

Michigan Journal of Race and Law

Volume 3

1997

Toward a South African Administrative Justice Act

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Recommended Citation

Michael Asimow, *Toward a South African Administrative Justice Act*, 3 MICH. J. RACE & L. 1 (1997).
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TOWARD A SOUTH AFRICAN ADMINISTRATIVE JUSTICE ACT

Michael Asimow*

Section 33 of South Africa's Constitution provides fundamental principles of administrative justice. It also requires Parliament to adopt an Administrative Justice Act. This Article contends that without enactment of such legislation Section 33 will be ineffective in practice and may prove to be an obstacle to achieving the economic and social objectives of the Constitution. In addition, such legislation is essential to preserving the legitimacy and the effectiveness of the Constitutional Court.

INTRODUCTION	2
I. CONSTITUTIONAL RIGHTS TO ADMINISTRATIVE JUSTICE	3
II. UNCERTAINTY AND OVERBREADTH IN SECTION 33.....	5
A. <i>The Section 33 Rights Are Uncertain and Overbroad</i>	5
B. <i>The Right to Procedural Fairness</i>	6
C. <i>The Right to a Written Statement of Reasons</i>	11
D. <i>Rulemaking vs. Adjudication</i>	12
E. <i>Reasonable Administrative Action</i>	13
F. <i>Public vs. Private Administrative Action</i>	15
G. <i>The Right to Lawful Administrative Action</i>	16
III. THE NEED FOR AN ADMINISTRATIVE JUSTICE ACT	17
IV. A SOUTH AFRICAN ADMINISTRATIVE JUSTICE ACT.....	21
A. <i>The Process of Drafting an Administrative Justice Act</i>	21
B. <i>Taking Administrative Efficiency into Account</i>	22
C. <i>Elements of a New Administrative Justice Act</i>	23
CONCLUSION	26

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This Article is based on my earlier articles, *Administrative Law Under South Africa's Final Constitution: The Need for an Administrative Justice Act*, 113 S. AFR. L.J. 613 (1996) [hereinafter Asimow, *Final Constitution*], and *Administrative Law Under South Africa's Interim Constitution*, 44 AM. J. COMP. L. 393 (1996) [hereinafter Asimow, *Interim Constitution*].

Many helpful suggestions for this Article came from seminars or faculty workshops at UCLA Law School, the University of Michigan Law School, and the schools of law at the University of the Witwatersrand, Capetown, Natal-Pietermaritzburg, and Natal-Durban. I received the generous assistance of many people, including Richard Abel, Lawrence Baxter, Martin Brassey, Hugh Corder, Jody Freeman, Karthy Govender, Cora Hoexter, Jonathan Klaaren, Jacqueline Krikorian, Gillian Lester, Rosemary Lyster, Etienne Mureinik, Xavier Philippe, David Pitman, Gary Schwartz, and Jonathan Zasloff. Stephanie Bailiff provided valuable research assistance. I, of course, remain responsible for errors and omissions.

INTRODUCTION

The Bill of Rights in South Africa's new Constitution contains administrative justice provisions that break sharply with preconstitutional law. Section 33 promises administrative action that is lawful, reasonable, procedurally fair, and accompanied by a written statement of reasons.¹ These are lofty aspirations, but they will not easily be achieved in practice. This Article, written from an outsider's perspective, examines some of the obstacles strewn on the path of implementation of section 33. It urges that Parliament enact an administrative justice act as a matter of priority,² as section 33(3) obligates it to do.³

Administrative law is certain to play an essential role in South Africa's immediate future.⁴ Only positive government action can bring economic development, housing, infrastructure, better education and health care, and numerous other services to the vast majority of the population who were victimized by apartheid laws and who subsist at Third World levels. The government must engage in redistributive programs, such as land restitution and affirmative action,⁵ and enforce laws that prohibit wrongful discrimination.

All this can be achieved only through executive-branch administrative bodies empowered by statute. Such bodies must act

1. Section 33 provides:

- (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.

S. AFR. CONST. § 33.

2. Cf. Hugh Corder, *Administrative Justice in the Final Constitution*, 13 S. AFR. J. ON HUM. RTS. 28, 41-43 (1997) (asserting that an Administrative Justice Act is an important, if secondary, "means of achieving democratic practices" and suggesting five essential features that should be incorporated into such an Act).

3. S. AFR. CONST. § 33; see *supra* text accompanying note 1.

4. Dennis M. Davis, *Administrative Justice in a Democratic South Africa*, in *CONTROLLING PUBLIC POWER: ADMINISTRATIVE JUSTICE THROUGH THE LAW* 19-27 (Hugh Corder & Fiona McLennan eds., 1995) [hereinafter *CONTROLLING PUBLIC POWER*].

5. See Stephen Ellmann, *The New South African Constitution and Ethnic Division*, 26 COLUM. HUM. RTS. L. REV. 5, 34-40 (1994).

in accordance with common law and constitutional principles of administrative law. Courts or tribunals must provide appropriate forms of review. Administrative procedure and review must be, and must appear to be, democratic in character, fully accountable, user-friendly, responsive, participatory, and transparent.⁶ Yet the administrative process must also satisfy traditional evaluative criteria: it must produce accurate results within a reasonable time and at reasonable cost to both the public sector and to private parties.

I. CONSTITUTIONAL RIGHTS TO ADMINISTRATIVE JUSTICE

Section 33 of the final Constitution,⁷ which is entitled “Just administrative action,” articulates basic rights to administrative justice. However, these rights are not self-executing; they must be implemented by legislation. In contrast, section 24 of the interim Constitution provided for a similar set of rights that were self-executing⁸ but were subject to limitation by legislation or judicial decision under the general limitations clause.⁹

An unusual transitional provision contained in the final Constitution leaves the administrative justice provisions of the interim Constitution in effect until the legislation envisaged in section 33(3) is adopted. If such legislation is not enacted within three years of the

6. Etienne Mureinik, *Reconsidering Review: Participation and Accountability*, in *CONTROLLING PUBLIC POWER*, *supra* note 4, at 28, 35 (“Whether we attain democracy will consequently depend upon administrative law: upon the legal forces which pull—or fail to pull—government decision-making towards democratic decision-making.”).

7. S. AFR. CONST. § 33; *see also supra* text accompanying note 1.

8. Section 24 of the interim Constitution provides:

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 her rights is affected or threatened.

S. AFR. CONST. of 1994 § 24.

9. The general limitations clause in section 33 of the interim Constitution allows the rights entrenched in the Bill of Rights to be limited by law of general application, provided that such limitations are reasonable, justifiable in an open and democratic society based on freedom and equality, and do not negate the essential content of the right in question. *Id.* § 33.

date the new Constitution takes effect, the administrative justice provisions of sections 33(1) and (2) apparently become free-standing and section 33(3) falls away.¹⁰

Thus the Constitution mandates the enactment of administrative procedure legislation. In addition, it furnishes a powerful incentive for Parliament to enact such legislation within the three-year period. The incentive exists because, as this Article will discuss, sections 33(1) and (2) are quite far reaching and therefore clearly require limitation. In addition, section 33(3)(c) explicitly permits Parliament to take account of efficiency considerations, whereas it is unclear whether Parliament has the same latitude under the Constitution's general limitation clause.¹¹ Yet the process of enacting such legislation will be lengthy and arduous; numerous painful compromises must be negotiated.¹²

One school of thought holds that it would be better if no administrative justice legislation were adopted. In that case, the section 33 administrative justice rights would apparently become free standing, subject only to legislative or judicial limitation under the general limitations provision.¹³ This Article argues that such an outcome would be unfortunate.

10. S. AFR. CONST. Sched. 6, §23(2); *see also* Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 802-03 (CC). This portion of the Court's certification decision concerned the freedom of information provisions of the interim and final Constitutions and a transitional provision which is very similar to the one governing administrative justice. The Court held that the suspended portion of the freedom of information provision, section 32(1), would become free-standing in the event that implementing national legislation was not enacted within three years.

