SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 81

Project 115

ADMINISTRATIVE LAW

January 1999

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

The Honourable Mr Justice I. Mahomed (Chairperson)
The Honourable Madam Justice Y. Mokgoro
The Honourable Madam Justice L. Mailula
Adv J.J. Gauntlett SC
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The project leader responsible for this project is Mr J.J. Gauntlett SC.

The project committee further comprises Prof Hugh Corder, Ms Cora Hoexter, and Prof Phillip Iya. Mr Andrew Breitenbach is the committee's researcher. The project committee is also assisted by Mr Rainer Pfaff of German Technical Co-operation (GTZ), funders of the project.

Any requests for information and administrative enquiries should be addressed to the Secretary of the Commission or the Commission staff member allocated to this project, Mr Pierre van Wyk.

PREFACE

This discussion paper (compiled in January 1999) has been prepared to elicit responses and, together with those responses, to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations which follow are not to be regarded as the Commission's final views.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that under section 32 of the Constitution the Commission may have to release information contained in representations.

Respondents are requested to submit written comments, representations or requests to the Commission **by no later than 31 March 1999** at the address appearing on page (iii).

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CHAPTER 1

ORIGIN OF THE INVESTIGATION

1.1 On 17 November 1992, the Commission submitted a report to the then Minister of Justice relating to its investigation into the courts' powers of review of administrative acts. This followed the circulation of its earlier Working Paper 15 (1986) in that regard, the receipt of a number of responses, a request by the then Minister of Justice to investigate whether it was considered that administrative appeal bodies should be reduced in number, and the consequential composition and distribution of a second Working Paper (Working Paper 34 of October 1991).

1.2 The original investigation into the courts' powers of review of administrative acts focussed on judicial supervision by means of appeal and the exercise of its review jurisdiction by the Supreme Court (now the High Court). It however also considered aspects of control exercised by administrative bodies themselves, as well as the question of administrative appeals. Certain articles of the Bill of Human Rights proposed in the Commission's interim report on group and human rights were also considered in relation to their potential impact on the investigation.

1.3 The 1992 report is a lengthy document, which was widely distributed for comment at the time, and which has been the subject of analysis and comment in a number of subsequent administrative law studies. It is available at a number of university law libraries in South Africa, and it is also available for consultation at the Commission's offices. A copy of the 1992 draft Judicial Review Bill is attached as annexure "A".

1.4 On 22 July 1994, the present Minister of Justice asked the Commission to advise him whether he should proceed with the Commission's original recommendations and legislation proposed in the 1992 report. The Minister's question was posed in the light of the coming into operation of South Africa's new constitutional dispensation, and particularly in view of the provisions of section 24 (dealing with administrative justice) of the 1993 Constitution.

1.5 In response, the Commission furnished a supplementary report relating to its investigation

into the courts' powers of review of administrative acts to the Minister in October 1994. It recommended that legislation should be enacted to complement and to give practical effect to section 24 of the 1993 Constitution. It advised that this legislation should provide for the review of administrative action, what was termed "an open-ended codification of the grounds for review", including the ground of unreasonableness, and the procedural regulation of a person's right to be furnished with reasons for administrative action. The Commission further recommended that the original proposed draft Bill be adapted in the respects apparent from the 1994 proposed draft Bill (enclosed as annexure "B").

1.6 Both the 1992 and 1994 draft Bills were confined, it is to be noted, to judicial review of administrative action.

1.7 It appears that thereafter a fresh initiative commenced within the Ministry of Justice (Planning Unit) itself. This did not involve the Commission. It is understood that some initial discussion commenced at the request of the Planning Unit under the auspices of the Centre for Applied Legal Studies (CALS) of the University of the Witwatersrand in collaboration with the University of Fort Hare.

1.8 The 1996 Constitution came into operation on 4 February 1997. Meetings took place between CALS, the Commission and the Planning Unit on 7 and 20 August 1997. The following process was agreed upon, and was submitted to the Minister for consideration:

(a) The review of administrative law should be placed on the Commission's programme by the Minister as a matter of urgency.

(b) The Commission should be the overall co-ordinating body to take responsibility for managing the project.

(c) A project committee would have to be established for the project in terms of section 7A(1)(b)(ii) of the South African Law Commission Act, 1973. The names of proposed appointees were forwarded to the Minister.

1.9 Correspondence and discussions thereafter ensued relating to the formal placing of the project on the Commission's programme, the appointment of the project committee, and other administrative matters, including the terms of reference of the project committee. The project committee was finally appointed by the Minister in November 1998. Immediate preliminary planning discussions ensued between the project leader and Mr Rainer Pfaff, representing German Technical Co-operation (GTZ), Professor Hugh Corder, and Mr Andrew Breitenbach (appointed as researcher in respect of the project). The first meeting of the project committee took place on 15 January 1999; its recommendations (in the form of this discussion paper and draft Bill (annexure "E") were approved by the Working Committee of the Commission in January 1998, for circulation for comment.

CHAPTER 2

TIMESCALE FOR THIS PROJECT

2.1 Any national legislation intended to give effect to section 33 of the Constitution (the successor to section 24 of the 1993 Constitution) must be enacted by no later than 3 February 2000. (We revert to this aspect in the ensuing chapter). The appointment of a project committee only in November 1998 leaves very little time for this to be accomplished. The situation is made more difficult by the extensive current legislative burdens borne by Parliament, and the interruption of the legislative programme for 1999 by the pending national elections. The result, it must be stressed at the outset, is that this project necessarily has to be conducted on an expedited basis, and the Commission seeks the understanding and co-operation of all potential respondents in this regard.

2.2 The Commission aims to report to the Minister by no later than 30 September 1999. This means that within a period of nine months, this discussion paper and draft Bill must have been prepared in an initial form for the consideration of the project committee; revised in the light of the preliminary analysis of the project committee and approved by the Working Committee of the Commission. Thereafter, the necessary adaptations must be effected and this discussion paper printed, publicised and distributed to interested parties. An opportunity must be afforded for their consideration and for the submission of responses and the responses must be evaluated. The report must thereafter be revised in the light of responses and the revised report must be considered by the Commission itself. If needs be, further amendments must be effected before the final report is submitted to the Minister as indicated above.

2.3 It is for this reason that the Commission is constrained to require all responses to be submitted by **no later than 31 March 1999**.

2.4 Once the responses have been considered by the project committee, and consequential revisions to the draft Bill considered, it is envisaged that a series of regional workshops will be held during late May and early June. Respondents (and other interested parties) will be invited

to these.

2.5 Thereafter the project committee will consider further revising the draft Bill, for presentation to the Commission itself.

2.6 It is hoped in this process to elicit (with the assistance of GTZ) the views of the several eminent international scholars in the field who have (as is indicated below) displayed a particular interest in South Africa's constitutional commitment to enhanced administrative justice.

CHAPTER 3

THE CONSTITUTIONAL IMPERATIVE

3.1 Attached for ease of reference as annexure "C" are the provisions of section 33 of the Constitution, read with item 23 of Schedule 6 (Transitional Arrangements) thereto.

3.2 The constitutional imperative is plain: national legislation must be enacted to give effect to the rights set out in section 33(1) and (2), and must provide for the additional matters specified in section 33(3)(a), (b) and (c). Item 23(1) of Schedule 6 requires this to be done "within three years of the date on which the new Constitution took effect". Item 23(2) provides for a default position: section 33(3) of the Constitution "lapse[s] if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect".

3.3 The idea of an Administrative Justice Act is not novel. Some other countries have already shown the way (see in this regard **Corder "Administrative Justice in the Final Constitution" (1997) 13 SAJHR 28,** attached as annexure "D", in which a number of legislative instruments elsewhere are summarised, and the background in South Africa to the contemplated legislation is traced). The topic has also received particular attention at the Breakwater workshops held in Cape Town in February 1993 ("Administrative Law for a future South Africa": **see 1993 Acta Juridica *passim***) and March 1996 ("**Controlling Public Power in Southern Africa**" published in **Corder and Maluwa (eds) Administrative Justice in Southern Africa (1997)**). In June 1997 the Nuffield Foundation, British Council and GTZ sponsored a workshop at the University College, London on "Codification of Just Administrative Action" (the papers are unpublished, but available at the Commission's offices). As the London and Cape Town workshops indicate, a number of eminent South African and foreign lawyers have displayed great interest in the concept and scope of an Administrative Justice Act for South Africa, and have made important contributions to the discussion, both in published and unpublished papers. The project committee has had the benefit of considering these.

CHAPTER 4

THE SOUTH AFRICAN BACKGROUND

4.1 Some other countries, it has been observed above, have preceded South Africa in adopting an Administrative Justice Act. South Africa is unique in being **required** by its Constitution to do so, and to achieve this within a stipulated time frame. What an Administrative Justice Act is required to achieve in South Africa is however not to be ascertained purely by reference to the wording of the constitutional imperative. Respondents, in considering submissions relating to the draft Bill (annexure "E"), will naturally do so in a specifically South African setting.

4.2 What this encompasses has been a matter of exhaustive analysis in the 1992 report and the conferences and papers to which reference has been made. A useful overview is again to be found in the article by Prof Corder included as annexure "D".

4.3 While the South African common law relating to administrative justice has developed significantly in recent years, an abiding restriction lay in its evolution under a system of Parliamentary supremacy, and domination in turn of Parliament by the executive. The Constitution reflects a determination that administrative law in South Africa should not henceforth survive interstitially, in legislative crevices, to the extent that judges are both able and minded to secure that result. The right to administrative justice, as the recent Constitutional Court judgment in **Fedsure Life Ass Ltd v Greater Johannesburg TMC 1998 (12) BCLR 1458 (CC)** underscores, is now rooted in the Constitution itself. The latter builds in this regard on the interim Constitution which "has radically changed the setting within which administrative law operates in South Africa**" (para [32])**.

