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Judicial Review of Administrative Power

The (Hegemonic?) Role of the English Language

L'indipendenza dell'amministrazione

Il ruolo del rinvio pregiudiziale alla CGUE nella giurisdizione amministrativa

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«JUDICIAL REVIEW OF ADMINISTRATIVE POWER»

JUDICIAL REVIEW IN A CONTEXT OF LEGAL INDETERMINACY

EDUARDO JORDÃO

1. Judicial review is an activity directed to guaranteeing that administrative authorities will comply with the law. But what happens when it is not clear what the law actually commands in a given case? How should the courts decide whether the administrative action was lawful? If the law is not clear, should the courts just defer to the decision taken by the public administration? Or should they impose their own views on the issue at hand?

Comparative law provides us with interesting examples of different orientations towards this dilemma. I will try to sketch four of them (France, Italy, Canada and the United States), underlining their differences.

My interest today is drawn specifically to the domain of the judicial review of statutory construction of ambiguous legislation. This seems like an interesting domain for my inquiry. First, because ambiguity is increasingly present in statutes in our highly complex and dynamic society. Second, because the indeterminacy of the law in such cases is debatable. We will then be able to see differences in the identification and acknowledgment of indeterminacy by different courts — and also in the attitudes they take thereafter. And through this domain we will then have a strong indication of the nature of the institutional relationship between courts and public administration in each of these countries.

2. Let me start with Canada. Of particular interest to our inquiry is the Supreme Court's contextual approach to determining the standard of review. Canadian administrative law has developed a workable two-stage structure. First, the Court determines the standard of review that it will apply. Second, it decides the case using that standard. The analytical framework used for the first stage was first called the «pragmatic and functional» approach (see Union des Employés de Service, Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, 1081). Since the Supreme Court decision in Dunsmuir, the reformed test is called «standard of review analysis» (see Dunsmuir v. New Brunswick, [2008], 1 S.C.R. 190, 192).

This analytical framework is relevant especially because, under the prongs of the test, courts weigh substantial and institutional aspects of the agency's decision. The framework requires the courts to assess which institution is better constituted to decide the issue under review. As a result, if the interpretation of an ambiguous statute entails policymaking of if it requires a technical evaluation, Courts will defer to the construction put forth by the agency.

So, for example, the Canadian Supreme Court often bases its deference on an understanding of the policymaking process in agencies and executive departments, and it developed the concept of polycentricity. A polycentric issue is one that involves delicate balancing among different interests. If agencies are competent to resolve polycentric issues, courts should usually defer to their decisions. The Canadian Supreme Court first used the concept in Pushpanathan v. Canada (Ministry of Citizenship and Immigration), [1998] 1 S.C.R. 982. Courts will defer also on issues involving complex and technical assessments that the agency seems better placed to address, such as antitrust litigation or financial market regulation. See Canada (Director of Investigation & Research) v. Southam Inc., [1997] 1 S.C.R. 748, 774-775; and Pezim v. B.C. (Superintendent of Brokers), [1994] 2 S.C.R. 557, 598-99. The Supreme Court referred to three important dimensions of expertise: (i) the court must characterize the expertise of the agency in question; (ii) it must consider its own expertise relative to that of the agency; and (iii) it must identify how the specific issue before the administrative decisionmaker relates to this expertise. See Pushpanathan v. Canada (Ministry of Citizenship and Immigration), [1998] 1 S.C.R. 982, 1007.

Courts seldom apply the non-deferential standard of correctness to strike down administrative actions, and the few cases where they do

are ones that raise general questions of law, human rights, constitutional issues, or jurisdictional concerns (for example, Dr. Q v. Coll. Of Physicians & Surgeons of B.C., [2003] 1 S.C.R. 226). That is: Canadian courts are prone to identify ambiguity in the law and then move to a discussion on which is the best institution to resolve the ambiguity. In so doing, they will most often then not find that it is the administrative agencies, and not the courts, the better suited to resolve the ambiguity — and their interpretation will be subjected to a deferential review.

