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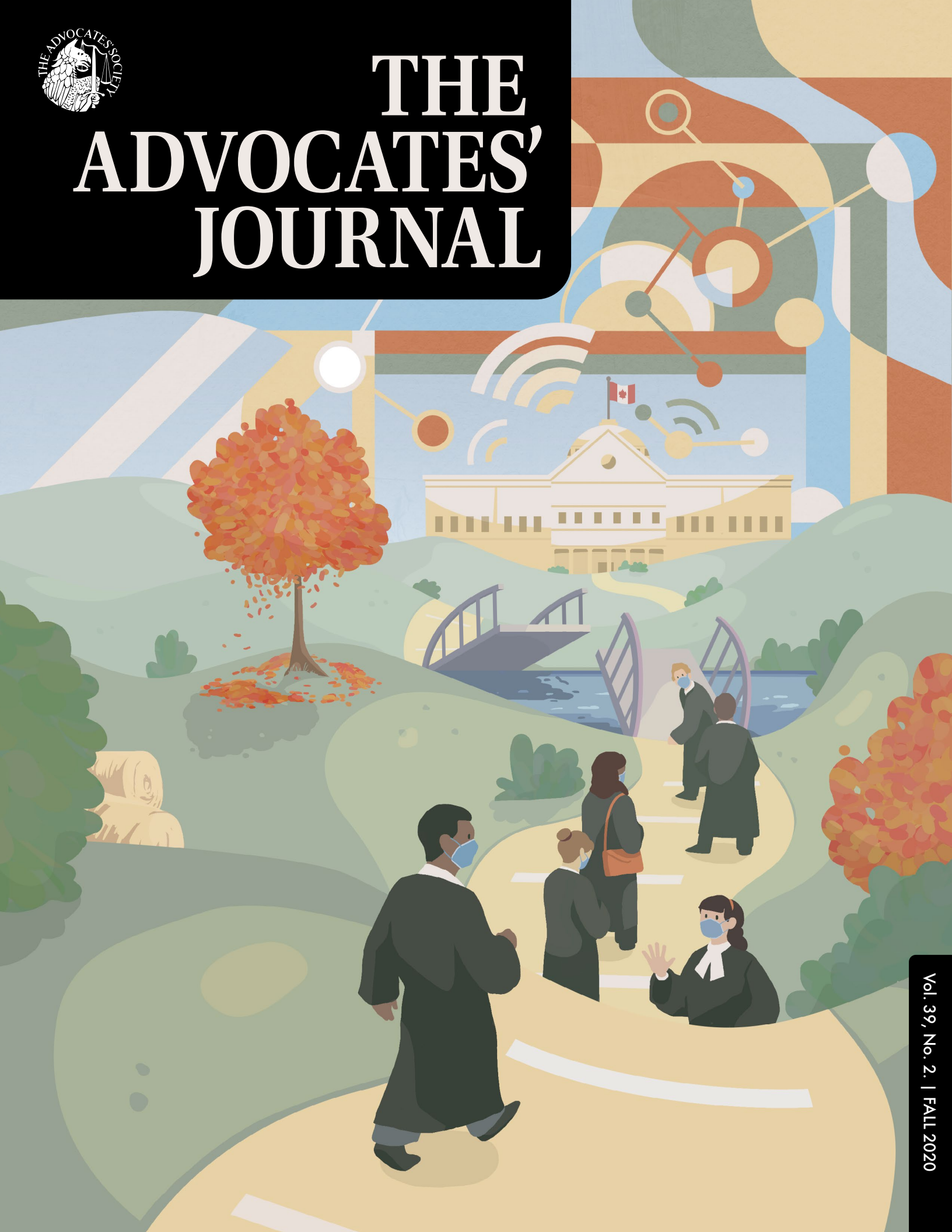

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Vavilov in the age of the autocrat:

Law as power that justifies itself

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When the Supreme Court of Canada released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[1] at the end of 2019, it was clear that, beyond its obvious implications for the standard of review, it was part of a larger conversation about public law. The COVID-19 pandemic has amplified the importance of this conversation. As we write this piece from our makeshift home offices in the middle of a global lockdown, we are acutely aware of the pressing public law issues that will face our governments and our courts in the fallout to this pandemic.