4.4 How that right is best now to be given effect, within the requirements and realities of South African society, is the challenge raised by this project.

CHAPTER 5

AN OVERVIEW OF THE DRAFT BILL

5.1 The draft Bill comprises six chapters.

5.2 The first chapter contains a list of definitions and a section dealing with the application of the Act. Following section 33 of the Constitution, the draft Bill works with the concept "administrative action", which is widely defined. The only exclusions are the actions of Parliament and the provincial legislatures and (following the Constitutional Court's decision in the **Fedsure** case) the local government functions listed in section 160(2) of the Constitution, namely the passing of by-laws, the approval of budgets, the imposition of rates and taxes and the raising of loans. Administrative action by natural or juristic persons contemplated in section 8(2) of the Constitution and exercising a public power or performing a public function (e.g. non-statutory bodies controlling national sports codes), is specifically included. (In what follows natural and juristic persons of this sort will be referred to as "section 8(2) persons").

5.3 Section 2 of the draft Bill provides that it applies to all "organs of state" (a term which bears the meaning ascribed to it in section 239 of the Constitution) and to all section 8(2) persons, and that the draft Bill prevails over the provisions of any other law other than the Constitution and any provincial Constitution.

5.4 The second chapter imposes a duty on all organs of state to give effect to the rights in section 33(1) and (2) of the Constitution (section 3 of the draft Bill, following section 33(3)(b) of the Constitution) and provides for the review of administrative action by the courts (sections 4 to 8, following section 33(3)(a) of the Constitution).

5.5 The draft Bill extends to the Magistrates' Courts the power of review. Until now, that power has been the preserve of the High Courts. Following the report by the South African Law Commission in November 1998 on the extension of constitutional jurisdiction to the Magistrates'

Courts (SALC Project 111), a consensus has emerged that Magistrates' Courts be authorised to review administrative action and not merely rule on the validity of administrative action (as the Commission had proposed).

5.6 In accordance with the requirement in section 33(3) of the Constitution that national legislation "be enacted to give effect to" the rights in section 33(1) and (2) of the Constitution, sections 4 and 5 lay down the grounds on which a court may review administrative action and the procedure for written reasons for administrative action, respectively.

5.7 Section 4 is a particularly important provision because it lays down, in a "closed list", the grounds on which courts must review administrative action. The section deals with the authorisation of the organ of state or section 8(2) person to take the administrative action (section 4(1)(a)), the procedure followed (section 4(1)(b) and (c)), the reasoning process leading to the administrative action (section 4(1)(d) and (e)) and the lawfulness, attributes and impact of the administrative action itself (section 4(1)(f)). In drafting the section the project committee has considered the wide range of materials on the codification of the grounds of judicial review of administrative action and, in particular, the discussion of this important question at the Cape Town and London workshops referred to above.

5.8 Section 5 lays down consecutive periods of 90 days during which a person adversely affected by administrative action may apply for written reasons and the organ of state or section 8(2) person must furnish those reasons. The section also provides remedies for non-compliance with the duty to furnish reasons.

5.9 Section 6 prescribes a period of 90 days during which proceedings for review must be instituted and makes provision for the adoption and implementation of new rules for applications for review. Until the new rules have been implemented, applications for review must be brought in the High Courts in terms of rule 53 of the Uniform Rules of Court.

5.10 Section 7 requires the courts in proceedings for review to grant appropriate relief, and then gives an "open list" of the remedies in proceedings for review. The aim of the list is to

structure the way in which reviewing courts approach the question of remedies.

5.11 Section 8 allows the parties (by agreement) and the courts (on application) to extend the 90-day periods during which reasons must be sought and supplied and proceedings for review may be instituted. In keeping with the Constitutional Court's decision in **Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC)**, the courts are given a wide discretion.

5.12 The third chapter of the draft Bill deals with the procedures in terms of which organs of state make "rules" and "standards". The chapter draws heavily on the pioneering work in this field in South Africa by Prof Lawrence Baxter and Justice Catherine O'Regan (their papers at the first Breakwater workshop are published in **1993 Acta Juridica**). It is to be noted that the chapter does not apply to section 8(2) persons.

5.13 "Rules" are defined in section 1 to mean statements designed to have the force of law, and include subordinate legislation. "Standards", by contrast, are defined to mean norms, guidelines, policies, general instructions or other similar statements about the way in which a public power or public function should be interpreted or exercised or performed.

5.14 Section 9 prescribes two types of registers of rules and standards, namely registers to be held and kept up to date by all organs of state regarding the rules and standards under their aegis and a central register to be held and kept up to date by the Administrative Review Council (established by chapter 5 of the draft Bill). The aim of these registers is to improve access to the many rules and standards made and administered by organs of state.

5.15 Sections 10 and 13 provide for the establishment of a Central Drafting Office within the Department of Justice, the main task of which will be to consider and approve the text of rules (but not standards) which organs of state intend making, to compile and establish protocols for the drafting of rules and standards and, in conjunction with the Administrative Review Council, to provide training to the drafters of rules and standards. The aim of these sections is to improve and standardise the drafting of rules and standards.

5.16 Section 11 lays down a notice-and-comment procedure for the making of rules which impose material burdens or disadvantages or confer material benefits on any person or group. Departures from the prescribed procedure are permitted in emergencies. Studies in other countries have shown that such a procedure, which has to be applied to only 10 to 20 per cent of rules, leads to fair, and better informed, administrative rule-making. One of the issues to be considered is whether the basic values and principles governing public administration set out in section 195(1)(e), (f) and (g) require that the notice-and-comment procedure be extended to the making of standards with a substantive impact, despite the costs and time-constraints involved.

5.17 Section 12 deals with the publication of rules. It provides, amongst other things, for the publication in newspapers of a concise description of the contents of a rule and a statement of the reasons for it.

5.18 Section 14 is designed to ensure that published rules and standards are up to date. The section contains two "sunsetting provisions". The first provides for the automatic lapsing of all rules and standards in force on the date of commencement of the draft Bill, five years after that date. The second compels all organs of state periodically to review the rules and standards under their aegis, by providing that all rules and standards made after the commencement of the draft Bill will be valid for at most 10 years and must reflect the date on which they will lapse.

5.19 Chapter 4 of the draft Bill lays down two special administrative procedures, namely public enquiries (section 15) and administrative investigations (section 16).

5.20 Public enquiries must be held by organs of state or section 8(2) persons which intend to take administrative action the object of which is to determine a matter of wide public interest and consequences and in respect of which they have a wide discretion. The aim is to ensure that those charged with taking administrative action of this sort (e.g. whether to build a new motorway and, if so, what route it is to follow) are as fully informed as possible as to the impact of the proposed action, the alternatives and the views of the persons, groups or communities affected. Public enquiries must be followed by a written report, including a statement of reasons for any administrative action taken or recommended.

5.21 Administrative investigations must be held whenever an organ of state is required to take administrative action the object of which is to determine the status, rights or duties of a person. An investigation need not be formal, but the organ of state or section 8(2) person must afford the person concerned proper notice and a proper opportunity to be heard. The reasons for the administrative action and details of any right of appeal and of the right to apply for review must also be given. In exceptional cases, investigations may be attenuated.

5.22 Chapter 5 establishes the Administrative Review Council and sets out the powers and functioning of the Council.

5.23 Section 17 sets out the composition of the Council, namely a Chairperson nominated by the Chief Justice; officials in the Department of Justice and Department for Public Service and Administration nominated by the relevant Ministers; the Public Protector or a member of his or her staff; and between three and nine other persons appointed by the President, after consultation with the National Council of Provinces.

5.24 Section 18 describes the general functions of the Council. These include investigating and reporting on review of administrative action and any improvements in the law, rules and standards for administrative action that might be made to ensure that it is efficient and conforms to the Constitution. The Council is also required to investigate the viability of independent review tribunals (a matter raised by section 33(3)(a) of the Constitution) and the efficacy of administrative appeals, including the possibility of specialised administrative appeals tribunals. Finally, the Council must initiate, conduct and co-ordinate programmes for educating the public at large and the members and employees of organs of state or section 8(2) persons regarding the contents of this Act and the provisions of the Constitution relevant to administrative action.

5.25 Sections 19 to 24 deal with the consequential matters arising from the establishment of the Council, such as the meetings, committees and staff of the Council, the engagement of persons to perform services in specific areas, and expenditure and reporting by the Council.

5.26 The sixth and final chapter of the draft Bill (which comprises section 25 only) provides

that the short title of the Act will be the Administrative Justice Act, 1999.

ANNEXURE A

DRAFT JUDICIAL REVIEW BILL, 1992

To provide for the extension of the grounds on which the decisions of certain organs may be reviewed, and for matters connected therewith.

To be introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

(i) "court" means a provincial or local division of the Supreme Court of South Africa;

(ii) "decision" means an administrative decision made by an organ in terms of any Act of Parliament, ordinance or any other subordinate or delegated legislation, but excludes a decision to prosecute any person in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), made by an Attorney-General or by a persons appointed or delegated by him to conduct a prosecution in criminal proceedings;

(iii) "organ" means the State President, a Minister, official, committee, council or any other person or body, excluding a court of law, that makes a decision.

Application for reasons for decision and review

2. (1) Notwithstanding the provisions of other law, but subject to subsection (3), any person who is aggrieved by or whose interests are affected by a decision made after the commencement of this Act by an organ may -

(a) within 90 days after having become aware of such decision, request in writing that such organ furnish reasons for the decision;

(b) at any time after the making of the decision but -

(i) if no reasons have been requested, within 90 days after having become aware of the decision; or

(ii) within 90 days after having been furnished with reasons or in the case of the refusal or failure by the organ to furnish reasons on request, within 90 days from the expiry of the period referred to in subsection (2),

apply to a court having jurisdiction for the review of the decision.

(2) An organ to which a request has been submitted in terms of subsection (1)(a) shall furnish the reasons in writing for the decision within 90 days after receipt of the request.

