REPORT ON "BREAKWATER" CONFERENCE

Faculty of Law, University of Cape Town

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Introduction

The "Breakwater Declaration", adopted during February 1993 at a conference of administrative lawyers in Cape Town, made an important contribution to the development of administrative law in post-apartheid South Africa. The conference which took place under the theme "Administrative Law for a future South Africa" agreed on key principles for administrative law reform in South Africa. Among these were effective parliamentary control and supervision of delegated power; a genuinely consultative and participatory rule-making and decision-making process; the duty to give reasons; open government, access to official information and limiting the scope of official secrets legislation; maximum access to administrative justice; training of public servants and the provision of accessible, appropriate and adequate remedies for maladministration, including both judicial review and alternative dispute resolution procedures. These principles served as important signposts for the reform of administrative law which took place during the democratic era.

During January 2024, just over three decades after the adoption of the Breakwater Declaration, a second gathering took place in Cape Town under the theme "Breakwater Revisited". The purpose of the gathering was to reflect on the growth and development of administrative law over the preceding three decades, with specific reference to the areas that were identified in the Declaration as requiring further consideration, as well as new themes which have since emerged. This report summarises the key topics which emerged from the "Breakwater Revisited" gathering.

Keynote address

In his keynote address, Professor Sir Jeffrey Jowell KC traced the journey which culminated in the right to administrative justice in South Africa as enshrined in section 33 of the Constitution and subsequently in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). He said that section 33 (and the South African Constitution as a whole) has been "emulated and acclaimed" internationally. The Charter of the European Union adopted the "right to good administration" in 2000, and countries as diverse as Malawi, Kenya, Zimbabwe, the Maldives, Cayman Island, Turks and Caicos Islands and Fiji have since constitutionalised the right to administrative justice in one form or another. He also mentioned that judgments from the Constitutional Court are frequently cited in the highest Commonwealth courts.

In his evaluation of the South African Constitution 30 years on, Professor Jowell raised a few probing questions. Has it worked? Was the constitutional euphoria of the early

nineties sadly deluded? Why has the right to just administrative action failed to prevent grave injustices, failed to suppress corruption on a grand scale or the hollowing out or capturing of state institutions? He argued that the Constitution could not be blamed for the "lost opportunities and rank irresponsibilities" which have occurred, and that the situation would have been more dire without the constitutional constraints that were put in place. On the positive side, he pointed out that many of the abuses which have been exposed in South Africa would have been swept under the rug in other countries which have no free press or active civil society to bring them to light. There have also been notable successes where the judiciary has struck down acts of administrative justice and continue to do so.

Professor Jowell proceeded to highlight some lessons that could be learned from the South African experience. He pointed out that there were limits to what constitutions could achieve absent political will and capacity to implement its provisions. Furthermore, constitutions could easily be subverted through the appointment of political cronies to institutions which were designed to play a key role in their protection and promotion. He said that this danger existed not only at the level of the judiciary but also at the level of other "enforcers" of the Constitution such as the public protector, SARS, the police etc. He said that, in retrospect, more attention should have been paid to ensuring the independence of these "enforcers" of the Constitution. He called for the Constitution to be renewed and sharpened (rather than jettisoned) to combat future abuses.

Professor Jowell said that fidelity to the Constitution had ramifications well beyond the shores of South Africa. He argued that there was an existential battle being waged globally about the efficacy of democracy and the rule of law. He stated that "[m]ore than at any time since the Second World War there is lack of trust in governments everywhere and a diminishing commitment to a kind of democracy for which South Africa struggled during the apartheid years and before". He criticised movements which sought to dismiss human rights and the rule of law as "western constructs", adding that it was condescending to assume that individuals in the developing world were not fit to be bearers of the right to legality, equal protection of the law and the opportunity to challenge laws in independent courts. Global commitment to democratic values would slip if it started to slip in South Africa.

The Public-Private Divide

One of the areas identified in the Breakwater Declaration as requiring further consideration was the precise scope and implications of the public/private divide. This theme was explored further at the "Breakwater Revisited" conference. It is considered trite that under our constitutional dispensation, organs of state are not the only entities which exercise public power. Private bodies may also exercise public power. This is made clear in the definition of "administrative action" in section 1 of the PAJA, which

includes decisions taken by natural or juristic persons when exercising a "public power or performing a public function" in terms of an "empowering provision".

