# SIMPLE, FAIR, AND DISCRETIONARY ADMINISTRATIVE LAW

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*This article discusses the immense contribution Lord Cooke made to the development of administrative law in New Zealand. It focuses on his desire for simplicity, his pursuit of fairness and his acceptance of discretion. In particular, this article examines the different ways this tripartite set of themes manifest themselves in and throughout the orthodox tripartite grounds of judicial review in New Zealand.*

## *I INTRODUCTION*

Lord Cooke was one of New Zealand's pre-eminent administrative law scholars and jurists, if not our finest. Sir Robin had a great passion for administrative law. His award winning PhD thesis in Cambridge in 1954 – "Jurisdiction: An Essay in Constitutional, Administrative and Procedural Law",[1] in which he critiqued the concept of "jurisdiction" as the organising principle in administrative law – signalled his fondness of, and expertise in, this area. In the early years of his career, Lord Cooke regularly lamented the fact that "Administrative Law" was not found as a title in *Halsbury's Laws of England* or in the index to the Law Reports.[2] To illustrate the gravity of that

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1 RB Cooke "Jurisdiction: An Essay in Constitutional, Administrative and Procedural Law" (PhD, University of Cambridge, 1954), referred to and discussed in Michael B Taggart "The Contribution of Lord Cooke to the Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 189 [Taggart "Scope of Review"]. See also Lord Cooke's mention of his "dissertation" in his Fourth Hamlyn Lecture, "The Liberation of English Public Law": Lord Cooke of Thorndon *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997) ch 4.

2 Robin Cooke "The Changing Face of Administrative Law" (1960) 36 NZLJ 128; Hon Mr Justice Cooke "Administrative Law: the Vanishing Sphinx" [1975] NZLJ 529, 529; Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1, 2 [Cooke "Struggle for Simplicity"].

omission and as a testament to the importance of administrative law, he estimated that around 40 per cent of reported (English) appellate court decisions concerned administrative law or had some administrative law element.[3]

Nowadays those oversights have been corrected.[4] Notably, the chapter in *Halsbury's* on administrative law now contains numerous citations to Lord Cooke's contribution to administrative law jurisprudence.[5] And the introduction to the equivalent chapter in our *Laws of New Zealand* honours that way in which Lord Cooke "charted the direction" for administrative law in New Zealand over the last 30 years, particularly his rejection of legal formalism in the area.[6] The electronic age also enables one to more readily analyse the number of administrative law cases. Focusing solely on the New Zealand Law Reports as a sample of the most significant cases, and analysing the cases over the "Cooke era",[7] nearly 10 per cent of the cases specifically refer to "Administrative Law" or "Judicial Review" in the catchwords in the headnote.[8] It is also instructive to see that Sir Robin's name appeared at the top of 35 per cent of those administrative law or judicial review decisions.[9] While this rudimentary quantitative assessment might not be as high as Lord Cooke's intuitive estimate, it is likely that administrative law actually represents a greater proportion of the courts' day-to-day work.[10] In any event, it is clear that administrative law now occupies a more tangible position within the public law dynasty.

Of course, the rise in administrative law in New Zealand is connected with Lord Cooke's attention and expertise. Given his prolific work in the area of administrative law – both in his

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3 Cooke "Struggle for Simplicity", ibid, 2.

4 See discussion of these development in KJ Keith "Public Law in New Zealand" (2003) 1 NZJPIL 3.

5 See, for example, "Administrative Law" in *Halsbury's Laws of England* (Butterworths, London) paras 74 (Jurisdiction and vires in general) 76 (Errors of fact) 77 (Errors of law) 81 (Error on the face of the record), 86 (Manifest unreasonableness) and 88 (Proportionality) (accessed 1 May 2008).

6 "Administrative Law" in *The Laws of New Zealand* (LexisNexis NZ, Wellington, 1993) para 2.

7 From 1972 when Lord Cooke first became a judge to 1996 when he retired from the Court of Appeal.

8 Administrative law cases represented 319 of the 3699 reported cases.

9 Lord Cooke was one of the judges in 112 cases of the 319 reported administrative law cases.

10 First, the publication of the specialised New Zealand Administrative Law Reports from 1976 onwards – reporting around 50 cases a year – obviates the need for many of the administrative law decisions to be reported in the premier report series and, indeed, the adoption of the specialised report epitomises Lord Cooke's views about the magnitude of administrative law. Secondly, a qualitative assessment of both unreported and reported decisions would no doubt indicate that many more cases could be properly attributed to the administrative law rubric. In part, it is understandable that some administrative law cases are not labelled as such: even though judicial review is the usual mechanism for challenges to administrative action, the particular facts, context and legislative scheme of many of these cases tend to dominate and overshadow these cases' administrative law pedigree.

adjudicative role and his extra-judicial writings – it is therefore no easy task to reflect on his contribution. Professor Taggart recently said administrative law was "one of the areas – arguably *the* area" that Sir Robin had "made his own".[11] One could point to many of the significant administrative law cases in which he adjudicated or in which he helped shape the development of administrative law principles. Some notable examples include his encouragement of a liberal approach to the amenability of decisions of private entities to judicial review,[12] the seminal decision on the disclosure of official information,[13] and his robust approach to the often-vexed test of bias.[14] Other important cases include those addressing the question of implied mandatory relevant considerations – generally[15] and more specifically where he addressed the relevance of international instruments[16] and the Treaty of Waitangi[17] to administrative decision-making. A recital of his

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11 Taggart "Scope of Review", above n 1 (emphasis in original).

