

THE IDEOLOGY OF ADMINISTRATIVE LAW

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Introduction

The prevalence of legal positivism in Canada has often prevented us from seeing the reasons for legal change. We see judgments as technical documents and laboriously trace “principles” back to distant times. Such an exercise is clearly useful, but it should not have a monopoly on legal studies. It is also important to know the purpose for any modification and its historical as opposed to its legal explanation.

Every area of law has, at all times, an ideology. It is used for a purpose. When the law changes drastically, it usually has changed ideologies. A well-known case springs to mind. When the criminal law changed in the late 18th and early 19th century, it was reflecting the influence of such thinkers as Beccaria and Bentham. It would be far too narrow to view those changes as simply the effect of technical statutes or precedents. The persons who made them were thinking of the effects, not of the theory.

Few will deny that the last twenty years have seen a revolution in administrative law. Some of it has originated from legislation. Most, however, has come from judges, usually from those on the higher courts. Much has been written on the technical side of this revolution. The purpose of this essay is different — to show what were the philosophical and political underpinnings of this revolution. It is submitted as a thesis that the changes we have witnessed reflect a new awareness of the threat which modern society poses to individual rights and individual liberty, but not a repudiation of that society. Courts have returned to judicial review for the purpose of protecting freedom, not of preventing government intervention in the economy or in other areas of life. Whenever a threat to the principle of government involvement arose, courts have tended to defend it. However, it has been established that the individual is entitled to a certain minimum of fairness, access to courts and justice. If this is missing, the court will interfere.

I. History Of Modern Administrative Law And Theory

A historical survey of judicial review of administrative action will lead us to conclude that there were three basic phases of the development of this concept.

Prior to approximately 1910, British law had an inchoate but reasonably generous system of remedies against authority. The system was inchoate because no general theory of administrative law and no significant state apparatus by modern standards was in being. The leading cases resembled *Cooper v. Board of Wandsworth Works*¹, which not only traced the principle of *audi alteram partem* back to the Book of Genesis, but also clearly established protection of vested rights and especially property rights as the main object of review.

There were other, non-property cases, some surprisingly “modern” ones dating back to Lord Coke,² but on the whole, property was the basic right to be protected by this area of law.

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1. *Cooper v. Board of Wandsworth Works* (1863), 143 E.R. 414 (H.L.).

2. *See, Bagg's Case*, 11 Co. R 93B. *See also, Julius v. Bishop of Oxford* (1880), 5 A.C. 214 (H.L.) as evidence of awareness of non-property issues but also as evidence of the difficulty of success in such cases.

The best evidence of the "generosity" of this early administrative law can be found in the works of Dicey³ and in Dicey's refusal to accept the French idea of "droit administratif". Every act of officials was subject to scrutiny by the courts and no man was immune from review or liability for damage if he exceeded his powers. This is extremely liberal when compared to later concepts of "non-reviewability".⁴ Obviously, the defence of vested rights was viewed as very important by the purely capitalist society of England around 1900.⁵

After the Liberal victory in 1906 England moved quickly towards a greater role for the state in the life of its citizens.⁶ A major change occurred almost at once in the attitude of the courts towards judicial review.

From the seminal case of *Local Government Board v. Arlidge*⁷, and especially from the famous and misunderstood decision of *R. v. Electricity Commissioners*⁸, there was a conscious attempt to take certain aspects of administrative conduct out of the supervisory jurisdiction of the Courts. Courts invoked the vague notion of "administrative decision"⁹ or of "domestic tribunal"¹⁰ to deny relief and rejected many apparently appealing cases.

The higher courts in England, which were obviously more aware of fashionable progressive intellectual events or political tendencies than the rest, seem to have decided to discourage judicial review since, before most judges, such review would be used as a way of stifling the new social democratic reforms. It was generally believed not only by philosophers but also by the higher judges that the frequent resort to the judiciary would lead to conservative decisions in defence of property and that the role of the courts was to interfere only in truly "judicial" matters or in cases of flagrant abuse.

An excellent example of this can be found in *Minister of Health v. R ex p Yaffe*.¹¹ The House of Lords refused to interfere with a housing scheme and to protect the private interests of a slum landlord; however, it suggested that in an extreme case of misuse of statutory power it would interfere notwithstanding the strongest privative clause. In short, judicial review was to be a way of correcting flagrant and obvious misuses of power, not a method of reviewing state intervention in the economy and in other areas of life.

This attitude persisted until the early 1960's and in Canada until the late 1970's. The epitome of it can be found in such cases as *Nakkuda Ali*,¹² *Calgary*

3. Dicey, *An Introduction to the Study of the Law of the Constitution*.

4. See, Grey, "Discretion in Administrative Law", (1979) 17 Osgoode Hall L.R. 107.

5. "Purely Capitalist" is here contrasted with the social-democratic society which emerged after 1906 and especially after 1945.

6. This is not to deny that the nineteenth century also saw some social reforms (e.g. Factory Acts, compulsory and free education Acts).

7. *Local Government Board v. Arlidge*, [1915] A.C. 120 (H.L.).

8. *R. v. Electricity Commissioners*, [1924] 1 K.B. 171 (C.A.) and the comments on it in *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).

9. See, *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66 (P.C.).

10. See, DeSmith, *Judicial Review of Administrative Action* (3rd ed.) at 198-200. In some cases such as the ones involving the Church of England's deliberative bodies, the "domestic tribunal" concept would hold today as well.

11. *Minister of Health v. R. ex p Yaffe*, [1931] A.C. 494 (H.L.). It is to be noted that Stafford Cripps represented the government which opposed judicial review. This is an indication of the prevalent intellectual trends at the time.

12. *Nakkuda Ali*, *supra* n. 9.

*Power v. Clarence Capithorne*¹³ and the Federal Court of Appeal decision of *Martineau v. Matsqui Institution No. 2*.¹⁴ This last decision is perhaps the most interesting, notwithstanding the fact it was reversed, because it constitutes the most unequivocal denial of judicial review in administrative matters that can be found in English law.¹⁵

During this period a number of decisions explicitly refused to protect vested rights against regulation¹⁶ and other cases decided against applying constitutional principles against government policy.¹⁷ In that connection, s. 96 of the British North America Act was deemed not to interfere seriously with the power to create administrative tribunals.¹⁸ These decisions illustrate the leading trends in that period, not the only ones. As late as 1938 the Privy Council struck down the Canadian new deal on purely constitutional grounds.¹⁹ At roughly the same time, s. 96 was applied against one instance of administrative encroachment of judicial power.²⁰ However, persons seeking to attack the use of power in those days faced an uphill battle where there was no manifest dishonesty or abuse.

The intellectual justification for this appears in an article by Professor Bora Laskin, as he then was.²¹ It is an eloquent expression of the need to respect expertise, and the right to regulate, as opposed to the ancient concepts of absolute property and freedom of contract. The intellectual leaders of the time clearly had more faith in the legislative process and procedure than in the courts, and wanted the latter to interfere only in very exceptional cases.

No serious authority ever disputed the need for *some* limited judicial power of review.²² Even in *Nakkuda Ali*,²³ and in *Clarence Copithorne*²⁴ some power of review remained for illegal or dishonest acts. However, those powers were very narrow indeed.

The British revolution in administrative law started in earnest with *Ridge v. Baldwin*.²⁵ That case disapproved the hocus pocus surrounding the definition of "quasi-judicial" decisions, and especially the strange notion of "super-added duty" which had been incorrectly derived from *R. v. Electricity*

13. *Calgary Power v. Clarence Capithorne*, [1959] S.C.R. 24.

