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The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000

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CHAPTER 1

INTRODUCTION: THE TRANSFORMATION OF SOUTH AFRICAN ADMINISTRATIVE LAW

1.1 BACKGROUND TO THE THESIS

Law was infamously used as an instrument of racial division, repression and disenfranchisement in South Africa for a large part of the twentieth century, and particularly from 1948. In that year the National Party came to power and began the official pursuit of its apartheid policy. The legislature, a body elected by a small white minority, institutionalised racial discrimination by means of statutes such as the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950 and the Reservation of Separate Amenities Act 49 of 1953. South Africans were racially classified at birth, required to live in an area reserved for their race and permitted to use only the separate facilities reserved for them – from train carriages to park benches. In countless ways the state deliberately and routinely favoured white South Africans over 'non-whites'. Certain professions were reserved for whites. A tiny proportion of the country's land was allocated to blacks and other races, and a similarly disproportionate fraction of state revenue was expended on their education, health, welfare and other services. These brutal features of South African life before 1994 are all too familiar and require no elaboration here.

What deserves emphasis, however, is the extent to which South African public law in general, and its administrative law in particular, were embroiled in and tainted by the apartheid enterprise.[1] The 'dreary burden of apartheid', as Evans puts it, was that 'it had to be constantly *administered*', and that its feasibility depended on the pervasive presence of the state in every facet of life.[2] Although in South Africa of the mid-twentieth century administrative law was barely recognised as a discipline,[3] it certainly existed as an effective

[1] See generally Kate O'Regan 'Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law' (2004) 121 *SALJ* 424;
[2] Ivan Evans *Bureaucracy and Race* (1997) 1, emphasis original.
[3] Baxter records that the first the first South African text on constitutional law, dated 1935, 'disposed of administrative law in a few pages': Lawrence Baxter *Administrative Law* (1984) 47, referring to W P M Kennedy & H J Schlosberg *The Law and Custom of the South African Constitution*. Twenty years later the phenomenon of 'government by bureaucracy' was acknowledged in the third edition of Henry John May's *The South African Constitution* (1955),and an entire chapter of that work was devoted to a discussion of delegated legislation and the administrative process (Chapter XIV, contributed by M L Mitchell). However, the first full text on administrative law, L A Rose Innes's *Judicial Review of Administrative Tribunals in South Africa,*

tool of oppression; for it was at the administrative level that black South Africans tended to suffer their daily hardships and humiliations. As Brookes and Macaulay recorded in 1958, '[a]lmost the whole of the African's life is now governed by administrative decisions, appeal from which to the courts has been deliberately denied by Parliament'.[4] It was administrative law, too, that enabled government officials to implement the oppressive statutes enacted by the legislature, and which recognised the wide and unguided discretionary power so lavishly conferred on members of the executive. And it was in administrative law that the highest court handed down the most devastating decision of the pre-democratic era, *Staatspresident v United Democratic Front*.[5] Here, during a state of emergency, a majority of the Appellate Division[6] supported a narrow or literal version of the ultra vires doctrine, effectively depriving the courts of a constitutional justification for judicial review in cases where no express statutory provision had been violated.[7]

The *UDF* decision exposed the paradoxical nature of South African administrative law, for this branch of law was also an important safeguard against oppression during apartheid. In fact, it was almost the only safeguard in existence. The doctrine of parliamentary sovereignty, a colonial inheritance from English constitutional law, ensured that original legislation was immune from challenge except on the narrowest procedural grounds. However, the Supreme Court was able to use its inherent power to test delegated legislation and administrative decisions on grounds established at common law.[8] Administrative-law review thus became the chief method for controlling public power and challenging the

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appeared only in 1963. Marinus Wiechers published his influential Afrikaans text on *Administratiefreg* ten years later. Baxter's book, the most seminal South African work of all, appeared as late as 1984.

[4] Edgar H Brookes & J B Macaulay *Civil Liberty in South Africa* (1958) 26. As to the administrative use of race classification in particular, see C J R Dugard *Human Rights and the South African Legal Order* (1978) 55ff.

[5] *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) (the *UDF* case). For criticism see especially Nicholas Haysom & Clive Plasket 'The War Against Law: Judicial Activism and the Appellate Division' (1988) 4 *SAJHR* 303; Etienne Mureinik 'Pursuing Principle: The Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* 60.

[6] Now called the Supreme Court of Appeal, and the highest court of appeal except in constitutional matters.

[7] With one or two exceptions, the South African courts had previously adhered to a wide conception of ultra vires in terms of which failure to comply with *any* principle of administrative law, whether judge-made or imposed by the legislature, would amount to acting ultra vires. Proponents of this orthodox theory reasoned that Parliament would surely not countenance an abuse of power (albeit one judicially defined) any more than it would want administrators to exceed their powers in a literal sense. In *UDF* the majority of the court held otherwise. It found that emergency regulations made by the President were not ultra vires even if they were vague, since the empowering statute did not expressly require the making of clear regulations or proscribe vague ones. The devastating implications of this reasoning were never fully confronted, however, and the decision was simply allowed to die an unobtrusive death in the years that followed.

[8] In *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115 Innes CJ described this common-law jurisdiction as follows: 'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court . . ..'

invasion of rights, and the courts were caught up in a sort of schizophrenia – alternating between the enforcement of discriminatory laws and the articulation of equitable common-law principles.[9] As Budlender observed in 1993,[10]

> '[i]t is striking that over the past twenty years and even longer, almost all of the major judicial decisions which have protected or extended human freedoms in South Africa have been based on principles of administrative law. If one thinks of freedom of movement, the limitations on emergency powers, the opening of public amenities to all, and now even some aspects of labour law, one continually finds that the legal issue has been the control of the powers of government through the application of the principles of administrative law.'

However, the doctrine of parliamentary sovereignty placed fundamental constraints not only on the powers of the courts in the pre-democratic era but also on their enthusiasm for protecting rights. While the courts had the power to review the legality of administrative conduct, Parliament was free to decide what counted as lawful and what did not. Sometimes Parliament expressly ousted the courts' jurisdiction, purporting to prevent them from exercising their powers of review in relation to certain statutory provisions. But less drastic measures were often more effective than ouster clauses.[11] Parliament could simply authorise administrative officials to interfere with people's rights, either in so many words or by conferring such wide discretionary powers on officials that it was difficult for the court to fault the exercise of the discretion – assuming that it had the will to do so. Often that will was absent, and the courts simply 'capitulated to the force of a legislature and executive bent on the abuse of power for racial ends'.[12]

Much has been written about the inability or refusal of most South African judges, for much of the twentieth century, to stand up to the increasingly oppressive tactics of the government. Major studies have recorded the judges' submission or capitulation to the legislature and executive at various stages of our history.[13] These studies have recorded moral

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[9] A Chaskalson 'The Past Ten Years: A Balance Sheet and Some Indicators for the Future' (1989) 5 *SAJHR* 293.
[10] Geoff Budlender 'The Accessibility of Administrative Justice' 1993 *Acta Juridica* 128 at 128.
[11] In fact there was a strong judicial antipathy to ouster clauses, and they were often found to be ineffective. Famous instances of this include *Union Government v Fakir* 1923 AD 466 and especially *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A), a case decided during a state of emergency.
[12] O'Regan (note 1 above) 424, where she provides the example of a dictum of Stratford JA in *Sachs v Minister of Justice* 1934 AD 11 at 37: 'Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and . . . it is the function of the courts of law to enforce its will.' See also eg Hugh Corder 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 39 at 42.
[13] Especially Hugh Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-50* (1984); C F Forsyth *In Danger for Their Talents: A Study of the Appellate Division of the Supreme*

and legal victories too, for there were some inspiring cases in which the courts refused to knuckle under, or came courageously to the aid of oppressed people. However, there is no denying the pervasive tendency, particularly from the mid-1950s, towards extreme judicial restraint and undue deference to both legislature and executive – an 'executive-mindedness' that was especially evident in administrative law.[14]

In a famous article dating from 1986, Dean described administrative law as 'a somewhat depressing area of South African law'[15] largely on account of the untrammelled freedom enjoyed by the government and the courts' often passive response to it:

> '[Administrative law] has developed within a system of government which concentrates enormous powers in the hands of the executive and the state administration and in which law has been used not to check or structure these powers, but rather to facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best. In this process the South African courts have at times appeared to be all too willing partners displaying what virtually amounts to a phobia of any judicial intervention in the exercise of powers by administrative agencies.'[16]

Fortunately, as a result of the dramatic change brought about by the advent of constitutional democracy, these features have been consigned to the past. The enactment of the interim Constitution[17] in 1993 and of the 'final' Constitution[18] in 1996 effectively revolutionised South African administrative law and its concept of administrative justice. Today a justiciable Bill of Rights and an array of other provisions express the Constitution's commitment to an

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Court of South Africa, 1950-80 (1985); David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992); Richard L Abel *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (1995); David Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998).

[14] See especially Forsyth (note 13 above) Chapters II and V. In his study Forsyth makes it clear, however, that there is 'no basis for a charge of conscious partiality' against the Appellate Division at any stage (at 225). Similarly, Cameron points out that executive-mindedness 'need not imply partiality in the sense of conscious bias': Edwin Cameron 'Legal Chauvinism, Executive-Mindedness and Justice: L C Steyn's Impact on South African Law' (1982) 99 *SALJ* 38 at 52.

[15] W H B Dean 'Our Administrative Law – A Dismal Science?' (1986) 2 *SAJHR* 164 at 164.