The relationship between the interim and final Constitutions and the transitional provision has given rise to a number of interpretations in addition to the one put forward in the text. Some South African scholars read the transitional provision to mean that if no national legislation is adopted, the provisions of section 24 of the interim Constitution remain in effect indefinitely. Others interpret the provisions to mean that the courts should immediately apply sections 33(1) and (2), with national legislation simply making the practical implementation of the rights in these sections more effective. *See Corder, supra* note 2, at 41-43. Still others read the transitional provision to mean that the administrative justice provisions of both the interim and final constitutions fall away if no legislation is enacted.

11. *See infra* note 84.

12. Prominent South African lawyers have labored for years to craft and enact an Open Democracy Bill incorporating freedom of information, open meetings, and whistleblower protection. These efforts made slow progress, although there is now some prospect that legislation may finally be enacted.

13. The general limitation provision of section 36(1) provides:

[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors including—

(a) the nature of the right;

II. UNCERTAINTY AND OVERBREADTH IN SECTION 33

I believe that section 33 should not be allowed to go into effect without limitation by national legislation.

A. *The Section 33 Rights Are Uncertain and Overbroad*

The rights to administrative justice entrenched in section 33 are precious and vital to democratic government. Nevertheless, their uncertainty and overbreadth present serious practical problems.

First, the section 33 rights will have little impact until they have been construed in a wide variety of contexts and actually applied in practice. So far as I can determine, there has been little change in administrative practice since the interim Constitution went into effect in April 1994.¹⁴ Government at all levels is preoccupied with the problems of managing a transition to multiracial democracy and investing in infrastructure and economic development—not worrying about procedural niceties. The right to administrative justice will make little difference to ordinary people until it is implemented by detailed legislation backed up by detailed procedural regulations that tell every unit of government exactly what must be done to take administrative action.

Second, South Africa must devote enormous resources to overcoming the effects of apartheid and neglect on the vast majority of its population. By any analysis the available resources fall far short

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- (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) the less restrictive means to achieve the purpose.

S. AFR. CONST. § 36(1).

It can be argued that Parliament would have less power to limit the administrative justice rights under section 36(1) than under section 33(3) because of the explicit reference to efficiency in section 33(3)(c). *See infra* note 84.

14. *See, e.g.*, GERRIT VAN DER WALDT & RITA HELMBOLD, *THE CONSTITUTION AND A NEW PUBLIC ADMINISTRATION* (1995). This work, which discusses public administration and the new Constitution, barely mentions administrative justice and does not even suggest that the administrative justice provisions of the interim Constitution might affect the practices of public administrators. *See also* Maharaj v. Chairman, Liquor Bd., 1997 (1) SALR 273 (NPD) (exemplifying the sort of shoddy local administrative practice that must be quite prevalent).

In general, little seems to be known about how South African bureaucracies actually operate. There appears to be a great need for empirical studies of ground-level administrative functions. Such studies would form a base, firmer than the one now in existence, upon which wise administrative procedure legislation could be drafted.

of what is needed for such a task. It is neither practical nor sensible to use limited resources to overproceduralize government action.¹⁵

Third, uncertainty about procedural requirements has a dynamic effect on agency procedure. A judicial reversal of agency action that occurs years after the action was taken can be costly and disruptive to a regulatory program. As a result, an agency uncertain about what is required is likely to provide every procedure that a private party demands. Demanding costly and time-consuming procedural steps thus becomes a powerful tactic in the hands of persons who are determined to prevent or delay government action and who can credibly threaten to seek judicial review. Yet agencies should provide only procedures that truly enhance fairness and are cost effective and should not be motivated to overproceduralize.

Fourth, judges can easily manipulate broad and vague administrative law principles to block or delay remedial government action. Many judges appointed to the bench during the apartheid era have little sympathy for radical economic and social change. By requiring a formal hearing or a written statement of reasons in the plethora of cases in which government and the individual interact, by expanding the constitutional administrative justice norms to their outermost frontiers, by employing hard look review of the reasonableness of agency action, and by deciding questions of law in ways that fail to give proper deference to administrative expertise, resourceful courts can stop almost any social or economic program in its tracks.¹⁶ The next section sketches some of the areas in which the section 33 rights, if allowed to become free-standing, will be uncertain in application or will require inefficient expenditure of precious resources.

B. *The Right to Procedural Fairness*

Section 33(1) provides that everyone has the right to administrative action that is procedurally fair. At a minimum, the procedural fairness clause entrenches the preconstitutional rules of natural justice, including a fair hearing (the “*audi* principle”) and an impartial decision-maker.¹⁷ The right to an administrative hearing is

15. See Christopher Forsyth, *Speaking Truth unto Power: The Reform of Administrative Law*, 111 S. AFR. L.J. 408, 408–10 (1994).

16. See, e.g., *Van Huyssteen v. Minister of Env'tl. Affairs & Tourism*, 1996 (1) SALR 283 (CPD). This case is discussed later in this Article. See *infra* text accompanying notes 17, 24.

17. “This subsection requires decision-makers to act fairly. *At the very least*, it constitutionalizes the principles of natural justice which require a person whose rights are affected by an administrative decision to be heard on his own behalf (*audi alteram partem*).” SOUTH AFRICAN CONSTITUTIONAL ASSEMBLY, EXPLANATORY MEMORANDA

of paramount importance because it compels a decision-maker to see and hear the affected individual and confront that person's side of the dispute. As a result, a hearing may well forestall an incorrect decision or cause an agency to exercise discretion more favorably to the individual than it otherwise would have done. Beyond these utilitarian benefits, a hearing is important because it safeguards an individual's dignitary interest, treating that person as a human being rather than as a computer file. Nevertheless, section 33(1)'s broadly stated right to procedural fairness will present numerous difficulties.

Under preconstitutional law, natural justice protected persons whose legal rights or legitimate expectations were affected by administrative action.¹⁸ Even taking the minimalist view that section 33(1) does no more than constitutionalize prior law, the right to procedural fairness is considerably broader than the right to due process under the U.S. Constitution.¹⁹ Yet American due process has flooded state and federal courts with a torrent of context-specific litigation that has never abated since the due process revolution ignited in the 1970s.²⁰ Granted, under present conditions, few of the citizens of South Africa have the resources to take a dispute over procedural fairness to court. Nevertheless, the right to procedural fairness may pose a considerable judicial and administrative burden as redistributive schemes begin to bite and as citizens learn of their new constitutional rights and become more accustomed and able to assert them in court.²¹

ON DRAFT BILL OF RIGHTS, 204 (1995) [hereinafter DRAFT BILL OF RIGHTS] (emphasis added); see also *Van Huyssteen v. Minister of Env'tl. Affairs & Tourism*, 1996 (1) SALR 283, 302-06 (CPD) (noting that preconstitutional law gave a right to whatever procedures were fair in the circumstances and was not limited to the *audi* principle).

18. See LAWRENCE G. BAXTER, *ADMINISTRATIVE LAW* ch. 14 (1984 & Supp. 1990).

19. Under the Fifth and Fourteenth Amendments to the U.S. Constitution, neither the state nor federal governments can deprive a person of life, liberty, or property without due process of law. For discussion of the ways in which preconstitutional natural justice might be more protective than American due process, see Asimow, *Interim Constitution, supra note **, at 399-403.

20. The beginning of that revolution is normally traced to the epochal case of *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the state must provide an evidentiary hearing prior to terminating welfare benefits).