14. *Martineau v. Matsqui Institution No. 2* (1978), 22 N.R. 250. (F.C.A.).

15. The Federal Court of Canada had a strong position on this. See, *Kurek v. Solicitor General*, unreported, September 10, 1975 (Fed. Ct. Trial Division).

16. See, *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198.

17. This was particularly evident in war cases. See, *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.) and *Cooperative Committee on Japanese Canadians*, [1947] A.C. 87 (P.C.).

18. See, *Reference re Adoption Act*, [1938] S.C.R. 398 and especially *Susk. L.R. Board v. John East Iron Works* (1948), 4 D.L.R. 673 (P.C.). This last Privy Council decision was a perfect illustration of lower courts attempting to defy Labour Relations Board interference in property rights under a CCF government in Saskatchewan. The higher court reversed.

19. See, *A.G.B.C. v. A-G Canada*, [1937] A.C. 326 (P.C.) (sub nom. *Natural Products Marketing Reference*).

20. *Toronto v. York*, [1938] A.C. 415 (P.C.). My view of this case as an exception is directly in conflict with the history of S. 96 as related in *Reference re Validity of the Residential Tenancies Act*, [1981] S.C.R. 714. In that case Mr. Justice Dickson considered that the application of this part of the constitution has become less strict since the 1930's. The disagreement is solely as to history not as to the result of this unimpeachable decision.

21. Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952), 30 Can. Bar Rev. 986.

22. The closest a court came to that was the Federal Court of Appeal in cases mentioned in footnotes 14 and 15. Those cases were certainly serious; however, they did not exclude *all* judicial review, for instance, on matters of jurisdiction.

23. *Supra* n. 9.

24. *Supra* n. 13.

25. *Supra* n. 8.

Commissioners.²⁶ From 1964 on, the judicial nature could be easily inferred from the general nature of the statute. Soon the notion of "right" hitherto necessary for review was also loosened.²⁷ Finally, and most radically, administrative decisions were opened to the scrutiny of the courts not only for matters concerning jurisdiction but also for issues of "fairness".²⁸

It is to be noted that in Canada, this transformation happened later than in Britain²⁹, but it was equally dramatic in its effect.³⁰ In addition, Canada's transformation was accompanied by a simultaneous judicial repudiation of the proceduralism which had haunted administrative law from its beginning as a collection of separate and almost unconnected writs³¹ and a relaxation of rules as to standing.³² It can, therefore, be said that judicial review is now broadly available.

II. Reactions to the Rebirth of Judicial Review

Canada's acceptance of the new British norms was not accompanied by an immediate intellectual transformation. In Britain the new ideas were widely accepted,³³ but in Canada opinions were divided. David Mullan's authoritative articles³⁴ were very objective. Various articles by Professor D.P. Jones³⁵ and the present writer³⁶ favoured the developments. The major texts attempted to remain reasonably neutral.³⁷ On the other hand, a very powerful criticism of judicial review was made by an important group of academics faithful to the principles expressed by Professor Laskin in 1952.³⁸ The articles included, most

26. *Supra* n. 8.

27. *See Wiseman v. Borneman*, [1969] 3 ALL.E.R. 275 (H.L.). This also happened in Canada. Two major cases must be mentioned, firstly *Saulnier v. Quebec Police Commission* (1975), 57 D.L.R. (3rd) 545 (S.C.C.) (but this case was narrowly interpreted in *Martineau v. Matsqui Institution No. 1* (1977), 14 N.R. 285 (S.C.C.) and *Martineau v. Matsqui Institution No. 2*, [1980] 1 S.C.R. 602.

28. *In Re H.K. (an Infant)*, [1967] 2 Q.B. 617; *R. v. Gaming Board for Great Britain, ex p. Benaim and Khaida*, [1970] 2 Q.B. 417 (C.A.); *Wiseman v. Borneman*, *supra* n. 27; *R. v. Landon Borough of Hilligdon ex p. Royco Homes*, [1974] 2 All E.R. 643 (Q.B.).

29. Mullan, "Fairness: The New Natural Justice" (1975), 25 U. of T. L.J. 281; Lyon, "Administrative Law-Combining Search for a General Theory of Judicial Review of Administrative Legality" (1980), 58 Can. Bar Rev. 646; Grey, "The Duty to Act Fairly After Nicholson" (1980), 25 McGill L.J. 598; Grey, "Can Fairness Be Effective?" (1982), 27 McGill L.J. 360.

30. *Nicholson v. Haldimand-Norfolk Regional Board*, [1979] 1 S.C.R. 311; *Cooper & Lybrand v. MNR* (1978), 24 N.R. 163 (S.C.C.); *Martineau v. Matsqui Institution No. 2*, *supra* n. 14.

31. *Vachon v. A-G Quebec* (1978), 25 N.R. 399 (S.C.C.). This case attempted to put an end to the proceduralism which had been the bane of Canadian public law and Quebec civil law. It did not succeed entirely in persuading lower courts because the lesson had to be repeated on several occasions (e.g. *Cité de Pont-Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516 and *St. Hilaire v. Bégin*, [1981] 1 S.C.R. 79. *See also Solosky v. The Queen*, [1980] 1 S.C.R. 821 (and declaratory judgments) and *Kelso v. Public Service Commission*, [1981] 1 S.C.R. 199 (also on declaratory judgments).

32. *Thorson v. A-G Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.); *McNeil v. Nova Scotia Board of Censors* (1975), 5 N.R. 43 (S.C.C.).

33. *See*, Wade, *Administrative Law*, 4th ed., De Smith, *supra* n. 10. This work was edited by a Canadian, Prof. J. Evans, in its last edition.

34. Mullan, *supra* n. 29.

35. D.P. Jones, "Institutional Bias" (1977), 23 McGill L.J. 605. Comment on *Committee for Justice and Liberty v. NEB* [1976], 68 D.L.R. (3rd) 716 (S.C.C.) (1977), 23 McGill L.J. 462. Comment on *PPG Industries v. A-G (Canada)* (1976), 65 D.L.R. (3rd) 354 (S.C.C.). *See*, "Administrative Fairness in Alberta" (1980), 18 Alta. L. Rev. 351.

36. Grey, *supra* n. 4 and n. 29.

37. *See*, especially Dussault, *Principes du Droit Administratif Canadien et Québécois*; and Ouellette *Les Principes du Contentieux Administratif* 4th ed.

38. Laskin, *supra* n. 21. However, Mr. Justice Laskin had himself evolved considerably for he was the man who rendered the *Nicholson* judgment (*supra* n. 30). This point was made by Chief Judge Alan Gold in his address to the Canadian Institute for the Administration of Justice, Montreal, November 1982.

significantly, works by Professors Hogg,³⁹ Angus,⁴⁰ Janisch,⁴¹ and Arthurs.⁴² A very extreme and conveniently compact formulation of this position can be found in a book review by Professor Macdonald.⁴³ According to this view, judicial review is an inconvenient and inefficient way of controlling the vast administrative mechanism of our society. Internal safeguards would be more accessible and more effective, and, in any case, the common weal would be better served if the courts interfered as little as possible and allowed administrators to administer. Judicial review could also be seen as undemocratic since it allows an unelected judiciary to overrule the delegates of elected assemblies.

The view that judicial review is ineffective can be justified by the fact that many administrators and administrative tribunals are specialists and can make better decisions than the courts. The counter argument is that specialists tend to be less objective about major issues in their discipline. Both positions seem to be reasonably arguable.