(3) A court having jurisdiction in the matter may grant leave to a person whose right to have a decision reviewed has expired, to institute review proceedings within a period fixed by the court if the court is satisfied that by reason of special circumstances the said person could not reasonably have been expected to comply with the relevant provisions of subsection (1) within the required period: Provided that no such leave shall be granted where a period of one year has expired after the date on which the said person became aware or should reasonably have become aware of the said decision.

Review

3. (1) Notwithstanding the provisions of any law, a court shall have the power to review a decision on any of the following grounds:

(a) That the relevant principles of natural justice have been breached in connection with the making of the decision;

(b) that a procedure or a condition required by law has not been complied with in the making of decision;

(c) that the organ which made the decision was not by law authorised to make the decision;

(d) that the decision was not authorised by the provisions of the law in terms of which it purports to have been made;

(e) that the decision was materially influenced by an error of law or fact;

(f) that no reasonable organ could have made the decision;

(g) that the decision was made for an ulterior motive or purpose;

(h) that the decision was otherwise contrary to law.

(2) If an organ fails to comply with the provisions of subsection (2) of section 2 it shall be presumed, in the absence of proof to the contrary, that such organ acted unreasonably within the ambit of subsection (1).

(3) The provisions of subsection (1) shall not be interpreted so as to restrict the jurisdiction of the court to review a decision of an organ in terms of any law or the

common law.

Short title

4. This Act shall be called the Judicial Review Act, 19... .

ANNEXURE B

DRAFT JUDICIAL REVIEW BILL, 1994

To provide for the extension of the grounds on which the decisions of certain organs may be reviewed, and for matters connected therewith.

To be introduced by the Minister of Justice

BE IT ENACTED by the President and the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

(i) "court" means a provincial or local division of the Supreme Court of South Africa or any other court which is granted jurisdiction by law to review administrative decisions;

(ii) "decision" means an administrative decision made after the commencement of this Act by an organ in terms of any Act of Parliament, ordinance or any other subordinate or delegated legislation;

(iii) "organ" means the President, a Minister, official, committee, council or any other person or body, excluding a court of law, that makes a decision.

Application for reasons for decision and review

2. (1) Notwithstanding the provisions of any other law, but subject to subsection (3), any person who is aggrieved by or whose rights, interests or legitimate expectations are affected or threatened by a decision, or any other person or association acting on behalf of or in the interest of such first-mentioned person, whether he or she be an individual or a member of an association or a member of a group or class of persons or, where the public interest is concerned, a member of the public, may-

(a) within 90 days after having become aware of a decision, request in writing that the organ furnish reasons for the decision;

(b) at any time after the making of the decision but-

(a) if no reasons have been requested, within 90 days after having become aware of the decision; or

(b) within 90 days after having been furnished with reasons or in the case of the refusal or failure by the organ to furnish reasons on request, within 90 days from the expiry of the period referred to in subsection (2),

apply to a court having jurisdiction for the review of the decision.

(2) An organ to which a request has been submitted in terms of subsection (1)(a) shall furnish the reasons in writing for the decision within 90 days after receipt of the request.

(3) A court having jurisdiction in the matter may grant leave to a person whose right to have a decision reviewed has expired, to institute review proceedings within a period fixed by the court if the court is satisfied that by reason of special circumstances the said person could not reasonably have been expected to comply with the relevant provisions

of subsection (1) within the required period: Provided that no such leave shall be granted where a period of one year has expired after the date on which the said person became aware or should reasonably have become aware of the said decision.

Review

3. (1) Notwithstanding the provisions of any law, a court shall have the power to review a decision on any of the following grounds:

(a) That the relevant principles of natural justice have been breached in connection with the making of the decision;

(b) that a procedure or a condition required by law has not been complied with in the making of the decision;

(c) that the organ which made the decision was not by law authorised to make the decision;

(d) that the decisions was not authorised by the provisions of the law in terms of which it purports to have been made;

(e) that the decision was materially influenced by an error of law or fact;

(f) that no reasonable organ could have made the decision;

(g) that the decision was made for an ulterior motive or purpose;

(h) that the decision is not justifiable in relation to the reasons given for it;

(i) that the decision was otherwise contrary to law.

(2) If an organ fails to comply with the provisions of subsection (2) of section 2 it shall be presumed, in the absence of proof to the contrary, that such organ acted unreasonably within the ambit of subsection (1).

(3) The provisions of subsection (1) shall not be interpreted so as to restrict the jurisdiction of the court to review a decision of an organ in terms of any law or the common law.

Short title

4. This Act shall be called the Judicial Review Act, 19... .

ANNEXURE C

SECTION 33 AND ITEM 23 OF SCHEDULE 6 TO THE CONSTITUTION, 1996

33 Just administrative action

(1) Everyone has the right to administrative action that 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 subsections (1) and (2); and

(c) promote an efficient administration.

23 Bill of Rights

(1) National legislation envisaged in sections 9 (4), 32 (2) and 33 (3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32 (2) and 33 (3) of the new Constitution is enacted-

(a) ...; and

(b) section 33 (1) and (2) must be regarded to read as follows:
'Every person has the right to-

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

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

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'.

(3) Sections 32 (2) and 33 (3) of the new Constitution lapse if the legislation envisaged in those sections, respectively, is not enacted within three years of the date the new Constitution took effect.

ANNEXURE D

CORDER "ADMINISTRATIVE JUSTICE IN THE FINAL CONSTITUTION"
(1997) 13 SAJHR 28

ADMINISTRATIVE JUSTICE IN THE FINAL CONSTITUTION*

HUGH CORDER**

Some of those who had argued for the inclusion of basic administrative law precepts as 'fundamental rights' in the interim Constitution,l and whose arguments had prevailed (albeit in rather a complicated formulation), wondered warily whether such elevated status would survive in the final constitutional text. Their concern centered on the requirement of Constitutional Principle II, which stated that 'universally accepted' fundamental rights should be included in the final Constitution. 3 It could certainly not be argued that rights to administrative justice enjoy constitutional protection 'universally', though of course their inclusion in the interim Constitution enhanced their chance of surviving into the final Bill of Rights. In the event, the basic rights remain secure, although in a rather peculiar shape 4 - on the surface, much plainer and more

* This article is based substantially on the text of a paper delivered at a Symposium on the Final Bill of Rights, held at the University of South Africa on 21 August 1996, the proceedings of which will be published as South Africa in Transition: Focus on the Bill of Rights shortly. I acknowledge with thanks the permission of the organiser of that event, Professor Yvonne Burns, to use that material as the basis of this article.

** BCom LLB (Cape Town) LLB (Cantab) DPhil (Oxon) Professor of Public Law, University of Cape Town.

1 Among whose number the author must be counted.

2 The text of the Constitution of the Republic of South Africa Act 200 of 1993, s 24, reads as follows:

'Every person shall have the right to -

1. lawful administrative action where any of his or her rights or interests is affected or threatened;
2. procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
3. be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
4. administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

3 lbid, Schedule 4.

4 The text of the Constitution of the Republic of South Africa Act 106 of 1996, s 33 reads as follows:

'(1) Everyone has the right to administrative action that 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.

(ii 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 subsections (1) and (2); and

(c) promote an efficient administration.'

generous language is used, but the sub-text contains many questions as will be seen. The controversial nature of the negotiations and formulation of these rights bears witness to their already common use in the practice of law and their undoubted effectiveness in securing elements of fairness and openness in bureaucratic practice.

This article seeks to set out the background to the drafting of s 33, to speculate a little as to its meaning, and to offer some thoughts on its consequences for the future development and shape of administrative law in South Africa. It is salutary to start by looking back, the more fully to appreciate the remarkable progress which has already been made in reforming this part of the law, before pondering the options which lie ahead. In doing so, we should bear in mind the admonition of the prominent German jurist, Otto Mayer, that 'constitutional law passes away, administrative law remains'.6 The ultimate objective is an efficient, accountable and just administration at all levels of government.

A THE BACKGROUND

The notion that administrative justice could be achieved through administrative law was a particularly far-fetched one in South Africa until very recently. Two studies published in the mid-1980s chose to describe our administrative law as a 'dismal science 7 which had signally failed to curb the development of an autocratic executive as the chief means of expressing public power.8 This sad state of affairs was partly to be ascribed to an inability to escape the strictures of the Diceyan origins of the discipline,9 but more particularly the outcome of being a discipline which is almost entirely judge-developed. Judicial policy over the decades, after early suspicion of the excessive transfer of discretion by Parliament to the executive's acquiesced in this process in the face of the two-pronged onslaught on civil liberties since the 1940s. It is notorious that substantial degrees of discretion in administrative hands were vital to implement racial discrimination (segregation and apartheid) in the socioeconomic sphere, and to suppress popular resistance to such measures through

5 In particular, the continued life of s 24 of the interim Constitution and the shape of the legislation which is required to be adopted within three years. See the discussion of Schedule 6, item'23 in the 1996 Constitution below.

6 *Deutsches Verwaltungstrecht* 3 ed Vol 1, Foreword.

7 W H B Dean 'Our Administrative Law: A Dismal Science?' (1986) 2 *SAJHR 164.*

8 Hugh Corder 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa (1989) *5 SAJHR 1.*

9 As our administrative law - despite the pioneering works of Marinus Wiechers in the 1960s and 1970s - has, remained, for practical purposes, Anglocentric, but in a time warp, having largely failed to incorporate the beneficial judge-made reforms which have so characterised the administrative lawkf England since the 1960s.

