CHAPTER 6

CONCLUSION:
AN ASSESSMENT OF THE TRANSFORMATION OF SOUTH AFRICAN ADMINISTRATIVE LAW SINCE 1994

The aim of this chapter is finally to assess the extent of the transformation of South African administrative law since 1994. In the first section the reader is reminded of the terrain covered in Chapter 1: the background to the thesis, its nature and scope, and the three main inquiries demanded by the research question. The second section surveys the separate detailed investigations conducted in Chapters 2, 3, 4 and 5. Finally, the third section offers a brief conclusion.

6.1 THE ASPIRATIONS OF A TRANSFORMED ADMINISTRATIVE LAW

As explained in Chapter 1 of this thesis, South African administrative law had a paradoxical nature before 1994. During the apartheid era it was effectively an instrument of oppression, a means of recognising and facilitating the use of wide discretionary power which was conferred for deliberately discriminatory ends. At the same time, administrative-law review was a significant safeguard against the abuse of human rights – though ultimately an insufficient one. Its insufficiency was not merely a function of the inherent limitations of judicial review but was linked to the doctrine of parliamentary sovereignty. This doctrine was a real constraint on the pre-democratic judiciary to the extent that it prevented the courts from testing original legislation on substantive grounds. But there were other, self-imposed factors constraining the judiciary. The most important of these were the courts’ generally parsimonious attitude towards administrative justice and their exaggerated deference to the other branches of government, which at times made them ‘all too willing partners, displaying what virtually amounts to a phobia of any judicial intervention in the exercise of powers by administrative agencies’.

Like all legal institutions in this country, South African administrative law has been affected deeply by the constitutional revolution of the 1990s: the advent of a supreme, justiciable democratic Constitution containing a full-scale Bill of Rights and many other safeguards. That revolution promised not merely reform but ‘transformation’, change of a

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1 At 1.1.
fundamental and dramatic nature. This is reflected in the broad aim of this thesis: to describe and critically assess the transformation of administrative law since 1994. Put more precisely, the question explored in this thesis has been the extent to which South African administrative law has achieved transformation in accordance with the promises of the constitutional era and the 1996 Constitution in particular.

Answering this question has entailed three main tasks: first, establishing the transformative promise of the democratic Constitution in the context of administrative law; secondly, identifying particular aspirations of a transformed system of administrative law in the light of the chief deficiencies of the pre-democratic law; and thirdly, describing and evaluating the actual transformation of the law since 1994.

The first two of these inquiries were pursued in Chapter 1. That chapter examined the transformative nature of the democratic Constitution and the enterprise of transformative constitutionalism: ‘inducing large-scale social change through non-violent political processes grounded in law’. Transformative constitutionalism was linked with Mureinik’s image of a bridge from a culture of authority to a culture of justification, an image that has become emblematic of the transformation of the South African legal order in general and of its system of public law in particular. The promise of a culture of justification was then discussed in the particular context of administrative law by considering some of the most significant features of the democratic Constitution.

Chapter 1 went on to identify the four main aspirations that would be implied by a culture of justification in the specific context of administrative law. Each of these aspirations corresponded with a major deficiency in the pre-democratic law, the law associated with the culture of authority, and could be regarded as the obverse facet of that deficiency. The choice of this set of deficiencies and aspirations was guided and informed by a seminal event in the history of South African administrative law: the Breakwater Workshop of 1993 and the eponymous Declaration issued by its participants. The four main deficiencies of the pre-democratic law were characterised as follows:

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At 1.3(a).
At 1.2(b).
Karl Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146 at 150; see at 1.4(a).
At 1.4(b).
At 1.4(c).
At 1.5.
Formalism was not a feature mentioned in the Declaration, for reasons explored in both Chapters 1 and 4.
Narrow and impoverished grounds of review that were often applied reluctantly or unevenly by the judiciary.\textsuperscript{10} The narrow range and impoverished content of the grounds of review before 1994 were shaped by the courts’ parsimonious view of administrative justice and their attitude of exaggerated deference to the legislative and executive branches.

