COURTS, LABOUR TRIBUNALS AND THE CHARTER

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Introduction

Ubi ius ibi remedium - the principle is as old as the law itself. But what the maxim does not signalize is the *locus* of remedy. If remedy there is to be, then of necessity every polity must fashion the machinery for its realization. In a society such as ours, which clothes its informing values in the language of legal rights and obligations, it is natural that the Court has become the arena for satisfaction where enforcement of duty and vindication of right is sought. Indeed, the Dicean ideology - or ought it not be termed idolatry? - of the law, encapsulated in the *Rule of Law* rubric would sacralize the Court as the only source of remedy, one intolerant of rival, in much the same way as the priestly cult of old sanctified the one High Place of Jerusalem as the sole altar of sacrificial worship.[1]

But the history of our law, stripped bare of the encrustations inspired by Dicean romanticism, has been one of heterogeneity rather than of homogeneity. Writers such as Arthurs[2] and Auerbach[3] have exposed the myth of uniformity in the institutions of our law and have uncovered for us the reality - a pluralism of institutional structure marvelously sensitive to felt social needs. Indeed, elements of that pluralism have been recaptured in the modern social welfare state. The principle of distributive justice has spurred legislatures to expand the range and character of entitlements. To ensure their distribution and vindication, legislatures have turned not to Courts, enthralled as they are by the cult of the individual and of property, but rather to creatures of their own devising - administrative tribunals, dedicated, even sworn, to furtherance of a legislative scheme of distribution grounded in the collectivity.

In short, the relief-granting monopoly held by Courts according to classical doctrine has given way to a regime of shared remedial jurisdiction. Irate ratepayers, exploited workers, outraged conservationists, the dispossessed of shelter or employment turn now not to a court but to an administrative tribunal to assert rights and seek relief, be it Municipal Board, Labour Tribunal, Conservation or Welfare Commission. The locus of *remedium* has become dispersed in the welfare state. Out of that dispersion of relief-giving authority arise fundamental queries. Who is best fitted to define, describe and decipher the nature of legislated entitlements? Who is to integrate entitlements legislatively based with com-

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[1]The *Rule of Law* comprises Part II (ch. iv-xii) of Dicey's celebrated *Introduction to the Study of the Law of the Constitution* which first appeared in 1885. The standard edition is the 10th edited by C.S. Wade (London: MacMillan, 1959). For an insightful critique see P. McAuslan and J.F. McEldowney eds., *Law, Legitimacy and the Constitution* (London: Sweet & Maxwell, 1985) being essays marking the centenary of this classic study. On the centralization of priestly cult worship at Jerusalem during the period of the Israelite monarchy see Roland DeVaux, *Ancient Israel*, (tr. J. McHugh) (London: Darton, Longman & Todd, 1961) Pt. IV, c.3-4.

[2]H.W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985).

[3]J.S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983).

plementary and conflicting ones of like origin? What relation do such entitlements bear to rights rooted at common law, and who is to determine that relationship? It is evident from our law that dispersion of relief-granting authority does not entail parity of relief-granting jurisdiction. A complex of factors including the nature of the right asserted, the character of the obligation sought and the form of the remedy claimed, will dictate the forum to which one turns. For the institutional structures and modalities of one forum may make it particularly appropriate for the determination of issues of one order but highly inappropriate for those of another. The matching of the strengths of one institution with the essence of a particular issue is neither a self- evident enterprise nor a simple process. Witness the vicissitudes of administrative decision making exercised under the umbrella of a privitive clause in the face of the reforming jurisdiction of our high courts.[4]

Of late, the question of *forum conveniens* has arisen in the setting of our new Constitution, that of 1982. Its informing principle is the entrenchment of fundamental rights and freedoms beyond the reach of even Parliament and our Legislatures, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[5] In what manner are the rights and freedoms there guaranteed to be asserted, their breach remedied? Two provisions of the *Constitution Act, 1982* address the issue. The first, s.24(1) is explicitly remedial in formulation:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The second is declaratory in formulation.

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Because with us the general capacity to grant relief under law has been dispersed by legislative action, it is natural to question whether or not a similar dispersion of relief-granting authority is accorded or even mandated by constitutional *fiat* where enforcement or application of a legislated entitlement is said to conflict with a *Charter* norm. This question has engaged the attention of a broad spectrum of administrative tribunals, courts and commentators.

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[4]The lamentable outcome of this institutional clash is well chronicled in Paul Weiler's critique of the Supreme Court of Canada, *In the Last Resort* (Toronto: Carswell Co. Ltd., 1974). The oppressive nature of the institution of judicial review has been central to the work of H.W. Arthurs, *supra*, note 2. See as well his "Protection Against Judicial Review" Canadian Institute for the Administration of Justice, *Judicial Review of Administrative Rulings* (Montreal: Les editions Yvon Blais Inc., 1983) at 149-162.

[5]The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [enacted by the *Canada Act, 1982* (U.K.), c.11], s.1.

On the whole, administrative tribunals have claimed a constitutional voice and embrace eagerly the opportunity to test their enabling legislation against the new constitutional norms.[6] Some courts have welcomed this development. The Courts of Appeal of both British Columbia[7] and Ontario[8] consider administrative tribunals sufficiently skilled to sculpt legislative action to fit the new constitutional cast. The Federal Court of Appeal has faltered. In what can only be described as a collapse of curial collegiality, panels of its members, differently composed, have disagreed vehemently with one another on the issue. None endorses the approach of the British Columbia Court of Appeal uncritically, but some are prepared to recognize a limited role in constitutional decision making for administrative tribunals.[9] Others deny unhesitatingly any such role whatsoever.[10] The commentators divide along the same lines.[11]

One discerns three factions in the debate. First, there are the Enthusiasts. These envisage a plenitude of jurisdiction vested in administrative tribunals to determine constitutional issues as they unfold before them. When a tribunal is called upon to remedy the alleged infringement or denial of *Charter* right or free-

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[6]This is particularly so in the case of Labour Tribunals. Jurisdiction to entertain *Charter* challenges to their respective enabling statutes has been claimed by the Canada Labour Relations Board in *Union of Bank Employees (Ont.), Loc. 2104* v. *Bank of Montreal* (1985), 10 C.L.R.B.R. (N.S.) 129; by the British Columbia Labur Relations Board in *Overwaitea Foods Division* of Jim Pattison Industries Ltd. (1987) 14 C.L.R.B.R. (N.S.) 268; by the Ontario Labour Relations Board in *Third Dimension Manufacturing Ltd.*, [1983] O.L.R.B. Rep. Feb. 261; and more recently in *Cuddy Chicks Ltd.*, [1988] O.L.R.B. Rep. May 468; application for judicial review dismissed *sub.nom. Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)* (1988) 66 O.R. (2nd) 284 (Div. Ct.); affirmed on appeal (1990), 62 D.L.R. (4th) 125 (Ont. C.A.); leave to appeal to S.C.C. granted, (1990), 65 D.L.R. (4th) vii; and by the Quebec Labour Court in *Association des Employés de Pyradia Inc. c. Pyradia Inc.* [1987] T.T. 382; [1988] T.T. 32; but see *contra*, *Syndicat de Professionnelles et Professionnels du Gouvernement du Québec c. Procureur General du Québec* [1988], T.T. 218.

