

**UNIVERSITY OF ZULULAND**



For the degree

Of

**DOCTOR OF LAWS**

In the field of Administrative Law

Full title of the thesis:

**TRANSFORMATIVE CONSTITUTIONALISM AND THE POSITION OF THE  
DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATIONS IN  
REFORMING ADMINISTRATIVE LAW IN SOUTH AFRICA**

By

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Submitted to the Faculty of Commerce, Administration and Law in fulfilment  
or partial fulfilment of the requirements for the degree of Doctor of Laws in the  
Department of Law at the University of Zululand

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Date submitted: 30 November 2018

## **DECLARATION**

I, Vuyo Lungile Ntsangane Joseph Peach, identity number [REDACTED] and Student No 201760032, hereby declare that this thesis entitled **"TRANSFORMATIVE CONSTITUTIONALISM AND THE POSITION OF THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATIONS IN REFORMING ADMINISTRATIVE LAW IN SOUTH AFRICA"** is my own original work. The thesis is hereby submitted to the University of Zululand, in fulfilment of the requirements for the LLD in Administrative Law, and has not been previously submitted to any other university.

.....  
**VUYO LUNGILE NTSANGANE JOSEPH PEACH**

**Date:** 30 November 2018

## ACKNOWLEDGEMENTS

I want to thank God for the strength, perseverance and resilience to carry me through the turbulent years of writing this thesis. Without His mercy and grace, I could not have succeeded, as the journey was full of obstacles. I would also like to thank my ancestors, who have always been on my side and protected me during difficult times.

I would also like to extend my appreciation and gratitude to my supervisor, Professor Desan Iyer, for his professional guidance and immense love for an African child, in order to enable him to reach his academic goal. If it were not for him, I would not be in this position of attaining my doctorate. Furthermore, his incisive and insightful comments on the drafts and final production of this work are highly appreciated. **Thank you, Professor Iyer.**

My gratitude also goes to the Deputy Dean of Research, Prof Kasseeram, for his profound role in ensuring that I defended this thesis in record time, and the financial support for this project. In addition, special thanks go to the Faculty of Administration, Commerce and Law at the University of Zululand for their support. My association with this faculty has been a long journey to academic excellence. My gratitude goes to Prof AWA Raath, for making me aware of the importance of transformative constitutionalism in shaping the direction of this study, and Professor Gerrit Ferreira, who was my supervisor for my LLM dissertation in administrative law.

## DEDICATION

I owe my academic success to my parents: my late father Qondile Peru, and Zanyiwe Peach. I must also mention my grandparents William Wintili and Nontombi Mpolweni, Ntemi Katima, MamCwerha Gxarha and Ntsagane Joseph Peach, my uncle Mvulene Gibson Mpolweni and aunt Novangaye Mpolweni, all of whom have since passed away. Their spirit sustained my journey to the completion of this study. I also dedicate this thesis to the following people: Mathudi Welleminah Peach (deceased) and Betty Daphney Peach. To my late sisters Shiwe Nuku Mogoshane, Nomathemba Martha Peach, and daughter Nothemba Mathlare -Peach. To my sisters and brothers, Biziwe, Thandiwe, Vuyisile, Soisile Peach and Thenjiwe Peach- Mohokare.

To Thenjiwe Maphumulo, who has always been on my side and provided every support during difficult times in my life and continues to do so. She deserves a big thank you. **Thank you Thenjiwe.**

To all my children, especially Nomfundo and Vuyo Lungile Peach, all of whom have contributed indirectly to the completion of this work, and to my colleagues and friends, especially Bongani Khumalo; Pule Moeketsi and Lungile Bomela, who believed in my capability and gave me moral and emotional support – I thank you. Mrs Doepie de Jongh who typed my LLM dissertation in 2003 and this LLD thesis. Thank you.

## ABSTRACT

The doctrine of legitimate expectation, initially adopted from English law, has been engrained in South African administrative law for some time, extending the scope of procedural rights afforded to individuals affected by administrative actions. In principle, the doctrine of legitimate expectations comprises two pillars: a procedural legitimate expectation which focuses on the procedure that a public authority will follow before making a decision, and a substantive legitimate expectation which focuses on the actual decision a public authority will make. Of concern, is that the doctrine continues to provide procedural protection to South Africans, yet on the face of it seemingly ignores matters that extend beyond procedural action. The substantive legitimate expectations pillar is not accepted in South African administrative law as grounds for review. The doctrine of substantive legitimate expectations is grounds for judicial review in other countries such as England, Ireland, New Zealand, the European Union and Hong Kong, among others. The evaluation of fairness as the driving force for granting substantive benefits for legitimate expectations in these jurisdictions could provide valuable indicators for incorporating substantive benefits through transformative constitutionalism in South African administrative law.

South African courts have been reluctant to pronounce whether substantive legitimate expectations should be part of South African law, largely due to poorly substantiated cases before them as well as the issue of separation of powers. However, judgments such as *Administrator, Transvaal v Traub and Others* and *Meyer v Iscor Pension Fund* and *Bel Porto School Governing Body v Premier, Western Cape* have left the door open for the acceptance of the doctrine of substantive legitimate expectations into South African law in the future.

The research highlights the fact that the current legal framework appears to be inadequate in protecting legitimate expectations as a whole. There is scant authoritative judicial precedent setting out whether and how a substantive legitimate expectation will receive substantive protection under the *Promotion of Administrative Justice Act (PAJA)*. With regard to procedural fairness and

the absence of substantive legitimate expectations, it will be argued that PAJA lacks the vision needed for transforming South African administrative law into a dynamic system of law that provides the basis for the meaningful transformation of administrative justice. In addition, the 1996 Constitution completely omitted the term "legitimate expectation" from Chapter 2. The research will show that arguments raised in opposition to the recognition of substantive legitimate expectations mostly remain committed to an overtly conservative approach by the judiciary to administrative decision-making, and to a large degree lack a sincere commitment to constitutional transformation. A further objective of the research is to show that transformative constitutionalism under the new constitutional legal order can assist in addressing the need for the recognition of the substantive legitimate expectations doctrine in South Africa. In this context, values such as the supremacy of the Constitution, the rule of law, fairness, separation of powers, Bill of Rights, democracy, administrative justice and the institutions to uphold them, particularly the independent judiciary, will form an integral part of the study. Finally, by analysing relevant case law and foreign developments pertaining to substantive legitimate expectations, a framework will be provided for the corresponding need in South Africa.

## **ISICATSHULWA (ABSTRACT ISIXHOSA)**

Imfundiso yokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho, eyamkelwa ngaphambili kumthetho wesiNgesi ibethelelwe kumthetho olawula ukwenziwa kwezigqibo waseMzantsi Afrika ithuba elide, inabisa umda wamalungelo okulandelwa kwemigaqo yenkundla anikwa abantu abathile abachatshazelwe zizigqibo ezinziwe ngokomthetho. Ngokubanzi, imfundiso yokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho iquka izisekelo ezibini, ukulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo okugxile kwinkqubo eza kulandelwa ngugunyaziwe karhulumente phambi kokuba kwenziwe isigqibo, kunye nokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo okugxile kwisigqibo ngqo esiza kwenziwa ngugunyaziwe karhulumente. Okuxhalabisayo, kukuba imfundiso iqhubeka nokunika ukhuselo lokulandelwa kwemigaqo yenkundla kubemi boMzantsi Afrika kodwa ngokubonakalayo ikhangeleka ingayinanzi imicimbi enabela ngokungaphaya kwesigqibo esenziwe ngokomthetho. Isisekelo sokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo asamkelwa ngumthetho olawula ukwenziwa kwezigqibo waseMzantsi Afrika njengomhlaba wokujonga kwakhona. Imfundiso yokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo ngumhlaba wokujongwa kwakhona kobulungisa kwamanye amazwe anje nge-England, i-Ireland, i-New Zealand, i-European Union kunye neHong Kong, phakathi kwamanye. Ukuhlolwa kobulungisa njengendlela yokuqhuba kokunikwa kwamancedo okwenene okulindelweyo okusemthethweni kule mimandla kunganika iziboniso ezizizo zokubandakanywa kwamancedo okwenene ngolwenziwo lwenguqu yomgaqo-siseko kumthetho olawula ukwenziwa kwezigqibo waseMzantsi Afrika.

Iinkundla zaseMzantsi Afrika bezisoloko zithandabuza ukubhengeza ukuba ingaba ukulindelwa kwendlela esemthethweni yokuziphatha koluntu ibe yinxenye yomthetho waseMzantsi Afrika kakhulu ngenxa yamatyala asilelayo ngobungqina obubambekayo obuthiwa thaca phambi kwabo kwakunye nomba weyantlukwano ngokwamagunya. Nangona kunjalo, izigwebo zale mihla ezinje

ngakwi-Administrator, *Transvaal v Traub and Others*, *Meyer v Iscor Pension Fund* and *Bel Porto School Governing Body v Premier, Western Cape*, zinike ikroba lokwamkelwa kwemfundiso yokulindelwa kokwenziwa kwesigqibo esinobulungisa ngokomthetho esinobungqina obubambekayo kumthetho waseMzantsi Afrika kwixesha elizayo.

Uphando luza kugxininisa umba wokuba inkqubo-sikhokelo yezomthetho yangoku ibonakala isilela ekukhuseleni okulindelweyo okusemthethweni kukonke. Akukho Akukho mzekelo wokwenzekayo wecandelo lenkundla eligunyazisayo owandlala isizathu okanye indlela ukulindelwa kokwenziwa kwesigqibo esinobulungisa ngokomthetho esinobungqina obubambekayo ukuba siyakufumana ukhuseleko lobungqina obubambekayo phantsi kwe-*Promotion of Administrative Justice Act* (i-PAJA). Ngokuphathelele kubulungisa bokulandelwa kwemigaqo yenkundla nokunqongophala kokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo, kuza kuphikiswana ngokuba i-PAJA iyasilela ngombono odingekayo wokwenza inguqu kumthetho olawula ukwenziwa kwezigqibo waseMzantsi Afrika kwinkqubo yomthetho eguquguqukayo enika isiseko senguqu enengqiqo yobulungisa bolawulo lokwenziwa kwezigqibo. Ukongeza, uMgaqo-siseko ka-1996 ushiye ngokugqibeleleyo igama "ukulindelwa kokwenziwa kwesigqibo esinobulungisa ngokomthetho" kwiQendu 2. Uphando luza kubonisa ukuba iimpikiswano eziphakanyiswe ekuqondweni kokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo ziza kuhlala ngakumbi ngokuzinikela kwinkqubo yobuntamolukhuni ngokuphandle kulwenziwo lwezigqibo ngokomthetho olawulayo, kwaye ngokungaphaya uyasilela kwisibophelelo esinyanisekileyo senguqu yomgaqo-siseko. Enye injongo yolu phando kukubonisa ukuba ulwenziwo-nguqu kumgaqo-siseko phantsi lolawulo lwezomthetho womgaqo-siseko olutsha kunganceda ukujongana isidingo sokuqondwa kwemfundiso yokulindelwa kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo eMzantsi. Ngokwale ntsingiselo, iimpawu zentsulungeko ezinje ngokuphakama koMgaqo-siseko, ulawulo lomthetho, ubulungisa, iyantlukwano ngokwamagunya, uSomqulu wamaLungelo, ulawulo lwentando yesininzi,

ezobulungisa ezilawula ukwenziwa kwezigqibo kunye namaziko emaziwaxhase, ingakumbi icandelo leenkundla elizimeleyo, ziza kuquka inxenye ebalulekileyo yolu phononongo. Okokugqibela, ngokuhlalutya umthetho wamatyala afanelekileyo neenkqubela zangaphandle eziphathelele kokulindelweyo kokwenziwa kwezigqibo ezinobulungisa ngokomthetho ezinobungqina obubambekayo, kuza kunikwa inkqubo-sikhokelo yesidingo esingqinelanayo eMzantsi Afrika.

**Key terms:**

Administrative action  
Administrative justice  
Administrative law  
Common law  
Constitution  
Constitutional values  
Constitutionalism  
Executive  
Final Constitution  
Interim Constitution  
Judicial review  
Judiciary  
Lawful  
Legality  
Legislature  
Legitimate expectations  
Parliament  
Power  
Procedural expectations  
Promotion of Administrative Justice Act  
Rationality  
Reasonable  
Reasonable expectation  
Reform  
Relief  
Statute  
Substantive  
Substantive expectations  
Supremacy  
Theories  
Transformation  
Unlawful  
Values

## TABLE OF CONTENTS

DECLARATION.....	i
ACKNOWLEDGEMENTS .....	ii
DEDICATION .....	iii
ABSTRACT .....	iv
ISICATSHULWA (ABSTRACT ISIXHOSA) .....	vi
LIST OF ABBREVIATIONS .....	xx
CHAPTER 1 .....	1
INTRODUCTION .....	1
1.1 Introduction.....	1
1.2 Literature review .....	2
1.2.1 <i>Introduction.....</i>	2
1.2.2 <i>General .....</i>	2
1.2.3 <i>History of the doctrine of legitimate expectations in South African administrative law .....</i>	5
1.2.4 <i>The reception of procedural legitimate expectations in South African administrative law .....</i>	6
1.2.5 <i>The arrival of procedural legitimate expectations doctrine in South African administrative law .....</i>	10
1.2.6 <i>Conclusion .....</i>	12
1.3 Problem statement and research question .....	13
1.3.1 <i>Court decisions negating the allowance of substantive benefits for legitimate expectations.....</i>	17
1.3.2 <i>A coherent, theoretical basis for recognising substantive legitimate expectations in a democratic South Africa.....</i>	20
1.3.2.1 The transformative vision of South Africa's constitutional state ...	20

1.3.2.2	Natural justice .....	21
1.3.2.3	Transformative constitutionalism and South African public law ...	22
1.3.2.4	Transformative constitutionalism, fairness and administrative law reform .....	25
<b>1.3.3</b>	<b><i>Substantive legitimate expectations in English law and other jurisdictions.....</i></b>	<b>27</b>
<b>1.4</b>	<b>Aim, objectives and purpose of the study .....</b>	<b>28</b>
<b>1.5</b>	<b>Intended contribution to the body of knowledge .....</b>	<b>29</b>
<b>1.6</b>	<b>Research methodology .....</b>	<b>30</b>
<b>1.7</b>	<b>Ethical considerations.....</b>	<b>32</b>
<b>1.8</b>	<b>Resources .....</b>	<b>32</b>
<b>1.9</b>	<b>Demarcation of the study .....</b>	<b>32</b>
<b>CHAPTER 2</b>	<b>.....</b>	<b>35</b>
<b>THE DOCTRINE OF LEGITIMATE EXPECTATIONS IN SOUTH AFRICAN ADMINISTRATIVE LAW</b>	<b>.....</b>	<b>35</b>
<b>2.1</b>	<b>Under the pre-1993 constitutional dispensation .....</b>	<b>35</b>
<b>2.1.1</b>	<b><i>The doctrine of fairness in England before 1994 .....</i></b>	<b>35</b>
<b>2.1.2</b>	<b><i>The doctrine of fairness in South Africa.....</i></b>	<b>36</b>
<b>2.1.3</b>	<b><i>The origins of the doctrine of legitimate expectation in England.....</i></b>	<b>37</b>
<b>2.1.4</b>	<b><i>Background to the doctrine of legitimate expectations in South African administrative law .....</i></b>	<b>43</b>
2.1.4.1	Natural justice .....	43
<b>2.1.5</b>	<b><i>The adoption of the doctrine of legitimate expectation in South African administrative law .....</i></b>	<b>45</b>
<b>2.1.6</b>	<b><i>The nature and functioning of the doctrine of legitimate expectation after Everett.....</i></b>	<b>48</b>

2.1.7	<i>The birth of the legitimate expectation doctrine in South African administrative law</i> .....	56
2.2	Conclusion .....	58
CHAPTER 3 .....		60
TRANSFORMATIVE CONSTITUTIONALISM AS THE UNDERLYING PARADIGM OF THE NEW SOUTH AFRICAN CONSTITUTIONAL ORDER.....		60
3.1	Introduction.....	60
3.1.1	<i>Historical method</i> .....	62
3.1.2	<i>Roman-Dutch law</i> .....	63
3.1.3	<i>The development of South African law</i> .....	63
3.1.4	<i>The definition of transformation</i> .....	63
3.2	Constitutions.....	64
3.2.1	<i>Definition of constitutions</i> .....	64
3.2.2	<i>Understanding constitutionalism</i> .....	65
3.2.3	<i>Forms of constitutionalism</i> .....	66
3.2.4	<i>Historical background to constitutional supremacy</i> .....	67
3.3	The status of South Africa in 1990 .....	69
3.3.1	<i>Groote Schuur Minute – 4 May 1990</i> .....	69
3.3.2	<i>Pretoria Minute – 6 August 1990</i> .....	70
3.3.3	<i>DF Malan Accord 12 February 1991</i> .....	70
3.4	Convention for a Democratic South Africa (CODESA) .....	70
3.4.1	<i>Record of Understanding 26 September 1992</i> .....	71
3.4.2	<i>Multi-Party Negotiating Process</i> .....	72
3.5	Path to the adoption of the Interim Constitution.....	72
3.6	The birth of constitutionalism in South Africa: under the 1993 Constitution.....	73

<b>3.6.1</b>	<b><i>Introduction</i></b> .....	<b>73</b>
<b>3.6.2</b>	<b><i>Characteristics of the 1993 Constitution</i></b> .....	<b>74</b>
<b>3.6.3</b>	<b><i>Transformative constitutionalism and the position of the judiciary under the 1993 Constitution</i></b> .....	<b>75</b>
<b>3.7</b>	<b>Reforming administrative law as a paradigm shift of the new constitutional order</b> .....	<b>79</b>
<b>3.8</b>	<b>Transformative constitutionalism: reforming administrative law under the 1996 Constitution of the Republic of South Africa</b> .....	<b>85</b>
<b>3.8.1</b>	<b><i>Introduction</i></b> .....	<b>85</b>
<b>CHAPTER 4</b> .....		<b>89</b>
<b>THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATIONS IN SOUTH AFRICAN ADMINISTRATIVE LAW</b> .....		<b>89</b>
<b>4.1</b>	<b>The doctrine of substantive legitimate expectations under the 1993 Constitution</b> .....	<b>89</b>
<b>4.1.1</b>	<b><i>Introduction</i></b> .....	<b>89</b>
<b>4.1.2</b>	<b><i>Values of the 1993 Constitution</i></b> .....	<b>91</b>
4.1.2.1	Values.....	91
4.1.2.2	The Supreme Court of Appeal and administrative justice .....	95
<b>4.1.3</b>	<b><i>Administrative justice under the 1993 Constitution</i></b> .....	<b>96</b>
<b>4.1.4</b>	<b><i>The culture of justification</i></b> .....	<b>99</b>
4.1.4.1	Justiciable Bill of Rights .....	99
4.1.4.2	Substantive legitimate expectations explained and applied under the 1993 Constitution.....	100
<b>4.2</b>	<b>Conservatism and the judiciary</b> .....	<b>108</b>
<b>4.3</b>	<b>What is a judge?</b> .....	<b>110</b>
<b>4.4</b>	<b>The judiciary under the parliamentary sovereignty</b> .....	<b>111</b>

4.5	The judiciary under the African National Congress government .....	111
4.6	Safeguards before Constitutional Court.....	112
4.7	Safeguards after the new court .....	114
4.7.1	<i>Founding principles</i> .....	114
4.8	Finding a coherent theoretical basis for recognising substantive relief for legitimate expectations in South African administrative law .....	116
4.8.1	<i>The transformative vision of South Africa's constitutional state</i> .....	116
4.8.2	<i>The development of legitimate expectations</i> .....	117
4.8.3	<i>Conclusion</i> .....	119
4.9	Theories underpinning the recognition of substantive legitimate expectations .....	120
4.9.1	<i>Original text of the Constitution</i> .....	120
4.9.2	<i>The Bill of Rights</i> .....	125
4.9.3	<i>Historical context and constitutionalism</i> .....	126
4.9.4	<i>Courts' decisions under the 1993 Constitution</i> .....	128
4.10	Conclusion .....	136
CHAPTER 5 .....		137
SUBSTANTIVE LEGITIMATE EXPECTATIONS UNDER THE 1996 CONSTITUTION.....		137
5.1	Introduction.....	137
5.2	Overview of the chapter .....	137
5.2.1	<i>Part A</i> .....	138
5.2.2	<i>Part B</i> .....	139
5.2.3	<i>Part C</i> .....	140

5.3	Introduction to the adoption of the Constitution of the Republic of South Africa .....	140
5.4	The status of the legislation .....	142
5.5	Separation of powers under the 1996 Constitution .....	144
5.5.1	<i>Introduction</i> .....	144
5.6	Justiciability of Rights in the 1996 Constitution .....	148
5.6.1	<i>Introduction</i> .....	148
5.6.2	<i>Conclusion</i> .....	149
5.7	Public administration and democratic values .....	149
5.8	Court decisions in favour of substantive benefits for legitimate expectations doctrine .....	152
5.8.1	<i>High Court</i> .....	152
5.8.1.1	Substantive legitimate expectations.....	152
5.8.2	<i>Supreme Court of Appeal decisions</i> .....	157
5.8.3	<i>Constitutional decisions in favour of the allowance of substantive benefits for legitimate expectations</i> .....	158
5.9	Court decisions negating the allowance of substantive benefits for legitimate expectations.....	168
5.9.1	<i>High courts</i> .....	168
5.9.2	<i>Supreme Court of Appeal judgments</i> .....	170
5.10	Constitutional Court decisions negating the allowance for substantive legitimate expectations.....	173
5.11	Finding a coherent theoretical basis for recognising substantive relief for legitimate expectations in South African administrative law .....	177
5.11.1	<i>The transformative vision of South Africa's constitutional state</i> .....	177
5.12	Natural justice .....	179

<b>5.13</b>	<b>Transformative constitutionalism and South African Public law .....</b>	<b>180</b>
<b>5.13.1</b>	<b><i>Values underpinning the Constitution .....</i></b>	<b>180</b>
5.13.1.1	Preamble .....	180
<b>5.13.2</b>	<b><i>Section 2 of the 1996 Constitution of the Republic of South Africa .....</i></b>	<b>184</b>
5.13.2.1	Supremacy of the Constitution.....	184
5.13.2.2	The rule of law .....	184
5.13.2.3	Constitutional Democracy .....	184
5.13.2.4	Section 7(1) Rights .....	185
5.13.2.5	Section 8(3) Application .....	185
5.13.2.6	Section 38 Enforcement of rights .....	185
5.13.2.7	Interpretation of the Bill of Rights .....	187
5.13.2.8	Section 172(1)(b) Just and equitable remedy .....	188
<b>5.14</b>	<b>Conclusion .....</b>	<b>194</b>
<b>CHAPTER 6</b>	<b>.....</b>	<b>195</b>
	<b>SUBSTANTIVE LEGITIMATE EXPECTATIONS UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT IN SOUTH AFRICA .....</b>	<b>195</b>
<b>6.1</b>	<b>Pre-democratic position .....</b>	<b>195</b>
<b>6.2</b>	<b>Transformative constitutionalism, fairness, and administrative law.....</b>	<b>197</b>
<b>6.3</b>	<b>Administrative Justice in South Africa after the apartheid government .....</b>	<b>199</b>
<b>6.4</b>	<b>Administrative justice.....</b>	<b>200</b>
<b>6.5</b>	<b>Organ of State .....</b>	<b>201</b>
<b>6.6</b>	<b>Promotion of Administrative Justice Act 3 of 2000 .....</b>	<b>202</b>

6.6.1	<i>Definition of PAJA 3 of 2000</i> .....	205
6.7	Court decisions negating administrative action under PAJA .....	207
6.8	The unresolved definition of administrative action .....	211
6.9	The case against PAJA .....	212
6.10	The disadvantages of PAJA definition.....	213
6.11	Conclusion .....	215
CHAPTER 7 .....		216
DEVELOPMENTS GEARED TOWARDS ACCOMMODATING SUBSTANTIVE LEGITIMATE EXPECTATIONS IN SOUTH AFRICAN ADMINISTRATIVE LAW THROUGH TRANSFORMATIVE CONSTITUTIONALISM .....		216
7.1	Substantive legitimate expectations as a substantive ground of review in foreign jurisdictions .....	216
7.1.1	<i>Introduction</i> .....	216
7.1.2	<i>Characteristics of England administrative law</i> .....	217
7.1.3	<i>The origins of the doctrine of legitimate expectations in England</i> .....	218
7.2	The birth of substantive legitimate expectations in England.....	222
7.2.1	<i>Introduction</i> .....	222
7.2.2	<i>The duty to act fairly</i> .....	224
7.2.3	<i>Conclusion</i> .....	225
7.2.4	<i>Substantive legitimate expectation in other jurisdictions where substantive legitimate expectation found application</i> .....	225
7.2.4.1	Ireland.....	225
7.2.4.2	New Zealand.....	227

7.2.4.3	Canada .....	229
7.2.4.4	Hong Kong.....	230
<b>7.3</b>	<b>Substantive legitimate expectations as a manifestation of transformative constitutionalism .....</b>	<b>232</b>
<i>7.3.1</i>	<i>Introduction.....</i>	<i>232</i>
<i>7.3.2</i>	<i>Audi alteram partem rule.....</i>	<i>234</i>
<i>7.3.3</i>	<i>The position of legitimate expectations under apartheid government .....</i>	<i>235</i>
<b>7.4</b>	<b>Application of substantive legitimate expectations under Section 24 of the Constitution of the Republic of South Africa, Act 200 of 1993.....</b>	<b>236</b>
<b>7.5</b>	<b>The position of substantive legitimate expectations doctrine under Section 24 of the 1993 Constitution before the 1996 Constitution .....</b>	<b>239</b>
<i>7.5.1</i>	<i>Definition of administrative action by the courts.....</i>	<i>239</i>
<b>7.6</b>	<b>The position of substantive legitimate expectations doctrine under Section 33 of the 1996 Constitution before PAJA .....</b>	<b>241</b>
<b>7.7</b>	<b>Manifestation of substantive legitimate expectation under the 1996 Constitution .....</b>	<b>242</b>
<b>7.8</b>	<b>The rise of substantive legitimate expectations doctrine under PAJA .....</b>	<b>246</b>
<b>7.9</b>	<b>Reforming South African administrative law by accommodating substantive legitimate expectations as a substantive ground of review in administrative law .....</b>	<b>248</b>
<i>7.9.1</i>	<i>Introduction.....</i>	<i>248</i>
<i>7.9.2</i>	<i>The nature of judicial review.....</i>	<i>248</i>
<i>7.9.3</i>	<i>The procedural protection of substantive expectations .....</i>	<i>253</i>
<i>7.9.4</i>	<i>The doctrine of fairness .....</i>	<i>254</i>

<b>7.9.5</b>	<b><i>The rule of natural justice .....</i></b>	<b>255</b>
<b>7.9.6</b>	<b><i>Reforming administrative law by recognising substantive legitimate expectation under Section 33 of the 1996 Constitution.....</i></b>	<b>257</b>
<b>7.9.7</b>	<b><i>The development of common law for the realisation of substantive legitimate expectations as a new ground of judicial review in administrative law .....</i></b>	<b>261</b>
<b>7.9.7.1</b>	<b>Definition of administrative action by the courts under Section 33 of the 1996 Constitution .....</b>	<b>266</b>
<b>7.9.8</b>	<b><i>The position of substantive legitimate expectation under the 1996 Constitution .....</i></b>	<b>266</b>
<b>7.9.9</b>	<b><i>Substantive legitimate expectation as a new ground of review.....</i></b>	<b>268</b>
<b>7.9.10</b>	<b><i>Promotion of Administrative Justice Act: The lost saviour.....</i></b>	<b>272</b>
<b>7.9.11</b>	<b><i>Just and equitable order in terms of the Final Constitution.....</i></b>	<b>274</b>
<b>CHAPTER 8</b>	<b>.....</b>	<b>275</b>
<b>CONCLUSION AND RECOMMENDATIONS.....</b>		<b>275</b>
<b>REFERENCES .....</b>		<b>280</b>
	<b><i>Literature</i></b>	<b>280</b>
	<b><i>Case law</i></b>	<b>299</b>
	<b><i>Legislation.....</i></b>	<b>308</b>
	<b><i>Internet sources.....</i></b>	<b>310</b>

## LIST OF ABBREVIATIONS

AD	Appellate Division
AJ	Acting Judge
ANC	African National Congress
BA	Bophuthatswana
CA	Constitutional Assembly
CC	Constitutional Court
CJ	Chief Justice
CL	Common Law
CODESA	Convention for a Democratic South Africa
CP	Constitutional Principles
FC	Final Constitution
GCHQ	Government Communication Headquarters
HC	High Court
IC	Interim Constitution
J	Judge
JR	Judicial Review
LRA	Labour Relations Act
MEC	Member of the Executive Council
MLRA	Marine Living Resources Act
MPNP	Multi-Party Negotiating Process
NC	Natural Justice
NDPP	National Director of Public Prosecutions
NP	National Party
NT	New Text
PAJA	Promotion of Administrative Justice Act
PLE	Procedural Legitimate Expectation
PPM	Parts per million

SARFU	South African Rugby Football Union
SCA	Supreme Court of Appeal
SHO	Senior/Station House Officer
SLE	Substantive Legitimate Expectation
SRC	Students' Representative Council
TECA	Transitional Executive Council Act

## CHAPTER 1

### INTRODUCTION

#### 1.1 Introduction

The doctrine of substantive legitimate expectations is a ground of judicial review in countries such as England, Ireland, New Zealand, the European Union and Hong Kong. However, the substantive legitimate expectations doctrine is not accepted in South African administrative law as a ground of review, despite the fact that Section 3(1) of the *Promotion of Administrative Justice Act*<sup>1</sup> and its position are unclear. This, in spite of the underlying transformative potential of the South African Constitution, and the possibility of widening the ambit of administrative justice, raises important constitutional questions which have motivated this research. On a practical level, the accommodation of substantive legitimate expectations as in English law (and in other jurisdictions) provides avenues for extending the ambit of legitimate expectations to the substantive level in South Africa.

This would, *inter alia*, amount to granting substantive benefits, advantages or privileges, which an aggrieved person could reasonably expect to acquire or retain, and which would be unfair to deny such persons without prior consultation or hearing. The transformation of the South African constitutional order, as an ongoing culture of enhancing fairness by recognising substantive legitimate expectations, would move the South African system of administrative law beyond the limitations of merely giving a person a hearing before some decision which is detrimental to the interests of the person concerned, is taken. Recognising substantive legitimate expectations would facilitate the nurturing of a human rights culture, increase the level of fairness applications, and promote administrative justice under Section 33 of the Constitution. In Chapter 5 of this study, South African administrative law will be compared with foreign jurisdictions<sup>2</sup> which have accepted the position of the substantive legitimate expectation's doctrine. In England, for example, substantive legitimate expectation is

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<sup>1</sup> Act 3 of 2000; Hoexter *Administrative Law* 195-196.

<sup>2</sup> England, New Zealand, Ireland, European Union and Hong Kong.

used by the courts as a ground of judicial review.<sup>3</sup> The court, in *Coughlan*, laid down the guideline that where there is a dispute of legitimate expectation, the dispute has to be determined by the court. This involves the following: a detailed examination of the precise terms of the promise or representation made, the circumstances under which the promise was made, and the nature of the statutory or other discretion.<sup>4</sup> The same principles applied in England can be applied in South Africa. The route to acceptance of substantive legitimate expectation by the courts, is to promote the values underlying the South African Constitution. These foreign jurisdictions exclude Canada, which does not recognise substantive legitimate expectation as a ground for judicial review.

## **1.2 Literature review**

### **1.2.1 Introduction**

In the following section, the origins of legitimate expectations in England will be discussed, as well as the acceptance of the doctrine in that country. This section will be followed by a discussion of the influence of the English court on South African courts, culminating in its acceptance in South Africa, albeit its procedural application only.

### **1.2.2 General**

Before considering the concepts of procedural fairness and legitimate expectations, it is necessary to state clearly that these concepts started in English law. This country adopted a flexible, "reasonable" or "legitimate" expectation test, which does away with the "rights" requirement as a determining factor in the enforcement of natural justice. In *Schmidt and Another v Secretary of State for Home Affairs*,<sup>5</sup> the facts were as follows: at Saint Hill Manor near East Grinstead, there was a college known as the Hubbard College of Scientology of California. The plaintiffs studied at this institution. They brought an action in the court against the Home Secretary, who was the

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<sup>3</sup> *R v North and East Devon Health Authority ex parte Coughlan* 2000 2 WLR 622.

<sup>4</sup> 2001 QB 213 at 241.

<sup>5</sup> 1969 2 Ch 149 (CA).

defendant. Their argument was as follows: (a) they were permitted to come to England to study at the College of Scientology; (b) they accepted the fact that permits were valid for a limited time, and that their time had now expired; (c) they wished to complete their studies, and asked the Home Secretary to extend their permits; but (d) he refused to do this. The plaintiffs argued that (a) the defendant's refusal was invalid, because he did it for an unauthorised purpose, and (b) he did not act fairly towards them.

The court considered three points. Only the third point is important for the purpose of this research, namely whether there were any grounds for saying that the Home Secretary did not observe the precepts of natural justice. It was submitted on behalf of the plaintiffs that the Minister ought to have given the students a hearing before he refused to extend their stay in England. Borrowing from what was said in *Ridge v Baldwin*,<sup>6</sup> Lord Denning MR, with regard to the distinction between administrative action and a judicial act, held that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity to make representations. Furthermore, he held that it all depends on whether the aggrieved person has some right or interest, or "I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."<sup>7</sup>

The doctrine of legitimate expectation entitles the complainant to be heard before an adverse decision is made against him. Furthermore, it needs be added that the distinction between "rights" and "privileges" ceased to have much relevance or, at least, significance in English law. A new approach to natural justice, which was introduced by *Ridge v Baldwin*, has highlighted the duty to act fairly.<sup>8</sup>

Natural justice requires that persons who are affected by administrative action should be afforded a fair and unbiased hearing before the decision to act is taken. These principles emanate from the Latin principles of *audi alteram partem* and *nemo iudex in propria causa*. These principles of natural justice, according to Baxter, serve three

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<sup>6</sup> 1964 AC 40.

<sup>7</sup> *Schmidt v Secretary of State for Home Affairs* 1969 2 Ch 149 (CA) 170F.

<sup>8</sup> *Ridge v Baldwin* 1964 AC 40 at 73.

reasons: (a) facilitation of accurate and informed decision-making; (b) assurance that decisions are made in the public interest; and (c) catering for process values.<sup>9</sup>

In *R v Leman Street Police Station Inspector and Secretary of State for Home Affairs; ex parte Venicoff*,<sup>10</sup> the applicant, Mr Venicoff, was deported from the United Kingdom in terms of the *Aliens Restrictions Act* of 1914 and Article 12 of the Aliens Order. In pursuance of this order, he was detained in custody until the ship finally left the United Kingdom. He applied to the King's Bench Division to review and set aside the Secretary of State for Home Affairs' decision to deport him, on the following grounds:

Giving the proper interpretation of Article 12, paragraph 1 of the Aliens Order 1919(1), the Secretary of State had no authority to make a deportation order, no opportunity of knowing the grounds on which the order was made, and/or the evidence or information relied on in support thereof, and/or giving him a fair opportunity of meeting the same, none of which had been given to the applicants.

The King's Bench held that the applicant was not entitled to be heard before the decision was taken to deport him, because the Secretary of State was not performing a judicial function, but rather an executive function.

In *In re HK (an infant)*,<sup>11</sup> a Commonwealth citizen had a right to be admitted to this country if he was (as he claimed to be) under the age of 16. The immigration officer was not satisfied that he was under 16, and refused him admission. Lord Parker CJ held that, even if they were acting in an administrative capacity, they were under a duty to act fairly, and that meant that they should give the immigrant an opportunity to satisfy them that he was under 16. In *Schmidt and Another v Secretary of State for Home Affairs*, the Home Secretary had failed to observe the precepts of natural justice by not giving a hearing to a number of scientology students before refusing to extend their stay in the United Kingdom. The doctrine of legitimate expectation, as one expression of the duty to act fairly, is a particular manifestation of this judicial effort to hold administration accountable for the fairness of its decision-making procedure.

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<sup>9</sup> Baxter *Administrative Law* 536-537.

<sup>10</sup> 1920 3 KB 72 79.

<sup>11</sup> 1967 2 QB 617.

Since this decision, English courts have imposed a duty upon administrative officials to act fairly.

### ***1.2.3 History of the doctrine of legitimate expectations in South African administrative law***

Wade and Forsyth<sup>12</sup> describe natural justice as a source of what is right and wrong, and, in administrative law, natural justice comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause, and that a man's defence must always be fairly heard. Natural justice is an important component of administrative law, and the principles of natural justice originate in natural law.<sup>13</sup> Furthermore, natural justice applies to natural power. The violation of natural justice makes the decision void. Baxter argues that the principles of natural justice serve three purposes, namely accurate and informed decision-making, decision-making in the public interest, and catering for certain important process values.<sup>14</sup>

As stated above, the violation of natural justice renders the decision void. This position arises because the rules of natural justice operate as implied mandatory requirements, and the failure to observe them invalidates the exercise of power. For the purpose of natural justice, the question that matters is not whether the claimant has some legal right, but whether legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interest, but simply of the exercise of governmental power in a manner which is fair and considerable. *Ridge v Baldwin* clarified the confusion caused by the artificial use of the word "judicial" to describe functions which were, in reality, administrative, and emphasised that "acting fairly" was "required" by the rules of natural justice. Natural justice has, for centuries, been enforced as a matter of law and the rule of discretion.<sup>15</sup>

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<sup>12</sup> Wade and Forsyth *Administrative Law* 414. The principle of natural justice is expressed in the form of two Latin maxims: *audi alteram partem* (hear the other side); and *nemo iudex in propria causa* (no one may judge in his own cause).

<sup>13</sup> Baxter *Administrative Law* 536.

<sup>14</sup> *R v Leman Street Police Station Inspector and Secretary of State for Home Affairs; Ex parte Venicoff* 1920 3 KB 72 at 79.

<sup>15</sup> Wade and Forsyth *Administrative Law* 469.

In the cases of *Minister of Interior v Bechler and Others* and *Beier v Minister of the Interior and Others*,<sup>16</sup> the proceedings of these cases in the Provincial Division arose out of a notice sent to each of seven persons (the applicants) in July 1947, intimating that the Commission mentioned the Government Notice of 1947, and recommended that he be deported from the Union, and that the Government had decided to act on the recommendation in terms of Section 1 of the *Alliens Affairs Amendment Act 52 of 1946*. In the case of the first six applicants, the Transvaal Provincial Division granted interdicts restraining the Minister from deporting the applicants. The grounds for the decision in each case was that the Commission had failed to give the applicants a sufficient hearing, in compliance with the requisites of natural justice. In the seventh application, which was brought in the Natal Provincial Division, Hathorn JP dismissed the application with costs, holding, in effect, that the Commission had given the applicant, Beier, a fair hearing as was reasonably practicable, having regard to the particular circumstances bearing on the enquiry entrusted to it. This case has adopted a test, such as whether the administrative Act in question is one "affecting rights or involving legal consequences to persons".

#### ***1.2.4 The reception of procedural legitimate expectations in South African administrative law***

As mentioned in the preceding paragraphs, the doctrine of legitimate expectations has its origin in *Schmidt and Another v Secretary of State for Home Affairs* under English law.<sup>17</sup> On the other hand, in South Africa, legitimate expectations has its origin in *Everett v Minister of the Interior*.<sup>18</sup> In this case, the court held that when an alien has been allowed into the country under a permit for a specified period, and before the expiration of that period, the alien is ordered to leave the country, he or she has acquired a right, consisting of a legitimate expectation of being allowed to stay for the permitted time. The court further held that the *audi alteram partem* was not followed. The notice was therefore set aside.

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<sup>16</sup> 1948 3 SA 409 (A).

<sup>17</sup> 1969 2 Ch 149 (CA) 170.

<sup>18</sup> 1981 2 SA 453 (C) 459G.

In South Africa, the legitimate expectation doctrine has its origin in *Everett v Minister of the Interior*.<sup>19</sup> The applicant in this case was a British citizen by birth, having been born at Kingston-on-Thames in England. In 1968, her parents and two siblings emigrated from England to South Africa. They were later granted permanent residence in South Africa. In 1972, the applicant entered South Africa at Beit Bridge. She travelled under a British passport. A temporary permit to stay in South Africa was issued to her, subject to security in an amount of R650 being furnished, which was done. The applicant remained in South Africa. A temporary residence permit issued to her was extended from time to time to enable her to study. She obtained her Bachelor of Arts degree, as well as an Honours degree in history, at the University of Cape Town. She qualified as a school teacher. During this time, she held various temporary teaching positions as a school teacher.

On the 10<sup>th</sup> June 1980, the applicant was personally served with a letter from the Secretary of the Interior. In terms of the letter, she was informed that the Minister of the Interior had, under the powers vested in him by Section 8(2) 1 of the *Aliens Act* 1 of 1937, ordered that the temporary residence permit stamped in her British passport in terms of Section 5(1) of that Act was withdrawn with immediate effect. She was told that she was, accordingly, no longer entitled to reside in the Republic of South Africa, and was ordered to leave the Republic. The applicant had received no prior notice of the Minister's intentions, and knew of no reason for her immediate removal from South Africa. Confronted with this, the applicant was advised by her attorney to bring an urgent application to review the decision of the Minister. The grounds for the review was that the notice withdrawing her temporary residence permit was against the rules of natural justice, because she was not given a chance to make a representation to the respondent, whether before or after the respondent's decision, and, in view of the foregoing, the notice was therefore ruled unreasonable. The respondent opposed the application on the grounds that there was no obligation on the part of the respondent to afford the applicant an opportunity to put her case to him, as the respondent acted within his power, in line with Section 8(2) of the *Aliens Act*.

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<sup>19</sup> 1981 2 SA 453 (C) 459G.

The applicant argued that the Minister was exercising a judicial function when he issued the notice, hence the application of the principle of a purely administrative function when acting in terms of Section 8(2)<sup>20</sup> of the Act, and that the *audi alteram partem* principle was applicable to the decision of the Minister. On the other hand, the respondent argued that the Minister was exercising statutory power on a proper interpretation of the sub-section, and that the applicant failed to establish that the Minister acted unreasonably.

Before reaching its decision, the court considered the view expressed by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*,<sup>21</sup> and did not define the doctrine of legitimate expectations.<sup>22</sup> The court reached the conclusion that when an alien has been allowed into the country under a permit for a period, and, before the expiration of that period, the alien is ordered to leave the country, such an alien has acquired a right, consisting of a legitimate expectation of being allowed to stay for the permitted time. The discretion granted to the Minister in terms of Section 8(2) is a quasi-judicial one, and the legislation intended that the Minister should apply the *audi alteram partem* rule, unless the clear intention of Parliament was negative and excluded the implication. The court held that the *audi alteram partem* rule was not followed. Consequently, the notice was set aside.

Subsequent to the adoption of this important principle of administrative law, which serves as a tool for fairness and legal reform of administrative law in South Africa, the court, in *Castel NO v Metal and Allied Workers Union*,<sup>23</sup> pointed out that there is a need for legal reform, which could be achieved through the use of the legitimate

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<sup>20</sup> Section 8(2) of Act 1 of 1937, give the Minister of Interior powers to cancel a temporary residence permit. The respondent's case was on the ground that there rested no obligation on respondent to afford applicant an opportunity to put her case to him when respondent acted in terms of s 8(2) of the *Aliens Act*. *Everett v Minister of the Interior* 1981 2 SA 453 (C) 455B. This section reads as follows: "The Minister may at any time direct that a notice in writing be addressed to the holder of a temporary permit issued in terms of ss (1) of s, whereby that permit is cancelled and whereby that holder is ordered to leave the Union within a period stated in the notice and upon the expiration of the temporary permit shall become null and void."

<sup>21</sup> 1969 1 All ER 904.

<sup>22</sup> Hlophe 1990 SALJ 197.

<sup>23</sup> *Connection Board of Pardons v Dumschat* 452 US 1981 458; *Everett v Minister of the Interior* 1981 2 SA 453 (C); *Castel NO v Metal and Allied Workers Union* 1987 4 SA 795 (A) 810E-I.

expectation doctrine. At this stage, these two courts did not define legitimate expectation or explain its nature.

Hefer JA expressed the following view:

*I am by no means sure that this case would in England be classified as a legitimate expectation case. There is nothing in this case which calls for an extension of the accepted principle.*<sup>24</sup>

In many cases, legal rights are affected, such as when property is taken by compulsory purchase from someone who is dismissed from public office. However, in other cases, as in the case under discussion, the person affected may have no more than an interest, a liberty or an expectation. Even though there is no legal right, it may involve what the courts sometimes call "legitimate expectation". For the purpose of natural justice, the question is not whether the claimant has some legal right, but whether legal power is being exercised over him to his disadvantage.<sup>25</sup>

Despite these developments in England, and the positive adoption of the legitimate expectation doctrine in South Africa, South African courts are still lagging behind in terms of their jurisprudence of an individual's existing rights, liberties or privileges. Baxter provided two reasons as to why the existing rights, privileges and liberties test was unsound:

- I. Whether the affected individual has a right to the decision is quite irrelevant to the question as to whether he has a right to natural justice, when the decision itself is made.
- II. It is hopeless in the modern state, in which so many citizens benefit from the state's hand-outs.<sup>26</sup>

The Appellate Division, in *Castel NO v Metal and Allied Workers Union*,<sup>27</sup> the first case in South Africa to deal with the doctrine of legitimate expectation, held that the refusal of authority to hold the meeting had not affected any right of, and had not involved any

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<sup>24</sup> *Castel NO v Metal and Allied Workers Union* 1987 4 SA 795 (A) at 810J-811A.

<sup>25</sup> Wade and Forsyth *Administrative Law* 464-465.

<sup>26</sup> Baxter *Administrative Law* 578.

<sup>27</sup> 1987 4 SA 795 (A).

legal consequences to, the respondent. It had therefore not been necessary for the appellant to rely on the *audi alteram partem* rule.

John Hlophe made a call to the South African courts to follow the footsteps of their English counterpart, and pleaded for the acceptance of the doctrine of legitimate expectations in South Africa.<sup>28</sup>

### ***1.2.5 The arrival of procedural legitimate expectations doctrine in South African administrative law***

Corbet CJ, in *Administrator, Transvaal v Traub and Others*,<sup>29</sup> understood the *audi* principle as decisions prejudicially affecting an individual in his liberty, property or existing rights. He understood further that the refusal to appoint respondents, as such did not affect an existing right. In the past, the traditional scope of principles relating to the observance of natural justice has been extended to decisions affecting a person who has no existing right, but merely a legitimate expectation.<sup>30</sup> In *Laubscher v Native Commissioner, Piet Retief*,<sup>31</sup> the trustees' permission had to be obtained before a person who was not black could occupy trust land; and the power of the Commissioner who gave such permission on behalf of the trustee was irrefutably a discretionary power. However, the Appellate Division held that the rules of natural justice do not apply in such a case.<sup>32</sup>

What the court had to decide was whether or not South African law should move in the direction taken by English law and give recognition to the doctrine of legitimate expectation, or some similar principle. The Chief Justice referred to the case of *Civil Union*, where the court observed that, since 1950, as a result of a series of judicial decisions in the House of Lords and the Court of Appeal, there had been –

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<sup>28</sup> Hlophe 1987 SALJ 165.

<sup>29</sup> 1989 4 SA 731 (A) 754E-F.

<sup>30</sup> *Everett v Minister of the Interior* 1981 2 SA 453 (C) 456-7; *Langeni and Others v Minister of Health and Welfare* 1988 4 SA 93 (W) 96B-98A; *Mokoena v Administrator Transvaal* 1988 4 SA 912 (W) 918; *Lunt v University of Cape Town* 1988 4 SA 731 (C).

<sup>31</sup> 1958 1 SA 546 (A).

<sup>32</sup> 1958 1 SA 546 (A) at 559.

*... a dramatic and a radical change in the scope of judicial review and this change had been described by no means critically, as an upsurge of judicial activism.*<sup>33</sup>

One aspect of change in the scope of judicial review was the evolution of the legitimate expectation doctrine. Legitimate expectation extended the scope of judicial review.<sup>34</sup> The Chief Justice went further to state that, in South Africa, there was a similar need to do so:

*There are many cases where one can visualise in this sphere – and for this reasons which I shall later visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected... like public policy, unless carefully handled it could become an unruly horse... A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.*<sup>35</sup>

The Chief Justice said the following with reference to legitimate expectation:

*These features, taken in conjunction with one another, constituted good ground in my opinion, for each of the respondents having a legitimate expectation that, once his or her application for the post of SHO had been recommended by the departmental head concerned, second appellant's approval of the appointment would follow as a matter of course; and/or a legitimate expectation that in the event of second appellant contemplating a departure from past practice, in the form of a refusal to make the appointment for a particular reason – especially where that reason related to suitability – the second appellant would give the respondent a fair hearing before he took his decision. In other words, the audi principle did apply.*<sup>36</sup>

He found that a classification of quasi-judicial adds nothing to the process of recognition – the court could just as well eliminate this step and proceed straight to the question of whether the decision prejudicially affects the individual's liberty, property and existing rights. Under modern circumstances, however, it is appropriate to include his legitimate expectation.<sup>37</sup>

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<sup>33</sup> *Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 All ER 953.

<sup>34</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

<sup>35</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 761E-G.

<sup>36</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 762B.

<sup>37</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

The Chief Justice held that the decision of the appellant to turn down the applications of the respondents for the post of SHO at the hospital, was invalid, by reason of his failure to accord the respondents a fair hearing before taking the decision. The respondents' cause of action is based upon the second appellant's failure to give them a fair hearing, and the corresponding obligation to afford it derives from common law. A year after the Appellate decision of Traub,<sup>38</sup> in *Administrator of the Province of the Cape of Good Hope and Another v Ikapa Town Council*,<sup>39</sup> Joubert JA held that it was common cause that the Demarcation Board's report referred to certain independent, afterwards-acquired information not available at the time of the enquiry. The question was whether the information received was material to the inquiry. If it was not material, then there was no duty to disclose it, and its non-disclosure would not constitute a violation of the *audi alteram partem* principle.

### **1.2.6 Conclusion**

Since this profound<sup>40</sup> and transformative decision by the Appellate Court, there have not been any significant decisions by the courts under the constitutional state, despite the constitutional mandate. The Interim Constitution contained legitimate expectation in its provision, but, strangely enough, the Final Constitution omitted this important administrative law principle for judicial review. Chief Justice Corbett laid the foundation for the recognition of substantive legitimate expectation in South Africa. In this regard, he said:

*The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interest of the person concerned is taken.*<sup>41</sup>

This is despite the fact that the *Traub* case was decided under apartheid, where the judges were constrained by parliamentary restrictions and a legal culture which was formalistic in nature. In various judgments under the Interim Constitution and final

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<sup>38</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 761D-G.

<sup>39</sup> 1990 2 SA 882 (AD) 890C-E.

<sup>40</sup> *Traub v Administrator, Transvaal, and Others* 1989 2 SA 396 (T) 420D-E.

<sup>41</sup> *Administrator Transvaal v Traub* 1989 4 SA 731 (A) 758D-F.

Constitution, the High Court, Supreme Court of Appeal and the Constitutional Court failed to engage in transformative constitutionalism in reforming administrative law by recognising the substantive legitimate expectation component. This is despite the fact that courts are the final arbiters of the limits of state power, and of the rights of an individual against the state. It would be wrong to suggest that the courts are restricted to a consideration of procedure only, or to a consideration of the way in which decisions are made, rather than the substance of the decisions themselves.<sup>42</sup> The substance of the decisions in cases which involve legitimate expectations is referred to as substantive legitimate expectations. The grounds of judicial review where the claim is a breach of a promise are both procedural and substantive. The substantive legitimate expectations doctrine should also be recognised as a separate ground of judicial intervention in South African administrative law, as is the case in England. In this study, it will be argued that it is now time for South African administrative law to be "rationalized, re-activated and used to achieve more than just ensuring that administrative bodies have complied with 'the law' in the exercise of their discretionary power"<sup>43</sup> or executive powers. The doctrine of legitimate expectation attaches the right to be heard not only to decisions which deprive one of legal rights, but also to those which deny one a substantive expectation.<sup>44</sup>

### 1.3 Problem statement and research question

The *Constitution of the Republic of South Africa, Promotion of Administrative Justice Act* and the courts do not accept the substantive legitimate expectations doctrine as a new ground for judicial review in South African administrative law. Unlike the Interim Constitution, the 1996 Constitution omitted the doctrine of legitimate expectations, and does not define the term 'administrative action'. The definition provided by PAJA is narrow, confusing and difficult to understand.<sup>45</sup> Furthermore, PAJA lacks the vision needed for transforming South African administrative law, which provides the basis for

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<sup>42</sup> Jowell 1993 *Acta Juridica* 118-119.

<sup>43</sup> Hlophe 1993 *Acta Juridica* 106.

<sup>44</sup> Mureinik 1993 *Acta Juridica* 37; *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 761-2.

<sup>45</sup> Hoexter *Administrative Law* 194-196.

the meaningful transformation of administrative justice.<sup>46</sup> There are conflicting judgments arising from the courts. Some judgments argue that they would be fettering the administrative organs or executive's discretion, and would be intruding into the domain of separation of powers. On the other hand, some judgments are of the view that the South African constitutional order hinges on the rule of law.<sup>47</sup> No decision grounded on the Constitution or law may be disregarded without recourse to a court of law.<sup>48</sup> For example, Section 3(1) of the *Promotion of Administrative Justice Act* 3 of 2000 states as follows:

*Administrative action which materially and adversely affects the rights or legitimate<sup>49</sup> expectations of any person must be procedurally fair.*

This section is not clear. It does not say whether it is a procedural or substantive legitimate expectation. The section gives effect to Sections 33(1) and 33(3) of the *Constitution of the Republic of South Africa*.<sup>50</sup> In *Economic Freedom Fighters and Others*, and *Democratic Alliance v Speaker of the National Assembly and Others*,<sup>51</sup> the court granted the applicants a substantive expectation based on the supremacy of the Constitution. The applications before the Constitutional Court were "based on the supremacy of the South African Constitution, the rule of law and consideration of accountability". The President was ordered to comply with the remedial action taken by the Public Protector, by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence. The court, as per Mogoeng CJ, observed the following:

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<sup>46</sup> Hoexter *Administrative Law* 203-205.

<sup>47</sup> *Corruption Watch and Others v The President of the Republic of South Africa* Case No 62470/2015.

<sup>48</sup> *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others; Democratic Alliance and Others* [2016] ZACC 11 at 38 para 74.

<sup>49</sup> Section 3(1) of the *Promotion of Administrative Justice Act* 3 of 2000.

<sup>50</sup> Sections 33(1) and 33(3) of the *Constitution of the Republic of South Africa*.

<sup>51</sup> *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others; Democratic Alliance and Others* [2016] ZACC 11 at 5 para 4; *Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others* [2011] ZACC 23; *President of the Republic of South Africa v The office of the Public Protector and Others* Case no 79808/16; *Corruption Watch and Others v The President of South Africa and Others* Case no 62470/2015. This judgment is known as the Nxasana judgment. It set aside the appointment of the National Director of Public Prosecutions and nullified the settlement agreement between Jacob Zuma and Nxasana. These cases dealt with substantive legitimate expectations, even though the word is not explicitly mentioned, and are discussed fully in Chapter 5 of this study.

*One of the crucial elements of our constitutional vision is to make decisive break<sup>52</sup> from the unchecked abuse of state power and resources that was virtually institutionalised during apartheid era.*

How will the executive be held accountable if the relief sought by citizens is not a substantive relief? In *Fose v Minister of Safety and Security*,<sup>53</sup> the Constitutional Court said the following about a remedy:

*An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.*

Based on the local and international literature discussed earlier, a view has emerged that if substantive legitimate expectation is not recognised in South Africa, the citizens of South Africa will not be able to uphold their constitutional right to fair administrative justice.

This problem can be formulated as follows:

- To what extent can the doctrine of substantive legitimate expectation be accepted in South African administrative law as a new ground of judicial review, in line with the Constitution of the Republic of South Africa, and which constitutional values contribute towards providing a legitimate basis for considering the transformation of the South African administrative law domain, with an emphasis on substantive legitimate expectation?
- Is there a need for acknowledging substantive legitimate expectations as a ground of review in South African administrative law?
- Is transformative constitutionalism a legitimate key paradigm of South African constitutional jurisprudence for facilitating administrative law reform?

A distinction is drawn between procedural and substantive legitimate expectations in South African law.

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<sup>52</sup> See para 1.1 above.

<sup>53</sup> 1997 3 SA 786 (CC) 826 para 69G-I.

The doctrine of legitimate expectations has become part of South African administrative law, following the decision of the Appellate Division in *Administrator, Transvaal v Traub and Others*.<sup>54</sup> Substantive legitimate expectation is the expectation of a favourable decision.<sup>55</sup> Procedural expectation, on the other hand, is the expectation that certain proceedings will take place and processes will be followed before a decision is taken – procedural legitimate expectations are claims to procedural fairness in light of a legitimate expectation.<sup>56</sup> Substantive legitimate expectations, on the other hand, raise the question as to whether a public authority should be required to decide in accordance with the expectation that it created – in other words, whether it should be bound to a particular outcome.

In *Administrator, Transvaal v Traub and Others*, Corbett CJ mentioned the two forms of legitimate expectations in the following terms:

*...legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.*<sup>57</sup>

The 1993 Interim Constitution of the Republic of South Africa was adopted as a tool for transformation, because it requires that its provisions must be interpreted and applied in a manner that furthers their transformative purpose.<sup>58</sup> It further requires the courts to promote the foundational values that underlie an open and democratic society based on human dignity, equality and freedom, in interpreting the Bill of Rights. The 1993 Constitution<sup>59</sup> boldly recognised legitimate expectations.<sup>60</sup>

Substantive legitimate expectation was not specifically mentioned, even though it is superior to procedural legitimate expectation, which applied under common law and administrative law before the democratic era. It begs mention that procedural

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<sup>54</sup> 1989 4 SA 731 (A).

<sup>55</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

<sup>56</sup> Hoexter *Administrative Law* 421.

<sup>57</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) at 758.

<sup>58</sup> The Preamble to the *Constitution of the Republic of South Africa*, 1993.

<sup>59</sup> Act 200 of 1993 (Interim Constitution).

<sup>60</sup> Section 24(b) Interim Constitution.

legitimate expectation stands in an inferior position to legal rights, as its jurisprudence only affords the individual procedural protection via judicial review when his or her rights have been violated by the administrator.<sup>61</sup> Therefore, the positions of both procedural legitimate expectation and substantive legitimate expectation have not changed under the South African Constitution. The 1996 Constitution completely omitted the term "legitimate expectation" from Chapter 2.<sup>62</sup> Furthermore, Section 3(1) of the PAJA only recognises procedural legitimate expectations, and provides that administrative action which "materially and adversely affects the rights or legitimate expectations of any person" must be procedurally fair.<sup>63</sup>

### ***1.3.1 Court decisions negating the allowance of substantive benefits for legitimate expectations***

The South African courts have, on more than one occasion, showed themselves to be against recognising substantive legitimate expectations as part of South African law.<sup>64</sup> In a number of respects, the views of South African courts on the issue of substantive legitimate expectations appear to be similar to those of the highest courts of Australia and Canada.<sup>65</sup>

In *Durban Add-Ventures Ltd v Premier, Kwa-Zulu Natal (No 2)*,<sup>66</sup> Booyesen J took the view that a legitimate expectation would "at best" afford an applicant a right to be heard, and that the use of the doctrine to create substantive rather than procedural rights was "not permissible in South African law". He went on to reject the proposition that a legitimate expectation could be applied to hinder the formation of government policy in circumstances where a change of direction is in the public interest.

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<sup>61</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

<sup>62</sup> Section 33 of the Constitution.

<sup>63</sup> Act 3 of 2000. The purpose of this Act is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair, and to the right to written reasons for administrative action contemplated in s 33 of the *Constitution of the Republic of South Africa*, 1996, and to provide for matters incidental thereto.

<sup>64</sup> 2010 3 SA 456 (CC) para 300.

<sup>65</sup> *Residents of Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC) at 549 para 306.

<sup>66</sup> 2001 1 SA 389 (N).

In *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*,<sup>67</sup> Chaskalson P cautioned that the doctrine of substantive legitimate expectations was an ongoing issue, where there is no authority in the South African law, and in *Meyer v Iscor Pension Fund*,<sup>68</sup> the Supreme Court warned against incorporating the substantive legitimate expectations doctrine into South African law.

The arguments denying substantive relief for legitimate expectations are justified by South African courts on the following grounds:

- (a) The granting of substantive relief for legitimate expectations would amount to fettering the administrative organ's discretion, and allowing substantive legitimate expectations would entail that the courts would be allowed to intrude upon the separation of powers.
- (b) Substantive relief would overstep the boundaries of legality.<sup>69</sup>

The arguments raised in opposition to the recognition of substantive legitimate expectations mostly remain committed to an overtly conservative approach to administrative decision-making, and lack a sincere commitment to constitutional transformation. Thus, for example, the argument in (a) fails to note that substantive relief merely relates to the issue of *when* the new policy choice is to take effect, not *whether* policies may be changed.<sup>70</sup> Furthermore, the denial of substantive relief for legitimate expectations does not take into account the principle of legal certainty.<sup>71</sup> According to this principle, government action should be predictable, and government should act in a trustworthy manner, in the sense that the public can rely upon representations made by public authorities. In addition, the argument in (a), that substantive legitimate expectations would allow the courts to intrude upon the merits of a decision, is unconvincing. The requirements of rationality and reasonableness in

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<sup>67</sup> 2002 9 BCLR 891 (CC); 2002 3 SA 265 (CC) para 96.

<sup>68</sup> 2003 2 SA 715 (SCA).

<sup>69</sup> *R v Secretary of State for Transport, ex parte Richmond upon Thames London BC* 1994 1 All ER 577; *Durban Add-Ventures Ltd v Premier of the Province of KwaZulu-Natal and Others* 2000 3 All 492 (N) 510G-H; De Ville *Judicial review of administrative action* 123. The denial of substantive legitimate expectation is usually justified with reference to the principle of legality and the prohibition against fettering of discretion.

<sup>70</sup> *R v Ministry of Agriculture, Fisheries and Food, ex Parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (QB) 724B-C.

<sup>71</sup> Cf. *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC); 2000 3 SA 936 (CC) para 47.

PAJA belong to the same category of considerations that could possibly intrude upon the merits of a decision. Enforcing substantive legitimate expectations does not do this to any significant extent. Substantive legitimate expectations merely require that if a legitimate expectation is created, unless it is under exceptional circumstances, the public body should then fulfil such expectations, or the expectation should be taken into consideration when making a decision.

Not only has the inherent conservatism of the South African judiciary been a barrier to recognising substantive legitimate expectations in South African administrative law, but a comprehensive vision of constitutional transformation focused on fairness in public administration, as a dynamic concept for legal reform, has been largely absent from the theoretical underpinnings of the judiciary's task to develop South African common law in accordance with the aims and spirit of the South African Constitution.<sup>72</sup>

Up to this point, most arguments in favour of substantive relief for legitimate expectations have been based on *ad hoc* considerations, lacking a comprehensive vision of the theoretical basis of constitutional development in South Africa.<sup>73</sup> However, rather than creating a principle of substantive legitimate expectations, some court decisions seem to have granted substantive benefits under the "guise" of procedural legitimate expectations.<sup>74</sup> In *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>75</sup> the effect of the order by the court was substantive in nature, viz. that the bursaries had to be paid until the end of the year. In *Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd*,<sup>76</sup> the legitimate expectation was based on the following:

- (a) regular practice
- (b) the *audi* rule was not complied with, and
- (c) the decision was found to be invalid.

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<sup>72</sup> *Constitution of the Republic of South Africa*.

<sup>73</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC); 1999 2 SA 91 (CC).

<sup>74</sup> 1999 2 BCLR 2 SA 91 (CC).

<sup>75</sup> 1999 2 BCLR 151 (CC); 1999 2 SA 91 (CC).

<sup>76</sup> 1992 2 SA 234 (Tka).

This matter was not referred back to the administrator, as there had been an undue delay because of the Minister's failure to consider the matter for about 17 months, and the fact that his mind appeared to have already been made up. In effect, the ruling amounted to the granting of substantive relief.

### ***1.3.2 A coherent, theoretical basis for recognising substantive legitimate expectations in a democratic South Africa***

#### 1.3.2.1 The transformative vision of South Africa's constitutional state

Transformation of legal cultures has become topical issues in contemporary jurisprudence. Although transformatory perspectives are not absent from libertarian jurisprudential theories, postmodern and socialistic theories, together with communitarian perspectives on justice, have impacted strongly on legal transformation theory. These theoretical points of view contain important perspectives for transforming the legal culture of the South African constitutional state – and public law in particular.

The provisions of both the Interim<sup>77</sup> and final Constitution<sup>78</sup> emphasise the Constitution's commitment to transformation. It requires a radical move from the past, and compels the transformation of the legislature, executive and South African legal culture.<sup>79</sup> The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with particular reference to recognising substantive legitimate expectations. Klare describes transformative constitutionalism as a long-term project of constitutional enactment, interpretation and enforcement, in order to transform a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.<sup>80</sup> In addition, Langa argues that a truly transformative South Africa requires a new approach to legal education, in that it should place "the Constitutional dream at the very heart of legal education".<sup>81</sup> He confronts the inherent conservatism of the South

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<sup>77</sup> Act 200 of 1993.

<sup>78</sup> Act 108 of 1996.

<sup>79</sup> Pieterse 2005 *SAPL* 166.

<sup>80</sup> Langa 2006 *Stell LR* 356; Klare 1998 *SAJHR* 151.

<sup>81</sup> Langa 2006 *Stell LR* 356.

African legal culture, which is based on formal, rather than substantive, reasoning. In light of this definition, it is the researcher's view that in order to reform South African administrative law and recognise substantive legitimate expectations, there is a need to achieve transformation by implementing the values and aspirations enacted in the Constitution,<sup>82</sup> and to change the South African legal culture, in order to meet the standards for reforming administrative law. Although transformation is not the sole responsibility of the court, since it is the task of all three arms of government,<sup>83</sup> the greatest responsibility lies in the hands of the judiciary. Furthermore, the Constitution commits all the branches of government to the promotion of democratic values, human rights and equality.<sup>84</sup>

### 1.3.2.2 Natural justice

If the rights of an individual have been violated by actions of the government, a public body or certain domestic tribunals or associations, such an individual may claim, depending on the circumstances of the particular case.<sup>85</sup> The content of these rules can be summarised in the maxim *audi alteram partem*. The application of the *audi alteram* rule, as is the case with many other concepts, has been eclectic,<sup>86</sup> but it developed certain nuances in the decisions of the civil courts.

The rule entails four principles. Firstly, a party to an administrative enquiry must be afforded an opportunity to state his or her case before a decision is reached, if such a decision is likely to affect his or her rights or legitimate expectations. Secondly, prejudicial facts must be communicated to the person who may be affected by the administrative decision, in order to enable him or her to rebut such facts. Thirdly, the rule also stipulates that the administrative tribunal which has taken the decision must give reasons for its decision. Fourthly, the rule entails that the administrative organ exercising the discretion must be impartial. As a general rule, it may be said that the principles of natural justice apply whenever an administrative act is quasi-judicial. An

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<sup>82</sup> Klare 1998 *SAJHR* 151.

<sup>83</sup> Langa 2006 *Stell LR* 351, 358.

<sup>84</sup> Act 108 of 1996.

<sup>85</sup> Craig *Administrative Law* 253; Peach *The application of the audi alteram partem rule* 3.

<sup>86</sup> Craig *Administrative Law* 253.

administrative act may be said to be quasi-judicial if it affects the rights and liberties of an individual.<sup>87</sup>

The application of the *audi alteram partem* rule was highlighted in the case of *Board of Education v Rice*,<sup>88</sup> when the court stated that the Board of Education had to ascertain the facts, as well as listen to both sides, since that is the duty of everyone who decides an issue that may have an impact on a person's rights. In *Administrator Transvaal and Others v Traub and Others*,<sup>89</sup> the Appellate Division rejected the long-established, traditional approach to the application of the *audi alteram partem* rule in South African law. In broad terms, the doctrine holds that where a decision-maker, either through the adoption of a regular practice, or through an express promise, leads those affected to legitimately expect that the decision-maker will decide in a particular way, then that expectation is protected, and the decision-maker cannot ignore it in making his decision.<sup>90</sup>

In South Africa, there is no movement by the South African courts to enforce the application of the *audi alteram partem* rule on the executive arm of government which exercises administrative functions, since these functions are not affecting a wide variety of interests, and do not constitute rights in the strict sense. The concept which has been fashioned to identify such interests is the doctrine of substantive legitimate expectations.

### 1.3.2.3 Transformative constitutionalism and South African public law

Klare states that the Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning, in line with its transformative goals. This can only be achieved with a judicial mindset.<sup>91</sup> Mlambo J indicated that one of the mechanisms for transforming South African society is the entrenchment of socio-economic rights in the Constitution.<sup>92</sup> Democratic transition in South Africa was

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<sup>87</sup> Baxter 1979 SALJ 608-609.

<sup>88</sup> 1911 AC 179 182.

<sup>89</sup> 1984 4 SA 731 (A) 762-764.

<sup>90</sup> Forsyth 1990 SALJ 387 338-339.

<sup>91</sup> Klare 1998 SAJHR 150.

<sup>92</sup> Mlambo "The pursuit of meaningful social justice".

intended to be a bridge from authoritarianism to a new culture, in which every exercise of power is expected to be justified.

The notion of incorporating transformative constitutionalism as a vision for developing South Africa's constitutional culture found support in the wording of the preamble and other provisions of the Constitution of the Republic of South Africa, 1996.<sup>93</sup> Section 1(a) is proclaimed as a fundamental value informing the South African vision of the Constitution. This section conveys what the new state should look like, and further proclaims human dignity, equality and freedom to be at the core of South Africa's vision of constitutionalism. According to Davis and Klare, in terms of transformative constitutionalism and common and customary law,<sup>94</sup> Sections 8(3) and 39(2) of the 1996 Constitution can be viewed as development clauses. They state that South Africa cannot progress towards a society based on human dignity, equality and freedom with a legal system that rigs a transformative constitutional superstructure onto a common and customary law-based one which has been inherited from the past and indelibly stained by apartheid.