But there is no universal litmus test for determining when powers exercised by a private body are subject to public-law review and the courts have not spoken with one voice on the topic. In AMCU[1] the Constitutional Court held that the question was not so much who exercised the power, or even where the power came from, "but what does the power look and feel like? What does it do?". Our jurisprudence indicates that there is a range of factors that have to be considered when determining the question of "public power", including the source and nature of the power; its subject matter; the degree of coercion involved; whether the power concerned was "governmental" in nature; whether there was a need for the power to be exercised in the public interest; whether the private entity received public funding; whether the decision was related to a clear legislative framework; whether the performance of the function constitutes a privatisation of the business of government itself; and whether the power exercised had been woven into a system of governmental regulation and control.[2]

The panellists who led the discussion on the topic (Geo Quinot[3] and Lauren Kohn[4]) discussed two recent cases in which the question regarding the public-private divide again came sharply to the fore, albeit in different contexts. In the first case, Ndoro,[5] the question which arose was whether a decision taken by SAFA's Arbitration Tribunal amounted to administrative action reviewable under the PAJA. In reaching the conclusion that it did, the High Court reasoned that it was the "assumption of exclusive, compulsory, coercive regulatory competence to secure public goods that reach beyond mere private advancement that attracts the supervisory disciplines of public law". The court found that although the bodies which performed oversight of the game of soccer (FIFA, SAFA and the NSL) were private entities, what they did and the objects they strove for were public in nature, and the regulatory regime they had put in place was exclusive, comprehensive, compulsory and coercive. The Court reasoned that the flourishing of the game of football was a "public good and one that is often understood to be bound up with the wellbeing of the nation". Because they oversee a public good, private bodies that regulate football exercise public functions and do not simply regulate private interests.

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[1] *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) (*AMCU*).

[2] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC); *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA); *AMCU* (n 1 above).

[3] The title of Prof Quinot's presentation was 'The Re-(sur)vival of the Jockey Club'.

[4] In a presentation titled 'The Public/Private Distinction Re-examined'. See L Kohn 'Private Sporting Bodies and the 'Supervisory Disciplines Of Public Law': *Ndoro v South African Football Association* as an Apt Case Study for Line-Drawing within a Four-Quadrant Typology' (2022) 38(1-2) *South African Journal on Human Rights* 112.

[5] *Ndoro v South African Football Association* 2018 (5) SA 630 (GJ).

In the second case, Bae Estates,[6] the Supreme Court of Appeal (SCA) held that a decision taken by a private body (the trustees of a body corporate) to prevent an estate agent from operating in a housing complex without having been afforded a hearing bore none of the hallmarks of public power. The Court held that the trustees' decision was not of an administrative nature and that the decision seemed more "commercial or managerial" in nature rather than "administrative" or "bureaucratic". Also, there was no governmental interest in the decision in question and it was not "woven into a system of governmental control". Furthermore, the trustees did not act in terms of any legislation or an "empowering provision". (Although the scheme's rules of conduct fell within the definition of "empowering provision" in the PAJA, they did not contain any provision which empowered the trustees to prevent an estate agent from operating in the scheme and were therefore not applicable).

However, the SCA held that the decision was subject to common-law review. At common law, private bodies performing private functions were subjected to administrative law discipline. This principle was initially developed in the context of the so-called "Jockey-Club" cases in which voluntary associations were required to afford their members a fair hearing before a domestic tribunal, based on a contractual relationship which existed between the parties. The SCA held that despite the absence of a formal contractual relationship between the parties, Bae Estates had been directly and materially affected by the trustees' decision and that there was no rational basis for why the rules of natural justice should not apply. The SCA found that the trustees' decision was procedurally unfair and unreasonable, irrational, and "most importantly unjust". Despite the absence of a formal contractual relationship, the duty of the trustees to act fairly came about consensually when they allowed Bae Estates to operate in the complex.

The panellists noted that the reviewability of decisions taken by sporting bodies and political parties had presented distinct challenges for the judiciary. They expressed the concern that the distinction between private and public power was still too much a matter of "feel". A better doctrinal basis was needed for identifying the actions of private actors which qualify as public functions. There was also a need for the doctrinal development of the basis for common-law review in those instances where private actors do not fulfil public functions. Kohn presented a 4-quadrant model which could be employed to distinguish public from private power. Having noted that Ndoro fits within the fourth quadrant, Ms Lauren Kohn highlights the High Court’s appetite to bring the decisions of private bodies within the scope of the PAJA in similar cases, and where it is justified.

Both Prof Geo Quinot and Ms Kohn concluded that the courts have been anything but consistent in their efforts to delineate the boundaries between public and private power.