In the recent years opponents of judicial review have suffered major blows at the hands of the judiciary. They did win a few significant victories, such as *Inuit Tapiraset v. Léger*⁴⁴, which limited the operation of the fairness doctrine to a very narrow but important class of cases.⁴⁵ More often their views were echoed in dissenting judgments, and in particular the dissent of Ritchie J. in *Kane v. University of British Columbia*.⁴⁶ Mr. Justice Ritchie stated the classical position prior to *Ridge v. Baldwin*, to the effect that officials are chosen for their integrity and ability. Should their decisions then be lightly disregarded?

The stance taken by Mr. Justice Ritchie and by opponents of judicial review is attractive at first blush. However, it is the thesis of this article that this position fails to take into account the real reasons for the revival of judicial review and therefore fails to provide a good solution for the problems which our society faces.

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39. Hogg, "Judicial Review: How Much Do We Need?" (1974), 20 McGill L.J. 157. However, Prof. Hogg was moderate in his conclusion. He said at 176: "Judicial review is rarely needed but when it is needed, nothing else will do." See, also Hogg, "The Supreme Court of Canada and Administrative Law" (1973), 11 Osgoode Hall L.J. 187. At one point in his 1974 publication, Prof. Hogg foreshadowed the thread of the present essay at a time when it was far from obvious in jurisprudence when he said at 175: "... the court still retains a power of review; it may in effect set down the generality of the language to protect fundamental civil libertarian values." The present author is prepared to take judicial review further than Prof. Hogg was in 1974 but on similar principles.
40. Angus, "The Individual and the Bureaucracy: Judicial Review — Do We Need It?" (1974), 20 McGill L.J. 177. Prof. Angus' brilliant analysis was one of the most convincing criticism of review although this writer was not ultimately convinced.
41. Janisch, "Policy Making in Regulation" (1979), 17 Osgoode Hall L.J. 46. See also, Janisch, "The Role of Independent Regulatory Agency in Canada" (1978), 28 U of NBLJ 83. However, Prof. Janisch's views, like Prof. Hogg's are aptly classifiable as moderate. He suggests that government policy be a major factor in dealing with regulation and in that way, he makes judicial review less powerful. On the other hand, he does not attack it directly and, since he writes about regulatory schemes as a whole and not abuses committed by officials, his view may not be radically different from this writer's. There is an important difference in emphasis. See also Pépin, "Quelques observations générales sur la question du caractère efficace ou illusoire du contrôle judiciaire" (1976), 36 R. du B. 453 for a thoughtful, undecided but profound analysis.
42. Arthurs, Address to Canadian Institute for the Administration of Justice, Montreal, November 1982. Also see Arthurs, "Rethinking Administrative Law" (1979), 17 Osgoode Hall L.J. 1.
43. R. Macdonald "Review of Wade Administrative Law, (4th ed.)" (*supra* n. 33), (1979), 28 U.N.B.L.J. 242.
44. *Inuit Tapiraset v. Léger*, [1980] 2 S.C.R. 735.
45. i.e., Cabinet Appeals.
46. *Kane v. University of British Columbia* (1980), 31 N.R. 214 (S.C.C.). The majority judgment was favourable to very liberal judicial review and, it is submitted, was right.

III. The Ideology of the New Judicial Review

If the main purpose of judicial review in the past was the protection of property, the main purpose today seems to be the protection of individual rights. This is evident both from the types of cases which tend to succeed and from the general climate of our times.

Since the development of the welfare state, western democracies have been unable to check the power and the growth of the bureaucracy. In a small government establishment, it is possible (though not always safe) to control abuses internally. In a gigantic bureaucracy it is impossible to know the abuser, let alone correct abuse. Moreover, large organizations acquire an *esprit de corps* which makes it more difficult for members to overrule each other. Many of the cases would in any case not have arisen if the internal mechanism had worked.⁴⁷ It is therefore obvious that arbitrariness can easily be found in large organizations.

Government all too easily develops a certain arrogance in which it sees the public as always represented by it and therefore any decision made by itself as correct. Could the facts of *Schavernoeh v. F.C.C.*⁴⁸ have occurred if the government did not at times consider itself either omnipotent or omniscient?

There is thus no doubt that large government present dangers not only of abuse by individual officials, but also of intentional, righteous error. If the former could conceivably be remedied internally, the latter can only be put right by courts. It is, for instance, virtually certain that Laker Airways would never have gotten off the ground except through the Court of Appeal.⁴⁹ Nor does it seem likely that Nicholson would have gotten a second hearing by appealing to the government.⁵⁰

Quite early in the history of the welfare state, these dangers were noted by conservative forces. Friedrich Hayek equated socialism and even social democracy with loss of freedom as early as the period of World War II.⁵¹ He concluded that economic liberalism is the only safeguard for democracy.

One need not share this extreme viewpoint to feel some concern. It is indeed arguable that the friends of the welfare state are even more anxious to find a solution to the problems it has created than are its enemies. Thus one could explain a shift in a "progressive" or "liberal"⁵² opinion away from the defence of the authority of the state and toward the defence of individual rights.

It is also true that if political liberalism has, since the days of Andrew Jackson, meant the defence of the weak against the strong, the strengthening of

47. See for instance, *Chartier v. A-G Quebec*, [1979] 2 S.C.R. 474 where every attempt was made to whitewash the policy and only the Supreme Court prevented this from succeeding; one can also query whether a reasonable administration would have taken the case of *Gershman v. Manitoba Vegetable Marketing Board* (1976), 69 D.L.R. (3rd) 114 (Man. C.A.) to appeal.

48. *Schavernoeh v. Foreign Claims Commission* (1982), 136 D.L.R. (3rd) 447 (S.C.C.). In that case, the government's ambassador's explanation of the meaning of a treaty he had negotiated was used by the government as an argument against applying the plain words of a regulation favouring Appellant's claim. Appellant succeeded only before the Supreme Court.

49. *Laker Airways v. Department of Trade*, [1977] 2 W.L.R. 234 (C.A.).

50. He did not succeed in the end. See *Nicholson v. Haldimand Norfolk No. 2* (1980), 117 D.L.R. (3rd) 604 (Ont. C.A.) (leave to appeal refused, 117 D.L.R. (3rd) 750 (S.C.C.)). However he did get a full hearing.

51. Hayek, *The New Serfdom*.

52. The word "liberal" is used here historically and not economically as in Hayek.

the state would by itself alienate some of its liberal friends. We can therefore see a new concern for individual rights in liberal philosophy⁵³ which trickles down to legal philosophy. It is natural for those judges who consider policy matters as well as hard law to be influenced by this, and indeed to be in the forefront of change.⁵⁴

The thesis, then, is that the rebirth of judicial review transformed it from a defence of property and other rights to the defence of the individual. This could provide us with a practical guide for determining which cases merit review. It would also provide us with an explanation for England's leadership in this field. England became a welfare state long before Canada and it sprouted the modern bureaucracy earlier. Canada's transformation occurred later and largely in the 1960's and 1970's. The reluctance to review administrative decisions before 1975 could thus be seen as parallel to the situation in Britain in the period 1920 - 1960.

What remains is to test the theory of the new ideology of administrative law to see if it explains present trends in administrative law and if it fits into recent history as easily as has been suggested above.

IV. Some Historical Anomalies

Two historical anomalies, one Canadian and one British, seem inconsistent with our theory.