10 See the comments", for example, of Innes ACJ in *Shidiack v UG* 1912 AD 642 at 653.

security laws'. 11 It is now equally well established that the judicial record was overwhelmingly executive-minded, with the occasional decision serving as a reminder of the feasibility of an alternative approach.12

The bleakness of the past was not absolute, however, as it in turn gave rise to a strong desire to put in place constitutional guarantees that such a situation should not occur again. The significant participants in the Multi-Party Negotiating Process in 1993 thus proposed the entrenchment of a right to administrative justice,' 13 even if it was only in the form of the elevation to constitutional status of the rules of natural justice and the guarantee of access to the courts. 14 Such rights lie at the heart of the administrative-justice enterprise, and the drafters of the Namibian Constitution *15* had made the running in this respect.

The gloomy past of our administrative law in its 'common law' form had also begun to show signs of regeneration and adaptation to changed circumstances. It was as though the extreme executive-mindedness of the Appellate Division in the early State of Emergency decisions 16 inspired those judges in that Division17 who disliked this approach to embark on this process of renewal, in cases such as *Blom,* 18 *Traub,19 Sibiya,*20 Hira,21 and *SA Roads Board.* 22

The Kempton Park negotiations around administrative justice became hotly-contested, however, chiefly because such rights were seen as having a potentially inhibitory effect on the ability of the transitional government meaningfully to pursue its policy of reconstruction and development. Thus

11 Authoritative accounts of this process from a civil rights perspective are to be found in C J R Dugard *Human Rights and the South African Legal Order* (1978) and A S Mathews *Freedom, State Security and the Rule of Law* (1986).

12 See C F Forsyth *In Dangerfor their Talents* (1985) and Stephen Ellmann *In a Time of Trouble* (1992).

13 See the fullness of such a proposed right in the ANC's *Draft Bill of Rights* (Preliminary Revised Version) of February 1993, Art 2(26), and the Democratic Party's *Freedom under the Rule of Law: Advancing Liberty in the New South Africa* of May 1993, Art 14. The text of both of these and those proposals referred to in note 14 is reproduced in Hugh Corder 'Administrative Justice' in Van Wyk et al (eds) *Rights and Constitutionalism* (1994) at 390-5. 14 The SA Law Commission's *Interim Report on Group and Human Rights* of November 1991, Arts 31 and 32, and the South African Government (National Party) *Charter of Rights of* February 1993, Arts 28 and 29.

15 Of 1990, Art 18, the text of which reads:
Administrative Justice
Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

16 See the analysis by Stephen Ellmann op cit note 12.

17 Which is not to say that some judges in the Provincial Divisions did not follow suit, or had never adhered to such an executive-minded approach.

18 Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A).

19 *Admintistrator, Transvaal v Traub* 1989 (4) SA 731 (A).

20 *Adtninistrator, Natal v Sibiya* 1992 (4) SA 532 (A).

21 *Hira v Booysen, NO* 1992 (4) SA 69 (A).

22 *SA Roads Board v Johannesburg City Council* 1991 (4) SA I (A).

the relatively convoluted formulations of s 24 of the interim Constitution, with its several thresholds and remedies. (Judging by its unimaginative and restrictive application to date by the courts, 21 however, it seems that the politicians were needlessly concerned.) Similar kinds of discussions preceded the drafting of the proposed s 33 of the final Constitution (of which more below), resulting in the compromise solution of granting wider rights, but suspending their operation effectively until limited and given practical effect in national legislation.

All this occurs in a changed atmosphere, a short period in our history in which democracy has been put at the forefront of all legislative developments. For administrative law and justice, the salient aspects of this brand of the democratic ideal are its emphasis on participation and 24 accountability, both of which depend on openness of process.24

Against this background, let us look in some detail at what s 33 provides, at what comparative jurisdictions have achieved in the sphere of statutory codification of administrative law, and then draw some brief conclusions.

B THE DRAFTING OF SECTION 33 OF THE FINAL CONSTITUTION AND SOME THOUGHTS ON ITS MEANING

The most obvious superficial difference between the interim and final Constitutions is to be seen at the outset, for s 33 is headed by the phrase 'Just Administrative Action'. This is clearly an attempt to further the laudable objective of 'plain language', but it is doubtful whether this choice of words will be any more understandable to the general public than the 'Administrative Justice' of the transitional right. Indeed, the ambiguity inherent in the word 'just' might only serve to confuse. Plain language aside, ss 33(l) and 33(2) effectively replicate what is contained in s 24 of the interim Constitution, except that the various thresholds have more or less been done away with so that the rights are cast much25 more widely. In principle, it seems that s 33(l) grants its benefits much more generously, in that *everyone* is entitled to the rights contained therein, whereas the interim Constitution referred to every person whose26 rights, legitimate expectations or interests were affected or threatened.26 Section 33(2), however, grants the right to obtain written reasons for

23 See, for example, *Xu and Tsang v Minister van Binnelandse Sake 1995* (1) SA 185 (T) and *Bernstein v Bester* 1996 (2) SA 751 (CC) at 799-805. But for a sympathetic interpretation, see *Vdn Huysteen v Ministerfor Environmental Affairs 1996* (1) SA 283 (C). 24 See the prescient piece by Etienne Mureinik 'Reconsidering Review: Participation and Accountability' 1993 *Acta Juridica* 35. It oes without saying that Professor Mureinik's contribution to debates around administrative law and justice was immense, and that his tragic death in mid-1996 has.robbed the field of one of its foremost exponents.

25 So there is no longer reference to 'rights, legitimate expectations or interests' as qualifications for the availability of the remedies: the rights in the final Constitution are accorded to I everyone' without restriction, except naturally through the operation of the general limitation clause, s 36 of the 1996 Constitution.

26 Or combination of these terms: see s 24(a), (b) and (d).

administrative action more narrowly than does s 24(c) under the final Constitution, for it states that everyone whose *rights are adversely affected* by administrative action is entitled to those written reasons (whereas s 24(c) affords this right also to those whose 'interests' are affected and no proof of 'adverse' effect is required).

On the face of it, therefore, ss 33(l) and (2) appear respectively to widen and narrow the remedies available under the interim regime, with the overall effect of simplifying the circumstances in which the protection can be sought. But that is not the complete story. For s 33(3), of course, provides for the enactment of national legislation to give effect to these rights. The general result of the inclusion of s 33(3) is to sanction a restrictive standard for the drafting of an 'Administrative Justice Act' (which will inevitably amount to a limitation of the generous grant of these rights in s 33). This attenuation may be quite severe because the reference to 'the promotion of an efficient administration' in s 33(3)(c) allows this factor to be taken into account in the limitation process in addition to those (such as reasonableness, justifiability, openness, democracy and so on) which would normally apply in terms of the general limitation clause in s 36. One might ask whether the strictures placed on the state administration by the duties entailed in s 33 do not by definition tend to foster efficiency and therefore why it **is** necessary even to include clause (c). The motivation for its inclusion will become clear presently, however.

Section 33(3), read together with item 23 in Schedule 6 of the final Constitution, prescribes that Parliament has three years to enact the legislation referred to, after which it will naturally be entitled to enact legislation to limit the right, but the special circumstances of such enactment which are provided for in s 33(3) will fall away, and the only test for the constitutionality of such restrictions will be that contained in s 36. Until then, item 23 further provides that s 33 of the final Constitution is to be interpreted by the courts as if it was cast in the language of s 24 of the interim Constitution. In principle, if no legislation is enacted within the three-year period, the terms of s 33(l) and (2) will apply in full thereafter. That, at least, is an exposition of what seems to be the situation created by the adoption of s 33.

What lies behind this rather convoluted way of describing the finalisation of the pioneering adoption of the right to administrative justice in the interim Constitution? In the drafting of this provision, there was clear concern among the ranks of the African National Congress negotiators about the workability of s 24, particularly in terms of the burden which it appears to cast on the administration to be accountable for their actions. It seemed as though practices which had developed over past decades were.-not able to accommodate the new demands of openness and justifiability. It is a commonplace that s 24, often in combination with the access to information rights granted in s 23, has been very widely used in practice in'order to gain access to information in the hands of the State

and reasons for administrative action taken by government at all its levels, but perhaps particularly at the level of local authorities.

The negotiators who had been in government for two years were of the view that the demands of compliance with this right were placing such strains on the public administration that the right ought to be removed[27] altogether. Indeed, at a seminar held in Parliament,[27] where a range of non-governmental organisations (NGOS) expressed their concern about the possible demise of the right, the representatives of the ANC appeared to be relatively strongly in favour of substituting the right with mere reference in the Bill of Rights to national legislation which ought to be adopted along the lines suggested.

The compromise solution now casts the right in slightly more generous and simplified terms, but endeavours to suspend its enforcement prior to the adoption of national legislation. It would be foolish to deny that s 24 (and all the more s 33) cries out for legislation of the type contemplated, an argument acknowledged by most South African commentators and strongly propagated by a leading American administrative lawyer, Professor Michael Asimow, in an article written after a visit to this country in mid-1995,[28] but the removal of the right altogether would inevitably have been perceived as a lessening of the importance of the goals of administrative justice.

That by way of background to the drafting of s 33. Now we must pay some attention to the meaning to be given to the intentions of the drafters, the crux of which seems to be locked up in the words 'must give effect to' (ie that national legislation *must give effect to* the bundle of rights in ss 33(l) and (2)). It is clear from the above description of events that those who favoured its circumscription intended the words 'must give effect to' to mean that the rights contained in s 33(l) and 33(2) were in effect suspended and would have no practical effect without such legislation. This approach to the interpretation of the words is borne out by the provision in item 23 of Schedule 6, to the effect that the meaning of s 24 of the interim Constitution will continue to be applied by the courts despite the adoption of ss 33(l) and (2) until national legislation is enacted.

The alternative meaning, naturally, is that the rights contained in ss 33(l) and (2) exist and will be able to be relied upon, and that the national legislation referred to merely makes the practical implementation of those rights easier and more effective; in other words, that the national legislation provides the procedures, the statutory mechanisms, the tribunals and

27 On 19 February 1996, which focused on the right to administrative justice, and was convened by the Bla'dk Sash.

28 See 'Administrative Law under South Africa's Interim Constitution' (1996) 44 *American Journal of Comparative Law* 201. Asimow's concern is well-founded within the context of the over-legalisation and stultification of American administrative law during the **f'ifty-year** life span of the Administrative Procedure Act. Whether this argument holds good for South African needs and circumstances is another matter.

so on which are necessary to give concrete effect to those rights. The national legislation will also have the very useful role of providing detailed guidance to public administrators as to when they have to comply with their duties under this section, and how they must do so.