[16] Ibid. See also Hugh Corder 'Introduction: Administrative Law Reform' 1993 *Acta Juridica* 1.

[17] Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter 'the interim Constitution').

[18] Constitution of the Republic of South Africa, 1996, formerly known as the Constitution of the Republic of South Africa, Act 104 of 1996. This Constitution was 'final' in the sense that it was preceded by the interim Constitution, a transitional measure. In this thesis the final Constitution is referred to as 'the 1996 Constitution' or simply 'the Constitution'.

administrative system that 'respects fundamental rights and is accountable to the broader public'.[19]

In the 1996 Constitution the most significant provision for administrative law is s 33, the administrative justice clause. This constitutional rarity[20] reads as follows:

> **'Just administrative action**
>
> **33.** (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.'

This provision's predecessor, s 24 of the interim Constitution, conferred similar rights by way of more complicated wording.[21] The interim administrative justice clause lived on for some years even after the 1996 Constitution came into force, the operation of s 33 being suspended in terms of a transitional provision for three years or until the national legislation mandated by s 33(3) was enacted.[22] That legislation was ultimately brought into being as the Promotion of Administrative Justice Act 3 of 2000. (For ease of reference, this statute and the constitutional provisions referred to here are appended to the thesis.[23])

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[19] The full court in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (the *SARFU* case) para 133.

[20] The Namibian Constitution was one of the first to contain such a right (art 18). South Africa's example seems to be inspiring other new democracies to follow suit, and it is interesting to note that the new Charter of Rights of the European Union includes a 'right to good administration' (art 41). See Jeffrey Jowell 'The Democratic Necessity of Administrative Justice' 2006 *Acta Juridica* 13 at 15-16.

[21] Section 24 read as follows: 'Every person shall have the right to – *(a)* lawful administrative action where any of his or her rights or interests is affected or threatened; *(b)* procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened; *(c)* be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and *(d)* administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

[22] Item 23 of Schedule 6 to the 1996 Constitution. Meanwhile, the right to administrative justice was not the right in s 33 itself, but rather the right set out in item 23(2)*(b)* of Schedule 6 – essentially the same as the right contained in s 24 of the interim Constitution. A similar arrangement applied to the right of access to information. See generally Jonathan Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 *SAJHR* 549.

[23] The constitutional provisions appear in Appendix 1, while the PAJA is included as Appendix 2.

South Africa's constitutional revolution has had tremendous implications for its administrative law. It is with these that this thesis is concerned.

1.2 NATURE AND SCOPE OF THE THESIS

(a) Title and aim of the thesis

The thesis is entitled 'The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000'.

The aim of the thesis is to describe and critically assess the transformation of South African administrative law during the democratic era in the light of its constitutional context. That context changed fundamentally on 27 April 1994, the date on which the interim Constitution came into force.

(b) Research question to be explored

The essential question to be explored in the thesis is 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. In broad terms this transformation entails a shift from a culture of authority to a culture of justification.

Answering this research question entails three main inquiries. The first is to explore the transformative promise of the democratic constitution in the context of administrative law. The second is to identify particular aspirations of a transformed system of administrative law in the light of the chief deficiencies of the pre-democratic law. The third is to describe and evaluate the development of the law since 1994.

These three inquiries are pursued in the six chapters of this thesis. While the content of the various chapters is set out in more detail below,[24] a brief indication of their subject matter is given here to assist the reader.

The purpose of this introductory chapter is to set out the thesis and to pursue the first two inquiries outlined above. Accordingly, this chapter explores the idea of transformation in its constitutional context. It then identifies four main aspirations of a transformed administrative law with reference to the most glaring deficiencies of the law before 1994. Each of these four themes is then addressed in the following four chapters of the thesis, which deal with the development of the law in the democratic era. The sixth and final chapter offers

[24] See at 1.6 below.

a summary of these developments and an overall assessment of the law's transformation since 1994.

(c) Methodology

The development referred to above has two main ingredients: the respective contributions of the legislature and the judiciary to administrative law since 1994. Both of these are subjected to detailed analysis in this thesis.

The main contribution of the legislature has been the Promotion of Administrative Justice Act 3 of 2000 (hereafter 'the PAJA'), the statute enacted in order to give effect to the rights to administrative justice contained in s 33 of the Constitution.[25] The PAJA is not merely a codification of the common-law principles relating to administrative law, and is best regarded as a type of 'codification-reform': a legislative restatement of those principles with a view to reforming them.[26] Conversely, however, the statute does not purport to be an exhaustive statement of those principles and tends rather towards legislative minimalism.[27] It has been fleshed out to some extent by a set of regulations dealing with fair administrative procedures.[28]

The main contribution of the courts, particularly the two highest courts – the Constitutional Court and the Supreme Court of Appeal – has been in interpreting the constitutional right to administrative justice and the PAJA in their judgments.

In addition to these primary sources, the thesis draws on scholarly work and commentary in the area of administrative law.

1.3 TERMINOLOGY

(a) Transformation rather than reform

This thesis is concerned with the 'transformation' rather than the mere 'reform' of administrative law.

The verb 'reform' means to improve by the removal or abandonment of imperfections, faults or errors.[29] Similarly, 'law reform' refers not merely to change but to change for the

[25] On the drafting history of the Act, see Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) paras 1.14-19.
[26] Ibid para 1.5, and see further Iain Currie 'What Difference Does the Promotion of Administrative Justice Act Make to Administrative Law?' 2006 *Acta Juridica* 325 at 328ff.
[27] Currie *Commentary* (note 25 above) paras 1.6, 1.14. The statute consists of only a dozen sections and is remarkably brief when compared, for instance, with the German equivalent or equivalents (ibid).
[28] Regulations on Fair Administrative Procedures, published in GN R1022 *GG* 23674 of 31 July 2002.
[29] J B Sykes (ed) *The Concise Oxford Dictionary* 7 ed (1982) 872.

better: it implies the improvement of the law.[30] Be it slight or extensive, incremental or sweeping, law reform generally encompasses 'the systemic development of the law, with a view to simplifying, modernising or consolidating the law' and making it more accessible.[31]

'Transformation', on the other hand, is the noun derived from the verb 'transform'. In their general usage both verb and noun signify a change in form, outward appearance, character or disposition; and both suggest considerable and perhaps dramatic changes, be they inward or outward.[32] Just as a caterpillar is 'transformed' into a butterfly, or water into steam or ice, so the transformation of a branch of law suggests something more than mere change for the better. It evokes change of a fundamental and significant nature.

I do not assert that 'reform' is an inaccurate or inappropriate way of characterising the changes that have taken place in South African administrative law since 1994. On the contrary, it is a natural and obvious description of those changes. The term is of course employed in the literature[33] and will be used freely in this thesis. However, the topic of this thesis is deliberately conceived as 'transformation' – something more than mere 'reform' – for two reasons.

First, as Klare has suggested, 'transformation' lies somewhere between 'reform' and 'revolution' in the traditional sense,[34] and the fact is that neither of these two alternative terms seems entirely appropriate to describe what has happened and is still happening to South African administrative law. 'Reform' is somewhat anodyne, while 'revolution' evokes change of a violent and political (rather than legal and constitutional) nature and thus goes too far – hence the use in the literature of the contradictory phrase 'constitutional revolution'.[35] 'Transformation' avoids the traditional connotations of 'revolution', includes the sense of

[30] Justice Roslyn Atkinson 'Access to Justice: Rhetoric or Reality?' Paper delivered at an Australasian Law Reform Agencies Conference, Wellington (2004) 8, referring to Stan Ross *The Politics of Law Reform* (1982) 5. See also David M Walker *The Oxford Companion to Law* (1980) 729.

[31] Atkinson (note 30 above) 9, referring to definitions in Australian law reform statutes. Reform is not defined in the South African Law Reform Commission Act 19 of 1973, but simplification, modernisation, consolidation and accessibility all feature in s 4, where the objects of the Commission are set out.

[32] *Concise Oxford Dictionary* (note 29 above) 1138.

[33] For instance, the seminal papers collected in 1993 *Acta Juridica* were published also under the title *Administrative Law Reform*: see note 112 below.

[34] Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150.

[35] See eg Lourens W H Ackermann 'The Legal Nature of South Africa's Constitutional Revolution' 2004 New *Zealand Law Review* 633 and Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) Chapter 1, where South Africa's transition to democracy is typified as a 'constitutional revolution'. Interestingly, the phrase is used pejoratively in the preface to the third edition (1955) of May's text on South African constitutional law (note 3 above at v), where it sums up the effects of the constitutional crisis of the early 1950s and the proliferation of apartheid laws.

improvement implied by 'reform'[36] and at the same time captures a nuance that 'reform' does not: the idea of fundamental and dramatic social change.[37]

Secondly, in the literature South Africa's transition to democracy, of which the reform of administrative law is a part, has become closely and ineluctably associated with 'transformation'. As Reddy indicates, it tops the list of terms used to describe the shift from the old apartheid order to the social relations and practices of the democratic era.[38] Thus both the introduction of constitutional democracy in 1994 and the subsequent (and continuing) development of the legal system in accordance with constitutional values are widely characterised as processes of 'transformation'.[39] Furthermore, the post-1994 constitutional dispensation has come to be identified in particular with 'transformative constitutionalism'. 'Transformation', then, is an apposite term in the context of administrative law.

The meanings of transformative constitutionalism and the particular kind of transformation promised for administrative law by the democratic Constitution are topics addressed separately in this chapter.[40]

(b) Administrative law

Administrative law is a sprawling discipline not easily susceptible of definition, and it is description rather than definition that will be attempted here.

