Rule-making and Policy Formulation in South African Administrative-law Reform

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I INTRODUCTION

South African administrative law has no coherent rule-making process.¹ Nor are there any democratically-oriented structures governing the development of administrative policy. This paper will consider the need for creating a general rule-making process in South Africa. It will be argued that such a process would be highly desirable in the kind of administrative system that is likely to emerge in the future under a new constitution.²

The paper will describe rule-making, identify the limits of rule-making, when rule-making should be employed and when it should not, and explain how rule-making might provide a realistic means of public participation in government without inappropriately compromising the integrity of the administrative process. The paper is therefore concerned with the generalized implementation of statutory powers and responsibilities by administrative authorities under the future South African constitution; it does not deal with the procedures for fair and rational decision-making in specific disputes between individuals and the government even though, as will be noted, the latter is likely in practice to be affected to a considerable extent by the former.³

II ADMINISTRATIVE STANDARD-SETTING AND THE RULE-MAKING ADVANTAGE

Administrative action takes diverse forms and serves a multitude of purposes. Individual administrative determinations are made for the purpose of exercising statutory power in specific situations—perhaps to grant a licence, impose restrictions on the development of a piece of land, or dismiss a public employee. In such situations, administrative law is

¹ 'Rule-making' is a creation of American administrative law. The concept is sometimes used in South Africa and Britain to describe the manner by which delegated legislation is produced, but this is merely because the American term is convenient. See, for example, L Baxter Administrative Law (1984) 201; P P Craig Administrative Law 2 ed (1989) 172; cf B Schwartz & H W R Wade Legal Control of Government (1972) 96 (equating 'rule-making' with 'delegated legislation'). When used in this way, 'rule-making' seldom refers to a process that is similar to the highly-developed rule-making process that exists in American administrative law.

² For my earlier arguments in support of a rule-making process for South Africa, see Baxter op cit 203–8.

³ For an analysis of the distinction between rule-making and decision-making, see for example O'Regan's paper in this collection.
usually concerned with the fairness of the procedures involved, or the rationality of the decision made by the public authority. Individualized decision-making is, however, only a part of the overall responsibilities of any public authority.

Administrative bodies are not only concerned with making decisions in individual situations; they are also more principally engaged in discharging a broad network of statutory responsibilities.\(^4\) Because they have a host of statutory mandates, public authorities are much more likely to be preoccupied with attaining certain overall goals than with ensuring that fairness and justice is attained in specific situations. To attain these overall goals (and sometimes merely for the purpose of maintaining internal co-ordination), public authorities develop sets of generalized standards which provide a framework within which their officers exercise the statutory powers entrusted to them. These standards take various forms, ranging in formality from published regulations having the force of law to 'policies', 'guidelines', and 'manuals'. (For convenience, I will refer to these general norms collectively as 'standards', except where their relative degrees of formality become relevant, in which case I will use more precise terms.)

The formulation and adoption of administrative standards, especially when these standards take the form of internal policies that are not published as regulations, is sometimes viewed with apprehension and suspicion. The fear is that they tend to create a kind of 'secret law' that might deviate or derogate from the standards already determined by the legislature in the empowering statute.\(^5\) Yet, given the exigencies of complex modern administration, the development of coherent administrative standards is often desirable and probably inevitable. Administrative standards, when they are clear and known to the public, are often better than the alternative of broad and sometimes quite unmanageable discretion.\(^6\) The virtues of rules or standards as a basis for administrative government need hardly be emphasized to lawyers: they provide a framework, known in advance, by which individuals can plan their conduct. Rules and standards, developed within the administrative process, also offer obvious advantages to public administrators: they help a public authority to articulate a coherent understanding of its mission;

\(^4\) The general and specific responsibilities do of course interact. The general standards within which public authorities function affect both directly and indirectly the way in which they decide individual cases. The converse is also true in many situations: public authorities, perhaps no less than courts of law, often develop policy through the process of individualized decision-making.

\(^5\) The longest standing objection against the use of such standards by administrative bodies is the fact that they are often not publicized and are frequently even kept confidential. See, for example, C K Allen Law in the Making 7 ed (1964) 550.

\(^6\) One should not of course lose sight of the flipside of this argument: discretion is often more appropriate than a rule. Rules, being general prescriptions, are necessarily crude when applied to many specific situations. Rules tend to be both over- and under-inclusive, and they are seldom a perfect substitute for the wise exercise of discretion in particular situations. See further for example, R Baldwin 'Why rules don't work' (1990) 53 MLR 321; C S Diver 'The optimal precision of legal rules' (1983) 93 Yale LJ 65.
because of their generality they resolve whole classes of problems and potential disputes, thereby conserving the resources a public authority needs in order to implement its responsibilities. Administrative rules and standards even offer an advantage directly to the public: they provide a means for the evaluation of administrative policy by opening up to public scrutiny the norms which the administration believes it has a duty to apply.\(^7\)

Where the applicable standards are specified in clear detail by the legislature, the principle of legality helps to ensure that an administrative agency remains faithful to the choices democratically established by elected legislators. The standards can be directly enforced through judicial review. But the link between democratic choices and administrative standards becomes more tenuous as the discretion of the public authority concerned increases, even where the public authority is expressly authorized to promulgate regulations. The formulation of regulations and the exercise of discretion involve making choices that were not made by the legislature. Whereas rules and standards that have been predetermined by a properly representative legislature are by definition democratic, the same cannot be assumed in the case of standards that have been formulated by a public authority itself. Hence the processes by which public authorities formulate regulations, policies, practices and guidelines, deserve attention if we want to devise a system of administrative justice that is not only purposive and efficient but also based upon standards that have themselves been determined in accordance with the democratic notions of participation, responsiveness and accountability.

In the South African administrative-law tradition, little attention has been given to the process by which administrative standards are formulated by public authorities. An administrative process analogous (though by no means identical) to what American administrative lawyers term 'rule-making' would greatly improve the present situation and would lay a foundation for a modern system of administrative law under the new constitution.