It seems to me that the latter explanation is preferable; although the outcome may be similar, the starting point of analysis differs significantly. If indeed the former interpretation is to be adopted, it will mean that there are at least two types of rights contained within the f'inal Bill of Rights: those rights which are full rights immediately able to be invoked (or self-executing) and those rights which are nascent, or almost-rights, these being the rights of access to information, which are similarly dependent upon the enactment of national legislation,[29] and the right to just administrative action. Such an approach would open the door for the courts to find that there are hierarchies of rights within the Bill of Rights, and the next logical category of rights to run the danger of not being regarded as full rights would be the socioeconomic rights.[30]

A further reason for adopting the second interpretation of the words must give effect to' is that the right to 'administrative justice' appears in the interim Bill of Rights, and Constitutional Principle 11 in the 1993 Constitution requires the final Bill of Rights to be drafted 'with due consideration' for those rights contained in the current Bill. If indeed the effect of s 33(3) is to take away the quality of 'right' from its provisions by making its enforcement conditional upon the enactment of legislation, one is in effect detracting from the guarantees provided for in the interim Constitution, which might be deemed to make that aspect of the Bill of Rights non-certifiable by the Constitutional Court. This was indeed argued in relation to the right of access to information, by reference in addition to Constitutional Principle IX, which provides for openness in government and access to information. Counsel for the Legal Resources Centre argued that, if one takes the interpretation that the right of access to information in s 32 does not exist unless and until there is legislation, one is in effect not giving expression to Constitutional Principle IX, and that therefore s 32 in the final Constitution is non-certifiable. [31]

With this discussion of the background to the enactment of s 33 as an aid to understanding its provisions, let us move to consider,the options

29 See s 32 of the final Constitution, similarly read with item 23 in Schedule 6.

30 Particularly those in ss 26 (housing) and 27 (health care, food, water and social security) which would not be a consequence which would please the drafters of the majority party.

31 In the result, the Constitutional Court has rejected this argument and has implicitly preferred the first interpretation of the section outlined above - see *Ex Parte Chairperson of the Constitutioqal Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (4) SA 744 (CC) at 82-87, in the course of which the Court indicated its concern that the three-year period was perhaps too long, but also acknowledged that the right of access to information was not a 'universally accepted fundamental right', a finding which would presumably apply in like measure to the right to administrative justice.

for the 'national legislation' contemplated. The prospect of having an Administrative Justice Act (AJA) within three years are almost guaranteed by item 23 in Schedule 6. Its mere existence, however, is not so important as what rights, duties, mechanisms and procedures it establishes in order to 'give effect to' the constitutional rights.

C THE CODIFICATION OF ADMINISTRATIVE LAW IN COMPARATIVE PERSPECTIVE

In contemplating the drafting of such a statute, it is helpful to consider the experience of appropriate foreign comparators, always bearing in mind the relatively peculiar antecedents and needs of our own legal system. So we can take note of the main features of the *statutory regula*tion of administrative law in the following legal systems (in no necessary order of importance).

I Australia

Australia provides a very significant model, sharing as it does the same parent legal system and judicial traditions. More importantly, however, Australia is the site of the most deliberate and systematic reform of its administrative law in the British Commonwealth. This process began in the early 1970s and is much too complex a revolution to describe here in any detail.[32] Suffice it to say that, after exhaustive investigation by government-appointed commissions of inquiry, the Federal Parliament adopted a series of statutes over a number of years which has effectively codified the main features of the entire edifice of administrative justice, without removing the capacity of the courts to exercise review jurisdiction. This process has been repeated in differing degrees in most of the[33] constituent states of Australia.

The year of enactment and short title of the major pieces of legislation give a flavour of the magnitude and creativity of the 'new administrative law' of Australia:

1975	Administrative Appeals Tribunal Act and Racial Discrimination Act
1976	Ombudsman Act and Federal Court of Australia Act
1977	Administrative Decisions (Judicial Review) Act
1982	Freedom of Information Act

32 Two outstanding academic works which can be consulted are Margaret Allars *Introduction to Australian Administrative Law* (1990) and Mark Aronson and Nicola Franklin *Review of Administrative* Addition *(1987).*

33 While Victoria and New South Wales led the way in this regard, the most thorough-going reforms have been adopted by Queensland, with the extensive preparatory work being done by the Electoral and Administrative Review Commission.

1984 Sex Discrimination Act
1986 Human Rights and Equal Opportunity Commission Act
1988 Privacy Act

Three features of these Acts must be spelled out: the establishment of appeals tribunals recognises and attempts to remedy the difficulties created by a rigid adherence to the appeal v review distinction so characteristic of English-based administrative law; the grounds of judicial review well known in our law are codified, but in an open-ended fashion, there being a provision that a court may intervene where the administrative decision 'was otherwise contrary to law'; [34] and the state of administrative justice is under constant investigation and review, undertaken by an official body, the Administrative Review Council,*35* which reports its findings regularly to Parliament and suggests further reforms.

Although the Australian approach has its critics, both within that country [36] and abroad,[37] the boldness and comprehensiveness of the undertaking deserve close examination, and might be well suited to South African conditions at this time.

2 Europe (except the United Kin dom)

The members of the European Union are fairly clearly divided between those who have committed many of their rules of administrative law and procedure to statute, and those who rely mainly on 'due process' provisions in their Constitutions and the development of the law through judgments of the courts. [38] In the latter category, one finds France, Italy, Belgium, Greece, Ireland, Luxembourg and Portugal. Among the former, Germany, Denmark, the Netherlands and Spain each provides an interesting model.

a Germany

Central to the administrative justice regime in Germany is the Law relating to Federal Administrative Procedure [39] and similar statutes in

34 See s 5(1)0) of the AD(JR) Act of 1977.
35 Set up in terms of the AAT Act of 1975, Part V. 36 See, for example, William De Maria 'Exposing the AAT's Private Parts' (1991) 16 *Legal Services Bulletin 10,* and the report of the proceedings of a seminar held to review the first decade of the reformed system: *Administrative Law - Retrospect and Prospect* Canberra Bulletin of Public Administration (1989).
37 The Law Reform Commission of Canada decided not to follow Australia's lead when considering the reform of its own administrative law. See *Towards a Modern Federal Administrative Law* (1987).
38 The information in this part is drawn largely from the outstanding *European Administrative . Law* (1992) by Jurgen Schwarze, from which further details can be gleaned.
39 The *Verwaltungsverfahrengesetz des Bundes* of 25 May 1976.

the Länder. [40] These laws [41] systematise and simplify the administrative law within their jurisdictions, and often provide for popular participation in the administrative process. A separate system of administrative courts exists in Germany, the current form of which was established in 1960. [42]

b Denmark

On 19 December 1985, the Danish system of administrative procedural law was extensively codified in two Laws. The Law on Public Administration sets out the rights of citizens to receive fair and impartial treatment from the administration, and the duties of the administrators in such process, including the giving of reasons and the observance of confidentiality. The Law on the Public Character of the Administration guarantees the right of citizens to consult the records of public authorities - indeed, openness of process is a much-emphasized feature of Danish administrative law. [43]

c The Netherlands

Until early this year, review of administrative decisions before the Raad van State was regulated by the Wet AROB. [44] This specified four grounds of review: the infringement of a generally-applicable provision; improper purpose; inequitable decision-making in the light of all interests; and the contravention of a basic notion of proper administration entrenched in the general legal consciousness. [45] This code is in the process of being replaced by the Algemene Wet Bestuursrecht of 16 February 1996, which endeavours comprehensively to regulate the administrative process and opportunities for its review.

d Spain

The Spanish Law Relating to Administrative Procedures, like its German counterpart but pre-dating it by some years, [46] standardises and simplifies procedures and improves popular participation in the administration. It

40 Mostly enacted in 1976 and 1977.

41 The impetus for which arose in a German Lawyers' Conference in 1960 - it is hoped that the process of reform will proceed more speedily in South Africa!

42 For a very brief but easily accessible overview of German administrative law, see Wilhelm Rapp 'Report on administrative law and judicial review of administrative decisions in Germany' in Hugh Corder and Fiona McLennan (eds) *Controlling Public Polver (I* 995) at 216-20.