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[6] *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd* 2022 (1) SA 424 (SCA).

Prof Quinot observed that 30 years after the Breakwater Declaration, this area of administrative law has become "messier than before". The interplay between administrative law and private law remains a contested area of the law on which the final word has not yet been spoken.

Procedural fairness

The paper on procedural fairness by Prof Michael Kidd[7] focused on the right to procedural fairness in relation to two aspects of environmental law – authorisation for activities affecting the environment and the making of subordinate legislation, such as regulations. With reference to recent case law, such as Sustaining the Wild Coast,[8] he emphasised that meaningful consultations with affected communities could not be approached as a tick-box exercise. There had to be a genuine, substantive two-way process. Communities could only make meaningful representations and provide informed consent if they were provided with material information about proposed mining and other economic activities. There was also a need to consider alternatives to newspaper adverts as a method of advertising. Record-keeping was crucial to demonstrate to a reviewing court who was consulted and what information was provided. Prof Kidd stated that consensus seeking was not an essential component of procedural fairness, and often not possible to achieve in practice. However, it was important that the decision maker considered the full range of information on the environmental consequences of proposed activities.

Similarly, notice regarding the making of subordinate legislation such as regulations had to contain sufficient information to enable the public to submit meaningful representations. Information placed on a department's website could not consist merely of references to relevant sources of information. The information had to contain a synopsis of the relevant documentation with reference to the source documents. The right to adequate information required that an appropriate balance be achieved between the protection of the rights of the public on the one hand and administrative efficiency on the other.

Procedural rationality

The topic of procedural rationality was discussed in relation to two main areas: The disjunct between substantive and procedural rationality under the principle of legality and the duty to consult in executive (as opposed to administrative) action. In her

[7] The title of Prof Kidd's presentation was 'Procedural Fairness in Environmental Law – Getting the Balance Right?'.

[8] *Sustaining the Wild Cost NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECmk). This matter was taken on appeal to the SCA and judgment was handed down on 3 June 2024; see *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* [2024] ZASCA 84.

presentation on the first topic, Ms Isabeau Steytler[9] pointed out that whilst the courts have tried to restrict the application of substantive rationality, there has been significant growth in the application of procedural rationality as a ground for review. She argued that procedural rationality has not stayed within the confines of rationality review but has taken on a form approximating that of review for procedural fairness and reasonableness. This development was influenced by two factors: The exclusion of procedural fairness under the principle of legality (a la Masetlha)[10] and the restriction of substantive rationality review. The disjunct between substantive and procedural rationality has given rise to a lack of conceptual coherence and uncertainty. She called for a principled approach to the inclusion of some or all of the elements of procedural fairness and reasonableness under the principle of legality, in a manner which respects the separation of powers.

Ms Nurina Ally and Dr Melanie Murcott[11] drew attention to the Constitutional Court's inconsistent rulings regarding the duty to consult when performing executive acts (as opposed to administrative acts). They argued for a principled, value-laden approach which recognised the need for consultation in the context of executive action. This approach formed an intrinsic part of participatory democracy and the value of ubuntu. Notwithstanding the conflicting jurisprudence, the presenters felt that procedural rationality provided a sound basis for promoting the duty to consult in executive decision-making, particularly when viewed through the prism of the constitutional values of accountability, responsiveness and openness. This approach also resonated with the principle espoused in the Breakwater Declaration, that "legal regulation of public power should include … genuinely consultative and participatory rule-making and decision-making procedures, accessible to the people affected".

Administrative justice and anti-discrimination law

The convergent streams of administrative justice and anti-discrimination law was the subject of discussion in the context of the Constitutional Court's decision in the Sembcorp Siza matter.[12] The issue which arose for determination in this instance was whether a decision taken by Umgeni Water to impose a differential water tariff on Sembcorp Siza (a private body) whilst imposing a much lower tariff on its municipal customers, was rational. Umgeni took the decision in order to abolish a cross-subsidy that Sembcorp Siza enjoyed and also to save on operational costs. The Constitutional Court found that the decision to impose the differential rate was rational. The Court held

[9] Ms Steytler's presentation was titled 'The Conceptual Disjunct between Substantive and Procedural Rationality under the Principle of Legality'.
[10] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC).
[11] The title of Ms Ally and Dr Murcott's presentation was "Beyond Labels: Executive Action and the duty to consult". See N Ally & MJ Murcott 'Beyond Labels: Executive Action and the Duty to Consult' (2023) 27 *Law, Democracy and Development* 93.
[12] *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd* 2023 (1) SA 1 (CC).

that the test for irrationality was simply whether there was a rational link between the differentiation and a legitimate purpose sought to be achieved by the differentiation. It did not require the court to evaluate the reasons underlying the differentiation. The Court held that on the facts, the differentiation did not rise to the level of unfair discrimination.

