The Politics of Deference: Judicial Review and Democracy

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INTRODUCTION

How should judges in common law jurisdictions respond to administrative determinations of the law? Should they defer to such determinations or evaluate them in accordance with their sense of what the right determination should have been? Buried in these often highly technical questions of administrative law are important issues in political and legal theory. Hence, to answer the questions one has to engage in a full discussion of the politics of judicial deference. I will start with a sketch of why these administrative law questions are so freighted with politics before examining the politics of judicial deference.

The role of judges in the legal order has always been controversial, though there was a time when at least the terms of the controversy were quite clear. At a time when legal order could be conceived as made up of a division of powers between the legislature, the judiciary, and the executive, one could agree that it was the task of the legislature to make law, of the executive to implement the law, and of judges to ensure that the executive stayed within the bounds of the law. Opinion divided on the question whether the legislature was the sole source of law or whether it was answerable to principles of a higher law, instantiated in the common law.

* This article is dedicated to the memory of my friend, teacher, and former colleague, Etienne Mureinik, whose tragic death in July 1996 deprived South Africa, the common law world, and the conference for which this paper was written of one of the most acute minds working in administrative law. In particular, his death leaves unworked out his idea of a legal culture of justification, a topic which, as will become clear below, is of crucial importance to my own work.

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The camps which divided on this question were, roughly speaking, democratic positivists and liberal antipositivists. Democratic positivists, following the tradition established by Jeremy Bentham, argued that the legislature is the sole source of law and that its legitimacy derived from its accountability to the people. For judges to claim that the law was anything but the law enacted by the legislature was, therefore, for them to act undemocratically. In order for judges to fulfil their role in the legal order of enforcing the will of the people, that will had to be expressed in legislation which made it as clear as possible what that will is. Put differently, lack of ambiguity is what made judicial deference to the will of the legislature possible. Conversely, ambiguity or alleged ambiguity in the law gave judges the occasion for judicial legislation, and thus was best avoided. Positive law is, then, the law of the legislature which has the attributes which enable judicial deference to legislative will.

Bentham was a great opponent of the common law, even advocating its abolition. His opposition was driven by more than his sense that the common law was too messy to ever have the attributes of positivity. He was also concerned about what he saw as the judicial device in a common law system of alleging that ambiguity existed in legislation in order to superimpose the judges' sense of right and wrong on the legislation. In other words, the common law provided a resource to judges which they could use to bootstrap themselves to the apex of the legal order.

Antipositivists, following a tradition most famously articulated by Sir William Blackstone, argued that the common law was not a mess but the legal repository of the moral values of the people. Judges, in enforcing common law values, were, on this view, giving effect to the will of the people. In using the common law as the value-laden background against which legislation was to be interpreted, judges were not setting themselves against the people's will because that background, no less than legislation, was the product of the people. Since proponents of this view identified common law values with the rights and liberties of the individual, we can therefore refer to them as liberal antipositivists.

The division into democratic positivists and liberal antipositivists is rough because the former set great store by the rights and liberties of the individual while the latter generally acknowledge that where a statute speaks clearly it legitimately overrides the common law. Nevertheless, the camps represent the poles on a continuum between which debate still moves today.

Albert Venn Dicey notoriously made both of its poles the supports of his model of the rule of law, and administrative law theory has yet to move out of his shadow.[1] This is the case despite the fact that Dicey wrote at the end of the era when legal order could be conceived in the simple way sketched

[1] A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, London, 1st ed. 1885). For an instructive account of Dicey, see P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, Oxford, 1990), ch. 2.

above. Dicey wrote, that is, at a time when the administrative state was on the cards. He could see the potential growth of administrative agencies which had power delegated to them by the legislature to develop the legal regimes governing the particular social programmes given to their charge.

Dicey's understanding of the rule of law not only made no place for such agencies; it was deliberately constructed as an ideological obstacle in the way of their growth. The major component of the obstacle is the assumption that law of the land to which public officials are to be held accountable is a unitary set of legal rules, maintained as such by judges of the superior courts who have ultimate interpretative authority over the law. Dicey reconciled that interpretative authority with the sovereignty of the legislature by adverting to the fact that the English Parliament did not generally use legislation as a blunt instrument to overrule judges' interpretation of statutes in the light of the common law. From this practice of non-intervention he inferred tacit approval by Parliament of the rule of law, a doctrine which, in his view, united parliamentary sovereignty with the "supremacy of law", meaning the supremacy of judicial interpretation.[2] In summary his argument is: the rule of law is an essential moral good; administrative agencies with power to make and interpret their own law do not fit within the model of the rule of law; therefore, allegiance to the rule of law entails opposing the administrative state.

Dicey's model could not, however, provide more than an intermittent obstacle to the administrative state for two reasons. First, the growth of the administrative state was driven by the popular demand for redistributive and welfare programmes, a demand which was expressed in the statutes that laid the basis of that state. Second, the democratic pole of Dicey's model required judicial deference to clear expressions of legislative intent, and so required deference to the intent to delegate law-making power to administrative agencies. It seemed to follow that even judges who were determined to assert their place as guardians of the rule of law against a looming administrative "despotism" could be brought into line by statutory command. Indeed, legislatures discovered a more sophisticated device than the threat of statutory reaction to judicial intransigence. They began to resort to the preemptive device of the privative or ouster clause, the statutory provision which tells judges that the decisions of the agency constituted by a statute are immune to judicial supervision.[3] In short, the practice of legislative non-intervention on which Dicey's model of the rule of law depended seemed to have died.

[2] See Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, London, 8th ed. 1924), ch. XIII.

[3] I shall in what follows adopt the term "privative clause" since it is far more indicative of a particular judicial attitude than the bland "ouster (or preclusive) clause". For the idea of privation suggests both a depriving and a privatisation. It thus conveys much more than the thought that something has been expressly removed or ousted from the court's purview that would otherwise lie therein. First, it conveys the thought that what has been removed is what should properly have been left to the court. Second, it conveys the thought that something that would otherwise have been public has been improperly made a private matter—one for decision outside the supposedly open public realm in which courts operate.

But, as I have already suggested, administrative law theory has not yet moved out of Dicey's shadow. One reason for this is that, as Sir William Wade has pointed out, the use of privative clauses has the paradoxical effect of appearing to increase judicial power.[4] The device of the privative clause, far from performing its intended preemptive role, perversely perpetuates what it seeks to avoid. It requires judges to provide an interpretation of legislative intention faithful to a more general legislative intention which has it that judges should have no role in providing such an interpretation. Since the effect would be to give agencies protected by a strong privative clause an unlimited jurisdiction, judges are forced to find some way of reconciling the privative clause with the incontestable idea that the legislature must have intended some legal limits to the agency's jurisdiction. The logic of the doctrine of *ultra vires*, that there are legal limits to any statutory delegation of law-making power to an agency, is one to which the legislatures of common law legal orders are as committed as their judiciaries. And if that logic is tied to alleged facts about legislative intent, it requires judges facing a privative clause to make some distinction of the kind between jurisdictional and non-jurisdictional errors of law. The former are mistakes made by an agency about the scope of its power and which it is not therefore entitled to make, while the latter are mistakes which are made within the scope of its power and which it therefore may be entitled to make.

Such distinctions cannot, however, be implemented in a satisfactory fashion because there is no practical way of determining what is jurisdictional and what is non-jurisdictional error of law. This is a fact more or less frankly recognised in the United Kingdom in the wake of the leading House of Lords decision in *Anisminic Ltd.* v. *Foreign Compensation Commission*.[5] In the result, the United Kingdom position seems to be that, whether or not there is a privative clause, there is no principled reason for a court to refrain from correcting what it perceives to be errors in an agency's determination of the law.

The Canadian Supreme Court, in contrast, is still wrestling with the task of elaborating a test which could make the distinction work, a commitment dating from its firm entrenchment of the distinction in its leading decision, *Canadian Union of Public Employees Local 963* v. *New Brunswick Liquor Corporation*.[6] But, as we will see more clearly below, the (inevitably) unsatisfactory nature of its test, as well as a recent move to deprivatise privative

[4] H.W.R. Wade, *Constitutional Fundamentals* (Stevens & Sons, London, rev. ed. 1980), 88–9.

[5] [1969] 2 AC 147 (hereafter referred to as *Anisminic*).