12 In *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA) he rejected a sharp distinction between public and private law and relied on the "position of major national importance" of the New Zealand Rugby Union (a private incorporated society) when he accepted that two members of the incorporated society had standing to challenge the decision to send a team to South Africa. Although strictly speaking the case was a private law proceeding (see particularly Michael Taggart "Rugby, the Anti-apartheid Movement, and Administrative Law" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 69, 83-91), the case has subsequently been used to augment the proposition that decisions of private entities are subject to supervision by judicial review. See, for example, *Peters v Collinge* [1993] 2 NZLR 554 (HC) and *Church v Commerce Club of Auckland* [2006] NZAR 494 (HC)*; Hopper v North Shore Aero Club Inc* [2007] NZAR 354; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 749 [Joseph *Constitutional Law*]. Also, the important public consequences or impact language and approach from *Finnigan* was adopted in *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) and *Dunne v Canwest TVWorks Ltd* [2005] NZAR 577 (HC), even though the case itself is not expressly cited in the later case.

13 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

14 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA). See Sir David GT Williams "Lord Cooke and Natural Justice" in Rishworth, above n 1, 177 and Philip A Joseph "The Bias Rules in Administrative Law Reconsidered" [1995] NZLJ 110. For recent partial overruling of *Auckland Casino*, see *Muir v Commissioner of Inalnd Revenue* [2007] 3 NZLR 495.

15 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA). McLean described this technique as "Lord Cooke's most potent legacy to administrative law": Janet McLean "Constitutional and Administrative Law – The Contribution of Lord Cooke" in Rishworth, above n 1, 221.

16 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). See generally Claudia Geiringer "*Tavita* and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66 and Phillip A Joseph "Constitutional Review Now" [1998] NZ Law Rev 85, 109 [Joseph "Constitutional Review Now"].

17 *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA) and *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA), along with other cases which addressed the application of the Treaty when expressly mandated by legislation such as *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA), and *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA). See McLean,

contribution would therefore seem like a verbatim recital of many chapters from Professor Joseph's text on constitutional and administrative law or GDS Taylor's commentary on judicial review. Lord Cooke's contribution has been interwoven throughout our country's development of its unique jurisprudence in this area. On that point, in the early 1980s he himself commented on the distinctiveness of our administrative law: "The time has probably come to emphasise that New Zealand administrative law is significantly indigenous."[18] He cautioned against the automatic adoption of English administrative law cases without an appreciation of the different procedure and theory of judicial review in New Zealand.[19] To a large degree, the crafting of the indigenous nature of New Zealand's administrative law is attributable to the work of Lord Cooke.

Rather than adopting a blow-by-blow approach to the discussion of his contribution, I here focus on a few of the themes which, in my view, underscore his philosophy in this area. First, a desire for simplicity; secondly, the pursuit of fairness; and thirdly, his acceptance of discretion. As is often the case with tripartite citations of administrative principle, these three themes overlap and tend to converge.[20] With this caveat though, these themes provide a useful framework for reflecting on the distinctive aspects of Lord Cooke's contribution in the area of administrative law.

## *II THREE CENTRAL THEMES*

### *A Simplicity*

The desire for simplicity was one of Lord Cooke's hallmarks. In his 1980s article "The Struggle for Simplicity in Administrative Law" he championed clarity and simplicity over the superfluous complications of principle:[21]

> If the subject-matter of administrative law is difficult and variable, it is all the more important not to add to the exercise by superfluous complications of principle. Administrative law had gone through, has still not completely shaken off, phrases of somewhat arcane concepts, in the nature of catchwords or half truths [or] shibboleths. Serving a useful enough purpose in their day, they are seen in time to distract attention from the true question: terms like quasi-judicial, nullity, jurisdiction, jurisdictional fact, the

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above n 15, 221; Joseph "Constitutional Review Now", ibid; and Lord Cooke's own comment on these cases in Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421, 424 [Cooke "Fairness"].

18 *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA). For the distinctiveness of New Zealand law, see generally Joseph "Constitutional Review Now", above n 16; Michael Taggart "The New Zealandness of New Zealand Public Law" (2004) 15 Public L Rev 81 and Keith, above n 4.

19 *Budget Rent a Car Ltd*, ibid, 418 Cooke J.

20 See Lord Cooke's comments about the merging of his own tripartite framework: below n 22.

21 Cooke "Struggle for Simplicity", above n 2, 5. Notably, simplicity was the theme of the Legal Research Foundation Conference held in Lord Cooke's honour in April 1997 and a feature of the title of the associated *Festschrift*: see Rishworth, above n 1.

> face of the record. … Obscure concepts hinder progress. So to attempt more direct and more candid formulations of principle has more than a semantic purpose.

This critique was not intended to be mere window-dressing. Lord Cooke was instrumental in presenting the core elements of judicial review in a clear and understandable format. At the meta-level, he expressed the tripartite cardinal principles of administrative law in remarkably simple terms: that decision-makers "must act in accordance with the law, fairly and reasonably".[22] His formulation represented a more straightforward articulation than Lord Diplock's famous "'illegality", "irrationality" and "procedural impropriety" formulation from the *CCSU* case.[23] Indeed, Lord Cooke himself commented on their similarity and he appeared to take some pleasure in noting that his initial expression of these principles came some five years before the *CCSU* case.[24]

His desire for simplicity and his rejection of legal formalism was also evident in relation to each of the grounds of review he articulated. In relation to the "in accordance with the law" ground, he suggested the concept of jurisdiction and jurisdictional error should be rejected in favour of the simpler "error of law" formulation.[25] His view was that the error of law formulation enabled consideration of whether or not privative clauses protected certain errors of law "with attention unclouded by a vague and probably undefinable concept of 'jurisdiction'".[26] The error of law formulation was later endorsed by the Court of Appeal in *Peters v Davison,*[27] and accordingly now

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22 Cooke "Struggle for Simplicity", ibid. See *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552 (CA) Cooke P [*New Zealand Fishing Industry Association*] for the adoption of this formulation. In this case Lord Cooke noted these three heads were not intended to be applied rigidly and tend to overlap; "[t]he threefold duty merges rather than being discrete".