Rule-making involves a set of flexible procedures that a public authority must follow whenever it wishes to develop binding standards. A public authority is required to publish its proposed standards together with a reasoned explanation of their purpose. The notice invites public comment, in either written or oral form (or sometimes both), by or on a certain date. After comments have been received, the public authority analyses the comments, adapts its proposed standards in response to those comments, and publishes the final standards together with an explanation of its response to the comments received and its choice of the particular form which the final standards have taken. Like regulations

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\(^7\) These are the principal reasons why the courts in the United States have encouraged agencies to use rule-making whenever they can, even where their statutory authority to do so is unclear. See, for example, *National Petroleum Refiners Association v Federal Trade Commission* 482 F2d 672 (DC Cir 1973), cert denied, 415 US 951 (1974).
promulgated in the Government Gazette under current South African law, these final standards then acquire the force of law unless they are set aside on judicial review.\textsuperscript{8}

This 'notice-and-comment' rule-making process constitutes a 'surrogate political process' that helps to compensate for the fact that democratically-elected representatives do not make the actual choices embodied in the standards that are produced by the administration.\textsuperscript{9} The solicitation of public comment also helps to inform the public authority.\textsuperscript{10} In addition, analytical public comments serve to highlight inconsistencies or lapses in the reasoning underlying proposed rules. Sometimes the very requirement that a process be followed at all serves to prevent the promulgation of hasty, ill-considered regulations that might actually prove to be a problem in themselves rather than a solution.\textsuperscript{11} Finally, the process provides a record upon which the final action of the public authority can be evaluated by a court applying the usual standards of judicial review.\textsuperscript{12}

\textsuperscript{8} This description summarizes the principal elements of rule-making in the United States. The details vary from state to state and under the Federal Administrative Procedure Act, 12 US Code § 553. Federal rule-making provides for two types—formal and informal—though the latter (which is much more flexible and less trial-like) has now become the dominant model. In addition, many specific pieces of legislation establish 'hybrid' rule-making procedures that modify the standard rule-making procedures ordinarily applicable. See generally A Aman & W T Mayton Administrative Law (1993) ch 2.

Rule-making is well established at the state level too. The former and current Model State Administrative Procedure Act also contains general provisions for rule-making. See Uniform Law Commissioners' Model State Administrative Procedure Act (1981), Article III (Rule-Making). See generally A E Bonfield State Administrative Rulemaking (1986) passim.

\textsuperscript{9} For the seminal analysis of this interest-representation function of rule-making, see R B Stewart 'The reformation of American administrative law' (1975) 88 Harv LR 1760–90.

\textsuperscript{10} Federal and state government agencies in the United States often rely heavily on information supplied to them by industrial and commercial organizations and public interest groups. The agencies are assisted in evaluating the reliability of much of this information by the fact that opposing groups will often counter each other's evidence with critical analyses or contradictory data.

\textsuperscript{11} This consideration is pertinent in the South African context. As Mureinik observes in this collection: 'Under the prevailing South African law, there is in general nothing to stop an official from drafting a major regulation in the morning, taking it to the Minister for signature that afternoon, and promulgating it in the Gazette that week.'

An interesting illustration comes from my own experience advising the Institute for Liberty and Democracy in Peru, which was assisting Peru’s new Fujimori administration to institute a rule-making process (Law for Public Participation) together with an Administrative Simplification Program in 1990–91. At the time, Peru was drowning in a sea of regulations that were issued on a daily basis by bureaucrats steeped in the statist tradition. When I warned the Institute that American-style rule-making would slow the rule-making process, they emphasized that this was precisely the point of introducing rule-making into Peru—in order to slow down the bureaucrats so they could not issue rules by decree!

\textsuperscript{12} For a classic statement of the importance of a rule-making record for subsequent judicial review, see Home Box Office Inc v Federal Communications Commission 567 F2d 9 (DC Cir), cert denied, 434 US 829 (1977).
III RULE-MAKING AND THE SOUTH AFRICAN ADMINISTRATIVE-LAW TRADITION

Rule-making is a peculiarly American invention. In Britain and in many countries of the British Commonwealth, administrative lawyers have tended, in considering the ‘problem of administrative justice’ in the administrative process, to focus their attention on the difficulties associated with ensuring valid and fair decisions in individual decisions. Emphasis is usually given to meaning and content of a ‘fair hearing’ as this concept relates to the individual who is in dispute with the government and to the specific facts and circumstances of that dispute. As far as ‘delegated legislation’ (regulations, orders, etc) is concerned, the focus has been on how parliament might control its production,\(^{13}\) or upon its substantive rationality;\(^{14}\) until fairly recently, very little analysis has been made of the possibility of using a rule-making process to enhance public participation in the actual formulation of delegated legislation.\(^{15}\) Still less consideration has been given to the general processes by which public authorities implement their statutory powers and obligations and the manner in which the policies that guide the implementation of these powers and responsibilities are developed.


\(^{14}\) Here I refer to the possibility of judicial review of delegated legislation on the ground of unreasonableness, as formulated under the case law spawned by Kruse v Johnson [1898] 2 QB 91, and Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223. See, for example, Ganz (n 13) 43–6; Wade (n 13) 868.


As far as official recognition of the importance of accountable rule-making procedures is concerned, Canada and Australia appear to have taken the lead in the British Commonwealth. In 1980 and 1985 the Canadian Law Reform Commission called for the adoption of notice-and-comment rule-making procedures by independent administrative agencies (Law Reform Commission of Canada Independent Administrative Agencies (Working Paper No 25 1980) 114–17; Independent Administrative Agencies (Report No 26 1985) 18–19 and 53–5). In Australia, the Commonwealth Administrative Review Council has recently presented a detailed report urging the enactment of a ‘Legislative Instruments Act’, which would apply to all administrative rules promulgated by Commonwealth departments except those rules expressly exempted by acts of Parliament. See Administrative Review Council Report to the Attorney-General Rule Making by Commonwealth Agencies (Report No 35 1992). Among the provisions of the proposed legislation would be the core notice-and-comment requirement of ‘mandatory consultation with the community prior to the making of important rules’ (ibid 36–41 (paras 5.27–5.48)). (I am grateful to Professor C Saunders, President of the Administrative Review Council, for drawing my attention to this Report and for kindly supplying me with a copy.)
except where episodic policy disputes have crystallized around specific events or localities (in which case administrative law has concentrated on the institution of public inquiries).\(^\text{16}\)

A major reason for the neglect by administrative lawyers of the process of administrative standard-setting and policy formulation in Westminster-based systems of administrative law is the fact that attention to this concern was neither necessary nor compatible with Westminster notions of representative democracy. The theoretical primacy of parliament in Westminster constitutionalism, and the doctrines and conventions of parliamentary, government and ministerial responsibility, has placed responsibility and accountability for policy formulation in the cabinet. The strong control by the executive of the formulation and passage of legislation has tended to ensure that statutes are fairly specific and executive policy is already in harmony with legislation as it is enacted. Subordinate regulations have tended to be limited in scope, procedural in content, and subject to rather narrow judicial scrutiny.\(^\text{17}\) Under the Westminster system, the substantive content of statutes is not subject to judicial review, statutes themselves already tend to embody concrete resolutions of the relevant policy disputes, and ministerial responsibility is the main technique for securing continuing accountability in any subsidiary policy formulation.

