

WITHOUT DEFERENCE, WITH RESPECT: A RESPONSE TO JUSTICE O'REGAN

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It is a great privilege and honour for me to be speaking on this occasion, not only as Dean of one of the two law faculties which are sponsors of this event, but also in response to a paper of such lucidity and quality. It has occurred to me that in holding this conference we are not only celebrating the anniversaries of the *South African Law Journal*, of Juta & Co, Ltd and of the Constitution¹ itself. We are also marking a milestone of another event which has special significance for administrative law. This year marks the 175th anniversary of the Charter of Justice of 1828 which effectively established the foundations of the Supreme Court of South Africa and therefore the beginnings of the system of judicial review of administrative action which has for so long formed the bedrock of our administrative law.² In another quirk of coincidence, I could not help noticing that the official dinner of this conference was held in a hotel which is part of a shopping complex the development of which itself led to one of the great landmarks of administrative law in the courts of this country, in the case of *Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council*.³

In responding to Justice O'Regan's paper I must at the outset acknowledge unequivocally that what we have heard has been a typically clear and authoritative statement of the development of and challenges facing South African administrative law. It is particularly good to be reminded of the 'dismal science'⁴ of the past, a statement that has certainly become a citation classic, much like Mureinik's 'culture of justification'.⁵ I also readily agree with

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¹ Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution) and Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution).

² For a description of these early days of the administration of justice at the Cape, see H R Hahlo and Ellison Kahn *South Africa: The Development of its Laws and Constitution* (1960) at 200–4.

³ 1971 (1) SA 56 (A).

⁴ The phrase was coined by W H B Dean in 'Our administrative law: A dismal science?' (1986) 2 *SAJHR* 164.

⁵ An approach anticipated in Mureinik's paper to the first significant conference on administrative law reform in South Africa, the Breakwater Conference, in February 1993. See Etienne Mureinik 'Reconsidering review: Participation and accountability' 1993 *Acta Juridica* 35 at 46. This approach was further developed in the oft-cited 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31.

Justice O'Regan that there has been a seismic shift in our administrative law, and I note that she has hinted at further developments. By way of an agenda for further reform of this area of the law,⁶ I would like to focus on four issues raised by or adverted to in Justice O'Regan's paper which are likely to determine the shape and direction of administrative law in the future.

The interrelationship of administrative law and other branches of law

We have been given an excellent reminder that administrative law in the past was very often the only remedy for those seeking to curtail or ameliorate the effects of executive and administrative tyranny. This led to the danger of administrative law being extended too much and spread too thinly, as we were warned by Schreiner JA in the *Laubscher* case in 1958⁷ in regard to the application of the *audi alteram partem* rule. It is entirely appropriate, indeed it is a relief, to note that many such applications for judicial review in the past would now be pursued by reference to other rights in the Bill of Rights. For example, *Lockhat*⁸ would now be contested in reliance on the right to equality;⁹ *Ngwevela*¹⁰ would be contested by claiming a right to freedom of movement;¹¹ the *SA Defence and Aid Fund* case¹² would clearly be a candidate for freedom of association;¹³ while the many applications to contest the lawfulness of detention without trial¹⁴ would be enhanced by relying on the criminal procedural rights¹⁵ in our Constitution today. It is likely that the right of access to court¹⁶ would have stopped the effectiveness of the ouster clause in *Staatspresident v United Democratic Front*¹⁷ much more effectively than some artificial reliance on the *ultra vires* doctrine.

But this relief of the inordinate burden placed on the right to seek judicial review of administrative action in the past is not as pervasive as may appear at first sight, in two areas. First, because of the narrow definition of 'administrative action' in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which may in any event not pass constitutional muster,¹⁸ there will probably be circumstances in which the common-law form of administrative review *may* continue to be available to those who wish to question administrative-type action taken by non-state organs exercising

⁶ The past decade has seen a concerted programme of reform in the area of administrative law, for an outline of which see Hugh Corder 'Reviewing review: Much achieved, much more to do' in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) at 2–7.

⁷ *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549.

⁸ *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A).

⁹ Section 9 of the 1996 Constitution.

¹⁰ *R v Ngwevela* 1954 (1) SA 123 (A).

¹¹ Section 21 of the Constitution.

¹² *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

¹³ Section 18 of the Constitution.

¹⁴ For example, *Rossouw v Sachs* 1964 (2) SA 551 (A) and *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A).

¹⁵ Section 35 of the Constitution.

¹⁶ Section 34 of the Constitution.

¹⁷ 1988 (4) SA 830 (A).

¹⁸ See the remarks of Cora Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 at 513ff.

public power. Secondly, in the context of the constitutionalization of administrative law, there will be situations on the edge, so to speak, which will throw out challenges to other areas of the common law. For example, contract and delict will be challenged to fashion appropriate procedures and remedies where the state is exercising 'private' power. (This has been addressed to some extent in a paper dealing with the effect of the Constitution on the law of delict;¹⁹ a challenge that was presaged by a paper given by Cockrell²⁰ at the first Breakwater Conference held early in 1993.)