The first concerns the Supreme Court of the 1950's. It is well-known that this court was perhaps the most sensitive in our history to individual rights.⁵⁵ Numerous cases still relevant today attest to this.⁵⁶ Does this not disprove the notion that Canada's 1950's were the equivalent of an earlier, pro-government period in Britain?

The answer can perhaps be found in the *type* of case which succeeded in the 1950's. Except for one remarkable decision⁵⁷, the leading cases would be generally classified as constitutional rather than administrative.⁵⁸ There was clearly a political dispute between the Supreme Court's view of democracy and that of certain government institutions and especially the government of Quebec.⁵⁹ The dispute was one involving policy questions (e.g. is it fair to persecute communists or Jehovah's witnesses?) and not one concerning the every day functions of a bureaucratic system, even one which has the best intentions. In that way, the judicial liberalism of the 1950's did not differ substantially from similar earlier debates and in particular the debate concerning social credit in Alberta which also had human rights undertones.⁶⁰ All of

53. See, Rawls, *A Theory of Justice*.

54. It is particularly admirable that Mr. Justice Laskin wrote the *Nicholson* judgment, *supra* n. 30 where he saw individual right threatened despite his opposition to judicial review in other areas and especially in labour relations.

55. See *esp.*, Prof. G. Beaudoin, *La Cour Suprême et la protection des droits fondamentaux* (1975), 53 *Can. Bar Rev.* 675.

56. *E.G., Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Saumur v. City of Quebec*, [1953] 2 S.C.R. 349; *Smith and Rhuland v. The Queen*, [1953] 2 S.C.R. 95.

57. *L'Alliance des Professeurs Catholiques v. L.R.B. (Qué.)*, [1953] 2 S.C.R. 140.

58. The distinction is, of course, arbitrary.

59. But we must remember that some cases like *Smith & Rhuland*, *supra* n. 56 did not originate in Quebec.

60. See *Reference Re Alberta Statutes*, [1938] 2 S.C.R. 100. Alberta under Premier Aberhart and Quebec under Premier Duplessis both embarked upon battles with the Courts and were badly beaten.

these decisions were welcomed by the liberal thinkers who opposed judicial review of a more ordinary kind. They were completely different and the issue each one of them raised was that of the type of society we want.⁶¹ Administrative law cases collectively raise that issue; each one alone does not.

The second anomaly occurred in England in the last decade. It would seem that what happened went far beyond ordinary administrative law and amounted to an all-out war between the courts and the legislature.⁶² Of course, such a war would not be inconsistent with simultaneous judicial review, but it would indicate the attention of the courts was elsewhere.

A possible answer would be to compare British Courts of recent years with the Supreme Court of the 1950's. Certainly the Labour Government of 1974-79 did not get along with the judiciary; radically different views of society were involved.⁶³ Moreover, the issues of pure administrative law had been settled for several years in England even though they were coming to a head in Canada. Thus, the British jurisprudence in the 1970's, although of interest for administrative lawyers, raises more fundamental constitutional issues about the identity of the ruler and the limits of his power and not only about the manner of the execution of it. All of this, however, does not come close to disproving the existence of a new human rights ideology in administrative law.

V. The Cases Which Succeed

The successful cases in recent years have by and large been cases where individual rights were in danger. The *Nicholson* and *Martineau No. 2*⁶⁴ cases were examples of cases which obviously would have been thrown out two decades earlier.⁶⁵ As well, *Saulnier*⁶⁶ would almost certainly have been decided on the basis of strict application of the famous dictum of *R. v. Electricity Commissioners*.⁶⁷ The courts had the technical means to dismiss all of these cases; they chose not to do so.

Property rights were not entirely forgotten. *Laker Airways v. Department of Transport*⁶⁸ and *Manitoba Fisheries v. The Queen*⁶⁹ were examples where these rights were protected in novel and imaginative ways. Moreover, the enforcement of crown liability in contract⁷⁰ was nothing less than a protection of people's economic or property rights.

61. Even the *Alliance des Professeurs Catholiques* case. (*supra* n. 57) which dealt with administrative law and to some extent foreshadowed *Kane v. University of British Columbia* (*supra* n. 46) raised fundamental political questions.

62. See, *Tameside*, *supra* n. 49; *Congreve v. Home Office*, [1976] Q.B. 629; *Laker Airways v. Department of Transport*, *supra* n. 49; the government won one in *Gouriet v. A-G*, [1977] 3 W.L.R. 300, where the very notion of government by elected delegates was questioned.

63. *Congreve*, *supra* n. 62 and *Laker*, *supra* n. 49 are perhaps the best examples.

64. *Nicholson*, *supra* n. 30; *Martineau No. 2*, *supra* n. 14.

65. To show that *Nicholson* would have failed in the past, see *Ridge v. Baldwin*, *supra* n. 8; for *Martineau*, see Price, "Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts" (1977) 3 *Queen's L.J.* 214.

66. *Saulnier*, *supra* n. 27.

67. *R. v. Electricity Commissioners*, *supra* n. 8; i.e., *Saulnier* would have lost because he had no rights in the narrow sense of that word.

68. *Laker Airways*, *supra* n. 49.

69. *Manitoba Fisheries v. The Queen*, [1979] 1 S.C.R. 101.

70. *Verrault v. A-G Quebec*, [1977] 1 S.C.R. 41. This case can be interpreted in many ways as can be seen from two comments on it in the same comment (1976) *Can. Bar Review* by Hilliard (401) and Grey (409). This author's views have not changed.

However, most of these cases involved the compensation of individuals or companies for rights they lost, not the sterilization of government regulatory schemes. Courts did not act on a philosophy of laissez-faire capitalism, but on the principle of the application of the rule of law to government and its economic function.

Two cases, *Laker Airways*⁷¹ and *Padfield v. Minister of Agriculture*⁷² involved more direct attacks on regulatory schemes. However, they too fit into the scheme. In *Laker*⁷³ one could liken the result to an order of specific performance in a case involving private parties. The government was ordered to perform its obligation. However, it was stated explicitly that if, instead of proceeding by directive, the government had obtained an act of Parliament, *Laker* would have had no case. In *Padfield*,⁷⁴ the principle was similar — the Minister had to obey the law and fairly consider every application. But if he had done that and decided negatively on correct principles, courts would not have doubted his right to govern nor the government's power to regulate the economy.

It is of course impossible to go through all successful applications. Administrative law has become an avalanche. It is likely that cases could be found to support just about any proposition. We can only look at the principal decisions.

We have seen that claims involving the protection of one's public employment,⁷⁵ as well as physical freedom and dignity,⁷⁶ have had considerable sympathy from courts. Property and vested rights have been protected but only to the limited degree of compensation for loss or preventing loss by decree.⁷⁷

In addition, individuals have been protected against bad faith,⁷⁸ misuse of power, or arbitrariness⁷⁹ by local authorities, though no one has doubted the right of municipalities to regulate and even to err in certain cases.⁸⁰

Governments and authorities have been ordered on a number of occasions to *listen* to individuals fairly prior to deciding;⁸¹ moreover, a minimum of reasonableness⁸² and good faith⁸³ has been required.

71. *Laker*, *supra* n. 49.

72. *Padfield v. Minister of Agriculture*, [1968] A.C. 997 (H.L.).

73. *Laker*, *supra* n. 49.

74. *Padfield*, *supra* n. 72.

75. *Nicholson*, *supra* n. 30; *Saulnier*, *supra* n. 27.