Administrative law has been described broadly as a branch of public law that regulates the legal relations of public authorities, whether with private individuals and organisations or with other public authorities.[41] In South Africa today, however, it is more accurate to regard administrative law as regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public authorities in a strict sense. This is borne out by the Constitutional Court's description of administrative law as 'an incident of the separation of powers under which the courts regulate and control the exercise of public power by the other branches of government'.[42]

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[36] Transformation denotes 'a change from one qualitative state to another, and usually implies "improvement" ': Thiven Reddy 'Transformation' in Nick Shepherd & Steven Robins (eds) *New South African Keywords* (2008) 209 at 209.

[37] Klare (note 34 above) 150 seems to conceive of transformation as achieving 'dramatic social change through law-grounded processes'.

[38] Reddy (note 36 above) 209.

[39] As to why the term has taken centre stage over alternatives such as 'radical change; or 'liberation', Reddy suggests that transformation 'is easily incorporated into many diverse, and often conflicting, discourses of politics and conceptions of social change' (ibid).

[40] At 1.4 below.

[41] Baxter (note 3 above) 2.

[42] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (hereafter *Pharmaceutical Manufacturers Association*) para 45.

As indicated by this description, the field of administrative law overlaps to a considerable extent with constitutional law. However, they have different areas of focus. Constitutional law is primarily concerned with the establishment and structuring of the system of government and the division of state power between the legislature, the executive and the judiciary. Administrative law is primarily concerned with the daily business of government: the implementing or administering of (enacted) policy and the exercise of delegated powers to take action, including the making of delegated legislation and further policy, within the framework allowed by the original legislation.[43]

Administrative law also differs from constitutional law in its emphasis on one particular branch of the state system, the public administration, and on a particular activity of the state:[44] 'administrative action'. This type of action has been pithily described by the Supreme Court of Appeal as 'the conduct of the bureaucracy . . . in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'[45]

It is important to note that the constitutional rights to just administrative action are confined to the realm of 'administrative action', a concept initially shaped by the courts and subsequently defined more closely in the PAJA. However, the field of administrative law as it is understood in this thesis extends beyond administrative action as defined in the PAJA. The exercise of any public power or function, even if it does not strictly qualify as administrative action, may still be of legitimate concern to administrative law. Thus 'administrative law' is used in a sense consonant with the traditional common-law understanding of the term.

Because judicial review has always played such a prominent role in South African administrative law, the two are often equated in this country.[46] This is a mistake, for administrative law is a wider concept than judicial review. Judicial review is essentially concerned with the judicial detection and correction of maladministration. Administrative law, on the other hand, is concerned with non-judicial as well as judicial safeguards against poor decision-making. Furthermore, while judicial review focuses on the diagnosis of what

[43] See Baxter (note 3 above) 50-1.
[44] The terms 'government' and 'state' are often used interchangeably in this thesis, as here, but 'state' is generally a more neutral, abstract term while the former refers to a political entity. 'Government' is thus more appropriately used as a synonym for 'executive'. See further Baxter (note 3 above) 94ff; L G Baxter ' "The State" and Other Basic Terms in Public Law' (1982) 99 *SALJ* 212. The 'state' is a term not used consistently in legislation, and its exact meaning depends on the context: *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA) para 16.
[45] *Grey's Marine Hout Bay v Minister of Public Works* 2005 (6) SA 313 (SCA) para 24 (Nugent JA).
[46] See Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 485ff.

administrators have done wrong, administrative law has a more positive side: it is concerned not merely with tracking down instances of bad administration, but with the empowerment of administrators, and the facilitation of administration and with methods of encouraging good decision-making. Nevertheless, judicial review remains by far the most prominent aspect of South African administrative law – a reality that is reflected in the content of this thesis.[47]

This thesis is concerned with general rather than particular administrative law. Particular or 'sectoral' administrative law deals with the rules and principles that have developed in specific and specialised areas of administration, such as social welfare, immigration and liquor licensing. General administrative law, on the other hand, could be described as 'the regulation of regulation'.[48] According to Baxter, it consists of

> 'the general principles of law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction.'[49]

The thesis seeks to discover the nature and extent of the transformation of these general principles.

1.4 THE TRANSFORMATIVE CONSTITUTION: TOWARDS A CULTURE OF JUSTIFICATION

(a) A transformative constitution

As indicated in 3.1 above, in general usage 'transformation' suggests change of a fundamental and dramatic nature. Employed more specifically, it is a contested term that takes its colour from the particular context in which it is employed.[50] When used by South African lawyers, the word tends to be associated with progressive programmes 'ranging from affirmative action and black economic empowerment to the complete overhaul of South African legal

[47] Most of the thesis focuses on judicial review (Chapters 2-4) while a single chapter is concerned also with other methods of controlling administrative power (Chapter 5).
[48] Cynthia Farina 'Administrative Law as Regulation: The Paradox of Attempting to Control and to Inspire the Use of Public Power' (2004) *19 SA Public Law* 489 at 490.
[49] Baxter (note 3 above) 5, italics omitted.
[50] Reddy (note 36 above) 209ff explores some of the meanings of the term in discourses of political change. As to its contested nature in the legal context, see eg Catherine Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248 at 248-9; Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *SAJHR* 309 at 315.

culture'.[51] Similarly, in relation to the South African Constitution the term can mean any number of things depending on the provision under discussion. For instance, a particular conception of transformation has developed in relation to the rights to equality, in which context Albertyn and Goldblatt understand the concept to demand nothing less than 'a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines'.[52] The challenge in this instance, as these authors see it, is to eradicate systemic forms of domination and material disadvantage based on race, gender, class and other grounds.[53]

Irrespective of the particular provision under scrutiny, any discussion of transformation in relation to South Africa's democratic constitution almost inevitably becomes a discussion of 'transformative constitutionalism'.[54] Klare usefully summarises this as connoting 'an enterprise of inducing large-scale social change through non-violent political processes grounded in law'.[55] The reason for the association lies in the abundant evidence that South Africa's post-1994 constitutional order is committed to the transformation of its society. There is no doubt that, as the former Chief Justice put it, '[t]he Constitution offers a vision of the future.'[56]

The epilogue to the interim Constitution made its transformative object explicit by describing the Constitution as an 'historic bridge' between 'the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'. Similarly, the preamble to the 1996 Constitution indicates that one of its purposes is to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights' in which 'every citizen is equally protected by law'.

There is a good deal of other such evidence. Much of it is canvassed by Pieterse in an article illustrating the Constitution's departure from traditional liberal constitutionalism to

[51] Marius Pieterse 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20 *SA Public Law* 155 at 155.
[52] Albertyn & Goldblatt (note 50 above) 249.
[53] Ibid. See further Catherine Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253. An impressive conception of transformative constitutionalism is also being developed in relation to property rights: see eg A J van der Walt 'Transformative Constitutionalism and the Development of South African Property Law' 2005 *TSAR* 655 (Part 1) and 2006 *TSAR* 1 (Part 2).
[54] See eg Justice Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351.
[55] Klare (note 34 above) 150.
[56] Arthur Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193 at 205.

transformative constitutionalism.[57] Significant transformative provisions in the 1996 Constitution include s 7, which envisages that the state will act positively to secure the realisation and protection of rights; s 39(2), which 'mandates and facilitates the gradual transformation of South African common law';[58] and s 9(2), which upholds a substantive rather than merely formal conception of equality. The inclusion of several justiciable socio-economic rights is another important clue to the transformative project of the Constitution, as is the limitation clause, s 36, which permits the infringement of rights only where it is reasonable and justifiable in 'an open and democratic society based on human dignity, equality and freedom'. These provisions speak also to what has been termed 'transformative adjudication' – the task of the judges, who are enjoined by the Constitution 'to uphold and advance its transformative design'.[59]

The transformative nature of the Constitution has been acknowledged by the courts, and especially by the Constitutional Court, on a number of occasions.[60] In its first decision, *S v Makwanyane,* Mahomed DP famously characterised the Constitution as representing 'a decisive break from and ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive', and a commitment to 'a conspicuously contrasting . . . future'.[61] In other decisions the court has recorded the Constitution's commitment to 'transform our society'[62] and to 'transform the *status quo ante* into a new order'.[63] This new order, Ngcobo J has suggested, 'is to be built on the foundation of the values entrenched in the very first provision of the Constitution',[64] including human dignity, equality and the advancement of human rights and freedoms. Indeed, transformation may itself be regarded as a foundational value of the democratic legal order, albeit not one listed in s 1 of the Constitution. Roederer takes this view, though he concedes that what the value reflects depends largely on one's view of the old order and 'what it is that is in need of transformation'.[65]

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[57] Pieterse (note 51 above) 161-3.
[58] Ibid 162.
[59] Klare (note 34 above) 157; Moseneke (note 50 above) 314.
[60] Langa (note 54 above) gives two important examples of such acknowledgement in the High Courts: *Rates Action Group v City of Cape Town* 2004 (12) BCLR (C) para 100 and *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 (6) BCLR 728 (W) paras 51-2.
[61] *S v Makwanyane* 1995 (3) SA 391 (CC) para 262.
[62] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8 (Chaskalson P).
[63] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 157 (Madala J)
[64] In a separate concurring judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 73.
[65] Christopher Roederer 'Founding Provisions' in Stuart Woolman et al *Constitutional Law of South Africa* 2 ed (OS 12-05) Chapter 13 at 13--6.