[7]*Moore* v. *British Columbia* (1988), 50 D.L.R. (4th 29 (B.C.C.A.) and *Douglas/Kwantlen Faculty Association* v. *Douglas College* (1988), 49 D.L.R. (4th) 749 (B.C.C.A.). Although in both cases the jurisdiction of an arbitrator to measure collective agreement terms against a *Charter* norm is at issue, the principle is identical to that where a statutory regime is engaged. See as well the Court's decision in *Re Shewchuk & Ricard (1986)* 26 D.L.R. (4th) 429 (B.C.C.A.) in which the jurisdiction of a provincial court judge to rule on the constitutionality of a provincial statute was upheld.

[8]*Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, *supra*, note 6.

[9]*Zwarich* v. *Canada (Attorney General) (1987)* 82 N.R. 341 (F.C.A.); *Tétreault-Gaduoury* v. *Canada Employment & Immigration Commission* (1988), 88 N.R. 6 (F.C.A.), leave to appeal to S.C.C. granted (1989), 57 D.L.R. (4th) vii.

[10]This is particularly the case of panels on which Justice Marceau sits. See *Vincer* v. *Canada (Attorney General)* (1987), 82 N.R. 352 (F.C.A.); *Terminaux portuaires du Québec Inc.* v. *Association des employeurs maritimes et al* (1988), 89 N.R. 278 (F.C.A.); and *Poirier* v. *Canada (Minister of Veterans' Affairs)* (1989), 96 N.R. 34 (F.C.A.).

[11]Those who would give to administrative tribunals a constitutional voice include: Danielle Pinard "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet a des textes qu'ils jugent inconstitutionnels" (1988) 33 McGill L.J. 170-193; Yvon Duplessis, "Un tribunal inférieur peut-il se prononcer sur une disposition legislative *ultra vires*?" (1984) 15 R.G.D. 127-132; Ingmar Borgers, "Do Inferior Tribunals Have the Power to Declare a Law Unconstitutional?" (1988) 19 R.G.D. 909-929; John Evans, "Administrative Tribunals and Charter Challenges" (1988) 2 C.J.A.L.P. 14-46. Those who would deny to the tribunals such a voice include Yves Ouellette, "La Charte canadienne et les tribunaux administratifs," (1984) 18 R.J.T. 295-328; and Gilles Pepin, - "La compétence des cours infériaures et des tribunaux administratifs de stériliser, pour cause d'invalidité ou d'ineffectivité, les textes législatifs et réglementaires qu'ils ont mission d'appliquer," (1987) 47 R. du B. 509-540 (Pepin I); and "La compétence du Tribunal du Travail de juger une loi ineffective (inopérante)" (1988) 48 R. du B. 125-137 (Pepin II).

dom, these give them let to do so either as s. 24 courts of competent jurisdiction, or as primary decision makers in the exercise of an uncontested legislative jurisdiction giving primacy only incidentally to the Constitution of Canada pursuant to s. 52(1).[12]

Then there are the Reformists. These assert a distinction of substance between a finding of invalidity and one of inefficacy. Courts of Law alone may presume to invalidate the Acts of a Legislature, and so these are disinclined to find administrative tribunals to be s. 24 courts of competent jurisdiction for the purpose of granting *Charter* relief. On the other hand, these view a finding of inefficacy to be incidental to one of illegality, the latter finding one which administrative tribunals routinely make. Indeed for them, by the terms of s. 52, inefficacy flows automatically from a finding of mere inconsistency with the provisions of the Constitution. This being so, administrative tribunals are of necessity competent to make determinations which uphold the primacy of the Constitution of Canada.[13] Third there is the Rejectionist Front. These see, neither in the terms of s. 24(1) of the *Charter*, nor in those of s. 52(1) of the *Constitution Act, 1982* warrant for entry into the arena of constitutional decision making by administrative tribunals. That arena is reserved in its fullness and plenitude to Courts of Law.[14]

Where does one turn to resolve this conflict? To the enabling legislation and the underlying concerns and values which fuel its enactment? Traditionally these are said to be a discrete and integrated cluster of social activities to be harnessed and channeled in a particular direction pursuant to legislative policy and under the superintendence of an administrative tribunal which exhibits characteristics of expertise, specialization, collegiality, accessibility, affordability, flexibility and efficiency. Certainly no solution can be found there. Yet, surprisingly, support is sought there to undergird a constitutional role for the administrative tribunal.[15] If not there, then where? Surely one should turn to the Constitution itself. However, this can be and for the greater part is done superficially by reference solely

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[12]Courts which I would number among this group include the British Columbia Court of Appeal given the combined effects of its decisions in the *Moore and Douglas/Kwantlen cases supra*, note 7, and the Ontario Divisional Court given its decision in *Cuddy Chicks, supra*, note 6. Of the Labour Boards, only that of Ontario has expressly adopted this position in *Cuddy Chicks, supra*, note 6. No commentator has expressed absolute endorsement of this view, although some consider it possibly correct, *e.g.* Borgers, *supra*, note 11.

[13]This position now appears to represent the received wisdom. It is a view strongly held by Justice Pratte of the Federal Court of Appeal as indicated by his decisions in *Zwarich* and *Vincer, supra* note 9 and 10. It has been endorsed as well by Justices Lacombe, Hugessen and Desjardins of the same Court in *Tétreault-Gadoury, supra*, note 9. It is representative of the "minimalist" position of the Canada, British Columbia and Ontario Labour Relations Boards as indicated in *Overwaitea, Bank of Montreal* and *Third Dimension Manufacturing, supra*, note 6. Commentators who are in accord are Pinard, Duplessis and apparently Evans, *supra*, at note 11.

[14]A passionate exponent of this view is Justice Marceau of the Federal Court of Appeal as revealed by his judgments in *Vincer, Terminaux portuaires* and *Poirier, supra*, note 10. It is adopted as well by Justice Finlayson in his dissent in *Cuddy Chicks, supra*, note 6. Of the commentators, Pepin, *supra*, note 11 holds this view strongly.

[15]The Boards are particulary adept at pleading administrative law values to justify a constitutional role. Many courts are supportive, *e.g.*, the Ontario Court of Appeal in *Cuddy Chicks, supra*, note 6; and some commentators are sympathetic *e.g.*, Evans, *supra*, note 11.

to those of its provisions that are specifically engaged, namely s.24(1) of the *Charter* and s.52(1) of the *Constitution Act, 1982*. To so limit one's search is myopic and leads to the misperception of a constitutional role for administrative tribunals grounded in the Constitution itself. A more penetrating analysis would take within its purview the entirety of our Constitution, and must needs lead to the opposite conclusion - one which would deny a role to administrative tribunals in the shaping and fashioning of our new constitutional order. Thus, I align myself with the third group earlier identified, the rejectionists. I hasten to add that it is not merely for constitutional reasons that I do so but as well for those rooted in labour relations and collective bargaining theory.