23 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, 950 (HL) Lord Diplock.

24 Cooke "Struggle for Simplicity", above n 2, 6, referring to his address to the Auckland District Law Society: RB Cooke "Third Thoughts on Administrative Law" [1979] NZ Recent Law 218, 225, where he said: "It might not be an altogether absurd over-simplification to say that the day may come when the whole of administrative law can be summed up in the proposition that *the administrator must act fairly and reasonably.*" (Emphasis in original.)

25 *Bulk Gas Users Group Ltd v Attorney-General* [1983] NZLR 129 (CA). For a thorough and typically incisive analysis, see Taggart "Scope of Review", above n 1. The transformation of this doctrine in New Zealand is also usefully traced by Joseph *Constitutional Law*, above n 12, 815.

26 *Bulk Gas Users Group Ltd v Attorney-General,* ibid, 136 Cooke J. Lord Cooke said, though, that the courts should be "slow" to conclude that Parliament had made (erroneous) determinations of law immune from judicial scrutiny because he believed this was the "fulfilment of [the courts'] constitutional role as interpreters of the written law" (adopting and endorsing the words of Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374, 382-383 (HL)).

27 *Peters v Davison* [1999] 2 NZLR 164 (CA).

represents the orthodox approach for determining whether a decision-maker has committed a reviewable error of law.[28]

Lord Cooke's quest for simplicity was evident from his preferred label for the process ground of review, preferring to describe this ground as the requirement to act "fairly", rather than adopting more abstract labels like "procedural impropriety" or "natural justice".[29] And, as will be discussed in more detail later, his general approach to this ground was broader than was customary.[30]

Lord Cooke's most damning criticism of the complexity and abstractness of the existing grounds of review was reserved for the "irrationality" ground or requirement to act "reasonably". He was also a staunch critic of the expression of the so-called *Wednesbury* test, used to scrutinise (or, more typically, not to scrutinise) the substantive merits of a decision. His antipathy towards the *Wednesbury* standard for intervention – that the decision must be "unreasonable in the sense that the courts considers a decision that no reasonable authority could have come to it"[31] – was plainly evident in extracts from two of the speeches he made while sitting as a member of the House of Lords. In the *International Trader's Ferry* case he said:[32]

> It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the courts of the United Kingdom and beyond. *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR twice uses the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it'. Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions.

He pulled no punches in the later *Daly* case either:[33]

> And I think that the day will come when it will be more widely recognised that the *Wednesbury* case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative

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

29 Cooke "Struggle for Simplicity", above n 2 and *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

30 See below section II B.

31 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680, 683 (CA) Lord Greene MR.

32 *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129, 157 (HL) Lord Cooke (citations omitted) [*ITF*].

33 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 549 (HL) Lord Cooke.

> decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

He described the *Wednesbury* test as "tautologous and exaggerated" and criticised its "distracting circumlocutions".[34] He argued that the meaning of reasonableness was straightforward and suggested judges and counsel were "not children requiring that to be hammered into them by minatory exaggeration".[35] His contempt for the *Wednesbury* test did not wane in his later years and is neatly illustrated by the closing sentence in his delivery of the Third Annual Commonwealth Lecture to the British Institute of International and Comparative Law, "The Road Ahead for the Common Law":[36]

> By and large administrative law is on the right road, as is shown by the fact that until now, the very end, this lecture has required not a single utterance of the word '*Wednesbury*'.

Over this period, he consistently advocated a simpler and less extreme formulation of the test of reasonableness: "[Is] the decision in question … one which a reasonable authority could reach[?]"[37] He ventured to suggest that reasonableness means what it says:[38]

> [R]easonable means reasonable. The definition in the Concise Oxford Dictionary, reflecting as it should ordinary educated usage, is 'within the limits of reason'. What is outside the limits is unreasonable; what is inside them is reasonable.

In his view, the simple formulation would still "give the administrator ample and rightful rein, consistently with the constitutional separation of powers".[39]

Of course, Lord Cooke was not the only one to condemn the *Wednesbury* test. Internationally, an impressive cohort of judges and scholars also waged a campaign against *Wednesbury*, including Professor Craig,[40] Sir Stephen Sedley,[41] Sir John Laws,[42] Professor Jowell and Lord Lester.[43]

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34 *ITF*, above n 32, 157 Lord Cooke.

35 Cooke "Struggle for Simplicity", above n 2, 15.

36 Robin Cooke "The Road Ahead For the Common Law" (2004) 53 ICLQ 273, 285 [Cooke "The Road Ahead for the Common Law"].

37 *ITF,* above n 32, 157 Lord Cooke.

38 Cooke "Struggle for Simplicity", above n 2, 14.

39 *ITF*, above n 32, 157 Lord Cooke.

40 PP Craig *Administrative Law* (5 ed, Sweet & Maxwell, London, 2003) 610 and PP Craig "Unreasonableness and Proportionality in UK Law" in E Ellis (ed) *The Principle of Proportionality in the Law of Europe* (Hart Publishing, Oxford, 1999) 85.

Domestically, Lord Cooke's disaffection with the *Wednesbury* test was shared and continues to be shared by a number of members of the judiciary, most notably Thomas, Hammond, Baragwanath and Wild JJ.[44]

In the light of this mounting opposition, *Wednesbury*'s claim to represent the orthodox and exclusive test for reviewing the merits of administrative action can no longer be sustained. Its monolithic and hyperbolic standard has been largely cast aside by Anglo-Commonwealth courts, in favour of more flexible, contextual approaches. Lord Cooke can claim some success in that regard. While there has been a move away from the pre-eminence of the *Wednesbury* test, there has not yet been the uniform adoption of the more simplified standard proposed by Lord Cooke. Rather the focus is on the depth of judicial scrutiny varying in the particular circumstances, allowing case-by-case deviations from *Wednesbury*'s high threshold.