Equality, freedom and fairness are proclaimed as fundamental values informing the South African vision of constitutionalism. Section 1 of the 1996 Constitution describes, with similar sensitivity, how the constitutional values must be understood. Transformative constitutionalism is not a neutral concept, but is intended to carry a positive voice and to connote a social good. Furthermore, the South African people have chosen to move away from the supremacy of Parliament to constitutional supremacy, where the judge is empowered to develop the law. Mureinik<sup>95</sup> indicates that to be a conscientious judge in South Africa involves promoting and fulfilling, through one's professional work, the democratic values of human dignity, equality and freedom, and to work towards establishing a society based on democratic values, social justice and fundamental human rights. In order to accomplish this, the state must respect, promote and fulfil the rights contained in the Bill of Rights. The 1996 Constitution is full of broad phrases, and is redolent with excellent hopes to overcome past injustices and move towards a democratic and caring society.<sup>96</sup>

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<sup>93</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>94</sup> 2010 SAJHR 403.

<sup>95</sup> 1994 SAJHR 31-32.

<sup>96</sup> Klare 1998 SAJHR 148.

At the heart of a transformative Constitution is a commitment to substantive reasoning, in order to determine the underlying principles that inform laws themselves and judicial reactions to those laws, as well as to uphold the transformative ideal of the Constitution, where the judges change the law to bring it in line with the rights and values for which the Constitution stands.

In *Nyanthi v MEC for Department of Health: Gauteng Province*,<sup>97</sup> the Constitutional Court declared the provisions of the *State Liability Act*,<sup>98</sup> which prevented the execution of orders against the property of the state, to be unconstitutional. Parliament was given 18 months to devise new legislation that enables the effective enforcement of court orders. Judge Madala observed the following:

*Certain values in the Constitution have been designated as foundational to the democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts are not carried out conscientiously, we have a recipe for the constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of the South African democracy. That in my view means at the very least that there should be strict compliance with court orders.*<sup>99</sup>

Transformation requires a complete reconstruction of the state and society, including the redistribution of power and resources along egalitarian lines. Equity as a value and as a right is central to the task of transformation. Kriegler J observed that the South African Constitution is primarily and emphatically an egalitarian Constitution.<sup>100</sup> The supreme laws of comparable constitutional states may underscore other principles and rights. However, in light of South Africa's own particular history and the South African vision for the future, a Constitution was written with equality as its core value.<sup>101</sup> He added that: "Equality is our Constitution's focus and its organizing principle".<sup>102</sup>

Fairness in public administration forms an important component of transformative constitutionalism, and has received much attention in the judicial review of

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<sup>97</sup> 2008 5 SA 94 (CC).

<sup>98</sup> Act 20 of 1957.

<sup>99</sup> 2008 5 SA 94 (CC) at 119 para 80-81.

<sup>100</sup> 1997 4 SA 94 (CC) at 34 para 74.

<sup>101</sup> 1997 4 SA 94 (CC) at 34 para 74l.

<sup>102</sup> *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC); 1997 4 SA 1 (CC).

administrative action in South Africa.<sup>103</sup> The doctrine of *audi alteram partem* in general and legitimate expectations in particular has been closely associated with notions of fairness and natural justice. In the case of *Attorney-General, Eastern Cape v Blom*,<sup>104</sup> the court alluded to the creative development of the *audi* principle.<sup>105</sup> In *Administrator Transvaal and Others v Traub and Others*, the court, in a creative fashion, officially imported the doctrine of legitimate expectations, based on the duty to act fairly.<sup>106</sup>

#### 1.3.2.4 Transformative constitutionalism, fairness and administrative law reform

Transformative constitutionalism, fairness and administrative law reform cannot be achieved in a vacuum. In South Africa, the people live in a society in which there are large disparities in terms of wealth. Millions of people are living in deplorable conditions and extreme poverty. There is a high level of unemployment and inadequate social security, and many do not have access to clean water or adequate health services. These conditions existed when the Constitution was adopted, and a commitment to address them and to transform South African society into one in which there will be human dignity, freedom and equality, lies at the heart of the new South African constitutional order. As long as these conditions continue to exist, this aspiration will have a hollow ring.<sup>107</sup> Transformative constitutionalism is an important vehicle for accomplishing transformation, in order to address many of the issues mentioned above.

In the sphere of administrative justice in particular, transformative constitutionalism could be regarded as a constitutional philosophy that represents fairness in public administration. The notion that administrative justice is an expression of fairness is not a novel idea in South African administrative law. Under the rubric of fairness, South African courts have often reverted to the doctrine of fairness in English law. Fairness aided the English courts to recognise substantive relief for legitimate expectations. In

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<sup>103</sup> Hoexter *Administrative Law* 418-419.

<sup>104</sup> 1988 4 SA 645 (A) 648.

<sup>105</sup> 1988 4 SA 645 (A) 660H.

<sup>106</sup> 1989 4 SA 731 (A).

<sup>107</sup> *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 1 SA 725 (CC) 740 para 26.

the case of *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*, the court held that:

*[T]he real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will not be listened to before the decision-maker decides whether to take a particular step.*<sup>108</sup>

The PAJA plays a very important role in the transformation of South African administrative law. The purpose of the Act is to give effect to the right to administrative action which is procedurally fair, as well as the right to written reasons for administrative action, as contemplated in Section 33 of the *Constitution of the Republic of South Africa*, 1996.<sup>109</sup> The term "administrative action" is not defined in the Constitution. However, in terms of Section 1 of the PAJA:

*Administrative action means any decision taken or any failure to take a decision, by-*

*(a) an organ of state, when-*

*(1) exercising a power in terms of the Constitution or a provincial constitution; or*

*a) exercising a public power or performing a public function in terms of any legislation; or*

*b) a natural or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ... .*

The lack of precision, transformative content and sensitivity towards extending administrative justice has elicited comments from many administrative law scholars. Although the PAJA brought with it a new statutory definition of administrative action, it is suggested that this definition is narrow, confusing and difficult to understand. Furthermore, with regard to procedural fairness and the absence of substantive legitimate expectations, the PAJA lacks the vision needed for transforming South African administrative law into a dynamic system of law that provides the basis for the meaningful transformation of administrative justice.

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<sup>108</sup> [1995] 2 All ER 714 696-697.

<sup>109</sup> Act 3 of 2002.

### ***1.3.3 Substantive legitimate expectations in English law and other jurisdictions***

The experience in other jurisdictions, especially that of England, has shown that the concept of general fairness plays an important role in the argument for substantive protection of legitimate expectations. In England, the duty to act fairly has been closely associated with substantive legitimate expectations. On this basis, the English courts have, over the last 20 years, moved from tentative recognition of the possibility of substantive protection to full acceptance of the idea. In *R v Secretary of State for the Home Department, ex parte Asif Khan*,<sup>110</sup> the court held that the government has not permitted anyone to change the conditions without affording interested parties a hearing, and then only if the overriding public interest demands it. In *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*,<sup>111</sup> the court's view was that there must be an overwhelming public interest if the change is to override individuals' expectations. A decision that denies substantive legitimate expectations must be reviewed on the basis of fairness and in terms of the ordinary principles of South African law, and substituted for that of the administration.

Other jurisdictions have also taken the route of granting substantive relief for legitimate expectations based mostly on considerations of fairness, including countries in the European Union,<sup>112</sup> Ireland,<sup>113</sup> New Zealand<sup>114</sup> and Hong Kong.<sup>115</sup> The evaluation of fairness as the driving force for granting substantive benefits for legitimate expectations in these jurisdictions could provide valuable indicators for incorporating substantive benefits through transformative constitutionalism in South African administrative law.

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<sup>110</sup> (1985) All ER 40 (CA).

<sup>111</sup> (1995) 2 All ER 714 (Q).

<sup>112</sup> Craig 1996 *Cambridge LJ* 289.

<sup>113</sup> *Webb v Ireland* [1988] IR 353 (SC).

<sup>114</sup> *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC) 754-756.

<sup>115</sup> Tai and Yam 2002 *Public Law* 688 (a discussion of the case of *Ng Siu Tung v Director of Immigration* 2002 1 HKLRD 561).

#### **1.4 Aim, objectives and purpose of the study**

The research topic demands an in-depth analysis of developments regarding legitimate expectations, both in South African administrative law and English law, the scope of procedural legitimate expectations and the limits of the procedural doctrine of legitimate expectations, the widening of the application of legitimate expectations through transformative constitutionalism, and what lessons can be learnt from English law and other foreign jurisdictions, in terms of recognising substantive legitimate expectations as substantive grounds for review in South African administrative law.

The following are the objectives of the study:

The general goal of this study is to highlight the limitation of the procedural legitimate expectations doctrine, as well as the need to recognise the substantive legitimate expectations doctrine, in order to reform administrative law in South Africa. In examining the limitation of the procedural legitimate expectations doctrine, the benefits of the substantive legitimate expectations doctrine for South African citizens will be considered.

The study of transformative constitutionalism under the new constitutional legal order will assist in addressing the need for recognition of the substantive legitimate expectations doctrine in South Africa. In this context, values such as the supremacy of the Constitution, rule of law, fairness, separation of powers, Bill of Rights, democracy, administrative justice, and the institutions to uphold them, particularly the independent judiciary, will be an important part of the study. This will be achieved by considering the following objectives:

- To analyse the scope of the application of procedural legitimate expectations in South African administrative law, and the omission of substantive legitimate expectations from both the 1993 and 1996 Constitutions.
- To investigate the need for courts, especially the Constitutional Court, to acknowledge substantive legitimate expectations as a ground of review in South African administrative law.

- To determine the extent to which the non-recognition of substantive legitimate expectations is misaligned with the underlying values of the South African constitutional system.
- To examine the theoretical perspectives which contribute towards providing a legitimate basis for considering the transformation of the South African administrative law domain, with particular emphasis on substantive legitimate expectations as a principle which encompasses fairness as an element of natural justice. This is one of the characteristics of transformative constitutionalism.
- To explore transformative constitutionalism as a legitimate key paradigm of South African constitutional jurisprudence for facilitating administrative law reform. This will be achieved by comparing South Africa with foreign jurisdictions which have accepted substantive legitimate expectations, and determining whether there are lessons to be learnt for South African administrative law in terms of how substantive legitimate expectation is accommodated in foreign jurisdictions.

### **1.5 Intended contribution to the body of knowledge**

Substantive legitimate expectations is not part of South African administrative law under the 1996 Constitution and the new legal order. Litigants in South African courts cannot obtain appropriate relief – which is assumed to be substantive legitimate expectations. Therefore, if the substantive legitimate expectations doctrine is accepted in South Africa, citizens will have a substantial benefit, as with the citizens of the United Kingdom and other jurisdictions, and the litigant's constitutional right to just administrative action will be realised. In the researcher's view, it is hoped that this research will make a scholarly contribution to this field of study.

Applying the dynamics of transformative constitutionalism, with its strong basis of fairness, could provide new avenues for legal transformation in administrative law in general, and the granting of substantive benefits for legitimate expectations in particular. This could provide the basis for reforming South African administrative law in a profound manner.

Notwithstanding Section 33 of the South African Constitution, the PAJA could possibly be amended in order to have a clear and unambiguous definition, which could incorporate substantive legitimate expectations. In this regard, attention should also be given to Section 7 of the Constitution, as well as Section 8(3), Section 38 and Section 39. The enjoyment of the right to just administration could be bolstered substantially by reforming South African administrative law along the lines mentioned above.

Despite the fear of incorporating the substantive legitimate expectations doctrine into South African law, the time has come to reform administrative law in South Africa, by incorporating the doctrine into South African law, thereby granting substantive relief in instances where substantive fairness needs to be applied. If, for example, it is found that an administrative decision is irrational, the court could then, in terms of the ordinary principles of South African law, substitute its decision for that of the administrative body involved – for example, administrative tribunals, disciplinary hearings and commissions of enquiry.

## **1.6 Research methodology**

In terms of methodology, the study requires a good knowledge of both administrative and constitutional law. As a South African citizen, the researcher has an LLM degree in administrative law, which was completed in 2003. His major subjects for the LLM degree were administrative law, constitutional law, fundamental rights and local government law. The researcher's dissertation was also in the field of administrative law. He taught in both administrative law and constitutional law for two years at the University of the Free State. The researcher also worked in both local government and public service, holding senior positions, and can modestly claim to have research experience in this field. Furthermore, the researcher has considerable practical legal experience as the practising advocate of the High Court of South Africa.

In the main, an analytical and conceptual approach is used in this study, by analysing the Constitution and court judgments in this area, as well as scholarly articles written by academics in this field. An in-depth literature review and critical examination of the various points of view were conducted.

The methodological approaches used here are not new, as they have been used in similar research. Undertaking this research requires the knowledge of English administrative law, as well as the different stages of the development of administrative law during and after the colonial era. History is always important, as one must know the previous legal system, at least as far as administrative law is concerned. Knowing the past legal system may help one to prepare for a better future, by striving towards a better life for all who are citizens of this country. Democracy and constitutionalism in the new South Africa were not easy to achieve. Many people lost their lives and others went into exile, in order to realise democracy and equality in South Africa.

The historical approach used here is important for this study, in so far as the study deals with the origins of the legitimate expectations doctrine in South African administrative law, and seeks to determine how legitimate expectations became part of South African law. The study also looks at how South African courts accepted and developed procedural legitimate expectations, but failed to accommodate substantive legitimate expectations in South African system of administrative law.<sup>116</sup>

From a comparative perspective, countries on other continents, especially the United Kingdom, went through the same struggle for the recognition of substantive legitimate expectations. It is not shameful that South Africa must learn from her coloniser in order to accommodate the doctrine of substantive legitimate expectations. A comparative study is therefore a necessity in a study such as this one.

Both Sections 38 and 39 of the 1996 Constitution are mandatory in this regard. Section 38 provides that any citizen of the Republic of South Africa has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. The court may then grant appropriate relief, including a declaration of rights. On the other hand, Section 39 provides that when interpreting the Constitution, the Bill of Rights, a court, tribunal or forum-

. . .

(a) *must consider international law; and*

(b) *May consider foreign law.*

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<sup>116</sup> 1989 4 SA 731 (A) 731; *Everett v Minister of the Interior* 1981 2 SA 453 (C) 456-7.

Therefore, it is not surprising that relevant developments in other jurisdictions (e.g. the United Kingdom) are critically reviewed as possible models for accommodating the doctrine of substantive legitimate expectations in the South African system of administrative law.

### **1.7 Ethical considerations**

As far as this study is concerned, there is no conflict of interest, real or perceived and the research does not fall into any category that requires special ethical obligations. There has been no interviews or face to face discussions involved as the research constitutes a desktop analysis of existing scholarly articles, case law and legislation.

### **1.8 Resources**

This research has special resource implications. Financial resources are needed, which include the following: travel and accommodation for meeting with the researcher's supervisor on a monthly basis and conducting a comparative study, as well as employing an editor.

### **1.9 Demarcation of the study**

#### ***Chapter 1***

Chapter one gives the background to the study and motivation why the study is undertaken. This includes preliminary literature review, problem statement, aims, objectives and purpose of the study. The research questions, objective of the study, research methodology, ethical consideration and preliminary of the study forms part of this chapter.

This chapter is followed by seven chapters. These chapters look at various legal issues which include:

#### ***Chapter 2***

*2.1 The doctrine of legitimate expectations in South African administrative law:  
Under the pre-1993 constitutional dispensation*

This chapter looks at the origins of the doctrine of legitimate expectations in English law and in South Africa pre-1993. The developments of this doctrine are discussed and its acceptance in South Africa by the Appellate Division in 1989 is analysed in line with the rules of natural justice.

**Chapter 3**

*3.1 Transformative constitutionalism as the underlying paradigm of South Africa's  
new constitutional order*

This chapter introduces the new South African legal order after the negotiated settlement by all political parties which participated in the negotiations of a democratic government. The supremacy of the Constitution and transformative constitutionalism are discussed as the vehicle for recognising substantive legitimate expectations in South African administrative law.

**Chapter 4**

*The doctrine of substantive legitimate expectations: Under the Interim Constitution*

Chapter discusses the constitutionalisation of administrative justice and the application of the doctrine of substantive legitimate expectations under the democratic government in South Africa.

**Chapter 5**

*The doctrine of substantive legitimate expectations: Under the 1996 Constitution*

Chapter 5 discusses administrative justice under the final Constitution of the Republic of South Africa and the application of the doctrine of substantive legitimate expectations under the final Constitution.

**Chapter 6**

*The birth of administrative justice in South Africa under the Promotion of  
Administrative Justice Act*

Chapter 6 looks at the *Promotion of Administrative Justice Act* 3 of 2000 as the codification of judicial review in South Africa and its definition of administrative action.

In addition, it looks at the extent in which it allows the recognition of the doctrine of substantive legitimate expectations in South Africa.

## **Chapter 7**

*Developments geared towards accommodating substantive legitimate expectations in South African administrative law through transformative constitutionalism*

Chapter 7 discusses the recognition of substantive legitimate expectation in England. England administrative law is one of the main sources of South African administrative law. Substantive legitimate expectations doctrine is a ground of judicial review in England and this ground is advocated in South African administrative law by this chapter. This chapter is organised in three main parts. These parts are:

- 7.1 Substantive legitimate expectations as a manifestation of transformative constitutionalism.*
- 7.2 Substantive legitimate expectations as a substantive ground of review in foreign jurisdictions*
- 7.3 Reforming South African administrative law by accommodating substantive legitimate expectations as a substantive ground of review*

## **Chapter 8**

### **Conclusion and Recommendations**

Chapter 8 discusses the conclusion of the study. The chapter looks back to the objectives of the research, the research questions and research methodology. The chapter concludes by recommending the amendment of both the Constitution and the *Promotion of Administrative Justice Act 3 of 2000*.

## CHAPTER 2

### THE DOCTRINE OF LEGITIMATE EXPECTATIONS IN SOUTH AFRICAN ADMINISTRATIVE LAW

#### 2.1 Under the pre-1993 constitutional dispensation

##### 2.1.1 *The doctrine of fairness in England before 1994*

The notion of procedural fairness is one of the doctrines which originated in England. In *Ridge v Baldwin*,<sup>117</sup> the House of Lords imposed the duty to act fairly upon administrative decision-makers. The duty to act fairly was viewed by judges and academic commentators as another form of natural justice, while others saw the duty to act fairly as a vehicle to broaden the ambit of the judicial review of procedural protection.<sup>118</sup> The doctrine of legitimate expectation is seen in England as another expression of the duty to act fairly, and is a manifestation of the judicial effort to hold administration accountable for the fairness of its decision-making procedures. Therefore, the duty to act fairly is argued within the context of the rules of natural justice. This duty to act fairly was later developed in the case of *In re HK (an infant)*.<sup>119</sup>

In this case, an application was brought to release H.K., an infant, who was detained by the Chief Immigration Officer at the London Airport, with a view to having him returned to Pakistan, and setting aside the decision of the Chief Immigration Officer of London Airport, on behalf of the Secretary of State for Home Affairs. It was decided that the infant, HK, should be refused admission to England. Lord Parker said the following:

*That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.*<sup>120</sup>;

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<sup>117</sup> 1964 AC 40.

<sup>118</sup> Riggs 1988 *The American Journal of Comparative Law* 408. Riggs observes that English judges sometimes use "natural justice" and the "duty to act fairly" interchangeably. *Ridge v Baldwin* 1963 1 QB 539 at 598.

<sup>119</sup> 1967 2 QB 617.

<sup>120</sup> *In re HK (an infant)* 1967 2 QB 617 at 630 para B.

It is for this reason that Baxter found it prudent to state that the doctrine of fairness stresses the flexibility inherent in procedural fairness and natural justice, and avoids the temptation of legalism.<sup>121</sup>

### **2.1.2 The doctrine of fairness in South Africa**

The *audi alteram partem* rule does not have a uniform application.<sup>122</sup> The tests which were applied, namely administrative or quasi-judicial, were flexible. This resulted in an unsatisfactory method for identifying decisions whose legality ought to be conditional on giving a hearing. To address this problem, a solution was found in two doctrines. These doctrines are the "legitimate expectation" test, and the duty to act fairly test.<sup>123</sup> The duty to act fairly also plays an important role as a ground of judicial review in South African administrative law, because South Africans have seen with English law, it is nothing more than the duty to observe the rules of natural justice, and has always been part of the South African law.<sup>124</sup> The purpose of the duty to act fairly is to avoid the problems of classification, by applying it to all forms of administrative decision-making, and to ensure that its content is flexible. What is fair can only be determined on the merits of each and every case, and its requirements differ from case to case.<sup>125</sup>

In *Roberts v Chairman, Local Road Transportation Board and Another*,<sup>126</sup> the issue was whether the Commission was not exercising a quasi-judicial function, but a purely administrative function, which meant that the *audi alteram partem* rule did not apply. However, if there is a duty on the Commission to act fairly in arriving at a decision in terms of Section 7(2), the question is whether the applicant has established that the Commission violated this requirement in any of the respects alleged. Furthermore, what occurred in Pretoria on 24 October 1979, prior to the decision of the Commission, called for interference with the decision reached, on the ground that, in reaching the decision, the Commission did not act fairly. Boule<sup>127</sup> then argued that this doctrine

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<sup>121</sup> Baxter 1979 SALJ 626-627.

<sup>122</sup> Baxter 1979 SALJ 632.

<sup>123</sup> Boule, Harris and Hoexter *Constitutional and administrative law* 338-340.

<sup>124</sup> Baxter *Administrative Law* 540.

<sup>125</sup> Boule, Harris and Hoexter *Constitutional and administrative law* 339.

<sup>126</sup> 1980 2 SA 472 (C) 496B-497H-A.

<sup>127</sup> Boule, Harris and Hoexter *Constitutional and administrative law* 340.

was not fully recognised in South African administrative law. However, the South African Law Commission noted the benefit of the general duty with a variable content, and therefore recommended the adoption of the general requirement of compliance with the principle of natural justice, and a general ground of review of unfairness. This aspect was vindicated by the judgment of *Administrator, Transvaal v Traub and Others*.<sup>128</sup> Corbet CJ stated that the doctrine of legitimate expectation is but one aspect of "the duty to act fairly", but its origin and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness.<sup>129</sup> In the same vein, Pretorius<sup>130</sup> stated that the Appellate Division in *Traub* seemed to have regarded the *audi* principle and the doctrine of legitimate expectation as aspects of the duty to act fairly. He highlighted the frustration caused by the lack of a clear distinction between the *audi* principle and the doctrine of legitimate expectation. However, the researcher does not share Malan's sentiments. In his view, there is a clear distinction between the two doctrines, with different objectives for judicial review.

### **2.1.3 The origins of the doctrine of legitimate expectation in England**

The doctrine of legitimate expectation originated in England. This country adopted a flexible "reasonable" or "legitimate" expectation test, which does away with the "rights" requirement as a determining factor in the enforcement of natural justice. In *Schmidt and Another v Secretary of State for Home Affairs*,<sup>131</sup> the facts were as follows: at Saint Hill Manor near East Grinstead, there was a college known as Hubbard College of Scientology of California. The plaintiffs studied at this institution. They brought an action in the courts against the Home Secretary, who was the defendant. Their argument was that they were permitted to come to England for the purpose of studying at the College of Scientology. They accepted that their permits were for a limited time, and that their time had then expired. They wished to complete their studies and asked the Home Secretary to extend their permits, but he refused. The plaintiffs argued that

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<sup>128</sup> 1989 4 SA 731 (A).

<sup>129</sup> 1989 4 SA 731 (A).

<sup>130</sup> Pretorius 2001 SALJ 503-531.

<sup>131</sup> 1969 2 Ch 149 (CA).

the defendant's refusal was invalid, since he did it for an unauthorised purpose, as well as not acting fairly towards them.

The court considered three points. Only the third point is important for the purpose of this research, namely whether there is any ground for claiming that the Home Secretary did not observe the precepts of natural justice.<sup>132</sup> It was submitted on behalf of the plaintiffs that the Minister ought to have given the students a hearing before he refused to extend their stay in England. Acknowledging what was said in *Ridge v Baldwin*,<sup>133</sup> Lord Denning MR, with regard to the distinction between an administrative action and judicial act, held that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity to make representations. He further stated that it all depends on whether such person has some right or interest, or "I would add, some legitimate expectation, of which it would not be fair to deprive him without a hearing what he has to say."<sup>134</sup>

The doctrine of legitimate expectation entitles the complainant to be heard before an adverse decision is made that adversely affects him. The distinction between rights and privileges ceased to have much relevance or, at least, significance, in English law. The new approach to natural justice as introduced in *Ridge v Baldwin* has been brought to fruition by the duty to act fairly.<sup>135</sup>

Natural justice requires that persons who are affected by administrative action should be afforded a fair and unbiased hearing before the decision to act is taken. These principles emanate from the Latin principles of *audi alteram partem* and *nemo iudex in propria causa*. These principles of natural justice, as Baxter puts it, serve three functions, namely: (a) facilitation of accurate and informed decision-making; (b) assurance that decisions are made in the public interest; and (c) catering for process values.<sup>136</sup>

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<sup>132</sup> 1969 2 Ch 149 170.

<sup>133</sup> 1964 AC 40.

<sup>134</sup> *Schmidt and Another v Secretary of State for Home Affairs* 1969 2 Ch 149 (CA) 170F.

<sup>135</sup> 1964 AC 40 73.

<sup>136</sup> Baxter *Administrative Law* 536-537.

In *R v Leman Street Police Station Inspector and Secretary of State for Home Affairs; ex parte Venicoff*,<sup>137</sup> the applicant, Mr. Venicoff, was deported from the United Kingdom in terms of the *Aliens Restrictions Act*, 1914 and Article 12 of the Aliens Order. In pursuance of this order, he was detained in custody until the ship finally left the United Kingdom. He applied to the King's Bench Division to review and set aside the Secretary of State for Home Affairs' decision to deport him, on the grounds that:

Giving the proper interpretation of article 12, paragraph 1 of the Aliens Order, 1919(1), the Secretary of State had no authority to make a deportation order an opportunity of knowing the grounds on which the order was made and/or the evidence or information relied on in support thereof/and or giving him a fair opportunity of meeting the same, none of which had been given to the applicants.

The King's Bench held that the applicant was not entitled to be heard before the decision was taken to deport him, because the Secretary of State was not performing a judicial function, but rather an executive function.

In *In re HK (an infant)*,<sup>138</sup> a Commonwealth citizen had a right to be admitted to the country if he was (as he claimed to be) under the age of 16. The immigration officer was not satisfied that he was under 16 and refused him admission. Lord Parker CJ held that, even if they were acting in an administrative capacity, they were under a duty to act fairly, which meant that they should give the immigrant an opportunity to satisfy them that he was under 16. In *Schmidt and Another v Secretary of State for Home Affairs*,<sup>139</sup> the Home Secretary had failed to observe the precepts of natural justice, by not giving a hearing to a number of scientology students before refusing to extend their stay in the United Kingdom. The doctrine of legitimate expectation, as one expression of the duty to act fairly, is a particular manifestation of this judicial effort to hold administration accountable for the fairness of its decision-making procedure. Since this decision, English courts have imposed a duty to act fairly upon administrative officials.

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<sup>137</sup> 1920 3 KB 72 79.

<sup>138</sup> 1967 2 QB 617.

<sup>139</sup> 1969 2 Ch 149 (CA).

Furthermore, in *Breen v Amalgamated Engineering Union and Others*,<sup>140</sup> Lord Denning, Master of the Rolls, observed:

*Then comes the problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim—such as an appointment to some post or other—then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt v Secretary of State for Home Affairs*, but, if he is a man whose property is at stake, or who is being deprived of his livelihood, and then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand.*

In *McInnes v Onslow-Fane and Another*,<sup>141</sup> the court distinguished three types of decisions which may be encountered when the court is asked to intervene. Of relevance here is the decision in expectation cases, which differ from application cases, only in that the applicant "...has some legitimate expectation from what has already happened that his application will be granted".

In *O'Reilly v Mackman and Others*,<sup>142</sup> the court stated that although, under prison rules, remission of sentence was not a matter of right but of indulgence, a prisoner had a legitimate expectation based upon "his knowledge of what is the general practice" that he would be granted the maximum remission of one-third if, by that time, no disciplinary award of forfeiture of remission had been made against him. In public law, the Court said:

*...Such legitimate expectation gave to each appellant a sufficient interest to challenge the legality of adverse disciplinary award made against him by the board on the ground that in one way or another the board in reaching its decision had acted out with the powers conferred on it by the legislation under which it was acting; and such grounds would include the board's failure to observe the rules of natural justice: which means no more than to act fairly towards him in carrying out their decision-making process and I prefer so to put it.<sup>143</sup>*

The first important issue in the case of *Attorney General of Hong Kong v Ng Yuen Shiu*<sup>144</sup> is whether an alien who enters without permission has a right to a hearing, in

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<sup>140</sup> 1971 1 All ER 1148 CA 1154F-H.

<sup>141</sup> 1978 3 All ER 211.

<sup>142</sup> 1982 3 WLR 604.

<sup>143</sup> *O'Reilly v Mackman and Others* 1982 3 WLR 604.

<sup>144</sup> 1983 2 AC 629.

accordance with the rules of natural justice and the doctrine of fairness. Secondly, if such an alien has no right to a hearing, whether he is entitled to a hearing according to the rules of natural justice, where an immigration official has given him a "legitimate expectation" of being accorded such a hearing – in other words, did a right arise from a press announcement? The court was of the view that "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.<sup>145</sup> The Secretary of State in *Findlay v Secretary of State for the Home Department*,<sup>146</sup> acting on recommendations made by the parole board, was empowered by Sections 60(1) and 61(1) of the *Criminal Justice Act 12 of 1967* to release certain prisoners on licence. In October 1983, the Secretary of State announced his decision to change parole policy with regard to life sentence prisoners, by abolishing the existing home office/parole board committee, and by deciding himself, in consultation with the judiciary, on the date when such a prisoner's case should first be referred to and reviewed by a local review committee. The Secretary of State did not consult the Parole Board before changing the policy, but only informed them about the implementation of the policy.

The applicants were affected by the change in policy. They applied for a judicial review of the changes in policy on the grounds, *inter alia*, that the Parole Board was so central to the parole system that not only did they have a legitimate expectation that it would remain so, but the Secretary of State was obliged to consult it before formulating the changes. After the appellant's application was dismissed by the Divisional Court, they approached the House of Lords. The House of Lords held that the doctrine of legitimate expectation plays an important role in developing the law of review. The legitimate expectation doctrine can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review.<sup>147</sup>

In *Council for Civil Service Unions and Others v Minister for the Civil Service*,<sup>148</sup> the Government Communication Headquarters (GCHQ) was a branch of the civil service, whose main functions were to ensure the security of the United Kingdom's military and

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<sup>145</sup> *Attorney General of Hong Kong v Ng Yuen Shiu* 1983 2 All ER 346 350C.

<sup>146</sup> 1984 3 All ER 801.

<sup>147</sup> *Findlay v Secretary of State for the Home Department* 1984 3 All ER 801.

<sup>148</sup> 1984 3 All ER 935 944C-D.

official communications, and to provide signals intelligence for the government. These functions are of great importance, and involve handling secret information which is vital to national security. Since 1947, when the GCHQ was established in its present form, all the staff employed there have been permitted, and indeed encouraged, to belong to national trade unions, and most of them did so. A well-established practice of consultation existed between the official and trade union sides with regard to all important changes in the terms and conditions of employment of the staff. On 25 January 1984, all these was abruptly changed. The Secretary of State for Foreign and Commonwealth Affairs announced in the House of Commons that the government had decided to introduce, with immediate effect, new conditions of service for staff at GCHQ, the effect of which was that they would no longer be permitted to belong to national trade unions, but would be permitted to belong only to a departmental staff association approved by the director.

Legitimate expectation, as discussed above, will always relate to a benefit or privilege to which the claimant has no right in private law, and it may even relate to one which conflict with private law rights.<sup>149</sup> Lord Roskill made observations about judicial review in this case, as did his counterparts. He observed that, as a result of a series of judicial decisions since 1950, both in the House of Lords and in the Court of Appeal, there has been a dramatic and, indeed, a radical change in the scope of judicial review.

Lord Fraser of Tullybelton held that if there had been no question of national security, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction of 22 December 1983.

Lastly, in *Leech v Governor of Parkhurst Prison*,<sup>150</sup> the House of Lords used the claimant's legitimate expectation as the basis for allowing a judicial review of the fairness of an administrative proceeding. The doctrine of legitimate expectation in South Africa is set out in three constitutional dispensations, namely the pre-1993 constitutional dispensation; the interim constitutional dispensation; and the 1996 constitutional dispensation.

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<sup>149</sup> De Smith *et al Principle of Judicial Review* 295.

<sup>150</sup> 1988 2 WLR 290 306.

These cases have shown how far England has gone in accommodating substantive legitimate expectation, by granting a substantive benefit where the government has failed to adhere to their promise, or where legitimate expectation has been created.

#### **2.1.4 Background to the doctrine of legitimate expectations in South African administrative law**

##### 2.1.4.1 Natural justice

Wade and Forsyth<sup>151</sup> describe natural justice as a source of what is right and wrong, and in administrative law, natural justice comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause; and that a man's defence must always be fairly heard. As such, natural justice is an important component of administrative law. The principles of natural justice originate in natural law.<sup>152</sup> Natural justice applies to natural power. As a result, the violation of natural justice makes the decision void. Baxter argues that the principles of natural justice serve three purposes, namely accurate and informed decisions making, decision making in the public interest, and catering for certain important process values.<sup>153</sup>

The rules of natural justice operate as implied mandatory requirements, the non-observance of which invalidates the exercise of power. For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interest, but simply of the exercise of governmental power in a manner which is fair and considerable.<sup>154</sup> *Ridge v Baldwin* sorted out the confusion caused by the artificial use of the word "judicial" to describe functions which were in reality administrative, and that "acting fairly" was "required by the rules of

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<sup>151</sup> Wade and Forsyth *Administrative Law* 414. The principle of natural justice is expressed in the form of two Latin maxims: *audi alteram partem* (hear the other side); and *nemo iudex in propria causa* (no one may judge in his own cause).

<sup>152</sup> Baxter *Administrative Law* 536.

<sup>153</sup> *R v Leman Street Police Station Inspector and Secretary of State for Home Affairs; ex parte Venicoff* 1920 3 KB 72.

<sup>154</sup> *R v Leman Street Police Station Inspector and Secretary of State for Home Affairs; ex parte Venicoff* 1920 3 KB 72.

natural justice". Natural justice has, for centuries, been enforced as a matter of law and rule of discretion.<sup>155</sup>

In the case of *Minister of Interior v Bechler and Others; Beier v Minister of the Interior and Others*,<sup>156</sup> the proceedings in the Provincial Division in respect of these cases arose out of a notice sent to each of seven persons (the applicants) in July 1947, intimating that the Commission mentioned in the Government Notice of 1947 recommended that he be deported from the Union, and that the government had decided to act on the recommendation in terms of Section 1 of *Aliens Affairs Amendment Act 52 of 1946*. In the case of the first six applicants, the Transvaal Provincial Division granted interdicts restraining the Minister from deporting the applicants. The ground of the decision in each case was that the Commission had failed to give the applicants a sufficient hearing, in compliance with the requisites of natural justice. In the seventh application, which was brought in the Natal Provincial Division, Hathorn JP dismissed the application with costs, holding, in effect, that the Commission had given the applicant, Beier, a fair hearing, as was reasonably practicable, having regard to the particular circumstances bearing on the enquiry entrusted to it. This case has adopted a test, such as whether the administrative act in question is one "affecting rights or involving legal consequences to persons".

In *Laubscher v Native Commissioner, Piet Retief*,<sup>157</sup> in terms of the *Native Trust and Land Act*,<sup>158</sup> no person had the right to enter a native trust area without the written consent of the person acting under the authority of the trustee. In the case under consideration, the official who was authorised to give such written consent was the respondent, the Native Commissioner of Piet Retief. Permission was refused by the Native Commissioner. Laubscher applied unsuccessfully to the Supreme Court (the Transvaal Provisional Division) for relief. He thereafter appealed to the Appellate Division. The gravamen of his complaint was that the respondent had not afforded him the opportunity to be heard before refusing his application to enter the trust property, for the purposes of carrying out his lawful profession.

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<sup>155</sup> Wade and Forsyth *Administrative Law* 469.

<sup>156</sup> 1948 3 SA 409 (A).

<sup>157</sup> 1958 1 SA 546 (A) 810-811.

<sup>158</sup> Act 18 of 1936.

The Appellate Division held that the *audi alteram partem* rule did not apply to the appellant. The court stated that the refusal of permission did not prejudicially affect Laubscher's liberty or property or other legal right, and that the granting of permission was intended by the legislature to be a purely administrative act, thereby allowing the official to exercise absolute discretion. The court failed to grant the applicant an opportunity to explain why he had to consult with his client.

In *R v Ngwevela*,<sup>159</sup> the court held that when a statute empowers a public official to give a decision that prejudicially affects an individual's property or liberty, that individual has a right to be heard before action is taken against him. The law should be made to reach out and come to the aid of persons prejudicially affected by an administrative decision.

#### ***2.1.5 The adoption of the doctrine of legitimate expectation in South African administrative law***

As mentioned in the preceding paragraphs, the doctrine of legitimate expectation has its origin in *Schmidt v Secretary of State for Home Affairs* under the English law.<sup>160</sup> On the other hand, in South Africa, legitimate expectation has its origin in *Everett v Minister of the Interior*.<sup>161</sup> The applicant in this case was a British citizen by birth, having been born at Kingston-on-Thames in England. In 1968, her parents and two siblings, emigrated from England to South Africa. They were later granted permanent residence in South Africa. In 1972, the applicant entered South Africa at Beit Bridge. She travelled under a British passport. A temporary permit to stay in South Africa was issued to her, subject to security in an amount of R650 being furnished, which was done. The applicant remained in South Africa. A temporary residence permit issued to her was extended from time to time to enable her to study. She obtained her degree of Bachelor of Arts, as well as an Honours degree in History, at the University of Cape Town. She qualified as a school teacher, and held various temporary teaching positions.

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<sup>159</sup> 1954 1 SA 123 (A) 127F.

<sup>160</sup> 1969 2 Ch 149 (CA) 170.

<sup>161</sup> 1981 2 SA 453 (C) 459G.

On the 10<sup>th</sup> June 1980, the applicant was personally served with a letter from the Secretary of the Interior. In terms of the letter, she was informed that the Minister of the Interior had, under the powers vested in him by Section 8(2) of the *Aliens Act*, ordered that the temporary residence permit stamped in her British passport in terms of Section 5(1) of that Act, was withdrawn with immediate effect. She was told that she was accordingly no longer entitled to reside in South Africa, and was ordered to leave the Republic of South Africa. The applicant had received no prior notice of the Minister's intentions, and knew of no reason for her immediate removal from South Africa. Confronted with this, the applicant was advised by the attorney to bring an urgent application to review the decision of the Minister. The ground for the review was that the notice withdrawing her temporary residence permit was against the rules of natural justice, because she was not given a chance to make representation to the respondent, whether before or after the respondent's decision. In light of the foregoing the notice was unreasonable. The respondent opposed the application on the ground that there was no obligation on the side of the respondents to afford the applicant an opportunity to put her case to him, as the respondent had acted within his power, in line with Section 8(2) of the *Aliens Act*.

The applicant argued that the Minister was exercising a judicial function when he issued the notice, hence the application of the principle of a purely administrative function when acting in terms of Section 8(2) of the Act, and that the *audi alteram partem* principle of natural justice was applicable to the decision of the Minister. On the other hand, the respondent argued that the Minister was exercising a statutory power, on a proper interpretation of the sub-section, and the applicant failed to establish that the Minister acted unreasonably.

Before reaching its decision, the court considered the view expressed by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*.<sup>162</sup> The court did this by not defining the doctrine of legitimate expectations.<sup>163</sup>

The court reached the conclusion that when an "alien" has been allowed into the country under a permit for a period and, before the expiration of that period, he or she is ordered to leave the country, that such an "alien" has acquired a right consisting of

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<sup>162</sup> 1969 1 All ER 904.

<sup>163</sup> Hlophe 1990 SALJ 197.

a legitimate expectation of being allowed to stay for the permitted time. The discretion granted to the Minister in terms of Section 8(2) is a quasi-judicial one, and the court held that the legislation intended that the Minister should apply the *audi alteram partem* rule, unless the clear intention of Parliament was negative, and excluded the implication.

The court held that the *audi alteram partem* rule was not followed in this case, and the notice was therefore set aside.

Subsequent to the adoption of this important principle of administrative law, which serves as a tool for fairness and legal reform of administrative law in South Africa, the court in *Castel NO v Metal and Allied Workers Union* pointed out that there is a need for legal reform, which could be achieved through the use of the legitimate expectation doctrine. At this stage, however, these two courts did not define legitimate expectation or explain its nature.<sup>164</sup>

Hefer JA expressed the following view:

*I am by no means sure that this case would in England be classified as a legitimate expectation case. There is nothing in this case which calls for an extension of the accepted principle.*

In many cases, legal rights are affected, for example where property is repossessed or where someone is dismissed from public office. In *Castel NO v Metal and Allied Workers Union*,<sup>165</sup> a person affected may have no more than an interest, a liberty or an expectation. Even though there is no legal right, it may involve what the courts sometimes call "legitimate expectation". For the purpose of natural justice, the question is not whether the claimant has some legal right, but whether legal power is being exercised over him to his disadvantage.<sup>166</sup>

Despite these developments in England and the positive adoption of the legitimate expectation doctrine in South Africa, the South African courts are lagging behind with

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<sup>164</sup> *Connection Board of Pardons v Dumschat* 452 US 1981 458. These two cases are *Everett v Minister of the Interior* 1981 2 SA 453 (C) and *Castel NO v Metal and Allied Workers Union* 1987 4 SA 795 (A) 810E-I.

<sup>165</sup> 1987 4 SA 795 (A) 810E-I.

<sup>166</sup> Wade and Forsyth *Administrative Law* 464-465.

the jurisprudence of an individual's existing rights, liberties or privileges. Baxter gave two reasons for why the existing rights, privileges and liberties test was unsound:

- a. Whether the affected individual has a right to the decision is quite irrelevant to the question as to whether he has a right to natural justice when the decision itself is made.
- b. The existing rights test has some utility in the case of an imaginary night watchman or regulatory state, where government acts only to protect its citizens and preserve the conditions for liberty, but it is hopelessly inadequate in the modern state, in which so many of South Africans' daily necessities derive from state handouts.<sup>167</sup>

The Appellate Division in *Castel NO v Metal and Allied Workers Union*,<sup>168</sup> the first case in South Africa to deal with the doctrine of legitimate expectation, held that the refusal of authority to hold the meeting had not affected any right of, and had not involved any legal consequences to, the respondent. It had not been necessary for the appellant to apply the *audi alteram partem* rule.

### ***2.1.6 The nature and functioning of the doctrine of legitimate expectation after Everett***

The term "legitimate expectation" was introduced by Barwick CJ to mean "recognition or entitlement" by the law.<sup>169</sup> However, Stephen J, in a minority judgment, understood "legitimate" to mean "reasonable" and held that "well-founded" expectations should be accorded the same protection of natural justice as the person's "rights" or "interests".<sup>170</sup> Stephen J explained that the source and reason for this principle lay in the doctrine of fairness. He went on to state that in his view, in any given case, "fairness" plays an important role in determining whether the expectation should be characterised as legitimate for the purpose of natural justice.

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<sup>167</sup> Baxter *Administrative Law* 578.

<sup>168</sup> 1987 4 SA 795 (A).

<sup>169</sup> *Salemi v Mackellar* [No 2] 1977 137 CLR 396.

<sup>170</sup> *Schmidt and Another v Secretary of State for Home Affairs* 1969 2 Ch 149 (CA) 170F; Hlophe 1987 SALJ 173.

After the introduction of legitimate expectation by *Everett v Minister of the Interior*,<sup>171</sup> the Appellate Division, the highest court in the land by then, had to grapple with the doctrine of legitimate expectation in *Castel NO v Metal Allied Workers Union*.<sup>172</sup> In this case, the court did not deal with the definition and scope of the doctrine of legitimate expectation.<sup>173</sup>

In *Castel NO v Metal Allied Workers Union*,<sup>174</sup> the respondent, a trade union, applied to the appellant, an acting Chief Magistrate, for permission to hold the annual general meeting of its Natal branch at an open-air venue in Durban. Permission was refused and the respondent made an urgent application to a local division for an order, setting aside the appellant's refusal and directing the appellant to authorise the meeting. The order was granted on the grounds that the respondent had not been given a hearing.

The court<sup>175</sup> per Hefer CJ observed:

*...it may well be that there is indeed a need for legal reform in the present case even if the 'legitimate expectation' approach were to be adopted, there is no room for its application here.*

The applicant's counsel submitted that the applicant had a legitimate expectation that it would receive a fair hearing, and that its application would not be refused on grounds which it had not been afforded an opportunity to refute. This submission was rejected by the court. The court held that, based on the facts of the case, the applicant trade union had no legitimate expectation to be heard before being refused permission to hold an open-air meeting, as nothing had happened before and after applying for such permission, which gave rise to legitimate expectation.

In *Langeni and Others v Minister of Health and Welfare*,<sup>176</sup> the four applicants were employed as workers at the Natalspruit Hospital, a provincial hospital in Alberton. They were all dismissed after a 24-hour notice period on 19 August 1987. Although they were technically temporary workers, they had been employed as such for many years. The first applicant began her employment as long ago as February 1967. The

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<sup>171</sup> 1981 2 SA 453 (C) 456D-457B.

<sup>172</sup> 1987 4 SA 795 (A).

<sup>173</sup> Hlophe 1990 SALJ 197.

<sup>174</sup> 1987 4 SA 795 (A).

<sup>175</sup> *Castel NO v Metal Allied Workers Union* 1987 4 SA 795 (A) 810E.

<sup>176</sup> 1988 4 SA 93 (W).

applicants brought this application because their employment was unlawfully terminated, for the sole reason that they were not given a hearing prior to the decision to give them 24 hours' notice of termination of such employment.

They pleaded, in their notice of motion, for the setting aside of the decision to dismiss them, and for their reinstatement. Sympathising with their co-worker, Mrs M Ntobela, who was dismissed on the 22 July 1987, one hundred employees stopped working. They were given an ultimatum to return to work within 30 minutes, or they would face certain consequences. Temporary workers would be immediately dismissed. The employment of the applicant was governed by the terms of the Public Service Code made thereunder, as well as the terms of a standard form contract, which had been signed by each of the applicants at the time they commenced their employment at the hospital.

The judge, in his analysis of the legitimate expectation doctrine, referred to *Everett v Minister of the Interior*,<sup>177</sup> where the court concluded that natural justice was applicable in the case of the expulsion of an alien – an administrative act which has been previously held exempt from natural justice. Baxter<sup>178</sup> submitted that the "legitimate expectation" test ought to be employed in future cases. The judge went on to say that "even in the absence of the legal right or interest", there may be a "legitimate expectation" or a legitimate claim of entitlement "which would make an arbitrary decision concerning that expectation" or entitlement both unfair and unjust. He referred to *Everett* above, where Fagan J put it as follows:

*To my mind, the distinction drawn by Lord Denning between the position of an alien wishing to enter the country or one in the country whose permitted time has expired, and an alien who had received permission to remain in the country for a period of time which period it is sought to curtail, is a sound one. An alien wishing to enter the country has no rights in that regard. A passport control officer to whom he applies for a temporary permit in terms of S 5(1) is entitled to refuse him entry in the officer's absolute and unfettered discretion. The alien has not right to put his case to the officer. And, when an alien is allowed into the country on a temporary permit for a limited time, he acquires no right to stay here for a longer period granted to him. On the expiry of that time, he is again in the position he was when he sought entry into the country in the first instance.*<sup>179</sup>

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<sup>177</sup> 1981 2 SA 453 (C) 456-457.

<sup>178</sup> Baxter *Administrative Law* 580.

<sup>179</sup> *Everett v Minister of the Interior* 1981 2 SA 453 (C) at 457B-C.

Widgery LJ, in the *Schmidt* case, aptly equated the position of an alien who had entered on a permit for a limited period to that of a man who signs the lease for a house for three months, and wishes to renew it for a further period. The landlord can reject his application for an extension out of hand. No question of natural justice arises, because there is no right of the tenant that can be infringed. However, the position is different when an alien has been allowed into the country under a permit for a period and, before the expiration of that period, the alien is ordered to leave the country. The researcher respectfully shares the views expressed by Lord Denning, in his judgment in the *Schmidt* case, a judgment with which Widgery LJ concurred, namely that such an alien has acquired a right consisting of a legitimate expectation of being allowed to stay for the permitted time.

De Smith and Evans<sup>180</sup> provide the following illustration:

*Non-renewal of an existing license is usually a more serious matter than refusal to grant license in the first place, and if the license has already been given, unless had already been given to understand when he was granted the license that renewal is not expected, non-renewal may seriously upset his plans, cause an economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew, when there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the license.*

In *Ridge v Baldwin*,<sup>181</sup> Lord Reid suggested that the duty to observe the rules of natural justice should be inferred upon the authority. This is a useful approach towards the consideration of whether, in any particular case, a person has acquired a right, interest or legitimate expectation. The question then becomes whether the right, interest or legitimate expectation is such that it would be unfair or unjust for the power to deprive him thereof to be exercised without a hearing. The court held that the employee's expectation of remaining in employment did not extend beyond the 24-hour notice period, and further that the rules of natural justice were not applicable to the applicants, and that the failure to provide the employees with a hearing before the decision to terminate their employment had not rendered the decision unlawful.

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<sup>180</sup> De Smith and Evans *Judicial review of administrative action* 223.

<sup>181</sup> 1964 AC 46 76.

As early as February 1988, the Supreme Court of Appeal and the Cape Provincial Division acknowledged a need for legal reform, by recognising the application of the legitimate expectation test, which will go a long way towards realising such reform. In *Lunt v University of Cape Town and Another*,<sup>182</sup> the respondent refused the applicant's re-registration as a postgraduate student in 1987, without giving the applicant a hearing. The tenets of basic fairness required that the applicant should have been given a hearing. The highest court in South Africa by then pointed to a need for reform, and for the acceptance of the legitimate expectation test, where appropriate.<sup>183</sup> The court held that in its opinion:

*... the very understandable and indeed natural appeal to feelings of fairness find recognition and effective practical expression in the application of the legitimate expectation approach even in contractual context. This has been tried and developed elsewhere, as the writings to which I have referred show. It has worked satisfactorily in doing natural in situations where the previously existing law was found inadequate to do so. There is in my view, a need in South Africa for the legal reform referred to in the above quoted passage in Castel case and application of the legal expectation test will do much to achieve it.*

The court found that there was a legitimate expectation in the foregoing respect and that, in consequence, the applicant should have been heard. This was informed by the factors which justified, on the applicant's part, the legitimate expectation<sup>184</sup> that he would have the opportunity of being heard if the university contemplated the refusal of re-registration by reason of consideration, as in this case.

On the other hand, in *Mokoena and Others v Administrator, Transvaal*,<sup>185</sup> Goldstone J had a different view, in that he found that the compulsory pension fund, of which the applicants became members after two- or five-years' employment, placed them in a different position from the employees in Langeni.<sup>186</sup> They were obliged to make the monthly payment, in order to have the right to a pension upon retirement. He went further to say that the fact that someone in the position of Mrs Mokoena or the other applicants, who were members of the pension scheme, could be dismissed and forfeit their right to a pension on the whim of an official and without enquiry, must be

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<sup>182</sup> 1989 2 SA 438 (C).

<sup>183</sup> *Castel NO v Metal and Allied Workers Union* 1987 4 SA 795 (A) 810-811A.

<sup>184</sup> *Lunt v University of Cape Town and Another* 1989 2 SA 438 (C) 450B-C.

<sup>185</sup> 1989 1 SA 397 (W).

<sup>186</sup> *Langeni and Others v Minister of Health and Welfare* 1988 4 SA 93 (W) 96B-98.

repugnant to any reasonable and decent person. In "singing a different tune", Goldstone J said that in this case, the administrative authority to give 24-hour notice to the applicants clearly affected their pension rights and involved adverse legal consequences for them. This was sufficient to have entitled them to be heard before such action was taken against them. Goldstone stated the following:

*I have equally no doubt that they did have a legitimate expectation that they would not be deprived of their right to qualify for a pension without good or sufficient or reasonable cause. That legitimate expectation would have entitled them to hearing before the decision to terminate their employment was made by the official having the power to do so.*<sup>187</sup>

It was submitted on behalf of the applicants that the *Langeni* case should be distinguished from the dispute before Langeni. It was argued that the distinction lay in the fact that all of the applicants were, for a considerable period of time, members of the *Temporary Employers Pension Fund Act*,<sup>188</sup> and a separate fund had been established for permanent employees in terms of the *Government Service Pension Act*.<sup>189</sup> This submission persuaded Goldstone to arrive at the decision he reached. In *Traub v Administrator, Transvaal and Others*,<sup>190</sup> the applicant was a qualified medical doctor. She completed her internship at Baragwanath Hospital in Soweto in 1986. Thereafter, she applied for and was granted a post as a senior house officer in internal medicine at Baragwanath Hospital for the first half of 1987. Baragwanath (as it was called) is a provincial hospital, and such appointments are required to be made by the Transvaal Provincial Administration. These appointments are made for a period of six months. The applicant made a further application for an appointment to the same position for the second half of 1987. This was also successful. In about September 1987, the applicant applied for a senior house officer post in paediatrics at Baragwanath Hospital for the first half of 1988. In a letter dated 18 November 1987,

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<sup>187</sup> *Mokoena and Others v Administrator, Transvaal* 1988 4 All SA 336 (W) 341. Goldstone J understood that the legitimate expectation refers to the rights sought to be taken away, and not the right to a hearing. It was submitted on behalf of the applicants that in the English case, there appears to be a right to a hearing, which the legitimate expectation refers to. A passage from *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904 at 904 was cited in the *Langeni* case, which said that it is some legitimate expectation of which it would not be fair to deprive him, without hearing what he has to say. *Langeni and Others v Minister of Health and Welfare* 1988 4 SA 93 (W).

<sup>188</sup> Act 75 of 1979.

<sup>189</sup> Act 57 of 1973.

<sup>190</sup> 1989 2 SA 396 (TPD).

the applicant was informed by the superintendent of the Baragwanath Hospital that the application had not been approved. She took the matter to court and obtained an order directing that she be appointed to the post for which she had applied. The appointment of the respondent amounted to a substantive relief or benefit, not a procedural expectation.

The court held that the fact that she was the only victim in the affair offended the sense of fairness and equity of any reasonable person. The court based this finding on a comparison between her qualifications and other positive attributes on the one hand, and the comparatively minor role she played in respect of the publication of the letter on the other hand, and ordered the first, second and third respondents to appoint the applicant to the position of a senior house officer at Baragwanath Hospital in Soweto.<sup>191</sup>

In this case, the appellant was unfairly and unjustly treated by the fourth respondent, and was entitled to a fair hearing. In this regard, the court referred to the decision of *Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another*,<sup>192</sup> where Goldman J said the following:

*It is clear on the authorities that a person who is entitled to the benefit of the audi alteram partem rule need not be afforded all the facilities which are allowed to a litigant in a judicial trial. 'He need not be given an oral hearing or allowed representation by an attorney or counsel; he need not be given an opportunity to cross-examine and he is not entitled to discovery of documents'. But on the other hand (and for this is no authority is needed) a mere pretence of giving the person concerned a hearing will clearly not be a compliance with the rule. Nor in my view will it suffice if he is given such a right to make representations as in the circumstances does not constitute a fair and adequate opportunity of meeting the case against him. What would follow from the last-mentioned proposition is, firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representation; secondly, he must be put in possession of such information as will render his right to make representation a real and not an illusory one.*

*Traub v Administrator, Transvaal and Others*<sup>193</sup> was taken on appeal. The application came before Goldstone J on 12 December 1987. Two days later, he made an order setting aside the decision of the second appellant, in not approving the appointment

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<sup>191</sup> *Traub v Administrator, Transvaal, and Others* 1989 2 SA 396 (TPD) 420D-E.

<sup>192</sup> 1980 3 SA 476 (T) 486D-G.

<sup>193</sup> 1989 2 SA 396 (T).

of each of the respondents. In this application, the first and fifth respondents made an application to continue as senior house officers for the first half of 1988. The other respondents made an application to become senior house officers for the same period. These six applicants were qualified medical doctors, having received their MBChB degrees from the University of Witwatersrand. The first and fifth applicants graduated in 1985, and the other four applicants in 1986. They are all employed by the Transvaal Provincial Administration at the Baragwanath Hospital in Soweto. The second, third, fourth and sixth applicants completed their periods of internship at Baragwanath Hospital at the end of that year. For the sake of the applicants' professional careers and education as medical practitioners, the appointments which they sought were of considerable importance to them.

The six applications were all turned down, and the applicants were informed of these decisions during November 1987. The decision not to appoint or reappoint the applicants was taken by the Director of Hospital Services, Transvaal, who was the second respondent. The court, per Goldstone, held that "as I understand the law, if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity".<sup>194</sup>

In *General Medical Council v Spackman*<sup>195</sup> Lord Wright said:

*If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.*

John Hlophe<sup>196</sup> made a call to the South African courts to follow the footsteps of their English counterpart, and pleaded for the recognition of the doctrine of legitimate expectations.

Hlophe J remarked as follows:

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<sup>194</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

<sup>195</sup> 1943 AC 627 664-665.

<sup>196</sup> Hlophe 1987 SALJ 165.

*In my opinion, the adoption of the concept in our law would be most welcome in view of the demands of a modern society and it would be preferable if the importance of the concept were to be unequivocally recognised by the Appellate Division as its English Counterpart in Findlay v Secretary of State for the Home Department.*<sup>197</sup>

### **2.1.7 The birth of the legitimate expectation doctrine in South African administrative law**

Corbet CJ in *Administrator, Transvaal and Others v Traub and Others*<sup>198</sup> understood the *audi* principle as decisions prejudicially affecting an individual in his liberty, property or existing rights. He understood further that the refusal to appoint them, as such, did not, therefore, affect an existing right. In the past, the traditional scope of principles relating to the observance of natural justice has been extended to decisions affecting a person who has no existing right, but merely a legitimate expectation.<sup>199</sup> *Laubscher's*<sup>200</sup> case did not close the door on the application of the *audi alteram partem* rule, as this case was decided on exception.

What the court had to decide was whether or not South African law should move in the direction taken by English law, and give recognition to the doctrine of legitimate expectation, or some similar principle. The Chief Justice referred to the case of *Civil Union*, where the court observed that since 1950, as a result of a series of judicial decisions in the House of Lords and the Court of Appeal, there had been:

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<sup>197</sup> *Findlay v Secretary of State for the Home Department* 1984 3 All ER 801.

<sup>198</sup> 1989 4 SA 731 (A) 754E-F.

<sup>199</sup> *Everett v Minister of the Interior* 1981 2 SA 453 (C) 456-457; *Langeni and Others v Minister of Health and Welfare* 1988 4 SA 93 (W) 96B-98A; *Mokoena v Administrator Transvaal and Others* 1988 4 SA 912 (W) 918; *Lunt v University of Cape Town and Others* 1988 4 SA 731 (C).

<sup>200</sup> 1958 1 SA 546 (A) at 554H. The appellant is an attorney practising at Benoni who acted for a Zulu tribe which occupied three farms situated in the Piet Retief district. These farms were the property of the South African Native Trust which was created by the *Native Trust and Land Act* 18 of 1936. Permission was given to allow him to be on or to carry on with his profession upon land in the Trust area. His averments were that their refusals to do so were unlawful. The respondents took exception to the declaration. This was because some judgments of the courts created an impression that the only way a subject can challenge only quasi-judicial acts before the civil courts. The so-called purely administrative acts fall almost entirely outside the court's power of review. The view articulated by the court was where an official is required by statute to exercise a purely administrative discretion, he is under no obligation whatsoever to acquaint an applicant for permission with any information. His visit to his clients were stopped by officials of the respondent. In his declaration the appellant stated that respondents were duly authorised by s 24 of Act 18 of 1936.

*... 'a dramatic and a radical change in the scope of judicial review' and this change had been described by no means critically, as an upsurge of judicial activism.*<sup>201</sup>

One aspect of the change in the scope of judicial review was the evolution of the legitimate expectation doctrine. It was found necessary, or at any rate desirable, to extend the scope of judicial review to include cases of legitimate expectation.<sup>202</sup> The Chief Justice went further to state that in South Africa, there was a similar need to do so:

*There are many cases where one can visualise in this sphere – and for this reasons which I shall later visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected... like public policy, unless carefully handled it could become an unruly horse... A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.*<sup>203</sup>

The Chief Justice said the following with reference to legitimate expectation:

*These features, taken in conjunction with one another, constituted good ground in my opinion, for each of the respondents having a legitimate expectation that, once his or her application for the post of SHO had been recommended by the departmental head concerned, second appellant's approval of the appointment would follow as a matter of course; and/or a legitimate expectation that in the event of second appellant contemplating a departure from past practice, in the form of a refusal to make the appointment for a particular reason- especially where that reason related to suitability- the second appellant would give the respondent a fair hearing before he took his decision. In other words, the audi principle did apply.*<sup>204</sup>

He found that a classification as quasi-judicial adds nothing to the process of recognition – the court could just as well eliminate this step and proceed straight to the question as to whether the decision prejudicially affects the individual's liberty, property and existing rights. However, under modern circumstances, it is appropriate to include his legitimate expectation.

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<sup>201</sup> *Council of Civil Unions v Minister for the Civil Service* [1983] UKHL 6; [1984] 3 ALL ER 935.

<sup>202</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

<sup>203</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 761E-G.

<sup>204</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 762B.

The Chief Justice held that the decision of the appellant to turn down the applications of the respondents for the posts of SHO at the hospital was invalid, by reason of his failure to accord the respondents a fair hearing before taking the decision. The respondents' cause of action was based upon the second appellant's failure to give them a fair hearing, and the corresponding obligation to afford it derived from the common law. A year after the Appellate decision *Traub*,<sup>205</sup> in *Administrator of the Province of the Cape of Good Hope and Another v Ikapa Town Council*,<sup>206</sup> as per Joubert JA, the court held that it was common cause that the Demarcation Board's report referred to certain independently, after-acquired information not available at the time of the enquiry. With regard to this after-acquired information, the first question to be answered was whether it was material to the inquiry. If it was not material, then there was no duty to disclose it, and its non-disclosure would not constitute a violation of the *audi alteram partem* principle.

## 2.2 Conclusion

Since this profound<sup>207</sup> and transformative decision by the Appellate Court, there has not been any significant decision by the courts under the constitutional state, despite the constitutional mandate. The Interim Constitution contained legitimate expectation in its provision, but strangely enough, the final Constitution omitted this important administrative law principle for judicial review. Chief Justice Corbett laid the foundation for the recognition of substantive legitimate expectation in South Africa. In this regard, he said:

*The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interest of the person concerned is taken.*<sup>208</sup>

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<sup>205</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 761D-G.

<sup>206</sup> 1990 2 SA 862 (AD) 890C-E.

<sup>207</sup> *Traub v Administrator, Transvaal and Others* 1989 2 SA 396 (TPD) 420D-E.

<sup>208</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 758D-F.

This legal position is despite the fact that the *Traub* case was decided under apartheid, where the judges were constrained by parliamentary sovereignty and a legal culture which was formalistic in nature. In various judgments under the Interim Constitution, High Courts, the Supreme Court of Appeal and the Constitutional Court failed to engage in transformative constitutionalism in reforming administrative law, by recognising substantive legitimate expectation.

## CHAPTER 3

### TRANSFORMATIVE CONSTITUTIONALISM AS THE UNDERLYING PARADIGM OF THE NEW SOUTH AFRICAN CONSTITUTIONAL ORDER

#### 3.1 Introduction

Transformative constitutionalism is the underlying paradigm for reforming administrative law in South Africa, because of the transformative nature of the Preamble to the 1993<sup>209</sup> and 1996<sup>210</sup> Constitutions. The Preamble to the 1993<sup>211</sup> Constitution began by acknowledging the existence of God in the following words:

*In humble submission to Almighty God,*

*We, the people of South Africa declare that-*

*WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.*

To achieve this goal, representatives of all political formations were mandated to adopt a new Constitution, in line with the thirty-four constitutional principles.<sup>212</sup> This was achieved by giving the mandate to an elected Constitutional Assembly to draw up a final Constitution. This was indeed a break from the past, because for the first time, the nationalist government accepted and recognised the injustices of the past, and a new dawn was further ushered in by the 1996 Constitution. This is seen by the Preamble to the 1996 Constitution, which committed all South Africans to a democratic and open society in which government is based on the will of the people, and every citizen is equally protected by the law. Therefore, the 1996<sup>213</sup> Constitution Preamble reads, in part, as follows:

*We, the people of South Africa,*

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<sup>209</sup> Act 200 of 1993.

<sup>210</sup> *Constitution of the Republic of South Africa.*

<sup>211</sup> Act 200 of 1993.

<sup>212</sup> Constitutional principles, served as a guide to the constitution-making bod's with drafting the final Constitution. The Constitutional Principles are highlighted by the preamble to the Interim Constitution as "a solemn pact".

<sup>213</sup> Preamble to the *Constitution of the Republic of South Africa.*

*Recognise the injustice of our past;*

*Honour those who suffered for justice and freedom in our land;*

*We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-*

*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*

*Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.*

This Constitution, following the footsteps of the Interim Constitution, aims to establish a society which is based on democratic values. These values enable the courts to be engaged in transforming the legal culture. In so doing, the need to recognise substantive legitimate expectation in South Africa will be achieved, because the break with the past made a constitutional scholar to come to the following conclusion:

The Constitution is an engagement with a future that it will partly shape; and has been welcomed as a document with a transformative vision looking at the advancing social justice and substantive equality.<sup>214</sup>

This is further informed by the constitutionalisation of administrative law in terms of Sections 24<sup>215</sup> and 33<sup>216</sup> of the Constitution. This optimistic outlook is as a result of the transfer of power from the white regime to the people as a whole, and the complete eradication of the system of apartheid.<sup>217</sup> The basic principles underpinning this new order are democracy, equality, human dignity, supremacy of the Constitution, rule of law (constitutionally entrenched under the final Constitution), separation of powers, and the Bill of Rights. The new values and notions of the new constitutional order are democracy, the Bill of Rights, supremacy of the Constitution, equality, human dignity, freedom, and constitutionalisation of administrative justice.<sup>218</sup> These values are discussed later in this study, in order to provide a seamless progression to the following chapters.

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<sup>214</sup> Klare 1998 SAJHR 150.

<sup>215</sup> Section 24 of Act 200 of 1993.

<sup>216</sup> Section 33 of the *Constitution of the Republic of South Africa*.

<sup>217</sup> This was contained in the Record of Understanding dated 26 September 1992. This ANC strategic perspective was adopted by the National Executive of the African National Congress, which was held on 25 November 1992.

<sup>218</sup> These values are found both in the interim and final Constitution. The rule of law was not included as a fundamental value under the interim Constitution. However, this is found in the final Constitution.

This chapter begins by tracing the origins and evolution of constitutionalism, from the indigenous people of South Africa up to present-day constitutionalism in the South African legal system. The chapter also shows how the various South African Constitutions, within which constitutionalism finds an expression, developed over many years. Lastly, it lays the foundation for transformative constitutionalism as the underlying paradigm of the new South African constitutional order. This new order fosters change, which is both inevitable and intrinsically important in providing a vehicle for creative renewal, something which is of profound benefit to mankind. Therefore, constitutional change and constitutional law are not synonymous. Constitutional change comes before formal legal changes, while legal changes invite constitutional changes. This study advocates both constitutional and legislative changes for the recognition of substantive legitimate expectations, in order to substantiate the position of the legitimate expectations doctrine as a new ground for judicial review in South African administrative law.

The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with particular reference to recognising the role of substantive legitimate expectations in reforming administrative law. The courts have to reject the notion of fettering with the other arm of government, which is, in this case the executive, in favour of transformative constitutionalism based on the values of the Constitution. Transformation takes place when a court fully overturns an established doctrine, but does not announce that it has done so.<sup>219</sup>

### **3.1.1 *Historical method***

Constitutionalism is an important issue in the developing world and democratic governments.<sup>220</sup> However, constitutionalism found its roots in the indigenous laws of the inhabitants of South Africa before the arrival of white settlers in 1652. In the South African context, the challenge was to achieve constitutionalism, and to limit the power of the one-party dominated state.

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<sup>219</sup> Eisenberg *The Nature of Common Law* 132.

<sup>220</sup> Thompson "Constitutionalism in the South African Republics" 49-72.

### **3.1.2 Roman-Dutch law**

South African law has its origin in Roman-Dutch common law. "Common law" is historical law, because it is distinguished from other forms of law which are in force in South Africa. English law was not completely replaced by Roman-Dutch law after the last British occupation of the Cape in 1806, and the growth of Britain's colonial power in South Africa.<sup>221</sup>

### **3.1.3 The development of South African law**

South African law developed from Roman-Dutch law and English law. This process was by means of customs, and has not remained static since then. It incorporated English legal influence by way of the principles of administration of justice and judicial precedent.<sup>222</sup> As the focus of this study is on both administrative and constitutional law, it is not necessary to emphasise other branches of law, but to rather focus specifically on the influence of English constitutional and administrative law. This approach is because of the constitutional framework of the past and present. Legislation, as the main source of law, is intertwined with the constitutional structure of government.

### **3.1.4 The definition of transformation**

From the onset, the word 'transformation' needs to be explained, so that the context in which it is used can be fully understood. To transform means to change. The *Oxford South African Concise Dictionary* defines transformation as the post-apartheid process of social and political change to establish democracy and social equality.<sup>223</sup>

Therefore, the South African legal system was transformed from Roman-Dutch law to English law, and to the present South African legal system. It is perhaps the idea behind the Preamble of both the interim and final Constitution, as well as Section

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<sup>221</sup> Du Plessis *An introduction to law* 19-21.

<sup>222</sup> Du Plessis *An introduction to law* 52-54.

<sup>223</sup> *Oxford South African Concise Dictionary*.

35(1)<sup>224</sup> of the Interim Constitution and Section 39 of the final Constitution, that as a theory of the new South African legal order, the interpretation of the Constitution must be transformative. As indicated above the word "transformation" implies a change from a state of affairs that existed previously.<sup>225</sup> One example is the fact that the South African legal system is no longer under parliamentary supremacy. In this context, transformation would mean that the present Constitution must be interpreted in a progressive way, taking into account the injustices of the past.

## 3.2 Constitutions

### 3.2.1 *Definition of constitutions*

A constitution is used as the original document of a nation, which determines the boundaries of state power. Mangu, in his unpublished doctoral thesis, says that it is uncertain when the concept "constitution" was used for the first time. According to him, it was the English scholars who first introduced the term "constitution" in its current form and meaning.<sup>226</sup> In the time of the Roman Empire, the word "constitution",<sup>227</sup> in its Latin form, became the technical term for acts of legislation passed by the emperor. Another scholar, McIlwain, argues that the term "constitution" may have been new in 1610, but the idea that it conveys is one of the oldest in the history of constitutionalism.<sup>228</sup>

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<sup>224</sup> Section 35(1) of the Interim Constitution. This section says that in interpreting the provisions of the Bill of Rights, a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law, and may have regard to comparable foreign case law.