I. Power and Our Constitution

"Law is a technique for the regulation of social power." So began Sir Otto Kahn Freund his celebrated Hamlyn Lectures. He continued:

> Power - the capacity to effectively direct the behaviour of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to ensure that these are obeyed, is a social power. It rests on many foundations, on wealth, on personal prestige, on tradition, sometimes on physical force, often on sheer inertia. It is sometimes supported and sometimes restrained, and sometimes even created by the law, but the law is not the principal source of social power.[16]

Power, its legitimate exercise and necessary restraint, serves well as an organizing principle in the study of our Constitution. The relationship, both real and ideal, between the various institutions of our Constitution - Crown, Parliament, Court - with each other, and each with the citizen, can be grasped readily in terms of the principle of power. Ours is a Constitution suffused with the theory of democracy - ultimate power rests in the people (GR: *demos* (people) & *kratos* (power)). Of course this was not always so. Our early constitutional development centered on the theme of restraining the autocratic power of the monarch (GR: *autos* (self) & *kratos*). The first great struggles were waged to assert not democratic, but aristocratic power over and against that of the King (GR: *aristes* (the best) & *kratos*). After *Magna Carta*, power was no longer his sole preserve but one to be shared - not equally to be sure - with an elite. Vestiges of such shared power are still evident in the preambular invocation to the Lords Spiritual and Temporal in English statutes. The great struggle to establish democratic power over against both King and Lord was fought only in the seventeenth and eighteenth centuries with the triumph of the Commons in winning to itself ultimate power in the Realm.

It is a peculiarity of the English Constitution of which we are heir that this shift in the locus of power was effected without change in its previous outward

[16] *Labour And The Law* (London: Stevens & Sons, 1972) at 4.

embodiment. The fiction of autocratic rule by the monarch is maintained through the principle of Responsible Government. Ministers of the Crown are made subject to the democratic will of Parliament though they exercise their authority in the name of the King. Similarly, the superiority of the Lords to the Commons has become but form, for the aristocratic principle too defers to the democratic, if clash there be between them.

I have spoken of autocratic, aristocratic and democratic power, but there exists in our Constitution a further seat of power. For the King dispensed justice as well as largesse, and that power too was wrested from him, and placed in a class skilled at discernment - the Judges. With the *Act of Settlement*,[17] critocratic power and its exercise became fully entrenched as an institution in our Constitution. (GR: *krites* (judge) & *kratos*). There too the fiction of the monarch dispensing justice remains to this day evident in the appellation of our Courts of Justice as King's or Queen's Bench.

The *autocratic* principle rests on the persuasive power of the *sword*. The Crown has at its disposal the overwhelming strength of the State to further its purpose. The *democratic* principle rests on the persuasive power of the *word*. Parliament (OF: speaking) is a place for verbal jousting. The *critocratic* principle rests on the persuasive power of *reason*. Judges exercise their critical faculties in discerning and articulating the law. These three principles continue to inform our Constitution. Parliament exercises its democratic power by law-making; the Court by law-determination; the Crown by law-enforcement. Although in the English tradition there is division of constitutional role and function among these institutions, there is no theory of formal division of power. Rather, the democratic principle prevails in the theory of parliamentary supremacy which is said by Dicey to be "the dominant characteristic of our political institutions:"[18] Of its sweeping authority he wrote:

> Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further no person or body is recognized by the law of England as having the right to override or set aside the legislation of Parliament.[19]

With approval he cited from Blackstone's *Commentaries*:

> It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth no authority upon earth can undo.[20]

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[17] 12 & 13 William III (1701), c.2.

[18] *Supra*, note 1, at 40.

[19] *Ibid*. at 41.

[20] *Ibid*. at 42, citing 1 Blackstone, *Comm*. at 160, 161.

So sweeping an assertion of power rests, to be sure, on the democratic principle, won only at great cost against the aristocratic power of the Lords and the autocratic power of the King. Nevertheless one must pause to ponder whether such power might not overreach and become despotic.

Our later constitutional history could be said to be a development of this theme: the necessary restraint of democratic power. Three phases may be discerned. The first is rooted in the critocratic principle. From an early period, indeed contemporaneous with the flourishing of democratic power, the judiciary asserted a right to restrain its exercise. Although paying heed to the sovereignty of Parliament, the Courts fashioned a wondrous engine to withstand its awesome power: the Common Law. The power of reason was harnessed to shield and defend the rights of the individual against the overwhelming power of the State now being exercised in the name of the people. Thus the jealous preference of the Common Law for individual right and liberty over and against that of the collectivity. The centrality of the exercise of critocratic power in the development of those civil and political liberties we associate with the English constitutional tradition, cannot be gainsaid. Nevertheless such power too could overreach and the history of labour and the law provides the paradigmatic example. There, critocratic power was abused to despoil the worker.[21] It was the democratic power of Parliament exercised over and against that of the Courts which restored dignity to the worker, for the democratic principle looks more favourably on the collectivity than does the critocratic.[22]

The second phase in the restraint of democratic power can be found in the development of federalism. It is the genius of the American revolutionaries to have fashioned a union of newly independent colonies into a single state organized on the federal principle. Here, the democratic principle is restrained by rejecting a single parliament in a unitary state. In its stead are created several parliaments, each supreme with respect to a class of common matters within their respective borders, a national parliament having exclusive jurisdiction across the entire union on a limited class of agreed matters. Plenary jurisdiction over the citizen can be exercised only jointly. Federalism as a restraint on the democratic principle was, until 1982 the distinguishing feature of the Canadian Constitution, otherwise declared to be one "similar in Principle to that of the United Kingdom."[23] Although it could never be doubted that in the combined jurisdiction of Dominion Parliament and Provincial Legislature, the full plenitude of sovereignty of the Parliament at Westminster could be exercised,[24] federalism, in concert with

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[21]The developing 19th century tort doctrine was particularly hostile to workers, as witness the economic tort of inducement of breach of contract and that of unlawful conspiracy to injure. Subsidiary tort doctrines such as *volenti* and common employment were equally hostile to workers. A short historical treatment can be found in A.W.R. Carrothers, *et al*, *Collective Bargaining Law in Canada*, 2d ed. (Toronto: Butterworths & Co., 1986) c. 2.

[22]Important among the legislative policies favourable to workers were the *Criminal Law Amendment Act*, 34 & 35 Vict., c.32, and the *Trade Unions Act*, 34 & 35 Vict., c.31, both enacted in 1871. Canadian legislation followed swiftly with the *Criminal Law Amendment Act* (1872) 35 Vict., c.31 and the *Trade Unions Act* (1872) 35 Vict. c.30. In addition and of significance in England was the *Trade Disputes Act* of 1906, 6 Edw. VII, c. 47.

[23]*Constitution Act, 1867*, U.K., 30 & 31 Vict., c. 3, Preamble.