[6] [1979] 2 SCR 227 (hereafter referred to as *CUPE*). In *CUPE* the issue before the Court was an interpretation by the Public Service Labour Relations Board of New Brunswick of a statutory provision in the Public Service Relations Act, RSNB 1973, c.P-25, s.102(3)(a). The Board, whose determinations were protected by a privative clause, held that the provision excluded the employer, the New Brunswick Liquor Corporation, from replacing striking employees with management personnel.

clauses, make its position in substance little different from that in the United Kingdom.[7]

In sum, privative clauses amount to a clear statutory command which judges find themselves compelled either to ignore or radically to rewrite. The result is an apparent increase in judicial power because judges are no longer without exception bound by the clear statutory command of the legislature. But the compulsion is not one whose force is limited to judges wishing to preserve a role for themselves at the apex of the legal order. Legislatures must also acknowledge that the power they delegate is inherently limited by law. It follows that judges when they read down privative clauses are at one level respecting the intention of the legislature (a more abstract and long term intention) that there are inherent legal limits to official power.

The force of the compulsion is perhaps best illustrated by the fact that, at least in Canada, the judges who have felt it most recently have not been motivated by a Diceyan fear of the administrative state. Since they are for the most part either quite well disposed or at least not outright hostile to the administrative state, their common motivation has had much more to do with worries about the rule of law, with concerns about maintaining legal standards to which public officials are accountable.

The irony is that this saga is being played out at a time when the opponents of the administrative state are to be found within the apparatus of the state, as governments get themselves elected on the basis of their determination to do away with state delivery and regulation of public programmes. The pressing problems of administrative law are going to be problems to do with the reach of public power. They will be problems to do with whether public legally enforceable standards of accountability apply to the bewildering range of quasi-public and allegedly private institutions and bodies which are competing to take over the tasks of the administrative state. Governments, as well as removing standard mechanisms of public law accountability, may well resort to privative clauses to protect the process of privatisation from the reach of standards developed during the heyday of the state. Hence, while the political context of administrative law is in a process of radical change, the issue of the judicial role in upholding the rule of law remains a relative constant. Indeed, if the current debate in the United Kingdom is anything to go by, the change in political context has reignited that issue.[8]

At present, that debate is for the most part firmly bound by the terms sketched at the outset of this article. The central question remains whether

[7] That is the position which obtains as a result of *R. v. Lord President of the Privy Council, ex parte Page* [1993] AC 682 (hereafter referred to as *Page*), where it was held, *inter alia*, that the common law, no less than a statute, can confer final and conclusive jurisdiction . See, e.g., the discussion in P.P. Craig, "Jurisdiction, Judicial Control, and Agency Autonomy", in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995), 173, 173–5.

[8] That debate is of course also fuelled by questions about the relationship between the law of the United Kingdom and its obligations under the law of the European Community.

the legal limits of an agency's power are just those limits the legislature intended to set, or whether the common law sets limits as well.

Liberal antipositivists argue that the story of *ultra vires* in the United Kingdom shows that the doctrine of *ultra vires* should itself be discarded along with the idea of legislative intention with which it is usually linked. Judges, they say, have a basis in the legal order for enforcing the law which is not dependent on any facts about legislative intent. The common law is the obvious alternative in a legal order where there is no written constitution, and the question then becomes how far different members of this camp are prepared to go. Do they rest content with the weak claim that the common law provides merely the basis for judicial evasion of privative clauses and for resolving "ambiguities" in statutes? Or do they make stronger claims about the common law protecting the rights and liberties of the individual to the extent that judges can legitimately (are *legally* entitled to) resist clear legislative encroachments on certain rights and liberties? Sir John Laws has opened up this particular issue with (given the general make-up of the Bench) an unfortunately phallic metaphor for the judicial role, saying that it is time to strip away the *ultra vires* "figleaf" from the fact of a judicial power autonomous of any statutory base.[9]

The other camp, the heirs of democratic positivism, are reluctant to concede that judges have a basis of legitimacy independent of statute.[10] They argue that the weak claims made within the antipositivist camp are easy to meet. In regard to the issue of the basis for the judicial creation of the doctrine of *ultra vires*, they respond by saying that that creation can itself be regarded as based on legislative intent. In regard to the issue of the justice of the common law filling gaps or resolving ambiguities in legislative intent, they respond by saying that such a practice is dependent on there not being clear indications of legislative intent to the contrary. To be sure, both responses turn out to be in substance identical, since the idea of legislative intent invoked in the first is one which, as in the second, is about legislative legitimation inferred from a lack of explicit legislative contradiction.

The real fear of the democratic positivists is the slippery slope that leads to the stronger claims about the priority of certain common law values over statute. In their view, it is for politicians and not judges to decide whether certain political and moral values are going to be made the criteria of valid law. However, as the most elaborate presentation of their views illustrates, their own version of the story of *ultra vires* belies their confidence in their position. For they do not argue that the figleaf metaphor is wrong—that judges were

[9] Sir John Laws, "Illegality: The Problem of Jurisdiction", in M. Supperstone and J. Goudie (eds), *Judicial Review* (Butterworths, London, 1992), 51, 67.

[10] Sir William Wade is the leading exponent of this view. See H.W.R. Wade and C.F. Forsyth, *Administrative Law* (Clarendon Press, Oxford, 7th ed. 1995), esp. 735–9 and C. Forsyth, "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament, and Judicial Review" [1996] *CLJ* 122.

in fact just giving effect to legislative intent. Rather, they argue that one has to keep the figleaf in place in order to "preserve the decencies".[11] One must, in other words, pretend that the judges were giving effect to legislative intent because, if we strip away the pretence, we are visibly on the slippery slope.

Now there are different versions of this position. One is that the judges wrested power away from the legislature; however, it is best to ignore this fact, remaining content with apparent legislative acquiescence and hence tacit legitimation of this state of affairs. The other is that judges were acting in accordance with fundamental constitutional/legal responsibilities in bringing the legislature to heel and that legislative acquiescence is best seen as evidence of legislative ackowledgement of the same set of constitutional fundamentals.[12] However, it is best not to acknowledge that judges have this basis in constitutional fundamentals for acting because it might go to their heads.

No-one in the democratic camp finds the first version adequate by itself, and so it is always offered together with the second version. But the trouble with the second version is that there is no real difference between it and the antipositivist position, except for the claim that the figleaf has to be kept in place both for decency's sake and to avoid judges' extending their power base. If that claim is to be understood as one based in principle—the idea that the figleaf must remain in place for democracy's sake—then it is question-begging. For its proponents have not yet begun to supply the theory of democracy in which such a claim must be situated.

In addition, the compromise democratic positivists make in balancing their view of democratic principle with the rule of law idea that there are legal limits to any political power is a bad one. As already suggested, the pressing problems of administrative law are going to be about the reach of public power. One of the factors that makes the new political context of administrative law so problematic is that new power holders will often not get their power directly from any statutory instrument, but, much more likely, through a contract with some branch of government. Hence, a doctrine of *ultra vires* tied to facts about legislative intent will not be of any help since there is no statutory instrument on which to hang the claim of inherent legal limits on power. However, if there is a basis independent of legislative intent for judicial enforcement of the rule of law, then there is the potential for judges to continue to play a role in maintaining the rule of law in the new political context.

It may well be the case that the democratic positivists are untroubled by this scenario if it is also the case that they are, by and large, in agreement with the political programmes that drive privatisation. It would follow that, strange as this may seem, the true heirs to Dicey's concerns about the erosion of the rule of law may be those who would resist government attempts to bring about an era of unrestrained "private" power. They have to cope with

[11] Forsyth, ibid., 136.

[12] Wade and Forsyth, above at n. 10, 737–8.

a much more complex legal order, one in which it is assumed that administrative agencies legitimately have power to make and interpret law at the same time as administrative power is increasingly devolved on quasi-public and private entities. The task that faces them is no less than providing a theory of democratic legal order, one which justifies a workable account of the role for judicial review in the new political context.

In this task, liberal antipositivists have the advantage over democratic positivists of frankly confronting the fact that judges have a crucial role to play in upholding the values of the legal order. But they persist both in maintaining judges at the apex of the legal order and in equating the values of the legal order with common law values understood in the individualistic way which implies hostility to the administrative state.[13]

In this paper, I hope to show that a close examination of some leading Canadian decisions, mainly on the topic of judicial deference to administrative decisions, can assist us in this task. I will argue that Dicey's model requires judges to adopt a principle of deference which has to be rejected. This is the principle I will call submissive deference, since what it requires of judges is that they submit to the intention of the legislature, on a positivist understanding of intention.

The alternative principle is the principle of deference as respect. Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency. I will argue that only this principle can rearticulate the proper relationship between the legislature, administrative agencies and the courts. I will argue further that the sense it makes requires the courts to reject the Diceyan model of law in which the idea of submissive deference is an essential component. I also suggest that the model of the rule of law to which the principle of deference as respect is committed might well prove fruitful in the new political context of administrative law, in particular because of its explicit commitment to the value of equality.