<sup>225</sup> Wesson and Du Plessis 2008 *SAJHR* 189.

<sup>226</sup> Mangu *The road to constitutionalism and democracy in Post-Colonial Africa* 163. He argues that in 1653, just after the arrival of Jan van Riebeeck in the Cape, Samuel K. Gardiner defined the Constitution as "the instrument of government". He goes on to quote Emmerich Vattel, who wrote in 1758 that the Constitution is the "fundamental legislation which determines how public authority must be exercised is what forms the constitution of the State".

<sup>227</sup> McIlwain *Constitutionalism* 23.

<sup>228</sup> McIlwain *Constitutionalism* 23.

In South Africa, the "Constitution is defined by various constitutional scholars as the founding document of a nation as the authority of the state is derived from."<sup>229</sup>

Rautenbach and Malherbe define a "Constitution as a law that contains the most important rules of law in connection with the constitutional system of a country. It confers government authority on particular institutions and regulates and limits its powers and constitutions guarantees and regulates the rights and freedoms of the individual in a bill of rights."<sup>230</sup>

In *S v Makwanyane and Another*,<sup>231</sup> the Constitutional Court defined the "Constitution" as follows:

*A constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the Courts, as well as the fundamental rights of every person which must be respected in exercising such powers.*

The "Constitution"<sup>232</sup> of the Republic of South Africa is the supreme law, as are many other constitutions of other countries in the world. It became the supreme law after the adoption of the Interim Constitution.<sup>233</sup>

### **3.2.2 Understanding constitutionalism**

There is a vast difference between a constitution and constitutionalism. Scholars of constitutional law do not provide us with only one definition of constitutionalism. In this regard, Currie and De Waal<sup>234</sup> define constitutionalism as the theory of law. They state that constitutionalism prescribes what a constitution and constitutional law should do, as opposed to describing what a particular constitution does. Constitutionalism informs South Africans that the Constitution structures and weakens state power and, last but

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<sup>229</sup> De Vos, Freedman and Brand *South African constitutional law in context* 1. De Vos is quick to point out that not all constitutions are written. He gives an example of the British Constitution.

<sup>230</sup> Rautenbach and Malherbe *Constitutional Law* 20.

<sup>231</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC) at 405 para 15.

<sup>232</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>233</sup> Act 200 of 1993.

<sup>234</sup> Currie and De Waal *The Bill of Rights Handbook* 8-9.

not least, constitutionalism gives direction to a weakened government, in contrast to the arbitrary rule of autocracy or a dictatorship.<sup>235</sup>

Constitutionalism is usually identified with a written Constitution, but not all constitutional texts are committed to the principles and goals of constitutionalism.

Rosenfeld, in his book entitled *Constitutionalism, identity, difference, and legitimacy*, explains that modern constitutionalism imposes requirements such as limited government, adherence to the rule of law, protection of fundamental interests, and compliance with the demands of abstract equality, which are bound to circumscribe the number of possible legitimate orderings of relevant identities and differences.<sup>236</sup> In the same vein, he emphasises the importance of the relationship between a constitution and constitutionalism, because constitutions lay the foundation for the institutionalisation of the main requirements for constitutionalism.

On the other hand, Carl J Friedrich<sup>237</sup> argues that as far as he is concerned, constitutionalism fails to differentiate between a constitutional and non-constitutional government, and "constitutionalism as the 'basic law' does not help much, as it traces the origin of law to the power of government".<sup>238</sup> Constitutionalism can be useful to the citizens through popular participation, because the citizens are the guarantors of constitutionalism.<sup>239</sup> To address Friedrich's problem, Rosenfeld identified the different forms of constitutionalism, which are described below.

### **3.2.3 Forms of constitutionalism**

Rosenfeld<sup>240</sup> understands the forms of constitutionalism as follows:

- (a) Present day constitutionalism is centred on sovereignty. Citizens of a country are the guardians of 'sovereignty' and the will of the citizens is the

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<sup>235</sup> Currie and de Waal *The Bill of Rights Handbook* 8.

<sup>236</sup> Rosenfeld *Constitutionalism, identity, difference, and legitimacy* 14.

<sup>237</sup> Gauba "Constitutionalism in a changing perspective" 4 quoted from Friedrich "Constitutions and Constitutionalism".

<sup>238</sup> Gauba "Constitutionalism in a changing perspective" 4.

<sup>239</sup> Kibwana *Constitutionalism in East Africa* vii.

<sup>240</sup> Rosenfeld *Constitutionalism, identity, difference, and legitimacy* 40-41.

source of authority. That is, the citizen directs and controls government, not the other way around.

- (b) A constitutionalist constitution is prescriptive. It is an embodiment of law, and it is the supreme law. The Constitution can only be legitimate if it is constitutionally proclaimed.
- (c) Constitutionalism requires a commitment to political democracy and representative government. Constitutionalism excludes government by decree, unless the Constitution itself gives permission for this.
- (d) Thus, a government which is bound by the Constitution is characterised by the following: limited government; separation of powers or other checks and balances; civilian control of the military; police governed by law and judicial control; and an independent judiciary.
- (e) Furthermore, constitutionalism expects government to honour and maintain individual rights, which are generally those rights recognised by the Universal Declaration of Human Rights. Rights may be subject to some limitations in the public interest, but such limitations have limits themselves.
- (f) Constitutional governance includes institutions to monitor and ensure respect for the constitutional blueprint, limitations on government, and individual rights.<sup>241</sup>
- (g) Modern constitutionalism means honour for self-determination, as well as the right of people to choose, change or terminate their political affiliation.

### ***3.2.4 Historical background to constitutional supremacy***

The Union of South Africa came into existence in 1910. This Constitution had the hallmarks of the English law.<sup>242</sup>

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<sup>241</sup> Our Constitution makes provision for state institutions supporting constitutional democracy. This is provided in section 181-194. State institutions supporting constitutional democracy.

<sup>242</sup> Act 1909. This Constitution established the Union of South Africa. South Africa was divided into four provinces.

The Constitution<sup>243</sup> 1961,<sup>244</sup> 1983,<sup>245</sup> 1993<sup>246</sup> and 1996<sup>247</sup> Constitution followed. The only significant change during the apartheid rule, in the eyes of the apartheid government, was the 1983 Constitution. South Africa moved to a constitutional state after the unbanning of liberal movements and the release of political prisoners in 1990 by the apartheid government.<sup>248</sup> This was not an easy move, however, because of the challenges which faced the negotiations.

The African National Congress (ANC) produced a document in 1955 known as the Freedom Charter. This document set forth the face of the future of South Africa. This led to the need for a different Constitution with a Bill of Rights.<sup>249</sup> The following is a brief synopsis of the timeline of the New Constitution in South Africa:

- 1986: South African government instructed the South African Law Commission to launch an investigation into the group rights and human rights which must be incorporated into the future Bill of Rights.<sup>250</sup>
- 1988: Constitutional guidelines for a democratic South Africa emanated from the ANC.<sup>251</sup>
- 1989: A number of South African academic lawyers and leading members of the ANC attended a conference on constitutional matters and fundamental rights.

The conference, which was held in February 1989 in Zimbabwe, resolved three main issues. These were the following:

- The need for a new constitutional order,

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<sup>243</sup> Constitution of 1909.

<sup>244</sup> Act 1961. This Constitution constitutionalised apartheid in 1961 and South Africa became the Republic of South Africa.

<sup>245</sup> Act 1983. This Constitution further racialised South Africa by establishing three separate houses.

<sup>246</sup> Act 200 of 1993. The interim Constitution was the result of a lengthy and difficult process of negotiation between the representatives of the apartheid state and its opponents. This Constitution was a break away from the apartheid Constitutions. It was a transitional Constitution. One of its primary purposes was to set out the procedures for the negotiation and drafting of the final Constitution.

<sup>247</sup> *Constitution of the Republic of South Africa*. The 1996 Constitution was drafted and adopted by an elected Constitutional Assembly. The Constitutional Court was required to certify the draft text of the final Constitution.

<sup>248</sup> Van Wyk *et al Rights and Constitutionalism* 131. FW de Klerk's speech changed the context of South African politics on 2 February 1990. He accepted a Bill of Rights, unbanned all the political parties, and released political prisoners.

<sup>249</sup> Van Wyk *et al Rights and Constitutionalism* 136.

<sup>250</sup> Project 58: Group and Human Rights Working paper 25 (1989).

<sup>251</sup> Corder and Davis 1989 *SALJ* 633.

- A justiciable Bill of Rights, and
- An independent judiciary.

### **3.3 The status of South Africa in 1990**

During this period in South Africa, no substantial change had taken place, despite the agreement reached at the Conference held in Zimbabwe on the new path for South Africa. The National Party led the government, and its legal system remained entrenched in "parliamentary sovereignty,<sup>252</sup> a dominant executive, indiscernible separation of powers, underdeveloped political accountability, no Bill of Rights, and a racist base". However, this did not last long after the resolution of the Conference. It took a period of a year for the South African government, under the leadership of De Klerk, to unban political parties and release all political prisoners, including Nelson Mandela, who was released on 10 February 1990. After this heroic political change, negotiations were set in motion by both the ANC leadership and the government of South Africa.

#### **3.3.1 *Groote Schuur Minute – 4 May 1990***

The first formal meeting between the South African government and the ANC was held in Cape Town on 4 May 1990. The Groote Schuur Minute was the foundation of various agreements, which became the landmarks of the process leading to the eventual adoption of the 'interim' Constitution at the end of 1993. Its significance lay in the following elements:

- (a) The definition of political offences and issues relating to the release of political prisoners;
- (b) Immunity for political offences;
- (c) Review by the Nationalist government of security measures.<sup>253</sup>

The Groote Schuur Minute was followed by the Pretoria Minute, which was held on 6 August 1990.

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<sup>252</sup> Van Wyk *et al Rights and Constitutionalism* 132.

<sup>253</sup> Van Wyk *et al Rights and Constitutionalism* 137.

### **3.3.2 Pretoria Minute – 6 August 1990**

The government and the African Congress held talks on 6 August 1990. During these talks, a commitment was once again made to the Groote Schuur Minute, as discussed in paragraph 3.3.1 above. The importance of the Pretoria Minute to this study lies in the fact that it set negotiations in motion, which led to a paradigm shift to a new Constitution. At these talks, a final report of the Working Group on Political Offences dated 21 May 1990, as amended, was accepted by the National Party (NP) and African National Congress (ANC). The meeting had instructed the Working Group on Political Offences to draw up a plan for the release of ANC-related prisoners and the granting of indemnity to people in a phased manner, and to report back before the end of August 1990.<sup>254</sup> In turn, the ANC agreed to suspend all armed activities with immediate effect. This concession was done in the interest of moving as speedily as possible towards a negotiated new legal order.<sup>255</sup>

### **3.3.3 DF Malan Accord 12 February 1991**

This was a report by the Working Group under paragraph 3 of the Pretoria Minute.<sup>256</sup>

The DF Malan Accord produced the National Peace Accord, which was signed on 14 September 1991. Again, what is important to this study is a chapter on democracy and fundamental rights. This set in motion the negotiations for a new Constitution. These negotiations came to be known as the Convention for a Democratic South Africa (CODESA). What follows is a short discussion of the purpose and achievements of CODESA.

## **3.4 Convention for a Democratic South Africa (CODESA)**

The first meeting of CODESA took place on 21 December 1991. The purpose of this meeting was to negotiate for a democratic South Africa. The overview provided here is historical, rather than a discussion of the failures or successes of CODESA.

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<sup>254</sup> Paragraph 2 of the Pretoria Minute 6 August 1990.

<sup>255</sup> Paragraph 3 of the Pretoria Minutes which was held on the 6 August 1990.

<sup>256</sup> The DF Malan Accord 12 February 1991 document. The Working Group was established under paragraph 3 of the Pretoria Minute.

However, CODESA did contribute to the new South African legal order, because it was the first formal public meeting of the apartheid government and the rest of the political parties, as well other minority white parties, including Homeland parties. The outcome of this formal meeting was the establishment of five working groups. Of particular significance for this study is Working Group 2, which dealt with constitutional principles. These constitutional principles will be briefly discussed later in this study, under the section on the Interim Constitution.

The second meeting of CODESA was held on 15 and 16 May 1992, where the various groups reported their successes or failures.<sup>257</sup> CODESA did not achieve much besides allowing the National Party Government, led by FW de Klerk, and the African National Congress, led by Nelson Mandela, to meet in secret. The outcome of this meeting produced what was known as the Record of Understanding, dated 26 September 1992. Of particular significance to the discussion of transformative constitutionalism as the underlying paradigm of the new constitutional order is an agreement that the:

*... new Constitution should be drafted by an elected constitution-making body, that there would be constitutional continuity, and the constitution-making body would serve as an interim or transitional Parliament.*<sup>258</sup>

This is as far as CODESA took the negotiations for a new constitutional order. CODESA was followed by the Multi-Party Negotiating Process.

### **3.4.1 Record of Understanding 26 September 1992**

The Record of Understanding was concluded on 26 September 1992, after the collapse of the CODESA negotiations. The agreement which came from this Record of Understanding included the following:

- The release of 400 prisoners;
- Hostels would be fenced;

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<sup>257</sup> Van Wyk *et al Rights and Constitutionalism* 139.

<sup>258</sup> Van Wyk *et al Rights and Constitutionalism* 139.

- The carrying and display of dangerous weapons (mostly by Inkatha Freedom Party members) at public gatherings would be prevented by the Government of the day within a specific time frame.<sup>259</sup>
- One of the agreements was that the then government of the Republic of South Africa and the ANC, which is now the governing party, agreed that there was a need for a democratic constitutional assembly/constitution-making body, and that for such a body to be democratic, it must be representative of all political parties involved in the negotiations. On 18 February 1993, the African National Congress and the Nationalist government proposed the sharing of power, as well as the establishment of a five-year interim government of national unity.

### **3.4.2 Multi-Party Negotiating Process**

The Multi-Party Negotiating Process (MPNP) was the body which took over after CODESA had failed. It was established after the Record of Understanding. The MPNP produced the Interim Constitution and other legislation aimed at facilitating the transition to democracy. The Negotiating Council appointed seven technical committees, which emanated from the MPNP and had to deal with the following: fundamental rights, among others, during the transition, constitutional affairs, and the Transitional<sup>260</sup> Council.

### **3.5 Path to the adoption of the Interim Constitution**

The *Transitional Executive Council Act*<sup>261</sup> (TECA) was established by the MPNP. Its purpose was to promote the preparation for and transition to a democratic order in South Africa, and to provide for matters connected therewith. The *Transitional Executive Council Act's*<sup>262</sup> importance lay in its constitutional significance, and in the fact that it was a bridge from one constitutional order (parliamentary sovereignty) to a

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<sup>259</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 7.

<sup>260</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 7.

<sup>261</sup> Act 151 of 1993.

<sup>262</sup> Act 151 of 1993. The purpose of this Act was to promote the preparation for and transition to a democratic order in South Africa. This council had power over all legislative and executive structures at all levels of government in South Africa.

fundamentally new one (constitutional state), where the Constitution became supreme.<sup>263</sup> Section 3 of this Act provided, among others, for the following:

- (5) *by creating and promoting a climate for free political participation by endeavouring to –*
- (i) *Eliminate any impediments to legitimate political activities;*
  - (ii) *Creating and promoting conditions conducive to holding of free and fair elections;*

This election was to be an inclusive election for all citizens of the country, in line with democratic principles.

The TEC facilitated the transition from one constitutional order to a fundamentally different one,<sup>264</sup> which had never been experienced in the Republic of South Africa since the arrival of the white settlers in 1652.

### **3.6 The birth of constitutionalism in South Africa: under the 1993 Constitution**

#### ***3.6.1 Introduction***

The terms 1993 Constitution and Interim Constitution are used interchangeably. The Interim Constitution was adopted on 22 December 1993 and came into operation on 27 April 1994. Du Plessis argues that the Constitution or, at least, the Bill of Rights, is based on a libertarian and liberationist approach.<sup>265</sup> All political parties agreed on 34 constitutional principles, which will bind the constitution-making body's task with the drafting of the final Constitution. What was also common to all political parties was that Chapter 3 of the Interim Constitution would be used as a basis for future development. The researcher will deal with this aspect when discussing the interpretation of the Constitution.

This Interim Constitution was not a product of a democratically elected body, but rather a product of negotiations, which began after the release of political prisoners and the

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<sup>263</sup> Van Wyk *et al Rights and Constitutionalism* 147.

<sup>264</sup> Van Wyk *et al Rights and Constitutionalism* 148.

<sup>265</sup> Du Plessis 1994 *SAPL* 1.

unbanning of liberation movements in South Africa in 1990. It was amended twice before the elections. The Interim Constitution was binding and fully justiciable. It contained a Bill of Rights, became the supreme law, and was fully justiciable.<sup>266</sup> After the 1994 elections, the new Parliament and a Government of National Unity were established and began to function in accordance with the Interim Constitution,<sup>267</sup> which came into force in 1994. This represented a major shift from the previous governments of the Republic of South Africa, which were oppressive for Blacks, in general and Africans in particular.

In part, the Preamble to the Interim Constitution reads as follows:

*In humble submission to Almighty God,*

*We, the people of South Africa declare that –*

*WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedom.*

Section 1 of the Interim Constitution provides that the Republic of South Africa shall be one sovereign state.

### **3.6.2 Characteristics of the 1993 Constitution**

This Constitution introduced a new constitutional order, by declaring the Constitution to be the supreme law of the Republic.<sup>268</sup> It applied to all branches and levels of government.<sup>269</sup> It took away the principle of parliamentary supremacy, which was the cornerstone of South African constitutionalism. One of the immediate features of this Constitution is the importance of a new democratic, constitutional state based on equality, fundamental rights and national unity. Van Wyk observed as follows:

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<sup>266</sup> Currie and De Waal *The Bill of Rights Handbook* 6.

<sup>267</sup> Currie and De Waal *The Bill of Rights Handbook* 6.

<sup>268</sup> Section 4 of the Interim Constitution. It says that "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

<sup>269</sup> Section 2 of the 1993 Constitution.

*First and foremost, it is the symbol of a new, apartheid-free South Africa; at the same time, it forms the governmental bridge between the past and the future; and the constitutional basis of writing of a new Constitution.<sup>270</sup>*

This was the new path for millions of South Africans, especially black people, and was the new paradigm on which the New South Africa was to be based. The key dynamics of this Constitution are contained in its preamble, which refers to the fundamental rights and values, including the supremacy of the Constitution, equality, freedom, human dignity, separation of powers and administrative justice, and the independence of the judiciary. In part, this preamble states the following:

*The new constitutional state in which all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.*

Although the Interim Constitution did not specifically refer to the separation of powers, Constitutional Principles VI in Schedule 4 of the Interim Constitution required the inclusion of the separation of powers in the final Constitution.<sup>271</sup> Constitutional Principle IV provides that:

*There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.*

Section 96(1)<sup>272</sup> of the Interim Constitution provides that the judiciary of the Republic shall vest in the courts established by this Constitution and any other law.

### ***3.6.3 Transformative constitutionalism and the position of the judiciary under the 1993 Constitution***

Section 96(2) of the Interim Constitution provides that the judiciary shall be independent, impartial and subject only to this Constitution and the law. Section 98 of this Constitution dealt with the jurisdiction of the Constitutional Court. This section established a Constitutional Court, consisting of a President and 10 other judges appointed in terms of Section 99 of the Constitution. This Constitutional Court shall

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<sup>270</sup> Van Wyk *et al Rights and Constitutionalism* 158. It represented a major break with the old order of parliamentary sovereignty and its particular manner of legislative drafting.

<sup>271</sup> Quinot (ed) *Administrative justice in South Africa* 35.

<sup>272</sup> Section 96(1) of the 1993 Constitution.

have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including<sup>273</sup> any violation or threatened violation of any fundamental right entrenched in Chapter 3; any dispute over the constitutionality of any executive or administrative act or conduct, or threatened executive or administrative act or conduct, of any organ of state.<sup>274</sup>

The recognition of the substantive legitimate expectations must be in line with the provision of the Constitution, because administrative law has to be realigned with the principles of the new Constitution. Administrative law fits into the new constitutional order in terms of Section 24 of the Constitution. This is in view of the transformative nature of the South African Constitution because, in the democratic South Africa, administrative law was reformed from common law to an inclusion of an administrative justice<sup>275</sup> clause in the Constitution. This includes further inquiry into the constitutionality of any law, including an act of Parliament, irrespective of whether such law was passed or made before or after the commencement of the interim Constitution, in terms of Section 21 of the Constitution.

Section 35 of the 1993 Constitution also becomes relevant in transformative constitutionalism, since it places a new obligation on the judiciary. This obligation requires a court of law to promote the values which underlie an open and democratic society based on freedom, and equality shall, where applicable, have regard to the public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign law.<sup>276</sup> Section 35(3) further states that in interpreting any law by the court, and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter 3 of the Constitution.<sup>277</sup>

In *Qozeleni v Minister of Law and Order*,<sup>278</sup> the applicant issued a summons out of the Grahamstown Magistrate's Court against the first respondent, claiming damages

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<sup>273</sup> Section 98(1) of the 1993 Constitution.

<sup>274</sup> Section 98(2)(d) of the 1993 Constitution.

<sup>275</sup> Hoexter "Administrative justice and the enforcement of the Constitution" 128.

<sup>276</sup> Section 35(1) of the 1993 Constitution.

<sup>277</sup> Section 35(3) of the 1993 Constitution.

<sup>278</sup> 1994 3 SA 625 (EC).

arising from alleged unlawful arrest and detention, as well as an assault upon him, by members of the South African Police. This matter was defended and went to trial. At the start of the proceedings, the applicant raised a point in *limine* to compel disclosure of the contents of the police docket, but this application was not granted by the court.

The court identified two issues to be determined:

- (i) *Who are the people who must interpret the Constitution?*
- (ii) *The effect of the supremacy of the Constitution on the interpretation of the Constitution.*

Froneman's opinion is that the Constitution must be examined with a view to extracting from it those principles or values against which such law or conduct can be measured. This, he said, is found in the Preamble and Section 35 thereof.<sup>279</sup> He suggested that the Constitution must be interpreted in a way which makes it a living document for all citizens of the country, and not only for the chosen few who deal with the courts of law.<sup>280</sup> For transformative constitutionalism to succeed as a new paradigm for a judicial order, the court observed as follows:

*For the Constitution, and particularly Chapter 3 thereof, however, to fulfil its purpose it needs to become, as far as possible a living document, and its contents a way of thinking, for all citizens of this country.*<sup>281</sup>

In light of the above, the researcher argues that transformative constitutionalism is a vehicle for reforming administrative law through substantive legitimate expectation.

The court stated that the previous constitutional system of South Africa was the fundamental "mischief" to be remedied by the new Constitution.

*S v Makwanyane and Another*<sup>282</sup> was one of the first constitutional cases that gave the Constitution its place in the South African legal system, as well as showing how the courts should go about interpreting the values which underlie the new constitutional order, after the two constitutional cases which were set to certify the 34 Principles agreed upon in the Interim Constitution. These Principles were to be

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<sup>279</sup> 1994 3 SA 625 (EC) at 633H-I.

<sup>280</sup> 1994 3 SA 625 (EC) at 633C-D.

<sup>281</sup> 1994 3 SA 625 (EC) at 637H.

<sup>282</sup> 1995 3 SA 391 (CC) para 15.

interpreted holistically, and in a manner that was not too technically rigid. These two cases mentioned above were *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*.<sup>283</sup> In this regard, the Constitutional Court said the following:

*The Constitutional Principles must be applied purposefully and theologically to give expression to the commitment to 'create a new order' based on 'a sovereign and democratic constitutional State' in which 'all citizens' are 'able to enjoy and exercise their fundamental rights and freedoms'.*

In this case, the Constitutional Court found that the text of the final Constitution does not comply with the structural requirements, and was not compatible with the Constitutional Principles on nine grounds.<sup>284</sup>

The Constitutional Court, as the highest court in the land, has an obligation to develop the body of law that underpins the values and principles underlying the Constitution. After this first judgment on the 34 Constitutional Principles, the Constitutional Assembly met and changed the Constitution, as directed by the Constitutional Court judgment.

The final Constitution was certified in the subsequent judgment in the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*. In this case, the Constitutional Court found that the final Constitution complied with the 34 Constitutional Principles.

After the judgments of these two cases, the Constitutional Court in the *Makwanyane* case had been leading in ensuring a culture of respect for human rights and the supremacy of the Constitution.<sup>285</sup>

In this case, the two accused were convicted in the Witwatersrand Local Division of the Supreme Court (renamed The High Court of South Gauteng: Johannesburg) on four counts of murder, one count of attempted murder, and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder, and to long terms of imprisonment on the other counts. The accused persons

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<sup>283</sup> 1996 4 SA 744 (CC) para 34.

<sup>284</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 482.

<sup>285</sup> Olivier "The courts' powers under the Constitution" 70.

appealed to the Appellate Division of the Supreme Court against their convictions and sentences. The Appellate Division dismissed the appeals against the convictions, concluding that the circumstances of murder were such that the accused should receive the heaviest sentence permissible according to law.

Two legal issues came to the fore in this case. Firstly, Section 277(1)(a) of the *Criminal Procedure Act* 51 of 1977 prescribed that the death penalty is a competent sentence for murder, and secondly, it was questioned whether this section was not in conflict with the provisions of Sections 9 and 11(2) of the Constitution. In this case, the court was faced with two other challenges. These challenges were caused by the legislature not stating whether or not the death sentence was allowed under the new Constitution.

In the researcher's view, this challenge also applies to Section 24(b) of the Constitution. Section 24(b) of the 1993 Constitution states as follows:

*Every person shall have the right to-  
Procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened.*

This right was left to the courts to interpret and develop, as the courts did in the *Makwanyane* case with the death sentence. The drafters of the Constitution did not state whether the legitimate expectations right of every person is procedural or substantive. This aspect is explored in more detail below.

### **3.7 Reforming administrative law as a paradigm shift of the new constitutional order**

The journey of administrative law from parliamentary supremacy before 1994 to the realisation of the constitutional ideal in 1994, although not easy, was in constitutional terms one of the first reforms of administrative law in South Africa. Furthermore, the recognition of the substantive legitimate expectations doctrine in South Africa is an appropriate vehicle for the facilitation of the reform of administrative law in South Africa.

## Administrative Justice under the 1993 Constitution

Section 24 of the Constitution reads as follows:

*Administrative justice*

*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) Procedural 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.*

Therefore, a successful Constitution has an inherent flexibility, which allows it to adapt to changing circumstances, and thus be a vehicle for the reform of administrative law. It is therefore the non-recognition of the substantive legitimate expectations doctrine that has brought the issue of reforming administrative law to the foreground. The South African Constitution is value-based in the democratic order. The Constitution of South Africa is not a neutral document that merely regulates state power, but is a document that aims to impose a normative value-based system in South Africa. Pending cases which dealt with administrative law during the operation of the new Constitution were governed by item 17 of the Sixth Schedule to the new Constitution.<sup>286</sup>

The case of *Commissioner of Customs and Excise and Others v Container Logistics (Pty) Ltd*<sup>287</sup> was concerned with the validity of an administrative decision taken at the time of the Interim Constitution. The Supreme Court of Appeal<sup>288</sup> held, on three occasions, that where the grounds for review would constitute an infringement on Section 24 of the Interim Constitution, it was doubtful whether it retained a parallel jurisdiction under the common law to determine whether it was valid or not.

However, the South African Constitution is different. It was written in response to the social, economic and political history of South Africa, and it is often described as a

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<sup>286</sup> Item 17 of the Sixth Schedule of the 1996 Constitution.

<sup>287</sup> 1999 3 SA 771 (SCA).

<sup>288</sup> *Rudolph v Commissioner for Inland Revenue* 1996 2 SA 886 (A) at 889B-C.

transformative constitution, a document that is committed to social, political, legal and economic transformation.<sup>289</sup>

The Interim Constitution shifted constitutionalism and, with it, all aspects of public law, from the realm of common law to the prescripts of a written Constitution, which is the supreme law. South African administrative law is based on the Constitution and legislation. Du Plessis and Corder argued that Section 24 of the Interim Constitution does not purport to constitutionalise judicial review in its fullness, and the courts remain empowered at common law to develop new grounds of review.<sup>290</sup> The researcher will argue that in the present context, substantive legitimate expectations would present a new ground. Common law is a theory of judicial adjudication. The development of administrative law in South Africa was influenced by the developments in England, and the courts of South Africa have frequently sought guidance from English law in this regard.

Under these circumstances, Section 24(b) will have a "substantial impact on the common-law version of administrative law".<sup>291</sup> Section 24(b), according to the argument of Du Plessis and Corder, requires, at the very least, compliance with the rules of natural justice, and could include the establishment of a "general duty to act fairly" where rights or legitimate expectations are affected or threatened. The focus is on administrative law because it plays an important role in the implementation and enforcement of certain constitutional rights, especially those rights that depend heavily on various official actions.<sup>292</sup> Section 24(b)<sup>293</sup> begins with the assumption that "legitimate expectations" fall somewhere in between a "right and an interest" as a legal concept,<sup>294</sup> though a lot will depend on how courts interpret "interest". Legitimate expectations, whether procedural or substantive, entitle a person to relief.<sup>295</sup>

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<sup>289</sup> Klare 1998 *SAJHR* 146-188; Chaskalson 2000 *SAJHR* 193-205.

<sup>290</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 170.

<sup>291</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 170.

<sup>292</sup> Hoexter "Administrative justice and the enforcement of the Constitution" 127.

<sup>293</sup> Section 24(b) of the 1993 Constitution.

<sup>294</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 167.

<sup>295</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

Du Plessis and Corder understand that the meaning of Section 24(b)'s words will vary according to the context:

*Legitimate expectations imply, at the minimum, compliance with the rules of natural justice and could be taken to establish a 'general duty to act fairly', in a procedural sense, in our law, where rights or legitimate expectations are affected or threatened.*<sup>296</sup>

In essence, this means, in the researcher's view, that depending on the remedy that a litigant seeks, an appropriate legitimate expectation must be applied. Section 24 did not complete the judicial review under the 1993 Constitution, in its formative stage, and the courts remain empowered at common law to develop new grounds of review. The new ground, in the researcher's view, is the substantive legitimate expectations doctrine. The researcher argues that such duty<sup>297</sup> falls within the courts' power in terms of Section 35(3) of the Constitution.

In *Du Preez and Another v Truth and Reconciliation Commission*,<sup>298</sup> the Commission of Truth and Reconciliation was established by the *Promotion of National Unity and Reconciliation Act*.<sup>299</sup> The Act was passed pursuant to a direction in the post-amble to the *Constitution of the Republic of South Africa*<sup>300</sup> that Parliament should pass a law providing for the mechanisms, criteria and procedures, including tribunals, through which amnesty in respect, *inter alia*, of gross violations of human rights arising from the conflicts of the past shall be dealt with. The respondents were notified in terms of Section 30 of this Act that a witness was to testify at a hearing before the Human Rights Violation Committee of the Truth and Reconciliation Commission (the appellant), and that such witness would make allegations of human rights violations against the respondents.

In part, the judgment by Friedman in the Cape Provincial Division was to the effect that rules of justice and, in particular, the *audi alteram partem* rule, would apply if persons, at a hearing on alleged gross human rights violations, are given an

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<sup>296</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 169.

<sup>297</sup> Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 170. See De Ville 1994 SAJLP 287-312.

<sup>298</sup> 1997 3 SA 204 (SCA) 231.

<sup>299</sup> Act 34 of 1995.

<sup>300</sup> Act 200 of 1993 (hereafter the Interim Constitution).

opportunity to submit representations to the Commission or the Committee, or give evidence at a hearing after the evidence of the witness has been heard, but before a finding is made by the Commission.<sup>301</sup> The court went further to state that Sections 23 and 24 of the Constitution do not confer those rights on respondents.<sup>302</sup> With regard to Section 24, the court was referring to Section 24(b) of the Constitution of 1993. This section states the following:

*Every person shall have the right to –*

*(5) procedurally fair administrative action where any of his or her rights or legitimate expectations are affected or threatened.*

It was on this basis that the respondents appealed to the Supreme Court. Corbett was of the view that the solution to the problems raised by the points of appeal were to be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, to observe the rules of natural justice in certain circumstances, by acting in a fair manner. He was courageous enough to state the following:

*In recent years our law in this sphere has undergone a process of evolution and development, focusing upon that principle of natural justice contained in the maxim audi alteram partem. In this process the classification of decisions of a person or body into quasi-judicial on the one hand and administrative on the other as a criterion for determining the rules of applicability of the rules of natural justice has in effect been abandoned.<sup>303</sup>*

In *Administrator, Transvaal and Others v Traub and Others*,<sup>304</sup> Corbett said the following with regard to the principles of legitimate expectations:

*As I have shown, traditionally, the enquiry has been limited to prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances it is appropriate to include also legitimate expectations.*

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<sup>301</sup> *Truth and Reconciliation, Commission v Du Preez and Another* 1996 3 SA 997 (CPD) para 1007F-H.

<sup>302</sup> *Truth and Reconciliation. Commission v Du Preez and Another* 1996 3 SA 997 (CPD) para 1008D-E.

<sup>303</sup> *Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 231 (SCA) para A-B; *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) at 762-763J; *Administrator of the Province of the Cape of Good Hope and Another v Ikapa Town Council* 1990 2 SA 882 (AD).

<sup>304</sup> 1989 4 SA 731 (A).

The court held that the Commission and the Committee are under a duty to act fairly towards persons implicated, to their detriment, by evidence or information coming before the Committee in the course of its investigations and hearings. Subject to the granting of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly, the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly,<sup>305</sup> and there was nothing in the Act itself which, expressly or by implication, restricted or negated the duty to act fairly. This also underpins the doctrine of substantive legitimate expectations, which will enhance the duty to act fairly by both the executive and administrator.<sup>306</sup> By not accommodating substantive legitimate expectations, the courts are overriding the common law obligation to act fairly, and the Constitutional Court does not follow its own precedents. This is also despite Section 35(3), which places an obligation on the courts that, in interpreting any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the Constitution.

After the approval of the amended text of the *Constitution of the Republic of South Africa*, the final version of the Constitution was signed on 10 December 1996 by the then President of South Africa, and it came into effect on 4 February 1997.<sup>307</sup> It is this Constitution<sup>308</sup> and the *Promotion of Administrative Justice Act*<sup>309</sup> which will form part of the further reform of administrative law in South Africa by transformative theories of the Constitution, in order to recognise substantive legitimate expectations.

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<sup>305</sup> *Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 204 (SCA) at 233B-E.

<sup>306</sup> *Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 204 (SCA) at 235F-G.

<sup>307</sup> De Vos, Freedman and Brand *South African constitutional law in context* 25.

<sup>308</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>309</sup> Act 3 of 2000.

## 3.8 Transformative constitutionalism: reforming administrative law under the 1996 Constitution of the Republic of South Africa

### 3.8.1 Introduction

The 1996 Constitution came into effect on 4 February 1997, and South Africa became a sovereign democratic state founded on the following values:

- (i) *Human dignity*,<sup>310</sup>
- (5) *The advancement of equality, non-racialism and non-sexism*,<sup>311</sup>
- (iii) *The supremacy of the Constitution*<sup>312</sup>
- (iv) *The rule of law*,<sup>313</sup>
- (v) *Universal adult suffrage*,<sup>314</sup>
- (vi) *A multiparty system of democracy in which free and fair elections are held regularly*.<sup>315</sup>

The researcher will deal with these values later in this study. The Constitution became the supreme law,<sup>316</sup> instead of the Parliament. Section 7(2) places both a negative and a positive obligation on the state and, in some cases, extra duties on both private individuals and institutions, to respect, protect, promote and fulfil the rights in the Bill of Rights. The Constitutional Court became the highest court in the land. This Constitution was written in response to the social, economic and political history of South Africa,<sup>317</sup> which is why the researcher speaks of a transformative Constitution. A transformative Constitution means a document that is committed to the norms of social, political, legal and economic transformation.<sup>318</sup>

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<sup>310</sup> Section 10 of the 1996 Constitution. This section states that everyone has inherent dignity and the right to have their dignity Constitution.

<sup>310</sup> Section (c) of the 1996 Constitution.

<sup>311</sup> Section 1(b) of the 1996 Constitution.

<sup>312</sup> Section 1(c) of the 1996 Constitution.

<sup>313</sup> Section (c) of the 1996 Constitution.

<sup>314</sup> Section (d) of the 1996 Constitution.

<sup>315</sup> Section (d) of the 1996 Constitution.

<sup>316</sup> Section 2 of the 1996 Constitution.

<sup>316</sup> Section (d) of the 1996 Constitution.

<sup>317</sup> De Vos *et al South African Constitutional law in Context* 26-27.

<sup>318</sup> De Vos *et al South African Constitutional Law in Context* 27; Klare 1998 *SAJHR* 146-88; Chaskalson 2000 *SAJHR* 193-205 at 199.

A Constitution which is drafted to promote constitutionalism protects the rule of law,<sup>319</sup> guarantees the protection of human rights,<sup>320</sup> and ensures that public policies are informed by the interests of the citizens.<sup>321</sup> One of the most important aspects of the 1996 Constitution is the supremacy of the Constitution. Section 1 of the Constitution states the following:

*The Republic of South Africa is one, sovereign, democratic state founded on the following values: supremacy of the Constitution and the rule of law.*

This is a foundational value. Constitutional supremacy dictates that the rules and principles of the Constitution are binding on all branches of the state and have priority over any other rules made by the government, the legislature, or the courts.<sup>322</sup>

Section 2 of the Constitution states the following:

*This 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.*

Section 172 of the Constitution gives power to the courts to enforce the Constitution. It must do this by declaring any law or conduct that is inconsistent with the Constitution invalid, to the extent of its inconsistency, while Section 165(5) requires that an order or decision of the court binds all persons and organs of state to which it applies. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*,<sup>323</sup> the court observed that there is one system of law. This system of law is made by the Constitution, which is the supreme law, and all law, including the common law, derives its power from the Constitution, and is subject to constitutional control.

In *Mkontwana v Nelson Mandela Metropolitan Municipality and Others; Bisset and Others v Buffalo City Municipality, Transfer Rights Action Campaign and Others v MEC for Local Government and Housing, Gauteng*,<sup>324</sup> the Constitutional Court held

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<sup>319</sup> Section 1(C) of the 1996 Constitution.

<sup>320</sup> Chapter 2 of the 1996 Constitution.

<sup>321</sup> Akiba *Constitutionalism and Society in Africa* 5.

<sup>322</sup> Currie and De Waal *The Bill of Rights Handbook* 9; *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) [62].

<sup>323</sup> 2000 2 SA 674 (CC) para 44.

<sup>324</sup> 2005 1 SA 530 (CC).

the view that the property clause must be interpreted in a manner which seeks to establish a balance between the need to protect private property, on the one hand, and to ensure that property serves the public interest, on the other. This balance needs to be struck in light of the South African history. The inclusion in Section 25 of the provisions of Subsection (5) to (9) of the 1996 Constitution emphasises the importance, in particular, of the need for land reform, as well as the security of land tenure. The court went on to say that "our Constitution is a document committed to social transformation". It insists that the deep injustices of the South African past, characterised by racial dispossession and exclusion, should be addressed and reversed.

In *S v Makwanyane and Another*,<sup>325</sup> the court said that what the Constitution wants to achieve, with differing degrees of intensity, is the shared aspirations of a nation; the values which bind its people. To discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future.

Unlike the Interim Constitution, the final Constitution excluded the right to legitimate expectations. The *Promotion of Administrative Justice Act* was drafted as the result of Section 33(3) of the final Constitution, and legitimate expectations was included in Section 3(1) of *Promotion of Administrative Justice Act*.

The provision on administrative action was applicable from 27 April 1994. However, not much was done by either legal practitioners or academics. During the drafting of the 1996 Constitution, the ANC – which led the Government of National Unity – wanted to do away with the right to administrative justice. This was rejected by opposition parties. Instead, a new right was adopted.<sup>326</sup> This right was suspended for three years or until Parliament approved a statute drafted in order to give effect to such right. This new right is contained in Section 33 of the Constitution. Unlike the 1993 Constitution, the 1996 Constitution was signed into law by President Mandela at Sharpeville on 10

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<sup>325</sup> 1995 3 SA 391 (CC).

<sup>326</sup> Quinot (ed) *Administrative justice in South Africa* 18.

December 1996. This brought an end to the long suffering and bitter struggle to establish democracy in South Africa.

The values underlying South African Constitution form the basis for the recognition of substantive legitimate expectations as a new ground of administrative law reform, and will be discussed fully in Chapter 4. These values are the supremacy of the Constitution, rule of law, equality, separation of powers, and administrative justice.

Transformative constitutionalism contains the values of the Constitution which must be considered by the courts in interpreting the Constitution, and in the adjudication of cases which come before the courts. The supremacy of the Constitution was first introduced by the 1993 Constitution, which signalled the dawn of democracy in South Africa. These values are further contained in the 1996 Constitution.

## CHAPTER 4

### THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATIONS IN SOUTH AFRICAN ADMINISTRATIVE LAW

#### 4.1 The doctrine of substantive legitimate expectations under the 1993 Constitution

##### 4.1.1 Introduction

This chapter gives a comparative overview of the position of substantive legitimate expectation under the 1993 Constitution and the 1996 Constitution. It looks at the nature of the new Constitution; the theoretical basis and values of the Constitution as the basis for the recognition of substantive legitimate expectations; and the constitutionalisation of the judiciary. Further to this, what has this foundational Constitution for the 1996 Constitution achieved in its two-year period of existence? A full account of the failures and achievements of the judiciary in recognising the doctrine of substantive legitimate expectations as a new ground of review will be provided in Chapter 5 below.

Since the ground-breaking decision in England in *Ridge v Baldwin*,<sup>327</sup> the principle of legitimate expectation has been accepted as a ground of review, and similar developments have taken place in South Africa in the form of both procedural<sup>328</sup> and substantive<sup>329</sup> legitimate expectations. The Constitutional Court judgment, decided under the democratic Constitution of the Republic of South Africa, granted substantive legitimate expectations. However, the court was not expressly aware that the relief it

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<sup>327</sup> 1964 AC 40.

<sup>328</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA (A) 731 at 758D-E; where Corbett said:

"In practice, the two forms of expectation are interrelated and even tend to merge. Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable or at least that before the adverse decision is taken, he will be given a fair hearing."

<sup>329</sup> *Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd* 1992 2 SA 234 (TKA).

granted was a substantive relief. The Republic of South Africa became a constitutional state under the 1993 Constitution,<sup>330</sup> and administrative law was constitutionalised.<sup>331</sup>

The 1993 Constitution<sup>332</sup> was passed by the Parliament of the Republic of South Africa on 22 December 1993 in Cape Town. This Constitution was known as the *Constitution of the Republic of South Africa, Act 200 of 1993*. It was amended by Parliament on 3 March 1994 by Act 2 of 1994<sup>333</sup> and again on 26 April 1994 by Act 3<sup>334</sup> of 1994. It came into operation on 27 April 1994,<sup>335</sup> the same date on which the first democratic elections were held in South Africa.<sup>336</sup> Government was conducted according to the provisions of the Interim Constitution from mid-May 1994 until February 1997. The nature of this Constitution was explained in the preceding chapter. Needless to say, this Constitution is transformative in nature because it has broken from the past, where parliament was sovereign. This can easily be seen from the preamble of the 1993 Constitution of the Republic of South Africa, which states the following:

*In humble submission to Almighty God,*

*We, the people of South Africa declare that-*

*WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;*

*AND WHEREAS in order to secure the achievement of this goal,*

*Elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn Pact recorded as Constitutional Principles;*

*NOW THEREFORE the following provisions are adopted as the Constitution of the Republic of South Africa.*

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<sup>330</sup> 1993 Constitution. *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) para 47.

<sup>331</sup> Section 24 of the 1993 Constitution.

<sup>332</sup> *Constitution of the Republic of South Africa* 200 of 1993, referred to throughout this study as the 1993 Constitution. This Constitution became the *Constitution of the Republic of South Africa*. It was amended by Parliament on 3 March 1994 by Act 2 of 1994, and on 26 April 1994 by Act 3 of 1994.

<sup>333</sup> *Constitution of the Republic of South Africa Amendment Act 2 of 1994*.

<sup>334</sup> Act 3 1994.

<sup>335</sup> De Villiers *Birth of a constitution* 50.

<sup>336</sup> Act 200 of 1993.

Through this Constitution, a new democratic order was introduced, and it brought an end to parliamentary sovereignty and the statutory prohibition against substantive rights for the courts. It established a constitutional state, and the Constitution became the supreme law of the Republic of South Africa. This Constitution is underlined by constitutionalism, the rule of law, democracy and accountability, separation of powers and checks and balances, cooperative government, and the devolution of power.<sup>337</sup> Section 1(1) of the Constitution declares the Republic of South Africa to be one sovereign state. The aim of South African constitutionalism is to transform society from one which is deeply divided by the legacy of a racist and unequal past, into one based on democracy, social justice, equality, dignity and freedom.<sup>338</sup>

#### **4.1.2 Values of the 1993 Constitution**

##### 4.1.2.1 Values

It is perhaps prudent to explain what values mean in the sphere of justice. Dias explains values as the drive behind doing 'justice according to law' which is provided by values, which inarticulate major premise of judicial reasoning.<sup>339</sup> Values consist of considerations, which are viewed as objectives of the legal order, and which shape the decisions of courts and guide their handling of the law, by providing yardsticks for measuring the conflicts of interest that are involved.<sup>340</sup> In the present government, judges must be informed by the values which underlie the new Constitution. The present legal position is different from that of twenty-four years ago, and is totally different from what it was under the apartheid government.

South Africa has adopted an advanced Constitution informed by the values of social interdependence. However, its jurists continue to deploy traditional methods of legal analysis, hence this study after 24 years of a constitutional state, is grappling with the issue of whether substantive legitimate expectation must be part of the South African

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<sup>337</sup> Currie and De Waal *The Bill of Rights Handbook* 7.

<sup>338</sup> Pieterse 2005 *South Africa Public Law* 158.

<sup>339</sup> Dias *Jurisprudence* 194-195.

<sup>340</sup> Dias *Jurisprudence* 194-195.

law or not.<sup>341</sup> Davis and Klare expressed their frustration with the South African judges as follows:

*Chief disappointment is the absence of coherent exploration of the Constitution's values or an explicit and sustained effort to develop new legal methodologies appropriate to transformative constitutionalism; ... and the lack of critical sharpness with separation of powers.*<sup>342</sup>

The values underpinning the Constitution were derived from various provisions of Chapter 3, the preamble, the epilogue, and the Constitutional Principles.<sup>343</sup> These values include democracy, constitutionalism and the rule of law, freedom, and equality. They go further to include open society, control over the exercise of power, effective protection of fundamental rights, separation of powers, independence of the judiciary, and freedom of information. Section 35 of this Constitution contains information on how the Constitution and Chapter 3 must be interpreted and applied. It refers to certain "values" which underlie the new legal order and which the courts are obliged to promote. These values also apply to the rulings of common law, specifically legitimate expectations. This Constitution is a basic value-oriented<sup>344</sup> Constitution.

Under the 1993 Constitution, South Africa bonded herself to these values, which trump the output of both a transient executive and legislature. People are the sources of constitutional values, but the government is not "the people", as a constitutional structure which separates the powers of the legislative and executive arms of government from the judiciary with the power of review prevents one branch of the government from being able to authoritatively represent "we the people".<sup>345</sup> Constitutionalism proclaims that there are characteristics fundamental to the democratic enterprise which cannot be amended or destroyed, even by a majority judgment.

*If 'we the people' set down principles in a constitutional document, the onus is placed upon the judges to preserve these principles against incursions by government. In*

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<sup>341</sup> Davis and Klare 2010 *SAJHR* 403. The Constitution finds its expression in the development clauses of ss 4.7 and 35 of the 1993 Constitution.

<sup>342</sup> Davis and Klare 2010 *SAJHR* 403.

<sup>343</sup> Act 200 of 1993.

<sup>344</sup> Van Wyk *et al Rights and Constitutionalism* 634-635.

<sup>345</sup> Ackerman *We the people* in Van Wyk *The new constitutional order* 2.

*this rate the judiciary does not engage in a simple exercise of interpretation of statutes.*<sup>346</sup>

Section 4(1) is the key to the new constitutional dispensation. It is new in the sense that the concept of constitutionalism had never been previously used in the history of the Republic of South Africa.<sup>347</sup> Thus, Section 4(1)<sup>348</sup> of the Constitution states the following:

*This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.*

All scholars seem to agree on the basic definition of constitutionalism, which was extensively dealt with in Chapter 3.<sup>349</sup> This is the idea that government should derive its powers from a written Constitution, and that its powers should be limited to those set out in the Constitution.<sup>350</sup> It provides, in Section 4(2), that "this Constitution shall bind all legislative, executive and judicial organs of state at all levels of government".

Chapter 3<sup>351</sup> of South Africa new Constitution introduces the fundamental rights of the individual, which have to be observed by government. In this regard, the Constitution contains an enforceable and justifiable Bill of Rights.<sup>352</sup> Equality before the law,<sup>353</sup> equal protection by the law, extending the franchise to all citizens, and guaranteeing freedom of political competition<sup>354</sup> are introduced in South Africa for the first time.<sup>355</sup>

The new Constitution contained fundamental rights which became an important feature of the Constitution. One of this fundamental principle entrenched is administrative justice.<sup>356</sup> Section 24(b) of the 1993 Constitution extended the

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<sup>346</sup> Van Wyk *et al Rights and Constitutionalism* 2.

<sup>347</sup> De Villiers *Birth of a Constitution* 57.

<sup>348</sup> Section 4 of Act 200 of 1993.

<sup>349</sup> Chapter 3 of this study laid the foundation for the discussion of substantive legitimate expectation, both under the 1993 and 1996 Constitutions.

<sup>350</sup> Currie and De Waal *The Bill of Rights Handbook* 8.

<sup>351</sup> 1993 Constitution.

<sup>352</sup> De Villiers *Birth of a Constitution* 56.

<sup>353</sup> Section 8 of the 1993 Constitution.

<sup>354</sup> Section 21 of the 1993 Constitution.

<sup>355</sup> Section 8 of the 1993 Constitution.

<sup>356</sup> Section 24 of Act 200 of 1993.

application of fairness to those whose 'rights or legitimate expectations' were affected or threatened.<sup>357</sup> The immediate significance of this provision is that the application of fairness is no longer under the mercy of legislation. 'Any limitation of the right has to be justified, so that an affected individual can rely upon the constitutional right to fairness even in the face of legislation that tries to exclude it'.<sup>358</sup> This administrative justice right came as a result of a long history of abuse of governmental power in South Africa. The government of the day was characterised by executive autocracy.<sup>359</sup> The application of the discretionary authority of government servants was extended by statute, while on the other hand the courts' common-law authority to review the exercising of that discretion was often restricted or ousted."<sup>360</sup>

It appears that both the negotiators and the drafters of the Constitution took the advice of Lord Roskill when he stated, in the case of *Council of Civil Service Unions and Others v Minister for the Civil Service*<sup>361</sup> said:

*Today it is perhaps commonplace to observe that as a result of the series of judicial decisions since 1950 both in this House and in the Court of Appeal there has been a dramatic and, indeed, radical change in the scope of judicial review. Furthermore, this change had been described "by no means critically, as an upsurge of judicial activism.*

Judicial review is used for the purpose of controlling what will otherwise be unfettered executive action whether of central or local government. One aspect of this change in the scope of judicial review was, of course, the evolution of the legitimate doctrine.

In *Chandra v Minister of Immigration*,<sup>362</sup> it was found that where it was deemed necessary, or at any rate applicable, the scope of judicial review should be extended to include cases of legitimate expectations. Secondly, the call of Corbet in *Administrator, Transvaal and Others v Traub and Others* should be heeded,<sup>363</sup> when he said:

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<sup>357</sup> Currie, Hoexter and Lyster *The new constitutional and administrative law* 211.

<sup>358</sup> Currie, Hoexter and Lyster *The new constitutional and administrative law* 211.

<sup>359</sup> Currie and De Waal *The Bill of Rights Handbook* 644-645.

<sup>360</sup> Currie and De Waal *The Bill of Rights Handbook* 645.

<sup>361</sup> 1984 3 All ER 935 at 953.

<sup>362</sup> 1978 2 NZLR 559.

<sup>363</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) at 761E-F.

*There is a similar need in South Africa to extend the scope of judicial review to include cases of legitimate expectations.*

This, in the researcher's view, influenced the inclusion of an administrative justice<sup>364</sup> clause as one of the fundamental rights in the Bill of Rights.

Since the ground-breaking decision in England in *Ridge v Baldwin*,<sup>365</sup> the principle of legitimate expectation has been accepted as a ground of review in England, and similar developments have taken place in South Africa in the form of procedural<sup>366</sup> and substantive legitimate expectations. This is not surprising in light of the establishment of the constitutional state under the 1993 Constitution<sup>367</sup> and the constitutionalisation of administrative law.<sup>368</sup>

Section 33(1)(b) of this Constitution indicates that limitations "shall not negate the essential content of the right in question." In this case, this right is the right to substantive relief. In dealing with the right to substantive relief, judges must always measure Section 7(4)(a) against the higher values of the Constitution. Section 7(4) provided that where an infringement of or threat to any right entrenched in Chapter 3 of this Constitution was alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

#### 4.1.2.2 The Supreme Court of Appeal and administrative justice

In the case of *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*,<sup>369</sup> the court had to decide whether common law grounds for judicial review of administrative actions still exist. Section 101(5) of the 1993 Constitution excluded the

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<sup>364</sup> Section 24 of the 1993 Constitution.

<sup>365</sup> 1964 AC 40.

<sup>366</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) at 758D-E where Corbett CJ said:

"In practice, the two forms of expectation are interrelated and even tend to merge. Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable or at least that before the adverse decision is taken, he will be given a fair hearing."

<sup>367</sup> 1993 Constitution. *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) para 47.

<sup>368</sup> Section 24 of the 1993 Constitution.

<sup>369</sup> 1999 3 SA 771 (SCA).

then Appellate Division of the Supreme Court of South Africa from adjudicating any case relating to the interpretation, protection and enforcement of the provisions of the Interim Constitution. Section 24 of this Constitution prescribes self-executing rights. This means that every administrative action has to be consistent with Section 24 of the Interim Constitution, and must therefore be lawful and procedurally fair. Judicial review under the common law is concerned with the legality of administrative action, and the issue must always be whether the action under consideration is in accordance with the behest of the empowering statute and the requirements of natural justice. Administrative law is not static.<sup>370</sup> "As new notions develop and take root, so must new measures be devised to control the exercise of administrative functions." He further stated that this is true in South Africa today because of Section 35(3) of the Constitution. This section, in liberal terms, states that any law should be interpreted, and that the common law should be applied and developed, with due regard to the spirit, purport and objects of the Bill of Rights.<sup>371</sup>

The court held that what is lawful and procedurally fair within the purview of Section 24 is for the courts to decide. The researcher has little doubt that, to the extent that there is no inconsistency with the Constitution, the common law grounds of review were intended to remain intact,<sup>372</sup> and the new role of administrative law must be to promote judicial review which involves the recognition of substantive legitimate expectation.

#### **4.1.3 Administrative justice under the 1993 Constitution**

Section 24 of the Constitution reads as follows:

*Administrative justice*

*Every person shall have the right to-*

*(a) Lawful administrative action where any of his or her rights or interests is affected or threatened;*

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<sup>370</sup> 1999 3 SA 771 (SCA) para 20B at 786.

<sup>371</sup> 1999 3 SA 771 (SCA) para 20C at 786.

<sup>372</sup> There is no indication in the IC of the intention to bring about a situation in which, once a court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds – para 20F.

- (b) *Procedurally fair administrative action where any of his or her rights or legitimate expectation 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 justified in relation to the reasons given for it where any of his or her rights is affected.*

The 1993 Constitution elevated the position of the doctrine of legitimate expectations in reforming administrative law, as contained in Section 24 of the Constitution. The 1993 Constitution introduced a new era of administrative law. The review power of the courts was no longer grounded in the common law only, neither was it restricted or ousted by legislation.<sup>373</sup> The *Traub* case recognised procedural legitimate expectation, not substantive legitimate expectation, and it was now up to the courts in a constitutional state to further develop the doctrine of legitimate expectation, as the court did in *S v Makwanyane and Another*.<sup>374</sup> In this case, the legislature avoided either expressly preserving the death penalty, or expressly outlawing it. In addition, they have not used the language that is so common in other constitutions, which provides that no-one may be deprived of life arbitrarily or without due process of law. The court came to the conclusion that it was left to it to determine whether this right, or any of the others enshrined in Chapter 3, would *prima facie* prohibit the death penalty.

What would have then prohibited the courts from following their own precedent, by incorporating substantive legitimate expectation into the South African law? Was it specifically left to the court to do this, as envisaged by the drafters of the Constitution? In the researcher's view, the answer is yes, because Section 24(b) conferred the right to procedurally fair administrative action on those whose "rights or legitimate expectations were affected or threatened".<sup>375</sup> This section pronounced on legitimate expectation, but did not specify what kind of legitimate expectation was being referred to. This is also applicable to the right to life in Section 9 of the Constitution, which does not state whether the death sentence must be abolished or not.

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<sup>373</sup> Currie and De Waal *The Bill of Rights Handbook* 645.

<sup>374</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC); 1995 6 BCLR 665 para 324.

<sup>375</sup> Hoexter *Administrative Law* 396.

This legislature, in the researcher's view, left it to the courts to provide the interpretation. It is this interpretation which led to the abolishment of the death penalty in South Africa. In giving meaning to Section 24, the courts must consider the purpose for which it was included in the Constitution. In *S v Makwanyane and Another*,<sup>376</sup> Mahomed explained the reasons why he agreed with the judgment of Chaskalson, who concluded that capital punishment is prohibited by the Constitution:<sup>377</sup>

*All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspiration of a nation; the values which bind its people, which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded ... The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos, expressly articulated in the Constitution.*

The Constitution expresses, in its preamble, the need for a "new order in which there is equality between ... people of all races". Section 10 constitutionally protects that dignity. And lastly, the preamble, Section 8 and the post-amble seek to articulate an ethos which not only rejects its rationale, but mistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination.

Generally, Section 35(1) instructs us, in interpreting the Constitution, to look forward instead of backward, to recognise the evils and injustices of the past, and to avoid their repetition. It is these values which the court should have adopted in Mpumalanga in developing and reforming administrative law, by explicitly recognising substantive legitimate expectation.

The implication of Section 24(b) was that the application of fairness was not dependent on the statute. The legitimate expectation doctrine is, in some instances, expressed in terms of some substantive benefit, advantage or privilege which the person concerned could reasonably expect to acquire or retain, and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision that is

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<sup>376</sup> 1995 3 SA 391 (CC).

<sup>377</sup> 1995 6 BCLR 665 para 262.

detrimental to the interests of the person concerned is taken.<sup>378</sup> Adding to the nature of legitimate expectation, Riggs saw the doctrine as being construed broadly to protect both substantive and procedural expectations.<sup>379</sup>

#### **4.1.4 The culture of justification**

The provision of entrenched and justifiable universally accepted fundamental rights takes the fundamental rights protected in the present Constitution into consideration. The 1993 Constitution brought with it the culture of justification, which was a culture of authoritarian rule.

##### 4.1.4.1 Justiciable Bill of Rights

The Truth and Reconciliation Commission<sup>380</sup> was challenged in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*<sup>381</sup> because of "inhibiting artificialities attendant on the justification of impunity for wilful perpetrations of severe human rights violations – for the sake of transition and eventually, transformation".<sup>382</sup> In this case, the applicant challenged the constitutionality of Section 20(7) of the Act, claiming that it was in violation of Section 22<sup>383</sup> of the 1993 Constitution. Despite this, the court observed that "the text acknowledge that the new dispensation arose in a particular historical context and that the democracy it inaugurates and celebrates is permanently a work – in progress, always looking forward, always subject to revision".

Mahomed DP went on to say the following:

*What the Constitution seeks to do is to facilitate the transition to a new democratic order, committed to 'reconciliation between the people of South Africa and the reconstruction of the society'. And he concluded by saying that he is satisfied that the epilogue to the Constitution authorised and contemplated an 'amnesty' in its most*

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<sup>378</sup> *Administrator, Transvaal, and Others v Traub and Others* 1989 4 SA 731 (A) at 758.

<sup>379</sup> Riggs 1988 *American Journal of Comparative Law* 395.

<sup>380</sup> Act 34 of 1995.

<sup>381</sup> 1996 4 SA 672 (CC); 1996 8 BCLR 1015 (CC) paras 42 & 50.

<sup>382</sup> Du Plessis "AZAPO: monument, memorial ... or mistake?" 52.

<sup>383</sup> Section 22 of the 1993 Constitution gave every person the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum. This is now s 34 of the 1996 Constitution.

*comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.*<sup>384</sup>

These words of the court make it clear that the courts must move from the position of the past, where substantive legitimate expectations were not recognised, to the future, which makes provision for substantive legitimate expectations to be part of the South African law. This will pave the way towards a new ground of judicial review in South African administrative law. In the case of reconciliation, the *Promotion of National Unity and Reconciliation Act*<sup>385</sup> was enacted, which laid down the procedures for amnesty applications. The section below describes how this doctrine was applied by some of South African courts.

#### 4.1.4.2 Substantive legitimate expectations explained and applied under the 1993 Constitution

In the researcher's view, one of the less considered principles of legitimate expectation in South African law is substantive legitimate expectations. This debate has been taken up by the judges of the Constitutional Court, most notably in *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal*.<sup>386</sup> O'Regan J, in arguing her view, said that the term "legitimate expectations" appears to have first been used in the context of administrative law in the decision of Lord Denning MR in *Schmidt and Another v Secretary of State for Home Affairs*.<sup>387</sup> She added that the notion of a "legitimate expectation"<sup>388</sup> has since been used frequently in many jurisdictions, including the jurisdiction of South Africa. In *Bel Porto School Governing Body and Others v The Premier of the Western Cape and the Other*,<sup>389</sup> Chaskalson held that substantive legitimate expectation "is a contentious issue to which there is no clear authority in our law". He said that his failure not to deal specifically with substantive

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<sup>384</sup> *S v Makwanyane and Another* 1995 6 BCLR 665.

<sup>385</sup> Act 34 of 1995.

<sup>386</sup> 1999 2 SA 91 (CC).

<sup>387</sup> 1969 2 Ch 149 (CA) at 170E-F.

<sup>388</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) para 32 at 163.

<sup>389</sup> 2002 3 SA 265 (CC) para 96 at 293.

legitimate expectation should not be considered as an acceptance that substantive legitimate expectation is part of the South African law.<sup>390</sup> This case will be dealt with fully in Chapter 5 below.

Thus far, arguments raised in favour of substantive relief in South Africa, by both the judiciary and scholars in administrative law, have been in the form of *ad hoc* considerations lacking a comprehensive vision of the theoretical basis of constitutional development. It is not surprising that there is no research that investigates the 1983 Constitution of the apartheid government, and how the future South Africa will review legislative and executive acts under a new Constitution.<sup>391</sup> Hlophe's discussion focused on the status of legitimate expectation<sup>392</sup> at the time, without any theoretical basis on which the courts can review both the legislation and the Constitution in the future. His scholarly concern, in the researcher's view, was the position of legitimate expectations in South Africa *vis-a-vis* developments in both England and Australia. Unfortunately, however, he did not offer any view of the development of substantive legitimate expectations after apartheid. One can accept that, unlike other scholars,<sup>393</sup> Hlophe was confronted with a Constitution which was characterised by parliamentary supremacy at the time when he wrote this article. The ANC guidelines had not yet been published, which could have helped him to examine the future of legitimate expectations.<sup>394</sup> He did not have ANC constitutional guidelines in mind when it came to administrative law reforms.

Malan Pretorius correctly stated that the application of the doctrine of legitimate expectation in administrative law has received attention in England, but observed that the views expressed in Coughlan<sup>395</sup> and Begbie<sup>396</sup> had an influence on the

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<sup>390</sup> *Bel Porto School Governing Body and Others v The Premier of the Western Cape and Another* 2002 3 SA 265 (CC). He referred to *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 SA 91 (CC), where substantive legitimate expectation was accepted. However, in the judge's view, it was left open. This is because the applicant received what they wanted.

<sup>391</sup> Van Wyk *et al Rights and Constitutionalism* 4.

<sup>392</sup> Hlophe 1987 *SALJ* 165.

<sup>393</sup> Quinot 2004 *SAPL* 543; Quinot 2004 *German Law Journal* 65; Campbell 2003 *SALJ* 292; Campbell 2004 *SALJ* 538; Devenish 2007 *De Jure* 113; The views of these scholars will be discussed fully under 4.2 below, since they relate to the 1996 Constitution.

<sup>394</sup> ANC Constitutional guidelines were published in 1988, while Hlophe's article was written in 1987.

<sup>395</sup> *R v North and East Devon Health Authority, ex parte Coughlan* 2000 2 WLR 622 (CA), 2000 3 all ER 850 (CA).

<sup>396</sup> *R v Department of Education and Employment, Ex parte Begbie* 2000 1 WLR 1115 (CA).

developments in administrative law with regard to the doctrine of legitimate expectation. However, he indicated that he "does not expect that the abuse of power doctrine will come to be regarded, in administrative law, as constituting an independent review ground".<sup>397</sup> Writing during the time of parliamentary supremacy, Pretorius did not have a constitutional state in mind, and did not foresee that the future Constitution would contain a Bill of Rights. Section 24 of the 1993 Constitution is the opposite of what Pretorius had in mind with regard to the position of legitimate expectation under the 1993 Constitution.

In *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others*,<sup>398</sup> the plaintiff was the Bushbuck Ridge Border Committee, a voluntary association of residents of Bosbokrand, whose object was to secure its incorporation into Mpumalanga. The questions which had to be decided by the court were the following:

1. Can the promise that was made create a legitimate expectation?
2. Even if this is the case, what type of relief is granted when a legitimate expectation is breached?
3. Can this court order that which is sought?

It was argued on behalf of the plaintiff that the claim was based upon the principles of constitutional and legitimate expectation, seen in the context of the administrative action clauses under the Interim and final Constitution, which do create such legitimate expectations. He argued that these clauses are Section 24 of the Interim Constitution and Section 33, read with item 23(2) of Schedule 6 of the final Constitution. The promises made to the second plaintiff and the residents of Bushbuck Ridge were not made in terms of or under the provisions of any statute or regulations, nor were any facts alleged which justified the inference that a legitimate expectation was created.

It was held that a person whose legitimate expectation has not been considered is limited to a procedural right to be heard, and not to seek specific performance. This was also said in *R v Secretary of State for Transport*,<sup>399</sup> where the court concluded

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<sup>397</sup> Pretorius 2001 SALJ 510.

<sup>398</sup> 1999 2 BCLR 193 (T) 200D-E; Devenish 2007 *De Jure* 113 at 120; Baxter 1979 SALJ 607; Hlophe 1987 SALJ 165.

<sup>399</sup> 1984 1 All ER 577 595C-D.

that a legitimate expectation only creates a procedural right to be heard, and not a right to enforce compliance with the promise. Devenish argues that these two cases are wrong because of the judgment of *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*.<sup>400</sup> In deciding what constitutes procedural fairness in a given case, O'Regan observed the following:

*[A] Court should be slow to impose obligations upon government which will block its ability to make and implement policy effectively. As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executives to act promptly and efficiently. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. ... In the circumstances of this case the decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in Section 24(b) of the Interim Constitution.*<sup>401</sup>

Despite what was stated in this case, Corder made the observation that "courts and practising lawyers are only now beginning to grapple with redefining the role of the law in regulating the tension which must exist between the procedural fairness and rationality of administrative process on one level, and the need for efficient, effective and expeditious public administration on the other".<sup>402</sup> Legitimate expectations depend on the circumstances<sup>403</sup> that give rise to it. Where an administrative body has exercised powers over a long period of time in a certain way, it can be compelled to perform as promised, in order to uphold the individuals' substantive legitimate expectations.

O'Regan concluded in *Premier, Mpumalanga*<sup>404</sup> that the "effect of constitutional invalidity in that the bursaries had to be paid by the second applicant until the end of the 1995 school year and in her view, this was not unjust nor inequitable. The reason

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<sup>400</sup> 1999 2 BCLR 151 (CC).

<sup>401</sup> *Premier, Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) paras 41 and 42.

<sup>402</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 3 SA 265 (CC) para 30. Mokgoro and Sachs' dissenting judgment was in stark contrast to the early judgment of *Premier, Province of Mpumalanga*, where the Constitutional Court granted substantive legitimate expectations under the pretext of procedural legitimate expectations.

<sup>403</sup> Forsyth 1998 *Cambridge Law Journal* 238 247.

<sup>404</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) at 172 para 52G-H.

of this finding was that the applicant failed to give both the respondents and its members with reasonable notice of termination and to give them an effective opportunity to be heard in connection with the proposed termination."

In *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others*,<sup>405</sup> the court stated that political promises made by members of a political party cannot form the basis of a legitimate expectation under the Interim Constitution. In *Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others*,<sup>406</sup> the first to fourth and sixth to eighth applicants, and the son of the fifth applicant, were students at the then Setlogelo Technikon (the third respondent; now Tshwane University of Technology) in Garankuwa. They belonged to the Students' Representative Council (SRC) at this institution. During the year when this application was heard (1993), there was student unrest and disruptive behaviour on the campus of the third respondent. This led to the closures of the Technikon. During the first half of the year (first semester), all applicants were registered as students. When students returned after the second semester in August, they were barred from the campus. However, other students were allowed to re-register and to resume their studies. They were informed by the third respondent that they needed to apply for registration for the second semester. The reason for this was communicated to the applicants as follows:

*Council Executive has as its final decision that it is not in the interests of the Technikon to re-register any member of the SRC and that Council has the reserved right to make such a decision.*<sup>407</sup>

It is on this basis that this application was urgently brought before the court, in order to seek an order reviewing and setting aside the decision(s) and action of the respondents, in refusing to allow them to resume their studies. Furthermore, the applicant sought an order declaring that they were entitled to resume their studies at the Technikon, and directing the respondents to allow them to do so. The alternative cause of action in this case was legitimate expectation, because their applications for re-registration would not be refused without a proper opportunity of being heard. This

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<sup>405</sup> 1999 2 BCLR 193 (T) 200B-C.

<sup>406</sup> 1994 4 SA 104 (B).

