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*DEFERENCE WITH A DIFFERENCE:  
OF RIGHTS, REGULATION AND  
THE JUDICIAL ROLE IN THE  
ADMINISTRATIVE STATE*

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A PLEA FOR JUDICIAL DEFERENCE IN THE NEW SOUTH AFRICA

In preparing to participate in a conference on South Africa's new administrative law, I read *Realising Administrative Justice*,<sup>1</sup> a book of essays edited by Professor Hugh Corder and Ms Linda van der Vijver, and published on the coming into force of the Promotion of Administrative Justice Act.<sup>2</sup> A theme running through several of the essays of this book is the critical importance of achieving a proper balance in administrative law between enabling administrators to get on with their job of delivering the public programmes that are of paramount importance to the development of South Africa and its people, and the need to protect individuals against the abuse of power by government, including by inaction.

This is, of course, the same tension that is found in any constitutional democracy, but it may have an especial urgency in the new South Africa, given the bleakness of its recent past and the daunting nature of the challenges now facing it. Rethinking the role of the judiciary in the governance of a newly democratic country committed to fundamental social and economic transformations is no easy task.

I noted, particularly, the essay by Professor Hoexter, 'The current state of South African administrative law',<sup>3</sup> in which the author's solution for striking the appropriate balance lay in the development of a theory of deference to guide the judiciary in the exercise of their judicial review jurisdiction

\* BA BCL (Oxon). This paper is based on a presentation that I gave to an LLM class at the University of Cape Town on August 1, 2002. I am very grateful to Professor Hugh Corder for inviting me to revisit Cape Town and for providing an opportunity for me to speak with students and faculty members in the Faculty of Law.

<sup>1</sup> (2002).

<sup>2</sup> Act 3 of 2000. Hereafter referred to as PAJA.

<sup>3</sup> Op cit note 1 at 20-37.

conferred by the broad grounds of review in s 6 of the PAJA, the prohibition of ouster clauses by s 34 of the Constitution,<sup>4</sup> and the generous requirements for standing in s 38 of the Constitution. Moreover, the paucity of merits review by appeal tribunals is liable to give judicial review an undue prominence in the supervision of the administration.

Professor Hoexter has spelled out her theory of deference in a fine article, 'The future of judicial review in South African administrative law'.<sup>5</sup> After distancing her theory from the kind of submissiveness to the Executive that had characterized the worst of the judiciary under the ancien régime, she says:

'Rather, the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for — and the consequences of — judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'<sup>6</sup>

Professor Hoexter then identifies what she calls the principle of 'variability'<sup>7</sup> as one mechanism for avoiding the excessive judicial interventionism that she fears may result from the broad constitutional right to 'lawful, reasonable and procedurally fair' administrative action conferred on everyone by s 33(1) of the Constitution, and the broad grounds of review in s 6 of the PAJA, including the basket provision in s 6(2)(i) (action that is 'otherwise unlawful'). By 'variability', Professor Hoexter seems to mean, among other things, that the content of the grounds of review cannot be assumed to be self-evident or monolithic. Rather, specific content must be supplied in light of the particular legal and administrative contexts of the impugned action, or inaction.

This, in my opinion, must be the way forward for judicial review in South Africa: the way to ensure both that administrators have the legal and administrative tools necessary to deliver the programmes of regulation and redistribution within their mandates, and that administrators observe the constitutional principles of legality, rationality, participatory decision-making and accountability. These competing considerations are more likely to be accommodated well in the long run by the development of a legal culture in which judges approach issues of judicial review by thinking in a pragmatic way about the appropriate allocation of responsibilities between courts and

<sup>4</sup> Constitution of the Republic of South Africa, Act 108 of 1996. Hereafter referred to as 'the Constitution'.

<sup>5</sup> (2000) 117 *SALJ* 484.

<sup>6</sup> *Op cit* note 5 at 501–2. By 'appeal', I understand the author to mean a review of the merits of the decision, including the correctness of findings of fact, and the wisdom of the exercise of any discretion, on which the decision was based.