(b) A culture of justification

In the context of South Africa's public law, transformative constitutionalism is associated with one idea above all others: what Mureinik famously termed a 'culture of justification'.[66]

Commenting on the Bill of Rights in the interim Constitution and the 'bridge' metaphor used in the epilogue to that Constitution, Mureinik depicted South Africa's legal order as in transition between a culture of authority – the ethos of the apartheid order – and a culture of justification. Before 1994 the legal order was constrained by the sovereignty of Parliament, which taught that 'what Parliament says is law, without the need to offer justification to the courts'.[67] Since South Africa's Parliament was elected by a white minority, the legitimacy of the legal order was even more attenuated: there was no need to offer justification even to those governed by the law. In Mureinik's analysis this state of affairs fostered an ethic of obedience in which '[t]he leadership of the ruling party commanded Parliament, Parliament commanded its bureaucracy, [and] the bureaucrats commanded the people'.[68] In short, it fostered a culture of authority.

As to the very different ethos of the democratic era, Mureinik said this:

> 'If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – *a culture in which every exercise of power is expected to be justified*; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.'[69]

For Mureinik the main strut of the bridge was the Bill of Rights, which he defined as 'a compendium of values empowering citizens affected by laws or decisions to demand justification'.[70]

In the years since these words were written, Mureinik's culture of justification has become 'established in constitutional discourse and in popular consciousness as a positive and empowering image for social, political and legal transformation and progress'.[71] It has

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[66] Etienne Mureinik 'A Bridge to Where?: Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.
[67] Ibid 32.
[68] Ibid.
[69] Ibid, my emphasis.
[70] Ibid.
[71] A J van der Walt 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *SALJ* 258 at 259. As Davis says, the culture of justification is 'arguably the most important contribution which the Constitution promises to make to a new society': Dennis Davis *Democracy and Deliberation* (1999) 21.

become emblematic of the transformation of South Africa's legal order generally and of its system of public law in particular.[72] For example, Pieterse includes 'the cultivation of a culture of justification in public law interactions'[73] as one of the four central features of the transformation envisaged by the 1996 Constitution, the other three being the attainment of substantive equality, the realisation of social justice and the infusion of the private sphere with human-rights standards. Langa, commenting on transformative adjudication, draws on Mureinik's culture of justification in asserting that '[i]t is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions'.[74] Mureinik's culture of justification has featured in the law reports, too, and has been referred to by the Constitutional Court on several occasions.[75]

The bridge metaphor of transformation and the associated image of crossing from one place to another have not gone unchallenged, however. In the context of property law Van der Walt, in particular, has criticised the metaphor for its assumption that the legacy of the past can be left behind so easily, and for its suggestion that our goal is simply to get to the other side as soon as possible – a view that leaves 'no room for imagining alternative futures'.[76] Van der Walt argues convincingly that the image of instant and complete transformation is a misleading one in any socio-economic context, but especially in relation to land law; for the legacy of apartheid land law remains with us, and dealing with it calls for continuous substantive action. He warns that an oversimplified or 'linear' vision of transformation can do more harm than good. Giving examples from the case law, he shows that 'rushing over the bridge of transformation'[77] unthinkingly can have unfortunate consequences, such as preventing an underprivileged community from gaining access to a cheap form of land tenure.[78] The courts should thus consider the circumstances sensitively and imaginatively when giving effect to land reform.

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[72] It has also been elaborated and developed by some commentators, notably Johan van der Walt & Henk Botha 'Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification' (2000) 7 *Constellations* 341.
[73] Pieterse (note 51 above) 161.
[74] Langa (note 54 above) 353.
[75] For instance, in *S v Makwanyane* (note 61 above) para 156n171; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25; *Pharmaceutical Manufacturers Association* (note 42 above) para 85n107.
[76] Note 71 above at 296, drawing on the work of writers including Jennifer Nedelsky and Johan van der Walt. See also Henk Botha 'Metaphoric Reasoning and Transformative Constitutionalism Part 2' 2003 *TSAR* 20 at 35; Langa (note 54 above) 353-4.
[77] Ibid 301.
[78] Ibid, with reference to the minority judgment in *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC) para 85.

South African administrative lawyers have thoroughly embraced the bridge metaphor together with Mureinik's culture of justification,[79] so it is as well to consider whether Van der Walt's warnings carry the same weight in this context as they do in property law and related areas. In my view they do not. In property law the legacy of land tenure under apartheid was and remains a physical and very much a communal reality. Administrative law, by contrast, is associated more with individual rights and claims than with communal ones; and here the legacy of apartheid was of a conceptual rather than a physical nature. So, despite the deliberate use of administrative law as an instrument of oppression before 1994, the apartheid legacy had a more ephemeral quality in this case: one could get rid of it far more easily and quickly. While it may take decades to change the patterns of land tenure in South Africa, the mere adoption of a liberal democratic constitution did much of the conceptual work that was necessary for the transformation of administrative law. It provided the political and constitutional foundation that O'Regan identified as lacking in the pre-democratic law,[80] and thus imbued the system with 'overarching coherence'.[81] Although the Constitutional Court has certainly built on the constitutional foundation and enhanced its coherence,[82] the immediate effects of the democratic constitution itself on administrative law are not incompatible with the notion of instant transformation. This is evident from the discussion in (c) below, which investigates the implications for administrative law of various provisions of the 1996 Constitution.

Another consideration is that property law has a significant legacy of Roman-Dutch common law whose assumptions, Van der Walt indicates, were 'related to and entangled with the . . . rhetoric of apartheid land law'[83] to the extent that it seems impossible to transform land law without questioning those assumptions. In administrative law, perhaps by virtue of the dual role it played under apartheid – oppressor *and* saviour – the common law inherited from England at the close of the nineteenth century could more easily be uncoupled from the apartheid purposes it had been made to serve in the middle of the twentieth century.

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[79] These have become what Corder calls a 'citation classic': Hugh Corder 'Without Deference, With Respect: A Response to Justice O'Regan' (2004) 121 *SALJ* 438 at 438.
[80] O'Regan (note 1 above) 428.
[81] Ibid 429.
[82] Especially in *Pharmaceutical Manufacturers Association* (note 42 above), where the court situated administrative law in its constitutional context and rejected the characterisation of the common law as a body of law separate from the Constitution. Chaskalson P said (para 45): 'There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'
[83] Note 71 above at 297-8, and see further Henk Botha 'Metaphoric Reasoning and Transformative Constitutionalism' 2002 *TSAR* 612 (Part 1) and 2003 *TSAR* 20 (Part 2), especially at 625-7.

For these reasons, I would argue, the bridge metaphor is less troubling in the context of administrative law than it may be in property law. But this is not to say that Van der Walt's warnings have no relevance. They are no doubt salutary in any context, for they remind the law reformer of the need for sensitivity and nuanced thinking. More profoundly, they remind us that transformation ought to be a 'permanent ideal' of a society that is truly open to change and contestation.[84]

(c) The promise for administrative law

The promise of a culture of justification in the context of administrative law is made and reinforced by a number of provisions of the 1996 Constitution.[85]

The most important and far-reaching provision for administrative law is s 33 of the Constitution, the administrative justice clause.[86] This section of the Bill of Rights explicitly promises administrative action that is lawful, reasonable and procedurally fair, and also confers a right to reasons for administrative action that affects rights adversely. It is thus obviously and emphatically redolent of a culture of justification. Indeed, Mureinik thought that its predecessor, s 24 of the interim Constitution, could 'put South Africa at the frontiers of the search for a culture of justification';[87] and s 33 arguably goes further than s 24 in this regard. In particular, s 33(1) abandons the careful calibrations[88] used in s 24 – the various references to 'rights', 'interests' and 'legitimate expectations' – and confers its right in unqualified terms. It may be contrasted with s 33(2), the right to reasons, which is qualified by reference to administrative action that affects 'rights' adversely.

The inclusion in s 33 of an unqualified right to 'reasonable' administrative action is especially noteworthy. Within the accepted constraints of administrative-law review – that is, the need to uphold a distinction between process and merits – it is difficult to imagine a bolder formulation. It is worth remembering that the drafters of s 24 settled on a right to 'justifiable' administrative action precisely in order to avoid the more direct and controversial notion of reasonableness.[89]

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[84] Langa (note 54 above) 354.
[85] Quoted at 1.1 above. See generally Corder 'Administrative Justice: A Cornerstone' (note 12 above).
[86] As O'Regan has written, '[r]ecognising that there is a right to administrative justice is the most important starting point in addressing all the questions that arise in modern administrative law. It places citizens at the heart of administrative law enquiries and should ensure that they are not forgotten when the importance of bureaucratic efficiency, cost-effectiveness or the proper democratic role of the judiciary . . . are asserted': Kate O'Regan 'Foreword' 2006 *Acta Juridica* vii at vii-viii.
[87] Mureinik 'A Bridge to Where?' (note 66 above) 38.
[88] A 'conspicuous idiosyncracy' according to Mureinik (ibid at 42-3).
[89] Ibid 40n34. The ploy was not entirely successful, however: see at 2.3(c) below.