<sup>407</sup> This was a letter written by the third respondent's attorneys, Smit & Kotze Inc, to the applicant's attorney, MP Panchia, on 2 September 1993.

was denied by the respondents.<sup>408</sup> After dismissing the applicant's ground of review on statutory grounds, Comrie held as follows on the alternative cause of action of the applicants:

*In Traub's case the AD accepted the doctrine of legitimate expectation as part of our law in South Africa. There is no doubt in my mind that the doctrine should be received in Bophuthatswana as well. Its significance is that in appropriate circumstances it extends the audi rule to a person whose existing rights are not affected by a decision taken under statutory power, but who has a legitimate or reasonable expectation of some benefit or privilege of which it would be unfair to deprive him without a hearing, or at least a legitimate expectation or reasonable expectation of a hearing.*<sup>409</sup>

The court held that the doctrine of legitimate expectation is not confined to contracts of public service employment. The doctrine is, for example, also applicable to the decision of a technikon or government in terms of the *Advanced Technikon Education Act*<sup>410</sup> to refuse re-registration in terms of Section 29 of the Act to students on punitive or disciplinary grounds.<sup>411</sup> Comrie concluded by giving the applicants a substantive benefit, and stating as follows:

*I am satisfied that the applicants, as they alleged, had a legitimate and reasonable expectation that they would not be refused re-registration on punitive or disciplinary grounds, and in effect be expelled from the Technikon, without a hearing. It would be unfair to deprive the applicants of that benefit.*<sup>412</sup>

Bophuthatswana was incorporated into South Africa after the democratic elections in South Africa.<sup>413</sup> The Bophuthatswana General Division became the Bophuthatswana Provincial Division. All the laws applicable in the Homelands, which were not inconsistent with the law, became the laws of the Republic of South Africa. This means

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<sup>408</sup> *Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others* 1994 4 SA 104 (BG) at 106F-G.

<sup>409</sup> *Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others* 1994 4 SA 104 (BG) at 114-115J.

<sup>410</sup> Act 38 of 1989 of Bophuthatswana. Section 29 of the Advanced Technical Education (Technikons) provided that the governing council of a technikon may refuse to admit or re-admit as a student of such technikon any person who applies for such admission or readmission, if that council considers it in the best interests of such technikon to do so.

<sup>411</sup> *Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others* 1994 4 SA 104 (BG) at 116H.

<sup>412</sup> *Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others* 1994 4 SA 104 (BG) at 116 para I.

<sup>413</sup> Act 200 of 1993. The Interim Constitution, which came into effect on 27 April 1994.

that substantive legitimate expectation applies in South Africa because of this judgment, and was incorporated into Section 24 of the Interim Constitution.

Craig<sup>414</sup> explains substantive legitimate expectations as the situation in which the applicant seeks a particular benefit or commodity, whether this takes the form of a welfare benefit, a license, or one of the myriads of other forms, which is said to justify the existence of the relevant expectation.

Lord Roskill in *Council of Civil Service Unions and Others v Minister for the Civil Service*<sup>415</sup> defined legitimate expectation, without differentiating between procedural and substantive legitimate expectation, as follows:

*Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.*<sup>416</sup>

In cases where the court was confronted with the application of substantive legitimate expectation, O'Regan held the view that the "term legitimate expectation" appears to have first been used in the context of administrative law<sup>417</sup> in a decision of Lord Denning in *Schmidt and Another v Secretary of State for Home Affairs*.<sup>418</sup> Lord Denning observed the following:

*(A)n administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making a representation. It all depends on whether he has some right or interest, or I would add some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.*<sup>419</sup>

The court arrived at the conclusion that the respondent was entitled to substantive legitimate expectations, without using these exact words. In this case, the Constitutional Court had an opportunity to pronounce the acceptance of substantive legitimate expectations, but failed to do so.

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<sup>414</sup> Craig 1996 *Cambridge Law Journal* 289-312 at 290.

<sup>415</sup> 1984 UKHL 9.

<sup>416</sup> 1984 3 All ER 935.

<sup>417</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 SA 91 (CC) at 14.

<sup>418</sup> 1969 2 Ch 149 (CA).

<sup>419</sup> 1989 4 SA 731 (A).

In Australia and New Zealand, the concept of legitimate expectation had been employed by the court in the context of the judicial review of administrative action. Cobert took it a step further, by stating the following:

*In my opinion, there is a similar need in this country. There are many cases that one can visualize in this sphere ... Where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the eight facts cry out for one: and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to an aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will no doubt bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority and by certain domestic tribunals and the contrary desirability of avoiding undue judicial interference in their administration.<sup>420</sup>*

O'Regan observed that the concept of legitimate expectation employed in Section 24 of the Interim Constitution needs to be interpreted in light of the understanding of this concept in Lord Denning's judgment in *Schmidt*, which has been adopted in a wide variety of jurisdictions. Expectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind. She went on to say that once a person establishes that a legitimate expectation has arisen, it is clear from the language of Section 24(b) of the Interim Constitution that he or she will be entitled to procedural fairness in relation to administrative action that may affect or threaten that expectation.<sup>421</sup>

Campbell's understanding of substantive legitimate expectations relates to the promise of an actual advantage, such as a licence, and should be distinguished from procedural expectations, which are lesser promises of a fair procedure before a decision is made. He goes on to say that both these expectations are enforceable, but procedural legitimate expectations can only be enforced by ordering the procedure to be followed, while substantive legitimate expectations can be protected, either by obliging the decision maker to follow a fair procedure, or by confirming such advantage

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<sup>420</sup> *Administrator, Transvaal and Others v Truab and Others* 1989 4 SA 731 (A) at 758D.

<sup>421</sup> 1999 2 SA 151 (CC) para 36 at 164.

on the expectation. In simple terms, substantive legitimate expectations are actual expectations of a real advantage, such as a license, while the term substantive protection means that the advantage itself is conferred by a court.<sup>422</sup>

Hlophe's understanding of the concept of legitimate expectations only applied to procedural expectations. According to him, legitimate expectations entitle the complainant to be heard before an adverse decision is made against him. It is not necessary to show that the decision affects his pre-existing rights.<sup>423</sup> However, this is where he ends. In the researcher's view, he did not have the concept of substantive expectations in mind. He can be excused, however, because this was before the decision in the *Traub* case, but after the decision of *Everett v Minister of the Interior*.<sup>424</sup>

Unfortunately, the role played by the concept of legitimate expectations since *Traub* has not been fully clarified. The object of this present study is to highlight the need for the recognition of substantive legitimate expectations as a new ground for judicial review in South African administrative law. The courts failed to engage in transformative constitutionalism and the theoretical values of the 1993 Constitution, which would have made it possible for them to accept or apply substantive legitimate expectations in reforming administrative law. Furthermore, there has been a failure to develop the *Traub* judgment and, more specifically, to amend the 1996 Constitution. This discussion will continue with the discussion of substantive legitimate expectations under the 1996 Constitution in Chapter 5 below.

## **4.2 Conservatism and the judiciary**

Not only has the inherent conservatism of the South African judiciary been a barrier to recognising substantive legitimate expectations in South African administrative law, but a comprehensive vision of constitutional transformation focused on fairness in public administration, as a dynamic concept for legal reform, has been largely absent from the theoretical underpinnings of the

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<sup>422</sup> Campbell 2003 *SALJ* 293.

<sup>423</sup> Hlophe 1987 *SALJ* 165.

<sup>424</sup> 1981 2 SA 453 (C) at 457. This judgment has been discussed fully in Chapter 2 of this study.

judiciary's task to develop the South African common law, in accordance with the aims and spirit of the South African Constitution.<sup>425</sup>

Up to this point, most arguments in favour of substantive relief for legitimate expectations have been based on *ad hoc* considerations lacking a comprehensive vision of the theoretical basis of constitutional development in South Africa. However, rather than creating a principle of substantive legitimate expectations, some court decisions seem to have granted substantive benefits under the 'guise' of procedural legitimate expectations. In *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>426</sup> the effect of the order by the court was substantive in nature, as the bursaries had to be paid until the end of the year. In *Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd*,<sup>427</sup> the legitimate expectation was based on the following:

- (a) *Regular practice;*
- (b) *The audi rule was not complied with;*
- (c) *The decision was found to be invalid;*
- (d) *The matter was not referred back to the administrator, as there had been an undue delay because of the Minister's failure to consider the matter for about 17 months;*
- (e) *The Minister's mind was already made up.*

*This ruling amounted to the granting of substantive relief.*

Judges, regardless of the extent of their independence, belong, of course, to a legal system, and it requires little sophistication to perceive that, in maintaining itself, any social order requires a judiciary to support its laws, as argued by Wacks.<sup>428</sup> This section seeks to explore whether judges who lack a comprehensive vision of the theoretical basis of constitutional development in

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<sup>425</sup> Section 1 of the 1996 Constitution.

<sup>426</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC); 1999 2 SA 91 (CC).

<sup>427</sup> 1992 2 SA 234 (TCA).

<sup>428</sup> This was a paper delivered by Professor Wacks at his inaugural lecture as a Professor of Law and Head of the Department of Public Law of the University of Natal, Durban, on 23 March 1983. Wacks 1984 SALJ 285.

South Africa should not be promoted to the Higher courts, or whether they should resign.

### 4.3 What is a judge?

Wacks defined a judge as "the prototypical"<sup>429</sup> legal institution. In his robed and exalted independence, the judge is tasked to exercise fairness in his or her adjudication. The social service that he/she renders to the community is, in Lord Devlin's<sup>430</sup> words, "the removal of a sense of injustice". Professor Wacks goes on to say that judges belong to a legal system, and that this social system requires a judiciary to support it. He posed a question regarding what judges who find the law to be morally wrong should do. According to him, such a judge must resign. Can the same be said about the South African current judges, who do not have the discretion to decide cases, but have to do what the *Constitution of the Republic of South Africa* dictates?

This is because a judge is a keeper of the law, and a protector and repository of justice.<sup>431</sup> Hlophe observed in 1988, in his unpublished doctoral thesis, that the attitude of the South African judiciary was a main obstacle for South African law, particularly administrative law, being relatively outdated.<sup>432</sup> Even though many scholars and judges elsewhere have long acknowledged that judicial review is a counter-majoritarian force in the legal system.<sup>433</sup> Davis described this force as follows:

*When the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of the ... people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.*<sup>434</sup>

On the other hand, Hlophe in his inaugural address delivered on Monday 17 October 1994 at the University of Transkei was of the view that the role of judges in the new

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<sup>429</sup> Prototypical is explained in the Oxford Dictionary as a first or preliminary form, from which other forms are developed or copied.

<sup>430</sup> Devlin 1976 *Modern LR* 3.

<sup>431</sup> Wacks 1984 *SALJ* 266.

<sup>432</sup> Hlophe 1987 *SALJ* 167.

<sup>433</sup> Bickel *The Least Dangerous Branch* 16-17.

<sup>434</sup> Van Wyk *et al Rights and constitutionalism* 6.

South Africa will be controversial. He motivates his assertion by stating that some judges will drag their feet in bringing the necessary changes envisaged by the Constitution.<sup>435</sup> He hoped that the judiciary would do well to learn from its mistakes of the past and under the constitutional state nothing should stand in the way of the judiciary from protecting human rights and civil liberties. Whether the judges heeded Hlophe's call is yet to be seen by the South African Society in realizing their administrative right.

#### **4.4 The judiciary under the parliamentary sovereignty**

The judiciary under apartheid was conservative, because of conservative appointments.<sup>436</sup> The legal culture during this period did not prefer racial equality. During this era, judges took over and were functioning within a legal system that was tainted by apartheid policies.<sup>437</sup> The Appellate Division presided over its many pro-executive interpretations of security legislation, which saw the majority of thousands of African detainees being ill-treated, and others beaten to death, by police. The rules of natural justice were denied to organisations which opposed apartheid.<sup>438</sup> Furthermore, the national government practice was to appoint judges who were sympathetic to its policies of oppression.<sup>439</sup>

#### **4.5 The judiciary under the African National Congress government**

Before the coming into effect of the 1993 Constitution, the Supreme Court was composed of provisional and local divisions, which had both original and review jurisdiction, with a final appeal to the Appellate Division. This set-up changed under the 1993 Constitution<sup>440</sup> and the final Constitution. Section 98(1) of the Interim Constitution changed the judicial system of South Africa completely, in the sense that

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<sup>435</sup> Hlophe 1995 SALJ 22-31.

<sup>436</sup> Hoexter and Olivier *The Judiciary in South Africa* 27.

<sup>437</sup> Hoexter and Olivier *The Judiciary in South Africa* 27.

<sup>438</sup> Hoexter and Olivier *The Judiciary in South Africa* 30.

<sup>439</sup> Klug *The Constitution of South Africa*.

<sup>440</sup> Section 98(1) of the IC and s 67 of the FC.

a new court was established. This court came to be known as the Constitutional Court of the Republic of South Africa. It had the final say in any matter related to the interpretation, protection and enforcement of the provisions of the Constitution.<sup>441</sup> The Appellate Division was denied all power in constitutional matters, and was left as the highest court of appeal for all non-constitutional matters. This was followed by the establishment of the Judiciary Service Commission, in line with Section 105 of the Interim Constitution.

Under the Final Constitution, the Supreme Court of Appeal was established. It has the same jurisdictions as the High Courts, except that it functions as a Court of Appeal on all matters, including constitutional issues.<sup>442</sup> After the new dawn of democracy, Hlophe further argues that a new image of judges is required.<sup>443</sup> The researcher agrees with Hlophe's sentiments, because for the new democracy to be realised, a new mindset is required from the institutions which have to implement the Constitution.

#### **4.6 Safeguards before Constitutional Court**

Before the democratic government in South Africa, there was no safeguard in the South African system in trying capital cases militating against a mistake, where a man is on trial for his life.<sup>444</sup> Today, however, the South African legal system is different. The South African courts are directed by the values in the Constitution. During apartheid, the reasons for mistaken identity in criminal trials were too manifold and too obvious. The case of *S v Serumula*<sup>445</sup> clearly shows that there is more than little ground for the assertion that there is a real risk of executing an innocent man. Judges are mortals, hence the possibility of differences of opinion on what factors constitute mitigating circumstances is very real. The pre-democratic judges lacked a meaningful

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<sup>441</sup> Van Wyk *et al Rights and constitutionalism*

<sup>442</sup> Klug *The Constitution of South Africa*.

<sup>443</sup> Hlophe 1995 SALJ 22.

<sup>444</sup> Van Niekerk 1970 SALJ 72.

<sup>445</sup> 1962 3 SA 962 (A).

contribution to human rights. This led the first democratic President of the Republic of South Africa, Mr Nelson Mandela,<sup>446</sup> and others to say:

*Why is that in this courtroom I am facing a white magistrate, confronted by a white prosecutor, escorted by white orderlies? Can anybody honestly and seriously suggest that [in] this type of atmosphere the scales of justice are evenly balanced?*

*Why is it that no African in the history of the country has ever had the honour of being tried by his own kith and kin? ... The real purpose of this rigid colour bar is to ensure that justice dispensed by the courts conform to the policy of the country, however much that policy might be in conflict with the norms of justice accepted in judiciaries throughout the civilised world.*

During the apartheid era, administrative law, as well as criminal law, were sources of oppression for the majority of South Africans.<sup>447</sup> This position, which was articulated by Mandela, has since changed, but the role of the judiciary as an unelected institution remains contested and controversial under the new legal system in South Africa. Some judges are still adopting a conservative approach in their decisions.

In *S v Van Niekerk*,<sup>448</sup> the appellant, who was a Professor of Law at the University of Natal, was charged with two counts, one of contempt of court, and the other of attempting to defeat or obstruct the course of justice. He was charged by saying the following:

*In the very first place our lawyers, all our lawyers from judges downwards, can make their voices heard about an institution which they must surely know to be an abdication of decency and justice.*

Van Niekerk continued to say:

*This is the very understandable retort of our Judges to the demand sometimes made upon them into the dust.*

The court found that the appellant should have been convicted on count 2 of the indictment, which was of attempting to defeat or obstruct the course of justice. This was the predicament faced by apartheid judges, because they were obliged to apply laws which they knew, from their legal education, to be contrary to human rights. These

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<sup>446</sup> Corder and Federico *The Quest for Constitutionalism* 8-9; Mandela *Long Walk to Freedom* 312-13.

<sup>447</sup> Corder and Federico *The Quest for Constitutionalism* 9.

<sup>448</sup> 1972 3 SA 711 (A).

judges found refuge for their decisions in positivism, which allocated them a passive, declaratory role. This has now changed under the constitutional state in which the South African judges operate.<sup>449</sup>

What then can be said about the South African judges who adjudicate under the new legal system and circumstances? Are they free to decide cases using the positivist approach? The answer is surely no. The South African are living in an age in which the concept of substantive legitimate expectations has acquired a constitutional status which differs profoundly from that which existed when the judges were operating under parliamentary supremacy. The culture of human rights and humanity now moves on, discarding concepts that are outdated and unsuited to the changed environment or to changed ideas.<sup>450</sup> "A judge is not an automation whose task is limited to applying clear rules of law to clear findings of fact in a purely logical manner. He is called to a higher duty, that of choosing between compelling alternative rules and conflicting factual situations,<sup>451</sup> and in exercising this choice he should be guided by accepted legal values."<sup>452</sup>

## **4.7 Safeguards after the new court**

### **4.7.1 *Founding principles***

The drafting of the new Constitution was informed by the 34 Constitutional Principles incorporated into Schedule 4<sup>453</sup> of the Interim Constitution. The Interim Constitution, Constitutional Principles and final Constitution served as sources of the South African constitutional system.<sup>454</sup>

Even though the new Bill of Rights under the 1993 Constitution accorded greater weight to certain rights than to the decisions of parliament, South Africans, both white and black, bonded themselves to certain values, which trumped the output of a

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<sup>449</sup> Dugard 1972 *SALJ* 271-285.

<sup>450</sup> Van Niekerk 1970 *SALJ* 61.

<sup>451</sup> Dugard 1972 *SALJ* 277.

<sup>452</sup> Dugard 1972 *SALJ* 277.

<sup>453</sup> Schedule 4 of the 1993 Constitution.

<sup>454</sup> Klug *The Constitution of South Africa* 47.

transient legislature. Some judges have shown the supremacy of the Constitution in this period of democracy by scrutinising the activities of both the legislature<sup>455</sup> and the executive, but failed to do so in the field of administrative law.

In *S v Makwanyane and Another*,<sup>456</sup> Mahomed observed as follows:

*The South African Constitution is different [from those which formalise an historical consensus of values]: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and inspirationally egalitarian ethos expressly articulated in the Constitution.*

This is seen in the argument that the courts have failed in their constitutional duty to reform administrative law, by not recognising substantive legitimate expectations<sup>457</sup> under the 1993 Constitution, while they were empowered to do so<sup>458</sup> by the constitutional theories and values. The Constitutional Court is an institution of transformation, and although it has made some strides in the development of a body of law, it has not fully developed administrative law to reflect the principles underlying the Constitution. The court's power to review and determine the constitutional validity of legislation and executive conduct is an important part of transformation, as indicated by Olivier.<sup>459</sup> How can the Executive Authority be regulated if the courts, especially the Constitutional Court, are reluctant to recognise substantive legitimate expectation? Courts are called upon to look at the theories and values of the Constitution to break with the past traditions of formalism, executive-mindedness and positivity. It is argued that the essence of judicial transformation lies in "not packing the courts with black judges. It was further argued that the courts must be packed with judges who are loyal to the Constitution, and the fundamental values which underpin the Constitution. These values are: the rule of law, human dignity, equality and freedom.<sup>460</sup> Judges have a significant role to play in the Republic of South Africa". The judges have to transform their legal knowledge, because most, if not all, have been trained under the apartheid education system. Therefore, they need to be retrained in order to bring their judgment

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<sup>455</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC).

<sup>456</sup> 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) para 262.

<sup>457</sup> Van Wyk *et al Rights and Constitutionalism* 2.

<sup>458</sup> Section 96 of the 1993 Constitution.

<sup>459</sup> Olivier "The courts' powers under the Constitution" 70.

<sup>460</sup> Klug *The Constitution of South Africa*.

in line with the new constitutional order, and to satisfy its transformative role in society.<sup>461</sup>

The non-recognition of substantive legitimate expectations undermines the founding values of human dignity and the development of equality. The introduction of the Bill of Rights has constitutionalised administrative law, and both the 1993 and 1996 Constitutions have entrenched the right to just administrative action in terms of Section 33. This right was supposed to play an important role in reforming administrative law, but problems such as conservatism and positivism still have an impact on the adjudication of the Bill of Rights by the judiciary.<sup>462</sup>

#### **4.8 Finding a coherent theoretical basis for recognising substantive relief for legitimate expectations in South African administrative law**

##### ***4.8.1 The transformative vision of South Africa's constitutional state***

Transformations of legal cultures have become topical issues in contemporary jurisprudence. Although transformatory perspectives are not absent from libertarian jurisprudential theories, postmodern and socialistic theories, together with communitarian perspectives on justice, have impacted strongly on legal transformation theory. These theoretical points of view contain important perspectives for transforming the legal culture of the South African constitutional state, and public law in particular.

The provisions of both the Interim<sup>463</sup> and Final Constitution<sup>464</sup> emphasise the Constitution's commitment to transformation. It requires a radical move from the past and compels the transformation of the legislature, executive and South African legal culture.<sup>465</sup> The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with particular reference to recognising substantive legitimate expectation. Klare describes

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<sup>461</sup> Mhango "The judiciary in South Africa" 69.

<sup>462</sup> 2002 3 SA (CC) para 96 at 293.

<sup>463</sup> Act 200 of 1993.

<sup>464</sup> Act 108 of 1996.

<sup>465</sup> Pieterse 2005 *SAPL* 166.

transformative constitutionalism as a long-term project of constitutional enactment, interpretation and enforcement, in order to transform a country's political and social institutions and power relationships in a democratic, participatory and egalitarian manner.<sup>466</sup> In addition, Langa argues that a truly transformative South Africa requires a new approach to legal education, in that it should place "the Constitutional dream at the very heart of legal education".<sup>467</sup> He confronts the inherent conservatism of the South African legal culture, which is based on formal rather than substantive reasoning. In light of this definition, it is the researcher's view that in order to reform South African administrative law and recognise substantive legitimate expectations, there is a need to achieve transformation by implementing the values and aspirations enacted in the Constitution<sup>468</sup> and to change the South African legal culture, in order to meet the standards for reforming administrative law. Although transformation is not the sole responsibility of the court, since it is the task of all three arms of government,<sup>469</sup> the greatest responsibility lies in the hands of the judiciary. Furthermore, the Constitution commits all the branches of government to the promotion of democratic values, human rights and equality.<sup>470</sup>

#### **4.8.2 The development of legitimate expectations**

The courts are tasked by Section 8(1) of the Final Constitution, which provides that:

*The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State.*

In *Carmichele v Minister of Safety and Security and Another*,<sup>471</sup> it was held that:

*... where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing the deviations.*

Ackermann et Goldstone observed the following:

*There is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive*

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<sup>466</sup> Langa 2006 *Stell LR* 356; Klare 1998 *SAJHR* 151.

<sup>467</sup> Langa 2006 *Stell LR* 356.

<sup>468</sup> Klare 1998 *SAJHR* 151.

<sup>469</sup> Langa 2006 *Stell LR* 351, 358.

<sup>470</sup> Act 108 of 1996.

<sup>471</sup> 2001 4 SA 938 (CC) para 44.

*component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.*<sup>472</sup>

However, before and after this decision, the courts deviated and still deviate, by failing to develop the common law in line with this decision, and by not reforming administrative law through the recognition of substantive legitimate expectation as a new ground of judicial review. This is the duty of judges in respect of administrative law.<sup>473</sup>

In *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*,<sup>474</sup> Chaskalson, without any scientific basis, said that the time has not yet arrived for the application of substantive legitimate expectation in South Africa. However, he neglected to give reasons why he thought that the time for substantive legitimate expectation has not arrived yet, and when that time will come, given the Constitution which he was tasked to enforce and protect. This, in the researcher's view, is why Madala J. dissented in his minority judgment. Madala questioned whether, in taking its decision, the WCED had regard to the requirement of fairness.<sup>475</sup> This point was overlooked by Chaskalson CJ, and is, in the researcher's view, a judicial error which existed in the past, where the death penalty was applied, and people in South Africa were wrongly convicted and executed.<sup>476</sup> This is the case with substantive legitimate expectation, where the courts find it to be unsuitable, even though corruption is increasing on a daily basis in South Africa.<sup>477</sup> The equation of this with the death penalty is due to the fact that administrative and criminal law were sources of oppression for the population of South Africa.<sup>478</sup> The majority judgment forgot that the Constitution required both historical redress and the building of a new South Africa.

This constitutional case therefore failed to advance the spirit, purpose and object of the Constitution.

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<sup>472</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) 44 at 956.

<sup>473</sup> Klug *The Constitution of South Africa* 126.

<sup>474</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 9 BCLR 891 (CC) para 46.

<sup>475</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 9 BCLR 891 (CC) para 76.

<sup>476</sup> Van Niekerk 1970 SALJ 68.

<sup>477</sup> Adv Thuli Madonsela *State Capture Report*.

<sup>478</sup> Corder and Federico *The Quest for Constitutionalism* 9.

### 4.8.3 Conclusion

"We must accept that to endow a court consisting of mortal men – not ordinary men but still men who may from time to time err – with the characteristic of infallibility is manifestly unacceptable."<sup>479</sup> It is the researcher's view that judges must discard the positivist viewpoint that the only issue is between mechanical applications of the law. Judges must execute their mandate in terms of the Constitution, which they are compelled to implement. The judiciary must be tested against the issues of transformation. If the judges fail to obey the Constitution, they should at least resign.

Even though the new Bill of Rights under the 1993 Constitution accorded greater weight to certain rights than to the decisions of parliament, South Africans, both white and black, bonded themselves to certain values, which trumped the output of a transient legislature. Courts have shown this in a short period of time, by scrutinising the activities of both the legislature<sup>480</sup> and the executive, but have failed to do so in the field of administrative law. This is seen in the argument that the courts have failed in their constitutional duty to reform administrative law, by not recognising substantive legitimate expectations<sup>481</sup> under the 1993 Constitution, even though they were empowered to do so<sup>482</sup> by the constitutional theories and values. The Constitutional Court is an institution of transformation, and although it has made some strides in terms of the development of a body of law, it has not fully developed administrative law to reflect the principles underlying the Constitution. The court's power to review and determine the constitutional validity of legislation and executive conduct is an important part of transformation, as indicated by Olivier.<sup>483</sup> How can the executive authority be regulated if the courts, especially the Constitutional Court, are reluctant to recognise substantive legitimate expectation? Courts are called upon to look at the theories and values of the Constitution, in order to break with the past traditions of formalism, executive-mindedness and positivity. An in-depth discussion of the new role of judges is presented in Chapter 5 below.

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479 Corder and Federico *The Quest for Constitutionalism* 9.

480 *S v Makwanyane and Another* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC).

481 Van Wyk *et al Rights and Constitutionalism* 1.

482 Section 96 of the 1993 Constitution.

483 Olivier "The courts' powers under the Constitution" 70.

## 4.9 Theories underpinning the recognition of substantive legitimate expectations

### 4.9.1 *Original text of the Constitution*

The courts under the new South African order, which prides itself on a Bill of Rights, must accord greater weight to certain rights than the decisions of Parliament. South Africa has bound herself to certain values, which trump the output of a transient legislature.<sup>484</sup> In determining the meaning of any of the Bill of Rights' provisions, "some help may be derived from considering the legislative approaches taken in similar fields by other acknowledged free and democratic countries."<sup>485</sup>

It was said in *Government of the Republic of Bophuthatswana and Others v Segale*<sup>486</sup> that the court should remain mindful of the fact that "the Bill of Rights is a declaration of values and a statement of the (Bophuthatswana) nation's concept of society it hopes to achieve." In this case, the respondent was the leader of the National Seoposengwe Party (the party) registered in the then Republic of Bophuthatswana (Homeland).<sup>487</sup> The party wished to hold a series of political meetings at which, so it was expected, more than 20 persons would be present. The Bophuthatswana Government had a Constitution<sup>488</sup> which has a Bill of Rights. Section 16 of this Constitution guarantees freedom of peaceful assembly and freedom of association with others, subject to conditions. However, the *Internal Security Act*<sup>489</sup> was introduced in 1979. Section 31 of this legislation restricted the right of members of the public to hold meetings within the meaning of Section 16 of the Constitution of Bophuthatswana.

The respondent, in his capacity as such, and having complied with the required preliminary procedures, wrote a letter on 24 November 1986 to the then Minister of Law and Order, asking his permission to hold a meeting. The subsequent reply of the Minister was that "the Honourable Minister has refused your application".

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<sup>484</sup> Van Wyk *et al* *Rights and Constitutionalism* 1.

<sup>485</sup> *R v Southham Inc* 1983 33 RFL (2<sup>nd</sup>) 279 at 296-7.

<sup>486</sup> 1990 1 SA 434 (BA).

<sup>487</sup> The president of this Homeland was President Lucas Mangope, who died in 2007.

<sup>488</sup> *Republic of Bophuthatswana Constitution Act* 18 of 1977.

<sup>489</sup> Act 32 of 1979.

The respondent was not happy about this state of affairs and approached the Supreme Court (General Division). One of the reliefs sought, which is relevant to this study, was Section 31 of the *Internal Security Act*. According to the respondent in this case, Section 31 "is null and void and constitutes an infringement of the declaration of fundamental rights in the Republic of Bophuthatswana and in particular Sections 15 and 16 thereof." The court *a quo* agreed with the respondent and declared Section 31 to be null and of no force.

Perhaps it is opportune here to outline the principle which the court *a quo* employed.

This court<sup>490</sup> was of the view that "the form of Government in Bophuthatswana must therefore for the purpose of the Constitution which makes the example *par excellence* of what is meant by the expression " 'democratic society' where that expression appears in Sections (15)(2) and 16(2) of the Constitution".<sup>491</sup>

On appeal of this judgment, the question before the court was whether or not Section 31 is null and void. Unfortunately, the Appellate Division found that the court *a quo* had erred, because in every legal system, provision must be made for measures aimed at maintaining law and order and the security of the State, and this responsibility does not lie with the courts, but with Parliament.

The court was not in the position to decide whether the legislation was constitutional or not.<sup>492</sup> It is important to note that this decision does not fall short of executive mindedness, where the theory of the Constitution does not count. Under this new constitutional order, the South African judges are still trapped in this formal adjudication of a Bill of Rights.<sup>493</sup>

The advocacy group, Section 27, brought an application on behalf of their deceased son, Michael Komape.<sup>494</sup> The deceased died at the age of six, after he fell into a pit toilet at Mohlodumela Primary School in Chibeng Village, outside Polokwane, in 2014. The court awarded R12 000,00 constitutional damages, in direct contrast to R1,2

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<sup>490</sup> *Segale v Government of the Republic of Bophuthatswana and Others* 1987 3 SA 237 (B) at 244H-I.

<sup>491</sup> Sections 15(2) and 16(2) of the Constitution of the Republic of Bophuthatswana.

<sup>492</sup> 1990 1 SA 427 (BAD) at 452 para C-D.

<sup>493</sup> *Pretoria News* Tuesday April 24 2018, 1.

<sup>494</sup> *Komape v Minister of Basic Education (Tebeila Institute of leadership Education and Governance Amicus Curiae)* 2018 JDR 0625(LP) (Case No 1416/2015).

million constitutional damages per family in the *Life Esidimeni* arbitration in 2018 by the retired Deputy Judge President Dikgang Moseneke.<sup>495</sup> However, the court gave a substantive relief, in that it ordered the Department of Basic Education and the Limpopo Member of the Executive Council (MEC) for Education to supply and install a number of safe and secure toilets at each rural school in Limpopo which was still using pit toilets.<sup>496</sup>

According to principles set down in a constitutional document by the people, the onus is placed upon the judges to preserve these principles against incursions by government. In this role, the judiciary does not engage in a simple exercise of interpretation of statutes, as in the case of *Monnakale v Government of the Republic of Bophuthatswana*,<sup>497</sup> where the applicants brought an application on behalf of their families, who were detained in terms of Section 25(1) of the *Internal Security Act 32* of 1979. The arrests resulted from the failed coup attempt against the then Government of the Republic of Bophuthatswana on 10 February 1988. The relief sought by the applicant was the release of the detainees in the main, with the alternative being access to the detainees by their legal representatives.

The argument on behalf of the applicant was the constitutionality of Section 25(1) of the *Internal Security Act 32* of 1979. Counsel for the applicant relied on the judicial interpretation of the words "has reason to believe". Counsel further argued that in interpreting Section 25 of the *Internal Security Act 32* of 1979, attention must be paid to the Declaration of Fundamental Rights contained in Sections 8 to 18 of the Bophuthatswana Constitution, and effect must be given thereto in considering Section 25(1) and (2). The Supreme Court of Bophuthatswana was expressly empowered by the Constitution to enforce the rights conferred under the provisions of the Declaration of Fundamental Rights in terms of Section 8(2) of the Constitution. These fundamental rights are binding on the legislature, the executive and the judiciary, and are directly enforceable by law.

When one has a closer look at the South African Bill of Rights, it is evident that the Bophuthatswana Bill of Rights bears some similarities to the South African

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<sup>495</sup> *Sowetan* Tuesday 24 April 2018 at para 6.

<sup>496</sup> *Pretoria News* Tuesday April 24 2018, 1 para 8.

<sup>497</sup> 1991 1 SA 598 (BGD).

Constitution. In the researcher's opinion, the latter were a window dressing. This argument is based on the fact that Bophuthatswana had similar laws to those of the Republic of South Africa under parliamentary sovereignty. Section 7 of the Bophuthatswana Constitution provided that the Constitution shall be the supreme law of Bophuthatswana. The judge, trained in the ways of Westminster-type constitutional law, held that "once the Attorney-General had considered the detention under the *Internal Security Act*, the court cannot interfere with that decision".<sup>498</sup> Accordingly, the applications relating to the release of the detainees were refused.

As Davis, Chaskalson and De Waal put it:

*Unfortunately, South African judges, trained in the ways of Westminster constitutional law, cannot draw a distinction between interpretation of a Bill of Rights and a statute.*<sup>499</sup>

In the case of *Lewis v Minister of Internal Affairs and Another*,<sup>500</sup> the applicant was a lecturer at the then University of Bophuthatswana, and stayed in Mmabatho. He was appointed to this position in August 1987, and was on contract for the period of 1 August 1987 to 31 December 1990. He was given temporary residence and work permit in terms of the *Aliens and Travellers Control Act 22 of 1979*. Later on, his temporary residence and permit were terminated by government in terms of Section 65(1) of the Act.

Aggrieved by this, he brought an urgent application to court for an order setting aside the warrant for his removal from Bophuthatswana – this order declared Section 65(2) of the Bophuthatswana *Aliens and Travellers Control Act 29 of 1977* to be void, in contrast to the Declaration of Fundamental Rights contained in the Constitution.

The first respondent, in ordering the removal of the applicant from Bophuthatswana, relied on Sections 65(1) and (2) of the said Act. Section 65(2) states that the decision of the Minister is not subject to review or appeal by any court, and no person shall be entitled to be furnished with any reason for such decision. In addition to the

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<sup>498</sup> 1991 1 SA 598 (BA) at 625J. Held that the decision of the AG, entrusted to him by the clear language of s 25(2), is a subjective one, and that it had been properly formed within the ambit of s 25(2). Therefore, the AG's decision was not justiciable and there was no reason on the facts before the court to set it aside.

<sup>499</sup> Davis, Chaskalson and De Waal "Democracy and Constitutionalism" 2.

<sup>500</sup> 1991 3 SA 628 (BG).

constitutionality of Sections 65(1) and 2 of the *Aliens and Travellers Control Act* 22 of 1979, the applicant argued that in terms of the final extension of the applicant's resident and work permit, the applicant had a legitimate expectation that he would be entitled to remain in the country until that date.<sup>501</sup>

Friedman referred extensively to *Administrator, Transvaal v Traub and Others*,<sup>502</sup> but in the end, he said that he was not bound<sup>503</sup> by this decision. In dismissing the applicant's case, Friedman found cover by giving credence to the legislature, not the Constitution. He found that the Act was a proper and necessary incidence of sovereignty, and in respect of which Parliament can legislate.<sup>504</sup>

In *Bongopi v Chairman of the Council of State, Ciskei*,<sup>505</sup> an application was brought by the sister of the detainee for his release. The applicant's relief was based on Section 26 of the *National Security Act* 13 of 1982. This relief found favour in the case of *African National Congress (Border Region) and Another v Council of State and Others*<sup>506</sup> (unreported case No 414/91), where the very section was found to be in conflict with the provisions of Schedule 6 ("Fundamental rights and obligations") of the Constitution Decree. In this case, the full Bench declined to determine whether such conflict invalidates Section 26 of the *National Security Act* 13 of 1982.

In the above-mentioned case, the applicant's brother (the detainee) had been detained on 20 January 1992 by members of the Ciskei Police, together with four other residents, under Section 26 of the *National Security Act* 13 of 1982. The respondent's argument was that the court of Ciskei cannot declare the law, on a proper construction of Section 26, read with Section 37(1) of the Constitution, invalid, given that it was an inherited law from South Africa (my addition). The applicant, on the other hand, argued that the Constitution of Ciskei constituted a law of "superior force" and status.

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<sup>501</sup> *Lewis v Minister of Internal Affairs and Another* 1991 3 SA 628 (BG) 634B.

<sup>502</sup> 1989 4 SA 731 (A).

<sup>503</sup> 1991 3 SA 628 (BG) 635F.

<sup>504</sup> 1991 3 SA 628 (BG) 639G-I. Friedman J, because of his formalism background, found that the applicant did not have the right to be heard, because s 65(1) excludes this right. Furthermore, s 65(2) clearly outlines the jurisdiction of the court relating to the Minister's decision to order the removal of an alien from Bophuthatswana, at 639J.

<sup>505</sup> 1992 3 SA 250 (Ck) at 265H-I.

<sup>506</sup> 1992 4 SA 434 (Ck).

Moving away from the judge's role under the Constitution, Pickard observed the following:

*This court has always stated openly that it's not the maker of laws.<sup>507</sup> It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the correct public attitudes or standards in regard to those policies is not its function ... That all of us would wish to see a charter of fundamental human rights enforceable on every level of human activity goes without saying.*

*However, I do not consider it to be the duty or privilege of this court to do so if it to do so would be against the tenor and meaning of the statute creating those rights and against what the intention of the legislature appears to be.*

*Unlike ordinary legislation, a bill of Rights has a more role to play. It is a link between the political morality and aspirations of society and positive law. The Bill of Rights talks to society and informs the society, not only of what kind of society it is but also of the one which it ought to be. It contains not only constraints but also aspirations.*

*This cases clearly shows that the Bill of Rights introduces the values of the Constitution into law which signals a transition from a formal vision of law to a substantive vision of law in South Africa. This new vision protects the substantive rights of the citizens of the Republic of South Africa.*

#### **4.9.2 The Bill of Rights**

The Bill of Rights is an important theory, according to which the Constitution should be read.<sup>508</sup> This is because every time a fundamental right is to be interpreted, the courts are under a constitutional duty to promote the values inherent in a system favouring democracy and fundamental rights, as required by Section 35(1):

*This lays a foundation for flexibility and a pro- fundamental rights orientation.*

William Rehnquist said the following about the Bill of Rights:

*The framers of the Constitution wisely spoke in general<sup>509</sup> language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live ... Where the framers ... have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.*

In the context of South African Constitution, the framers of the South Africa's new Constitution have left the words 'substantive legitimate expectations' to courts to fill

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<sup>507</sup> 1992 3 SA 250 (Ck) at 265H-J.

<sup>508</sup> Van Wyk *et al* *Rights and Constitutionalism* 2-3.

<sup>509</sup> Rehnquist 1976 *Texas LR* 694.

in.<sup>510</sup> In *S v Zuma and Others*,<sup>511</sup> the Constitutional Court dealt with the approach to be adopted in the interpretation of the fundamental rights enshrined in Chapter 3 of the Constitution. In this regard, Kentridge AJ observed the following:

*The acceptable and correct approach should be the approach which Whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution.*

The framers of the Constitution did not foresee that judges would not observe their duties in line with Section 35(1) of the Constitution, which obligates:

*[A] court of law to promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable case law.*

#### **4.9.3 Historical context and constitutionalism**

In American jurisprudence, as far as history as a theoretical basis for constitutionalism is concerned, the justification for the Bill of Rights and its importance to the democratic sphere was highlighted by Alexander Hamilton. He explained it as follows:

*There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that the men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.<sup>512</sup>*

In the Interim Constitution, the idea of South Africa as a constitutional state, despite the Bill of Rights, did not expressly provide for the judicial review of substantive legitimate expectation, which violated the principles of the Bill of Rights as contained in Chapter 3 of the 1993 Constitution. Davis, Chaskalson and De Waal in Van Wyk wrote the following with regard to the case of *Marbury v Madison*, where Marshall emphasised the importance of judicial review:

*So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution,*

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<sup>510</sup> *S v Makwanyane and Another* 1995 6 BCLR 665 (CC) para 9 at 676.

<sup>511</sup> 1995 2 SA 642 (CC).

<sup>512</sup> Van Wyk *et al Rights and Constitutionalism* 5, quoting from the Federalists Paper 78 of Alexander Hamilton.

*disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of the judicial duty.*

*If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act which, according to the principles and theory of our government, is entirely void, is in practice, completely obligatory.*<sup>513</sup>

The South African government, during the apartheid era, used administrative law to oppress the majority of South Africans.<sup>514</sup> Chapter 3 of the 1993 Constitution introduced the Bill of Rights for the purpose of curbing the occurrence of this abuse of power. The influence of a different historical context and the openness of language compel judges to make some basic choices in order to give the Constitution its content.<sup>515</sup>

Stevens observed the following:

*... if the task of judicial construction began and ended with the grammatical and etymological analysis of legal texts, or even if it were slightly expanded to include an analysis of the original intent of those who drafted and enacted that text into positive law, one would expect an impartial court to reject any claim that the word 'liberty' as used in the 1791 Constitution, endorsed the revolutionary idea that all men were created equal. For the text of the 1791 Constitution, before as well as after the ratification of the bill of rights, expressly approved of invidious discrimination. Article iv provided positive protection for the institution of slavery and art I provided for the purpose of apportioning congressional representatives; each slave should be counted as three-fifths of a person ... The framers had constructed a document that, like the fledgling nation itself, could be described as a house divided against itself- an institution that was half slave and half free. A Constitution that expressly tolerated the worst kind of discrimination could not simultaneously condemn all irrational discrimination.*<sup>516</sup>

Chapter 7 of the 1993 Constitution placed judicial authority and the administration of justice in the hands of the courts. Section 96(1) of the Constitution vested judicial authority in the courts established by the 1993 Constitution and any other law. Section 96(1) further stated that the judiciary shall be independent, impartial and subject only to the Constitution.<sup>517</sup> The major change to the South African judicial system was the establishment of the Constitutional Court in terms of Section 98(1) of the Constitution. As the court which has a final say in any matter related to the "interpretation, protection

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<sup>513</sup> 5 US (1 Cranch) 137 (1803) 60.

<sup>514</sup> Asimow 1996 SALJ 613-614.

<sup>515</sup> Van Wyk *et al Rights and Constitutionalism* 3.

<sup>516</sup> Stevens "A bill of Rights: A Century of Progress" 21.

<sup>517</sup> No person and no organ of state shall interfere with judicial officers in the performance of their functions. This was clearly stated in terms of s 96(3) of the 1993 Constitution.

and enforcement of the provisions of the Constitution, it had a major role in the administration of justice in South Africa."<sup>518</sup> An independent judiciary had the power to safeguard and enforce the Constitution and all fundamental rights.<sup>519</sup>

Chapter 7 of the Constitution binds all legislative and executive organs of state at all levels of government. Furthermore, Section 7(4)(a) says that when an infringement of or threat to any right entrenched in this chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply for appropriate relief, which may include a declaration of rights. Sections 7 and 7(b) go on to say that the relief referred to in paragraph (a) may be sought by:

- (5) *a person acting in his or her own interest;*
- (ii) *an association acting in the interest of its members;*
- (iii) *a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;*
- (iv) *a person acting as a member of or in the interest of a group or class of persons;*  
*or*
- (v) *a person acting in the public interest.*

In *Fose v Minister of Safety and Security*, the plaintiff relied heavily on foreign law, alleged to be comparable for purposes of Section 35(1) of the Constitution, in support of his argument, in terms of both the nature and the content of the relief envisaged by Section 7(4)(a).<sup>520</sup>

The vision of constitutional transformation focused on fairness in public administration as a dynamic concept for legal reform.

#### **4.9.4 Courts' decisions under the 1993 Constitution**

The common law *audi alteram partem* rule has been developing over the years with regard to South African administrative law. Section 24(a) of the Constitution gives every person the right to a lawful action where any of his rights or interests is affected or threatened. In complying with this section, the South African courts are supposed

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<sup>518</sup> Van Wyk *et al Rights and Constitutionalism* 168.

<sup>519</sup> Constitutional principle II.

<sup>520</sup> 1997 7 BCLR 851 (CC) at 863 para 24.

to develop the notion of "fairness" or "the duty to act fairly" whenever an administrative decision is taken. This rule essentially means that they must "hear the other side".

In *Fose v Minister of Safety and Security*,<sup>521</sup> the applicant instituted action against the respondent for delictual damages, alleging assault and torture at the hands of members of the police. In addition to such damages, the applicant claimed "constitutional damages" because the alleged assault and torture had constituted an infringement of his fundamental rights, as contained in Sections 10, 11 and 13 of the Interim Constitution. The respondent had successfully objected to the claim for constitutional damages, contending that "an action for damages does not exist in law, and an order for payment of damages does not qualify as appropriate relief contemplated in Section 7(4)(a)<sup>522</sup> of the Interim Constitution".

The plaintiff's case, however, was that Section 7(4)(a) of the Interim Constitution establishes a separate cause of action, namely a public law action directed against the state, based on the infringement of a fundamental right entrenched in Chapter 3 of the Interim Constitution. Section 7(4)(a) provides as follows:

*When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.*

The Interim Constitution is the supreme law. It confers rights on persons and informs them that they may look to the courts for the protection and enforcement of such rights. Under the common law, the concept of administrative justice is associated with the notion of natural justice, which has now been narrowed down to the idea of fairness.<sup>523</sup> The concept of legitimate expectation has been introduced to reinforce the constitutional right to justice.<sup>524</sup> The cases decided under the 1993 Constitution demonstrate the reluctance of courts to recognise the substantive legitimate expectations doctrine, despite the transformative vision of the Constitution.<sup>525</sup> Thus, in the *Fose* case, the court said the following:

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<sup>521</sup> 1997 6 BCLR 851 (CC).

<sup>522</sup> Section 7(4) of the 1993 Constitution.

<sup>523</sup> Devenish *A Commentary on the South African Constitution* 28-29.

<sup>524</sup> Ikhariale 2001 JAL 3.

<sup>525</sup> Ikhariale 2001 JAL 3.

*An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.*<sup>526</sup>

Giving a substantive benefit is an important means of curbing the abuse of power by the executive or administration.

In the case of *Claude Neon Ltd v Germiston City Council and Another*,<sup>527</sup> the first respondent granted the applicant the sole right to erect illuminated street signs in the municipal area for the period of 1 September 1984 to 31 July 1994. The applicant decided to call for tenders after the expiry of the contract. The respondent employee gave an undertaking to the applicant representative that the applicant would be timeously notified when the tender documents were ready, so that it could bid for a new contract.

However, the respondent employee failed to adhere to the promise given to the applicant representative, and the tender was awarded to another party. In the court's view, the respondent created a "legitimate expectation in favour of the applicant in accordance with Section 24(b) of the Constitution to have procedurally fair administrative action". Therefore, the first respondent did not have the power to ignore the right given to the applicant by the Constitution, and to award the tender to the second respondent. The first respondent exercised a "purely administrative function". The court went further in examining the conduct of the first respondent, and observed that the conduct of the first respondent, which the applicant complained about in this regard, amounted to a failure of "administrative justice" in accordance with Section 24 of the Constitution.<sup>528</sup> The court found that the express promise had created a legitimate expectation of being informed, and set aside the awarding of the tender to a third party, ordering the City Council to call for fresh tenders.<sup>529</sup> In the researcher's

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<sup>526</sup> 1997 7 BCLR 851 (CC) para 69.

<sup>527</sup> 1995 3 SA 710 (W) para 720H-I.

<sup>528</sup> Section 24 of the 1993 Constitution. The court set aside the contract entered into between the first and second respondents, even though the second respondent was an innocent party.

<sup>529</sup> 1995 3 SA 710 (WLD) 719H, 720H-722A.

view, and correctly so, the court found that the applicant was entitled to substantive legitimate expectation.

In *Jenkins v Government of the Republic of South Africa*,<sup>530</sup> the court held that the definition of legitimate expectation is unnecessary, since the doctrine has become part of South African common law. The right to procedurally fair administrative action in terms of Section 24(b) is guaranteed to any person, where any of his rights or legitimate expectation is affected or threatened.<sup>531</sup> Therefore, the concept of legitimate expectation was accorded protection in the 1993 Constitution.

In another case, namely *Oranje-Vrystaatse Vereniging vir Staatsondersteunde Skole en 'n Ander v Premier van die Provinsie Vrystaat en Andere*,<sup>532</sup> a year after the new provincial government of the Free State came to office (1995), it announced that the payment of subsidies in the province would cease. These subsidies were catered for in terms of the *Education Affairs Act*.<sup>533</sup> The management and control of state-aided schools were vested in governing bodies, the membership of which was largely drawn from parents of pupils. This increased discrimination in the education system, and changed patterns in the funding of school education.

The Act provided for financial aid to be given to those pupils whose parents could not afford the fees, and for financial assistance for the transportation of pupils. Subsidies were allocated and paid during the period 1992 to 1994, and in the Free State Province during the first quarter of 1995. The applicants objected to the Executive Council of the Free State stopping the payment of the subsidies, and therefore commenced these proceedings.

The dispute in this case was that the decision to suspend the subsidies amounted to the violation of their right to procedurally fair administrative action, as contained in Section 24(b) of the Constitution, and that the decision was in conflict with Section 24(b) of the Constitution. For purposes of this study, however, the researcher will not deal with the latter aspect. The applicants claimed that the decision should be reviewed and set aside on common law grounds. The court found that the applicants

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<sup>530</sup> 1996 3 SA 1083 (Tk) 1093F-G.

<sup>531</sup> Section 24(b) of Act 200 of 1993.

<sup>532</sup> 1996 2 BCLR 248 (O) 274 I-J.

<sup>533</sup> Act 70 of 1988.

had established that "a legitimate expectation existed that the subsidies would continue". They had shown both "express promise given on behalf of a public authority" and "the existence of a regular practice which the claimant can reasonable expect to continue" such as had been recognised in *Administrator Transvaal and Others v Traub and Others*<sup>534</sup> as circumstances from which a legitimate or a reasonable expectation may arise. Therefore, this is a case where the expectation was founded on both an express promise and a regular practice.

Cora Hoexter<sup>535</sup> observed that in South Africa, it is difficult to find an exact position of fairness, duly triggered by the legitimate expectation doctrine. She also indicated that as far as Section 24 of the Constitution is concerned, most cases move in a more conservative direction. However, she stated that there are only a few such cases. In *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others*,<sup>536</sup> the applicants were the trustees of a trust which owned property of the Witterdrift Trust. This trust instituted proceedings by notice of a motion against the respondents. The applicants sought an order requiring the first respondent to make copies of all documentation in his possession relevant to the dispute available to them. One of the issues to be decided was whether the applicants had shown that a right of theirs was being infringed. This case suggests that fairness applies when it is right, just and fair to apply it.<sup>537</sup>

The issue of whether or not an expectation has been created is always a question of fact to be answered in relation to a particular case. In some cases, knowledge of a practice may prevent the formation of legitimate expectation. This happened in the case of *Maqungo v Government of the Republic of Transkei and Others*,<sup>538</sup> where the appellant was found to have no legitimate expectation of being heard before being transferred to a different department. The Chief Justice found the appellant to be "well aware of the practice of transferring workers in the public service without hearing them unless they have some interest or legitimate expectation that it is adversely

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<sup>534</sup> 1989 4 SA 731 (A).

<sup>535</sup> Hoexter *Administrative Law* 399.

<sup>536</sup> 1996 1 SA 283 (C).

<sup>537</sup> *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 1 SA 283 (C).

<sup>538</sup> 1995 1 SA 412 (TkA) 416E-F.

affected".<sup>539</sup> The researcher found it difficult to understand the reasoning of the court in this regard when it said that "if the official being transferred has a family and children attending school and the place to be which he is being transferred have no schools, it is proper to hear him". This information after the hearing. Where else will the administrator get this information if one can only be obtained denies an employee a hearing? A closer look at the court's understanding of Section 24(b) does not seem to make sense.

In the case of *Podlas v Cohen and Bryden NNO and Others*,<sup>540</sup> the facts are as follows: The applicant was provisionally sequestrated on the 27 January 1994 and finally on the 22 February 1994. Messrs Leslie Cohen and Mark Bryden were appointed as joint trustees of the applicant's insolvent estate. The decision to issue notices to attend an inquiry in terms of Section 152 of the *Insolvency Act* 24 of 1936 did not attract natural justice in terms of Section 24(b) of the 1993 Constitution, since no existing rights were prejudicially affected. The court's tendency was to interpret Section 24(b) as conservatively as possible.<sup>541</sup>

In another case, namely *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>542</sup> which was heard in 1995, the member of the Executive Council (second applicant) responsible for education in the province of Mpumalanga decided that bursaries which had been paid for certain students in state-aided schools in the province would no longer be paid with effect from July 1995. The *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*<sup>543</sup> brought an application to challenge the decision of the Member of the Executive Council (MEC) on the basis that it amounted to unfair administrative action. The respondent was acting in the interests of its members, about one hundred governing bodies of state-aided schools situated in the Eastern Transvaal, now known as the province of Mpumalanga.

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539 Currie, Hoexter and Lyster *The new constitutional and administrative law* 217.

540 1994 4 SA 662 (T).

541 Hoexter *Administrative Law* 396.

542 1999 2 SA 91 (CC).

543 1999 2 SA 91 (CC).

The respondent challenged the second applicant's decision to terminate bursaries paid to certain pupils on the grounds that it was procedurally unfair and unjustifiable, and therefore in breach of Section 24 of the *Constitution of the Republic of South Africa*, 200 of 1993 (the Interim Constitution).<sup>544</sup> The court *a quo* granted an order setting aside the decision, as well as an order requiring the applicants to pay the bursaries till 31 December 1995. The applicants then sought and obtained leave to appeal to the Supreme Court of Appeal. Even though this case was appealed at the Supreme Court of Appeal, it was referred to the Constitutional Court to obtain clarity as far as jurisdiction is concerned, because when the case came to the Supreme Court of Appeal, the 1996 Constitution had<sup>545</sup> come into force. Section 101(5) of the Interim Constitution provides as follows:

*The Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court.*<sup>546</sup>

The court held that it is hard to avoid the conclusion that has been reached by the Appellate Division that under the Interim Constitution it has no jurisdiction over matters concerning "administrative action" as contemplated by Section 24 of the Interim Constitution. This case was postponed and the applicant approached the Constitutional Court for leave for appeal to the Constitutional Court against the whole judgment and order of De Klerk J in the High Court. In order to finalise this case, the Constitutional Court granted leave to appeal and dealt with this matter. The respondent's case was that the procedure followed by the second applicant, which led to the summary and retroactive termination of tuition, transport and boarding bursaries, was unconstitutional in that it was in breach of Section 24 of the 1993 Constitution.

In particular, the respondent argued that the decision to terminate bursaries was an administrative action that was procedurally unfair in terms of Section 25(b), and unjustified in terms of Section 24(d). The court went on to discuss the nature of legitimate expectation in this fashion. The concept of legitimate expectation in Section 24 of the 1993 Constitution needs to be discussed in light of the "legitimate expectation" that sprang from Lord Denning's judgment in *Schmidt* and which has

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<sup>544</sup> 1999 2 SA 91 (CC) 95 2-3.

<sup>545</sup> 1998 2 SA 1115 (SCA) 1123G-H.

<sup>546</sup> 1998 2 SA 1115 (SCA).

been adopted in a wide variety of jurisdictions. This expectation can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind. There are also situations in which a legitimate expectation arises that have interrelated substantive and procedural elements.<sup>547</sup> Once a person establishes that a legitimate expectation has arisen, it is clear from the language of Section 24(b) of the Interim Constitution that he or she will be entitled to procedural fairness in relation to an administrative action that may affect or threaten that expectation. The court went on to say that it was not necessary for it to decide in this case under what circumstances, if any, a legitimate expectation will confer a right to substantive relief beyond that ordinarily contemplated by a duty to act fairly.<sup>548</sup>

The question that arose in this case was whether the second applicant acted procedurally fairly in the context of the legitimate expectation that the respondent and its members entertained. The Constitutional Court argued that "it is well-established in the South African's legal system and in others that what will constitute fairness in a particular case will depend on the circumstances of the case". In conclusion, O'Regan found that the second application to terminate the payment of bursaries to members of the respondent with retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness, as enshrined in Section 24(b) of the Interim Constitution. The court held that it would be unjust or inequitable for bursaries to continue to be paid for the balance of the 1995 school year.<sup>549</sup> In essence, the Constitutional Court raised the question of substantive fairness, but failed to recognise that the relief granted to the respondent amounted to substantive legitimate expectation.

This was in direct contrast with Section 71(2) of the Interim Constitution because the court has a judicial and not a political mandate<sup>550</sup> and in my opinion this judicial function is the development of fairness in administrative law. The 34 constitutional principles contained in *In re Certification of the Constitution of the Republic of South*

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<sup>547</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 758F.

<sup>548</sup> 1999 2 SA 91 (CC) 109 (36).

<sup>549</sup> 1999 2 SA 91 (CC) 109 (47).

<sup>550</sup> *In re Certification of the Constitution of the RSA*, 1996 1996 4 SA 744 (CC) para 27 at 784. S 71(1) of the Interim Constitution provided that a new constitutional text shall - (a) comply with the Constitutional Assembly contained in Schedule 4; and be passed by the Constitutional Assembly in accordance with Chapter 4.

*Africa* contains the fundamental guidelines, the prescribed boundaries, according to which the Constitutional Assembly was obliged to perform its drafting function. The Interim Constitution, Constitutional guidelines specifically provided that the Constitutional Principles must be applied purposively and teleologically to give expression to the commitment "to create a new order" based on a sovereign and democratic constitutional State in which "all citizens" are "able to enjoy and exercise their fundamental rights".

It is in this regard that I am of the view that the court in *Premier of Mpumalanga* did not comply with its mandate by failing to recognise substantive legitimate expectation.<sup>551</sup>

#### 4.10 Conclusion

The court, in its certification judgment, held that the New text 241(1)<sup>552</sup> failed to comply with the provisions of CP IV<sup>553</sup> and VII,<sup>554</sup> in that "it impermissibly shields an ordinary statute from constitutional review".<sup>555</sup> What the court should have done, in the researcher's view, was to declare Section 24(b) unconstitutional, because it omitted substantive legitimate expectation from the new order (Interim Constitution). Constitutional Principle II provided that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution. These provisions shall be drafted after having given due consideration to, *inter alia*, the fundamental rights contained in Chapter 3 of the Interim Constitution.

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<sup>551</sup> 1999 2 BCLR 151 (CC).

<sup>552</sup> The New Constitutional Text provided that the provisions of the LRA shall, despite the provisions of the Constitution, remain valid until they are amended or repealed. It was objected to on the grounds that it is in conflict with CP IV, which provide that the fundamental rights contained in the Constitution shall be justiciable.

<sup>553</sup> CP IV provides that the Constitution shall be the supreme law of the land. It shall be binding on all organs of State at all levels of government.

<sup>554</sup> CP VII provides that the Judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to enforce the Constitution and all fundamental rights.

<sup>555</sup> 1996 4 SA 744 (CC) para 482G at 910.

## CHAPTER 5

### SUBSTANTIVE LEGITIMATE EXPECTATIONS UNDER THE 1996 CONSTITUTION

#### 5.1 Introduction

The 1996 Constitution which was drafted by the National Assembly omitted the doctrine of legitimate expectations in Section 33 of the Bill of Rights. This omission was corrected in the drafting of the *Promotion of Administrative Justice Act*.

#### 5.2 Overview of the chapter

Substantive legitimate expectations under the 1996 Constitution will be dealt with in three parts, namely part A, B and C. These parts will show the two-stage reform which administrative law reform underwent. These were three reform stages, which were:

- The first stage reform covers: Substantive legitimate expectations under Sections 33(1) and (2) of the *Constitution of the Republic of South Africa, 1996* (Schedule 6).
- The second stage reform covers: Substantive legitimate expectation under PAJA.
- The third stage third stage reform covers substantive legitimate expectations under Section 33 of the Constitution.

This chapter investigates the third stage reform under the 1996 Constitution which anticipates suggestions for recommendation at the conclusion of this research. The position of legitimate expectations in general (pre-1994) was dealt with in Chapter 1 while the position of substantive legitimate expectations under the 1993 Constitution was dealt with in section 4.1 above. The following table shows the position of Section

33 of the 1996 Constitution before PAJA<sup>556</sup> and the applicable legislation during this period:

<p>Just administrative action</p> <p>Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.</p> <p>Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.</p> <p>National legislation must be enacted to give effect to these rights, and must –</p> <p>(a) Provide for review of administrative action by a court or, where appropriate, an independent and impartial tribunal;</p> <p>(b) Impose a duty on the state to give effect to the rights in subsection (1) and (2); and</p> <p>(c) Promote an efficient administration.</p>	<p>Just administrative justice action (under Sections 33(1) and (2) of the Constitution of the Republic of South Africa) until the legislation 33 of the new Constitution is enacted must be regarded to read as follows:</p> <p>'Every person has the right to-</p> <p>(a) Lawful administrative action where any of their rights or interests is affected or threatened;</p> <p>(b) Procedural fair administrative action where any of their rights or legitimate expectations is affected or threatened;</p> <p>(c) Be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public, and</p> <p>Administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'</p>
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- Third stage reform: Substantive legitimate expectations under Section 33 of the Constitution

Section 33 of the final Constitution came into force on 4 February 1996 when the new Constitution came into existence.

### **5.2.1 Part A**

Part A of this report deals with just administrative action under Section 23 of Schedule 6 the *Constitution of the Republic of South Africa, 1996* (Schedule 6)

Sections 33(1) and (2) were applicable before the promulgation of PAJA.

This arrangement is in accordance with Section 33 (3) of the Constitution.

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<sup>556</sup> This distinction becomes apparent after the coming into effect of s 33(3) of the Constitution. This section states that 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.

Section 33 of the final Constitution found its application under Schedule 23(2) of the Constitution. Sections 33(1) and (2) must be regarded to read as follows:

*Every person has the right to–*

- (a) Lawful administrative action where any of their rights or interests is affected or threatened;*
- (b) Procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;*
- l Be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and*
- (d) Administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.*

Sections 32(2) and 33(3) of the new Constitution lapses if the legislation envisaged in those sections, respectively, are not enacted within three years of the date the new Constitution took effect.

Judicial review of administrative action was taken under Schedule 23(2) in terms of this schedule until the 29 of November 2000 when PAJA was promulgated. PAJA became operational from the 30 November 2000. Judicial review was undertaken directly from the constitution. That is administrative law was constitutionalised.

### **5.2.2 Part B**

Part B of this report deals with the recognition of substantive legitimate expectations under the *Promotion of Administrative Justice Act 3 of 2000*

Section 33(3)<sup>557</sup> of the 1996 Constitution required the enactment of the *Promotion of Administrative Justice Act*.<sup>558</sup> Section 33(3) was complied with when, the *Promotion of Administrative Justice Act* was enacted. The question that follows is whether a litigant whose rights have been affected by an administrative action could rely directly on Section 33 of the Constitution, as was the case under the 1993 Constitution.<sup>559</sup> The answer to this question is twofold: First, Section 33 of the 1996 Constitution existed independently of Act 3 of 2000; Secondly the *Promotion of Administrative Justice Act*

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<sup>557</sup> Section 33(3) of the 1996 Constitution.

<sup>558</sup> Act 3 of 2000.

<sup>559</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook 27*.

may in some instances be unconstitutional if it is inconsistent with Section 33 of the 1996 Constitution. Section 33 of the 1996 Constitution cannot be amended by the PAJA. It is argued that the Constitution gives authority to Parliament to elaborate on the requirements of the constitutional right to administrative justice.<sup>560</sup> It is the researcher's view that substantive legitimate expectation is the proper vehicle in the absence of a clear right flowing from PAJA. Common law provides for the review of administrative action based on the doctrine of legitimate expectations.

### **5.2.3 Part C**

Part C of this report deals with the recognition of substantive legitimate expectations after PAJA

The constitutional right to administrative justice can be directly relied on to challenge a provision of the Act. This definition of administrative action is narrow and it fails to give effect to Section 33 of the Constitution. The definition constitutes a limitation if not a violation of the Constitution.<sup>561</sup> Section 3(1) of *Promotion of Administrative Justice Act* provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. But this section falls short because it excludes substantive legitimate expectations as a ground of review. The researcher aims to examine how substantive legitimate expectations can lead to substantive relief in administrative action complain.

## **5.3 Introduction to the adoption of the Constitution of the Republic of South Africa**

Section 71(2)<sup>562</sup> of the Interim Constitution (IC) provided that a Constitutional text passed by the Constitutional Assembly (CA) shall be of no force and effect unless the Constitutional Court has certified that the provisions of the New Text (NT) comply with the principles of the Constitution. On 8 May 1996 the CA adopted a new Constitutional

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<sup>560</sup> *Promotion of Administrative Justice Act* 3 of 2000.

<sup>561</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 28.

<sup>562</sup> Section 71(2) of the IC. The "Judicial 'certification' of a Constitution is unprecedented". This was explained in *In re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC).

Text (NT). In the same month of May 1996, the NT was referred to the Constitutional Court for certification. On the 6 September 1996 the court gave judgment.<sup>563</sup> In this case the court held that it was unable and, therefore refused to certify that all the provisions of the Constitution of the Republic of South Africa of 1996 comply with the Constitutional principles (CP) contained in Schedule 4 to the Constitution of the Republic of South Africa, 200 of 1993.<sup>564</sup>

For the purposes of this study, only non-compliance of the NT 241(1), which failed to comply with the provisions of CP VII in that it is impermissible, shields an ordinary statute from constitutional review and NT's schedule 6, Section 22(1)(b), fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review. Constitutional Principle 11<sup>565</sup> to this study shows that substantive legitimate expectations fits in Chapter 2 of the Bill of Rights, with particular reference to Section 33 of the Constitution of the Republic of South Africa. Section 33 of the Constitution is entrenched and protects the rights of all the citizens of the RSA against the organs of the state and the President of the RSA. In this manner CP VII<sup>566</sup> finds fulfilment in the Constitution because of the supremacy of the Constitution over other statutes which would have been a mere phantom<sup>567</sup> (something that does not really exist) were the courts not entrusted with the authority to enforce it.

On the 11 October 1996, the CA passed an amended text (AT) with the permitted majority of the new Constitution which addressed the grounds for non-certification set out in the first certification<sup>568</sup> judgment. The court held:

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<sup>563</sup> *In re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC).

<sup>564</sup> 1996 4 SA 744 (CC) para 484 at 911.

<sup>565</sup> CP provides that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the constitution, which shall be adopted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of the IC.

<sup>566</sup> CP VII provides that the judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.

<sup>567</sup> Venter *Constitutional Comparison* 79.

<sup>568</sup> *In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* (CCT37/96) [1996] ZACC 24; 1997 1 BCLR 1; 1997 2 SA 97 (CC).

*We certify<sup>569</sup> that all the provisions of the amended constitutional text, the constitution of the Republic of South Africa, 1996, comply with the CP contained in Schedule 4 to the Constitution of the Republic of South Africa 200 of 1993.*

The CC certified the amended text on the 4 December 1996.<sup>570</sup> This cemented the role of the Constitutional Court as the new apex court in the new democratic South Africa. The 1993 Constitution formed the foundation of the 1996 Constitution because the 1993 Constitution was a product of a process which was not wholly democratic in that it had not been subjected to a democratic vote or the will of the people conclusively lobbied and tested.<sup>571</sup>

#### **5.4 The status of the legislation**

The legislation adopted since the coming into operation of the Final Constitution (FC) was not exempted from scrutiny for its constitutionality; one relevant constitutional challenge to new legislation was dealt with by the court in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*.<sup>572</sup> It is on this basis that this study challenges the constitutionality of the definition of administrative action and Section 3(1) in *Promotion of Administrative Justice Act 3 of 2000*. Both the definition of administrative action and Section 3(1) of PAJA have not been tested against the Constitution.<sup>573</sup> In *S v Makwanyane and Another* the CC established an interpretive approach that is to be "purposive"; generous, contextual, historical, genetic and teleological.<sup>574</sup>

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<sup>569</sup> *In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC).

<sup>570</sup> *In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) para 68 at 126 and para 159 of the amended text judgment. Proclamation R6 of 1997 (GG 17737 of 24 Jan. 1997). It is incorrect to refer to the 1996 Constitution as Act 108 of 1996. The difference between the 1996 Constitution and the 1993 Constitution lies in the fact that the 1996 Constitution was certified by the Constitutional Court and not parliament as is the situation with the 1993 Constitution.

<sup>571</sup> De Villiers *Birth of a constitution* 51.

<sup>572</sup> 1996 4 SA 672 (CC); Venter *Constitutional Comparison* 100; *In re Certification of Amended Text of the Constitution of the Republic of South Africa* 1996 1997 2 SA 97 (CC) para 154.

<sup>573</sup> Venter *Constitutional Comparison* 100.

<sup>574</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC) paras 9, 10, 17-19, 188 & 266.

It follows from the minority judgments<sup>575</sup> of both Mokgoro, Sachs JJ and Madala J that the non-recognition of substantive legitimate expectations is in violation of the right to administrative justice because citizens are denied their right to fairness as they are unable to be granted a relief if it is found that the administration did not adhere to its policy.<sup>576</sup> These minority judgments follow from the case of *Bel Porto School Governing Body and Others v Premier, Western Cape Province and Another*,<sup>577</sup> where the court had to decide whether in taking its decision, the respondent had had regard to the requirement of fairness. The right to procedurally fair administrative action and the right to written reasons in turn elevated the rules of natural justice to a constitutional right.<sup>578</sup>

This aspect will be dealt with in part B of this chapter.

The notion of incorporating transformative constitutionalism as a vision for developing South Africa's constitutional culture found support in the theories of the Constitution and the values underpinning it.

The 1996 Constitution includes the following features concerning the rule of law and Constitutional supremacy. The significance of these features is highlighted by the condition that any proposed amendment to the Constitution needs a seventy percent majority in the National Assembly and approval by at least six out of the nine provincial legislatures.<sup>579</sup>

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<sup>575</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape Province and Another* 2002 9 BCLR 891 (CC).

<sup>576</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 234 at 483.

<sup>577</sup> 2002 3 SA 265 (CC) para 68.

<sup>578</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC). This case was decided before PAJA came into operation. It was decided on the 25/2/2000. PAJA only came into operation on the 30 November 2000.