At the same time, administrative law in a Westminster system includes certain corollary doctrines that provide a basis for some meaningful judicial intervention in the administrative process in individual administrative decisions. The sub-delegation doctrine, for example, insists that once parliament has chosen the repository of the power it has conferred, that power can only be further delegated under highly restrictive conditions.\(^\text{18}\) To some extent, this doctrine might be understood as an effort to preserve the integrity of the convention of ministerial responsibility.\(^\text{19}\) Furthermore, when parliament confers a discretionary power on the public authority, the courts have tended to insist that the discretion be exercised anew whenever the power itself is brought to bear on a specific individual.\(^\text{20}\) These injunctions against ‘acting under dictation’ and ‘fettering’ discretion have had the effect of reducing the importance of, and even preventing the emergence of, a generalized administrative process.

\(^{16}\) For a pioneering study, see D J Galligan ‘The nature and function of policies within discretionary powers’ 1976 PL 332.

\(^{17}\) Traditionally, the principles of natural justice have not been held to apply to the formulation of delegated legislation, and substantive review has been largely confined to the unreasonableness formula under Kruse v Johnson. For the scope of judicial review of delegated legislation, see, for example, Wade (n 13) 863ff.

\(^{18}\) See, for example, ibid 874.

\(^{19}\) This is because the doctrine seeks to ensure that the person upon whom the power to legislate was originally conferred (almost always a minister) could be held responsible for the way in which the power was exercised.

\(^{20}\) See, for example, Wade (n 13) 370–5; S A de Smith Judicial Review of Administrative Action 4 ed (1980) 311–17.
The structure of government in the United States is, of course, profoundly different. Based upon a separation of co-equal branches of government, and deliberately designed to accommodate the diversity inherent in a nation of over 250 million people located in fifty states and the District of Columbia, the federal system of government in the United States has produced a different set of concerns regarding the process of administrative policy formulation and implementation. Congress often does not resolve the hardest policy disputes surrounding legislation; instead it tends to enact legislation that espouses broad goals and guidelines, leaving details to be worked out by the administrative agency in whom authority is vested.\(^{21}\) The vagueness of the statutory mandates, coupled with the massive scope of responsibilities usually thrust upon the government agencies, has created a situation in which American administrative law has had little to say about the sub-delegation of power,\(^{22}\) and the courts have not developed significant restrictions against the fettering of discretionary power by the agencies themselves.\(^{23}\) In fact, the courts have actively encouraged the adoption by agencies of rules restricting the scope of their discretion in individual circumstances, and they have extolled the virtues of rules as a means of ensuring regular, fair and accountable administration\(^{24}\)—hence the origins of the 'rule-making process', which Kenneth Culp Davis hailed as 'one of the greatest inventions of modern government'.\(^{25}\)

Where would we place South Africa in this compendium of administrative law systems? Where is South African administrative-law likely to be categorized in the future?

It is obvious that the doctrinal tradition of South African administrative law has emerged from the Westminster system. Sovereignty of parliament has always been a fundamental characteristic of constitutional

\(^{21}\) See, for example, R J Pierce, S A Shapiro & P R Verkuil Administrative Law and Process 2 ed (1992) 34. Complaints about 'congressional gridlock' were frequently aired during the 1992 presidential election campaign.

\(^{22}\) Sub-delegation by an agency head to subordinates (as opposed to delegation by Congress to the agency head), is widely tolerated in the United States and has not attracted much judicial attention as a restricting concept. See, for example, Towby v United States 111 S Ct 1752 (1991), 1758 (placing a broad interpretation on statutory provision permitting delegation by Attorney General to subordinate).

\(^{23}\) See, for example, Federal Communications Commission v WCN Listeners Guild 450 US 582 (1981); United States v Storer Broadcasting Co 351 US 192 (1956); Fook Hong Mak v Immigration and Naturalization Service 435 F2d 728 (2d Cir 1970). Some courts have required agencies to use individualized discretion in particular cases (see, for example, Asinakopoulos v Immigration and Naturalization Service 445 F2d 1362 (9th Cir 1971)) but these cases are unusual. American courts are very tolerant of agencies that choose to use rule-making as a means of restricting their discretion in future cases.

\(^{24}\) The classic statement is to be found in National Petroleum Refiners Association v Federal Trade Commission 482 F2d 672 (DC Cir 1973), cert denied, 415 US 951 (1974).

\(^{25}\) KC Davis Administrative Law Treatise (1978) vol 1 448. There are of course a multitude of cultural and socio-economic differences between the United States and countries such as Britain that help to explain why rule-making has not been perceived to be so obviously blessed. An effort to capture these factors is beyond the scope of this paper.

See, for example, P P Craig Public Law and Democracy in the United Kingdom and the United States of America (1990); D Vogel National Styles of Regulation (1986).
dogma; supposed ministerial responsibility has often operated to enjoin courts from evaluating the content of major policy decisions,\(^{26}\) and the sub-delegation,\(^{27}\) acting-under-dictation\(^{28}\) and fettering doctrines\(^{29}\) have sometimes played a vigorous role within the general body of South African administrative law.\(^{30}\) There is also very little South African administrative law on general procedural principles in the formulation of delegated legislation or administrative policy, even though delegated and ‘quasi’ legislation abounds.\(^{31}\) The system has presupposed the resolution of policy issues by parliament or at least by ministers responsible to parliament.

Yet we are all aware, of course, that the assumptions upon which this approach to administrative law is based have been grotesquely false. Parliament might have been ‘sovereign’ from the point of view of the courts, but the reality has long been that it is almost entirely under the control of the cabinet and the governing party. Ministers may have been nominally accountable to parliament, but in reality they have been accountable only to the National Party. Vast realms of power have been delegated to executive officers, from the president down to the police and petty officials, and these powers have often been held by the courts to be immune from the traditional doctrines of judicial control because they have been classified as emergency powers. As a result, the executive has wielded massive policy- and rule-formulation powers outside of the Westminster-based doctrines of administrative law that govern the exercise of those powers. A compliant parliament has produced detailed legislation where such has been required by the executive for reasons of convenience, but in the many situations where broad discretionary powers have been conferred on the executive, the shibboleth of ministerial responsibility has operated to obscure the need for a serious means of regularizing the development of government policy and subjecting that policy to public access and scrutiny. Even where some ministerial responsibility did apply, it signified no more than responsibility to the representatives of a minority of South

\(^{26}\) See Baxter (n 1) 334–5. Jansen JA might have had this concern in mind when he drew a distinction between discretionary powers that involved little or no policy content and those (described as ‘composite’) that involved substantial elements of policy and could therefore not be reviewed for unreasonableness Theron v Ring van Wellington van die NG Sendingerk in Suid Afrika 1976 (2) SA 1 (A), 20A–D; Mandela v Minister of Prisons 1983 (1) SA 938 (A) at 964A–B.