In New Zealand, leading scholars have recorded this subtle and incremental move away from the irrationality standard. Professor Joseph suggests authoritatively that "the sliding scale of review is part of the legal tapestry".[45] Similarly, Professor Taggart concludes that "the courts now openly accept that [*Wednesbury*] (un)reasonableness is not a monolithic concept, and in truth never was" and points to a "rainbow of possibilities, with the intensity of review varying depending on the context and other factors".[46] Although actual application of this increased scrutiny is relatively uncommon, there are, increasingly, references to variable standards of review rather than the application of the previously all-embracing *Wednesbury* test.[47] The level of scrutiny (or deference)

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41 Sir Stephen Sedley "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 LQR 270 and Rt Hon Lord Nolan of Brasted and Sir Stephen Sedley *The Making and Remaking of the British Constitution* (Blackstone Press, London, 1997) 19 and 31.

42 See, for example, Sir John Laws "Wednesbury" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Clarendon Press, Oxford, 1998) 185.

43 See, for example, Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1988] PL 368; J Jowell "Proportionality: Neither Novel nor Dangerous" in Jeffrey Jowell and Dawn Oliver *New Directions in Judicial Review* (Sweet & Maxwell, London, 1998) 61 and Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671.

44 See below n 47.

45 Joseph *Constitutional Law*, above n 12, 834.

46 Michael Taggart "Administrative Law" [2006] NZ Law Rev 75, 83 [Taggart "Administrative Law"]. See also Michael Taggart "Reinventing Administrative Law" in Nicholas Bamforth & Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 311 [Taggart "Reinventing Administrative Law"].

47 For different standards of reasonableness, see *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC); *Wolf v Minister of Immigration* [2004] NZAR 414 (HC); *A v Chief Executive of the Department of Labour* (19 October 2005) HC AK CIV-2004-404-006314 Winkelmann J; *Wright v Attorney-General* [2006] NZAR 66 (HC); *S v Chief Executive of Department of Labour* [2006] NZAR 234 (HC); *Progressive Enterprises v North Shore City Council* [2006] NZRMA 72 (HC) and *Dunne v CanWest*

applied by the courts has varied according to the circumstances of the case – sometimes with a conscious rejection of the "irrationality" standard in *Wednesbury*, sometimes without. It is no longer sufficient for decision-makers to assert that their decision is not absurd or irrational; it is necessary for them to consider whether the circumstances in which the decision was made and its consequences mandate closer scrutiny of the logic and substantive merits of the decision. Curiously, while this development appears to have been accepted by the legal community generally,[48] the "definitive" pronouncement of this revolution has so far been restricted to the High Court. Discussion of the issue at appellate level has to date been somewhat muted, although obiter comments suggest that, in principle, this move would be welcomed.[49] The formal endorsement by our appellate courts of the death-knell for *Wednesbury* will be warmly welcomed.

Other Anglo-Commonwealth courts have also moved out of *Wednesbury*'s shadow. English courts have understandably become preoccupied with the proportionality standard so familiar to their continental European colleagues and mandated by their recently adopted Human Rights Act 1998.[50] However, the English courts have also adopted a variegated approach to the reasonableness standard. As Sir John Laws recorded "the courts, while broadly adhering to the monolithic language of *Wednesbury*, have to a considerable extent in recent years adopted variable standards of review".[51] A notable example of this is the application of the "anxious scrutiny" standard in cases

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*TVWorks Ltd* [2005] NZAR 577 (HC). For a discussion of the application of the "hard look" doctrine or increased scrutiny, see *New Zealand Public Service Association Inc v Hamilton City Council* [1997] 1 NZLR 30 (HC); *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) and *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA). For more detailed discussions and taxonomies, see Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL (forthcoming); Taggart "Administrative Law", above n 46; Michael Taggart "Proportionality, Deference, *Wednesbury*" in *Judicial Review* (NZLS, Wellington, 2007).

48 For example, all of the contemporary, leading academic and practice writings on administrative law acknowledge the variegated standard of review: Joseph *Constitutional Law*, above n 12, 834; Taggart "Administrative Law", above n 46; Paul Radich and Jessica Hodgson *Public Law* (New Zealand Law Society, Wellington, 2006) 83; *Laws of New Zealand*, above n 6, para 102.

49 *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd*, above n 47, 66 Richardson P, Henry, Blanchard and Tipping JJ and *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, para 54, n 28 Keith J.

50 *R (Daly) v Secretary of State for the Home Department*, above n 33; *Tweed v Parades Commission for Northern Ireland* [2007] 2 WLR 1 (HL); Julian Rivers "Proportionality and Variable Intensity of Review" (2006) 65 Cambridge LJ 174.

51 Sir John Laws, above n 42, 187. On a related point, Fordham notes how the *Wednesbury* standard is capable of manipulation: "[I]t tends to be the language of *Wednesbury* 'unreasonableness' when a court is inclined toward intervening; and *Wednesbury* 'perverse' when disinclined": Michael Fordham "*Wednesbury* Successes in 1995" [1996] JR 115, 118.

involving fundamental human rights.[52] More recently, the English Court of Appeal came close to formally acknowledging the demise of the *Wednesbury* standard, but indicated that it was up to a higher court to perform its "burial rights".[53]