<sup>579</sup> Corder *The Quest for Constitutionalism* 186.

## 5.5 Separation of powers under the 1996 Constitution

### 5.5.1 Introduction

Separation of powers remains part and parcel of the theory and philosophy of constitutional law and constitutionalism.<sup>580</sup> The objective of this doctrine is to prevent abuse of power by any one arm of government. In South Africa this principle is constitutionalised. A system in which powers are separated is commonly known as checks and balances. In other words, the different branches of government should control each other to ensure effective and proper fulfilment of their various powers and functions.<sup>581</sup>

The certification process of the 1996 Constitution brought with it reference to separation of powers which was initially not in the 1993 Constitution. Even though this was not contained in the 1993 Constitution, the Constitutional principles which was an annexure to the 1993 Constitution called for the separation of powers. *In re Certification of the Constitution of the RSA, 1996*,<sup>582</sup> the Constitutional Court in its first task, did not hesitate to point out the mandate of the 1993 Constitution in the form of the Constitutional principles. Constitutional Principle VI mandated that there be a separation of powers.<sup>583</sup> The separation of powers includes the Legislature, Executive and Judiciary. This court further went on to say that the language of CP VI was wide enough to cover the type of separation required by the NT. For the purpose of this research it is important to bear in mind which interpretation approach must be given to the interpretation of the constitutional principles. Two observations are made:

1. The CP's now the separation of powers must not be interpreted with technical rigidity and
2. All 34 CP's must not be read in isolation from the other CP's which give meaning and context.

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<sup>580</sup> Bekink *Principles of South African Constitutional Law* 47.

<sup>581</sup> Bekink *Principles of South African Constitutional Law* 48.

<sup>582</sup> 1996 4 SA 744 (CC) at 811 para 113.

<sup>583</sup> Constitutional Principle VI. The Constitutional Principles have been described by the Constitutional Court in para 36 of this judgment as a broad constitutional stroke on the canvas of constitution making in the future.

An argument that the incorporation of the doctrine of substantive legitimate expectation will violate the principle of separation of powers cannot be accepted without challenge. The reason is that the doctrine of separation of powers must be read and understood within the context of the rights contained in the Bill of Rights.

*All exercise of public power has to have a rational basis, this is one of the foundations of legality, or lawfulness by Section 33(a) of the 1996 Constitution. Justifiability which will be discussed below is required by Section 33(d), demand something more substantial and persuasive than mere rational connection.*<sup>584</sup>

In *Carephone (Pty) Ltd v Marcus NO and Others*,<sup>585</sup> Froneman DJP made this argument to the view held by some people that substantive legitimate expectation will inhibit the executive to do its function:

*The particular conception of the State and the democratic system of government as expressed in the Constitution determines the power to review administrative action and the extent thereof. This is necessary because of the foundational values of accountability, responsiveness and openness in a democratic system of government. The judiciary provides a broad framework within which the executive and public administration must do its work and the Constitution requires administrative action to be justified<sup>586</sup> in relation to the reasons given for it, its purpose is to give expression to the fundamental values of accountability, responsiveness and openness. This clearly shows that its intention is not to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness; assessed on review by the courts.*

In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*,<sup>587</sup> the court held that any law or conduct that is not in accordance with the Constitution, whether for procedural or substantive reasons, will therefore not have force of law. On the other hand, in *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>588</sup> the court gave substantive relief to the respondents. This was an appeal attempting to reverse an early order made in a High Court against government, because of shortcomings to respond to an aspect of the HIV/AIDS challenge. The court a *quo* found that government had not reasonably addressed the

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<sup>584</sup> *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* 2000 3 BCLR 241 (CC) at paras 85 & 90.

<sup>585</sup> 1999 3 SA 304 (LAC) at 315 para 34.

<sup>586</sup> 1999 3 SA 304 (LAC) at 315 para 35.

<sup>587</sup> 1995 4 SA 877 (CC) para 62; Currie and De Waal *The Bill of Rights Handbook* 6<sup>th</sup> ed 9.

<sup>588</sup> 2002 5 SA 721 (CC) para 96-114.

need to reduce the risk of HIV-positive mothers transmitting the HIV infection to their babies at birth. The government had acted unreasonably in refusing to make the antiretroviral drug called Nevirapine, available in the public sector where the attending doctor considered it medically indicated and not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV.<sup>589</sup> The government appealed against this order.

The government's defence was based on separation of powers. This argument was coined in two respects:

1. *The respect that courts should show to its decisions taken by the Executive concerning the formulation of its policies*
2. *The competent order to be issued by the court in the event it finds in favour of the respondents.*<sup>590</sup>

The court considered early judgment of *Government of the Republic of South Africa and Others v Grootboom and Others*,<sup>591</sup> where the court found that State's housing policy in the Cape Metropolitan Council failed to make reasonable provision within its available resources to provide houses for people in that area who had no access to land and no roof over their heads and were living in intolerable conditions.<sup>592</sup> In the *Treatment Action Campaign* case, the applicant's case was further that under the separation of powers the making of policy is the prerogative of the Executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy. The court found that this argument lacks merit because there are no bright lines that separate the roles of the legislature, the executive and the courts from one another. There are matters that lie pre-eminently within the domain of one or other arms of government but not others. Unfortunately, this does not mean, that courts cannot or should not make orders that impact on policy. This case clearly takes away the counter argument that the recognition of substantive legitimate expectations will interfere with the executive. Because Section 7(2) of the 1996 Constitution requires the State to "respect, protect, promote, and fulfil the rights in the Constitution". How will the rights in terms of the Constitution be fulfilled if

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<sup>589</sup> 2002 5 SA 721 (CC) at 728 para 2.

<sup>590</sup> 2002 5 SA 721 (CC) at 735 para 22.

<sup>591</sup> 2001 1 SA 46 (CC), 2000 11 BCLR 1169.

<sup>592</sup> Section 165(5) of the 1996 Constitution.

substantive legitimate expectation is not recognised as part of the South African administrative law? What happens to the individual right of the citizens? The researches submission is that Section 33 of the 1996 Constitution mandates the courts to accept the doctrine of substantive legitimate expectation in South African administrative law. This submission is supported by the decision of the Constitutional Court in *Fose v Minister of Safety and Security*<sup>593</sup> where the court came to this conclusion:

*... appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.*

In light of this judgment the courts are given the latitude to fashion substantive legitimate expectation as a new ground of judicial review in a case where a litigant is claiming substantial relief. Ackerman J went on to state:

*In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. ... when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.<sup>594</sup>*

This innovation, of recognizing substantive legitimate expectations is not new in South Africa and it will not be the first time that South African courts break with the dichotomy of existing rights. At no stage does this offend the principle of separation of powers. In *Mohamed v President of the Republic of South Africa*, the Constitutional Court had an occasion to address the issue of separation of powers, in this way:

*... to stigmatize an order of this court as breach of the separation of State as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, viz supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.<sup>595</sup>*

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<sup>593</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC), 1997 7 BCLR 851 at para 42.

<sup>594</sup> 1997 3 SA 786 (CC) para 71.

<sup>595</sup> 2001 7 BCLR 685.

In conclusion the court held in the *Treatment Action Campaign* case that when it is appropriate to do so, courts may-and, if need be, must-use their wide powers to make orders that affect policy as well as legislation.<sup>596</sup> Policies must be consistent with the Constitution and the law.<sup>597</sup>

## 5.6 Justiciability of Rights in the 1996 Constitution

### 5.6.1 Introduction

The discussion which follow has omitted the other two aspects of justiciability. This section gives a short overview of justiciability. Justiciability means that the decision of the government of the day must be justified by a Constitution or empowering statute.

Before I deal with the issue of justifiability in detail, one must first ask whether the doctrine of substantive legitimate expectations fits in the Constitution. If the answer is negative, then, substantive legitimate expectation doctrine is not justiciable. But if the answer is that the doctrine fits in Section 33(a) of the Bill of Rights, then the substantive legitimate expectations doctrine is justiciable. The provisions of the Constitution are justiciable. The judiciary have the power to enforce the constitution.<sup>598</sup> When an applicant alleges that a right in the Bill of Rights has been infringed or threatened, Section 38 of the 1996 Constitution may be directly relied on to obtain standing.

Section 38 states as follows:

#### *Enforcement of Rights*

*Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.*

In *Democratic Alliance* Section 38 of the Constitution further applies in cases where a litigant (applicant/s) alleges that a right in the Bill of Rights has been infringed or threatened.<sup>599</sup> In *Energy Africa Free State v Freedom Front Plus*, the court observed

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<sup>596</sup> 2002 5 SA 721 (CC) at 760 para 113.

<sup>597</sup> 2002 5 SA 721 (CC) at 760 para 114.

<sup>598</sup> Currie and De Waal *The Bill of Rights Handbook* 73-75; S 165(5) of the 1996 Constitution.

<sup>599</sup> Currie and De Waal *The Bill of Rights Handbook* 74.

that the Constitutional Court has given an extended interpretation to Section 38 to incorporate violations of and threats to all the rights, obligations, values and principles contained in the Constitution committed by public bodies or public officials. This would include "any executive or administrative act or conduct or threatened administrative act or conduct of any organ of the state." The court went further to state that the rationale for this approach is the principle of legality, which is enshrined in the Constitution.<sup>600</sup>

*v Acting National Director of Public Prosecution*, all political parties participating in Parliament have an interest in ensuring that public power is exercised in accordance with constitutional principles and that the rule of law is upheld. Therefore, the Democratic Alliance has standing in terms of Section 38 of the Constitution to act in its own interests as well as in the public interests, and was entitled to pursue the unlawful appointment of Mr Simelane.<sup>601</sup>

### **5.6.2 Conclusion**

The right to just administrative action, is contained in Section 33 of the 1996 Constitution. This constitutional supremacy and the rule of law, provides the tools for the control of all public powers. If a right has been infringed, justifiability is then activated, irrespective of the degree of discretion in the functionary against whom proceedings have been brought or irrespective of the policy content.

## **5.7 Public administration and democratic values**

Section 195<sup>602</sup> of the 1996 Constitution deals with the functioning of the public administration. The purpose of this section was to ensure that public administration is efficient and administrative justice is forthcoming. This section reads in part as follows:

*Section 195(1) of the Constitution*

*Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- (a) A high standard of professional ethics must be promoted and maintained.*

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<sup>600</sup> 2008 4 SA 367 (CC), 2008 3 BCLR 251 (CC) 3.

<sup>601</sup> 2012 3 SA 486 (SCA) para 44-45.

<sup>602</sup> Section 195(1) of the 1996 Constitution.

(b) *Public administration must be accountable*

I *Transparency must be fostered by providing the public with timely, accessible and accurate information.*

These principles apply also to the administration in every sphere of government, organs of state, and public enterprise.<sup>603</sup> In *President of the Republic of South Africa v South African Rugby Union*, the Constitutional Court had this to say about public administration:<sup>604</sup>

*Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical administration which respects fundamental rights and is accountable to the broader public.*

However, the Constitution does not define public administration. Quinot relies on Hoexter that Section 195 can be equated with the founding values of the Constitution because these impose duties without giving rise to justiciable rights.<sup>605</sup> This conclusion is supported by the observation of the court in *Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality*<sup>606</sup>. In this case the applicants were property developers on the west coast. During a period from April 2003 to August they made six applications ("development applications") to the Saldana Bay Municipality ("Municipality") for rezoning and subdivision of properties acquired by them. The applicant approached the Constitutional Court on the basis that the Supreme Court had failed to deal with the constitutional issue relating to the municipality's alleged duty to account for the alleged overpayment. In the end the court held that, "this court had on a number of occasions stated that although these values underlie our Constitution, they do not give rise to independent rights outside those set out in the Bill of Rights". Then the court referred to what was said in *Chirwa v Transnet Limited and Others*.<sup>607</sup> In this case the court said:

*Even if the applicant was permitted to bypass the specialised framework of the LRA in the attempt to challenge her dismissal, the reliance on Section 195 is misplaced.*

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<sup>603</sup> Section 195(2) of the 1996 Constitution.

<sup>604</sup> 1999 10 BCLR 1059 (CC) 1115B-D para 133.

<sup>605</sup> Quinot *Administrative Justice* 33; Hoexter *Administrative Law* 19.

<sup>606</sup> 2013 11 BCLR 1217 (CC) para 16.

<sup>607</sup> 2005 3 SA 280 (CC), 2004 5 BCLR 445 (CC), 2008 4 SA 367 (CC).

Because in *Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and Others*,<sup>608</sup> the court held:

*The values enunciated in Section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of Section 1 itself, but also from the way the Constitution is structured and in particular the provisions of chapter 2 which contains the Bill of Rights.*

The accountability and transparency are informed by the Constitution and derived from the values which underpin the Constitution.<sup>609</sup>

Legislation is in place which ensures that the public administration performs its mandate within the parameters of the Constitution.<sup>610</sup> The remedy provided in Section 7(2) of PAJA must be assessed within the context of the functioning of the public administration. Public administration is characterised by state capture as a result of massive corruption.<sup>611</sup> The interview of the Public Protector, Adv Thuli Madonsela with the then Deputy Minister of Finance, Mr Mcebisi Jonas revealed as Mr Jonas couched it:

*Mr Ajay Gupta mentioned to him that collectively as a family, they 'made a lot of money from the State' and they wanted to increase the amount from R6 billion to R8 billion and that a bulk of their money was held in Dubai.*<sup>612</sup>

The Public Protector concluded that the proper constitutional and just remedial action<sup>613</sup> will be:

*... the appointment of a Commission of enquiry within 30 days headed by a judge solely selected by Chief Justice who will provide a name to the President.*

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<sup>608</sup> 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC); S 1(d) of the 1996 Constitution.

<sup>609</sup> Chapter 2 of the Bill of Rights of the 1996 Constitution.

<sup>610</sup> Plasket *The fundamental right to just administrative action* 289. This legislation is listed by Plasket as *Public Service Act 103 of 1994*, *Public Finance Management Act 1 of 1999* and the *Provincial Exchequer Act 1 of 1994*.

<sup>611</sup> State of Capture Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprise resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses Report No 6 of 2016/17.

<sup>612</sup> Public Protector Report No 6 of 2016/17 at 94.

<sup>613</sup> Public Protector Remedial Action at 353.

Given the above, it can no longer be argued that recognising substantive legitimate expectation will interfere with government policy, in a government which has delegated its mandate to a third party which is not government consequence, the South African public administration is now characterised by dysfunctionality and unable to deliver services as mandated by Section 195 of the Constitution. Furthermore, there is no accountability as required by Section 1(d) of the Constitution:

*Responsive democracy is an aspiration towards government which is accountable to its subjects; towards government that acknowledge a responsibility to justify its decisions to those whom it governs. In administrative law, that translate into an aspiration towards institutions which foster the government decisions.*<sup>614</sup>

## **5.8 Court decisions in favour of substantive benefits for legitimate expectations doctrine**

### **5.8.1 High Court**

#### *5.8.1.1 Substantive legitimate expectations*

Substantive legitimate expectations form part of the common law review in England. When legitimate expectation was accepted in South Africa as part of the grounds of review on procedural grounds, Corbet CJ was inclined to follow the developments of other countries.

Professor Riggs said the doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations.<sup>615</sup> The instances where conduct would give rise in an application based on a legitimate expectation was adequately addressed in the English case of *Civil Service Unions and Others v Minister for the Civil Service*:<sup>616</sup>

*But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law ... Legitimate or reasonably, expectation may arise either*

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<sup>614</sup> Mureinik 1993 *Acta Juridica* 36.

<sup>615</sup> Riggs 1988 *American Journal of Comparative Law* 404.

<sup>616</sup> 1985 AC 374 (HL); 1984 3 ALL ER 395 para 7561.

*from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonable expect to continue.*

In *Administrator Transvaal and Others v Traub and Others* the court said that legitimate expectation is capable of including expectations which go beyond enforceable legal rights, provided expectations have some reasonable basis.<sup>617</sup> Corbet CJ, went on to say the following:

*... Legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interest of the person concerned is taken.*

These sentiments were previously echoed by the Attorney-General of Hong Kong where the legitimate expectation on the part of the respondent was induced by the promise made by the senior immigration official on behalf of the State.<sup>618</sup>

- *SARFU and Others v President of the Republic of South Africa* 1998 10 BCLR 1256 (T)

The court, per De Villiers J, found that the legitimacy on SARFU's part was induced by the promise or agreement made on behalf of the State by the Minister and the DG. The decision to appoint the Commission was taken by the President also acting on behalf of the State.<sup>619</sup> SARFU, so the court held:

*SARFU had a legitimate expectation that if the Minister approached the President for the appointment of a commission on the basis of SARFU's alleged breach of the agreement, where SARFU had in fact not breached it, but was abiding by it, it would be given the opportunity of present its case.*<sup>620</sup>

De Villiers continued to say:

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<sup>617</sup> 1989 4 SA 731 (A) at 756G-H.

<sup>618</sup> *SARFU and Others v President of the Republic of South Africa and Others* 1998 10 BCLR 1256 (T) at 1290 para C.

<sup>619</sup> *SARFU and Others v President of the Republic of South Africa and Others* 1998 10 BCLR 1256 para B.

<sup>620</sup> *SARFU and Others v President of the Republic of South Africa and Others* 1998 10 BCLR 1292 at 1292 para C.

*SARFU could reasonably expect to retain the substantive benefit or advantage it had acquired in terms of the agreement, as long as it complied with its terms.*<sup>621</sup>

This case was decided under the Schedule 6 (Transitional Provisions). On 22 September 1997 pretending to be acting in line with Section 84(2)(f)<sup>622</sup> of the Constitution of the Republic of South Africa, Mr Mandela, the then President of the first democratic order, appointed a commission of inquiry ("Commission") into certain financial and administration aspects of the South African Rugby Union ("SARFU") and related matters.<sup>623</sup> The Commission was given the terms of reference under the chairmanship of Acting Justice J Browde ("Browde"). The then Minister of Sports, Mr Steve Tshwete announced an intention to appoint a "task team" to investigate the management and internal affairs of SARFU and its constituent unions. The minister stated that it would be in the interests of SARFU to cooperate. SARFU was not prepared to submit to a procedure that could amount to a "fishing expedition", nor was it prepared to submit to any such investigation without being appraised of whether allegations were considered to need investigation. The court held that SARFU had a legitimate expectation to be heard before the Commission was appointed. Yet in *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others*,<sup>624</sup> Farlam considered the interpretation of Section 24(b)<sup>625</sup> of the IC. Farlam J held as follows:

*It follows from what I have said that even if Section 24(b) is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under Section 24(b) is entitled, in appropriate cases, to more than just the application of the audi alteram partem and the nemo iudex in sua rules. What he is entitled to is, in my view, what Lord Morris of Borth-y-Gest described as 'the principles and procedures'<sup>626</sup> which, 'in (the) particular situation or set of circumstances, are right and just and fair'.*

This court equated Section 24(b) with Section 33(b) read with Sections 39(1) and (2) of the Final Constitution. Judge de Villiers found no substantial difference between the relevant provisions of the IC and the FC. The court held, correctly so that there was

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<sup>621</sup> *SARFU and Others v President of the Republic of South Africa and Others* 1998 10 BCLR 1256 at 1291-1292.

<sup>622</sup> Section 84(2)(f) of the *Constitution of the Republic of South Africa*. This section provides that the president is responsible for appointing Commissions of Inquiry.

<sup>623</sup> 1998 10 BCLR 1256 at 1260 para 1.1.

<sup>624</sup> 1996 1 SA 283 (C) at 305C-G.

<sup>625</sup> Section 24(b) of the IC.

<sup>626</sup> *Wiseman v Born-Man* [1969] 3 All ER 275 at 278C-E.

nothing in the Act itself which, expressly or by implication, restricts or negates the general duty to act fairly and in particular the duty to give reasonable and timely notice and SARFU had a legitimate expectation entitling it to a hearing. The general requirement of natural justice that the president should act fairly, was applicable in this case.<sup>627</sup>

- *Ampofo and Others v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province and Another* 2002 2 SA 215 (T)

In *Ampofo and Others v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province and Another*, the applicants relied on the doctrine of legitimate expectation for the contention that, as it has been the practice of the department to furnish each of the applicants with a letter supporting their application, and the applicants had a legitimate expectation that the letter would be issued to them. The applicants contended that they had a legitimate expectation to receive from the department a letter stating that they were permanently employed under the department.

The court held:

*As this practice was followed year after year, the applicants had a legitimate expectation, also at the end of the year 2000, that the department would write a letter.*

In *Putco Limited v The Minister of Transport for the Republic of South Africa*,<sup>628</sup> Gildenhuys stated:

*One of the requirements for an expectation to that effect is a clear and unambiguous representation. In analyzing whether the applicant has established the existence of such a representation, I will assume, without deciding, that the doctrine of substantive legitimate expectations forms part of our law. In the absence of sufficient facts to establish a basis to establish a substantive legitimate expectation, the applicant is not entitled to the relief claimed.*

What happened in this case is that the new government changed the existing public bus transport system operating in South Africa and the way in which contracts were awarded. This change affected the applicant. In order to introduce this change, the

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<sup>627</sup> 1998 10 BCLR 1256 (T) at 1288A.

<sup>628</sup> 2003 JDR 0484 (W) 43.

respondent agreed with the applicant to enter into interim contracts that would preserve existing jobs and operations and gradually phase in the new tender system.<sup>629</sup> The applicant disputed that the government in general and Gautrans in particular is entitled to take a decision that the present tender process be discontinued and argues that it must bring the process to its conclusion by the award of contracts for the relevant routes. The applicant suffered losses as a result of the fourth respondent's failure to award the new contracts.<sup>630</sup> The applicant's case was that, since the third and fourth respondents have embarked on a tender process for the Soweto routes, it was contractually bound to complete the process and to award the tender for five routes to the applicant.

As a further alternative, the applicant submits that it had a legitimate expectation that the government would follow fair procedures in administering the tender process. By not giving the applicant an opportunity<sup>631</sup> to be heard before taking the decision to abort the process, the government acted unfairly. It was the applicant's alternative argument which is the focus of this discussion. Gildenhuis rejected this argument on the basis that the doctrine of legitimate expectation would only be applicable if the invitation to submit tenders and the subsequent handling of the process constituted administrative action. Further, a competitive tender process for the provisions of subsidised transport services involves public money to be spent by the government in the public interest and brought the process, within the confines of administrative action, which made it subject to Sections 33 and 217 of the Constitution and to the provisions of the *Promotion of Administrative Justice Act* (Act 3 of 2000).

These two cases show a sharp contrast of the court's approach to the recognition of substantive legitimate expectations cases. On the one hand Booyesen J<sup>632</sup> was not favourably disposed to its recognition while on the other hand, Gildenhuis J was prepared to recognise substantive legitimate expectation as a ground of relief.

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<sup>629</sup> 2003 JDR 0484 (W) 9.

<sup>630</sup> *Putco Limited v The Minister of Transport for the Republic of South Africa* 2003 JDR 0408 (W) 28.

<sup>631</sup> 2003 JDR 0484 (W) 28-29.

<sup>632</sup> *Durban Add-Ventures Ltd v Premier, Kwa-Zulu Natal* (No 2) 2001 1 SA 389 (N).

- *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 4 SA 308 (LCC)

In this case Meer J, did not hesitate to accept the applicant's substantive legitimate expectations. Meer J held that the respondents, through their conduct, caused applicants to entertain a legitimate expectation that the State would purchase applicants' properties and indeed sign the deeds of sale. The learned judge continued:

*Subjectively applicant entertained their expectation, which was reasonable, based on objective facts, namely the expressed undertaking on the part of first and second respondents that the agreements would be honoured. In addition, applicants' legitimate expectation was substantive.*<sup>633</sup>

The court was blind to the acceptance of substantive legitimate expectations. The position of this court has not been overturned. The position of substantive legitimate expectation in the researcher's view is cemented by this case.

### **5.8.2 Supreme Court of Appeal decisions**

- *Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 204 (SCA)

In this case Corbet CJ held that the issues in dispute in *Du Preez*, may be found in the common law, and more particularly the rules of the common law which require persons, bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner.<sup>634</sup> The learned Chief Justice continued:

*The audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly.*<sup>635</sup>

- *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 3 SA 472 (SCA)

The Supreme Court of Appeal found a legitimate expectation based on the severity of the impact of the administrator's adverse decision on the individual concerned, without

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<sup>633</sup> 2010 4 SA 308 (LCC) 318-319 para 23.

<sup>634</sup> *Du Preez and Another v Truth and Reconciliation Commission* 2007 3 SA 204 (SCA) at 230 I-J.

<sup>635</sup> 2007 3 SA 204 (SCA) at 231 F-G.

referring to any prior statements or practice by the administrator. The court held that the right to be heard comes into play when an administrative decision affects a person to such an extent that the decision, according to the person's legitimate expectation, may not be taken without allowing him to state his case. Furthermore, in each case the question must be always be asked whether the person who was prejudiced by the relevant decision had a fair and equitable opportunity to state his case.

Despite the changes brought in by the supremacy of the Constitution, the principles of common law still afford guidance as to what will constitute fairness in the circumstances. Under Section 33 of the FC, all administrative action must be lawful, reasonable and procedurally fair. The all or nothing rights-based approach belongs strictly to the position before 1994.<sup>636</sup>

### ***5.8.3 Constitutional decisions in favour of the allowance of substantive benefits for legitimate expectations***

- *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal* 1999 2 SA 91 (CC)

The position of legitimate expectation received constitutional recognition under the 1993 Constitution<sup>637</sup> after the decision in *Traub v Administrator, Transvaal*,<sup>638</sup> where the doctrine of procedural legitimate expectation was accepted as part of the law in South African administrative law. Corbet CJ explained the existence of two forms of expectations. These expectations include procedural and substantive expectations. Section 24(b) provided that every person shall have a right to procedurally fair administrative action where any of his or her rights or legitimate expectation is affected. Although Corbet in *Traub* found that substantive legitimate expectation is also applicable in administrative decisions, the drafters of the 1993 Constitution, omitted to include substantive legitimate expectation, and in the researcher's view, left it to the courts to incorporate it in South African administrative law. The type of expectation held by a person, can differ from procedural expectation. In the latter it

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<sup>636</sup> 1989 4 SA 731 (A). See also 1997 3 SA 204 (A); 1999 2 SA 709 (SCA).

<sup>637</sup> Act 200 of 1993.

<sup>638</sup> 1989 4 SA 731 (A) 758F.

means that he or she will be heard or that some<sup>639</sup> other procedure will be followed before a decision is taken. By contrast a substantive expectation, means that a person expectation entertains of a favourable decision.<sup>640</sup>

As pointed out already, Section 33 of the 1996 Constitution dealing with just administrative action left out legitimate expectation. After 22 years in a constitutional state, the judiciary and academics are still facing the question as to whether or not substantive legitimate expectation can be incorporated into South African law. In *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>641</sup> O'Regan concluded that the decision by the applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard, was a breach of their right to procedural fairness enshrined in Section 24(b) of the 1993 Constitution. The court upheld the decision of the High Court by compelling the second applicant to continue to pay the bursaries till the end of the 1995 school year. This decision amounted to substantive legitimate expectation though the court did not specifically mention that substantive legitimate expectation is recognised in South Africa.

- *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 3 SA 1151 (CC) / 2001 7 BCLR 652<sup>642</sup>

In this case, the respondents objected to a government decision to provide temporary accommodation to a group of people who had lost their houses in Alexandra as a result of floods.<sup>643</sup> The temporary accommodation was to be provided on the land of the Leeukop prison, which belonged to the state. The first objection raised, was that the provision in the area of accommodation to homeless people would negatively affect the value of the fixed property of members of the first respondent. The second was latter's rights had been being affected, they had been entitled to be given a hearing before a decision was taken.

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<sup>639</sup> 2001 3 SA 1151 (CC); 2001 7 BCLR 652 (CC) para 102.

<sup>640</sup> 1989 4 SA 731 (A).

<sup>641</sup> 1999 2 SA 91 (CC).

<sup>642</sup> 2001 7 BCLR 652 at para 101.

<sup>643</sup> 2001 3 SA 1151 (CC) 1183G-H/I and 11831/J-1184E.

The court held that no rights of the respondent's members had been violated, that the members of the respondents were entitled to put their case, and that the interest that they had in the price of their properties and the nature of their neighbourhood was in terms of Section 33(b) of the 1996 Constitution not sufficient ground to warrant procedural protection in terms of the Constitution.<sup>644</sup>

- *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC)

This case concerned the change of a promise to pay subsidies to independent schools. The applicant – an association of independent schools in KwaZulu-Natal – sought an appeal against a decision of the KwaZulu-Natal High Court, (Pietermaritzburg) dismissing its application to enforce payment of certain monies it claimed to be due to the school it represents. Leave to appeal was refused by both the High Court and the Supreme Court of Appeal. This application originates from a subsidy the first respondent, the Member of the Executive Council for Education in KwaZulu-Natal (MEC), granted to independent schools in the province in accordance with Section 48 of the *South African Schools Act* 84 of 1996 (the *School Act*) for 2009/2010. On 22 September 2008, the second respondent issued a notice to independent schools in KwaZulu-Natal setting out "appropriate" funding levels for 2009. The department did not pay the subsidies to the schools in the amount indicated in the notice.<sup>645</sup> They showed a cut of 30% from the amounts indicated in the 2008 notice less than those set out in the 2008 notice.

In November 2010, the applicant brought proceedings to enforce what it said were "promises" in the 2008 notice.<sup>646</sup> The applicant's case was based on a promise to pay the amounts set out in it for the whole school year of 2009. An order was asking the Department to pay the exact shortfall in the subsidies actually received in 2009 as

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<sup>644</sup> Driver 2001 *Annual Survey of SA Law* 106-107; Peach *The application of the audi alteram partem rule* 24.

<sup>645</sup> *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC) para 6.

<sup>646</sup> *KwaZulu-Natal* case para 8.

compared to that set out in the 2008 notice. Alternatively, the applicant sought an order for payment of a percentage of the shortfall.

The applicant relied on a contract, not on administrative law (researcher's words). This was informed by the contents of the applicant's founding affidavit which relied purely on a promise or undertaking to pay.<sup>647</sup> Courts enforce undertakings when parties agree by contract to be bound by their terms: when the undertakings give rise to a legitimate expectation and administrative fairness requires some measure of their enforcement; or when any legal principle or rule requires enforcement. The respondent's defence was that the undertaking in the 2008 notice could not be fulfilled because of a budgetary-knock-on.<sup>648</sup>

In this case, the Centre for Child Law (Amicus) Pretoria University was admitted as *amicus curiae* submitted that the facts relating to the promise and past practice are adequately pleaded on papers. They further argued that the court should not inquire formalistically whether the label "legitimate expectation" was used but must rather determine whether its elements (promise and/or settled practice and resultant prejudice) are pleaded and supported on record. The court was thus in a position to make a finding regarding the legitimate expectation of the affected schools, and to grant appropriate relief.<sup>649</sup> The court did provide an appropriate relief, but not one based on legitimate expectation. The court's view was that the respondent's action constituted a publicly promulgated promise to pay.<sup>650</sup>

The court ordered the second respondent to pay to the schools affiliated with the applicant on 22 September 2008 the appropriate amounts specified in the notice of that date, which had fallen for payment on 1 April 2009. The court reasoning for not developing the substantive legitimate expectation approach was the fact that the applicant did not properly plead or rely on substantive legitimate expectation and that

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<sup>647</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 14 31.

<sup>648</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 32.

<sup>649</sup> Section 38 of the 1996 Constitution. Any person listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. Our courts have expressly left open the question whether a legitimate expectation may give rise to substantive benefit. *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 13.

<sup>650</sup> *KwaZulu-Natal* case para 48; *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 9 BCLR 891 (CC) 96.

the applicant expressly disavowed reliance upon the doctrine of legitimate expectation. Murcott<sup>651</sup> argued that the Constitutional Court felt bound by the applicant's stance. It found it necessary to develop the doctrine of substantive legitimate expectation, to formulate a new legal mechanism at public law. The court offered some substantive protection to the schools represented by the applicant "on broader public law and regulatory grounds". She further argued that this mechanism affords the schools substantive protection in respect of conduct bearing all the hallmarks of administrative action without reliance on the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA).

- *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) (Nkandla judgment)

In this case the Public Protector investigated allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic of South Africa. It was found by the Public Protector that the President failed to act in terms of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular use of state resources.<sup>652</sup> The Preamble of South African Constitution specifically deals with the break from the past where the apartheid government used administrative law to perpetuate apartheid policies. On these facts there was no check and balances on the State abuse of power.

To achieve the recognition of substantive legitimate expectations as part of South African law, accountability, the rule of law and the supremacy of the constitution as values of South African constitutional democracy must be applied. This duty is imposed on the courts which have been entrusted with the duty to develop the law.<sup>653</sup>

- *United Democratic Movement v Speaker of the National Assembly and Others* 2017 5 SA 300 (CC); 2017 8 BCLR 1061 (CC) (*Secret Ballot* judgment)

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<sup>651</sup> Murcott 2015 *PELJ* 3134-3135.

<sup>652</sup> 2016 3 SA 580 (CC) para 1.

<sup>653</sup> 2016 3 SA 580 (CC) para 35. S 182(1)(c) impose an actor-specific obligation.

Dealing with the legitimate expectation of the applicants (members of the National Assembly) the Constitution provides for freedom of speech and choice. The Constitutional Court per Mogoeng CJ observed:

*... to allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisal, a secret ballot has been identified as the best voting mechanism.*

This judgment amounted to substantive legitimate expectation. The applicant's benefit was to allow secret ballots to Members of Parliament.

- *President of the Republic of South Africa v The Office of the Public Protector and Others* 2018 2 SA 100 (GP) (State Capture judgment)

In this case the then President of the Republic of South Africa, Mr Jacob Zuma brought an urgent application to interdict the Public Protector from releasing a report<sup>654</sup> on 13 October 2016. The purpose of his application was to prevent the finalisation and the release of the report through the interdict, until such time as he had been afforded a reasonable opportunity to provide input into the investigation carried out by the Public Protector.<sup>655</sup>

- The basis of the application

The applicant alleged that he was at risk of being the subject of adverse factual findings without having been afforded an opportunity to be heard and questioned those who made allegations against him as well as to provide answers and input into the investigation.<sup>656</sup> At time of the application the report by the Public Protector was already being finalised. Furthermore, the applicant argued that the investigation by the Public Protector constitute an administrative action whose actions were subject to the provisions of Section 33 of the Final Constitution<sup>657</sup> as well as his right to just

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<sup>654</sup> The name of this report is called "State Capture". It has its origin in the investigation into complaints of improper and unethical conduct by the President Mr Jacob Zuma and officials of state organs due to their alleged inappropriate relationship with members of Gupta family, para 1. This judgment is also known as *Nxasana Judgment*, Case no 7980/16.

<sup>655</sup> *President of the Republic of South Africa v The Office of the Public Protector and Others* 2018 2 SA 100 (GP) para 2.

<sup>656</sup> *Nxasana Judgment* para 9.

<sup>657</sup> *Nxasana Judgment* para 20.

administration action has been infringed. Note must be taken of the fact that the applicant is not litigating in his capacity as the President of the country but as the Citizen of the Republic of South Africa. He asserted his rights in terms of the *Promotion of Administrative Justice Act 3 of 2000*. Despite the finalisation of the report, he had a right to review<sup>658</sup> the report, as he had not been afforded an opportunity to make an input before the report was finalised.

- Preservation of the report

Parties<sup>659</sup> to the proceedings agreed that the report be preserved and put into safekeeping pending the application by the President and the Minister. In part the order by agreement read:

Pending the determination of this application in this court:

*The Public Protector's report in the investigation into complaints of improper and unethical conduct by the President and officials of state organs due to their alleged inappropriate relationship with members of the Gupta family, finalised and signed on 14 October 2016 ('the report'), will not be released to the public.*

*The report shall be preserved and kept in safe keeping. As facts show, there was no need for the Mr Zuma to proceed with his application. But however, he proceeded to do so. Substantive relief. The intervening parties sought a relief that the report be released not later than 8 November 2016 and the President pay the legal costs in his personal capacity. The fifth respondent alleged that she has a direct and substantial interest in the case. The court was faced with the questions to decide:*

- a) Was the litigation conducted in a manner becoming of a reasonable litigant?*
- b) Whether this litigation was in his capacity as the President or in his personal capacity as the citizen of the Country?*<sup>660</sup>

Intervening parties argued that the costs be paid by the President personally. Even though the report was finalised, the applicant persisted with his application. This ignored the fact that the right to review a report can only come in after the decision is final.

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<sup>658</sup> *Nxasana Judgment* para 21.

<sup>659</sup> Economic Freedom Fighters, United Democratic Movement; Congress of the People; Democratic Alliance even though at that stage it did not bring a formal application to intervene; Ms Vytjie Mentor. The Minister, Des Van Rooyen withdraw his application because no purpose would be served by pursuing the application as the Public Protector had confirmed that her report expressed no adverse findings and recommendations para 17.

<sup>660</sup> *Nxasana Judgment* para 26.

The court gave a substantive relief to the intervening parties because in the face of the finality of the investigation and report, amounted to abuse of judicial process. The court went further to explain what constitutes the abuse of power, which is when a party conducts litigation in an unreasonable manner to the prejudice of those who are "naturally forced to defend their interests". This is a justifiable basis to punish the culpable litigant with a punitive costs order. The court found that the applicant acted in "flagrant disregard for the constitutional duties of the Public Protector". This clearly shows that it is wrong of the administrator to frustrate the promise he or she has made to the community member or the citizen and they rely on the separation of powers or fettering the decision of the administrator, executive or the Legislature.<sup>661</sup> The court did not explain whether the rights of the President was violated in terms of PAJA.

- *Pikoli v President and Others* 2010 1 SA 400 (GNP)

In this case the applicant obtained an order against the President interdicting him from appointing any successor in the office of the National Director of Public Prosecutions (NDPP), pending the applicant's application to review and set aside his removal from office.

- *Democratic Alliance v Acting National Director of Public Prosecutions and Others*<sup>662</sup> (Society for the Protection of South African Constitution as *amicus curiae*)<sup>663</sup>

In this case the court held that rationality involves substantive and procedural issues. The applicant approached the court claiming substantive relief that the charges be reinstated against Mr JZ Zuma. The applicant was the official opposition political party in South Africa. It sought the review of the first respondent's decision to discontinue the criminal prosecution of the third respondent (the then President of the Republic of South Africa). The first respondent was the Acting National Director of Public Prosecution who was at the time Advocate Mokotedi Mpshe SC (Mr Mpshe). The court's conclusion was that the decision of the first respondent fell within the realm of administrative law and that the decision to discontinue the prosecution of the case

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<sup>661</sup> *Nxasana* judgment para 49.

<sup>662</sup> 2016 3 All SA 78.

<sup>663</sup> 2016 3 All SA 78; 2016 8 BCLR 1077 GP; 2016 2 SACR 1 Case No 19577/2009. This case is known as the spy tape Ledwaba DJP judgment.

against Mr Zuma was irrational and was reviewed and set aside. This amounted to a substantive benefit.

The Supreme Court of Appeal in *Democratic Alliance v Acting National Director and Another*,<sup>664</sup> here the court held that a decision to discontinue prosecution can be reviewable on the grounds of legality and irrationality. Similarly, in *National Director of Public Prosecutions v Freedom under the Law*<sup>665</sup> the court held that:

*The principle of legality acts as a safety net to give the court some degree of control over the action that does not qualify as administrative action under PAJA, but which in any case involves public power.*

By the same token, substantive legitimate doctrine will serve as a safety net to give the courts judicial control over the action of the administrator or the executive. *Albutt v Centre for the Study of Violence and Reconciliation and Others*<sup>666</sup> explained what is a rationality review. The court said a rationality review is concerned with the evaluation of a relationship between means and ends – "the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself". Furthermore, rationality involves substantive and procedural issues.<sup>667</sup>

In *Fose v Minister of Safety and Security*,<sup>668</sup> the court had regard to Section 7(4) of the Constitution, which allowed any person to "apply to a competent court of law for the appropriate relief, which may include a declaration<sup>669</sup> of rights". The courts cannot turn away litigants who argue that their rights to a benefit under the common law is being violated. If this should be the case, the courts will be failing in their duty to be the custodian of the Constitution.

Substantive legitimate expectation is in line with Section 38 of the FC, which in its simplest terms says that anyone listed in Section 38 has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or

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<sup>664</sup> 2012 3 SA 486 (SCA).

<sup>665</sup> 2014 SA 298 (SCA) para 29.

<sup>666</sup> 2010 3 SA 293 (CC) para 51.

<sup>667</sup> 2010 3 SA 293 (CC) para 46.

<sup>668</sup> 1997 3 SA 786 (CC); 1997 7 BCLR 1675 (CC).

<sup>669</sup> 1997 3 SA 786 (CC) para 18-19.

threatened, and the court may grant appropriate relief, including a declaration of rights. This was eloquently addressed in *Fose v Minister of Safety and Security*<sup>670</sup> where the Constitutional Court stated that:

*An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.*

So is the case with the procedural legitimate expectation the courts are empowered by the Constitution to give a remedy.

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.<sup>671</sup> This section ensures that the rights of the citizens of the Republic of South Africa protected not only by the judiciary but by the other two arms of government. The litigant who has a substantive expectation would arguably have no protection of his rights enshrined in Chapter 2 of the FC, if his "or her rights are ignored in the name of fettering with the powers of administration."<sup>672</sup> Government has a right and responsibility to have policies in place to carry its function as the elected representative of the people but this power is not unfettered. This power is always open to judicial review.<sup>673</sup> So substantive legitimate expectations will enable the judiciary to exercise its power of judicial review. Government politicians (Executive and Legislature) will do as they wish as this has emerged in the Secured in Comfort: a report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province.<sup>674</sup>

- *Joseph and Others v City of Johannesburg and Others* 2010 4 SA 55 (CC)

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<sup>670</sup> 1997 3 SA 786 (CC); 1997 7 BCLR 851 (CC) at 69.

<sup>671</sup> Section 8(1) of the FC.

<sup>672</sup> *EFF and Others v The President of the Republic of South Africa and Others* 2016 3 SA 580 (CC).

<sup>673</sup> *EFF and Others v The President of the Republic of South Africa and Others* 2016 3 SA 580 (CC) para 71.

<sup>674</sup> 2013/14 (Public Protector's Report) at para 11.

In this case the court held the constitutional validity of the respondent by-laws regulating the supply of electricity in the City, the City's Credit Control and Debt Collection by-laws could be read consistently with PAJA so that procedural fairness is afforded not only to customers of City Power but to any person whose rights would be materially and adversely affected by the termination of electricity supply. In conclusion the court held that to the extent that the City's electricity by-laws permitted the termination of electricity supply "without notice", they were inconsistent with PAJA and Section 33 of the FC.

## **5.9 Court decisions negating the allowance of substantive benefits for legitimate expectations**

### **5.9.1 High courts**

- *Durban Add-Ventures Ltd v Premier, KwaZulu-Natal and Others (No 2)* 2001 1 SA 389 (N)

*Durban Add-Ventures Ltd v Premier, KwaZulu-Natal and Others*<sup>675</sup> is one of the cases which brought the doctrine of substantive legitimate expectation into the debate and hence attention of South African courts. The applicant in this case had registered as a participant in a process devised to determine preferred finalists who would be invited to apply for a casino licence. The process had been devised to advise in terms of the *KwaZulu-Natal Gambling Act* 10 of 1996. The applicant structured its casino development proposal to best meet the criteria identified by the board. The applicant was selected as a finalist as the board adjudicated applicant's proposal to be acceptable as compared to other competing bidders. After this process, it emerged that the *KwaZulu-Natal Act* 10 of 1996 were in conflict with the *National Gambling Act* 33 of 1996 and also that certain provisions of the regulations were ultra vires the *KwaZulu-Natal Act* 10 of 1996. A Bill amending this Act was published, but never passed.

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<sup>675</sup> (No 2) 2001 1 SA 389 N.

Later the applicant was advised that it was a preferred finalist and invited to apply for a casino licence. After this, the *KwaZulu-Natal Act 10 of 1996* was amended and new regulations, published in provincial notice 38 of 2000, promulgated. The new regulation had the effect of abolishing the status of preferred finalist. Sections 2 to 5 of the new regulations substituted certain new procedures regarding applications for casino licences in place of the old regulations.

The applicant applied for an order declaring the amended regulations, published in Provincial Notice 38 of 2000, to be ultra vires and void, in that they were incapable of meaningful interpretation and thus vague and uncertain and that they deprived the applicant of its legitimate expectation that the licensing procedures would not be altered and of its status as a preferred finalist. Booysen went about the position of legitimate expectation in South African law: legitimate expectation may only be based on a practice where there is evidence to establish that a regular practice exists and, therefore, the applicant has no evidence of any regular practice which might be said to have generated a legitimate expectation. That the applicant used the doctrine of legitimate expectation in an effort to generate substantive legitimate expectation instead of procedural rights as such a move was not permissible in South African law.

Sadly, the doctrine of legitimate expectation may not be employed so as to place substantive constraints on the power of a lawmaker to enact delegated legislation and, in particular, could not operate in the case before him so as to inhibit the formation of government policy. Furthermore, he said for good reasons the courts are reluctant to fetter governments from implementing changes to policy. "The first respondent has considered it necessary to promulgate the new regulations as a matter of government policy. Therefore, the doctrine of legitimate expectation cannot be used in the present context by the applicant so as to preclude the provincial government from giving effect to a policy which it considers to be in the public interest". Booysen did not give any authority for his conclusion that substantive protection of legitimate expectation cannot be part of the law and if one accepts government policy as a condition of the

acceptance of substantive legitimate expectation, substantive legitimate expectation will not be recognised as part of South African administrative law.<sup>676</sup>

Strangely he referred to *R v Ministry of Agriculture, Fisheries and Food; ex parte Hamble (Offshore) Fisheries Ltd*<sup>677</sup> case as support for his contention that government policy cannot be fettered by an application of the legitimate doctrine.<sup>678</sup> This sparked a huge debate which concerns the non-recognition of substantive legitimate expectations. This position did not end up with the above case as the debate continued to be addressed in the judgment of Putco. Considering the relief to be granted, the judge referred to the Supreme Court of Appeal's opinion in *Meyer v Iscor Pension Fund*<sup>679</sup> holding that the doctrine of substantive legitimate expectations has not yet been permitted in South African law.<sup>680</sup>

In practice an individual may have substantive expectation.<sup>681</sup> "The doctrine of legitimate expectation was construed broadly to protect both substantive and procedural expectations".<sup>682</sup>

### **5.9.2 Supreme Court of Appeal judgments**

- *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA)

The Supreme Court warned against incorporating the substantive legitimate expectations doctrine into South African law.<sup>683</sup>

In this case,<sup>684</sup> the court was of the opinion that copying the developments in English law by incorporating the doctrine of legitimate expectation into the South African law was difficult and complex. Furthermore, by simply transplanting a legal concept from

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<sup>676</sup> Quinot 2004 *German Law Journal* 549.

<sup>677</sup> [1995] 2 All ER 714 (QB).

<sup>678</sup> Quinot 2004 *German Law Journal* 549; Hoexter *Administrative Law* 432.

<sup>679</sup> 2003 2 SA 715 (SCA).

<sup>680</sup> Quinot 2004 *German Law Journal* 550; judgment of Gildenhuys in *Putco Limited v the Minister of Transport for the Republic of South Africa* 2003 JDR 0484 (W) 25 para 55.

<sup>681</sup> Hoexter *Administrative Law* 421.

<sup>682</sup> *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 758E.

<sup>683</sup> 2003 2 SA 715 (SCA).

<sup>684</sup> 2003 2 SA 715 (SCA).

one system of law to another, it was imperative first, to examine the context in which that concept originated and developed in its system of origin. Brand JA concluded:

*In deciding whether to adopt the doctrine of substantive legitimate expectation as part of our law, we will have to consider the possibility that the doctrine was developed as a solution to problems.*

- *South African Veterinary Council and Another v Szymanski* 2003 4 SA 42 (SCA)

A few months later in *South African Veterinary Council and Another v Szymanski*,<sup>685</sup> the court heard the appeal against an order of the Pretoria High Court which set aside an examination pass mark decision of the first appellant, which ordered the appellant to register the respondent. The dispute arose from a special examination the Council conducted in September 1998 to enable South African citizens or permanent residents with foreign veterinary qualifications to qualify for registration under the South African legislation.<sup>686</sup>

The respondent case was that he had a legitimate expectation that the requirement for passing the special examination was 40% for each of the oral and written parts (not 50% for either or both combined). He claimed that the expectation arose from (a) pre-examination letters the Council sent; and (b) conversation he had in August 1998 with its members, who were conducting a preparatory course on behalf of the Council for special examination entrants.

Cameron JA felt that the propriety of the order given in the court *a quo* was open to serious question, not least because it is by no means clear that a legitimate expectation can found an extra-procedural entitlement such as the substantive benefit claimed in this case. Later, Cameron JA said:

*Though this court has recently cautioned against an over hastily answer to this 'difficult and complex' issue and has suggested that the substantive legitimate expectation doctrine may have been developed to deal with problems of English law that do not exist in our law, this case does not require us to resolve the issue. This is because the respondent case was deficient in its most basic essentials.*<sup>687</sup>

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<sup>685</sup> 2003 4 SA 42 (SCA) paras 15 and 19.

<sup>686</sup> 2003 4 SA 379 (SCA) 1-3.

<sup>687</sup> 2003 2 SA 715 (SCA).

Cameron is one of the judges who is described as a conscientious judge, did not seek a solution from the Constitution which is the supreme law of the Republic of South Africa. Cameron, in justifying his decision held:

*The requirements relating to the legitimacy of the expectation upon which an application may seek to rely has been drawn in case of National Director of Public Prosecutions and Another v Phillips and Others,<sup>688</sup> in this case it was held that for an expectation to be legitimate, it must be a reasonable expectation that was induced by the decision-maker, based on a clear, unambiguous<sup>689</sup> representation which it was competent and lawful for the decision maker to make.*

Quinot<sup>690</sup> points out that the development of substantive legitimate expectation in South African law is still in the early stage and it is not clear whether the doctrine will be accepted. All the statements in the higher courts suggest that a much more careful analysis of the relevant issues regarding the doctrine must be put before the court before it will be prepared to endorse the doctrine. I am not sure whether the approach suggested by Quinot is the appropriate approach to accommodate substantive legitimate expectations or if this can be done without reforming administrative law as the common law, is no longer the only way for judicial review. This must be achieved through transformative constitutionalism.

- *Minister of Environmental Affairs and Tourism and Another v Phambili Fisheries (Pty) Ltd and Others* 2003 2 SA 616 (SCA)

The respondents were two fishing companies, Phambili Fisheries (Pty) Ltd ("Phambili") and Bato Star Fishing (Pty) Ltd ("Bato").<sup>691</sup> They brought review applications in the Cape Provincial Division. They succeeded in their application. The quota allocations were made by the Chief Director on 24 December 2001, under the powers vested in the Minister under Section 18 of the *Marine Living Resources Act* 18 of 1998 ("the MLRA") which had been delegated to him in terms of Section 79. The respondents claimed that it had a legitimate expectation of a "substantial allocation and increase" in the allocation to it, in that it "believed that the application for a right to

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<sup>688</sup> 2002 4 SA 60 (W) at 102 para 28.

<sup>689</sup> 2002 1 BCLR 41 at 77 para 28.

<sup>690</sup> Quinot 2004 *German Law Journal* 82.

<sup>691</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC).

catch 5000 tons would be favourably considered". The respondents relied on the policy guidelines and ministry media statements, each dating from 2001. In dealing with legitimate expectations doctrine, Schutz JA referred to the case of *South African Veterinary Council and Another v Szymanski*,<sup>692</sup> the judgment was delivered by Cameron who stated in para [19]:

*The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Hefer J.*<sup>693</sup>

Schutz JA found that there was no substantive legitimate expectation and there was no ground of review.<sup>694</sup>

### **5.10 Constitutional Court decisions negating the allowance for substantive legitimate expectations**

- *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 10 BCLR 1059 (CC)

In this case, the Constitutional Court had to consider whether, the decision of the President in terms of Section 84(2) of the Constitution, to appoint a commission of inquiry in order to investigate the affairs of SARFU, amounted legitimate expectation.

The court concluded that the respondents had no legitimate expectation that the President would afford them a hearing prior to his deciding to confer the *Commission Act* powers upon the commission he had appointed.<sup>695</sup>

- *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 3 SA 265 (CC)

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<sup>692</sup> 2003 4 SA 42 (SCA) para 19.

<sup>693</sup> 2002 4 SA 60 (W) 102 para 28.

<sup>694</sup> 2003 2 All SA 616 (SCA) 65.

<sup>695</sup> 1999 10 BCLR 1059 (CC) 1149 para 216.

Chaskalson cautioned that the doctrine of substantive legitimate expectations was an ongoing issue on which there was no authority in the South African law.<sup>696</sup>

In *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*,<sup>697</sup> this case concerned the validity of the policy pursued by the government of the Western Cape attempting to give effect to the Constitutional imperative to introduce equity into its educational system. The appellant's complaint arose from the manner in which the rationalisation programme was introduced, the impact that it would have on them, and that they were not consulted in regard to such matters. Appellants' claim was:

1. *Declaring the respondents' failure to employ the general assistants presently employed by the applicants, to be in conflict with the fundamental rights entrenched in Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996, and therefore unlawful.*
2. *Directing the respondents to employ the general assistants presently employed by the applicants.*<sup>698</sup>

This claim was dismissed by the Cape High Court. The applicant then applied to the Constitutional Court for leave for appeal which was granted.

Before the Interim Constitution came into force, education in South Africa was conducted at racially segregated schools managed by different departments of education. When the appellant schools were administered by the departments of the House of Assembly Education Department, the policy of that department was that the general assistants would be employed by the schools themselves. This policy was followed for several years before the Interim Constitution. After a year in government the appellants requested that the policy be changed. The appellants' claim was a substantive claim for positive relief in respect of the alleged infringement of Constitutional rights.<sup>699</sup>

The appellants based their arguments on three constitutional rights:

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<sup>696</sup> *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 3 SA 265 (CC) at para 76.

<sup>697</sup> 2002 9 BCLR 9 (CC) 294.

<sup>698</sup> 2002 9 BLLR 891 (CC) 902 (32).

<sup>699</sup> 2002 9 BLLR 891 (CC) 903 (33).

1. *Failure by the Western Cape Department of Education to employ the general assistants at the appellants' schools infringed the equality rights of the schools under Section 9 of the Constitution.*
2. *The policy adopted by the department infringed the rights of the children at the appellant schools under Section 28 of the Constitution.*
3. *In its dealings with the appellants, the department had infringed the appellant schools' rights under Section 33 of the Constitution, to just administration action.*<sup>700</sup>

The appellant alleged that their right to procedural fairness was infringed, in that the decision taken by the department was unilateral and without consultation. In responding to this argument, Chaskalson CJ went on to say:

*It was not contended in written or oral argument that any of the appellants had a substantive legitimate expectation that the department's policy would be changed to comply with the request. The argument went no further than asserting that there was a legitimate expectation to a hearing, and that there was thus a basis for the enforcement of the audi principle, even if the appellant's rights were not infringed. Substantive legitimate expectation is a contentious issue on which there is no clear authority in our law.*<sup>701</sup>

Chaskalson CJ left the question open for decision in a case when the issue is properly raised and the factual foundation for such a contention is established. In the same breath, the same court said that the provision of remedies is open-ended and therefore flexible,<sup>702</sup> courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity. However, the court failed to grant the applicants a substantive relief based on its view of open-ended and flexible remedies. It is not a matter of discretion or personal "inclination" but rather a constitutional imperative for substantive legitimate expectation to be recognised.<sup>703</sup> The conclusion reached by Chaskalson was vague. He did not explain what constitutes factual foundation and under what circumstances will issues be raised properly. In the researcher's view it

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<sup>700</sup> *Bel Porto Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 9 BLLR 891 (CC) 903 (34).

<sup>701</sup> *Bel Porto Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 9 BCLR 891 (CC) 917; *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) (32).

<sup>702</sup> *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 3 SA 265 (CC) 324 para 180.

<sup>703</sup> *Robert James Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 4 SA 50 (GP) para 10.

could be argued that both the cases of *Administrator Transvaal*<sup>704</sup> and *Premier, Mpumalanga*<sup>705</sup> laid the basis for substantive legitimate expectation.

This shows why the majority decision is in split of 6 and 4 on different grounds. Even though the majority ground is binding, the correct judgment, in the researcher's view goes to that of Mokgoro and Sachs JJ and Madala J.

Madala J observed that the doctrine of legitimate expectation has developed in English law to include substantive protection.<sup>706</sup> Quinot did not agree with Madala. He is of the view that the doctrine of legitimate expectation, as it exists in South African law, protects both procedural and substantive expectations to the statement that legitimate expectation will be protected substantively in certain instances. "Substantive expectations are protected by the doctrine of legitimate expectation, they are no authority for the proposition that substantive legitimate expectations will be protected substantively".<sup>707</sup>

Both scholars and the courts (negating substantive legitimate expectations) wrote on this field of substantive legitimate expectations and expressed a desire for substantive legitimate expectations to become part of South African legal system as suggested. However, they fall short in arguing for a coherent theoretical basis for recognising substantive relief for legitimate expectations in South African administrative law and transformative Constitutionalism as a vehicle to achieve this.<sup>708</sup> For example, Quinot is of the opinion that the way in which substantive application is constructed and formulated will motivate its significance in the courts.<sup>709</sup>

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<sup>704</sup> *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A) 758D-E.

<sup>705</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) 156 (62).

<sup>706</sup> *Bel Porto Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 9 BCLR 891 (CC) 954 (209).

<sup>707</sup> Quinot 2004 *German Law Journal* 81.

<sup>708</sup> Devenish 2007 *De Jure* 113; Campbell 2003 *SALJ* 292; Campbell 2004 *SALJ* 538; Quinot 2004 *German Law Journal* 65; Quinot 2004 *SAPL* 543-570.

<sup>709</sup> Hoexter *Administrative Law* 434, referring to what was stated by Quinot 2004 *SAPL* 548.

- *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 3 SA 454 (CC)

In this case the applicants argued that the eviction should not take place as that would be to permit the respondents to evict the occupiers in breach of the legitimate expectation that 70 percent of the housing to be built on the site of Joe Slovo would be allocated to current and former occupiers of Joe Slovo.<sup>710</sup> O'Regan in this case said<sup>711</sup> that in South African law, where an applicant can show that government has acted in opposition to the existence of a legitimate expectation, without giving the applicant an opportunity to be heard, the applicant may launch review proceedings to set the government conduct aside. Some courts in South Africa expressly refrained from determining whether a legitimate expectation might give rise to a substantive benefit,<sup>712</sup> although the English courts have developed a doctrine of substantive legitimate expectation.<sup>713</sup>

## **5.11 Finding a coherent theoretical basis for recognising substantive relief for legitimate expectations in South African administrative law**

### ***5.11.1 The transformative vision of South Africa's constitutional state***

Transformations of legal cultures have become topical issues in contemporary jurisprudence. Although transformatory perspectives also drive libertarian jurisprudential theories, postmodern and socialistic theories, together with communitarian perspectives on justice, have impacted strongly on legal transformation strongly. Today libertarian, post-modern, socialistic and

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<sup>710</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 3 SA 454 (CC) at 549 para 305.

<sup>711</sup> 2010 3 SA 454 (CC) at 549 para 306.

<sup>712</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 3 SA 265 (CC); 9 BCLR 891.

<sup>713</sup> *R v North Devon Health Authority, ex parte Coughlan (Secretary for Health and Another) Intervening* [2001] QB 213 [2000] 3 All 3 All ER 850.

communitarism theories contain creative approaches for transforming the legal culture of South African State in public law in particular and in general.

The provisions of both the Interim<sup>714</sup> and the final Constitution<sup>715</sup> emphasise the Constitution's commitment to transformation. It requires a radical move from the past and compels the transformation of the legislature, executive and South African legal culture.<sup>716</sup> The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with particular reference to recognising substantive legitimate expectation. Klare describes transformative constitutionalism as a long-term project of constitutional enactment, interpretation and enforcement, in order to transform the country's political, social institutions and power relationships in a democratic, participatory and egalitarian direction.<sup>717</sup> In addition, Langa argues that a truly transformative South Africa requires a new approach to legal education, in that it should place "the Constitutional dream at the very heart of legal education".<sup>718</sup> He confronts the inherent conservatism of the South African legal culture, which is based on formal rather than substantive reasoning. In light of this definition, it is the researcher's view that in order to reform South African administrative law and to recognise substantive legitimate expectations, there is a need to achieve transformation by implementing the values and aspirations enacted in the Constitution<sup>719</sup> and to change the South African legal culture, in order to meet the standards for reforming administrative law. Although transformation is not the sole responsibility of the court, since it is the task of all three arms of government,<sup>720</sup> the greatest responsibility lies in the hands of the judiciary. Furthermore, the Constitution commits all the branches of government to the promote democratic values, human rights and equality.<sup>721</sup>

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<sup>714</sup> Act 200 of 1993.

<sup>715</sup> Act 108 of 1996.

<sup>716</sup> Pieterse 2005 *SAPL* 166.

<sup>717</sup> Langa 2006 *Stell LR* 356; Klare 1998 *SAJHR* 151.

<sup>718</sup> Langa 2006 *Stell LR* 356.

<sup>719</sup> Klare 1998 *SAJHR* 151.

<sup>720</sup> Langa 2006 *Stell LR* 351, 358.

<sup>721</sup> Act 108 of 1996.

## 5.12 Natural justice

If the rights of an individual have been violated by actions of the government, a public body or certain domestic tribunals or associations, such an individual may claim, depending on the circumstances of the particular case.<sup>722</sup> The content of these rules can be summarised in the *maxim audi alteram partem*. The application of the *audi alteram partem* rule, as is the case with many other concepts, has been eclectic.<sup>723</sup> Nevertheless it developed certain nuances in the decisions of the civil courts. The rule entails four principles. Firstly, a party to an administrative enquiry must be afforded an opportunity to state his or her case before a decision is reached, if such a decision is likely to affect his or her rights or legitimate expectations. Secondly, prejudicial facts must be communicated to the person who may be affected by the administrative decision, in order to enable him or her to rebut such facts. Thirdly, the rule also stipulates that the administrative tribunal which has taken the decision must give reasons for its decision. Fourthly, the rule entails that the administrative organ exercising the discretion must be impartial. As a general rule, it may be said that the principles of natural justice apply whenever an administrative act is quasi-judicial. An administrative act may be said to be quasi-judicial if it affects the rights and liberties of an individual.<sup>724</sup>

The application of the *audi alteram partem* rule was brought out in the case of *Board of Education v Rice*,<sup>725</sup> when the court stated the Board of Education had to ascertain the facts as well as listen to both sides, for that is a duty upon everyone who decides an issue that may have an impact on a person's rights. In *Administrator Transvaal and Others v Traub and Others*,<sup>726</sup> the Appellate Division rejected the long-established traditional approach to the application of the *audi alteram partem* rule in South African law. In broad terms, the doctrine holds that where a decision maker, either through the adoption of a regular practice or through an express promise, leads those affected legitimately to expect that the decision maker will decide in a particular way, then that

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<sup>722</sup> Craig *Administrative Law* 253; Peach *The application of the audi alteram partem rule* 3.

<sup>723</sup> Craig *Administrative Law* 253.

<sup>724</sup> Baxter 1979 SALJ 608-609.

<sup>725</sup> 1911 AC 182.

<sup>726</sup> 1984 4 SA 731 (A) 762-764.

expectation is protected, and the decision maker cannot ignore it before in making his or her decision.<sup>727</sup>

While there is nothing in both the Interim and Final Constitution of the Republic of South Africa which negates acceptance of substantive legitimate expectations, there is no movement by South African courts to enforce the application of the *audi alteram partem* rule on the executive arm of government, because the latter, also exercises administrative functions. These functions are not affecting a wide variety of interests which do not constitute rights in the strict sense. The only concept which has been fashioned to beef up such interests is the doctrine of substantive legitimate expectation.

The amended text of the certification of the 1996 Constitution was certified as compliant<sup>728</sup> by the Constitutional Court after it rejected the first attempt to comply with the seven Constitutional Principles.<sup>729</sup> This Constitution is characterised by the rule of law<sup>730</sup> and constitutional supremacy.<sup>731</sup> The "Founding Provisions" in Section 1 signal many values which underlay the Constitutional principles.<sup>732</sup> These values will be discussed below.

## **5.13 Transformative constitutionalism and South African Public law**

### ***5.13.1 Values underpinning the Constitution***

#### **5.13.1.1 Preamble**

The Interim Constitution expressed in its preamble the need for a new order. The South African New Constitution retain from the past only what is defensible and

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<sup>727</sup> Forsyth 1990 SALJ 387-389.

<sup>728</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) (4 December 1996).

<sup>729</sup> *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) (6 September 1996).

<sup>730</sup> Section 1 of the 1996 Constitution.

<sup>731</sup> Section 2 of the 1996 Constitution.

<sup>732</sup> Corder *The Quest for Constitutionalism* 186.

committed to a democratic value.<sup>733</sup> The preamble of the Final Constitution is the first value of the Constitution. In part the preamble states:

*We, the people of South Africa,*

*Recognise the injustice of our past*

*We therefore, through our freely elected representatives, adopt this Constitution as the Supreme law of the Republic so as to-*

*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*

*Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*

*Improve the quality of life of all citizens and free the potential of each person ...*

What the Constitution did was to uphold the supremacy of the Constitution, first as a foundational value and secondly declare the supremacy of the Constitution as a binding and enforceable rule.<sup>734</sup> Section 1 of the Constitution guarantees that the South African constitutional model is not only descriptive but prescriptive.

- *Section 1 of the Constitution of the Republic of South Africa, 1996*

The Republic of South Africa is one sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms. In *Carmichele v Minister of Safety and Security and Another*<sup>735</sup> (Centre for Applied Legal Studies Intervening), the court held that the state is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. The courts have a duty to develop common law in accordance with the spirit, purport and objects of Bill of Rights in Section 39(2) of the Constitution. Where common law falls short in promoting the objectives of Section 39(2), courts are under a general obligation, depending on the circumstances of the principle to be developed.<sup>736</sup> The obligation of courts to develop the common law, in the context of Section 39(2), does not give the court the discretion whether to develop common law or not. This section is supported by Section 173 of the Constitution which states that the Constitutional Court, the

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<sup>733</sup> *S v Makwanyane and Another* 1995 3 SA 391 (T) 487 para 262.

<sup>734</sup> De Vos, Freedman and Brand *South African constitutional law* 454.

<sup>735</sup> 2001 4 SA 938 (CC) at 955F/D-956.

<sup>736</sup> 2001 4 SA 938 (CC) at 955F/G-956D.

Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. In *S v Makwanyane and Another*,<sup>737</sup> O'Regan reiterated the importance of dignity as a founding value of the new Constitution. She stated that recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: humans are entitled to be treated as worthy of respect and concern.

The learned judge continued:

*Human dignity is the foundation of many of other rights that are specifically entrenched in Chapter 3 of the Constitution.*<sup>738</sup>

But the Constitutional Court in *Bel Porto* failed to develop the rules of natural justice which include substantive legitimate expectations. As it stands the rule of natural justice is deficient in promoting fairness in the public administration. As matters stand, the public has no substantive benefit. It was implicit in the *Bel Porto* case that the common law had to be developed beyond procedural expectations. This situation obtained despite the fact that the applicants raised constitutional arguments at the beginning.

Section 1(c) Supremacy of the Constitution and the rule of law. *Corruption Watch Freedom Under the Law v President of the Republic of South Africa and Others*.<sup>739</sup>

The court had to look at the values underpinning the Constitution in taking an appropriate decision for setting aside the appointment of the National Director of Public Prosecution. In order to understand the role of the promotion of administrative action in South African constitutional state, one must always take cognisance of the fact that the Constitution empowers those who govern and imposes limits on their power. Further the Constitution expects courts to have a wider constitutional scheme in which both the institution and the individual are dealt with. In dealing with a legislation or the Constitution itself, the starting point should be to explore the founding values of the

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<sup>737</sup> 1995 3 SA 391 (CC) at 506-507 para 328.

<sup>738</sup> 1995 3 SA 391 (CC) at 507B para 328.

<sup>739</sup> Case No 62470/2015.

Constitution.<sup>740</sup> Thus every citizen and every arm of government ought rightly to be concerned with constitutionalism and its protection (researcher's emphasis).<sup>741</sup>

Before the democratic government in South Africa there was no safeguard in the legal system in trying capital, cases militating against mistake where a man is on trial for his life,<sup>742</sup> but now the South African legal system is different. South African courts are directed by the values in the Constitution. During apartheid the reasons for mistake of identity in criminal trials were too manifold and too obvious, for example in the case of *S v Serumula*.<sup>743</sup>

In conformity with Section 1(d) of South Africa Constitution with regard to accountability, the Constitutional Court in *United Democratic Movement v Speaker of the National Assembly and Others*,<sup>744</sup> found that a Member of Parliament could be exposed to various reasonably foreseeable prejudicial consequences when called upon to pronounce through a vote on the President's accountability or continued suitability for the highest office.

Writing for the majority judgment, Jafta, in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (NA judgment)<sup>745</sup> saw it prudent to remind the Speaker of the National Assembly that the National Assembly is elected "to represent the people and to ensure government by the people under the Constitution". In other words, the interests served and advanced by the exercise of its powers must be the collective interests of the people it represents.<sup>746</sup> How can it be acceptable for the administrator not to be held accountable for the legitimate expectations of the citizens if these cannot be judicially protected? Section 1(d) of the Constitution is the safeguard for the

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<sup>740</sup> *Corruption Watch and Others v The President and Others (Nxasana Judgment)* Case no 62470/2015 para 27.

<sup>741</sup> 2010 3 SA 454 (CC) at 549 para 305.

<sup>742</sup> Van Niekerk 1970 SALJ 60-75.

<sup>743</sup> 1962 3 SA 962 (A).

<sup>744</sup> 2017 5 SA 300 (CC); 2017 8 BCLR 1061 (CC) (UDM) para 74-5.

<sup>745</sup> 2016 3 SA 580 (CC).

<sup>746</sup> *EEF and Others v The Speaker of the National Assembly and Another* (Case no CCT76/17) para 141 (The National Assembly judgment). See also s 42(3) of the 1996 Constitution.

accountability of the administrators and gives the court the power to enforce the rights of the people of South Africa.

### **5.13.2 Section 2 of the 1996 Constitution of the Republic of South Africa**

#### 5.13.2.1 Supremacy of the Constitution

The supremacy of the Constitution directs how the new South Africa must operate and directs inter-governmental relations mandatory. Constitutional supremacy provides a defining feature of South African constitutionalism as it renders the entire Constitution justiciable.