Restricted access to judicial remedies.\textsuperscript{11} In the pre-democratic era access to judicial remedies was hampered by very restrictive common-law rules relating to standing. In addition, such access was frequently blocked by legislative devices such as ouster clauses.

An overly formalistic style of judicial reasoning. Before 1994 the courts showed a preference for formal, technical or mechanistic reasons over substantive ones based on moral, political, economic or other social considerations. They were also strongly attracted to conceptualism as a method of problem-solving.

An incomplete system of administrative law. There was a paucity of controls and safeguards in the administrative system before 1994. As a result, administrative-law review was relied on heavily and almost exclusively as a method for disciplining public power.

In Chapter 1 the corresponding aspirations of post-1994 administrative law – the aspirations implied by a culture of justification and promised by the Constitution – were identified as follows:

- Well-developed grounds of review. A culture of justification requires grounds of review that are capable of upholding the fundamental principles of good administration promised by the Constitution – lawfulness, reasonableness, procedural fairness and the giving of reasons.
- Improved access to judicial remedies. A culture of justification is advanced by reducing obstacles to judicial review, whether these are traditionally imposed by the courts or by the legislature.
- A more substantive style of judicial reasoning. A formalistic, coded style of judicial reasoning is not conducive to a culture of justification. Rather, such a culture demands substantive engagement with the Constitution and the law.

\textsuperscript{10} At 1.5(a).
\textsuperscript{11} At 1.5(b).
The completion of administrative law. A culture of justification is unlikely to flourish in a system that entrusts the control of public power to a single institution, and is more likely to become a reality in the presence of a range of institutions and methods.

These four aspirations became the respective themes of Chapters 2, 3, 4 and 5. Each of these chapters has thus pursued the third main inquiry of the thesis by investigating the detailed development and transformation of the law since 1994. This investigation has taken account of the constitutional context and the contribution of the courts in each of the four areas, with particular reference being made to the provisions of the PAJA.

6.2 THE TRANSFORMATION OF THE LAW SINCE 1994

(a) The development of the grounds of review

Chapter 2 dealt selectively with the development of the grounds of review under the four main themes of s 33: lawfulness, reasonableness, procedural fairness and reasons. The discussion indicated appropriate development of the grounds, and thus successful transformation of the law, in every instance but one.

The sphere of ‘lawfulness’ encompasses the most basic and the least controversial principles of good administration, and in this area the pre-democratic grounds of review were generally well developed. Where they stood in need of expansion, important reforms were initiated by the courts towards the end of the pre-democratic era. Fortunately, these have been included in the PAJA and, in some instances, taken further by the statute. Thus dishonesty and ulterior motive, which previously had an uncertain status, are clearly grounds of review under the PAJA today. Furthermore, the PAJA explicitly makes all material errors of law reviewable, while the courts have interpreted the Constitution and the PAJA in such a way as to make all factual mistakes reviewable as well. Subjective jurisdictional facts, formerly a trigger for submissively deferential judicial reasoning, may now be tested for their rationality. Even more remarkably, material mistakes of (non-jurisdictional) fact have become objectively reviewable. The last frontier of judicial review has thus been crossed.

In Mureinik’s work the aspiration to better justified decisions translates ‘pre-eminent’ into reasonableness review.12 In the light of the troubled history of reasonableness in South African administrative law, the introduction of a constitutional right to reasonable

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administrative action was a remarkable occurrence. The interpretation of this right in the PAJA was a particularly unpromising one, however, for it seemed to hark back to an egregious standard reminiscent of the Wednesbury test. Nevertheless, in spite of the retrogressive wording of s 6(2)(h) of the PAJA, the Constitutional Court has developed this ground of review so as to make it possible to achieve an appropriate balance between judicial intervention and non-intervention in this sensitive area of administrative law. It has done so in a manner that allows for the development of proportionality as well as rationality; and in the process it has rejected the mechanical, all-or-nothing style of reasoning associated with the application of reasonableness before 1994.

