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## Citation Information

Bouchard, Mario. "Administrative Law Scholarship." *Osgoode Hall Law Journal* 23.3 (1985) : 411-425.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol23/iss3/3>

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# Administrative Law Scholarship

## **Abstract**

Administrative law scholarship is deficient in scope (narrowed by an obsessive preoccupation with judicial review) and in nature (marked by a failure to re-examine the underlying assumption that reinforces the status quo). Furthermore administrative law scholars in Canadian common law jurisdictions largely ignore comparative approaches and so reject the contributions of civil lawyers. Fundamental research that challenges the assumptions and underpinnings of the law in this area is needed. Optimal changes will stem from the law schools because writings by professors are immediately influential and because the classroom is an effective forum for provoking long-range alterations in the attitudes of the profession as a whole.

# ADMINISTRATIVE LAW SCHOLARSHIP

BY MARIO BOUCHARD\*

*Administrative law scholarship is deficient in scope (narrowed by an obsessive preoccupation with judicial review) and in nature (marked by a failure to re-examine the underlying assumption that reinforces the status quo). Furthermore, administrative law scholars in Canadian common law jurisdictions largely ignore comparative approaches, and so reject the contributions of civil lawyers. Fundamental research that challenges the assumptions and underpinnings of the law in this area is needed. Optimal changes will stem from the law schools because writings by professors are immediately influential, and because the classroom is an effective forum for provoking long-range alterations in the attitudes of the profession as a whole.*

## I. INTRODUCTION

The state of legal scholarship in Canada has recently been thoroughly reviewed in the Arthurs Report.<sup>1</sup> The report divides legal literature into four types of research. While these types are not mutually exclusive or carved in stone, they are useful organizational and analytical tools with which to approach the subject. The first type of research identified is conventional texts and articles, defined as “research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources.” The second is described as legal theory, “research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled: this type would include scholarly commentary on civil law, usually referred to as *doctrine*.” A third category, law reform research, is defined as “research designed to accomplish change in the law, whether to eliminate anomalies, to enhance effectiveness, or to secure a change in direction.” The fourth type identified is fundamental research, or “research designed to secure a deeper understanding of law as a social phenomenon, including research on

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\* Coordinator, Administrative Law Project, Law Reform Commission of Canada. I wish to thank particularly Alison Harvison Young and Stephen Toope for their assistance in the preparation of this paper, as well as the Law Reform Commission of Canada for allowing me to express the following views, which, as always, remain solely those of the author.

<sup>1</sup> Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983).

the historical, philosophical, linguistic, economic, social, or political implications of law.”<sup>2</sup>

As the Arthurs Report states, the bulk of legal research is conventional. While such writings undoubtedly enable judges, practitioners, and law students to find the answers to legal problems, difficulties arise, primarily when new problems present themselves, or when the judge or lawyer feels that ‘old’ solutions are no longer appropriate. At this point comparative and historical research might lead to some alternative solutions. Nevertheless, merely comparative research cannot yield the required degree of innovation and adaptation necessary to any legal system. Legal theory is, at this point, a potentially useful tool as it provides a critical perspective on existing rules. As the report says,

It is explanatory and evaluative: it seeks to tell us, for example, how judges do or should decide cases, or how particular solutions do or should reflect underlying values in the law. Inevitably, therefore, legal theory makes certain assumptions about the nature of knowledge, language, law or society, and risks leaving such assumptions unstated and unexplored.<sup>3</sup>

As the attempt is made to grapple with assumptions, the line is crossed into fundamental research, and “in so doing [legal research] is pulled loose from its roots in conventional legal materials, which become increasingly objectified, increasingly treated as phenomena to be investigated, rather than as the embodiment of ultimate (if not always obvious) truths.”<sup>4</sup>

A healthy state of legal scholarship, then, would consist of a wholesome blend of all four types of research. This, however, has not been the case. The Arthurs Report found that “[l]egal theory, and particularly fundamental research into the values, operation and effects of law, have been largely neglected.”<sup>5</sup>

Scholarship in administrative law suffers from these commonly recognized difficulties and deficiencies. It is expository, doctrinal, and taxonomic, rather than critical, evaluative, or reflective. It neglects fundamental theory. It lacks historical, comparative, or interdisciplinary support as well as methodological diversity. It has no epistemology and tries desperately to conceal its ideology. These general problems give rise to some specific manifestations in the field of administrative law. Thus, administrative law scholarship tends to focus on judicial pronouncements and administrative pathology, and manifests a pervasive conser-

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<sup>2</sup> These ideal types are described in *ibid.* at 65-66.