The pandemic has created urgent circumstances of necessity that have not existed since the Second World War. It has required collective and extraordinary action that only state actors can provide. But this urgent need for state action has landed at a time when global political developments – and, in particular, the paradoxical and simultaneous ascent of populism and authoritarian patterns of thinking and political discourse – have called into question a postwar liberal order that was ostensibly pluralistic, democratic and rules-based.

Public law is, at bottom, about power. What does the *Vavilov* decision tell us about the relationship between law and political power in a COVID-19 world already reeling from a rise in populism and authoritarianism?

The paradox of populism

In a speech given in Washington, DC, on June 13, 2018, then Minister of Foreign Affairs Chrystia Freeland expressed concern about "the weakening of the rules-based international order and the threat that resurgent authoritarianism poses to liberal democracy itself." She told her audience that "[n]ow is the time for us to plant our flag on the rule of law."[2]

It is no accident that populist politicians gravitate toward arbitrary and authoritarian political solutions. If the claims of populism were true – that there is a monolithic "popular will" which is universal, unquestionably legitimate and self-justifying – there would be no need for populism. Indeed, there would be no need for government. We would be living in a prelapsarian paradise in which coercion is unnecessary and social order – with its attendant human flourishing – arises spontaneously and perpetuates itself organically.

The dark side of populism – and its tendency to gravitate toward authoritarianism – emerges when its premises collide with pluralism, diversity and the messy reality of different perspectives and real social problems that defy easy solutions.

The paradox of populism is explained when we supply a necessary – and missing – premise to the populist argument: that the exercise of political power is inherently legitimate and should not be questioned, whenever it is wielded by the right people. Which, in the case of populism, means that subset of the population which represents the popular will espoused by those who claim to be the guardians of it.

It has been persuasively argued that certain brands of populism present in many countries today take the form of a "moralized anti-pluralism" under which power must (and, critically, *can*) be wielded by "the people" in as unmediated a fashion as possible: the "people" here being conceived of not inclusively, but as a subset of the population – often believing itself to be the majority, and very often comprising the dominant gender and ethnicity.[3] By this ideology, the criterion by which power is legitimized is its use in the service of the right cause.

In other words, the implication of populist claims is that where

the exercise of power can be placed in the hands of the right people, the need for principled limits on that power and rational scrutiny of it evaporates.

Prorogation, public law and the populist

We saw the inevitable collision between the populist program and the rule of law earlier this year in the decision of the United Kingdom Supreme Court to nullify the prorogation of Parliament that had been obtained on the advice of Prime Minister Boris Johnson.[4]

Despite the widely held belief that the prime minister was acting improperly for political ends (to advance Brexit without further parliamentary involvement), many commentators were convinced the Supreme Court would determine that the matter was not justiciable. Contrary to these expectations, the Court held that the express political rationale for seeking prorogation was in fact subject to judicial review. Constitutional principles of parliamentary sovereignty and the accountability of the executive to Parliament rendered the prime minister's actions unlawful, as Parliament was being frustrated in playing its proper role "without reasonable justification." Although the Supreme Court did not make a finding that the prime minister's stated reasons for proroguing Parliament were not his true reasons, the Court held that the justification offered by the prime minister for the lengthy prorogation (that Parliament had already had a long session and was facing minimal further business) was unreasonable.

From a Canadian legal perspective, the *Prorogation Ruling* was somewhat unsurprising. We have no "political questions" doctrine, and it has been accepted at least since *Roncarelli v. Duplessis*[5] that executive power exercised irrationally and in bad faith is reviewable. Ironically, however, outside of these "big" questions that present comparatively less difficulty in Canadian law than they do elsewhere, the past 30 years have seen something of an existential crisis in Canadian courts concerning the real-life administrative decisions that affect Canadians daily. As we will see, for more than 30 years, Canadian courts struggled with developing a principled foundation for the rational scrutiny of administrative action that is at the core of public law.

The Supreme Court of Canada's decision in *Vavilov* is important because it finally supplies this principled foundation. And, as the prorogation controversy in the United Kingdom demonstrates, it comes at a time when the need for a stable and coherent system of scrutiny has been made especially apparent with the election across the globe of governments claiming popular mandates to act arbitrarily in the achievement of what they claim to represent the popular will.

The bumpy road to *Vavilov*

Vavilov's lasting importance can be grasped only when we appreciate where it came from. For the decades preceding *Vavilov*, administrative law jurisprudence had become burdened with legal complexity that had evolved out of an understandable desire by courts to properly calibrate the relationship between the judiciary and the administrative state.