76. *Martineau No. 2*, *supra* n. 14.

77. *Laker*, *supra* n. 49; *Padfield*, *supra* n. 72; *Manitoba Fisheries*, *supra* n. 69; *Verreault v. A-G Quebec*, *supra* n. 70.

78. *Landreville v. Town of Boucherville* (1978), 22 N.R. 407 (S.C.C.). In this case, the municipality was in bad faith.

79. *Bell v. The Queen*, [1979] 2 S.C.R. 212. *Municipality of Prince George v. Payne*, [1978] 1 S.C.R. 458.

80. *Welbridge Holdings v. Metro Winnipeg* (1970), 72 W.W.R. (n.s.) 705 (Man. C.A.). This case is in some ways a descendant of *Everett v. Griffiths*, [1921] 1 A.C. 631 (H.L.). See also, *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770.

81. That is the essence of *Nicholson*, *supra* n. 30; See also, *Esiter Wright v. Office de la langue française*, unreported, (Que. S.C.) (per Barbeau, J.).

82. See, Grey, *Can Fairness be Effective?* *Supra* n. 29.

83. See, *Gershman v. M.V.B.*, *supra* n. 47.

In quasi-judicial matters the rules of natural justice have been reaffirmed.⁸⁴ Certain institutions hitherto considered private, such as the university, were pushed into the public area, and the concept of fairness was extended to administrative matters. At no time was there the slightest threat to the welfare state⁸⁵ or to the controlled economy; on the contrary, the courts made the system more just.

It is useful to consider the new judicial review in the theoretical language of "rights". In recent years much has been said of "collective rights" as opposed to individual rights.⁸⁶ What a collective right would mean in Hohfeldian terms⁸⁷ is utterly unclear. Who has such a right? What is a collectivity? Who has the right or the duty to enforce on behalf of the collectivity? It is difficult to avoid the conclusion that "collective rights" are a democratic-sounding euphemism for tyranny.

The issue was raised in *Quebec Protestant School Boards v. A-G Quebec*⁸⁸ when the Quebec government tried to argue that the Charter of Rights⁸⁹ gave collective and not individual rights, and was rebuffed by Chief Justice Deschênes.

It is this author's submission that collective rights do not exist and that rights are by their nature individual. This does not prevent some individual rights from being collectively enforced⁹⁰ (e.g. workers' rights in a syndicalist society). The essential point is that the collectivity as such has no separate rights and no Hegelian notions of national or group "spirit" can be recognized.

In recent administrative law, courts have been quick to defend individual rights.⁹¹ They have recognized no concept of collective rights and have been wary of allowing pressure groups to affect policy which is normally the domain of the majority in a democracy.⁹²

VI. The Cases Which Fail

It is now necessary to look at cases which have not succeeded to see if they fit our thesis.

84. See, *Kane v. University of British Columbia*, *supra* n. 46.

85. The welfare state absolutely needs judicial review as we learn from *R. v. Northumberland Compensation Board ex p. Shaw*, [1951] 1 K.B. 711, a case directly caused by the arrival of the National Health. Without judicial review, a major injustice would have occurred. Frequent injustices would inevitably bring the system into disrepute.

86. Public international law has bred this dangerous development with ideas of self-determination and other group rights.

87. Hofeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913), 23 Yale L.J. 16 and Dworkin, *Taking Rights Seriously*.

88. *Quebec Protestant School Board v. A-G Quebec*, unreported. (Que. S.C.). (This case is presently under appeal).

89. *The Constitution Act, 1982*.

90. Such a possibility is essential for social democracy; otherwise, no social reforms can take place.

91. Indeed, they have interpreted the word "right" very liberally (see, Dickson, J.'s concurring judgment in *Martineau No. 2*, *supra* n. 14).

92. See, for instance, *Inuit Tapirasiat*, *supra* n. 44; *Gouriet v. A-G*, *supra* n. 49. But courts have not excluded the possibility of affirmative action. See, s. 15(2) of the new entrenched *Charter* which performs the same function.

Firstly, as we have seen, attempts to influence policy in favour of private interests have generally failed. Courts recognize that where a decision must be made, (i.e. where each individual is not free to act as he wishes), it is the majority which must make it.⁹³

Secondly, attacks on the power of the state to regulate or on the scope of the regulatory authority have met with a cool reception. The fundamental difference between the ideology of modern administrative law and that of the past, is the new acceptance of the possibility of a social-democratic state and of very broad state power, subject only to individual rights.

In a recent case, *CTV v. CRTC*,⁹⁴ the Supreme Court provided an illustration of its unwillingness to overturn regulatory decisions on technicalities. The early Quebec decisions⁹⁵ on language laws (however distasteful they may be) also showed the courts' reluctance to strike down regulatory schemes set up by the legislature.

The most striking defeats for judicial review come in the field of labour relations. Labour relations was the topic which attracted the most powerful inductive argument against judicial review in the 1950's. It is the area in which there has been no change of mind on the part of anyone.

The most important decision in this area was undoubtedly *C.U.P.E. v. New Brunswick Liquor Commission*.⁹⁶ The Supreme Court, led by Mr. Justice Dickson, decided that even on matters of law a privative clause would exclude review unless the specialized tribunal's decision was patently unreasonable. In short, even on questions which might at one time have been considered jurisdictional and therefore totally unaffected by privative clauses, the court might defer to the tribunal's decision so long as it is arguably correct. Only a gross jurisdictional error will be accepted as such and therefore corrected.⁹⁷ However one may choose to interpret this case, one cannot escape the view that it was intended as a signal for the courts to interfere as little as possible in labour matters.⁹⁸

93. See, *Gouriet*, *supra* n. 49; *Inuit Tapirsat*, *supra*, n. 44; *Lord Luke v. Minister of Housing*, [1967] 2 W.L.R. 623 (Q.B.); Grey, "Discretion," *supra* n. 4.

94. *CTV v. CRTC* (1982), 134 D.L.R. (3rd) 193 (S.C.C.). See also, *Barreau du Québec v. Ste-Marie* (1977), 2 S.C.R. 414.

95. See, *Le Bureau Métropolitain des Écoles Protestantes v. Le Ministre de l'Éducation* [1976] C.S. 430 (Que. S.C. Deschênes, C.J.). Once the constitution entrenched certain individual rights, the individual rights prevailed, consistently with our thesis. See, *Quebec Protestant School Board*, *supra* n. 88.

96. *C.U.P.E. v. New Brunswick Liquor Commission* (1979), 26 N.R. 341 (S.C.C.). The conclusions were strongly reiterated in *Teamsters Union Local 938 et al v. Massicotte* (1982), 134 D.L.R. (3rd) 385 (S.C.C.).

The Supreme Court added to the jurisprudence on this subject in *Re Alberta Union of Public Employees* (1982), 136 D.L.R. (3rd) 1 (S.C.C.). This case confirms *C.U.P.E.* in all ways. It is fascinating to see how, on the same day, the Supreme Court put the same principle to work in defence of individual rights in *St. Luc Hospital v. Lafrance* (1982), 136 D.L.R. (3rd) 577 (S.C.C.). The fact that the court looks at the merit became evident from the outset because Mr. Justice Chouinard pointed out before analysing the law that Dr. Lafrance's scientific competence and qualifications were not contested by anyone (at 579). The role equity in shaping judgments is thus brought into the open.