Like the right to reasonableness, the inclusion of a right to reasons in the interim Constitution was of huge significance to the transformation of South African administrative law. In Chapter 2 it was described as a prime mechanism for achieving the culture of justification the Constitution commits us to. The courts’ initial response to the right was disappointingly timid, however, and the more cautious wording introduced by s 32(2) of the Constitution and s 5 of the PAJA had the potential to reduce the right considerably. Since then the courts have avoided this result by means of a creative, if somewhat circular, interpretation of ‘rights’. The courts have begun to shed light on the nature and scope of reasons in the context of s 5, and are in the process of developing principles to govern and inform a variable notion of adequacy.

The rule against bias, an unproblematic part of the pre-democratic law, was not considered in Chapter 2. That chapter dealt with procedural fairness only in the sense of audi alteram partem. In relation to the content of the audi principle, the law was fairly well developed before 1994 apart from the absence of a general duty to give reasons for administrative action. The best of the common law has since been codified in the PAJA, where ss 3 and 4 give specific and yet flexible meaning to the constitutional right in s 33(1). In the case of s 4 the PAJA is innovative, making provision for forms of public participation that were hardly dreamt of before 1994. However, the PAJA is less generous when it comes to the application of procedural fairness in terms of ss 3 and 4. As far as s 4 is concerned, the use of its innovative provisions may be merely voluntary. In relation to s 3, the requirement of an adversely affected right seems to reproduce the pre-democratic position regarding ‘existing rights’. While it seems possible to extend the legitimate expectation doctrine so as to allow for the protection of interests in addition to rights and expectations, no court has yet undertaken this task. In its application the ground of procedural fairness remains strangely untransformed, then, in comparison with the rest of the grounds of review.
Finally, Chapter 2 highlighted a particularly important feature of the democratic era: the identification of a constitutional principle of legality and its development in the jurisprudence of the Constitutional Court. Crucially, the principle of legality is not confined to the realm of administrative action but applies to all exercises of public power. In terms of its content, the principle is the mirror image of the grounds of review associated with lawfulness and has been extended to cover reasonableness in the sense of rationality, if not yet proportionality. The principle thus ensures that all exercises of public power meet certain minimum standards of administrative justice.

(b) Improved access to judicial remedies

Chapter 3 showed that the Constitution sets out to transform the law by facilitating access to judicial remedies. Two provisions are especially significant in this regard.

Section 38 of the Constitution represents a radical departure from the restrictive common-law approach to locus standi by making very generous provision for standing to vindicate constitutional rights (including those in s 33). Such a generous approach is consonant with a culture of justification and, as has been recognised by the Constitutional Court, wholes appropriate in a constitutional democracy. Unfortunately, there has been widespread doubt as to whether s 38 applies in cases not involving the direct application of constitutional rights, and the omission of the provisions of 38 from the PAJA has not helped matters. For some years the courts tended to adhere to the common-law requirements and to be easily daunted by practical difficulties such as the constitution and definition of classes of litigants. However, there is more recent evidence of a convergence of the common law with s 38 and of a new judicial impatience with formal barriers to administrative justice. It seems, then, that the transformation intended by s 38 is finally taking place.

Section 34 of the Constitution confers a right of access to court, and its presence means that any purported limitation of the courts’ review or remedial jurisdiction – by ouster clauses, limitation clauses or in any other way – has to be constitutionally justified under s 36. Two such limitations are contained in the PAJA. Section 7(1), which sets a six-month time limit on applications for judicial review, might well fail the test imposed by s 36 of the Constitution if and when it comes to be challenged in court. Section 7(2) of the PAJA embodies a particularly stringent duty to exhaust internal remedies, and may also be thought unconstitutional for this reason. However, the courts have tended to interpret this provision

13 Ferreira v Levin NO 1996 (1) SA 984 (CC) para 165.
very much in line with the more flexible common law, thus again suggesting a lack of sympathy with technical obstacles to review and perhaps making a constitutional challenge unnecessary.