THE PARADOX OF THE RECOGNITION OF RATIONALITY

The most astonishing fact about the Supreme Court of Canada's role in administrative law is that two of the Court's most important decisions in this domain were not only decided in the same year, but are so in tension with

[13] T.R.S. Allan has done the pioneering work in constructing a liberal antipositivist basis for administrative law. See T.R.S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, Oxford, 1993). I explore the problematic tendencies in his work in a book review in (1995) 45 *UTLJ* 205. For a powerful account of why Ronald Dworkin's legal theory, the principal inspiration of contemporary liberal antipositivism, is unlikely to prove helpful in this task, see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994) 20 *Queen's LJ* 163.

each other that they have created a central paradox for Canadian administrative law. That is, taken together, these decisions make a statement about Canadian administrative law which is contradictory but also true. The two decisions are *CUPE* and *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police.*[14]

CUPE's contribution to the paradox is the following proposition. The courts should take a hands-off approach when an administrative body interprets ambiguous language in a statute, when that ambiguity pertains to matters within the body's particular expertise. This contribution can be summed up in a deference principle, one which requires courts to defer, other things being equal, to administrative determinations of the law.

Nicholson held that the courts, in deciding whether the procedures by which such determinations are made are valid (meaning in this context "fair"), should look to criteria other than whether the courts regard the agency's function as more judicial or more administrative in nature. Since this distinction had largely sealed off the so called "administrative area" from judicial scrutiny, *Nicholson* proposed that the courts should thenceforth take a hands-on approach to administrative action. *Nicholson* is thus an interventionist decision.

So, crudely speaking, we have a contradiction in what the Court was prescribing for the future: the Court in the same year made two landmark decisions which, taken together, tell courts to adopt a non-interventionist and an interventionist stance.

Just how crude one thinks this description is will depend largely on how firmly one holds to the substance/procedure distinction. If one thinks, as the Court doubtless did in 1979, that the decisions were given in two more or less discreet worlds within the administrative system, there might appear to be no tension at all. Courts should generally defer on matters of substance, but be ready to intervene when the fairness of the procedures by which substantive matters are decided is in issue.

It is worth noting here that the Court itself has no longer been able to function in terms of the distinction. It was only a matter of time before it had to decide whether the deference principle required judicial deference to the questions of law involved in determining what procedures an agency should follow in deciding substantive issues. And it in effect decided that deference on this issue may be required in *International Woodworkers of America Local 2–69* v. *Consolidated Bathurst Packaging Ltd.*[15]

[14] [1979] 1 SCR 311 (hereafter referred to as *Nicholson*). *Nicholson* by and large followed the reasoning of Lord Reid in *Ridge* v. *Baldwin* [1964] AC 40.

[15] [1990] 1 SCR 282. Here the issue was whether the Ontario Labour Relations Board violated procedural fairness when it permitted the policy implications of certain matters before tripartite panels to be discussed by a full board meeting in the period between the conclusion of the hearing before the panel and the panel's final decision on the matter. The parties to the matter were not informed of the meeting nor given access to it. Gonthier J., for the majority of the Court, held that this was a legitimate process as long as it was subject to various qualifications

Such a decision was more or less inevitable because in *Nicholson* the Court was adamant that the appropriateness of rules of fairness or natural justice could not be properly evaluated outside of the particular administrative law context in which they were to be applied. And since *CUPE* required deference to an agency's more expert sense of what was best in its own context, it should also require deference to an agency's sense of what was fair in such a context.

But what made the breakdown of the process/substance distinction inevitable is something deeper than any particular piece of judicial reasoning. It is the result of the judges' (belated) acceptance of the welfare state and their consequent willingness to permit some measure of autonomy for administrative decision-making. And in order to avoid making that acceptance toothless, the autonomy of the administrative process had to be taken to include both the procedures by which decisions are made and the substance of the decisions which issue from that process.

Until this time, three basic attitudes to administrative tribunals had prevailed among judges. Some thought the administrative process was somehow outside the law because it was so irrational—the realm of political arbitrariness and caprice. Others thought the process was necessarily subject to the law, which meant subject to the Diceyan hierarchical arrangement where judges police the administrative process in a way which leaves no room for judicial deference to tribunals. The last, and perhaps biggest group, adopted some combination of the first two attitudes.

CUPE and *Nicholson* together made it very difficult for judges publicly to adopt these attitudes. But the contradiction that leads to paradox is implicit in either of the two landmark decisions taken by itself. All the other decision does is bring the contradiction to the surface.

CUPE tells judges that because administrative tribunals can make rational decisions about the law, judges must not assume that the courts should have the last word about what the law is. But *CUPE* also thereby invites judges to intervene when administrative tribunals in fact fail to live up to the standards which in principle make their decisions rational. *Nicholson* tells judges that processes of administrative decision-making are rational, and thus amenable

necessary to maintain the independence of the members of the panel. *CUPE* played a very different role in the majority judgment, where it seemed to indicate judicial deference to the administrative sense of procedural fairness, than it did in Sopinka J.'s dissent, a judgment which nicely illustrates the paradox sketched below. For Sopinka J. used *CUPE* together with *Nicholson* as authority for the following proposition. *CUPE* holds that boards may legitimately make policy, while *Nicholson* holds that there is nothing inherently unreviewable about policy-making. Because the board meeting exercised a policy-making function, it is therefore in principle subject to the rules of procedural fairness. In a subsequent decision, *Tremblay* v. *Québec (Commission des affaires sociales)* [1992] 1 SCR 952, Gonthier J. appears to have moved the Court closer to Sopinka J.'s position. See my discussion in "Developments in Administrative Law: The 1991–92 Term" (1993) 4 *Supreme Court LR (2d)* 177, 200–205. In *CAIMAW* v. *Paccar of Canada Ltd.* [1989] 2 SCR 983 (hereafter refered to as *Paccar*) La Forest J. for the majority of the Court said, *obiter*, that deference to procedural determinations is due only when these are protected by a privative clause.

to judicial scrutiny, even where the agency making the decision is not like a court. But, as already suggested, *Nicholson* also contains an implicit limitation on judicial review by requiring judicial attention to the particular administrative context.

The impulse behind both judgments is, I suggest, the same—the judicial sense of the need for a positive response to the fact that the administrative state is here to stay (even if has recently come under the most sustained political attack since its entrenchment). The impulse leads to an attempt to put into effect a judicial recognition of the inherent or at least potential rationality of the administrative process. And the recognition, in order to be positive, had also to take into account that the criteria for rationality of the administrative process often are and should be different from the criteria for rationality of the judicial process. In other words, judges had to recognise that tribunals have a deserved claim to at least some autonomy in the legal order.

But for the courts to recognise the administrative process as inherently or at least potentially rational, is also precisely what creates the paradox of the recognition of rationality. To recognise rationality is at the same time to claim a judicial role in supervising the administrative process to ensure that it meets standards of rationality, even if a sincere attempt is made to conceive these differently.

We have then the idea that administration is at least in principle and often in practice rational. Taking this to be true leads to paradox because to recognise rationality in practice is always at the same time to begin to measure a practice against standards of rationality. To date the only model of rationality with which the courts have generally been comfortable is one which approximates the way in which judges think decisions should be made. The recognition of the rationality of administration thus seems to carry with it the risk of the imposition of judicial standards of rationality. And that means that a return to Diceyan type judicial review is an ever present danger.

It should be no surprise then that the Court has been far from successful in elaborating the deference principle articulated in *CUPE* in a way that looks markedly different from interventionist periods in the past.[16] That is to say, appearances to the contrary, *CUPE* by itself contained the seeds for an expansion of judicial review. In the next section, I discuss several examples of the way in which the paradox has played itself out in practice.

[16] Beetz J.'s judgments for the Supreme Court in two cases—*Syndicat des employés de production du Québec et de l'Acadie* v. *Canada Labour Relations Board* [1984] 2 SCR 412 (hereafter referred to as *Syndicat des employés*) and *U.E.S., Local 298* v. *Bibeault* [1988] 2 SCR 1048 (hereafter referred to as *Bibeault*)—are considered the main culprits here.

