THE BREAKWATER *Declaration* 1993

Administrative law for a future South Africa

Adopted by the participants in a workshop held
at the Breakwater Campus, University of Cape Town
10 - 13 February 1993

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This document is not intended to be the final word on administrative law reform. Rather, the aim is to contribute positively to the debate about administrative justice in a future South Africa. With the exception of the constitutional entrenchment of a right to administrative justice in Part IV below, the general thrust and framework of this declaration are supported overwhelmingly by the workshop participants.

I Points of departure

(i) South Africa is a country in which most people live in poverty and in which there are extreme disparities of power, income and wealth. The absence of a democratic political order is regarded as the chief cause of this situation. In many instances the public administration has been harnessed by government to further these inequities, rather than to serve the population as a whole. An imperative of any future governmental action will be to redress these imbalances, and a democratic system of public administration and public law will be crucial as a vehicle to this end.

(ii) At present there is no system which regulates the exercise of public power adequately. While the law should be used creatively to narrow (and to seek to eliminate) socio-economic injustice, it is acknowledged that lawyers, courts and a system of rules cannot by themselves effectively regulate the exercise of public power. South African administrative law currently has a retrospective focus: it concentrates on judicial remedies for maladministration. It needs to develop a prospective focus; it needs to create procedures and structures which will foster good decision-making. Generally, it needs to create the conditions that conduce to good administration, among which will be the development of a code of principles of good governance, to be recognised and observed by all in the political and administrative process.

(iii) Public power includes not only the power exercised by governmental institutions at all levels and of different kinds. It includes also the exercise of power in some circumstances by nominally private bodies. In a democracy, the exercise of public power should be accountable and be required to conform to the principles of fairness, equality and responsiveness.

(iv) Administrative law should facilitate creative decision-making in the public interest, but it should also permit the effective assertion of citizens' rights and limit any abuses of public power.

(v) An effective system of administrative justice requires a democratic political culture and a responsive, honest, competent and accountable public service. Solutions to the problems posed by the exercise of public power might prove expensive. It is therefore crucial that the limited human and material resources available be utilised as efficiently as possible in promoting the goal of administrative justice.

II Areas of agreement

Legal regulation of public power should include judicial review of administrative action as well as a range of procedures and institutions to ensure good governance, including:

(i) effective Parliamentary control and supervision of the nature and scope of delegated power and the way in which it is exercised;

(ii) genuinely consultative and participatory rule-making and decision-making procedures, accessible to the people affected;

(iii) the explicit articulation in empowering legislation of the purpose of conferring and the criteria governing the exercise of public power, to the greatest extent possible;

(iv) a duty upon those exercising all forms of public power to give reasons for decisions on request and to give justifiable decisions, i.e. decisions the reasons for which plausibly meet the objections to the decisions taken, on plausible grounds discard the alternatives to the decision taken, and disclose a rational connection between the premises of the decision and the decision itself;

(v) open government, access to official information and the minimisation of the scope of official secrets legislation;

(vi) maximum feasible access to administrative justice, including class actions, a broad definition of legal standing and the provision of adequate legal services;

(vii) the training of public servants in the principles of good governance; and

(viii) the provision of accessible, appropriate and adequate remedies for maladministration, including review of administrative action and, where desirable, alternative dispute resolution procedures (having special regard to the dangers of informal procedures for those with poor bargaining power).

III Areas requiring further consideration

The workshop participants felt that further research, study and debate (perhaps including a further workshop) are needed urgently to consider the following areas:

(i) the need for and design of administrative appeals, internal or external;

(ii) the desirability of a generalised statutory prescription of administrative procedures;

(iii) the precise scope and implications of the public/private distinction in administrative law;

(iv) the potential for abuse of mechanisms of administrative review, especially in order to block social reconstruction by a future government;

(v) the need to codify the principles of good governance (which may be thought to include accountability, certainty, consistency, efficiency, equality, fairness, honesty, impartiality, openness, participation, proportionality, and responsiveness to the interests of the citizens) and the justiciability and status of such a codification (e.g. whether it should be statutory or constitutional).

IV Constitutional entrenchment of a right to administrative justice

The workshop did not have sufficient time to debate a proposal to incorporate a clause in the Constitution to entrench the right to administrative justice, although the leading political parties and the South African Law Commission have included such clauses in their draft bills of rights, and several submissions on the desirability of constitutional entrenchment and on the terms of any such entrenchment were made during the process leading to the publication of this Declaration. In the light of these comments, the proposal rendered below was circulated among the participants by the workshop convener. It met with wide-ranging fundamental criticisms. As a result, the people charged with the final drafting of this declaration, Hugh Corder and Andrew Breitenbach, decided to publish the circulated clause, together with a synopsis of the principal objections, as a touchstone for further debate and consideration.