[24]*Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 (P.C.). See as well *Murphy* v. *C.P.R. & A.-G. Can.*(1959) 15

a continuously developing and vibrant curial jurisprudence served as an effective barrier against an overreaching democratic power.[25]

We have only recently entered the third phase in the restraint of democratic power with entrenchment in our Constitution of rights and freedoms beyond the reach of a democratic parliament. For the Americans both the second and third phases were conflated into one with the early incorporation into their great federal Constitution of a Bill of Rights, comprising the first ten amendments to that instrument. Imperfect as the entrenchment of our own *Charter of Rights and Freedoms* may be in contrast with that of the venerable *Bill of Rights*, - I am speaking here of the retention of the democratic principle evident in the s. 33 override - it is nevertheless evident that a further fetter has been placed on the exercise of power by our democratic parliaments.[26] Their every enactment must now be measured against entrenched *Charter* norms and where found overreaching, pruned back and even felled.

Whatever the restraint on democratic power - whether weak as in the case of the common law, strong as in the case of federalism, or absolute as in the case of entrenched rights and freedoms - a common issue is engaged: namely, in what forum is the overreaching exercise of democratic power to be determined. In the Court of Parliament, in the Court of the King, or in the Court of Law? I am convinced that a single answer must be given - only in the Court of Law can such an act take place. Let me explain why this must be so.

II Critocratic Power and the Independence of the Judiciary

We are now thrust into a debate of long standing: the tension between the democratic principle and judicial review; between consent of the governed as the only requirement for exercise of democratic power and the preservation of just entitlements as its necessary corollary.[27] It is a central theme in American constitutional colloquy. Despite the ongoing ferocity of the theoretical debate, it was institutionally resolved shortly after the founding of the United States. In his most celebrated decision, Chief Justice Marshall proclaimed it the unique constitutional duty of the United States Supreme Court to restrain democratic power violative of constitutional principle.[28] Thus, just as the principles of federalism and entrenched rights are conflated in the American Constitution as restraints on

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D.L.R. (2d) 145 (S.C.C.).

[25] "A State, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a Federal State. By it the bounds of sovereignty are defined and supremacy circumscribed." *per* Justice Dickson in *Amax Potash Ltd.* v. *Government of Saskatchewan* (1977) 71 D.L.R. (3d) 1 (S.C.C.) at 10.

[26] On the weakness of the entrenchment of the *Charter* in contrast to its counterpart in the U.S. Constitution, the Bill of Rights, see Anne F. Bayefsky, "The Judical Function Under the *Canadian Charter of Rights and Freedoms*" (1987) 32 McGill L.J. 791-833.

[27] A particularly helpful discussion is that of John Whyte in "Legality and Legitimacy" (1987) 12 Queen's L.J. at 1-12.

[28] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

the democratic principle, so too are conflated the twin bases on which the Court, and the Court alone, may give shape to that restraint. Perhaps the formalized division of powers impressed on that instrument made more critical the resolution of the issue. For in such a scheme, premised on coordination of legislative, executive and judicial powers in the working of the constitutional structure, every function must be characterized and assigned to one or the other of that triumvirate.

The urgency of such characterization and assignment must seem less immediate in a Constitution such as ours, which although recognizing distinctness of function upon the same triadic lines does not insist upon purity of institutional lineament in their exercise. On occasion the principle of parliamentary sovereignty tolerates the exercise of legislative, executive or judicial functions by institutions not accustomed to their exercise.[29] Yet, notwithstanding such apparent constitutional syncretism, it is clear that in our constitutional tradition as well, the right and duty to restrain democratic power is that of judges alone. Indeed it is a central feature of critocratic power.

Even in its weakest formulation the seat of restraint of democratic power has been a judicial one. The entire construct of statutory interpretation is expressive of an "inveterate habit"[30] to subject democratic power to the "hydra-headed presumptions of the courts in favour of the common law.[31] In Canada, this "inveterate habit" quickly adapted itself to a federal enviroment and our courts have eagerly embraced "the high duty. . . to ensure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."[32] The self perception of the critocracy in its relationship to the Constitution is revealing. The judiciary is said to be the "guardian,"[33] "protector"[34]and "defender"[35] of the Constitution and its fundamental values. In much the same manner as the King defends the integrity of the Realm against external depredation, so does the judiciary defend it against internal depredation. There are many examples in the jurisprudence which illustrate the vindication of constitutional values against over-reaching legislatures. In the *Alberta Press Case* it was the right of free and public discussion, said to be "the breath of life for parliamentary institutions."[36] In the *Anti-Inflation Act Reference* it was the demo-

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[29]On the absence of a strict doctrine of separation of powers under our constitution, see the remarks of Chief Justice Dickson in *Reference Re Residential Tenancies Act* (1981), 123 D.L.R. (3d) 554 (S.C.C.) at 566.

[30]The phrase is Lord Reid's in describing the engrafting by the courts of the principles of natural justice onto legislative enactments authorizing interference with private rights. See *Ridge* v. *Baldwin* [1964] A.C. 40 (H.L.) at 73.

[31]This evocative reference to Greek mythology is Wade's found in his Introduction to Dicey's *Law of the Constitution, supra*, note 1 at *ci*.

[32]Justice Dickson in *Amex Potash Ltd.* v. *Government of Saskatchewan, supra*, note 25.

[33]*Hunter* v. *Southam Inc.* (1985), 11 D.L.R. (4th) 641 (S.C.C.) *per* Justice Dickson at 649.

[34]*The Queen* v. *Beauregard* (1987), 30 D.L.R. (4th) 481 (S.C.C.) *per* Chief Justice Dickson at 492.

[35]*Ibid.* at 494.

[36]*Reference Re Alberta Statutes (Alberta Bank Taxation)* [1938] 2 D.L.R. 81 (S.C.C.) affirmed *sub. nom. A.G. Alberta* v. *A.G. Canada* [1938] 4 D.L.R. 433 (P.C.).

cratic principle itself.[37] In the *Patriation Reference* it was the federal principle.[38] In the *Manitoba Language Reference* it was the rule of law.[39]

Now, of course the imagery of knighthood - of St. George the Slayer of Dragons - should not degenerate into judicial hubris. Many years ago the great Holmes reminded us "that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[40] And in a trenchant dissent Justice Stone admonished against "any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction"[41]. Canadian judges too have eschewed a role as "sole guardian" of the Constitution and have recognized Parliament and the legislatures as "equally responsible to ensure that the rights conferred by the *Charter* are upheld."[42] Nevertheless, it is the judiciary alone which can smite overreaching power, for the question of the constitutionality of legislation - of democratic power statutorily embodied - "has in this country always been a justiciable question."[43] On what basis is the critocracy entitled to wield such a sword? I find it in the principle of the Independence of the Judiciary. What is its nature?

Lederman, Canada's foremost theoretician of the centrality of judicial independence to our Constitution, espied at least four elements which together guarantee that value. First, judges are "primary and original officers of state" as truly possessed of separate and autonomous powers as is the King or Parliament. Second, judges emerge from the autonomous and private profession of the law, weaned on its ancient traditions and learning, shaped by its demanding training and experience. Third, upon appointment judges enjoy a security of tenure and certitude of remuneration unmatched by any other public servant. Fourth, judges remain distant from all other affairs of state or commerce, holding no other office or sinecure, public or private.[44] It is this independence which makes judges particularly fitted to proclaim definitively our constitutional order. Our present Chief Justice has called judicial independence "the life blood of constitutionalism in democratic societies."[45]

The principle of judicial independence acts as licence in the exercise by the

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[37] *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.), Question 2.