3. In American Law, judicial review of statutory construction is officially very deferential too — but in practice, that is not always the case. In reviewing agencies' statutory constructions, Courts claim to apply deferential doctrines, such as *Chevron* or *Skidmore*, but many decisions are based on quite strong judicial readings of statutory language. The actual impact of the *Chevron* doctrine is debated. It is among the most heavily cited cases of all time, and some empirical studies show that the percentage of administrative decisions that the federal courts affirmed rose after *Chevron.* Others, however, have found that the Supreme Court continues to impose its own interpretations of the law on agencies, often without even citing Chevron.

Even when courts nominally apply Chevron, the deferential orientation is not clear. Under step one of Chevron, Courts are supposed to assess whether «Congress has directly spoken to the precise question at issue» (see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). In practice, courts use the so-called «traditional tools of statutory construction» to decide this issue, and sometimes they reach out to find and resolve ambiguity against agency interpretations.

Courts frequently conclude that a given text is not ambiguous, but only after a rather long analysis of the purpose of the statute or its legislative history. In other words, sometimes courts seem to use the traditional tools of construction in step one to regain the powers of statutory construction that they lost with *Chevron.* An example is FDA v. Brown & Williamson, 52.529 U.S. 120 (2000).

In short: when acknowledging the ambiguity of a given statute, courts will usually defer to the construction of the administrative authority. However, Courts are not always ready to admit the existence of an ambiguity.

4. In Italian case law judicial review has a very curious and

inconsistent history. It moved from intensive review to deference and then back again.

Traditionally, Italian courts work within a binary framework, giving limited review to discretionary decisions and stronger review to non-discretionary decisions. Administrative discretion (*discrezionalità amministrativa*), however, has a very specific meaning in Italian Law: it corresponds to the balance of competing public interests. Only in cases requiring balancing do courts engage in limited review; traditionally, judges do not defer to agencies' construction of ambiguous statutory terms.

In this binary context (discretion/non discretion), thus, pure statutory constructions would always give rise to a non-deferential review. However, during two different periods, judges challenged this binary orientation to accommodate some decisions of regulatory and antitrust authorities that did not seem to fit in the binary tradition. Before 1999, using the concept of «technical discretion» courts applied limited review to cases where the terms interpreted were «technical» and «debatable» (see, for example, Cons. St., IV, 12 dicembre 1992, n. 1055; and Cons. St., IV, 30 novembre 1992, n. 986). In 1999, after a landmark decision, technical discretion became reviewable on non-deferential terms (Cons. St., IV, 9 aprile 1999, n. 601).

Between 2001 and 2004, courts deferred also to «complex technical assessments», claiming they involved both complex technical expertise and policymaking that was better performed by agencies (See, e.g., Cons. St., VI, 14 marzo 2000, n. 1348; Cons. St., VI, 12 febbraio 2001, n. 652; Cons. St., VI, 20 marzo 2001, n. 1671; Cons. St., VI, 26 luglio 2001, n. 4118).

These two periods brought Italian law closer to American and Canadian practice. During them, Italian courts explicitly admitted that the construction of ambiguous legislative terms can give rise to policymaking and, hence, to limited, «weak» review. However, heavily criticized by scholars and practitioners, the Consiglio di Stato abandoned these concepts, and went back to the binary tradition. Arguing that its reference to «weak review in cases of complex technical assessments» had been misinterpreted, the Consiglio di Stato abandoned the concept and began to stress that review had only one limit: the judge could not substitute the decision of the authorities with its own, and the court must annul the administrative decision and remand the case back to the agency. See Cons. Stato, VI, 02 marzo 2004, n. 926. This decision sought to incorporate the new approach into the older

doctrines. Later cases completely abandoned the previous language, rejecting «weak review» and characterizing their standard as «full and particularly penetrating» (*pieno e particolarmente penetrante*) and «certainly not weak» (*certamente non debole*).

