[7] Lorraine Weinrib 'The Supreme Court of Canada and s 1 of the Charter' (1988) 10 *Supreme Court Law Review* 469 at 486.

[8] *Watson v City of Memphis* 373 US 528 (1063) at 537.

[9] *Municipal Council, Ratlam v. Shri Vardichand and Others* 1980 (4) SCC 62 at para 12.

[10] *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SA 765 (CC).

[11] *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC)

[12] See the discussion in Sandra Fredman *Human Rights Transformed:Positive Rights and Positive Duties* (Oxford, 2008) 181-189

[13] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, and General Comment 3 of the UN Committee on ESCR, which are discussed in *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) at [45].

[14] *State of Himalchal Pradesh v Umed Ram Sharma* (1986) SCC 68.

[15] Para [13].

[16] *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213.

[17] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2010 (3) SA 454 (CC) para [306] and the cases cited at footnote 25.

[18] *Grootboom*, paras [42] – [44].

[19] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) 721 (CC) as explained in *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) para [67].

[20] *Treatment Action Campaign* para [123].

[21] Abram Chayes 'The Role of the Judge in Public Law Litigation' *Harvard Law Review* Vol 89 (1976) pages 1281 – 1316.This account is borrowed from Kent Roach 'The Challenges of Crafting Remedies for Violations of Socio-economic Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence:Emerging Trends in International and Comparative Law* (Cambridge, 2008) 47.

[22] *Ferreira v Levin N.O. and Others; Vryenhoek and Others v Powell N.O. and Others* 1996 (1) SA 984 (CC) para [229].

[23] Sandra Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, 2010) 435.

[24] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

Challenging government decisions:

codified and uncodified judicial review in South Africa

By Hugh Corder, Professor of Public Law, University of Cape Town

'There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

Chaskalson P in *Pharmaceutical Manufacturers Association : In re Ex parte the President of the Republic of South Africa*.[1]

This portion of perhaps the leading administrative-law judgment of the Constitutional Court (CC) encapsulates much of what needs to be recorded on this occasion. Yet it masks not only the frustration which gave rise to a degree of judicial pique, but also the diversification of pathways to judicial review (albeit under the broad umbrella of the Constitution) over the intervening decade. In what follows, I shall attempt a brief overview of these and other aspects of the law relating to judicial review of the exercise of public power[2] in South Africa, and point out some areas of concern.

The common law era

The origins of judicial review of administrative action in South African law predate the establishment of the nation state itself one hundred years ago. The superior courts of all four colonies which united to form South Africa had practised some form of judicial review, with the courts of the Boer republics in fact exercising a form of judicial review of legislative action as well. But it is to the courts of the Cape Colony that most lawyers look for the original insistence, as part of their 'inherent jurisdiction', of the authority of the judges to regulate the exercise of public power.[3] This occurred first in judgments delivered soon after the establishment of a Supreme Court at the Cape in terms of the Charter of Justice of 1828,[4] but the tone was set in the post-Anglo-Boer War Transvaal by Innes CJ in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council*, in which he outlined three types of review power of the courts.[5] The most oft-quoted restatement of the grounds of review is to be found in the words of Corbett CJ [6] as follows:

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'. .. Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

This type of formulation ought to sound comfortably familiar to most administrative lawyers in the British Commonwealth, but notice that review even for *Wednesbury* unreasonableness is not listed. Indeed the unreasonableness has to be 'gross' and even then it is merely symptomatic of a failure to apply the mind. Notice too that the rules of natural justice are still referred to as the basis for procedural fairness, without mention of the general duty to act fairly or the doctrine of legitimate expectation. The last-mentioned concept was not far off in South African common law, as the same court adopted legitimate expectation as the basis for a hearing in *Administrator Transvaal*

v Traub [7] a year later, but in other respects progress was only made after the demise of apartheid.