[38] *Reference Re Amendment of Constitution of Canada* (Nos. 1, 2, 3) (1981), 125 D.L.R. (3d) 1 (S.C.C.).

[39] *Reference Re Manitoba Language Rights* (1985), 19 D.L.R. (4th) 1 (S.C.C.).

[40] *Missouri, Kansas & Texas Ry. Co.* v. *May* 194 U.S. 267, 270 (1904).

[41] *United States* v. *Butler* 297 U.S. 1, 87-88 (1936).

[42] *Reference Re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.) at 57.

[43] *Per* Justice Laskin in *Thorson* v. *A.G. of Canada (No.2)* (1975) 43 D.L.R. (3d) 1 at 11.

[44] William R. Lederman, "The Independence of the Judiciary" (1956) 34 C.B.R. 769-809, 1139-1179 reprinted as c.7 in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworth & Co., 1981).

[45] *The Queen* v. *Beauregard*, *supra*, note 34 at 492.

critocracy of its "high constitutional power"[46] and "deeply constitutional role."[47] Paradoxically, it acts as a restraint as well. For the peculiarity of critocratic power so based is that it is stripped of any external instrument to ensure its dominance. The Court has neither army nor bureaucracy to enforce its pronouncements. Their realization rests solely on the strength of reason to which King and Parliament must bow. Failure so to do would make of our Constitution a hollow thing. Independence licenses the critocracy to gird only reason in the exercise of this power. At the same time it safeguards us against its abuse - for irrational exercise of the restraining power cannot threaten and will be ignored.

The jurisprudence reveals two elements inherent in the principle of judicial independence, the one individual, the other institutional.[48] Aspects of each are enjoyed to a greater or lesser extent by all who hold judicial office, but in its plenitude the principle of judicial independence is truly enjoyed only by judges of our high courts.[49] It has been said that the "internal logic" of federalism leads to the inexorable conclusion that only such judges should exercise a restraining jurisdiction against democratic power under our Constitution.[50] So too does the logic of entrenched rights and freedoms.[51] The monopoly over this restraining power by high court judges is one strand in the ongoing dialogue concerning the judicature provisions of the *Constitution Act, 1867*, and in particular the substantive significance of s. 96.

One has but to glance at the administrative tribunal to recognize how little it shares in the independence of the judiciary. Lack of such independence strips it of any pretense to restrain democratic power. In place of primary and original officers of our Constitution we have mere creatures of Parliament which exercises power of life and death over their very existence.[52] In place of the learned profes-

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[46]*Re Shewchuk & Ricard*, *supra*, note at 439.

[47]*The Queen* v. *Beauregard*, *supra*, note 34 at 493.

[48]The principal decisions are *The Queen* v. *Valente* (1985), 34 D.L.R. (4th) 161 (S.C.C.); *The Queen* v. *Beauregard supra*, note 34; and *MacKeigan* v. *Hickman* (1989), 61 D.L.R. (4th) 688 (S.C.C.) (The *Marshall* case).

[49]*The Queen* v. *Valente*, *supra*, note 48.

[50]The phrase is Professor Lederman's articulated in a review of B.L. Strayer's *Judicial Review of Legislation in Canada* found in (1970) 16 McGill L.J. 723 and reprinted as c. 9 in *Continuing Canadian Constitutional Dilemmas supra*, note n.44 at 192. See as well *ibid*, c. 14 "The Balanced Interpretation of the Federal Distribution of Legislative Power in Canada," pt. III "The Necessity for Independent Judicial Review of the Federal Distribution of Powers," at 281-83. That such jurisdiction cannot be stripped from the Superior Courts is stressed by Justice Estey in *Attorney-General of Canada* v. *Law Society of British Columbia et al* (1982), 137 D.L.R. (4th) 1 (S.C.C.) at 16-17.

[51]That the independence of the judiciary was central to the debate on entrenchment of a Bill of Rights in the U.S. Constitution is noted by Tribe in his text *American Constitutional Law* (New York: The Foundation Press, 1978). He writes "The winning argument for some who most doubted the efficacy of a Bill of Rights, was Jefferson's stress upon "the legal check which [such a Bill would put] into the hands of the judiciary, as a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.," *ibid* at 3, note 7 citing 14 *The Papers of Thomas Jefferson* 659 (J. Boyd ed. 1958).

[52]The holder of a public office acquires no absolute contractual right to it. The appointment is always subject to abolition of the office itself by Act of Parliament. See *Reilly* v. *The King* [1932] 3 D.L.R. 529 (S.C.C.), aff'd. [1934] 1 D.L.R. 434 (P.C.).

sion of the law as patrimony we have one of expertise and experience in the life of the world.[53] In place of security of tenure and certainty of remuneration we have appointment for a limited term on conditions unilaterally alterable.[54] In place of distance from public and private affairs, we have intimacy in their very working.[55] None of this is the garb of one called upon to proclaim abiding constitutional values over against those democratically pursued.

Some see in the appellation of administrative tribunals as "quasi-judicial" license to engage in a process constitutional. But this is to confuse function with status. To be sure, in the adjudication of disputes administrative tribunals perform a judicial act. Evidence is led, facts determined and these measured against normative standards. But this merely confirms the loose nature of division of powers in our Constitution which tolerates exercise of judicial function by those who do not enjoy judicial status.[56] That administrative tribunals act impartially in their adjudicative function does not confer judicial independence.[57] Even under a Constitution premised upon a strong separation of powers principle it has been said that the term *quasi* "is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."[58] To this I would add that it is only as *ersatz* court that the administrative tribunal might claim a place in the critocracy. For even its adjudicative function is not sacrosanct, but rather subject to superintendence and review by both democratic[59] and autocratic power.[60]

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[53] In his speech in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1948] 4 D.L.R. (673, 682) (P.C.) Lord Simonds stressed these characteristics of an administrative tribunal as profoundly distinguishing it from a s. 96 Court. This has now become the received wisdom, see *e.g.*, *Tomko* v. *Labour Relations Board (Nova Scotia)* (1977) 69 D.L.R. (3d) 250 (S.C.C.).

[54] A recent example of this untrammelled authority is found in s. 59(5) of *The Canadian International Trade Tribunal Act*, S.C. 1988 c. 56, disentitling appointees to the federal Tariff Board, which was abolished by the Act, from any right to relief for consequent loss of appointment, although preserving the right of Cabinet to authorize such relief. See *Canada* v. *Beauchamp* (1990) 31 F.T.R. 50 (F.C.) where compensation was awarded upon Cabinet initiative. Appointments to public office are characteristically by Order-in-Council for a set term and upon conditions stipulated.