<sup>3</sup> *Ibid.* at 68.

<sup>4</sup> *Ibid.* at 68-69.

<sup>5</sup> *Ibid.* at 154.

vatism. As one trained in the civil law but working daily at the very centre of a sea of common law, I feel compelled to comment on what I consider to be the 'closed shop' mentality of the common lawyer. I will make some suggestions on how the various protagonists can each help improve the situation, and present some thoughts as to what a change of direction might involve.

## II. THE PROBLEMS WITH ADMINISTRATIVE LAW SCHOLARSHIP

### A. *The Nature and Approach of Administrative Law Scholarship*

In no other branch of learning (except perhaps religion) does received wisdom enjoy a preferred position over newly revealed insights. In law . . . precedent and doctrine acquire authority in part through longevity. It is the job of the scholar to question old assumptions.<sup>6</sup>

Most administrative law research falls squarely under the 'conventional' category. In my view, the lack of scholarship toward the other end of the spectrum is both the cause and the result of a generally narrow perspective of the ambit of administrative law and of the deeply ingrained conservatism of administrative law scholars.

#### 1. The focus on administrative pathology

Scholarship in the area of administrative law pays too much attention to judicial pronouncements, thereby shifting attention away from the real sources of power. Administrators solve more disputes than judges; and yet a review of the literature would suggest that judicial review may be equated with administrative law. The *Index to Canadian Legal Periodicals* lists 163 articles published on administrative law between 1979 and 1984. Of these, eighty-five were on the subject of judicial review of administrative action, thirty-three dealt with regulatory theory and policy, twenty-four were studies of specific administrative agencies or procedures, while only twenty-one could be considered to be dealing with the general theory of administrative law in the broadest sense. This preoccupation with judicial review is nothing short of obsessive. It reminds one of a metaphor used by K.C. Davis in another context: an army of workers reinforce the areas of the roof that are already several feet thick, while only a few of them bother to tend to those sections that are paper thin and ready to collapse.<sup>7</sup>

Even if one assesses the current state of administrative law scholarship from a purely 'conventional' perspective, the conclusion is that it is leaving

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<sup>6</sup> *Ibid.* at 139.

<sup>7</sup> K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969) at vi-vii.

substantial areas neglected. Thus, "compared to their American counterparts, Canadian independent regulatory agencies have been almost completely ignored by both academic students of public administration and governmental inquiries into administrative issues and problems."<sup>8</sup>

Administrative law scholarship is unquestionably handicapped by this approach. It is 'micro' oriented and pathological, being concerned with what goes wrong in individual cases and with the ways in which 'illnesses' can be 'cured'. This approach pays an inordinately small amount of attention to the 'macro' aspects, to the global physiology of Administration, to what happens in the overwhelming majority of cases where the administrative universe unfolds as it should, and to the ways in which the health of the system as a whole can be improved. This complaint is by no means new. Angus voiced it in 1974, comparing the millions of administrative decisions to the few hundred administrative law cases heard each year in the Supreme Court of Ontario. Mr. Justice Blair reproached lawyers for looking at the Administration from the wrong end of the telescope. And the Law Reform Commission of Canada renewed the pleas for a broader outlook in its recent *Report on Independent Administrative Agencies*.<sup>9</sup>

The administrative law scholar would indeed be a poor doctor, always looking at the symptom, sometimes diagnosing a sickness but never bothering to find out what a healthy body looks like. No physician would dare pass judgment on the state of health of the general population solely on the basis of those who come to see him in his surgery. Yet the skewed emphasis on judicial review in the literature encourages the view that this is the central and most deserving issue in administrative law and fosters an unhealthy, overly critical attitude toward administrative action.