THE PARADOX IN PRACTICE

In *CUPE* Dickson J. for the Court did not say that judges should defer to privative clauses merely because the legislature has deemed it fit to include such a clause in the statute in issue. Rather he said, in the passage most often quoted from his judgment, that courts should defer when there is good reason to defer, the expertise of the tribunal being the major factor to be taken into account. As a result the deference principle for which CUPE stands is fundamentally ambiguous. On the one hand, it offers a formal reason for deference—courts should defer to administrative determinations of the law when the legislature requires them to do so. On the other hand, it articulates a substantive rationale for deference, one which says that courts must defer when there are reasons, such as superior agency expertise, for deference.[17]

This ambiguity left Canadian courts in a dilemma. Should they defer merely because the legislature has said so despite the fact that the substantive rationale for deference is not in place? And should they defer when there is a substantive rationale for deference despite the fact that the legislature has not included a privative clause in the relevant statute, perhaps even has expressly allowed for appeals on questions of law?

This dilemma surfaced clearly only in the very recent jurisprudence of the Court, although it played a crucial subterranean role from the start. Its late arrival on the surface is explained wholly by the fact that *CUPE* superimposed another layer of conundrum on top of the dilemma because of its formal reason for deference—obedience to legislative command. In the nature of things, the Court did not follow the logic of that formal reason which requires a court's self-exclusion from supervising agencies protected by a privative clause. Rather, it said, first, that within an agency's area of expertise or jurisdiction, its determinations of the law should be set aside only if patently unreasonable. Second, it said that the courts should not be alert to brand an agency's determination of the law jurisdictional for the purposes of judicial review, thus clearly implying that the standard for review on jurisdictional questions is correctness.[18] The conundrum of how to distinguish between which determinations of law are jurisdictional and which are not and how to

[17] He said in *CUPE*, above at n. 6, 235–6:

> "Section 101 [the privative clause] constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are usually found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialised tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area."

[18] *CUPE*, ibid., 233 and 237.

distinguish a test for patent unreasonableness from one for correctness then occupied the Court for over a decade.

By and large the Court adhered loyally to the idea that there is a real distinction between jurisdictional questions of law and others, and that it should adopt different standards of review depending on the nature of the question answered by the agency. Never did any Canadian judge approach Lord Denning's cynical dictum after *Anisminic* that the distinction between jurisdictional and other questions is so malleable that the courts can always characterise a question as jurisdictional, should they want to review on a standard of correctness.[19]

At times, however, the Court's assertive declarations in a Diceyan tone of its duty to uphold the rule of law over agencies led commentators as well as members of the Court to worry that it was straying from *CUPE*'s spirit. One judge especially, Beetz J., who had a strong record of judgments for employers in review of labour board decisions, was thought to have subverted that spirit.[20] But his judgments were for unanimous courts. And even those among its members who would be most easily categorised as friendly to *CUPE*'s deference principle did not on occasion escape a temptation to make Diceyan pronouncements about the Court's role as guardian of the rule of law.[21]

Indeed, whatever Beetz J.'s intentions in the most notorious of his judgments,[22] it is difficult to fault him jurisprudentially. As long as the Court conceived its role in terms of a duty to police the limits of jurisdiction by enforcing a correctness standard in regard to such limits, but could not design a bright line test between jurisdictional and other issues, it was doomed to be mired in a conceptual bog of its own making.

In the second of his major judgments, Beetz J. even did his best to reconcile the formal reasons for deference with the substantive rationale. He did so by suggesting that courts should rely on the kinds of reasons that make up a substantive rationale for deference in determining whether a question is jurisdictional. Courts should apply, he said, a "pragmatic and functional approach". This would be an approach sensitive to "the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal".[23]

This dictum soon became as canonical for the Court as Dickson J.'s articulation in *CUPE* of both formal and substantive reasons for deference. But the apparent pragmatism of the approach was undermined by three

[19] *Pearlman* v. *Keepers and Governors of Harrow School* [1979] QB 56, 70. This view now seems the dominant one in the United Kingdom, following the decisions by the House of Lords in *Re Racal Communications Ltd.* [1981] AC 374, 382–3, per Lord Diplock, and in *Page*, above at n. 7, 701, per Lord Browne-Wilkinson.

[20] Above at n. 16.

[21] For example, Dickson J. in *Jacmain* v. *Attorney-General of Canada* [1978] 2 SCR 15, 29, and Laskin C.J. in *Crevier* v. *Attorney-General of Québec* [1981] 2 SCR 220.

[22] *Syndicat des employés*, above at n. 16.

[23] *Bibeault*, above at n. 16, 1088.

considerations. First, the distinction between jurisdictional and other questions is an unworkable formal one and so its preservation is at odds with a pragmatic approach. Second, Beetz J. still found it appropriate to pronounce in formalistic language on the importance of the Court's role in maintaining the rule of law. Third, he declared the intention of the legislature to be the single most important factor in determining whether a question is jurisdictional.[24] It was thus left completely unclear whether courts were to treat the idea of legislative intent as a fiction constructed on the basis of substantive considerations or whether legislative intent should play an independent formal role.

These problems, none of which can be blamed on Beetz J. given that each is present in the structure of *CUPE*, made it very difficult to give a coherent account of the politics of deference. Prior to *CUPE*, formalistic approaches usually travelled with a judicial conservatism—one which tried to preserve at all costs a rationale for ultimate judicial power over the determination of all questions of law. But the move to recognition of substantive reasons for judicial deference to administrative determinations of the law opens up inevitable problems about the judicial evaluation of substance.

Such problems manifested themselves both when, in the face of a privative clause, judges had to decide on the jurisdictional/other issues of law distinction and when, having decided that the issue was not a jurisdictional one, the question was whether the agency's determination of the issue met the test of patent unreasonableness. When there was judicial consensus both that the issue was not jurisdictional and that it had not been unreasonably determined, it often seemed to be the case that judges were using the language of reasonableness to describe what they clearly thought to be a correct, and therefore, *a fortiori* reasonable, agency determination. Dickson J.'s reasoning in *CUPE* on the topic of the agency's interpretation of the terms of its governing statute is one of the best examples here.[25] And as Sopinka J. frankly pointed out in *Paccar*,[26] the issue of reasonableness might only properly arise once a judge had come to the conclusion that the administrative determination was not in fact correct. I am unaware of any judgment of the Court in which a judge has stated that an administrative determination, though incorrect, had to be upheld because it was not patently unreasonable.

When a judge disagreed with an administrative determination of the law, she had, therefore, one of two options open to her. She could categorise the determination as jurisdictional in nature, thus permitting review on a standard of correctness. Or she could try to articulate why the determination, though within jurisdiction, was patently unreasonable. When judges engaged in the former exercise, one could charge them with departing from the spirit

[24] Bibeault, above at n. 16, 1088.
[25] *CUPE*, above at n. 6, 235–7.
[26] Above at n. 15, 1018.

of *CUPE*.[27] But it was very difficult to make that charge stick given the problems inherent in the structure of *CUPE* itself. And when a judge had no option but to find that the agency's determination was within jurisdiction, it usually seemed that a finding that that determination was patently unreasonable was driven by the judge's sense that it was incorrect.

One fine example of this is the dissenting judgments of two of the standard bearers of *CUPE*, Wilson and L'Heureux-Dubé JJ., in *Paccar*.[28] Here the British Columbia Labour Relations Board, under the protection of a privative clause, decided that an employer could unilaterally impose new and detrimental terms on its employees after a collective agreement had terminated. The question before the Court was whether this decision was a patently unreasonable interpretation of section 27 of the British Columbia Labour Code, which enjoined the Board to secure industrial peace, improve the practices and procedures of collective bargaining, and promote conditions favourable to the orderly and constructive settlement of disputes.

The dissenting judges shared the premise that the interpretation was inconsistent with the objective of Labour Codes to promote equality of bargaining power between employers and employees. In her judgment, Wilson J. dealt with the point that the privative clause clearly remitted to the Board the question of how to translate that objective into practical policy in the following passage:[29]

> "[D]oes describing a Board's decision as a 'policy choice' insulate it from review if the policy on which the choice is based is inconsistent with the policy of the legislation under which it purports to be made? I do not believe so. A policy choice is only truly a policy choice if the choice is made between policies which are equally consistent with and supportable by the legislation."

In other words, even within its area of specialisation, a Board has to be true to the basic objective of its governing statute, on the judge's understanding of what is consistent with implementing that objective. *CUPE* is then implicitly relied on as authority for the proposition that administrative determinations of law/policy must be held to standards of rationality whose content judges have a legitimate role in deciding.