\(^{28}\) See, for example, Baxter (n 1) 442–3.

\(^{29}\) See, for example, ibid 415–19; Hoexter (n 27) 24–5.

\(^{30}\) Closely related to these doctrines is the judicial insistence that an administrative officer should ‘apply his mind’ to the individual decision at hand. See, for example, Hofmeyr v Minister of Justice 1992 (3) SA 108 (C) 112F; Baxter (n 1) 476–7.

Africans, thereby hardly serving as a democratic check on the exercise of governmental power.

Administrative law in the future South Africa will operate under a more meaningfully democratic framework. Even so, it is almost inconceivable that the orthodox doctrines of Westminster constitutionalism would be well suited to the policy-formulation process of government. In the first place, the new constitution may well embody a separation of powers between executive and legislature that would render the doctrine of ministerial responsibility meaningless. Secondly, if the new legislature is truly democratic, it is likely that it will be composed of a very diverse range of representatives. It is also likely that complicated voting systems will be installed as part of the blueprint emerging from the forthcoming constitutional negotiations. Legislative compromise will be necessary to achieve passage of most legislation, and legislative compromise guarantees vague legislation in which extensive discretion and the responsibility for resolving controversial policy issues is transferred to the executive branch agencies. Thirdly, the task of rebuilding the country, bringing urgently needed services to the populace, and redistributing economic wealth must inevitably entail the implementation of complex and broad-scale administrative programs that will require extensive bureaucratic planning and 'administrative engineering'.

If these assumptions are correct, many of the decisions that really matter to the public, to specific groups, and to individuals, will be made at the general policy level by government bodies, and they will be made after the basic empowering legislation has been enacted by the legislature. So, for reasons that differ from those which spawned the rule-making process in the United States but for reasons that are equally as cogent, a proper rule-making process would surely be a desirable feature of a new system of South African administrative law. It would be essential if we are concerned that administrative rules and regulations have a democratic flavour.

IV DEFICIENCIES AND POSSIBILITIES

South African administrative law is not inherently hostile to the idea of rule-making. Nor should we ignore other features of the system that might also advance the goals described above. There are indeed some fundamental principles in South African administrative law that are hostile to the basic principle of rule-making, and there are some procedures that might serve at the very least to supplement a rule-making process.

(1) The principles of natural justice

The principle of a fair hearing—*audi alteram partem*—embraces, at least partially, some of the aspects of participation, responsiveness and accountability that have been identified as a principal goal of any rule-making process. *Audi alteram partem* is primarily concerned with ensuring fair and accurate decisions in individual instances. By requiring
a decision-maker to grant an affected individual a hearing, the decision-maker is properly informed of any relevant facts relating to the case that the individual might be able to supply at the same time that the individual is afforded an opportunity of attempting to influence the decision-maker in the latter's choice of decision.

After depressing setbacks, the audi alteram partem principle has been dramatically modernized by the Appellate Division during the past couple of years. It has been freed from its conceptual moorings and it, or the closely-related 'legitimate expectation' doctrine, is now applicable to all forms of individual administrative actions, whether they be 'quasi-judicial' or 'purely administrative'. Decisions based on contractual relationships are no longer immune from fair hearing requirements. Perhaps even more remarkably, the court has applied the fair hearing requirement to situations where a decision-maker is engaged in 'legislative' action.

Yet the audi alteram partem doctrine has relatively limited application in the field of administrative policy and standard formulation, for two reasons. First, the principles of natural justice hew closely to the judicial model of decision-making. They are the products of judicial development, and judges have quite understandably drawn on their own decision-making experience in fashioning the principles that give meaning to the requirement of a fair hearing. It is not surprising that the courts took so long before they cautiously extended the application of natural justice to generic administrative decisions or ones that affected large numbers of individuals. Judges were instinctively aware that the judicial model of decision-making is not always appropriate in the administrative process, and few felt comfortable developing more imaginative alternatives. It is unlikely that many will feel able to do so now.

Secondly, when public authorities make decisions that affect the public as a whole or large numbers of individuals (as opposed to when they make decisions that affect one or only a few individuals), the cost of such decisions is correspondingly multiplied. So, too, is the cost of hearing

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32 See especially in the area of emergency actions, for example, Omar v Minister of Law and Order 1987 (3) SA 859 (A) (discussed in Hoexter (n 27) 5–6 and the works there cited), and in so-called 'contractual' situations (see ibid 80–3 and the cases there cited).
33 See Administrator, Transvaal v Traub 1989 (4) SA 731 (A) (see, for example, J Hlohe 'The doctrine of legitimate expectations and the Appellate Division' (1990) 107 SALJ 197).
34 See Administrator, Natal v Sibaya 1992 (4) SA 532 (A); Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A) (discussed in, for example, Hoexter (n 27) 82–3; J Grogan 'Dismissals in the public sector: the triumph of audi?' (1992) 108 SALJ 599).
35 South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) (involving the designation of a toll road without affording a hearing to the local authority primarily affected). 'Legislative' decisions have traditionally been treated as immune from the requirements of natural justice. See, for example, Pretoria City Council v Modimola 1966 (3) SA 250 (A) 261–2; Baxter (n 1) 580–2.
36 See Baxter (n 1) 581–2 (discussing S v Moroka 1969 (2) SA 394 (A), 398; and Laubscher v Native Commissioner, Piet Retief 1958 (1) SA 546 (A), 549). The reluctance to extend fair hearing requirements to 'legislative' decisions is also to be found in the United States. See the leading case of Bi-Metallic Investment Co v State Board of Equalization 239 US 441 (1915).
those large numbers. *Audi alteram partem*, as a doctrine, does not contemplate the kind of 'mass access' that is required for such decisions, nor does it provide an assurance that the public authority will or can hear the range and diversity of views of all those affected by the decisions involved. More tailored procedures have to be employed. Because these procedures cost money, they ought to be chosen when the public authority itself is empowered and funded to perform its statutory responsibilities. And because mass access procedures tend to be time-consuming, they ought to be clearly anticipated and understood in advance by the public authority and planned for accordingly. They need, in other words, to be on the public authority's administrative agenda.