Lord Cooke's simplified form of reasonableness was also endorsed by the Constitutional Court of South Africa. In *Bel Porto School Governing Body v Premier of the Western Cape Province,* Chief Justice Chaskalson adopted the simplified approach to reasonableness – whether "the decision is one which a reasonable authority could reach", directly acknowledging Lord Cooke's commendation of this approach.[54] The review of discretionary decisions in Canada has moved well beyond the blunt application of the *Wednesbury* test, with the courts approaching the inquiry from the perspective of the appropriate degree of deference and varying standards of review.[55] The deferential standard of "patent unreasonableness" is, in general terms, equivalent to the *Wednesbury* standard; however, the more exacting standards of "reasonableness simpliciter" and "correctness" may apply in any case.[56] Australia appears to be the notable anomaly; augmented in part by the statutory context of judicial review in Australia, Australian courts continue to apply the unmodified form of *Wednesbury* unreasonableness.[57]

While these more recent developments do not entirely implement Lord Cooke's aspiration to rid administrative law of its *Wednesbury* straitjacket, they are reconcilable with this aim. Most fundamentally they speak to a more aggressive role for the courts, allowing a supervising court to

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52 *R v Secretary for State for the Home Department, ex parte Bugdaycay* [1987] AC 514 (HL). For examples of the variable standard generally, see *R v Secretary of State for Defence, ex p Smith* [1996] 1 All ER 257 (CA); *R v Secretary of State for the Home Department, ex p Mahmood* [2001] 1 WLR 840 (CA); *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL) and A Le Sueur "The Rise and Ruin of Unreasonableness" [2005] JR 32.

53 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 (CA).

54 *Bel Porto School Governing Body v Premier of the Western Cape Province* [2002] ZACC 2, para 90, n 20 Chaskalson CJ (constitutional challenge to equity policy in schools). The reliance on Lord Cooke's approach was noted by Arthur Chaskalson in his Lord Cooke Lecture: Arthur Chaskalson "Bad Law Makes Hard Cases: Legal Responses to Terrorism" (Lord Cooke Lecture, Victoria University of Wellington, 16 November 2006).

55 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 and David Philip Jones and Anne S de Villars *Principles of Administrative Law* (4 ed, Thomson Carswell, Scarborough, 2004) 449-483.

56 *Law Society of New Brunswick v Ryan* [2003] 1 SCR 247; *Dr Q v College of Physicians & Surgeons (British Columbia)* [2003] 1 SCR 226 and Jones and de Villars, ibid.

57 *STKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 546; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 198 ALR 59 and "Administrative Law" in *Halsbury's Laws of Australia* (Butterworths, Sydney) para [10-2254] (accessed 1 May 2008).

undertake an overall evaluation of the merits of the decision.[58] In undertaking that evaluation, the courts are required to exercise a degree of judgement about the depth of the inquiry, but – importantly – that judgement is not complicated by rather enigmatic distinctions between procedure and merits, legality and discretion and the like.[59]

As further illustration of Lord Cooke's attempts to escape the high threshold of the *Wednesbury* test, the flexibility and responsiveness provided to the courts by the increased scrutiny under the sliding scale framework is also analogous to Lord Cooke's proposed "substantive fairness" approach. Lord Cooke was in favour of the so-called "innominate" ground of review expressed by Lord Donaldson in the *Guinness* case: the standard being "whether something had gone wrong of a nature and degree which required the intervention of the court".[60] Lord Donaldson's formulation mirrored Lord Cooke's own expression of the concept of substantive fairness in the *Thames Valley* case.[61] Lord Cooke described substantive fairness as "a legitimate ground of judicial review, shading into but not identical with unreasonableness".[62] This form of substantive review focused unashamedly on the *quality* of the decision and allowed significant judicial intervention, albeit with the usual caveat that the courts ought not usurp the role of the decision-maker:[63]

> It is clear … that the adequacy of the administrative consideration given to a matter and of the administrative reasoning may be reviewed. ... Inevitably this means, whatever the verbal formula of review adopted, that the quality of an administrative decision as well as the procedure is open to a degree of review, although not of course to appeal in the absence of a statutory right of appeal.
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> … The merit of the substantive unfairness ground is that it allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked. Leading text writers recognise this valuable flexibility. ... It seems safe to say that the limits or categories of substantive fairness will never be defined with exhaustive precision. … At times it becomes necessary to give especial weight to human and civil rights, including class or group rights … and of course in New Zealand race rights. At times the emphasis will be more on non-interference with the legitimate exercise

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58 Joseph "*Ultra Vires*", above n 28, 371.

59 For a discussion of the blurring of these distinctions, see Taggart "Administrative Law", above n 46, 83 and Peter Cane *Administrative Law* (3 ed, Oxford University Press, New York, 2004) ch 9.

60 *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All ER 509, 513 (CA) Lord Donaldson, referred to in Cooke "Fairness", above n 17, 426 and Lord Cooke of Thorndon "The Discretionary Heart of Administrative Law" in Forsyth and Hare, above n 42, 212 [Cooke "Discretionary Heart"]. See also Lord Cooke's foreword in GDS Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) iv.

61 *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641, 653 (CA) Cooke P.

62 Ibid.

63 Ibid.

> of governmental or other administrative discretion. It is equally safe to say, however, that never has it been suggested that the mere personal opinion of a Judge that a decision is unfair will justify holding it invalid. Nor is that ever likely to be suggested. The functions of exercising administrative discretion and judicially reviewing its exercise are fundamentally different. The line is not always easy to draw, but it has to be drawn.

The method of review suggested in the *Guinness* and *Thames Valley* cases can be viewed in different ways: the development of a further ground of review (as one of New Zealand's leading administrative law texts regards it, possibly only as a ground of last resort),[64] an expansion of the meaning of fairness beyond mere procedural matters (as Lord Cooke's appeared to treat it), or greater intensity of review (consistent with the now popular sliding-scale of review). But nothing particularly turns on the classification. More significant is the framing of the test for judicial intervention in a simple, flexible and realistic way. Lord Cooke welcomed the increasing recognition of this approach as a "refreshing and healthy move away ... from the more formalistic constraints once orthodox".[65] At the same time he recognised the relationship between this drive for simplicity and the themes identified in this article, namely fairness and discretion:[66]

> [J]udges are accepting that they have a responsibility to do practical justice in administrative law as in other fields. Ample room for respect for administrative discretion remains.