The Consiglio di Stato presented no justification for its change of direction. The judges provided no theoretical explanation to why it was now possible to review aspects of the decision that were beforehand deemed to include policymaking. They just started to ignore the institutional difficulties of review that they had themselves brought up some years before. The Consiglio di Stato introduced its new approach by claiming that it was just an explanation of its previous case law—in fact, it represented a complete change of direction. Whereas it previously invoked indeterminate legal concepts to justify limited review, it now uses «full review also in regard to indeterminate legal concepts». Whereas it previously highlighted the agencies' institutional positions to suggest the need for judicial deference, it now states that a full review is needed because independent agencies are insulated from the political arena (*fuori del circuito dell'indirizzo politico*). In 2002 the Consiglio di Stato very explicitly affirmed that cases of «complex technical discretion» involved a combination of technical and administrative discretion, and hence only limited review was possible. When it decided to change its orientation and to provide «complete and effective review», it did not reconsider the degree of pure discretion embedded in regulatory decisions-it just ignored the issue.

5. Finally, France has had a consistent pattern of non-deferential review of administrative construction of statutes over its recent legal history. Judicial review has become progressively less deferential (under the standard of *contrôle normal*), and some authors talk about the decline, or the death, of the deferential standard of review (*contrôle restreint*).

Theoretically, French administrative courts apply a deferential standard of review to highly technical or politically sensitive cases. For examples of judicial review of technical administrative decisions, see, e.g., CE Ass., Apr. 27, 1951, Rec. Lebon 236 (applying restricted review on whether a hair lotion was poisonous); Conseil d'État (CE) Oct. 14, 1960, Rec. Lebon 529, Syndicat Agricole de Lalande-de-Pomerol (applying restricted review to determine whether a wine was worthy of an appellation controlée). More recently, some telecommunication regulation cases have also received restricted review due to

their complexity. See, e.g., Conseil d'État (CE) July 10, 2006, Requête n. 274455 (applying restricted review to determine the distribution of the costs of the universalization of the service); CE, Dec. 5, 2005, Requête n. 277441, 277443-277445 (applying restricted review to the establishment of a price floor regulation to dominant companies). For examples of judicial review of politically sensitive cases, good examples are the cases on the so-called mesure de haute police. See Conseil d'État (CE) July 25, 1985, Requête n. 68151; Conseil d'État (CE), Feb. 3, 1975, Requête n. 94108. These cases dealt with measures against foreigners on French soil and refusals to apply an administrative sanction due to the principle of prosecutorial discretion (opportunité des poursuites). See Conseil d'État (CE), Dec. 30, 2002, Requête n. 216358; Conseil d'État (CE), July 28, 2000, Requête n. 199773.

In practice, however, French courts are clearly less prone to find instances of highly technical or politically sensitive cases when compared to their Canadian and American counterparts. A good example of this tendency to overlook technical complexities is the case law on mergers. The Conseil d'État has reviewed for correctness the identification of the relevant market and the evaluation of anticompetitive effects, assessed the very existence of a merger, and established the criteria under which making an «exception for a failing firm» could be accepted (see, respectively, Conseil d'État (CE), Oct. 6 2000, Requête n. 216645; CE Sect., Apr. 9, 1999, Requête n. 201853; CE Sect., May 31, 2000, Requête n. 213161; CE Sect., Feb. 6, 2004, Requête n. 249267).

Likewise, the political component of many constructions of statutes is not officially recognized in courts. French courts usually claim legitimacy to interpret ambiguous terms in statutes. See Conseil d'État (CE), June 7, 1999, Requête n. 193438 (broadcasting authority's domain); Conseil d'État (CE), May 18, 1998, Requête n. 182244 (same); Conseil d'État (CE), July 30, 1997, Requête n. 153402 (same). They view such concepts as «legal» because they are in the statutory text; therefore, the courts can interpret them. French courts define the realm of law broadly, allowing for far-reaching review. Thus, in cases where Canadian and American courts would claim that agencies are better suited to interpret the statutes, French courts would disagree and impose their own construction.

