FOCUS ARTICLES

ADMINISTRATIVE JUSTICE IN THE SOUTH AFRICAN CONSTITUTION

by Hugh Corder*

Some of those who had argued for the inclusion of basic administrative law precepts as 'fundamental rights' in the transitional South African Constitution,[1] and whose arguments had prevailed (albeit in rather a complicated formulation),[2] wondered warily whether such elevated status would survive in the final constitutional text. Their concern centred 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 transitional 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 generous language is used, but the sub-text contains many questions,[5] 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 section 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 '[c]onstitutional 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

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the excessive transfer of discretion by Parliament to the executive,[10] 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 socio-economic sphere, and to suppress popular resistance to such measures through '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 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 Division[17] 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 1993 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 the relatively convoluted formulations of s 24 of the transitional Constitution, with its several thresholds and remedies. (Judging by its unimaginative and restrictive application to date by the courts,[23] however, it seems that the politicians were needlessly concerned.) Similar kinds of discussions preceded the drafting of the proposed section 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 South African 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 accountability, both of which depend on openness of process.[24]

Against this background, let us look in a little 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 transitional 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, sections 33(1) and 33(2) effectively replicate what is contained in section 24 of the transitional Constitution, except that the various thresholds have more or less been done away with so that the rights are cast much more widely.[25] In principle, it seems that section 33(1) grants its benefits much more generously, in that *everyone* is entitled to the rights contained therein, whereas the transitional Constitution referred to every person whose 'rights, legitimate expectations or interests' were affected or threatened.[26] Section 33(2), however, grants the right to obtain written reasons for administrative action more narrowly than does section 24(c) under the transitional 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, sections 33(1) 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 section 33(3), of course, provides for the enactment of national legislation to give effect to these rights. The general result of the inclusion of section 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 section 33). This attenuation may be quite severe because the reference to 'the promotion of an efficient administration' in section 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, dignity, equality, freedom and proportionality) which would normally apply in terms of the general limitation clause in section 36. One might ask whether the strictures placed on the state administration by the duties entailed in section 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 section 33(3) will fall away, and the only test for the constitutionality of such restrictions will be that contained in section 36. Until then, item 23 further provides that section 33 of the final Constitution is to be interpreted by the courts as if it was cast in the language of section 24 of the transitional Constitution. In principle, if no legislation is enacted within the three-year period, the terms of section 33(1) 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 section 33.

What lies behind this rather convoluted way of describing the finalisation of the pioneering adoption of the right to administrative justice in the transitional Constitution? In the drafting of this provision, there was clear concern among the ranks of the majority (African National Congress) negotiators about the workability of section 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 section 24, often in combination with the access to information rights granted in section 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 altogether. Indeed, at a seminar held in Parliament,[27] where a range of 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 South Africa 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 section 33(1) 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 sections 33(1) 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 section 24 of the transitional Constitution will continue to be applied by the courts despite the adoption of section 33(1) and (2) until national legislation is enacted.

The alternative meaning, naturally, is that the rights contained in section 33(1) 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 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 final 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 is 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 socio-economic 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 transitional Bill of Rights, and Constitutional Principle II 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 section 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 transitional 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 argued that, if one takes the interpretation that the right of access to information in section 32 does not exist unless and until there is legislation, one is in effect not giving expression to Constitutional Principle IX, and that therefore section 32 in the final Constitution is non-certifiable.[31]

With this discussion of the background to the enactment of section 33 as an aid to understanding its provisions, let us move to consider the options for the 'national legislation' contemplated. The prospect of having an Administrative Justice Act (AJA) within three years is 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 South Africa's legal system. So the main features of the statutory regulation of administrative law in the following legal systems (in no necessary order of importance) can be noted.

(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 constituent states of Australia.[33]

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
- 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 versus review distinction so characteristic of English-based administrative law; the grounds of judicial review well known in South African 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.

(ii) **Europe (except the United Kingdom)**

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 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-emphasised feature of Danish administrative law.[43]

(c) *The Netherlands*

Until early 1996, 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 goes further, however, in its attempt also to encompass the substantive rules of administrative law.[47]

(iii) United Kingdom

The judge-made nature of English administrative law is well known to most lawyers in the Commonwealth. 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'[50] in place of the obscure complexity of the royal prerogative writs, a step which itself threw up problems on interpretation by the courts.[51]

(iv) **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 reached the stage of tabling 'An Act respecting administrative justice' in 1993, but this now appears unlikely to be pursued.[59]

(v) **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:

- 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;
- 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

- 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 assistance in drafting the 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]

(vi) **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 Iyer 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.'

(vii) **South Africa**

Recent years have provided some proposals for statutory regulation of 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 transitional Constitution.

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 and political arrogance and complacency - so long a part of South Africa's history - has an opportunity to re-assert itself.

