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SUBORDINATE LEGISLATION:
Towards a Differentiated Administrative Law

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Synopsis of a Paper to be presented to the Conference on Administrative Law For a Future South Africa

Cape Town Friday 12 February 1993

The problem with subordinate legislation in a democracy is easy to state, but difficult to resolve. Bureaucrats are not accountable to the broader community yet they have sweeping powers to make rules which affect people's interests fundamentally. To date the key legal mechanism for the control of the bureaucracy has been judicial review, but judicial review, even if well developed is not all that the law should do to structure and control bureaucratic power.

In the first part of this paper, I argue that the control of bureaucratic power needs more legal response than the development of a sophisticated system of judical review. Administrative lawyers need to identify objectives that administrative law should achieve and recognise that in achieving those objectives a range of different mechanisms and responses should be developed. In the second part of this paper, I will argue that a distinction should be drawn between rule-making and decision-making functions and that such functions need to be structured, confined and controlled differently. Thirdly, I will look at the existing controls of administrative rule-making and analyse their shortcomings and finally I will suggest possible mechanisms which should be adopted to control administrative rule-making.

My thesis will be that there are a range of institutions and mechanisms which can be used to structure bureaucratic rule-making but that determining which of those institutions or mechanisms should be adopted at a general level will prevent the development of an administrative law which is sensitive not only to the needs of accountability to and fairness between citizens, but also to financial constraints upon government. We do not need generally applicable procedures to govern all rule-making but procedures fashioned to the demands of particular rule-making tasks.

1. The proper function of administrative law

Achievement of representative government in South Africa should not blind us to the shortcomings of representative

democracy. The traditional constitutional explanation of the control of bureaucratic power sees it being directly authorised by a representative legislature and policed by the judiciary. In fact, of course, the process does not work as the constitutional theory describes. It is important to find an alternative model of administrative law. I would suggest that the starting point should be the recognition that representative government is not enough. Only part of the answer lies in better judicial review. The other part lies in structuring and confining bureaucratic power more effectively. The aims of such an exercise are to ensure not that bureaucratic power is simply subject to the will of parliament, but that its exercise is fair, efficient and acceptable. These are the three normative requirements which should guide the development of administrative law: it should ensure that government works, that it is accepted by the majority of the people, and that it is not oppressive.

Of course, inevitably these three requirements may clash: the most efficient decision may not be the most acceptable or the fairest, but a balance must be struck. It is my view however that different legal rules and institutions may be required in different circumstances to ensure that the balance is struck. Setting standards for judicial review in stone, or establishing general and compulsory procedures for all administrative decisions will almost certainly create difficulties for achieving that balance in specific circumstances. A more differentiated approach to administrative law is required.

An important caveat needs to be made: the purpose in reforming administrative law cannot be to build a perfect system, it should be to build a better system. We all accept that representative democracy is not as Abraham Lincoln would have it 'government by the people', but it is a lot better than what we have at present. That is what our aim for administrative law should be.

2. The Distinction between Rule-making and Decision-making

A distinction should be drawn between legislative and administrative functions, or between rule-making and adjudication. The common distinction drawn between rulemaking and adjudication is that 'rulemaking is normally general and looks only to the future; adjudication is particular and looks also to the past.' There are two separate grounds for distinction in this epigram: the distinction between general and particular impact; and the distinction between prospective and retrospective effect.

The first, the distinction between general and particular application is the one that seems clearest between administrative and legislative acts and is most commonly used. In fact, although this distinction seems clear and

easy to grasp, there are cases which blur its clarity. The problem of the specific effect of otherwise apparently 'legislative' functions has arisen in a variety of jurisdictions. It is my view that instead of focusing on the particular vs general, one should see the key distinction between adjudicative and legislative tasks lying in the fact that in legislative tasks, administrators make law, they determine the content of it by setting binding rules, whereas in adjudicative tasks, administrators merely apply the law. Of course, it too is not without difficulty. Generally, the difficulty arises where adjudicative tribunals set standards for future decisions. The system of precedent is quite clearly a process of rule-making._ Where one establishes different procedures for rule-making and adjudication, it would need to be clear that adjudicative decisions should not be used to set rules, thereby avoiding the established rule-making procedures.