Crucially, s 33 and its predecessor are not to be understood as a mere codification of the common-law principles of review. While it is true that almost all of the principles of South African administrative law were originally developed by the courts in the exercise of their common-law review powers, the Constitutional Court has emphasised that s 33 is nothing less than an entrenchment of rights to administrative justice.[90] The rights thus entrenched apply to all law and bind all organs of state,[91] require a two-thirds majority for their amendment[92] and may be limited only in terms of s 36 of the Constitution, the limitation clause – that is to say, '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'.[93] This flows from the Constitution's subordination of Parliament and all other organs of state to the supremacy of the Constitution. The review power of the courts is no longer grounded in the common law and subservient to the authority – or whim – of the legislature. Instead, the Constitution itself is supreme.[94]

Another provision of importance to administrative law is s 1 of the Constitution, which lists the values on which South Africa's legal order is founded. While they do not confer enforceable rights as such,[95] the founding values play a significant role in the Constitution. They 'inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid'.[96] The rule of law, rightly described by Forsyth as the 'mainspring'[97] of administrative law, is listed as a founding value in s 1*(c)*.[98] Three other significant public-law values, accountability,

[90] The *SARFU* case (note 19 above) para 135.
[91] Section 8(1) of the Constitution.
[92] Section 74(2) of the Constitution stipulates that the chapter containing the Bill of Rights may be amended only with the support of at least two-thirds of the National Assembly and at least six of the provinces in the National Council of Provinces.
[93] Section 36(1) lists as the relevant factors to be taken into account in this balancing exercise '*(a)* the nature of the right; *(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)* less restrictive means to achieve the purpose'.
[94] Section 2 of the Constitution states that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Supremacy of the Constitution is also listed as a founding value in s 1*(c)* of the Constitution.
[95] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 21.
[96] The full court in *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) para 19. The court went on to note that the founding values are specially protected: in terms of s 74(1) of the Constitution, s 1 may be amended only with the support of at least 75 per cent of the members of the National Assembly and six of the provinces in the National Council of Provinces (ibid).
[97] Christopher Forsyth *Administrative Law* 10 ed (2009) 20.
[98] The rule of law has proved to be a very important source of administrative law in recent years, though it may seem strange that we should stand in need of this fundamental and general constitutional principle when we have such a profusion of more specific and more detailed rules in administrative law: see Cora Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165.

responsiveness and openness, are listed in s 1*(d)*. These all contribute handsomely to the promise of a culture of justification in administrative law.

The various values, in turn, may be regarded as 'matched' to particular rights or bundles of rights in the Bill of Rights.[99] The rule of law is matched partly by s 33 and partly by other provisions – including s 9, containing rights to equality, and s 35, which lists the rights of persons who have been arrested, detained or accused. Section 34, which confers a right of access to court,[100] has been held to be the 'corollary' of the 'first aspect of the rule of law', the obligation on the state to provide mechanisms to resolve disputes.[101] Section 34 also serves the value of accountability; while openness is upheld particularly by s 32, which confers a right of access to information held by government.[102]

A provision of considerable significance to administrative law is s 195 of the Constitution. Section 195(1) sets out the basic values and principles governing the conduct of the public administration, while s 195(2) makes these applicable to the administration in every sphere of government, to organs of state and to public enterprises. Administrative virtues that are promoted in s 195(1) include impartiality, responsiveness, public participation, accountability and transparency. Some of these values have been restated as *Batho Pele* principles in an eponymous White Paper dealing with service delivery.[103] As to the status of the desiderata in s 195(1), they are comparable to the founding values in s 1 of the Constitution in that they appear to impose duties without giving rise to justiciable rights. Although one or two High Courts have supported a more ambitious conception of s 195,[104] the Constitutional Court has recently upheld the view that the section 'provides valuable interpretive assistance' but does not confer any directly enforceable rights.[105] Even without

[99] See further Roederer (note 65 above).
[100] Section 34 reads as follows: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[101] Langa ACJ in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 39.
[102] Section 32 reads as follows: '(1) Everyone has the right of access to – *(a)* any information held by the state; and *(b)* any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.' These rights and the legislation that gives effect to them, the Promotion of Access to Information Act 2 of 2000, are discussed in Chapter 2 below.
[103] Department of Public Service and Administration *Batho Pele – People First: White Paper on Transforming Service Delivery* (1997).
[104] See eg *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) para 17; *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* [2006] 10 BLLR 960 (LC) para 47.
[105] In his majority judgment in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para 75 Skweyiya J approved the approach of Griesel J in *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) para 40. All the members of the Constitutional Court were in agreement on this point: see the dissenting judgment of Langa CJ (in which Mokgoro and O'Regan JJ concurred) para 195.

such an enhanced status, however, the values and principles of s 195(1) must be regarded as significant pointers to a culture of justification.

The constitutional provisions outlined above are by no means the only ones that can be construed as adding to or reinforcing the promise of a culture of justification in administrative law. No real purpose would be served by trying to enumerate them all, but it is worth mentioning the provisions of Chapter 9 of the Constitution and the various 'state institutions supporting constitutional democracy' created there. These include the Public Protector (ss 182-3), the Human Rights Commission (s 184), the Auditor-General (ss 188-9) and the Electoral Commission (ss 190-1) – all institutions of relevance in the administrative context. Chapter 13 of the Constitution, which deals with 'finance' and related matters such as public procurement (s 217), is another significant source of administrative-law norms.

It is difficult to overstate the transformative potential of what is promised for administrative law by the 1996 Constitution. The shift from a culture of authority to one of justification arguably makes for an entirely new order of administrative law.[106] In this new order law, previously treated as 'a convenient instrument, to be manipulated at will'[107] for repressive purposes, is expected to do the work of constraining as well as enabling the exercise of state power, and of upholding and indeed of fulfilling rights. In the familiar typology of Nonet and Selznick, this is nothing less than an evolution from a model of 'repressive law' (albeit with a number of characteristics of autonomy) to 'responsive law'.[108] It represents, quite simply, a shift from a model of administrative law to one of administrative justice[109] – at least on paper. As Corder has 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'.[110] It is the aim of this thesis to examine that translation into reality.

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[106] Albeit not in the literal sense, since it is clear that the courts may continue to draw on old rules where these are compatible with the purposes of the democratic era. In *Pharmaceutical Manufacturers Association* (note 42 above) para 45 the Constitutional Court accepted that the common law would continue to inform the content of administrative law and to contribute to its future development – adding in *Bato Star Fishing v Minister of Environmental Affairs* (note 64 above) para 58 that the continuing relevance of the common law would have to be worked out on a case-by-case basis.

[107] Sydney Kentridge 'The Pathology of a Legal System: Criminal Justice in South Africa' (1980) 128 *University of Pennsylvania Law Review* 621.

[108] Philippe Nonet & Philip Selznick *Law and Society in Transition: Towards Responsive Law* (1978), a typology discussed in more detail in Chapter 4 below.

[109] Hugh Corder 'Administrative Justice Across the Commonwealth: A First Scan' 2006 *Acta Juridica* 1 at 2.

[110] Hugh Corder 'Reviewing Review: Much Achieved, Much More to Do' in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 1 at 7.

1.5 ACHIEVING A CULTURE OF JUSTIFICATION: FOUR ASPIRATIONS FOR SOUTH AFRICAN ADMINISTRATIVE LAW

As stated at the outset, this thesis is concerned with the implications of South Africa's constitutional revolution for administrative law. Above it has been argued that in this area the central promise or vision of the 1996 Constitution is that of a culture of justification. I now turn to consider what this means in specific and practical terms – that is to say, what the implications of this are for the form and content of administrative law.

In what follows I identify what I consider to be the four main aspirations associated with a culture of justification in South African administrative law. In the context of the 1996 Constitution they are best conceived as transformative ideals. More generally, they may be regarded as four qualities that a South African system of administrative justice should deliver if it is to qualify as such. The first three are specifically concerned with administrative law in the courts, which has been the traditional focus of the administrative system in South Africa, while the last goes beyond judicial review. Appropriately enough, these aspirations are the obverse of the most serious deficiencies of the pre-democratic law – the law associated with the culture of authority. The four aspirations thus relate to the aspects of administrative law that were most in need of transformation before 1994.

My choice of the four deficiencies and the four related aspirations has been informed by a crucial event in the history of South African administrative law: the Breakwater Workshop of February 1993.[111] This conference resulted not only in a seminal collection of papers[112] but also in the Breakwater Declaration, a sort of manifesto intended to stimulate 'constructive and wide-ranging reform in the sphere of administrative justice'.[113] The Declaration was subtitled 'Administrative Law for a Future South Africa' and was divided into four sections: 'Points of Departure', 'Areas of Agreement', 'Areas Requiring Further Consideration' and finally, a section on 'Constitutional Entrenchment of a Right to Administrative Justice' – a controversial issue that was not much debated at the workshop owing to lack of time. Except for this last item, the Declaration had the overwhelming support of the Breakwater participants. Moreover, as the inspired organiser noted at a follow-up

[111] This three-day conference on 'Administrative Law for a Future South Africa' was organised by Professor Hugh Corder of the University of Cape Town and attended by participants representing the academy, the legal profession, the judiciary, the public administration and political parties.
[112] First published as 1993 *Acta Juridica* and subsequently as T W Bennett & Hugh Corder (eds) *Administrative Law Reform* (1993). In this thesis references are given to the *Acta Juridica* in preference to *Administrative Law Reform*, but the page numbers in the two works are identical.
[113] Corder 'Introduction' (note 16 above) 15.

conference in 2001,[114] parts of the Breakwater Declaration resemble an agenda for the reform process that actually took place from 1994.[115] For this reason alone it is worth taking serious account of the Declaration. Particular points of relevance are highlighted in the discussion that follows, while the full document is appended to this thesis.[116]

(a) Well-developed grounds of review

A culture of justification demands accountability, and in many systems of administrative law accountability translates primarily into properly developed grounds for the judicial review of administrative decision-making.[117] This focus on grounds of review is particularly apposite in the South African context, since judicial review has always been the most prominent and significant method of controlling administrative power in this country.[118] However, the culture of authority that prevailed before 1994 was content with impoverished and poorly developed grounds of review that were often applied reluctantly and unevenly by the judiciary.