L'Heureux-Dubé J.'s basic premise was different. She started by arguing, not that the policy content of the decision was inherently irrational, but that the Board had not explicitly justified its decision in terms of whether it met the statute's objective of securing industrial peace, etc. The implication might seem to be that the Board might have been able to offer an adequate justification, one that could meet the reasonableness standard, so that the problem is one of failure to provide reasons on crucial issues. However, the judge then had to explain why there was this particular onus on the Board to provide

[27] Beetz J.'s judgment in *Syndicat des employés*, above at n. 16, is a good example.
[28] *Paccar*, above at n. 15, 1020 and 1026.
[29] Ibid., 1022–3.

such reasons. And her explanation here is that its interpretation was fundamentally inconsistent with the objective of the statute. In other words, the Board would have found it next to impossible to supply reasons that could justify its departure from her understanding of the policy requirements of the statutory scheme.[30]

The only way to explain these two dissents is that both judges thought that the Board had lost jurisdiction when it ceased to operate in accordance with a particular understanding of the value of equality of bargaining power which they attributed to the legislature.[31] And then the judges might seem to be superimposing substantive moral limits as jurisdictional limits on a clear statutory delegation of power to an administrative agency.

My point is not that they were wrong to do so, for I will argue later they were right. Nor is my point that any of the judges could somehow avoid getting engaged in an interpretative, value-laden choice as to the legal limits of the tribunal's powers. Rather, if judges were to take seriously the formal reason for deference articulated in *CUPE*—the legislative command to judges to adopt a hands-off approach—their value choice should have been to let the tribunal make the value choice. To do otherwise, was to enter into an evaluative contest within the tribunal's area of specialisation, an area protected by legislative command. (It is worth noting in this regard that Dickson C.J. concurred in one of the majority judgments in *Paccar*.) Nor, finally, is my point that the minority judgments were irreconciliable or even difficult to reconcile with *CUPE*, taken as a whole. After all, the judges had to draw a line somewhere, and *CUPE* said that tribunals could not be patently unreasonable within jurisdiction. Rather, my point is that *CUPE* taken as a whole is riddled with tension since the formal and the substantive rationales for deference are in conflict. To anticipate a bit, I do not think that it is possible for judges to avoid interpretation and interpretation requires substantive evaluation. In short, the formal rationale for deference cannot be taken seriously.

Paccar can be usefully contrasted with the Court's decision in *Lester (W.W.) (1978) Ltd.* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*.[32] The Newfoundland Labour Relations Board had to deal with a situation of "double breasting", one in which a company creates a parallel company in order to employ non-union labour, thus evading the scope of a collective agreement binding on the first company. It did so by declaring the parallel company bound by the collective agreement because it was a "successor" to the first. The statutory provision it relied on referred explicitly to the situation where one enterprise "sells, leases, transfers or otherwise disposes of" the business.

The majority of the Court held that the Board's determination was non-jurisdictional but patently unreasonable because there was no evidence that a

[30] *Paccar*, above at n. 15, 1043–6.

[31] For a very illuminating analysis along these lines, see Allars, above at n. 13, 189–90.

[32] [1990] 3 SCR 644 (hereafter referred to as *Lester*).

transfer or other disposition of a business had taken place. In effect, the majority held that the Board had by its decision enacted an anti-"double breasting" provision into the statute under the guise of interpreting the successorship provision.

Wilson J., in a dissent concurred in by Cory J. and Dickson C.J., repeated an earlier warning that the Court was straying from the spirit of *CUPE*:[33]

> "[T]here has been a tendency in the post-*C.U.P.E.* era to return to a less stringent test for judicial review than the one established in *C.U.P.E.* This backsliding has been largely predicated upon a rather Dicean [sic] view of the rule of law and the role that the courts should play in the administration of government. That approach to curial review in the administrative context is, in my opinion, no longer appropriate given the sophisticated role that administrative tribunals play in the modern Canadian state. I think we need to return to *C.U.P.E.* and the spirit which *C.U.P.E.* embodies."

But she went on to hold that the Board was entitled to deference not simply because its decision were protected by a privative clause, but because it was "clearly arguable" that the Board's "liberal" interpretation of the successorship provision was "consonant with the purpose and intent of the overall legislative scheme, i.e., to facilitate and preserve collective bargaining regimes between unions and employers".[34] That is, she found here both that the Board had not lost jurisdiction and that its interpretation was not patently unreasonable. And both findings, I suggest, are driven by her sense that the Board's decision did accord with the value of equality from which the Board in *Paccar* had strayed.

Such descents into substance by judges who agree that the issue is one within the jurisdiction of the tribunal but who are at odds over how to deal with the substantive merits of the tribunal's actual decision were both inevitable after *CUPE* and signalled *CUPE*'s demise. They were inevitable because of the mixed message which *CUPE* sent and, even more important, because if the spirit of *CUPE* was to be more than a will-o'-the-wisp, it was the substantive part of the message that had to be heeded. If it were not, then even when there were good substantive reasons for deference but no formal command to do so, courts would be entitled to review on a standard of correctness.

The Court has now held that when such reasons exist, courts must defer on a spectrum ranging from correctness to patent unreasonableness.[35] While this holding whittles away at the distinction beteeen form and substance and is for that reason welcome, the idea of a spectrum is inherently confusing—a clear product of *CUPE*'s mixed message.

[33] Ibid., 651.

[34] Ibid., 653.

[35] *Pezim* v. *British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557, following the implied rationale of *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] 1 SCR 1722 (hereafter referred to as *Bell Canada*).

In addition, by making a distinction between "true" or "strong" and other privative clauses, the Court has started on the slippery slope to holding that, when there are not very weighty substantive reasons to defer, courts should reinterpret the legislative command to defer.[36] I would again venture that the Court is here whittling away at the form/substance distinction while remaining trapped by it.

Now if one can rely on judges to deal properly with substantive reasons for deference, the descent into substance might seem welcome. Deference would not then depend on whether or not the legislature had commanded such an attitude but on whether judges should have such an attitude.

The problem, as I will argue more fully later, is not so much that judges will not agree on what kind of reason is a substantive one, and when and how it should count, but that the question of reasons for deference can never be wholly or even mostly kept apart from the judge's evaluation of the merits of the agency's determination. It is no accident that Beetz J.'s articulation of the substantive rationale for deference in the pragmatic functional approach was, as he said, to be deployed to determine the administrative decision's unreasonableness once it had been used to determine that the decision was within the agency's jurisdiction.[37]

It is, perhaps, awareness of this fact that has led the standard bearers of *CUPE* to retreat on occasion to the formalist element of that judgment, or, at least, to back off substance because of their sense that the descent into substance involves a battle of judicial views about correctness.

An example of retreat to formalism is Cory J.'s dissent in the first of the decisions which made the distinction between true and other privative clauses. He dissented mainly because of his sense that it would proliferate review if one allowed the question of deference to be settled by the judicial evaluation of substance rather than by a formal legislative command.[38]

An example of retreat from substance is Wilson J.'s judgment in *National Corn Growers Association* v. *Canada (Import Tribunal)*.[39] She gave a separate judgment, in which Dickson C.J. concurred, warning for the first time that the Court was beginning to stray from the spirit of *CUPE*; and she backed this warning with a sophisticated theoretical discussion of the rule of law. While

[36] *Dayco (Canada) Ltd.* v. *CAW-Canada* [1993] 2 SCR 230 (hereafter referred to as *Dayco*) and *United Brotherhood of Carpenters and Joiners of America, Local 579* v. *Bradco Construction Ltd.* [1993] 2 SCR 316 (hereafter referred to as *Bradco*).

[37] *Bibeault*, above at n. 16, 1088.

[38] "To open the way to many and varied judicial interpretations of the words of any privative clause as to whether it was more or less privative in nature can do little but encourage a proliferation of litigation and interminably delay a final resolution. It would defeat the aim of legislators who no matter what the words chosen . . . were seeking to have the courts refrain from interfering with the decisions of the statutory labour boards or tribunals": *Dayco*, above at n. 36, 311. In the subsequent decision, *Bradco*, above at n. 36, 350 Cory J. repeated his concern that the Court's approach was undermining *CUPE*, but said he would thenceforth "loyally follow the reasoning of the majority".

[39] [1990] 2 SCR 1324 (hereafter referred to as *Corn Growers*).

her concerns were directed mainly at Beetz J.'s perceived misdemeanours, she was clear that the majority's approach to the matter before the Court triggered the same concerns about the erosion of the deference principle, even though the majority had found, with her, that the tribunal's determination met the reasonableness standard. The majority erred, she said, in determining the issue of patent unreasonableness by engaging in "the kind of detailed review of a tribunal's findings that this Court's jurisprudence makes clear is inappropriate".[40] That is, courts should avoid the descent into substance by remaining at a more abstract level because—the implicit reason—such a detailed review must engage with judicial views about correctness.[41]

It is significant that L'Heureux-Dubé J., who with Cory J. is the remaining *CUPE* standard bearer on the present Court, concurred in the majority judgment in *Corn Growers*. As her dissent in *Paccar* shows, the main feature which distinguishes it from Wilson J.'s dissent in that case is that L'Heureux-Dubé J. takes the tack of going into detail in order to defend or attack a tribunal's determination within jurisdiction.