21. Preconstitutional law sometimes provided procedural protection for persons whose status depended wholly on the discretion of a government official. For example, if a government employer discharged low-level temporary workers because of redundancy or misconduct, these workers had the right to a hearing. *Natal v. Sibiyi*, 1992 (4) SA 532 (A) (redundancy); *Transvaal v. Zenzile*, 1991 (1) SA 21 (A) (misconduct). Courts reasoned that such dismissals affected legal and property rights, even when the employment contract provided that the employee could be dismissed on twenty-four hours notice. *Transvaal*, 1991 (1) SA at 26. Moreover, with respect to a dismissal for misconduct, the Court made clear that a hearing must be provided, even if the only issue is the severity of the penalty. *Id.* It

Section 33(1)'s right to procedural fairness may well expand rather than entrench the existing common law of natural justice.²² The interim Constitution, like the common law, limited the right to procedural fairness to administrative action that affected or threatened a person's "rights or legitimate expectations." Since this limiting language does not appear in section 33(1), it seems at least possible that procedural fairness would apply to cases of administrative action affecting a person's "interests" rather than merely that person's "rights or legitimate expectations."²³ Indeed, one decision applied section 24(b) to require the state to provide a full-fledged trial-type hearing to explore the environmental impact of rezoning land for the construction of a steel mill near a protected wetland—a precedent of truly awe-inspiring proportion.²⁴

Under preconstitutional law, natural justice apparently did not apply in connection with the withdrawal of "privileges,"²⁵ such as the termination of benefits or the rejection of applications for benefactor programs such as pensions or welfare.²⁶ In contrast, under American due process, the right to a hearing in cases of statutory entitlement to government benefit programs is solidly

appears that the rule will be the same under the interim Constitution. See *Maharaj v. Chairman, Liquor Bd.*, 1997 (1) SALR 273 (NPD) (finding that under both section 24(b) and natural justice, the local authority must provide fair procedure before refusing a discretionary application for a liquor license).

American due process law differs substantially. For example a nonstigmatic dismissal of a government employee, such as an untenured professor, from a job held at the employer's discretion entails a deprivation of neither liberty nor property. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

22. See Jonathan Klaaren, *Administrative Justice*, in CONSTITUTIONAL LAW OF SOUTH AFRICA § 25.6 (Matthew Chaskalson et al. eds., Supp. 1997).

23. In the interim Constitution, the right to written reasons extended to situations in which administrative action affected "interests," clearly a much more inclusive term than "rights" or "legitimate expectations." S. AFR. CONST. of 1994 §24(c); see also Asimow, *Interim Constitution*, *supra* note *, at 412 (arguing that "interests" cover just about any state action that affects a person and about which the person wants to litigate).

24. *Van Huyssteen v. Minister of Env'tl. Affairs & Tourism*, 1996 (1) SALR 283, 302-08 (CPD). The applicant owned a parcel of land near the proposed steel mill, on which he hoped to build a holiday residence. *Id.* at 289.

25. Lower court cases indicate that the right/privilege distinction continues to exist under the interim Constitution with respect to aliens who were denied the right to written reasons in connection with deportation decisions. The courts simply declared that aliens have no rights, legitimate expectations, or even interests that could be affected or threatened by administrative action. Jonathan Klaaren, *So Far Not So Good: An Analysis of Immigration Decisions under the Interim Constitution*, 12 S. AFR. J. ON HUM. RTS. 605, 607 (1996).

26. See BAXTER, *supra* note 18, at ch. 14 (c)(b)(2)(iii) (Supp. 1990); see also Marinus Wiechers, *Administrative Law and the Benefactor State*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 130, 134.

entrenched.²⁷ Certainly, South African law of the future will contain a variety of benefactory programs; such programs will be seen as conferring rights or legitimate expectations. Consequently, any reduction or termination in benefits and probably any denial of admission to the program will trigger a requirement that the agency act with procedural fairness under section 33(1).

Moreover, section 33(1) opens the field of mass justice to the requirement of procedural fairness. All the unpleasant interactions between local officials and ordinary people relating to public housing, provision of utility service, prisons, schools, or public hospitals should trigger rights to procedural fairness.²⁸ Consider prisons, for example: decisions to transfer a prisoner from a minimum to a maximum security prison or to subject a prisoner to denial of privileges because of misconduct might trigger a right to some kind of appropriate procedure under section 33(1).²⁹ A good case can be made that such proceduralization would be good for the prison system which is widely viewed as lawless and capricious. Still, proceduralization would entail a significant diversion of the system's resources.

Pending the adoption of administrative justice legislation, the Constitutional Court should tread cautiously in expanding the right to procedural fairness. Realistically, it is not possible to grant hearings or other sorts of compulsory processes in connection with the vast bulk of low-level discretionary decisions that street-level bureaucrats make every day.

Defining which government/private interactions trigger the right to procedural fairness is only the first step in applying section 33(1). The second step is to spell out the content of the right—what process must be provided and when must it be provided. Obviously, the question of what qualifies as an appropriate procedure is wholly contextual. There must be sufficient notice of the proposed government action and an appropriate opportunity to respond to the government's contentions. Depending on the context, this may entail the presentation of witnesses, interpreters, confrontation, and cross examination. There must be an impartial decision-maker and a decision based exclusively on the record, but this generalization

27. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Under the Canadian Charter, the Supreme Court abandoned the right/privilege distinction recognized under the former Canadian Bill of Rights. *Re Singh v. Minister of Employment and Immigration*, [1985] 17 D.L.R.4th 422, 461-62 (Wilson, J., concurring).

28. See Geoff Budlender, *The Accessibility of Administrative Justice*, in *CONTROLLING PUBLIC POWER*, *supra* note 4, at 144, 149-51.

29. After years of fumbling, the U.S. Supreme Court recently ruled that due process is inapplicable to most decisions involving prisoners. *Sandin v. Conner*, 515 U.S. 472 (1995).

conceals numerous complex issues relating to separation of functions, *ex parte* contact, biases of various sorts, and what qualifies as record exclusivity.

Often, the question of timing is critical. Generally, notice and opportunity to be heard should be provided *before* the government acts,³⁰ but the timing issue can be resolved only after a careful balancing of interests.³¹ A hearing provided after government has acted often comes too late to repair the damage caused by that action. In welfare cases, for example, a mistaken termination of benefits can leave the beneficiary and her family homeless.³² Yet in many situations, a right to a prior hearing can be very costly to the particular regulatory or benefactor program. In welfare programs, for example, if government must provide a hearing before it terminates benefits, unqualified recipients have an incentive to demand a hearing to keep the checks coming. The result is that many more hearings will be demanded, often leading to significant backlogs, and substantial amounts will be paid to unqualified beneficiaries before the hearing occurs. Therefore, in some circumstances, a balancing of interests may suggest that government need only provide rudimentary procedure before it acts and then a full hearing later. In American due process law, this has become the typical pattern in connection with termination of government disability benefits³³ or discharge of civil service employees.³⁴

There are countless issues wrapped up in the question of procedural fairness. It is all very well to say that the right to natural justice is flexible and that the agency is given substantial deference in deciding appropriate procedures, but a court must still decide

30. *Transvaal v. Traub*, 1989 (4) SA 731 (A) (indicating that the hearing must occur before the decision is taken in order to avoid the natural human inclination to adhere to a decision and that exceptions can be made when there is a need to act with expedition but that the decision whether to appoint young doctors to a hospital staff was not such a situation). In *Van Huyssteen v. Minister of Envtl. Affairs & Tourism*, 1996 (1) SALR 283, 306-08 (CPD), the Court required that a hearing on the environmental aspects of building a steel mill precede the decision to rezone the property since it would be useless to hold a hearing after the project was built or even substantially begun.

31. See *Transvaal Agric. Union v. Minister of Land Affairs*, 1996 (12) BCLR 1573 (CC) (stating, in *dicta*, that the analysis under section 24 of the interim Constitution should be purely contextual—and thus quite unpredictable).

32. See *Goldberg*, 397 U.S. at 264 (finding that the brutal need of welfare recipients requires a full hearing before the termination of benefits).

33. *Mathews v. Eldridge*, 424 U.S. 319 (1976) (cutting back sharply on *Goldberg*). *Mathews* distinguished *Goldberg* because disability benefits are not based on financial need, 424 U.S. at 339-343, but this distinction is unpersuasive, since by definition disabled persons cannot work and are very likely to be indigent.

34. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

whether the omission of one or more trial-type elements rendered the particular procedure unfair.³⁵

C. The Right to a Written Statement of Reasons

Section 33(2) guarantees a written statement of reasons when a person's rights have been adversely affected by administrative action.³⁶ The value of the written reasons provision is clear. A decision-maker who is compelled to give reasons must at least consider the appropriate factors and produce an apparently justified decision. A statement of reasons helps persons disappointed by the decision evaluate whether to seek judicial review, and it facilitates judicial scrutiny of the decision.³⁷ Since there was no right under preconstitutional law to a written statement of reasons,³⁸ the courts will have little guidance when they confront disputes under section 33(2). For example, courts must decide which "rights" arising out of mass justice situations are sufficiently important to merit a written (as opposed to an oral) reasons statement, whether a request for reasons must first be made, and how detailed the statement must be. Would check marks on a form that furnishes a list of possible reasons suffice?³⁹ Must an agency explain a purely discretionary call such as the decision to suspend a license for one year rather than issue a warning to the licensee?

35. The Industrial Court has worked out guidelines for procedural fairness in connection with dismissal of employees in the private sector. This has required many years of case-by-case development. By a natural process of accretion, the process now includes virtually every significant aspect of a formal trial. Edwin Cameron, *The Right to a Hearing Before Dismissal – Part I*, 7 INDUS. L.J. 183, 183 n.3 (1986) (noting that there were 59 procedural cases in the first seven years of the Court's existence); see also Edwin Cameron, *The Right to a Hearing Before Dismissal – Problems and Puzzles*, 9 INDUS. L.J. 147 (1988).

36. S. AFR. CONST. § 33(2).

37. The provision in section 33(2) is considerably narrower than the parallel provision in the interim Constitution which guaranteed a written reasons statement whenever administrative action affected a person's "rights or interests." See Asimow, *Final Constitution*, *supra* note *, at 613–14.

38. See *National Transp. Comm'n v. Chetty's Motor Transp.*, 1972 (3) SA 726, 736–38 (A) (noting that an agency would be well advised to give reasons but that it is not required). *But see Maharaj v. Chairman, Liquor Bd.*, 1997 (1) SALR 273, 281–83 (NPD) (finding that both the interim Constitution and natural justice require a local authority to provide a statement of reasons why an application for a liquor license was refused).

39. See Klaaren, *supra* note 25, at 614–15 (observing that courts are very concerned with the burden of requiring the Department of Home Affairs to state reasons in every case of an application for residence permits).

D. Rulemaking v. Adjudication

Preconstitutional South African administrative law imposed no procedural requirements on agencies engaged in generalized action such as rulemaking.⁴⁰ Section 33(1) and (2) may well require procedural fairness and written statements of reasons in the case of generalized agency action, because the term “administrative action” is used in connection with all four rights spelled out in section 33. The words “administrative action” were intended to describe as wide a range of administrative behavior as possible.⁴¹ Certainly the requirements of lawfulness and reasonableness in section 33 apply to action of generalized applicability. Unless the words “administrative action” have a different meaning with respect to the different rights to administrative justice, it should follow that the right to procedural fairness and reason statements apply to generalized as well as particularized administrative action.⁴²

40. This shortcoming has been lamented by numerous writers. Lawrence G. Baxter, *Rule-making and Policy Formulation in South African Administrative Law Reform*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 92; Etienne Mureinik, *Reconsidering Review: Participation and Accountability*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 28, 30-31; Catherine O'Regan, *Rules for Rule-Making: Administrative Law and Subordinate Legislation*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 105.

Several preconstitutional cases imposed natural justice requirements in cases of what could be described as generalized agency action. See *South African Rds. Bd. v. Johannesburg City Council*, 1991 (4) SA 1, 16-17 (A) (deciding that charging tolls on existing road entitles local city council to hearing); *Minister of Educ. and Training v. Ndlovu*, 1993 (1) SA 89, 98-99 (A) (deciding that to make entire class retake exam because a few members had cheated was unconstitutional and that finding that each member of the class was entitled to a separate hearing). As a result, the distinction between particularized and generalized agency action was blurred under prior law.

41. LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 168 (1994); Klaaren, *supra* note 22, § 25-2 (1996) (stating that the term covers all action taken by bodies exercising public power). The drafters rejected language in prior drafts referring to “acts” or “decisions” in order to achieve the widest possible coverage. DU PLESSIS & CORDER, *supra*, at 168; see also DRAFT BILL OF RIGHTS, *supra* note 17, at 203 (“‘Administrative action’ covers all types of administrative action—legislative, judicial, quasi-judicial and purely administrative.”). But see *Bernstein v. Bester*, 1996 (2) SALR 751, 801 (CC) (stating, in *dicta*, that administrative action does not include an investigative inquiry).

42. Preliminary drafts of the final Constitution specifically targeted the issue of whether the right to procedural fairness covered rulemaking. Because sections 33(1) and (2) of the final Constitution contain no limitation on the right of procedural fairness for administrative actions of general applicability, it would appear that no such limitation was intended.

See FIFTH DRAFT OF THE FINAL CONSTITUTION (Apr. 15, 1996) § 34(1) (bracketing the language “unless it is of general application” as an exception to procedural fairness); see also SUPPLEMENTARY MEMORANDUM ON BILL OF RIGHTS AND PARTY SUBMISSIONS § 32 note (Apr. 23, 1996) (calling attention to the problem and expressing doubt about whether the right to procedural fairness should extend to rulemaking).

And this is as it should be. Regulations create law that agencies and courts must follow. A regulation may reduce a civil servant's compensation, disqualify a welfare beneficiary, or compel a discharger to install pollution control equipment or an employer to install safety devices. In such cases, the regulation seriously affects the economic interests of the person affected, even though it has not yet been applied to that person individually.

If the requirements of procedural fairness and statement of reasons apply to rulemaking, the Constitutional Court must decide exactly what these provisions demand. The Court might decide that the Constitution requires something like the traditional notice and comment rulemaking process under the U.S. Administrative Procedure Act (APA).⁴³ Procedural fairness under section 33(1) would entail notice to the public of what an agency proposes and the opportunity to furnish written comments on the issues. Section 33(2) would be satisfied by a discussion of the purpose of the rule and why alternatives suggested by the public were rejected. All this must be spelled out by the Constitutional Court as challenges to regulations arise. Needless to say, a court decision invalidating a regulation because it was adopted without providing the required pre-adoption procedure could have a devastating effect on an entire program of government regulation.

E. Reasonable Administrative Action

The requirement that administrative action be reasonable is of fundamental importance. It diverges sharply from preconstitutional law.⁴⁴ Members of the public should not be subjected to irrational

43. Administrative Procedure Act, 5 U.S.C. § 553(b), (c) (1994). Since the enactment of the APA in 1946, hundreds of judicial decisions have transformed its bare-bones rulemaking provisions into demanding requirements. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 287-377 (3d ed. 1994); Michael Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD J. LEGAL STUD. 253, 255-57 (1983). My suggestion here is that the rights to administrative justice in sections 33(1) and (2) would be satisfied by the relatively simple requirements of the original American APA without the subsequent judicial embellishment.

44. *Maharaj v. Chairman, Liquor Bd.*, 1997 (1) SALR 273, 277 (NPD) (finding that prior law accorded a much narrower scope of review than the interim Constitution).