#### 5.13.2.2 The rule of law

Constitutionalism is supported by the entrenchment of the rule of law in the founding provision of Section 1 of the Constitution.<sup>747</sup> The rule of law requires state institutions to act in accordance with the law.<sup>748</sup> In *Albutt v Centre for the Study of Violence and Reconciliation and Others*, the Constitutional Court held that procedural fairness was required as a matter of rationality, i.e. that it would be irrational to take the decision in question without hearing both sides.<sup>749</sup>

#### 5.13.2.3 Constitutional Democracy

Democracy in South Africa defines the parameters within which the South African constitutional state is founded. This element qualifies South Africa as a constitutional democracy.<sup>750</sup> The South African Constitution entrenches democracy within the parameters of the supremacy of the Constitution; justiciable Constitution, a culture of human rights; non-racialism, multiculturalism and multilingualism. Of particular relevance to this study is that constitutional democracy allows judicial review as a legitimate mechanism to review any of the decisions of the executive.<sup>751</sup>

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<sup>747</sup> Section 1 of the 1996 Constitution.

<sup>748</sup> Currie and De Waal *The Bill of Rights Handbook* 11.

<sup>749</sup> 2010 3 SA 293 (CC) at 69 and 72; Currie and De Waal *The Bill of Rights Handbook* 13.

<sup>750</sup> De Vos, Freedman and Brand *South African constitutional law* 95.

<sup>751</sup> De Vos, Freedman and Brand *South African constitutional law* 95.

These constitutional values must inform a court in interpreting the Bill of Rights and what a court must do to apply the doctrine of substantive legitimate expectation in South African administrative law. In this instance judges do not have a choice but to implement the mandate of the Constitution. Again, this will inform the judicial review of administrative law by invoking substantive legitimate expectation.

#### 5.13.2.4 Section 7(1) Rights

The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa country and affirms the democratic values of human dignity, equality and freedom.

Section 7(2) of the 1996 Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

#### 5.13.2.5 Section 8(3) Application

When applying a provision of the Bill of Rights to a natural or juristic person in terms of Subsection (2)(a) a court -

- (a) In order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and*
- (b) May develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).*

#### 5.13.2.6 Section 38 Enforcement of rights

This section provides that anyone listed in Section 38 has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The persons who may approach a court are-

- (a) Anyone acting in their own interest;*
- (b) Anyone acting on behalf of another person who cannot act in their own name;*
- (c) Anyone acting as a member of, or in the interest of, a group or class of person;*

- (d) *Anyone acting in the public interest; and*
- (e) *An association acting in the interest of its members.*

The argument that the recognition of substantive legitimate expectations will encroach on separation of powers does not hold water as explained by the court. PAJA has separated the powers of the executive, legislature and the judiciary. In *Democratic Alliance v President of the Republic of South Africa and Others*,<sup>752</sup> (*Simelane* judgment) the court held that institutions of government, organs of State and public office bearers are important components for the functioning of South Africa new Constitution. The rule of law is a central and founding value. No one is above the law and everyone is controlled by the Constitution and the law. The executive and legislative arms of government are bound by legal prescripts. Accountability, responsiveness and openness are constitutional watchwords. To ensure a functional, accountable constitutional democracy the drafters of both the interim and final Constitution placed limits on the exercise of power. It is the duty of the courts to ensure that the state has enough power to govern but at the same time the state power must be limited by the constitution to see that state authority does not trump the law or the human rights of its citizens.<sup>753</sup> The recognition of substantive legitimate expectation would ensure that the law and the human rights of its citizens are not violated.

In *Democratic Alliance v President of the Republic of South Africa and Others*,<sup>754</sup> the Constitutional Court rejected the argument that a restraint must be put in a rationality review of a decision of the President on the grounds that review would violate the separation of powers.<sup>755</sup> The Constitutional Court sent a strong warning to those who do not want to be held accountable by stating that it is wrong that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision was an executive one.

The separation of powers has nothing to do with whether a decision is rational. The court found that the principle of separation of powers was applicable in the

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<sup>752</sup> This judgment is known as the *Simelane* judgment. Case No 263/11 2012 1 SA 417 at 438 para 66.

<sup>753</sup> Currie and De Waal *The Bill of Rights Handbook* 8.

<sup>754</sup> 2013 1 SA 248 (CC).

<sup>755</sup> *Democratic Alliance v President of the Republic of South Africa and Others* 2013 1 SA 248 (CC).

appointment of the fourth respondent. This was in response to the respondent's arguments that reviewing and setting aside Simenane's appointment would undermine the separation of powers.<sup>756</sup> In the light of this decision of the Constitutional Court, the arguments denying substantive relief for legitimate expectations because the granting of substantive relief for legitimate expectations would amount to fettering the administrative organ's discretion and allowing substantive legitimate expectations would entail that courts would be allowed to intrude upon the separation of powers do not stand.<sup>757</sup> In reviewing decisions where the court finds that the doctrine of substantive legitimate expectation has not been complied with a court would always be mindful of its boundary. Like the Constitutional Court has rightly observed in *Affordable Medicine Trust and Others v Minister of Health and Others*:<sup>758</sup>

*The rational basis test involves restraint on the part of the court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the legislature its rightful role in a democratic society.*

This applies equally to executive decisions or administrative decisions which may affect the rights or legitimate expectations of the individual.

#### 5.13.2.7 Interpretation of the Bill of Rights

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. In *H v Fetal Assessment Centre*,<sup>759</sup> a boy, assisted by his mother, sued the Fetal Assessment Centre for damages flowing from the centre's alleged failure to warn his pregnant mother that he might be born with Down's syndrome, which he had.

The question was whether the law should recognise such an action. The Constitutional Court was now asked to decide whether the common law could potentially be developed to recognise the child's claim. The court held that South African law,

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<sup>756</sup> *Democratic Alliance v President of the Republic of South Africa and Others* 2013 1 SA 248 (CC) at 273 para 44.

<sup>757</sup> Chapter 1 above.

<sup>758</sup> 2006 3 SA 247 (CC) para 86. See also 2013 1 SA 248 (CC) at 273. Annual Survey of South Africa 2013 at 44-45.

<sup>759</sup> 2015 2 SA 193 (CC).

including common law, must conform to the values of the Constitution, especially, in this instance, the rights of equality, dignity and the paramount importance of children's interests in every matter concerning them.

Ultimately, the court found that a child's claim for damages may potentially be found to exist in these circumstances, should the common law not develop as to include substantive legitimate expectation as it was developed in this case. It can be argued with respect that the Constitutional Court do not record their jurisprudence in developing the common law. The researcher says this because the approach taken by the court in this case, is the approach which was to be followed by the court in reforming administrative law.

#### 5.13.2.8 Section 172(1)(b) Just and equitable remedy

This section provides that when deciding a constitutional matter within its power, a court may make any order that is just and equitable. This point was emphasised in the case of *Economic Freedom Fighters v Speaker of the National Assembly: Democratic Alliance v Speaker of the National Assembly*,<sup>760</sup> where Mogoeng CJ said the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector and therefore the Minister's findings which found the President not wrong was inconsistent with the Constitution and therefore unlawful. In minority judgment in *Corruption Watch NPC and Others v President of South Africa and Others*,<sup>761</sup> Jafta and Petse JJ held the view that a just and equitable order must "invariably be fair to all persons affected by it". They went on to state:

*A court that contemplates issuing such order must weigh up the interests of all parties to a litigation and where appropriate, the balancing must also take into account the interest of the public.*

The researcher supports the conclusion of the minority judgment that the public deserve an accountable administration and which account for its action. How does Mr JG Zuma account for the forced termination of the contract of Mr M Nxasana? Mr Nxasana expected no less than to returning to work after he had paid the money back.

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<sup>760</sup> 2016 3 SA 580 (CC) at 618 para 97-9.

<sup>761</sup> 2018 ZACC 23 (13 August 2018 judgment) para 125.

In my view the decision of Madlanga J in terms of Section 172(1)(b) was not appropriate in these circumstances.

In *Economic Freedom Fighters v Speaker of the National Assembly: Democratic Alliance v Speaker of the National Assembly*,<sup>762</sup> (Assembly judgment), the Constitutional Court stated that remedial power is not confined in Section 172 only. It is wide enough.<sup>763</sup> This is addressed in Section 172(1)(b), which provides that when deciding a constitutional matter within its power, a court:

- (b) *May make any order that is just and equitable, including –*
  - (i) *an order limiting the retrospective effect of the declaration of invalidity; and*
  - (ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*, the court said that the test for Sections 172(1) and 172(1)(b) is the interest of justice and equity in a case. The courts cannot ignore the interest of justice in the name of fettering with the functions of the executive in order to order substantive legitimate expectation as an appropriate remedy.<sup>764</sup> A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This the judge said permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.<sup>765</sup> Some of the people who opposed corruption more often than not, were the biggest perpetrators.<sup>766</sup>

The court which orders the recognition of substantive legitimate expectations does not fetter the functions of the administrator. Instead it brings the principle of fairness in administrative law. This cannot be described as violating the principle of separation of

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<sup>762</sup> 2016 3 SA 580 (CC) para 141.

<sup>763</sup> *EFF and Others v The President of the Republic of South Africa and Others* 2016 3 SA 580 (CC) para 141.

<sup>764</sup> 2010 3 BCLR 177 (CC) 207 para 96.

<sup>765</sup> *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 3 BCLR 177 (CC) 207 para 97.

<sup>766</sup> Pitchford *Blood on their hands* 171.

powers.<sup>767</sup> What substantive legitimate expectations doctrine does is to add or enhance the principle of fairness as it were. It was said that:

*Do not think that I have come to do away with the Law of Moses and the teachings of the prophets. I have not come to do away with them, but to make their teachings come true.*<sup>768</sup>

Therefore, the Constitution did not do away with the rules of fairness but enhanced the common law rule of natural justice. That is why Section 8(3)(b) says in order for the court to give effect to a right in the bill, it must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right. Yes, it is so that the *Promotion of Administrative Justice Act*, does not give effect to the right of fairness both in the definition of the term administrative action and in Section 3(1).<sup>769</sup>

In this case *Masiya v Director of Public Prosecutions, Pretoria and Another*,<sup>770</sup> the court found that the definition fell short of the spirit, purport and objects of the Bill of Rights. The definition of rape was extended to include non-consensual sexual intercourse or penetration of the penis into the anus of a female. She said that the anal penetration of males is no less humiliating, degrading or dehumanising in nature, she emphasised that focusing on non-consensual anal penetration of females should not be seen as being disrespectful to males.

Nkabinde J was not correct with respect that the legislature and not the courts have the major responsibility for law reform in South Africa's constitutional democracy. She held that extending the definition to include male would encroach onto the legislative terrain. Nkabinde misconstrued the function of the court and she did not have Section 8(3) of the Constitution. This section specifically refers to a court. It says:

*When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-*

*(a) In order to give effect to a right in the Bill, must apply, or if necessary common law to the extent that legislation does not give effect to that right;*

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<sup>767</sup> *National Assembly Judgment* para 217.

<sup>768</sup> Good News Bible *Mathew* 5:17.

<sup>769</sup> Section 3(1) of PAJA.

<sup>770</sup> 2007 5 SA 30 (CC).

It was the duty of the court and not the legislature to give effect to equal treatment of men and women with regard to the issues of rape. The legislation does not give explicit recognition of substantive legitimate expectations. In line with this section (Section 8(3)(a)) it is the duty of a court to develop common law to the extent that both the Constitution and the PAJA does not explicitly recognise the application of substantive legitimate expectations doctrine in South Africa.

Furthermore, the court above ignored Section 39(1) which calls the court or tribunal or forum when interpreting the Bill of Rights to:

- (a) Promote the values that underlie an open and democratic society based on human dignity, equality and freedom.*
- (b) Must consider international law; and*
- (c) May consider foreign law*

All of these constitutional imperatives are the vehicles for recognising substantive legitimate expectations doctrine.

Klare states that the Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning, in line with its transformative goals. This can only be achieved with a judicial mind set.<sup>771</sup> Mlambo J indicated that one of the mechanisms for transforming South Africa's society is the entrenchment of socio-economic rights in the Constitution.<sup>772</sup> Democratic transition in South Africa was intended to be a bridge from authoritarianism to a new culture, in which every exercise of power is expected to be justified.

The notion of incorporating transformative constitutionalism as a vision for developing South Africa's constitutional culture found support in the wording of the preamble and other provisions of the Constitution of the Republic of South Africa, 1996.<sup>773</sup> Section 1(a) is proclaimed as a fundamental value informing South Africa's vision of the Constitution. This section conveys what the new state should look like and further proclaims human dignity, equality and freedom to be at the core of South Africa's vision of constitutionalism. According to Davis and Klare, in terms of transformative

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<sup>771</sup> Klare 1998 SAJHR 150.

<sup>772</sup> Mlambo "The pursuit of meaningful social justice" 1-19.

<sup>773</sup> *Constitution of the Republic of South Africa*, 1996.

constitutionalism and common and customary law,<sup>774</sup> Sections 8(3) and 39(2) of the 1996 Constitution can be viewed as development clauses. They state that South Africa cannot progress towards a society based on human dignity, equality and freedom with a legal system that rigs a transformative constitutional superstructure onto a common and customary law-based one, which has been inherited from the past and indelibly stained by apartheid.

Equality, freedom and fairness are proclaimed as fundamental values informing South Africa's vision of constitutionalism. Section 1 of the 1996 Constitution describes, with similar sensitivity, how the constitutional values must be understood. Transformative constitutionalism is not a neutral concept but is intended to carry a positive voice and to connote a social good, and the South African people have chosen to move away from the supremacy of Parliament to constitutional supremacy, where the judge is empowered to develop the law. Mureinik<sup>775</sup> indicates that to be a conscientious judge in South Africa involves promoting and fulfilling, through one's professional work, the democratic values of human dignity, equality and freedom, and to work to establish a society based on democratic values, social justice and fundamental human rights. In order to accomplish this, the state must respect, promote and fulfil the rights contained in the Bill of Rights. The 1996 Constitution is full of broad phrases and is redolent with excellent hopes to overcome past injustices and move towards a democratic and caring society.<sup>776</sup>

At the heart of a transformative constitution is a commitment to substantive reasoning, in order to determine the underlying principles that inform laws themselves and judicial reactions to those laws, as well as to uphold the transformative ideal of the Constitution, where the judges change the law to bring it in line with the rights and values that the Constitution stands for.

In *Nyanthi v MEC for Department of Health: Gauteng Province*,<sup>777</sup> the Constitutional Court declared the provisions of the *State Liability Act*,<sup>778</sup> which prevented the

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<sup>774</sup> 2010 SAJHR 403.

<sup>775</sup> 1994 SAJHR 31-32.

<sup>776</sup> Klare 1998 SAJHR 148.

<sup>777</sup> 2008 BCLR 865 (CC).

<sup>778</sup> Act 20 of 1957.

execution of orders against the property of the state, to be unconstitutional. Parliament was given 18 months to devise new legislation which enables the effective enforcement of court orders.

Judge Madala observed the following:

*Certain values in the Constitution have been designated as foundational to the democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts are not carried out conscientiously, we have a recipe for the constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That in my view means at the very least that there should be strict compliance with court orders.*<sup>779</sup>

Transformation requires a complete reconstruction of the state and society, including the redistribution of power and resources along egalitarian lines. Equity as a value and as a right is central to the task of transformation. Kriegler observed that the South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. However, in light of South Africa's own particular history and South Africa's vision for the future, a Constitution was written with equality at its core. He added that: "Equality is South Africa's Constitution's focus and its organizing principle".<sup>780</sup>

Fairness in public administration forms an important component of transformative constitutionalism and has received much attention in the judicial review of administrative action in South Africa. The doctrine of *audi alteram partem* in general and legitimate expectations in particular has been closely associated with notions of fairness and natural justice. In the case of *Attorney-General, Eastern Cape v Blom*,<sup>781</sup> the court alluded to the creative development of the *audi* principle.<sup>782</sup> In *Administrator Transvaal v Traub*, the court, in creative fashion, officially imported the doctrine of legitimate expectations based on the duty to act fairly.<sup>783</sup>

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<sup>779</sup> *Nyanthi v MEC for Department of Health: Gauteng Province* 2008 BCLR 865 (CC) para 80.

<sup>780</sup> *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC); 1997 4 SA 1 (CC).

<sup>781</sup> 1988 4 SA 645 (A) 648.

<sup>782</sup> 1988 4 SA 645 (A) 660H.

<sup>783</sup> 1989 4 SA 731 (A).

## 5.14 Conclusion

The legislature complied with Section 33(3)<sup>784</sup> of the 1996 Constitution by enacting the *Promotion of Administrative Justice Act 3 of 2000*. This legislation codified administrative review in administrative law. This was not the situation under the parliamentary sovereignty in South Africa. What is now left is for PAJA to comply with the Constitution.

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<sup>784</sup> Section 33(3) provides: 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 subsection (1) and (2);
- (c) Promote an efficient administration.

## CHAPTER 6

### SUBSTANTIVE LEGITIMATE EXPECTATIONS UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT IN SOUTH AFRICA<sup>785</sup>

#### 6.1 Pre-democratic position

Before the constitutional rights to administrative action in South Africa, administrative acts were known as the conduct of administrative organs of the state. It is within this definition that the rules of natural justice had to comply with the term of a quasi-judicial act.<sup>786</sup> This quasi-judicial act had to be performed in the exercise of a discretion. Therefore, if the rules of natural justice do not apply, the administration was obliged to perform a certain act and as a result of this, so the argument went, there was no need to give the person affected by the act an opportunity to give.<sup>787</sup> This position was articulated in the case of *Laubscher v Native Commissioner Piet Retief*,<sup>788</sup> where the appellant was refused written permission in terms of Section 24(1) of Act 18 of 1936<sup>789</sup> before he could lawfully enter Trust property. Schreiner JA held that the view that he had no antecedent right to go upon the property and the refusal did not prejudicially affect his property or his liberty. "Nor did it affect the appellant legal right that he already held."<sup>790</sup> This was the unfortunate position under the parliamentary government. In this case Wiechers held the view that the appellant could still have alleged that the commissioner had not considered the facts, had acted mala fide or had exercised his powers for an ulterior purpose, but he could not rely on non-compliance with the rules of natural justice.<sup>791</sup>

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<sup>785</sup> *Promotion of Administrative Justice Act* 3 of 2000 main objective is to promote an efficient administration and good governance; as well as creating a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administration action. This is derived from Section 33(3) of the Constitution.

<sup>786</sup> Wiechers *Administrative Law* 129.

<sup>787</sup> Wiechers *Administrative Law* 29.

<sup>788</sup> 1958 1 SA 546 (A).

<sup>789</sup> Section 24(1) of Act 18 of 1936.

<sup>790</sup> *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A) at 549E-F.

<sup>791</sup> Wiechers *Administrative Law* 130-131.

But before the decision in *Laubscher v Native Commissioner, Piet Retief*, the Appellate Division in *R v Ngwevela*,<sup>792</sup> the accused had been prohibited by the Minister by notice issued under Section 9 from attending for the next two years gatherings in the Union other than those of a bona fide religious, recreational or social nature. On appeal the court considered that the Minister before exercising his powers under Section 9 of *Suppression of Communism Act* 44 of 1950,<sup>793</sup> failed to give the appellant an opportunity of defending himself. The court held that the Minister's notice was invalid because of his breach of the *audi alteram partem* rule in failing to give the respondent an opportunity to state his defence before issuing the notice. The Minister's notice took away rights, which the appellant possessed in full measure before the issue of the notice, of belonging to the organisation, of attending meetings and residing in any Province of the Union.<sup>794</sup>

With the pressure for constitutional reform in South Africa, the court in *Attorney-General, Eastern Cape v Blom*, held that the right to be afforded the *audi alteram partem* rule is incorporated into legislation unless expressly or impliedly excluded.<sup>795</sup> This position was nullified by the constitutional right to just administrative action. In *South African Roads Board v Johannesburg City Council*, the court rejected the rigid classification of functions as either administrative or legislative as a means of determining whether natural justice applied to a particular type of administrative act.<sup>796</sup> This was a new term in the new dispensation of rights.<sup>797</sup> This term of administrative justice was not defined both under the 1993<sup>798</sup> and 1996<sup>799</sup> Constitution. Despite the defects of both Constitutions, this fundamental right changed the nature of South African administrative law.<sup>800</sup> Both Section 24 of the 1993 Constitution; Section 33 of the final Constitution and the *Promotion of Administrative Justice Act* 200 of 2000 marked the most reformatory change of South African administrative law since the

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<sup>792</sup> 1954 1 SA 123 (AD).

<sup>793</sup> Section 9 of Act 44 of 1950.

<sup>794</sup> *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A) at 551F.

<sup>795</sup> 1988 4 SA 645 (A).

<sup>796</sup> 1991 4 SA 1 (A).

<sup>797</sup> Section 24 of the 1993 Interim Constitution.

<sup>798</sup> Section 24 of the 1993 Interim Constitution.

<sup>799</sup> Section 33 of the 1996 Final Constitution.

<sup>800</sup> Plasket *The fundamental right to just administrative action* Abstract.

creation of a superior court of general jurisdiction at the Cape of Good Hope in 1827.<sup>801</sup> The *Promotion of Administrative Justice Act* 3 of 2000 signalled an important phase in the country's reform of administrative law. But this was not the end for the need to reform administrative law under the present Constitution.

## 6.2 Transformative constitutionalism, fairness, and administrative law

We live in a society in which there are large disparities in terms of wealth. Millions of people are living in deplorable conditions and in extreme poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or adequate health services. These conditions existed when the Constitution was adopted, and a commitment to address them and to transform South Africa's society into one in which there will be human dignity, freedom and equality, lies at the heart of South Africa's new constitutional order. For as long as these conditions continue to exist, this aspiration will have a hollow ring.<sup>802</sup> Transformative constitutionalism is an important vehicle for accomplishing transformation in order to address many of the issues mentioned above.

In the sphere of administrative justice in particular, transformative constitutionalism could be regarded as a constitutional philosophy that represents fairness in public administration. The notion that administrative justice is an expression of fairness is not a novel idea in South African administrative law. Under the rubric of fairness, South African courts have often reverted to the doctrine of fairness in English law. Fairness aided the English courts to recognise substantive relief for legitimate expectations. In the case of *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*, the court held that:

*... the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will not be listened to before the decision-maker decides whether to take a particular step.*<sup>803</sup>

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<sup>801</sup> Plasket *The fundamental right to just administrative action* 4.

<sup>802</sup> *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 1 SA 725 (CC) 740 para 26.

<sup>803</sup> 1995 2 All ER 714 696-697.

The PAJA plays a very important role in the transformation of South African administrative law. The purpose of the Act is to give effect to the right to administrative action which is procedurally fair, as well as the right to written reasons for administrative action, as contemplated in Section 33 of the *Constitution of the Republic of South Africa*, 1996.<sup>804</sup> The term "administrative action" is not defined in the Constitution, however, in terms of Section 1 of the PAJA:

Administrative action means any decision taken or any failure to take a decision, by

- (b) *an organ of state, when*
  - (i) *exercising a power in terms of the Constitution or a provincial constitution; or*
  - (ii) *exercising a public power or performing a public function in terms of any legislation; or*
  - (iii) *a natural or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ... .*

The lack of precision, transformative content and sensitivity towards extending administrative justice has elicited comments from many administrative law scholars. Although the PAJA brought with it a new statutory definition of administrative action, it is suggested that this definition is narrow, confusing and difficult to understand. Furthermore, with regard to procedural fairness and the absence of substantive legitimate expectations, the PAJA lacks the vision needed for transforming South African administrative law into a dynamic system of law that provides the basis for the meaningful transformation of administrative justice.

The power to review administrative actions is primarily derived from the Constitution which is the highest law of the land.<sup>805</sup> Secondly, the powers and functions conferred to the courts owe their existence or significance to the Constitution.<sup>806</sup> So the definition of administrative action must be in line with the principles of constitutionalism which limit the powers of administration where the citizens' rights are affected. The argument

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<sup>804</sup> Act 3 of 2002.

<sup>805</sup> This power came from s 33 of the Constitution in which the promotion of administrative justice was enacted on the 30 November 2000.

<sup>806</sup> Section 165(1) of the Final Constitution.

that the application of substantive legitimate expectations will obstruct the government or administration to do its functions lacks merit.<sup>807</sup>

The *Promotion of Administrative Justice Act*<sup>808</sup> has been specifically enacted to play an important role in the transformation of South African administrative law by extending the scope or ambit of the judicial review in South Africa. The purpose of the Act is to codify the grounds for judicial review which include both the right to administrative action which is procedurally fair, as well as the substantive relief as contemplated in Section 33 of the Constitution and *Promotion of Administrative Justice Act*.

This is indeed correct because the courts, including the Highest Court in the land, is not in the position to develop the common law or amend the *Promotion of Administrative Justice Act*.

In conclusion, the court set aside the order of the High Court dismissing the application; declaring that the failure by the department to consult with the appellants on the determination of the plan to implement the personnel provisioning measures infringed the appellants' constitutional rights to administrative justice in terms of Section 33. Furthermore, parties were directed to file supplementary papers dealing with appropriate relief in the light of the findings of the violation of the appellants' constitutional rights to administrative justice.<sup>809</sup>

### **6.3 Administrative Justice in South Africa after the apartheid government**

Administrative action takes various forms and undertakes multiple objectives. Individual administrative determinations are made for the purpose of exercising statutory power in specific situations. This is illustrated by a granting licence, imposing a restriction on workers or dismissing a public employee. The role of administrative law in these situations is concerned with the fairness of the procedures involved, or

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<sup>807</sup> *EFF and Others v The President of the Republic of South Africa and Others* 2016 3 SA 580 (CC) para 64.

<sup>808</sup> Act 3 of 2000.

<sup>809</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 9 BCLR 891 (CC) 967.

the rationality of the decision made by the public authority.<sup>810</sup> As can be seen, the principle of legitimate expectations was imported from English law in South Africa.<sup>811</sup> The Appellate Division extended the rules of natural justice to include legitimate expectation as a ground of judicial review.<sup>812</sup> The Chief Justice was well aware of the potential of this principle and he issued the following warning:<sup>813</sup>

*In working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb.*

This was the first step in reforming South African administrative law. For the first time in South African administrative law, legitimate expectations became part of South African law. But this expectation was still procedurally legitimate expectation. Substantive legitimate expectation was left out by this judgment. Riggs' view was that:

*... the doctrine of legitimate expectation is construed broadly to protect both substantive and procedural legitimate expectations.*<sup>814</sup>

Not long after the recognition of procedural legitimate expectations by the Appellate Division, a new Constitution<sup>815</sup> was negotiated and adopted by the South African people after a long struggle. This Constitution revolutionised administrative law by including the administrative justice clause in the Bill of Rights.

#### **6.4 Administrative justice<sup>816</sup>**

Section 24 of the Interim Constitution reads as follows:

*Every person shall have the right to*

*(a) Lawful administrative action when any of his or her rights or interests is affected or threatened;*

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<sup>810</sup> Baxter 1993 *Acta Juridica* 176.

<sup>811</sup> *Schmidt v Secretary of State for Home Affairs* 1969 1 All ER 904 (CA) at 909.

<sup>812</sup> 1989 4 SA 731 (A).

<sup>813</sup> 1989 4 SA 731 (A) at 761E-F.

<sup>814</sup> Riggs 1988 *American Journal of Comparative Law* 395 at 404. Madala's J dissenting judgment in *Bel Porto Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 9 BCLR (CC) 891 at 955.

<sup>815</sup> Act 200 of 1993.

<sup>816</sup> Section 24 of the 1993 Constitution.

- (b) *Procedurally fair administrative action when any of his or her rights or legitimate expectation 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 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.*

This right elevated the constitutional status of common law. Corder is not pleased with this right because, it did not, as had the Namibia Constitution of 1990,<sup>817</sup> give a positive duty to act fairly and reasonably on all administrative bodies and officials.<sup>818</sup> One of the important changes brought about by Section 24 is the principle of justifiability. That is namely that any action by public officials must be justified. This right had to be seen in line with the rights of access to information<sup>819</sup> and access<sup>820</sup> to the courts. These rights, so argues Corder, was a reaction to the evils of apartheid perpetrated through bureaucratic discretion "under a cloak of ouster clauses".<sup>821</sup>

## 6.5 Organ of State

Definition of Organ of State in terms of the 1996 Constitution.

The organ of state was first introduced in Section 7(1) of the 1993 Constitution which provided that the Bill of Rights bound "all legislative and executive organs of state at all levels of government".<sup>822</sup> Section 7(2) of the 1993 Constitution also maintained that chapter 1 of this Constitution shall apply to all law in force and all administrative decisions taken and acts performed during the existence of the Interim Constitution.

Section 239 of the 1996 Constitution is broader than its predecessor. It defines the organ of the state as follows:

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<sup>817</sup> Article 18 of the *Namibia Constitution*.

<sup>818</sup> Corder and Van der Vijver *Realising Administrative Justice* 8.

<sup>819</sup> Section 23 of the 1993 Constitution.

<sup>820</sup> Section 22 of the 1993 Constitution.

<sup>821</sup> Corder and Van der Vijver *Realising Administrative Justice* 8.

<sup>822</sup> The organ of state will not be discussed in this section, suffice to state that this term was applied in the case of *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B), in this case the court was called upon to decide whether the University falls under the Bill of Rights.

- (a) Any department of state or administration in the national, provincial or local sphere of government;
- (b) Any other functionary or institution
  - (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

State departments (administrators) are bound by the Bill of Rights whether they exercise a power in terms of legislation or act in another capacity.<sup>823</sup> Executive powers may be challenged for consistency with the Bill of Rights. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*, the court held that there is one system of law and this system of law 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.<sup>824</sup>

## 6.6 Promotion of Administrative Justice Act 3 of 2000

Section 24 of the 1993<sup>825</sup> Constitution was replaced by Section 33(3) of the *Constitution of the Republic of South Africa*. The *Promotion of Administrative Justice Act* was an important vehicle in the development of South African administrative law to its current form. The Constitutional Assembly did not follow the structure of the 1993 Constitution for the administrative justice clause in the 1996 Constitution.<sup>826</sup> Section 24 was replaced by the *Promotion of Administrative justice Act* of 2000.<sup>827</sup> This Act was assented by the President on 3 February 2000.<sup>828</sup> The *Promotion of Administrative Justice Act* is mandated by the Constitution in order to give effect to "the constitutional rights to administrative justice". This Act, as Currie and Klaaren put

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<sup>823</sup> Currie and De Waal *The Bill of Rights Handbook* 43.

<sup>824</sup> 2000 2 SA 674 (CC) para 44.

<sup>825</sup> Section 24 of the 1993 Constitution.

<sup>826</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 5.

<sup>827</sup> Act 3 of 2000.

<sup>828</sup> Section 11 of the *Promotion of Administrative Justice Act* provided that: the Act would come into effect on a date fixed by the President by proclamation. The proclamation date was 30 November 2000.

it in the early stages of this Act, expresses values that stand above the will of the legislature. The Act must be interpreted in the same way as the Bill of Rights. The Act must be interpreted purposively as it was said in *S v Makwanyane and Another*.<sup>829</sup>

*While paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give' ... expression to the underlying values of the Constitution.*

The purposive interpretation acknowledges that legislation cannot be precisely drafted to anticipate every eventuality, and that questions of interpretation should be resolved by reference to the broad purpose of the enactment.<sup>830</sup> In *Pharmaceutical Manufacturers Association of South Africa and Another: In re: ex parte President of the Republic of South Africa and Others*,<sup>831</sup> the Interim Constitution shifted constitutionalism, and with all aspects of public law, from the realm of common law to the precepts of a written constitution which is the supreme law. Common law principles continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. The main purpose of the Act is to give effect to constitutional rights concerned with the proper limits and control of public power.<sup>832</sup> The aim of the Act was to promote constitutional values such as an efficient administration, good governance, accountability, openness and transparency.<sup>833</sup> In analysing accountability and transparency, Mureinik observed that:

*... the best that democracy can be is a system in which government responds to the citizens. Democracy means responsible government.*<sup>834</sup>

The common law plays an important role in the interpretation of the administrative justice rights. The term "legitimate expectations" in Section 3(1) of PAJA can only apply by reference to the common law jurisprudence.

In *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>835</sup> O'Regan found that

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<sup>829</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 9.

<sup>830</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 13.

<sup>831</sup> 2000 2 SA 674 (CC) para 45 at 696.

<sup>832</sup> Preamble of the *Promotion of Administrative Justice Act*.

<sup>833</sup> Section 195 of the 1996 Constitution.

<sup>834</sup> Mureinik 1993 *Acta Juridica* 35.

<sup>835</sup> 1999 2 SA 91 (CC) para 36.

the concept of "legitimate expectation" employed in Section 24 of the 1993 Constitution needed to be interpreted in the light of the concept of legitimate expectation where expectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind. After this judgment, South African administrative law underwent a complete reform in South Africa after the introduction of the Interim Constitution,<sup>836</sup> 1996 Constitution<sup>837</sup> and the *Promotion of Administrative Justice Act*.<sup>838</sup> PAJA introduced the definition of administrative action. The definition of administrative action in Section 1<sup>839</sup> and Section 3(1) of PAJA did not meet the expectation of both the administrative law lawyers and academic scholars. This Act is sympathetic to the aims of accountability and participation which must be attained by means of transparency.<sup>840</sup> This observation is so because the Act's definition of administrative action' is narrower than the Constitution's conception of administrative action. Currie and Klaaren lamented this position as follow:

*The definition indicates Parliament's choice of a narrow field of application of the procedures, duties and rights in the administrative justice act, to avoid overburdening the administrative process.*<sup>841</sup>

The administrative action contained in the *Promotion of Administrative Justice Act* is the product of South African Commission's draft Administrative Justice Bill<sup>842</sup> and the Cabinet draft<sup>843</sup> (Administrative Bill 56 of 1999). The breakwater declaration drafted a clause which the workshop participants wished to see in the future democratic constitution.<sup>844</sup> This clause preceded the two draft Bills which shaped the *Promotion*

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<sup>836</sup> Section 24 of the 1993 Constitution.

<sup>837</sup> Section 33 of the 1996 Constitution.

<sup>838</sup> Act 3 of 2000.

<sup>839</sup> Driver and Plasket 2001 *Annual Survey of SA Law* 81 at 81; 2002 *Annual Survey* 88 at 91-96; 2003 *Annual Survey* 69 at 70-84 doubt the correctness of the court's diagnosis of administrative action; Van Wyk 1997 *SAJHR* 249; Hoexter *Administrative Law* 245-251; De Ville *Judicial Review of Administrative Action in South Africa* 37; the definition of administrative action in PAJA brings about little change to the approach adopted under s 24 of the 1993 Constitution and the transitional s 33 of the 1996 Constitution.

<sup>840</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 19.

<sup>841</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 35.

<sup>842</sup> *Administrative Justice Bill* (August 1999).

<sup>843</sup> *Administrative Justice Bill* 56 of 1999.

<sup>844</sup> Bennett and Corder *Administrative law reform* 19.

of *Administrative Justice Act*. This draft review clause<sup>845</sup> is worth repeating in this chapter.

- (a) *Anyone adversely affected by a decision made in the exercise of public power shall have the right to a decision which is lawful, procedurally fair and in accordance with the principles of equality and rationality, and shall have the right to seek redress from an independent court and any other body or tribunal established for that purpose.*
- (b) *Subclause(a) shall not be construed as an exhaustive statement of the grounds upon which decisions made in the exercise of public power may be re-viewed.*
- (c) *In the exercise of the power of review, due weight shall also be given to the principles of good governance and the need to empower all public authorities to undertake programmes to remedy social, political and economic disadvantage.*

This clause makes no mention of the doctrine of substantive legitimate expectation, let alone procedural legitimate expectation. In the researcher's view this is a grave mistake which was made by administrative law scholars and which this research seeks to correct. Therefore, *The Promotion of Administrative Justice Act* is the product of the Cabinet Draft Bill introduced in Parliament by the Minister of Justice.<sup>846</sup>

### **6.6.1 Definition of PAJA 3 of 2000**

The application of PAJA is informed by the term administrative action. The Act applies to administrative action as defined.<sup>847</sup>

In terms of Section 1 of the *Promotion of Administrative Justice Act*, administrative action means any decision taken, or any failure to take a decision, by -

- (a) *an organ of state, when-*
  - (i) *exercising a power in terms of the Constitution or a provincial constitution; or*
  - (ii) *exercising a public power or performing a public function in terms of any legislation; or*
- (b) *a nature or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.*

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<sup>845</sup> Bennett and Corder *Administrative law reform* 19.

<sup>846</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 8. The authors make reference to <http://www.polity.org.za/govdocs/bills/1999/b56-99.pdf>.

<sup>847</sup> Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 35.

The current definition of administrative action was not favoured by many scholars. The preferred definition was couched in the following terms by the Break Water Declaration:<sup>848</sup>

*Anyone adversely affected by a decision made in the exercise of public power shall have the right to a decision which is lawful, procedurally fair and in accordance with the principles of equality and rationality, and shall have the right to seek redress from an independent court and any other body or tribunal established for that purpose.*

Had the drafters of the administrative justice clause implemented this definition, South Africans would not be having the problem South African's are having with the definition of administrative action under PAJA. Its failure was not to comply with the requirements of the law. By this I mean what Corder described as follows:

*... the law must comply with certain formal prerequisites in order to be valid, such as that it must be fully certain in conveying meaning.*<sup>849</sup>

The term administrative action was not defined in Section 33 of the Constitution. This unfortunate position put an extra burden on the Constitutional Court to give meaning to this concept and distinguish it from the legislative, executive and judicial function.<sup>850</sup> This was not lost as the administrative law legislation envisaged in Section 33 of the Constitution, introduced a new definition of administrative action. This was supposed to be a big relief towards reforming administrative law further from both the IC and the FC. It was seen that this definition was a disappointment as it was narrow and more complicated than the Constitutional Court's definition. This definition excluded the application of substantive legitimate expectations in order to reform administrative law. This submission is supported by the three elements of the requirement of administrative action, namely, (a) A decision; (e) that adversely affects rights and (c) that has a direct, external legal effect. The other four elements have been excluded deliberately as they do not advance my submission.<sup>851</sup>

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<sup>848</sup> Bennet *et al Administrative Law Reform* 18-19.

<sup>849</sup> Corder *Constitutional Reform in South African History* 182.

<sup>850</sup> Hoexter *Administrative Law* 172.

<sup>851</sup> These four elements are (a) decision exercising a power in terms of the Constitution or a provincial constitution (b) by an organ of state (or a natural or juristic person other than an organ of state); (c) exercising public, in terms of any legislation (or in terms of an empowering provision) power or performing a public function and (d) and that does not fall under any of the listed exclusions.

## 6.7 Court decisions negating administrative action under PAJA

PAJA contains an extensive definition of administrative action in Section 1(i). This section states:

- ...administration act means any decision taken, or failure to take a decision, by-
- (a) an organ of state, when
    - (i) exercising a power in terms of the Constitution or a provincial constitution; or
    - (ii) exercising a public power or performing a public function in terms of any legislation...

Courts has more recently described this definition as "cumbersome" and do not attach meaning to the term as to limit its meaning by surrounding it with a number of palisade qualifications.<sup>852</sup> In *Minister of Defence and Military Veterans v Motau and Others*,<sup>853</sup> the applicant terminated the respondents' membership of Armscor board of directors in terms of Section 8(c) of the *Armaments Corporation of South Africa Limited Act (Arm Scor Act)*.<sup>854</sup> The respondents were aggrieved by this decision and approached the High Court to set this decision aside in terms of the *Promotion of Administrative Justice Act* 3 of 2000. The issue before the court was whether the dismissal decision was executive or administrative action and from its review ambit, the exercise of executive powers and functions in terms of Section 1 of PAJA. The High Court held that the decision of the Minister was an administrative decision rather than executive action and awarded a punitive costs order against the minister. This decision was justified by the minister's failure to observe the requirements of procedural fairness.<sup>855</sup> Before the Constitutional Court, Khampepe J held that the minister's decision was an executive decision not an administrative decision and therefore the decision was not subject to review under PAJA.

The logic behind Khampepe's decision was that Section 8(c) of the *Arm Scor Act*<sup>856</sup> is the minister's power to make defence policy.<sup>857</sup>

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<sup>852</sup> Quinot *et al Administrative Justice in South Africa* 76.

<sup>853</sup> 2014 5 SA 69 (CC) para 69.

<sup>854</sup> Act 51 of 2003.

<sup>855</sup> *Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC) para 21 at 79.

<sup>856</sup> *Armaments Corporation of South Africa Limited Act* 51 of 2003.

<sup>857</sup> 2014 5 SA 69 (CC) para 47 and 51.

*Minister of Home Affairs and Others v Scalabrini Centre and Others*,<sup>858</sup> Nugent JA held that decisions heavily influenced by policy generally belong in the domain of the executive. He argued:

*The more a decision is driven by consideration of executive policy the further it moves from being reviewable under PAJA.*<sup>859</sup>

It appears that Nugent J has forgotten what he said in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*. In this Case Nugent J said that the term administrative action is a palisade of terms which does not assist to determine what constitutes administrative action. This clearly shows that courts are also confused by the real application of administrative action. For example, in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* Nugent said that it does not matter whether a particular conduct constitutes administrative action; what matters is the nature of the power that is being exercised rather than the identity of the person who does so.<sup>860</sup> This kind of reasoning is apparent in the case of *New Clicks SA (Pty) Ltd v Tshabalala-Msimang*.<sup>861</sup> Instead of court dealing with the merits of the case, the courts spent their energy on what is administrative action or not. The court saw the conduct and activities of the pricing committee not falling within the ambit of the definition of administrative action as defined in Section 1 of PAJA.<sup>862</sup> But the minority judgment by Traverso saw the rule-making as not constituting administrative action which in turn does not remove the regulations beyond the purview of judicial scrutiny. She found that review on the basis of the principle of legality, the principle of common law to the extent such common law principles are not inconsistent with the Constitution.<sup>863</sup> In conclusion the court accepted common law as a ground of review.

In *Pharmaceutical Society of South Africa v Tshabalala-Msimang*,<sup>864</sup> the issue on appeal was the validity of the "Regulations relating to a Transparent Pricing System for Medicines and Scheduled Substance". The merits of cases which come before

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<sup>858</sup> 2013 6 SA 421 (SCA).

<sup>859</sup> 2013 6 SA 421 (SCA) para 57 at 438.

<sup>860</sup> 2005 6 SA 313 (SCA) para 24.

<sup>861</sup> 2005 3 SA 238 (SCA).

<sup>862</sup> 2005 2 SA 530 (C) at 552 para 40.

<sup>863</sup> 2005 2 SA 530 (C) at 557 para 50.

<sup>864</sup> 2005 3 SA 238 (SCA).

courts on the basis of PAJA, the focus become the definition of administrative action. This was the case in point in the present case. The Supreme Court however took a different approach and decided the case on the principle of legality. This court (SCA) completely ignored PAJA. The SCA, did not give any reason for resorting to the principle of legality.<sup>865</sup> Hoexter is of the view that the standard constitutional logic that general norms should be resorted to only when norms of specificity run out.<sup>866</sup>

*Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC)

Even though the majority decision observed that PAJA is the national legislation that was passed to give effect to the rights in Section 33 and it codifies these rights the whole court delivered separate judgments which did not see the application of PAJA. The issue was whether PAJA was applicable.<sup>867</sup> The Counsel for the applicants contended that the majority in the SCA<sup>868</sup> were correct to hold that PAJA was not applicable to the making of the disputed regulations. Chaskalson CJ said that this definition must be construed consistently with Section 33 of the Constitution. In a separate minority judgment Moseneke, Mokgoro J, Skweyiya J and Yacoob J, and Madala, elaborated as follows:

*Perhaps the immaculate reasoned judgment of Sachs J is a telling example of the depth and intricacy of the debate on administrative justice and subordinate law-making. Shortly put, I do not consider myself to have had the benefit of full argument on a matter of much importance for the proper development of our administrative law which hopefully will pay due regard to prudent consideration which inform the separation of powers required by our Constitution.*<sup>869</sup>

This judgment irked one of the distinguished scholars of administrative law. She laments:

*Administrative lawyers will surely be discouraged and hopeless with the courts' lack of agreement on the administrative action matter, it appears that the Constitutional Court is defeated by the definition of PAJA. The rest of the South Africans are left hopeless.*<sup>870</sup>

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<sup>865</sup> 2005 3 SA 238 (SCA) para 94.

<sup>866</sup> Hoexter 2006 *Acta Juridica* 317-318.

<sup>867</sup> 2006 2 SA 311 (CC) at 365 para 100.

<sup>868</sup> 2005 3 SA 238 (SCA).

<sup>869</sup> *Minister of Health v New Clicks SA (Pty) Ltd and Others* 2006 2 SA 311 (CC) at 542-543 paras 723-724.

<sup>870</sup> Hoexter 2006 *Acta Juridica* 303-324.

This surely calls for the reform of administrative law. The Constitutional Court must eat humble pie and declare PAJA inconsistent with Section 33 of the Constitution.

In *President of the RSA v SARFU*, the court said the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What counts is not the functionary but the function. The focus is not the arm of government to which the relevant actor belongs, but the nature of the power he or she is exercising.<sup>871</sup>

In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*, Streicher JA, had a different understanding of the definition of administrative action because he understood the appellant to cancel the contract from common law ground not from the statute, therefore implying that substantive legitimate expectations were applicable.<sup>872</sup>

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, the applicant was dissatisfied with the allocation of fishing quotas it had received in the 2001 allocation process for 2002–2005 fishing seasons and it sought to review the allocation. In the review to the Constitutional Court, O'Regan had this to say about administrative action:<sup>873</sup>

*Section 6 of PAJA gives the aim of PAJA to codify the grounds of judicial review of administrative action. This ground, she said, arises from PAJA and not from the common-law, as in the past.*

This decision of the Constitutional Court clearly shows that the courts second guess the meaning and application of administrative action. This is also true with the full bench decision of *Botha v Matjhabeng Municipality*.<sup>874</sup>

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<sup>871</sup> 2000 1 SA 1 (CC) at 67 para 141.

<sup>872</sup> 2001 3 SA 1013 (SCA) para 18.

<sup>873</sup> 2004 4 SA 490 (CC) para 25.

<sup>874</sup> 2010 ZAFSHC 18.

## 6.8 The unresolved definition of administrative action

Since the inception of PAJA, the South African courts have experience problems with the definition of PAJA, because of the unexplained relationship between the PAJA, Section 33 of the 1996 Constitution, the principle of legality and the common law. This is informed by the culture of courts which suggest that it may decide between these various grounds of review.

PAJA is rarely relied on. Instead the courts rely on the principle of legality. The side step of PAJA, so argues Hoexter, is supported by an overlap between "regular" administrative law and the principle of legality. This varies from an apparent reluctance to engage with the statutory definition of administrative action. The applicants were landowners whose properties were affected by the road network in the Gauteng Province because portion of their properties fell within the "road" or "rail reserve" of the network. This after the Member of the Executive Council (MEC) had published the route determination under Sections 10(1) and (3) of the *Gauteng Transport Act 8 of 2001*.<sup>875</sup> The applicants alleged that the MEC's decision amounted to expropriation of land without just and equitable compensation. The question before court was whether the promulgation of the notices amounted to administrative action. The applicant's case was that the decision to publish constitute administrative action and attracts the obligation to act procedurally fairly as contemplated in PAJA, which would require offering affected landowners an opportunity to be heard, by way of public notice and comment procedure. Nkabinde J understood administrative action as follows:

*The power conferred by legislation upon a member of the executive to determine the date upon which legislation shall come into force is not administrative action because bringing a law into force is neither making it nor is its administrative law. The MEC's power did not constitute administrative action. The exercise of discretionary powers, therefore, does not constitute administrative action.*<sup>876</sup>

This court did not see it fit to decide this case under PAJA, even though the applicant's case was pleaded under this statute.

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<sup>875</sup> Sections 10(1) and 3 of the *Gauteng Transport Act 8 of 2001*.

<sup>876</sup> *Reflect-ALL 1025 CC v MEC for Public Transport, Gauteng 2009 6 SA 391 (CC) at 423 para 84.*

In *Albutt v Centre for the Study of Violence and Reconciliation and Others*,<sup>877</sup> the President did not give the side of the story of the victims of politically motivated cases. Instead he announced a special pardoning dispensation for offenders who had been convicted of politically motivated offences and who had not participated in the earlier truth and reconciliation process. The court *a quo* applied the rules of natural justice which included substantive legitimate expectations. However, the Constitutional Court did not find the need to decide whether the decision of the President constituted administrative action.

The more direct and telling case of the problem with PAJA, as Nugent put it:

*... a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.*<sup>878</sup>

Administrative action does affect an individual right and this categorisation of rights is a requirement of the past administrative law before the constitutionalisation of administrative law, as explained above.

## 6.9 The case against PAJA

Judicial review of administrative action is informed by the term administrative action. This term "administrative action" is contained and defined by PAJA. This is also informed by the purpose of PAJA which is to give effect to Section 33 of the 1996 Constitution. Thus, Hoexter have long observed that the definition of administrative action in PAJA narrowed the rights contained in Section 33 of the 1996 Constitution and the development of common law that informs these rights which are contained in Section 33 of the Constitution. Not only is the narrowness of administrative action definition but also the failure to mention certain well-established grounds of review such as vagueness, rigidity and fettering in Section 6 and the imposition of Section 7 of a strict duty to exhaust domestic remedies and a strict time limit for instituting review

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<sup>877</sup> 2010 3 SA 293 (CC).

<sup>878</sup> *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) paras 22, 23, 24.

proceedings.<sup>879</sup> When the legislature came with this last minute definition of administrative action, the sole purpose of the legislature was to minimise the burden of administration at the expense of fairness and interest of the citizen of the Republic of South Africa. Not long ago in South Africa, the Constitutional Court in *United Democratic Movement v Speaker of the National Assembly and Others*,<sup>880</sup> Mogoeng CJ, held that the "President is an indispensable actor in the proper governance of South Africa and bears important constitutional responsibilities". He observed:

*Public office, in any of the three arms of government, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. These resources are not for personal gain or sectarian interests. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.*

This was contrary to the legislature which had the interest of the executive in mind rather than the interest of the Public or citizens. The comments of Mogoeng CJ were informed by his early judgment in *Economic Freedom Fighters and Others v The President of the Republic of South Africa and Others* where the court, without referring to the term administrative action, found that Mr Zuma, was partly liable for the costs of the renovation to his Nkandla House. The majority (ANC members) of the National Assembly did not want to hold the president accountable in terms of the Constitution. The abuse of the tax payer's money cannot be equated with administrative efficiency.

## **6.10 The disadvantages of PAJA definition**

The *Promotion of Administrative Justice Act* was specifically promulgated to give effect to Section 33 of the 1996 Constitution. The doctrine of legitimate expectations was introduced by Corbet CJ in the *Traub*<sup>881</sup> case as the common law ground of review. However, as South Africans have already seen, PAJA excluded the doctrine of legitimate expectation in its Section 1<sup>882</sup> definition. This can also be found in the

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<sup>879</sup> Hoexter *Administrative Law* 246.

<sup>880</sup> 2017 ZACC 21.

<sup>881</sup> 1989 4 SA 731 (A).

<sup>882</sup> Section 1 of Act 3 of 2000.

requirements laid down in all of which must be met before an action qualifies as administrative. This did not stop litigants from bringing their case on other grounds of review which includes procedural legitimate expectations.<sup>883</sup> Hoexter lists four possible disadvantages<sup>884</sup> of PAJA. These are:

- (i) *PAJA is supposed to give effect to Section 33 of the 1996 Constitution, therefore it cannot be ignored and codify the common law and legitimate expectation being part of the rules of natural justice or fairness. To establish the presence of PAJA, the court have to engage whether PAJA is applicable or not without coming into the merits. This results in poor litigants especially public servants losing their case.*
- (ii) *The complexity and obscurity of the definition and the onus of proving whether the executive action or administrators action constitute administrative action or not.*<sup>885</sup>
- (iii) *Administrative action inquiry is unnecessary and unaffordable drain of resources. Cases which come to court deal with this point in line rather than substantive issues of administrative law. This hinders the development of administrative law. Instead of spending time on content, the courts have shown that they spend time determining the meaning of terms such as 'decisions', 'rights' and 'direct, external legal effect'.*
- (iv) *The most shameful experience is the different meanings that is one meaning from the Constitution and other one from the statute.*

Hoexter put this bluntly:

*Some of the elements of PAJA's definition have no real counterpart in the jurisprudence that has developed in Section 33 of the 1996 Constitution. The most glaring position is the definition in the PAJA, the disparity between it and the meaning that has been given to administrative action under Section 33 of the Constitution.*<sup>886</sup>

This is in violation of the constitution. PAJA does not give effect to the constitution as it was initially intended as far as the position of substantive legitimate expectation is concerned in administrative law in South Africa. To cure this, as Sections 39(1) and 8(3)<sup>887</sup> of the Constitution mandates, South Africa need to develop common law and consider common law. A central concern is the traditional South Africa legal culture which constrain the transformation project as envisaged by Section 39 of the Constitution.<sup>888</sup> The position of substantive legitimate expectation in South Africa can

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<sup>883</sup> Hoexter *Administrative Law* 247.

<sup>884</sup> Hoexter *Administrative Law* 247-251.

<sup>885</sup> Hoexter *Administrative Law* 247-251.

<sup>886</sup> Hoexter *Administrative Law* 250.

<sup>887</sup> Both these sections are development clauses.

<sup>888</sup> Davis and Klare 2010 *SAJHR* 403.

be achieved by importing English Law. These developments in England are worth exploring in the next chapter.

### **6.11 Conclusion**

The inability of the Constitutional Court to realise that its duty is to advance the constitutional values, in the pretext of separation of powers and transformation of the state borders on executive mindness. This is despite the fact that it is constitutional to rely directly on Section 33 of the Constitution.

It, therefore, seems fair to conclude that there is agreement among judges of the courts of the Republic of South Africa on the question as to whether the South African doctrine of legitimate expectations requires judicial development in order for it to accommodate substantive legitimate expectations as a new ground of judicial review.

## CHAPTER 7

### DEVELOPMENTS GEARED TOWARDS ACCOMMODATING SUBSTANTIVE LEGITIMATE EXPECTATIONS IN SOUTH AFRICAN ADMINISTRATIVE LAW THROUGH TRANSFORMATIVE CONSTITUTIONALISM

#### 7.1 Substantive legitimate expectations as a substantive ground of review in foreign jurisdictions

##### 7.1.1 Introduction

Both the Interim<sup>889</sup> and Final<sup>890</sup> Constitution are foreign law-friendly. These Constitutions incorporate (Final Constitutions) both foreign and public international law when the fundamental rights of chapter 2 are to be interpreted. The theoretical basis for invoking foreign and public international law when interpreting the fundamental rights of Chapter 2 is provided in chapter 2 in Section 39(1) of the Constitution.<sup>891</sup> Every time an administrative justice right<sup>892</sup> is to be interpreted the courts are under a constitutional duty to promote the values inherent in a system favouring democracy and fundamental rights as required by Section 39(1) of the Constitution. This relevance of public international law informed the choice of England as a foreign jurisdiction for the protection of substantive legitimate expectation.

The experience in other jurisdictions, especially in England, has shown that the concept of general fairness plays an important role in the argument for substantive protection of legitimate expectations doctrine. In England the duty to act fairly has been closely associated with substantive legitimate expectations. On this basis, the English courts have, over the last 25 years, moved from tentative recognition of the possibility of substantive protection to full acceptance of the idea. In *R v Secretary of State for the Home Department, ex parte Asif Khan*,<sup>893</sup> the court held that the government has

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<sup>889</sup> Act 200 of 1993. Section 35(1) of the 1993 Constitution.

<sup>890</sup> *Constitution of the Republic of South Africa*. Section 39 of the 1996 Constitution.

<sup>891</sup> Van Wyk *et al Rights and Constitutionalism* 637.

<sup>892</sup> Section 33 of the Constitution.

<sup>893</sup> (1985) All ER 40 (CA).

not permitted anyone to change the conditions without affording interested parties a hearing, and then only if the overriding public interest demands it. In *R v Ministry of Agriculture Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd*,<sup>894</sup> the court's view was that there must be an overriding public interest if the change is to override individuals' expectations. A decision that denied substantive legitimate expectations must be reviewed on the basis of fairness and in terms of the ordinary principles of South African law and substitute its decision for that of the administration.

Other jurisdictions have also taken the route of granting substantive relief for legitimate expectations based mostly on considerations of fairness, including countries in the European Union,<sup>895</sup> Ireland,<sup>896</sup> New Zealand<sup>897</sup> and Hong Kong.<sup>898</sup> The evaluation of fairness as the driving force for granting substantive benefits for legitimate expectations in these jurisdictions could provide valuable indicators for incorporating substantive benefits through transformative constitutionalism in South African administrative law.

### **7.1.2 Characteristics of England administrative law**

In this context of judicial review in England, administrative law is defined by Wade and Bradley as a branch of public law which is concerned with the composition, powers, duties, rights and liabilities of the various organs of government which are engaged in administration.<sup>899</sup> The only distinct feature between the British administrative law systems and South African administrative law is the absence of a formal separation between private and public law. The public authorities are subject to the common law as modified by the Parliamentary statutes<sup>900</sup> while in South Africa, administrative law regulates the activities of bodies that exercise public power or perform public functions, irrespective of whether those bodies are public authorities in a strict sense.<sup>901</sup> This

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<sup>894</sup> (1995) 2 All ER 714 (Q).

<sup>895</sup> Craig 1996 *Cambridge LJ* 289.

<sup>896</sup> *Webb v Ireland* [1988] IR 353 (SC).

<sup>897</sup> *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC) 754-756.

<sup>898</sup> Tai and Yam 2002 *Public Law* 688 (a discussion of the case of *Ng Siu Tung v Director of Immigration* [2002] 1 HKLRD 561).

<sup>899</sup> Wade and Bradley *Constitutional and Administrative Law* 593.

<sup>900</sup> Schwarze *European Administrative Law* 140.

<sup>901</sup> Hoexter *Administrative Law* 2.

principle of administrative law is derived from the "the rule of law" doctrine which is the second pillar of England's unwritten constitution. In terms of the Constitution of the Republic of South Africa, South Africa is a sovereign, democratic state founded on the values of supremacy of the Constitution and the rule of law.<sup>902</sup>

### ***7.1.3 The origins of the doctrine of legitimate expectations in England***

The principle of legitimate expectations was featured for the first time in an English court on an administrative law question in connection with the guaranteed right to a lawful hearing (*audi alteram*), which is derived from natural justice, *Schmidt v Secretary of State for Home Affairs*.<sup>903</sup> Lord Denning MR in this case was confronted with a policy issue as to whether an expectation should be accorded the same protection in law as a legal right in terms of natural justice. The judge explained that the right to be heard arose out of HK's<sup>904</sup> (Infant) "legitimate expectation" of admission to the United Kingdom since he would have a right to such admission if he satisfied the statutory requirements.<sup>905</sup>

Now this protection has developed into the protection of a substantive legitimate expectation and is now fully accepted in English law as a ground for judicial review. However, for protection to be legitimate the expectation of a substantive benefit or advantage must meet the following requirements:<sup>906</sup>

- The expectation must be induced by the decision maker either expressly by means of a promise or undertaking, or implicitly by means of a settled past conduct or practice.
- An express promise or undertaking can take the form of (a) a general representation, issued either to "the world" or to a class of beneficiaries; or (b) a specific representation addressed to a particular individual or individuals.
- A general representation may take many directions, including that of a circular letter or other statements of policy.

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<sup>902</sup> Section 1(c) of the 1996 Constitution.

<sup>903</sup> 1969 2 Ch 149 (CA).

<sup>904</sup> This is the name of the respondent. It is not an abbreviation.

<sup>905</sup> 1969 2 Ch 149 (CA) at 170.

<sup>906</sup> Woolf and Jowell *Principles of Judicial Review* 473-477.

- A specific representation may take the direction of a letter, or another considered assurance, undertaking or promise of a benefit.
- Legitimate expectation is fulfilled in a situation where detrimental reliance had not taken place or was not appropriate or required in the circumstances.

The concept of legitimate expectation was introduced into English law through the interstices of natural justice. In *Schmidt v Secretary of State for Home Affairs*,<sup>907</sup> and in *Breen v Amalgamated Engineering Union and Others*,<sup>908</sup> Forsyth says that Lord Denning wanted to extend the traditional range of natural justice by introducing the concept of legitimate expectations.<sup>909</sup> The concept of legitimate expectation provides an escape from the restriction of the rules of natural justice to cases where the rights of the offended people were affected.<sup>910</sup> The role of natural justice is not only limited to the field of natural justice but its extension goes to a ground of judicial review where a person was given a promise of a benefit.

In *Regina v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association*,<sup>911</sup> the court held that a person who has a licence has a settled expectation of having it renewed, and that it is a thing of value.

In the case of *Council of Civil Service Unions and Others v Minister for the Civil Service*,<sup>912</sup> the Government Communication Headquarters (GCHQ) was a branch of the civil service whose main functions were to ensure the security of the United Kingdom and official communication and to provide signals intelligence for the government. All the staff at GCHQ had a long-standing right, originating when GCHQ was formed in 1947, to belong to national trade unions, and most of them did so. The dispute arose as a result of the Minister for the Civil Service issuing an oral instruction to the effect that the terms and conditions of the civil servants at GCHQ would be revised so as to exclude membership of any trade union other than a departmental staff association approved by the director of GCHQ without consulting the union.

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<sup>907</sup> 1969 2 Ch 149.

<sup>908</sup> 1971 1 All ER 1148.

<sup>909</sup> Forsyth 1988 *Cambridge LJ* 253.

<sup>910</sup> Forsyth 1988 *Cambridge LJ* 253.

<sup>911</sup> 1972 2 WLR 1262.

<sup>912</sup> 1984 3 All ER 935 at 943.

It was submitted on behalf of the appellants that the minister had a duty to consult the Council of Civil Service Unions on behalf of employees at GCHQ, before giving the instruction for making an important change in their conditions of service. He based his submission on the fact that the employees had a legitimate, or reasonable, expectation that there would be such prior consultation before any important change was made to their conditions.

Lord Fraser of Tullybelton concluded as follows:

*But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law.*<sup>913</sup>

In conclusion to substantive legitimate expectation Lord Fraser held that "if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before taking a decision".<sup>914</sup>

The significance of this case in this study is the moving away of the courts to review judicial prerogative powers. The court found that where a person's private rights or legitimate expectations are affected by the execution of prerogative power, that execution should be amenable to review.

In *Attorney-General of Hong Kong v Ng Yuen Shiu*,<sup>915</sup> Lord Fraser was of the view that "the principle that a public authority is bound by its undertaking as to the procedure it will follow, provided they do not conflict with its duty", was applicable to the undertaking given by the government of Hong Kong as the respondent's legitimate expectations was not fulfilled and the removal order against him was quashed. In this case the court did not restrict itself to natural justice but indicated that even if a proper hearing had been given before the undertaking was broken, he would still be inclined to strike down the decision.<sup>916</sup> The court continued:

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<sup>913</sup> *Council of Civil Service Unions and Others v Minister for the Civil Service* 1984 3 All ER 935 at 943J.

<sup>914</sup> *Council of Civil Service Unions and Others v Minister for the Civil Service* 1984 3 All ER 935 at 944D-E.

<sup>915</sup> 1983 2 WLR 735.

<sup>916</sup> 1983 2 AC 629 at 307-308.

*... expectations may be based upon some statement by, or on behalf of the public authority ... if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him (the person affected) to be denied such an inquiry.*

In *O'Reilly v Mackman*,<sup>917</sup> the court said that the right of a man to be given a "fair hearing of what is brought against him and of presenting his own case is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that failure to observe it should render null and void any decision reached in breach of the rule of natural justice." If the executive undertakes, expressly or by past practice, to behave in a particular way the subject expects that undertaking to be complied with. Forsyth further argues that this is fundamental to good government and it would be outrageous if the Executive could easily change on its promise.<sup>918</sup> *Cunningham v Cole*<sup>919</sup> is a case in which the legitimate doctrine was called in aid of an application involving reappointment to the Public Service. The court held that the Public Service Board was bound to comply with the rules of natural justice when considering the application for reappointment to the Public Service. Although as a general rule, a person applying to the Service for the first time or an applicant for reappointment would be entitled to be heard, for neither would possess a relevant right or legitimate expectation. Nevertheless, in the very special circumstances of the applicant's case, the applicant had a legitimate expectation that the question of his future employment in service would not be decided on the ground of his alleged prior misconduct while a departmental officer, without first being given sufficient particulars of the misconduct alleged in the character report from his former department and, an opportunity to be heard in relation thereto.

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<sup>917</sup> [1983] 2 AC 237 at 276.

<sup>918</sup> Forsyth 1988 *Cambridge LJ* 239.

<sup>919</sup> 1982-83 ALR 334 at 335.

## 7.2 The birth of substantive legitimate expectations in England

### 7.2.1 Introduction

English law is one of the sources of administrative law in South Africa. This is the case because before the constitutional order in South Africa, the main source of law in administrative law was English law. In passing the *South African Act* 1909, South Africa adopted the Westminster system. As a result, administrative law in South Africa largely reflects the doctrines, traditions and conventions of English law.<sup>920</sup>

In *Civil Service Salaries: EC Commission v EC Council*,<sup>921</sup> the court used the Council's failure to protect the legitimate expectations of the staff members as a ground for overturning a particular piece of legislation. It made it clear that the role of protection "is primarily applicable in the field of individual decisions i.e. the normal discretion of administration discretion".

The role of legitimate expectation is not limited to the field of natural justice. It has been extended to the role of substantive legitimate expectations. In *R v Secretary of State ex parte Kahn*,<sup>922</sup> the court found that the applicant would not derive any value from a hearing if the authority in making a decision is free to ignore the legitimate expectations it has previously made. Similarly, in *R v Secretary of State for the Home Department ex parte Ruddock*,<sup>923</sup> the court said granting a hearing would be inappropriate and would achieve little.<sup>924</sup> This decision was based on the ground that the legitimate expectation could be protected on the duty to act fairly and there are instances in which the duty to act fairly<sup>925</sup> has been linked to the protection of a benefit.

In South Africa, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege that the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such person

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<sup>920</sup> Baxter *Administrative Law* 30.

<sup>921</sup> 1973 ECR 575 1973 CML 639.

<sup>922</sup> 1984 1 WL 1337 (CA).

<sup>923</sup> 1987 2 All ER 518.

<sup>924</sup> Forsyth 1988 *Cambridge LJ* 253.

<sup>925</sup> *Attorney General of Hong Kong v Ng Yuen Shiu* 1983 2 AC 629.

without a prior hearing; and at other times of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.<sup>926</sup>

In *R v North and East Devon Health Authority, ex parte Coughlan*,<sup>927</sup> the court of Appeal arrived at the decision that affirmed substantive legitimate expectation as a principle of administrative law, laid the jurisprudential basis for the doctrine of substantive legitimate expectation as well as that legitimate expectations have their origin in the doctrine of fairness.<sup>928</sup> In this case, the applicant, who was severely injured in a road accident, was partially paralysed in the respiratory tract and suffered from recurrent headaches. In 1993, the applicant and seven fellow patients were moved with their consent from a hospital which the health authority wished to move to Mardon House, a national health facility for the long-term disabled, which the health authority assured them would be their home for life.

The court examined its role where the issue was a promise and how it ought to behave in the future when a public body is exercising a statutory function. In the past it would have been argued<sup>929</sup> that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. This was no longer the situation. But what now was the situation with substantive legitimate expectations in England?

By then the subject of some confusion was as to what was the court's role is when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. The starting point is the question under which circumstances the member of the public could legitimately expect?

The court laid down the following basic requirements: Where there is a dispute of legitimate expectation, the dispute has to be determined by the court. This involves the following: (a) a detailed examination of the precise terms of the promise or

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<sup>926</sup> 1989 4 SA 731 (A) 758D-F.

<sup>927</sup> 2000 2 WLR 622.

<sup>928</sup> Clayton 2003 *Cambridge LJ* 93-105.

<sup>929</sup> *R v North and East Devon Health Authority, Ex parte Coughlan* 2001 QB 213 at 241F.

representation made, (b) the circumstances in which the promise was made and, (c) the nature of the statutory or other discretion.<sup>930</sup>

In the court's own view, the court said there are three possible outcomes. The court went on to list them as follows:

- (a) *The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight, it thinks right, but no more, before deciding to change course.*
- (b) *On the other hand, the court may decide that the promise or practice induces legitimate expectations of, for example, being consulted before a particular decision is taken.*
- (c) *Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.*

In this case, what happens is that, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness<sup>931</sup> against any overriding interests relied upon for the change of policy.

In *R v Metropolitan Police Commissioner ex parte*,<sup>932</sup> and in *Council of Civil Service Unions and Others v Minister for the Civil Service*,<sup>933</sup> the court saw legitimate expectation as arising "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue".

### **7.2.2 The duty to act fairly**

De Smith was of the view that the idea of fairness is also a substantive principle, while on the other hand Wade's view was that the duty to act fairly extends beyond the sphere of procedure.<sup>934</sup> Powers of an administrative character must be exercised "fairly", in line with natural justice. Fairness is but "writ large and judicially".<sup>935</sup> As acting

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<sup>930</sup> 2001 QB 213 at 241.

<sup>931</sup> 2001 QB 213 at 242C.

<sup>932</sup> 1996 8 Adm LR 6.

<sup>933</sup> 1984 3 All ER 935 (HL) at 943-944A; Hoexter *Administrative Law* 395.

<sup>934</sup> Brown and Evans *Judicial review of administrative action* 346.

<sup>935</sup> *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679.

fairly is a requirement of natural justice, and the latest jurisprudence<sup>936</sup> in administrative law is in favour of the view that there is no difference in principle between natural justice and "acting fairly", yet natural justice is a flexible doctrine whose content may vary according to the nature and the circumstances of the case.<sup>937</sup>

### **7.2.3 Conclusion**

Wade<sup>938</sup> agreed with the observations of what was said in *HTV Ltd v Price Commission*<sup>939</sup> that "acting fairly" is a phrase of such wide implications that it extends beyond the sphere of procedure and that it included a duty of acting with substantial fairness.

### **7.2.4 Substantive legitimate expectation in other jurisdictions where substantive legitimate expectation found application**

This section gives a brief overview of the recognition of substantive legitimate expectations doctrine in New Zealand, Hong Kong and Ireland. The main country where the recognition of legitimate expectation took place is England. Reasons were canvassed for this jurisdiction. Although South Africa followed the model of Australia and Canada in drafting the 1996 Constitution these two countries do not recognize substantive legitimate expectation doctrine. A short summary of this position will be given below to serve as a basis why England was preferred in line with Section 39 of the 1996 Constitution. The following are countries in favour of substantive legitimate expectations:

#### **7.2.4.1 Ireland**

The first case to consider the principle of legitimate expectation as it is known in Ireland was *Webb v Ireland*.<sup>940</sup> According to Hogan and Morgan,<sup>941</sup> legitimate expectation

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<sup>936</sup> Wade and Forsyth *Administrative Law* 465-467.