This willingness to go to bat for tribunals has served her well in her dissents to two decisions by the Court on the standard of review to be applied to human rights tribunals adjudicating matters arising out of complaints in terms of federal and provincial codes of rights.[42] In both of these cases, the majority of the Court, noting that the legislature had not seen fit to shield such tribunals with a privative clause, insisted that the standard of review had to be correctness. Their reasons pertained to the legal nature and far-reaching implications of the issues at stake in human rights adjudication. They also held that the tribunals failed to meet this standard. Both of these decisions are setbacks to the constitutional commitment to equality between Canadians and one can confidently predict that Wilson J. would have spoken strongly in dissent.

But she would not have been able to do so on the basis adopted by L'Heureux-Dubé J.—that there can be reasons to defer even when there is no privative clause—for those reasons involve the kind of descent into substance which Wilson J. wanted courts to avoid. She could, of course, have defended the tribunals' determinations on the basis that they were correct. And so detailed is L'Heureux-Dubé J.'s defence allegedly using the standard of reasonableness that in a separate dissent in the first of these decisions, two of the judges held with the majority that the standard for review in such cases is correctness but that L'Heureux-Dubé J. had shown that the tribunal was correct.[43] But that defence would have required Wilson J. to reduce the spirit of

[40] Ibid., 1347–8.

[41] Hence Wilson J. is in a sense in agreement with Sopinka J. in *Paccar*; see text accompanying note 26 above.

[42] *Canada (Attorney-General)* v. *Mossop* [1993] 1 SCR 554 (hereafter referred to as *Mossop*) and *Gould* v. *Yukon Order of Pioneers* [1996] 1 SCR 571 (hereafter referred to as *Gould*).

[43] Cory and McLachlin JJ.

CUPE to its formal part, which she would surely have been loath to do. For if judges regard deference as a purely formal matter detached from any substantive rationale for deference, deference jurisprudence becomes a matter of judicial accounting. And, as the English as well as the Canadian experience shows, creative accounting permits review on substance or correctness when judges are so disposed.

In short, formalism without substance is futile. But the relationship between formalism and substance is such that the latter inevitably undermines the former.

However, not even L'Heureux-Dubé J. has been able to resist the retreat to formalism in her judgments for the Court in two decisions where the logic of the situation seemed to demand that the court descend into substance. In both the situation was one in which the issue fell within the jurisdiction of at least one tribunal protected by a privative clause and so would normally have been subject to reasonableness review. But the issue came to court because of conflicting decisions so that it appeared that the reviewing court would, for the sake of coherence in the legal order, have to choose between the decisions. If it was then the case that both decisions met the reasonableness standard, it appeared further that the only way to adjudicate between them would be on a standard of correctness.

In the first of these decisions, *Domtar Inc.* v. *Québec (Commission d'Appel en Matière de Lésions Professionnelles)*,[44] L'Heureux-Dubé J. held that the commitment to the formal element of the deference principle is of such great importance that it outweighs the disadavantage of living with the incoherence created by what she called a "jurisprudential conflict", one in which two different administrative tribunals give conflicting interpretations of the same statute in cases involving different parties. She said:[45]

> "The advisability of judicial intervention in the event of conflicting decisions among administrative tribunals, even when serious and unquestionable, cannot, in these circumstances, be determined solely by the 'triumph' of the rule of law. Where decisions made within jurisdiction are not patently unreasonable, the issue instead turns on whether the principles underlying curial deference should give way to other imperatives. In my opinion, the answer is no."

To hold otherwise would, she said, alter "the already delicate institutional relationship between administrative tribunals and courts with reference to the impugned decision" and this risked that the "arbitrariness which the judicial sanction is designed to remedy may . . . become the result".[46]

In the subsequent decision, *British Columbia Telephone Co.* v. *Shaw Cable Systems (BC) Ltd.*,[47] the Court was faced with a situation in which the con-

[44] [1993] 2 SCR 756 (hereafter referred to as *Domtar*).
[45] Ibid., 795.
[46] Ibid., 795–6.
[47] [1995] 2 SCR 738 (hereafter referred to as *BC Tel*).

flict was even starker.[48] A British Columbia labour arbitration board held that a company—BC Tel—violated an exclusive-work provision in a collective agreement when it contracted out cable installation work to a company whose workforce did not belong to the union. However BC Tel, in contracting out, was falling into line with a ruling made after the labour arbitration board's ruling by a federal agency, the Canadian Radio-Television and Telecommunications Commission (CRTC).

The case came to the Supreme Court by way of an appeal against a decision by the Federal Court of Canada, where Mahoney J. had held that that the CRTC's decision was patently unreasonable because it did not take into account the labour arbitration board's decision. In doing so, it had exceeded its extensive powers by requiring BC Tel to violate its collective agreement with the union.[49]

L'Heureux-Dubé J. recognised that here there were two genuinely conflicting decisions, although she held that the conflict was short of what she termed an "operational conflict"; one in which the individual is forced to ignore one of two orders, because these require contradictory courses of action. She was prepared to assume that the conflict was operational but she held that this did not require the Court to go into the merits of the decisions. She relied here on an analogy with the constitutional doctrine of paramountcy, whereby a court is able to declare inoperative provincial legislation to the extent that it is in conflict with federal legislation.[50]

She then said that the courts could apply the paramountcy doctrine in the administrative context by using a pragmatic and functional approach to decisions in operational conflict. The approach would determine which tribunal the legislature intended to be paramount. The criteria she identified as playing a role in such an approach are all in a sense structural, that is, they pertain to the tribunal's place in the legal order and so allow a court to avoid considering the merits of the actual decisions.[51]

First, the courts should consider the "legislative purpose behind the establishment of each administrative tribunal", the idea being that the "more important the tribunal, the more likely the government would have intended that tribunal's purpose to take precedence over that of another tribunal".[52] Second, the more central a decision is to the purpose of a tribunal, the more likely it is that that tribunal should take precedence over a tribunal whose decisions are less central to its purpose. Third, a tribunal whose decisions

[48] Indeed, L'Heureux-Dubé J. held in *Domtar*, above at n. 44, that the situation was not even one of true jurisprudential conflict, but she was prepared to treat it as such for the sake of resolving the issue of the appropriate judicial attitude in such cases.

[49] (1993) 13 Admin LR (2d) 250, 260–65. Strictly speaking, the test need not have been the unreasonableness test, since the CRTC's decisions, by contrast with the labour arbitration board's, were not protected by a privative clause and were subject to appeal.

[50] *BC Tel*, above at n. 47, 768–70.

[51] Ibid., 770–3.

[52] Ibid., 771–2.

fulfil a policy-making or policy-implementation role to a greater degree than another tribunal's will take precedence over it.

On these criteria, she said, the answer to the question of precedence in the case was clear. The CRTC was fulfilling "Parliament's intention of regulating monopoly service providers in the public interest" while the labour arbitration board was "merely interpreting a private contract relating to the internal arrangements made by BC Tel to carry out the activities assigned to it".[53]

While the rest of the Court agreed with L'Heureux-Dubé J.'s disposition of the matter as well as with her reason for doing so, the other judges were concerned that her test for true conflict was too strict. In addition, Cory J. expressed a concern to do with her view that the CRTC's decision was public in nature by contrast with the private nature of a decision interpreting a collective agreement, so that the former in virtue of that fact had to take precedence.[54] He said:[55]

> "A collective agreement is much more than a private arrangement. It provides the foundation for labour relations. It exists so that peace in labour relations can be achieved and maintained. This goal which is so important for our society is the aim of all labour legislation."

I quote this extract in order to suggest a general problem with the retreat to formalism, in this case a retreat to what may appear to be structural factors from the substantive issues involved in evaluating the tribunals' decisions.

Recall that in *Paccar* Wilson and L'Heureux-Dubé JJ. dissented because of their sense that the tribunal's decision undermined the value of equality which a statute governing employment relations was meant to serve. Put differently, they understood the decision as placing employment relations on a slippery slope to pre-collective bargaining standards, to a world which Wilson J. said had "ceased to exist".[56] And in *Lester* she upheld the Board's decision to extend a successorship provision to the practice of double breasting because that extension increased the reach of the same value.