Under prior law, courts could review discretionary administrative action only on the grounds of vagueness, *mala fides*, dishonesty, improper purpose, or unreasonableness so gross that the court could draw an inference that the decision-maker failed to apply his or her mind properly or honestly to the case. See *Standard Bank of Bophuthatswana Ltd. v. Reynolds*, 1995 (3) SALR 74 (B); *Nat'l Transp. Comm'n v. Chetty's Motor Transp.*, 1972 (3) SA 726, 735 (A); John Hlophe, *Control of Administrative Action in a Post-Apartheid South Africa—Some Realities*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 60, 61-66. But see BAXTER, *supra* note 18, at 475-534; Arthur

agency action in adjudication, rulemaking, or any other type of administrative action. The prospect that such actions will be scrutinized by courts or tribunals for reasonableness disciplines agency decision-makers and strengthens the hands of those staff members who insist on reasoned decision-making.⁴⁵

Nevertheless, there are compelling arguments in favor of a cautious approach to reasonableness review. An obligation to assess the reasonableness of agency action can impose a significant burden on busy courts. In order to decide whether a scheme of environmental regulation meets rationality standards, for example, the judges must master detailed and often highly technical records.⁴⁶ Limited judicial resources of time and talent militate against this sort of review. Most significant, judges can utilize the power to declare agency action unreasonable as a device to substitute their own policy preferences in place of the agency's. This is a particular risk if courts engage in the sort of "hard look" review of agency methodology and reasoning that sometimes surfaces in American judicial review practice.⁴⁷

Review for reasonableness should entail the following steps. First, a court should insure that the action under review is factually supported. After examining the evidence that both supports and opposes the agency decision, a court must conclude that a reasonable person could have arrived at the agency's conclusion. This would constitutionalize something like the American test of

Chaskalson, *Legal Control of the Administrative Process*, 102 S. AFR. L.J. 419, 427-28 (1985) (observing that courts sometimes assessed the reasonableness of administrative acts).

45. See William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 170-72 (1991); William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 60 (1975).

46. See, for example, *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), a case which required the court to review the reasonableness of air pollution standards for coal-fired power plants. Judge Wald wrote:

We have read the record with as hard a look as mortal judges can probably give its thousands of pages. We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise — and more.

Id. at 410 (footnote omitted).

47. The prototypical hard look case is *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 391-94 (1986); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-26, 1451-54 (1992).

substantial evidence on the whole record.⁴⁸ A faithful application of the substantial evidence test does not allow a court to reweigh the evidence and overturn the decision merely because it prefers a conclusion different from the agency's.

In addition to finding factual support, the court must be satisfied that the agency took account of all relevant factors and no irrelevant factors. The court must conclude that the agency acted out of proper motives and considered and addressed objections to its decision. Discretionary decisions must meet the test of proportionality, meaning that the agency must explain why a less onerous alternative would not have served its purpose. Finally, and most fundamental, the court must review the actual balance of factors struck by the agency to insure that the decision is within the bounds of logical reasoning and common sense. It is apparent that reasonableness review of administrative action can be a significant consumer of legal resources and contains large potential for the substitution of judicial for administrative judgment.

F. Public vs. Private Administrative Action

Some preconstitutional cases imposed administrative law norms on bodies outside the government, at least as American readers would apply the state action requirement.⁴⁹ Influential commentary⁵⁰ and the reports of a committee engaged in drafting the final Constitution⁵¹ all suggest that powerful private sector entities should be bound by the section 33 norms. It will not be easy for the Constitutional Court to decide which institutions fall on which side of the line. Nor is it obvious what procedures are appropriate for private sector decision-makers, particularly as new

48. The leading U.S. decision reflecting this test is *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). See *Reynolds*, 1995 (3) SALR at 96 (indicating that section 24(d) of the interim Constitution embodies the substantial evidence test).

49. See Alfred Cockrell, *Can You Paradigm—Another Perspective on the Public Law/Private Law Divide*, in *CONTROLLING PUBLIC POWER*, *supra* note 4, at 118.

50. See *The Breakwater Declaration, Administrative Law for a Future South Africa*, in *CONTROLLING PUBLIC POWER*, *supra* note 4, at 233, 234 § 1(iii) ("Public power includes not only the power exercised by governmental institutions at all levels and of different kinds. It includes also the exercise of power in some circumstances by nominally private bodies. In a democracy, the exercise of public power should be accountable and be required to conform to the principles of fairness, equality and responsiveness."); see also Marinus Wiechers, *Administrative Law and the Benefactor State*, in *CONTROLLING PUBLIC POWER*, *supra* note 4, at 130, 133–36.

51. DRAFT BILL OF RIGHTS, *supra* note 17, at 203, 205 ("Section 24 is principally enforceable against the State; thus it clearly has vertical operation. It may, however, also be raised against private institutions, such as churches, universities and trade unions.").

nongovernmental institutions emerge to provide services or engage in regulation.

G. *The Right to Lawful Administrative Action*

The ability of reviewing courts or tribunals to decide questions of legality is fundamental to administrative law. Such review provides assurance that agency action will fall within the scope of the discretion delegated by the legislature and otherwise be faithful to the rule of law. Such review is essential, therefore, to a system of accountable government. Section 33(1) provides a right to “lawful administrative action” and thus assures scrutiny of agency legal interpretations by courts or tribunals.

Preconstitutional South African law displayed ambivalence about the reviewability of agency legal interpretations. Under one formulation, an agency’s legal interpretation is reviewable unless the legislature intended to commit the interpretive question to the agency’s discretion.⁵² I question whether this distinction can be maintained under section 33(1). Since the right to lawful action in section 33(1) was intended, at a minimum, to ban ouster clauses,⁵³ it would appear that Parliament cannot commit a question of legal interpretation to an agency’s discretion. All interpretive issues must be reviewable, whether or not jurisdictional, and whether they involve interpretation of a statute, a regulation, or other legal text.⁵⁴

In America, a high percentage of administrative law cases require the court to review an agency’s interpretation of statutes or regulations. These cases are often challenging, since many regulatory schemes involve complex statutes and regulations little

52. *Hira v. Booyesen*, 1992 (4) SA 69, 93 (A). *Hira* indicated that a delegation of unreviewable interpretive power is likely in cases involving broad agency discretion but less likely in cases where the question is whether a person’s conduct falls within a defined standard. *Id.* The reasoning of *Hira* was apparently influenced by Etienne Mureinik, *The Application of Rules: Law or Fact*, 98 LAW Q. REV. 587 (1982) (recommending that the test should be whether the legislature intended to commit interpretive discretion to agency).

53. DRAFT BILL OF RIGHTS, *supra* note 17, at 204; DU PLESSIS & CORDER, *supra* note 41, at 163–68; Klaaren, *supra* note 22, § 25-9.

54. In order to successfully implement the judicial review norm, courts must resolve the difficult issue of the scope of review of applications of law to fact. For various perspectives, see Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1209–24 (1995) (stating that such applications are questions of law with appropriate deference to the agency’s view); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 41 (1985) (recommending that application questions should be considered issues of discretion); Mureinik, *supra* note 52 (arguing that such applications are questions of law).

understood by judges. Section 33(1) is likely to impose similar burdens on South African reviewing courts and tribunals.

Section 33(1) is clearly intended to introduce a rule-of-law norm in connection with review of agency statutory interpretations. As a result, South African courts and tribunals should not follow the *Chevron* rule,⁵⁵ which is sporadically applied by American federal courts. *Chevron* commits the interpretation of ambiguous statutory language to agency discretion. Instead, South African reviewing authorities should consider adapting the pre-*Chevron* model, which is employed in most states, of giving deference only to carefully reasoned interpretations of ambiguous statutory language and only where the agency's expertise gives it a genuine interpretive advantage over the court or tribunal.⁵⁶

III. THE NEED FOR AN ADMINISTRATIVE JUSTICE ACT

The Constitutional Court confronts an enormous challenge. On the shoulders of this Court rests the long-term viability of the Constitution and of successful multiparty democracy. To an outside observer, the Court's responsibilities are breathtaking. The drafters of the Constitution deliberately created a Bill of Rights that they knew would require substantial limitation before it could work in practice. Some of the rights are extraordinarily open-ended, such as the rights to protection of dignity, privacy, equality, property, and to an environment that is not harmful to health or well-being.⁵⁷ The Court will also find it difficult to give content to the provisions for positive rights to housing, health care, access to land, nutrition, social security, and education.⁵⁸ While the Constitution represents a consensus that the courts should vindicate some broadly stated rights, there is little consensus on what these rights actually mean in practice, how to resolve conflicts between rights, and what limitations on rights are appropriate. And, of course, in addition to applying and limiting the Bill of Rights, the Constitutional Court has numerous other formidable chores, such as resolving disputes over federalism and other political controversies. Prior to 1994, South

55. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

56. See Asimow, *supra* note 54, at 1193-98, 1203-08; see also DAVIS & PIERCE, *supra* note 43, at 233-48; David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329, 332-36 (1979) (summarizing pre-*Chevron* judicial practice).