Contextual values

It is very important to focus on the values that surround our new administrative law, which are mainly to be found in the prominence accorded to accountability, responsiveness, and openness as 'founding values' of the Constitution;²¹ to the requirements of lawfulness, reasonableness and procedural fairness in s 33; and to the obligations placed on the public administration under s 195. In the latter regard I have always believed that the developmental and service-emphasizing objectives set by the Constitution for the public administration constitute a justiciable framework for review, and I look forward to the day when they are regularly used as such in court.

'Efficiency' is also relevant as a value, and is normally seen to be an implied inhibition on the extent of administrative compliance with accountability, responsiveness and openness. This, at least, appears to have been the intention behind the inclusion in the Constitution of s 33(3)(c), an added justification for the legislative limitation of the rights in s 33, and this was clearly the motivating consideration behind the Justice Portfolio Committee's partial mutilation of the draft Bill presented to it by the Working Group of the South African Law Commission.²² Incidentally, I have always been intrigued by the status of s 33(3), for it would have lapsed had no Administrative Justice Act appeared within three years; and now that it has done its work, one wonders what relevance can be accorded to it today. Be that as it may, 'efficiency' can also cut another way: it could well be argued that the achievement of administrative efficiency is indeed *enhanced* by compliance with progressively improving levels of accountability, responsiveness and openness, so that it is not a basis for justifying the limitation of such values but rather for emphasizing their ever-expanding enforcement. In other words, the greater its accountability, the more efficient administrative action will become.

¹⁹ See Hector L MacQueen 'Delict, contract, and the Bill of Rights: A perspective from the United Kingdom' elsewhere in this issue.

²⁰ Alfred Cockrell ' "Can you paradigm?" — Another perspective on the public law/private law divide' 1993 *Acta Juridica* 227, especially at 241ff.

²¹ Section 1(d).

²² For a description and analysis of this process, see Hoexter op cit note 18.

Continuing importance of the common law in the interpretation of section 33 and the Act

I fully accept that the common law is not some independent, parallel system as decided by the Constitutional Court in *Pharmaceutical Manufacturers Association*,²³ but it must still assist in understanding concepts such as the grounds of review contained in s 6 of the PAJA, the doctrine of legitimate expectation²⁴ and so on. In one particular case, at least, it may well live on. Section 6(2)(i) of the PAJA provides for the review of action which is 'otherwise unlawful or unconstitutional', and it must be assumed that the common law-grounds of review not included in the PAJA, for example the rule against vagueness and the no-fettering rule, will surely be candidates for inclusion here, unless they can be shoe-horned in under 'lawfulness' or 'reasonableness'. While I am dealing with this matter, may I express the hope that the courts will ignore entirely the misguided circularity of *Wednesbury* unreasonableness²⁵ which appears to be provided for in s 6(2)(h) of the Act, and rather adopt a proportionality test so well known to our own constitutional jurisprudence²⁶ and to European administrative law, and so elegantly phrased in the Law Commission's draft Bill:²⁷

'The effect of the action is unreasonable, including any (i) disproportionality between the adverse and beneficial consequences of the action, and (ii) less restrictive means to achieve the purpose for which the action was taken.'

The 'D' word

The idea of 'deference' underlies several parts of Justice O'Regan's paper, although it is never mentioned expressly in it. It is completely understandable in this country that the idea of deference has a thoroughly bad press, being too easily associated with 'deference as submission' rather than 'deference as respect', as Dyzenhaus²⁸ and Hoexter²⁹ have argued. If we mean that we should be considering adopting an approach characterized by deference as respect, which I assume to be axiomatic, let us just call it 'respect' or 'respectful', and not use 'deference' or 'deferential'. But labels are less important than the underlying approach or philosophy and its consequences, as Schreiner JA once more reminded us in regard to the classification of administrative functions in *Pretoria North Town Council*³⁰ almost 50 years ago.

²³ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

²⁴ See in this regard the judgment of O'Regan J in *Premier, Mpumalanga v Executive Committee of the Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 45.

²⁵ The test adopted in the United Kingdom in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, but long since abandoned.

²⁶ As is to be seen in the first judgments of the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) as well as the limitation clause in the Constitution, s 36(1).

²⁷ See clause 7(1)(g) of the Law Commission's draft bill in its *Report on Administrative Justice* Project 115 (August 1999).

²⁸ David Dyzenhaus 'The politics of deference: Judicial review and democracy' in Michael Taggart (ed) *The Province of Administrative law* (1997) 279.

²⁹ Hoexter op cit note 18.

³⁰ *Pretoria North Town Council v A1 Electric Ice Cream Factory* 1953 (3) SA 1 (A) at 11B–C.

Justice O'Regan has made the same point, and I agree entirely with her that an emphasis on approach or philosophy is what is needed now in South African administrative law. The lead must come from the judiciary, especially the Constitutional Court, which has provided some clues so far.

