.*, at 367.

<sup>17</sup> The Hon. Mr Justice Cooke, “Administrative Law: the Vanishing Sphinx” [1975] NZLJ 529, at 529.

<sup>18</sup> *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 62 ALR 321, 346, High Court.

<sup>19</sup> [1960] NZLJ 128.

<sup>20</sup> [1951] AC 66, PC.

<sup>21</sup> *The Lawyers and the Constitution* (1960), at 17.

<sup>22</sup> [1960] NZLJ at 128.

<sup>23</sup> *Id.*, at 129.

<sup>24</sup> *Id.*, at 130. See *Board of Education v Rice* [1911] AC 179, H.L.

<sup>25</sup> [1964] AC 40, H.L.

<sup>26</sup> [1959] NZLR 1259, C.A.

<sup>27</sup> *Id.*, at 1276.

<sup>28</sup> John, Lord Campbell, *The Lives of the Chief Justices of England* (new and revised ed. in U.S.A., 1894), Vol. III, at 222.

<sup>29</sup> *Id.*, at 223.

- <sup>30</sup> (1724) 1 Strange 557.
- <sup>31</sup> *Op. cit.*, at 221. See also, Henry S. Eeles, *Lord Chancellor Camden and his Family* (1934) at 16-17, where Dr Bentley is described as a man “not over-charged with modesty.”
- <sup>32</sup> (1724) 1 Strange at 564.
- <sup>33</sup> *Id.*, at 566.
- <sup>34</sup> *Id.*, at 567.
- <sup>35</sup> (1863) 14 CB(NS) 180, 194.
- <sup>36</sup> “The Struggle for Simplicity in Administrative Law”, in Michael Taggart (ed.), *Judicial Review of Administrative Action in the 1980's. Problems and Prospects* (1986) 1,5.
- <sup>37</sup> *Supra*, note 17, at 530.
- <sup>38</sup> *Hannah v Larche* 363 US 420 (1960) at 487 and 442 respectively.
- <sup>39</sup> [1949] 1 All E.R. 109, 118, C.A. (Tucker L.J.)
- <sup>40</sup> [1980] 2 NZLR 130, 141, C.A. See Sir Robin Cooke, “Third Thoughts on Administrative Law” (1979) 5 Recent Law (NS) 218, 222.
- <sup>41</sup> (1985) 62 ALR 321, 347. See also, *Attorney-General v Bay of Islands Timber Co. Ltd* [1979] 2 NZLR 511, 513-14 (Cooke J.) and 517 (Richardson J.), C.A.; *F.A.I. Insurances Ltd. v Winneke* (1982) 15 CLR 342, 409, 417-18 (Brennan J.), High Court.
- <sup>42</sup> *Re Erebus Royal Commission; Air New Zealand Ltd. v Mahon (No. 2)* [1981] 1 NZLR 618. See report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft operated by Air New Zealand Ltd. 1981 (Govt Printer, Wellington, 1981); Peter Mahon, *Verdict on Erebus* (1984). 257 people died in the crash, on 28 November 1979.
- <sup>43</sup> [1983] NZLR 662, 685, PC.
- <sup>44</sup> Lord Denning’s Report, Cmnd. 2152 of 1963.
- <sup>45</sup> *Tribunals of Inquiry* (1967), at 14.
- <sup>46</sup> Report of the Tribunal appointed to inquire into certain issues in relation to the circumstances leading up to the cessation of trading by the Vehicle and General Insurance Company Ltd., HL 80, HC 133 (1972), para.14.
- <sup>47</sup> Report of the Inquiry into the Export of Defence Equipment and Dual - Use Goods to Iraq and Related Prosecutions, HC 115, (1996), Vol. 1, B2.29.
- <sup>48</sup> *Id.*, B2.27. See also The Rt. Hon. Sir Richard Scott, “Procedures at Inquiries the Duty to be Fair” (1995) 111 LQR 596; articles in Public Law (Autumn 1996) on the Scott Report: see [1996] Public Law 359 where Professor Dawn Oliver speaks of the Report as consisting of five volume plus an index, running to over 1,800 pages in all. See also, Leigh and Lustgarten in (1996) MLR 695-725.
- <sup>49</sup> *CREEDNZ Inc v Governor-General* [1981] NZLR 172, 194, C.A.
- <sup>50</sup> [1981] NZLR at 177.
- <sup>51</sup> *Id.*, at 179.
- <sup>52</sup> *Id.*, at 192.
- <sup>53</sup> *Supra*, note 3.
- <sup>54</sup> [1995] 1 NZLR 142, C.A. See Philip A Joseph, “The Bias Rules in Administrative Law Reconsidered” [1995] NZLJ 110.
- <sup>55</sup> [1995] 1 NZLR at 149.
- <sup>56</sup> (1989) 19 VUWLR 421, 425.
- <sup>57</sup> G.D.S Taylor, *Judicial Review. A New Zealand Perspective* (1991).
- <sup>58</sup> Preface, at v.
- <sup>59</sup> 363 US 420 (1960).
- <sup>60</sup> *Id.*, at 505-06.
- <sup>61</sup> [1964] AC 40, 64, H.L.
- <sup>62</sup> *Id.*, at 46.
- <sup>63</sup> G.H. Hardy, *Bertrand Russell and Trinity* (1970), at 44. This was originally published as a pamphlet in 1942.
- <sup>64</sup> *Id.*, at 46.
- <sup>65</sup> 363 US 420, 494 (1960).
- <sup>66</sup> HL, Vol 278, c.1268, 5 June 1996.
- <sup>67</sup> *Id.*, c. 1292.
- <sup>68</sup> [1985] NZLJ 252, at 253 (obituary of Lord Diplock).
- <sup>69</sup> [1980] 2 NZLR 1, C.A.
- <sup>70</sup> *Id.*, at 4.
- <sup>71</sup> [1977] 2 NZLR 472, 483, C.A.
- <sup>72</sup> [19708] 1 NZLR 1, 29, C.A.

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<sup>73</sup> [1994] NZAR 548, 558-59, C.A.; [1995] 1 NZLR 142, 152-53, C.A.

<sup>74</sup> [1985] NZLJ 252, 253.

<sup>75</sup> [1953] NZLR 366, C.A.

<sup>76</sup> *The Late Mr Justice Cooke*, [1956] NZLJ 334, 342.

<sup>77</sup> *New Zealand United Licensed Victuallers Association of Employers v Price Tribunal* [1957] NZLR 167, 200-07.

<sup>78</sup> Cm. 2850 of 1995. See Comment by Dawn Oliver in [1995] Public Law 497-503.

<sup>79</sup> *Administrative Justice. Some Necessary Reforms* (1988).

<sup>80</sup> *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd.* [1994] 2 NZLR 641,653, C.A. Lord Cooke was referring to substantive fairness in the judgment.

<sup>81</sup> *Fraser v State Services Commission* [1984] 1 NZLR 116,121, C.A.

<sup>82</sup> (1610) 8 Co.Rep. 113 b, 118b.

<sup>83</sup> *Bill of Rights Reports Launch* [1993] NZLJ 123, at 123.