The accessibility of the avenues for administrative review and the Southern African socio-legal context are particularly stressed in the second set of published papers.[81]

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',[82] so it is submitted that section 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 human resources) associated with 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', 'executive action', 'acts of State', 'rule-making', 'adjudication', 'lawful', 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).

(ii) **Rules for Rule-making**

Along the lines set out by O'Regan,[83] provision should be made for general notice of intended subordinate legislation to be given in the 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.

(iii) **Rules for Adjudication**

Following Asimow,[84] 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.

(iv) **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.

(v) **Continuous review**

Finally, provision should be made for the establishment and functions of a small but influential research and review secretariat, such as the Administrative Review Council in Australia,[85] whose 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[86] that: 'The

history of liberty has largely been the history of the observance of procedural safeguards'.

Notes

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, section 24, reads as follows:

'Every person shall have the right to -

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

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

(c) 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

(d) 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 Ibid, Schedule 4. An essential feature of the compromise reached at the 1993 negotiations about the transfer of power in South Africa was the notion of a five-year transitional period under a temporary Constitution and a government of national unity, in the course of which the popularly-elected Parliament would draft the "final" Constitution. This drafting process occurred within the framework of 34 unalterable "Constitutional Principles", agreed to by the negotiators in 1993.

4 The text of the Constitution of the Republic of South Africa, 1996, section 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.

(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.'

5 In particular, the continued life of s 24 of the transitional 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 Verwaltungsrecht* (3ed) Vol 1 Foreword.

7 WHB 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 South African administrative law - despite the pioneering works of Marinus Wiechers in the 1960s and 1970s - has remained, for practical purposes, Anglo-centric, but in a time-warp, having largely failed to incorporate the beneficial judge-made reforms which have so characterised the administrative law of England since the 1960s.

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

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

12 See CF Forsyth *In Danger for 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 390-395.

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

20 *Administrator, 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 1 (A).

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 *Van Huysteen v Minister for Environmental Affairs* 1996 (1) SA 283 (C).

24 See the prescient piece by Etienne Mureinik 'Reconsidering Review: Participation and Accountability' 1993 *Acta Juridica* 35.

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 'everyone' without restriction, except naturally through the operation of the general limitation clause, s 36 of the 1996 Constitution.

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

27 On 19 February 1996, which focussed on the right to administrative justice.

[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 fifty-year lifespan of the Administrative Procedure Act. Whether this argument holds good for South African needs and circumstances is another matter.

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

[30] Particularly those in sections 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 rejected this argument and has implicitly preferred the first interpretation outlined above: see *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) at paras 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.

[32] (Australian readers must forgive the author's sketchy outline of their system - it was written for those who know nothing of it.) Two outstanding academic works which can be consulted are Margaret Allars *Introduction to Australian Administrative Law* (1990) and Mark Aronson and Bruce Dyer *Judicial Review of Administrative Action* (1996).

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

[34] See s 5(1)(j) 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). The Commonwealth government appeared to join the critics with proposed attenuation of the system in 1997.

[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.

[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 *Controlling Public Power* (1995) at 216-220.

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

[44] The law on 'administratieve rechtspraak overheidsbeschikkingen' of 1 May 1975.

45 See Schwarze op cit note 38 at 189-191.

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

47 See Schwarze op cit note 38 at 201-202.

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* (5ed) (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* (4ed) (1995).

53 RSO 1990, Ontario.

54 Sections 1 and 3.

55 Section 5.3.

56 Section 9.

57 Section 15.

58 See Evans et al op cit note 52 at 220-237.

59 Ibid at 241.

60 5 USC, Chapter 5.

61 S 702.

62 Especially the Freedom of Information Act (s 552) and the Government in the Sunshine Act (s 552b).

63 Public Law 101-552, 104 Stat 2736 and Public Law 101-648, 104 Stat 4969 respectively.

64 See 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.

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, articles 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 requested the Commission to review its Report in the light of that Constitution and particularly s 24. The Commission's recommendations are contained in a *Supplementary Report* of October 1994.

73 See clauses 3, 2 and 1 respectively, at 24, 23 and 22 of the *Supplementary Report.*

74 See note 34 above.

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 Law Reform* (1993), and Corder and McLennan op cit note 42 above.

77 See Catherine O'Regan 'Rules for Rule-Making: Administrative Law and Subordinate Legislation' 1993 *Acta Juridica* at 168-175.

78 See Lawrence Baxter 'Rule-making and Policy Formulation in South African Administrative-law Reform' 1993 *Acta Juridica* at 184-196.

79 O'Regan loc cit.

80 Op cit at 196, emphasis in the original.

81 See Hugh Corder and Tiya Maluwa (Eds) *Administrative Justice in Southern Africa* (1997), particularly Parts 3 and 4.

82 See the text as adopted by the Constitutional Assembly on 8 May 1996 at clause 7(1).

83 See text at note 79 above.

84 See the articles referred to in note 64 above.

85 As referred to at note 35 above.

86 In *McNabb v United States* 318 US 332 at 347 (1943).