[55] This is particularly the case with tripartite boards representative of particular social and economic interests. The experience and knowledge extrajudically acquired which members of such tribunals bring to their deliberations is well captured in Chief Justice MacKeigan's decision in *Tomko* v. *Nova Scotia Labour Relations Board et al* (1975) 9 N.S.R. (2d) 277 (App. Div.), at 298-99.

[56] Since the decision of the Privy Council in *John East Iron Works supra*, note 53, this has become a central tenet of the s. 96 jurisprudence. See as well the *Tomko* case *supra*, note 53 and more recently *Reference Re Residential Tenancies Act*, *supra*, note 29.

[57] The distinction between impartiality and independence is emphasized in the decision of the Supreme Court of Canada in the *Valente* case *supra*, note 48.

[58] *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952) *per* Justice Jackson at 488.

[59] Thus, it has been held, that an Ombudsman may be vested with the legislative jurisdiction to investigate complaints filed as to the merits of a decision of a Labour Relations Board acting in its adjudicative capacity. See *Ombudsman of Ontario* v. *Ontario Labour Relations Board* (1988), 44 D.L.R. (4th) 312 (C.A.).

[60] Examples abound of the cabinet appeal from a decision of an administrative tribunal. This is particularly the case with regulatory agencies. For a classic instance see *Attorney General of Canada* v. *Inuit Tapirisat of Canada* (1981), 115 D.L.R. (3d) 1 (S.C.C.) in which the statutory jurisdiction of the federal cabinet to vary or rescind any decision of the *Canadian Radio, Television and Telecommunications Commission* (C.R.T.C.) is engaged.

Such a possibility is anathema to the functioning of courts in our Constitution.[61]

But, it is said administrative tribunals routinely look beyond their enabling legislation as they engage in law-making and entitlement determination. Beyond their enabling legislation, yes, but not beyond the will of Parliament democratically proclaimed. For it is Parliament itself that confers on the administrative tribunal the right and duty to determine its will and intention wherever found, whether within the enabling statute or another declared and proclaimed. Thus, when the administrative tribunal "attacks" its enabling or other legislation on the grounds of legislative norms, as in the case of the measurement of a statutory entitlement against a legislatively entrenched standard, it does so in furtherance of the democratic principle which has given it birth.[62] For Parliament itself proclaims a hierarchical order to its enactments.[63] This is a far different thing from restraining democratic power by the assertion of overriding constitutional norm.

Nor can it be asserted that the Constitution itself mandates restraint of democratic power by administrative tribunals. Far from it. Section 52(1) proclaims the Constitution *in its entirety* to be the supreme law of Canada. Who can doubt this includes "the lifeblood of constitutionalism," judicial independence and its monopoly over the restraint of democratic power? Kelsen's logic "that every law-applying organ has this power of refusing to apply unconstitutional laws" is premised upon absence in the legal order of an explicit rule to the contrary. The "internal logic" of our Constitution and the very terms of s. 52 provide that explicit rule.[64] It cannot be circumvented by theoretical distinctions between declarations of invalidity and findings of inefficacy. Indeed our constitutional jurispru-

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[61]In her decision in the *Marshall* case, *supra* 48, Justice McLachlin powerfully articulates the theory of judicial immunity from legislative and executive oversight.

[62]This explains decisions such as *McLeod* v. *Egan* (1974), 46 D.L.R. (3d) 150 (S.C.C.). What cannot be overemphasized is that such decisions underscore the primacy of legislative intent in the decision-making process of an administrative tribunal.

[63]In *Insurance Corporation of British Columbia* v. *Heerspink et al* (1982), 137 D.L.R. (3d) 219 (S.C.C.) Justice Lamer wrote as follows of the relationship between general legislation, human rights legislation and the principle of the supremacy of Parliament: "When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have, through their legislature, clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the *Code* or in some other enactment, it is intended that the *Code* supersede all other laws when conflict arises." At 229.

As an example of the jurisdiction of an administrative tribunal to give effect to such legislative intent, see *Canada (Attorney-General)* v. *Druken* (1989), 53 D.L.R. (4th) 29 (F.C.A.). See as well the decision of Chief Justice Dickson, dissenting *aliter* in *Re Bhinder et al and Canadian National Railway Co.* (1986) 23 D.L.R. (4th) 481 (S.C.C.).

[64]Pinard adopts the Kelsenian approach to such plenitude of constitutional jurisdiction without giving due regard to its limits even on his own terms. See *supra*, note 11 at 187-88 citing from Kelsen's *General Theory of Law and State*, tr. Wedberg (Cambridge: Harvard University Press, 1945) at 268. In this regard it is noteworthy that in the civilian tradition jurisdiction to entertain constitutional issues is vested in a distinct and specialized Constitutional Court. Although s. 96 Courts enjoy a general jurisdiction in contradistinction to the civilian practice, their jurisdiction over constitutional issues must in a similar fashion be exclusive.

dence reveals the fallacy of that construct.[65] Nor could the *dicta* of Chief Justice Dickson be of avail, that, by strength of s. 52, a court "or tribunal" has the duty to regard a statute it has found inconsistent with the Constitution as being no longer "of force or effect."[66] 'Homer himself hath been observ'd to nod.' (Horace, *Ars Poetica*, l. 402)

Is there any role then for administrative tribunals in our constitutional discourse? Indeed there is, but not in the exercise of a restraining power. Clearly, in the application of their enabling legislation administrative tribunals are entitled to make primary findings of constitutional fact. The determination of whether the circumstances which present themselves for resolution are embraced by the scope of the enabling legislation has always been part of the tribunal's function. For instance, cases exploring the federal principle as it unfolds in the labour setting abound. But what is engaged here is simply the characterization of facts to determine whether these fall within the scope of the legislation enacted.[67] The enactment itself is the premise on which the inquiry is embarked. Never is the legislation measured against a constitutional norm.[68] Nevertheless it is significant

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[65] In the *Manitoba Language Reference supra*, note 39 at 20-1, the Court equated the inefficacy flowing from s. 52 of the *Constitution Act, 1982* with the invalidity doctrine. The distinction has been described as "specious." See Pepin I, *supra*, note 11, at 515-16.

[66] *R. v. Big M. Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 at 367. By way of contrast, note his remarks in *The Queen* v. *Beauregard, supra*, note 34 at 493: "In Canada, since Confederation, it has been assumed and agreed that the Courts would play an important constitutional role of umpire of the federal system. Initially the role of the Courts in this regard was not exclusive; in the early years of Confederation, the federal government's disallowance power contained in s. 55 of the *Constitution Act, 1867* was also central to federal-provincial dispute resolution. In time, however, the disallowance power fell into disuse and the Courts emerged as the ultimate umpire in the federal system. That role, still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes.

Secondly, the enactment of the *Canadian Charter of Rights and Freedoms* (although admittedly not relevant to this case because of its date of origin) conferred on the Courts another truly crucial role: the defence of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independence is essential." Any reference to "tribunals" is pointedly absent.

[67] For example *Northern Telecom Ltd.* v. *Communications Workers of Canada* (1979), 98 D.L.R. (3d) 1 (S.C.C.); *Four B Manufacturing Ltd.* v. *United Garment Workers of America* (1979), 102 D.L.R. (3d) 385 (S.C.C.).

