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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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DECLARATION

I, the undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree.

I acknowledge that, in accordance with the Senate Standing Orders on Higher Degrees of the University of the Witwatersrand and with the permission of the Postgraduate Studies Committee of the Faculty of Commerce, Law and Management, this thesis incorporates parts of a book published by Juta & Co, Ltd in 2007 under the title *Administrative Law in South Africa*.

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Johannesburg, 18 June 2009

ABSTRACT

South Africa's constitutional revolution has profoundly affected its administrative law. Since 1994 South Africans have enjoyed constitutional rights to administrative justice as well as a range of other constitutional safeguards. More recently legislation mandated by the 1996 Constitution has been enacted, in the form of the Promotion of Administrative Justice Act 3 of 2000, to give effect to the constitutional administrative-justice rights. This thesis describes and critically assesses the transformation of South African administrative law since 1994 with particular reference to that legislation.

The essential transformative promise of the democratic Constitution is to replace the old, pre-democratic culture of authority with a culture of justification. Drawing on the seminal Breakwater Declaration of 1993, the most serious deficiencies of the pre-democratic law are indentified as consisting in narrow and impoverished grounds of review; restricted access to judicial remedies; an overly formalistic style of judicial reasoning; and an incomplete system of administrative law, the result of a paucity of safeguards apart from judicial review. Conversely, the main aspirations of a transformed administrative law – the law associated with a culture of justification – are identified as well-developed grounds of review; improved access to judicial remedies; the achievement of a more substantive style of judicial reasoning; and the completion of administrative law through the supplementation of judicial review. The transformation of the law in relation to each of these four aspirations is investigated in turn. It is concluded that South African administrative law the transformative promise of the democratic Constitution has been realised to a great extent.

ACKNOWLEDGEMENTS

A doctoral thesis is ideally something to be tackled in one's early twenties rather than in one's late forties – but perhaps a belated thesis gives the author less pain. I enjoyed writing this one, and I am grateful to all those who encouraged me to undertake the task and helped me to complete it.

A colleague, Professor Iain Currie, did both. A few years ago, when I was due to start working on a book on South African administrative law, he suggested that I write it under supervision and later incorporate parts of the published work into a doctoral thesis (a practice contemplated by the rules of our university). More than that, he agreed to be my supervisor and performed his duties in this regard assiduously and promptly. I thank him most warmly for all this.

Another colleague, Professor Marius Pieterse, willingly read and commented on the first chapter of the thesis at an early stage, when I was assailed by doubts. I thank him for his kind encouragement.

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The thesis incorporates parts of a book which was published by Juta & Co, Ltd in 2007, and I am grateful to the publishers for their co-operation in this regard. Special thanks are due to Ria de Kock and Ute Kuhlmann for assisting me with materials for both book and thesis. The Breakwater Declaration of 1993, which first appeared in 1993 *Acta Juridica* 17-20, is reproduced in Appendix 3 with the permission of Juta.

My husband, James van den Heever, and our son, Julian van den Heever, suffered a good deal less than they would have done had I had produced this thesis when younger – or so I tell them. Nevertheless, they cheerfully put up with a certain degree of neglect during the writing of both the book and the thesis, and they helped me in many other ways. I can never thank them enough for their love and support, and I dedicate this thesis to both of them.

In this thesis the law is stated as at the end of May 2009. For the sake of economy the details of additional parties, joined matters and the like have been omitted from case names in the text and footnotes. Full case names including such details are to be found in the table of cases. Note that double references are given only for English cases to facilitate their access by South African readers.

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Johannesburg, 18 June 2009