Part of the explanation for the relative backwardness of South African administrative law when compared with its natural comparators in the former Dominions is to be attributed to the role expected of the courts in South Africa under apartheid and even before.[8] I refer here to the fact that, absent protected rights in the Constitution and any pretence at real adherence to the rule of law, judicial review of administrative action provided the only means (short of 'unlawful' conduct) of challenging and seeking to curtail state injustice through the law and the exercise of official discretion. The system of race classification on which all discrimination was based was an overtly administrative act, and victims of the security laws could only seek relief through applying for the observance of the rules of natural justice prior to action being taken against them.

Thus it is fair to say that the central character of South African administrative law by 1990 had been forged on the anvil of bitter struggle between the white minority and the disfranchised, and that the judiciary had proved itself, with singular exceptions, unable to resist leaning in favour of the executive.[9] There were some signs (outside this particularly fraught context) of 'normal' administrative review, but it was not significant enough to alter the basic premises of the system. As a result, those who gathered to debate and draft the new constitutional framework were acutely aware of the need for radical surgery and a fresh start.

Constitutionalising administrative review

It is well known that the solution to the transition from racist autocracy to a formal democracy in South Africa lay in the device of agreeing on an 'interim Constitution' (iC)[10] which included a set of non-negotiable Constitutional Principles[11], which in turn became the foundational values of the 'final Constitution' (fC)[12], compliance with which (in the form of the final constitutional text) had to be certified by the newly established Constitutional Court (CC).[13]

Given the experience of judicial review of administrative action outlined above as well as a dearth of alternative avenues of review (such as had been developed elsewhere in the Commonwealth),[14] those negotiating the iC were able easily to agree that there should be some protection in the Bill of Rights for administrative justice,[15] but the actual formulation proved more strenuously contested. In the result, section 24 of the iC read as follows:

'Administrative Justice

Every person shall have the right to --

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects his or her rights or interests unless the reasons for such action have been made public;

(d) administrative action that is justifiable in relation to the reasons given for it when any of his or her rights is affected or threatened.'

Note a number of aspects of this complex formulation:

- the varying 'thresholds' for access to different rights, with the language of rights,interests, and legitimate expectation being affected or threatened being used in a series of combinations;
- the gradually-narrowing class of persons who could claim such relief as one reads through the section;
- the elevation to constitutional status of the right to obtain reasons, which had not existed at the common law hitherto; and
- the use of the word 'justifiable' rather than ' reasonable' in the last sub-paragraph, expressing the fear among those about to be in government that allowing reasonableness to be a ground of review would place too much power in the hands of an unelected (and likely unreconstructed)[16] judiciary. This would allow the courts to hinder progressive socio-economic reform measures that depended on large tranches of executive discretion for their successful implementation.

This convoluted formulation came into effect in late April 1994, and was treated with some hesitation by both counsel and judges, who were clearly more comfortable with the common-law model of judicial review. Indeed, perhaps the most striking feature of the administrative-law jurisprudence of the period 1994 to 2000 was the jurisdictional spat which characterised the relationship between the CC and the Appellate Division/Supreme Court of Appeal (SCA). Mainly because of its executive-minded approach during the last years of apartheid, the SCA had been denied constitutional jurisdiction under the iC, which meant that it was technically no longer able to consider administrative-law questions. In several cases,[17] the SCA judges wondered whether they could perhaps still do so, relying on a parallel stream of common-law administrative law, a view which was firmly quashed by the CC in the quotation with which this paper opens.[18]

However, the interim regime remained in force beyond the implementation of the fC in early 1997, because the inclusion of a right to administrative justice had become controversial in the drafting of the fC. The political compromise reached was the re-enactment of the right in changed form, but its suspension for a three-year period, during which a statute which would provide further guidance as to its meaning and scope would be drafted and adopted.[19] So the right to 'just administrative action' now reads as follows:

'33 (1) Everyone has the right to administrative action which is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal ; (b) impose a duty on the state to give effect to the rights in subsection (1) and (2);and (c) promote an efficient administration.'

It can readily be seen that the formulation of these rights in the fC is far simpler than before, that reasonableness is now directly a ground of review, and that the creation of tribunals for the review of administrative action is anticipated, but that the right to obtain reasons is available to a slightly narrower class of people.