57. S. AFR. CONST. §§ 9-10, 14, 24-25.

58. S. AFR. CONST. §§ 25(5), 26, 27(1)(a)-(c), 29; see also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 889 (1986) (asserting that these "rights . . . have such imprecise boundaries that their effectuation is not to be expected without legislative and executive definition").

African courts were totally unaccustomed to the sort of wide-open judicial policymaking that bill of rights adjudication entails. The pillar of preconstitutional law was parliamentary supremacy. The judiciary had little leverage available to check parliamentary or executive action, however unjust it seemed.⁵⁹ Today the compass has moved 180 degrees. The eleven judges of the Constitutional Court are the philosopher kings of South Africa. In defining the meaning of the Bill of Rights and limiting their application, the Court will be called upon to settle a vast number of critical and hotly controversial questions of public policy.⁶⁰

The Canadian Charter of Rights and Freedoms of 1982 imposes similar responsibilities on the Canadian Supreme Court. It has been deluged with difficult cases,⁶¹ yet the Canadian Charter contains many fewer rights and freedoms than does the South African Constitution.⁶² The U.S. Supreme Court has taken 200 years⁶³ to define and apply the provisions of the American Bill of Rights, which also contain far fewer guarantees than does the South African Constitution, and it certainly has not completed the job. The Constitutional Court is expected to do it all immediately.

The history of the U.S. Supreme Court, as well as of supreme judicial bodies in other nations,⁶⁴ suggests that the

59. The paradigms suggested by Nonet and Selznick describe this immense shift. Preconstitutional law conformed to the model of "repressive law," meaning that its purpose was the defense of the social status quo. The government had vast discretionary power and was not subject to much legal restriction. Under the Constitution, South Africa conforms to the model of "autonomous law," meaning that it is more oriented to procedural fairness, official discretion is more confined, and the government is extensively bound by law. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 104-05 (1978).

60. See Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFR. L.J. 134, 148-50 (1997).

61. See Jeremy Webber, *Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms*, 5 CANTERBURY L. REV. 207, 212, 229-30 (1993) (observing that the court has to decide at least 25 constitutional cases per year, most of which involve wide-open judicial policymaking and value judgment).

62. For example, the Charter does not provide for due process in connection with deprivations of economic rights. *Attorney Gen. of Quebec v. Irwin Toy Co.* [1989] 58 D.L.R.4th 577. Moreover, the Canadian charter allows for an override of constitutional rights by specific legislation. CAN. CONST. (Canada Act 1982) Sched. B (Canadian Charter of Rights and Freedoms) pt. I, § 33.

63. More precisely, it has been working for 200 years on the first ten amendments to the Constitution and 125 years on the problems of due process and equal protection embodied in the Thirteenth, Fourteenth, and Fifteenth amendments.

64. In India, the Supreme Court obstructed land reform, setting off a cycle of constitutional amendments that were in turn invalidated by the Court. See David Gwynn Morgan, *The Indian "Essential Features" Case*, 30 INT'L & COMP. L.Q. 307 (1981). In postrevolutionary Iran, the Council of Guardians invalidated radical land reform legislation on constitutional grounds, leading ultimately to the demise of the

legitimacy⁶⁵ of the Constitutional Court will soon be called into question.⁶⁶ In the 1930s, a conservative Supreme Court invalidated, on due process and federalism grounds, a long line of federal and state statutes intended to grapple with the Depression and to enhance workers' economic security.⁶⁷ This led to President Roosevelt's attempt to pack the Court. Similarly, when the Supreme Court or lower courts have ventured into the great questions of the day, such as school desegregation, abortion, the death penalty, affirmative action, immigrant rights, or school prayer, the public response has been strong, sustained, and vitriolic.⁶⁸ In California, state supreme court justices perceived to be thwarting the death penalty were voted out of office.⁶⁹ A U.S. Supreme Court decision denying citizenship to a slave and spreading slavery to free states helped provoke the Civil War.⁷⁰

The American experience shows that there is a limit on the extent to which a court can engage in policymaking that obstructs the popular will before it is viewed as just another political player—and a nonaccountable one at that. Already, the Constitutional Court has rendered a series of controversial decisions under the interim

Council. CHIBLI MALLAT, *THE RENEWAL OF ISLAMIC LAW* 79–111, 146–55 (1993). In Chile, decisions by the Supreme Court that invalidated land reform led to a refusal by the executive branch to enforce the Court's decrees. See Neal P. Panish, Comment, *Chile Under Allende: The Decline of the Judiciary and the Rise of a State of Necessity*, 9 *LOY. L.A. INT'L & COMP. L. REV.* 693 (1987).

65. By "legitimacy," I mean the court's ability to command obedience to its decisions without the use of force. See ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 103–05 (1976); see also MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATIONS* 130–32 (1947) (observing that the willingness to submit to the order of a group implies a belief in the legitimacy of the authority of the source imposing it); Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 *L. & SOC. INQUIRY* 407, 411–12 (1995) (defining legitimacy as effective belief in the binding quality of the social order).

66. The definitive treatment of this issue is JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 129–70 (1980) (examining the danger and necessity of judicial review). For a discussion of the ways in which the Constitutional Court can enhance its legitimacy, see Jonathan Zasloff, *The Tyranny of Madison*, 44 *UCLA L. REV.* 795, 850–55 (1997) (urging judges to adopt literalism, bright line rules, *stare decisis*, and proceduralism).

67. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 307–10, 567–86 (2d ed. 1988).

68. Controversial Supreme Court decisions prompted calls in Congress for limitation of the Court's jurisdiction. The bills were not enacted, so the Court never had to confront the difficult constitutional question of whether Congress could, in effect, amend the Constitution by limiting the Court's jurisdiction. See *id.* at 44–50.

69. See Gerald F. Uelman, *Supreme Court Retention Elections in California*, 28 *SANTA CLARA L. REV.* 333 (1988); Colloquy, *Transcript—California Judicial Retention Elections*, 28 *SANTA CLARA L. REV.* 357 (1988).

70. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); see also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.6, at 608–610 (4th ed. 1991).

and final constitutions,⁷¹ and it has scarcely begun the process of applying the Bill of Rights to the endless assortment of preconstitutional statutes, regulations, and common law rules.⁷²

Very quickly, the Constitutional Court will test the limits of its legitimacy. At that point, its unpopular decisions may be amended out of existence,⁷³ and many of the underlying rights may disappear along with them.⁷⁴ Parliament should come to the rescue of the Constitutional Court by resolving as many of the open questions as possible. This includes the conceptual puzzles posed by the administrative justice provisions of the Constitution. The Constitutional Court's legitimacy is a precious coin that must not be squandered.

Policymakers must also be concerned by the Court's meager resources of time and energy. The number of issues upon which the Court will be called to address may swiftly outstrip its ability to decide cases.⁷⁵ Thus the Court may encounter an ever-lengthening backlog or be compelled to use its discretionary powers to decline review of cases that urgently require review. The administrative law provisions of the Bill of Rights threaten to deluge the courts, including the Constitutional Court, with context-specific issues relating to the lawfulness and reasonableness of administrative

71. See the articles and case comments on the first year of Constitutional Court jurisprudence in 12 S. AFR. J. ON HUM. RTS. 1-192 (1996).