43 See Schwarze op cit note 38, especially at 163-4.

44 The law on 'administratieve rechtspraak overheidsbeschikkingen' of I May 1975.

45 See Schwarze op cit note 38 at 189-91.

46 The *Ley de Procedimiento Administrativo* was adopted on 17 July 1958.

goes further, however, in its attempt also to encompass the substantive rules of administrative law.47

3 The United Kingdom

The judge-made nature of English administrative law is well known to most South African lawyers. While the activities of a vast range of administrative tribunals and inquiries are regulated by statute,48 leading to some uniformity of process, establishing mechanisms for the appointment of members, stipulating powers for appeal and review and imposing a general duty to give reasons for their decisions, the grounds of review are not generally codified. 49 We would do well to take note of the essential qualities sought for the administrative process by the Franks Committee, whose work preceded the adoption of this Act, being 'openness, fairness and impartiality', to which have been added subsequently 'efficiency, expedition and economy' - perhaps these are the values which ought to guide the drafting of the national legislation required in South Africa. Procedural reforms in 1981 produced a uniform 'application for judicial review''O in place of the obscure complexity of the royal prerogative writs, a step which itself threw up problems on interpretation by the courts. *51*

4 Canada

While there has been no general initiative at federal level, such as in Australia, to reform the whole of administrative law and procedure, 52 several Canadian provinces have attempted to codify this area of law. The most significant is that of Ontario, whose original Statutory Powers Procedure Act was the product of the McRuer Commission of 1968-1971. The most recent consolidation of this Act 53 contains important and detailed provisions defining its scope and applicability,54 requiring specific procedures such as pre-trial conferences, *55* public hearings, 56 the admissibility of evidence, 57 and so on. Elsewhere, the province of Alberta has had an Administrative Procedures Act 58 since 1966, and Quebec

47 See Schwarze op cit note 38 at 201-2.
48 The Tribunals and Inquiries Act of 1992, successor to the Act of the same name of 1958.
49 For an excellent recent treatment of English administrative law see De Smith, Woolf and *Jowell Judicial Review of Administrative Action 5* ed (1995).
50 Under Order 53 of the Supreme Court. 51 *See O'Reilly v Mackman* [1983] 2 AC 237.
52 See note 37 above, and the leading text-book, Evans, Janisch, Mullan and Risk *Administrative Law:.Cases, Text and Materials* 4 ed (1995).
53 RSO 1990, Ontario.
54 Sections I aid 3.
55 Section 5.3.
56 Section 9.
57 Section 15.
58 See Evans et al op cit note 52 at 220-37.

reached the stage of tabling 'An Act Respecting Administrative Justice' in 1993, but this now appears unlikely to be pursued.[59]

5 The United States of America

The USA provides probably the earliest and most comprehensively codified treatment of administrative law in the English-speaking world. The code originated from a much-expressed need properly to regulate the large measures of discretion granted to administrators in the socio-economic sphere, following on the steps taken by government to confront the demands placed on it by severe economic depression and the Second World War. The Administrative Procedure Act of 1946 [60] has the following main structural components:

(d) a definitions section, including details regarding which agencies are not bound by its terms;
- requirements for administrative rule making;
- details of the duties of administrators exercising an adjudicative function;
- requirements for fair hearings;

5. the scope and content of a process of judicial review of administrative action ('a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof'); [61] and
6. the appointment and service conditions of administrative law judges.

This legal regime is amplified by statutes whose objective is 'open government', [62] as well as a Model Administrative Procedure Act for the States, of 1981, and any number of such Acts in the States. The extent and detail of such regulation has, however, become too complex and cumbersome over time, inducing Congress to attempt to address the difficulties in two further statutes, the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, both of 1990. [63]

The tendency to over-regulation or over-elaboration ought to be guarded against, and this much and more of great value can be gained from the American experience. To this end, the direct and sensitive application by a leading administrative-law reformer [64] of American principles and practices to the South African situation will be of great

59 Ibid at 241.
60 5 USC, Chapter 5.
61 Section 702.
62 Especially the Freedom of Information Act (s 552) and the Government in the Sunshine Act (s 552b).
63 Public Law 10IT552, 104 Stat 2736 and Public Law 101-648, 104 Stat 4969 respectively.
64 See M Asimow op cit note 28, as well as a further article by the same author: 'Administrative Law under South Africa's Final Constitution: The Need for an Administrative Justice Act' (1996) 113 *SALJ 613.*

assistance in drafting our own legislation. In this regard, we should note the main elements of such a statute proposed by Asimow: the creation of several different administrative adjudicatory models (full-scale formal, informal or conference and summary procedures); rules for public participation in rule-making; and the scope and content of judicial review of administrative action. [65]

6 South Asia and Africa

British Commonwealth jurisdictions [66] in these continents add little to the trends surveyed above, apart from India's establishment of a Central Administrative Tribunal, [67] the important role played by constitutional provisions in its administrative law, [68] and the judicially-crafted liberalisation of the rules relating to standing to sue. [69] In language reminiscent of AV Dicey's eulogy to the rule of law, [70] Krishna lyer J said:[71]

> '. . . [L]ittle Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy.'

7 South Africa

Recent years have provided some proposals for statutory regulation of our administrative law, chief among them the Law Commission's significant 'Investigation into the Courts' powers of review of administrative acts'. [72] Although limited in scope, because it deals only with the Supreme Court's power of judicial review, the proposed Judicial Review Act represents the first formal attempt to codify the grounds of review, to provide for the circumstances in which reasons must be given for administrative decisions, and to define key terms. [73] The list of grounds on which judicial review can proceed reads very much like the Australian Administrative Decisions,(Judicial Review) ACt[74] adapted to the provisions of s 24 of the interim Constitution.

65 Asimow, ibid at 35-39 of the typescript.
66 Such as Malaysia, Singapore, Sri Lanka, Nigeria, Kenya and Malawi.
67 In terms of the Administrative Tribunals Act of 1985.
68 The Constitution of 1947, Arts 32, 226 and 227.
69 Pioneered by Bhagwati CJ in, for example, *National Textile Workers Union v P R Ramakrishnan* AIR 1983 SC 75.
70 See *The Law of the Constitution* (1985) at 199-200. 71 In *ABSK Sangh (Rly) v India* AIR 1981 SC 298 at 317. 72 A working paper in this project (No 24) was published in 1986, and the Report appeared in November 1992. Subsequent to the coming into force of the 1993 Constitution, the Minister of Justice req.4sted the Commission to review its Report in the light of that Constitution (Act 200 of 1993) and particularly s 24. The Commission's recommendations are contained in a *Supplementary Report* of October 1994.
73 See clauses 3, 2 and I respectively, at 24, 23 and 22 of the Supplementary Report.
74 See note 34.

On the academic front, two important workshops have been held in Cape Town with the focus on administrative law reform. 75 Among the papers published after the first of these events,76 two are particularly germane to the present discussion. On the subject of rule-making by administrative agencies, both O'Regan 77 and Baxter 78 provide detailed and well-substantiated agendas for reform. Among the necessary features of a future system mentioned by O'Regan 79 are the following: a central drafting office; periodical review of subordinate legislation; a national register of subordinate legislation; legislative scrutiny of administrative rule-making; interest-group representation on rule-making institutions; a process for public consultation (including notice and comment procedures and public inquiries); and proper scope for judicial review of administrative rule-making.

Baxter concludes with a somewhat prescient comment,80 which we would do well to heed:

> 'Moreover, the system should be built into the new constitutional framework of government at the outset, *before the tradition of bureaucratic andpolitical arrogance and complacency - so long a part of South Africa's history - has an opportunity to re-assert itself.'*

D PROSPECTS AND PROPOSALS

Work on drafting an Administrative Justice Act (AJA) for South Africa must begin. Just as the Bill of Rights is described in the final Constitution as a 'cornerstone of democracy', 81 so it is submitted that s 33 as 'realised' by a future AJA constitutes another of such cornerstones, because it fosters participation in and accountability of executive government at all levels. At the same time, we must guard against exaggerating the importance of an AJA, as it necessarily remains a secondary means of achieving democratic practices - democratic accountability through the elected legislature remains the chief channel of regulation.

South African reality influences the legislative-drafting exercise in several important ways. We should be wary of overburdening the administrative and judicial systems, of too much emphasis on formal procedures, and of the costs (both financial and in terms of skills) associated with

75 'Administrative Law for a future South Africa' in February 1993, and 'Controlling Public Power in Southern Africa' in March 1996.

76 See 1993 *Acta Juridica,* also published as *Administrative Lait? Reform* (1993), and Corder and McLennan op cit note 42.

77 See Catherine O'Regan 'Rules for Rule-Making: Administrative Law and Subordinate Legislation *1993 Acta Juridica* at 168-75.

78 See Lawrence Baxter 'Rule-making and Policy Formulation in South African Administrativelaw Reform' 199Y, *Acta Juridica* at 184-96.

79 O'Regan loc cit.

80 Op cit at 196, emphasis in the original.

81 See the text as adopted by the Constitutional Assembly on 8 May 1996 at clause 7(l).

such stipulated procedures. A particular issue which needs to be addressed is whether an oral or a written process should be preferred, in the light of the high levels of illiteracy among the population at present. Any such legislation should aim for maximum levels of the following qualities: rationality, fairness, accessibility, affordability, responsiveness and efficiency. I suggest that the draft AJA incorporate the following five essential features:

I Definitions

Key terms, such as 'administrative action', 'agency', 'administration', 6 6 -making', 'adjudication', 'lawful', executive action', 'acts of State" rule and 'reasonable', must be defined. In the process, certain areas of government activity must be excluded from the ambit of the Act (such as Parliament, the courts and the military).

2 Rules for Rule-making

Along the lines set out by O'Regan, [82] provision should be made for general notice of intended subordinate legislation to be given in the Government Gazette; a time and place for a public hearing; exceptional circumstances; written and oral participation in the rule-making process; and the giving of reasons for the chosen alternative.

3 Rules for Adjudication

Following Asimow, [83] and as the importance of the rights at stake declines, provision should be made for different types of hearings before the taking of administrative decisions, from full-scale formal, to informal, to summary process. Procedural fairness and statements of reasons for action must be essential features of any adjudicative process, and the following further issues must be resolved: the giving of notice; the submission of evidence and arguments; the role of legal counsel; the appointment, qualities and conduct of presiding officials; the burden of proof, recording the process; and special rules for licensing.

4 Circumstances of Judicial Review

Alternative forms of review (courts or tribunals) and their essential qualities (such as independence and impartiality) must be spelled out, including the possible appointment and conditions of service of administrative law 'judges'. The grounds of review and procedural requirements (such as standing and justiciability) must be defined.

82 See text at note 79.

83 See the articles referred to at note 64.

5 Continuous review

Finally, provision should be made for the establishment and function of a small but influential research and review secretariat, such as the Administrative Review Council in Australia, [84] hose chief purpose would be constant oversight of the administrative process and recommendations for its improvement.