[68] Labour Boards have traditionally eschewed any right to question their constitutive legislation against the federal principle. Thus in *Indusmin Ltd.* [1977] O.L.R.B. Rep. (Sept.) 552 the Ontario Labour Relations Board noted at para. 3: "The Board is of the view that the appropriate forum for litigating issues pertaining to the *ultra vires* nature of the *Labour Relations Act* is before the Courts. Until the Board is in receipt of any decision, direction or enamation from the courts indicating the nullity of the Act or any portion thereof, we intend to operate under the assumption that the impugned portions of the *Labour Relations Act* are properly conceived." The several cases in which this position is articulated are collected in J. Sack and M. Mitchell, *Ontario Labour Relations Board Practice* (Toronto: Butterworth & Co., 1985) at 78, note 158.

This mirrors the practice of the National Labor Relations Board, first articulated in *Rite Form Corset Co.* (1947) 75 N.L.R.B. 174; 21 L.L.R.M. 1110 as follows: "As an administrative agency of the federal government, it is inappropriate for the Board to pass upon questions regarding the constitutionality of congressional enactments. Such questions will be left to the courts. In the absence of any court decision to the contrary, the Board assumes that the act as amended does not violate any provision of the Constitution of the United States, as alleged by the petitioner."

On the American jurisprudence, see generally *Note* "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes" (1977) 90 Harv. L. Rev. 1682 at 1707. These and other authorities are considered by Justice Finlayson in his dissent in *Cuddy Chicks, supra*, note 6 at 143-44 (C.A.).

that because such an inquiry touches the critocratic restraining power, tribunal determination of this order accorded no judicial deference.[69]

As well, constitutional values exercise a more subtle influence over the workings of administrative tribunals. Through constant exposure to a climate suffused with constitutional values these tribunals become sensitized to them and, by a process almost spontaneous, refine legislative values to the rigors of that climate. Thus constitutional norms are breathed into legislative ones in the ordinary process of interpretation of the enabling legislation over which such tribunals exercise broad discretion. For example, the labour tribunal must explore anew the labour values of free speech and the right to join a trade union - both legislatively entrenched, in light of the constitutional values of freedom of expression and of association.

How is the newly articulated jurisprudence touching a "court of competent jurisdiction" to be integrated into the theory I have here propounded? It clearly recognizes in inferior courts, exercising a criminal law power, the right to restrain democratic parliaments by application of constitutional norms.[70] The devolution of Superior Court jurisdiction in criminal law matters to inferior provincial courts is a subject of some complexity. Great as it has been, we now know that it cannot be absolute.[71] That it is so fulsome as to include the "deeply constitutional role" to restrain democratic power can only be explained by an independence sufficiently great to share with Superior Courts such "high constitutional power." It is clear that the degree of independence held by administrative tribunals is nothing of the order of independence enjoyed by inferior provincial courts. Elements of the four characteristics which comprise an independent judiciary are clearly present in the latter while almost totally absent in the former.[72] In addition these perform a purely judicial function while tribunals are eclectic performing executive and legislative functions as well. Finally, what is most telling is that in the exercise of a criminal law power the inferior court judge is confronted with a central issue in our polity - that of the liberty of the subject. Indeed this factor alone compels one to conclude that the inferior court judge must have access to the fullness of the Constitution, including the right to restrain democratic power.[73] In

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[69]In *Northern Telecom*, Justice Dickson noted that the principles governing the constitutional division of power rather than those governing judicial review of administrative action apply in cases such as these, *supra*, note 67 at 12.

In *Cuddy Chicks*, *supra*, note 6, Justice Grange noted at 132 (C.A.): "It [the Ontario Labour Relations Board] is, of course, not infallible and as I have stated, when its decisions on constitutional issues are challenged it will receive no curial deference." Perhaps this is the answer to those who argue lack of access to the Courts by the ordinary litigant due to economic and cost barriers, as an argument in support of vesting constitutional jurisdictions in administration tribunals. The fact of the matter is that final determination of such issues can only be made by a court, leaving the access issue unresolved.

[70]*Mills* v. *The Queen* (1986), 29 D.L.R. (4th) 161 (S.C.C.).

[71]*McEvoy* v. *Attorney-General of New Brunswick* (1983) 148 (D.L.R.) (3d) 25 (S.C.C.).

[72]*Valente* v. *The Queen*, *supra*, note 48 and text *supra*, note 52-55.

[73]Because this factor is absent in the case of a provincial court judge exercising a civil jurisdiction, I am of the view that such a judge has no jurisdiction to exercise a restraining power under our Constitution. Thus I consider *Re Shewchuk & Ricard*, *supra*, note 7 to have been wrongly decided.

none of this can it be said that the administrative tribunal is analogous.[74]

One is driven to conclude that the authority to restrain democratic power under our constitutional order is reserved to the critocracy. Administrative tribunals can have no part of it.

III Labour Tribunals and The Critocracy

I turn from consideration of our constitutional order to that of our labour regime - for it too affords a powerful basis for rejecting a role by labour tribunals in constitutional decision-making. I have already made reference to the antagonism Courts have shown to labour and its compelling values.[75] This is an old story rooted in the exultation by the common law of the individual and of property over against the collective and distributive justice. The tale is a sorry one, as critocratic power was marshalled against that of labour, on its own defenseless against the onslaught. Succour was sought and obtained through Parliament. Democratic power asserted its primacy over that of the judges and ensured for labour a legitimate place in our social order.[76] The democratic principle, unlike the critocratic, is one sensitive to collective aspirations and has found it just to vest social, political and economic entitlements in labour. The right to bargain collectively and its necessary incident, the strike, are now entrenched legislatively in our polity.[77]

Cognizant of the deep-seated antagonism Courts have for labour values, the legislatures have entrusted superintendence over the newly articulated labour entitlements, their furtherance and implementation, to an institution sympathetic to their underlying values. This is the labour tribunal, whose structure and composition are premised on a theory of participation by, and acceptability to, the estates of labour and management subject to its jurisdiction. Thus, the centrality of tripartitism to the proper functioning of the labour tribunal, comprised of representatives and proponents of both labour and management sitting together with an appointee of the State who represents its neutrality in the conflict between these two social forces.[78] It is critical to the proper functioning of our labour rela-

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[74]In the cases which explore the jurisdiction of an Ombudsman to review the workings of administrative tribunals, stress has been placed by the courts on the function of the latter to implement government policy as legislatively expressed. See *Re Ombudsman of Ontario*, *supra*, note 59 and the authorities there cited. In *Scowling v. Glendenning* (1983) 148 D.L.R. (3d) 55 (Sask. C.A.) at 65 Justice Tallis described the provincial Human Rights Commission as an "instrument of social policy." Decision reversed *obiter* (1987) 32 D.L.R. (4th) 161 (S.C.C.). This concept of a "legislative mandate" as fueling the jurisdiction of an administrative tribunal is totally foreign to the criminal law jurisdiction of inferior courts.