<sup>7</sup> *Op cit* note 5 at 502–5.

the administration, than by attempts by Parliament to impose formalistic limitations on the scope of judicial review.<sup>8</sup>

## THE CANADIAN WAY

### *The pragmatic or functional approach*

Over the last twenty years the Canadian judiciary, led by the Supreme Court of Canada, has developed a sophisticated analytical framework within which to determine the proper roles of the generalist courts and specialist administrative agencies in the decision-making process. Despite the vast differences between the challenges facing Canada and South Africa, their administrative structures<sup>9</sup> and available resources, Canada's distinctive approach to public law provides a source of ideas and experience that might be useful to South African lawyers when responding to Professor Hoexter's challenge to develop and operationalize a theory of deference.

The term 'a pragmatic or functional analysis' is now used by the Supreme Court of Canada to connote its approach to most of the administrative law problems that come before it. It was originally coined in the late 1980s to determine the standard of review applicable to administrative agencies' decisions interpreting and applying their enabling legislation, especially labour tribunals whose decisions are often protected by a preclusive clause.<sup>10</sup> Since then, however, the same underlying methodology is apparent in the way that courts have examined the context of administrative action in order to determine the content of the duty of fairness,<sup>11</sup> approached the review of the exercise of discretion by officials of main-line government departments,<sup>12</sup> defined the circumstances in which administrative action may be impeached collaterally (as a defence to criminal proceedings, for example) rather than through the statutory avenues of redress created for this purpose,<sup>13</sup> and, more generally and importantly, tackled the interpretation of legislation.

<sup>8</sup> See, for example, the narrow definition of 'administrative action' in s 1 of PAJA, which limits the scope of the act to the review of a *decision which adversely affects the rights* of any person and which has a *direct external legal effect*. The apparent intent of such provisions may be thwarted by a broad judicial interpretation or a determination that, in so far as they unduly limit the scope of the right created by s 33(1) of the Constitution, they do not 'give effect' to it within the meaning of s 33(3). Contrast the more flexible definition of reviewable administrative action contained in the Federal Court Act RSC 1985 c F-7, s 18.1, as exemplified by *Larry Holdings Ltd (c o b Quickie Convenience Stores)* 2002 FCT 750 (legality of letter written by Minister warning retailers that it is illegal to sell multiple packages of cigarettes at a discount reviewable). Compare *Gillick v Wisbech Health Authority* [1986] AC 112 (declaration of invalidity available in appropriate cases with respect to non-statutory circulars).

<sup>9</sup> I have in mind, particularly, the prevalence in Canada of rights of appeal to independent specialist administrative tribunals from decisions determining individual rights made by line officials in government departments or by municipalities, and of independent tribunals that perform regulatory functions that in other jurisdictions might be the responsibility of a minister.

<sup>10</sup> See *UES, Local 298 v Bibeault* [1988] 2 SCR 1048 at 1088. Beetz J contrasted this method of analysis with the formalism of the 'preliminary or collateral question' theory as a method for identifying which statutory provisions that agency had to interpret correctly in order to remain within its jurisdiction.

<sup>11</sup> See, for example, *Knight v Indian Head School Division No 19* [1990] 1 SCR 653. One is tempted to suggest that the effect of the pragmatic or functional approach in this context is to shape the content of the duty of fairness on the basis of a cost-benefit analysis: is the harm likely to be avoided by affording the particular procedural right claimed greater than the likely costs of requiring it?

<sup>12</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

<sup>13</sup> See, for example, *R v Consolidated Maybrun Mines Ltd* [1998] 1 SCR 706; *R v Al Klippert Ltd* [1998] 1 SCR 737.