Much depends on the successful completion of this project. The product must comply with the demands of s 33 as a whole, and s 36 of the final Constitution. At the same time, the judge-made character of South African administrative law should be treated with some care, so as to strike a balance between too much rigid prescription and too little guidance by way of principle in the statute. It is clear that the situation produced by current circumstances represents a wonderful opportunity for creative modernisation and progress in the field. Having said this, it is wise always to bear in mind the inherent limitations of the judicial process, and the need to allow the executive to lead in the formulation of policy and the exercise of discretion - in other words, preserving a basic distinction between form and substance. Lest this seem a diminution of the potential of the undertaking, we should take comfort from and be guided by Felix Frankfurter's assertion [85] that: 'The history of liberty has largely been the history of the observance of procedural safeguards'.

84 As referred to at note 35.

85 In *McNabb v Uiiiied States* 318 US 332 at 347 (1943).

ANNEXURE E

DRAFT ADMINISTRATIVE JUSTICE BILL

To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action in section 33 of the Constitution of the Republic of South Africa, 1996; to impose a duty on organs of state to give effect to those rights; to provide for the review of administrative action by the High Courts and Magistrates' Courts; to regulate the making of rules by administrative bodies; to establish special procedures for public enquiries and administrative adjudication; to promote efficient administration and for that purpose to establish an Administrative Review Council; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:–

CHAPTER 1: DEFINITIONS AND APPLICATION OF THIS ACT

Definitions

1. In this Act, unless the context indicates otherwise:–

(a) "**administrative action**" means any act performed, decision taken or rule or standard made, or which should have been performed, taken or made, by:-

(i) an organ of state other than Parliament or a provincial legislature; or

(ii) a natural or juristic person contemplated in section 8(2) of the Constitution and exercising a public power or performing a public function,

but does not include the municipal council functions referred to in section 160(2)

of the Constitution;

(g) "**Chairperson**" means the Chairperson of the Council appointed in terms of section 17(1)(a);

(c) "**Constitution**" means the Constitution of the Republic of South Africa, 1996;

(d) "**Council**" means the Administrative Review Council established by section 17;

(e) "**court**" means the High Court or Magistrate's Court within whose area of jurisdiction the administrative action occurred or the organ of state or natural or juristic person concerned has its principal place of administration;

(f) "**Drafting Office**" means the Central Drafting Office established by section 13;

(g) "**executing authority**" means:–

(i) in the case of the organs of state referred to in the definition of "executing authority" in section 1 of the Public Service Act, 1994 (Proclamation 103 of 1994), the "executing authority" as so defined in relation to each such organ of state;

(ii) in the case of all other organs of state and all juristic persons contemplated in section 8(2) of the Constitution and exercising public powers or performing public functions, the chief executive officer thereof;

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(iii) in the case of natural persons contemplated in section 8(2) of the Constitution and exercising public powers or performing public functions, such persons;

(h) "**Open Democracy Act**" means the Open Democracy Act, 1999;

(i) "**organ of state**" bears the meaning assigned to it in section 239 of the Constitution;

(j) "**provincial Constitution**" means a provincial Constitution made in terms of sections 142 to 145 of the Constitution;

(k) "**Public Protector**" means the Public Protector described in sections 182 and 183 of the Constitution;

(l) "**qualified litigant**" means:–

(i) anyone acting in their own interest;

(ii) anyone acting on behalf of another person who cannot act in their own name;

(iii) anyone acting as a member of, or in the interest of, a group or class of persons;

(iv) anyone acting in the public interest; and

(v) an association acting in the interest of its members;

(m) "**rule**" means any statement designed to have the force of law, including subordinate legislation made in terms of an Act of Parliament or in terms of provincial legislation;

(n) "**Rules Board**" means the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985); and

(o) "**standard**" means any norm, guideline, policy, general instruction or other similar

statement about the way in which a public power or public function should be interpreted or exercised or performed, but does not include a rule.

Application of this Act

2. The provisions of this Act apply to all organs of state and all natural or juristic persons contemplated in section 8(2) of the Constitution and exercising public powers or performing public functions, and prevail over the provisions of any other law other than the Constitution and any provincial Constitution.

CHAPTER 2: ADMINISTRATIVE ACTION AND JUDICIAL REVIEW

Organs of state obliged to give effect to the rights to just administrative action

3. All organs of state must give effect to the right:–

(a) of everyone to administrative action that is lawful, reasonable and procedurally fair in section 33(1) of the Constitution; and

(b) of everyone whose rights have been adversely affected by administrative action to be given written reasons in section 33(2) of the Constitution.

Grounds of review

4. (1) A court has the power to review administrative action if:–

(a) the organ of state or natural or juristic person which took the action was not authorized to do so by the empowering provision;

(b) a peremptory procedure or peremptory condition prescribed by law was not

complied with;

(c) the action is procedurally unfair;

(d) the action was materially influenced by an error of law or fact;

(e) the action was taken:–

(i) for a reason not authorized by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations not considered;

(iv) because of rigid adherence to a standard;

(v) because of the dictates of another person or body; or

(vi) arbitrarily, capriciously or without properly considering the matter; or

(f) the action itself:–

(i) contravenes a law or is not authorized by law;

(ii) is uncertain;

(iii) is not rationally connected to:–

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the organ of state; or

(dd) the reasons given for it by the organ of state or natural or juristic person concerned; or

(iv) is unreasonable, taking into account all relevant factors, including:–

(aa) the adverse effect of the action;

(bb) the relationship between that effect and the benefits of the action; and

(cc) any less restrictive means to achieve the purpose for which the action was taken.

(2) In this section:–

(a) "**empowering provision**" means the legislative or constitutional provision or the non-legislative agreement or document in terms of which the administrative action was purportedly taken;

(b) "**law**" means the empowering provision or any other applicable legislative or constitutional provision; and

(c) "**relevant considerations**" includes all material information and all seriously intended objections and seriously intended alternatives to the administrative action.

Reasons for administrative action

5. (1) A person whose rights have been adversely affected by administrative action may, within 90 days after the date on which the person became aware of the action or might reasonably have been expected to do so, request in writing that the organ of state or natural or juristic person concerned furnish written reasons for the action.

(2) Subject to the Open Democracy Act, an organ of state or natural or juristic person to which a request has been submitted in terms of subsection (1) must furnish adequate reasons in writing within 90 days after receiving the request.

(3) If an organ of state or natural or juristic person fails or refuses to furnish reasons or furnishes inadequate reasons:–

(a) the person concerned or any other qualified litigant may apply to court for appropriate relief; and

(b) in any proceedings for judicial review, in the absence of proof to the contrary, it must be presumed that the administrative action was taken without good reason.

(4) An organ of state or natural or juristic person which takes an administrative action which adversely affects a person's rights must at the time the action is taken or as soon as possible thereafter inform that person in writing of his or her right to request reasons in terms of subsection (1).

Procedure for review

6. (1) A qualified litigant may:–

(a) within 90 days after the date on which the person became aware of the action or

might reasonably have been expected to do so; or

(b) if the person has requested reasons in terms of section 5(1), within 90 days after the expiry of the period referred to in section 5(2),

apply to a court for review of the administrative action.

(2) The Council must, in consultation with the Rules Board, within one year after the date of commencement of the Act, make and implement rules of procedure for applications for review.

(3) In the period before the implementation of the rules of procedure in terms of subsection (2) all applications for review must be made to the High Courts.

Remedies in proceedings for review

7. The court in proceedings for review may grant appropriate relief, including:–

(a) a temporary interdict or other temporary relief;

(b) orders dismissing the application and affirming the administrative action under review;

(c) orders upholding the application and:–

(i) setting aside the administrative action and:–

(aa) remitting the matter for reconsideration by the organ of state or natural or juristic person in accordance with any recommendations by the court; or

(bb) in exceptional cases, substituting or varying the administrative action so set aside or correcting a defect in any state of affairs resulting from the administrative action;

(ii) directing the organ of state or natural or juristic person concerned:–

(aa) to act; or

(bb) in exceptional cases, to correct a defect in the administrative action or any state of affairs resulting from the administrative action or to pay compensation to the applicant or another specified person; or

(iii) prohibiting the organ of state from acting in a particular way;

(d) declarations of rights; or

(e) orders awarding costs of suit.

Extensions of time

8. (1) The periods of 90 days referred to in sections 5 and 6 may be extended for a fixed period:–

(a) by agreement between the parties or

(b) failing agreement, by a court on application by the person or organ of state or natural or juristic person concerned.

(2) The court may grant an application in terms of subsection (1)(*b*) where the interests of justice so require.

CHAPTER 3: RULES AND STANDARDS

Registers and indexes of rules and standards

9. Subject to the Open Democracy Act:–

(a) every organ of state must:–

(i) compile and maintain an up-to-date register containing the text of all current rules and standards used by it;

(ii) compile and maintain an up-to-date and accessible index of all current rules and standards used by it, including a concise description of their contents and the particulars of the places and times at which the rules and standards or further information regarding them can be inspected and copied;

(iii) make available all rules and standards used by it for inspection and copying at all reasonable times by any member of the public at his or her own expense, and

(iv) annually forward to the Council copies of that register and index;

(b) the Council must:–

(i) compile and maintain an up-to-date national register containing the text of all current rules and standards used by organs of state;

(ii) compile and maintain an up-to-date and accessible national index of all current rules and standards used by organs of state, including a concise

description of their contents and the particulars of the places and times at which the rules and standards or further information regarding them can be inspected and copied;

(iii) publish that national index:–

(aa) weekly on the Internet; and

(bb) annually in the *Government Gazette* , and

(iv) itself make available all current rules and standards for inspection and copying at all reasonable times by any member of the public at his or her own expense.

Approval of proposed rules by Drafting Office

10. Every organ of state must submit the text of rules which it proposes to make to the Drafting Office for consideration and approval.