In the South African system, as in most other jurisdictions sharing a common-law heritage, the grounds of review are generally understood as the negative aspect of a more positive concept: principles of good administration, or what administrators should ideally do.[119] Thus narrow and impoverished grounds of review translate into minimal accountability on the part of administrators and give them greater scope for abuses of power and the infringement of rights.

In analyses from the pre-democratic era such minimalism is generally associated with and attributed to executive-mindedness, a submissive attitude that manifested itself in

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[114] Subsequent workshops were arranged by Professor Corder and held at the University of Cape Town in 1996 (on the theme *Administrative Justice in South Africa*), 2001 (*Realising Administrative Justice*) and 2005 (*Comparing Administrative Justice across the Commonwealth*). Papers from these conferences were published respectively in Hugh Corder & Tiyanjana Maluwa (eds) *Administrative Justice in Southern Africa* (1997); Corder & Van der Vijver (eds) *Realising Administrative Justice* (note 110 above); and 2006 *Acta Juridica*, republished as Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007).
[115] Corder 'Reviewing Review' (note 110 above) 4.
[116] Appendix 3.
[117] See eg Jeffrey Jowell 'The Democratic Necessity of Administrative Justice' Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008) and, from the same conference, Mahendra P Singh 'Foundations of Judicial Review of Administrative Action in India – Tension Between Principle and Pragmatism'; Mark Daly 'Judicial Review in the Hong Kong Special Administrative Region – Necessary Because of Bad Governance'.
[118] Judicial review was the focus of most of the administrative-law texts (see note 3 above), and even in the 1980s and 1990s official proposals for law reform were confined to the improvement of judicial review through the codification of the grounds of review: see Hoexter 'Future of Judicial Review' (note 46 above) 486.
[119] Baxter (note 3 above) 301ff; Laurence Boulle, Bede Harris & Cora Hoexter *Constitutional and Administrative Law: Basic Principles* (1989) 256.

exaggerated judicial deference towards the government.[120] That is no doubt correct. But in my view, such minimalism was also informed by what I have described as the 'parsimony' of the pre-democratic courts when it came to administrative justice: 'the pervasive sense, apparently shared by all three branches of the state, that administrative justice was something to be carefully hoarded and doled out only grudgingly'.[121] Interestingly, this attitude was by no means confined to conservative or pro-executive judges. A well-known example of parsimonious thinking comes from a judgment of Schreiner JA – a judge respected then and now for his liberalism – in which he warned that the value of the audi alteram partem principle 'would be lessened rather than increased if it were applied outside its proper limits'.[122]

Since the substance of administrative law was a matter of judge-made common law, the minimal content of many rules and principles of the pre-democratic law may be explained by this combination of submissive deference and parsimony. In the absence of any general PAJA-type legislation governing administrative law, the courts essentially controlled the extent to which the principles of lawfulness, reasonableness and procedural fairness were capable of disciplining public power – though that control was admittedly exercised within the real, and not purely imaginary, constraints of parliamentary sovereignty.[123]

The relatively narrow range of the pre-democratic grounds and the impoverished content of some of them are suggested in the Breakwater Declaration.[124] Its third Point of Departure was that the exercise of public power, whether by public or private bodies,[125] should be required to conform to the principles of fairness, equality and responsiveness; and the fourth dealt with importance of asserting citizens' rights and limiting of abuses of power. The Areas of Agreement addressed more specific concerns in relation to lawfulness, reasonableness and procedural fairness. They called for consultative and participatory

[120] For allegations of executive-mindedness, judicial conservatism and abstentionism, see eg Cameron 'Legal Chauvinism' (note 14 above) and 'Judicial Endorsement of Apartheid Propaganda: An Enquiry into an Acute Case' (1987) 3 *SAJHR* 223; D M Davis 'Competing Conceptions: Pro-Executive or Pro-Democratic – Judges Choose' (1987) 3 *SAJHR* 96 and the various contributions to the 'Focus on Omar' in (1987) 3 *SAJHR* 295-337; Dennis Davis & Hugh Corder 'A Long March: Administrative Law in the Appellate Division' (1988) 4 *SAJHR* 281; Haysom & Plasket 'The War Against Law' (note 5 above); Hugh Corder 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' (1989) 5 *SAJHR* 1; Mureinik 'Pursuing Principle' (note 5 above).

[121] Hoexter 'Principle of Legality' (note 98 above) 168.

[122] *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549B-C.

[123] See further Boulle, Harris & Hoexter (note 119 above) 242ff.

[124] See also Corder 'Introduction' (note 16 above) 9-10.

[125] The particular point here was that private bodies exercising public power ought not to escape accountability by virtue of their private status. In fact the law of the time was already fairly sophisticated in this respect, and the courts were willing to apply the requirements of lawfulness and procedural fairness to private bodies such as churches and schools: see Baxter (note 3 above) 101, 340-2.

decision-making; the clear articulation in empowering legislation of the purposes of the power being conferred and the criteria for its exercise; a duty to give reasons on request; and a test of justifiability and rationality for administrative decisions.[126]

These aspects of the Declaration give some sense of where and how reform was needed. To be more specific, the areas of greatest deficiency were the grounds relating to jurisdiction, reasonableness and fairness. Error of law existed as a very limited ground; and while 'jurisdictional' mistake of fact was a well-established basis for review, the courts almost invariably treated subjective statutory language as an excuse for extreme deference on their part – while mistakes of 'non-jurisdictional' fact were unreviewable in themselves. The vast majority of administrative acts and decisions could not be tested for reasonableness, since this ground was applicable only to 'legislative' decisions and, from 1976, 'purely judicial' decisions. Procedural fairness, too, applied to a narrow category of decisions that could be described as 'quasi-judicial', and this left out of account a wide range of decisions that were 'legislative' or merely 'administrative' in character. Finally, there was no general duty on administrators to give reasons for their decisions, though particular duties applied in areas such as arrest and detention.

What was lacking, then, was a culture of justification in the form of more meaningful grounds of review – grounds that would translate accurately into the principles of good administration conceived as lawfulness, reasonableness and procedural fairness. As Corder indicated at the time, what was needed were grounds of review that could prevent or cure the 'maladministration, corruption, repression and arbitrary abuses characteristic of public administration in this country for the past fifty years'.[127] The transformation of this part of the law would require gaps to be filled, existing grounds to be extended and, in some cases, the creation of entirely new grounds of review.

(b) Improved access to judicial remedies

One of the Areas of Agreement listed in the Breakwater Declaration was the need for 'maximum feasible access to administrative justice, including class actions [and] a broad definition of legal standing'.[128]

'Access to administrative justice' is of course a notion capable of straddling both judicial and non-judicial controls on administrative power, for the barriers to such access may

[126] Items ii, iii and iv of the Areas of Agreement.
[127] Corder 'Introduction' (note 16 above) 10.
[128] Item vi. Another item listed here was 'the provision of legal services', a topic well beyond the scope of this thesis.

take many forms.[129] A system that relies almost exclusively on judicial review, as South Africa's did before 1994, limits the accessibility of administrative justice to the extent that it fails to offer citizens cheaper and more readily available redress for maladministration, such as an effective set of internal appeals or an ombudsman. Access to administrative justice in this looser sense overlaps with the characteristic of 'completeness' identified in 1.5(d) below, and will be dealt with as part of that theme. But in any event, the wording of this item of the Declaration clearly indicates that the participants had something narrower in mind here: the accessibility of administrative justice within the confines of judicial review, and in the light of obstacles to judicial redress such as standing. In this thesis the idea of access to justice is understood in this narrower sense.

Standing was certainly an area in which the law cried out for transformation. The common-law locus standi rules were redolent of private-law litigation and proved very restrictive in the context of administrative law. It was often difficult or impossible for an applicant to show a sufficient interest of a personal nature, particularly where large numbers of people were affected by administrative action.[130]

The Areas of Agreement also called for the provision of 'accessible, appropriate and adequate remedies for maladministration, including review of administrative action and, where appropriate, alternative dispute resolution procedures'[131] – thus clearly referring to both judicial and non-judicial remedies. The latter are dealt with under the rubric of 'completeness' below. As regards the former, the judicial remedies available on review before 1994 were generally both appropriate and adequate. The problem was rather that access to judicial remedies was frequently blocked by legislative devices such as ouster clauses and indemnity clauses. In addition some less intrusive limits, such as a duty to exhaust internal remedies, were imposed by the courts. The transformation of the law would require such obstacles to be reduced or, where appropriate, removed altogether.

(c) A more substantive style of judicial reasoning

> 'The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to

[129] As noted in Corder 'Introduction' (note 16 above) 8-9.
[130] See especially Budlender (note 10 above) 132.
[131] Item viii of the Areas of Agreement.