Until the 1979 decision of the Supreme Court of Canada in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,[6] administrative law in Canada was influenced heavily by the work of the 19th-century British jurist Albert Venn Dicey.[7] A creature of late 19th-century political liberalism, Diceyan administrative law stressed the need for court supervision of the work of administrative bodies, on the basis that only courts should have the final word in setting the bounds within which administrative bodies should be permitted to affect the rights of the subject.

While this conceptualization of the rule of law – with its professed focus on ensuring that administrative bodies exercised only the authority granted to them by the legislative body which created them – has a lot to commend it, cracks in its ideological foundations began to appear when courts had to contend with the actions of administrative bodies protected by privative clauses. In these cases, the rule of law (typified, at bottom, by parliamentary sovereignty – a concept well supported by Dicey) clashed with an inability of certain courts to tolerate decisions by "inferior" bodies with which they disagreed.

Government regulation of labour relations was the front line for this clash. *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*,[8] decided in 1970 and later termed by Wilson J. in *National Corn Growers Assn. v. Canada*[9] as a high-water mark of activist review in Canada, is one example of courts' overzealous disregard of privative clauses in labour relations legislation. In *Metropolitan Life*, instead of upholding the board's power to determine who were "members" of a union, the Supreme Court of Canada brushed aside a privative clause on the basis that the board stepped outside its jurisdiction by failing to consider whether, under the terms of the union's constitution, the employees were eligible to become members of the union. If any principle can be inferred from such a decision, it would be that what the Court termed "inferior tribunals" do not possess the jurisdiction to make decisions with which reviewing courts disagree.

In *CUPE*, the Supreme Court of Canada recognized the fundamental flaws in these prevailing attitudes to judicial review. *CUPE* also concerned the interpretation of labour legislation by a board protected by a privative clause. The issue was whether a prohibition of replacing striking workers with any other "employee" applied where the employer replaced striking workers with management personnel. This was classically an issue about which reasonable minds could disagree. The employer argued that the prohibition merely protected employees' jobs during a strike, while the board held that the provision, read in the context of a prohibition on picketing, was intended to refer to all replacement workers. The board's decision was quashed on a *certiorari* application, on the basis that the interpretation of the word "employee" was a "preliminary or collateral matter" that went to the board's jurisdiction.

Dickson J., writing for a unanimous Supreme Court, restored the board's decision. Noting that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so," Dickson J. made a vital distinction between the *substance* of a tribunal's solution to a question and the question whether the tribunal has the power to decide the question at all. He ruled that where a tribunal has the power in the strict sense to decide a question, then in cases where there is a privative clause, the question to be asked is, "[W]as the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?" And with that, the patent unreasonableness standard was born.

From patent unreasonableness to "law office metaphysics"

The birth of patent unreasonableness as a criterion for reviewing the substance of an administrative decision was a significant step toward a theory of judicial review that respected legislative choices. Privative clauses are a compelling sign that the legislature was not interested in whether a court agreed or disagreed with a particular outcome. The "rule of law" in the Diceyan sense is nevertheless vindicated by ensuring that decisions of administrative bodies stay within reasonable boundaries of rationality – that is, are not patently unreasonable.

Unfortunately, the pragmatic approach to policing the "jurisdiction" of administrative tribunals adopted in *CUPE* began to lose focus over the ensuing decade. Courts began to stray from asking what the legislature intended into a more involved and esoteric inquiry into questions of judicial policy unmoored from legislative intent.

The chief event in this evolution was the 1988 decision of the Supreme Court of Canada in *U.E.S., Local 298 v. Bibeault*,[10] which spawned the "pragmatic and functional" analysis of judicial review questions. *Bibeault* introduced a focus on a range of factors of which express legislative intent was only one. The standard of review applicable to a tribunal's decision became a polycentric inquiry into the "wording of the enactment conferring jurisdiction on the administrative tribunal, [and] the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."[11]

Bibeault was a significant and unfortunate wrong turn in administrative law. It took almost 30 years for the Court to find its way back to a rational and principled approach to judicial review rooted in legislative intent within an overall culture of rational scrutiny. From *Bibeault*, we got a growing focus on the identity and status of the decision-maker as one of the most significant factors influencing the degree of scrutiny afforded to it.