Of course, Lord Cooke's spirit of simplification and complementary inclination for more frequent judicial intervention was not necessarily welcomed by all. Some legal formalists and those favouring a more conservative, deferential role for the courts still clung to *Wednesbury*'s high standard for intervention and described moving away from the traditional standard as a "grave concern".[67]

### *B Fairness*

Lord Cooke was a strong champion of fairness. The motto on his personal coat of arms is: "pro aequitate dicere", that is, "to speak for fairness". His judgments expressed the need for the courts to ensure both procedural and substantive fairness when exercising their supervisory jurisdiction. Lord Cooke's commitment to a pre-eminent principle of fairness is evident from his approach to natural

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64 Joseph *Constitutional Law*, above n 12, 845.

65 Cooke "Foreword" in Joseph *Constitutional Law*, above n 12, vi, and repeated in Cooke "The Road Ahead for the Common Law", above n 36, 284.

66 Ibid.

67 See, for example, Melissa Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] NZ Law Rev 426, 446.

justice or claims of procedural impropriety, or, as Lord Cooke expressed it in his tripartite test, the obligation to act "fairly".[68]

A more detailed analysis of his contribution under this ground of review has been undertaken elsewhere:[69] Sir David Williams concluded that Lord Cooke's attention to this ground of review had left a "priceless legacy", namely the "rescue and reinvigoration" of natural justice.[70] Rather than replicating that analysis, it is sufficient to provide a flavour of Lord Cooke's analysis by reference to one or two key developments, developments which again converge with the two other themes – simplicity and discretion – underlying Lord Cooke's jurisprudence.

First, Lord Cooke's judgment in the *Daganayasi* case strengthened the concept of fair hearing rights.[71] He rejected a binary approach to the question of whether or not natural justice applied. Specifically he rejected the suggestion that natural justice was limited to occasions where a decision-maker was acting "judicially" or "quasi-judicially". Instead, he emphasised that "[t]he requirements of natural justice vary with the power which is exercised and the circumstances".[72] His desire to achieve practical justice required the rejection of formalised categories of entitlement in favour of a more holistic, discretionary approach. Based on this approach, Lord Cooke rejected claims by the decision-maker that no hearing rights arose because the applicant – an overstayer – did not have an entrenched right and the empowering legislation conferred a large degree of discretion on the Minister to determine the appropriate procedure. He ruled that the interests of justice required that an independent report that was adverse to overstayer's claim be disclosed to her and that she be given the opportunity to make written comments correcting or contradicting the prejudicial material in the report. Lord Cooke did not, however, claim that this principle was a dramatic development, suggesting this was one of the points about natural justice that had become "fairly elementary".[73]

Secondly, Lord Cooke's approach to factual errors and the doctrine of "mistake of fact" was also notable. The mistake of fact doctrine – a ground which was closely aligned to but different from the

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68 Cooke "Struggle for Simplicity", above n 2. See also Lord Cooke's own discussion of this ground: Cooke "Fairness", above n 17.

69 See generally Professor Sir David GT Williams QC "Lord Cooke and Natural Justice" in Rishworth, above n 1, 177.

70 Ibid, 188.

71 *Daganayasi v Minister of Immigration*, above n 29.

72 Ibid, 141 Cooke J.

73 He placed particular reliance on *Ridge v Baldwin* [1964] AC 29 (HL); *Durayappah v Fernando* [1967] 2 AC 337 (PC); *Jeffs v New Zealand Dairy Production Marketing Board* [1967] NZLR 1057 (PC) and *Attorney-General v Ryan* [1980] 2 WLR 143 (PC). Similar sentiments are expressed in Cooke "Fairness", above n 17, 425 where he dismissed any purported complexity of administrative law: "[B]ut the problems are essentially of fact, to be resolved in the main by the application of tolerably well settled principles."

ground of procedural fairness – gained significant momentum during Lord Cooke's tenure. Put simply, he did not consider it was fair for citizens to suffer injustice because of errors in the fact-finding process by the decision-maker:[74]

> [W]hen the Minister instructs a referee to ascertain the facts for him and report, the Minister should bear responsibility for a misleading or inadequate report. … [I]f as a result the Minister is led into a mistake and a failure to take into account the true facts, it is not right that the appellant should suffer. On this view the decision is invalid on the ground of mistake as well as on the ground of procedural unfairness.

Driven from the desire to achieve fairness and to correct injustice, Lord Cooke's intervention to correct plain factual errors was consistent with his rejection of the *Wednesbury* standard as the basis for reviewing factual conclusions of decision-makers and his belief in a broader formulation of the principle of fairness. Lord Cooke himself noted that it was possible to reach the same conclusion on the broader "substantive fairness" basis, allowing defects in different grounds of review to be aggregated to provide a basis for judicial intervention.[75] As noted earlier, although the substantive fairness rubric has fallen out of favour recently, our courts' aggressive scrutiny of the fact-finding process continues today, albeit under different rubrics: mistake of fact,[76] adequacy of evidence[77] and relevancy.[78]

Finally, on the question of the content of the fairness obligation, Lord Cooke was not one to be tied down by legal niceties or formalistic definitions. As to the meaning of fairness, he commended the words of Lawton LJ in the *Maxwell* case:[79]

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74 *Daganayasi v Minister of Immigration*, above n 29, 149 Cooke J. Lord Cooke's willingness to apply this doctrine is also evident in numerous other cases, such as *Bulk Gas Users Group Ltd v Attorney-General*, above n 25; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA); *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA); and *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264.

75 *Daganayasi v Minister of Immigration*, above n 29, 149 Cooke J.