> justify their decisions not only by reference to authority, but by reference to ideas and values.'[132]

A significant deficiency of South Africa's pre-democratic administrative law was its formalism. While this was not a feature mentioned in the Breakwater Declaration, that is not particularly surprising. Administrative law is formalistic by definition, as it were, because the distinction between review and appeal, or form and substance, is so central to it. Indeed, administrative-law review is supposed to be confined to matters of form. Then, too, formalism is a feature that might well be underestimated by many of the participants in a legal culture owing to its insidious and pervasive nature.[133] However, there was certainly some awareness of the problem amongst public lawyers before 1994. This is especially evident in the path-breaking work of John Dugard, who attributed judicial formalism in public law largely to the influence of Austinian legal positivism.[134]

Formalism has no single meaning but rather a 'family of meanings'.[135] In this thesis I employ the term rather broadly to describe a style of legal reasoning, especially as used in the judgments of courts. As explained by Atiyah and Summers in their authoritative study of the English and American legal systems,[136] formalism in this sense is associated primarily with a preference for formal, technical or mechanistic reasons, as opposed to substantive reasons based on moral, political, economic or other social considerations. An important and related characteristic of legal formalism is implied by standard dictionary definitions of the term, which refer to 'excessive adherence to prescribed forms' and 'use of forms without regard to inner significance'.[137] The courts of pre-democratic South Africa often seemed to be preoccupied with the outward appearance of problems in administrative law at the expense of their 'inner significance', or what one might call their substance. Thus, as I have explained it elsewhere, formalism describes 'a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a

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[132] Langa (note 54 above) 353, and see also Davis *Democracy* (note 71 above) 15-16.
[133] See eg Langa (note 54 above) 356; Henk Botha 'Freedom and Constraint in Constitutional Adjudication' (2004) 20 *SAJHR* 249 at 266.
[134] See especially John Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 181, John Dugard 'Some Realism About the Judicial Process' (1981) 98 *SALJ* 372 and Dugard *Human Rights and the South African Legal Order* (note 4 above) Part 4, 'The Judicial Process and Human Rights'.
[135] Steven M Quevedo 'Formalist and Instrumentalist Legal Reasoning and Legal Theory' 73 (1985) *California Law Review* 119 at 140; and on the varieties of formalism, see Martin Stone 'Formalism' in Jules Coleman & Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 166 at 170-2.
[136] P S Atiyah & Robert S Summers *Form and Substance in Anglo-American Law* (1987) 2ff.
[137] *Concise Oxford Dictionary* (note 29 above) 385.

concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense'.[138]

Significantly, Klare has observed that formalistic reasoning is a feature of South African law generally.[139] Formalism is part of the 'professional sensibilities, habits of mind, intellectual reflexes, rhetorical strategies and recurring argumentative moves' that make up our legal culture.[140] Klare points out, for instance, that South African lawyers are far more 'highly structured, technicist, literal and rule-bound'[141] than their counterparts in the United States, and more readily persuaded by formal or 'legalistic' reasons where American lawyers would expect substantive ones of policy or principle. This tendency to formalism was strong in pre-democratic administrative law. For instance, an affinity with formalistic reasoning is easy to discern in the cases relating to error of law and ulterior motive, in the judge-made rules of standing and in the courts' treatment of contracts in administrative law. The reasoning of the court in the *UDF* case,[142] too, is surely an example of rampant formalism.

The pre-democratic law also evinces a good deal of conceptualism, which is formalism of a more specific type. Broadly, conceptualism means reasoning characterised by an undue reliance on concepts. In this thesis I use the term more specifically to mean treating concepts as the key to solving legal problems. In this sense conceptualism flows from the fallacious view that legal concepts can be applied directly to concrete situations 'merely by the use of some kind of formal logic'.[143] It is the belief that by applying a legal concept or concepts, the answer to a legal problem can be discovered by simple syllogistic reasoning.[144] Referring to similarities in the work of two writers who derided this kind of thinking, Rudolf von Jhering and Roscoe Pound, Hart describes the intellectual error of conceptualism thus:

> 'The fundamental error consists in the belief that legal concepts are *fixed* or *closed* in the sense that it is possible to define them exhaustively in terms of a set of necessary and sufficient conditions; so that for any real or imaginary case it is possible to say with certainty whether it

[138] Cora Hoexter 'Contracts in Administrative Law: Life After Formalism?' (2004) 121 *SALJ* 595 at 597.
[139] Klare (note 34 above) 168. See also Theunis Roux 'Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court' (2004) 20 *SAJHR* 511, an important study of the continuing deleterious influence of legal formalism in South Africa's professional legal culture.
[140] Klare (note 34 above) 166. Cf Martin Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001). For Chanock the legal culture is made up of 'an interrelated set of discourses about law' (at 23), and he distinguishes between South Africa's professional legal discourse – which was formalistic – and its bureaucratic legal discourse, which was not.
[141] Klare (note 34 above) 168.
[142] Note 5 above.
[143] Anton-Hermann Chroust 'Law: Reason, Legalism and the Judicial Process' (1963) 74 *Ethics* 1 at 8-9.
[144] *Oxford Companion to Law* (note 30 above) 266.

falls under the concept or does not; the concept either applies or it does not; it is logically closed (*begrenzt*).'[145]

This is an apt description of the conceptualism engaged in by South African judges attempting to 'solve' problems relating to reasonableness and procedural fairness in the pre-democratic era by means of the classification of administrative functions. In essence this system entailed different treatment for administrative acts of a 'legislative', 'judicial' or 'administrative' nature – broad categories which were then subdivided into narrower ones such as 'quasi-judicial' and 'purely administrative'. Once a particular administrative act was classified, the requirements of administrative justice applicable to it were supposedly fixed and certain; and so, in order to find the legal answer to a problem, all a court had to do was classify the action that gave rise to the problem. Davis puts it graphically when he says that the reviewing court 'became no more than a jurisprudential slot machine into which was placed the nature of the dispute . . . and out popped the answer to the review application'.[146]

Forsyth has recently deplored the fashionable tendency to criticise formalism in administrative law as a self-evident vice, and has argued that in this area of the law there is a proper and important role both for formalism – something ingrained in the English common law – and conceptual reasoning.[147] He points out that all legal systems are 'relatively formalistic'[148] in the sense that they all rely on formal rules in order to obviate the need for time-consuming substantive debate every time a legal problem arises. He also highlights the benefits to be gained by formal and conceptual reasoning. The former, he says, favours certainty and predictability, and thus buttresses the rule of law; and the latter allows questions to be clarified and understood, thus facilitating problem-solving.[149] Using the problem of void and voidable acts as an example, Forsyth then shows how formal and conceptual reasoning can be used to resolve difficult issues in administrative law.[150]

I have no quarrel with most of Forsyth's claims. I agree that all legal systems are 'relatively formalistic' and that justice and the rule of law generally demand the consistent application of authoritative rules. When it comes to administrative law, I am certainly no

[145] H L A Hart 'Jhering's Heaven of Concepts' in *Essays in Jurisprudence and Philosophy* (1983) 267 at 269.
[146] Dennis Davis 'To Defer and When? Administrative Law and Constitutional Democracy' 2006 *Acta Juridica* 23 at 34.
[147] Christopher Forsyth 'Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66 *Cambridge Law Journal* 325.
[148] Ibid 329ff.
[149] Ibid 333ff.
[150] Ibid 337-9.

advocate of 'unfettered judicial discretion'[151] as a replacement for rules. I am ready to admit that formalistic and conceptual reasoning are capable of solving problems in this branch of the law. Indeed, I have myself made the point that in the pre-democratic era this type of reasoning was occasionally used to achieve progressive results, such as rendering ouster clauses ineffective.[152] In this regard, Klare has correctly observed that formalism does not necessarily go hand in hand with a conservative ideology.[153]

However, it seems to me that what Forsyth defends is a rather benign kind of formalism, which is to say formalism in the mildest sense of not revisiting the substance behind formal and authoritative rules *when there is little or no call for it.* In Forsyth's words, when the answer to a legal question is to be found in an authoritative rule

> 'there is no need to have regard to the substantive reasons that persuaded parliament to enact the statute or persuaded the minister or other authority to make the delegated legislation. Nor, indeed, is it necessary to consider any more diffuse political or moral reasons that might favour one or other result in the litigation. These matters are simply irrelevant; all that is necessary is that the law should be applied according to its terms.'[154]

He is careful to add that the formalism he is defending does not involve judicial dishonesty, that is, judicial decisions in which the judgment does not reflect the true reasons for the decision.[155]

One suspects that what Forsyth means by formalism could fairly easily shade into Hart's description of the vice: 'an attitude to verbally formulated rules which both seeks to disguise and to minimise the need for choice, once the general rule has been laid down'.[156] Otherwise there is nothing particularly objectionable about applying rules according to their terms – unless of course those terms are unclear or unlawful, or the constitution enjoins the court to do more than simply apply clear and apparently lawful rules. That is in fact the position in South Africa, where s 39(2) of the 1996 Constitution requires all courts, tribunals and forums to 'promote the spirit, purport and objects of the Bill of Rights' when interpreting legislation and when developing the common law or customary law.[157] In South Africa today,

[151] Ibid 339.
[152] See Hoexter 'Contracts' (note 138 above) 598.
[153] Klare (note 34 above) 170. See also Roux (note 139 above) 534, where he notes that 'a formalistic approach to social transformation legislation is not necessarily an indication of conservative judicial politics'.
[154] Forsyth 'Showing the Fly' (note 147 above) 328.
[155] Ibid 329.
[156] H L A Hart *The Concept of Law* 2 ed (1994) 129.
[157] See generally Stu Woolman 'Application' (OS 02-05) in Woolman et al (note 65 above) Chapter 31 at 31--77.

then, there is a very definite call for revisiting the substance behind formal and authoritative rules.