(2) *Alternative procedural techniques*

South African administrative law already contains some nascent techniques that ought to be understood as supplements to rule-making as devices for democratizing the administrative process.

(a) *Consultation*

Various statutes have provided that before promulgating regulations a minister or public body should 'consult' with those affected by the proposed regulations.\(^{37}\) Even where consultation has not been specifically prescribed in the enabling legislation, it is also common for certain departments to consult with industrial representatives before either drafting or finalizing the implementing regulations.\(^{38}\)

Consultation requirements are, of course, based on the wisdom that it makes sense to ascertain the views of those affected by government action before that action is taken. Consultation also provides the government with an opportunity of drawing upon private resources in formulating complicated rules. On the other hand, consultation by itself has significant limitations. First, consultation secures input only from those who are *consulted*. This can result in an exclusive process in which the views of certain privileged organizations gain influence while those of other groups, individuals, or the general public are neglected. Secondly, the consultative process seldom imposes a meaningful constraint upon the government: the public authority doing the consulting does not have to demonstrate that it has been *responsive* to the views that were secured as a result of the consultation.

The consultative process should not be overlooked as a principle of good government, and it might even provide a basis for the establishment of a system of 'negotiated rule-making' in cases where

\(^{37}\) See, for example, Baxter (n 1) 223–5; Ganz (n 13) 32–6.

\(^{38}\) In South Africa, however, statutes do not often require consultation between public authorities and the public (as opposed to other government bodies).

\(^{39}\) For an unusual exception, see Government of the Republic of South Africa v Government of KwaZulu 1983 (1) SA 164 (A), in which the South African government's complete failure to consult, as required by the statute, was held to constitute a procedural irregularity.
regulations have to be technically complex. But consultation marks only the beginning of a fully fledged rule-making process. It facilitates a limited degree of participation, by those consulted in the governmental process, but it remains too exclusive to qualify as a fully democratic procedure; it carries no guarantee that the resulting rules will be responsive to the views of those consulted, and without more it does not provide the record upon which the consulting authority can be held accountable.

(b) Public inquiries

Public inquiries are a familiar aspect of government in Westminster systems. In South Africa we have witnessed numerous judicial commissions of inquiry on a wide variety of public issues, many highly technical and many concerned with controversies that receive the attention of the general public. Less visible inquiry procedures also include public local inquiries on town planning matters, though public local inquiries are much less common or developed as procedural forms in South Africa than they are in Britain.

Analogies have been drawn between the British public local inquiry and the American rule-making process. To some extent this is true: rule-making in the United States embraces the formulation of both generally applicable rules and standards that might have highly specific application—perhaps to no more than one industry or one site. Public controversies regarding the licensing of power stations, for example, are processed in remarkably similar fashions through the public local inquiry process in Britain, on the one hand, and the rule-making process in the United States, on the other. Public inquiry procedures therefore provide a process that is already a part of South African administrative

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40 Negotiated rule-making (or 'reg-neg') is a concept that has been developed fairly recently in the United States. Now formalized by legislation (Negotiated Rulemaking Act of 1990), reg-neg permits agencies to engage in substantial negotiations with interested parties before and sometimes even without engaging in a rule-making process. Hence reg-neg constitutes a form of 'alternative dispute resolution' in the rule-making context. It is important to note, however, that the language of the statute is permissive, not mandatory, and that reg-neg is only likely to be successful where all the interested parties are included in the negotiations. Furthermore, rule-making usually still takes place after the negotiations. As a result, reg-neg is perhaps better understood as an attempt to alleviate the problems of rule-making gridlock peculiar to the federal administrative process in the United States (on which see further below text at nn 47–50), than as a very helpful model for use in less gridlocked systems.


41 Perhaps the most well-known is the Goldstone Commission: Commission of Enquiry Regarding the Prevention of Public Violence and Intimidation.

42 See, for example, Baxter (n 1) 178–80.


44 'Rules' for rule-making purposes include the prescription for the future of rates, wages, prices, facilities and other rules specific to one area or industry. See 5 USC § 551(4).

45 See Asimow (n 43) esp at 263–6.
law and that displays some elements of democratic participation in administrative policy formulation.

At the same time, however, public inquiry proceedings lack the breadth of rule-making procedures. They are designed to address specific controversies relating to particular government decisions. Rule-making, on the other hand, is a generic procedure applicable to all government standard- or policy-formulation. While targeted public inquiries are an attractive procedural facility that I would urge to be included in a new South African system of administrative law, the public inquiry process should not be treated as a substitute for rule-making itself.

IV DEVISING A RULE-MAKING PROCESS FOR THE NEW SOUTH AFRICAN ADMINISTRATIVE LAW

(1) General cautions

(a) Constitutional and institutional prerequisites for an effective, successful rule-making process

(i) The ‘political process’ as ‘due process’

In designing a democratic administrative process we should bear in mind that it can only be a secondary democratic process. A well-constructed system of democratic representation would include a legislature that not only provides a floor for deliberation and voting by elected representatives but is also able to inform itself (through a process of committee hearings) and exercise continuing oversight, again through committees of the implementation of empowering statutes by the government. This is worth emphasizing, because one should attempt as far as possible to ensure that hard policy choices are addressed in an informed fashion by the legislature and that the legislature remains apprised of how its legislative choices are being implemented by the administration.

This fundamental aspect of democratic government in a complex system of government provides the starting point for designing a democratic administrative process, because it places the horse before the cart inasmuch as it is the legislature, and not the bureaucracy, that is primarily responsible for making and retaining control of the hard policy choices the nation must make. While this paper does not investigate the legislative process, it is worth noting the importance of the development of a committee system that would enhance the legislature’s ability to inform itself, maintain oversight of executive activity, and address as many of the policy choices underlying legislation as possible. Sight should not be lost of the fact that the administrative process can at most be no more than a substitute for or ‘surrogate’ of the political process.46

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46 See further, for example, Yasmin Shehnaz Meer ‘Legislative Controls of the Executive’ (paper delivered at the International Workshop on Administrative Law for a Future South Africa, 11 February 1993) passim.
(ii) Necessary institutional reforms

Administrative-law reformers tend to focus primarily on the question of process. Their concern is based upon a desire to enhance the rationality of the administrative process, its fairness, and its accessibility and responsiveness to public opinion. The principle of democratic equality accentuates this focus on process because it concentrates on the goals of meaningful access to government by, and accountability of, government to the general public. The emphasis on process is not directed at identifying, nurturing or facilitating those persons most skilled, or those institutions most able, to govern.