3. Administrative Rule-making in South African Law

Administrative rule-making is not comprehensively regulated in South Africa: but its extent cannot be understated. There are certainly more administrative rules enacted each year than acts of parliament, and this has been so for a long time. In addition, in many cases, parliament gives sweeping powers to the State President or senior officials to make rules, giving few or no guidelines as to the substantive content of those rules ('Henry VIII clauses'). This has been a long-standing practice of the South African Parliament. Clauses of this nature give the lie to the argument that administrative rule-making is merely a process of giving effect to the will of the elected legislature. There are few techniques presently in operation in South Africa to control this plethora of rule-making. The key technique is judicial review, but other techniques are used: there is a weak system of legislative and executive overview; from time to time the legislature requires some form of consultation; and publicisation of regulations is required in most cases but is inaccessible and badly indexed.

Judicial Review of Subordinate legislation

Judges will generally overturn subordinate legislation if it is shown not to be authorised by the enabling statute, or if it is so unreasonable that it could not have been contemplated by the Legislature in granting the particular powers, or if the subordinate legislation is not sufficiently clear or certain. Certain subordinate legislation however is only subject to the first ground of review. South African courts have generally taken the view that persons affected have no right to a hearing prior the making of rules.

A long-standing principle of South African administrative law provides that bodies enjoying 'original' rule-making power will only be subject to review on the grounds of jurisdiction. The test to determine what powers are 'original' is not clear. The key question in reviewing rules issued by a body enjoying original rule-making power is 'did the body act in terms of the powers conferred upon it'? Where the power is not expressly provided for in the enabling legislation is silent on a matter, the question will be whether such power may be regarded as 'properly', or 'reasonably' 'incidental' to any of the powers expressly granted.' Normative considerations will inevitably creep in to an investigation of whether a power is implied in legislation or not, and the courts have held that a benevolent approach should be taken to the issue.

A benevolent approach is taken not only to the question of whether the power fell within the enabling legislation but also to the question of whether the delegated legislation is unreasonable or not. In *Kruse v Johnson* [1898] 2 QB 91 (Div Court), Lord Russell established the grounds for unreasonableness in the context of subordinate legislation passed by public representative bodies as follows: treatment which is partial and unequal as between different classes; or manifestly unjust; or in bad faith; or constituting such oppressive or gratuitous interference in the rights of those subject to them as could find no justification in the minds of reasonable men.

The third ground on which the courts will overturn subordinate legislation is if the legislation itself is so ambiguous or confusing that it can be said to be void for vagueness. Reasonable certainty is required. In *Staatspresident v UDF* 1988 (4) SA 830 (A) the court held that an ouster clause had the effect of limiting the court's jurisdiction to overturning subordinate legislation when the subordinate legislation exceeded the authority granted by the legislature, and consequently ousted the court's jurisdiction to overturn subordinate legislation that is vague or unreasonable. This approach has not yet been expressly rejected by our courts.

4. Developing rules to deal with subordinate legislation

The process of structuring, confining and controlling subordinate legislation as opposed to administrative decision-making requires attention first to the institutions that make subordinate legislation, secondly to the procedures whereby those rules are made and publicised and thirdly attention to other mechanisms which may improve fairness, accountability and acceptability.

Rule-making Institutions: Interest Group Representation

One of the key ways of affecting the making of rules is to change the people who make them. The incorporation of different interest groups into administrative rule-making is not, in itself, a solution to all the problems that are faced but it is a useful technique in certain circumstances. Interest group representation is premised on the basis that it may make for fairer, more efficient and more acceptable rules.

Perhaps the greatest difficulty with seeking to obtain interest group representation on the rule-making institution is determining which interest groups should be represented. Such schemes are criticised for often permitting the capture of decision-making bodies by powerful well-organised interest groups which further marginalise the disorganised and less powerful interests. An example from South African law is used to illustrate the problem: The National Manpower Commission.