## 2. The conservatism of administrative law scholarship

If the first problem with Canadian administrative legal scholarship has to do more with its scope than with its nature, the second is a direct result of the lack of work being undertaken toward the fundamental end of the methodological spectrum. As the Arthurs Report pointed out, expository taxonomic scholarship in itself becomes inadequate when new problems arise. Moreover, such literature does not exist in a vacuum, but rather presupposes the existence of a set of values. If the appro-

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<sup>8</sup> P. Schultz, Book Review (1978) 21 Can. Pub. Admin. 219 at 291-92.

<sup>9</sup> See respectively: W.H. Angus, "The Individual and the Bureaucracy" (1974) 20 McGill L.J. 177 at 180; S.G. Blair, "Preparation of the Filing" in Law Society of Upper Canada, *Continuing Education Program on Administrative Tribunal Advocacy* (1981) at 14-15; Law Reform Commission of Canada, *Independent Administrative Agencies* (Report No. 26) (1985) at 41.

priateness of those values is not periodically reassessed, such scholarship runs the risk of building on premises whose foundations have shifted. At a time when the area of administrative law is virtually exploding, an excessive reliance on exposition or taxonomy simply increases the likelihood of presenting a distorted picture of it.

Underlying most of the literature in the field are a number of assumptions that are rarely expressly referred to and even more rarely questioned. A few examples follow:

(i) As Arthurs put it:

Law is regarded as an unqualified good; its Rule is perceived as a constitutional imperative. It follows that administration should be accepted only with reluctance and to the extent that it conforms to Law and abjures its own true, but intrinsically wicked, instincts.<sup>10</sup>

Seldom is the question raised whether there are more accurate ways of perceiving the place of administrative law within our legal system than by continuously placing it in opposition to the Rule of Law;

- (ii) We assume (and overestimate) the instrumental effects of legal rules and decisions; we also assume that law, where it does have an impact, always results in the intended conforming behaviour. We reject any notion that the impact of law on the administrative process is marginal, or that there may be “a marked discrepancy between the actual practice of the administrative process and the picture painted of it by legal doctrine”;<sup>11</sup>
- (iii) We assume that administrative agencies are inferior to courts not only hierarchically but qualitatively;
- (iv) We assume that administrative agencies cannot protect personal freedoms as well as courts;
- (v) We assume that legality calls for the resolution of disputes by ordinary courts. The judicial way of doing things is better *per se* than the administrative way of doing things. So much so, in fact, that privative clauses, though enacted by Parliament, must be interpreted down to reflect the perceived improbability that Parliament really intended to fully exclude the courts from an area of administrative decision making;
- (vi) We assume that proceeding orally is inherently better than proceeding in writing;<sup>12</sup>

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<sup>10</sup> H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 Osgoode Hall L.J. 1 at 1.

<sup>11</sup> A.C. Hutchinson, “The Rise and Ruse of Administrative Law and Scholarship” (1985) 48 Mod. L. Rev. 293 at 302.

<sup>12</sup> See Wilson J. in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, esp. at 213.

(vii) We assume that discretion is the antithesis of law.

This sheepish acceptance of articles of faith may result in part from the relationship that has existed between academics and the judiciary in Canada. The former have been reluctant to, and have been discouraged from, criticizing the latter. If criticizing the judges is not acceptable, it is not surprising that segments of the law should be beyond judicial reach or could even require fundamental re-examination.

There are a number of possible explanations for this phenomenon. Of course, judicial warnings against such criticism have had a role to play. Moreover, it is made easier by a system of internal policing based on the fact that the profession generally shares the views perpetuated by the judiciary. How else could one conclude that a spirited attack on a decision of the Supreme Court of Canada may fall outside "the dictates of good taste"?<sup>13</sup> The main roots for this attitude are probably to be found in the profession's "organic, Tory view of the world with its attendant respect for authority."<sup>14</sup> This conservatism shows itself in all the aspects of legal scholarship discussed in this paper. Not surprisingly, the net result is a spate of taxonomic papers and a sparsity of more critical, reflective writings that ask fundamental questions and challenge articles of faith. The *status quo*, as expressed in judgments and generally accepted and reflected in literature, becomes a self-reinforcing norm. As a result, the fundamental tenets are hardly ever questioned. Apologists of the system are rewarded. Critics are often shouted down, ostracized, or considered objects of amusement; the substantive arguments they raise are rarely, if ever, addressed.

