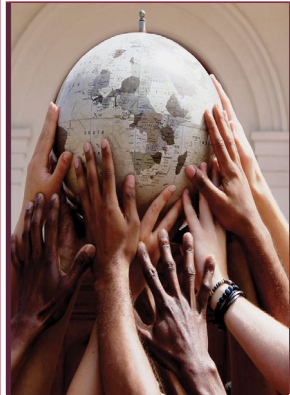


# GUARDRAIL STATE PERFORMANCE THROUGH ADMINISTRATIVE LAW COMPLIANCE



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PRESENTATION TO THE OFFICE OF THE CHIEF STATE LAW ADVISOR  
STAKEHOLDERS



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# GUARDRAIL STATE PERFORMANCE THROUGH ADMINISTRATIVE LAW COMPLIANCE: OVERVIEW

Thoughts From Administrative Law For State Functionaries Short Course  
and G Quinot (ed) *Administrative Law In South Africa: An Introduction*



# GUARDRAIL STATE PERFORMANCE THROUGH ADMINISTRATIVE LAW COMPLIANCE

## THE STATE LAW ADVISOR AS A CONSTITUTIONAL GUARDRAIL

The State Law Advisors are the most important lawyers in government. Just as the Constitutional Court is the ultimate guardian of the Constitution, the Office of the Chief State Law Advisor is the ultimate **guardrail** with the responsibility to ensure constitutional compliance. The office also has a responsibility to ensure compliance with public policy and the law, including administrative law, in all state affairs, with particular focus on legislative drafting, government contracts and international agreements.

In doing so, the State Law advisor should be guided by the Constitutional vision of society, which is a society based on the three pillars of **democratic values**, **social justice** and **fundamental human rights** and grounded on the values of the achievement of equality, human dignity, Ubuntu, fundamental human rights, constitutional supremacy and the rule of law. This includes embracing transformative constitutionalism (*EFF1*, *Bato Star*, *Clicks1* and *Brink v Kitshoff*, among others) – (Note the Wheelbarrow Story)



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## ADMINISTRATIVE LAW AS A GUARDRAIL

Administrative law is a guardrail that seeks to ensure the state operates within constitutional parameters. This entails giving effect to the transformative constitutionalism ethos of the Constitution. It includes ensuring that state decisions and actions are attuned to democratic values such as accountability, fairness, responsiveness, participation, the rule of law, human rights guarantees and separation of power. Also incorporated are the principles of public administration (s195) underpinning South Africa's democracy architecture and societal vision. Properly implemented, administrative law compliance can ensure good governance as outlined in the UN 8 Principles of Good Governance.



# GUARDRAIL STATE PERFORMANCE THROUGH ADMINISTRATIVE LAW COMPLIANCE

ADMINISTRATIVE LAW AS A GUARDRAIL: NB of PURPOSES, INTERPRETATION AND OVERALL APPROACH

## 2 DIMENSIONS AND 5 PRINCIPLES OF ADMINISTRATIVE LAW

1. Just Administrative Action and Legality
2. 4 PAJA + 4 Legality Principles
  - Lawfulness
  - Reasonableness\*\*
  - (Procedural) Fairness\*\*\*
  - Accountable (Written Reasons)
  - Rational(Legality)\*\*\*

Remember the purpose is justice and justice incorporates equality (Plato, 375 BC) and related advancement of social justice (Rawls, 1971), which in turn is a dimension of Ubuntu (Mbiti, 1969)



## 8 PRINCIPLES OF GOOD GOVERNANCE

1. Rule of Law
2. Equity and Inclusiveness
3. Responsiveness
4. Transparency
5. Effectiveness and Efficiency
6. Participatory
7. Consensus Oriented
8. Accountability

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## THE COST OF ADMINISTRATIVE LAW LAPSES

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When the administrative law system and advisory services system malfunction:

Justice, efficiency and effectiveness are lost leading to loss of state craft and public trust. Belief in democracy and the ROL is also eroded. An example is Covid-19 Regulations. Despite judicial deference (Heightened scrutiny only under PAJA (*Motau(2014), para 43*), courts are increasingly demanding accountability and compliance with administrative justice requirements in all decisions and actions of state functionaries. Covid-19 and international agreements have been among of the areas reviewed for administrative law compliance in recent times (*Essau* regarding Level 4 Regulations)

NB that matters won in court are often lost in the court of public opinion and note Adam Smit's observation that : "Justice is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric of society... must in a moment crumble into Atoms" plus the fact that the architects of South Africa's democracy crafted the constitution as a blueprint for transformative constitutionalism to **heal the divisions of the past** and establish a new society based on the three pillars of **democratic values, social justice** and **fundamental human rights**



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## SOME IDEAS ON ATTUNING STATE LAW ADVISOR SERVICES FOR EFFECTIVE CONSTITUTIONAL GUARDRAILING TO OPTIMISE STATE PERFORMANCE

1. Act with appreciation that lawyering is leadership - Mind the Wheelbarrow
2. Ethics grounding ( NB s 195 and 237)
3. Purpose driven conduct anchored in the constitutional guardrails (OCSLA + Admin Law) paradigm and transformative constitutionalism (Mureinic, 1994)
4. Impact consciousness anchored in systems thinking
5. Commitment to serve each other, leaders in government, and ultimately, the people collaboratively
6. Consider the **Administrative Law for State Functionaries Short Course** (Note feed back from OCSLA and other) and **Quinot (2020) Administrative Justice in South Africa: An Introduction**



# THE FUTURE

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## MINE THE DUALITY OF ADVERSITY

South Africa, the continent and the world are at an inflection point marked by crises, growing social injustice and calls for justice, a public trust deficit and declining trust in democracy as we know it. But failure can be a great teacher if you are a good student. Accordingly, the journey that culminates in the greatest of mountains begins with intention and a commitment to abandon one's comfort zone, which is the basis for this gathering.

Let's go ahead and mind the wheelbarrow





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## GRATITUDE

Enkosi! Dankie! Thank You! Asante Sana!

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