76 Although there appears to be some diffidence in the Court of Appeal about the doctrine, it has been noted that the High Court "has not hesitated" in treating this doctrine as a ground of review in its own right: see *Laws of New Zealand*, above n 6, para 54. See, for example, *Taiaroa v Minister of Justice* (4 October 1994) HC WN CP 99/94 McGechan J; *Northern Inshore Fisheries Company Ltd v Minister of Fisheries* (4 March 2002) HC WN CP 235/01 Ronald Young J; *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 726 (HC) and *Air Nelson Ltd v Minister of Transport* [2007] NZAR 266 (HC).

77 For example *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 49 and *Progressive Enterprises Ltd v North Shore Council*, above n 47.

78 For example *Talley's Fisheries Ltd v Minister of Immigration* (10 October 1995) HC WN CP 201-93 McGechan J and discussion in Joseph *Constitutional Law*, above n 12, 794.

79 *Maxwell v Department of Trade and Industry* [1974] 2 All ER 122, 131 (CA) Lawton LJ, commended in Cooke "Discretionary Heart", above n 60, 212.

> From time to time ... lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise. As a result of these efforts a word in common usage has acquired the trappings of legalism: 'acting fairly' has become 'acting in accordance with the rules of natural justice', and on occasion has been dressed up with Latin tags. This phrase in my opinion serves no useful purpose and in recent years it has encouraged lawyers to try to put those who hold inquiries into legal straitjackets. … For the purposes of my judgment I intend to ask myself this simple question: did the [decision-maker] act fairly towards the plaintiff?

Lord Cooke's approach to fairness was therefore, as this suggests, driven by a desire to achieve real justice in individual cases. Simplification of previously rigid rules gave judges the discretion to respond to injustice. Once again, this approach did not mollify those favouring a more formalistic approach or those who favour certainty about the prospect judicial intervention.[80] However, nowadays our courts continue to reject the historic formalist notions of natural justice in favour of a broad approach to the question of fairness.[81]

### *C Discretion*

Lord Cooke's adjudication and scholarship was imbued with his acceptance of the role of discretion in administrative law, particularly the discretion necessarily wielded by judges, and rejection of rigid rules. Indeed, he adopted this subject – under the title "The Discretionary Heart of Administrative Law" – as his contribution to the *Festschrift* to honour one of the great administrative law scholars, Sir William Wade.[82] Sir Robin once noted that when he was writing his PhD thesis he was "quite well-disposed towards discretion",[83] in contradistinction to famous administrative law names such as Dicey and Wade. He went on to say that almost a quarter of a century on the bench had "warmed [his] feelings to something approaching affection for it".[84] Sir Robin understood the need for both administrative and judicial discretion in administrative law. Indeed he once remarked that "there is no difference *in essence* between judicial discretion and

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80 See, for example, Poole, above n 67.

81 For two recent examples of the contextual and flexible approach to fairness, see *Goulden v Wellington City Council* [2006] 3 NZLR 244 (HC) and *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

82 Cooke "Discretionary Heart", above n 60, 203.

83 Ibid, 204.

84 Ibid.

administrative discretion".[85] He accepted that both were subject to limits, but suggested that those limits varied according to the subject-matter and surrounding statutory context.[86]

Lord Cooke's acceptance of the role of discretion in the courts' supervisory role manifested itself in a number of ways. First, his formulation of the grounds of review provided for appropriate discretion. His formulation of the reasonableness test, as discussed earlier, eschewed the rigidity of the *Wednesbury* test and rejected the more structured enquiry of the proportionality standard. The standard of reasonableness, in its simple sense, provided sufficient discretion for the supervising judge without unduly usurping the role of the administrator. But the methodology was, as Professor Joseph has described it, one of "overall evaluation", a discretionary judgement made after considering all material factors in the round.[87] Likewise, the standard of natural justice – or, as Lord Cooke preferred, fairness – depended not on compliance with a number of prescriptive rules. Instead, the overarching question was whether the decision-maker had acted fairly.[88]

Lord Cooke's attitude towards the role of discretion within the illegality or unlawfulness ground of review was more oblique. On the face of it, he seemed to shun any notion of discretion in the judicial supervision of questions of law: if there was any doubt about the meaning of legislation, "this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity".[89] That is, the courts were under an obligation to correct all errors of law and interpretative judgements of decision-makers were not entitled to be accorded any degree of deference by the judiciary.

As Professor Taggart explains, however, Lord Cooke's approach appeared to be directed at situations involving a "pure question of statutory interpretation", that is, posing an "ascertainable test".[90] Arguably, this presents the possibility that a decision-maker's interpretation may be afforded a degree of deference where the interpretative task is more open-textured and does not suggest a definitive answer.[91] Unfortunately, any such evolution of the interpretative process was not further addressed by Lord Cooke during his tenure; discussion of whether he favoured this deferential and

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85 Ibid, 210 (emphasis in original).

86 Ibid, 211.

87 Joseph *Constitutional Law,* above n 12, 763 and Joseph "*Ultra Vires*", above n 28, 371.

88 *Daganayasi v Minister of Immigration*, above n 29 and discussion above at II B.

89 *Bulk Gas Users Group v Attorney-General*, above n 25, 133 Cooke J adopting the words of Lord Diplock in *Re Racal Communications Ltd*, above n 26, 382.

90 *Bulk Gas Users Group v Attorney-General* ibid, 136 Cooke J; discussed in Taggart "Scope of Review", above n 1, 196.

91 Taggart, ibid.

discretionary approach – now common-place in North American jurisprudence[92] – must be speculative.