97. This would provide a convincing explanation of *Priangle v. Fraser* (1972), 26 D.L.R. (3rd) 28 (S.C.C.). Of course, one could take a very narrow view of *C.U.P.E.* (*supra* n. 96) and say that only error of law on the face of the record was excluded from review by the privative clause. This is very orthodox theory and could find some (though weak) support at 395 of the *Teamsters* case (*supra* n. 96).

98. But Deschênes C.J. went too far in saying the courts should not deal with labour relations by means of injunctions. *Commission de Transport de la C.U.M. v. Syndicat du Transport de Montréal* 09-00904-748, May 2, 1977 (Montreal C.A.). Any other conclusions leaves society helpless before ruthless business or labour.

Recently, there have also been cases where, despite their reluctance, courts were forced to quash labour board decisions which they could not consider reasonable. See for instance, *Re Labour Relations Board N.S. and Digby Municipal School* (1982), 135 D.L.R. (3rd) 582 (N.S.C.A.).

In a completely different area of law, the Supreme Court refused to overturn an erroneous decision of Quebec's Small Claims Court.⁹⁹ Even though the court erred in law, the court refused to consider the mistake as affecting jurisdiction.

This decision is a clear illustration of the present thesis. Individual rights and freedoms are unaffected by the Small Claims Court. On the contrary, they are probably better protected by its existence.¹⁰⁰ It would therefore be undesirable to interfere in any but the most extreme cases.¹⁰¹

How can the courts justify in purely legal terms what appears to be a selective intervention, dependent not on the technical issue but on the subject matter and on the individual interest present in the case? The answer is both clear and convincing — they leave themselves considerable discretion.

There has always been an element of discretion in the exercise of prerogative writs.¹⁰² The scope of this discretion has been greatly expanded by *Harekin v. University of Regina*.¹⁰³ In all but questions of *a priori* jurisdiction the court can now choose to interfere only in cases it deems worthy.¹⁰⁴ In matters of *a priori* jurisdiction we have seen that courts have a discretion as to what constitutes true jurisdictional error and what is really within the administrative competence.¹⁰⁵ It follows that only a significant jurisdictional error is not subject to discretion.¹⁰⁶

Another major increase in the court's discretion has been the elimination of technical bars to review.¹⁰⁷ Once a procedural or technical error is made, it will be corrected unless there is serious prejudice.¹⁰⁸ The vague concept of prejudice, in contrast to the clear if capricious technical rule, increases the power of the court to judge each case on its merits.

Discretion has been extended to non-prerogative remedies, and in particular to the increasingly popular declaratory relief. In *Solosky v. The Queen*¹⁰⁹ and *Kelso v. Public Service Commissions*¹¹⁰ the Supreme Court refused to accept technical restrictions of any sort on its power¹¹¹ to grant or to refuse relief.

99. *A-G (Que.) v. Labrecque et al.*, [1980] 2 S.C.R. 1057.

100. The courts said so directly in *Nissan Automobiles v. Pelletier*, [1976] C.S. 296 (Que. S.C.).

101. *Lalonde Automobiles v. Naylor*, [1974] R.P. 372 (Que. C.A.). In that case, a judge in Small Claims virtually heard one side only.

102. De Smith, *supra* n. 10; *R. v. Aston University Senate ex P. Roffey*, [1969] 2 Q.B. 538.

103. *Harekin v. University of Regina* (1979), 26 N.R. 364 (S.C.C.). See, comment on it by D.P. Jones, "Discretionary Refusal of Judicial Review" (1981), 19 Alta. L.R. 483. This author disagrees with the criticism of *Harekin* notwithstanding the strong arguments presented by Prof. Jones.

104. The use of discretion for that purpose was consecrated by Laskin, C.J. in *P.P.G. Industries v. A-G Canada* (1975), 65 D.L.R. (3rd) 354 (S.C.C.).

105. See, *C.U.P.E. supra* n 96 and the discussion which followed.

106. The other non-discretionary aspect of administrative law is the issuance of the writ of habeas corpus.

107. See, *Vachon, supra* n. 31.

108. *St. Hilaire, supra* n. 31.

109. *Solosky, supra* n. 31.

110. *Kelso, supra* n. 31.

111. *But see, Les Terrasses Zarolega v. La Régie des installations Olympiques*, [1981] 1 S.C.R. 94 where some technical restrictions at least on declaratory motions under art. 453 CPC (as opposed to ordinary declaratory actions) seem to exist.

All of this permits the court to distinguish between cases with similar technical aspects but with different merits. A comparison of *Kane*¹¹² with *Harelkin*¹¹³ will show how this operates.¹¹⁴ Although the illegal act in *Kane*¹¹⁵ was very minor, it was corrected. In *Harelkin*, on the other hand, a more serious failure to hear an individual was allowed to stand. The result was not unjust, because the individuals had different interests and had acted differently with respect to the University's action against them.¹¹⁶

It follows from all this that it is erroneous to claim that there is a total rebirth or explosion of judicial review. There is, rather, a selective increase in those areas where freedom is threatened. Since labour law was in the past one of the main areas of review, it is arguable that, in some areas, the trend against review continues.^{116a}

VII. The Case of Section 96

One of the most interesting examples of the thesis of this essay can be found in the long series of cases dealing with s. 96 of the British North America Act. S. 96 is an important aspect of constitutional law;¹¹⁷ it is also crucial in administrative law.¹¹⁸ On the one hand, it could constitute a threat to the very existence of administrative tribunals.¹¹⁹ On the other, it controls the content of the jurisdiction of those tribunals and limits their immunity from review.¹²⁰

In the *Residential Tenancies*¹²¹ case Mr. Justice Dickson outlined a history of s. 96 which indicated a movement away from its strict application and towards greater scope for administrative tribunals.

This theory seems highly attractive. Unfortunately, it fails to account for the flurry of successful litigation in the 1970's and 1980's. It is difficult indeed to speak of liberalization when we live in a period when it is easier than ever before to contest the legality of legislation on this basis.

The best solution is to view Mr. Justice Dickson's historical survey as both right and wrong.

112. *Kane*, *supra* n. 46.

113. *Harelkin*, *supra* n. 103.

114. But a technical distinction is possible on the basis that Prof. Kane had no further avenues of appeal, but Mr. Harelkin did.

115. *Kane*, *supra* n. 46.

116. A study of judicial review of university decisions will reveal the importance of the individual's interest and of the merits of the case. Students have almost never succeeded (e.g. *Langlois v. Laval University* (1973), 47 D.L.R. (3d) 674 (Que. C.A.); *King v. University of Saskatchewan*, [1969] S.C.R. 678; *R. v. Aston University Senate ex p. Raffrey*, *supra* n. 102; *Glynn v. Keele University*, [1971] 1 W.L.R. 487 (Ch.); *Harelkin v. University of Saskatchewan*, *supra* n. 103). Professors have been more lucky (e.g. *Kane v. UBC*, *supra* n. 46); even there of course, review is unpredictable (see, Christie and Mullan, "Canadian Academic Tenure: An Uncertain Future" (1982), *Dalhousie L.J.* 72).

116a. The Supreme Court has recently stated its philosophy in this matter in *Maple Lodge Farms Limited v. Government of Canada et al.* (1982), 44 N.R. 354. The Court made it quite clear that judicial review is not to be taken as freedom to wreck administrative schemes or intervene in policy matters.

117. See, Hogg, *Constitutional Law of Canada*.

118. See, Dussault, *op. cit.* n. 37.

119. *A-G Quebec v. Slanec & Grimstead*, [1933] 2 D.L.R. 289 (Que. K.B.); *A-G (Australia) v. The Queen*, [1957] A.C. 288 (P.C.).