In their critique of the judgment, Ms Raisa Cachalia and Dr Meghan Finn[13] argued that the various courts which considered the matter were confused as to the precise nature of Sembcorp Siza's legal status. The High Court and the SCA treated Sembcorp Siza as an organ of state, without much analysis, whereas the Constitutional Court treated Sembcorp Siza as a private actor – except in respect of the issue of costs. In respect of costs, the Constitutional Court held that Sembcorp Siza had performed a public duty, that it ought to be treated as an organ of state and that the Biowatch principle did not extend to it.

The presenters found this to be incongruous. They argued that the courts had over-emphasised the public nature of the functions which Sembcorp Siza had performed but had failed to engage in a proper analysis of what constituted an "organ of state" as defined in section 239(b)(ii) of the Constitution. It is apparent from this section that the exercise of public power and the performance of a public function were not the only requirements that had to be met to qualify as an organ of state. In addition, the exercise of the public power or performance of the public function had to be "in terms of any legislation" (i.e. there had to be some proximity to a statutory source). The presenters noted the tendency of the courts to endorse an expanded notion of "state bodies" to ensure that private entities performing public functions were unable to escape administrative law control. However, this did not mean that private bodies had to be treated as though they were public bodies.

The presenters also argued that Sembcorp Siza did not involve unfair discrimination in the true sense. None of the grounds of unfair discrimination listed in section 9(3) of the Constitution were triggered. They pointed out that anti-discrimination law was aimed at protecting dignity and dismantling historical inequalities and that these features were noticeably absent from the case. They felt that the case actually involved a proportionality assessment, rather than a question of unfair discrimination.

Internal remedies

In his paper on internal remedies, Dr Ernst Heydenrych[14] set out basic principles to guide public entities when drafting internal administrative remedies. These include the following: the remedy must be founded in law; it must be internal to the administration; it must be available, effective and appropriate; it must provide for a speedy resolution of

[13] Ms Cachalia and Dr Finn's presentation was titled 'Converging Currents: Administrative Justice and Anti-Discrimination Law in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd*'.

[14] The title of Dr Heydenrych's presentation was 'Refocusing the Administrative Justice Lens on Internal Controls (Remedies and Procedural Fairness) in South African Law'.

disputes; it must provide a final and binding decision; it must provide for the right to reasons; and there should be continuous review of the effectiveness of the internal remedy.

Perspectives from other African countries

Justice Redson Kapindu[15] of the Malawian bench submitted that Malawi could benefit from adopting legislation governing the control of administrative power, similar to the PAJA. He mentioned that there is some debate in Malawi regarding the scope and extent of judicial review. One school of thought holds that the review had to be confined to procedural aspects of the decision-making process and not intrude onto the merits of the decision. Another school of thought (one supported by Justice Kapindu) was that some assessment of the merits was inevitable to determine whether the reasons given for an administrative decision were justifiable. He said that this position was more aligned with section 43 of the Malawian Constitution which states that "every person has a right to lawful and procedurally fair administrative action, which is justifiable in relation to the reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened". Legislation could assist in providing clarity on this matter.

Justice Kapindu stated that whereas section 46 of the Malawian Constitution gave courts wide powers to fashion any remedy "that are necessary or appropriate" that would vindicate the right being threatened or violated, the courts tended to limit themselves to the standard common-law remedies. He argued that the Malawian Constitution provided scope for more innovative remedies, which could be provided for in legislation. Legislative intervention was also required to establish the interplay between administrative law and traditional authorities.

In his paper on "The Role of Administrative Law in Promoting Effective Public Finance Management in Uganda", Dr Ronald Kakungulu-Mayambala reflected on the effectiveness of administrative law in holding public officials accountable in Uganda. Although criminal law is used as an instrument to control the abuse of power in Uganda, administrative law is the main avenue used to promote effective public finance management. Failure by officials to follow administrative law prescripts usually culminates in judicial review with impugned decisions being overturned under Article 42 of the Ugandan Constitution.