Procedure for making rules with substantive effect

11. (1) Before an organ of state makes a rule which imposes a material burden or disadvantage or confers a material benefit on any person or group, the organ of state must:–

(a) publish a notice in English and at least one of the other official languages in the Government *Gazette* or the relevant provincial *Gazette*, containing –

(i) the text of the proposed rule as approved by the Drafting Office;

(ii) a concise description of the contents of the rule and a statement of the

reasons for it;

(iii) the particulars of the places and times at which further information regarding the rule can be inspected and copied; and

(iv) a request that succinct written comments regarding the proposed rule reach the organ of state at a specified address within a period of not less than 21 days after the date of the publication of the notice;

(b) at the same time publish a notice in English and at least one of the other official languages in at least two newspapers circulating in the area concerned containing the particulars set out in subparagraphs (ii), (iii) and (iv) of paragraph (*a*);

(c) where reasonably practicable, at the same time serve on any person or group who may be specially affected by the proposed rule, by registered post addressed to the person at his or her last known address, a copy of the notice described in paragraph *(a)* together with a letter calling for succinct written comments regarding the proposed rule to be lodged with the organ of state within a period of not less than 21 days after the date of posting; and

(d) on the expiry of the period within which comments may be lodged in terms of the notice referred to in paragraph *(a)* or the letter referred to in paragraph *(c)*, whichever is the later, consider the comments and decide whether or not to make the proposed rule, with or without alterations.

(2) Non-compliance or partial compliance with the requirements in paragraphs (*a*) to (*d*) is permissible in emergencies, provided that where reasonably practicable persons or groups affected by the proposed rule and the general public must be given adequate prior notice of the proposed rule and a proper opportunity to comment.

Publication of rules

12. If an organ of state decides to make a rule it must:–

(a) publish a notice in English and at least one of the other official languages in the Government *Gazette* or the relevant provincial *Gazette*, containing:–

(i) the text of the rule;

(ii) a concise description of the contents of the rule and a statement of the reasons for it;

(iii) the organ of state's response to any relevant comments not reflected in the remainder of the notice;

(b) at the same time publish a notice in English and at least one of the other official languages in at least two newspapers circulating in the area concerned containing the particulars set out in subparagraphs (ii), and (iii) of paragraph (*a*), and

(c) forward to the Council a copy of the notice referred to in paragraph (*a*).

Central Drafting Office

13. There is hereby established within the Department of Justice a Central Drafting Office which must:–

(a) scrutinize and correct the text of all rules and any standards submitted to it and ensure that the text is clear and as simple as possible;

(b) compile and publish protocols for the drafting of rules and standards; and

(c) in conjunction with the Council, provide training to the drafters of rules and standards.

Automatic lapsing of rules and standards

14. All rules and standards:–

(a) in force on the date of commencement of this Act, will lapse five years after that date; and

(b) made after the date of the commencement of this Act:–

(i) will be valid for 10 years at most, and

(ii) must reflect the date on which they will lapse.

CHAPTER 4: SPECIAL ADMINISTRATIVE PROCEDURES

Public enquiries

15. (1) An organ of state or natural or juristic person intending to take administrative action the object of which is to determine a matter of wide public interest and consequences and in respect of which the organ of state or natural or juristic person has a wide discretion, must, before taking that action, hold a public enquiry.

(2) The executing authority must conduct the public enquiry or appoint a suitably qualified person or panel of persons to do so.

(3) The Council, in consultation with the Minister of Justice, must make rules regulating the procedure to be followed in connection with public enquiries; and different rules may be made for

specified classes of public inquiries.

(4) All public enquiries must be conducted in accordance with the procedural rules referred to in subsection (3).

(5) After completion of a public enquiry, the executing authority, person or panel of persons conducting the enquiry must publish in the Government *Gazette* a written report on the enquiry, including a statement of reasons for any administrative action taken or recommended to the executing authority.

Administrative investigations

16. (1) An organ of state or natural or juristic person required to take administrative action the object of which is to determine the status, rights or duties of a person must conduct an investigation before taking that action.

(2) An investigation need not be formal, but the organ of state or natural or juristic person concerned must:–

(a) notify the person of the nature and reasons for the proposed action in a manner that the person concerned can reasonably be expected to understand;

(b) allow the person a reasonable opportunity to respond to the proposed action, including:–

(i) notice of and access to relevant information;

(ii) a reasonable time to prepare a response;

(iii) assistance and, in serious or complex cases, a legal representative; and

(iv) if applicable, an opportunity to present and controvert evidence and argument; and

(c) inform the person of any right of appeal and of the right to apply to a court for review.

(3) In exceptional cases where the organ of state or natural or juristic person cannot reasonably be expected to conduct the investigation, it may attenuate the investigation.

CHAPTER 5: ADMINISTRATIVE REVIEW COUNCIL

Establishment of Council

17. (1) There is hereby established an Administrative Review Council consisting of:–

(a) a Chairperson nominated by the Chief Justice;

(b) an official in the Department of Justice nominated by the Minister of Justice;

(c) an official in the Department for Public Service and Administration nominated by the Minister of Public Service and Administration;

(d) the Public Protector or a member of the staff of the Public Protector nominated by him or her; and

(e) not fewer than three nor more than nine other persons appointed by the President, after consultation with the National Council of Provinces.

(2) The members of the Council hold office for the period, not exceeding three years, specified

in their instruments of nomination or appointment.

Functions of the Council

18. In addition to the functions conferred on the Council by this Act or any other law, the Council must:–

(a) inquire into the adequacy of the law and practice relating to the review by courts of administrative action and make recommendations to the Minister of Justice as to any improvements that might be made;

(b) inquire into the adequacy of the law, rules and standards for administrative action by organs of state and make recommendations to the Minister of Justice, the Minister of Public Service and Administration and the relevant executing authorities as to any improvements that might be made to ensure that administrative action is efficient and conforms to the rights to administrative justice in section 33 of the Constitution and the basic values and principles governing public administration in section 195(1) of the Constitution;

(c) inquire into the appropriateness of establishing:–

(i) independent and impartial tribunals, in addition to the courts, to review administrative action, and

(ii) specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action,

and make recommendations to the Minister of Justice; and

(d) initiate, conduct and co-ordinate programmes for educating the public at large, the members and employees of organs of state and natural or juristic persons contemplated in section 8(2) of the Constitution and exercising public powers or performing public functions, regarding the contents of this Act and the provisions of the Constitution relevant to administrative action.

Meetings

19. (1) The Council must hold such meetings as are necessary for the performance of its functions.

(2) The Chairperson or, in his or her absence, a member of the Council elected by the members present, must preside at a meeting of the Council.

(3) The Council meets at the times and places determined by itself. However, the first meeting of the Council must be held at a time and place determined by the Minister of Justice.

(4) The Chairperson may at any time convene a special meeting of the Council, and he or she must determine the time and place of the meeting.

(5) The quorum for a meeting of the Council is the majority of its members.

(6) A decision of the Council must be taken by resolution of the majority of the members present at any meeting of the Council, and, in the event of an equality of votes, the person presiding has a casting vote in addition to his or her deliberative vote.

(7) Subject to the approval of the person presiding, any person may attend or take part, but may not vote, in a meeting of the Council.

(8) When the Council is in session, a member may not take part in the discussion of, or may not

participate in the making of a decision on, any matter in which he or she or his or her spouse, partner or employer has any personal and direct or indirect pecuniary interest, unless he or she first declares the nature, extent and particulars of that interest: Provided that the Council may require that any member who declares that he or she has such an interest recuse himself or herself from its proceedings regarding such matter.

(9) A decision taken by the Council at a time when any member of the Board contravened the provisions of subsection (8), shall not be invalid if the decision was taken by a majority of the members of the Council.

(10) Any member of the Council who contravenes the provisions of subsection (8) will be guilty of an offence and on conviction liable to a fine or imprisonment for a period not exceeding 12 months.

(11) The minutes of meetings of the Council and any committees appointed in terms of section 20 must be signed by the person who chairs the next meeting.

Committees

20. (1) The Council may appoint one or more committees which may, subject to the instructions of the Council, perform those functions of the Council which the Council may determine.

(2) A committee may consist of both members and non-members of the Council, but at least one member of the Council must be appointed to each committee.

(3) The Council may at any time dissolve or reconstitute a committee.

(4) If a committee consists of more than one member, the Council must designate a member of that committee who is a member of the Council as chairperson of the committee.

(5) The Council is not absolved from the performance of any function entrusted to any committee in terms of this section.

Staff

21. The administrative staff required for the proper performance of the Council's functions, must be appointed or employed subject to the laws governing the public service.

Engagement of persons to perform services in specific cases

22. (1) The Council may, in consultation with the Director-General: Justice, on behalf of the State engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

(2) The terms and conditions of service of a person engaged by the Council under subsection (1) must be as determined from time to time by the Minister of Justice in consultation with the Minister of Finance.

Expenditure by Council

23. (1) The expenses incurred in connection with:–

(a) the performance of the functions of the Council;

(b) the remuneration and other conditions of service of members of the staff of the Council; and

(c) the engagement of persons to perform services in specific cases,

must be defrayed out of monies appropriated by Parliament for that purpose.

(2) The Department of Justice must, in consultation with the Chairperson, prepare the necessary estimate of revenue and expenditure of the Council.

(3) The Director-General: Justice must, subject to the Exchequer Act, 1975 (Act 66 of 1975):–

(a) be charged with the responsibility of accounting for State monies received or paid out for or on account of the Council; and

(b) cause the necessary accounting and other related records to be kept.

(4) The records referred to in subsection (3)*(b)* must be audited by the Auditor-General.

Reporting

24. (1) The Council must annually not later than the first day of March, submit to the Minister of Justice a report on all its activities during the previous year.

(2) The report referred to in subsection (1) must be laid upon the Table in Parliament within 14 days after it was submitted to the Minister, if Parliament is then in session, or if Parliament is not then in session, within 14 days of the commencement of the next ensuing session.

CHAPTER 6: GENERAL

Short title

25. This Act must be called the Administrative Justice Act, 1999.