6. Our comparative account suggests that courts can adopt different orientations when reviewing administrative construction of am-

biguous statutes. Some will defer to administrative constructions, on the grounds that the interpretation of statutory terms may require technical knowledge or entail choices of policies — and that this is better done by the agencies. Others will impose their own constructions, either by *denying* the existence of any ambiguity (saying, thus, that the law is clear) or by claiming that judges are the proper constructor of statutes.

Having Canada and the United States as the somewhat more deferent jurisdictions and France and Italy as the somewhat less deferent, we may want to reflect upon the reasons why they have adopted these divergent options.

The first temptation might be to associate the options with the existence or inexistence of administrative courts in a given country. Being more used to deal with administrative issues and having a somewhat more similar institutional configuration to the public administration, administrative courts might feel more comfortable to dig into administrative issues. This is however countered by the fact that in Italy they had periods of deference and also by the fact that both in Italy and in France, the non deferential patterns hold even in instances where the judicial review is put forward by civil courts, such as, in France, the review of the acts of the former antitrust agency, le Conseil de la Concurrence (See, for example, Cour d'Appel Paris, 30 mars 2004, SAS Novartis Pharma v. Conseil de la Concurrence and Cour de Cassation, Chambre Commerciale, 29 juin 2007, Bouygues Télécom. See also Cour de Cassation, Chambre Commerciale, 31 janvier 2006, Colas Midi Mediterranée/Bonna sabla et autres).

A second explanation might be related to the diffusion and influence of the movement of legal realism in the legal education of a given country. Legal realists tend to be skeptical about the limits of the law - and they were more influential in Canada and the US than in France and Italy. Their influence in academia might have something to do with the education of judges that are more prone to identify issues of policymaking in the mere interpretation of statutes. But this intuition would certainly require further investigation.

References

The intervention and the paper draw from an article the author had previously published with S. Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced. Democracies: Beyond Rights*

Review, in 66 *Administrative Law Review* 1 (2014). For a longer reflection of the author on the issue of judicial review in a comparative perspective, see E. Jordão, *Le juge et l'administration: entre le contrôle et la déférence*, Bruxelles, Bruylant, 2016.

As of February 2011, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 had been cited 10,720 times by the federal courts. The number greatly exceeds the mentions of other important public law cases. See Stephen Breyer, Richard Stewart, Cass Sunstein, Adrian Vermeule and Michael Herz, Administrative Law and Regulatory Policy 287 (7th ed. 2011). For papers debating the actual impact of Chevron, see P.H. Shuck & E.D. Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, in 984 *Duke L.J*, (1991), 1026; O.S. Kerr, *Shedding Light on Chevron: An Empirical Study on the Chevron Doctrine in the U.S. Court of Appeals*, in 15 *Yale J. on Reg.* 1 (1998), 1-4; W.N. Eskridge, Jr. & L.E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, in 96 *Geo. L. J.* (2008), 1083.

In France, technically complex decisions reviewed for correctness are also common outside the realm of antitrust. In the regulation of telecommunications, see, e.g., Conseil d'État (CE) May 19, 2008, Requête n. 311197 and Conseil d'État (CE) Dec. 29, 2006, Requête n. 288251.

On the influence of the movement of legal realism on the judicial deference to administrative decisions, see F. Iacobucci, *Articulating a rational standard of review doctrine: a tribute to John Willis*, in 27 *Queen's LJ* (2002), 859 and S. Breyer et al., *Administrative Law and regulatory policy: problems, text and cases*, Aspen, 2006, 250: «Consider the view that Chevron is, in a sense, an ultimate triumph of legal realism. The legal realists believed that "law" was not autonomous, in the sense that judgments of both policy and principle lie behind any real-world judgment about "what the law is". If the realists were right, perhaps it follows, post-New Deal, that administrative agencies should have a large role in saying what the law is because they are better than courts at the relevant judgments at policy and principle. Their comparative advantages stem from their better democratic pedigree and their immersion in the facts and policies of particular areas of law».