There are circumstances of course where interest group representation will be impractical. Factors which will tend to make this so include: circumstances where interest groups are not organised at all, or very unevenly organised; circumstances where an enormous number of interest groups are affected; and circumstances where the rules are of a highly technical or non-controversial nature. In such cases, the use of interest group representation on decision-making bodies should not be adopted.

Procedures For Rules: Participation in Process

In addition, to changing the character of the rule-making institution, however, an important legal device is the use of prescribing procedures that should be followed in the making of rules. Such procedures can be aimed at ensuring that the decision is properly informed so that the substance of the rules is as fair as possible and that the rules themselves are acceptable and that the rules are technically well-drafted which can avoid difficulties with application and review. Inevitably there is a balance to be struck between fully informed rule-making processes and efficiency in relation to cost and time.

In this section, I will briefly consider procedures that have been adopted in other jurisdictions to structure administrative rule-making.

Other Safeguards

Other safeguards that will be considered include parliamentary scrutiny, compulsory periodical sunsetting of administrative rules and techniques to ensure competent drafting.

The Proper Scope of Judicial Review of Administrative Rule-making

I will argue that the rules governing judicial review of administrative rule-making should not be inflexible. Account should be taken of the nature of the institution making the rules and the subject matter of the rules in order to determine the extent of judicial intervention. In this sense, the existing doctrines regarding 'original' rule-making powers should not entirely be rejected.

Conclusion

Administrative law needs to distinguish between rule-making and decision-making. Different procedures should be required of these different administrative processes. However I will argue that a uniform procedure for rule-making should not be established as in many cases it may result in unnecessary time delays and financial cost. On the other hand, general principles should be set establishing procedures to be followed by specific types of rule-making. Factors relevant include the nature of the interest groups affected by the rules, the subject matter of the rules, the need for urgent response, and the political sensitivity of the rules. When parliament delegates the power to make rules, it should also specify the procedures to be followed and give careful thought to the institution given the rule-making power. Finally, I will argue that the principles governing the judicial review of administrative rule-making should also not be absolute but flexible enough to take similar considerations into account.

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Administrative Law for a Future South Africa:
Workshop, 10-13 February 1993

ADMINISTRATIVE JUSTICE and DEMOCRACY
WITHIN THE SOUTH AFRICAN CONTEXT
Synopsis of paper by Kader Asmal

Introduction

A future and democratic South Africa will inherit a system of governance where from 1910 onwards there were effectively two forms of government for our people. The one was the official white constitution from 1910 to 1983 with its entrenched clauses and the forms of a liberal democracy with its courts, executive and legislature and an administration peopled and staffed by a small racial oligarchy. The form was amended in 1983, with its complex "own" and "general" affairs in order to co-opt coloured and Indian South Africans.

But the reality for Africans is best typified by section 93 of the Republic of South Africa Act of 1983 which vests the "control and administration of Black (sc. African) affairs" in the State President, "... who shall exercise all those special powers in regard to black administration which immediately before the commencement of this Act were vested in him". In other words, whatever the *form* in which such "control" was exercised, the effect of this provision was to treat all matters relating to Africans as if they were part of the administrative process.

Statutes conferring enormous discretion on civil servants, virtually limitless powers of delegated legislation granted to Ministers and a virtual absence of any appeal system - either administrative or judicial - ensured that legalised tyranny operated in the implementation of grand apartheid. If virtually all governmental power in relation to Africans was assimilated in effect to uncontrolled administration, it would not be an exaggeration to describe the position of the voteless majority as objects of the law.

The South African courts may have - with the imminence of change on the horizon - controlled the exercise of certain administrative powers on the margins of apartheid power in recent years but their surrender to apartheid administrative tyranny affects their credibility to deal with the future political and constitutional dispensation. It is an awesome legacy for the future.

The Future

The agreement reached at the first session of the Convention for a Democratic South Africa on the Declaration of Intent in December 1991 has important implications for the future administrative order. The Declaration of Intent has been supplemented by subsequent agreements on constitutional principles at working Group 2. These principles - on which there is now clear consensus - will bind all further negotiations and will determine the content of the Constitution that will emerge from a Constituent Assembly or any other constitution-making process that may emerge. In other words, the agreed constitution-making process will not be fully "sovereign" or free to resile from these principles.