For example, we have the following statement from Chaskalson P in *Pharmaceutical Manufacturers Association*:³¹

'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and its functionaries. Action that fails to pass this threshold is . . . unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision because it disagrees with it, or considers that the power was exercised inappropriately.'

A different emphasis is seen in the following statement from O'Regan J in *Dawood*:³²

'It is not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution . . . Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance.'

But we need much more, and references to the ultra vires doctrine no longer assist us directly: although we can learn from the debate in the United Kingdom about the basis of and justification for judicial review of administrative action in the ultra vires doctrine, such as has been described, the matter is settled as far as we are concerned. The basis of the authority of the judiciary to review administrative action lies in the Constitution, and the Constitutional Court has repeatedly asserted its authority to do so. However, a number of subsidiary questions arise.

- What theory of respect animates the drawing of the line between executive action³³ and administrative action?
- Does such differentiation (between executive and administrative action) make a real difference when it comes to standards of review? We have seen in the *SARFU* case³⁴ as well in *Pharmaceutical Manufacturers Association*³⁵ that the executive powers provided for in s 84(2) of the Constitution are subject to review in terms of the principle of legality. To what extent do the provisions of s 33 and the PAJA constitute a more invasive degree of review?
- How will 'reasonableness' be interpreted? Will the courts rely on a notion of 'rationality' as we saw in *Pharmaceutical Manufacturers Association*, or 'proportionality' as Froneman DJP set out in *Carephone*?³⁶ In the latter

³¹ Supra note 23 para 90.

³² *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 54.

³³ As identified in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) and *Pharmaceutical Manufacturers Association* supra note 23.

³⁴ Supra note 33.

³⁵ Supra note 23.

³⁶ *Carephone (Pty) Ltd v Marcus* NO 1999 (3) SA 304 (LAC) para 32.

regard, we must note the widespread use of proportionality as a ground of review in the United Kingdom and Europe³⁷ as well as the formulation proposed by the Law Commission in relation to the PAJA.³⁸ I make so bold as to argue that the statutory inclusion of both 'rationality' (in s 6(2)(f)(ii)) and 'reasonableness' (in s 6(2)(h)) as grounds of review in the PAJA leads inescapably to the conclusion that a test of the 'proportionality' of administrative action is the missing element which gives meaning to 'reasonableness' as more than mere rationality. In other words, rationality plus (at least) proportionality equals reasonableness.

- Do we not need to move to a vision of 'substantive fairness' as a key element of 'reasonableness', for we already have 'procedural fairness' protected in s 33 and the PAJA? In this regard the distinction between the majority in *Bel Porto*³⁹ and the judgment of Mokgoro and Sachs JJ in that case seems to me to be significant.

In sum on this point, I would argue that judges must respect the legitimate decision-making activities of both the legislature and the executive but should not give up too much of their review power at this stage by setting the test for rationality at too low a threshold.

Conclusion

I would like to offer two final comments in response to Justice O'Regan's paper. Firstly, as so cogently argued by Hoexter,⁴⁰ we need urgently to expand our legal horizons beyond backward-looking judicial review of administrative action (of the red-light variety, suspicious of all administrative power in a watch-dog mode) to a prospective, progressive improvement of the decision-making process in all administrative action, and the creation of specialized tribunals or fora for administrative appeals, on the merits, in a systematic way. This development is anticipated in the ministerial power given in s 10(2) of the PAJA, which has not yet been acted on. Incidentally, a recent Australian study⁴¹ after 25 years of their new administrative law indicates that the heightened requirement of administrative accountability has led to considerably improved decision-making processes within the administration itself, which have ultimately been widely welcomed by bureaucratic leaders.

Secondly, we need openly to acknowledge that the old approach to distinguishing review from appeal is no longer tenable. It is also not necessary, as our courts have now been expressly authorized to determine the reasonableness of administrative action, which *must contain a merits-based substantive element*. However, this is not an appeal and nor is it mere procedural

³⁷ See the treatment of Jürgen Schwarze 'The convergence of the administrative laws of the EU member states' (1998) 4 *European Public Law* 191 at 195ff.

³⁸ See note 27.

³⁹ *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC).

⁴⁰ Cora Hoexter 'The current state of South African administrative law' in Corder & Van der Vijver op cit note 6, particularly at 25–7.

⁴¹ See Robin Creyke & John McMillan 'Executive perceptions of administrative law — An empirical study' (2002) 9 *Australian Journal of Administrative Law* 164.

review: perhaps it would be better to describe what is required now, in all honesty, as 'substantive' or 'wide' review. We must acknowledge, too, that the merits were inevitably referred to, even in the circumstances of 'procedural' or 'narrow' review, in our own wicked past.

So we eagerly await the case or judgment of the Constitutional Court that will fix the answers, for the time being, to these questions. In doing so, I have no doubt that the court will respect the different spheres of authority delimited by the doctrine of the separation of powers but that, mindful of the history of the abuse of executive and administrative power under apartheid with which Justice O'Regan so vividly started her paper, the court will reserve its space to call the executive and administration to account in terms of the Constitution and the law on all forms of the exercise of public power — without deference, but with respect.