Justice Steven Majiedt's address

In his after-dinner address, Constitutional Court Justice Steven Majiedt picked up on some of the topics which emerged during the plenary sessions. In the main, his address focused on the Constitutional Court's judgments regarding the relationship between the

[15] The title of Justice Kapindu's presentation was 'Examining the Need for Specific Legislation on Administrative Justice in Malawi: Lessons from South Africa's PAJA'.

principle of legality and the PAJA as a basis for review, the "perennial bane of administrative law litigation" as he described it. During his discussion of the emerging jurisprudence in this area of the law, Justice Majiedt paid specific attention to the notion of rationality, and procedural fairness as an element of rationality.

After an extensive survey of the leading cases, he pointed out that the case law has been far from uniform, and that the jurisprudence often pulled in different directions. He discussed cases which seemingly concerned administrative action where the Court avoided making decisions based on the PAJA, and other cases where the Court had applied the principle of legality so as to include procedural rationality, but not procedural fairness. He said that it was hard to predict where the PAJA versus legality-based review would go in the future but emphasised that an "extended version" of legality was not yet clear cut or well defined.

He also emphasised that where the PAJA and legality were pleaded in the alternative, judges ought first and foremost to decide the case on the basis of the PAJA if it involved administrative action. He said that "courts should resist the temptation to adopt the position that, as litigants often contend, it matters not whether the court decides a review on legality or the PAJA because the applicable principles overlap, to opt for the less onerous route of legality review".

Justice Majiedt reminded the audience that much of what was envisaged in the Breakwater Declaration has come to pass in the Constitution and the PAJA. However, he acknowledged that the PAJA was “fraught with difficulty” particularly the "unwieldy" definition of administrative action and that legislative amendments were needed to address its shortcomings.

Reflections on the Breakwater Declaration

A panel comprised of Prof Hugh Corder and Prof Cora Hoexter and chaired by Judge Dennis Davis, discussed the topic "The PAJA: Its Creation and Subsequent Fate". Prof Corder played a pivotal role in the formulation and adoption of the Breakwater Declaration. In sketching the socio-political context at the time the Declaration was adopted, the panellists stated that the Declaration was a reaction to the state of administrative law before the advent of democracy. Hence, the emphasis on the importance of redressing social imbalances, accountability, responsibility and openness – values which were foreign to the apartheid state.

The Breakwater gathering of 1993 also presented an opportunity for reform "before the new bureaucracy adopted the habits of the old". The gathering emphasised the importance of administrative appeal bodies, internal controls, and the establishment of an a priori set of processes and standards for consultation to ensure procedural fairness, reasonableness and lawfulness. However, the early drafts of the PAJA underwent

significant changes under the pen of the Law Commission and Parliamentary Committee. For example, the definition of "administrative action" became unduly restricted, the concept of "direct legal effect" was imported from German law, section 2 was added to allow for exemptions and variations, unreasonableness as a ground for review was replaced with a "Wednesbury clone"[16] in section 6(2)(h) and vagueness and fettering were dropped as grounds for review. These changes were aimed at reducing the scope of the PAJA, making it less burdensome on the administration.

The panellists also mentioned that there was initial resistance to the PAJA from practitioners, who favoured review based on the common law or directly under s 33 of the Constitution. However, the constitutionality of the PAJA has never been challenged and Parliament hasn't seen it fit to amend the PAJA, despite the difficulties it presented in practice. The rulings of the Constitutional Court in Bato Star[17] and New Clicks[18] soon made it clear that the PAJA had to be the first port of call in administrative law review cases.

The panellists felt that there was an obsession with judicial review in South Africa, a phenomenon which they attributed to the failure on the part of Chapter 9 institutions to occupy the space carved out for them by the Constitution. The result has been that the courts have been placed on the frontline of efforts to ensure accountability. The panellists felt that if the PAJA was not on the statute books, the judiciary would have proven to be quite capable to develop the common law for the constitutional era in line with s 33.

In his presentation Mr Mitchell de Beer[19] called for the abolition of the current definition of "administrative action". He argued that the exercise of all public power had to be included in the definition of administrative action.

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[16] Referring to *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.
[17] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) 2004 (4) SA 490 (CC).
[18] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) 2006 (2) SA 311 (CC).
[19] The title of Mr De Beer's presentation was '*Pharmaceutical Manufacturers* Re-examined'.

with the planning and hosting of the conference. Finally, we are indebted to Dr Peter Volmink for preparing this report, with input from Ms Nurina Ally and Mr Tsukudu Moroeng.[20]

[20] The report was based on extensive notes of the conference proceedings prepared by student volunteers from UCT. For this, we owe thanks to Daniel Erasmus, Phemelo Matie, Luyanda Mtembu and Abigail Tshiamala.