Indeed, many of the intellectual assumptions that underlie 'a pragmatic or functional analysis' are evident in the way that courts nowadays tackle issues in all areas of the law. It represents a retreat from the abstract and general concepts of legal positivism or formalism, and a recognition that, in law as in life itself, the barrier between 'is' and 'ought' is quite permeable. Through the pragmatic or functional approach, courts attempt to ensure that solutions are found to legal problems that are derived from the rationales or values underlying the relevant legal rules (deciding cases from first principles). It recognises the inherently open-ended nature of legal rules and the indeterminate nature of language and the limited utility in trying to craft precise rules and exceptions. The pragmatic or functional approach to legal issues tends to be more willing to leave judges with the task of weighing the relevant factors and exercising discretion in light of the circumstances of a case (as for example, by creating the reliability and necessity of evidence as a residual exception to the rule against the admission of hearsay<sup>14</sup>), and taking into account social context<sup>15</sup> and the likely consequences of decisions.

This may also be called a contextual approach to law, and is similar to what I understand Professor Hoexter to mean when she refers to 'variability' as an essential element in fashioning an appropriate legal framework within which the courts review administrative action.

Rather than tracing in tiresome detail the case law elaborating the elements of the pragmatic or functional approach to judicial review in Canada,<sup>16</sup> I shall attempt to trace some of the assumptions on which it rests, and some of the implications for the way that we have traditionally thought about the law and the roles of the courts.

### *Statutory interpretation*

The key to the new administrative law in Canada lies in the courts' approach to the interpretation of legislation. Indeed, the doctrine of judicial restraint or deference is said to rest ultimately on legislative choice, as indicated by, among other things, the text and purpose of the enabling legislation under which the relevant public programme is delivered and the characteristics of the institutions created to administer it.

The fundamental shift in the way that courts interpret legislation is not, of course, a phenomenon that is confined to Canada, nor to the interpretation

<sup>14</sup> See *R v Khan* [1990] 2 SCR 531; *R v Smith* [1992] 2 SCR 915.

<sup>15</sup> See, for example, *R v S (RD)* [1997] 3 SCR 484.

<sup>16</sup> Useful judicial overviews of the emergence of the current law can be found in *National Corn Growers Assn v Canada (Import Tribunal)* [1990] 2 SCR 1324 at 1331–46 (per Wilson J), and *Canada (Attorney General) v Public Service Alliance of Canada* [1991] 1 SCR 614 at 649–57 (per Cory J). *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, is perhaps the case now most frequently cited for its restatement of the elements of the pragmatic or functional analysis used to identify the standard of review to be applied to an administrative agency's determination of a question of law. In one of its most significant administrative law decisions since 1979, *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, the Supreme Court of Canada, among other things, applied the pragmatic or functional analysis to determine the standard of review applicable to the exercise of discretion by an immigration officer, noting (para 54) that 'there is no easy distinction to be made between interpretation and the exercise of discretion'.

of statutes creating public programs and empowering the agencies that administer them. Nonetheless, the interpretation of the legislation under which public programmes are delivered can rightly claim the status of an important sub-specialty, in part because, when a statutory scheme entrusts first level decision-making to a public authority other than a court, a reviewing court must ask whether the view of the court or of the administrative decision-maker on the interpretation of the enabling legislation, or on its application to the facts, carries the day.

I set out below some elements of our courts' current understandings of the interpretative process that have been of particular importance in shaping the pragmatic or functional approach to administrative law in general and to determining the standard of review in particular. If regularity of citation is any guide, the Supreme Court of Canada seems to have pinned its interpretative colours to the following passage:

'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.'<sup>17</sup>

However, more specific guidance on the Court's current practices is also available:

- (a) While dictionaries provide the range of meanings that words can bear in 'ordinary speech', the particular shade of meaning to be attributed to a given word or phrase is derived from the context in which it is used. In the case of statutory language, the interpretative context includes: the overall purposes of the statute; the legislative history of the scheme and the Act; the function in the statutory scheme of the particular provision in dispute; and the impact of the legislation on fundamental individual rights and constitutional values, including, in particular, those protected by constitutional<sup>18</sup> and quasi-constitutional<sup>19</sup> instruments, and by international legal norms.<sup>20</sup>
- (b) Statutory texts are often incomplete and ambiguous: legislators cannot foresee and deal with all the problems likely to be encountered in the administration of any regulatory scheme, all the facts to which it will be argued that the statute applies, and changes in societal values. Regulatory legislation is often more realistically conceived as a set of directional pointers rather than a comprehensive blueprint containing

<sup>17</sup> E A Driedger *Construction of Statutes* 2 ed (1983).