It is important, however, to remember that all the process in the world cannot guarantee good government if the decision-makers in government are incompetent or if the institutions through which they govern are institutionally inappropriate for the task. It is perhaps a failure to attend to this side of the democratic coin that has tempted some administrative lawyers to want to pile process upon process in an often futile attempt to improve the quality of governmental decision-making. The result has been the ‘due process explosion’ of the late twentieth century—an explosion that has consumed prodigious resources without producing corresponding results. We ought to pay at least as much attention to the institutions of administrative decision-making as we might to the processes of government.

This endeavour would require us to explore possibilities for improving the expertise of government agencies without having to sacrifice the democratic elements of responsiveness and accountability. We would need to consider the right balance between centralized and politically accountable control over the development and implementation of administrative policy, and the need for specialized expertise in technical administrative decision-making. In the process, it would be necessary to examine the relative merits of line departments, semi-autonomous permanent agencies, and special-purpose tribunals of permanent or limited duration.

The right balance involves difficult judgments, and it is unlikely that we would all agree on the appropriate formula. Nevertheless, administrative lawyers must examine the institutional aspects of reform in conjunction with the procedural aspects. While these issues are not the subject of this paper, we should bear them in mind when thinking about adopting a rule-making process.

(b) Limitations of rule-making

Rule-making, despite its many advantages, has limitations and potential disadvantages, and it consumes scarce government resources. It is essential therefore to be aware of these negative aspects in order to avoid them.

47 There is an extensive literature on the subject. For the United States, see, for example, S G Breyer & R B Stewart Administrative Law and Regulatory Policy 3 ed (1992) 178–94 (and the materials there cited).
In the United States the rule-making process has become extremely cumbersome in some areas of government—so much so that it has been described as 'ossified'. The rule-making agenda of some (though not all) agencies appears to have reached a state of paralysis; it has become so expensive and time-consuming for agencies to conduct the process that they have actually begun to neglect some of their responsibilities, or they have attempted to avoid rule-making by relying instead upon 'informal' policies that need not be implemented through a rule-making process.

Many of the problems just described are the product of American conditions that are not fully replicated in South Africa. One should, however, recognize that rule-making does not always enhance the quality of the administrative process and that, if over-formalized, it can become counterproductive and even entirely unworkable. The ultimate utility of rule-making will depend upon whether it can be made sufficiently flexible to permit meaningful public comment while also remaining manageable by the criterion of administrative feasibility.

It is also important to acknowledge that public authorities often need to use standards that lie somewhere between binding, unbending rules and amorphous ad hoc discretion. They should not be forced to observe time-consuming and expensive rule-making requirements every time they wish to make general statements about the way in which they intend

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48 See T O MacGarity ‘Some thoughts on “deossifying” the rule-making process’ (1992) 41 Duke LJ 1386 (attributing the label to E D Elliott). There is already an extensive literature on the perceived failure of the rule-making process in the United States. See, for example, MacGarity op cit (and the works there cited) and J L Mashaw ‘Improving the environment of agency rulemaking: an essay on management, games and accountability’ (1994) 57(1) Law & Contemporary Problems (forthcoming) (reviewing and analysing the extensive literature on the subject of rule-making dysfunction).

49 Despite widespread dissatisfaction with rule-making in many areas (most particularly environmental, auto safety, energy and trade regulation) rule-making continues to work quite well in other spheres of regulation. The author's experience in the field of federal banking regulation, where the issues are also extremely controversial, is that some of the most complicated rules have undergone a rule-making process administered by as many as four banking agencies with considerable success. The most important recent example is the new set of rules on 'prompt corrective action', which govern the conditions under which the federal banking agencies can take far-reaching coercive measures against ailing banks and savings institutions. See, for example, L G Baxter 'Administrative and judicial review of prompt corrective action decisions by the federal banking regulators' (1993) 7(3) Administrative Law Journal (forthcoming).

50 See, for example, R A Anthony 'Interpretive rules, policy statements, guidelines, manuals, and the like—should federal agencies use them to bind the public?' (1992) Duke LJ 1311 (describing the tendency on the part of agencies to resort to non-rule-making techniques that may in part be attributable to the high costs of getting anything done through the rule-making process).

51 Factors such as the lengthy period of Democratic control of the Congress and Republican control of the White House (which seemed to intensify the lack of congruence between agency action and statutory prescription), the extraordinary power and litigious ability of interest groups in the United States, and the high degree of judicialization of the American administrative process, all seem to have contributed to a situation in which rules take years to wend their way through the administrative process in America—sometimes only to be struck down on review once they are finalized!
to use their powers or the way in which subordinate officials ought to interpret those powers.\textsuperscript{52} Rule-making procedures should therefore draw a distinction between standards intended to have the force of law, with automatically binding effect in individual decision-making, and those standards intended only for guidance or as expressions of initial government positions. The latter standards should of course be subject to minimum publication requirements, but they should also be exempted from the more rigorous requirements of rule-making. On the other hand, they should not enjoy the status of law and should not be permitted as complete reasons in themselves to constitute the basis for discretionary decisions.\textsuperscript{53}

(2) \textit{South African conditions and needs}

The practical options for administrative-law reform in South Africa are limited. Years of damage to the South African economy and the impoverished state of the majority of its citizens, indicate that administrative processes cannot be expensive, either for the government itself or for many of the individuals who might wish to use them. If rule-making is to be affordable, it must be informal and flexible. The difficulty is trying to strike a balance that will also render rule-making meaningful.

The cost constraint suggests that rule-making should be conducted through a procedure that is primarily written. Experience with rule-making in the United States, for example, seems to indicate that oral procedures tend to be vastly more expensive than ‘paper hearings’.\textsuperscript{54} To be effective, the process should also be fairly short: the public authority involved should be required to formulate its proposals, responses and final standards in accordance with strict deadlines. This helps to avoid

\textsuperscript{52} The expense, delay and rigidity of the rule-making process in the United States has forced many agencies to attempt to avoid the process altogether by resorting to less formal policy statements and guidelines. Unfortunately, while the use of such standards is often appropriate, when it has been used solely for the purpose of avoiding a process that is really applicable, this indicates not only deception on the part of the agency concerned but also that the rule-making process itself has broken down and badly needs fixing. On the other hand, the range and variety of agency activities and needs strongly suggest that it would be unwise to force all generalized agency policy formulation into the straitjacket of rules that must be developed through the rule-making process. For the debate, see, for example, Anthony (n 50); P L Strauss ‘The rule-making continuum’ (1992) 41 Duke LJ 1463.