This development was typified by courts' approach to administrative bodies that, far from being protected by a privative clause, were governed by legislation containing rights of appeal – rights that on any common-sense view of the legislation must be taken to *invite* judicial scrutiny. It is ironic that an approach to administrative law that began with a principled desire to respect the legislature's design choices by giving effect to privative clauses came back full circle and directed courts effectively to ignore provisions subjecting certain bodies to statutory appeals. Cases such as *Pezim v. British Columbia (Superintendent of Brokers)*[12] saw courts showing deference to specialized bodies such as Securities Commissions even in the presence of a statutory right of appeal. Courts saw it as their function to pull back from detailed scrutiny based on a presumed obligation to defer to a tribunal's status and identity.

A concept of judicial review unmoored from the specific terms of legislation creating administrative tribunals was bound to create uncertainty and confusion. It did so, creating a crisis that Binnie J. memorably described in his concurring reasons in *Dunsmuir v. New Brunswick*, decided in 2008.[13] Noting that judicial review "is an idea that has lately become unduly burdened with law office metaphysics,"[14] Binnie J. lamented that the courts' approach to judicial review led litigants in a judicial review proceeding to "find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test."[15]

The majority in *Dunsmuir*, while acknowledging the difficulties in standard of review jurisprudence, attempted to fix the problem not by attacking it at its source, but rather by restricting the range of possible standards of review to two: reasonableness and correctness. The Court in *Dunsmuir*, however, did not fix the most basic problem that *Bibeault* introduced into standard of review jurisprudence, which was a focus not on how legislative design choices frame judicial scrutiny of administrative action, but rather on an esoteric inquiry focused on the identity of the decision-maker and the unanswerable question of who in principle is best placed as a matter of policy to decide specific kinds of issues.

***Vavilov* and the culture of justification**

Into this less than ideal picture, enter *Vavilov*. Alexander Vavilov was born in Canada in 1994 and held a Canadian passport. Unbeknownst to him, his parents were Russian spies, posing as Canadians under assumed names. After his parents were arrested in the United States and pled guilty to espionage, Vavilov's attempts to renew his Canadian passport were denied. He was, however, issued a certificate of Canadian citizenship.

In 2014, the Canadian Registrar of Citizenship cancelled Vavilov's certificate. She did so based on her interpretation of a section of the *Citizenship Act*, which exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar's decision had been upheld on judicial review to the Federal Court, but then quashed by the Federal Court of Appeal as unreasonable.

The Supreme Court of Canada dismissed the appeal. The Court held that it was not reasonable to interpret the legislation as applying to the children of individuals who had not been granted diplomatic privileges and immunities. In so doing, the majority of the Supreme Court outlined a new approach to the standard of review: going forward, the presumed standard of review of administrative decisions will be reasonableness. The reason for this presumption, the Court held, is that where a legislature has created an administrative body to administer a statutory scheme, we must presume that the legislature intended that body to fulfill its mandate and interpret the law applicable to the issues that come before it, with minimal judicial interference. This focus on institutional design choice renders it no longer relevant or appropriate to assess the relative expertise of the administrative decision-maker or engage in the other aspects of contextual analysis.

The reasonableness standard can be rebutted in two circumstances, grounded in respect for legislative design choices and the rule of law. The first is where it can be said that the legislature has made a specific choice suggesting a different standard of review, either by language explicitly prescribing a different standard of review or by granting appeal rights. In general, appeal provisions will be taken to demonstrate legislative intent that an appellate standard of review applies.

The second circumstance is where the rule of law requires a correctness standard; this will generally be where constitutional questions, general questions of law of central importance to the legal system as a whole, or questions of jurisdiction as between two administrative bodies arise. The Supreme Court found that application of the correctness standard in these circumstances respects the role of the judiciary in interpreting the Constitution and upholding the rule of law, by ensuring consistency and determinate answers on questions that have an impact across the legal system.