In brief, we shall have a non-racial, non-sexist and "united" South Africa, with a separation of powers, a written constitution with a justiciable Bill of Rights enforced before an independent but representative judiciary. The existence of regions and local authorities will be constitutionally enshrined. In addition, there is wide agreement amongst the parties that there should be an effective method of dealing with complaints of maladministration and the abuse of discretionary powers through the office of a commissioner of complaints - the Ombud. In other words, to replace the present attenuated office set up in 1991, an effective provider of relief against executive action must be provided. The African

National Congress, at its policy conference in May 1992 went further than most other South African proposals and existing Ombud structures in other parts of the world by deciding that the Ombud would have binding, and not merely advisory, powers.

Democracy and Structures

Such a formal commitment by political organisations and parties constitutes a challenge to administrative lawyers. The challenge is really in the context of guaranteeing that the vast majority of South Africans have effective remedies to make sure that their rights are protected, while at the same time ensuring that we do not graft on to the existing system constraints on governmental action which would lead to powerlessness and an inability to adopt and carry out policies of reconstruction and development, if not transformation.

We have at present, a vast, impersonal, bureaucratic, unreceptive and unrepresentative administration. The reform of the civil service - at all levels - is necessitated not only by the need to professionalise it but also to make it more open, accessible and truly representative of the people of South Africa. Impartiality requires that the organs of government shall be accountable to parliament and to the whole community and must not serve the interests of any party or sectional grouping. In addition, there must be adequate parliamentary control over the functioning of the public service.

The lawyers' obsession with judicial review of administrative action tends to ignore the quality of the provider of"services" and minimises the dangers of over-judicialisation of the administrative process. Such an emphasis ignores two vital factors in our country. A piece-meal approach in the context of South Africa may have the dire effect of immobilising government and bringing the administration of justice into disrepute.

There is a necessary tension between democracy and judicial review in South Africa, especially in the context of a Bill of Rights, with powerlessness on the one hand and extreme concentration of economic, social and military power on the other. Our courts must not repeat the failures of other common law countries in refusing or being unable to understand the administrative system. If they have tried to understand, they have sought to protect property or vested rights, and have not considered the merits and demerits of the system or tried to work out as matters of principle what is the role the courts should fulfil. What they have done, as John Griffith has described it, is to react by "spasms and hiccups" to the exercise of public powers which they instinctively dislike. (*Public Rights and Private Interests*, 1981,p.143).

We have no *droit administratif*, because of the politics of apartheid but also because of the baneful Diceyan influence, compounded by the implicit acceptance by the profession of the whimsical prejudices of the British Committee on Ministers' Powers of 1932. Administrative law means more than judicial review. If administrative law is to be looked at in the continental sense, the law we must look at is the whole law relating to administration, and especially the law governing relations between various governmental agencies and the private citizen.

In other common law jurisdictions, the piecemeal growth of administrative law has meant the strained and artificial application of private law remedies to public authorities.

But there is a wider equity involved which a coherent approach must take into account. The infringement of a private right may be critical for the individual but a resolution of a dispute between an individual and the State has an impact on the wider community also. Therefore, administrative law decisions which benefit or harm the individual citizen are often decisions the equity of which cannot be judged simply as between the citizen and the government, because the interests of the wider community are also affected. This should be evident when we look at the issues arising out of land utilisation, planning and environmental controls, anti-trust legislation and job creation in a future South Africa.

In developing a body of administrative law, lawyers must be aware that the State is not only the sole wielder of power but that private power in South Africa has an extraordinary concentration in a limited number of hands. The new jurisprudence must therefore be based on an economic and social reality which is peculiarly South African in which the relationship between the individual and the State will have little to do with nineteenth century liberalism and much to do with multinationals, with environmental degradation, with poverty and undernourishment, with racism and sexism and with chronic unemployment.

Natural lawyers will look to the judiciary to deal with the problem of the individual *vis-a-vis* state powers. But even those who support a Bill of Rights approach must need to emphasise the political nature of these problems and look at political sources also for formulations.