72. See Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 S. AFR. J. ON HUM. RTS. 185 (1997). Klug gives an insightful analysis of the Constitutional Court's strategy in insuring its legitimacy.

73. S. AFR. CONST. § 74 (providing that in most situations, the Constitution can be amended by a two-thirds vote of the National Assembly and six provinces in the National Council of Provinces). *But see* Premier, KwaZulu-Natal v. President of the Republic of S. Afr., 1996 (1) SALR 769, 783-84 (CC) (suggesting that an amendment that radically and fundamentally restructured and reorganized the fundamental premises of the Constitution might not qualify as an "amendment").

74. This has frequently occurred in California, where the state constitution can be easily amended by voter initiative. See, e.g., J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come from and How Much Did It Do?*, 23 PAC. L.J. 843, 855-65 (1992) (discussing an initiative that wiped out numerous criminal procedure decisions by the California Supreme Court). The Zimbabwean legislature has repeatedly amended its Constitution to thwart its Supreme Court's decisions. Anthony R. Gubbay, *The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience*, 19 HUM. RTS. Q. 227, 243, 251-53 (1997); see also John Hatchard, *Undermining the Constitution by Constitutional Means: Some Thoughts on the New Constitutions of Southern Africa*, 28 COMP. & INT'L J. S. AFR. 21, 21-25 (1995).

75. As an outside observer, I am impressed by the length and erudition of Constitutional Court opinions. Each opinion cites, quotes at length, and analyzes a wide variety of foreign and international authorities. Each one meticulously discusses the prior South African practice and case law. Frequently there are several opinions. Unfortunately, reflecting the leisurely habits of the South African judiciary of the past, the Constitutional Court seems ill-equipped to dispose of its case load swiftly and efficiently.

action as well as questions relating to procedural fairness and written reasons.

This onslaught of cases, and the risk that an improvident decision might completely disrupt the functioning of government, may lead the courts into unprincipled decisions narrowing the scope of the constitutional right to administrative justice. Although the Constitutional Court has yet to confront any of the major issues posed by the administrative justice provisions of the interim or final constitutions, some lower court decisions are troubling. For example, the Supreme Court has ruled that aliens have no right, legitimate expectation, or even a legally protected interest in receiving a temporary residence permit; consequently they are not entitled to fair procedure or a statement of reasons under sections 24(b) and (c) of the interim Constitution.⁷⁶ The subtext of these decisions may well have been judicial concern that a reasons requirement would have swamped both the Department of Home Affairs and the courts.⁷⁷

In order to protect the Court's legitimacy and conserve its resources, to safeguard the constitutional provisions from unprincipled narrowing by the judiciary, and to guard against decisions mandating improvident expenditures of public resources,⁷⁸ Parliament should not allow the provisions of section 33 to become free-standing. Instead, it should resolve through legislation as many of the questions arising under the administrative justice provision as it possibly can.⁷⁹

IV. A SOUTH AFRICAN ADMINISTRATIVE JUSTICE ACT

A. *The Process of Drafting an Administrative Justice Act*

The difficulties encountered in drafting a South African Administrative Justice Act (AJA) are daunting. The statute is certain to be controversial, lengthy, and detailed, striking countless compromises between fairness and efficiency. Failing enactment of a new AJA, Parliament should consider the administrative law aspects of each piece of legislation it enacts, providing for the procedural modalities that will be used to implement the Act and for the details of review of agency decisions by courts or tribunals.

76. See, e.g., *Xu v. Minister van Binnelandske Sake*, 1995 (1) SALR 185 (T).

77. Klaaren, *supra* note 25, at 614-16.

78. See *Van Huyssteen v. Minister of Env'tl. Affairs & Tourism*, 1996 (1) SALR 283, 302-08 (CPD).

79. See Lene Johannessen et al., *A Motivation for Legislation on Access to Information*, 112 S. AFR. L.J. 45 (1995) (urging enactment of legislation to implement the Constitution's freedom of information provision).

There are plenty of models from which the drafters of a new AJA can draw inspiration. American courts have long experience interpreting and applying the federal APA. All fifty states have APAs of their own, some of them recently adopted.⁸⁰ The 1981 Model State APA is a rich source of guidance.⁸¹ There are numerous models available from other nations.⁸²

B. Taking Administrative Efficiency into Account

The Constitution provides that Parliament must “promote an efficient administration” when it implements the rights to administrative justice.⁸³ This explicit recognition of efficiency is of paramount importance, since it is unclear whether Parliament or the courts are permitted to take account of efficiency in applying the general limitations provision of section 36 to the administrative justice provisions.⁸⁴ As this Article has argued, if the rights to administrative justice are pushed too far, the costs in terms of resources and obstruction of government programs will outweigh the benefits.⁸⁵ Therefore, limitations based on administrative efficiency are appropriate and essential.

80. The California, Florida, Wisconsin, Utah, and Washington statutes will be of particular assistance. For discussion of the issues that must be addressed in drafting the adjudication and judicial review provisions of a new APA, see Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067 (1992); see also Asimow, *supra* note 54.

81. MODEL STATE ADMIN. PROCEDURE ACT (1990 & Supp. 1997).

82. See, e.g., MARGARET ALLARS, INTRODUCTION TO AUSTRALIAN ADMINISTRATIVE LAW (1990); WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 904–63 (7th ed. 1994) (reviewing the British tribunal system under the Tribunals & Inquiries Acts of 1958, 1971, and 1992); Corder, *supra* note 2, at 35–41; O’Regan, *supra* note 40, at 105, 111, nn.37–38; Wilhelm Rapp, *Report on Administrative Law and Judicial Review of Administrative Decisions in Germany*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 216; Cheryl Saunders, *Appeal or Review: Administrative Appeals in Australia*, in CONTROLLING PUBLIC POWER, *supra* note 4, at 196.

83. S. AFR. CONST. § 33(3)(c).

84. In Asimow, *Final Constitution*, *supra* note *, at 627–28, I argued that the courts and Parliament could consider administrative efficiency in applying the general limitations provision in the interim Constitution. To the extent Parliament fails to enact an AJA within the time constraints set by section 33(3), the chore of limiting the administrative justice rights falls to Parliament or the Constitutional Court under section 36 of the final Constitution. I continue to believe that both the courts and the legislature can, and should, consider efficient administration under the general limitations clause. See the discussion of the need to take efficiency into account in SUPPLEMENTARY MEMORANDUM OF THE BILL OF RIGHTS AND PARTY SUBMISSIONS, *supra* note 42, § 32.

85. On this point, Parliament and the courts should be influenced favorably by American decisions that limit the scope of the due process clause by considerations of cost and efficiency. See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 319–34 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 320–22 (1976). These decisions balance the nature of the right in question, the utility of the procedure in issue, and the

Many South Africans, exhilarated by their new Bill of Rights and reacting against the oppression of the past, are reluctant to countenance limitation of these rights for reasons of cost, efficiency, or expediency. Their reaction to the explicit recognition of efficiency in section 33(3)(c) is one of dismay. Yet this Article has attempted to show that such limitations are necessary, lest government agencies administering vital functions find themselves spending their limited resources or incurring excessive delays in order to satisfy procedural requirements of dubious utility. South Africa cannot afford all the procedure that the broadest interpretations of section 33(1) and (2) would require. Neither under- nor overproceduralization is "justifiable in an open and democratic society based on human dignity, equality, and freedom."⁸⁶

C. Elements of a New Administrative Justice Act

This Article is obviously not the place to set forth a detailed scheme for a South African AJA, but I would like to suggest some of the elements that might be contained in such a law.⁸⁷

1. *Administrative Adjudication.* The statute might create several different adjudicatory models. These models would provide the elements of procedural fairness and reasons statements when the statute creating the administrative scheme in question fails to spell out the appropriate procedures.⁸⁸ The models involve descending levels of formality and cost, depending on the importance of the

government's interest in refusing to provide the procedure. *Mathews*, for example, upheld a statute providing that hearings relating to the termination of disability benefits can occur after, rather than before, the benefits are cut off. *Mathews*, 424 U.S. at 322. The Court was heavily influenced by the administrative burdens and costs of requiring prior hearings. *Id.*

86. S. AFR. CONST. § 36(1).

87. These suggestions arise out of my experience as consultant to the California Law Revision Commission which has worked since 1989 to propose a new APA for California. See Asimow, *supra* note 80; Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297 (1996). The Commission will propose legislation relating to judicial review and rulemaking. The administrative adjudication provisions recommended by the Commission have already been enacted. CAL. GOV'T CODE §§ 11400-11470.10 (West Supp. 1997). This Article reflects my views, not those of the Commission, its staff, or members.