As a result of the Supreme Court's decision, we should now see the primacy of reasonableness review. Reasonableness review, according to the Court, starts from a position of judicial restraint and respect for the distinct role of administrative decision-makers. Courts should intervene only where it is necessary to do so to safeguard the legality, rationality and fairness of the administrative process. But administrative

bodies, for their part, will be expected to adopt a "culture of justification," to demonstrate that their exercise of delegated power can be justified. Decisions must be transparent, intelligible and justified – not just the result, but the reasoning process itself. Unlike in a correctness review, the court does not ask itself what decision it would have made or conduct a new analysis. Instead, the court focuses on the decision that the administrative body actually made, and its rationale, and considers only whether it was unreasonable. For administrative bodies that issue reasons, those reasons should explain how and why decisions were made, demonstrate that the parties' arguments have been considered, and convey that the decision was made in a fair and lawful manner.[16]

Courts will review for logical fallacies, or conclusions that are untenable given factual or legal constraints. These constraints include the statutory scheme (which the administrative body should review employing modern principles of statutory interpretation), the need for general consistency with previous decisions of the administrative body, and consideration of the impact on the person involved.

Vavilov's emphasis on the primacy of reasonableness, its rejection of deference to expertise as an organizing principle of law, and its replacement of deference with a culture of justification will result in better decisions. It also reminds us of the proper relationship between courts and institutions exercising state power.

A test that is actually pragmatic and functional

For many years, lawyers and students of administrative law had been conditioned to receive new administrative law jurisprudence almost as emergent lists of arbitrary rules posted on a bulletin board in a high-school cafeteria. In the decades since *Bibeault*, it has been difficult to discern in the jurisprudence any coherent sense of what courts believed they were doing when they tinkered with, revised, applied and (in cases such as *Dunsmuir*), purported to wholly revisit the governing principles.

With its emphasis on institutional design choices rooted in an overall baseline expectation of demonstrated rationality in administrative decision-making, *Vavilov* has provided more than just a replacement set of tests for standard of review decisions. It has supplied the long-absent *why* from the Canadian conversation about judicial review of administrative action. It is now much easier to see what judicial review is *for*.

The Court's focus on institutional design choices nested in an overall culture of justification supplies a fresh and principled understanding of the rule of law that mediates between the Diceyan mistrust of the administrative state on the one hand and an unmanageable culture of deference to status and expertise on the other. At its most basic level, a reviewing Court asks simply what, if anything, the legislature has asked the Court to do with the decisions of an administrative body (i.e., either to leave the decision with the body tasked with it, if rational, or actively review it if an appeal clause is present). Where the legislature has not empowered the Court to engage in appellate-scale scrutiny of a body's decision, the Court is concerned only with a decision's outer limits, which requires bodies (a) to act rationally; (b) to stay in their lanes (i.e., not to decide questions entrusted to other bodies); and (c) to get "big" legal issues right.

A culture of justification affirms the core value of the rule of law, which is that the exercise of power must be transparent and demonstrate a rational foundation in established law. This structure and coherence is a welcome development in an age where authoritarianism and anti-pluralism seem to be on the rise, and where we will continue to see extraordinary exercises of state power in the fallout to the pandemic. No body – whether a court, a ruler or a tribunal – should be able to escape a baseline requirement that, when called upon to do so, it justify any use of power or authority in clear terms rooted in rational principle and clear legislative mandate.

Notes

1. 2019 SCC 65 ["*Vavilov*"].
2. *Address by Minister Freeland when receiving Foreign Policy's Diplomat of the Year Award*, June 13, 2018, <https://www.canada.ca/en/global-affairs/news/2018/06/address-by-minister-freeland-when-receiving-foreign-policys-diplomat-of-the-year-award.html>.
3. See Aziz Z Huq, "The People against the Constitution" (2018) 116:6 Mich L Rev 1123 at 1132–33.
4. *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41 [the "*Prorogation Ruling*"].
5. [1959] SCR 121.
6. [1979] 2 SCR 227 ["*CUPE*"].
7. Dicey's most famous work is *Introduction to the Study of the Law of the Constitution* (1885).
8. [1970] SCR 425 ["*Metropolitan Life*"].
9. [1990] 2 SCR 1324.
10. [1988] 2 SCR 1048 ["*Bibeault*"].
11. *Ibid* at para 122.
12. [1994] 2 SCR 557.
13. [2008] 1 SCR 190 ["*Dunsmuir*"].
14. *Ibid* at para 122.
15. *Ibid* at para 133.
16. It will be interesting to see how courts review decisions of administrative bodies which do not issue reasons – a challenging problem for a culture of justification. While the Supreme Court contemplates that, even without reasons, it is possible for the record and context to reveal impermissible reasoning, it is difficult to see how this will play out.