More fundamental research is desperately needed to challenge both the implicit and explicit underpinnings of the common approaches to administrative law. The most basic needs are for greater exploration of (1) the meaning and nature of the field of administrative law and (2) the relationship of the 'legal' elements with the framework of public administration and regulation and with social, economic, and political issues. The need for a look that does not restrict itself to a narrow conception of legal rules exists in other areas. However, the very nature of administrative law, which only exists as threads of a fabric into which are woven economic and social policy, and within which law in the narrow sense plays only a small role, is such that it particularly needs to be reassessed on a broader basis. Only a few have done this. Arthurs' "Rethinking Administrative Law"<sup>15</sup> is an excellent example of the sort

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<sup>13</sup> See the text cited in R. Martin, "Criticizing the Judges" (1982) 28 McGill L.J. 1 at 26 n. 118.

<sup>14</sup> *Ibid.* at 1.

<sup>15</sup> *Supra*, note 10.



of work that does challenge assumptions and underpinnings, and explores the nature of the beast. Such papers have been few and far between. In fact, it is almost shocking that administrative law, a relatively new field that raises fascinating legal and extra-legal issues, has attracted so little in the way of fundamental scholarship.

Some of the issues central to the area that require exploration include the following:

- (i) Is our understanding of the concept of Administration adequate? Is the differential treatment given by law to Administration adequate? The English legal language has yet to come up with a term for the very real concept of *administré*;
- (ii) Do writings on administrative law fully appreciate how much the volume of regulation may not be co-extensive with its impact? The extent to which we are regulated is not related to the thickness of the Consolidated Regulations of Canada but to the frequency with which the provisions contained therein are resorted to;
- (iii) Have we developed any coherent notions about the nature of regulation? (This is related again to the need for exploration of the most basic definitions or starting points);
- (iv) What is, and ought to be, the relationship between the political process and the courts?;
- (v) How much attention should be paid to formulation, implementation, and evaluation of public policy?;
- (vi) Should the Administration have the power to create laws? To what extent could the effectiveness of such laws rest not on sanctions, but on persuasion, compromise, consultation, and consensus? Is the criminal law a model at all relevant to administrative law?;
- (vii) How should we approach the gaps that obviously exist between what law does, what it says it does, and what various people say it is meant to do?

#### B. *The 'Closed Shop' Mentality of the Common Law Scholar*

Common law professors aspire to greater contact with the other legal system, but remarkably few pursue it in research or otherwise.<sup>16</sup>

The Canadian academic trained in common law is confronted with at least two particular difficulties. First of all, English-speaking common law academics tend to ignore almost completely materials written in French. The ratio of literature on administrative law written in English and in French appears to be somewhere between three and four to one.

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<sup>16</sup> *Supra*, note 1 at 89.

This is not reflected in the materials to which English authors refer. While French-speaking authors quote sources in English, and often write in English in English law journals, anglophone authors rarely quote materials written in French and commonly write in English in French law journals.

This issue is not raised for the sake of waving the bilingualism flag. The problem is that a large body of Canadian literature in administrative law is not being considered. A different way of thinking about administrative law issues is clearly being ignored. The possibility that some of it could provide a much needed impetus for change, or at least contribute to a broader awareness, cannot peremptorily be overlooked. It is the common lawyer, not the *civiliste*, who loses in this. A Vancouver senior counsel, specialized in constitutional and administrative law, recently struggled to articulate an argument that had been concisely put in a book published in French ten years earlier. This counsel was quite bilingual. However, he had never imagined that a paper written in French might have something different to offer from anything that had been written in English on the subject.

The 'two solitudes' problem may also be witnessed in cases decided in the Supreme Court of Canada. There is an argument to be made that the case law emerging out of Quebec is not always in line with that from the rest of the country. For example, neither *Blanco v. Rental Commission*<sup>17</sup> nor *A.G. Quebec v. Labrecque*<sup>18</sup> mention *C.U.P.E. v. New Brunswick Liquor Corp.*<sup>19</sup> in spite of the fact that it had been and still is widely regarded as a landmark case in the rest of Canada (*C.U.P.E.* has been explicitly followed in *Blanchard v. Control Data Corporation*<sup>20</sup>). Mullan, in a 1982 comment, seemed somewhat surprised at this. He saw these cases as somewhat of a regression to the pre-*C.U.P.E.* willingness to brand any error as jurisdictional.<sup>21</sup> Subsequent cases have not really borne this out; *C.U.P.E.* still seems to be alive and well. It may be that what Mullan feared to be a regression was really a manifestation of the two solitudes problem on the bench. After all, is it realistic to expect that the judiciary will be any more cosmopolitan than the ranks of legal academics (whence many of them now come)?