Bill of Rights and the Administration

The general acceptance of restraints through a Bill of Rights on legislative and extensive competence, in a country where parliamentary sovereignity has been debased into parliamentary tyranny, is one of the strange quirks of history. Different motivations prompt support for a minimum floor of rights on which the executive or the legislature may not encroach. There are those who see the Bill of Rights as enlarging rights - immediately or prospectively - in accordance with internationally-accepted notions of rights. There are others who use the language of rights as restrictions on the competence of the majority to overcome the legacy of apartheid and, hence, begin the process of healing in our deeply scarred society.

Virtually every provision of a Bill of Rights will have an impact on administrative decision-making. But more specifically, the two well-articulated versions - the African National Congress' and the Law Commission's - refer to a general right to judicial review, independently of challenging the validity or propriety of legislation and its compatibility with the Bill of Rights. For example, Article 2, paragraph 26 of the revised (May 1992) version of the ANC's proposed Bill of Rights proposes that:

> "Any person adversely affected in his or her rights, entitlements or legitimate expectations by an administrative or executive act shall be entitled to have the matter reviewed by an independent court or tribunal on the grounds of irregularity, including abuse of authority, going beyond the powers granted by law, bad faith, or such (gross) unreasonableness in relation to the procedure or the decision as to amount to manifest injustice".

Such an approach provides a constitutional guarantee of access to the courts in order to challenge procedural defects and to guarantee the concept of manifest "legality". There is, therefore, whatever voices may be heard to the contrary, a clear acceptance of supervision over and accountability for administrative or executive action for the future.

But is this approach an entirely adequate one?

The clause provides for procedural safeguards. But should it permit control over the substantive decision, substituting the judgement of the courts for a decision of the administration? Should courts usurp the functions of government?

In the absence of legal aid in such cases, judicial review and even challenges to legislation on grounds of unconstitutionality will not provide wondrous cures against the "authoritarianism which is the heart of politics". For democracy to triumph, we need to empower people by open government, abolishing the draconian official secrets legislation and the "total onslaught" laws which provide a fig-leaf of respectability for what is government by secrecy. In other words, laws concerning contempt of court, restrictions on access to official documents, independent investigations of complaints against police, the prison services and public servants, a freer and more independent process, must be looked at. The organs of civil society must be strengthened so that the citizen as complainant, consumer and resident accepts motions of legality, of morality and common democracy.

It is more important to develop and sustain a community or general spirit of law obedience and legality than, with the lawyer's instinct for dispute resolution, rely on the courts entirely. Over-emphasis on judicial review, either over administrative action or to challenge the constitutionality of legislation, must evoke the warning of their remarkable American judge, Learned Hand:

> "A society so riven that the spirit of moderation is gone, no constitution can save; a society where that spirit flourishes, no constitution need save; a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, in the end will perish".

If we are to give judges political power - as now seems certain - then we must subject them to detailed investigation. Law, policy and politics are inextricably intertwined in such judicial review.

The Judicialisation of Administration.

The Constitution or the Bill of Rights will not be self-enforcing in the area of administrative law. The due process clause and the Constitutional right to challenge administrative action, the role of the Human Rights Commission and the Ombud will provide the possibility of enforcement. There are other methods also.

It is now generally agreed that historical, cultural and political factors determine the best method for providing protection against power. But the common interest appears to be the maintenance of the principle of legality (The Rule of Law, Rechtsstaat). In sum, this means that the protection of citizens should primarily be regarded as a protection against arbitrariness, partiality, unfairness, abuse of power, inaction, unlawful or wrongful acts.

There can be little or no argument against this limited area of intervention. Any form of oppressive conduct by any administration is inconsistent with democratic values. The content of these headings may provide some difficulty but these grounds provide the core of the protection. The experience of other countries has shown that respect for these core values assists in improving the quality or the worth of the public service and instils confidence in the general public.