(i) Draft judicial review clause:

(a) Anyone adversely affected by a decision made in the exercise of public power shall have the right to a decision which is lawful, procedurally fair and in accordance with the principles of equality and rationality, and shall have the right to seek redress from an independent court and any other body or tribunal established for that purpose.

(b) Subclause *(a)* shall not be construed as an exhaustive statement of the grounds upon which decisions made in the exercise of public power may be reviewed.

(c) In the exercise of the power of review, due weight shall also be given to the principles of good governance and the need to empower all public authorities to undertake programmes to remedy social, political and economic disadvantages.

(ii) Comments received:

(a) Some respondents felts strongly that judicial review of administrative acts or abstentions should derive from the terms of the Bill of Rights in general and needed no specific entrenchment.

(b) Others felt that the entrenchment of requirements for validity, such as those embodied in subclause *(a)*, would engender expansive judicial review at the expense of programmes for socio-economic reconstruction.

(c) Yet others felt that such an extension of the judicial power to review administrative acts or abstentions is indispensable for securing administrative justice. In particular, this last group felt that the effect of subclause *(b)* would be to render those requirements for validity not mentioned in subclause *(a)* susceptible to legislative ouster clauses, and that subclause *(c)* would destroy the entire basis of entrenchment by too easily granting immunity from review to officials ostensibly pursuing socio-economic reform programmes. One suggestion to resolve this last problem was the inclusion of the words 'legally prescribed' after 'to undertake' in subclause *(c)*.

Report on the three-day workshop on 'Administrative Law for a Future South Africa' convened by the Department of Public Law, University of Cape Town, and the Community Law Centre, University of the Western Cape between 10 and 13 February 1993

The workshop attracted participants from a wide variety of backgrounds and interest groups, including local and foreign academics (both legal and non-legal), public administrators, and members of the South African judiciary, legal profession and political parties.

The overseas participants who addressed the workshop were: John Allison, Lawrence Baxter, Laurence Boulle, Peter Bayne, Françoise Dreyfus, John Evans, Christopher Forsyth, Jeffrey Jowell, Cheryl Saunders, Anne Seidmann and Robert Seidmann, as well as the Hon. Mr Justice Wilhelm Rapp of the German Federal Administrative Court, and the Hon. Mr Justice P N Bhagwati, former Chief Justice of India. The South African participants who delivered papers were Kader Asmal, Geoff Budlender, Alfred Cockrell, Dennis Davis, Karthy Govender, John Hlophe, Pius Langa, Gilbert Marcus, Shehnaz Meer, Etienne Mureinik, Kate O'Regan, Dullah Omar, Albie Sachs and Marinus Wiechers.

The workshop was preceded by the circulation to all prospective participants of both a working document compiled by a group of South African administrative lawyers in August 1992 and the great majority of the papers to be discussed by the various keynote speakers.

The formal opening dinner held on Wednesday 10 February was addressed by Judge Bhagwati, whose theme was that the traditional dichotomy between efficiency in administration and fairness to individuals had to be supplanted by a democratic conception of administrative justice in which fairness to individuals is seen as an integral part of efficiency.

On Thursday 11 and Friday 12 February, eight consecutive plenary sessions were held in which key issues facing administrative law in South Africa were scrutinised. In each session, general discussion of the issue(s) at hand was preceded by brief synopses by the keynote speakers of the main themes of their papers. On Thursday evening a public forum was held in the Library Auditorium of the University of the Western Cape, at which issues surrounding the accessibility of administrative justice were presented by a distinguished panel of South African and foreign lawyers before being opened for general discussion.

On Saturday morning, in a plenary session, the participants discussed the first draft of a document, compiled over the course of the conference by a drafting committee, reflecting the tenor of the discussions during the various sessions. The debate during the plenary session was incorporated in a second draft which was circulated to all the participants for comment in early March; the comments received were reflected in a final draft which was circulated for comment, once again, in late March. The result of this process – *The Breakwater Declaration: Administrative Law for a Future South Africa* – is presented in this publication. It will be widely disseminated. A special effort will be made to bring it to the attention of the various constitutional negotiators, and a programme will be devised to explain both its contents and probable implications to a range of individuals and institutions, including present and aspirant civil servants, the political parties, practising and academic lawyers, civic organisations, trade unions, chambers of commerce, and employers' federations.

The main themes of the workshop will be reflected in an accessible publication to be produced by the Community Law Centre, University of the Western Cape, and most of the papers presented at the workshop will be published in the 1993 edition of *Acta Juridica*, the Journal of the Faculty of Law, University of Cape Town.

Recipients of this document are encouraged to discuss the issues which it raises in the circles in which they move. Comments and criticism will be welcomed and should be directed to:

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