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<sup>17</sup> [1980] 2 S.C.R. 827.

<sup>18</sup> [1980] 2 S.C.R. 1057.

<sup>19</sup> [1979] 2 S.C.R. 227.

<sup>20</sup> [1984] 2 S.C.R. 476.

<sup>21</sup> D.J. Mullan, "Developments in Administrative Law" (1982) 3 Supreme Court L.R. at 41ff. and esp. at 49.

The phenomenon is but an illustration of a second, more general, problem with common law scholarship in administrative law: its lack of genuine comparative approach. Comparative references in administrative law papers usually focus on other common law jurisdictions. Other systems, including the widely influential continental systems of administrative law, are often fundamentally misunderstood. I am reminded of a conversation with the widely-read, prominent and legally-trained chair of an administrative agency who was shocked to learn that a particularly crucial difficulty that confronted the agency was solved quite straightforwardly . . . in the Austrian Code of Civil Procedure.

This detachment from the comparative approach is particularly regrettable since in it probably lies part of the solution to many of the difficulties with administrative law scholarship. Thus, much of whatever coherence that has been achieved to date in the Administrative Law Project of the Law Reform Commission of Canada may be traced to the attempts on the part of researchers from both our legal cultures to learn from one another.

As I have mentioned above, administrative law scholarship tends also to be isolated from the social sciences. This is crucial for administrative law because it is "the interface between law and modern government administration."<sup>22</sup> Multidisciplinary collaboration ought to be the backbone of scholarship in administrative law, but this is not the case. The minimal number of contributions by non-lawyers to law journals still overwhelm the even more minimal legal contributions to non-legal journals.

### III. HOW CAN THE SITUATION BE IMPROVED?

The observation that more broad-minded fundamental research is necessary is not terribly original. Indeed, it applies to the whole area of law. In my view, there are a number of factors that operate to maintain the *status quo* and inhibit change. I have just outlined a few. These factors cannot be dealt with as isolated causes; they are elements of a problem that is made worse by their combined effect.

The problem with legal scholarship in administrative law, then, is not one that can be remedied by simply improving skills or retraining in particular areas. It is much more profitable to look at the component elements of the legal community with a view to prospects for change.

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<sup>22</sup> Law Reform Commission of Canada, *Independent Administrative Agencies* (Working paper No. 25) (1980) at 1.

### A. *The Legal Profession*

The legal profession helps maintain entrenched attitudes. This is due partly to the fact that it is usually involved in particular disputes, with a view to the courts as a final resort. It is somewhat reactive in nature, and usually becomes involved at what I have called the pathological stage. The profession also encourages similar views in other elements of the community, since it provides the main market for legal publications. Legal academics are obviously influenced by it in their choices and orientation of research. One can write a book about judicial review, warn that it is not a general treatise on administrative law,<sup>23</sup> and still see it being considered by others as fundamental to administrative law notwithstanding its narrow focus. Thus it is not realistic to expect the impetus for change to come from the profession.

### B. *Law Schools*

Legal education is structured primarily to produce candidates acceptable to the law societies for legal practice.<sup>24</sup> This orientation tends to result in the production of technicians rather than creative thinkers likely to conduct fundamental research. Consequently, there are not enough first rate people attracted to academic life. Moreover, those who do surface have been trained to look at administrative law with a narrow focus. Lawyers are taught to approach individual problems rather than looking at systems, and law school courses in administrative law tend to be courses on judicial review.

In contrast to the legal profession, the law schools are fertile seeding grounds for any long-range plan for change. Broader, more fundamental approaches to administrative law would be more likely to attract students to academia and to produce practitioners more sensitive to the system as a whole. Ultimately, even judges would be appointed from such a pool.