On the case of the United States: W.R. Andersen *Against Chevron - A Modest Proposal*, in 56 *Admin. L. Rev.* (2004), 957; D.J. Barron and E. Kagan, *Chevron's Nondelegation Doctrine*, in *Sup. Ct. Rev.*

(2001), 201; L.S. BRESSMAN, *Chevron's Mistake*, in 58 *Duke Law Journal* (2009), 549; L.S. BRESSMAN, *How Mead has muddled Judicial Review of agency action*, in 58 *Vanderbilt Law Review* (2005), 1443; S. BREYER, *Judicial Review of Questions of Law and Policy*, in 38 *Admin. L. Rev.* (1986), 363; S. BREYER, *On the uses of legislative history in interpreting statutes*, in 65 *S. Cal. L. Rev.* (1992), 845; C. BYSE, *Judicial Review of Administrative Interpretation of Statutes: an analysis of Chevron's Step Two*, in 2 *Admin. L.J.* (1988), 255; F.B. CROSS and E.H. TILLER, *Judicial Partisanship and Obedience to Legal Doctrine*, in 107 *Yale L. J.* (1998), 2155; E.D. ELLIOT, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, in 16 *Vill. Envtl. L.J.* 1 (2005); W.Jr. ESKRIDGE and L.E. BAER, *The continuum of deference: Supreme Court treatment of agency statutory interpretations from Chevron to Hamdan*, in 96 *Georgetown Law Journal* (2008), 1083; J.E. GERSEN and A. VERMEULE, *Chevron as a Voting Rule*, in 116 *Yale L. J.* (2007), 676; M. HERZ, *Deference Running Riot: Separating Interpretation and Lawmkaing under Chevron*, in 6 *Admin. L.J. Am. U.* (1992), 187; O.S. KERR, *Shedding Light on Chevron: An Empirical Study on the Chevron Doctrine in the U.S. Court of Appeals*, in 15 *Yale J. on Reg.* 1 (1998); T.W. MERRILL, *Textualism and the future of the Chevron Doctrine*, in 72 *Washington University Law Quarterly* (1994), 351; T.W. MERRILL, *The story of Chevron: the making of an accidental landmark*, in *Administrative law stories*, ed. by P. Strauss, New York, Thomsom/West, 2006; A. SCALIA, *Judicial Deference to Agency Interpretations of Law*, in *Duke L. J.* (1989), 511; P. SCHUCK and D. ELLIOTT, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, in *Duke L.J.* (1991), 984; P.M. SHANE, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, in 16 *Vill. Envtl. L.J.* (Spring 2005); C.R. SUNSTEIN, *Law and Administration after Chevron*, in 90 *Colum. L. Rev.* (1990), 2071; A. VERMEULE, *Mead in the Trenches*, in 71 *Geo. Wash. L. Rev.* (2003), 347.

On the case of Italy: F. AGNINO, *Discrezionalità tecnica e sindacato giurisdizionale: scelta la strada della coerenza*, nota a Cons. St., VI, 1 ottobre 2002, n. 5156, in *Urb. app.*, 2003, n. 4, 448; A. BERTOLDINI, *La consulenza tecnica d'ufficio nella giurisdizione del Consiglio di Stato, la ricerca della prova attenersi ai limiti posti al sindacato giurisdizionale sul merito dell'azione amministrativa*, in *Foro amm.*: CDS, 2003, 225-231; M. CAGNO, *Discrezionalità tecnica e sindacato giurisdizionale: scelta la strada della coerenza*, nota a Cons. Stato, VI, 1 ottobre 2002,