\textsuperscript{53} The distinction between ‘binding’ and ‘non-binding’ rules is one of the tests used in US federal administrative law to determine when rules must be developed through a rule-making process. The other is the ‘substantial impact’ test, which measures the practical effect on persons subject to the standard in question. Both tests are only partly satisfactory and neither has been definitively adopted by the US Supreme Court, and each has its adherents among the commentators. For a critical evaluation of the more formal ‘bindingness’ test, see R M Levin ‘Nonlegislative rules and the administrative open mind’ (1992) 41 Duke LJ 1497. See generally, for example, Aman & Mayton (n 8) 90–8.

\textsuperscript{54} This at least was the assumption of the court in \textit{Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council} 435 US 519 (1978) when it ruled that lower courts could not add to the ‘paper hearing’ requirements of the federal Administrative Procedure Act a requirement that an agency permit cross-examination and discovery. Cf Aman & Mayton (n 8) 65–6.
situations in which bureaucratic timidity or changes in the prevailing political winds render mutual effort on the part of administrators and commenters wasted as the result of government delay.

On the other hand, paper hearings can themselves develop into unmanageable proceedings. While this is less likely in South Africa than has been the case in the United States (where interest groups have powerful resources and where armies of lawyers are paid to inundate agencies with comments), we should be aware of the dangers and ensure that the limits of the notice-and-comment phase are tightly defined.

Furthermore, written proceedings are not always satisfactory, even where the government is formulating general standards (and not resolving specific disputes). These standards are often dependent on an understanding of complicated facts and evidence, which cannot be adequately aired or tested through the process of a paper hearing. Sometimes, where the factual issues are localized or where potentially differing views from various regions of the country need to be heard, a public inquiry would be more appropriate. Even where a rule-making process (as opposed to a public inquiry) is appropriate, it might sometimes be essential to take oral testimony. Public authorities should therefore be given discretion to hold public hearings as a special procedure during a particular rule-making, but the circumstances in which they should exercise this discretion should also be prescribed.

An essential consideration in the South African context is the fact that many of those most severely affected by administrative action are illiterate, impoverished, or (usually) both. We must avoid a situation in which rule-making becomes, as sometimes it perhaps has in the United States, no more than a game for the wealthy or powerful. There are some things one cannot avoid entirely. It is likely that some individuals or organizations will be better organized and funded than others. Their comments on government proposals are always going to be skillfully crafted and effectively presented, and their influence will inevitably be strong. This places an unusual responsibility on both those who design the rule-making process and those who implement it (namely, the public authorities themselves) to ensure that less well-funded or articulate individuals or organizations are in a position to have meaningful access. Measures that would help include information brochures that publicize in clear and simple terms what is being proposed, how the rule-making process works, and how those who wish to comment might prepare and submit their comments. I fear that it would be too costly or time-consuming for the public authorities themselves to provide much more assistance than this. Instead, publicly and privately funded organizations should be encouraged to take an active role in rule-making processes, helping individuals and organizations to prepare and submit their views. Strict limitations on the formality of procedures would also help to curb the ability of well-funded groups to block or otherwise hijack the process for their own direct advantage.

Another likely obstacle that is particularly pronounced in South Africa is a tradition of bureaucratic arrogance and insensitivity. The rule-
making process must be taken seriously by the administration if it is to be meaningful. While one might hope that some improvement will occur automatically as a result of the installation of an entirely new system of government, a new tradition of bureaucratic responsiveness would also be encouraged by requiring public authorities to maintain complete records of their notice-and-comment processes and to publish, together with the final standards, an analysis of the comments received and the public authorities' treatment of those comments. These records would then provide a basis for possible subsequent challenges on judicial review, and they would enable courts to determine whether public authorities have taken seriously the comments they have received. Where they have clearly disregarded relevant comments or evidence, where their reasons for adopting the final standard are illogical in the light of the record, or where the standards adopted manifestly fail to serve their stated purpose, courts would then be able to strike down the final standards and remand the process to the public authority concerned for further rule-making.  

V OUTLINE OF A PROPOSED RULE-MAKING PROCESS FOR SOUTH AFRICA

It would be helpful to conclude with an outline, based on the American experience, of the essential requirements for a rule-making process suited to present and future South African conditions. The exact form in which the implementing legislation would take will, of course, depend on whether the process is to be included as part of a general code of administrative procedure or whether it is to be enacted as a separate statute applicable to all government departments and agencies. I do not attempt to address the questions whether any public authorities should be specially exempted and whether public authorities at all levels of government (central, regional and local) should be subjected to the same rule-making requirements. The answers to these questions will depend on the outcome of political negotiations still to be held.

A basic rule-making process as envisaged in this paper would have the following elements.

(1) A requirement that public authorities publish in a national register

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55 This paper assumes that judges will be both able and more willing than they have been in the past in South Africa to scrutinize the substantive content of administrative rules and regulations in order to determine whether these rules and regulations are supported by sound reasoning and will lead to a reasonable result.

56 Because of the common Westminster influence, the Australian experience is also very important for South Africa. The discussion, analysis, and proposals for rule-making, presented in the report by the Australian Administrative Review Council (see n 15 above) are directly relevant. While no attempt is made here to draw from the Australian proposals, they appear to be generally compatible with what is suggested in this paper and they should of course be considered when developing the practical details of any South African rule-making legislation.

57 I adopt the term 'national register', appropriately suggested by O'Regan, in place of 'Government Gazette'. See O'Regan's contribution.
all substantive and procedural rules that are intended to have binding effect.

(2) A requirement that public authorities make available to the public, for inspection and copying, all internal policies, guidelines, staff manuals or other general instructions that are intended to influence the manner by which the body and its officers exercise their statutory responsibilities, whether these documents are intended to be binding or not.

(3) A requirement that, except in emergencies (the grounds and duration of which should be defined in the rule-making statute), public authorities should, when proceeding to adopt or rescind rules or regulations that are intended to have the force of law (and are not specially exempted by the rule-making statute or subsequent legislation), publish a notice in the national register containing:

(a) the text of the proposed rules or regulations;
(b) a statement explaining the statutory basis for and purpose of the proposed rules or regulations;
(c) information concerning the place where further information relating to the rules or regulations, including any scientific information being relied on by the public authority, can be inspected; and
(d) information concerning the address to which comments may be sent, the deadline for comments, and the date and venue for a hearing, if any.