Clearly, this is a very long range plan. There are signs, however, that such changes in curriculum are beginning to happen. The long-term success depends partly on drawing to the academic world sufficient numbers of high quality people who will create the tradition of legal scholarship necessary to attract 'bright young minds'.

While there can be some hope that changes may be underway, there is no room for complacency. Law schools have been giving administrative

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<sup>23</sup> I am, of course, referring to S.A. De Smith, *Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (1980) at 11.

<sup>24</sup> H.W. Arthurs, "Paradoxes of Canadian Legal Education" (1976-77) 3 Dal. L.J. 639.

law a superficial, narrow treatment. Current hopeful signs are not enough in themselves to effect real change unless they increase in number and the degree of seriousness with which they are implemented is maintained.

### C. *Legal Academics*

Law professors are products of their own background. They are obviously conditioned by what they have learned. Yet, arguably, they are in the most immediately influential position to effect change, as what they write is read by lawyers and students, and possibly cited to courts. They are, of course, subject to 'market considerations'. When writing a paper or a book, they have to keep in mind what will sell or what will forward their career plan. This is particularly true in those law faculties where a collective agreement does not yet provide a detailed code for the accession to full professorship.

Not all papers need be 'seminal' for the situation to improve. Even in the more pedestrian pieces of research, greater attention could be paid to the vast areas of administrative law besides judicial review. As teachers, legal academics can also broaden the perspective of administrative law given to students and have long-term influence on them.

Any significant improvement necessarily involves a change in focus and attitudes. Legal academics must stop being apologists of judicial review and abandon the delusion that their discipline ever was apolitical. They must try to look into the social, historical, political, and other reasons for the legal mess in which the Administration finds itself, rather than merely trying to make sense of it from the outside and through the dictates of the courts. They must stop side-stepping fundamental issues. They must also resist the temptation to overspecialize: arcane analyses on specific areas will be of little use if they are not aimed at gaining a better understanding of administrative law as a whole.

### D. *Law Journals*

Law journals are, with casebooks, the main outlet for scholarship in administrative law. In fact, it could be said that periodical articles dominate this field. Most journals cast an unfavourable eye on longer pieces that may be submitted to them. This, combined with the understandable reluctance of private publishers to venture into producing treatises or monographs, further encourages fragmented, specialized, doctrinal scholarship, at the expense of more thorough, fundamental research.

Journals also contain a significant amount of repetitive or useless material, also known in computer jargon as 'noise'. It could be argued

that the time spent preparing, editing and generally making palatable the 'noise' is so much time taken away from focusing on the appropriate preparation and edition of more significant materials. In my opinion, to allow repetitive papers to be published in the hope that some seminal article will surface from time to time is misguided. The Arthurs Report called for better quality control of law review articles.<sup>25</sup> I, for one, would go even further: I hope one day to receive a notice from the editor of a review to the effect that they do not intend to publish a particular issue because what they have to deliver is not worth my reading it.

### E. *The Courts*

Even if legal scholars were to remedy overnight all the deficiencies heretofore discussed, it would have little immediate discernable influence on the attitudes of our courts toward 'inferior' decision makers. The courts probably will continue to resist change, particularly when it is directed at limiting their area of authority. Perhaps, if we wait out an entire generation from the time law school curricula becomes sufficiently enlightened, real change will occur when those students end up on the bench. On the other hand, there is a risk that the students will have been co-opted in the meantime to the older, more conservative views of the legal profession. Consequently, progress at the level of case law can only be extremely slow, and is directly dependent on attitudinal changes within the profession.

One of the reasons why the courts have such influence over the whole system of administrative law lies with the fact that due to our legal training, we ascribe an enormous influence to court judgments in legal writing. Whether these judgments have a genuine impact on day-to-day administrative action is a different question. Yet few legal academics would think of publishing an article for which no, or little, case law could be found on point. This is part of, and reinforces, the Canadian tendency toward legal conservatism. This is one area in which *civilistes* might be expected to be more imaginative. *Stare decisis* is not meant to be a dominating concept in civil law, and in fact, *doctrine* occupies a superior position as far as persuasive authority is concerned. Consequently, one might expect *civilistes* to be less shackled by the views of the courts than common law academics. This is one further reason why common lawyers might do very well to pay greater attention to writings in French; the underlying assumptions and priorities are not necessarily the same.