88. Alternatively, a statute that creates a particular regulatory or benefactor scheme could conveniently refer to one of the APA models to describe the procedure. The statute might then rework that model for the specific function in question.

The statute should provide for alternative dispute resolution (negotiation, mediation, and arbitration) to the fullest extent possible. It should also provide for the use of the telephone and other electronic media in the interests of efficiency.

issues at stake and the type of issues that must be resolved.⁸⁹ This is the approach taken by the 1981 Model State APA.⁹⁰

One model would prescribe full-scale formal adjudication.⁹¹ This model would be employed when important rights are at stake and the agency must resolve questions of adjudicatory fact that turn on credibility. For example, formal adjudication is appropriate when the state seeks to revoke a professional license, expel a student from school, or impose a substantial civil penalty. Most of the procedures employed in court should apply in formal adjudication. Among other things, parties should have a right to retained counsel, presentation of evidence through testimony, and cross-examination of adverse witnesses.⁹²

A second model might be called informal or conference procedure.⁹³ When informal procedure applies, an agency would be required to provide proper notice and an impartial decision-maker, to decide the case exclusively on the record, and to provide a written reasons statement. However, the agency could dispense partially or completely with testimony by witnesses and cross-examination. Instead, the litigants would be entitled to submit written statements and to make oral arguments.

Informal procedure would be appropriate for matters where less important rights are at stake, such as small monetary sanctions or a brief disciplinary suspension from work or school. It is especially useful where the agency need not resolve questions of credibility. For example, cases involving economic issues such as rate-making, permitting, license applications, land planning, and zoning are appropriate subjects for informal procedure; they often involve issues of discretion and judgment but not credibility. Most

89. In a recent South African death penalty case, *State v. Makwanyane*, 1995 (3) SALR 391 (CC), Presiding Judge Chaskalson pointed out that not all constitutional rights are equal and that each has different implications for democracy. *Id.* at 436. As a result, there is no absolute standard for determining whether a limitation is permissible. Different levels of formality are appropriate, depending on the particular claim to administrative justice. *See id.*

90. MODEL STATE ADMIN. PROCEDURE ACT, §§ 4-101 to 4-506 (1990 & Supp. 1997).

91. *See, e.g., id.*, §§ 4-201 to 4-221.

92. Some cases that call for formal adjudication also require the government to act quickly and decisively. It may be appropriate in such situations to provide a relatively brief probable-cause type proceeding before the government acts, and to follow up with a full-fledged hearing later. This pattern may be appropriate in cases involving termination of government benefits, suspension of professional licensees from practice, or removal of tenured government employees for misconduct. *See supra* text accompanying note 21.

93. *See, e.g., CAL. GOV'T CODE* §§ 11445.10 to 11445.60 (West Supp. 1997); MODEL STATE ADMIN. PROCEDURE ACT §§ 4-401 to 4-403; Asimow IV, *supra* note 80, at 1096-1100.

factual issues arising in this sort of case can best be resolved through written submissions by experts followed by oral argument.⁹⁴

Finally, there are cases to which section 33 might apply which involve relatively trivial stakes or which are characterized by an extraordinary need for speedy and routine disposition. Here, even informal procedure may be too costly. The statute might call for a third model, called summary procedure,⁹⁵ in which a party is provided an opportunity to tell his or her side of the story to a decision-maker. The decision-maker need not be impartial or uninvolved in the dispute and need not decide the case on an exclusive record. The party would be entitled to receive an oral explanation of the decision and to seek reconsideration of the decision at a higher bureaucratic level. Summary procedure provides relatively little procedural protection, but it is better than nothing and may be all that society can afford to provide in a wide range of situations.

2. *Rulemaking.* The AJA should spell out a bare-bones procedure for public participation in the adoption of delegated legislation.⁹⁶ These provisions might include public notice of a proposed rule, an opportunity to make written comments,⁹⁷ a statement of reasons for the agency's decision which explains why less burdensome alternatives were rejected, and publication of the rule before it goes into effect. The statute should provide that comments can be received after the rule goes into effect in emergency situations and it should make clear that guidance documents (such as circulars, interpretations, bulletins, rulings and the like) can be adopted without public participation. It might also provide a negotiated rulemaking option.

3. *Judicial review.* The statute should clarify the fundamental questions relating to review, whether such review is performed by courts or by generalized or specialized tribunals outside the judicial system. It should define in some detail the reviewing body's scope of review with respect to questions of fact, law, application of law to fact, procedure, and discretion. In particular, the terms "lawful" and "reasonable" in section 33(1) should be defined. The statute should

94. For this reason, I question the decision in *Van Huyssteen v. Minister of Envtl. Affairs & Tourism*, 1996 (1) SALR 283 (CPD), discussed *supra* text accompanying note 24.

95. See, e.g., MODEL STATE ADMIN. PROCEDURE ACT §§ 4-502 to 4-506; Asimow, *supra* note 80, at 1100-02.

96. Thus, the procedure would resemble the one provided in the federal APA before it became encumbered with a variety of legislative, judicial, and executive refinements. See *supra* text accompanying notes 40-45; see also Ross Kriel, *Codifying Pre-Adoption Procedures for Subordinate Legislation in South Africa*, 13 S. AFR. J. ON HUM. RTS. 354 (1997) (making carefully considered suggestions about the rulemaking provisions in an Administrative Justice Act).

97. The statute should encourage extensive use of the internet for giving notice, submitting comments, and publishing final rules.

preclude the reviewing body from substituting judicial for administrative judgment on issues involving fact, discretion or policy.

In addition, the statute should clarify other fundamental review issues. It should define who has standing to seek review and clarify timing questions such as ripeness and exhaustion of remedies. It should explain when a court or tribunal can grant a stay of administrative action pending review. It should define the record for review and explain whether that record is open or closed and whether the agency can supply post hoc reasons for its actions.

CONCLUSION

The Bill of Rights in South Africa's Constitution embodies a true legal revolution. It is one of the most inspiring jurisprudential developments of the twentieth century. Yet none of us can know whether this constitutional experiment will take root and flourish in the decades to come or will wither because of crippling amendments and delegitimation of the courts. Everything depends on the ability of the Constitutional Court to implement and to limit the provisions of the Bill of Rights. Its success is by no means assured.

In its decision certifying the final Constitution, the Constitutional Court made some trenchant observations about the freedom of information provision of the Constitution:

The transitional measure [which is the same as the transitional measure concerning administrative justice] is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement. . . . The Legislature is far better placed than the Courts to lay down the practical requirements for the enforcement of the right and the definition of its limits. Although § 32(1) [the freedom of information provision which provides a broad right of access to any information held by the State] is capable of being enforced by a court—and, if the necessary legislation is not put in place within the prescribed time it will have to be—legislative regulation is obviously preferable.⁹⁸

This observation, and its subtextual plea for help, applies with even greater force to the open-ended administrative justice provi-

98. Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744, 802-03 (CC).

sions of the Constitution. It is essential that, whenever possible, the Bill of Rights be appropriately defined and limited by statutes enacted by the electorally accountable Parliament rather than by decisions of a non-accountable Court.

Although the demands on the time and attention of Parliament and of South African academics are enormous, priority must be accorded to drafting and enacting an Administrative Justice Act within the three-year time frame established by the Constitution.