120. Recent cases which show this include significantly *Seminary of Chicoutimi v. City of Chicoutimi* (1972), 27 D.L.R. (3rd) 356 (S.C.C.); *A-G Quebec v. Farrah* (1978), 86 D.L.R. (3rd) 161 (S.C.C.) invalidating Quebec's transport tribunal); *Reference re the Validity of the Residential Tenancies Act (Ontario)*, *supra* n. 20; *A-G Quebec v. Crevier* (1981), 38 N.R. 541 (invalidating Quebec's Professional Tribunal on substantially the same grounds as those in *Farrah*.)

121. *Residential Tenancies*, *supra* n. 120.

It is right when it explains the continued unwillingness of the courts to sterilize the existence of administrative tribunals. In the 1930's such cases as *A-G Quebec v. Slanec & Grimstead*,¹²² *LRB (Sask.) v. John East Iron Works*¹²³ and *Reference Re Adoption*¹²⁴ had threatened to nip in the bud the proliferation of boards and tribunals and to render practically unfeasible the very slight socialization that was taking place in those days. The courts have not changed their minds. In *Tomko v. LRB (NS)*¹²⁵ the court refused to render Labour Relations Boards ineffectual. In *Corporation of the City of Mississauga v. Regional Municipality of Peel*,¹²⁶ administrative control of municipal questions was likewise upheld. State compensatory schemes were ruled *intra vires* even with boards as the judges in *Massey-Ferguson Industries Limited et al v. Saskatchewan*.¹²⁷ The opposite conclusion would have made impossible such common schemes as no-fault automobile insurance.

It was quite different whenever an attempt was made to eliminate access to the courts through judicial review. Such cases as *Seminary of Chicoutimi*,¹²⁸ *Farrah*¹²⁹ and *Crevier*¹³⁰ did not seek to prevent the government scheme from existing; they imposed certain protections for the individuals affected.¹³¹ In *Residential Tenancies*¹³² Mr. Justice Dickson took care to emphasize that nothing in the merits of the Ontario Legislation was *ultra vires*, only the transfer of certain powers to non-section 96 courts. He said (at 720):

It should be noted that the court is concerned in this appeal only with the constitutional validity of two powers, the subject matter of the reference, and not with the soundness of the overall legislative scheme or the wisdom of the Legislative Assembly in enacting it. The general subject matter of landlord and tenant rights and obligations is unquestionably within provincial legislative competence.

The issue is unequivocally that of recourse to the superior courts and not of freedom from regulation.

In *Crevier* we find an excellent example of the use of s. 96 for the defence of individual rights. The courts had stated on numerous occasions that a man's livelihood could not lightly be taken away from him.¹³³ It is not surprising that they now chose to invalidate a law which denied a professional access to the courts in defence of his right to practise. This case settled many ancient

122. *Slanec*, *supra* n. 119.

123. *LRB (Sask.) v. John East Iron Works*, *supra* n. 18.

124. *Reference re Adoption*, *supra* n. 18.

125. *Tomko v. LRB (NS)* (1975), 69 D.L.R. (3rd) 250 (S.C.C.).

126. *Mississauga v. Regional Municipality of Peel* (1979), 26 N.R. 200 (S.C.C.).

127. *Massey-Ferguson v. Saskatchewan* [1981] 6 W.W.R. 596 (S.C.C.); *Re Auto Machinery and General Supply Co. Ltd. v. Minister of Transportation* (1977), 80 D.L.R. (3rd) 350 (N.B. C.A.).

128. *Seminary of Chicoutimi*, *supra* n. 120.

129. *Farrah*, *supra* n. 120.

130. *Crevier*, *supra* 120.

131. The courts sanctioned by nullity schemes which did not meet the standards set by them. Without this, s. 96 would be toothless.

132. *Residential Tenancies*, *supra* n. 20. That the court is unwilling to tamper with regulatory schemes is evident from the way Dickson, J. distinguished *Tomko*, *supra* n. 125 and *Mississauga*, *supra*, n. 126 at p. 731 and 732. As well, dicta in the constitutional case of *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134 serve as illustration of the courts' reluctance to tamper with the essence of regulatory schemes but their willingness to interveine in other matters.

In some cases, it is difficult to decide whether a scheme should be left alone or not. See, *Re S.B.I. Management Ltd. and 109014 Holding Ltd.* (1981), 128 D.L.R. (3rd) 89 (Alta. C.A.) (leave to appeal to S.C.C. granted December 17, 1981).

133. See, *Kane*, *supra* n. 46.

disputes and finally established that there was a minimum of judicial review which could not be taken away. In short, everyone was entitled to ask for a high court judgment on matters that seriously affected him and this right could be limited somewhat but not totally removed.¹³⁴

It can thus be seen that the courts refused to interfere politically by striking down social programmes. On the contrary, they tended to leave them intact. However, they used s. 96 of the British North America Act to ensure that basic individual rights were respected under such programmes, and access to superior courts was one such basic right.

One can rephrase this as follows to make it more clear. The Canadian courts were asked two basic questions with respect to s. 96. The first was whether administrative tribunals and regulatory schemes could exist at all in view of the reserved jurisdiction of s. 96 courts. The second was whether such boards, tribunals, commissions or even lower courts could escape all judicial supervision and a minimum of judicial review. Even if respect for the rule of law and for individual rights required a negative answer to the second question, it must be remembered that a firm and unequivocal positive answer was given to the first.^{134a}

VIII. The Example of Other Areas of Law

Administrative law is not the only area of law moving towards the protection of individual rights. International law and constitutional law have adopted the same values and have evolved in a similar manner.

Since the drafting of the United Nations Declaration on Human Rights¹³⁵ and the adoption by most states of the Covenant on Refugee Status¹³⁶, human rights have been a major concern of international lawyers¹³⁷ and the formerly unshakeable sovereignty of the state has given way, at least in the minds of lawyers, to some amount of international control or at least imposition of standards.¹³⁸

Our constitutional law has unquestionably moved away from parliamentary sovereignty, through the Charter of Rights contained in our newly-repatriated

134. *Crevier, supra* n. 120 clearly represents a restriction on the sovereignty of legislators because judicial review becomes a fundamental right inherent in the nature of superior courts which no assembly and certainly not a provincial one can take away. This solution is a fitting one in an era of entrenched charters of rights.

134a. Since the writing of the main part of this essay, the Supreme Court rendered another major judgment on sec. 96: *Capital Regional District v. Concerned Citizens of British Columbia et al* (1982), 45 N.R. 95. This case clearly supported this writer's thesis that sec. 96 is not used to sterilize administrative action but to protect the basic right of individuals. The Chief Justice said (at 107):
What this court is asked to consider is whether there is an intertwined administration that would bring the administrative tribunal into a policy framework even if there be a judicial element in its operation. In my opinion, an affirmative answer should be given to this question.

135. United Nations Universal Declaration on Human Rights (Dec. 10, 1948) and other such documents which followed it. See. Brownlie, (ed.) *Basic Documents in International Law*.

136. 1951 Convention on the Status of Refugees. See. Office of UN High Commissioner Handbook of Procedures and Criteria for Determining Refugee Status, 1979.

137. See. Brownlie, *Principles of Public International Law*. Cotler, "The Coming Explosion in Human Rights Law" Address to Plenary Session of Canadian Bar Association, Montreal, 1980 (tape available from Canadian Bar Association); Helsinki Charter.