It is, of course, an excess of wishful thinking to suppose that Wilson J. was right in her claim in *Paccar* that the world had ceased to exist in which private power, in the form of the economic power of the 'haves', dominated employment and other relations. The realm of the public which was carved out in the creation of the administrative state, a realm premised on rich understandings of the equality of all citizens, is being privatised with increasing rapidity and vehemence. Cory J.'s reminder to the Court in *BC Tel* that the

[53] *BC Tel*, above at n. 47, 772–3.

[54] Several judges expressed their general concurrence with Cory J., as well as with McLachlin J., who confined her concerns to the issue of whether there was a true operational conflict. It is unclear whether (and I suspect unlikely that) this concurrence extended to Cory J.'s worry about the diminution in status of labour arbitration boards.

[55] *BC Tel*, above at 47, 776.

[56] See *Paccar*, above at n. 15, 1025–6. She was quoting here from the majority reasons of Professor Bora Laskin (as he then was) in *Re Peterboro Lock Mfg. Co.* (1954) 4 LAC 1499, 1502.

control of labour relations serves a *public* value, one of crucial importance to "our society", is a salutary warning to judges. It warns them of the need for judicial sensitivity to the forces of political change increasingly behind the legal issues before the courts.[57] In contrast, the retreat from substance in which L'Heureux-Dubé J. has at times engaged obscures such issues.

Now it may seem that the thesis for which I am arguing is the absurd one that judges must defend social democracy at all costs, that administrative decisions that uphold equality must be upheld while those that detract from it must be struck down. However, I have in mind something which I hope is more subtle.

First, my thesis is not that equality is a central concern in all or even many cases of judical review. However, equality is implicated in a lot of the decisions regarded as landmarks in Canadian administrative law, as a read through the leading casebook will attest.[58] For example, if one reads through the passages in *CUPE* where Dickson J. in effect vindicated the decision of the New Brunswick Labour Relations Board, it is clear that his support for the Board's determination is driven by his sense that it preserved equality of bargaining power as between employer and employee.[59]

Nor are such examples confined to review for error of law. Review for procedural error may implicate the value of equality even more often. Thus, *Nicholson* and its most important successor, *Knight* v. *Indian Head School Division No. 19 of Saskatchewan*,[60] were both about equality in the following sense. Both concerned the issue whether a category of public employees hitherto considered not entitled to a hearing before dismissal were so entitled. The extension of the right to procedural fairness in these contexts is premised on the view that the state and public actors are rightly held to higher moral standards than are "private" individuals. And that must be because the state is obligated to exemplify what it is to treat all citizens as equals.[61]

[57] Cory J.'s acute sense of such issues is reflected in his important lone dissent in *Canada (Attorney-General)* v. *Public Service Alliance of Canada* [1991] 1 SCR 614. The Public Staff Relations Board had decided that teachers working for a private company to which a penitentiary had contracted out teaching services for inmates were "employees in Public Service" and therefore were to be included in the teaching group bargaining unit. Sopinka J. for the majority of the Court (L'Heureux-Dubé J. concurring) held that this decision was patently unreasonable.

[58] J.M. Evans, H. N. Janisch, David J. Mullan and R.C.B. Risk (eds), *Administrative Law: Cases, Text, and Materials* (Emond Montgomery Publications Ltd., Toronto, 4th ed. 1995).

[59] As he put it, if, in the context of a public sector strike, the employer were permitted to replace striking workers with management, the "right to strike would be sterilised and the supposed choice of settlement techniques . . . would become illusory": see *CUPE*, above at n. 6, 242.

[60] [1990] 1 SCR 653 (hereafter referred to as *Knight*).

[61] See L'Heureux-Dubé J. for the majority in *Knight*, ibid., 668–9. As she put it : "The duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that must be exercised according to the rules of administrative law". Note that, later in her judgment, L'Heureux-Dubé J. qualified the point about statutory basis in ways that might have important implications for requiring procedural fairness of employers where the basis is not strictly a statute but rather a statutory delegation of power to a public official to enter into a contract with a private individual or entity to perform public services. She said that there need only be a "strong 'statutory

The second reason why my thesis about the role of equality in judicial review is not too simple-minded is that it does not hold that the issue is one about whether the judge agrees with the agency about the interpretation of equality. I have tried to show that even judges who seek to be loyal followers of *CUPE* have trouble working out its mixed message and are tempted on occasion to embrace its formalist part in order to avoid descending into substance. However, I want now to argue that one can reject formalism, or, perhaps better put, any strict dichotomy between form and substance, without reviving the kinds of judicial activism which Dickson J. in *CUPE* sought to put to rest.

My thesis depends on a theory which connects the value of equality with the rule of law through the idea of a legal culture of justification.[62] And that idea, as I will now argue, gives a role to the agency's reasoning which offers judges a new understanding of the deference principle.

EQUALITY AND THE RULE OF LAW

Recall that in *BC Tel* Mahoney J. for the Federal Court of Appeal found the CRTC's decision to be patently unreasonable because it had failed to take into account the labour arbitration board's decision. In so doing, he was, in my view, relying on an implicit theory about the role of the rule of law in the administrative context. Much the same theory is implicit in L'Heureux-Dubé J.'s judgment in *Paccar* when she started by arguing, not that the policy content of the decision was inherently irrational, but that the Board had not explicitly justified its decision in terms of whether it met the statute's objective of securing industrial peace, etc.

While L'Heureux-Dubé J. then seemed to offer little hope that such a justification could be made, the fact that she left open the space for such a justification is significant. For in leaving open that space she, in contrast with Wilson J., acknowledged the independent weight that judges should give to the tribunal's reasoning. And it is a curious feature of such an acknowledgement that it requires the close judicial scrutiny of the tribunal's reasoning that Wilson J. generally sought to avoid. That is, L'Heureux-Dubé J.'s approach raises starkly the paradox of the recognition of rationality—that to recognise rationality in practice is always at the same time to begin to measure a practice against standards of rationality. How then is such a recognition consistent with a deference principle? It is consistent, I will argue, if we understand

flavour' " to the office (quoting from H.W.R. Wade, *Administrative Law* (Clarendon Press, Oxford, 5th ed. 1982), 498–99): *Knight*, ibid., 672. And she affirmed a non-statutory basis for review on procedural grounds, claiming that "[l]ike the principles of fundamental justice in s. 7 of the *Canadian Charter of Rights and Freedoms*, the concept of fairness is entrenched in the principles governing our legal system": ibid., 683.

[62] I owe this term and the idea to Etienne Mureinik; see, e.g., his "Emerging from Emergency: Human Rights in South Africa" (1994) 92 *Mich LR* 1977.

deference in terms of its secondary dictionary meaning—deference as respect —and not in terms of its primary dictionary meaning—deference as submission.

It is Dicey's model which adopts the deference principle according to its primary meaning of submission to authority. It is only if law can be construed positivistically that deference of this kind can work. However, it is crucial to see that deference of this kind need not involve a humble renunciation of judicial power. Far from it. Since it presumes that there will be a fact of the matter as to legislative intent which judges are uniquely equipped to discover, its consequence is that, absent other factors, judges owe no deference to administrative determinations of the law.

When other factors are present, most notably, when there is a privative clause, Diceyan judges will try to reach an accommodation between such factors and their model. All the twists and turns in the Court's jurisprudence on the issue of substantive review for error of law and jurisdiction are explicable in terms of different *ad hoc* attempts to reach such an accommodation.

Deference as respect, by contrast, provides an ideal which can inform an attempt to rearticulate the relationship between the legislature, the courts and the administration in such a way that the courts retain a legitimate role as the ultimate authority on the interpretation of the law.

In statutory interpretation, this ideal requires of judges that they determine the intention of the statute, not in accordance with the idea that there is some prior (positivistic) fact of the matter, but in terms of the reasons that best justify having that statute. Since a statute states a series of conclusions to deliberations rather than the reasoning that led to these conclusions, judges have here to reconstruct the reasoning that justifies those conclusions. And since in issue is what those conclusions are, this reconstructive project is one which at the same time plays a role in determining their content.

When the statute is one that sets up a regulatory regime and a tribunal to decide disputes that may arise out of the regime, this interpretative approach requires judges to take the tribunal's decision seriously. More precisely, they have to take the tribunal's reasoning seriously because what they are primarily concerned to do is to find the reasons that best justify any decision, whether legislative, administrative or judicial. And, if the court has before it not only a statute to interpret, but also a tribunal's interpretation of that statute, then the tribunal's interpretation makes a difference to the structure of the interpretative context.