[75]*Supra*, note 21. These ideas are more fully explained in my study "Constitution as Covenant" in *Labour Law Under the Charter* (Kingston: Queen's University Pressd, 1988) at 32-60.

[76]*Supra*, note 22.

[77]Order-in-Council P.C. 1003 (1944) under the *War Measures Act*, R.S.C. 1927, c. 206, first integrated the culture of collective bargaining into that of the law in the Canadian context. Its centrality to our democratic traditions cannot be over-emphasized. See *The Report of the Task Force on Labour Relations (The Woods Task Force Report)* (Privy Council Office, Ottawa 1968).

[78]On the institution of tripartitism, see my two studies, "*Is the Doctrine of Bias Compatable With the Tri-partite Labour Tribunal?*" (1986) 19 Admin. L.R. 81-98; and "*Bias and the Labour Boards Redux*" (1988) 31 *Admin. L.R.*

tions system, if it is to avoid the tactics of confrontation in the determination of the nature and extent of entitlements, that its decision-making bodies enjoy confidence and exude credibility. Expertise, experience, and a specialized knowledge gained from involvement in the institution of collective bargaining are all prerequisites to the attainment of that credibility and the winning of that confidence. These are the virtues that shore up the jurisprudence of the labour tribunals in their fashioning of a law and theory of collective bargaining in furtherance of a legislative policy democratically proclaimed.

It is not without a struggle that the labour tribunals have asserted their sole right and duty to engage in this enterprise. The saga of the law of judicial review in Canada can be said to be one of the contest between Court and Labour Tribunal as to which institution would determine authoritatively the distribution of labour entitlements legislatively recognized by exercise of democratic power.[79] Only recently has the old orthodoxy which asserts a curial hegemony over that process given way to a heterodoxy which recognizes the legitimacy, even the superiority of the making of such determinations in the theatre of the labour tribunal.[80]

Initially labour hailed the *Charter* as repository of its deepest enlivening values. In defence against democratic parliaments newly turned hostile labour sought to raise the *Charter* as a shield. But its guardians and keepers were the ancient foe. Courts blocked access to its protective embrace, declaring labour's values to be ephemeral, a passing fashion, the largesse of democratic power, not rooted in constitutional bedrock. The new orthodoxy of the *Charter* age is the old common law orthodoxy renascent, as if by process of counter-reformation judicial ultramontanists could recapture a bygone era and extirpate a heresy grounded in mere legislation. A new hierarchy of values has been proclaimed. Those of labour, expressed and declared by democratic parliaments must forever bow down before those of the *Charter*, articulated by a critocracy newly resurgent.[81]

Should labour tribunals participate in a discourse so constrained? They are themselves emanations of democratic power, creatures of democratic parlia-

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216-226; and as well *"Bias and the Arbitral Forum"* J. Sack, *et al* eds. *"Labour Arbitration Yearbook"* (Toronto: Butterworth & Co., forthcoming).

[79] *Supra*, note 4.

[80] The decision of the Supreme Court of Canada in *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation* (1979) 97 D.L.R. (3d) 417 heralded the era of judicial deference to labour tribunals. There is some indication that it is coming to a close as indicated by decisions emanating from the same Court such as *National Bank of Canada* v. *Retail Clerks' International Union* (1984), D.L.R. (4th) 10; *Syndicat des Employés de Production du Québec et l'Acadie* v. *Canada Labour Relations Board* (1985), 14 D.L.R. (4th) 457 and more recently *Syndicat National des Employés de la Commission Scolaire Regionale de l'Outaouias (C.S.N.)* v. *Union des Employés de Service, Local 298* (F.T.Q.) (1989) 95 N.R. 161.

[81] This is epitomized in the Supreme Court of Canada's Labour Trilogy comprised of *Reference Re Public Service Employee Relations Act (Alberta Labour Reference)* (1987) 38 D.L.R. (4th) 161; *Public Service Alliance of Canada et al* v. *The Queen in Right of Canada et al, ibid.* at 349; and *Government of Saskatchewan et al* v. *Retail, Wholesale & Department Store Union, Locals 544, 496, 635 & 955 et al, ibid.* at 277.

ments, formed to further and enhance labour's values in the face of the refusal by courts to accord them recognition. That a labour tribunal should now covet the power of the critocracy, nay participate in its restraining of democratic power on the strength of constitutional values impervious to those which gave it birth, is a monstrous thing. The moment a labour tribunal does so it becomes a court like any other and suffers grievous loss to its stature, one premised on democratic, not critocratic principles. Its experience, expertise and specialized knowledge are powerful implements where the realization of democratic power is the agenda, but vain weapons where its limitation is the discourse.

Nor does it avail the labour tribunal to plead a tactical alliance with the court to shore up labour against democratic power turned hostile. In such an alliance it can participate either fully, or not at all. If democratic power is to be challenged, it is to be challenged whether it enhances or inhibits labour values. In any event, an alliance so formed will lead to domination by the stronger ally over the weaker. Having extracted acknowledgment from the tribunal of its inferiority in the determination of constitutional values, the Court will inevitably reassert a superiority in the determination of purely labour values.[82] The vanquishing of the labour tribunal will be complete, its stature in the eyes of labour irretrievably sullied. This is all the more so when we recall that critocratic power too may be abused. I spoke earlier of the threat of judicial hubris. It has already revealed itself under the *Charter* - and precisely where labour values are engaged. I am speaking here of the declared immunity of Courts generally from the reach of the *Charter*[83] and their particular immunity from labour's exercise of its freedom of expression.[84]

The labour tribunal must forebear then from entering the constitutional arena. To maintain the stature it has earned, it must maintain fidelity to the democratic principle. It must, as it has from its creation, and perhaps even more so now, articulate forcefully the labour values entrenched in its enabling statute. Indeed, by fulfilling its role as exponent and executor of the democratic power and by continuing to shape and develop a jurisprudence of labour values rooted in legislative enactment, the labour tribunal will have articulated in a manner democratic parliaments cannot otherwise do, precisely "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" which the Court seeks to discern as it measures those values against *Charter* norms.[85]

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[82] That this process is already underway is indicated by decisions such as that in *The National Bank, C.B.C., & C.S.N. v. F.T.Q. Cases*, *supra*, note 80.

[83] *Retail, Wholesale Department Store Union, Local 580 v. Dolphin Delivery Ltd.* (1987), 33 D.L.R. (4th) 174 (S.C.C.).

[84] *B.C.G.E.U. v. British Columbia (Attorney-General)* (1989) 53 (D.L.R.) (4th) 1 (S.C.C.); *N.A.P.E. v. Newfoundland (Attorney-General)*, *ibid.* 39 (S.C.C.).

[85] It cannot be over-emphasized that the articulation of labour values by a labour tribunal permeates its everyday workings. This process of articulating the legislatively entrenched will of parliament is its core function and is not exercised in a subsidiary manner as part of a s.1 justificatory enquiry in the face of a *Charter* challenge. In other words, a labour tribunal does not wait for a constitutional challenge to its enabling statute before engaging in this process, but rather performs it daily as part of its statutory mission.