In the pre-democratic era there was admittedly no such call. However, in South African administrative law of that era the formalism and conceptualism engaged in by the courts went far beyond the mild kind described by Forsyth. This thesis will show that, guided by their philosophy of parsimony and submissive deference, the courts were attracted to mechanical reasoning, that they were inclined to rely on highly artificial distinctions and that they sometimes focused on appearances to the extent of ignoring reality. All too often the certainty this achieved was the false certainty of slot-machine jurisprudence. Forsyth, a pre-eminent commentator on the performance of the South African judiciary under apartheid, would surely agree that he and I are concerned with rather different kinds of formalism.[158]

On the basis of this particular understanding of what is meant by formalism and conceptualism in the pre-democratic era, it will be argued in the thesis that the transformation of administrative law demanded the development of a more substantive style of reasoning from the courts – a departure from the prevailing judicial preoccupation with form and technicality.

(d) The completion of administrative law

A culture of justification – one in which 'every exercise of power is expected to be justified'[159] – is unlikely to flourish where the control of public power is entrusted to a single institution or method, and far more likely to succeed where such control is exercised and relief is offered by a range of institutions and by a number of different methods.

A great shortcoming of the pre-democratic law was its incompleteness, a problem relating to the prominence of judicial review and the general paucity of other controls on administrative power.[160] Before 1994 South African administrative law was dominated by judicial review at the expense, and almost to the exclusion, of other safeguards such as public participation, and other legitimate ways of reconsidering administrative decisions, such as a reliable system of administrative appeals. Because of the crucial role it played in remedying the injustices of apartheid, judicial review was given special prominence in the administrative system and liberal public lawyers tended to become preoccupied with it. For much of the

[158] Forsyth *In Danger* (note 13 above) himself acknowledges the deleterious effects of and formalistic reasoning and mechanistic interpretation; see eg at 123ff and 229-30.
[159] Mureinik 'A Bridge to Where?' (note 66 above) 32.
[160] See Hoexter 'Future of Judicial Review' (note 46 above) at 485-8 and Corder 'Administrative Justice: A Cornerstone' (note 12 above).

apartheid era there was a strong (and often justified) sense that the courts alone could be trusted to treat citizens objectively and fairly. In 1958, for example, Brookes and Macaulay contrasted the public, rational and objective nature of court proceedings and the 'Stygian darkness of administrative tyranny' represented by the decisions of officials:[161]

> 'They take place behind closed doors. The sufferer often does not know really what the accusation against him is. He has no chance of hearing or cross-examining those who provide evidence against him. There is not the slightest guarantee of consistency. Too often the prosecutor is judge in his own cause. Those who make the decisions are themselves servants of the government, which can dismiss them, transfer them, or withhold promotion from them, if their decisions are not what the government wants. . . . How much misery and oppression of the helpless and despised could be avoided in South Africa if men were penalised only by trained judicial officers, only for clearly defined and adequately proved offences, and only after a fair hearing. But this which should be the rule of life has become in our country, especially so far as the African people are concerned, the exception.'

Fuelled by the liberal lawyer's distrust of the government, this over-reliance on judicial review became thoroughly entrenched over the years. It was so well established that in 1992, when the South African Law Commission admitted the absence of a 'coherent system'[162] of administrative appeals, it saw the answer as lying in the extension of the grounds of review rather than the reform of the system of appeals itself.[163] In reality there was a pressing need for the completion of administrative law by the addition of further, and different, controls on administrative power.

There was a concomitant need for the integration of the various controls, which would allow judicial review to play a somewhat more limited and thus more realistic role in the administrative-law system. South African administrative lawyers have traditionally expected judicial review to do it all, and have tended to disregard its inherent limits and limitations.[164] In this they have lagged behind their counterparts in countries with a similar common-law tradition of administrative law, such as New Zealand, where a critical literature relating to judicial review was in place more than twenty years ago.[165] In such jurisdictions it has long been understood that the institution of judicial review is expensive, inaccessible, slow and

[161] Brookes & Macaulay (note 4 above) 27-8.
[162] South African Law Commission *Report* (Project 24) (1992) 50.
[163] Ibid 106.
[164] See Hoexter 'Future of Judicial Review' (note 46 above) 488ff.
[165] See for instance the papers collected in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) and *The Province of Administrative Law* (1997).

obviously inapt in some ways, and that an effective system of administrative justice will necessarily combine review with other methods of control.

The system's over-reliance on review was acknowledged at the Breakwater Workshop, as was the desperate need for additional methods of control. Both themes are evident in a number of the papers emanating from the conference[166] and in the Declaration itself. The document's second Point of Departure explicitly recognised that South African administrative law had 'a retrospective focus' owing to its concentration on judicial remedies for maladministration. It acknowledged that the effective regulation of administrative power requires more than court-based processes, and it called for a more prospective focus by the creation of 'procedures and structures which will foster good decision-making', including a code of principles of good governance.[167]

The Areas of Agreement in turn addressed the need for a range of procedures and institutions, in addition to judicial review, to ensure good governance. Specific procedures and institutions listed included parliamentary control over delegated legislation;[168] 'genuinely consultative and participatory rulemaking and decision-making procedures';[169] access to official information;[170] the training of public servants in the principles of good governance;[171] and the provision of a variety of remedies for maladministration, including judicial review and alternative dispute resolution.[172] Finally, three areas listed as requiring further consideration were administrative appeals, both internal and external;[173] 'the desirability of a generalised statutory prescription of administrative procedures';[174] and the codification of the principles of good governance, such as accountability and participation.[175]

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In this section the four main aspirations of a transformed South African administrative law (and their converse, the chief deficiencies of the pre-democratic law) have been identified and introduced. As indicated under the next heading, each of these aspirations forms the subject matter of the following four chapters of this thesis.

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[166] Three of the sixteen published papers dealt with appeal as an alternative to review, and two with rulemaking. In addition, there were papers on alternative dispute resolution and freedom of information.
[167] Item ii of the Points of Departure.
[168] Item i of the Areas of Agreement.
[169] Ibid item ii.
[170] Ibid item v.
[171] Ibid item vii.
[172] Ibid item viii.
[173] Item i of the Areas Requiring Further Consideration.
[174] Ibid item ii.
[175] Ibid item v.

1.6 OUTLINE OF THE STUDY

The thesis is divided into six chapters. The subject matter of each chapter is outlined below.

(a) Chapter 1

This first chapter has been concerned with the background to the thesis and with the nature and scope of the thesis. It has also dealt with the first two inquiries demanded by the research question: the kind of transformation promised for administrative law by the democratic constitution – a culture of justification – and the qualities that culture demands of administrative law. The third question, which relates to the development of the law since 1994, is dealt with in the next four chapters of the thesis.

(b) Chapter 2

The second chapter deals selectively with the principles of good administration and their obverse, the grounds of review, within the four broad themes of lawfulness, reasonableness, procedural fairness and the giving of reasons. It considers the role of the PAJA and the contribution of the courts in developing existing grounds of review and in creating new ones.

In relation to lawfulness, Chapter 2 deals with two areas that were especially deficient in the pre-democratic era: the courts' treatment of motives and dishonesty and the various grounds relating to jurisdiction. Chapter 2 considers the progress made in strengthening and expanding these grounds since 1994.

Reasonableness is an especially controversial area because review on this ground tends to blur the distinction between review and appeal. It is thus an area in which judicial restraint is thought to be especially appropriate. This chapter examines the approach to reasonableness taken by the PAJA and the work done by the Constitutional Court in this regard.

An area in which the PAJA makes a notable contribution is that of procedural fairness. Chapter 2 considers the application of fairness before and after 1994 with specific reference to provisions of the PAJA.

Finally, Chapter 2 deals with the general right to reasons for administrative action – something that did not exist before 1994 and is now governed by the PAJA. Two particularly important issues discussed are the courts' development of the concept of adequacy and the scope of application of the right to reasons.

(c) Chapter 3

Chapter 3 is concerned with access to judicial remedies. The two main themes of the chapter are the transformation of the law relating to standing and the removal of obstacles to judicial review and its associated remedies.

As far as standing is concerned, there is tension between the restrictive common-law rules and the provisions of s 38 of the Constitution. The latter brought about dramatic change by introducing class actions into our law, together with other innovations that improve access to the courts. Exposing and resolving this tension is one of the concerns of the chapter.

Most of the obstacles to judicial review associated with the pre-democratic era have been eliminated by s 34 of the Constitution, which entrenches a right of access to court. However, the PAJA itself includes provisions limiting access to review, and the effect of these is also considered in this chapter.

(d) Chapter 4

Chapter 4 assesses to what extent South African administrative law has moved away from formalism, a distinct weakness of the pre-democratic law. It will be shown that while the courts are no longer mesmerised by the classification of functions, and have abandoned other instances of formalistic reasoning, some of the provisions of the PAJA – and especially its close and narrow definition of administrative action – seem to invite a return to the style of reasoning of the old era.

(e) Chapter 5

The fifth chapter is concerned with the completion of South African administrative law by the addition of further controls on administrative power, all of them broadly mandated by the Constitution and some of them more specifically dealt with in the PAJA. Chapter 5 indicates the extent to which judicial review has been supplemented by other safeguards and evaluates their effectiveness in the democratic administrative process.

(f) Chapter 6

The concluding chapter draws together the threads of the previous chapters and offers a final assessment of the nature and extent of the transformation of South African administrative law since 1994.