<sup>18</sup> The Constitution Acts 1867–1982, including the Canadian Charter of Rights and Freedoms introduced as part of the package that patriated the Constitution.

<sup>19</sup> These include: the Canadian Bill of Rights, a statutory precursor of the Charter enacted in 1960 and applicable only to the federal Parliament and government; anti-discrimination legislation; and access to information statutes.

<sup>20</sup> See, for example, *Rahaman v Canada (Minister of Citizenship and Immigration)* 2002 FCA 89 paras 34–49. The effect of international norms is not necessarily to reduce the scope of a public authority's statutory power. For example, writing for the majority in *114957 Canada Ltée (Spraytech, Société d'Arrosage) v Hudson (Town)* [2001] 2 SCR 241, L'Heureux-Dubé J found support in international law respecting the environment for upholding a municipal by-law restricting the use of pesticides on private property.

- the answers to all the questions that may arise about the way that the statute should be interpreted and applied.
- (c) When creating a statutory programme, Parliament can be presumed to have intended that the enabling legislation be interpreted in a manner best calculated to achieve its overall purposes. Hence, when filling gaps and resolving ambiguities in the statutory text, the body charged with its interpretation should consider the impact on the efficacy of the programme, and the efficiency with which it is delivered, when interpreting or applying the statute one way rather than another. In the interpretation and application of legislation, the distinction between law and policy is often blurred, at best.
  - (d) The range of knowledge, experience and perspectives required for the effective interpretation of legislation is not limited to those possessed by judges. Indeed, it was partly in recognition of this fact that Parliament created a specialist agency to administer the legislation, a task that includes deciding how the legislation should be interpreted and applied to particular facts, generally case-by-case at first, but later through the promulgation of guidelines and other decisional criteria.
  - (e) Hence, on an application for judicial review in which the applicant alleges that the administrative decision-maker misinterpreted a provision in the statute, or misapplied it to the facts, the reviewing court should not assume that it is the function of the court to determine the 'correct' meaning or application of the statute. For, as Dickson J so shrewdly noted with respect to the ambiguous statutory provision examined in the leading case of *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp.*<sup>21</sup> 'there is no one interpretation which can be said to be "right"'. Or, at least, if there is a 'right' answer, the skills and institutional characteristics of the judiciary may not be well suited for determining it. An understanding of the subject matter of the scheme (labour relations, land use, or telecommunications, for example), including an appreciation of the likely consequences of interpreting the statute one way rather than another, and the perspective brought to the task by members of the specialist agency, may prove more valuable to making an informed decision on the meaning to be attributed to the statute so as best to advance its purposes.
  - (f) Thus, if the question in dispute is one that the administrative decision-maker is better positioned than a court to answer, a reviewing court should only conclude that the decision is erroneous in law if it is unreasonable.<sup>22</sup> I should note that our courts recognize a standard of

<sup>21</sup> [1979] 2 SCR 227 at 237.

<sup>22</sup> See *Domtar Inc v Québec (Commission d'appel en matière de lésions professionnelles)* [1993] 2 SCR 756 at 772, where L'Heureux-Dubé J said that determining the standard of review is about deciding whether the administrative tribunal or the reviewing court 'is in the best position to rule on the impugned decision'.