138. It is true that international law has also adopted a certain number of vague and, it is submitted, dangerous "collective" principles such as self-determination of nations.

constitution.¹³⁹ It is possible that the constitution will receive a narrow reading;¹⁴⁰ nevertheless the principle of absolute and untrammelled sovereignty such as one might have gleaned from *Dupont*¹⁴¹ is now not tenable.

It would be very surprising if our administrative law had insisted on the absolute application of privative clauses¹⁴² or on the strict interpretation of statutes in this legal context. Nor would it be reasonable to leave administrative law as a very technical and therefore somewhat random form of relief.¹⁴³ It is therefore suggested that the attitude of the courts has been not only just but also fits into the modern legal and philosophical world.¹⁴⁴

IX. Administrative Law and Basic Human Rights in the Future

Now that we have established administrative law as a potent instrument in the defence of human rights we can attempt to predict how that function will develop and how it will be applied by the new Charter of Rights.

The future probably means considerable refinement and expansion of the notion of individual rights. On the other hand, unless the far right of the American political scene wins a permanent and total victory, the courts will not attempt to throw government out of the economy but only to defend the basic standards which make that intervention tolerable and often welcome.

The new Charter is seen as basically constitutional in its nature. This is probably correct and will enable constitutional lawyers to win back some of the libertarian causes of the 1950's.¹⁴⁵ However, the new Charter certainly has important implications for administrative law.

The first and most obvious is its application to the issue of subordinate legislation.¹⁴⁶ It is a well-known principle that in determining the validity of subordinate legislation one examines the act granting the power to legislate¹⁴⁷ to see if the power to pass the proposed regulation or by-law is properly found there.¹⁴⁸

It is clear from the Charter itself that a direct violation of the Charter in the form of a regulation will be as illegal as a direct violation in a statute. But a more pervasive application of the Charter is also likely. Even in the absence of direct violation, when the validity or invalidity of subordinate legislature is not

139. *Protestant Schoolboard*, *supra* n. 88 in which Deschênes, C.J. points out the new legislative role for courts.

140. *See, Jamieson v. A-G Quebec*, unreported. (Que. S.C.) (per Durand, J.). This is one of the first restrictive cases from a superior court.

141. *Dupont*, *supra* n. 80.

142. As some thought following *Executors of the Estate of Woodward v. Minister of Finance* (1972), 27 D.L.R. (3rd) 608 (S.C.C.): *Pringle v. Fraser*, *supra* n. 97.

143. Especially in the Supreme Court which has become fairly liberal.

144. *See, Wolfgang Friedmann, Law in a Changing Society*. Other areas of law (e.g. family law) could also have been considered.

145. In the 1960's and 1970's constitutional law with few exceptions, was concerned with the division of power. Individual rights were protected by administrative law.

146. *E.g.*, Regulations, municipal by-laws.

147. In the absence of statutory power, subordinate legislation cannot be valid. This was stated firmly in *Reference re Regulations (Chemicals)*, [1943] 1 D.L.R. 248 (S.C.C.) and is not open to question.

148. *Toronto v. Forest Hill*, [1957] S.C.R. 569.

altogether clear, the original act may well be construed so as to be more in harmony with the rights protected by the Charter.¹⁴⁹ Thus the Charter, including its unproclaimed portions, would be a powerful rule of construction in administrative law.

It should be pointed out that subordinate legislation has been judged by standards similar to those contained in the Charter long before the Charter. For instance, the presumption of equality has always served as a rule of construction in this area.¹⁵⁰ If the government wanted to have unequal regulations it had to provide explicitly for them.¹⁵¹ Now, the presumption can legitimately become much stronger and it may prove more difficult for legislative draftsmen to get around it.

It is essential for us to remember that the standard is not necessarily the same for regulations as for law. It should be easier to annul administrative rules than those promulgated by a sovereign and elected assembly. Hence the importance of administrative law in applying the Charter.

In addition, the Charter should prove useful to prohibit not only illegal legislation¹⁵² but also administrative acts incompatible with the Charter. The existence of a general remedy under s. 24 means that an aggrieved party could ask for such remedies as injunctions and damages against transgressing bureaucrats.¹⁵³

It follows that the new Charter may affect to a large degree the practice and theory of administrative law. All depends on its construction and on the direction taken by the rest of law in the future. It is possible that except for the language rights provided by s. 23, the Charter will become a "dead letter" as provinces use the opting out formula and courts use s. 1 to justify all but totally aberrant use of power. However, if any effect at all is given to the Charter, administrative law will be affected.

X. Conclusion

Whenever a major change occurs, it is necessary to analyze it and systematize it in order to understand the reasons for it. Such systematization in law is inevitably full of holes. There are numerous exceptions to any trend; there are always competing ideologies and tendencies in any period. No idea has a monopoly on justice and the courts must often be inconsistent and imprecise in order to fulfill their most important function — to render justice to the parties.

149. Prof. Brun said this even with respect to Quebec rights which are found in a charter which is not entrenched in the Constitution. Brun, "La Charte des droits et libertés" (1977), 37 R. du B. 179. This would apply much more strongly now that the Charter is entrenched.

It is useful to add that constitutional guarantees should be generously construed according to the most orthodox authorities: *Edwards v. A-G Canada*, [1930] A.C. 124 (P.C.). The Privy Council reiterated this principle strongly in *Minister of Home Affairs v. Fisher*, [1979] 3 All E.R. 21 (P.C.). Another case worth reading is *Les Ateliers d'Ingénierie Dominion v. La Commission des droits de la personne du Québec*, [1980] R.P. 209 (Que. C.A.).

150. Pigeon, *Rédaction et Interprétation des Lois*.

151. This was not so for statutes even under the previous bill of rights. See *Bliss v. A-G Canada*, [1979] 1 S.C.R. 183. The legislator benefited from a powerful presumption of validity. See *Curr v. The Queen*, [1972] S.C.R. 889.

152. Which is the province par excellence of constitutional lawyers.

153. The existence of s. 24 may make it advantageous to characterize a series of events as a breach of the Charter. It makes all discussions of procedural niceties unnecessary.

Despite all these qualifications, the recent revolution in administrative law can be seen as having a clear and desirable direction. Courts have revived the once declining notion of judicial review in order to protect individuals from bureaucratic and political oppression. In doing so, they have placed on its head the old judicial review whose main function had been to protect property and other vested rights from government intervention. It would seem that the courts have abandoned the conservatism once attributed to them and therefore that the "liberal" critics of judicial review are persisting in positions which no longer serve their purpose.¹⁵⁴ Indeed, it is difficult to characterize the new judicial review in any but a positive way.¹⁵⁵

154. It would make more sense to today's conservatives to oppose review. In a fascinating analysis, Prof. Samek opposes an entrenched charter and sees the new concern for human rights as merely form without content. Each period will supply some ideological content to such notions. *See*, Samek, "Untrenching Fundamental Rights" (1982), 27 McGill L.J. 755. This writer agrees in part but also sees an absolute value in the protection of human dignity independent of the ideological aspect of each period. That is why he supports both the Charter and judicial review.

155. For additional reading on the general subject of this topic, see Ian Hunter, "Human Rights Legislation in Canada" (1976), 15 U.W.O.L. Rev. 21, and Ian Hunter, "Judicial Review of Human Rights Legislation" (1972), 7 U.B.C.L.R. 17. *See also*, the lengthy and excellent chapters on individual human rights found in Chevrette and Marx, *Droit Constitutionnel*.