A 'project committee' of the South African Law Reform Commission was set up late in 1998 to draft the legislation envisaged in section 33(3), and the product of its work was put before Parliament, where it was altered in critical respects, before being adopted and becoming law as the Promotion of Administrative Justice Act of 2000 (commonly known as the PAJA). The rights in section 33 became directly available from early February 2000, on the expiry of the three-year period during which the legislation was to be enacted, until the PAJA was brought into force in late November 2000. The PAJA consists of the following provisions, in summary: a series of definitions, the most significant of which is an exceptionally convoluted and heavily-excepted definition of 'administrative action', the gateway to the rights under section 33; minimum requirements to ensure procedural fairness before administrative action which affects individuals and that affecting the public in

general; a detailed process for obtaining written reasons; a codified but open-ended list of grounds of review based on what existed at common law; provisions detailing process and remedies in regard to judicial review; and authority for the making of regulations by the Minister of Justice the better to facilitate the operation of the Act in practice.

How has this new legislative regime fared in practice in the last decade?

Codified administrative law in practice

There are several excellent texts and journal articles in which the implementation in practice of this codified framework for the judicial review of administrative action is recounted and analysed.[20] My task is to give a succinct overview of the current state of administrative justice in South Africa. Inevitably, what follows conceals a wealth of nuanced qualifications, which may be pursued through the sources referred to in the footnotes.

First, as Justice Chaskalson insisted in *Pharmaceuticals*, there is indeed now a single system of administrative law, founded on the Constitution, and the common law informs its interpretation but is not separate from it. However, this conceals a variety of 'pathways or avenues' to judicial review,[21] at least as follows:

- for 'administrative action' as defined in section 1 of the PAJA, the full range of grounds of review22 is available;
- for the exercise of public power which does not satisfy this definition, including 'executive action' and the former prerogative powers,23 the CC has developed its review power relying EITHER on the ' principle of legality' which it takes to be an ' incident' of the rule of law, one of the founding values of the Constitution, the grounds of review being not misconstruing the authorised powers ('narrow ultra vires'), acting in good faith, and acting rationally (not the same as reasonableness),24 OR occasionally by resorting directly to its own interpretation of the constitutional right in section 33:25
- for administrative action as defined in PAJA but which is also separately regulated by 'specialist' legislation applicable to certain fields, such as labour relations26, the courts prefer to use the latter rather than the PAJA27; and perhaps,
- for the exercise of 'public' power by a private agency, even resort to the common law, read through a constitutional lens.

Secondly, review for reasonableness has been accepted by the Court, and seems to mean not the circular *Wednesbury* definition that Parliament saw fit to adopt in the PAJA[28], but rather a combination of 'rationality of process with proportionality of outcome or impact.'[29]

Thirdly, the orientation of the PAJA[30] and the failure of the Minister to accept the invitation in section 10(2) of the Act to explore non-judicial means of securing review of administrative action have resulted in judicial review, in all its complexity and inaccessibility, remaining as the chief method of checking the exercise of public power.

Fourthly, as far as alternatives to judicial review are concerned, administrative appeals tribunals do not exist in great numbers; the access to information regime has had mixed success; the Public Protector (South Africa's ombudsman) has generally failed to act sufficiently independently from the executive; the other State Institutions Supporting Constitutional Democracy[31] (such as the Human Rights Commission) have with singular exceptions[32] been beset by internal wrangling and the infliction on them of party politicians as members; and Parliament has been increasingly sidelined despite the important role allocated to it by the Constitution[33] to monitor the executive and hold it accountable.

Conclusion

Despite the mixed picture set out above, there is little doubt in my mind that the formal state of South African administrative law is an infinite improvement on what existed just 20 years ago, and that in some respects the regulation of public power is subject to greater restraints through the law than it has ever been in our history. The codification of the common law has provided a firm basis for the happier state in which we now find ourselves. The partial failure to meet the expectations generated in the early stages of the process of renewal of the system remains disappointing. The challenges lie in consolidating what progress has been made, and in building on the statutory edifice to move the substance closer to the form. Perhaps this is the perennial task facing all those who seek the strengthening of the notion of limited government under law.

Endnotes

[1] 2000 (2) SA 674 (CC) at para 44.