How best to provide the procedural safeguard is a matter of historical evolution, accident or conscious policy-making.
First, is by way of constitutional provision, such as a due process clause or the development of such a notion as constitutional justice by the Irish Supreme Court. Here judicial activism is associated with constitutional validity. As with the establishment of a

procedural safeguard by ordinary judicial decision, a great deal depends on the accident of litigation, the ability or willingness of the Courts to establish general principles and their capacity to work out a coherent approach. Of course, Justice Hughes of the United States Supreme Court, writing in 1907, was correct when he said: "We are under a Constitution, but the Constitution is what the judges say it is". In the South African context, without a hierarchy of administrative courts and with a legal profession which has kept its distance from the administrative system, it may be more sensitive not to rely too much on such judicial activism.

Secondly, administrative procedures may be ensured by administrative practice in such matters as internal appeals, reasoned decisions, right to be heard, the production of documents, etc. It is too much hope that such a radical departure could take place reasonably quickly in South Africa but, clearly, this is a complementary way of inserting openness, fairness and an element of impartiality in administrative decision-making.

Thirdly, there can be ordinary legislation dealing with such discrete areas as planning and licensing appeals, administrative tribunals, land use and acquisition where either the procedure is laid down or the substantive powers of these decision-making bodies identified in the legislation.

Finally, there can be a general act which will prescribe the principles, scope and approach of all administrative decision-making. Such legislation is generally described as an Administrative Procedure Act and embraces what each country considers to be general rules appropriate to it. Effectively, they embrace the principle of legality and echo the provisions of Article 9 of the International Covenant on Civil and Political Rights which is concerned with the liberty of the person and the fairness of procedures associated with any restriction as regulation of such freedom.

The extrapolation from Article 9 to administrative decision-making is a guarantee of fair procedures and is not concerned with establishing judicial or court-like procedures. It is concerned with providing minimum levels of propriety below which no administrative decision should fall. For example, the duty to give a reasoned decision has beneficial effects, both on the quality of the decision and upon public confidence in the whole process of government and its enactment as a general principle of good administration should be openly recognised as an "inherent element in the concept of natural justice (*Administration under Law*, a Report by *Justice*, 1971, p.23)

Administrative Procedure Acts add clarity and consistency to procedural practices and contribute greatly to public confidence in public administration. They lessen fears of favouritism and suspicions of hostility. The provision of a sense of security that procedural rules provide make the citizens feel that she is a genuine partner in the proceedings.

However, comparative studies concerning APAs have shown that the general rules must be kept within reasonable limits - *locus standi*, the *audi alteram partem* rule, absence of bias, publicity of official documents, motivated decisions, review of decisions - and there must be a determined effort not to "drown the administration in formalism".

Finally, and especially important in the South African context, it must be recognised that the best provisions for administrative procedures are useless unless they are practised by well-trained officials, educated in a democratic and non-racial spirit.

Conclusion

The workshop will, I hope, look carefully at the need for a coherent body of public law to be developed for South Africa's needs. An administrative division of the Supreme Court may be one method of overcoming the absence of a systematic approach. Non-technical and easy to understand rules concerning *locus standi*, the necessity for representative actions, the awarding of damages even where a decision is simply nullified and a simplified procedure for remedies must be points of departure for judicial review.

A critic of recent administrative law cases before South African courts has referred to the "inconsistent and largely unpatterned approach of our courts". There is obviously need for a more systematic approach. "The impending transformation of the South African constitutional system provides an ideal opportunity to escape the empty formalism of current theory and practice. Irrespective of the precise nature of the ultimate settlement, the democratic political process - even should it provide for extensive public participation - will not eliminate questionable administrative behaviour" (A. Breitenbach, *The Justification for Judicial Review*, SAJHR 8(1992) p.535).

There will be control and supervision of executive action. But it must not be erratic, politically insensitive and lacking a firm and principled base. "What is required now is the construction of a theoretical basis for administrative law against which the ~~the~~ courts' functions can be understood, assessed and reconciled with what passes as good, democratic government". (Breitenbach, *ibid*, p.535)

There must also be recognition that the State can be supervised, assisted and controlled through a multiplicity of devices, of which judicial review is only one. Democratisation of our society at all levels must be the cardinal principle, not abstract or ideologically motivated attacks on government power or competence.

January 1993

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