Secondly, his approach to the mechanics of judicial review – procedure and remedies – was permeated with judicial discretion. Again, Lord Cooke's philosophy can be illustrated by reference to a few cases. Lord Cooke was at the forefront of the relaxation of the rules on standing. In ruling that a public interest group had sufficient standing to challenge the validity of the Order in Council fast-tracking the proposed Aramoana aluminium smelter under the National Development Act 1979, he endorsed Lord Diplock's rejection of a technical approach to locus standi:[93]

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

Not only did Lord Cooke reject an overly formalistic approach, he emphasised the discretionary nature of the inquiry:[94]

> [T]o determine the sufficiency of an applicant's interest it is essential, indeed elementary, to consider the matter to which his application relates. The emphasis is on the totality of the facts. Any tendency to consider the issue of standing in isolation from the nature of the complaint is resisted.

Nowadays, standing is rarely raised pre-emptively; instead it falls for consideration, along with other factors, in the assessment of whether or not a remedy should be granted.[95] As a result, standing presents little, if any, impediment to an applicant wishing to challenge alleged misuse of power by the administration.

Lord Cooke also embraced the discretionary approach to remedies in judicial review, rejecting the straitjacket presented by the previous "void"/"voidable" distinction. His succinct statement of principle continues to be the leading authority on the discretionary nature of remedies in administrative law:[96]

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92 *CUPE v New Brunswick Liquor Corporation* [1979] 2 SCR 227 and *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837, discussed in Taggart "Scope of Review", above n 1.

93 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 (HL) Lord Diplock, adopted in *Environmental Defence Society Inc v South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA).

94 *Budget Rent A Car Ltd v Auckland Regional Authority*, above n 18, 419 Cooke J.

95 See Joseph *Constitutional Law,* above n 12, § 25.4.10 and 25.7.

96 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1, 4 (CA) Cooke J. See also JL Caldwell, "Discretionary Remedies in Administrative Law" (1986) 6 Otago L Rev 245; Joseph *Constitutional Law*, above n 12, 973-983 and *Laws of New Zealand*, above n 6, paras 144-160.

> When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside. 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.

Notably, the discretionary approach to remedies operated as a counterweight to the discretion implicit in the other aspects of Lord Cooke's judicial methodology. The liberalisation of the grounds of review favoured applicants; however, the discretionary approach to remedies provided an opportunity for the interests of the administration and third parties to also be brought into the mix and to temper any pressure for intervention. As Lord Cooke once said:[97]

> 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. After all, progress is not synonymous with giving judgment for plaintiffs.

Lord Cooke therefore recognised that discretion and judgement were the central features of administrative law, both for an administrator and for the supervising judge. Indeed, he once queried whether administrative law might be better renamed "the law of public discretions".[98]

Of course, this inherently discretionary approach was not necessarily universally welcomed. The contextual and discretionary nature of Lord Cooke's form of judicial review, and the desire to achieve justice in individual cases, represented a move away from the formalistic and deferential – or, as some would describe it, the "classic" – model of administrative law.[99] The certainty, predictability, and overall coherence of the classic model could not survive in the more discretionary era. It can be argued that the desire to achieve justice on a micro-level came at the expense of justice on a meta-level. That is, the incertitude associated with reliance on the discretion or judgement of individual judges is anathema for many litigants, particularly decision-makers whose actions are under scrutiny. And, while Lord Cooke's resort to principles of fairness in individual cases seems to have stood the test of time, it can be argued that not all members of the judiciary share his refined

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97 *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1, 29 (CA) Cooke J.

98 Cooke "Discretionary Heart", above n 60, 211.

99 See discussion of the move from the "classic model" (coined by Carol Harlow in relation to the form of review in the United Kingdom up to the 1960s: Carol Harlow "A Special Relationship? American Influences on Judicial Review in England" in Ian Loveland (ed) *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995) 79, 83) in New Zealand by Taggart "Reinventing Administrative Law", above n 46, 312.

sense of fairness when it comes to exercising such an unconstrained evaluative judgement. The unpredictability of judicial review has ramifications beyond the results in individual cases. However, Lord Cooke did not overlook this point. His appreciation of it is aptly illustrated by his vivid analogy of judicial supervision in administrative law to the making of a cocktail:[100]

> Into a vessel are poured an Act of Parliament or regulation which does not provide a plain answer to the specific question that has arisen; a handful of conflicting and sometimes antiquated canons of statutory interpretation; the modern Alice-in-Wonderland attitude to the meaning of words (as learned Judges have called it), now of impeccable respectability in consequence of the favour it has found with the highest Courts; and a number of irreconcilable precedents. They are all stirred together by argument, a few imponderables are added, the outlook of the presiding Judge or Judges lends a distinctive flavour, and what will be the dominating ingredient in the final mix is something of a matter of chance.

Uncertainty associated with the reliance on judicial discretion comes with the territory and is one of the foibles of a robust and responsive system of checks and balances on the administration. In the eyes of Lord Cooke, achieving individual justice was paramount. The desire for individual justice came with an acceptance of discretion in the judiciary's supervisory jurisdiction. This discretionary approach was tempered, though, by an appreciation of the contextual nature of the inquiry, which required a keen awareness of the countervailing interests of the administration and third parties.

## *III CONCLUSION*

Lord Cooke's contribution to New Zealand – and Commonwealth – administrative law was immense. It is marked particularly by a desire for simplicity, the pursuit of fairness, and an acceptance of discretion. These themes manifest themselves in and throughout the tripartite framework for judicial review commonplace in administrative law. Lord Cooke's simplified formulation of these grounds now represents the orthodox approach in our country's administrative law. His general philosophy is also an entrenched feature of present-day judicial scrutiny of administrative decision-making.

Lord Cooke has left behind a tremendous legacy through his work fashioning an indigenous form of administrative law for our country. Administrative law which is – expressed in the time-honoured tripartite format – simple, fair, and discretionary.

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100 Robin Cooke "The Changing Face of Administrative Law", above n 2, 130.