<sup>937</sup> *Re Pergamon Press Ltd* 1971 Ch 388 at 399.

<sup>938</sup> Wade and Forsyth *Administrative Law in Ireland* 468.

<sup>939</sup> 1976 ICR 170 at 189.

<sup>940</sup> [1988] IR 353.

<sup>941</sup> Hogan and Morgan *Administrative Law in Ireland* 671.

developed from German administrative law before it was later recognised as a general principle of law by the European Court of Justice. The Ireland administrative law received the principle of legitimate expectations through the judgments of the Court of Justice and the House of Lords in a ground-breaking case of *Council of Civil Unions v Minister for the Civil Service*.<sup>942</sup> The courts of Ireland, have held the public authorities to a promise made to the subject (Citizen) representation or past practice, irrespective of which of the doctrines the decision is grounded. This is in line with the position of substantive legitimate expectations in England where this doctrine was originally adopted in the Council of Civil Union case. In *Nova Media Services Ltd v Minister for Posts and Telegraphs*,<sup>943</sup> the plaintiffs operated an illegal radio station without a licence. The plaintiff's equipment was seized. The plaintiff's brought an application restraining the defendant from interfering with their broadcasting. The plaintiff's case was based on an inaction and tacit co-operation from the Minister, public representative and State agencies who had encouraged them "to enter into and to expand the particular business in which they are now engaged." Murphy J had this to say about the promise:

*If the position is that persons in authority are prepared to make use of and co-operate with illegal radio broadcasts, it is not surprising that the owners of those stations should assume that they have an immunity from the law or that, at the very least, the law would not be enforced against them.*<sup>944</sup>

Although the court did not find in favour of the plaintiff because the plaintiff did not act in terms of the statute, it found that the plaintiff had a substantive expectation, which he was prepared to grant had it not been an illegal operation.<sup>945</sup> The basis upon which the courts of Ireland grant substantive legitimate expectations is the grounds upon which the South African courts have been granting substantive legitimate expectations. This developments of the applications of substantive legitimate expectations in Ireland principally originates from the decision of the House of Lords in *Council of Civil Service Unions and Others v Minister for the Public Service*.<sup>946</sup> In this case the House of Lords ruled that the exercise of prerogative powers was

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<sup>942</sup> 1985 AC 319.

<sup>943</sup> 1984 ILM 161.

<sup>944</sup> 1984 ILM 161.

<sup>945</sup> 1984 ILM161 at 179.

<sup>946</sup> 1985 AC 374.

amenable to judicial review. Second to this was a legitimate expectation enjoyed by the applicant's members, the rules of natural justice had to be complied with when such an expectation was not going to be honoured. Lord Fraser did not hesitate to state:

*Legitimate, or reasonable, expectation may arise either from an express promise<sup>947</sup> given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.*

The discussion of substantive legitimate expectations in Ireland shows that England is the proper and relevant jurisdictions in which European Countries had import the doctrine of substantive legitimate expectations as a ground of review.

#### 7.2.4.2 New Zealand

*Schmitt and Another v Secretary of State for Home Affairs*,<sup>948</sup> is the founder of the doctrine of legitimate expectation in administrative decision-making.<sup>949</sup> This developments did not escape New Zealand and it is recognised in this Country in its substantive nature.<sup>950</sup> Legitimate expectation in New Zealand forms part of the rules of natural justice.<sup>951</sup> In *Chandra v Minister of Immigration*, was an application brought by the respondent for an order striking out an application for review brought by the applicant under the *Judicare Amendment Act* of 1972. The application for review sought: a review of the decision of the Minister of Immigration refusing to grant the applicant's application for permanent residence in New Zealand. Secondly an order directing the minister to grant the applicant permanent residence in New Zealand. *Furnell v Whangarei High Schools Board*<sup>952</sup> introduced the adaption of the concept of fairness into New Zealand administrative law. Lord Morris of Borth-Gest delivered the majority judgment which was fashioned as follows:

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<sup>947</sup> 1985 AC 401 at 401; Hogan and Morgan *Administrative Law in Ireland* 678. See also what Lord Diplock added at 401.

<sup>948</sup> [1969] 1 All ER 904.

<sup>949</sup> Hlophe 1987 SALJ 165.

<sup>950</sup> *Chandra v Minister of Immigration* (1978) 2 NZLR 559 AT 572.

<sup>951</sup> Joseph *Constitutional and administrative law in New Zealand* 961.

<sup>952</sup> [1973] 2 NZLR 705 at 718.

*It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules.*

The majority of the Privy Council in this case held that the legislature had considered the question of procedural protection and had enacted a detailed code, with the result that the court could not engraft procedural requirements onto it.<sup>953</sup> It was submitted on behalf of the appellant that the old concept of the Royal prerogative to keep foreigners at bay has been superseded by the modern transportation and the mass population movements of the 20<sup>th</sup> century. This can be said of the South African position with regard to recognition of the doctrine of substantive legitimate expectations. The Interim Constitution and the Final Constitutions constitutionalised administrative law in terms of both Section 24 (Interim Constitution) and Section 33 (of the Final Constitution). The applicant was the holder of a temporary permit, which had been extended indefinitely until his application for permanent residence was determined. The court per Barker J, found that the applicant had a legitimate expectation because he was allowed to remain in New Zealand until his application for permanent residence was determined "one way or the other". This Barker did by considering the judgment of Lord Denning MR in *Schmidt v Home Secretary*, where the learned judge introduced the concept of legitimate expectation. He understood legitimate expectation in the context whether an individual has some right or interest, or, some legitimate expectation,<sup>954</sup> "which it would not be fair to deprive him without hearing what he has to say". The South African courts, in the researcher's respectful view must follow the genesis of the New Zealand court in accepting substantive legitimate expectations as part of the South African Administrative law.

If the government adopts the policy and publish it, legitimate expectation is created and the community has a legitimate expectation that a decision maker will apply policies it has applied in the past. This creates substantive legitimate expectations.<sup>955</sup> This position was stated in *New Zealand Maori Council v Attorney-General*.<sup>956</sup> New Zealand is offering a good direction which the South African courts must follow to

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<sup>953</sup> [1978] 2 NZLR 559 at 666 para 20.

<sup>954</sup> [1969] 1 All ER 904 (CA) at 909C.

<sup>955</sup> Joseph *Constitutional and administrative law in New Zealand* 961.

<sup>956</sup> 1994 1 NZLR 513 (PC).

develop administrative law in South Africa. Canada is an exception to this development in Ireland and Hong Kong.

#### 7.2.4.3 Canada

The doctrine of legitimate expectations in Canada is limited to the procedural domain only. The court reaffirmed that legitimates could not be the source of substantive rights.<sup>957</sup> This is strange because, in Canada if a tribunal has promised that it will consult certain persons before making its decision, those people to which a promise have been made has a legitimate expectation<sup>958</sup> that they will be consulted, even if there is no statutory right to be consulted.<sup>959</sup> Unlike the English law, where the doctrine of substantive legitimates, provides that a legitimate expectation may, in some circumstances, generate a right to the substantive outcome that was expected. In *Regina v North and East Devon Health Authority, ex parte Coughlan*, the debate of substantive legitimate was settled.<sup>960</sup> In South African administrative law, pre-democracy era, legitimate expectations applied when existed rights were affected. Canadian courts have articulated their understanding of the doctrine of legitimate expectations under the ultra vires doctrine and this version of the doctrine resist the claim that the courts should enforce substantive legitimate expectations.<sup>961</sup> In *Minister of Health and Social Services v Mount Sinai Hospital Centre and Others*,<sup>962</sup> the centre applied for mandamus, requesting that the minister be ordered to issue the permit. The Superior Court, applying the doctrine of legitimate expectations in its procedural version, ordered the minister to consult with the Center over the decision-maker concerning the modified permit. The court relied on the doctrine of estoppel as the only route that allowed a court to constrain the minister to keep his word, since Canadian law does not enforce substantive legitimate expectations.

This decision clearly shows that Canadian judiciary is not willing to recognise substantive legitimate expectations as is the case with the UK version of the doctrine

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<sup>957</sup> *Reference Re Canada Assistance Plan* (BC) [1991] 2 SCR 525 [AP] para 557.

<sup>958</sup> *Blake Administrative Law in Canada* 22.

<sup>959</sup> *Old St Boniface Residents Association Inc v Winnipeg (City)* 1990 3 SCJ No 137 at para 73.

<sup>960</sup> [2000] 3 All E.R.850 (CA).

<sup>961</sup> *Cartier A 'Mullanian' Approach to the Doctrine of Legitimate Expectations* 193.

<sup>962</sup> [2001] 2 SCR 281.

of substantive legitimate expectations. Mullan criticised the Canadian judiciary for conditioning the recognition of procedural obligations on classifying public functions as quasi-judicial as opposed to administrative. His argument was to the effect that this classification was likely to cause injustice to individuals.<sup>963</sup> In *Old St. Boniface Residents Assn. Inc v Winning (City)*,<sup>964</sup> where this court was confronted for the first time with the doctrine of legitimate expectations, this court analysed this doctrine as follows:

*The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there would be no such opportunity.*

This approach by the court placed the doctrine of legitimate expectation in the procedural domain. This Canadian position does not accord with English law which recognises the application of substantive legitimate expectations. South African courts are not totally opposed to substantive legitimate expectations.

#### 7.2.4.4 Hong Kong

The position of legitimate expectations in Hong Kong saw its appearance in administrative law in the case of *Durayappah v Fernando*.<sup>965</sup> Poole argues further that legitimate expectation has a potential to become a concept which goes beyond the question of procedure to address substantive benefit. This substantive benefit held by the applicant for judicial review is supported by the courts in Hong Kong.<sup>966</sup> The court in *Regina v North and East Devon Health Authority, Ex parte Coughlan* (Court of Appeal)<sup>967</sup> referred to *Attorney-General of Hong Kong v Ng Yuen Shui*.<sup>968</sup> This case (Ng Siu Tung) is best known for the contribution 'which it made to the development of the law of legitimate expectation in Hong Kong.<sup>969</sup> In this case the Government of Hong

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<sup>963</sup> Mullan 1975 *UTLJ* 281.

<sup>964</sup> [1990] 3 SCR 1170 at 1204.

<sup>965</sup> [1967] 2 AC 337; Poole 1995 *New Zealand Law Review* 426.

<sup>966</sup> *Attorney-General of Hong Kong v Ng Yuen Shui* [1983] 2 AC 629.

<sup>967</sup> [2000] 2 WLR 622 at 626 para 1.

<sup>968</sup> [1983] 2 AC 629.

<sup>969</sup> Forsyth and Williams 2016 *Asia Pacific Review* 34. "The doctrine of legitimate expectations addresses the protection of the trust which citizens have placed in statements or practices of

Kong promised some unlawful immigrants, who were liable to be removed, would be interviewed individually and treated on the merits in each case. The appeal arose out of the serious immigration problem which faced the government of Hong Kong in 1980. Immigrants from mainland China were pouring into the colony in increasing numbers. Some of the immigrants had permission to enter while others did not. A removal order made without according an individual proper interview was set aside. The Privy Council held:

*When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.*

However, the court held that the protection of substantive expectations was part of the administrative law of Hong Kong.<sup>970</sup> Lord Fraser of Tullybelton saw substantive legitimate expectations as follows:

*The expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.*<sup>971</sup>

In *Regina v North and East Devon Health Authority Ex parte Coughlan*, the critical issue was whether nursing care for a chronological ill patient may lawfully be provided by a local authority as a social service or whether it is required by law to be provided free of charge as part of the National Health Service.<sup>972</sup> Miss Coughlan was grievously injured in a road traffic accident. She was tetraplegic, double incontinent, requiring regular catheterisation. In this case "the promise for life" was a relevant consideration. The judge saw this promise in the following light:

*Consideration of the promise had to start with a proper understanding of the promise. It was a promise to provide care at Mardon House but the health authority wrongly*

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those in authority. Citizens to whom solemn assurances have been made, who have placed their trust in those promises of officials, should not find when those officials do not act as promised, that the law cannot give them a remedy." Hence section 172 (1) (a) and (b)(i) and (ii) of the 1996 Constitution.

<sup>970</sup> Forsyth and Williams 2016 *Asia Pacific Review* 35.

<sup>971</sup> [1983] 2 629 A.C at 637 para D.

<sup>972</sup> *National Health Service and Community Care Act* 1990.

*treated it as merely a promise to provide care. That meant that the authority's attitude to the place where care was to be provided was flawed from the start.*<sup>973</sup>

The English Court of Appeal unequivocally adopted the doctrine of substantive legitimate expectation, on the ground that, where a substantive legitimate expectation was found, that expectation should be fulfilled, save where an overriding public interest was found by the court itself not the executive. This development has not yet seen light in some of the courts in South Africa, despite the transformative nature of the 1996 Constitution and the values which underpins this Constitution. A humble submission is made to the courts, especially the Constitutional Court to follow other jurisdictions especially the English jurisdiction which took from Hong Kong in arriving to the acceptance of substantive legitimate expectation.

The appropriate remedy granted by the Privy Council was to quash the removal order made by the appellant (Attorney General of Hong Kong) on October 31 against the applicant. This nurtured substantive legitimate expectation as a new right in administrative law in Hong Kong. It is the researcher's humble view that the similar approach must be adopted by the courts of the Republic of South Africa. This approach stands to improve and nature the human rights culture of administrative justice in South Africa. Moreover, in South African legal system, this is enforced by Section 33 of the 1996 Constitution and the *Promotion of Administrative Justice Act*.

### **7.3 Substantive legitimate expectations as a manifestation of transformative constitutionalism**

#### **7.3.1 Introduction**

The doctrine of legitimate expectations is founded upon a basic principle of fairness that legitimate expectations must not be frustrated. In *Minister of Justice, Transkei v Gemi*,<sup>974</sup> the then Transkei Supreme Court of Appeal, held that "undertakings and courses of conduct were not the only ways in which legitimate expectations could

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<sup>973</sup> 2000 2 W.L.R at 644 para 54F.

<sup>974</sup> 1994 3 SA 28 (TKA).

arise" and Corbett in *Administrator Transvaal and Others v Traub and Others*<sup>975</sup> had not intended promises to be the bases upon which the doctrine of legitimate expectations could be invoked.<sup>976</sup> The court regarded the doctrine to encompass the broader doctrine of fairness a specific manifestation of the duty to act fairly. In *Du Preez and Another v Truth and Reconciliation Commission*,<sup>977</sup> the court's view was that the solution to the problems raised by the applicant may be found in common law, and more particularly the rules of common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner and that the 'right to be heard was 'but one fact, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly.<sup>978</sup> The protection of expectation is at the root of the constitutional principle of the rule of law. The rule of law requires regularity, predictability and certainty in Government's dealings with the public.<sup>979</sup> The doctrine of legitimate expectations is applied in two varying situations, namely:

- (a) That a hearing or other appropriate procedure will be afforded before the decision is made; or
- (b) That a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied.

Fairness requires that the expectation of the benefit should not be disappointed and that the recipient of the benefit should be allowed to advance its fulfilment. It does not matter whether a person will receive a benefit or not. What counts is that the opportunity be given to participate in the decision about whether or not it should be granted. In this case, justice will require the expectation to be fulfilled by the actual granting of what was promised.<sup>980</sup>

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<sup>975</sup> 1989 4 SA 731 (A).

<sup>976</sup> *Minister of Justice, Transkei v Gemi* 1994 3 SA 28 (TkA) at 32A.

<sup>977</sup> 1997 3 SA 204 (A) at 230I.

<sup>978</sup> 1997 3 SA 204 (A) at 231G.

<sup>979</sup> De Smith *et al Principles of Judicial Review* 295.

<sup>980</sup> De Smith *et al Principles of Judicial Review* 299.

### 7.3.2 *Audi alteram partem* rule

The principle of *audi alteram partem* rule, in its simplest terms, means that hear the other side. This is the intensive principles of the law of natural justice because it embraces every step of fair procedure and due process. It also includes the rule against bias, since a fair hearing must be an unbiased hearing. However, the *audi alteram partem* rule is treated differently.<sup>981</sup> This rule appears to be an ancient rule which was applied by God Himself. This was quoted from the case of *R v the Chancellor of the University of Cambridge*,<sup>982</sup> where it was said that the first hearing in human history was given in the Garden of Eden: God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam, said God, where art thou? Has thou not eaten of the tree, whereof I commanded thee that thou should not eat?" Adam answered, "The woman you put here with me gave me the fruit, and I ate it."<sup>983</sup> "The Lord God asked the woman,<sup>984</sup> why did you do this?" She replied, "The snake tricked me into eating it."

Adam was able to put his defence which said that He was misled by Eve. This happened after God commanded Adam that He is free to eat from any tree of the garden but not from the tree of the knowledge of good and evil. But Adam and Eve disobeyed God by listening to the snake that deceived Eve.<sup>985</sup> Adam said the woman God put there with him gave him some fruit from the tree and he ate it. Eve said the serpent deceived her and she ate.<sup>986</sup> This principle applied in the case of Dr Bentley, where the court held that the applicant was entitled to make his defence, as required by the laws of God and man.<sup>987</sup>

It is now clear that the courts are bound to apply the rules of natural justice where the rights of individual are affected and adversely affected in administrative cases.

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<sup>981</sup> Wade and Forsyth *Administrative law* 405.

<sup>982</sup> (1723) 1 Str 557.

<sup>983</sup> Good News Bible Today's English Version *Genesis* 3:12.

<sup>984</sup> Good News Bible Today's English Version *Genesis* 3:13.

<sup>985</sup> *Genesis* 2:16 and 17.

<sup>986</sup> *Genesis* 2:13.

<sup>987</sup> *In re HK (an infant)* 1967 2 QB 617.

### 7.3.3 *The position of legitimate expectations under apartheid government*

In the absence of a directive from a statute on the issue of fairness, the approach of the South African courts was to imply that Parliament intended the *audi alteram partem* principle to apply. This came out in the case of *R v Ngwevela*,<sup>988</sup> where the court held that *audi alteram partem* rule would apply unless Parliament has expressly or by implication enacted that it should not apply or that there are exceptional circumstances which would justify the court's not giving effect. Later, the same court contradicted itself and held that *audi alteram partem* rule does not apply unless it were found to be impliedly incorporated in the statute.<sup>989</sup> Ngwevela's judgment directed the operation of the court to administrative action prejudicially affecting the property or liberty of an individual or "quasi-judicial" decisions.

The classification of this function, the presumption in favour of natural justice did not apply to decisions that could not be classified as quasi-judicial.<sup>990</sup> However, this classification was stopped in the much celebrated case of *Administrator, Transvaal v Traub and Others*<sup>991</sup> by a more liberal Justice Corbet who was appointed by FW de Klerk at the beginning of the democratic transition.<sup>992</sup> This judgment fundamentally changed the position of legitimate expectation in South Africa and administrative law.<sup>993</sup> The then Chief Justice remarked:

*There may be cases where an adherence to the formula of liberty, property and existing rights, would fail to provide a legal remedy, when the facts cry out for one, and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected.*<sup>994</sup>

Before the appointment of Corbet, the integrity of some justices – especially the extremely conservative Chief Justice Rabie – was increasingly brought to question.<sup>995</sup>

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<sup>988</sup> Hoexter *Administrative Law* 391; *R v Ngwevela* 1954 1 SA 123 (A) at 131.

<sup>989</sup> *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A); Hoexter *Administrative Law* 391.

<sup>990</sup> Hoexter *Administrative Law* 391.

<sup>991</sup> 1989 4 SA 731 (A) 761E-F.

<sup>992</sup> Klug *The Constitution of South Africa* 230.

<sup>993</sup> Klug *Constituting Democracy* 139.

<sup>994</sup> 1989 (4) SA 731 (A) at 761E-F.

<sup>995</sup> Klug *The Constitution of South Africa* 230.

Hence there was no movement by the South African judges to enforce the application of *audi alteram partem* rule on domestic tribunals, of which are said that they are exercising a wide variety of interests which do not constitute rights in the strict sense. Ultimately the concept of legitimate expectation was fashioned to identify such interests.<sup>996</sup> Corbet CJ in this regard argued for legitimate expectation in this manner:

*The legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonably expect to acquire or retain and which it would be unfair to deny such a person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.*<sup>997</sup>

In *South African Roads Board v Johannesburg City Council*,<sup>998</sup> Milne further rejected the classification of functions in order to find the application of the *audi alteram partem* rule. Milne held that a decision to declare part of a national road a toll-road required the observance of natural justice in spite of its legislative character.<sup>999</sup>

#### **7.4 Application of substantive legitimate expectations under Section 24 of the Constitution of the Republic of South Africa, Act 200 of 1993**

Section 24 became popular immediately after the coming into effect of the Interim Constitution. During this period administrative action and organs of the state were given narrow interpretations in order to avoid the application of Section 24(b). In *Bernstein v Bester*,<sup>1000</sup> it was submitted on behalf of the applicants that the mechanism established by Sections 417 and 418 of the *Companies Act 61 of 1973*<sup>1001</sup> violates Sections 24(b) and (c) of Section 24 of the Interim Constitution. This section applies when someone's "rights" are "affected" by "administrative action". However, the court was of the view that the issue before it was not a common law issue, but the constitutional question as to whether Sections 24(b) and 24(c) apply to an enquiry

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<sup>996</sup> Peach *The application of the audi alteram partem rule* 9.

<sup>997</sup> 1989 4 SA 731 (A) at 758D.

<sup>998</sup> 1991 4 SA 1 (A) at 10.

<sup>999</sup> Hoexter *Administrative Law* 396.

<sup>1000</sup> 1996 2 SA 751 (CC).

<sup>1001</sup> *S417 and 418 of 1973*.

under Sections 417 and 418 of the Act. The court concluded by holding that the rights of the applicants were not affected by the enquiry. If so, their remedy was to enforce this claim through the ordinary courts.<sup>1002</sup>

The shift by the courts from the conservative approach in applying the Constitution began to cripple in administrative justice. Procedural fairness was given a meaning broader than natural justice. During this period the Appellate Division did not have jurisdiction to hear and give judgments on constitutional matters.<sup>1003</sup> Section 24 had rendered administrative law a constitutional status whose interpretation was a constitutional matter. The new Supreme Court was assigned Constitutional jurisdiction in terms of item 16(3)(a)<sup>1004</sup> of Schedule 6, the Appellate Division became the Supreme Court of Appeal. It was no longer a division of the Supreme Court but a separate institution. In terms of Section 163(3)<sup>1005</sup> of the Constitution, the Supreme Court of Appeal had jurisdiction to decide appeals in any matter and was the highest Court of Appeal in Constitutional matters. The coming into force of the *Seventeenth Amendment Act* of 2012<sup>1006</sup> changed the Supreme Court into a Court of Appeal, a status now given to the Constitutional Court.<sup>1007</sup>

The judgment of *S v Mhlungu and Others*<sup>1008</sup> cast some light in the court's judicial review based on the grounds of common law even though later the court changed its own principle in judicial matters based on common law. The Constitutional Court per Kentridge, laid down a general principle that:

*... where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. One may conceive of cases where an immediate reference under s 102 (1) would be to the interest of justice – for example, a criminal case trial likely to last many months, where declaration by this court of the invalidity of a statute would put an end to the whole prosecution.*<sup>1009</sup>

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<sup>1002</sup> 1996 2 SA 751 (CC) 799 paras 93, 99 and 100.

<sup>1003</sup> Section 101(5) of the 1993 Constitution.

<sup>1004</sup> Item 16(3)(a) of Schedule 6 of the FC.

<sup>1005</sup> Section 163(3) of the FC.

<sup>1006</sup> *Constitution Seventeenth Amendment Act* of 2012.

<sup>1007</sup> Hoexter and Olivier *The Judiciary in South Africa* 17.

<sup>1008</sup> 1995 3 SA 867 (CC).

<sup>1009</sup> *S v Mhlungu and Others* 1995 3 SA 867 (CC) at 895 para 59.

This judgment in my view was not in line with the Constitution because, the common law was subsumed by the Constitution.<sup>1010</sup>

In *Zantsi v Council of State, Ciskei*,<sup>1011</sup> the Ciskei Provincial Division; referred the issue, namely whether the High Court division has jurisdiction to inquire into the constitutionality of acts of the Legislatures of South Africa which were passed prior to the commencement of the new South African Constitution. Per Trengove, the Constitutional Court held that a provincial or local division of the High Court has no jurisdiction to inquire into the constitutionality of an Act of Parliament passed by the South African Parliament, irrespective of whether such an Act was passed before or after the commencement of the Constitution. But as far as the legislatures of the former Homelands, a High Court Division of the Supreme Court has jurisdiction, in terms of Section 101(3)(c) of the 1993 Constitution, to inquire into the constitutionality of any such law applicable within its jurisdiction.<sup>1012</sup>

However, in this case, *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd*<sup>1013</sup> Hefer understood the *Fedsure*<sup>1014</sup> judgment to have only dealt with the interplay between the Constitutional Court and the common-law relating to administrative action in the context of the jurisdiction of the Appellate Division that the plurality every administrative action has to be consistent with Section 24 of the interim Constitution, that is lawful and procedurally fair. His judgment continued that:

*Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether it is or is not inconsistent with the Constitution and the only criterion being the Constitution itself. Judicial review under the common law is concerned with the legality of administrative action, but the question in each case is whether the action*

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<sup>1010</sup> *S v Mhlungu and Others* 1995 3 SA 867 (CC) at 895 para 59.

<sup>1011</sup> 1995 4 SA 615 (CC).

<sup>1012</sup> 1995 4 SA 615 (CC) 615 at 629A-B. In terms of s 17 of Schedule 6 to the new Constitution, all proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been acted, unless the interests of justice require otherwise.

<sup>1013</sup> 1999 3 SA 771 (SCA).

<sup>1014</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 2 SA 1115 (SCA).

*under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice.*<sup>1015</sup>

## **7.5 The position of substantive legitimate expectations doctrine under Section 24 of the 1993 Constitution before the 1996 Constitution**

### **7.5.1 Definition of administrative action by the courts**

Administrative action was not defined in the Constitution and the legislature left it to the courts to define. This also applied to "legitimate expectations" referred to in Section 24(b) of the 1993 Constitution. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,<sup>1016</sup> the Constitutional Court was faced with two questions posed by the Supreme Court of Appeal. The first question was the definition of administrative action. This question can be formulated as follows: Was the adoption of a budget and the imposition of property rates and levies by a popularly elected local authority properly to be classified as administrative action?

The answer to this question was no. The court held that in legislation and executive acts that do not constitute administrative action, the principle of legality is implicit in the Constitution.

The same problem of the definition of administrative action became an issue in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.<sup>1017</sup> The question in this case was whether the appointment of a commission of inquiry by the head of state constitutes administrative action. The court defined administrative action as that part of government which is primarily concerned with the implementation of legislation. Because in the national sphere, it ensures that the administration implements executive decisions. These responsibilities are outlined in Section 85(2) of the Constitution.<sup>1018</sup> In Section 33 the adjective "administrative" not

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<sup>1015</sup> *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 3 SA 771 (SCA) at 785 para 20.

<sup>1016</sup> 1999 1 SA 374 (CC) at 391.

<sup>1017</sup> 1999 10 BCLR 1059 (CC).

<sup>1018</sup> 1999 10 BCLR 1059 (CC) para 138.

"executive" is used to qualify "action". The focus of the enquiry as to whether conduct is "administrative action" is not the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.<sup>1019</sup>

The court went further to say that the right to just administrative action was entrenched in the Constitution of South Africa for in recognition of the importance of the common law governing administrative review. It is not correct to see Section 33 as a mere codification of common law principles. The right to administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by common law will be important, though not necessarily decisive, in determining not only the scope of Section 33, but also its content.<sup>1020</sup> By saying this the court was simply distinguishing between the difference or the role of common law and Section 24 of the Constitution.

In *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd*,<sup>1021</sup> the court held that judicial review under the Constitution and under the common law are different concepts. Hefer JA, gave a distinction between administrative law constitutional review and judicial review under common law.

The judge said administrative law constitutional review is concerned with the constitutional legality of administrative action and judicial review under common law is essentially also concerned with the legality of administrative action but the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. In South Africa, Section 35(3) of the Interim Constitution requires that any law and application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the Bill of Rights.

The judge held that in Section 35(3) it was not the intention of the legislature to abolish any branch of common law but to leave it to the courts to bring it in line with the spirit, purport and objects of the Bill of Rights. Despite the Constitutional Court view in *Pharmaceutical Manufacturers Association of South Africa*: In *Pharmaceutical*

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<sup>1019</sup> 1999 10 BCLR 1059 (CC) para 138-141.

<sup>1020</sup> 1999 10 BCLR 1059 (CC) para 35.

<sup>1021</sup> 1999 3 SA 771 (SCA).

*Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*<sup>1022</sup> that common law and the Constitution are not separate bodies. The courts are under a duty to develop the common law, although maybe not in the way Hefer reached his decision. Section 8(3)(a) of the Final Constitution, specifically mandates the courts to give effect to the Bill of Rights, must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right.

Substantive legitimate expectation manifests itself as a vehicle to transformative constitutionalism in that it reforms administrative law by expanding the grounds of review. Secondly, the Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>1023</sup>

## **7.6 The position of substantive legitimate expectations doctrine under Section 33 of the 1996 Constitution before PAJA**

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*,<sup>1024</sup> Chaskalson chastised the Supreme Court of Appeal by saying:

*I cannot accept the contention which treats the common law as separate and distinct from the Constitution. There is no system 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.*

The Pharmaceutical Manufacturers Association, in the words of Corder, marked the clearest statement of the basis of the judicial power to review administrative action which has been made since 1994. The second<sup>1025</sup> face of reforming administrative law

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<sup>1022</sup> 2000 2 SA 674 (CC) at para 44.

<sup>1023</sup> Section 7(2) of the 1996 Constitution.

<sup>1024</sup> 2000 2 SA 674 (CC) para 44.

<sup>1025</sup> The first face or stage was the acceptance of the doctrine of legitimate expectations in South Africa in 1989 by Corbet CJ in *Administrator Transvaal and Others v Traub and Others* 1989 4 SA 731 (A).

from the common law position to a system of administrative justice<sup>1026</sup> under the constitution has been dealt with.

In *Fedsure*, the Constitutional Court held that persons denied lawful or procedurally fair administrative action are entitled to approach the courts to enforce rights vested in them by Section 24, and that in terms of the Constitution, this court is the court of final instance of any such dispute.

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,<sup>1027</sup> the respondent contended that they had a legitimate expectation that a commission of enquiry with powers would not be established before the President afforded them a hearing.<sup>1028</sup>

## **7.7 Manifestation of substantive legitimate expectation under the 1996 Constitution**

The doctrine of legitimate expectations as explained above was introduced by *Administrator Transvaal and Others v Traub and Others*.<sup>1029</sup> Now this doctrine has developed to include substantive legitimate expectations<sup>1030</sup> both under the 1993 and 1996 Constitution. The expectation as Hoexter put it, varied and has been involved in many ways which include:

- (a) *Express assurance,*
- (b) *A settled practice or*
- (c) *An established policy.*<sup>1031</sup>

The status of legitimate expectation was given an impetus by Section 3(1) of the PAJA.<sup>1032</sup> This section requires fairness to be observed in relation to "administrative

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<sup>1026</sup> The second face is the constitutionalisation of administrative law under the Interim Constitution.

<sup>1027</sup> 1999 10 BCLR 1059 (CC).

<sup>1028</sup> Corder and Van der Vijver *Realising Administrative Justice* 15.

<sup>1029</sup> 1989 4 SA 731 (A).

<sup>1030</sup> *Claude Neon Ltd v City Council of Germiston* 1995 3 SA 710 (W).

<sup>1031</sup> Hoexter *Administrative Law* 421.

<sup>1032</sup> Section 3(1) of the PAJA.

action" which materially and adversely affects the rights or legitimate expectations of any person.

In the case of *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>1033</sup> Constitutional Court was faced with an appeal of the executive which the court *a quo* ruled in favour of the respondent. The appellant member of the Executive Council in the Government of Mpumalanga terminated the bursaries paid to students of the respondent. The respondent argued that the decision of the appellant was a violation of their right to administrative justice in terms of Section 24 of the Interim Constitution.<sup>1034</sup> In adjudicating this dispute, the Constitutional Court held:

*In determining what constitutes procedural fairness in the given case, the court should be slow to impose obligation upon government which will inhibit its ability to make and implement a policy effectively (a principle well-recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness.*<sup>1035</sup>

This was the judicial review founded on substantive legitimate expectation even though O'Regan wanted to justify her conclusion. Section 24(b)<sup>1036</sup> of the Interim Constitution contained an express reference to "legitimate expectations". The following paragraph shows the extent to which O'Regan relied on substantive legitimate expectation.

She said the term "legitimate expectation" appears first to have been used in the context of administrative law in a decision of Lord Denning MR in *Schmidt and Another v Secretary of State for Home Affairs*.<sup>1037</sup> Lord Denning observed:

*... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends*

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<sup>1033</sup> 1999 2 SA 91 (CC) para 41.

<sup>1034</sup> Section 24 of the 1993 Constitution.

<sup>1035</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 SA 91 (CC) 109 para 41.

<sup>1036</sup> Section 24(b) of the 1993 Constitution.

<sup>1037</sup> 1969 2 Ch 149 (CA).

*on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.*<sup>1038</sup>

Section (24)(b) has implications<sup>1039</sup> for both the executive and the legislature. It must be remembered that both the executive and the legislature are bound by Sections 7(1)<sup>1040</sup> and (2)<sup>1041</sup> of the Constitution. The decision which is taken against Section 24(b) is a subject of judicial review. This was the case in Premier Mpumalanga above.

O'Regan went on to emphasise the importance of substantive legitimate expectation and she observed in the following paragraph:

*This legitimate expectation, is one which intertwined substantive and procedural aspects.*<sup>1042</sup>

It is clear from O'Regan's dictum that legitimate expectation has developed to include substantive legitimate expectation. The practical implication was that the bursaries were paid out until the end of the year.<sup>1043</sup> Thus giving the respondents substantive relief.

The importance of the doctrine of legitimate expectation received a boost under the constitutional system of South Africa. In *Public Servants' Association of South Africa v Minister of Justice*,<sup>1044</sup> the court held that the applicant had a substantive legitimate expectation to be appointed to the posts, and as a result, the minister was supposed to apply the principle of *audi alteram partem* rule.

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<sup>1038</sup> 1969 2 Ch 149 (CA) at 170.

<sup>1039</sup> De Ville 1995 SAJHR 265.

<sup>1040</sup> Section 7(1) of Act 200 of 1993 provides that "this chapter shall bind all legislative and executive organs of state at all levels of government".

<sup>1041</sup> Section 7(2) of Act 200 of 1993 provides that this chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of the Interim Constitution.

<sup>1042</sup> 1999 2 BCLR 151 (CC) at 167 para 38.

<sup>1043</sup> Hoexter *Administrative Law* 432-433 where she refers to Quinot 2004 SAPL 548.

<sup>1044</sup> 1997 3 SA 925 (T).

In *Winckler and Others v Minister of Correctional Services and Others*,<sup>1045</sup> the court found that the applicant had a legitimate expectation to be fairly considered in accordance with the policy of the Department of Correctional Service.

It did not take the Constitutional Court long to deal with the same doctrine. This again involved the school association and the executive. In the writer's view, the case below changed or renegaded from its own decision.

Chaskalson CJ in *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*<sup>1046</sup> gave this warning:

Substantive legitimate expectation is a contentious issue on which there is:

*... no clear authority in our law. As the foundation for such a claim has not been laid. I do not consider it appropriate to consider that issue in the present case. My failure to deal specifically with that issue should not be understood as an acceptance of the proposition ... accepted by Madala that substantive legitimate expectation is part of our law. I leave that question open for decision in a case when the issue is properly raised and the factual foundation for such a contention is established.*<sup>1047</sup>

In light of the above, this study seeks to lay the foundation of substantive legitimate expectation by introducing the values which underpin the Constitution which Chaskalson seems to have forgotten as well as the theoretical basis which informs the court. A significant value is Section 1(c) which identifies the rule of law as a founding value of the South African State. The founding values<sup>1048</sup> inform the interpretation of the Constitution and other law and set positive standards which all law must comply with in order to be valid. In *United Democratic Movement v President of the Republic of South Africa*,<sup>1049</sup> the court went further by saying:

*The founding values are protected by s 74(1) of the Constitution, which provides that s 1 may only be amended with the support of at least 75% of the members of the National Assembly, and six of the provinces in the National Council of Provinces.*

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<sup>1045</sup> 2001 2 SA 747 (C); Hoexter *Administrative Law* 422.

<sup>1046</sup> 2002 9 BCLR 891 at 917 para 96.

<sup>1047</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 9 BCLR 89 at 917 para 96.

<sup>1048</sup> *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Others as Amici Curiae (No 2))* 2003 1 SA 495 (CC) at 508 para 19.

<sup>1049</sup> 2003 1 SA 488 (CC)(z No1)

The doctrine of the rule of law, and in particular the principle of legality contained within it, is the general constitutional counterpart where administrative justice fit in, in the Bill of Rights.<sup>1050</sup>

## 7.8 The rise of substantive legitimate expectations doctrine under PAJA

Administrative law governs all "administrative action".<sup>1051</sup> Furthermore, administrative action governs all exercises of public power. In short, every public power is reviewable on administrative law principles when exercising power emanating from the Constitution.<sup>1052</sup> In *Kaunda v President of the Republic of South Africa*,<sup>1053</sup> O'Regan put the justiciable decision as follows:

*Jurisprudence of the Constitutional Court has shown that all public power is to some extent justiciable under the Constitution of the Republic of South Africa but the exact application will depend on various factors including the nature of the power being exercised.*<sup>1054</sup>

In *Joseph* the Constitutional Court extended the meaning of "rights" under Section 3(1) of PAJA by holding that the term legitimate expectations include legal entitlements that have their basis in the constitutional and statutory obligations of government.<sup>1055</sup> In terms of Section 172(a) of the Final Constitution, the Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an act of Parliament. In *Pharmaceutical Manufacturers Association of South Africa and Others In re ex parte President of the Republic of South Africa*, the court said that administrative law occupies a special place in the South African Law. The Interim Constitution shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. The court concluded per Chaskalson JP:

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<sup>1050</sup> Corder and Federico *The Quest for Constitutionalism South Africa since 1994* 129.

<sup>1051</sup> Section 1 of PAJA.

<sup>1052</sup> Hoexter "Administrative Justice and the Enforcement of the Constitution" 127-142.

<sup>1053</sup> 2005 4 SA 235 (CC).

<sup>1054</sup> 2005 4 SA 235 (CC).

<sup>1055</sup> Quinot *et al Administrative Justice in South Africa* 150; *Joseph and Others v City of Johannesburg and Others* 2010 4 SA 55 (CC) paras 31 & 43.

*Even if the common law constitutional principles continue to have applications in matters not expressly dealt with by the constitution (legitimate expectations doctrine), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control.*<sup>1056</sup>

Section 33 of the Constitution expands<sup>1057</sup> on the established principles of the common law. Section 39(3) which states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by the common law, customary law or legislation, to the extent that they are consistent with the Bill. The development of common law must be within the realm of the rules of natural justice which include legitimate expectations.

Substantive legitimate expectations doctrine as a manifestation of transformative constitutionalism must be seen in the context of democratic virtues' relevance to administrative law for instance, the promotion of public participation in the processes of law making and governmental decision making.<sup>1058</sup> This aspect is taken in the PAJA.<sup>1059</sup>

In *National Director of Public Prosecutions v Phillips and Others*,<sup>1060</sup> the court detailed the aspects of legitimate expectations to be:

- (a) *reasonable expectation*
- (b) *expectation arising from representation must include; clear, unambiguous and devoid of relevant qualification; tricked by the decision maker and the decision maker was authorized.*

Section 195 of the Constitution establishes the constitutional role of the public administration. Public administration is required to be governed by the democratic values and principles which include developmental oriented, the needs of the citizens must be responded to and the public must participate in policy making and public administration must be accountable.<sup>1061</sup>

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<sup>1056</sup> 2000 2 SA 674 (CC) at 696 para 45.

<sup>1057</sup> Hoexter *Administrative Law* 29.

<sup>1058</sup> 1969 2 CH 149 at 170.

<sup>1059</sup> Section 4 of the PAJA.

<sup>1060</sup> 2002 4 SA 60 (W) para 28; Quinot *Administrative Justice in South Africa* 151.

<sup>1061</sup> Section 195 of the Constitution.

Many commentators<sup>1062</sup> have welcomed the enactment of *Promotion to Administrative Justice Act*. They argue that grounds of judicial review have been written down in the *Promotion of Administrative Justice Act* and have been made more accessible. Despite this happiness by administrative lawyers, the Act's definition of administrative action is far too narrow in its insistence on direct, 'that' adversely affects', external legal effect'. The Act's definition appears to be unconstitutional.<sup>1063</sup> Davis sees the definition of administrative action in Section 1 of the Act, particularly the word "any decision taken, or failure to take a decision ... which adversely affects the rights of any person and which has a direct, external legal effect". Davis<sup>1064</sup> continues to argue that the definition of administrative action holds the key to the balance of the Act.

## **7.9 Reforming South African administrative law by accommodating substantive legitimate expectations as a substantive ground of review in administrative law**

### **7.9.1 Introduction**

In South Africa, the 1996 Constitution introduced legislative steps to codify administrative law. This was achieved by enacting the promotion to administrative Act 3 of 2000. This act was meant to be the only avenue of judicial review. However, this is not the case.

### **7.9.2 The nature of judicial review**

Legal control of the functions of public authority by the courts takes two forms as seen by Cane.<sup>1065</sup> Public authority or the state are subject to administrative law and judicial review. Judicial review is concerned with the remedy. Therefore, the courts' duty is to

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<sup>1062</sup> Hoexter "Administrative Justice and the Enforcement of the Constitution" 28; Corder and Van der Vijver *Realising Administrative Justice* 72.

<sup>1063</sup> Hoexter "Administrative Justice and the Enforcement of the Constitution" 29.

<sup>1064</sup> Corder and Van der Vijver *Realising Administrative Justice* 72.

<sup>1065</sup> Cane *Administrative Law* 2.

make principles of administrative law and rules which must be adhered to by the legislature, executive and administrators. Therefore, judicial review refers to judicial control of public decision making in accordance with rules and principles of administrative law.<sup>1066</sup>

The origins of judicial review are at the heart of the dialectic between constitutionalism and democracy.<sup>1067</sup> Judicial review justifies the usefulness of controlling the abuse of power by the government. In *Marbury v Madison*,<sup>1068</sup> it was held that it was within the courts' power to apply the constitution and decide on the validity of the Constitution and legislation. Constitutional rules and common law must be developed by the courts. This is exactly the position with South Africa's current legal system. The courts are tasked with the duty to review any legislation that is not consistent with the spirit of the Constitution.

Judicial review is an appropriate tool for the implementation of the constraints designed to promote fairness and equality. Therefore, it is correct to say constitutionalism legitimates judicial review. Rosenfeld is of the opinion that judicial review rests on three elements of constitutionalism: respect for individual rights, democracy and the rule of law.<sup>1069</sup>

Before the dawn of democracy in South Africa, South African courts created an amount of space within which they exercised a degree of judicial review. They did not refer to any constitutional base for this power, used common law principles and English judicial precedent instead.<sup>1070</sup> In 5.1 above it was shown how the English courts have adopted substantive legitimate expectation as a ground of judicial review. In 5.2 above the researcher has shown how transformative constitutionalism has manifested itself as substantive legitimate expectation. Sachs J makes the point that judges under apartheid upheld claims that proclamations, regulations and by laws issued by bodies or persons in terms of powers granted by Parliament, be declared void because of vagueness or unreasonableness. In the past, Judges declared some

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<sup>1066</sup> Cane *Administrative Law* 28.

<sup>1067</sup> Rosenfeld *Constitutionalism, identity, difference and legitimacy* 27.

<sup>1068</sup> 5 US (1 Cranch) 137 (1803) 21.

<sup>1069</sup> Rosenfeld *Constitutionalism, identity, difference and legitimacy* 28.

<sup>1070</sup> Sachs *Protecting human rights* 35.

executive acts, such as forced removals or banning orders because void, people adversely affected were not given a hearing.<sup>1071</sup>

The question which arises and which the researcher answers in this part is: Does the non-recognition of substantive legitimate expectation correspond with the Bill of Rights and is it manifestly justifiable? Secondly, does this non-recognition accord with aspiration of the people of South Africa for a transparent and accountable government? Answers to this are given below.

Strangely and not surprising with the confusion which was brought by the definition of administrative action by PAJA, the court in *Zondi v MEC for Traditional and Local Government Affairs*,<sup>1072</sup> Section 33 was directly applied by the court. This is a shortcoming of PAJA, namely that it cannot be used to evaluate a constitutional challenge. Ngcobo J observed as follows: "A constitutional challenge must be evaluated under Section 33 of the Constitution."

A remedy which seeks a constitutional solution in administrative matters, can only be given effect by the Constitution not PAJA, even though PAJA is a vehicle for administrative judicial review. This is the huge shortcoming of PAJA.<sup>1073</sup> This lacuna has not been answered in the courts. As a result, the researcher intends to provide an answer to this lacuna by advocating the amendment of Section 33 of the Constitution. It is submitted that the argument of Ngcobo cannot stand that statutes that authorise administrative action must be read with PAJA<sup>1074</sup> while PAJA itself is inconsistent with Section 33 because the definition of administrative action is narrow and reduce the sphere of administrative action.<sup>1075</sup>

A central issue that this part addresses is the ability of the courts to serve as a consciousness-transforming vehicle for judicial review of unlawful and unconstitutional administrative decisions: what kind of justice is advanced by the courts? How can substantive legitimate expectation be used to promote transformative

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<sup>1071</sup> Sachs *Protecting human rights* 35.

<sup>1072</sup> 2005 3 SA 589 (CC) at 621J-622B.

<sup>1073</sup> Hoexter 2006 *Acta Juridica* 303-324 at 307.

<sup>1074</sup> 2005 3 SA 589 (CC) at 622 para 101E-F.

<sup>1075</sup> Hoexter 2006 *Acta Juridica* 306.

constitutionalism?<sup>1076</sup> In early jurisprudence the court established that legitimate expectations doctrine has altered significantly the role and function of the South African courts in administrative decisions. Some commentators speculated that the doctrine of legitimate expectations would not have a substantial impact on how the courts evaluate the common law because conservative South African judicial culture has been reluctant to question the role of legislature in resolving important social questions.<sup>1077</sup> Later judgments seemed anxious to distance themselves from earlier judgments, which were characterised by a reluctance to scrutinise legislative objectives in conflict with the provisions of the South African Bill of Rights. Some courts have recognised the Bill of Rights as the Supreme Law of South Africa and suggested that it represent the break with the past.<sup>1078</sup>

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*,<sup>1079</sup> the Constitutional Court explained that both Sections 35(3) and 33(3) of the Interim Constitution explain that the Constitution was not intended to be an exhaustive code of all rights that exist under the South African law. The common law supplements the provisions of the written Constitution and derives its force from it. Therefore, the common law must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims. Thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." Section 39(2) of the 1996 Constitution ensures that the common law will evolve within the framework of the Constitution. It is also important to mention that the call for reforming administrative law comes from the shortcomings of Section 33(3)(c) of the Constitution. As Hoexter put it, set a lower standard for compliance with the rights in Subsections (1) and (2) of Section 33 of the Final Constitution.<sup>1080</sup> Further ground for reforming administrative law by incorporating substantive legitimate expectation as a ground of judicial review is as Professor Hoexter put it as follows "Section 1 of the *Promotion of Administrative Justice Act* limit the right to administrative justice in a manner which is not supported

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<sup>1076</sup> *Bilsky Transformative Justice* 3.

<sup>1077</sup> Hiebert *Limiting Rights* 55.

<sup>1078</sup> Hiebert *Limiting Rights* 55.

<sup>1079</sup> 2000 3 BCLR 241 at 263 para 49.

<sup>1080</sup> Hoexter 2000 *SALJ* 499.

by the Constitution. This alone is not justifiable in an open and democratic society."<sup>1081</sup> Furthermore to this limitation of PAJA, Section 33 of the Constitution exist, together with the common law that forms it. It is along this basis that the researcher advocates for this reform of administrative law.

The intersection of fairness and its importance for the development of common law forms an important aspect for judicial review as Section 33 incorporates common law and its expansion. The Bill of Rights is not limited where the constitution is directly involved.<sup>1082</sup> The constitutionalisation of the common law does not mean that the Constitution has done away with common law administrative law or made it redundant. On the contrary the common law still plays an important role in judicial review. More importantly, Section 33 is seen as incorporating and expanding on the principle of common law which was established many centuries.<sup>1083</sup> In *S v Mhlungu and Others*,<sup>1084</sup> the court said that it is important to decide a case without recourse to the Constitution. Similarly, it will be important that substantive legitimate expectation be invoked in matters where the executive did not adhere to its promise without reference to what is administrative action or not.

In the case of *Council of Civil Service Unions and Others v Minister for the Civil Service*, Lord Fraser of Tullybelton concluded as follows:

*But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law.*<sup>1085</sup>

This relief comes after the acceptance of substantive legitimate expectations in the rest of the European Union countries<sup>1086</sup> regardless of its rejection by some judges in South Africa. It is a question of time. Finally, the indubitable evidence that its application will fetter the executive power becomes illusory and is in fact non-existent. This doctrine has been the subject of a burning debate since the acceptance of the

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<sup>1081</sup> Hoexter 2000 SALJ 517.

<sup>1082</sup> Ntlama *Impediments in the promotion of the right to gender equality* 175.

<sup>1083</sup> Hoexter *Administrative Law* 29.

<sup>1084</sup> 1995 3 SA 867 (CC) para 59.

<sup>1085</sup> 1984 3 All ER 935 at 943J.

<sup>1086</sup> Schwarze *European Administrative Law* 870.

legitimate expectation doctrine in South Africa as explicated by Corbet in *Traub and Others v Administrator Transvaal*.<sup>1087</sup> It will be remembered that Corbet said that substantive legitimate expectations is also applicable in South Africa although however he did not take the matter further but only introduced procedural legitimate expectations doctrine. He never categorically stated that substantive legitimate expectation will not be applicable in South Africa as a ground of review. This concluding chapter aims to bring this debate to an end.

### **7.9.3 The procedural protection of substantive expectations**

In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,<sup>1088</sup> the court held that the decision to lease the vacant lot constituted administrative action for purposes of Section 1 of PAJA. Then the court moved to a further point of a hearing before a decision was taken. Section 3(1) of PAJA provides that administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Substantive expectations are often protected procedurally.<sup>1089</sup> The shortcoming of the case did not see the applicability of the legitimate expectation aspect of Section 3(1) of PAJA. According to the court, the applicants failed to establish either an express promise or a practice that would render it unfair to take a decision without affording them a hearing.<sup>1090</sup> Nugent, in the writer's view, incorrectly referred to *Administrator, Transvaal and Others v Traub and Others*.<sup>1091</sup> The person who is a subject of an enquiry or investigation which might have adverse consequences is entitled to give the side of his or her story. This dictum does not support the Nugent decision nor the decision of Tullybelton in *Council of Civil Unions and Others v Minister for the Civil Service*.<sup>1092</sup> If these two decisions are examined closely, one finds that they contain a substantive legitimate expectation. In *Administrator, Transvaal and Others v Traub and Others*,<sup>1093</sup> the then Chief Justice remarked:

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<sup>1087</sup> 1989 4 SA 751 (A).

<sup>1088</sup> 2005 6 SA 313 (SCA).

<sup>1089</sup> 2005 *Annual Survey of South African Law* 118-119.

<sup>1090</sup> 2005 6 SA 313 (SCA) at 326 para 32.

<sup>1091</sup> 1989 4 SA 731 (A) at 756l.

<sup>1092</sup> 1984 3 All ER 935 at 944A-B.

<sup>1093</sup> 1989 4 SA 751 (A) 761E-F.

*The legitimate doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned would reasonable expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.*

#### **7.9.4 The doctrine of fairness**

Roederer and Moellendorf understand the principle of fairness as follows:

*A person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntary accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests, provided that this institution is just or fair.*<sup>1094</sup>

There were situations in which individual rights had not been affected, but where the citizen could legitimately expect to be treated fairly. In *Lunt v University of Cape Town and Another*,<sup>1095</sup> the university refused to register a student because he did not have a training post at a hospital, a prerequisite for postgraduate studies. The court set the decision aside on the basis that the applicant had a legitimate right to be heard. This decision is endorsed by the substantive legitimate expectation rather than procedural expectation because the student was allowed to register at the university. Nugent JA, indicated the difficulty created by the narrow and formalistic approach to procedural fairness that was invented by the makers of PAJA. "The rights and legitimate expectations approaches leave a big hole in the net of procedural fairness in the form of cases that, will cry for interests to warrant substantive protection." It is argued that this jurisprudence is a backward step in relation to the important developments that have taken place in the cases which Nugent quoted in a decision before PAJA in entrenching the fairness doctrine which South African administrative law lawyers and scholars alike, including the researcher, are advocating as a ground of judicial review.<sup>1096</sup>

PAJA was intended to give effect to the fundamental right to fair administrative action. But this purpose is not realised because PAJA restricts the application of substantive legitimate expectation which co-exist with procedural legitimate expectation. It bears

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<sup>1094</sup> Roederer and Moellendorf *Jurisprudence* 544.

<sup>1095</sup> 1989 2 SA 438 (C) 450-451; Peach *The application of the audi alteram partem rule* 9.

<sup>1096</sup> 2005 *Annual Survey of South African Law* 119.

stressing that it moved from the underlying principle that the duty to act fairly rests on anyone who is called upon to decide anything in the exercise of public power.

*Buffalo City Municipality v Gauss*<sup>1097</sup> dealt with the application of the right to procedural fair administrative action in the procedure in line with the expropriation of property by a local government in terms of the Cape Ordinance 20 of 1974. In this case, the court *a quo* held that the owner had a right to be heard before the decision to serve the preliminary notice was taken. This was rejected by the Supreme Court of Appeal, on the grounds that the ordinance did not envisage a hearing prior to the issuing of the preliminary notice because it provided expressly for the opportunity to make representation after the notice was issued. Thus, the requirement to be excluded by a statute was not in conflict with the Constitution. This judgment took the debate back to the pre-existing rights era, did not advance the objective of the Constitution and was in consequence in conflict with Section 8(3) of the Constitution.

Legitimate expectation is founded upon a basic principle of fairness that legitimate expectations ought not to be disappointed. Thus, protection of legitimate expectations is at the root of the constitutional principle of the rule of law.<sup>1098</sup> In cases where no promise of a benefit has been made, and there is no clear practice of granting the benefit, the person concerned is by right entitled to be treated fairly.<sup>1099</sup>

The writer's argument here is that the recognition of substantive legitimate expectation will lead to the reform of administrative law.

#### **7.9.5    *The rule of natural justice***

The right to procedural administrative justice included the *audi alteram partem* principle which was traditionally applicable where the individual was prejudicially affected in his or her liberty, property or existing rights. Therefore, the right to procedurally administrative justice was recognised in the cases where legitimate expectations of individuals were affected, that is, in cases where a person's claim falls

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<sup>1097</sup> 2005 4 SA 498 (SCA).

<sup>1098</sup> Rawls *A theory of justice* 235-243.

<sup>1099</sup> Wade and Forsyth *Administrative Law* 458.

short of a legal right but the interests attract legitimate expectation.<sup>1100</sup> Furthermore, legitimate expectation was granted a constitutional mandate, even though the term legitimate expectations was not defined by the Constitution.<sup>1101</sup> Most importantly, Section 24 extended the principles of judicial review.

Even though the Constitution did not define legitimate expectations, the South African courts saw it fit to retain the procedural legitimate expectations as found by Corbet in *Administrator, Transvaal and Others v Traub and Others*,<sup>1102</sup> where Corbet observed that in *Schmidt* case, it was found that there was no scope for the application of the concept of a legitimate expectation. There have been a large number of decisions (these decisions have been discussed under Chapter 5.1 above) after *Schmidt*<sup>1103</sup> in England accepting the concept as an integral part of the rules relating to the *audi* principle. In some cases, the party claiming the benefit of the principle has been held to have had such a legitimate expectation, in others not.

After the adoption of a constitutional state in the Republic of South Africa, an administrative justice clause was included under the 1993 Constitution.<sup>1104</sup> This sections states:

*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 unless the reasons for such action have been made public; and*
- (d) administrative action which is justifiable in relation to reasons given for it where any of his or her rights is affected or threatened.*

Nowhere in this Constitution is a definition of administrative action offered or explained what kind of legitimate expectations the section is referring to, whether legitimate

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<sup>1100</sup> Basson *South Africa's Interim Constitution* 33.

<sup>1101</sup> Section 24 of the 1993 Constitution.

<sup>1102</sup> 1989 4 SA 731 (A) at 755C.

<sup>1103</sup> *Schmidt v Secretary of State for Home Affairs* 1969 1 ALL ER 904 at 909 para C.

<sup>1104</sup> Section 24 of the 1993 Constitution. South Africa followed the *Constitution of the Republic of Namibia* 1 of 1990 which contains the similar provisions in art 18 of its Bill of Rights. See Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 165 where an analysis of Section 24 is given.

expectation refers to substantive legitimate expectations or procedural legitimate expectations. This, in the writer's view, was left to the courts to interpret. However, courts have shown that they are in favour of staying within the procedurally legitimate expectations space instead of venturing into the boarded horizon of substantive legitimate expectations without showing any Constitutional values which inform their decisions.<sup>1105</sup>

As far as the legislatures of the former Homelands are concerned, a High Court Division of the Supreme Court has jurisdiction in terms of Section 101(3)(c) of the 1993 Constitution, to inquire into the constitutionality of any such law applicable within its jurisdiction.<sup>1106</sup>

### **7.9.6 Reforming administrative law by recognising substantive legitimate expectation under Section 33 of the 1996 Constitution**

The concept of legitimate expectation, as giving a basis for challenging the validity of the decision of a public body on the ground of its failure to observe the rules of natural justice was given the stamp of approval in a number of English law cases.<sup>1107</sup> The cases cited in *Ex parte Hamble (Offshore) Fisheries Ltd*, were cited<sup>1108</sup> in the European court of justice. This case raised directly the question as to whether there could be substantive legitimate expectations: The applicants claim was not based on the denial

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<sup>1105</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 2 SA 91 (CC) para 41. On behalf of the court, O'Regan said in her judgment on behalf of the court: "In determining what constitutes procedural fairness in the given case, the court should be slow to impose obligations upon government which will inhibit its ability to make and implement a policy effectively (a principle well-recognised in our common law and other countries). As a young democracy facing immense challenges of transformation, South Africa cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another principle, that of procedural fairness.

<sup>1106</sup> 1995 4 SA 615 (CC) 615 at 629 para A-B. In terms of s 17 of Schedule 6 to the new Constitution, all proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been acted, unless the interests of justice require otherwise.

<sup>1107</sup> These cases are *O'Reilly v Mackman and Others* 1982 3 All ER 1124 (HL) at 1126-1127; *Findlay v Secretary of State for Home Department and Other Appeals* [1984] 3 All ER 801 (HL) at 830B-C; *Council of Civil Service Unions and Others V Minister for the Civil Service* [1984] 3 All ER 935 [HL] at 944A-E; 949F-J; 954E-H; *Leach v Parkhurst Prison Deputy Governor* [1988] 1 All ER 485 at 496.

<sup>1108</sup> *Reg v Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* 1984 1 WLR 1337; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408-409.

of any procedural rights but on what Hamble Fisheries (HF) took to be unjust refusal to allow it to fish with the licences which it had obtained up to the change of policy. Sedly J accepted that this was the point at issue and did not seek to avoid deciding this important point of substantive legitimate expectations. Sedley J, held that there was precedent in favour of a doctrine of substantive legitimate expectations.<sup>1109</sup> Sedly J, held that a specific public promise made by the government could suffice.<sup>1110</sup> These cases all concern policies or practices conferring substantive benefits from which member states were not allowed to resile when the policy or practice was altered.

The operation of the developed doctrine of substantive legitimate expectations is well documented in the case of *Attorney General Hong-Kong v Ng Shiu*.<sup>1111</sup> The court held that the respondent's legitimate expectations was not fulfilled and the removal order against him was quashed. The courts motivation for wanting to protect such expectations is plain as said by Forsyth: if the executive undertakes, expressly or by past practice, to behave in a particular way the subject expects that undertaking to be complied with.<sup>1112</sup> This is in any democratic government fundamental to good government and it would be monstrous if the executive could freely renege on its undertakings. Government accountability should not be left unchecked. When government is left unaccountable<sup>1113</sup> it breeds corruption as is seen today. Writing about lack of accountability and clear example of bad administration at the expenses of the citizen of South Africa, Myburgh says "the Free State Government in a nine year period under Ace Elias Magashule spent R2 billion to contractors which failed to deliver houses to the poorest of the poor of the Free State citizens".<sup>1114</sup> This project was characterised by mismanagement and corruption. This maladministration and bad

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<sup>1109</sup> Craig 1996 *Cambridge LJ* 292.

<sup>1110</sup> *R v Minister for Agriculture, Fisheries and Foods, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 728-9; *R v Secretary of State for Home Department, ex parte Ruddock* (1987) 1 WLR 1482.

<sup>1111</sup> [1983] 2 A.C.629 (PC).

<sup>1112</sup> Forsyth 1988 *Cambridge LJ* 239.

<sup>1113</sup> Myburgh *Gangster State* part iv: Iron fist; v: All the president's pal; vi: Daddy's girl; vii The Igo files. Proclamation 3 2018 established the Zondo Commission, to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud. See Democratic Alliance, Free State letter to the Zondo Commission, 26 September 2018.

<sup>1114</sup> Myburgh *Gangster State* unravelling Ace Magashule's Web of Capture 79-91. See part vi at 200-211, houses awarded to Unital's Holdings worth millions of Rands were not inherited. This left the beneficiaries without a remedy.

governance action cannot be remedied by an invoking procedural legitimate expectation. The remedy which is at the disposal of the beneficiaries of this project is a substantive benefit.

The English Court of Appeal unequivocally adopted the doctrine in *Regina v North and East Devon Health Authority ex parte Coughlan*, that where a substantive legitimate expectation was found, that expectation should be fulfilled, save where an "overriding public interest" was found by the court.<sup>1115</sup> The law of England had moved on to protect, in appropriate cases, substantive legitimate expectations.

Section 24 of the 1993 Constitution, also made provision for legitimate expectation though not specifically mentioning which expectation because legitimate expectations can be either procedural or substantive. Substantive legitimate expectation falls under Section 33 of the 1996 Constitution.<sup>1116</sup> This doctrine is not only confined to England. It has been applied and accepted in South Africa in *Administrator, Transvaal, and Others v Traub and Others*, where Corbet saw that the legitimate doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain a benefit.<sup>1117</sup> Riggs understood the doctrine as follows:

*The doctrine of legitimate expectations is construed broadly to protect both substantive and procedural expectations.*<sup>1118</sup>

The doctrine of substantive legitimate expectation was recently applied in *Premier of Mpumalanga v Executive Committee of State-Aided Schools, Eastern Transvaal*.<sup>1119</sup> How will the government of the Republic of South Africa be held accountable when it has a free right when it deals with its citizens? The government dealings with its citizens must be characterised by the values and precepts enshrined in the

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<sup>1115</sup> [2000] 2 WLR 622.

<sup>1116</sup> *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) para 191B. Madala J, held that the applicant violated the principle of administrative justice and fundamental fairness which are ordered in the Constitution. The attitude of the Western Cape Education Department gave rise to a legitimate expectation as to the future of their workers, at para 200.

<sup>1117</sup> 1989 4 SA 731 (A) at 78 para D. *Secretary of State for Environment; Ex parte London Borough Council and Others* [1983] 3 All ER (QB) at 354F-H.

<sup>1118</sup> 1988 *American Journal of Comparative Law* 395 at 404.

<sup>1119</sup> 1999 2 SA 91 (CC).

Constitution.<sup>1120</sup> Madala J in his dissenting judgment agreed with the judgment of Mokgoro J and Sachs J that the Constitutional Court should issue a declaratory to the effect that the rights of the general assistance and the appellant schools as a whole have been infringed in terms of Section 33(1)(b) and (d), to the extent of depriving their general assistants of the right to have their length of service taken into account when the PPM is implemented, and order the WCED to take account of the length of service of the general assistants at appellant schools when implementing the personnel provisioning measure. In his view, this is a substantive relief or a substantive legitimate expectation which the appellants are entitled for. The researcher agree with Madala J because sections 33 (1) (b) and d of the 1996 Constitution deals with constitutional remedies which the court must consider. In *Fose v Minister of Safety and Security*, the Constitutional Court stated that:

*It is left to the courts to decide what would be appropriate relief in any particular case, appropriate relief will in essence be relief that is required to protect and enforce the Constitution...*<sup>1121</sup>

Mokgoro J and Sachs J, were of the view that a severance method is permitted of detaching a defective part of the statute from the body of the legislation as a whole, and reading-in is appropriate method of filling an easily definable gap in a measure that constitutionally-speaking is under-inclusive, therefore, appropriate techniques be developed to fashion remedies for administrative justice. It is the researcher's view that in the similar line of Justices Mokgoro J and Sachs J, substantive legitimate expectation should be fashioned a new remedy for administrative justice.<sup>1122</sup> In *Stransham-Ford v Minister of Justice*,<sup>1123</sup> the applicant has terminal stage 4 cancer and had only a few weeks left to live. The applicant was provisionally diagnosed with adenocarcinoma on 19 February 2013. The cancer had metastasised into lymph glands and had to have his lymph removed. It was further discovered that applicant's cancer had spread to his lower spine, kidneys and lymph nodes.<sup>1124</sup> Before court, the applicant seeked the order which allowed him to request a medical practitioner,

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<sup>1120</sup> 2002 3 SA 265 (CC) at 334 para 217D.

<sup>1121</sup> 1997 3 SA 786 (CC); 1997 7 BCLR 851) at paras 18-19.

<sup>1122</sup> 2002 3 SA 265 (CC) at 326 para 187G; *R v Secretary of State for the Home Department, Ex parte Pieson* [1998] AC 539 (HL) 592A-D.

<sup>1123</sup> 2015 4 SA 50 (GP).

<sup>1124</sup> 2015 4 SA 50 (GP) at 54 para 4.

registered as such in terms of the *Health Professions Act 56 of 1974*<sup>1125</sup> (a medical practitioner), to end his life or to enable applicant to end his life by the administration or provision of some or other lethal agent.<sup>1126</sup> In this case, the court found it necessary to develop common law in order to accept euthanasia. Fabricius J, found that Section 39 (2) of the 1996 Constitution obliged to undertake a two-stage enquiry which cannot be hermetically separated from one another. Fabricius J understood the first stage enquiry would be to consider whether the existing common law, having regard to Section 39(2) objectives, requires development in accordance with these objectives. He held that Section 39(2) enquiry requires the development of common law in terms of Section 39(2). In his view the second stage enquiry concerns itself with how such development is to take place in order to meet the Section 39(2) objectives. Applying this to reforming administrative law by recognising substantive legitimate expectation, substantive legitimate expectation must be recognised.<sup>1127</sup> The non-recognition of substantive legitimate expectation in common law does not accord with the rights contained in Section 33 of the 1996 Constitution.

The writer finally submits that the underlying values, spirit and purport of the applicable sections (which have already been alluded to in the previous chapters) in the Constitution seem to be supportive of the introduction of substantive legitimate expectation in South Africa. Change and development of the law, if it is going to come about at all, will come about through the courts not through the executive or legislative means which is not informed by any scholarly work like this research. The recommendations at the end of this study will reflect this line of reasoning.

#### ***7.9.7 The development of common law for the realisation of substantive legitimate expectations as a new ground of judicial review in administrative law***

For a period of three years judicial review was conducted directly from the Constitution. This was before the promulgation of the *Promotion of Administrative Justice Act*.<sup>1128</sup>

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<sup>1125</sup> Act 56 of 1974.

<sup>1126</sup> 2015 4 SA 50 (GP) at 54 para 3.

<sup>1127</sup> *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 4 SA 50 (GP) at 70 para 41-42.

<sup>1128</sup> Act 3 of 2000.

In *Pharmaceutical Manufacturers Association and Another: In re ex parte President of the Republic of South Africa and Others*, the Constitutional Court put the rivalry between Constitutional judicial review and common law to rest by making it very clear that the Constitutional Court cannot accept the lower court's decisions that the common law, as a body of law, is separate and distinct from the Constitution. Chaskalson rebuked the Supreme Court of Appeal by stating that:

*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.*<sup>1129</sup>

In *Thebus and Another v S*,<sup>1130</sup> the court placed an importance on the court's duty to develop the common law in terms of Sections 8(3).<sup>1131</sup> This section simply states: When applying a provision of the Bill of Rights to a natural or juristic person in terms of Subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply; or if necessary develop, the common law to the extent that legislation does not give effect to that right; and Sections 39(2) and 173 of the Constitution.

Moseneke expressed it more boldly as follows:

*A new approach which is different from the apartheid regime is required when a court of law deals with a constitutional challenge to a rule of the common law. The common law is the creature of the court. High courts are protectors and expounders of the common law. The High Court has an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic makeup of the society. That power is now constitutionally authorized and must be exercised within the precepts and ethos of the Constitution.*<sup>1132</sup>

The Constitutional Court has the power to reform administrative law by accepting substantive legitimate expectations as a new ground of judicial review. In *Carmichele v Minister of Safety and Security and Another* the court noted the importance of the development which is in line with values of the South African Final Constitution.<sup>1133</sup>

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<sup>1129</sup> 2000 2 SA 674 (CC) at 696 para 44.

<sup>1130</sup> 2003 10 BCLR 1100 (CC).

<sup>1131</sup> Section 8(3) of the Constitution.

<sup>1132</sup> 2003 10 BCLR 1100 (CC) at 115 para 31.

<sup>1133</sup> 2001 10 BCLR 995 (CC) para 59.

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* Chaskalson was quick to describe the role which is played by the Constitutional Court and stated that the Constitutional Court was established as part of that order. As a new court, with no links to the past, the Constitutional Court is the highest court in respect of all constitutional matters, and as such, the guardian of Constitution South Africa.<sup>1134</sup>

The Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others*<sup>1135</sup> described 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.

*KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and Others* concerned the withdrawal of a promise to pay subsidies to independent schools.<sup>1136</sup> This case is similar to the present dispute between the *Democratic Alliance v Zuma* regarding the continued payment of Mr Jacob Zuma's legal fees which the state has been paying since 2006. This emanates from an agreement between Zuma, the state attorney and the then president Thabo Mbeki, to pay the costs of Zuma's defence in his corruption trial.<sup>1137</sup> Zuma argues that stopping state funding of his defence will amount to a violation of his fair trial right contained in Section 35(3)(g) of the *Constitution of the Republic of South Africa*. This section provides that:

*Every accused person has a right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this promptly ...*

The Democratic Alliance and Economic Freedom Fighters have brought an application to stop Zuma's funding because he was "not entitled to such funding, and wants him and his former attorney, Michael Hulley, to repay the millions spent on multiple fruitless

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<sup>1134</sup> 2000 3 BCLR 241 at para 55.