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<sup>25</sup> *Supra*, note 1 at 44.

## F. Government

Government has to shoulder part of the blame for the sorry state of scholarship in administrative law. First, it is one of the main protagonists of administrative law and takes great advantage of the current situation. Second, government pays for most research in Canada, directly or indirectly. By focusing on the more attractive and politically profitable issues, and not insisting on more inspired and more fundamental research in administrative law, government has added to the difficulty. In this sense, government is part of the problem by refusing to be part of the solution.

## IV. THE FUTURE

Administrative law is a field in particular need of less pedestrian scholastic attention. Scholarship in administrative law should, among other things, service and improve the effectiveness and fairness of the administration and guide it towards better ways of getting the job done. This can happen only if assumptions are challenged, and certain 'principles' exposed for what they are: articles of faith, not unshakable truths.

There is ground for optimism, at least 'at the margins' to use an expression dear to Dean Prichard's heart. Law school curricula are starting to include genuine courses in administrative law. Dussault's *traité*<sup>26</sup> was written, and is being translated, helping to ensure that his ideas will spread outside Quebec. Programmes like the one in law and economics at the University of Toronto are breaking down the isolation that has characterized lawyers generally and has impaired administrative law. Some papers now being produced are critical, reflective pieces that address fundamental issues and assumptions. Some argue for an enlightened understanding of administrative law. Some provide an examination of the nuts and bolts that is desperately needed to build an empirical data base. However, there are not enough of these to allow one to say that the overall character of scholarship in administrative law has changed.

A massive shift in attitudes is required. Certainly, recognizing the necessity of attracting good students to academic life and giving them the necessary tools to become good scholars will help. In this regard, something must be done to remedy the lack of incentive for higher studies. However, this can have a significant impact only if we fully reassess the very methodology of administrative law. We must develop the elements necessary to any decent tradition of legal scholarship. We have no established body of theory to build on, no serious findings, no significant

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<sup>26</sup> R. Dussault & L. Borgeat, *Traité de Droit Administratif* (1984).

secondary literature.<sup>27</sup> These must be provided. We do not have the empirical research skills for interdisciplinary work; how can we hope to pass them on if we do not start by acquiring them? A genuine scientific method is crucial to the healthy development of legal scholarship.

One can hope that such a methodological restructuring will immediately result in a complete about-face in the prevalent view held about administrative law. The judicial bias would be abandoned in favour of an approach geared more directly to the reality of day to day administration. This should, in turn, generate some motivation for empirical investigations into a range of government decision makers. Only then will legal models be developed for non-judicial decision-making formats (such as mediation and conciliation), for classes of entitlement, and for participation in decision making. The tendency to look down the wrong end of the telescope must be reversed.

Where to begin with this change of attitude is not as important as starting now. The kind of corrective measures that are needed exist symbiotically and reinforce one another. Challenging common assumptions on the fundamental level will open the way to new approaches and set the stage for more expository pieces. In turn, such pieces should raise other fundamental issues and provide the foot on the ground that is necessary to higher thinking.

For my own perspective, I should add that the law reform commissions are part of the problem and part of the solution. Too much law reform research tends to be doctrinal and fails to confront the most problematic issues of the day, at least in the area of administrative law. Law reform commissions should not be content with improving judicial review; they should start by questioning its very existence, its very rationale. Moreover, as Arthurs pointed out, there is a potential conflict of interest between government as contractor and consumer of research and government as sponsor of intellectual activity. Law reform agencies must tread carefully if they are not to stifle, rather than improve upon the quality and progress of legal scholarship.

There is hope, however. I will be so bold as to suggest that the Administrative Law Project of the Law Reform Commission of Canada evidences a commitment to spread its efforts between empirical data gathering and fundamental thinking, between attractive short-term problem solving and thinking about more fundamental issues with long-term rewards. I think it displays a commitment to treat substantive and procedural issues about public law in light of twentieth-century realities. It recognizes the need for improvement in design, implementation, and

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<sup>27</sup> *Supra*, note 1 at 146; *supra*, note 24 at 651.



evaluation of public policy; and the need for developing a range of expositions about decision making in government. It is in this form, even more than in any legislative amendments that might follow from its work, that research programmes like the one I have the honour of participating in will probably pay the highest dividends.