- review scale that slides from unreasonable (or, clearly wrong)<sup>23</sup> to patently unreasonable, a very deferential standard reserved, in the main, for Ministerial decisions with a high policy content and agency decisions protected by a strong ouster clause.<sup>24</sup>
- (g) On the other hand, courts interpret in a broad and purposive manner the fundamental rights protected by anti-discrimination legislation and the Charter. Since courts regard themselves as having a special responsibility to protect fundamental rights and constitutional values they do not defer to administrators' decisions on how to balance these rights against competing considerations. Thus, when an administrative decision impinges on a Charter-protected right, the reviewing court will decide for itself whether the decision can be upheld under s 1 of the Charter as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society.<sup>25</sup> Similarly, the Supreme Court of Canada has consistently reviewed human rights tribunals' interpretation of anti-discrimination legislation on a standard of correctness,<sup>26</sup> in large part because of the close connection between the statutory right to be free from discrimination and the right under s 15 of the Charter to equality before and under the law without discrimination on the enumerated grounds and those analogous thereto. One might say that courts in Canada have applied at the administrative law level the direction to courts contained in *United States v Carolene Products Co*<sup>27</sup> with respect to the judicial review of legislation: that is, defer to agency decisions made in the course of administering programmes of economic regulation, but remain vigilant when the constitutional rights of individuals are at stake. In my opinion, the law and the courts that administer it have a special responsibility towards those whose interests are not adequately served by either the market or the political process.

## DEFERENCE AND THE RULE OF LAW

It could be argued that for the South African courts to adopt a policy of judicial restraint, or deference, towards administrative action that affects individuals' rights would be an abdication of their responsibility to uphold the

<sup>23</sup> This term was coined by Iacobucci J in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc* [1997] 1 SCR 748 at 776 to connote an intermediate standard of review between patently unreasonable and wrong. 'An unreasonable decision,' said Iacobucci J, 'is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.'

<sup>24</sup> In *Southam* supra note 23 at 777 Iacobucci J said that a decision was patently unreasonable if the defect is obvious or immediately apparent. An earlier formulation had spoken more clearly to the *seriousness* of the defect, rather than its obviousness. Thus, in *Syndicat des employés de production du Québec et de l'Acadie v Canada (Labour Relations Board)* [1984] 2 SCR 412 at 420, Beetz J said that a patently unreasonable interpretation of legislation 'amounts to a fraud on the law', and is treated as 'an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice'. In my opinion, given the complexity and non-obviousness of many administrative schemes, there is much to be said for this latter view.

<sup>25</sup> See, for example, *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

<sup>26</sup> The leading authority for this proposition is *Canada (Attorney General) v Mossop* [1993] 1 SCR 554.

<sup>27</sup> 304 US 144 (1938).



rule of law, and contrary to the constitutional right of everyone to lawful administrative action and to access to the courts. However, as I have tried to show, the kind of pragmatic or functional approach developed by courts in Canada towards the allocation of responsibilities between themselves and specialist administrative bodies created by legislatures for the delivery of public programmes both adequately protects against the dangers of bureaucratic over- (or under-) reaching, and avoids unduly burdening an already hard-pressed public administration.

The right to challenge the legality of administrative action in judicial review proceedings does not determine the standard by which the reviewing court must determine whether the impugned action was unlawful. If the question in dispute is more appropriately decided by the agency because, for example, it falls at least as much within the agency's expertise as the court's, I see no constitutional basis for judicial intervention, provided, of course, that reasons have been given for the administrative action in question, no other constitutional rights are at risk, and the action has a rational basis.

Only an extreme positivist view of the rule of law, such as that posited in the late nineteenth century by AV Dicey in his *Introduction to the Study of the Law of the Constitution*, assigns to the 'ordinary courts' the power to substitute their view for that of other actors in the administrative state on the correct interpretation of enabling legislation and its application to given facts. Such a view is incompatible both with the often open-textured nature of law and the blurred boundary between the interpretation of a statutory provision and the exercise of discretion,<sup>28</sup> and with the constitutional responsibility of Parliament for designing, and of the administration for efficiently and effectively delivering, the public programmes needed to bring about the social and economic transformations to which South Africa is now committed. I would agree with the following comment by Professor Hoexter:

'Now, of course, we have entered an era of constitutional democracy, an era in which it is no longer possible automatically to equate deference with acquiescence in political repression; an era, indeed, in which executive-mindedness might sometimes be a desirable judicial stance.'<sup>29</sup>

<sup>28</sup> See the observation to this effect in *Baker* supra note 16.

<sup>29</sup> Op cit note 5 at 488.