n. 5156, in *Urb. app.*, 2003, n. 4, 448; V. CARBONE, *Grana padano tra antitrust e giurisdizione*, nota a Cass. civ., Sez. Unite, 20 gennaio 2006, n. 1064, in *Corriere Giur.*, 2006, n. 2, 169; F. CARINGELLA, *La tutela giurisdizionale nei confronti degli atti delle Autorità amministrative indipendenti*, in *Società*, 2001, 523; G.A. CHIESI, *Un nuovo mezzo istruttorio nel processo amministrativo. La consulenza tecnica e su rilevanza con riferimento al sindacato sulla discrezionalità tecnica*, nota a T.A.R. Campania Napoli, II, 23 maggio 2002, n. 3011, in *Corriere Giur.*, 2003, n. 2, 233; M. D'ALBERTI, *Il diritto amministrativo fra imperativi economici e interessi pubblici*, in *Dir. amm.*, n. 1, 2008, 52; M. DELSIGNORE, *Il sindacato del giudice amministrativo sulle valutazioni tecniche: nuovi orientamenti del Consiglio di Stato*, in *Dir. proc. amm.*, 2000, n. 1, 185 (nota a Consiglio di Stato, IV, 09/04/1999, n. 601); F. DENOZZA, *Discrezione e deferenza: Il controllo giurisdizionale sugli atti delle Autorità indipendenti regolatrici*, in *M.C.R.*, II, n. 3, 2000; M. DI CAGNO, Discrezionalità tecnica e sindacato giurisdizionale: scelta la strada della coerenza, nota a Cons. Stato, VI, 01 ottobre 2002, n. 5156, in *Urb. app.*, 2003, n. 4, 448; D.B. DI PATTI, *Il Consiglio di Stato si pronuncia nuovamente in tema di sindacato giurisdizionale*, (nota a Cons. Stato, VI, 30/08/2002, n. 4362), in *Giur. it.*, 2004, n. 1, 199; M. GIOVANELLI, *Discrezionalità tecnica e amministrativa nella scelta della proposta del promotore*, nota a Cons. St., V, 20 maggio 2008, n. 2355, in *Urb. app.*, 2008, n. 9, 1107; M. GIUNTA, *Il sindacato del giudice amministrativo si estende fino all'analisi compiuta dall'Autorità*, in *Guida al diritto*, IX, 2005, 103-109; A. LALLI, Il sindacato giurisdizionale sui provvedimenti dell'Autorità garante della concorrenza e del mercato, in *Giorn. dir. amm.*, 2003, n. 4, 358; P. LAZZARA, *Autorità indipendenti e discrezionalità*, Padova, Cedam, 2001; F. LIGUORI, *Il sindacato "debole" sulle valutazioni riservate delle amministrazioni indipendenti*, in *Giorn. dir. amm.*, n. 6, 2003 609; L. LOMBARDI, *Il sindacato giurisdizionale delle valutazioni tecniche tra vecchie e nuove istanze*, nota a Cons. Stato, IV, 21 maggio 2008, n. 2404, in *Urb. app.*, 2008, n. 10, 1164; S. MIRATE, *La consulenza tecnica nel giudizio di legittimità: verso nuovi confini del sindacato del giudice amministrativo sulla discrezionalità tecnica della pubblica amministrazione*, nota a Cons. Stato, IV, 10/02/2000, n. 715, in *Giur. it.*, 2000, 12; N. PAOLANTONIO, *Discrezionalità tecnica e giurisprudenza pratica* (nota a Cons. Stato, VI, 3 luglio 2002 n. 3637), in *Foro Amm.*: *CDS*, 2002, 2587-2597; D. DE PRETIS, *Discrezionalità tecnica ed incisività del controllo giurisdizionale*, in *Giorn. dir. amm.*, n. 12, 1999, 1179-1183; A. ROMANO

TASSONE, *Sulle vicende del concetto di "merito"*, in *Dir. amm.*, n. 3, 2008, 517; A. TRAVI, *Il giudice amministrativo e le questioni tecnico-scientifiche: formule nuove e vecchie soluzioni*, in *Dir. pubbl.*, 2004, 439; A. TRAVI, *Sindacato debole e giudice deferente: una giustizia "amministrativa"?*, nota a T.A.R. Lazio Roma, I, 09 agosto 2005, n. 6157, in *Giorn. dir. amm.*, 2006, n. 3, 304; F. VOLPE, *Discrezionalità tecnica e presupposti dell'atto amministrativo*, in *Dir. amm.*, n. 4, 2008, 791-837.