(c) Towards a more substantive style of judicial reasoning

Chapter 4 revealed that in South African administrative law important steps have been taken away from a formalistic and ‘coded’ style of judicial reasoning and towards a more substantive style of judicial reasoning. Consonant with the substantive vision of the democratic Constitution and with the culture of justification it promises, some of the more artificial distinctions familiar to administrative lawyers have been eroded, and the rigid classification of functions has been abandoned. Thanks to s 38 of the Constitution, too, the rules of standing no longer provide a formal refuge for courts reluctant to confront ‘policy’. Other significant anti-formalistic phenomena are the courts’ interest in the constitutional principle of legality and their recent commitment to the construction of an explicit rather than a covert doctrine of deference. However, formalistic reasoning has by no means been eradicated from the law, and this is well illustrated by the courts’ continuing reliance on it at the intersection of administrative law and contract. Furthermore, the PAJA encourages conceptualism not only in its definition of administrative action but also in its application of procedural fairness in ss 3, 4 and 5.

It seems, then, that transformation is proving more difficult in this area than in the two other areas relating to judicial review. However, this is not surprising when one considers that formalism is such a strong element in South Africa’s legal culture generally. This not only makes formalism a less obvious problem than the first two deficiencies identified in this thesis, but also a less tractable one. Unlike many other types of reform, anti-formalism is not something that can be legislated.

(d) The completion of administrative law

The discussion in Chapter 5 indicated that, in addition to changing the basis of judicial review itself, the democratic Constitution has significantly increased the range of controls on administrative power in South African law. The legal system today is replete with safeguards against secrecy, arbitrariness and maladministration. Some reforms, such as the introduction of a right of access to information, have enormous transformative potential, and an institution such as the Public Protector may prove invaluable in exposing and helping to remedy maladministration. The PAJA, too, makes a contribution to the completion of administrative
law, most notably in its provision for public participation in administrative rule- and decision-making.

The enactment of the PAJA presented a (probably unique) opportunity to go much further than this, and could ultimately have driven the badly needed reform of safeguards such as administrative appeals and the scrutiny of secondary legislation. Notwithstanding such missed opportunities, however, the survey undertaken in Chapter 5 indicates that the aspiration to a more complete and integrated set of administrative-law controls has been realised to a considerable extent.

6.3 CONCLUSION

In 2002 Corder discerned the end of

‘the initial phase of transforming administrative law, from the stultified limitations of judicial review . . . using principles of the common law attenuated by the doctrine of parliamentary sovereignty as it manifested itself under apartheid, to a system of administrative justice worthy of the constitutional democracy which exists on paper . . ..’

As he also remarked, ‘the “translation into reality” of the legislated edifices of administrative justice remains the key to unlocking the undoubted benefits which exist currently in law’.

Several years have passed since those statements were made, and South Africa has now had the benefit of constitutional democracy for fifteen years. Have the transformative promises of the democratic Constitution indeed become a reality in South African administrative law? It may be concluded that to a great extent they have, both within the realm of judicial review and beyond it.

Within that realm there is very little that remains to be achieved in relation to the development of the grounds of review of administrative action. As far as the application of procedural fairness is concerned, the period since 1994 has seen some retrogression. In other respects, however, appropriate judicial interpretation of the grounds listed in the PAJA has fulfilled the generous promise of s 33 of the Constitution. Furthermore, the constitutional principle of legality guarantees a minimum level of justification in the realm of non-administrative action. Judicial remedies, too, have become far more accessible. The benefits

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15 Ibid at 7.
of s 34 of the Constitution have long been a reality in the administrative context, and those of s 38 seem now to be taking hold. Important gains have also been made in relation to the achievement of a more substantive style of judicial reasoning in administrative law. It is unfortunate, however, that the style of the PAJA tends to subvert the project of anti-formalism that has been initiated by the judiciary.

South African administrative law has also achieved completion in large measure: judicial review itself has been generously supplemented by other safeguards and procedures likely to help advance a culture of justification. Again, however, it is unfortunate that so many opportunities to for the further transformation of administrative law were squandered at the time of the PAJA’s enactment.