<sup>1135</sup> 2000 2 SA 674 (CC) at para 45. Hoexter *Administrative Law* 2-3. The *Promotion of Administrative Justice Act* came into effect on the 30 November 2000.

<sup>1136</sup> 2013 4 SA 262 (CC).

<sup>1137</sup> *Sowetan* 27 August 2018 4.

challenges to his application". Mr Zuma's defence is that the "application is 'misconceived' because the corruption charge, he is accused of is directly linked to his official role and position in government and he is therefore entitled to receive state funding of his defence".<sup>1138</sup>

It is the researcher's view that Mr Zuma could have ground of defence is substantive legitimate expectations not his role and position in government, because there has been a practice of funding Zuma since 2006 and his Constitutional right to a fair trial.

Mr Zuma's arguments are also similar to *Magidiwana and Other Injured and Arrested Persons v President of the Republic of South Africa and Others* where the applicants argued a right to state-funded legal assistance on the basis of various rights in the Bill of Rights, in particular the rights to equality and access to courts in Section 34 of the Constitution.<sup>1139</sup> In addition, they invoked the principle of legality, arguing that the refusal to provide legal aid was irrational and inconsistent with the rule of law. This case emanates from the death of the mine workers who were killed by the South African police on August 2012. The President of South Africa appointed a commission of enquiry to investigate the killings of the unarmed workers. In this case the court ordered Legal Aid South Africa to provide legal aid to the injured and arrested persons in the Marikana Commission of Inquiry. The judgment is relevant in that the court granted substantive relief to the applicants to be represented in the Inquiry.<sup>1140</sup> What persuaded the court was the "interest of justice and the rule of law that would be undermined by a failure to uphold the right". In addition, the court added substantial and direct interest of the applicants in the outcome of the commission. The court went on to state:

*The commission has adapted a decidedly adversarial nature. The consequences arising from the commission's findings include possible criminal prosecution for murder committed possibility of life or long-term imprisonment. These factors call for fairness and equality of arms, which in turn, locates the commission within the purview of Section 34 of the Constitution. Section 34 has to be interpreted purposively and expansively.<sup>1141</sup> This carries with it the constitutional values of justice and*

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<sup>1138</sup> Sowetan 27 August 2018 4.

<sup>1139</sup> 2005 *Annual Survey of South African Law* 10-11.

<sup>1140</sup> 2014 1 All SA 76 [GNP].

<sup>1141</sup> 2014 1 All SA 76 [GNP] at 95 para 65-66.

*fairness. Our Constitution is a 'never again': never again will we allow the right of ordinary people to freedom in all forms to be taken away.*<sup>1142</sup>

It is clear from this judgment that the rule of law requires that substantive legitimate expectations must be included in the amended Section 33 of the Constitution to be a new ground of review. This will ensure that South Africans do not experience the injustices of the past where administrative law together with criminal law, were the pillars of oppression.

In *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*,<sup>1143</sup> the judgment from the High Court declared the appointment of the National Director of Public Prosecutions invalid and the settlement agreement between the former National Director of Public Prosecution, Mr M Nxasana constitutionally invalid. This judgment was brought to the Constitutional Court for confirmation and to hear Mr M Nxasana's appeal. Mr Nxasana's complaint in his appeal was that the High Court made adverse findings against him contrary to the *audi alteram partem* principle and furthermore, in violation of Section 172(1)(b) of the Constitution. The court upheld the appeal based on substantive legitimate expectation. The court recorded this expectation as follows:

*Although the explanation of the delay in filing the affidavit is weak, Mr Nxasana is strong on the merits of what the explanatory affidavit was – in the main – meant to achieve; that is to counter Mr Zuma's version and based on the possible relief that may be granted and the likely bases for it, a lot is at stake in this matter; that tends to tilt the scales towards giving a hearing to all disputants.*<sup>1144</sup>

This judgment effectively recognised the importance of the interest Mr Nxasana had in the outcome of the case which was going back to his position. This was a ground upon which the Constitutional Court reviewed the decision of the High Court. This judgment relief accords with what was said in *R v Secretary of State for Health, ex parte US Tobacco International Inc*<sup>1145</sup> where the court denied the applicant

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<sup>1142</sup> *South African Transport and Allied Workers Union and Another v Garvas and Others* 2012 8 BCLR 840 (CC); 2013 1 SA 83 (CC) para 63.

<sup>1143</sup> 2018 ZACC 23 para 51.

<sup>1144</sup> 2018 ZACC 23 para 65.

<sup>1145</sup> 1992 1 All ER 212.

substantive benefit but held that the Minister was in breach of his (statutory) duty to consult by refusing to reveal the contents of an independent report.<sup>1146</sup>

This definition informs the definition of administrative action by the courts and later on shows the different approaches by the South African courts in determining what constitutes administrative action under the 1996 Constitution and under the *Promotion of Administrative Justice Act*.

#### 7.9.7.1 Definition of administrative action by the courts under Section 33 of the 1996 Constitution

Courts have given different meanings of administrative action.<sup>1147</sup> In the *Fedsure* case, the court said that administrative action does not apply to legislative decisions. On the other hand, in *President of South Africa v SARFU* the court held that administrative action does not apply to executive decisions. Administrative action is the main source of judicial review under Section 33 of the Constitution and PAJA.

#### **7.9.8 The position of substantive legitimate expectation under the 1996 Constitution**

Like the 1993 Constitution, the 1996 Constitution did not define the doctrine of substantive legitimate expectations. In fact, the 1996 Constitution completely left out the doctrine of legitimate expectations. The drafters of the 1996 Constitution chose to frame the section which deals with administrative action as follows:

*Just administrative action*

33(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

This section is different from the previous section in the 1993 Constitution.<sup>1148</sup> It left out the doctrine of legitimate expectations. What is complicated about this section, is

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<sup>1146</sup> De Smith *et al Principles of Judicial Review* 301.

<sup>1147</sup> *Fedsure Life Assurance and Others v Greater Johannesburg Metropolitan Council and Others* 1999 1 SA 374 (CC) paras 33-45; *President of the Republic of South Africa v South African Rugby Football Union* (the SARFU case) 2000 1 SA (CC) para 142; *Nel v Le Roux* 1996 3 SA 562 (CC) para 24; Hoexter 2006 *Acta Juridica* 303-324.

<sup>1148</sup> 1993 Constitution.

that no definition was given as to what will constitute administrative action or legitimate expectation. The new term was used differently from administrative justice which is contained in its predecessor. Sections 33(1) and 33(2) widen and narrow the remedies available under the 1993 Constitution.<sup>1149</sup>

Section 33(3) required that Parliament must enact National Legislation to give force to Sections 33(1) and 33(2) of the 1996 Constitution. Section 33(3)(c) says national legislation must be enacted to give effect to the above right and must promote an efficient administration. This was the beginning of the problem of this section of the Constitution which was supposed to entrench the rights of the citizen of South Africa. Corder<sup>1150</sup> laments the point that it is unclear why this subsection was included because the limitation clause applies.<sup>1151</sup> During the drafting of this legislation the ANC negotiators were not in favour of this legislation because they saw this as putting a burden on the government.<sup>1152</sup>

After three years of the administrative action clause, the *Promotion of Administrative Justice Act 3 of 2000*<sup>1153</sup> was promulgated on the February 2002. This Act was seen as the third ground of reform of administrative law. This reform was in fact the fourth reform of administrative law because the first one was the recognition of the doctrine of legitimate expectations in South African administrative law in 1989. This Act's aim is to codify the grounds for judicial review and the definition of administrative action. This reform of administrative action left out a further development of administrative law by making substantive legitimate expectation as a further ground of judicial review thus complying with Section 95 of the Constitution. Section 3(1) states that administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair. Similar to the Constitution, the Act does not define or exclude substantive legitimate expectations.

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<sup>1149</sup> Corder 1997 *SAJHR* 32.

<sup>1150</sup> Corder 1997 *SAJHR* 32.

<sup>1151</sup> Section 36 of the 1996 Constitution.

<sup>1152</sup> Corder 1997 *SAJHR* 32.

<sup>1153</sup> Act 3 of 2000.

### **7.9.9 Substantive legitimate expectation as a new ground of review**

The doctrine of legitimate expectations governs participation and it attaches the right to be heard not only to decisions which deprive one of a legal right, but also to those which deny a person of an expectation akin to a legal right.<sup>1154</sup> In *Administrator Transvaal and Others v Traub and Others*, Corbet CJ observed what was said in the *Council of Civil Service Unions* case and said:<sup>1155</sup>

*... the scope of judicial review is the evolution of the legitimate principle and it evolved in the social context of the age in order to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-extensive with notions of what is fair and what is not fair in the circumstances of the case.*

Since this decision legitimate expectation has developed and evolved in the sphere of substantive benefit and beyond procedural benefit. However Corbet CJ advised that a reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority and the contrary desirability of avoiding undue judicial interference in their administration.<sup>1156</sup> In *Zondi and Others v Natal and Others*,<sup>1157</sup> Corbet CJ held that the employer ought to have given the applicants an opportunity to explain why they had not met the announced deadline, and that the employer's failure to do so rendered its decision to confirm the dismissal invalid. It is precisely the purpose of substantive legitimate expectation to protect the rights of the individuals from the executive authority. This principle also entrenches an individual right to administrative justice enshrined in the *Constitution of the Republic of South Africa*.

The other aspect which advocates for substantive legitimate expectations for judicial review is accountability.<sup>1158</sup> The most important aspect of modern democracy is accountable government. Section 1 of the 1996 Constitution lays the foundation for responsive, transparent and accountable government. This requires a government to justify its decisions to those it governs. This is part of the growth of the rules of natural

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<sup>1154</sup> Davis 1993 *Acta Juridica* 37.

<sup>1155</sup> 1989 4 SA 731 (A) at 761B-C.

<sup>1156</sup> 1989 4 SA 731 (A) at 761G-H.

<sup>1157</sup> *Zondi and Others v Administrator of Natal and Others* 1991 3 SA 583 (AD) at 591 H-I. This judgment contains the principle of legitimate expectation. The element of promise and practice are present. See *Annual Survey* of 1991 SA 622 for a full discussion of this case.

<sup>1158</sup> Davis 1993 *Acta Juridica* 40.

justice. If the decision maker knows that his or her decision must be justified, he or she has a duty to act fairly. [The principle of fairness, respect and adherence to constitutional values are vital in a democratic society.] In this case judicial review in recognising substantive legitimate expectation is the vehicle for transformation and implementation of socio-economic rights. This will improve the human rights culture and legitimate the Constitutional vision.<sup>1159</sup>

Substantive legitimate expectation provides an avenue for judicial review where both the Constitution and PAJA do not apply. This principle is a mechanism of holding the executive and administration accountable to the public for its actions if the Constitution has to be respected. If government is found to be wanting, the courts will have the power to review the decision. The drafters of PAJA could have taken the draft judicial review clause recommended by scholars at Breakwater Declaration 1993. It is worth repeating here:

*Anyone adversely affected by a decision made in the exercise of public power shall have the right to a decision which is lawful, procedurally fair and in accordance with the principles of equality and rationality, and shall have the right to seek redress from an independent court and any other body or tribunal established for that purpose.*<sup>1160</sup>

But everything is not lost as the researcher proposes one of the mechanisms of administrative reform in line with the above initiative of administrative reform before the enactment of administrative justice in the 1993 Constitution.

Judicial review under common law continues and will continue to dominate the South African administrative law field. In *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another*,<sup>1161</sup> Madala J in his dissenting judgment with which the writer agrees, concluded that substantive legitimate expectation was part of the South African law. By contrast Chaskalson CJ in his majority judgment, held that substantive legitimate expectation is a contentious issue for which there is no clear authority in the South African law. The Honourable Chief justice was not correct to hold that *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern*

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<sup>1159</sup> Davis 1993 *Acta Juridica* 24.

<sup>1160</sup> Bennet *Administrative Law Reform* 19.

<sup>1161</sup> 2002 3 SA 265 (CC) para 96 at 54-55.

*Transvaal* did not embrace substantive legitimate expectation.<sup>1162</sup> The remedy given by the same court was a substantive benefit as the appellant was ordered to pay the subsidies until the end of the year.

The rule against vagueness was used to a great effect in striking down discriminatory and oppressive delegated legislation. This gave effect to rights of equality and dignity.

During the apartheid period, judicial intervention helped compensate for the inability of most of the population to exercise the "ultimate sanction against abuse of power. This goes for today". In the *Traub* case the court found that past practice had given the applicants a legitimate expectation to be appointed to their post and thus of being heard before a decision was taken to depart from the practice.<sup>1163</sup> In *Administrator, Natal v Sibiyi*, the court rejected the disciplinary-character restriction, and recognised the right of a public employee retrenched with due notice to a hearing before dismissal.<sup>1164</sup>

In *Applicant v Administrator, Transvaal, and Others*,<sup>1165</sup> the applicant sought an order setting the decision of the respondent or respondents not to supply and/or administer the drug to the applicant as invalid and of no force and effect. The applicant was diagnosed as being HIV-infected and suffering from acquired immune deficiency syndrome (AIDS).<sup>1166</sup> The applicant was implanted with a Hickman-line into the applicant's left sub-clavian vein<sup>1167</sup> by a surgical registrar at the Johannesburg Hospital. This implant was later removed because it became infected. Meanwhile a special kind of administration of the drug was commenced at the hospital to a terminally ill patient, creating in his mind the expectation that the treatment would be continued until completion. This expectation which was created to the applicant amounted to a substantive expectation benefit.

These expectations have been created in line with Section 10 of the Constitution which says: "Everyone has inherent dignity and the right to have their dignity respected and

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<sup>1162</sup> 1999 2 SA 91 (CC).

<sup>1163</sup> *Traub* 1989 4 SA 731 (A) 761F, 762 B-D; Hoexter *Administrative Law* 394.

<sup>1164</sup> 1992 4 SA 532 (A).

<sup>1165</sup> 1993 4 SA 733 (T).

<sup>1166</sup> 1993 4 SA 733 (T) at 735C.

<sup>1167</sup> 1993 4 SA 733 (T) at 736A.

protected". This is supported by Section 11 of the Constitution which says "Everyone has the right to life". In *S v Makwanyane and Another*,<sup>1168</sup> the Constitutional Court held that the death sentence is a cruel, inhuman and degrading punishment which conflicts with the rights to life and dignity. Section 27 states that everyone has the right to have access to healthcare services. These rights entrench the constitutional right of administrative justice. A court is entitled to review a discretionary act if the official vested with the discretion fails to apply his mind to the matter, and in applying his mind the official is obliged to have regard to all relevant information.<sup>1169</sup> The court set the decision of the respondent on the basis of substantive legitimate expectation. Myburgh elaborated as follows:

*It follows that the applicant is entitled to substantive relief which includes the drug to be made available to the applicant and the principle of fairness requires that the respondents to supply the drug to the applicant. Respondents will not be prejudiced by the order.*<sup>1170</sup>

Clearly the court has shown as early as 1993 that substantive legitimate expectation is a new ground for judicial review which has to be followed by South African courts. In *Residents of Joe Slovo Community v Thubelisha Homes*, O'Regan was alive to the position of South Africa, where an applicant showed that the government has acted in a manner inconsistent with the existence of legitimate expectation, without giving the applicant an opportunity to be heard. The applicant had both common law and constitutional right to bring review proceedings to set the decision of the executive or administration aside.<sup>1171</sup> English courts have developed a review of a government decision resulting from violation of substantive legitimate expectation.<sup>1172</sup>

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<sup>1168</sup> 1995 3 SA 391 (CC).

<sup>1169</sup> 1993 4 SA 733 (T) at 738 para I.

<sup>1170</sup> 1993 4 SA 733 (T) at 741 para G.

<sup>1171</sup> 2010 3 SA 454 (CC) at 549 para 306; 1989 4 SA 731 (A) at 758 D-F; 1999 2 SA 91 (CC) para 33-37.

<sup>1172</sup> *R v North and East Devon Health Authority, ex parte Coughlan* 2001 QB 213 (CA) 2000 3 All ER 850.

### **7.9.10 Promotion of Administrative Justice Act: The lost saviour**

The aim of the *Promotion of Administrative Justice Act's* was to enlarge rather than restrict administrative law. Both administrative law and criminal law were cruel laws used by the apartheid government.<sup>1173</sup>

- PAJA does little to further the immediate or eventual integration of South Africa's system of administrative law to address the abuse of the apartheid government.
- The prominence of Judicial review after twenty-four years in democracy

Judicial review by the courts has shown to be favourable and effective to the public. Judicial review also works in curbing the abuse of power as it was held in the case of *Judicial Alliance of South Africa v President of the Republic of South Africa and Others*<sup>1174</sup> in which the applicants challenged the decision of the then President JZ Zuma which extended the term of office of the Chief Justice of South Africa for five years. This was in line with Section 8(a) of the judge's *Remuneration and Conditions of Employment Act* 88 of 1989.<sup>1175</sup> This section gave the President the power to extend the term of office of the Chief Justice. The applicants found this to be unconstitutional and took the matter for review.

The Constitutional Court reviewed and set aside the decision of the President because Section 8(a) of Act 47 of 2001 was inconsistent with the Constitution.<sup>1176</sup> This reasoning, in the researcher's view applies to Section 1 of Act 3 of 2000 because the definition of administrative law is violating the rule of law. Section 233 of the Constitution requires courts to draw guidance from international law in the interpretation of legislation. Section 39(1) requires courts to consider international law and foreign law. It is on these bases that England and administrative law principles and rules must be adopted in South Africa in order to recognise substantive legitimate expectation as a ground of judicial review.

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<sup>1173</sup> Sachs *Protecting human rights* 95.

<sup>1174</sup> 2011 ZACC 23.

<sup>1175</sup> 2011 ZACC 23 para 4 at 4.

<sup>1176</sup> 2011 ZACC 23 para 116(3) at 55.

In *Corruption Watch NPC and Others v President of the Republic of South Africa*,<sup>1177</sup> former President Zuma appointed the fourth respondent (Abrahams) following his unlawful removal of Mr Nxasana. The latter's removal, so observed the court, is abuse of power. As a result of this unlawful removal of the third respondent, the fourth respondent benefitted from this abuse of power.

In curing this abuse of power, the court responded as follows:<sup>1178</sup>

*It matters not that he may be aware of the abuse of power; the rule of law dictates that the office of NDPP be cleansed of all the ills that have plagued it for the past few years. It would therefore not be just and equitable to retain him, as this would not vindicate the rule of law.*

Substantive legitimate expectations, if recognised as a ground of review will be the most visible and significant method of dealing with maladministration during the researcher's lifetime.

*R v North and East Devon Health Authority, ex parte Coughlan*<sup>1179</sup> provided a watershed in accepting the substantive legitimate expectations doctrine in England. The applicant challenged the decision by way of judicial review. The court held that the Authority had created in the applicant, a legitimate expectation of having a home for life in Mardon House such that to frustrate that expectation would be unfair.

The case of *Ng Siu Tung and Others v Director of Immigration*<sup>1180</sup> followed the lead from the Coughlan issue in recognising the doctrine of substantive legitimate expectation in judicial review. In this case the court held that the representation made by the respondent had created substantive legitimate expectations and highlighted the failure of the Government to honour those undertakings thus amounted to an abuse of power. The courts are now entitled to review administrative decisions on the more general ground of abuse of power.

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<sup>1177</sup> *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of South Africa and Others* 2018 1 SACR 317; 2018 1 All SA 471.

<sup>1178</sup> *Corruption Watch and Others v President of South Africa and Others* Case no 62470/2015 at para 88.

<sup>1179</sup> 2001 QB 213.

<sup>1180</sup> 2002 1 HKLRD 561.

### **7.9.11 Just and equitable order in terms of the Final Constitution**

The Constitution has an impact on the common-law remedies. This impact is accommodated in Section 39(2) of the Constitution of the Republic of South Africa. This section requires that a court interpreting any legislation or developing the common law must promote the spirit, purport and objects of the Bill of Rights.<sup>1181</sup>

In *Jaya v Member of the Executive Council for Welfare, Eastern Cape*,<sup>1182</sup> the court was invited to decide who ought to be joined in judicial proceedings against national or provincial government departments in terms of Section 6 of PAJA. The court held that Section 2 of the *State Liability Act 20 of 1957* required a political head of the National Government or provincial department concerned to be joined and that person alone.

In *South Africa Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*,<sup>1183</sup> the applicant was dismissed for calling his supervisor a kaffir in a workplace. SARS sought to have part of the arbitration award in a dismissal dispute under the LRA reviewed and set aside. The word "kaffir", as Mogoeng CJ put it, was meant to visit the worst kind of verbal abuse ever, on another person. An arbitration award issued by a CCMA arbitrator in a dismissal dispute constitutes an administrative action in terms of Section 33(1) of the Constitution. This is a constitutional matter. As in this case, where the court found that Section 194(1) of the LRA is in line with Section 172 of the 1996 Constitution, that the remedy for unfair dismissal be just and equitable,<sup>1184</sup> the remedy for not adhering to a promise by the executive, substantive legitimate expectation was found to be applicable.

This judgment clearly shows that the values of the Constitution contained in Section 1 of the Constitution must be respected to ensure that every citizen of the Republic of South Africa is protected by the Constitution.

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<sup>1181</sup> *South African Annual Survey* 2004 707.

<sup>1182</sup> 2004 2 SA 611 (SCA).

<sup>1183</sup> 2016 ZACC 38.

<sup>1184</sup> *South African Revenue Service v Commissioner for Conciliation, Mediation and Arbitration and Others* Case No [2016] ZACC 38 (CCT19/16) para 58 at 29.

## CHAPTER 8

### CONCLUSION AND RECOMMENDATIONS

Before the constitutionalisation of administrative law, the safe-guarding of human rights received limited protection by the judiciary as reflected in earlier chapters. Apartheid laws were implemented through the medium of discretionary administrative power, and it is in the field of administrative law that the judiciary's failures were blared. The way the courts exercised their powers of judicial review revolved around white elitism, executive-mindedness and rigid positivism.<sup>1185</sup> This position together with the position of the doctrine of legitimate expectations before democracy and the constitutionalisation of administrative law in South Africa were analysed in order to critically understand the law surrounding legitimate expectations in South Africa.

Before the new dawn of democracy in South Africa, administrative law was not constitutionalised. The Interim Constitution<sup>1186</sup> introduced the concept of administrative action.<sup>1187</sup> The term administrative action or legitimate expectation was not defined in the Constitution. This also applied under the final Constitution, where this concept was also not defined. Worse still is that Section 33<sup>1188</sup> of the final Constitution excludes the legitimate expectation doctrine. The definition of what amounts to administrative action was left to the courts to give meaning.<sup>1189</sup> The principle of legitimate expectation is inferred in Section 33 of the final Constitution. This inference has caused confusion and uncertainty in the field of administrative law.

The *Promotion of Administrative Justice Act*<sup>1190</sup> was enacted and was tasked to give effect to the rights in Section 33. It defines administrative action but this definition excludes the application of legitimate expectation, let alone substantive legitimate expectation. This exclusion of the doctrine of legitimate expectations in Section 1 of PAJA limits the right of the public to administrative justice which is contained in the Bill

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<sup>1185</sup> Wiechers 1993 *Acta Juridica* 248-249; *Bloem and Others v State President of the Republic of South Africa and Others* 1986 4 SA 1064 (O) at 1076E.

<sup>1186</sup> Act 200 of 1993 came into effect on the 27 April 1994.

<sup>1187</sup> Section 24 of the Interim Constitution.

<sup>1188</sup> Section 33 of the 1996 Constitution.

<sup>1189</sup> Hoexter *Administrative Law* 72.

<sup>1190</sup> Act 200 of 2000.

of Rights. It is only in Section 3(1) of the PAJA where legitimate expectation is clearly mentioned.

The courts are reluctant to recognise substantive legitimate expectation as a ground of judicial review even though substantive legitimate expectation was not expressly excluded by the Constitution. The PAJA definition of administrative action is too narrow for it to accommodate substantive legitimate expectation. Both the Constitution and PAJA must be amended in order to make provision for the definition of substantive legitimate expectations in order to widen the scope of judicial review. This also applies to Section 1 the PAJA. The definition of administrative action has to be given a broader meaning which must include the doctrine of substantive legitimate expectations. Section 172(1)(a)<sup>1191</sup> of the 1996 Constitution provides that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. The definition of administrative action must be declared in line with Section 172(1)(a)<sup>1192</sup> of the Constitution. This will uphold the rule of law by promoting the rights of citizens whose rights are affected by Section 1 of the *Promotion of Administrative Justice Act*.

The study has shown that the doctrine of legitimate expectation has been engrained in South African administrative law for some time, with the focus being on expressly providing procedural protection to South Africans, yet seemingly avoiding the recognition of the substantive component of legitimate expectations which extend beyond procedural action. During the apartheid era, administrative law, as well as criminal law, were sources of oppression for the majority of South Africans. As reflected in Chapter 4, the democratisation process has liberated administrative law, together with all other facets of state institutions. The earlier part of the study illustrated what constitutionalism has meant for South Africa in realising substantive legitimate expectations in South Africa under the 1993 Constitution and its impact on judicial review in South Africa. The social project which the Constitution makers were dreaming about during the transition remains unfulfilled. The realisation of the values of the 1993 and 1996 Constitution remain unattained. The courts power to review and determine the constitutional validity of legislation and executive conduct is an

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<sup>1191</sup> Section 172.

<sup>1192</sup> Section 172(1)(a) of the 1996 Constitution.

important component of transformation. The authority to hold the other two arms of government accountable is the constitutionally sanctioned way to ensure protection against the abuse of power that defined the apartheid era. A key outcome of the transformation is an independent judiciary with its main task as being the enforcement of the Constitution as opposed to the policies of the government of the African National Congress.<sup>1193</sup> Human dignity, freedom and equality are foundational values of the South African society. All the rights in Bill of Rights are interrelated and mutually supporting.<sup>1194</sup> Socio-economic transformation is envisioned by the transformative mandate of the Constitution.

From the comparative analysis with English law, it has emerged that the South African legal framework is lacking in regard to the substantive ground of review in administrative law. The advantages for the recognition of substantive legitimate expectations has been highlighted in earlier chapters and these include the following:

- the court can weigh "the requirements of fairness against any overriding interest relied upon for a change of policy";<sup>1195</sup>
- administrative injustices can be cured by the recognition of substantive legitimate expectations;
- the abuse of power is curbed, thus maintaining and nurturing the human rights culture in South African administrative law;
- as illustrated in the case of *Mount Sinai Hospital Center v Quebec*,<sup>1196</sup> fairness' covers an enormous amount of territory, and English cases on substantive legitimate expectations cover 'the full remedy of administrative relief, from cases which 'would fit within the principles of procedural fairness' to a 'level of judicial intervention in government policy' that violates the administrative justice rights of the citizens contained in Section 33 of the 1996 Constitution.<sup>1197</sup>

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<sup>1193</sup> Wesson and Du Plessis 2008 *SAJHR* 187.

<sup>1194</sup> *Government of the RSA and Others v Irene Grootboom and Others* 46.

<sup>1195</sup> Coughlan 2001 QB 213 at 242.

<sup>1196</sup> *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* 2001 2 SCR 281 para 26.

<sup>1197</sup> Groves *Modern administrative law in Australia concepts and context* 245.

As illustrated by the study, South African case law has been reluctant to pronounce on whether substantive legitimate expectations should form part and parcel of the legal system due largely to the poorly substantiated cases brought before the courts as well as the "burning" issue of separation of powers. However, recent judgments such as in *Administrator, Transvaal and Others v Traub and Others*,<sup>1198</sup> *Meyer v Iscor Pension Fund*,<sup>1199</sup> *Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*,<sup>1200</sup> *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*<sup>1201</sup> have left the door open for the acceptance of the doctrine of substantive legitimate expectations into South African law in the future. In *Administrator, Transvaal and Others v Traub and Others*, Corbet CJ did not rule out the recognition of substantive legitimate expectations. The court clearly illustrated that substantive legitimate expectations may be applied in appropriate circumstances. In *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*, Chaskalson also did not rule out the acceptance of substantive legitimate expectation. He was of the view that time has not yet arrived but there is a possibility of substantive legitimate expectation when a case is properly pleaded before the court.

The development in both South African administrative law and English law have been investigated, including the widening of the application of legitimate expectations through transformative constitutionalism and the lessons to be derived from English law. By accepting substantive legitimate expectations into South African administrative law, the citizens of South Africa will benefit by holding the executive to its promises as well as holding them accountable for any failure to adhere to their promises. This will include accountability by both the administrators and the executive. Transformative constitutionalism will assist the courts by upholding values of the Constitution such as the rule of law, fairness, separation of powers, democracy, and administrative justice in arriving at decisions to recognize substantive legitimate expectations. The arms of government have to function within the parameters of a supreme constitution where the judiciary exercises a supervisory role to the other two arms of government.

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<sup>1198</sup> 1989 4 SA 731 (A).

<sup>1199</sup> 2003 2 SA 715 (SCA).

<sup>1200</sup> 1999 2 SA 91 (CC).

<sup>1201</sup> 2002 3 SA 265 (CC).

Transformative constitutionalism demands critical approaches to law which call for a post liberal reading of the Constitution and an acknowledgment of the open-ended meaning of legal text.<sup>1202</sup>

The study has illustrated a clear gap in South African law widened, by the negotiators of the 1993 Constitution and the National Assembly in their efforts to exclude substantive legitimate expectation. The Constitution as a transformative text embodies a political character demanding positive actions from all branches of government, including the judiciary, to achieve this transformation vision.<sup>1203</sup> Post-liberal reading of the Constitution advocates changes to administrative law.

The recommendations of the study are as follows:

Amendment of both the Constitution and PAJA take place within the next 12 months:

- (i) Section 33(1) be amended to explicitly include the doctrine of substantive legitimate expectation;
- (ii) The Constitution be amended so that it can define administrative action and substantive legitimate expectation;
- (iii) PAJA be amended in line with the amendment of the Constitution in order to have a clear and wide definition of administrative action which must incorporate the substantive legitimate expectations doctrine.

In addition, the scope of judicial review be widened so as to make it more accessible to the broader community in order to invoke the doctrine of substantive legitimate expectation whenever fairness and equity demand so.

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<sup>1202</sup> Van Marle 2003 *SAJL* 550-557; Van Marle 2009 *Stell LR* 286-301.

<sup>1203</sup> Brand 2011 *Stell LR* 614-638.

## REFERENCES

### *Literature*

#### **A**

Ackerman *Human dignity*

Ackermann L *Human dignity: Lodestar for equality in South Africa* (Juta Cape Town 2012)

Ackerman *We the people*

Ackerman B *We the people* (Harvard University Press Cambridge 1991)

Albertyn and Goldblatt 1998 *SAJHR*

Albertyn C and Goldblatt B "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality" 1998 *South African Journal on Human Rights* 248-276

Asimow 1996 *SALJ*

Asimow M "Administrative law under South Africa's Constitution: The need for an administrative justice act" 1996 *South African Law Journal* 613-630

#### **B**

Basson *South Africa's Interim Constitution*

Basson D *South Africa's Interim Constitution: Text and Notes* (Juta Kenwyn 1994)

Baxter 1979 *SALJ*

Baxter LG "Fairness and natural justice in English and South African law" 1979 *South African Law Journal* 607-639

Baxter *Administrative Law*

Baxter L *Administrative Law* (Juta Cape Town 1984)

Baxter 1993 *Acta Juridica*

Baxter L "Rule-making and Policy Formulating in South African Administrative-Law Reform" 1993 *Acta Juridica* 176-196

Beinart 1948 *THRHR*

Beinart B "Administrative law" 1948 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 204-215

Bennett and Corder *Administrative law reform*

Bennett TW and Corder HM *Administrative law reform* (Juta Kenwyn 1993)

Beukes and Southwood 2003 *SAPL*

Beukes M and Southwood I "Do bad cases make hard law? *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC): case note" 2003 *South African Public Law* 516-530

Bickel *The Least Dangerous Branch*

Bickel AM *The Least Dangerous Branch: Supreme Court at the Bar of Politics* 2<sup>nd</sup> ed (Yale University Press Cambridge 1996)

Blake *Administrative Law in Canada*

Blake S *Administrative Law in Canada* 5<sup>th</sup> ed (LexisNexis Durban 2006)

Bilsky *Transformative Justice*

Bilsky LY *Transformative Justice: Israel Identity on Trial* (University of Michigan Press Michigan 2004)

Botha 2003 *TSAR*

Botha H "Metaphoric reasoning and transformative constitutionalism (part 2)" 2003 *Tydskrif vir die Suid-Afrikaanse Reg* 20-36

Boulle, Harris and Hoexter *Constitutional and administrative law*

Boulle L, Harris B and Hoexter C *Constitutional and administrative law: Basic principles* (Juta Cape Town 1989)

Brand 2011 *SA Stell LR*

Brand D "Judicial deference and democracy in socio-economic rights cases in South Africa" 2011 *SA Stell LR* 614-638

Brink "The day after a miracle"

Brink AP "The day after a miracle" in *les temps modernes* 585 (1995)

Brown and Evans *Judicial review of administrative action*

Brown DJM and Evans JE *Judicial review of administrative action in Canada* 4<sup>th</sup> ed (Canvasback Publishing Toronto 2009)

Brynard 2010 *Administratio Publica*

Brynard DJ "The duty to act fairly: A flexible approach to procedural fairness in public administration" 2010 *Administratio Publica* 124-140

Burns *Administrative Law*

Burns Y *Administrative Law under the 1996 Constitution* (LexisNexis Butterworths Durban 2007)

## C

Campbell 2003 *SALJ*

Campbell J "Legitimate expectations: the potential and limits of substantive protection in South Africa" 2003 *South African Law Journal* 292-321

Campbell 2004 *SALJ*

Campbell J "Legitimate expectations: developments at home and abroad" 2004 *South African Law Journal* 538-544

Cane *Administrative Law*

Cane P *Administrative Law* 5th ed (Oxford University Press Oxford 2011)

Cartier A '*Mullanian*' Approach to the Doctrine of Legitimate Expectations

Cartier G A '*Mullanian*' Approach to the Doctrine of Legitimate Expectations: Real Questions and Promising Answers in Inside and Outside Canadian

*Administrative Law Essays in Honour of David Mullan* (University of Toronto Press Toronto 2006)

Christiansen 2010 *The Journal of Gender, Race & Justice*

Christiansen EC "Transformative constitutionalism in South Africa: Creative uses of constitutional court authority to advance substantive justice" 2010 *The Journal of Gender, Race & Justice* 576-614

Clayton 2003 *Cambridge LJ*

Clayton R "Legitimate expectations, policy, and the principle of consistency" 2003 *Cambridge Law Journal* 93-105

Corder 1997 *SAJHR*

Corder H "Administrative justice in the final constitution" 1997 *South African Journal on Human Rights* 28-43

Corder and Federico *The Quest for Constitutionalism*

Corder H and Federico V *The Quest for Constitutionalism: South Africa since 1994* (Routledge 2014)

Corder and Van der Vijver *Realising Administrative Justice*

Corder H and Van der Vijver L *Realising Administrative Justice* (Siber Ink Cape Town 2002)

Craig *Administrative Law*

Craig PP *Administrative Law* (Sweet & Maxwell London 1983)

Craig 1996 *Cambridge LJ*

Craig PP "Substantive legitimate expectations in domestic and community law" 1996 *Cambridge Law Journal* 289-312

Currie 2006 *Acta Juridica*

Currie I "What difference does the Promotion of Administrative Justice Act make to administrative law?" 2006 *Acta Juridica* 325-351

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* (Juta Cape Town 2013)

Currie, Hoexter and Lyster *The new constitutional and administrative law*

Currie I, Hoexter C and Lyster R *The new constitutional and administrative law*  
(Juta Lansdowne 2002)

Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook*

Currie I and Klaaren J *The Promotion of Administrative Justice Act Benchbook*  
(Siber Ink Cape Town 2001)

## D

Davis "Administrative justice: a judicial perspective"

Davis DM "Administrative justice: a judicial perspective" in Corder H and Van der  
Vijver L *Realising Administrative Justice* (Siber Ink Cape Town 2002) 69

Davis 1993 *Acta Juridica*

Davis DM "Administrative justice in a democratic South Africa" 1993 *Acta Juridica*  
21-34

Davis 2010 *SAJHR*

Davis D "Transformation: the constitutional promise and reality" 2010 *South  
African Journal on Human Rights* 85-101

Davis and Klare 2010 *SAJHR*

Davis DM and Klare K "Transformative constitutionalism and the common and  
customary law" 2010 *South African Journal on Human Rights* 403-509

Davis, Chaskalson and De Waal "Democracy and Constitutionalism"

Davis D, Chaskalson M and De Waal J "Democracy and Constitutionalism: The  
Role of constitutional interpretation" in Van Wyk D, Dugard J, De Villiers B and  
Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order*  
(Clarendon Press Oxford 2004) 1-130

Devenish *A Commentary on the South African Constitution*

Devenish GE *A Commentary on the South African Constitution* (Butterworths Durban 2004)

Devenish 2007 *De Jure*

Devenish GE "Legitimate expectation revisited: An apology for the recognition and application of its independent and substantive existence" 2007 *De Jure* 113-138

Devlin 1976 *Modern LR*

Devlin P "Judges and Lawmakers" 1976 *Modern Law Review* 1-16

De Smith and Evans *Judicial review of administrative action*

De Smith SA and Evans JM *De Smith's Judicial review of administrative action* (Stevens London 1980)

De Smith *et al Principle of Judicial Review*

De Smith SA *et al Principle of Judicial Review* (Sweet and Maxwell London 1999)

De Ville 1994 *SAJPL*

De Ville JR "Proportionality as a requirement of legality in administrative law in terms of the new Constitution" 1994 *South African Journal of Public Law* 287-312

De Ville 1995 *SAJHR*

De Ville J "The right to administrative justice: an examination of section 24 of the interim Constitution" 1995 *South African Journal on Human Rights* 264-280

De Ville *Judicial review of administrative action*

De Ville J *Judicial review of administrative action in South Africa* (LexisNexis Durban 2005)

De Villiers B *Birth of a constitution* (Juta Kenwyn 1994)

De Villiers B *Birth of a constitution* (Juta Kenwyn 1994)

De Vos, Freedman and Brand *South African Constitutional Law*

De Vos P, Freedman W and Brand D *South African Constitutional Law in Context* (Oxford University Press Cape Town 2014)

Dias *Jurisprudence*

Dias RWM *Jurisprudence* (Butterworths London 1985)

Driver 2001 *Annual Survey of SA Law*

Driver S "The right to be heard" 2001 *Annual Survey of South African Law* 106

Driver and Plasket 2001 *Annual Survey of SA*

Driver S and Plasket C "Administrative Law" 2001 *Annual Survey of SA* 81

Dugard 1972 *SALJ*

Dugard J "Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case" 1972 *South African Law Journal* 271-285

Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights*

Du Plessis L and Corder H *Understanding South Africa's Transitional Bill of Rights* (Juta Kenwyn 1994)

Du Plessis 2000 *Stell LR*

Du Plessis L "The South African Constitution as memory and promise" 2000 *Stellenbosch Law Review* 385-394

Du Plessis "AZAPO: monument, memorial ... or mistake?"

Du Plessis L "AZAPO: monument, memorial ... or mistake?" in Le Roux W and Van Marle K *Law, memory, and the legacy of apartheid: ten years after AZAPO v President of South Africa* (Pretoria University Law Press Pretoria 2007)

## **E**

Eversley 2004 *Common Law World Review*

Eversley C "Legitimate Expectation and the Creation of Procedural and Substantive Legal Rights in Commonwealth Caribbean Public Law" 2004 *Common Law World Review* 332-351

Eversley 2003 *Caribbean Law Review*

Eversley C "The role of the courts in developing the principles of legitimate expectation and creating procedural and substantive legal rights in commonwealth Caribbean public law" 2003 *Caribbean Law Review* 95-118

## F

Fernandez 2007 *Speculum Juris*

Fernandez L "The national director of public prosecutions in South Africa: Independent Boss or Party Politician?" 2007 *Speculum Juris* 129-145

Forsyth 1997 *Public Law*

Forsyth C "Wednesbury Protection of Substantive Legitimate Expectations" 1997 *Public Law* 375-384

Forsyth 1988 *Cambridge LJ*

Forsyth CF "The Provenance and Protection of Legitimate Expectations" 1988 *Cambridge Law Journal* 238-260

Forsyth and Williams 2016 *Asia Pacific Review*

Forsyth C and Williams R "Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong" 2016 *Asia Pacific Review* 29-47

Friedrich "Constitutions and Constitutionalism"

Friedrich CJ "Constitutions and Constitutionalism" in Sills DL *International Encyclopaedia of the Social Sciences* (Macmillan New York 1968)

Froneman "The horizontal application of human rights norms"

Froneman JC "The horizontal application of human rights norms" Paper delivered at the *Seminar for newly appointed judges* (Ritz Hotel, Sea Point, Cape Town 2007) 14-24

## G

Groves 2008 *Melbourne ULR*

Groves M "Substantive legitimate expectations in Australian administrative law"  
2008 *Melbourne University Law Review* 470-523

## H

Hiebert *Limiting Rights*

Hiebert JL *Limiting Rights: The dilemma of judicial review* (McGill-Queen's University Press London 1996)

Hlophe 1987 *SALJ*

Hlophe J "Legitimate expectation and natural justice: English, Australian and South African Law" 1987 *South African Law Journal* 165-185

Hlophe 1990 *SALJ*

Hlophe J "The doctrine of legitimate expectation and the appellate division" 1990 *South African Law Journal* 197-203

Hlophe 1993 *Acta Juridica*

Hlophe J "Judicial Control of Administrative Action in a Post-Apartheid South Africa - Some Realities" 1993 *Acta Juridica* 105-116

Hlophe 1995 *SALJ*

Hlophe JM "The role of judges in a transformed South Africa – problems, challenges and prospects" 1995 *SALJ* 22-31

Hoexter 1994 *SALJ*

Hoexter C "Administrative justice and dishonesty" 1994 *South African Law Journal* 701-719

Hoexter 2000 *SALJ*

Hoexter C "The future of judicial review in South African administrative law" 2000 *South African Law Journal* 484-519

Hoexter 2004 *Macquarie Law Journal*

Hoexter C "The principles of legality in South African Administrative Law" 2004 *Macquarie Law Journal* 165-185

Hoexter 2006 *Acta Juridica*

Hoexter C "Administrative action in the courts" 2006 *Acta Juridica* 303-324

Hoexter 2008 *SAJHR*

Hoexter C "Judicial policy revisited: Transformative adjudication in administrative law" 2008 *SAJHR* 281-299

Hoexter *Administrative Law*

Hoexter C *Administrative Law in South Africa* 2<sup>nd</sup> ed (Juta Cape Town 2012)

Hoexter "Administrative Justice and the Enforcement of the Constitution"

Hoexter C "Administrative Justice and the Enforcement of the Constitution" in Corder H and Federico V *The Quest for Constitutionalism: South Africa since 1994* (Routledge London 2014) 127-142

Hoexter and Olivier *The Judiciary in South Africa*

Hoexter C and Olivier M *The Judiciary in South Africa* (Juta Cape Town 2014)

Hogan and Morgan *Administrative Law in Ireland*

Hogan G and Morgan DG *Administrative Law in Ireland* (Round Hall Ltd Ireland 1998)

## I

Ikhariale 2001 *JSAL*

Ikhariale MA "The doctrine of legitimate expectations: prospects and problems in constitutional litigation in South Africa" 2001 *Journal of South African Law* 1-12

## J

Joseph *Constitutional and administrative law in New Zealand*

Joseph PA *Constitutional and administrative law in New Zealand* 4<sup>th</sup> ed (Law Book Sydney 1993)

Jowell 1993 *Acta Juridica*

Jowell J "Judicial review of the substance of official decisions" 1993 *Acta Juridica* 117-120

Juta's Statutes Editors *Constitution of the Republic of South Africa*

Juta's Statutes Editors *Constitution of the Republic of South Africa* (Juta Law Cape Town 2012)

## K

Klaaren 1990 *Columbia HRLR*

Klaaren JE "Beyond Administrator, Transvaal v Traub: Legitimate Expectations for South African Administrative Law" 1990 *Columbia Human Rights Law Review* 149-176

Klare 1998 *SAJHR*

Klare KE "Legal culture and transformative constitutionalism" 1998 *South African Journal on Human Rights* 146-188

Klare 2008 *Constitutional Court Review*

Klare K "Legal Subsidiarity and Constitutional Rights: A reply to AJ van der Walt" 2008 *Constitutional Court Review* 129-154

Klug *The Constitution of South Africa*

Klug H *The Constitution of South Africa: A Contextual Analysis* (Hart 2010)

Klug *Constituting Democracy*

Klug H *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press Cambridge 2000)

Kriel 1999 *Annual Survey of South Africa*

Kriel RR "Scope of the audi doctrine" 1999 *Annual Survey of South Africa* 84-88

Kruger and Currin *Interpreting a Bill of Rights*

Kruger J and Currin B *Interpreting a Bill of Rights* (Juta Cape Town 1994)

## L

Langa 2006 *Stell LR*

Langa P "Transformative Constitutionalism" 2006 *Stellenbosch Law Review* 351-360

Lange and Wessels *The right to know South Africa's Promotion of Administrative Justice and Access to Information Acts*

Lange C and Wessels J *The right to know South Africa's Promotion of Administrative Justice and Access to Information Acts* (Siber Ink Cape Town 2004)

Le Roux and Van Marle K *Law, Memory and the Legacy of Apartheid*

Le Roux W and Van Marle K *Law, Memory and The Legacy of Apartheid: Ten years after AZAPO v President of South Africa* (PULP Pretoria 2007)

Lewis 2009 *Law Quarterly Review*

Lewis J "The Constitutional Court of South Africa: An Evaluation" 2009 *Law Quarterly Review* 440-460

Liebenberg *Socio-economic rights*

Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (Juta Claremont 2010)

## **M**

Mandela *Long Work to Freedom*

Mandela NR *Long Work to Freedom: The autobiography of Nelson Mandela* (Little Brown Boston 1994)

Mhango "Transformation and the judiciary"

Mhango M "Transformation and the judiciary" in Hoexter C and Olivier M *The judiciary in South Africa* (Juta Cape town 2014) 68-98

Mlambo "The pursuit of meaningful social justice"

Mlambo D "The pursuit of meaningful social justice" Opening address delivered at the *Law Society of the Northern Provinces' Annual General Meeting (AGM)* (9 November 2013 Sun City)

Moseneke 2007 *Speculum Juris*

Moseneke D "Transformative adjudication in post-apartheid South Africa - Taking stock after a decade" 2007 *Speculum Juris* 2-12

Mullan 1975 *UTLJ*

Mullan DJ "Fairness: The New Natural Justice?" 1975 *The University of Toronto Law Journal* UTLJ 281-316

Munro 2017 [www.defsa.org.za](http://www.defsa.org.za)

Munro A 2017 *Doing Research to Decolonise Research: to Start at the very Beginning* Paper presented at the 14th National Design Education Conference (Tshwane University of Technology & Inscape Education Group Pretoria 27-29 September 2017) 192-201 ([www.defsa.org.za](http://www.defsa.org.za))

Murcott 2015 *PELJ*

Murcott M "A future for the doctrine of substantive legitimate expectation? The implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*" 2015 *Potchefstroom Electronic Law Journal* 3134-3135

Mureinik 1993 *Acta Juridica*

Mureinik E "Reconsidering Review: Participation and Accountability" 1993 *Acta Juridica* 35

Mureinik 1994 *SAJHR*

Mureinik E "A bridge to where? Introducing the Interim Bill of Rights" 1994 *South African Journal on Human Rights* 31-48

Myburgh *Gangster State*

Myburgh P-L *Gangster State: Unravelling Ace Magashule's Web of Capture* (Penguin Random House Johannesburg 2019)

## N

Ntlama *Impediments in the promotion of the right to gender equality*

Ntlama NP *Impediments in the promotion of the right to gender equality in post-apartheid South Africa* (LLD-thesis University of South Africa Pretoria 2010)

## O

Olivier "The courts' powers under the Constitution"

Olivier M "The courts' powers under the Constitution" in Corder H and Federico V *The Quest for Constitutionalism* (Routledge 2014)69-79.

O'Regan 2004 *International Journal of Legal Information*

O'Regan K "Human Rights and Democracy - A New Global Debate: Reflections on the First Ten Years of South Africa's Constitutional Court" 2004 *International Journal of Legal Information* 200

## P

Peach *The application of the audi alteram partem rule*

Peach VL *The application of the audi alteram partem rule to the proceedings of commissions of inquiry* (LLM-dissertation PU for CHE Potchefstroom 2004)

Pieterse 2005 *SAPL*

Pieterse M "What do we mean when talk about transformative constitutionalism?" 2005 *South African Public Law* 155-166

Pitchford *Blood on their hands*

Pitchford J *Blood on their hands: General Johan Booyesen reveals his truth* (Pan Macmillan Johannesburg 2016)

Plasket *The fundamental right to just administrative action*

Plasket C *The fundamental right to just administrative action: Judicial review of administrative action in the democratic South Africa* (LLD-thesis Rhodes University Grahamstown 2002)

Plasket 2007 *Speculum Juris*

Plasket C "Post-1994 Administrative Law in South Africa: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law" 2007 *Speculum Juris* 25-40

Poole 1995 *New Zealand Law Review*

Poole M "Legitimate expectation and substantive fairness: Beyond the limits of procedural propriety" 1995 *New Zealand Law Review* 426-447

Pretorius 2001 *SALJ*

Pretorius DM "Letting the unruly horse gallop in the field of private law: The doctrine of legitimate expectation in purely contractual relations" 2001 *South African Law Journal* 503-531

## Q

Quinot *Administrative Justice in South Africa*

Quinot G *Administrative Justice in South Africa: An Introduction* (Oxford University Press Cape Town 2015)

Quinot 2004 *German Law Journal*

Quinot G "Substantive legitimate expectations in South African and European administrative law" 2004 *German Law Journal* 65-85

Quinot 2004 *SAPL*

Quinot G "The developing doctrine of substantive protection of legitimate expectations in South African administrative law: judicial review of administrative action" 2004 *South Africa Public Law* 543-570

## R

Rautenbach and Malherbe *Constitutional Law*

Rautenbach IM and Malherbe EFJ *Constitutional Law* 6<sup>th</sup> ed (LexisNexis Durban 2012)

Rawls *A theory of justice*

Rawls JA *A theory of justice* (Belknap Cambridge 1972)

Rehnquist 1976 *Texas LR*

Rehnquist WH "The notion of a living constitution" 1976 *Texas Law Review* 693-706

Riggs 1988 *American Journal of Comparative Law*

Riggs RE "Legitimate Expectation and Procedural Fairness in English Law" 1988 *American Journal of Comparative Law* 395-436

Roederer and Moellendorf *Jurisprudence*

Roederer C and Moellendorf D *Jurisprudence* (Juta Cape Town 2004)

Rosa 2011 *Stell LR*

Rosa S "Transformative constitutionalism in a democratic developmental state" 2011 *Stell LR* 452-565

Rosenfeld *Constitutionalism, identity, difference, and legitimacy*

Rosenfeld M *Constitutionalism, identity, difference, and legitimacy* (Duke University Press London 1994)

Roux 2009 *Stell LR*

Roux T "Transformative Constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?" 2009 *Stellenbosch Law Review* 258-285

## **S**

Sachs *Protecting human rights*

Sachs A *Protecting human rights in a new South Africa* (Oxford University Press Cape Town 1991)

Schwartz *Administrative law*

Schwartz B *Administrative law* 4<sup>th</sup>ed (Little Brown Boston 1994)

Schwarze *European Administrative Law*

Schwarze J *European Administrative Law* (Sweet and Maxwell London 1992)

Sibanda 2011 *Stell LR*

Sibanda S "Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty" 2011 *Stellenbosch Law Review* 482-500

Stacey 2006 *SAJHR*

Stacey R "Substantive protection of legitimate expectation in the Promotion of Administration Justice Act – Tifru Raiders Rugby Club v SA Rugby Union" 2006 *South African Journal on Human Rights* 664-672

Steele 2005 *Law Quarterly Review*

Steele I "Substantive legitimate expectations: Striking the right balance?" 2005 *Law Quarterly Review* 300-328

Stevens "A bill of Rights: A Century of Progress"

Stevens JP "A bill of Rights: A Century of Progress" in Stone GR, Epstein RA and Sunstein CR *The Bill of Rights in the Modern State* (University of Chicago Press Chicago 1992) 13-40

## T

Tai and Yam 2002 *Public Law*

Tai BYT and Yam K "The advent of substantive expectation in Hong Kong: Two competing visions" 2002 *Public Law* 688-702

Taitz 1982 *THRHR*

Taitz J "The application of the *audi alteram partem* rule in South African administrative law" 1982 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 254-273

## V

Van der Walt 2005 *TSAR*

Van der Walt AJ "Transformative constitutionalism and the development of South African property law (part 1)" 2005 *Tydskrif vir die Suid-Afrikaanse Reg* 655-689

Van der Walt 2006 *TSAR*

Van der Walt AJ "Transformative constitutionalism and the development of South African property law (part 2)" 2006 *TSAR* 1-31

Van Marle 2009 *Stell LR*

Van Marle K "Transformative constitutionalism as/and critique" 2009 *Stellenbosch Law Review* 286-301

Van Marle 2003 *SALJ*

Van Marle K "Revising the politics of post-apartheid constitutional interpretation" 2003 *South African Law Journal* 550-557

Van Niekerk 1970 *SALJ*

Van Niekerk B "Hanged by the neck until you are dead" 1970 *SALJ* 60-75

Van Wyk 1997 *SAJHR*

Van Wyk D "Administrative justice in *Bernstein v Bester* and *Nel v Le Roux*" 1997 *South African Journal on Human Rights* 249

Van Wyk 1991 *CILSA*

Van Wyk D "The Making of the Namibian Constitution: Lessons for Africa" 1991 *Comparative and International Law Journal of South Africa* 341-351

Van Wyk *et al Rights and Constitutionalism*

Van Wyk D, Dugard J, De Villiers B and Davies D *Rights and Constitutionalism - The new South African legal order* (Clarendon Oxford 1996)

Venter *Constitutional Comparison*

Venter F *Constitutional Comparison: Japan, Canada, Germany and South Africa as constitutional states* (Juta Cape Town 2000)

Venter 2010 *SAJHR*

Venter F "Liberal democracy: The unintended consequence-South African constitution-writing propelled by the winds of globalisation" 2010 *South African Journal on Human Rights* 45-65

## **W**

Wacks 1984 *SALJ*

Wacks R "Judges and injustice" 1984 *South African Law Journal* 266–285

Wade and Bradley *Constitutional and Administrative Law*

Wade ECS and Bradley AW *Constitutional and Administrative Law* 10<sup>th</sup> ed (Longman London 1985)

Wade and Forsyth *Administrative Law* 11<sup>th</sup> ed

Wade HWR and Forsyth CF *Administrative Law* 11<sup>th</sup> ed (Oxford University Press Oxford 2014)

Wade and Forsyth *Administrative Law* 9<sup>th</sup> ed

Wade HWR and Forsyth CF *Administrative Law* 9<sup>th</sup> ed (Oxford University Press Oxford 2004)

Wade and Forsyth *Administrative Law* 5<sup>th</sup>ed

Wade HWR and Forsyth C *Administrative Law* 5<sup>th</sup>ed (Clarendon Press Oxford 1977)

Wesson and Du Plessis 2008 *SAJHR*

Wesson M and Du Plessis M "Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary" 2008 *South African Journal on Human Rights* 187-213

Wiechers *Administrative Law*

Wiechers M *Administrative Law* (Butterworths Durban 1985)

Wiechers 1993 *Acta Juridica*

Wiechers M "Administrative Law and the benefactor state" 1993 *Acta Juridica* 248-262

Woolf and Jowell *Principles of Judicial Review*

Woolf H and Jowell JL *De Smith, Woolf and Jowell's Principles of Judicial Review* (Sweet and Maxwell London 1999)

### **Case law**

#### **A**

*Administrator of the Province of the Cape of Good Hope and Another v Ikapa Town Council* 1990 2 SA 882 (AD)

*Administrator, Transvaal and Others v Traub and Others* 1989 4 SA 731 (A)

*African National Congress (Border Region) and Another v Council of State and Others* 1992 4 SA 434 (Ck)

*Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 3 SA 293 (CC)

*Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 2 SA 215 (T)

*Applicant v Administrator, Transvaal, and Others* 1993 4 SA 733 (T)

*Attara v University of British Columbia* 1998 BCJ No 115

*Attorney General of Hong Kong v Ng Yuen Shiu* 1983 UKPC 2; 1983 2 All ER 346

*Attorney-General, Eastern Cape v Blom* 1989 1 SA 349 (A)

*Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 (A)

*Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 4 SA 672 (CC)

#### **B**

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC)

*Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 3 SA 265 (CC); 2002 9 BCLR 891 (CC)

*Bloem and Others v State President of the Republic of South Africa and Others* 1986 4 SA 1064 (O)

*Board of Education v Rice* 1911 AC 179

*Bongopi v Chairman of the Council of State, Ciskei* 1992 3 SA 250 (Ck)

*Botha v Matjhabeng Municipality* 2010 ZAFSHC 18

*Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Founding Workers Union)* 1971 1 All ER 1148

*Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality* 2013 11 BCLR 1217 (CC)

*Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others* 1999 2 BCLR 193 (T)

## **C**

*Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 3 SA 1013 (SCA)

*Carephone (Pty) Ltd v Marcus NO and Others* 1999 3 SA 304 (LAC)

*Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC)

*Castel NO v Metal and Allied Workers Union* 1987 4 SA 795 (A)

*Chandra v Minister of Immigration* 1978 2 NZLR 559

*Chikane v Cabinet for the Territory of South West Africa* 1990 1 SA 349 (A)

*Chirwa v Transnet Limited and Others* 2013 11 BCLR 1217 (CC)

*Civil Service Salaries: EC Commission v EC Council* 1973 ECR 575 1973 CML 639

*Claude Neon Ltd v Germiston City Council and Another* 1995 3 SA 710 (W)

*Council of Civil Service Unions and Others v Minister for the Civil Service* [1983] UKHL 6; [1984] 3 All ER 935

*Cunningham v Cole* [1982-3] 44 ALR 334; [1985] 59 AW 33

## **D**

*Dawood v Minister of Home Affairs; Shabai v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC); 2000 3 SA 936 (CC)

*De Lange v Smuts* 1998 3 SA 785 (CC)

*De Vries v Western Cape Education Department* (1997) 18 ILJ (C)

*Democratic Alliance v President of the RSA and Others* 2013 1 SA 248 (CC)

*Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC); 1996 5 BCLR 658

*Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 204 (SCA)

*Durban Add-Venture Ltd v Premier, KwaZulu-Natal and Others (No 2)* 2001 1 SA 389 (N)

## **E**

*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 3 SA 580 (CC)

*Everett v Minister of the Interior* 1981 2 SA 453 (C)

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC)

## **F**

*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 2 SA 1115 (SCA); 1999 1 SA 374 (CC)

*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC)

*Findlay v Secretary of State for the Home Department* 1984 3 All ER 801

*Floor Crossing* 2003 1 SA 495 (CC)

*Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 6 BCLR 851 (CC)

## **G**

*General Medical Council v Spackman* 1943 AC 627

*Glenister, Helen Suzman Foundation as Amicus Curiae v President of the Republic of South Africa* 2011 ZACC 6; 2011 7 BCLR 65

*Government of the Republic of Bophuthatswana and Others v Segale* 1990 1 SA 434 (BA)

## **H**

*H v Fetal Assessment Centre* 2015 2 SA 193 (CC)

*Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another* 1980 3 SA 476 (T)

*HTV Ltd v Price Commission* 1976 ICR 170

## **I**

*In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC); 1997 10 BCLR 1653

*In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC)

*In re HK (an infant)* 1967 2 QB 617

*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd, In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 1 SA 545 (CC); 2000 10 BCLR 1079 (CC)

## **J**

*Jenkins v Government of the Republic of South Africa* 1996 3 SA 1083 (TkSC)

*Joseph and Others v City of Johannesburg and Others* (CCT 43/09) 2009 ZACC 30; 2010 3 BCLR 212 (CC); 2010 4 SA 55 (CC) (9 October 2009)

## **K**

*KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC)

## **L**

*Langeni and Others v Minister of Health and Welfare* 1988 4 SA 93 (W)

*Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A)

*Leech v Parkhurst Prison Deputy Governor*; 1988 UKHL 16; 1988 1 All ER 485; 1988 2 WLR 290

*Lewis v Minister of Internal Affairs and Another* 1991 3 SA 628 (BG)

*Lunt v University of Cape Town* 1989 2 SA 438 (C)

## **M**

*Maqungo v Government of the Republic of Transkei* 1995 1 SA 412 (Tka)

*Marbury v Madison* 5 US (1 Cranch) 137 (1803)

*Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC)

*Matatiele Municipality and Others v President of the RSA and Others* 2006 5 SA 47 (CC)

*McInnes v Onslow-Fane and Another* [1978] 3 All ER 211

*Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 5 SA 171 (CC)

*Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA)

*Minister for Justice and Constitutional Development v Dingaani Hendrik Nyathi* 2009 ZACC 29

*Minister of Defence and Military Veterans v Motau and Others* 2014 5 SA 69 (CC)

*Minister of Environmental Affairs and Tourism and Another v Phambili Fisheries (Pty) Ltd and Others* 2003 2 SA 616 (SCA)

*Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC)

*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC)

*Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC)

*Minister of Interior v Bechler and Others and Beier v Minister of the Interior and Others* 1948 3 SA 409 (A)

*Minister of Justice, Transkei v Gemi* 1994 3 SA 28 (T�A)

*Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd* 1992 2 SA 234 (T�A)

*Mkontwana v Nelson Mandela Metropolitan Municipality and Others; Bisset and Others v Buffalo City Municipality, Transfer Rights Action Campaign and Others v MEC for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC)

*Mokgoko and Others v Acting Rector, Setlogelo Technikon and Others* 1994 4 SA 104 (BG)

*Monnakale v Government of the Republic of Bophuthatswana* 1991 1 SA 598 (BGD)

*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* 2001 2 SCR 281

## **N**

*Naidoo v Minister of Law and Order* 1986 2 SA 264 (W)

*National Director of Public Prosecutions v Phillips* 2002 4 SA 60 (W)

*New Zealand Maori Council v Attorney-General* 1994 1 NZLR 513 (PC)

*Northern Roller Milling Co Ltd v Commissioner* [1994] 2 NZLR 747 [HC]

*Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 3 SA 472 (SCA)

*Nova Media Services Ltd v Minister for Posts and Telegraphs* 1984 ILM 161

*Nyathi v MEC for Department of Health, Gauteng and Another* 2008 5 SA 94 (CC)

*Nyathi v Member of the Executive Council for the Department of Health, Gauteng* (2008) ZACC 8

## **O**

*Old St Boniface Residents Association Inc v Winnipeg (City)* 1990 3 SCJ No 137

*Oranje-Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier van die Provinsie Vrystaat en Andere* 1996 2 BCLR 248 (O)

*O'Reilly v Mackman* [1982] 3 All ER 1124; 1982 3 WLR 604

## **P**

*Paponette and Others v Attorney General of Trinidad and Tobago* 2010 UKPC 32

*Pharmaceutical Manufacturers Association of South Africa and Another: In re: ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC); 2000 3 BCLR 241

*Pharmaceutical Society of South Africa v Tshabalala-Msimang* NO 2005 3 SA 238 (SCA)

*Podlas v Cohen and Bryden* 1994 4 SA 662 (T)

*Premier, Mpumalanga, and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 2 SA 91 (CC)

*President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC)

*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC); 1999 10 BCLR 1059 (CC)

*President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC)

*President of the Republic of South Africa v the Office of the Public Protector and Others* 2018 2 SA 100 (GP)

*Pretoria North Town Council Al Electrical Ice Cream (Pty) Ltd* 1953 3 SA 1 (A)

*Public Servants' Association obo Botes v Department of Justice* 2000 21 ILJ 690 (CCMA)

*Public Servants' Association of South Africa and Another v Minister of Justice and Others* 1997 3 SA 925 (T)

## **Q**

*Qozeleni v Minister of Law and Order* 1994 3 SA 625 (EC)

## **R**

*R v Chancellor of the University of Cambridge* (1723) 1 Str 557

*R v Gaming Board for Great Britain, ex parte Benaim* 1970 EWCA Civ 7; 1970 2 All ER 528

*R v General Medical Council* 2013 EWCA Civ 327

*R v Leman Street Police Station Inspector and Secretary of State for Home Affairs ex parte Venicoff* 1920 3 KB 72

*R v Ministry of Agriculture Fisheries and Food, ex Parte Hamble (Offshore) Ltd Fisheries* 1995 2 All ER 714 (QB)

*R v North and East Devon Health Authority ex parte Coughlan* 2000 2 WLR 622

*R v Secretary of State ex parte Kahn* 1984 1 WL 1337 (CA)

*R v Secretary of State for Education* 2011 EWHC 3256 child protection shown

*R v Secretary of State for foreign and Commonwealth Affairs ex parte Bancoult (No 2)* 2007 EWCA Civ 498 appeal of house lords upheld

*R v Secretary of State for Home Department; ex parte Ruddock* [1987] 2 ALL ER 513 [QB]

*R v Secretary of State for the Environment, ex parte Brent London Borough Council* [1983] 3 ALL ER 321 [QB]

*R v Secretary of State for the Home Department ex parte Ruddock* 1987 2 All ER 518

*R v Secretary of State for the Home Department, ex parte Asif Khan* [1985] 1 All ER 40 (CA)

*Reflect-ALL 1025 CC v MEC for Public Transport, Gauteng* 2009 6 SA 391 (CC)

*Regina v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators Association* 1972 2 WLR 1262

*Ridge v Baldwin* 1963 1 QB 539

*Ridge v Baldwin* 1964 AC 40

*Robert James Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 4 SA 50 (GP)

*Rosina Mankone Komape and Others v Minister of Basic Education and Others* 2018 JDR 0625(LP)

## **S**

*S v Makwanyane and Another* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC)

*S v Mhlungu and Others* 1995 3 SA 867 (CC)

*S v Serumula* 1962 3 SA 962 (A)

*S v Van Niekerk* 1972 3 SA 711 (A)

*S v Zuma and Others* 1995 2 SA 642 (CC)

*Schmidt and Another v Secretary of State for Home Affairs* 1968 EWCA Civ 1; 1969 2 Ch 149 (CA); 1969 1 ALL ER 904 [CA]

*Schmidt v Secretary of State for Home Affairs* 1969 1 All ER 904

*Segale v Government of the Republic of Bophuthatswana and Others* 1987 3 SA 237 (B)

*Shabalala and Others v Attorney-General of Transvaal and Another* 1996 1 SA 725 (CC)

*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 12 BLLR 1097 (CC)

*Sisulu v State President and Others* 1988 4 SA 731 (T)

*South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A)

*South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A)

*South African Veterinary Council and Another v Szymanski* 2003 4 SA 42 (SCA)

*Staatspresident en Andere v United Democratic Front en 'n Ander* 1988 4 SA 830 (A)

*Strydom v Staatspresident, Republiek van Suid-Afrika, en 'n Ander* 1987 3 SA 74 (A)

*Swanepoel v Western Region District Council and Another* 1998 19 ILJ 1418 (SE)

## **T**

*Traub v Administrator, Transvaal, and Others* 1989 2 SA 396 (T)

## **U**

*United Democratic Movement v President of the Republic of South Africa and Others* 2003 1 SA 488 (CC)

*United Democratic Movement v Speaker, National Assembly and Others* 2017 5 SA 300 (CC); 2017 8 BCLR 1061 (CC)

## **V**

*Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 1 SA 283 (C)

## **W**

*Webb v Ireland* [1988] IR 353 (SC)

*Winckler and Others v Minister of Correctional Services and Others* 2001 1 SA 747 (C)

## **Z**

*Zondi and Others v Administrator of Natal and Others* 1991 3 SA 583 (AD)

## **Legislation**

### **A**

*Administrative Justice Act* 3 of 2000

*Advanced Technikon Education Act* 38 of 1989 (Bophuthatswana)

*Aliens Act* 1 of 1937

*Aliens Affairs Amendment Act* 52 of 1946

*Aliens and Travellers Control Act* 22 of 1979

*Aliens and Travellers Control Act* 29 of 1977 (Bophuthatswana)

*Aliens Restrictions Act* of 1914

*Armaments Corporation of South Africa Limited Act* 51 of 2003

### **C**

*Commissions Act* 8 of 1947

*Companies Act* 71 of 2008

*Constitution of the Republic of Namibia* 1 of 1990

*Constitution of the Republic of South Africa* 108 of 1996

*Constitution of the Republic of South Africa* 200 of 1993

*Constitution of the Republic of South Africa Amendment Act* 2 of 1994

*Constitution Seventeenth Amendment Act* 72 of 2012

*Criminal Justice Act* 1967

*Criminal Procedure Act* 51 of 1977

## **E**

*Education Affairs Act* 70 of 1988

## **G**

*Gauteng Transport Act* 8 of 2001

*Government Service Pension Act* 57 of 1973

## **I**

*Insolvency Act* 24 of 1936

*Internal Security Act* 32 of 1979

## **J**

*Judges' Remuneration and Conditions of Employment Act* 47 of 2001

## **K**

*Kwazulu-Natal Ingonyama Trust Act* 3 of 1994

*KwaZulu-Natal Gambling Act* 10 of 1996

## **M**

*Marine Living Resources Act* 18 of 1998

## **N**

*National Gambling Act* 33 of 1996

*National Security Act* 13 of 1982

*Native Trust and Land Act 18 of 1936*

## **P**

*Promotion of Administrative Justice Act 3 of 2000*

*Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*

*Promotion of National Unity and Reconciliation Act 34 of 1995*

*Provincial Exchequer Act 1 of 1994*

*Public Finance Management Act 1 of 1999*

## **R**

*Remuneration and Conditions of Employment Act 88 of 1989*

*Republic of Bophuthatswana Constitution Act 18 of 1977*

## **S**

*South African Schools Act 84 of 1996*

*State Liability Act 20 of 1957*

*Suppression of Communism Act 44 of 1950*

## **T**

*Temporary Employers Pension Fund Act 75 of 1979*

*Transitional Executive Council Act 151 of 1993*

## ***Internet sources***

Munro 2017 [www.defsa.org.za](http://www.defsa.org.za)

Munro A 2017 *Doing Research to Decolonise Research: to Start at the very Beginning* Paper presented at the 14th National Design Education Conference (Tshwane University of Technology & Inscape Education Group Pretoria 27-29 September 2017) 192-201 [www.defsa.org.za](http://www.defsa.org.za)