On the case of France: M. BAZEX and S. BLAZY, *Le juge doit-il contrôler la pertinence de l'analyse économique servant de base à une décision?*, in 2 *Droit Administratif* (2005, comm. 26.); R. BONNARD, *Le contrôle juridictionnel de l'administration: Etude de droit administratif comparé*, Paris, Dalloz, 2005; C. BRECHON-MOULENES, *La place du juge administratif dans le contentieux économique public*, in *AJDA* (2000), 679; J.-Y. CHÉROT, *Les méthodes du juge administratif dans le contentieux de la concurrence*, in *AJDA* (2000), 687; M. COLLET, *Le contrôle juridictionnel des actes des autorités administratives indépendantes,* Paris, LGDJ, 2003; P. DELVOLVÉ, *La cour d'appel de Paris, juridiction administrative*, in *Études offertes à Jean-Marie Auby*, Paris, Dalloz, 1992; J.-F. FLAUSS, *Vers une extension du contrôle normal dans le contentieux de la police administrative*, in *LPA* (19 mai 1989), 19; S.-J. LIÉBER and D. BOTTEGHI, *L'étoile du recours pour excès de pouvoir pâlirait-elle encore?*, in *AJDA* (2009), 583; D. LOCHAK, *Le conseil d'État en politique*, in 123 *Le Seuil - Pouvoirs* 4 (2007); M. LOMBARD, *Les analyses économiques dans le contrôle juridictionnel des actes pris sur proposition des agences de régulation*, in 1 *Droit Administratif* (Janvier 2005, comm. 12); J. MARIMBERT, *L'ampleur du contrôle juridictionnel sur le régulateur*, in 17 *Petites affiches* (2003), 41; J. MORAND-DEVILLER, Le contrôle juridictionnel des actes des autorités administratives indépendantes, in 183 *LPA* (2003), 6; P. QUILICHINI, *Réguler n'est pas juger: Réflexions sur la nature du pouvoir de sanction des autorités de régulation économique*, in *AJDA* (2004), 1060; A.-L. SIBONY, *Le juge et le raisonnement économique en droit de la concurrence*, Paris, LGDJ, 2008; V. TCHEN, *Contrôle par le juge administratif des attributions de fréquence décidées par le Conseil supérieur de l'audiovisuel (CSA)*, in *AJDA* (1994), 74; J.-M. WOEHRLING, *Le contrôle du pouvoir discrétionnaire en France*, in 7 *Rev. Administration. n. spécial* (1999), 75.

On the case of Canada, G. CARTIER, *Keeping a check on discretion*, in *Administrative Law in Context*, coord. by C. Flood and L. Sossin, Toronto, Emond Montgomery, 2008; D. DYZENHAUS, *The logic of the rule of law: lessons from Willis*, in 55 *U. Toronto L.J.* 691 (2005); J.M.

EVANS, *Jurisdictional Review in the Supreme Court: Realism, Romance and Recidivism*, in 48 *Admin. L.R.* (1991), 255; W. LAHEY and D. GINN, *After the Revolution: being pragmatic and functional in Canada's Trial Courts and Courts of Appeal*, in 25 *Dal. L.J.* (2002), 274; D.K. LOVETT, *That Enigmatic Curial Deference and the Continuing and Most Curious Search for Legislative Intent - What to Do, What to Do?*, in 17 *Can. J. Admin. L. & Prac.* (2004), 207; A. MACKLIN, *Standard of review: the pragmatic and functional test*, in *Administrative Law in Context*, see *supra*; H.W. MACLAUCHLAN, *Transforming Administrative Law: the didactic role of the Supreme Court of Canada*, in 80 *Can. Bar Rev.* (2001), 281; D.J. MULLAN, *Establishing the standard of review: the struggle for complexity*, in 17 *Canadian Journal of Administrative Law* (2004), 59; D.J. MULLAN, *Dunsmuir v. New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!*, in 21 *Can. J. Admin. L. & Prac.* (2008), 117; L. SOSSIN and C.M. FLOOD, *The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law*, 57 *U.T.L.J.* (2007), 581.