[2] I use this term in preference to 'government decisions' throughout this paper, as it accords more closely with the language used both in legislation (including the Constitution) and in the jurisprudence. It also serves to straddle (but not to resolve) the troublesome ' public/private' divide

[3] For the most complete treatment of this issue, see Jerold Taitz *The Inherent Jurisdiction of the Supreme Court* (Cape Town: Juta 1985).

[4] See, for example, *Du Preez v The Protector of Slaves* (1831) 1 Menzies Reports 528, and *Municipality of Green Point v Powell's Trustees* (1848) 2 Menzies Reports 380.

[5] 1903 TS 111. These were the superior court's review of the decisions of inferior courts, judicial review of administrative action as we know it today, and a 'wide' variety of the latter, amounting virtually to an appeal (but of course this ultimately depends on the terms of the statute).

[6] See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*, 1988 (3) SA 132 (A), at 152 A-D. Note that the 'president' referred to throughout is the head of the governing committee of the stock exchange, in a clear application of judicial review to non-state administrative agents which nevertheless exercised public power. The establishment of this principle in our law predated *Datafin* : see *Dawnlaanbeleggings v President of the Johannesburg Stock Exchange* 1983 (3) SA 344 (W), per Goldstone J.

[7] *Administrator Transvaal v Traub and Others*, 1989 (4) SA 731 (A).

[8] There are many accounts of the judicial record in the face of legislated and executive injustice in the 1900s, but perhaps the best-known overview of such history is to be found in John Dugard *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978).

[9] The 'executive-mindedness' of the courts was the subject of frequent criticism in the last decades of apartheid. See, for example, the work of Dugard (note 7 above), and Stephen Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Oxford: Clarendon Press, 1992)

[10] Formally known as the Constitution of the Republic of South Africa Act, 200 of 1993.

[11] There were 34 such principles, to be found in Schedule 4 to the iC.

[12] The Constitution of the Republic of South Africa, Act 108 of 1996.

[13] Perhaps the best treatment of this process is to be found in Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Johannesburg: Witwatersrand University Press, 2000). For a narrower focus on the bill of rights, see Lourens Du Plessis and Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (Cape Town: Juta, 1994).

[14] See particularly the wholesale process of reform of Australian administrative law in the 1970s, as well as similar efforts in Canada in the 1980s, not to mention the almost continuous process of improvement of the UK system of tribunals from Donoughmore to Franks and beyond.

[15] Indeed, this right was strengthened by the inclusion of a right to have access to information in section 23 of the iC, which has been repeated in section 32 of the fC, and given greater detail in the Promotion of Access to Information Act 2 of 2000.

[16] In fact, after some debate, the judges in office at the time of the political transition to majority rule were allowed to continue to serve, subject to swearing an oath of allegiance to the new constitution, which each of them did. A new method of appointing judges, through a Judicial Service Commission, and the establishment of the CC as the highest authority on constitutional matters, among other measures, sought gradually to change both the composition of the judiciary and its approach. The irony is that the

courts have arguably become the most effective means of enforcing socio-economic rights!

[17] Among which the following are the most noteworthy: *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, 1999 (1) SA 374 (CC) on appeal from *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, 1998 (2) SA 1115 (SCA); and *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight*, 1999 (3) SA 771 (SCA), which was the immediate precursor to the *Pharmaceutical Manufacturers* case.

[18] In fact, by this stage and indeed from early 1997, the SCA had regained its constitutional jurisdiction through the fC, section 168(3).

[19] This was provided for in Schedule 6, item 24 of the fC.

[20] See, for example, Cora Hoexter *Administrative Law in South Africa* (Cape Town: Juta, 2007), Jacques de Ville *Judicial Review of Administrative Action in South Africa* (Durban: LexisNexis Butterworths, 2003); Iain Currie *The Promotion of Administrative Justice Act: A Commentary* (Cape Town: Siber Ink, 2007) and Cora Hoexter '"Administrative Action" in the Courts' *Acta Juridica* (2006) 303–24.

[21] For further details, see Hoexter ' "Administrative Action" in the Courts' in the preceding note.