(4) Provision for the right of any member of the public to petition for a rule-making process to create or rescind a rule, and a requirement that any such petition be considered by the public authority concerned and denied only upon the statement of reasons.\(^{59}\)

(5) A requirement that the public authority shall read and analyse the comments received after the period for comments has expired.

(6) A well-defined discretionary power on the part of all public authorities to hold public hearings in addition to the mandatory notice-and-comment procedure, either during the period for comment or afterwards.

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\(^{58}\) The US federal Administrative Procedure Act and the Model State Administrative Procedure Act both exempt certain kinds of rules from the rule-making process (though not from the publication requirements). For the federal provisions, see 5 USC §§ 552(a) (exempting rules relating to military or foreign affairs, and to agency management, personnel, public property, loans, grants and the like), 553(b)(A) (exempting ‘interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice’), 553(b)(B) (exempting rule-making where an agency on good cause, with reasons, finds the process ‘impracticable, unnecessary, or contrary to the public interest’); and see generally, for example, Aman & Mayton (n 8) 83–9; Pierce, Shapiro & Verkuil (n 21) 285–91. For the much more finely crafted and narrowly drawn Model State provisions, see MSAPA § 3–116; and see generally Bonfield (n 8) 396–426.

\(^{59}\) Both the federal and Model State APAs provide for the right to petition for creation, amendment or repeal of a rule. See 5 USC § 553(e); MSAPA § 3–117; and see generally Administrative Conference Guide to Federal Agency Rulemaking (n 40) 137–40; Bonfield (n 8) 426–34.
(7) A requirement that if the public authority decides to adopt a final rule or regulation it publish the rule or regulation in the national register together with a concise description of the content of the comments received and its reasons for adopting the final rule or regulation in its published form.

(8) Postponement of the implementation of the final rule or regulation for a defined period (except in emergency circumstances defined by the rule-making statute).

(9) Provision for judicial review of the final rule or regulation (or the denial of a private petition for rule-making) in order to determine whether

(a) the rule-making procedure was correctly followed;
(b) the public authority properly reviewed and took into account the comments received;
(c) the final rule or regulation is authorized by statute, rationally related to the purposes sought to be achieved by the public authority, and responsive to the comments received;
(d) the denial of a private petition for rule-making was reasonable.  

The court should be prohibited from imposing further procedural requirements on the public authority unless it specifically finds (with reasons) that the authority would not be able to make a proper determination of the content of the final rule, or the party claiming the procedure would otherwise be unable to make relevant comment on the rule, without the additional procedure.

(10) Judicial review to be available (within a defined time) to any party who participated in the rule-making proceeding and who can demonstrate that he or she would be adversely affected by the final rule or regulation, or to any organization that either participated in the rule-making proceeding and can demonstrate adverse effect or is suing on behalf of one or more of its members who would otherwise themselves qualify for standing.

VI CONCLUSION

The rule-making procedure should not be the exclusive procedure for public authorities in non-adjudicative situations. On the contrary, they should also be empowered, where appropriate, to hold public inquiries, and the grounds for choosing one procedure over another should be prescribed. Other, more sophisticated devices such as provision for negotiated rule-making, mandatory regulatory impact analyses, and

60 For examples where courts have set aside refusals to initiate rule-making in the United States, see Public Citizen Health Research Group v Auer 702 F2d 1150 (DC Cir 1983); American Horse Protection Association, Inc v Lyng 812 F2d 1 (DC Cir 1987).
61 See above n 40, and see also Boule’s paper in this collection.
62 In the United States, all federal departmental agencies are required to justify all proposed major rules (i.e., those with an economic impact of $100 million or more) with a regulatory impact analysis, which analysis must be forwarded to the Office of Management and Budget (OMB) for review and comment. The analysis must describe the potential costs
one or more permanent rules review commissions (including parliamentary review committees) might also be considered as helpful supplementary devices for enhancing administrative legality and accountability.

Whatever the final details, generalized rule-making is an essential core around which all procedures should be considered. 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. We cannot be sure that elected representatives will attend to the matter after they have already become accustomed to wielding authority.

A genuinely participatory, responsive, accountable, affordable and efficient system of administrative decision-making is attainable in South Africa, and every South African, no matter how poor or disadvantaged, is entitled to nothing less. The new system of government must, of course, be tailored according to the limited resources available. But those multitudes of South Africans, who have too long had to endure the insult of second- and third-class citizenship, should not now be prepared to settle for second- or third-class administrative justice and accountability.

and benefits of the proposed rule and it must analyse and explain the rejection of any alternative approaches that might secure the same objectives at a lower cost. Executive Order No 12,291, 3 CFR Pt 128 (1981). See generally, for example, Aman & Mayton (n 8) 565–7. In order to enhance coordination and planning, the agencies are also required to publish and file with OMB an annual regulatory agenda. Executive Order No. 12,498 (1986), 12 CFR Pt 323 (1986). See Aman & Mayton op cit 570–2. Various states have established similar controls. For the provisions of the MSAPA, see §§ 3–102 (Public rule-making Docket) and 3–105 (Regulatory Analysis).

The Australian Administrative Review Council, in its recommendations for the adoption of a rule-making process, has recommended that a 'rule making proposal' should, where possible, include an analysis of the estimated and comparative economic and social costs and benefits of the proposal. Rule Making by Commonwealth Agencies (n 15) 40 (para 5.46).

Numerous states in the United States have permanent agencies which are charged with the duty of examining agency rules in order to determine whether they conform to the relevant empowering legislation, whether they are consistent with the intentions of the enabling legislature, and whether the rules fall within a coordinated system of executive government. Such bodies are responsible directly to the legislative branch of government, the state governor, or, as separate agencies, to both. See generally Bonfeld (n 8) ch 8. There is no general rules-reviewing agency responsible to Congress at the federal level of government, but during the past 15 years the Executive Branch has invested the Office of Management and Budget with increasing powers of general oversight of the federal rule-making process. See, for example, Pierce, Shapiro & Verkuil (n 21) 83–7.

The Australian Administrative Review Council, for example, has proposed that notice of proposed rules should be given to parliament so that a parliamentary scrutiny committee might have the opportunity to review (and if necessary disallow) the rules before they are promulgated. Rulemaking by Commonwealth Agencies (n 15) 81–3.