One should not underestimate this difference. It might well be true that a court would come to a different conclusion as to statutory meaning than the one the tribunal reached had the tribunal not given a reasoned decision, but the context is different just by virtue of that decision. The issue for the court is not then what decision it might have reached had the tribunal not pronounced, but whether the reasons offered by the tribunal justify its decision.

There are what one can think of as both formal and substantive reasons for

this attitude of judicial deference. Formally speaking, whether or not there is a privative clause, the legislature has chosen the tribunal and not the court as its front line adjudicative body. More substantively, because the tribunal is closest to the problems out of which the issue arises, can deal with them relatively quickly and cheaply, and may have in addition developed a considerable expertise, the court should take the tribunal's reasoning seriously. That is to say, it must treat the reasoning with respect by asking whether that reasoning did in fact and also could in principle justify the conclusion reached.[63]

Moreover, the court must adopt that attitude whatever the subject matter of the tribunal's reasoning—whether the issue is fact or law (including the tribunal's powers, other statutes, the common law, and constitutional law). The court should therefore intervene only if it is prepared to discharge the onus of showing, not that it would have reached a different decision, but that the decision reached is not reasonably supportable.

"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.

"Reasonable" should not therefore be taken to mean that there could reasonably have been another resolution of that issue. If one understands reasonableness in such a way, one is willy-nilly operating within Dicey's shadow. When Diceyan judges have to interpret a privative clause they are faced with a legislative command to which their doctrine of deference requires submission. But that requirement is at odds with their understanding of their role at the apex of the intepretative hierarchy. Their "solution" is to adopt a "two or more right answer" thesis when, and only when, the issue is one apparently within a tribunal's jurisdiction and that jurisdiction is protected by a privative clause.

While this thesis contradicts the idea of submissive deference to one correct answer as to what the law is, it permits Diceyan judges, albeit in an *ad hoc* way, to live with privative clauses. First, it permits them to adjudicate in the old way when there is no privative clause. Second, it permits them to retain

[63] I remain undecided on the important topic of whether my argument entails the claim that there is a common law duty on tribunals to give reasons. As has often been pointed out, a reason-giving requirement invites both judicial activism and distortion of the administrative process. See, e.g., M. Shapiro, "The Giving Reasons Requirement" [1992] *Univ. of Chicago Legal Forum* 179 and R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1989–90) 3 *Can J of Admin L & Prac* 123. A most promising basis for a reason-giving requirement in particular classes of cases is laid out by Sedley J. in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242.

the standard of correctness for determining the scope of jurisdiction. Finally, the *ad hoc* nature of their methodology permits them, when there is a privative clause, to reason that the tribunal's decision was not in fact one among the range of reasonable decisions.

In sum, the idea that there are two reasonable answers is one which implements a positivist solution to the problems Dicey's model has in compromising with the administrative state. It seeks to preserve judges in their place at the apex of the interpretative hierarchy by adopting a "solution" which treats privative clauses as a legislative tie-breaker on certain issues. However, as we have seen, that solution is completely *ad hoc* and thus no solution at all.

This brings me to the last and most substantive reason for adopting the principle of deference as respect. The principle is inherently democratic. It adopts the assumption that what justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them. The difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power.

The legislature, the administration and the courts are then just strands in a web of public justification. The courts' special role is as an ultimate enforcement mechanism for such justification. When administrative tribunals make decisions on points of law, those subject to the decision are entitled to require that the tribunal should offer reasons that in fact justify the decision. Should they not be satisfied, recourse to the courts should be available. But that recourse must be on the basis of the question whether the tribunal's decision was supportable by the reasons it in fact and could in principle have offered.

Deference as respect thus seems to avoid the dangers of judicial activism, even though it invites judges closely to scrutinise tribunal determinations of the law. It may however be thought that it risks a judicial quietism which comes about when the judicial stamp of approval is required merely because a tribunal has offered a full set of reasons for its decision. But judicial quietism is avoided just because the ideal which guides deference as respect is a democratic one which links form to substance—to the value of equality.[64]

In review for procedural error, the principle of equality is more formal, requiring as it does that a court attend to considerations to do with the provision of fair opportunities to participate in the administrative process. That is, to be treated as an equal one must be given the right to be heard by an impartial tribunal, with both the content of the right and of the kind of impartiality due to one varying according to the context. However, as cases like *Knight* illustrate, form easily shades into substance since to require a hearing for employees prior to dismissal requires giving reasons for the dismissal, a factor which changes the status of the employee.

[64] My project is thus on all fours with that proposed by Sir Stephen Sedley; see, e.g., his "Human Rights: A Twenty-First Century Agenda" [1995] *PL* 386, esp. 399.

In review for error of law where the value of equality is implicated because the legislative regime in question is an equality-promoting one, that value plays a rather different role. Although the administrative state has become much more than the welfare state, it was put in place in order to follow through on the promise of substantive equality before the law, once formal equality had been by and large achieved by legal subjects.

Now that state is under attack on at least three fronts. It is argued, first, that its delivery of services to the public is inefficient; second, that public resources can no longer support the levels of delivery which had come to be taken for granted; third, that it is morally wrong for the state to be committed to the substantive value of equality.

Part of the problem with addressing the first two issues is that they are often confused with the third. Attacks on the very existence of the administrative state are often disguised as arguments about ineffeciency and lack of resources. The need to disguise is significant—it tells us that, despite popular misgivings about inefficiency and lack of resources, there is still a popular commitment to equality.

Administrative agencies are going to play a crucial role in determining how, in an era of fiscal restraint, the administrative state can best be reconfigured. But it makes a great deal of difference whether one regards that process as genuinely one of reconfiguration or as one whose aim is to destroy the institutional and legislative expressions of a political commitment to equality. When judges find themselves confronted with administrative determinations of the law that flow from this changing political situation, they should not be embarrassed to ask how those determinations advance the cause of equality. For the administrative state has entrenched equality as one of the values of the rule of law.[65]

However, the attitude of deference as respect requires that judges defer to such an agency determination not on the basis of whether they agree with it, but, rather, on the basis whether the agency has justified its determination in terms of its commitment to the value that provides the rationale for the administrative state. Sometimes, as in *Paccar*, the agency determination will be so out of kilter with any understanding of a commitment to equality that it may seem that such a justification is not available. But generally matters will not be so clear and the issue will be one of whether the agency provided a reasonable justification.

I also want to suggest that the attitude of deference as respect may be helpful in another regard. Recall that the paradox of the recognition of rationality arises because one process of reasoning and decision-making—the administrative process—is recognised by another—the judicial process—as

[65] I mean here to imply that this was a process of recognition through entrenchment; that is, the value was one to which the rule of law has always been committed. I argue for this position in *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Clarendon Press, Oxford, forthcoming).

both autonomous and subject to judicial supervision. The danger, then, is that judges, whether consciously or unconsciously, will impose their own standards of rationality on the administrative process. Deference as respect, however, seems to me to open up space for judicial sensitivity to particular tribunals' own sense of how best they can respond to their mandates.

In an era where agencies are going to face complex questions about the relationship between private and public power, and may increasingly differ among themselves about how to resolve such questions, judges will have to be alert to both the substance and the form of the rule of law. My thesis is that the substance of the rule of law is the equality of all citizens before the law and that the form of the rule of law is the procedures whereby public officials demonstrate that they have lived up to—are accountable to—that substance.[66]

It is an anti-positivist thesis in that it claims a distinct moral content to the rule of law. But it is also a democratic thesis, in that it requires that the content be developed through the institutions of government and not determined by abstract philosophising. And until political leaders are prepared frankly to declare in their legislation that the institutions of state should serve the cause of inequality, I suggest that it is the thesis which judges should adopt.[67]

[66] My account of interpretation is clearly indebted to Ronald Dworkin. See, e.g., R. Dworkin, *Law's Empire* (Fontana Press, London, 1986). But there are some differences. Like Dworkin, I do not think that judges deciding questions of law should decide those questions on policy grounds; rather they should decide the questions on the basis of which decision as to the law is best justified by the principles immanent within the law. However, in my view, Dworkin's understanding of principles immanent in the law makes no room for a space accorded by judges as a matter of legal principle to tribunals autonomously to develop the law. In other words, Dworkin accepts the Diceyan picture of judges at the apex of the interpretative legal hierarchy. I lay the groundwork for a different, more democratic account of interpretation in *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*, ibid.

[67] I leave dangling the question whether judges and tribunals should obey the legislature's commands when these are inequitable. My own view is that when such commands reach a certain pitch of inequity, they offend against the ideals of the rule of law even when these ideals are largely implicit because there is no written constitution. See my *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Clarendon Press, Oxford, 1991), esp. ch. 10.