[22] See PAJA, section 6(2).

[23] Which were deemed reviewable in an early decision of the Court: see *President of the RSA v Hugo*, 1997(4) SA 1 (CC).

[24] This was established in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, 1999 (1) SA 374 (CC), applied in *Pharmaceutical Manufacturers*, note 1 above, and more recently also in *Masetlha v President of the Republic of South Africa*, 2008 (1) SA 566 (CC), among other cases.

[25] See *Zondi v MEC for Traditional and Local Government Affairs*, 2006 (3) SA 1 (CC).

[26] The Labour Relations Act 66 of 1995, provides for review of a certain type in regard to decisions made under its terms. It may be that the National Environmental Management Act, 107 of 1998, provides a similar alternative regime for review.

[27] This is the outcome of the following cases: *Sidumo v Rustenburg Platinum Mines Ltd*, 2008 (2) SA 24 (CC), *Chirwa v Transnet Ltd*, 2008 (4) SA 367 (CC), and *Gcaba v MEC for Education, Eastern Cape*, 2010 (1) 238 (CC).

[28] Section 6(2)(h).

[29] I argue that this is the meaning given in effect in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, 2004(4) SA 490 (CC) and subsequent cases which have relied on it.

[30] For a view severely critical of this aspect of the Act, see Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' *South African Law Journal* 117 (2000) 484–519.

[31] Provided for in Chapter 9 of the Constitution.

[32] One being the Electoral Commission and, to a lesser extent, the Auditor General.

Fashioning constitutional remedies in South Africa: some reflections

By Justice Kate O'Regan, former judge of the Constitutional Court of SA

To a British lawyer, the striking aspect of the rules regulating constitutional remedies in South Africa is probably section 172 of the Constitution which provides that a court, when deciding a constitutional matter within its power, must declare invalid any legislation it finds to be inconsistent with the Constitution. This mandatory rule flows logically, of course, from the supremacy clause in the Constitution – section 2 – which states that the Constitution 'is the supreme law of the Republic' and that 'law or conduct that is inconsistent with it is invalid' and (interestingly) that 'obligations imposed by it must be fulfilled.'

Section 172 contrasts sharply with section 4 of the United Kingdom Human Rights Act, 1998, which provides that a court 'may make' a declaration of incompatibility when the court is satisfied that that a legislative provision cannot be read and given effect to in a manner compatible with the European Convention on Human Rights. The declaration of incompatibility does not affect the validity of the provision and is not binding on the parties to the proceedings in which it is made.

These remarks are divided into three parts. In the first portion, I would like to consider briefly the issue of statutory interpretation, particularly as under section 3 of the UK Human Rights Act, and section 39 of our Constitution, statutory interpretation holds a central place in modern public law adjudication. Then I shall outline some of the issues that have arisen relevant to declarations of invalidity in the South African context, in particular, the question of the retrospective effect of an order of invalidity, the role of severance, both actual and notional severance, and the use of the technique of ' reading in.' Finally, I would like to turn to an issue, which although in its conception is somewhat different in South African law than English law, nevertheless constitutes a challenge both systems. That issue is the question of the role of damages, whether in private or public law, in relation to the infringement of constitutional rights.

A. Interpretation

Under our constitutional order, just like under the Human Rights Act in the United Kingdom, if one can find a constitutionally sound interpretation of legislation that can be said to be a reasonably possible interpretation given the text of the legislation, questions of constitutional inconsistency fall away. The first question in considering any constitutional challenge to a statutory provision, therefore, is whether the language of the provision is reasonably capable of bearing a meaning that would be consistent with the Constitution.

The task of statutory interpretation that seeks to find an interpretation consistent with the Constitution is thus different to the primary task of interpretation in the pre-constitutional era. Much as section 3 of the Human Rights Act has changed the nature of the task in the United Kingdom. As Lord Steyn suggested in an early commentary on the Human Rights Act, ' … [i]n practical effect there will be a rebuttable presumption in favour of an interpretation consistent with Convention rights. Given the inherent ambiguity of language that presumption is likely to be a strong one.'[1]